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REPORTS OF CASES

DECIDED BETWEEN

DECEMBER 10, 1982 and APRIL 7, 1983

IN THE

Supreme Court of Nebraska

VOLUME CCXIII

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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		Bryce Bartu	Seward
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		Darvid D. Quist	Blair
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Twelfth	Sherman and Buffalo	DeWayne Wolf	Kearney
Thirteenth	McPherson, Logan, Lincoln, Dawson, Keith, Arthur, Grant, Hooker, and Thomas	Hugh Stuart John P. Murphy	North Platte North Platte
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CUMULATIVE LIST OF CASES DISPOSED OF WITHOUT OPINION

No. 81-924: **Bode v. Petet.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellants.

No. 82-002: **Fernald v. Fernald.** Affirmed as modified by order of the court.

No. 82-025: **Rowley v. Caveny.** Affirmed as modified by order of the court.

No. 82-028: **State v. Robinson.** Motion of appellant to enlarge bill of exceptions denied; motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 82-095: **McManus v. Dewey.** Appeal dismissed; see Rule 7A(4).

No. 82-129: **Scott v. Scott.** Affirmed as modified by order of the court.

No. 82-140: **State v. Townsell.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 82-207: **State ex rel. Schleve v. Scotts Bluff Co.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 82-233: **State v. Jewell.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 82-264: **State v. Shandera.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 82-280: **State v. Davis.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 82-281: **State v. Bothwell.** Motion of court-appointed counsel for leave to withdraw appearance

sustained; judgment affirmed; see Rule 3B(4).

No. 82-299: **State v. Green.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 82-306: **State v. Parks.** Motion of appellee for summary dismissal sustained; appeal dismissed; see Rule 7B(1).

No. 82-308: **State v. Hurley.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 82-339: **State v. Holzapfel.** Affirmed; see Rule 7A.

No. 82-347: **State v. Clark.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 82-356: **Duncan v. Duncan.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 82-366: **State v. Johnson.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 82-367: **State v. Ebberson.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 82-376: **Salisbury v. Salisbury.** Affirmed as modified by order of the court.

No. 82-449: **State v. Ohler.** Motion of appellant for dismissal of appeal sustained; appeal dismissed.

No. 82-450: **State v. Schulz.** Affirmed; see Rule 7A.

No. 82-454: **State v. Coran.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 82-478: **Ryan v. Howard.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 82-494: **State v. Martinez.** Affirmed; see Rule 7A.

No. 82-526: **State v. Lujan.** Motion of appellee for summary affirmance sustained; judgment af-

firmed; see Rule 7B(2).

No. 82-533: **First Security Bank & Trust Co. v. Little.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 82-540: **State v. Erickson.** Dismissed for failure to file briefs.

No. 82-541: **State v. Zweerink.** Motion of appellant for dismissal of appeal sustained; appeal dismissed.

No. 82-560: **Barnard v. Barnard.** Affirmed as modified by order of the court.

Nos. 82-565, 82-566: **State v. Brezina.** Affirmed; see Rule 7A.

No. 82-567: **State v. Rodriguez.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 82-570: **State v. Allen.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 82-578: **State v. King.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

Nos. 82-590, 82-591: **State v. Roberson.** Motion of appellee for summary affirmance sustained; judgment of conviction and sentence affirmed; see Rule 7B(2).

No. 82-592: **State v. Fortner.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 82-613: **State v. Towler.** Dismissed for failure to file briefs.

No. 82-631: **Russell & Perley v. Fitch.** Dismissed for failure to file briefs.

No. 82-638: **Aguayo v. Aguayo.** By order of the court, appeal dismissed at costs of appellant.

No. 82-641: **Yungmeyer v. City of Hastings.** Joint motion for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 82-650: **State v. Elitte.** Motion of court-appointed counsel for leave to withdraw appearance

sustained; judgment affirmed; see Rule 3B(4).

No. 82-653: **State v. Scott.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 82-660: **State v. Hamlin.** Affirmed; see Rule 7A.

No. 82-664: **City of Madison v. C & R Engineering.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 82-669: **State v. Seibert.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 82-670: **Kahler Construction, Inc. v. Andy's Pizza & Italian Restaurant, Inc.** Dismissed for failure to file briefs.

No. 82-677: **State v. Raven.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 82-678: **Meyer v. Lutkemeier.** Motion of appellant for dismissal of appeal sustained; appeal dismissed with prejudice at costs of appellant.

No. 82-679: **State ex rel. Edler v. Guy.** By order of the court, judgment vacated and cause remanded to the District Court for further proceedings.

No. 82-682: **State v. Michaels.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 82-684: **Michal v. Dewey.** Appeal dismissed; see Rule 7A(4).

No. 82-686: **Tyler v. Tyler.** Motion of appellant for dismissal of appeal sustained; appeal dismissed.

No. 82-687: **Tyler v. Tyler.** Motion of appellant for dismissal of appeal sustained; appeal dismissed without prejudice.

No. 82-689: **Stromsburg v. Nuttleman.** Appeal dismissed as premature.

No. 82-692: **State v. Vavra.** Motion of appellant for dismissal of appeal sustained; appeal dismissed with prejudice at costs of appellant.

No. 82-695: **State v. Stierwalt.** Affirmed; see

Rule 7A.

No. 82-701: **Jones v. Jones.** Affirmed as modified by order of the court.

No. 82-704: **In re Estate of Brown, Sherwood v. Brown.** Dismissed for failure to file briefs.

No. 82-705: **Asche v. Asche.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 82-706: **State v. Perez.** Motion of appellant for dismissal of appeal sustained; appeal dismissed.

No. 82-708: **Centurion Sales Co., Inc. v. Nebraska Liquor Control Commission.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 82-714: **State v. Meckna.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 82-715: **State v. Vanbeek.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 82-718: **State v. Monroe.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 82-719: **Tract No. KR-1-3508 v. NPPD.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 82-722: **J. M. McDonald Co. v. WRC Properties, Inc.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 82-728: **Gleeson v. Frahm.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 82-735: **State v. Reutcke.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 82-736: **Harmon v. Harmon.** Affirmed as modified by order of the court.

No. 82-738: **BM&S, Inc. v. Heim-Mick Distributing, Inc.** Motion of appellants for dismissal of ap-

peal sustained; appeal dismissed at costs of appellants.

No. 82-741: **Wellington v. Buttercup Foods.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 82-753: **Johns v. Beerline.** Motion of appellee for summary dismissal sustained; appeal dismissed; see Rule 7B(1).

No. 82-755: **In re Interest of Friedricksen, State v. Friedricksen.** Motion of appellants for dismissal of appeal sustained; appeal dismissed without prejudice at costs of appellants.

No. 82-756: **State v. Schanaman.** Motion of appellant for dismissal of appeal sustained; appeal dismissed.

No. 82-758: **Christensen v. Piccolo.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

Nos. 82-759, 82-769: **State v. Webber.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 82-760: **Hohnholt v. American National Insurance Co.** Motion of appellee for summary dismissal sustained; appeal dismissed at costs of appellant; see Rule 7B(1).

No. 82-762: **State of Oklahoma ex rel. Dept. of Human Services v. Sivetts.** Motion and stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 82-768: **Dowty v. Sunflower Beef Packers, Inc.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 82-770: **State v. Schlabs.** Motion of appellant for dismissal of appeal sustained; appeal dismissed.

No. 82-771: **State v. Burlington Northern Railroad Co.** Motion of appellant for dismissal of appeal sustained; appeal dismissed without prejudice at costs of appellant.

No. 82-775: **Blanco v. The Continental Insurance**

Co. Stipulation for dismissal of appeal allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 82-782: **Olson v. Olson.** Affirmed as modified by order of the court.

No. 82-786: **State v. Scott.** Dismissed for failure to file briefs.

No. 82-789: **In re Interest of Arthaloney, State v. Taylor.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 82-790: **In re Interest of Arthaloney, State v. Taylor.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 82-795: **Parker v. Duxbury.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 82-796: **Dain Bosworth, Inc. v. Nixon.** Stipulation for dismissal of appeal allowed; appeal dismissed; each party to pay own costs.

No. 82-799: **Evers v. Bamford, Inc.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 82-804: **State v. Littleton.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 82-813: **McGowan v. Driskell.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellants.

No. 82-818: **State v. Styers.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 82-823: **Phillips v. Johnson.** Motion and stipulation for dismissal of appeal allowed; appeal dismissed with prejudice at costs of appellant.

No. 82-842: **Kizzier Chevrolet Co., Inc. v. General Motors Corporation.** Affirmed on the court's own motion; see Rule 7A.

No. 82-848: **Hessling v. Western Land Roller.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 83-007: **Bank of Brady v. Rosendahl.** By order of the court, appeal dismissed at costs of appellants.

Nos. 83-008, 83-009: **State v. Hallman.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4); motion of appellant for substitute counsel overruled.

No. 83-010: **State v. Scott.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 83-017: **Commercial National Bank & Trust Co. v. Jones.** Appeal dismissed at costs of appellant.

No. 83-021: **Searcey v. First National Bank & Trust Co.** Motion of appellant for dismissal of appeal sustained; appeal dismissed.

No. 83-027: **State v. Runnals.** Motion of appellant for dismissal of appeal sustained; appeal dismissed.

No. 83-029: **State v. Stone.** Motion of appellant for dismissal of appeal sustained; appeal dismissed.

No. 83-036: **State v. Kallos.** Motion of appellant for dismissal of appeal sustained; appeal dismissed.

No. 83-040: **Tyler v. Tyler.** Motion of appellant for dismissal of appeal sustained; appeal dismissed without prejudice.

No. 83-042: **State v. Smith.** Stipulation for dismissal of appeal allowed; appeal dismissed.

No. 83-049: **Bussart v. Bussart.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 83-065: **In re Estate of Blanchard, Blanchard v. White.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 83-067: **Meyer v. Life Insurance Co. of Georgia.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 83-078: **Tyler v. Plasma Alliance, Inc.** Motion of appellant for dismissal of appeal sustained; appeal dismissed.

No. 83-081: **IBEW Local 1521 v. MUD.** Stipulation for dismissal of appeal allowed; appeal dismissed with prejudice at costs of appellant.

No. 83-082: **Tyler v. The Greater Bethlehem Temple.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 83-088: **State v. Kuhn.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 83-092: **State v. Schlund.** Motion and stipulation for dismissal of appeal allowed; appeal dismissed.

No. 83-098: **Eden v. Eden.** Stipulation for dismissal of appeal allowed; appeal dismissed with prejudice at costs of appellant.

No. 83-160: **State ex rel. NSBA v. Leahy.** Judgment of disbarment entered.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

STATE OF NEBRASKA, APPELLEE, V. ISAIAH JERRY JONES, APPELLANT.

328 N.W.2d 166

Filed December 10, 1982. No. 44117.

1. **Search and Seizure: Probable Cause.** The existence of probable cause must be determined by a practical and not by a technical standard. When objects which are indicative of a criminal offense are within the plain sight of an officer who has the right to be in the position to have such view, a seizure is justified and legal.
2. **Expert Witnesses: Appeal and Error.** The admission of expert testimony is ordinarily within the trial court's discretion, and its ruling will be upheld in the absence of an abuse of discretion.
3. **Evidence.** The admission into evidence of gruesome photographs rests in the sound discretion of the trial court, which must determine their relevancy and weigh their probative value against their possible prejudicial effect.
4. **Homicide: Photographs.** In a homicide case, photographs of the victim, upon proper foundation, may be received for purposes of identification, to show the condition of the body, the nature and extent of the wounds and injuries, and to establish malice or intent.
5. _____: _____. A photograph which illustrates or makes clear some controverted issue in a homicide case may be received even if it is gruesome, where a proper foundation has been laid.
6. **Photographs.** In cases where it is appropriate to admit some gruesome photographs into evidence, no more photographs than absolutely necessary should be used.
7. **Criminal Law: Right to Counsel.** The right of an indigent defendant to have counsel does not give him the right to be represented by counsel of his own choosing, and mere distrust of, or dissatisfaction with, appointed counsel is not enough to secure the appointment of substitute counsel.
8. **Criminal Law: Effectiveness of Counsel.** The standard for determining whether or not counsel for defendant in a criminal prosecution has provided adequate representation requires that trial counsel perform at least as well as a lawyer with ordinary training and skill in the criminal law in his area, and that he conscientiously protect the interests of his client.

9. **Criminal Law: Immunity.** In order to be constitutionally adequate, the immunity granted by a state to a witness in a criminal case must afford protection to the witness extending to criminal proceedings by other states, or by the United States.
10. _____: _____. Constitutionally adequate statutory immunity must leave the witness and the federal government, or another state government, in substantially the same position as if the witness had claimed his constitutional privilege against self-incrimination, in the absence of a state grant of immunity.
11. _____: _____. The true test of the constitutionality of an immunity statute is whether the result under such a statute is the same as if the witness retained his fifth amendment right and did not testify.
12. **Sentences: Immunity.** Where the defendant has testified in a previous criminal case under a lawful grant of immunity, the sentencing court in a subsequent criminal case cannot consider such testimony or any information directly or indirectly derived from it in determining whether a death sentence should be imposed under the provisions of Neb. Rev. Stat. § 29-2523 (Reissue 1979) and related statutes.

Appeal from the District Court for Douglas County: PAUL J. HICKMAN, Judge. Affirmed in part, and in part remanded with directions for resentencing.

John E. North, Jr., and Alan G. Stoler of Fromkin, Herzog, Jabenis & North, for appellant.

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

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

MCCOWN, J.

The defendant was charged with first degree murder in the deaths of Ann L. Speese and her 12-year-old daughter, Tina M. Speese. A jury found the defendant guilty of murder in the first degree in the death of Tina Speese, and guilty of second degree murder in the death of Ann Speese. Judgments were entered upon the verdicts, and the trial court sentenced the defendant to life imprisonment for the second degree murder of Ann Speese and to death for the first degree murder of Tina Speese.

On December 4, 1979, the Omaha Police Depart-

ment was called to a residence at 3456 Grant Street. When the police officers arrived they were met by 16-year-old Robert Frazier, who lived at the address with his mother.

Frazier showed the officers a car partially in and partially out of the Frazier garage. The trunk of the car was open and Frazier had already removed some women's clothing, newspapers, and blankets, all of which were blood soaked. The officers observed what appeared to be bloodstains in the trunk well of the car.

Frazier informed the police that Isaiah Jerry Jones had parked the car in the garage earlier that morning and had instructed Frazier to clean out the trunk of the car. Jones was a friend of Frazier's mother and had frequently been at the Frazier residence. Frazier showed the police a handgun given to him by Jones, who had told him that he had been shot in a gun battle as the explanation for the blood in the trunk.

Frazier, who had the keys to the car, also told officers that he had looked in the glove compartment of the car, where he had found a checkbook and a savings and loan book bearing the name of Ann Speese. A police officer testified that he found the checkbook of Ann Speese on the floor of the car. The police officers seized the items which had been removed from the car, and impounded it. The police attempted to locate Jones but were unable to find him in Omaha.

The police also tried to contact Ann Speese, but their investigation indicated that no one had seen her or her daughter since December 2, 1979. At that point an investigation was begun into the disappearance of Ann Speese and her daughter, and the police obtained a search warrant to search Jones' apartment in Omaha.

As part of the search, a forensic serologist conducted a luminol examination of the apartment. A luminol examination involves the application of a

chemical which emits a light blue glow in the presence of bloodstains, which light can be seen in photographs. The luminol examination showed bloodstains on the floor and walls throughout Jones' apartment. Later tests showed the blood which produced the stains was human, matched the blood type of the victims, and did not match the blood type of Jones. Bloodstains matching the victims' blood type were also found on various items of Jones' clothing and other personal items discovered and seized in his apartment.

Further investigation established that on December 3, 1979, Jones had rented carpet cleaning equipment and inquired as to whether it would remove blood from carpeting. On the same day, Jones was observed by several witnesses obtaining a post-hole digger and a shovel from friends. The investigation also established that Jones had been acquainted with Ann and Tina Speese for approximately 2½ years prior to December 1979. Several witnesses, including Jones' sister, testified that they had seen Jones with the Speeses on December 2, 1979, the last day they were seen alive.

On January 14, 1980, the bodies of Ann and Tina Speese were discovered in shallow graves in a wooded area along Interstate 29 near Oregon, Missouri. Exposed leg bones led to the discovery. Both bodies were partially clothed, and the body of Ann Speese was dismembered. The bodies were identified by dental charts and by a key on a chain around the neck of the girl's body, which fit the bicycle of Tina Speese.

A pathologist testified that the death of Ann Speese was probably caused by multiple wounds to the head inflicted by a blunt instrument. The pathologist also testified that Tina Speese died as a result of asphyxiation.

There was also testimony at trial that on December 6, 1979, Jones had requested friends of his to drive him to Kansas City along Interstate 29, and

that when they approached the site where the Speese bodies were later found, Jones scanned the area with binoculars and requested the driver to go past the site a second time.

On March 25, 1980, Jones was arrested in Chicago, Illinois, and returned to Omaha, where he was charged and tried. The witnesses for the defense testified to an alibi defense. The defendant did not testify at trial. The jury found Jones guilty of second degree murder in the death of Ann Speese and first degree murder in the death of Tina Speese. The trial court sentenced him to life imprisonment for the second degree murder and to death for the first degree murder. This appeal followed.

The defendant contends that there was prejudicial error in admitting or refusing to suppress various items of evidence, and in refusing to permit defendant's trial counsel to withdraw and requiring him to proceed rather than to appoint new counsel. Defendant also contends that the Nebraska death penalty statutes are unconstitutional, and that the trial court erred in imposing a sentence of death upon the defendant.

The defendant asserts that the trial court erred in refusing to suppress evidence which had been seized and removed from the defendant's car. Defendant argues that the evidence was derived from a warrantless search of the car by police officers. The evidence does not support the defendant's contention.

When the police arrived at the Frazier residence the articles from the trunk of the defendant's car had already been removed from the trunk by the defendant or Frazier, and Frazier, who had the keys to the car and control of it, showed the articles to the police and explained how they had come to be there. The officers had a legal right to be where they were, and the objects, as well as the interior of the trunk and the car, were in plain view.

The existence of probable cause must be deter-

mined by a practical and not by a technical standard. When objects in an automobile which are indicative of a criminal offense are within the plain sight of an officer who has the right to be in the position to have such view, a search is justified and legal. *State v. Connor,* 189 Neb. 269, 202 N.W.2d 172 (1972); *State v. Collins,* 186 Neb. 50, 180 N.W.2d 687 (1970). At the suppression hearing prior to trial the court properly refused to suppress this evidence, and that determination was correct.

Defendant also contends that it was error to admit testimony concerning the luminol examination of the defendant's apartment, and to admit the photographs which showed the luminol reaction. The argument is that there was not sufficient foundation to qualify the State Patrol forensic serologist or the officer who took the photographs as experts in regard to luminol testing.

The officer who took the photographs essentially testified as a photographer. His job was merely to photograph what he saw, and his testimony established what he had done, and the photographs accurately reflected what he had seen. Such testimony is clearly admissible and did not require foundation evidence showing that he had prior experience with the luminol process.

The forensic serologist testified that luminol examinations are considered and recognized as reliable by the forensic serology profession, and that she had personally conducted luminol experiments and tests and had done fieldwork. The fact that she was a qualified professional serologist is not disputed by the defendant. The argument is that she was not sufficiently experienced in luminol testing to be an expert witness. There is no evidence that luminol testing is not in the field of expertise of a professional serologist.

The admission of expert testimony is ordinarily within the trial court's discretion, and its ruling will be upheld in the absence of an abuse of discretion.

Shover v. General Motors Corp., 198 Neb. 470, 253 N.W.2d 299 (1977). There was no abuse of discretion in the present case.

The defendant also contends that it was prejudicial error to admit into evidence 24 colored photographs and duplicate slides showing the condition of the bodies of the victims at the time they were brought into the autopsy room, but before the autopsies were begun. The defendant argues that the photographs and slides were gruesome and excessive in number and the prejudicial effect of such photographs upon the jury far outweighed the probative value of the photographs.

The pathologist testified that the photographs helped to illustrate his testimony, and that the slides were preferable to prints so that each photograph would not have to be shown to each juror individually. The pathologist testified, using the slides, that all the photographs showed the condition of the bodies of the victims; that the body of Tina Speese showed bruises indicating that she died as a result of asphyxiation or suffocation; and that the dismembered body of Ann Speese showed bruising around the head and blows to the head with a blunt instrument which probably caused the death, and that the injuries were inflicted while the victim was alive. He also testified that the photographs showed that a saw, or similar mechanical means, was used to dismember the body of Ann Speese.

All the photographs and slides show the condition of the bodies or parts of the bodies of the victims prior to autopsy incisions or any post mortem work. A majority of the photographs show the nature and extent of wounds or injuries and reflect or explain testimony as to the probable causes of death. Six or seven of the photographs and slides were substantially duplicative of other photographs or slides already introduced.

The argument is that the photographs were also unnecessarily prejudicial because the defendant of-

fered to stipulate to the findings of the pathologist contained in the autopsy report. In essence the defendant argues that if the defense stipulates that an autopsy report may be admitted into evidence, without admitting the defendant's responsibility for the acts reflected in the report, the stipulation prevents the State from introducing photographs supportive of the pathologist's testimony. We disagree.

The admission into evidence of gruesome photographs rests in the sound discretion of the trial court, which must determine their relevancy and weigh their probative value against their possible prejudicial effect. *State v. Freeman,* 201 Neb. 382, 267 N.W.2d 544 (1978). In a homicide case, photographs of the victim, upon proper foundation, may be received in evidence for purposes of identification, to show the condition of the body, the nature and extent of the wounds and injuries, and to establish malice or intent. *State v. Williams,* 205 Neb. 56, 287 N.W.2d 18 (1979).

A majority of the photographs and slides in the present case were admitted into evidence to prove identity, condition of the victims' bodies, the cause of death, and intent and malice. We cannot say that the trial court abused its discretion to the extent that a new trial is required where, as here, more photographs were admitted than were necessary to establish the State's case. A photograph which illustrates or makes clear some controverted issue in a homicide case may be received even if it is gruesome, where a proper foundation has been laid. *State v. Partee,* 199 Neb. 305, 258 N.W.2d 634 (1977).

Under the circumstances shown in the record in the present case, we cannot say, as a matter of law, that the probative value of the photographs was outweighed by their possible prejudicial effect on the defendant or that there was an abuse of discretion on the part of the trial court which requires a new trial.

This court again cautions that the probative value

of gruesome photographs must be carefully weighed by the trial courts, which must determine the relevancy of the photographs and weigh their probative value against their possible prejudicial effect. When other evidence is available prosecuting attorneys should avoid the use of gruesome photographs when the relevance or probative value of such photographs is unclear or doubtful. In cases where it is appropriate to admit some gruesome photographs into evidence, no more photographs than absolutely necessary should be used.

Defendant also contends that the trial court erred in refusing to permit defendant's trial counsel to withdraw, and in refusing to appoint new trial counsel. It should be noted here that defendant's counsel at the time of trial was the second counsel appointed for the defendant, and that defendant's and his counsel's action to replace trial counsel came only 4 days prior to the date trial was scheduled to commence. Counsel on appeal is now the third appointed counsel. The record reflects a breakdown of communication between defendant and his counsel and raises a strong inference that defendant's requests for new counsel were based on mistrust of all lawyers and an attempt to delay the proceedings.

The law in this state is well settled that the right of an indigent defendant to have counsel does not give him the right to be represented by counsel of his own choosing, and mere distrust of, or dissatisfaction with, appointed counsel is not enough to secure the appointment of substitute counsel. *State v. Fallis,* 205 Neb. 465, 288 N.W.2d 281 (1980). The standard for determining whether or not counsel for defendant in a criminal prosecution has provided adequate representation requires that trial counsel perform at least as well as a lawyer with ordinary training and skill in the criminal law in his area, and that he conscientiously protect the interests of his client. *State v. Shepard,* 208 Neb. 188, 302 N.W.2d 703 (1981). There is no evidence in the present case that trial

counsel failed to adequately represent the defendant. To the contrary, the record reflects a competent and capable defense.

Finally, the defendant contends that the trial court erred in imposing a sentence of death upon the defendant. More specifically, the defendant argues that at the statutory sentencing hearing in this case the trial court considered immunized testimony of the defendant given at a prior independent criminal trial in the State of Iowa. The argument is that the court based its finding of the aggravating circumstance that the defendant had "a substantial history of serious assaultive or terrorizing criminal activity" and imposition of the death penalty upon that immunized testimony in the Iowa case. Defendant asserts that he was thus deprived of his constitutional privilege against self-incrimination, protected by his grant of immunity. He also contends that the aggravating and mitigating circumstances of the Nebraska death penalty statutes were improperly applied.

In 1978 Charles O. Reese was charged with the first degree murder of Charles Dean Sallis in the State of Iowa. The defendant in the present case was granted immunity under Iowa law in exchange for his testimony against Reese. That immunized testimony was introduced in evidence at the sentencing hearing in the present case to determine whether the death penalty should be imposed.

Neb. Rev. Stat. § 29-2523 (Reissue 1979) defines the aggravating and mitigating circumstances to be considered by the court in determining whether the death penalty should be imposed. Aggravating circumstance (1)(a) is: "The offender was previously convicted of another murder or a crime involving the use or threat of violence to the person, or has a substantial history of serious assaultive or terrorizing criminal activity."

The court found that no evidence had been submitted that the defendant had previously been con-

victed of either another murder or a crime involving the use or threat of violence to the person, and that the first portion of subsection (1)(a) was not applicable in the present case. The court excluded a Michigan conviction in 1968 for mutilating or defacing a dead body, and a 1964 Indiana conviction for theft.

The court specifically found that the defendant's immunized testimony established that, although the defendant in this case was not the actual killer in the Iowa case, "he was clearly liable, but for the State of Iowa's grant of immunity, as an aider and abettor to first degree murder."

The court then held that the second clause of aggravating circumstance (1)(a) was clearly applicable beyond a reasonable doubt based upon the defendant's previous involvement in the Iowa murder reflected by the immunized testimony. The court specifically held that the defendant's conduct in the Iowa case, set out by his immunized testimony, constituted "a history of assaultive or terrorizing criminal activity which is both 'substantial' and 'serious.' "

Aggravating circumstance subsection (1)(e) is: "At the time the murder was committed, the offender also committed another murder." The court specifically found that aggravating circumstance (1)(e) was clearly applicable.

The court also found that none of the other statutory aggravating circumstances were applicable and that none of the statutory mitigating circumstances were applicable.

The court concluded that the presence of a substantial history of serious assaultive or terrorizing criminal activity, as reflected by the defendant's immunized testimony, and the fact that the defendant also committed another murder at the time the murder of Tina Speese was committed were, together, sufficient to justify imposition of a death sentence.

The court also determined that the nonstatutory

mitigating factors presented by the defendant were not of sufficient weight to approach or exceed the weight given the aggravating circumstances, and that the sentence of death in this case was not excessive or disproportionate to the penalty imposed in similar cases. The sentencing court then imposed a death sentence on the defendant for the murder of Tina Speese.

The Nebraska statute governing immunity in effect at the time was Neb. Rev. Stat. § 29-2011.01 (Reissue 1979). That statute provided in relevant part: "No person who testifies or produces evidence in obedience to the command of the court in such case shall be liable to any forfeiture or penalty for or on account of any transaction, matter or thing concerning or arising from that as to which he may so testify or produce evidence; nor shall such testimony *or evidence be used directly or indirectly in any proceedings against him* except that no person shall be exempt from prosecution and punishment for perjury or contempt committed in so testifying." (Emphasis supplied.)

The current statute in relevant part provides: "The witness may not refuse to comply with such an order of the court on the basis of the privilege against self-incrimination, but no testimony or other information compelled under the court's order, or any information directly or indirectly derived from such testimony or other information, may be used against the witness in any criminal case, except in a prosecution for perjury, giving a false statement, or failing to comply with the order of the court." Neb. Rev. Stat. § 29-2011.02 (Cum. Supp. 1982).

The Iowa statute under which the defendant was granted immunity is more specific. It provides in part: "Testimony, documents or evidence which has been given by a witness granted immunity shall not be used against the witness in any trial or proceeding, or subject the witness to any penalty or

forfeiture . . . ." Iowa Code Ann. § 813.2, Rule 19.3.a.(4) (West 1979).

Under the specific language of the Iowa statute a sentencing hearing to determine whether a death sentence should be imposed is clearly a "proceeding," and it is difficult to imagine any penalty or forfeiture more severe than death. It seems equally clear that a sentencing hearing is an integral part of a "criminal case."

In order to be constitutionally adequate, the immunity granted by a state to a witness in a criminal case must afford protection to the witness extending to criminal proceedings by other states, or by the United States. *Murphy v. Waterfront Comm'n.*, 378 U.S. 52, 84 S. Ct. 1594, 12 L. Ed. 2d 678 (1964).

The aim of the *Murphy* rule is to leave the witness and the federal government, or another state government, in substantially the same position as if the witness had claimed his constitutional privilege against self-incrimination, in the absence of a state grant of immunity. "This purpose can be achieved only if the Federal Government is forbidden not only to introduce the testimony as evidence or to obtain investigatory leads from it, but is also forbidden to see it." *United States v. McDaniel,* 449 F.2d 832, 837 (8th Cir. 1971).

The broad scope of a grant of immunity is also demonstrated by cases holding that testimony compelled under the protection of immunity cannot be used against a witness for impeachment purposes. See, *United States v. Herring,* 602 F.2d 1220 (5th Cir. 1979); *United States v. Moss,* 562 F.2d 155 (2nd Cir. 1977), *cert. denied* 435 U.S. 914, 98 S. Ct. 1467, 55 L. Ed. 2d 505 (1978).

It is clear that immunity statutes are designed to serve as substitutes for the fifth amendment right not to incriminate oneself. Without such statutes no person in a criminal case can constitutionally be compelled to testify.

It is also clear that the only true test of the consti-

tutionality of an immunity statute is whether the result under such a statute is the same as if the witness retained his fifth amendment right and did not testify. The constitutional right would be illusory indeed if testimony produced under a grant of immunity could later be used as evidence of an aggravating circumstance supporting the imposition of a death penalty in a later criminal case against him.

We have found only one case directly dealing with testimony given under a grant of immunity at a previous trial in connection with the sentencing of the immunized witness at a subsequent criminal trial. In *People v. Provost,* 77 Mich. App. 667, 674-75, 259 N.W.2d 183, 186-87 (1977), the Michigan Court of Appeals said: "Defendant's final claim concerns his sentencing. Defendant had previously given testimony under a grant of immunity at a trial conducted before the same trial judge as in the case at bar. That testimony contained statements which would have incriminated defendant in the prior crime were it not for the immunity. Defendant moved to have the judge disqualify himself from sentencing defendant here on the basis of his knowledge of the previous testimony. The judge refused to disqualify himself and stated expressly that he would take the testimony into consideration for this sentence. Given the wide berth of information that a trial court in Michigan can consider in sentencing, we find no error in this court's actions. Under *People v. Grimmett*, 388 Mich 590, 202 NW2d 278 (1972), a sentencing court may consider 'public records concerning the defendant' and 'defendant's admissions to the court'. 388 Mich at 608 [202 N.W.2d at 287]. Since any judge rendering the sentence could have considered the public record of defendant's prior testimony, there was no reason for the trial judge below to disqualify himself or ignore that testimony."

The Supreme Court of Michigan reversed the Court of Appeals and remanded the case to the trial court for resentencing by another judge, and held

that the sentencing judge may not consider defendant's participation in the earlier crime in connection with which defendant received a grant of immunity. *People v. Provost,* 403 Mich. 843, 271 N.W.2d 777 (1978). The basic principle is even more obviously applicable where a death sentence is involved.

We therefore hold that where the defendant has testified in a previous criminal case under a lawful grant of immunity, the sentencing court in a subsequent criminal case cannot consider such testimony or any information directly or indirectly derived from it in determining whether a death sentence should be imposed under the provisions of § 29-2523 and related statutes.

In view of this holding, there was no evidence to support the finding of the sentencing court that aggravating circumstance (1)(a) was applicable in the present case. The death sentence must therefore be vacated and the cause remanded for resentencing.

The conviction and life sentence of the defendant for the murder of Ann L. Speese is affirmed. The conviction of the defendant for the murder of Tina M. Speese is affirmed; the sentence of death is vacated and the cause is remanded to the District Court with directions to hold a new sentencing hearing and sentence the defendant in accordance with the provisions of Neb. Rev. Stat. §§ 29-2520 et seq. (Reissue 1979) and this opinion.

AFFIRMED IN PART, AND IN PART REMANDED WITH DIRECTIONS FOR RESENTENCING.

BEATRICE R. LANGFELD, OWNER, DANIEL LANGFELD, HUSBAND OF BEATRICE R. LANGFELD, APPELLEES, V. STATE OF NEBRASKA DEPARTMENT OF ROADS, APPELLANT.

328 N.W.2d 452

Filed December 10, 1982. No. 44422.

1. **Eminent Domain: Witnesses.** An owner of real property shown to

be familiar with the value of such land is a competent witness to testify as to its value for the use to which it is then being put, without additional foundation. However, in order to estimate its value for other purposes, the owner must, as any other witness, be shown to have an acquaintance with the property and be informed as to the state of the market.

2. **Expert Witnesses.** Expert testimony should not be received if it appears the witness is not in possession of such facts as will enable him to express a reasonably accurate conclusion as distinguished from a mere guess or conjecture.
3. **Eminent Domain: Evidence.** Evidence of the price at which other lands have been sold is admissible in evidence in condemnation proceedings on the question of damages where such evidence is predicated upon sufficient foundation to furnish a criterion for market or going value of the land condemned.
4. _____: _____. Such lands must be shown to be similar or similarly situated to the land condemned and to have been sold at about the same time as the taking in the condemnation action.
5. _____: _____. Whether the properties the subject of other sales are sufficiently similar to the property condemned to have some bearing on the value under consideration, and to be of any aid to the jury, must necessarily rest largely in the sound discretion of the trial court, which will not be interfered with unless abused. The exact limits, either of similarity or difference, or of nearness or remoteness in point of time, depend upon the location and character of the properties and the circumstances of the case.
6. **Evidence.** Where the fact sought to be shown, even though independent of the fact being litigated, has an actual and substantial tendency to establish or disprove such fact, it must be admitted. Evidence is relevant not only when it tends to prove or disprove the precise fact in issue but when it tends to establish a fact from which the existence or nonexistence of the fact in issue can directly be inferred.
7. **Expert Witnesses: Witnesses.** The value of an opinion of an expert witness, or any witness, must be dependent upon and is no stronger than the facts upon which it is predicated, and it has no probative force unless the assumptions upon which it was based are shown to be true.
8. **Eminent Domain.** The measure of the right of the owner of property abutting on a street to access to and from it by way of the street is reasonable ingress and egress under all the circumstances.
9. **Jury Instructions.** If an instruction is not sufficiently specific in some respect, it is the duty of counsel to offer requests to supply an omission.

Appeal from the District Court for Sarpy County:

RONALD E. REAGAN, Judge. Reversed and remanded for a new trial.

Paul L. Douglas, Attorney General, and Warren D. Lichty, Jr., and Sharon M. Lindgren, for appellant.

Charles L. Titus and Robert L. Freeman of White, Lipp, Simon & Powers, for appellees.

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

HASTINGS, J.

The appellant, the State of Nebraska Department of Roads, has appealed a judgment in condemnation entered by the District Court for Sarpy County. Assigned as errors include the reception into evidence of value opinion testimony given by the landowner and an expert witness, the exclusion of certain exhibits, improper jury instructions, and excessiveness of the award of attorney fees.

By this action the State of Nebraska Department of Roads acquired the fee title to 5.2 acres of approximately 99 acres of land owned by Beatrice R. Langfeld. The purpose of the acquisition was to reconstruct Highway 50 near its intersection with Interstate 80. In addition to the fee title, certain restrictions as to access from Highway 50 to the plaintiff's remaining property were imposed. The board of appraisers in the county court had awarded damages in the total sum of $131,000. On plaintiff's appeal to the District Court she testified that in her opinion her total damages amounted to $444,603, whereas her expert witness, Joseph G. Strawn, indicated total damages of $438,200. Motions to strike the opinion testimony of both of these witnesses on the ground of lack of foundation were overruled. The State's expert witnesses, Attilio Rindone and George J. Bighia, testified that the total damages were $109,298 and $97,600, respectively. The jury returned a verdict in the amount of $316,595. In addi-

tion, the court awarded the plaintiff the sum of $1,900 as a fee for her expert witness and $45,000 for her attorney fees.

One of the main points of contention between the parties was whether the plaintiff's land at the time of taking was commercial in nature or whether it simply had commercial potential. To a great extent a resolution of this matter depends upon the nature of the access from Highway 50 to the plaintiff's land existing as of the date of the present taking, as well as that which remained following these proceedings.

The plaintiff testified that in placing a value upon her property she considered it as commercial property. In doing so, according to her, she considered the type of access that the property had before the taking. In her words this consisted of two general-purpose driveways and a farm entrance. She said that a general-purpose entrance would accommodate "anything we wanted to bring in" without any limitations having been placed on those accesses by the Department of Roads.

However, the record is quite clear that in a 1962 condemnation proceeding a strip of land formerly part of the plaintiff's farm and lying between the highway right-of-way and the remainder of the property was taken. Those proceedings provided that "there will be no ingress or egress" from the property taken onto the remainder of plaintiff's land except for one private residential entrance "to provide ingress and egress to dwelling of the owner so long as it is used consistent with normal activities thereto" and except for two field entrances "to provide for the movement of farming implements and crops so long as they are used consistent with normal farming operations of the owner." By stipulation later entered into between Mrs. Langfeld and the State of Nebraska, it was agreed that all three entrances or driveways were to be changed to "farmstead entrances to provide ingress and egress to the dwellings and outbuildings sites so long as

they are used consistent with rural living and farming activities."

Additional testimony of the plaintiff, which was claimed to be foundational in support of her opinion as to value, included the fact that she had purchased the property in 1951; that it was used for farming purposes; and that she and her husband moved off the farm in 1974 but the land was still being used for agricultural pursuits, specifically the raising of miniature donkeys. She also said that she was aware of commercial development around the farm, but was not familiar enough with sales of other property in the vicinity as to be able to quote them. As previously mentioned she admitted that in concluding that the property could be developed for commercial interests, she took into account the access which she understood she had and was losing as a part of the instant proceedings. She said that she had never inquired as to whether commercial development would be feasible with the use of the existing driveways, nor did she know from a technical standpoint what would have to be done to provide sewer services, whether gas service was available for certain, or how much it would cost to develop the land. She had never contacted anyone about developing the property. On further questioning she acknowledged that she was a little out of date regarding the access road because she had not lived there for 7½ years. She said that if it were shown that there were restrictions as to access previously existing which would prevent commercial development, she did not know whether that would affect her opinion as to value because that was a very important question which she was not prepared to answer at that time.

Following the conclusion of Mrs. Langfeld's testimony, the State moved to strike all of that testimony relating to value on foundational grounds, which was overruled. It is the court's ruling in denying that motion that constitutes the State's first assignment of error.

As pointed out above, at the time these proceedings were commenced there was a controlled access line preventing ingress and egress from Highway 50 to the plaintiff's land except for the three farmstead driveways. Without further explanation this factor would seem to obviate any reasonable conclusion that the property as it existed at the time these proceedings were commenced was commercial property. The record is also clear that by the terms of these proceedings, although two of the three farmstead driveways were eliminated, they authorized a larger, commercial drive with no restrictions as to the number or size of vehicles entering or leaving the premises.

Considering the plaintiff's apparent misconception as to the situation regarding access, her failure to demonstrate any awareness of the suitability of her property for commercial development, and a lack of knowledge as to the state of the market, we believe that her opinion testimony was utterly devoid of foundation.

However, the plaintiff relies upon what she denominates in her brief as the established rule in Nebraska that a "landowner is always qualified to testify as to the value of her own property in a condemnation action without any further foundation being required." It is true that in a number of our reported cases we can find language strongly supportive of that rule. In *Thacker v. State,* 193 Neb. 817, 824, 229 N.W.2d 197, 202 (1975), we said: "Of course, the owner may always testify as to its value." Earlier, in *Schmailzl v. State,* 176 Neb. 617, 622, 126 N.W.2d 821, 824 (1964), appears similar language: "An owner, by virtue of the ownership relation, is qualified to give his estimate of the value of such property." A case decided the following year which would appear to be directly in point is *Swanson v. State,* 178 Neb. 671, 677, 134 N.W.2d 810, 814 (1965), in which we said: "The owner of real estate which is taken in condemnation proceedings who is familiar

with its value can testify as to its value. State v. Wixson, 175 Neb. 431, 122 N.W.2d 72; 32 C.J.S., Evidence, § 546(116), p. 433. The owner may testify to the value of his property without any foundation being laid other than the fact of his ownership. Borden v. General Ins. Co., 157 Neb. 98, 59 N.W.2d 141. The witness who was also the owner should have been allowed to testify without laying a foundation."

The "ipso facto" rule, as stated above, apparently would permit a person with a limited farm experience, who has no knowledge of the attributes of land necessary for commercial development and no information as to the state of the market as to such type of land, to express an opinion as to value of the land for commercial purposes. Because we believe such conclusion is completely unreasonable, we have chosen to reexamine the logic of the presently existing rule.

The statement in *Thacker, supra,* was pure dictum. *Schmailzl* cited *Johnson v. City of Lincoln,* 174 Neb. 837, 120 N.W.2d 297 (1963), in support of its statement that ownership was the foundation stone warranting an opinion as to value. However, an examination of *Johnson* reveals the following language: "It cannot be questioned that the owner of the real estate which is taken in a condemnation proceeding, or the lessee thereof, who is familiar with its value, and the owner of personal property can testify as to its value. See Chicago, R. I. & P. Ry. Co. v. Buel, 56 Neb. 205, 76 N.W. 571." *Id.* at 848, 120 N.W.2d at 304.

Swanson, supra, cites *State v. Wixson,* 175 Neb. 431, 122 N.W.2d 72 (1963), which in turn relies on *Johnson,* and so on back to *Chicago, R. I. & P. R. Co. v. Buel,* 56 Neb. 205, 76 N.W. 571 (1898). Actually, *Swanson* relied in part upon *Borden v. General Insurance Co.,* 157 Neb. 98, 59 N.W.2d 141 (1953), which was a case involving personal property. Of course, the rule as to personal property is purely one of necessity, as suggested by *Jensen v. Palatine Ins. Co.,*

81 Neb. 523, 116 N.W. 286 (1908), cited in *Borden.* In *Jensen* this court said: "We are of the opinion that where the value of a stock of goods is a relevant fact, *and no more accurate evidence is under the circumstances obtainable,* the owner of such stock and witnesses acquainted with the value of the different articles of which such stock is composed, and who have observed the same for the purpose of estimating the value thereof, may give their opinion of such value." (Emphasis supplied.) *Id.* at 529, 116 N.W. at 289.

However, returning to our common denominator case, *Buel,* its pertinent language is as follows: "It is argued that he [the owner] was not shown to be competent to testify on the question of value. The evidence discloses that he owned the land and *cultivated it, was familiar therewith and with other real estate in the same vicinity, and that he was acquainted with the value of his farm before and after the location of the defendant's right of way.* He was competent to testify on the subject of value, even though he was not an expert, or dealer in real estate. The first paragraph of the syllabus in *Burlington & M. R. R. Co. v. White,* 28 Neb. 166, reads thus: 'Where witnesses are shown to be familiar with the value of a particular piece of land across which a railroad has been built, they are competent to testify as to the value of such tract of land . . . .' And the first and second divisions of the syllabus in *Burlington & M. R. R. Co. v. Schluntz,* 14 Neb. 421 [16 N.W. 439 (1883)] are as follows: '(1.) The owner of land taken for right of way by a railroad company, having resided upon and improved it for several years, who swears that he knows what it is worth, is a competent witness on the question of value. (2.) So, too, are other persons who have resided for several years in the immediate neighborhood of the land, and who seem, upon examination, to be well informed of its situation, condition, and value.' " (Emphasis supplied.) *Id.* at 208-09, 76 N.W. at 572-73.

Decided 2 years before *Buel* is *Chicago, B. & Q. R. Co. v. Shafer,* 49 Neb. 25, 68 N.W. 342 (1896). This court held that if neighbors in the vicinity of the property have been declared competent to testify as to value, then an owner, who has resided upon his own land and is "acquainted from hearsay with the recent sales of land in the vicinity and the prices paid therefor," is also competent to testify. The court's precise holding is contained in the following language: "It appears further from the cross-examination that the plaintiff has resided upon and owned the tract of land in question, which adjoins the city of Seward, for more than twenty years, and knew the cost of the improvements thereon. He is also shown to have been acquainted with the recent sales of land in that vicinity and the prices paid thereat. It has been frequently said by this court that to qualify a witness to give testimony concerning the value of land he must be shown to possess some knowledge of the subject, although the amount or scope of such knowledge has not been defined. Nor is it at this time deemed necessary, if, indeed, it were possible, to lay down a precise rule by which to determine the competency of witnesses as to value in all cases. It is sufficient that resident owners of land in a farming neighborhood have generally been held competent witnesses to the value of real estate in such community. In a leading case upon the subject, *Robertson v. Knapp,* 35 N.Y., 91, the witnesses, all of whom were residents of the immediate neighborhood, some being engaged in farming and others retired farmers, were held competent without further showing. In the opinion it is said: 'There are no certain data which, if given, will fix the value of land. The same data will produce widely different results as to the value, depending, perhaps, on location and the use to which it can be applied, or upon the demand. The value of land in the vicinity is usually understood by all of the residents of a farming neighborhood, without respect to occupation.'

The opinion of such a witness may not be the best or most satisfactory evidence attainable, and yet it is difficult to conceive of persons better qualified to testify upon the subject of the value of *farming* lands than resident owners of like property in the particular locality." (Emphasis supplied.) *Id.* at 31-32, 68 N.W. at 343.

Finally, we refer to *B. & M. R. R. Co. v. Schluntz,* 14 Neb. 421, 16 N.W. 439 (1883), cited as authority in *Buel,* and another similar case decided at the same term of court as *Schluntz, M. P. R. R. Co. v. Coon,* 15 Neb. 232, 18 N.W. 62 (1883). In *Coon,* this court, speaking through Lake, C.J., found that an owner-witness' testimony was erroneously admitted. The court said: "Without any showing whatever, there is certainly no presumption that a witness is competent to give a reliable estimate of the market value of land; and where one's competency is challenged, before he should be permitted to express an opinion, it should be made to appear that he has in some way become qualified to do so." *Id.* at 233, 18 N.W. at 62-63.

Lake, C.J., again speaking for the court, said in *Schluntz:* "The defendant himself was the first witness called. He was subjected to a very lengthy examination upon the question of his competency to testify as to the value of the property. He swore explicitly that he knew its value, and from the fact that he had lived there for twelve years, had made the improvements upon it, and appears to have possessed ordinary intelligence at least, I am satisfied he was qualified to give his opinion on that point." 14 Neb. at 422-23, 16 N.W. at 440.

It seems apparent to us from a review of these early authorities that we have on occasion utilized some broad language. However, the thrust of our competency rule has been to permit the owners of residential or farm properties, who testify that they are familiar with its values, to offer opinions on such value when the land is to be used for the same pur-

pose. We believe that we went too far in *Swanson v. State,* 178 Neb. 671, 134 N.W.2d 810 (1965), when we reversed the action of the District Court and held that a farm owner who testified in detail respecting the adaptability of his land for agricultural purposes only might nevertheless express an opinion as to its value for industrial purposes.

Both Kentucky and Montana have struggled with this same problem. In *Commonwealth, Department of Highways v. Fister,* 373 S.W.2d 720 (Ky. 1963), that court reviewed the history of the "ipso facto" rule and declared that it originated as a matter of practical necessity. It then reasoned that if an owner is presumed qualified to express an opinion simply by reason of ownership, he can immediately testify concerning market values, when in truth and in fact he may lack such knowledge. It then went on to announce a "new rule" as follows: "We see no reason why an owner, before expressing his opinion concerning the market value of his real estate, should not have the initial minimum qualifications required of his neighbors. It follows that the qualifications of the owner witness, as other witnesses, must be affirmatively shown *before* his opinion of market values is expressed." (Emphasis supplied.) *Id.* at 722-23. Such a rule in Nebraska would require the owner to have an acquaintance with the property and to be informed as to the state of the market. *Chudomelka v. Board of Equalization,* 187 Neb. 542, 192 N.W.2d 403 (1971).

Montana has arrived at a somewhat different and, we believe, more reasonable solution. In *Alexander v. State Highway Comm'n,* 142 Mont. 93, 381 P.2d 780 (1963), the Montana court reviewed the earlier cases in much the same way that we have done here. It then concluded: "A resume of the foregoing expressions of this court on the rule permitting an owner to estimate the value of his property discloses that in the early opinions the owner needed the qualifications of practical experience, observation and knowl-

edge on which to base an intelligent opinion." *Id.* at 108, 381 P.2d at 788. It went on to say: "It would appear from the expressions in our later opinions that mere proof of ownership has been interpreted to permit such owner to estimate the value in any field of use of his property that could be conceived, rather than limiting it to his reasonable opinion as to the value of the property. We believe the rule should be further limited to make the owner a competent witness to testify as to the reasonable value of the property for the use to which he is putting it, and to go beyond that field he must possess the qualifications required of a general witness as to value. Illustrating our view, one using land owned by him for the purpose of pasture in grazing cattle may testify in a reasonable way as to its value for that purpose, but he may not testify as to its value as town lots, or as a gravel pit, or for any other purpose unless he be further qualified." *Id.* at 109-10, 381 P.2d at 789.

We therefore restate the rule to be that an owner who is shown to be familiar with the value of his land shall be qualified to estimate the value of such land for the use to which it is then being put, without additional foundation. Such owner is not qualified by virtue of ownership alone to testify as to its value for other purposes unless such owner possesses, as must any other witness as to value, an acquaintance with the property and is informed as to the state of the market. Since the adoption of this rule may make necessary a different procedural method from that heretofore allowed, it shall apply only to trials held after the issuance of the mandate in this case. However, as the judgment before us must be reversed on other grounds, the restated rule here will apply on a retrial of this cause.

The next assignment of error concerns the testimony of Joseph G. Strawn as an expert witness on value. The State contends that it should have been stricken because of his reliance upon "noncom-

parable" sales and that he incorrectly concluded that the land was commercial property.

The first sale he described was a tract of ground containing 48,310 square feet located just across Interstate 80 from the subject property, and which he stated was commercial property. Although he gave no selling price for the specific property, he had indicated that property generally in that commercial subdivision was selling for $1.25 to $1.75 per square foot.

The second sale was located approximately 1 mile north of the plaintiff's property, on Highway 50 and Harrison Street, and consisted of 24,000 square feet, or a little more than one-half of an acre. This sold for $2.49 per square foot.

The third sale involved a tract of ground consisting of 7.9 acres located north of Papillion. It had been purchased by K-Mart Corporation for $56,500 per acre.

According to Mr. Strawn's testimony the first two sales were developed properties, i.e., the utilities and streets were all in place. He said that he was able to compare these properties with the Langfeld property by plugging in some type of an improvement factor. He attempted to explain this factor later on during cross-examination when he stated that it would cost approximately $12,000 per acre to develop raw land for commercial purposes. The third sale, he said, was of undeveloped land. However, no attempt was made to correlate the various factors inherent in that property with those of the Langfeld land.

The State calls our attention to several of our recent opinions dealing with comparable sales. Specifically, in *Clearwater Corp. v. City of Lincoln,* 202 Neb. 796, 804, 277 N.W. 2d 236, 241 (1979), we said: "Expert testimony should not be received if it appears the witness is not in possession of such facts as will enable him to express a reasonably accurate conclusion as distinguished from a mere guess or

conjecture. The witness should not be allowed to express an opinion on an inadequate basis or in respect to facts not disclosed to the jury."

The second time around, in *Clearwater Corp. v. City of Lincoln,* 207 Neb. 750, 301 N.W.2d 328 (1981), we were faced with a claim of error for rejecting evidence of so-called comparable sales. We said: "It is well settled that evidence of the price at which other lands have been sold is admissible in evidence in condemnation proceedings on the question of damages where such evidence is predicated upon sufficient foundation to furnish a criterion for market or going value of land condemned. [Citation omitted.] However, it is equally clear that such land must be similar or similarly situated land sold at about the same time, especially when the price paid depends upon the market or going value rather than other considerations." *Id.* at 753, 301 N.W.2d at 330. We concluded by stating with approval the rule from 5 Nichols on Eminent Domain § 21.31 (1979): " 'Whether the properties are sufficiently similar to have some bearing on the value under consideration, and to be of any aid to the jury, must necessarily rest largely in the sound discretion of the trial court, which will not be interfered with unless abused. The exact limits, either of similarity or difference, or of nearness or remoteness in point of time, is difficult, if not impossible, to prescribe by any arbitrary rule, but must to a large extent depend on the location and the character of the property and the circumstances of the case.' " *Id.* at 754, 301 N.W.2d at 330.

The testimony of the witness as to the details of the three sales was meager at best. But, assuming the correctness of the characterization of the plaintiff's land as commercial property, we cannot say that the trial court abused its discretion in admitting evidence of the three sales.

However, we cannot agree that the record supports a conclusion that this was commercial prop-

erty. In dealing with this issue, we will of necessity have to consider the court's exclusion of certain exhibits, which comprises a separate assignment of error.

Reference has been made earlier to the nature of the access to this property which existed both before and after the commencement of the present proceedings. Although Mr. Strawn stated that "in essence" he was not basing his opinion on unrestricted access to the property, he went on to say: "The access was already at Cornhusker [county road] for this property. There's no limitation on the county road, and there was an access provided, in fact until just a short time ago, to the north edge of this property . . . that was just eliminated . . . . So . . . there was sufficient access for commercial development." Earlier, he had testified that access was limited onto Highway 50 by reason of condemnation proceedings in 1960; however, he went on to say that "there was a stipulation in the County Court records for Langfeld's property, Voss's property, Karloff's, Hanson, from Harrison Street ultimately all the way to the north of Springfield at the Fase property where the State of Nebraska allowed access every quarter of a mile. So depending, of course, on their permit, I assumed the access to be at the north end of the Langfeld property and at Cornhusker . . . ."

Earlier, the plaintiff herself had testified that prior to the present proceedings her access directly to the county road was limited to "two farm entrances, two tractor entrances." Although the witnesses for both parties could have been more specific in their testimony, it appears from the record that the entrance "to the north edge of this property" referred to by Mr. Strawn was the one farm driveway which the State did not eliminate by these proceedings.

Finally, his statement that access was provided for the Langfeld property every quarter of a mile by the stipulation is just not supported by the record.

There is found in exhibit 9 a stipulation between the Department of Roads and Mildred Voss, Wilma Wessel, Raymond Wessel, and John Voss. It provides that if the remainder of the particular property owned by these condemnees is platted and subdivided, streets will be allowed access to the highway at locations to be determined and approved by the State of Nebraska, but which "shall not exceed one street for each quarter mile of State highway frontage." This is the only such stipulation which appears in the record and is applicable only to the land owned by those condemnees—Voss and Wessel. Their property is located in the north half of the northwest quarter of Section 13, Township 14, Range 11. The Langfeld property is all located within the southeast quarter of Section 23, Township 14, Range 11.

Upon further cross-examination the witness Strawn was unable to give a reference as to where the stipulation was located, and, although he testified that he was not saying that the records located in the register of deeds office were incorrect, he did insist that "I just know that there is a stipulation that there will be an access on Highway 50 every quarter of a mile."

In an effort to rebut or impeach this testimony, the State offered in evidence exhibit 11. This exhibit purported to show all documents filed in the office of the register of deeds affecting the subject property during a time commencing prior to the date when the plaintiff first obtained title in 1951 up until the present date. The documents comprising this exhibit revealed the access limitations which had been imposed by the 1962 condemnation proceedings, but, more importantly, they failed to disclose any stipulation as to the additional access, and thereby served to rebut the testimony of Mr. Strawn. The exhibit was also offered for the purpose of contradicting the plaintiff's testimony as to the nature of the access which she enjoyed both before and after these proceedings.

The reason assigned by the trial judge in sustaining the objection to exhibit 11 was that it was cumulative. The exhibit did contain much of the same information that was found in exhibit 9. Exhibit 9 was certified as containing all county court filings with reference to the 1962 condemnation action. On the other hand, exhibit 11, as earlier mentioned, contained all filings made in the office of the register of deeds affecting this property. The appellant was entitled to have all of the evidence before the jury so as to attempt to refute the witness Strawn's testimony that "I just know that there is a stipulation that there will be an access on Highway 50 every quarter of a mile." "Where the fact sought to be shown, even though independent of the fact being litigated, has an actual and substantial tendency to establish or disprove such fact, it must be admitted. Evidence is relevant not only when it tends to prove or disprove the precise fact in issue, but when it tends to establish a fact from which the existence or nonexistence of the fact in issue can be directly inferred." *Rickertsen v. Carskadon,* 169 Neb. 744, 749, 100 N.W.2d 852, 856 (1960). See, also, *Herman v. Midland Ag Service, Inc.,* 200 Neb. 356, 264 N.W.2d 161 (1978); Neb. Rev. Stat. § 27-401 (Reissue 1979).

Exhibit 11 was relevant as to the issue of whether the land in fact had commercial-type access, and it was error not to have received it in evidence. As a matter of fact, absent a further explanation, it, together with the other exhibits, would seem to contradict the assumption of both the plaintiff and her witness that the land was commercial in nature, and their testimony as to value should have been excluded. The value of an opinion of an expert witness, or any witness, must be dependent upon and is no stronger than the facts upon which it is predicated, and it has no probative force unless the assumptions upon which it was based are shown to be true. *Clearwater Corp. v. City of Lincoln,* 202 Neb. 796, 277 N.W.2d 236 (1979).

The State complains that the trial court erred in failing to instruct the jury that it could consider only the loss of *reasonable* access to the remainder property. Instruction No. 5 was the general instruction explaining "reduction in the fair and reasonable market value of the property remaining." The concluding sentence reads: "This may include the reduction in size of the property, or the remaining access and egress to the property when compared to that which existed prior to the taking." This paraphrases NJI 13.05, which concludes with "This may also include . . . the way in which you can get to and from the remaining property as compared to the way in which you could get to and from the property before the taking." *W.E.W. Truck Lines, Inc. v. State,* 178 Neb. 218, 224, 132 N.W.2d 782, 787 (1965), does, as pointed out by the appellant, contain the following language which tends to support its contention: " 'The measure of the right of the owner of property abutting on a street to access to and from it by way of the street is reasonable ingress and egress under all the circumstances.' " However, although the record does not disclose that the appellant affirmatively approved the instructions tendered by the court, it neither objected to them nor submitted a more specific instruction. If an instruction is not sufficiently specific in some respect, it is the duty of counsel to offer requests to supply an omission. *Beveridge v. State,* 183 Neb. 406, 160 N.W.2d 229 (1968).

Because we order a new trial, it is not necessary for us to consider the claimed error regarding the awarding of attorney fees.

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

REVERSED AND REMANDED FOR A NEW TRIAL.

CLINTON, J., participating on briefs and concurring.

I join in the majority opinion except that I would apply to pending cases the principle of law an-

nounced in the first syllabus. I see no just reason why the principle should not be applied retroactively.

STATE OF NEBRASKA EX REL. MARLIN LANDANGER, APPELLANT, V. MADISON COUNTY BOARD OF COMMISSIONERS, AND PAUL TERRY, HAROLD SEILER, AND LOUIS BARRY, APPELLEES.

327 N.W.2d 93

Filed December 10, 1982. No. 81-594.

1. **Police Officers and Sheriffs.** The office of sheriff and the office of jailer are separate and apart, although the sheriff may, if he elects, act as jailer.
2. _____. If the sheriff performs the duties of jailer in addition to his duties as sheriff, he is entitled not to extra compensation for the performance of his duties as sheriff but to the compensation provided for the performance of the other duties as jailer.

Appeal from the District Court for Madison County: RICHARD P. GARDEN, Judge. Reversed and remanded with directions.

Walter H. Radcliffe and Ronald Albin, for appellant.

David A. Domina, for appellees.

James H. Moylan of Garvey, Nye, Crawford, Kirchner & Moylan, for amici curiae Adams County et al.

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

KRIVOSHA, C.J.

This appeal involves the single question of whether the increase in fees as provided for in the amendment to Neb. Rev. Stat. § 33-117 (Reissue 1978), adopted by the Nebraska Legislature (1980 Neb. Laws, L.B. 628), which increased from $3 to $10 per day the fees to be paid by the county to the sheriff

as jailer when there are prisoners confined in the county jail, may be collected by the appellant, Marlin Landanger, the sheriff of Madison County, Nebraska, during his existing term as sheriff. The sheriff maintains that the increase in fee is due and owing to him as jailer, and not as sheriff. The county board, on the other hand, refuses to pay the increase, maintaining that such fee is compensation and, as such, cannot be increased during the course of the sheriff's term of office, as prescribed by the provisions of Neb. Const. art. III, § 19. The trial court agreed with the county board and found that the increased fee should not be paid. We believe that the trial court was in error in that conclusion, and we reverse the decision of the trial court and remand the action back to the trial court with directions.

Strange as it may seem, this is not the first time this precise question has been presented to this court. It appears that the specific question has been presented to the court on at least three other occasions. See, *Dunkel v. Hall County,* 89 Neb. 585, 131 N.W. 973 (1911); *Afflerbach v. York County,* 95 Neb. 611, 146 N.W. 1050 (1914); *Flint v. Mitchell,* 148 Neb. 244, 26 N.W.2d 816 (1947).

The determination of the question presented in part turns upon the application of article III, § 19. Article III, § 19, in relevant part provides as follows: "[N]or shall the compensation of any public officer, including any officer whose compensation is fixed by the Legislature, be increased or diminished during his term of office . . . ." If, indeed, the position of jailer, for which the increased fees are to be paid to the sheriff as provided for by § 33-117 (Cum. Supp. 1982), is a public office having a fixed term and is included within the provisions of article III, § 19, then the county board's position is correct. On the other hand, if the position of jailer is separate and apart from that as sheriff and, as such, has no fixed term

and is therefore not within the meaning of article III, § 19, the sheriff is correct.

Section 33-117 provides in part as follows: "The several sheriffs shall charge and collect fees as follows: . . . where there are prisoners confined in the county jail, ten dollars shall be allowed *the sheriff as jailer* . . . ." (Emphasis supplied.)

The use of the phrase "sheriff as jailer" is not mere surplusage, for Neb. Rev. Stat. § 47-115 (Reissue 1978) specifically provides for the position of jailer. That section provides: "The jailer or keeper of the jail shall, unless the sheriff elects to act as jailer in person, be a deputy appointed by the sheriff, and such jailer shall take the necessary oath before entering upon the duties of his office; *Provided,* the sheriff shall in all cases be liable for the negligence and misconduct of the jailer, as of other deputies." It is clear from a reading of the statutes that the office of sheriff and the office of jailer are separate and apart, although the sheriff may, if he elects, act as jailer. Furthermore, it is obvious from the clear reading of the quoted section that the office of jailer does not have a term either coextensive with the sheriff or separate and apart. Rather, the jailer is "appointed by the sheriff" and therefore can be removed by the sheriff. The sheriff may elect to serve as jailer during a portion of the time he is sheriff and may appoint a deputy to serve as jailer during the rest of the time. It was for that very reason that in the *Dunkel* case we acknowledged that the Legislature obviously recognized a distinction between the duties of the office of sheriff and those of the position of jailer, and why in *Afflerbach* at 612-13, 146 N.W. at 1050, we specifically held: " 'Section 13, ch. 46, Comp. St. 1907, recognizes a distinction between the duties of the office of sheriff and those of the position of jailer, and gives the sheriff the election to act as jailer in person; and, if the sheriff does not so elect, it provides that the jailer shall be a deputy appointed by the sheriff'—leaving

it optional with the sheriff whether he will discharge the duties of jailer himself or by a deputy. It was held in that case that, if the sheriff 'performs the duties of jailer, in addition to his duties as sheriff, he is entitled, not to extra compensation for the performance of his duties as sheriff, but to the compensation provided for the performance of the other duties as jailer.' "

The county board argues that whatever we may have held prior to the 1920 Constitutional Convention, the convention changed the language of the Constitution and therefore overruled the earlier decisions holding to the contrary. That argument, of course, has no basis for at least two reasons. In the first instance the amendments to the Constitution and, in particular, article III, § 19, did not address the issue of jailer, nor were the predecessors to § 47-115 amended. Furthermore, the *Flint* case, which upheld the right of the sheriff to receive an increase in jailer fees as jailer during his term of office, was decided in 1947, long after the 1920 convention. In *Flint* we specifically said at 245, 26 N.W.2d at 818: "It is also true that if in addition to his duties as sheriff he acts as jailer he is entitled to the fee provided therefor by section 33-117, R.S. 1943." For these reasons, therefore, we hold that the duty of jailer, which may be performed by a sheriff pursuant to § 47-115 and for which he is entitled to receive payment at the rate of $10 per day for each day there are prisoners in jail, pursuant to the provisions of § 33-117, is separate and apart from his duties as sheriff and is not covered by article III, § 19. The jailer does not have a term and, while he may be a public officer, he is not precluded from receiving fees increased by the Legislature. For that reason the Legislature may increase or decrease the fee to be received by the sheriff acting as jailer, or anyone else acting as jailer, whenever it chooses and, when so acting, it becomes effective as provided by the Legislature. The judgment of the Dis-

trict Court is reversed and the cause remanded with directions to enter judgment in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

JACK A. POTTS AND YVONNE L. POTTS, APPELLEES AND CROSS-APPELLANTS, V. THE BOARD OF EQUALIZATION OF HAMILTON COUNTY AND HAMILTON COUNTY, NEBRASKA, APPELLANTS AND CROSS-APPELLEES.

328 N.W.2d 175

Filed December 10, 1982. No. 81-616.

1. **Taxation: Valuation.** All tangible property and real property in this state, not expressly exempt therefrom, shall be subject to taxation, and shall be valued at its actual value. Such actual value shall be taken and considered as the taxable value on which the levy shall be made. Neb. Rev. Stat. § 77-201 (Reissue 1981).
2. _____: _____. Under the provisions of Neb. Rev. Stat. §§ 77-202.01 and 77-202.02 (Reissue 1981) any person seeking tax exempt status for any real property shall apply for exemption to the county assessor by January 1 of the year following adoption of §§ 77-202.01 to 77-202.07, on forms prescribed by the Tax Commissioner, and a hearing shall be held by the county board of equalization to consider the matter.
3. **Taxation: Valuation: Presumptions.** There is a presumption that a board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action, which presumption remains until there is competent evidence to the contrary. Once there is competent evidence on appeal to the contrary, the presumption disappears and the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon the evidence.
4. _____: _____: _____. Evidence of sale price alone may not be sufficient to overcome the presumption that the board of equalization has valued the property correctly. But where the evidence discloses the circumstances surrounding the sale and shows that it was an arm's length transaction between a seller who was not under compulsion to sell and a buyer who was not compelled to buy, it should receive strong consideration.
5. **Taxation: Valuation: Appeal and Error.** The trial of an appeal from a county board of equalization involving the valuation of real estate, both in the District Court and the Supreme Court, is de novo as an equitable proceeding.

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

Michael J. Owens, Hamilton County Attorney, for appellants.

Jack A. Potts and Yvonne L. Potts, pro se.

BOSLAUGH, MCCOWN, CLINTON, and WHITE, JJ., and BRODKEY, J., Retired.

BRODKEY, J., Retired.

The appellants, the Board of Equalization of Hamilton County and Hamilton County, Nebraska, appeal to this court from a judgment entered by the District Court of Hamilton County finding that the actual value of certain real estate for taxation purposes in 1980, owned by the appellees herein, Jack A. Potts and Yvonne L. Potts, was $150,000. The only issue involved in this appeal is whether or not the property involved in this case was valued and assessed for tax purposes at more than its actual value. No issues as to uniformity or proportionate equalization are involved.

The property in question is residential property owned by the appellees and purchased by them under a contract dated March 5, 1979, reciting a purchase price of $150,000. Thereafter, on August 6, 1979, the State Board of Equalization and Assessment entered its order that certain changes be made to the valuation of property "by class" in the various counties, as set forth in that order. The schedules attached thereto indicate that Hamilton County was to increase the valuation of its urban real property and commercial and industrial property and improvements thereon by 29 percent, following which the Hamilton County assessor placed the actual value of the Potts residence for the year 1980 at a figure of $166,670. The appellees filed their protest from that assessment with the Hamilton County Board of Equalization; and the board, after a visual inspection of the premises by the assessor and two

members of the county board, fixed the value for taxation purposes at $165,590, or approximately $15,000 greater than the 1979 purchase price for the property paid by Mr. and Mrs. Potts. The appellees thereafter appealed that decision to the District Court of Hamilton County; and after a hearing on the matter the District Court, as stated above, set the actual value of the property at $150,000, without stating its reasons for arriving at that figure, but which coincidently was the same as the purchase price paid by the appellees in 1979. The appeal to this court followed.

The real estate in question is an acreage of approximately 8.9 acres with a residential building and garage, occupied by the appellees, and also a barn located thereon. It is located on the westerly edge of Aurora, Nebraska, on U.S. Highway 34. While the property is classed as residential, it borders the industrial development park which has a number of industrial factories located thereon. There is a buffer zone between Highway 34 and the residence, with a shelterbelt containing several hundred mature trees running the length of the southern property boundary and highway right-of-way.

There is little question that the appellees purchased the property in question from their vendor in 1979 in the normal course of business for real estate transactions in an arm's length transaction, although appellants, by innuendo, suggest that the sale was not an "arm's length transaction" because of the fact that at the time of the sale the vendor was in the process of obtaining a divorce from his wife. However, in oral argument before this court the attorney for the appellants conceded that he had no basis for such inference or conclusion.

The statutes of this state provide: "All tangible property and real property in this state, not expressly exempt therefrom, shall be subject to taxation, and shall be valued at its actual value. Such actual value shall be taken and considered as the taxable

value on which the levy shall be made." Neb. Rev. Stat. § 77-201 (Reissue 1981). Also, Neb. Rev. Stat. § 77-112 (Reissue 1981) provides: "Actual value of property for taxation shall mean and include the value of property for taxation that is ascertained by using the following formula where applicable: (1) Earning capacity of the property; (2) relative location; (3) desirability and functional use; (4) reproduction cost less depreciation; (5) comparison with other properties of known or recognized value; (6) market value in the ordinary course of trade; and (7) existing zoning of the property."

Before proceeding with the discussion of the evidence adduced in this case, we point out that no witnesses who appeared at the trial directly testified as to the "actual value" of the property in question, although documentary evidence was introduced at the trial bearing upon that issue. No independent appraisers testified as to the "actual value" of the property, and the only witness who might possibly be considered as an "expert witness" was the county assessor who testified. Mr. Potts, a certified public accountant, appeared pro se in the proceedings and declined to testify orally until the end of the case, at which point he testified to certain matters not relative to the question of "actual value." His evidence on that point (but not testimony) consisted of six exhibits offered in evidence, which exhibits were not objected to by counsel for appellants, and were received in evidence by the court. It is true, however, that on the offer of exhibit 6 by Mr. Potts, counsel for the appellants did state: "Your Honor, I have no objection to the admission of Exhibit No. 6. I think it's generally hearsay. I don't wish to object on that basis, but I think in view of the situation, Mr. Potts representing himself, that that is an indication of his own testimony, and I don't want to object to it, but I think that I would request that the weight of evidence be weighed in that light." Regardless of

counsel's courteous treatment of Mr. Potts, the fact still remains that all of Mr. Potts' proffered exhibits were received in evidence by the court and are evidence in the case, for whatever weight they are entitled to be given.

We now review the exhibits offered on behalf of Mr. Potts and which were received by the court. Exhibit 1 was the agreement for the sale of the real estate to Jack A. Potts and Yvonne L. Potts for the sum of $150,000, which agreement is dated March 5, 1979. Exhibit 2 is a plat, presumably prepared by Mr. Potts, showing the location of their property with reference to the Aurora Industrial Park and surrounding area. Exhibit 3, prepared by Mr. Potts, is his computation of market value of the property less the exemption permitted by statute with reference to trees along the roadside, under Neb. Rev. Stat. § 77-202 (Cum. Supp. 1982), attached to which is an appraisal of the trees in question by the president of First Securities Corporation in Aurora showing the value of 294 trees at $32,925 which, when deducted from the sale price, according to Mr. Potts, would leave a remaining taxable value in the ordinary course of trade of $117,075. There is no evidence in the record with reference to the foundation for the figures used by the appraiser of the trees. It is true that § 77-202 provides in part: "(2) The increased value of land by reason of shade and ornamental trees planted along the highway shall not be taken into account in the assessment of such land." However, Mr. Potts apparently has overlooked the provisions of Neb. Rev. Stat. §§ 77-202.01 and 77-202.02 (Reissue 1981) which provide that any person seeking tax exempt status for any real property shall apply for exemption to the county assessor by January 1 of the year following adoption of §§ 77-202.01 to 77-202.07, on forms prescribed by the Tax Commissioner, and that a hearing shall be held by the county board of equalization to consider the matter. There is no evidence whatsoever in the

record that the appellees ever requested the exemption for shade trees adjoining the highway previously referred to. Potts' exhibit 4, entitled "Comparison with Other Properties of Known or Recognized Value," constitutes his own interpretation of certain residential property sold 3 months before and 3 months after the acquisition of the property in question, and concludes that the resulting actual value based on comparison with other properties of known or recognized value is $117,000. There is no evidence in the record creating a foundation for this exhibit. Exhibit 5 is Potts' comparison of what he asserts to be comparable property owned by one Gary D. Sallans, by which he purports to show that the assessor's valuation of his property was erroneous and that the resulting value by comparison with that property which he claims to be of the same construction class, relative location, and known value is $124,500. There is no evidence to sustain the conclusion that the two properties are indeed comparable and that there are no differences in construction or other differences which might account for the variation. Potts' exhibit 6, entitled "Reproduction Cost Less Regular Depreciation Desirability and Functional Use," also received without foundation, purports to show that the total valuation based upon reproduction cost less functional and economic obsolescence should have been $125,055.

The foregoing constitutes all the evidence on behalf of Potts. The fact remains that all of such exhibits were received in evidence by the court without objection and constitute evidence on behalf of Potts in the record. There may be some question as to the weight to be given to certain of the exhibits, but there is little question that exhibit 1, the sale price of the property in question on March 5, 1979, was properly received and is to be given great weight in determining the "actual value" of the property in question for tax purposes for the year 1980. In their brief on appeal appellees urge that the court reduce

the valuation for the real estate in question to a sum not greater than $125,055. It is interesting to note, however, that in their petition on appeal to the District Court of Hamilton County, Nebraska, they allege "That attached hereto, marked as Exhibit 'A' and incorporated herein by this reference is a copy of a Purchase Agreement with Houtz G. and Dorothy T. Steenburg for the purchase of the above described real estate in the amount of $150,000, *the actual market value of said real estate.*" (Emphasis supplied.)

We recognize that there is a well-established rule of law in this state that there is a presumption that a board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action, which presumption remains until there is competent evidence to the contrary. Once there is competent evidence on appeal to the contrary, the presumption disappears and the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon the evidence. *Hastings Building Co. v. Board of Equalization,* 212 Neb. 847, 326 N.W.2d 670 (1982); *Otradovsky v. Board of Equalization,* 206 Neb. 559, 294 N.W.2d 334 (1980). In view of what we have stated with reference to appellees' documentary evidence received by the court, we think that under the foregoing rule there can be no presumption that the valuation made by the board of equalization is correct, but that the reasonableness of the valuation in this case is a question of fact to be determined from the evidence.

We now discuss the testimony and evidence adduced by the appellant Hamilton County Board of Equalization. The Hamilton County assessor, Glen Troyer, generally testified that in assessing the appellees' property he had used the Nebraska Construction Cost Manual which he is required by law to use as a guide in assessing real estate. He has the discretion to deviate from the manual if he wishes to do so, but is not obligated to do so. He testified that

in appraising the property in question he had considered the current Construction Cost Manual, depreciation, relative location of the property, comparison with other properties, and market value. Appellees contend, on the basis of the evidence introduced by the assessor, that while normal depreciation was allowed by the assessor in computing the value of the property, no consideration was given to functional or economic obsolescence, which should have been done under the provisions of the Nebraska Construction Cost Manual; and also that the assessor gave no consideration whatsoever to the fact that the residence borders the Aurora Industrial Park, which contains factories, and that this should have been done under the provisions of the manual. They also argue that the county assessor was of the opinion that market value was not a factor in the determination of values. The assessor was aware that the appellees had purchased the property in 1979 for $150,000 but that in his opinion the buyers had received a bargain, and also that he did not consider the one sale as creating market value. He testified that he had arrived at the initial valuation of $166,670 by utilizing the Construction Cost Manual and his judgment on certain factors to establish a base of $129,205, which was then increased by 29 percent as a result of action by the State Board of Equalization. The county assessor's appraisal in the amount of $166,670 was later reduced by the board of equalization to $165,590.

The assessor further testified that after Mr. Potts had filed his protest with the board of equalization, he and others reinspected the property and found out that they had missed a half bath on the original construction and that the barn was overpriced and should have been given a 70 percent depreciation instead of 40 percent, and the figures were thereafter corrected. The assessor was asked: "Q. Do you feel that based upon your inspection and the figures which you used from the manual and also the com-

parison with other similar houses in Aurora and Hamilton County that this figure of $165,590 is *accurate*? A. Yes." (Emphasis supplied.) He did not state, however, that that figure represented the "actual value" of the property for tax purposes. He was also asked: "Q. In other words, location has no bearing on your valuation of real estate in the city of Aurora? A. We feel that—not as far as the building is concerned." He admitted in his testimony that the amount of depreciation and the classification of the real estate in question as to the class as set forth in the manual were judgment matters on his part.

Tom Sherman, one of the Hamilton County commissioners, also testified. He stated that he too had personally inspected the appellees' house and felt that they had received a bargain on their purchase of the premises and that the house in question was one of the best built houses in the county, as was also testified to by the county assessor. Mr. Sherman was asked: "Q. Do you feel that based on your knowledge of the situation that the valuation arrived at by the Board on this protest was a fair and reasonable one? A. Yes, we think it was as fair as we could be. Q. You feel that the fact that—how do you account for the fact that the purchase price is somewhat less than the valuation? A. Well, I agree with Mr. Troyer. He probably got a pretty good buy."

While our statutes require that the assessor consider and use the various elements of "actual value" in the valuation of property for tax purposes, they are merely tools, or guidelines, and the assessor is not bound by them and may deviate from them when, in his opinion, the particular element is not applicable to the case under consideration. We have carefully reviewed the record in this case and have concluded that too much emphasis has been placed upon reproduction costs and other elements, and insufficient consideration was given to relative

location and desirability. Although the District Court did not specifically so state in entering its finding that the actual value of appellees' property was $150,000, it is evident that the court considered that the recent sale price of the property to the appellees for $150,000 was an important consideration in its decision. In short, it felt that the "actual" and "market" value of the property in question was established by that purchase price, market value being one of the seven elements to be considered in determining the "actual" value of property for tax purposes under § 77-112.

Some states have held that the best evidence of true value or actual value is the actual sale of the property in an arm's length transaction. See *Conalco v. Bd. of Rev.,* 50 Ohio St. 2d 129, 363 N.E.2d 722 (1977). Nebraska has apparently not gone that far to the present date, but in *Novak v. Board of Equalization,* 145 Neb. 664, 666, 17 N.W.2d 882, 883 (1945), this court stated: "Plaintiffs rely on the purchase price as constituting the actual value and cite authority from foreign jurisdictions and texts, to the effect that purchase price constitutes the fair market value of property. It is true that the purchase price of property may be taken into consideration in determining the actual value thereof for assessment purposes, together with all other relevant elements pertaining to such issue; however, standing alone, it is not conclusive of the actual value of property for assessment purposes, and many other matters relevant to the actual value of property appear in the record and must be considered in connection with the purchase price to determine the actual value."

Also, in *Collier v. County of Logan,* 169 Neb. 1, 8, 97 N.W.2d 879, 885 (1959), we held: " 'The sale price of property may be taken into consideration in determining the actual value thereof for tax purposes, together with all other elements pertaining to such issue. However, sale price standing alone is not con-

clusive of the actual value of property for tax purposes and other matters relevant to the actual value thereof must be considered in connection with the sale price to determine actual value. The true test in all cases is to arrive at actual value, meaning value in the market in the ordinary course of trade.' "

In *Josten-Wilbert Vault Co. v. Board of Equalization,* 179 Neb. 415, 138 N.W.2d 641 (1965), the court held that evidence that a sale of real estate was made at a price less than the value for tax purposes is not ordinarily sufficient to establish that the value of the property has been unlawfully fixed by the county board of equalization, stating at 417, 138 N.W.2d at 643: "We have held that the presumption of correctness disappears if there is competent evidence to the contrary, and thereafter the reasonableness of the valuation is one of fact to be determined by the evidence. [Citation omitted.] Evidence that a sale was made at a price different than the value for tax purposes is not sufficient competent evidence to overcome the presumption without proof of the character and circumstances of sale. There is no magic formula or mathematical yardstick by which actual value can be precisely determined. No single factor or element of value standing alone is conclusive. While a sale price, in some circumstances, may be a very important factor in determining actual value or fair market value, it is only evidence to be considered along with other evidence. 'Sale price' is not synonymous with actual value or fair market value."

However, in his dissenting opinion to the above case, Judge Boslaugh states at 419, 138 N.W.2d at 644: "Evidence of sale price alone may not be sufficient to overcome the presumption that the board of equalization has valued the property correctly. But where, as in this case, the evidence discloses the circumstances surrounding the sale and shows that it was an arm's length transaction between a seller

who was not under compulsion to sell and a buyer who was not compelled to buy, it should receive strong consideration."

We are of the opinion that the statement of Judge Boslaugh, as set out in his dissenting opinion above and as concurred in by Judge Brower and Judge Smith, is correct and is particularly applicable to the case under consideration.

Our conclusion is that the trial court did not err in setting the value of the appellees' real estate for tax purposes in the amount of $150,000 under the evidence adduced in the record before us. It is the well-established rule, however, that the trial of an appeal from a county board of equalization involving the valuation of real estate, both in the District Court and the Supreme Court, is de novo as an equitable proceeding. *Beaver Lake Assn. v. County Board of Equalization,* 210 Neb. 247, 313 N.W.2d 673 (1981); *Gradoville v. Board of Equalization,* 207 Neb. 615, 301 N.W.2d 62 (1981). This being so, we must consider the evidence anew and make our own decision, both on the appeal of the Board of Equalization of Hamilton County and also on the cross-appeal filed by the appellees who, in their assignments of error in connection with their brief on cross-appeal, contend that the court erred in adopting as actual value the purchase price of $150,000 and in not finding that the actual value, or total value for assessment purposes, was $125,055 or less. From a de novo review of the evidence as contained in the record before us, we hereby find that the actual value of the property in question for tax purposes for the year 1980 is the sum of $150,000, and not the amounts contended for by the respective parties to this appeal and cross-appeal, and the county assessor of Hamilton County is directed to correct his records accordingly.

The judgment of the District Court is affirmed.

AFFIRMED.

Cite as 213 Neb. 49

BUILDING SYSTEMS, INC., A NEBRASKA CORPORATION, APPELLEE AND CROSS-APPELLANT, V. MEDICAL CENTER, LTD., A NEBRASKA LIMITED PARTNERSHIP, ET AL., APPELLANTS AND CROSS-APPELLEES.

327 N.W.2d 95

Filed December 10, 1982. No. 81-619.

Pleadings. The refusal to permit an amendment which is proposed at an opportune time, and which should be made in the furtherance of justice, is an abuse of discretion on the part of the trial court. The law of amendments should be liberally construed in order to prevent a failure of justice. Changes in judicial procedure have not altered the rule or indicated any reason for discontinuing its judicial application.

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

Nelson, Eggers & Morrow, for appellants Medical Center and Action Enterprises.

Bruce H. Brodkey of Garber & Batt, for appellants Trustland and Trustin.

Abrahams, Kaslow & Cassman, for appellee Building Systems.

BOSLAUGH, CLINTON, and HASTINGS, JJ., and CAMBRIDGE, D.J., and COLWELL, D.J., Retired.

COLWELL, D.J., Retired.

This is a suit to recover on a contract for remodeling a building. Summary judgment was entered for plaintiff, Building Systems, Inc., against defendants Trustland Company, a Nebraska partnership (Trustland), Yale F. Trustin, Medical Center, Ltd., a Nebraska limited partnership (Medical Center), and Action Enterprises, Inc. (Action). Those defendants appeal the judgment, claiming as error the entry of summary judgment, and that the trial court denied their applications to file amended answers and setoff.

The case presents a complicated interrelationship of party and nonparty interests, agreements, claims, and liabilities generally related to the operation of real estate ventures and investments. Originally, William Venard and defendant Trustin each owned one-half of the stock of Building Systems, Inc. Medical Center did business as Ford Professional Plaza, Omaha, Nebraska; it is insolvent. Trustland, a general partnership, was a partner in Medical Center; it is insolvent. Defendants Trustin, Raymond L. Lemke, and Action are general partners of Trustland.

Plaintiff alleges that between July 1976 and November 1977 it remodeled Ford Professional Plaza in performance of a written contract (lost and no available copies) with Medical Center, and there is due $29,492.61 from all defendants because of Medical Center's insolvency. All defendants filed answers on or before July 3, 1980. On March 6, 1981, plaintiff filed a motion for summary judgment. On March 26, 1981, defendants Trustin and Trustland filed their motion for leave to file an amended answer and a setoff, supported by affidavit and proposed amended pleading. On April 1, 1981, defendants Medical Center, Lemke, and Action similarly filed their motion for leave to file an amended answer and setoff.

Upon hearing and rehearing, the motions were denied by the court, stating that the alleged setoff did not arise out of the same transaction between the same parties and would create confusion in the minds of the jury; further, that the possible equitable setoffs would permit defendants through assignment to benefit disproportionately to other creditors.

Hearing on the summary judgment was had forthwith. Plaintiff, Trustland, and Trustin stipulated that Medical Center owed $29,492.61 to plaintiff on the contract for work done on Ford Professional Plaza. Other proof of the amount due was invoices.

Summary judgment was entered for plaintiff against defendants for $29,492.61.

The motion and proposed amendments of Trustin and Trustland exceed 100 pages; in summary, they show that prior to November 8, 1977, Trustin, as sole owner, incorporated Trustland Company, Inc., a corporation (Trustland Corp.). On November 8, 1977, a final settlement agreement was made between plaintiff, Venard, Trustin, and Trustland Corp. dividing and assigning the assets and liabilities of plaintiff. All corporate stock was assigned to Venard. One-half of the accounts receivable was assigned to Trustland Corp., which was to pay one-half of liabilities; Trustin personally guaranteed the payment of the debts. Later, Trustin claims he personally paid $7,138.31 of plaintiff's debts, created a trust to pay certain creditors of plaintiff, and agreed to pay $47,000 of other related debts. The settlement agreement also provided for plaintiff and Trustland Corp. to become parties to a joint venture and assigned certain of plaintiff's assets to the joint venture. These defendants claim the foregoing as an affirmative defense of accord and satisfaction. Plaintiff argues that the setoff must fail for the further reason that Trustland Corp. is not a party defendant.

The motion and proposed amendments of defendants Medical Center, Lemke, and Action restate much of the material in the motion, and claim a right of setoff against plaintiff because the November 8, 1977, settlement agreement and payments made thereunder were made for Action's benefit relating to plaintiff's cause of action. These defendants also allege the creation of a trust for the benefit of some of plaintiff's creditors. Defendant Lemke claims he paid $12,500 into a trust and paid other accounts, all or in part, for the benefit of the plaintiff's creditors arising out of the transaction constituting plaintiff's cause of action.

Defendants devote a large part of their briefs con-

cerning the application of Neb. Rev. Stat. §§ 25-812, 25-813, 25-815, and 25-816 (Reissue 1979) to the proposed setoff, particularly whether it was a part of the same transaction, a setoff, counter claim, or separate cause of action. The resolution of those questions is premature.

" 'A defendant in an action is not restricted to the counterclaim provided for in sections 100 and 101 of the code (now sections 25-812 and 25-813, R.R.S. 1943), but, in a proper case, may seek affirmative relief, either against the plaintiff or against codefendants, by cross-petition.' " *Weller v. Putnam,* 184 Neb. 692, 697, 171 N.W.2d 767, 770 (1969).

Neb. Rev. Stat. § 25-852 (Reissue 1979) provides in part as follows: "The court may, either before or after judgment, *in furtherance of justice*, and on such terms as may be proper, amend any pleading, process or proceeding . . . or by inserting other allegations material to the case, or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved." (Emphasis supplied.)

This statute was discussed in *Kleinknecht v. McNulty,* 169 Neb. 470, 100 N.W.2d 77 (1959), concerning an amendment question similar to the one presented here. The court said that the provision in the statute, "in furtherance of justice," was "the lodestar to guide it." *Id.* at 476, 100 N.W.2d at 81. Further, " ' "[T]he refusal to permit an amendment which is proposed *at an opportune time* and should be made in the furtherance of justice is an abuse of discretion on the part of the trial court." ' " (Emphasis supplied.) *Id.* at 478, 100 N.W.2d at 82. "The law of amendments should be liberally construed in order to prevent a failure of justice. Changes in judicial procedure have not altered the rule, nor indicated any reason for discontinuing its judicial application." (Syllabus of the court.)

Important here is the time that the motions were filed. No issues have been settled, and the hearing

on summary judgment had not been held. The proposed amendments were opportunely presented, fully informing the court of defendants' alleged new and other claims relating to plaintiff's cause of action, and that such was necessary to do complete justice to the parties.

The motions did not present to the court for determination the exact nature of the claims alleged in the setoff, the transactions involved, trial issues and procedures, and possible equities. On the contrary, the issue was whether the setoff alleged claims of the parties that, if proved, should be considered and determined in furtherance of justice. We think that it did.

After the amendments have been filed, it is then that the sufficiency and nature of the amendments can be tested, determined, issues settled, and trial procedures established.

The trial court abused its discretion in denying the motions to amend.

Neb. Rev. Stat. § 25-1330 (Reissue 1979) provides that a party "may, at any time after the filing of answer . . . move . . . for a summary judgment . . . ." Here, defendants had been denied the right to file amended answers and a setoff. To permit plaintiff to proceed in summary judgment would be prejudicial to those defendants. The summary judgment is set aside.

REVERSED AND REMANDED
FOR FURTHER PROCEEDINGS.

IN RE APPLICATION OF CRUSADER COACH LINES, INC.
CRUSADER COACH LINES, INC., APPELLANT, V.
GREYHOUND LINES, INC., APPELLEE.
327 N.W.2d 98

Filed December 10, 1982. No. 81-654.

1. **Public Service Commission: Appeal and Error.** Upon an appeal

from an order of the Public Service Commission, this court may decide only whether the commission acted within the scope of its authority and whether the order was based on evidence which shows that such order was not unreasonable or arbitrary.

2. **Motor Carriers: Proof.** The burden is on the applicant to show that the proposed service is required by public convenience and necessity. In determining that issue, the controlling questions are whether or not the operation will serve a useful purpose responsive to a public demand or need; whether or not this purpose can or will be served as well by existing carriers; and whether or not it can be served by the applicant in a specified manner without endangering or impairing the operations of existing carriers, contrary to the public interest.
3. **Public Service Commission: Appeal and Error.** It is not the province of this court to weigh or resolve conflicts in the evidence or the credibility of witnesses. The Supreme Court does not act as an appellate public service commission, but will sustain the action of the commission if there is evidence in the record to support it.
4. _____: _____. The issue of public convenience and necessity is ordinarily one of fact, and where there is evidence in the record to sustain the Public Service Commission's order, this court cannot say that it is unreasonable and arbitrary. The determination of what is consistent with the public interest, or public convenience and necessity, is one that is peculiarly for the determination of the Public Service Commission.

Appeal from the Nebraska Public Service Commission. Affirmed.

Marshall D. Becker of Stern & Becker, for appellant.

James E. Ryan of Ryan & Williams, P.C., for appellee.

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

HASTINGS, J.

This is an appeal from an order of the Nebraska Public Service Commission denying the application of Crusader Coach Lines, Inc., to operate as a common carrier furnishing charter motorbus service between all points within the State of Nebraska.

Protests were filed by Greyhound Lines, Inc., and Arrow Stage Lines, Inc., both of which hold authority to operate charter bus service to all points

within the State of Nebraska, as well as certain regularly scheduled routes within the state. Because of defective service of protest, Arrow was not permitted to offer evidence in support of its protest, but only to make a statement for the record. Greyhound appeared and offered evidence. Following a hearing, the commission found that the applicant was fit, willing, and able to perform the service proposed. Nevertheless, it further found that the proposed service "is not, or will not be required by the present or future public convenience and necessity," and denied the application. Crusader appeals from that order.

Crusader Coach Lines, Inc., is located in Logan, Iowa, and has been in business strictly as a charter bus company since 1979. It holds temporary authority from the Interstate Commerce Commission for operation between all points within and between the States of Iowa and Nebraska which lie within a radius of 150 miles from Logan, Iowa, and all points within the continental United States, as well as certain permanent charter authority in southwest Iowa as granted by the Iowa Department of Transportation. Crusader currently owns and operates four 41-passenger buses. As previously indicated, there is no question as to Crusader's fitness and ability to perform the requested service.

As to the issue of public convenience and necessity, the applicant called two witnesses other than its president, representatives of Brandeis Travel and Triple A World Travel. Both are travel agencies located in Omaha, Nebraska. The witness from Brandeis testified that it was important to her agency that she be able to call a bus company and get confirmation on the price and availability of a bus right away. Her experience with Greyhound, she said, was that it normally took about 3 days to get this confirmation, whereas her experience with Crusader had led her to believe she could get confirmation the same day. She particularly com-

plained that she had tried to book buses for Nebraska football games in Lincoln for the fall of 1981, but was told by Greyhound, Trailways, and Arrow that no buses were available. However, she conceded that buses are extremely difficult to obtain on Nebraska football Saturdays. This witness also testified that Brandeis had used both Greyhound and Trailways for various intrastate package trips and that their services were satisfactory.

The witness from Triple A World Travel gave similar testimony. Her agency had used Greyhound, Trailways, and Arrow, although she said that in a couple of instances she had not been as satisfied with the equipment and the actual busdriver for Arrow as she had been with the other companies. She also complained about the 3- to 5-day wait for confirmation of buses. She said it was important to get back to a potential customer first, as usually these customers are getting bids from other agencies. A lack of buses for football excursions was also cited by her as a problem, although she too agreed that football Saturdays made extraordinary demands on the bus companies for equipment.

The witness in support of the protest of Greyhound testified that its charter revenue amounted to approximately 8 percent of its total revenue generated within the State of Nebraska. He stated that because certain of Greyhound's regular routes and schedules lose money, it is important to have the charter business to make up this loss. Greyhound already experiences competition from Trailways and Arrow for charter business. He said that his company actively solicits charter bus service business in Nebraska intrastate commerce. He stated that in his opinion, with the exception of football Saturdays, Greyhound and the other carriers in the area could adequately handle the intrastate charter business in Nebraska. He volunteered that, on occasion, Greyhound itself has handled 25 or more charters on a football weekend.

The statement offered in behalf of Arrow disclosed that it had been in business in Nebraska for 51 years and that more than 51 percent of its business income comes from charters. Also, according to the statement of Arrow's president, it generally is losing money on the regular routes, which are therefore being subsidized by the charter business. He conceded that four buses probably would not make all that much difference, particularly with relation to the football charters, but he was concerned about the cumulative effect of this application. Arrow has a fleet of 42 buses, 16 based in the Omaha area, and it has as many as 20 to 25 buses available for charter service in the area.

Upon an appeal from an order of the Public Service Commission, this court may decide only whether the commission acted within the scope of its authority and whether the order was based on evidence which shows that such order was not unreasonable or arbitrary. *In re Application of Greyhound Lines, Inc.*, 209 Neb. 430, 308 N.W.2d 336 (1981).

The burden is on the applicant to show that the proposed service is required by public convenience and necessity. In determining that issue, the controlling questions are whether or not the operation will serve a useful purpose responsive to a public demand or need; whether or not this purpose can or will be served as well by existing carriers; and whether or not it can be served by the applicant in a specified manner without endangering or impairing the operations of existing carriers, contrary to the public interest. *In re Application of Petroleum Transport Service, Inc.*, 210 Neb. 411, 315 N.W.2d 245 (1982).

The applicant complains particularly of the following language contained in the commission's order: "Charter service has traditionally been the province of the bus lines who provide the regularly scheduled service which is the backbone of passenger and express service. If the Commission were to open up

the charter service to everyone who can buy a bus or two and let those operators skim the cream from the passenger service, it would undermine the already precarious positions of the bus companies who have made significant investments not only in fleets of buses, but in terminal facilities, agencies, and other support functions which a strictly charter operator would not have to make."

The choice of language in a portion of those findings is unfortunate. However, in actuality, it does nothing more than to conclude that by granting the authority it would endanger or impair the operations of existing carriers, contrary to the public interest. The cited case authority justifies such considerations, as does Neb. Rev. Stat. § 75-301 (Reissue 1981): "It is hereby declared to be the policy of the Legislature to (1) regulate transportation by motor carriers in intrastate commerce upon the public highways of Nebraska in such manner as to recognize and preserve the inherent advantages of, and *foster sound economic conditions in, such transportation and among such carriers, in the public interest* . . . ." (Emphasis supplied.)

The applicant who was denied authority in the case of *In re Application of Schroetlin,* 210 Neb. 508, 315 N.W.2d 630 (1982), also complained that the commission accepted evidence of possible economic harm to other carriers as being sufficient ground upon which to deny a certificate without any evidence of harm to the public interest. However, we answered that charge with the following language: "Whether we agree or disagree with the decision of the commission, however, is immaterial. It is not the province of this court to weigh or resolve conflicts in the evidence, or the credibility of witnesses. The Supreme Court does not act as an appellate public service commission but will sustain the action of the commission if there is evidence in the record to support it.

"The issue of public convenience and necessity is

ordinarily one of fact and where there is evidence in the record to sustain the Public Service Commission's order, this court cannot say that it is unreasonable and arbitrary. The determination of what is consistent with the public interest, or public convenience and necessity, is one that is peculiarly for the determination of the Public Service Commission." *Id.* at 512, 315 N.W.2d at 633.

The findings of the commission are supported by the record, and its order denying the application must be affirmed.

AFFIRMED.

DORSEL J. CARMICHAEL, APPELLANT, V. ROBERT R. CARMICHAEL, APPELLEE.

326 N.W.2d 854

Filed December 10, 1982. No. 81-664.

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

L. J. Karel, for appellant.

Peter L. Harlan of Schrempp & Lefler, for appellee.

KRIVOSHA, C.J., HASTINGS, and CAPORALE, JJ., and RIST, D.J., and COLWELL, D.J., Retired.

RIST, D.J.

This is an appeal from a decree of dissolution of marriage.

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.

NORMANDY SQUARE ASSOCIATION, INC., ET AL., APPELLEES, V. ELMA M. ELLS, APPELLANT.

327 N.W.2d 101

Filed December 10, 1982. No. 81-666.

Restrictive Covenants. Where powers are granted to a committee to approve or disapprove the erection of a fence based on a standard of whether it conforms to the harmony of external design and location in relation to surrounding structures, such a standard, per se, is not ambiguous and, in proper circumstances, it is enforceable, provided that the authority is exercised reasonably within the framework of the covenant purposes. Such rule is to be applied on a case-by-case basis.

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

Terry K. Barber of Johnston, Barber & Wherry, for appellant.

Barlow, Johnson, DeMars & Flodman, for appellees.

KRIVOSHA, C.J., HASTINGS, and CAPORALE, JJ., and RIST, D.J., and COLWELL, D.J., Retired.

COLWELL, D.J., Retired.

Defendant, Elma M. Ells, appeals from a mandatory injunction requiring relocation of a fence she built contrary to restrictive covenants and the approval of plaintiff Normandy Square Association, Inc. (Association).

The Association includes all owners of housing units in the Normandy Square addition to Lincoln, Nebraska. Pursuant to restrictive covenants, defendant made application to build a new fence on her property, Lot 11, Block 4. Upon review by the Association's architectural committee (committee), changes were required and conditional consent was given. Defendant disregarded the restrictions and constructed the fence as she had proposed. This suit followed. Upon trial, plaintiff Hassan Sharifi was the only witness; defendant offered no evidence.

After a personal inspection, the trial judge found for the plaintiffs, ordering the specific location of the fence, including a 25-foot setback from the street and enclosure of the utility box. Defendant appeals, assigning as error, considered together, (1) the covenants were vague and ambiguous, and (2) they were arbitrarily applied.

The only issue here is whether article VII of the corporate "Declaration of Covenants, Conditions and Restrictions" is enforceable. It reads in part as follows:

"Architectural Control

"No building, fence, wall or other structure shall be commenced, erected or maintained upon the property, nor shall any exterior additions to or change or alteration therein be made until the plans and specifications showing the nature, kind, shape, height, materials and location of the same shall be submitted to and approved in writing as to the harmony of external design and location in relation to the surrounding structures and topography by the directors of the Association, or by an architectural committee composed of three or more representatives appointed by the board."

Defendant's application was to build a 6-foot stockade-type fence beginning about 5 feet from her south front lot line, running thence west 7 feet, thence north along the west side of her residence 111 feet, thence east 35 feet, thence south 6 feet, and east 5 feet (to exclude a metal utility box), and thence south 23 feet to the midpart of the dwelling.

Within a few days the committee considered the application, and on December 8, 1980, approved the application with changes, material here, that the fence must commence 25 feet north from the south lot line; on the north, it must run straight east on the lot line, so that the utility box was south of the fencing; and "Should you desire during the winter to put up a temporary removable snow fence on the front twenty-five feet on the west, we see no objection to

that." The approval was personally delivered to defendant by Sharifi, the Association's secretary. It appears defendant understood the approval, but said "she wanted the fence and it was her property"; also, she had indicated that one purpose for the fence at the front was for protection from drifting snow.

Defendant contends *Ross v. Newman,* 206 Neb. 42, 291 N.W.2d 228 (1980), is dispositive here. We do not agree. *Ross* turns on the lack of a standard for "alteration." Here, the structure in question is a fence, which requires no further description or standard. Defendant understood the restriction, as shown by her application.

The record does present the question of whether or not the powers of the committee are ambiguous and enforceable. These issues are fully discussed in the annotation "Validity and Construction of Restrictive Covenant Requiring Consent to Construction on Lot," 40 A.L.R.3d 864 (1971). "It has been said that today housing is ordinarily developed by subdividers who utilize the restrictive covenant to guarantee to the homeowner that his house will be protected against adjacent construction which will impair its value, and that a general plan of development will be followed; the requirement of consent to construction or approval of plans of construction is one method by which guaranties of value and of adherence to a general plan can be accomplished and maintained.

"The cases collected herein . . . all seem to agree, at least as a generalized proposition, on the validity and, in a proper case, the enforceability, of covenants requiring consent to construction or approval of plans of construction, which covenants do not of themselves impose standards of approval . . . when applicable to all of the lots in a residential subdivision as part of a uniform plan of development . . . . *Also generally recognized is the validity and, in a proper case, the enforceability, of restrictive cove-*

nants requiring approval of plans of construction, which covenants in themselves regulate the extent of the authority to approve, as by imposing standards upon which disapproval might be based." (Emphasis supplied.) *Id.* at 870.

Article VII of the declaration imposes the following broad standard for the committee's approval: "[T]he harmony of external design and location in relation to the surrounding structures and topography . . . ." Such standard in a proper case is generally held not ambiguous, and enforcement follows where the authority is exercised reasonably. See, *Hollingsworth, et al., vs. Szczesiak, et al.,* 32 Del. Ch. 274, 84 A.2d 816 (1951); *Winslette v. Keeler,* 220 Ga. 100, 137 S.E.2d 288 (1964); Annot., 40 A.L.R.3d, *supra* at 876.

Other covenants included in the declaration and bylaws impose duties on the committee and owners to maintain the exterior attractive appearance and condition of the homes, common areas, streets, sidewalks, driveways, and parking areas, including control of the construction of foundations, the color of roofs and vents, and television antennas. A part of the declaration recites that such are for the "purpose of enhancing and protecting the value, desirability and attractiveness of said property . . . ."

It appears that article VII was a part of a general intended plan for the development, maintenance, and improvement of the subdivision for the benefit of all owners. *Hogue v. Dreeszen,* 161 Neb. 268, 73 N.W.2d 159 (1955).

As shown in the A.L.R. annotation, the authorities are in disagreement as to any rule of law that can be applied in these cases because of the unlimited purposes, plans, local regulations, and circumstances that may possibly exist. We think the applicable rule here is that where powers are granted to a committee to approve or disapprove the erection of a fence based on a standard of whether it conforms to the harmony of external design and location in re-

lation to surrounding structures, such a standard, per se, is not ambiguous and, in proper circumstances, it is enforceable, provided that the authority is exercised reasonably within the framework of the covenant purposes. Such rule is to be applied on a case-by-case basis.

We conclude that although the standards are general and broad, they do conform to the purposes of the declaration for the benefit of all owners, they were neither ambiguous nor vague, and they were not contrary to public policy. Under the circumstances here, the committee had the power to act. Did it do so reasonably?

The record shows that the fence extended to a point within 4 to 5 feet from the sidewalk; it prevented some visibility by other owners; it was described variously as an eyesore, ugly, prominent, and imposing; and that the 6-foot by 5-foot area at the rear of the house which excluded the utility box was an eyesore resembling a garbage unit, causing a mowing problem and a neighborhood character change. Plaintiffs' conditional approval was reasonable and enforceable under the facts and circumstances of this case.

AFFIRMED.

ANN H. KUHLMAN, APPELLEE, V. GWYER GRIMMINGER ET AL., APPELLANTS.

327 N.W.2d 104

Filed December 10, 1982. No. 81-751.

Contracts: Specific Performance: Abatement. Where it appears that the vendor is unable to make a complete or perfect title, or that there is a deficiency in the quantity of land contracted to be sold, the general rule is that the vendee, if he so elects, is entitled to have the contract specifically performed to the extent of the vendor's ability to comply therewith and at the same time have a just abatement out of the purchase price for the deficiency of title, quantity, or quality of the estate to compensate for the vendor's

failure to perform the contract in full. The measure of abatement should be such portion of the purchase price as the relative value of the land lost bears to the purchase price of the whole tract.

Appeal from the District Court for Merrick County: JOHN M. BROWER, Judge. Affirmed.

O. Wm. VonSeggern of Cunningham, Blackburn, VonSeggern, Livingston, Francis & Riley, for appellants.

Powell & Powell, for appellee.

BOSLAUGH, MCCOWN, CLINTON, and WHITE, JJ., and BRODKEY, J., Retired.

PER CURIAM.

This suit began as a foreclosure of a real estate mortgage brought by plaintiff, Ann H. Kuhlman. Defendants, Gwyer Grimminger and Carol Grimminger, husband and wife, by cross-petition allege abatement of the amount due because plaintiff was unable to convey a part of the land; defendants do not resist the sale. Foreclosure was decreed and defendants were awarded $7,416.03 damages. Defendants appeal, claiming error in decreeing foreclosure and that the court used the wrong measure of damages. After de novo review, we affirm.

On March 1, 1977, the parties completed the sale of 279.25 acres of farmland for $212,000 from plaintiff vendor to defendants vendees. A $167,000 purchase money note and mortgage was given, payable in annual installments. Defendants made all payments until March 1, 1980, when they discovered plaintiff had previously conveyed an 18.5-acre tract. Plaintiff had forgotten that sale, and it did not appear on the abstract of title. Defendants computed their loss at $18,164 and tendered their check of $1,538.50 as payment of the $19,702.50 installment due March 1, 1980. Plaintiff refused the tender and this suit followed.

The facts are not in dispute except as they relate to land values and damages.

There is no merit to defendants' claim that they were not in default and that foreclosure is not a proper remedy. The law is well settled in Nebraska that under the pleadings, facts, and circumstances here, the mortgagee may proceed in foreclosure. See, *Musgrove v. Eskilsen,* 127 Neb. 730, 256 N.W. 883 (1934); *Mettlen v. Sandoz,* 131 Neb. 625, 269 N.W. 98 (1936).

Both parties agree that defendants are entitled to an abatement of a part of the unpaid mortgage debt, and they both cite as authority for the measure of damages *Ready Sand & Gravel Co. v. Cornett,* 184 Neb. 726, 733, 171 N.W.2d 775, 780 (1969): " '[W]here it appears that the vendor is unable to make a complete or perfect title, or that there is a deficiency in the quantity of land contracted to be sold, the general rule is that the vendee, if he so elects, it [sic] . . . entitled to have the contract specifically performed to the extent of the vendor's ability to comply therewith . . . and at the same time have a just abatement out of the purchase price for the deficiency of *title, quantity, or quality of the estate* to compensate for the vendor's failure to perform the contract in full. The vendee, in other words, may waive full performance and accept such title as the vendor is able to give, and if he chooses to do so, he has a right to that and to an abatement . . . . The measure of abatement should be such portion of the purchase price as the *relative value of the land lost bears to the purchase price of the whole tract.* At any event, abatement should be made upon the basis of the contract price.' " (Emphasis supplied.)

Defendants argue that a proper application of "abatement should be made upon the basis of the contract price" would be to compute damages for the average cost per acre, or $759 per acre. That is incorrect, although there might be some merit to that view if all of the land described in the contract being considered had the same value. The reference to the "contract price" is the constant $212,000

gross value factor fixed by the parties and the contract terms to which the values of the actual land or tracts of land conveyed and of the lost land are compared and related in value terms. See 71 Am. Jur. 2d *Specific Performance* § 134 (1973). During the trial, the court announced this measure of damages would be applied.

The evidence shows that the 279.25 acres had different soil types and farm uses, including, generally, 70 acres of irrigated cropland, 11 acres of dry cropland, 48 acres of meadow, 5 acres of grassland, 120 acres of pasture, 7 acres of turnrows, and the 18.5-acre tract not conveyed, which was sandy soil pasture adjacent to the Wood River, subject to flooding, and having some scrub tree growth. All witnesses said the 18.5-acre tract had the least value of any of the other land, and fixed its value from $200 to $550 per acre. The best land was the irrigated land, having a value of upwards of $1,250 per acre.

The land included in the contract has parts or units having unequal values by reason of either quality, adaptable use, productivity, or other relevant factors. Recoupment or measure of damages for the lost land is the value of the lost land compared to the value of the parts or units of land actually conveyed as all such values relate to the contract price.

In comparing these tracts of land and relating their values to the contract price, the trial court properly found the value of the 18.5-acre tract was $6,475 and that the total damages to defendants were $7,416.03.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMES RAY BROWN, APPELLANT.
327 N.W.2d 107

Filed December 10, 1982. No. 81-916.

1. **Evidence: Witnesses: Juries.** The relative weight of conflicting evidence is necessarily determined by the credibility of the witnesses, which question is one solely for the jury which saw the witnesses and heard the testimony.
2. _____: _____: _____. The jurors are the judges of the credibility of the witnesses and the weight to be given to the testimony, and they have the right to credit or reject the whole or any part of the testimony in the exercise of their judgment.
3. **Verdicts: Appeal and Error.** This court will not interfere with a jury verdict of guilty based upon evidence unless it is so lacking in probative force that the court can say as a matter of law that it is insufficient to support a verdict of guilty beyond a reasonable doubt.

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

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

James Ray Brown, pro se.

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

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

HASTINGS, J.

The defendant was charged with first degree murder resulting from the June 17, 1981, shooting death of Claud V. Spencer in Omaha, Nebraska. However, upon trial to a jury he was convicted of second degree murder and sentenced to a term of 25 years in the Nebraska Penal and Correctional Complex. He has appealed to this court. The brief filed by his counsel assigns as the sole error that the evidence was insufficient as a matter of law to support the conviction. In a brief filed pro se, the defendant charges that a police officer destroyed evidence at

the scene of the crime. We affirm the conviction and sentence.

The defendant in his testimony admitted that he killed the victim. However, he testified that the killing arose out of a sudden quarrel. He said that during the argument the victim stated to the defendant that he would cut his throat. Then, according to the defendant, the victim pulled a large knife out of his pocket, which he opened and started slashing at the defendant. The defendant claims that he retreated out of the building where the argument began, but that the victim pressed on. Finally, the defendant said he pulled a revolver from his pocket, fired a warning shot into the ground, and when that did no good, he fired approximately five more shots. He claimed that the victim then just lay down on the street, raised back up, picked up his knife, which had fallen to the ground, closed it, and tried to return it to his pocket but it fell beside him. The victim apparently was dead when the police arrived minutes later.

The defendant's story is supported in substance by the testimony of several friends, Alfonzo Ray Hunter, Roosevelt Kirk, and Mar Haman.

However, there was other testimony which would support a finding that the argument, which had begun inside, broke off; that the defendant left and walked across the street; and later, after the victim came outside, unarmed, he was sought out by the defendant and shot a number of times.

Neb. Rev. Stat. § 28-304 (Reissue 1979) defines murder in the second degree as causing the death of a person intentionally, but without premeditation. Manslaughter is the killing of another without malice, upon a sudden quarrel. Neb. Rev. Stat. § 28-305 (Reissue 1979). The jury was instructed as to both first and second degree murder and manslaughter.

Although the evidence was conflicting, the jury resolved the conflicts against the defendant and in favor of second degree murder. The relative weight

of conflicting evidence is necessarily determined by the credibility of the witnesses, which question is one solely for the jury which saw the witnesses and heard the testimony. *Lee v. State,* 124 Neb. 165, 245 N.W. 445 (1932). The jurors are the judges of the credibility of the witnesses and the weight to be given to the testimony, and they have the right to credit or reject the whole or any part of the testimony in the exercise of their judgment. *State v. Godinez,* 190 Neb. 1, 205 N.W.2d 644 (1973). This court will not interfere with a jury verdict of guilty based upon evidence unless it is so lacking in probative force that the court can say as a matter of law that it is insufficient to support a verdict of guilty beyond a reasonable doubt. *State v. Booth,* 202 Neb. 692, 276 N.W.2d 673 (1979). The evidence was sufficient to support a verdict of guilty of second degree murder.

The complaint raised in the pro se brief is wholly without merit. The defendant complains because one of the police officers, who first arrived at the scene, saw the victim lying on the ground with a billfold and a knife that was closed lying alongside the body. The officer testified that he placed the knife and billfold in the victim's pocket. The defendant claims that this amounted to destroying evidence. Such is not the case. The knife was offered in evidence at the trial. The officer testified that it was closed. This is consistent with the testimony of one or more of the defendant's own witnesses.

The judgment and sentence of the District Court is affirmed.

AFFIRMED.

IN RE ASSESSMENT OF OMAHA, LINCOLN AND BEATRICE RAILWAY COMPANY.
OMAHA, LINCOLN AND BEATRICE RAILWAY COMPANY, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.

327 N.W.2d 108

Filed December 10, 1982. Nos. 82-057, 82-058.

1. **Railroads: Assessments: Appeal and Error.** The review in this court of the assessment of railroad operating property made by the State Board of Equalization and Assessment is de novo on the record.
2. **Railroads: Valuation.** There are no infallible rules or criteria for the valuation of railroad property. Approximation is all that reasonably can be expected.
3. **Railroads: Valuation: Presumptions.** The presumption that a valuation made by a board of equalization is correct applies to the valuation of railroad property made by the state board.
4. **Railroads: Assessments.** The burden of showing the assessment was improper is on the complaining party.
5. **Railroads: Valuation.** Although the earnings of a railroad are evidence of importance in determining its value, the earning capacity of the railroad is of greater importance.

Appeal from the State Board of Equalization and Assessment. Affirmed.

James W. Hewitt, and Scott J. Norby of Crosby, Guenzel, Davis, Kessner & Kuester, for appellant.

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

BOSLAUGH, CLINTON, and HASTINGS, JJ., and CAMBRIDGE, D.J., and COLWELL, D.J., Retired.

PER CURIAM.

The Omaha, Lincoln and Beatrice Railway Company (OL&B) has appealed from the orders of the State Board of Equalization and Assessment fixing the system value and assessment of the railroad for the years 1980 and 1981.

All operating property of a railroad in the State of Nebraska is assessed by the state board. Neb. Rev.

Stat. § 77-601 (Reissue 1981). The state board determined the system value of the railroad property to be $385,880 for 1980. The railroad filed a complaint alleging that the state board had failed to allow a sufficient amount for obsolescence and had not considered the earnings of the railroad. The complaint alleged that the system value should have been fixed at $193,501.94 for 1980.

In 1981 the state board determined the system value to be $413,142. The railroad again filed a complaint alleging the system value should have been fixed at $320,355.

After an evidentiary hearing on both complaints the state board fixed the system value of the railroad at $385,880 for 1980 and $413,142 for 1981. From these orders the railroad has appealed.

The review in this court is de novo on the record. Neb. Rev. Stat. § 77-617 (Reissue 1981); *Chicago, B. & Q. R.R. Co. v. State Bd. of Equalization & Assessment,* 170 Neb. 77, 101 N.W.2d 856 (1960).

The assignments of error are that the valuations fixed by the board were excessive and its action was arbitrary because it failed to take into consideration the gross or net earnings of the railroad.

"The subject of the valuation of railroads is a difficult one. Neither railroad commissioners, nor taxing authorities, nor courts have as yet arrived at settled or infallible rules or criteria for the ascertainment of actual value of such property. Approximation is all that can reasonably be expected." *Chicago, R. I. & P. R. Co. v. State,* 111 Neb. 362, 378, 197 N.W. 114, 120 (1923).

The railroad in question is a Class III switching and terminal railroad. It is wholly owned by Nebco, Inc., of Lincoln, Nebraska. The railroad has only 2.67 miles of track and two diesel-electric locomotives, a 1950 44-ton General Electric locomotive and a 1951 70-ton General Electric locomotive. In 1980 the railroad owned 191 open top hopper and ore cars,

and in 1981, 202 open top hopper and ore cars.

The railroad performs no line-haul service and there are only three industries located on its tracks: Far-Mar-Co., Inc., McGowan Grain, and Lincoln Ready Mix. All of its revenue is derived from switching services or railroad car rental.

The roadbed of the railroad is described as substandard and many of the cars are more than 25 years old and do not meet industry standards for interchange service.

In 1980 the railroad experienced a net operating loss for the fourth year in a row. At the initial hearing before the board, on July 7, 1980, Michael Heaton, a property tax specialist employed by the Nebraska Department of Revenue, testified that in determining the 1980 assessment for the railroad the department did not take into consideration the gross and net earnings of the railroad.

At the hearing on December 1, 1981, on the complaints filed by the railroad, Heaton again testified that the income of the railroad was not used in making the determination of the system value for 1980. Arlo Woolery, an expert witness called by the department, testified that he did not use the income reported by the railroad in his calculations.

Heaton testified that the value of a railroad usually is determined through income, cost, and market data approaches. The department did not use a market data approach because of the difficulty in finding a truly comparable railroad for comparison purposes and the railroad's capital stock is closely held. The railroad has no bonded indebtedness. The income approach was not used because of the difficulty in making adjustments to income which would have been necessary.

The department based its determination on the cost of equipment less depreciation as shown on the report, Form 41, filed annually with the department by the railroad. To this was added the value of the roadbed, calculated at $6.25 per foot of rail. The

total was then reduced by 20 percent for obsolescence.

The witnesses for the railroad at the hearing on the complaints were its secretary, vice president, and a securities analyst. The secretary testified as to the losses sustained by the railroad during the last 5 years and the values as shown on the books of the railroad. The net book value of road and equipment was $441,560. He testified that the property should be valued at $290,107.86 less one-third because of lack of profitability, leaving a system value of $193,501.94 for 1980 and $320,355 for 1981.

The securities analyst testified that the railroad company would have no significant appeal to an outside investor because of its lack of earnings. It was also his opinion that the company had no significant potential for growth.

An officer of a scrap metal company, called by the department, testified that the locomotive and cars owned by the railroad had a salvage value as scrap metal of $162,562.56 on January 1, 1980.

Heaton testified that he determined the system values of all railroads operating in Nebraska in 1980 and that the board adopted his recommended values. In valuing the railroads the same approaches were used where applicable. The income approach and the market data approach were not used in valuing the OL&B. The values were calculated from the Form 41 reports filed with the department by the railroads. He also consulted the R-3 form, a report filed with the Interstate Commerce Commission by the railroad, in making his determination. The obsolescence factor used in valuing the railroad was lower than the average factor applied to other railroads because much of the equipment, although used, had been purchased recently.

The department called as an expert witness Arlo Woolery, an appraiser with considerable experience in appraising railroad properties. At the request of the department Woolery made an appraisal of the

OL&B. Woolery testified that the value of the railroad by the cost approach was $573,600; by the market data approach, $421,500; and by the income approach, $415,000. He concluded that the market value of the railroad as of January 1, 1980, was $420,000.

As we view the record the valuation made by the board was not excessive. The presumption that a valuation made by a board of equalization is correct applies to the valuation of railroad property made by the state board. *Union P. R.R. Co. v. State Board of Equalization & Assessment,* 170 Neb. 139, 101 N.W.2d 892 (1960). The burden of showing the assessment was improper is on the complaining party.

We do not find the valuation evidence of the railroad to be persuasive. The only direct testimony as to valuation presented by the railroad was that of the secretary. The secretary admitted that he was not a qualified appraiser and gave no explanation as to why he believed the net book value of the property should be reduced $151,452.14 to arrive at $290,107.86, which should then be reduced by one-third because of lack of profitability.

"[T]he failure [of a railroad] to operate at a profit is not in and of itself conclusive evidence that the assessment of its property is unreasonable, nor does it operate to relieve the railroad from paying its proportion of the public tax burden." *Jersey City v. State Dept. of Taxation, &c.,* 136 N.J.L. 353, 356, 56 A.2d 479, 481 (1948).

Although we have said that "The earnings of a railroad are evidence of a most important character in determining the value of the railroad," *Chicago, B. & Q. R.R. Co. v. State Bd. of Equalization & Assessment,* 170 Neb. 77, 92, 101 N.W.2d 856, 866 (1980), it is the earning capacity of the railroad that is of greater importance. Earning capacity and actual earnings are not the same thing. It is what the property, efficiently managed, should have earned

that throws light on value. *Harris Trust & Savings Bank v. Earl,* 26 F.2d 617 (8th Cir. 1928).

Although it is true the witnesses for the department, Heaton and Woolery, testified they did not take into consideration the gross and net earnings of the railroad, as shown on its books, the witnesses did consider the earning capacity of the railroad. The railroad is a wholly owned subsidiary of Nebco, and the evidence suggests its profit and loss statement did not properly reflect its earning capacity. There was some evidence to the effect that the general administrative expense appeared to be excessive and certain car repair expenditures should have been capitalized rather than treated as expense items in computing the earnings of the railroad. The effect of such adjustments would be to increase the earnings of the railroad. The department witness Woolery called attention to the fact that from 1974 to 1979 the railroad had invested $718,769 in additional cars, and in the last 3 years, 1977 to 1979, $517,503 in cars and car repairs.

We conclude that the orders of the State Board of Equalization and Assessment fixing the system value and assessment of the railroad for the years 1980 and 1981 should be affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CLINTON W. JOHN, APPELLANT.

328 N.W.2d 181

Filed December 10, 1982. No. 82-066.

1. **Conspiracy.** In determining whether a conspiratorial agreement exists, the defendant's conduct subsequent to the agreement and the circumstances surrounding the agreement may be considered by the jury.
2. _____. The function of the overt act in a charge of conspiracy is simply to manifest that the conspiracy is still at work.
3. _____. Under the provisions of Neb. Rev. Stat. § 28-202 (Reissue

1979), a person may be convicted of a conspiracy to solicit the commission of murder even though the person with whom he conspired feigned agreement and at no time intended to go through with the plan.

4. _____. Under the provisions of Neb. Rev. Stat. § 28-202 (Reissue 1979), an overt act done is an outward act done in pursuance of the conspiracy and manifests an intent or design looking toward the accomplishment of the crime. It need not of itself have a tendency to accomplish the object of the conspiracy and need not be an act which is criminal in itself.

5. **Indictments and Informations: Waiver.** An information charging an offense in substantially the words of the statute is generally sufficient. All defects that may be excepted to by a motion to quash are taken to be waived by a defendant pleading the general issue.

Appeal from the District Court for Hall County: RICHARD L. DEBACKER, Judge. Affirmed.

Joseph Ginsburg of Ginsburg, Rosenberg, Ginsburg, Cathcart, Curry & Gordon, and Baldwin & McKernan, for appellant.

Paul L. Douglas, Attorney General, and Mel Kammerlohr, for appellee.

BOSLAUGH, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

CLINTON, J.

The defendant was charged with the crime of criminal conspiracy as defined by Neb. Rev. Stat. § 28-202 (Reissue 1979), found guilty by a jury, and sentenced to a term of 1 to 5 years' imprisonment. On appeal to this court he assigns and argues the following errors, which allegedly occurred during the course of the trial, and that these mandate either a dismissal of the charges or a reversal and new trial: (1) The evidence was, as a matter of law, insufficient to establish the crime charged, hence the defendant's various motions for a directed verdict of acquittal should have been granted. (2) The trial court erred in failing to define the elements of criminal conspiracy. (3) The trial court erred in submitting to the jury for its consideration alleged overt acts which, as a matter of law, could not constitute

overt acts within the meaning of the statute, and in failing to specifically define overt act. (4) The court erred in giving instruction No. 5, which stated in part, "The conspiracy may exist even though the party with whom it is charged the defendant conspired, pretended or feigned agreement and did not in fact intend to follow through." (5) The trial was conducted in a manner which, in several respects, prevented the defendant from having a fair trial, namely, (a) wholly hearsay and gratuitous remarks of witnesses were admitted; (b) the trial court received in evidence tape recordings of conversations of the defendant with an undercover agent posing as a hit man, as well as transcriptions of those conversations, which resulted in undue emphasis of that evidence; and (c) the transcript and tape recordings contained erroneous and prejudicial introductory information.

A consideration of the assignments of error makes it necessary that we first set forth the pertinent portions of the statute under which the defendant was charged, the charges as set forth in the information, and a summary of the evidence.

Section 28-202 provides in part: "(1) A person shall be guilty of criminal conspiracy if, with intent to promote or facilitate the commission of a felony:

"(a) He agrees with one or more persons that they or one or more of them shall engage in or solicit the conduct or shall cause or solicit the result specified by the definition of the offense; and

"(b) He or another person with whom he conspired commits an overt act in pursuance of the conspiracy."

The information charged: "Clinton W. John . . . did, on or about the 4[th] day of June A.D. 1981, in the County of Hall and the State of Nebraska aforesaid, with the intent to promote or facilitate the commission of first degree murder, did then and there, agree with one or more persons that they or one or more of them would engage in, solicit, or cause the

first degree murder of Barbara John, and that Clinton W. John did commit overt acts in pursuance of the conspiracy, to-wit:

"1. Clinton W. John, on June 4, 1981, provided a business card which listed his name and phone number to an individual whom he had asked to contact a person who would contract to kill Barbara John;

"2. Clinton W. John, during a telephone conversation on June 5, 1981, with an individual purporting to be a killer for hire, discussed arrangements for an in-person meeting and agreed to another telephone conversation the next day to arrange an in-person meeting with said individual;

"3. Clinton W. John made arrangements on June 6, 1981, during a telephone conversation with an individual purporting to be a killer for hire, to meet said individual on June 6, 1981, at 2:15 p.m. in the parking lot of the Interstate Holiday Inn in Hall County, Nebraska;

"4. Clinton W. John drove a pickup truck on June 6, 1981, to the Interstate Holiday Inn in Hall County, Nebraska, for the purpose of meeting an individual who purported to be a killer for hire;

"5. Clinton W. John met an individual purporting to be a killer for hire on June 6, 1981, at about 2:15 p.m. in the parking lot of the Interstate Holiday Inn in Hall County, Nebraska, and discussed with said individual methods, plans and arrangements for the first degree murder of Barbara John;

"6. Clinton W. John on June 6, 1981, gave an individual purporting to be a killer for hire a slip of paper which listed the probable itinerary his wife, Barbara John, and their two children would take on a vacation which was planned to begin in the next several days, and which also listed the make, model and year of the automobile Barbara John would be driving, and which also listed the location and names of motels where Barbara John and their children would be likely to stay during said vacation;

"7. Clinton W. John on June 6, 1981, gave an in-

dividual purporting to be a killer for hire pictures of the two John children so they could be identified by said individual and would not be harmed in any attempts to murder Barbara John by said individual; and

"8. Clinton W. John met with an individual purporting to be a killer for hire on June 6, 1981, at about 4:30 p.m. in the area of the Interstate Holiday Inn in Hall County, Nebraska, and agreed to have said individual telephone him in 30 days to further discuss the murder of Barbara John by said individual."

The State introduced evidence which tended to establish the following facts. On June 4, 1981, the defendant John and his wife, Barbara, were separated and an action for divorce was pending. John operated a business in Grand Island, Nebraska, and at that time lived at his place of business in an office which he had converted into a bedroom. On about June 3, 1981, the defendant John had dinner with an acquaintance from Minnesota, one Hanauer, and two other men, apparently Grand Island residents. Hanauer made a hobby of gun collecting, as did John.

Hanauer testified that, following the dinner, John approached him in private and said that he had a problem but did not want to discuss it at that time and asked Hanauer to come by the office the next day. Hanauer went to John's office the next morning as requested. At that time a conversation occurred between them. According to Hanauer, John asked him if he knew where he could get an unregistered gun and where he could find someone to dispose of his wife. To the latter question Hanauer answered "No." At that time John said, "This conversation is now ended." Hanauer stated that as they walked to the door he became nervous and frightened. His thought, as indicated by inference from later testimony, apparently was that, since John had disclosed a possible intention to mur-

der his wife, he (Hanauer) might himself be in danger if the plan were actually carried out. At that time he turned to John and said, "Well, maybe I do know somebody." He then asked for John's card, and John gave him two. Hanauer testified that the more he thought about the matter the more concerned he became. He returned to Minnesota that day. When he reached home he called the sheriff's department, made an appointment for the following day, and disclosed the nature of his conversations with John.

At trial John, who took the stand in his own behalf, did not deny that a conversation had taken place in the office which he had converted into a bedroom, but gave a different version of the conversation and gave it different import. John stated he knew that Hanauer had a gun collection worth millions and that he asked Hanauer only three questions. John testified, "[M]y first statement to him was, 'You know a lot of people that have guns'. His answer was, 'Yes'. . . . I then asked him, I said, 'Do you know people that use guns'. His answer was, 'Yes'. . . . The third question I asked Mr. Hanauer was, 'Do you know people that use guns to eliminate people'. Q. What was his response? A. His response was an emphatic, 'No'. With that I said, 'Fine'. I then opened the door and started to leave my office. Then, as the door was opened and he was about out of the door he said, 'Wait a minute'. So I turned around, closed the door and he said, 'I might know somebody that knows somebody'. I might add that at no time during the conversation did I ever mention my wife, not her name or anything to do with our upcoming divorce. Q. Mr. John, what was your purpose in asking the man these questions? A. Basically, my purpose was to ask him these questions in regard to the same weapons that I had requested information from him and had never gotten, previously on the old — to use the names of the weapons, they're the American Thompson sub-

machine gun, the British Sten gun, I believe it's called and the German Burp gun. Basically, these were guns used in the Second World War by our troops when they went in against the Germans in Europe?" John admitted that on that occasion he might have given Hanauer one or more business cards, although he was sure that he had previously given Hanauer business cards also.

Hanauer kept the appointment with the St. Cloud, Minnesota, sheriff's department and advised one of the sheriff's deputies of his conversation with John. He told the officer that he wanted no part of the matter and related his fear for his own safety. The deputy to whom Hanauer spoke then, with Hanauer's knowledge, contacted the Hall County sheriff's office, told the sheriff's deputy of the information he had received, and later transmitted, with a memo, one of the business cards which Hanauer stated he received from John.

Upon receipt of this information the Hall County sheriff's department contacted a sergeant at the criminal investigation division of the Nebraska State Patrol. Between them it was decided that an undercover agent of the State Patrol should play the part of a hit man who had been contacted by Hanauer and get in touch with John. This was done immediately and a telephone conversation between John and the undercover agent Zeleski, a regular employee of the State Patrol, took place. There were subsequent telephone conversations and meetings between the two. With the exception hereinafter noted, all of these conversations were tape recorded and later transcribed. Zeleski supervised the transcription by listening to the tapes, supplying parts which were inaudible, and, as will be observed, supplying parenthetical material. Both the tapes and the transcriptions were received in evidence at the trial, with the foundation being laid by the testimony of Zeleski. These conversations and meetings constitute the basis of the various overt

acts (with the exception of the first, i.e., John's handing the business cards to Hanauer) charged in the information. The meetings between the two were corroborated by the surveillance of an officer of the Nebraska State Patrol and photographs which were taken. In addition, one of the conversations at a meeting between Hanauer and John was monitored by a remote receiver.

We summarize and/or quote the contents of the conversations that took place at the various meetings between John and Zeleski. The first was a telephone conversation which occurred on June 5, 1981, at about 9:15 p.m., when Zeleski called John at his place of business. The following is a verbatim transcription of the recorded conversation:

"Mr. John: Hello.

"Inv. Zeleski: Yes, Mr. John?

"Mr. John: Yes.

"Inv. Zeleski: Ah, you don't know me, but I was contacted this morning, ah, by well, let's say a friend of a friend from Minnesota.

"Mr. John: Uh-huh.

"Inv. Zeleski: Who stated that you were having some problems that I might be able to help you with. I understand that you were becoming a little bit tired of sleeping in your office.

"Mr. John: That's right.

"Inv. Zeleski: And ah, he stated that, ah, I should contact you and visit with you and ah, I might possibly be able to help you with your situation.

"Mr. John: I think you may very possibly could. Now, the best thing, ah, are you calling long distance?

"Inv. Zeleski: Yes, I am.

"Mr. John: OK. Ah, you have my card?

"Inv. Zeleski: No, I, I haven't, ah, seen the card or anything. I was contacted by telephone. Ah.

"Mr. John: Oh, I see. OK.

"Inv. Zeleski: Tell ya, I'm going to the west coast. Have to be there by the middle of next week.

"Mr. John: That, that's all very.

"Inv. Zeleski: You are in Grand Island, Nebraska, is that correct?

"Mr. John: Right. All this fits in very beautifully.

"Inv. Zeleski: OK, ah, I can probably be in Grand Island sometime, ah, oh, I think probably after noon tomorrow. Sometime in the afternoon, I believe.

"Mr. John: Sometime after noon tomorrow, that will be fine. You have my phone number, give me a call. I'll either meet you at the airport and ah, we can discuss things then or ah, wherever you want to meet."

They then made arrangements for a call back by Zeleski to John's office between noon and 2 p.m. The conversation then continued:

"Inv. Zeleski: Then, when I get you, I'll, we can make arrangements to get together.

"Mr. John: You bet. That would be wonderful.

"Inv. Zeleski: OK?

"Mr. John: Very good.

"Inv. Zeleski: We'll talk later.

"Mr. John: Thank you."

The followup conversation occurred on June 6, 1981, at 1:36 p.m. In that conversation the parties arranged for the time and place for a personal meeting. They agreed upon the parking lot at the Interstate Holiday Inn. Zeleski gave information by which John could identify him. The telephone conversation continued:

"Inv. Zeleski: If, if, ah, you could maybe bring a picture of your problem along and ah, possibly get ahold of Mr. Green and get some expense money, we can probably get things started here pretty quick.

"Mr. John: OK, fine. Ah, I was just trying to think about the picture here, where I might get one, here. Well, let me, let me worry about that, I'll, anyway about 2:15?

"Inv. Zeleski: Ya, there abouts.

"Mr. John: I'll catch you out there, then."

The meeting was kept as arranged. Zeleski suggested they go for a ride and asked if John objected. We now quote from the transcript:

"Mr. John: Hell, no. That's why I tried to bring one of our company pickups and we've got this old rough and ready that I always drive, drive in. Nobody knows that I'm just going out to help a man fix a tractor.

"Inv. Zeleski: There you go!

"Mr. John: Chain saws in back.

"Inv. Zeleski: Shit, little cars, damn things. (inaudible) Well, I was contacted like I said, by a, we'll just say a friend of a friend.

"Mr. John: Ya, ya, there is no sense of going into that now.

"Inv. Zeleski: You can give me the details when we get into it."

Zeleski then indicated he would need money. We again quote from the transcript.

"Mr. John: (interrupting or talking at the same time — I'm not, I'm not) See, the best part of it is you don't have to stay in town.

"Inv. Zeleski: Well, I don't.."

John then explained he could not get a picture of his wife as he never carried one, but he would furnish a picture of the two children. He then furnished Zeleski with an itinerary of the vacation which his wife and children were about to take, which itinerary he had secured from his son. We now return to the transcription:

"Mr. John: I just copies down what he gave me and ah — because my wife wants me to know as little as possible, and ah, but anyway these are what she gave him to give to me.

"Inv. Zeleski: Why don't you read that to me.

"Mr. John: OK.

"Inv. Zeleski: I gota [sic] drive here.

"Mr. John: Leaving Monday morning and, ah — they plan to be in Raton, New Mexico Monday night. They plan to be in Santa Fe Tuesday thru Thrusday

[sic], and in the Grand Canyon Friday thru Sunday. Then driving home on Monday or Tuesday. Then, she has written here, will call Grandad when we know where we're staying. Now that's her father, but I am sure ah, they might tell me, but, ah, then again they might not.

"Inv. Zeleski: All right.

"Mr. John: Then she has written underneath that — possibly the La Pasada, anyway, Inn in Santa Fe and the Grand Canyon Lodge in the Grand Canyon. OK, here is what they drive. She'll be driving a 1977 white Granada four-door sedan with a maroon vinyl top with a bike rack on the back with one or two bikes, probably a 10-speed, a burgandy [sic] colored 10-speed, and, ah, one of these new red racing bikes that my son races, you know bicycles.

"Inv. Zeleski: OK.

"Mr. John: And the license number on the car is 8-3888.

"Inv. Zeleski: You want to, ah, either on that or on this or something, write down a physical description of her.

"Mr. John: Five foot one.

"Inv. Zeleski: You don't have a picture of her in the house or anything?

"Mr. John: Well, there in the house but I can't get in the god damn house until, till after they leave.

"Inv. Zeleski: You want to write down what she looks like, so I will have it. I mean cause, I don't know, you know.

"Mr. John: Ya."

John then gave Zeleski a general description of Mrs. John and wrote it on the back of the itinerary. He then gave Zeleski pictures of the children, stating he did not want either of them involved and that he wanted the pictures back eventually. The conversation continued:

"Inv. Zeleski: Is there anything in particular you had in mind, ah, that, ah.

"Mr. John: Well when you, when you say — like had in mind.

"Inv. Zeleski: Well, to, like you know.

"Mr. John: Well, if it could be made to look like an accident, fine. So much the better is all I'm getting at.

"Inv. Zeleski: What do, ya, a traffic accident, you mean.

"Mr. John: Traffic accident, a holdup in a store, ah, somebody shot by mistake, etc. etc. If you see what I am getting at.

"Inv. Zeleski: OK, sure. Now is she going to be traveling at anytime, do you know, by herself without the children?

"Mr. John: This, I don't know. This is why my son is taking his bicycle. I doubt.

"Inv. Zeleski: Do you have relation or does she have relation down there or anything, or anything? Huh?

"Mr. John: None (pause)

"Inv. Zeleski: Um?

"Mr. John: At least if she does, there is none that I've known about. I take it you don't smoke?

"Inv. Zeleski: Oh, go ahead. I used to, but I started losing my wind so I had to quit. (laughs) Well, let me ask you this, the way, the way this situation is, ah, do you just as soon that, that she got out of town?

"Mr. John: Absolutely, the farther, the farther away, the better. Because, see whats happened, to give you a brief rundown. . . ."

Then followed a recital by John of his marital troubles, including what he referred to as his wife's unreasonable financial demands and John's expression of opinion that the judge might yield to them. The conversation then turned to charges for Zeleski's services.

"Mr. John: Oh, I am not, I am not asking, I was just trying to get you to give me basic lump, to know what I have to come up with, cash dollars. Be-

cause that is the only way you probably want it anyway.

"Inv. Zeleski: Ya. I don't take Mastercharge.

"Mr. John: No, no Mastercharge or checks or anything else, and first of all, I wouldn't want to give it to you that way because then the son-of-a-bitch is traceable.

"Inv. Zeleski: Ya. I am going to have to have a $1000 to start with.

"Mr. John: Uh-huh.

"Inv. Zeleski: Ah, with the ah, traveling, I'm going to have to, to, ah, you know, I, I want to, I am going to be honest with you, I am not going to take you for a ride.

"Mr. John: Well, hell, ya.

"Inv. Zeleski: I got no, I got no reason.

"Mr. John: Hell no, this is, this is your.

"Inv. Zeleski: I need a $1000 and as soon as I get that, I will get started. I like to get things over with as fast as I can.

"Mr. John: Uh-huh.

"Inv. Zeleski: And be on my way. So, $1000 when I get started and if my expenses [sic] over that, you cover the balance of the expenses when I'm done, the other thousand dollars.

"Mr. John: Uh-huh.

"Inv. Zeleski: And ah, you know, if the expenses, you say run over $500, ah..

"Mr. John: You mean, you talk about running over the two thousand or so?

"Inv. Zeleski: Well, I'm figuring $500 expenses out of the first $1000.

"Mr. John: Ya.

"Inv. Zeleski: Then, if they run over that..

"Mr. John: Well, I can, I can understand your position, ya..

"Inv. Zeleski: You know, I'll ah, contact you and you know, because you — hey, I am not, I, I am not, a fortune teller, I don't know what is going to happen here.

"Mr. John: Well, no, hell no.

"Inv. Zeleski: I've got to have money to operate on. That's it.

"Mr. John: OK."

John then began a discussion with Zeleski of the possibility of just "riding it out," that is, taking a chance that the judge in the divorce action would not grant Mrs. John's financial requests. That discussion continued for some minutes. The tape then ran out and the balance of the conversation was not recorded. Zeleski testified that he realized when the recording ran out because the recorder emits a whine, which he covered by fiddling with the radio. He testified to the balance of the conversation, which related to the total amount of $2,000 that Zeleski would charge and the methods to be used. John expressed fear of blackmail by Zeleski at a later time and received assurances from Zeleski. Zeleski discussed specific methods by which the slaying might be carried out. John stated he wanted the children kept out of it. No method was agreed upon. They then agreed to a meeting later that day at 4:30 p.m.

The continuation meeting between John and Zeleski was held as scheduled. After some introductory remarks, the following conversation took place, as indicated by the transcription:

"Mr. John: Well, anyway, I think what I am going to do is, I'm gonna ride this son-of-a-bitch out, and wee [sic] what the hell happens and ah, the only thing that worries me is, ah, how the hell I can get ahold of you (inaudible).

"Inv. Zeleski: Well.

"Mr. John: The same route.

"Inv. Zeleski: I could have somebody call you, you know, whatever you want.

"Mr. John: Well, lets just, lets just put it a month from now. OK, now, would it be best that I got the pictures back and that stuff.

"Inv. Zeleski: Yes, if you want them.

"Mr. John: Ya, why don't I, cuz those are the only things I, keep the itinerary if you want it. I don't need it, I have a copy of it.

"Inv. Zeleski: Well, if you, ah you know, if you want me to do something yet this week (inaudible), ah, well if you don't want me to do anything, I am just going to go ahead and go out west. You know, ah.

"Mr. John: Well, for right now, for right now, I would say that's the way, that's the way it would stand, but, ah, see I am so god damn involved here in Grand Island that, ah, I am talking about the meetings, you know, and all that shit. The timing, even if it was here T.J., would make no difference at all. I'd have better, I'd almost have better cover then [sic] I would if something happened there, you follow me?

"Inv. Zeleski: Ya."

John then indicated to Zeleski that he (John) would check with his attorneys to find out how the divorce settlement was going. Then followed this statement:

"Mr. John: If, ah, if we can, I, I don't, let me put it this way, I sure as hell don't want to lose ya. Ah.

"Inv. Zeleski: Well.

"Mr. John: But, ah —

"Inv. Zeleski: Well, you can, you want me to contact you, whenever, 30 days from today?

"Mr. John: Let's just make it that way and see what the hell is going on."

After a rather meandering conversation they concluded that Zeleski would contact John in 30 days, with Zeleski saying, "if you want to call it quits," it was OK, but that he would want to get his expense money. To this John replied, "OK." Later in the conversation John was apologetic for not having money with him as he usually did, explaining that on Saturday afternoon he could not cash a check. The conversation then continued on a social note, with John inviting Zeleski to go fishing with him and his

buddies anytime. They parted with Zeleski saying, "Don't do anything for Christ's sakes."

When John, at trial, took the stand on his own behalf he did not deny the various meetings with Zeleski or challenge the contents of their various conversations. He explained that he was astounded when he received the first call from Zeleski. He explained his consenting to and his participation in the meetings with Zeleski by stating that he was curious to find out what a hit man was like.

It is apparent, however, the jury did not accept John's explanation, and that seems quite understandable in light of the fact that it is perfectly clear, despite the ambiguity of Zeleski's first approach to John, that John realized he was being contacted by a hit man. John also testified that after his first conversation with Zeleski he discussed the matter with two advisers, who told him to have nothing to do with the fellow. He testified he disregarded the advice because of his curiosity. John did not attempt to offer the testimony of these two advisers.

The defendant's first assignment of error contains two contentions, namely, (1) there was insufficient evidence to establish the agreement and (2) no conspiracy can exist when one of the parties is feigning the agreement. The basis for the State's charge of conspiracy is clearly founded upon the conversation between the defendant and Hanauer on June 4, for that is the date stated in the information.

Which version of the conversation the jury might have believed and whether the agreement, if made, constituted an agreement between John and Hanauer that "one or more of them shall engage in or solicit the conduct or shall cause or solicit the result specified," to wit, the first degree murder of Barbara John, need not have been viewed by the jury solely on the basis of what occurred in the transaction which allegedly constituted the agreement, but also in the light of the defendant's subse-

quent conduct. The rule in Nebraska is that the nature of the agreement may be inferred from the defendant's conduct subsequent to the agreement and to the circumstances surrounding it and may be proved by circumstantial evidence. *Beyl v. State,* 165 Neb. 260, 85 N.W.2d 653 (1957); *State v. Knecht,* 181 Neb. 149, 147 N.W.2d 167 (1966); *United States v. Hayutin,* 398 F.2d 944 (2d Cir. 1968). The function of the overt act in a charge of conspiracy is simply to manifest that the conspiracy is still at work. *Yates v. United States,* 354 U.S. 298, 77 S. Ct. 1064, 1 L. Ed. 2d 1356 (1956).

Disregarding for the moment the fact that Hanauer was feigning the agreement, the jury was entitled, under the above authority, to consider John's subsequent conduct in determining whether an agreement existed and the nature thereof. We hold that the evidence was sufficient for the jury to determine beyond a reasonable doubt that John and Hanauer entered into an agreement which John understood was an agreement by Hanauer to "solicit" a hit man for the purpose of carrying out the first degree murder of Barbara John. Under the provisions of the plain language of § 28-202, the agreement may be either to "engage in" the conduct or "solicit" the conduct. Hanauer's version of the conversation and John's subsequent conversations and transactions with the "hit" man, if believed by the jury, do establish that John agreed to have Hanauer solicit someone to murder his wife.

We now turn to the second question of whether, under the provisions of § 28-202, two people must actually agree to the criminal conduct necessary to constitute the first element of a conspiracy, or whether agreement by the defendant and a feigned agreement by the alleged coconspirator is sufficient. Prior to the adoption of § 28-202 in 1977, the Nebraska statute defining a conspiracy read: "If *two* or more persons conspire to commit any felony . . . and one or more of such parties do any act to effect the

object of the conspiracy . . . ." (Emphasis supplied.) Neb. Rev. Stat. § 28-301 (Reissue 1975). It is not controverted that under the former statute the conspiracy or agreement must be actual and made by two or more people. The State takes the position in this case that under the provision of § 28-202, which was adopted from Model Penal Code § 5.03 (Tentative Draft No. 10, 1960), the unilateral approach of the agreement element of conspiracy has been adopted, and under that approach only the defendant need agree with another; the second party can feign the agreement and the conspiracy may exist.

There are significant differences in the language of the two statutes. The former provided, "If two or more persons conspire . . . ." The present statute says, "A person shall be guilty . . . if, with intent . . . (a) He agrees . . . ." The commentary to § 5.03 of the Model Penal Code, *supra* at 104-05, says: "2. *The Conspiratorial Relationship.*

"*Unilateral Approach of the Draft.* The definition of the Draft departs from the traditional view of conspiracy as an entirely bilateral or multilateral relationship, the view inherent in the standard formulation cast in terms of 'two or more persons' agreeing or combining to commit a crime. Attention is directed instead to each individual's culpability by framing the definition in terms of the conduct which suffices to establish the liability of any given actor, rather than the conduct of a group of which he is charged to be a part—an approach which in this comment we have designated 'unilateral.'

"One consequence of this approach is to make it immaterial to the guilt of a conspirator whose culpability has been established that the person or all of the persons with whom he conspired have not been or cannot be convicted. Present law frequently holds otherwise, reasoning from the definition of conspiracy as an agreement between two or more persons that there must be at least two guilty con-

spirators or none. The problem arises in a number of contexts.

. . . .

"*Second:* Where the person with whom the defendant conspired secretly intends not to go through with the plan. In these cases it is generally held that neither party can be convicted because there was no 'agreement' between two persons. Under the unilateral approach of the Draft, the culpable party's guilt would not be affected by the fact that the other party's agreement was feigned. He has conspired, within the meaning of the definition, in the belief that the other party was with him; apart from the issue of entrapment often presented in such cases, his culpability is not decreased by the other's secret intention. True enough, the project's chances of success have not been increased by the agreement; indeed, its doom may have been sealed by this turn of events. But the major basis of conspiratorial liability— the unequivocal evidence of a firm purpose to commit a crime—remains the same."

A number of states have adopted the Model Penal Code language. The following cases, among others, hold: Under a statute providing that if a person conspires with another to commit a crime, and in furtherance of the conspiracy one or more of the parties does some overt act in furtherance of such conspiracy, he may be guilty of conspiracy even though the person with whom he conspired feigned agreement and at no time intended to go through with the plan. *State v. St. Christopher,* 305 Minn. 226, 232 N.W.2d 798 (1975); *State v. Marian,* 62 Ohio St. 2d 250, 405 N.E.2d 267 (1980); *Garcia v. State,* ____ Ind. ____, 394 N.E.2d 106 (1979).

We believe it is clear that § 28-202 adopts the unilateral approach.

The defendant argues that our Legislature did not adopt the unilateral approach because it did not also adopt Model Penal Code § 5.04 (Proposed Official

Draft, 1962), which reads in part as follows at 86: "(1) Except as provided in Subsection (2) of this Section, it is immaterial to the liability of a person who solicits or conspires with another to commit a crime that: (a) he or the person whom he solicits or with whom he conspires does not occupy a particular position or have a particular characteristic which is an element of such crime, if he believes that one of them does; . . . ." An examination of § 5.04 indicates that its language does not support the defendant's position and is, in fact, irrelevant to the unilateral approach as set forth in our statute. Section 5.04 pertains only where the person whose status is an element of the crime does not occupy a particular position or have a particular characteristic which is an element of the crime, if he believes that one of them does. That language is quite consistent with the unilateral approach and, in fact, carries it a step further. It provides that the unilateral approach applies even when one of the necessary elements of the contemplated crime which is the object of the conspiracy may be missing. For example, assume a crime of conspiracy to bribe a public official. The effect of § 5.04 of the Model Penal Code would be that the crime is committed if the defendant only believes the person to be bribed holds the requisite office, but in fact does not. Apparently our Legislature did not wish to change the substantive element of crimes other than conspiracy and hence did not adopt § 5.04. The defendant's contention that the evidence is insufficient to support the verdict is not meritorious.

The defendant's second assignment of error is wholly frivolous. The trial court did define the crime in the exact language of the statute.

In determining the merits of the defendant's third assignment, it becomes necessary to discuss the nature of an overt act. An overt act is such as tends to show the preexisting conspiracy. *Platt v. State,* 143 Neb. 131, 8 N.W.2d 849 (1943). It is an outward act

done in pursuance of the conspiracy and manifests an intent or design looking toward the accomplishment of the crime. *Chavez v. United States,* 275 F.2d 813 (9th Cir. 1960). It need not of itself have a tendency to accomplish the object of the conspiracy. *Hall v. United States,* 109 F.2d 976 (10th Cir. 1940). It need not be an act which is criminal in itself. *Yates v. United States,* 354 U.S. 298, 77 S. Ct. 1064, 1 L. Ed. 2d 1356 (1957); *Braverman v. United States,* 317 U.S. 49, 63 S. Ct. 99, 87 L. Ed. 23 (1942). See, also, *Collier v. United States,* 255 F. 328 (5th Cir. 1918); *United States v. Sarno,* 456 F.2d 875 (1st Cir. 1972); *State v. Stanley,* 123 Ariz. 95, 597 P.2d 998 (1979).

The various overt acts charged in the information, all of which find support in the evidence, are, in the light of the principles cited, overt acts within the meaning of the law, and the court did not err in submitting them to the jury. We will discuss just a few of the acts charged. The giving of the business cards with name, address, and telephone number of John afforded to Hanauer a convenient means for the hit man or Hanauer to later contact John. The meetings with the alleged hit man were clearly overt acts. The furnishing of the vacation itinerary of Barbara John, the description of her car, and her physical description were actual steps toward accomplishment of the ultimate purpose.

Assignment (4) is inherent in assignment (1) and has already been disposed of.

Although not specifically assigned as error, the defendant argues that the information was insufficient and should have been quashed because it did not identify the alleged coconspirator. The motion to quash was based upon the allegation that the information stated no crime, for the reason the statute was unconstitutional because the statute was vague and indefinite. The motion to quash did not raise the issue of a defect in the information for failure to name the coconspirator. On the same day the mo-

tion to quash was overruled, the defendant entered a plea of not guilty. The applicable rules are: An information charging an offense in substantially the words of the statute is generally sufficient. All defects that may be excepted to by a motion to quash are taken to be waived by a defendant pleading the general issue. *State v. Abraham,* 189 Neb. 728, 205 N.W.2d 342 (1973). The defendant's contention that the information should have been quashed because of failure to allege the identity of the coconspirator is without merit.

As to the claimed multifarious errors listed in assignment (5), which allegedly prevented the defendant from having a fair trial, we conclude, after carefully examining the whole record, that either the alleged errors were not error at all, were not raised by proper objection, or were beyond a reasonable doubt not prejudicial and could not have affected the outcome of the trial.

AFFIRMED.

McCOWN, J., participating on briefs.

CAROL E. RUDEL, APPELLANT, V. RODELL RUDEL, APPELLEE.

327 N.W.2d 46

Filed December 10, 1982. No. 82-344.

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

Kelley, Wallace, Scritsmier, Moore, Romatzke & Byrne, P.C., for appellant.

Murphy, Pederson, Piccolo & Anderson, for appellee.

KRIVOSHA, C.J., BOSLAUGH, McCOWN, CLINTON, WHITE, HASTINGS, and CAPORALE, JJ.

PER CURIAM.

This 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.

IN RE ESTATE OF HARRY W. CARMAN, DECEASED. EDWARD AXMANN ET AL., APPELLANTS AND CROSS-APPELLEES, V. AMANDA CARMAN, APPELLEE AND CROSS-APPELLANT.

327 N.W.2d 611

Filed December 17, 1982. No. 44419.

1. **Decedents' Estates: Wills: Appeal and Error.** A challenge to a spouse's statutory election to take against a will is tried in this court de novo on the record.
2. **Decedents' Estates.** The combined effect of the statutory elective share and augmented estate concepts is intended to protect the surviving spouse of a decedent against donative inter vivos transfers by devices which would deprive the survivor of a "fair share" of the decedent's estate and at the same time prevent the surviving spouse from receiving more than such share by allowing the acceptance of certain transfers and insurance proceeds and also yet elect against the will.
3. _____. In the absence of an express contract to compensate a spouse for extra and unusual services, no obligation to do so will be implied.
4. _____. A spouse's labor does not, absent a contract, become a contribution "in money's worth" such as to take one-half the value of jointly produced and acquired assets out of the computation of the augmented estate.

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

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

Tye, Worlock, Tye, Taylor & Hopkins, for appellee.

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

CAPORALE, J.

In this appeal the appellants, Edward Axmann, Elaine Dobish, and Shirley Tesmer, grandnephew and grandnieces of the deceased Harry W. Carman, challenge the District Court's computation of the decedent's augmented estate. The appellee, Amanda Carman, surviving spouse of the decedent, cross-appeals, also claiming error in the District Court's computation of the augmented estate and further in its determination that there was no adequate showing of need for a supplemental family allowance to her. We affirm in part and reverse in part.

In general, the deceased's last will and testament devised to Mrs. Carman a life estate in certain described real estate. All the rest, residue, and remainder of the real estate was devised, in equal shares, to the appellants. The personal property was bequeathed to one Robert Downey, in trust, to pay the income to Mrs. Carman and to distribute the corpus, upon her death, to the appellants, in equal shares.

Mrs. Carman elected to take against the will under the provisions of Neb. Rev. Stat. § 30-2313(a) (Reissue 1979), which provides that the surviving spouse has a right to take an elective share of one-third of the augmented estate. Neb. Rev. Stat. § 30-2314 (Reissue 1979), so far as material here, basically defines the augmented estate as the probate estate, less certain allowances, plus the value of property owned by the spouse at the decedent's death and which would have been includable in the surviving spouse's augmented estate if that spouse had predeceased the decedent, to the extent the owned property was derived by the surviving spouse from the decedent without a full consideration in money or money's worth.

We have in the past stated that a challenge to a

statutory election is tried in this court de novo on the record. *In re Estate of Bergren,* 154 Neb. 289, 47 N.W.2d 582 (1951). We therefore so review the instant matter.

The combined effect of the statutory elective share and augmented estate concepts is intended to protect the surviving spouse of a decedent against donative inter vivos transfers by devices which would deprive the survivor of a "fair share" of the decedent's estate and at the same time prevent the surviving spouse from receiving more than such share by allowing the acceptance of certain transfers and insurance proceeds and also yet elect against the will. Nebraska Probate Code, Part 2, Comments, §§ 30-2313 to 30-2315.

Appellants claim that the augmented estate computation in this case should include all the real estate held by the decedent and appellee as tenants in common, all the items of farm production, and certain other items of personalty. The appellee, on the other hand, urges that only one-half of the tenancy in common real estate, items of farm production, and the other items of personalty should be included; the other one-half being her own and separate estate.

The decedent and appellee were married in November 1959. Decedent was about 50 years old and appellee was about a year younger. It was the first marriage for each; no children were born to the marriage. Appellee and appellants are the decedent's only heirs.

Prior to the marriage appellee had been working as a general cleaning woman in Kearney and continued to do so for a period of time following the marriage. Prior to the marriage the decedent had been engaged in a general farming operation and continued to so be after the marriage. Subsequently, the two parties jointly conducted the farming operation for the duration of the marriage. Various evidence was introduced concerning the work done by appellee in the farming operation. She partici-

pated in such chores as raising chickens, selling eggs and fryers, milking cows, and separating and selling cream. She also purchased some milk cows, fed cattle and hogs, scooped grain, put up hay, and chopped sunflowers, cockleburs, and musk thistles by hand. Additionally, she fixed fence, drove tractors, and stacked hay bales, as well as helping to repair and weld machinery, repairing and reshingling farm buildings, and assisting in the butchering process, including the cutting up of all the meat by herself.

From these facts appellee argues that she did more than merely perform as a farmwife; that in fact she functioned as a partner in the farming operation, or in any event did at least as much as would a hired hand; and, thus, one-half of the items of farm production and other items of personalty were to be treated as being owned by her outright. We, as did the District Court, disagree.

The question becomes whether appellee's labor as above described constitutes a contribution "in money's worth" such that one-half the value of the farm production and jointly acquired personalty should be excluded from the augmented estate and set over to appellee as her own property. Notwithstanding the cases cited to us which adopt that point of view for tax purposes (*Craig v. United States,* 451 F. Supp. 378 (D.S.D. 1978); *In re Estate of Kersten,* 71 Wis. 2d 757, 239 N.W.2d 86 (1976); *Est. of Everett Otte,* 41 T.C.M. 72,076 (P-H 1972)), we adhere to our traditional view that in the absence of an express contract to compensate a spouse for extra and unusual services, no obligation to do so will be implied. See, *Peterson v. Massey,* 155 Neb. 829, 53 N.W.2d 912 (1952); *Brodsky v. Brodsky,* 132 Neb. 659, 272 N.W. 919 (1937). Accordingly, a spouse's labor does not become a contribution "in money's worth" such as to take one-half the value of jointly produced and acquired assets out of the augmented estate computation.

Next, Mrs. Carman argues that her extraordinary labor, coupled with the fact that the realty which she acquired prior to the marriage and owned separately was relied upon by the lender in issuing the purchase money mortgage on the realty acquired by her and decedent as tenants in common, establishes she contributed "in money's worth" to that commonly owned property. She concludes, therefore, that one-half its value should be excluded from the augmented estate computation. Although the District Court agreed with appellee, we do not. The fact that a separately owned asset was relied upon to acquire another asset during marriage does not, in and of itself, change the nature of the contribution by a spouse to the acquisition of a shared asset.

Yet remaining for determination is whether appellee satisfactorily proved her statutorily required need for a supplemental family allowance. The personal representative of the estate initially determined an allowance to appellee in the amount of $6,000, payable in monthly installments of $500. Nine or ten of the twelve payments were made, totaling $4,500 or $5,000 (the record is not clear), and then discontinued because of a lack of cash in the estate. Subsequently, the personal representative filed a petition requesting permission to continue to pay $500 per month during the remaining administration period of the estate; however, the county court granted a maximum of $175 per month. The District Court found that appellee had failed to adequately demonstrate her statutorily required need for a continuation of the family allowance beyond the initial 12-month period. The District Court denied the request for the additional allowance but ruled that the full $6,000 be paid when the assets of the estate so permit. The District Court was correct.

Neb. Rev. Stat. §§ 30-2324 and 30-2325 (Reissue 1979), applicable at the time of the proceedings at issue, provided for an allowance to appellee in the to-

tal amount of $6,000, permissibly payable in periodic installments not exceeding $500 per month for 1 year. This was a specific, vested, and indefeasible statutory right accruing to appellee upon decedent's death. See § 30-2325. Therefore, the remaining balance of the original $6,000 properly determined shall be paid to appellee. We also agree with the District Court that appellee failed to establish the requisite need for any continued allowance beyond the $6,000.

We remand to the Twelfth Judicial District Court, Buffalo County, for judgment consistent with this opinion.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

CLINTON, J., concurs in the result.

ELEANOR F. LEACH, APPELLANT, V. STATE DEPARTMENT OF MOTOR VEHICLES ET AL., APPELLEES.

327 N.W.2d 615

Filed December 17, 1982. No. 44484.

1. **Administrative Agencies: Parties: Appeal and Error.** Where an administrative agency is charged with the responsibility of protecting the public interest as distinguished from determining the rights of two or more individuals in a dispute before such agency, it is a necessary party in any appellate proceeding.
2. **Statutes.** When a statute adopts the general law on a particular subject rather than a specific statute, it adopts not only the existing law but later legislation on the subject as well.
3. **Administrative Agencies: Appeal and Error.** An "appeal" from an order of the director of the Department of Motor Vehicles under Neb. Rev. Stat. § 60-420 (Reissue 1978) or § 84-917(2) (Reissue 1981) is commenced or perfected by filing a petition within 30 days of the service of the final decision of the director and causing a summons to issue on the petition and be served within 6 months of such filing.
4. **Administrative Agencies: Parties: Appeal and Error.** Making an administrative agency a party defendant in an appeal under the provisions of Neb. Rev. Stat. § 60-420 (Reissue 1978) or § 84-917(2) (Reissue 1981) is not an action against the State of Nebraska within the meaning of Neb. Rev. Stat. §§ 24-319 et seq. (Reissue 1979) so as to require service of summons upon the Governor and the Attorney General.

Appeal from the District Court for Cheyenne County: JOHN D. KNAPP, Judge. Reversed and remanded.

David T. Schroeder, for appellant.

Paul L. Douglas, Attorney General, and Ruth Anne E. Galter, for appellees.

KRIVOSHA, C.J., HASTINGS, and CAPORALE, JJ., and DAVIS, D.J., and COLWELL, D.J., Retired.

HASTINGS, J.

The driver's license of the plaintiff, Eleanor F. Leach, was revoked for a period of 6 months under the provisions of the Nebraska implied consent law, Neb. Rev. Stat. § 39-669.16 (Reissue 1978), by an order of Harry "Pete" Peterson, Director, Department of Motor Vehicles, State of Nebraska. The plaintiff appealed to the District Court of Cheyenne County. That court sustained a special appearance filed by all defendants because of lack of jurisdiction over them. The plaintiff has appealed to this court.

The director's order was entered on June 26, 1980, and the petition on appeal was filed in the District Court on July 9, 1980. However, the praecipe for summons was not filed until October 23, 1980, upon which summons was issued the same date and served on Harry "Pete" Peterson, Director, Department of Motor Vehicles of the State of Nebraska, on October 28, 1980.

In the meantime, on September 5, 1980, the State of Nebraska, the Department of Motor Vehicles, and Harry "Pete" Peterson, Director, Department of Motor Vehicles of the State of Nebraska, had filed a special appearance which was sustained on October 29, 1980. The cause had been submitted on briefs on October 22, the day before the plaintiff finally filed her praecipe for summons.

The plaintiff assigns as error simply that the court

erred in sustaining the special appearance and dismissing her appeal.

We should note at the outset that no summons was ever requested or issued for service upon the State of Nebraska or the Department of Motor Vehicles, and therefore the special appearance was properly sustained as to those parties. As to the defendant Peterson, the summons served upon him was not returned to the court until November 3, 1980, and therefore the order sustaining the special appearance as to him was proper as of the date of its issuance, October 29, 1980. However, by the time the motion for a new trial had been filed and overruled, the record disclosed that the summons had in fact been served on October 28, 1980.

Neb. Rev. Stat. § 60-420 (Reissue 1978) authorizes an appeal from an order of the director and provides specifically as follows: "Applicant or licensee shall file his petition in such district court within thirty days from the date of filing of the director's final order in the matter, and he shall file such transcript before answer day which shall be the same as provided under the code of civil procedure in section 25-821."

In order to determine the proper procedure to perfect an appeal in a case such as this, the foregoing section must be read together with Neb. Rev. Stat. § 84-917(2) (Reissue 1981), which provides: "Proceedings for review shall be instituted by filing a petition in the district court of the county where the action is taken within thirty days after the service of the final decision by the agency. All parties of record shall be made parties to the proceedings for review. Summons shall be *served as in other actions* except that a copy of the petition shall be served upon any such agency together with the summons. . . ." (Emphasis supplied.)

Although § 60-420 speaks in terms of an "appeal," it is apparent from a reading of § 84-917(2) and a consideration of the actual nature of the proceedings

that this is not an appeal, but rather is a proceeding to review the action of an administrative agency. Thus, particularly in cases of this kind, where the agency, or rather the director, is charged with the responsibility of protecting the public interest as distinguished from determining the rights of two or more individuals in a dispute before such agency, Peterson, as such director, was one of "all parties of record." He therefore is a necessary or indispensable party in this "appellate" proceeding. *Winkelmann v. Nebraska Liquor Control Commission,* 198 Neb. 481, 253 N.W.2d 307 (1977).

The defendants insist that *Norris P.P. Dist. v. State ex rel. Jones,* 183 Neb. 489, 161 N.W.2d 869 (1968), requires that in order to perfect an appeal in this type of proceeding, not only must the petition be filed within the 30-day period but so must the summons be issued and served within that same time frame. That was clearly the holding of *Jones,* which stated that the filing of a petition without the issuance of a summons did not amount to the commencement of an action, and cited Neb. Rev. Stat. § 25-217 (Reissue 1964) in support of that statement. However, at the time of the opinion, that particular section read: "An action shall be deemed commenced, within the meaning of this chapter, as to the defendant, *at the date of the summons* which is served upon him . . . ." (Emphasis supplied.) Section 25-217 (Reissue 1979), which was effective at the time the instant case was decided by the trial court, reads as follows: "An action shall be deemed commenced, within the meaning of this chapter, as to the defendant, *on the date the petition is filed* with the court if proper service is obtained within six months of such filing." (Emphasis supplied.)

It is the defendants' further contention, however, that where the provisions of a statute are incorporated by reference into another or where one statute refers to another for powers given or rules of procedure prescribed by the former, the statute or

provision referred to becomes a part of the referring statute; and in the event the earlier statute is later repealed the provisions incorporated, the powers given, or rules prescribed by the incorporated statute continue in force. They cite *Hanson v. City of Omaha,* 157 Neb. 768, 61 N.W.2d 556 (1953), in support of such a rule. More recently, the same rule was again stated in *School Dist. No. 17 and Westside Comm. Schools v. State,* 210 Neb. 762, 316 N.W.2d 767 (1982). However, the same situation as found in *Hanson* and *School Dist. No. 17* is not present in the instant case. In the first place, no specific statute has been incorporated into § 84-917(2). At most, it amounts to the adoption of the general law as to service of summons "as in other actions," part of which is composed of § 25-217. We believe that when a statute adopts the general law on a particular subject rather than a specific statute, it adopts not only the existing law but later legislation on the subject. *State v. District Court (Delaware County),* 253 Iowa 903, 114 N.W.2d 317 (1962). Furthermore, the statute under discussion was not repealed but was amended, contrary to the situation in *Hanson* and *School Dist. No. 17.* The specific holding in *Jones,* that a "plaintiff on appeal" must not only file a petition within the 30-day period but must also cause a summons to be issued within the same time frame, is no longer applicable.

Whether we look to § 60-420 (the applicant "shall file his petition . . . within thirty days") or § 84-917(2) ("proceedings . . . shall be instituted by filing a petition . . . within thirty days"), the plaintiff, by filing a petition within 30 days and causing summons to issue and be served within 6 months thereof, has perfected her "appeal" within the statutory time limits.

The defendants also argue that in order to make the State of Nebraska a party defendant, summons must issue in the manner provided for in Neb. Rev. Stat. § 24-321 (Reissue 1979), which requires service upon the Governor, the Attorney General, and the

chief officer of the department involved. However, that section is applicable only to actions brought under Neb. Rev. Stat. § 24-319 (Reissue 1979), which include claims rejected or disallowed by the Director of Administrative Services, claims for relief that may be presented to the Legislature, setoffs and claims for damages, cases where the State of Nebraska shall have a lien, and all cases where the State of Nebraska or the Board of Educational Lands and Funds of the State of Nebraska is the owner of or has or claims an interest in certain municipal bonds. The present proceeding does not fit within any of those requirements. Making an administrative agency a party defendant in an appeal under the so-called "Administrative Procedures Act," Neb. Rev. Stat. §§ 84-901 et seq. (Reissue 1981), is not an action against the State of Nebraska within the meaning of §§ 24-319 et seq.

The District Court was in error in sustaining the special appearance of the defendant Peterson and in dismissing the plaintiff's appeal. Accordingly, its judgment is reversed and the cause is remanded for further proceedings.

REVERSED AND REMANDED.

DAIRYLAND INSURANCE COMPANY, RICHARD A. WRICH, AND JUDITH C. POPISH, APPELLANTS, V. DIANA K. KAMMERER, MATTHEW B. KAMMERER, AUTO-OWNERS INSURANCE COMPANY, AND ALLSTATE INSURANCE COMPANY, APPELLEES.

327 N.W.2d 618

Filed December 17, 1982. No. 44505.

Insurance: Breach of Contract: Waiver. An insurer is precluded from asserting a forfeiture where, after acquiring knowledge of the facts constituting a breach of condition, it has retained the unearned portion of the premium or has failed to return or tender it back with reasonable promptness, especially where the nature of

the breach or ground for forfeiture is of such character as to render the policy void from its inception.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Reversed and remanded with directions.

John J. Respeliers of Respeliers and DiMari, for appellants.

Eugene P. Welch of Gross, Welch, Vinardi, Kauffman & Day, P.C., for appellee Auto-Owners.

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

KRIVOSHA, C.J.

The instant appeal grows out of a suit instituted principally by the appellant Dairyland Insurance Company seeking to have the trial court find that a certain insurance policy, issued by the appellee Auto-Owners Insurance Company, provided primary coverage for an accident which occurred on March 27, 1980. The trial court found that because the principal insured, Judith C. Popish, had fraudulently failed to disclose to Auto-Owners the fact that Richard A. Wrich was a member of her household at the time the insurance was issued, the policy of insurance issued by Auto-Owners provided no coverage to Wrich as driver of Popish's car when involved in the accident of March 27, 1980. For reasons more particularly set out in the opinion, we believe that the trial court was in error and therefore reverse and remand the decision with directions.

The record discloses that on March 5, 1980, Auto-Owners, through one of its authorized agents, issued a binder to Popish covering a certain 1974 MGB convertible owned by Popish. On March 27, 1980, Wrich, with permission of Popish, was operating her insured automobile and was involved in an accident with another automobile, allegedly injuring Diana K. Kammerer. On April 10, 1980, Auto-Owners sent to Popish a notice of cancellation, advising her that

the company would cancel the policy effective 12:01 a.m. on April 22, 1980. This, of course, was almost a month after the accident occurred. The reason given in the notice of cancellation was "UNDERWRITING REASONS." Consistent with the company's position concerning the date upon which the cancellation was to be effective, the company returned only a portion of the total premium paid by Popish to Auto-Owners, which was equal to the premium collected for the period after the date of cancellation. The record is devoid of any evidence that Auto-Owners has returned to Popish anything more than the initial refund.

In its answer to the petition filed by Dairyland, Auto-Owners maintained that the policy was void ab initio because Popish had failed to disclose to the company the fact that Wrich resided in the home owned by Popish and was therefore a "member of her household." The trial court agreed with Auto-Owners and found specifically that Popish's failure to advise Auto-Owners that Wrich was a member of her household was a material misrepresentation which entitled Auto-Owners to avoid coverage of Wrich under the policy. Because of the action taken by Auto-Owners in attempting to cancel the policy, we need not reach the question of Popish's alleged fraud.

Under the terms of the policy issued by Auto-Owners, when, on March 27, 1980, Wrich operated Popish's motor vehicle with her permission, he was an "insured." The policy specifically defined the insured to be "the named insured and any person using the automobile . . . with the permission of the named insured . . . ." The policy clearly provided coverage for both Popish and Wrich, unless, on March 27, 1980, the policy was not at all in effect.

When learning of the alleged fraud, Auto-Owners had two choices. Either it could determine that, because of the alleged fraudulent statements made to it, it wished to cancel the policy from its inception

and return to Popish the entire premium, on the theory that the policy never came into existence, or it could waive the alleged fraud, keep the premium earned to date of cancellation, and accept responsibility under the policy. If Auto-Owners elected to rescind the policy from its inception, it must place Popish back in the same position Popish was in before the policy was issued, including returning to her all of the premium. But Auto-Owners chose not to do so. Both by its notice of cancellation and by its retention of a portion of the premium, Auto-Owners elected to recognize the existence of the policy from the date of its issuance on March 5, 1980, until the date of its declared cancellation on April 22, 1980. Having made that choice, Auto-Owners acknowledged that the policy was in effect on the date of the accident, March 27, 1980, and it therefore became liable under the policy. Auto-Owners could not, on the one hand, recognize the existence of the policy and retain a portion of the premium and, on the other hand, deny the coverage afforded by the policy because of alleged fraudulent misrepresentations.

In 45 C.J.S. *Insurance* § 716 at 696-97 (1946), the author notes: "Insurer is precluded from asserting a forfeiture where, after acquiring knowledge of the facts constituting a breach of condition, it has retained the unearned portion of the premium or has failed to return or tender it back with reasonable promptness, especially where the nature of the breach or ground for forfeiture is of such character as to render the policy void from its inception . . . ." See, also, *Hawkeye Casualty Co. v. Stoker,* 154 Neb. 466, 48 N.W.2d 623 (1951); *Farmers & Merchants Ins. Co. v. Bodge,* 76 Neb. 31, 106 N.W. 1004 (1906), *rev'd on other grounds* 76 Neb. 35, 110 N.W. 1018 (1907); 45 C.J.S. *Insurance* § 470 (1946); *St. Paul Fire & Marine Ins. Co. v. Ruddy,* 299 F. 189 (8th Cir. 1924).

Obviously, Auto-Owners had knowledge of the alleged "fraudulent misrepresentation" at least by the time it filed its answer in this case. And even

though it relied upon rescission in its answer, it nevertheless stood by its earlier cancellation and kept the portion of the premium earned during the time the accident occurred. Having waived its right to rescind the policy from its inception and having elected to keep the policy in force until April 22, 1980, Auto-Owners became liable to defend Popish and Wrich and to pay any judgments which may be assessed against Popish and Wrich as covered by the policy.

Appellants jointly have requested the allowance of an attorney fee both in this court and in the trial court, pursuant to the provisions of Neb. Rev. Stat. § 44-359 (Reissue 1978). That section provides in part: "In all cases where the beneficiary, or other person entitled thereto, brings an action upon any type of insurance policy . . . the court, upon rendering judgment against such company, person or association, shall allow the plaintiff a reasonable sum as an attorney's fee in addition to the amount of his recovery, to be taxed as part of the costs. If such cause is appealed, the appellate court shall likewise allow a reasonable sum as an attorney's fee for the appellate proceedings . . . ." Because the plaintiffs in the court below and the appellants in this court include both the beneficiaries of the policy (i.e., Popish and Wrich) and Wrich's carrier, we are unable at this time to determine whether the provisions of § 44-359 should be applied. The appellants Popish and Wrich clearly are "beneficiaries" who have brought "an action upon" the liability insurance policy. Attorney fees under the statute are available for an insured who wins a declaratory judgment action against the insurer. *Herrera v. American Standard Ins. Co.*, 203 Neb. 477, 279 N.W.2d 140 (1979). However, the appellant Dairyland Insurance Company stands on different ground. Dairyland may be entitled to bring or join this declaratory judgment action because of the effect a judgment may have on its own liability to Wrich on

a separate policy. But, as between Dairyland and Auto-Owners, this suit is merely an adjustment of liability priorities and cannot be seen as "an action upon" the policy issued by Auto-Owners to Popish. The appellants Richard A. Wrich and Judith C. Popish are therefore given 10 days from the date of the issuance of this opinion in which to make a showing to this court of whether they have incurred any expenses by way of attorney fees in connection with either the trial of this case in the District Court or its appeal in this court. See *Hawkeye Casualty Co. v. Stoker, supra.* The appellees are given 5 days thereafter to make any countershowing. Upon the filing of such showings, the court will give further consideration to the request for attorney fees. Except, therefore, for the matter of attorney fees, which the court reserves at this time, the judgment of the trial court is reversed and the cause remanded with instructions to enter a judgment for the appellants as prayed for in their petition.

REVERSED AND REMANDED WITH DIRECTIONS.

BOSLAUGH, J., concurs in the result.

ELLA BETH STOLTE, APPELLANT, V. HERBERT A. BLACKSTONE, APPELLEE.

328 N.W.2d 462

Filed December 17, 1982. No. 81-633.

1. **Summary Judgment.** The absence of a genuine issue as to any material fact and entitlement to judgment as a matter of law are prerequisites to a summary judgment.
2. _____. The purpose of a motion for summary judgment is to pierce the allegations of the pleadings and to show conclusively that the controlling facts are otherwise than as alleged.
3. _____. Summary judgment is not appropriate, even where there are no conflicting evidentiary facts, if the ultimate inferences to be drawn from those facts are not clear.
4. **Witnesses: Perjury.** Witnesses generally are immune from civil liability for damages resulting from testimonial statements, and

no civil action lies to recover damages caused by perjury or for conspiracy to commit perjury unless the perjury is but a part of a larger plan or scheme.

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

Wright, Simmons & Selzer, and P. J. Heaton, Jr., for appellant.

Richard M. Van Steenberg of Van Steenberg, Brower, Chaloupka, Mullin & Holyoke, and Thomas J. Shomaker of Sodoro, Daly & Sodoro, for appellee.

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

CAPORALE, J.

This appeal challenges the summary judgment granted by the trial court to defendant-appellee, Dr. Herbert A. Blackstone, which dismissed the petition of plaintiff-appellant, Ella Beth Stolte. Stolte's petition sought money damages for Blackstone's alleged fraud and conspiracy to defraud Stolte and others in a will contest case. Among other assignments, Stolte contends the trial court erred in ruling that no civil action for damages lies for giving or conspiring to give false testimony. We affirm the judgment of the trial court.

Clair V. Gilbert felt deeply the September 1969 death of his wife. In July 1970 he was committed to a state hospital, but was discharged approximately 1 month later. Dr. Blackstone was Mr. Gilbert's attending physician at that time, had participated in the commitment, and had treated him after the release.

Following the death of his wife, Mr. Gilbert, having no children, became reliant upon one of his nieces, Millie Gilbert. The record further indicates that from March 1970 to May 1973 Mr. Gilbert made gifts to Millie Gilbert of money to the extent of about one-quarter of a million dollars. On May 7, 1971, he executed a will leaving his remaining estate of a

little over one-half of a million dollars to Millie Gilbert. Mr. Gilbert died on January 31, 1975.

An action was brought to contest Millie Gilbert's claim to Clair V. Gilbert's estate, as well as the validity of the inter vivos gifts to her. The action sought to invalidate the will and to recover the gifts made, claiming Millie Gilbert unduly influenced the decedent and that he was mentally incompetent. The suit was settled in July 1977, immediately preceding trial. The parties in settlement compromised the amount of moneys they would respectively take.

Dr. Blackstone testified on March 12, 1977, in a deposition given in conjunction with that suit, that Clair V. Gilbert was competent, in his professional opinion, to have made both the gifts and the will. However, on May 16, 1978, the heirs herein discovered, during a consultation with the Internal Revenue Service in regard to other matters, a handwritten memorandum from Dr. Blackstone to the effect that Mr. Gilbert was incompetent. This memorandum was dated May 18, 1972. In addition to describing Clair V. Gilbert's condition in technical medical terms, it certified that he was not then in possession of his mental faculties and had not been for some time, and, further, that he had not managed his own affairs for the preceding 12- to 18-month period.

The pivotal issue is whether the trial court was correct in ruling that the March 12, 1977, testimony of Dr. Blackstone, if indeed it was false, would necessarily be immune from civil liability. If such immunity does exist, then there could be no genuine issue as to any material fact and Dr. Blackstone was entitled to judgment as a matter of law. The absence of a genuine issue as to any material fact and entitlement to judgment as a matter of law are prerequisites to a summary judgment. Neb. Rev. Stat. § 25-1332 (Reissue 1979); *Gitschel v. Sauer,* 212 Neb.

454, 323 N.W.2d 93 (1982); *Manzer v. Pentico,* 209 Neb. 364, 307 N.W.2d 812 (1981).

It appears that we have not heretofore addressed the question of whether the immunity generally granted witnesses should extend to giving or conspiring to give false testimony. However, a variety of reasons have been stated by other courts in support of the majority rule which refuses to recognize a common-law civil cause of action for giving false testimony. Among the principal reasons are that witnesses need to be protected against the fear of subsequent actions based on their testimony; that a final judgment or other final disposition cannot be collaterally attacked; and that to permit the issues to which the allegedly false testimony was addressed to be retried would lead to endless litigation. The general rule is stated to extend to conspiracy actions on the ground that an act which is not itself actionable cannot be the object of an actionable conspiracy. An exception is frequently recognized when the total objective of the conspiracy is greater than the determined issue and the determined issue is but a step or part of the larger total conspiracy or fraudulent scheme. See, Annot., 31 A.L.R.3d 1423 (1970); Annot., 54 A.L.R.2d 1298 (1957).

Plaintiff alleges a conspiracy. Among the items of evidence is the affidavit of Dr. Blackstone in which he categorically denies any scheme or conspiracy with Millie Gilbert or anyone else to assist her or them in gaining an advantage over plaintiff-appellant or others. This statement stands uncontradicted. Although the purpose of a motion for summary judgment is to pierce the allegations of the pleadings and to show conclusively that the controlling facts are otherwise than as alleged, *Gerdes v. Spetman,* 197 Neb. 406, 249 N.W.2d 210 (1977), and *Prairie View Tel. Co. v. County of Cherry,* 179 Neb. 382, 138 N.W.2d 468 (1965), summary judgment is not appropriate, even where there are no conflicting evidentiary facts, if the ultimate inferences to be drawn

from those facts are not clear. *Metro. Tech. Community College v. South Omaha Industrial Park,* 207 Neb. 472, 299 N.W.2d 535 (1980). For the purpose of this opinion we assume arguendo that an inference of a conspiracy can be drawn from the circumstances, notwithstanding Dr. Blackstone's denial of such.

15A C.J.S. *Conspiracy* § 16 at 648 (1967) speaks to the issue as follows: "Since, as a general rule, in the absence of statute, no action lies to recover damages caused by perjury, false swearing, subornation of perjury, or an attempt to suborn, as discussed in Perjury § 92, an action for damages for conspiracy to commit perjury and the giving of false testimony or for subornation or attempted subornation of perjury, cannot ordinarily be maintained. It has been held, however, that where the giving of false testimony is but a part of a plan or scheme to defraud a person, an action for the conspiracy will lie. . . ." The same view is taken in 16 Am. Jur. 2d *Conspiracy* § 63 at 275-76 (1979): "The general rule is that no civil action for damages lies for false testimony, or for subornation of false testimony, or for conspiracy to give or to procure false testimony. Several reasons have been stated by the courts for refusing to recognize a cause of action for conspiracy to give false testimony: testimony of witnesses is privileged to protect them against the fear of subsequent actions based on their testimony; an act which is not in itself actionable cannot be the subject of an actionable conspiracy; and the final judgment in the action in which the false testimony has been given cannot be collaterally attacked.

"An action for conspiracy to procure false testimony can be brought where all the parties to the conspiracy action were strangers to the action or proceeding in which the testimony was used. Also, some cases hold or recognize that an action may be brought where the alleged perjury is merely a step

in the accomplishment of a larger, actionable conspiracy."

Eikelberger v. Tolotti, 96 Nev. 525, 611 P.2d 1086 (1980), held that plaintiffs had no cause of action for civil conspiracy against an attorney who submitted a partially false affidavit, on the basis that perjury is an offense against the public only and is subject only to the criminal law.

In *W. G. Platts, Inc. v. Platts,* 73 Wash. 2d 434, 438 P.2d 867 (1968), plaintiff claimed that defendants testified differently in depositions than they had indicated they would in a criminal action and a civil action growing out of it wherein both actions were defeated. Defendants were then sued for the damages plaintiff claimed he suffered. In affirming the trial court's granting of the summary judgment, the Washington Supreme Court said at 440, 438 P.2d at 871: "Perjury is, of course, a public offense and punishable in criminal proceedings, but from earliest times the giving of false testimony has not been treated as a wrong actionable in civil proceedings. This same immunity applies to statements made preliminary to testifying."

In *Ragsdale v. Watson,* 201 F. Supp. 495 (W.D. Ark. 1962), plaintiff alleged that he had sustained an injury while acting within the scope of his employment but was defeated in his efforts to obtain workmen's compensation benefits by a conspiracy between the insurance adjuster and two physicians to defraud him. Plaintiff claimed the adjuster had him examined by the physicians and subsequently secured from them false, incomplete and misleading reports and evidence as to his physical condition which resulted in denial of his claim. The motion of the several defendants to dismiss for failure to state a claim was sustained and the complaint dismissed. In doing so the court stated at 502: "Since the civil conspiracy to defraud alleged in this action is based on the overt act of perjured testimony, the next question is whether the perjured testimony itself on

the part of an individual is subject to a civil suit. The rule as to civil liability for perjury is stated as follows in 41 Am.Jur., Perjury, beginning at page 44:

" 'Sec. 81. Generally.—Ordinarily, aside from defamation and malicious prosecution, the courts will not recognize any injury from false testimony upon which a civil action for damages can be maintained. Thus, it has been held that false testimony in a criminal action which results in a conviction of the plaintiff does not furnish the basis of a civil suit to recover damages, and that no action for damages lies for false testimony in a civil suit whereby the plaintiff fails to recover a judgment, or a judgment is rendered against him. * * * In accordance with these principles, therefore, no action lies for false testimony by reason of which the plaintiff recovers a smaller amount of damages than the amount to which he is entitled.' "

Williams v. McClellan, 59 Misc. 620, 111 N.Y.S. 229 (1908), is somewhat similar to the present case. Plaintiff therein claimed that, in reliance upon certain statements made to him by the defendants, and upon their agreements to testify to certain facts, he had brought an action to establish a will and to set aside certain allegedly fraudulent deeds. He further claimed that, pursuant to a conspiracy between the defendants, they had withheld that testimony and had falsely testified to the contrary, as a result of which judgment was entered against plaintiff. A demurrer to the complaint was sustained, the court observing that an action will not lie to recover damages for perjury alleged to have been committed in a former case in which the plaintiff might have been interested. However, *Newin Corp. v. Hartford Acc.,* 37 N.Y.2d 211, 333 N.E.2d 163, 371 N.Y.S.2d 884 (1975), held a cause existed against insurers to recover on bonds issued to persons not involved in the suit on another bond wherein the perjury occurred. *Newin* rested on the rationale that the conspiracy in-

volved a fraudulent scheme beyond the issues involved in the proceeding at which the perjury took place.

Although the Wisconsin Supreme Court in *Radue v. Dill,* 74 Wis. 2d 239, 246 N.W.2d 507 (1976), held that the allegation that defendants conspired to injure plaintiff's reputation and professional standing by giving false information stated a cause of action under its statute prohibiting conspiracies to injure another's reputation or profession by any means, the allegation did not state a cause of action based on perjury. In so concluding, the court reviewed the authorities as follows at 241-43, 246 N.W.2d at 509-10: "The defendants' contention in support of the demurrer is simply that a conspiracy to give or to procure the giving of false testimony is not civilly actionable. The basis for this argument is the long established rule that statements made during investigatory proceedings and judicial proceedings are absolutely privileged, and therefore acts of perjury may not form the basis of a civil action for damages. *Bergman v. Hupy* (1974), 64 Wis.2d 747, 221 N.W.2d 898; *Schultz v. Strauss* (1906), 127 Wis. 325, 106 N.W. 1066. Such statements are privileged to promote the policy of encouraging witnesses to speak freely without fear of civil liability, and as a result perjury is an offense against the public only and subject only to the criminal law. The defendants argue that since overt acts pursuant to the conspiracy are necessary, there can be no civil action where, as in this case, the only overt acts are privileged acts of perjury. They apparently reason that an act which constitutes no ground of an action when done by one alone cannot be made the ground of such action by alleging it to have been done by and through a conspiracy of several.

"Although this court has never considered the question, the courts of other jurisdictions have uniformly held that a plaintiff may not, by claiming conspiracy, avoid the doctrine that there is no civil

action for perjury. *Platts v. Platts,* (1968), 73 Wash.2d 434, 438 P.2d 867; Annot., *Actionability of Conspiracy to Give or to Procure False Testimony or Other Evidence,* 31 A.L.R.3d 1423 (1970). These decisions reveal two basic grounds upon which the courts have relied to void this type of action. The first ground is, of course, that privileged acts of perjury may not form the basis of any civil action. The second ground relied upon is that there may be no action for civil conspiracy unless the overt acts causing damage are actionable themselves. *See Platts v. Platts, supra,* at p. 439.

"The plaintiff, however, bases his claim for relief upon two arguments, which, he contends, distinguish this case from those of other jurisdictions. First, plaintiff claims that an exception to the general rule against civil actions for conspiracy to commit perjury exists and applies here where the perjury is merely a step in the accomplishment of a larger plan. Second, plaintiff claims that sec. 134.01, Stats., creates a civil cause of action for conspiracy alone.

"An action for conspiracy will lie where the perjury is merely a step in the accomplishment of a larger plan. *Verplanck v. Van Buren* (1879), 76 N.Y. 247. The instant case, however, does not fall within this rule. According to the complaint, the only acts complained of are privileged acts of giving false information, and while the plaintiff contends that these acts are only a part of the entire transaction, there is nothing alleged to show any other parts. These acts of perjury appear to be the entire plan. In each of the cases to which plaintiff points in support of his contention, there were either other acts in furtherance of the conspiracy besides the acts of perjury, or the action involved was one based not solely upon conspiracy but upon fraud and deceit. For example, in *Verplanck v. Van Buren, supra,* the defendants had not only perjured themselves but, as the court pointed out, more importantly had pre-

pared fictious [sic] contracts and made false entries into the books of account. In *Frist v. Gallant* (W.D.S.C. 1965), 240 F. Supp. 827, the court held that the plaintiff's action charging the defendants with conspiracy to defraud could be based upon perjured testimony, provided all the necessary elements of fraud and deceit were proved. In the case now before this court the claim is one based solely upon an executed conspiracy, the only overt acts of which are the giving of false testimony."

Application of the general rule is not, however, universal. For example, *Morgan v. Graham,* 228 F.2d 625 (10th Cir. 1956), held that the general rule did not apply to the false and fraudulent acts of an insurer and its tort-feasor in making false statements that the tort-feasor was not covered by insurance.

Nonetheless, since it is the damage resulting from the perjury which a civil action seeks to redress, we are of the opinion the better reasoning requires that the perjury be but a step or part of a larger total conspiracy or fraudulent scheme in order to create an exception to the rule that there is no civil liability for giving or conspiring to give false testimony. Here, the only complaint made is of the alleged false testimony; the consequence sought to be redressed flows solely and only from the defendant's deposition testimony.

In the absence of a statute imposing civil liability, we believe the better policy to be to grant witnesses immunity from civil liability for damages resulting from statements made by them as such, and to leave the matter of liability for perjury to the criminal law. See Neb. Rev. Stat. § 28-915 (Reissue 1979). In view of this determination, consideration of appellant's other arguments of error is not necessary.

AFFIRMED.

WHITE, J., participating on briefs.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. PAUL G. MATT III, RESPONDENT.

327 N.W.2d 622

Filed December 17, 1982. No. 81-690.

1. **Disciplinary Proceedings.** It is the obligation of this court in disciplinary proceedings to review the evidence de novo to determine if discipline should be imposed and, if it should, the extent thereof.
2. **Disciplinary Proceedings: Aiding and Abetting.** Aiding and abetting criminal dealings in controlled substances, whatever the motivation of an attorney may be, constitutes conduct involving moral turpitude and warrants disciplinary action.

Original action. Judgment of suspension.

Paul L. Douglas, Attorney General, and Mel Kammerlohr, for relator.

Barlow, Johnson, DeMars & Flodman, for respondent.

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

PER CURIAM.

This is an original proceeding in which the Nebraska State Bar Association, relator, filed formal charges against Paul G. Matt III, respondent, who was admitted to the practice of law in this state on February 23, 1971.

Formal charges against the respondent Matt were filed in this court on September 28, 1981, by the Committee on Inquiry of the First Judicial District. The formal charges allege that on or about March 7, 1980, the respondent received a telephone call at his law office from a personal friend, Judy Gierlich. Gierlich asked the respondent where she could obtain cocaine. The respondent first told her that he did not know, but on further questioning agreed to contact a friend of his in Omaha, Nebraska, concerning the availability of cocaine and then recontact her.

On or about March 8, 1980, respondent called

Gierlich at approximately 10:15 a.m. and told her that he had talked to the friend in Omaha and had been told that anything was available. At approximately 10:23 a.m. on the same day respondent received a telephone call from Gierlich. Respondent asked Gierlich what quantity of cocaine she intended to purchase. Respondent then gave the telephone number of the person in Omaha to Gierlich and advised her that he would also call again "to make sure there's no problem."

Later on March 8, 1980, Gierlich called the person in Omaha and agreed to meet him at his residence in Omaha at 1 p.m. for the purchase of cocaine. At approximately the appointed time Gierlich arrived at the residence in Omaha. When she left the residence some 2 hours later she was arrested by officers of the Nebraska State Patrol. She was subsequently searched and found to be in possession of 2 ounces of cocaine and $2,000 in cash.

The record establishes that Gierlich's telephone was being tapped by the Lincoln Police Department in connection with a drug investigation at the time of the conversations between Gierlich and respondent. The record also establishes that, based on respondent's telephone conversations with Gierlich, the respondent was charged with conspiracy to possess cocaine with intent to deliver. Those charges were pending for more than a year before the respondent was allowed to enter the pretrial diversion program. Upon his successful completion of the program, the charges against respondent were dismissed.

A hearing was held before the Committee on Inquiry of the First Judicial District on July 17, 1981. Exhibits were received and the respondent testified fully and freely. The record reflects that prior to the events in March 1980 the respondent had occasionally used marijuana personally and had purchased marijuana more than once from Gierlich, who was a close personal friend. His conduct here was motivated by his friendship with Gierlich and

he received no remuneration for his efforts.

Following the hearing the Committee on Inquiry prepared formal charges against the respondent, alleging that these facts constituted a violation of the Code of Professional Responsibility and of Disciplinary Rule 1-102(A)(1) and (6). Those rules provide: "A. A lawyer shall not:

"1. Violate a Disciplinary Rule. . . . 6. Engage in any other conduct that adversely reflects on his fitness to practice law."

The charges of the Committee on Inquiry were reviewed by the Disciplinary Review Board, which found that grounds existed for discipline of the respondent and directed that formal charges and the record be filed with this court. The Disciplinary Review Board recommended that the court issue a reprimand. Formal charges were filed in this court on September 28, 1981.

By agreement of counsel a conditional admission was filed, together with a recommendation that this court impose a judgment of censure and reprimand on the respondent. The recommendation was not accepted by this court and the matter was referred to a referee. The referee considered the matter solely upon the record at the hearing before the Committee on Inquiry. On April 15, 1982, the referee filed his report finding that the respondent had violated Disciplinary Rule 1-102(A)(1) and (6) of the Code of Professional Responsibility and recommended that respondent be suspended from the practice of law for a period of 1 year, and that readmission be denied unless respondent made a satisfactory showing of rehabilitation from usage of controlled substances.

It is the obligation of this court in disciplinary proceedings to review the evidence de novo to determine if discipline should be imposed and, if it should, the extent thereof. *State ex rel. Nebraska State Bar Assn. v. McArthur,* 212 Neb. 815, 326 N.W.2d 173 (1982).

The referee specifically found that as a result of respondent's efforts Judy Gierlich was able to illegally purchase a controlled substance and respondent's personal acquaintance in Omaha was able to sell a controlled substance, and respondent knew, or had reason to know, that such would be the result of his efforts.

This court finds that such conduct adversely reflects upon respondent's fitness to practice law and constitutes a violation of the disciplinary rules as charged. There can be no doubt that aiding and abetting criminal dealings in controlled substances, whatever the motivation of an attorney may be, constitutes conduct involving moral turpitude and warrants disciplinary action.

The record reflects that the respondent has successfully completed pretrial diversion and no longer is involved with drugs. There are other mitigating circumstances shown in the record which should be considered in determining what discipline should be imposed.

We conclude that the respondent should be suspended from the practice of law for a period of 1 year. All costs are taxed to the respondent.

JUDGMENT OF SUSPENSION.

STATE OF NEBRASKA, APPELLEE, V. RICHARD SCHMIDT, SR., APPELLANT.

327 N.W.2d 624

Filed December 17, 1982. No. 82-147.

1. **Criminal Law: Judgments: Appeal and Error.** In reviewing criminal cases this court will not set aside the judgment of the trial court if there is sufficient evidence, taking the view most favorable to the State, to support the judgment.
2. **Plea in Abatement.** Any error by the District Court in ruling on a plea in abatement is cured by a subsequent finding by the "trier of fact" of guilt beyond a reasonable doubt.
3. **Sentences: Appeal and Error.** A sentence imposed within statu-

tory limits will not be disturbed on appeal absent an abuse of discretion.

Appeal from the District Court for Hall County: JOSEPH D. MARTIN, Judge. Affirmed.

David A. Bush, for appellant.

Paul L. Douglas, Attorney General, and Lynne Rae Fritz, for appellee.

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

KRIVOSHA, C.J.

On June 15, 1981, the appellant, Richard Schmidt, Sr. (Schmidt), was charged in an amended complaint with the crimes of attempted murder in violation of Neb. Rev. Stat. § 28-201 (Reissue 1979) and kidnapping in violation of Neb. Rev. Stat. § 28-313(1) (Reissue 1979). Following a preliminary hearing, Schmidt was bound over to the District Court for trial on both charges. He waived his right to a jury trial, and trial to the court commenced on January 11, 1982. At the conclusion of the trial he was found guilty of both offenses. Following the overruling of his motion for new trial, appellant was sentenced to concurrent terms of 7 to 15 years on the charge of attempted murder and 2 to 5 years on the charge of kidnapping, and he appealed to this court. Having reviewed the record in this case, we find that both the conviction entered by the trial court and the sentence imposed are in all respects correct, and affirm both the conviction and sentence.

Schmidt has assigned a number of errors. His first assignment of error is, in essence, that the evidence was insufficient to find him guilty beyond a reasonable doubt of the offenses charged. The record simply will not support that claim. There was more than sufficient evidence presented to the trial court from which the trial court could find beyond a reasonable doubt that on June 10, 1981, Schmidt, then being separated from his wife, Charlette

Schmidt, the victim in this case, contacted his wife and asked her to meet him at his partment so that they could go to pick up a gift that Schmidt told her she would enjoy. Schmidt directed his wife to come alone and to bring her own car. After arriving at Schmidt's apartment, Schmidt offered to drive, and his wife accepted. Schmidt drove to a gas station where he purchased gas, and then he drove his wife to a secluded country road in Hall County. Schmidt stopped the car on the shoulder of the road and informed his wife that he was leaving, taking only his clothes. He then handed her a letter and asked her to recopy it for him because, he maintained, the letter expressed her feelings about him and he wanted to keep this letter to remember her wherever he went. However, the letter actually referred to his wife leaving, instead of Schmidt. She refused to write the letter and asked Schmidt to take her home. Schmidt insisted that she rewrite the letter, and she finally acquiesced and rewrote the letter with a pen and stationery provided by Schmidt. Schmidt then gave her an envelope and instructed her to address it to his apartment and to place in it the rewritten letter. After she sealed the envelope, Schmidt took it from her.

Schmidt then asked his wife to go for a walk with him in the secluded area. She refused, and again requested that she be taken home. Schmidt got out of the car, walked around to the passenger side where his wife was seated, opened the door, and dragged his wife from the car. He continued to drag her through a vacant field a distance of about 100 to 150 yards into a grove of trees. Schmidt then forced his wife through some branches into a secluded clearing surrounded by trees and brush and attempted to place around her neck a piece of nylon rope with a loop tied into it. His wife struggled to get free, but could not. During the course of the struggle, however, the rope slipped down around her neck, causing the knot to come apart. She tried to

grab the rope to throw it away, but Schmidt retrieved it and tried to get it around her neck again. The attempt was unsuccessful and she struggled free. While on her knees, she pleaded with Schmidt to stop it, reminding him of a letter from a mutual friend and stating that the children did not deserve a broken home. She promised to come back to Schmidt and do anything he desired. At his request, she kissed him. She then asked Schmidt to take her home and they headed back for the car. Schmidt then returned his wife to her home and, believing her promise that they would reconcile, went home to change his clothes. Following an investigation of the incident, Schmidt was arrested by a sheriff's lieutenant 2 days later.

We have often stated that in reviewing criminal cases this court will not set aside the judgment of the trial court if there is sufficient evidence, taking the view most favorable to the State, to support the judgment. *State v. Parks,* 212 Neb. 635, 324 N.W.2d 673 (1982); *State v. King,* 204 Neb. 47, 281 N.W.2d 226 (1979). The question presented to us by these assignments of error is whether the evidence introduced at trial and viewed most favorably to the State establishes the elements of the crimes charged beyond a reasonable doubt. Section 28-313 as relevant to this case defines kidnapping as follows: "(1) A person commits kidnapping if he abducts another or, having abducted another, continues to restrain him with intent to do the following: . . . (c) Terrorize him or a third person; or (d) Commit a felony . . . ." Section 28-201 as relevant to this case defines criminal attempt as follows: "(1) A person shall be guilty of an attempt to commit a crime if he: . . . (b) Intentionally engages in conduct which, under the circumstances as he believes them to be, constitutes a substantial step in a course of conduct intended to culminate in his commission of the crime. (2) When causing a particular result is an element of the crime, a person shall be guilty of an attempt to

commit the crime if, acting with the state of mind required to establish liability with respect to the attendant circumstances specified in the definition of the crime, he intentionally engages in conduct which is a substantial step in a course of conduct intended or known to cause such a result." We believe that the facts in this case more than adequately establish that Schmidt abducted his wife against her will and took her to the secluded area for the purpose of strangling her. It would be difficult to argue that the evidence did not prove that Schmidt abducted his wife and continued to restrain her for the purpose of either terrorizing her or committing a felony. One would further be hard pressed to argue that his dragging her through a field against her will and placing a rope around her neck in an attempt to strangle her did not establish a violation of both offenses charged. See *State v. Sodders,* 208 Neb. 504, 304 N.W.2d 62 (1981). We believe the evidence was sufficient, taking the view most favorable to the State, to find that the elements of both §§ 28-201 and 28-313(1) were established and the law violated. The assignment therefore is without merit.

A second error assigned by Schmidt is that he was denied a preliminary hearing both in form and in substance and, thus, the trial court erred in overruling his plea in abatement. In view of what we have just said concerning the sufficiency of the evidence, this assignment must likewise be overruled. The general rule in this jurisdiction is that any error by the District Court in ruling on a plea in abatement is cured by a subsequent finding by the "trier of fact" of guilt beyond a reasonable doubt. See, *State v. Franklin,* 194 Neb. 630, 234 N.W.2d 610 (1975); *State v. Brehmer,* 211 Neb. 29, 317 N.W.2d 885 (1982); *State v. Lehman,* 203 Neb. 341, 278 N.W.2d 610 (1979). Under the circumstances in this case, this assignment therefore is likewise without merit.

The third assignment of error is that the trial court erred in finding Schmidt guilty of kidnapping,

in that the kidnapping was simply a part of another offense. This argument has been presented to this court on previous occasions and rejected. In *State v. Pankey,* 202 Neb. 595, 598, 276 N.W.2d 233, 235 (1979), quoting from *State v. Goham,* 187 Neb. 34, 187 N.W.2d 305 (1971), we said: " 'The purpose of kidnapping in every instance is to make it possible to commit some other crime. Its very nature therefore embraces other crimes as well as that of kidnapping. The penalties of kidnapping are intentionally more severe than the other crimes which may be included because of the consequences which often result from its perpetration.' " The evidence in this case established a classic kidnapping violation. That violation occurred even before anything more took place. One may not erase the commission of a crime simply because, after committing the crime, a second crime is committed. The assignment is overruled.

Schmidt further argues that even if he had committed the crime of attempted murder, the act was completely and voluntarily abandoned and therefore, under the provisions of the Model Penal Code from which our § 28-201 is patterned, the act of abandonment should be considered as an absolute defense to the instant charge. While it is true that the Model Penal Code, which was used as a guideline by the Legislature when it adopted § 28-201, does contain the defense of abandonment in § 5.01(4) (Tent. Draft No. 10, 1960), it is further true that the defense was not included in the act when adopted by the Legislature. Nor can it be said that the omission of the defense of "voluntary abandonment" in connection with the crime of criminal attempt was either an oversight by the Legislature or due to its failure to know that such a defense could have been included when it adopted the criminal attempt statute in 1977. At the same time that § 28-201 was adopted, the Legislature also enacted Neb. Rev. Stat. § 28-202 (Reissue 1979), the crime of "con-

spiracy." As a part of the crime of criminal conspiracy, the Legislature specifically adopted the defense of abandonment or renunciation of criminal intent. See Neb. Rev. Stat. § 28-203 (Reissue 1979). The defense, however, was limited to the crime of conspiracy under § 28-202, and did not include criminal attempt, § 28-201. Schmidt concedes that this defense has never been adopted in Nebraska but maintains that this court should nevertheless treat abandonment as an affirmative defense to be judicially grafted into the statutes. If that portion of the Model Penal Code is to become a part of the substantive law of the State of Nebraska, it is for the Legislature to do, and not for this court. Since abandonment is not a defense to the commission of the crime of criminal attempt under Nebraska law, Schmidt's assignment of error is without merit.

Schmidt's final assignment of error is that the trial court abused its discretion in sentencing him to two concurrent terms of 7 to 15 years for the offense of attempted murder and 2 to 5 years for the offense of kidnapping. Both the offenses of attempted murder and kidnapping are Class II felonies punishable by a minimum of 1 year's imprisonment and a maximum of 50 years' imprisonment. In reviewing the sentences imposed by trial courts we are, of course, bound by our long-established rule that a sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion. See, *State v. Beckner,* 211 Neb. 442, 318 N.W.2d 889 (1982); *State v. Prosser,* 209 Neb. 766, 311 N.W.2d 525 (1981). As we have already indicated, the evidence clearly establishes that Schmidt intended, on the day in question, to kidnap his wife and to bring about her death by strangulation. It was only by reason of events beyond his control that he was not able to immediately carry out his plan, and then only because of his wife's pleading and promises did he give up his plan. But for circumstances not of Schmidt's own doing, he might well have been charged with

the murder of his wife. His offers of excuse to the crimes are not very impressive under the circumstances. Kidnapping and attempted murder as Class II felonies are considered by the Legislature to be among the most serious crimes one can commit. The sentences imposed were at the minimum end of the spectrum. We are unable to say that, under the facts of this case, the trial court abused its discretion. The final assignment of error therefore must also be overruled.

Having overruled all of Schmidt's assignments of error, we therefore affirm the judgment and sentences of the trial court.

AFFIRMED.

GILMORE CONSTRUCTION COMPANY, APPELLANT, V. MARVIN D. MILLER AND JOHN HANLON, COMMISSIONER OF LABOR, APPELLEES.

327 N.W.2d 628

Filed December 17, 1982. No. 82-214.

1. **Employment Security Law: Case Overruled.** To the extent that the holding in *A. Borchman Sons v. Carpenter,* 166 Neb. 322, 89 N.W.2d 123 (1958), is understood to provide that both members of nonstriking unions and nonunion employees who may ultimately benefit by reason of a strike called by another union are disqualified from receiving unemployment compensation benefits under the provision of Neb. Rev. Stat. § 48-628(d) (Reissue 1978), even though they are not directly involved in the work stoppage, it is overruled.
2. **Employment Security Law.** Members of nonstriking unions and nonunion employees who are not participating in or financing or directly interested in a labor dispute which caused a work stoppage, and who do not belong to a grade or class of workers who, immediately before the commencement of the stoppage, were members employed at the premises at which the stoppage occurs and are participating in or financing or directly interested in the labor dispute, are not disqualified from receiving benefits under Neb. Rev. Stat. § 48-628(d) (Reissue 1978).

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

Dean G. Kratz of McGrath, North, O'Malley & Kratz, P.C., for appellant.

Pamela A. Mattson, for appellee Hanlon.

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

KRIVOSHA, C.J.

The appellant, Gilmore Construction Company, appeals from a judgment of the District Court for Douglas County, Nebraska, upholding a decision of the Nebraska Appeal Tribunal, a part of the Nebraska State Department of Labor. The appeal tribunal found that the employee, Marvin D. Miller, was not disqualified from receiving unemployment compensation benefits by reason of being involved in a labor dispute. We believe that the trial court was correct in its decision and therefore affirm the trial court.

Miller is a member of Cement Masons Local No. 538 and was employed by Gilmore Construction Company on a project called "Financial Plaza" located in the city of Omaha, Nebraska. On June 4, 1980, a strike was called by the Omaha carpenters union against contractors in Omaha, Nebraska, including Gilmore. On the first day of the strike, Miller reported to the jobsite and spoke to his foreman. According to Miller, he was told that the equipment necessary to perform the work had been removed by Gilmore and that Miller therefore would be called back to work as "soon as they got it settled." The cement masons did not go on strike in sympathy with the carpenters, and, in fact, after their separate contract expired they worked without a contract until a settlement of the contract for the cement masons was reached. Miller testified that as a cement mason he did not stand to gain or lose in any way by the outcome of the carpenters' strike or the ironworkers' strike because the cement masons

had a separate contract with the employers. Miller further testified that he did not in any way participate in the strike of the carpenters or the ironworkers, nor did he in any way finance the strike of the carpenters or the ironworkers. This testimony, as given by Miller, was not refuted.

The Employment Security Law of Nebraska contains a specific provision regarding claims for benefits filed as a result of a labor dispute. Neb. Rev. Stat. § 48-628(d) (Reissue 1978) provides that an employee shall be denied unemployment benefits "(d) For any week with respect to which the commissioner finds that his total unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment, or other premises at which he is or was last employed; *Provided,* that this subdivision shall not apply if it is shown to the satisfaction of the commissioner that (1) he is not participating in or financing or directly interested in the labor dispute which caused the stoppage of work, and (2) he does not belong to a grade or class of workers of which, immediately before the commencement of the stoppage, there were members employed at the premises at which the stoppage occurs, any of whom are participating, financing, or directly interested in the dispute . . . ."

Gilmore points out to us that in the case of *A. Borchman Sons v. Carpenter,* 166 Neb. 322, 328, 89 N.W.2d 123, 127 (1958), we denied unemployment compensation to a member of a union not a member of the striking union on the basis that " ' "a labor dispute that affects the wages, hours of work, and general conditions of employment, causes all employees concerned to be directly interested." ' " Furthermore, in *Borchman* we held, as a matter of law, that the disqualification rule "applies to members of unions who do not strike and to nonunion employees." (Syllabus of the court.)

While there is a split of authority among jurisdictions on this point, we believe that the better-

reasoned cases would reach a conclusion contrary to that which we declared in *Borchman* and therefore would cause us to overrule our previous decision, thereby bringing about the result urged by the Commissioner of Labor. It appears to us that the rationale of *Borchman,* as pointed out by the commissioner, effectively repeals the exemptions contained in § 48-628(d) and brings about just the opposite result intended for by the Legislature. See Annot., 62 A.L.R.3d 380 (1975).

The evidence is undisputed that work stoppage in the first instance was because of a labor dispute. Therefore, in order for Miller to become "requalified," he must show that he was not participating in or financing or directly interested in the labor dispute which caused the stoppage of work *and* that he does not belong to a grade or class of workers of which, immediately before the commencement of the stoppage, there were members employed at the premises at which the stoppage occurs, any of whom are participating in, financing, or directly interested in the dispute.

The evidence, as presented, established without dispute that Miller was not participating in or financing the labor dispute and did not belong to a grade or class of workers of which, immediately before the commencement of the stoppage, there were members who were participating in or financing the dispute. Miller's disqualification could only come about if we were to hold, as we did in *Borchman,* that because Miller was a member of a union, having a contract with the employer, and might indirectly benefit from the strike, he thereby had a "direct interest" in the dispute. The cases from other jurisdictions which have carefully examined the specific language contained in § 48-628(d) and found to the contrary are persuasive. In the case of *Outboard, Marine & Mfg. Co. v. Gordon,* 403 Ill. 523, 536-37, 87 N.E.2d 610, 617 (1949), the Illinois Supreme Court, in reviewing a statute identical to the one in

question, said: "The conclusion is unescapable that the legislature intended to provide for the innocent victims of a labor dispute by specifically excluding them from the denial of unemployment compensation. The previously quoted subsection of section 7 of the Illinois Act was meant to protect and except such victims from the classes denied compensation by its terms. Those who were to be excluded from benefits by the statute were those who attempted to gain by conduct which caused their unemployment or those who actively aided or abetted the previous group, whether or not they gained or lost. A proximity of conduct aiding or abetting the strikers or proximity of result to be gained from the dispute were meant to be the measuring factors. The legislature did not intend to bar, because of remote claims of causation or result, those who were deprived of their employment from the benefits to be received under the act."

And in *Shell Oil Co. v. Cummins,* 7 Ill. 2d 329, 336-37, 131 N.E.2d 64, 68 (1955), the Illinois Supreme Court again, in reviewing the identical statute, said: "The appellant next contends that the 12 craft unions, all members of the same Trades Council, by jointly negotiating with the Company for a single working agreement had placed all their members in the same 'grade or class' so that a strike by one would cause the ineligibility of all. In support thereof, it cites *Brown Shoe Co. v. Gordon,* 405 Ill. 384 [91 N.E.2d 381 (1950)], and *Local No. 658, Boot and Shoe Workers Union v. Brown Shoe Co.,* 403 Ill. 484 [87 N.E.2d 625 (1949)]. In these cases, all production and maintenance workers were members of and represented by the same union local. In both instances, although a new contract had been negotiated by this union and approved by its members, certain workers employed in the lasting department refused to abide thereby, resulting in the involuntary unemployment of other members. We held, upon these facts, that the claimants were of the same

grade and class as the striking bedlasters, and for that reason, denied unemployment compensation benefits. The same reasoning, however, will not apply in the present case. Here we are dealing not with one but with 12 different unions and with 12 different bargaining agents. Although it was customary for these unions to jointly negotiate with the employer and to have the resulting agreement embodied in a single document, yet there was in fact a separate contract existing between the Company and each of the 12 individual unions which, to be effective, required only the ratification of the particular union concerned. This is shown by the fact that in the present case, even though ten unions ratified the agreement, two others were free not only to reject these terms but also to take independent steps to enforce their demands." The Illinois court recognized that while there was some commonality between the unions, there was still independence, and therefore, in effect, it was inappropriate to suggest that each union was directly involved with the other.

In *Ancheta v. Daly,* 77 Wash. 2d 255, 264-65, 461 P.2d 531, 537 (1969), the Washington Supreme Court, reviewing a similar statute, said: " 'The words "directly interested in the labor dispute" are clearly limited in their application to those employees directly interested in furtherance of the dispute by participation and activity therein.' [Citation omitted.] Although there are some shortcomings in this definition of 'directly interested,' we believe that there was no direct interest by the claimants based both upon the lack of participation by the claimants coupled with a recognition that the minimal penny an hour wage increase was in no real sense an economic benefit when compared with the long period during which the claimants were out of work. We are convinced that the claimants were within the relief provisions of RCW 50.20.090 and are entitled to unemployment benefits."

And, finally, in *Wicklund v. Commissioner,* 18

Wash. 2d 206, 217-18, 138 P.2d 876, 882 (1943), the Washington Supreme Court said: " 'The argument is that, inasmuch as every employee was interested in the improvement of his working conditions, rate of pay and other matters related to his employment, therefore, each employee was "directly interested in the labor dispute which caused the stoppage of work." We conclude that this is a strained interpretation of the statute. The clear meaning of the language is to confine disqualification to those who are creating the dispute or participating therein in order to enforce their demands. To accept the prosecutor's construction would render every employe of a business, some of whose employes went on strike, ineligible for benefits, notwithstanding his nonparticipation therein and even though he might be opposed to the labor dispute and decline to have any part therein. The use of the words "directly interested in the labor dispute" clearly limits their application to those employes directly interested in its furtherance by participation and activity therein.'

. . . .

" '. . . [T]he conclusion is inescapable that the Legislature never intended that one, who has purchased his protection against involuntary unemployment, should be denied those benefits because of a "labor dispute" in which he was in no way involved and the causes of which unemployment he, his agents or organization were powerless to avert. To conclude otherwise, it appears to this court, would be to defeat the true and beneficent purposes of the statute and convert that statute into a sham and a mockery with respect to those industrial employees, as appellee, whom it must have been designed to protect against the hazards of enforced unemployment, the causes of which they were helpless to avoid. If such were not so, then a situation could be conceived and easily executed whereby a few persons could accomplish the unemployment of hundreds of innocent victims, entirely faultless in the

matter, and thereby deprive them of compensation benefits which they had bought and paid for.' "

It would have been very easy for the Legislature to draft a statute which would produce the result urged by Gilmore and reached by us in *Borchman*. We must, however, believe that by using the word "direct," the Legislature did not mean to exempt persons "indirectly affected" by a strike called by another union. To hold, as *Borchman* did, that "directly interested" includes not only members of the union and others directly involved but also members who do not strike and nonunion employees who have no control over the strike or the work stoppage is to effectively repeal § 48-628(d). If that is to be done, it should be done by the Legislature and not by the courts.

We believe that to the extent the holding in *Borchman* is understood to provide that both members of nonstriking unions and nonunion employees who may ultimately benefit by reason of a strike called by another union are disqualified from receiving unemployment compensation benefits under the provisions of § 48-628(d), even though they are not directly involved in the work stoppage, it is overruled. The better rule is that members of nonstriking unions and nonunion employees who are not participating in or financing or directly interested in a labor dispute which caused a work stoppage, and who do not belong to a grade or class of workers who, immediately before the commencement of the stoppage, were members employed at the premises at which the stoppage occurs and are participating in or financing or directly interested in the labor dispute, are not disqualified from receiving benefits under § 48-628(d).

We believe that both the Nebraska Appeal Tribunal and the District Court were correct in finding that Miller had met his burden of proving he was within the exceptions of § 48-628(d) and was not disqualified, by reason of the labor dispute, from re-

ceiving unemployment compensation, and we therefore affirm the decision of the District Court which upheld the determination of the Nebraska Appeal Tribunal.

AFFIRMED.

CAPORALE, J., dissenting.

I respectfully dissent. In doing so, I concede that the majority's analysis in this case employs a logical method in defining the phrase "directly interested," as used in Neb. Rev. Stat. § 48-628(d) (Reissue 1978). My difficulty arises from the fact that the question is not an open one; this court in *A. Borchman Sons v. Carpenter,* 166 Neb. 322, 89 N.W.2d 123 (1958), adopted a contrary definition by an equally logical analysis.

For almost 25 years the law in this jurisdiction has been that nonstriking union members are "directly interested" in a work stoppage produced at their place of employment by another union. During this period the Legislature has seen fit to allow our prior construction of its statute to stand. Where a statute has been judicially construed and that construction has not evoked an amendment, it will be presumed that the Legislature has acquiesced in the court's expository analysis of the legislative intent. *The People v. Hairston,* 46 Ill. 2d 348, 263 N.E.2d 840 (1970), *cert. denied* 402 U.S. 972, 91 S. Ct. 1658, 29 L. Ed. 2d 136 (1971); *Santanelli v. City of Providence,* 105 R.I. 208, 250 A.2d 849 (1969); *Nevada Indus. Comm'n v. Strange,* 84 Nev. 153, 437 P.2d 873 (1968); *Hewett v. Garrett,* 274 N.C. 356, 163 S.E.2d 372 (1968); *Chart v. Gutmann,* 44 Wis. 2d 421, 171 N.W.2d 331 (1969), *cert. denied* 397 U.S. 973, 90 S. Ct. 1089, 25 L. Ed. 2d 267 (1970); *Pa. Labor Rel. Bd. v. Uniontown H. Assn.,* 432 Pa. 146, 247 A.2d 621 (1968); *Magreta v. Ambassador Steel Co.,* 380 Mich. 513, 158 N.W.2d 473 (1968). See, also, *Lincoln Woman's Club v. City of Lincoln,* 178 Neb. 357, 133 N.W.2d 455 (1965); *State v. Standard Oil Co.,* 100 Neb. 826, 161 N.W. 537 (1917). If there is to be a change in the ex-

isting law it is not incumbent upon this court to make it. *Lincoln Woman's Club v. City of Lincoln, supra.*

The employer in this case was entitled to rely on the rule announced in *Borchman, supra.* Had the employer been operating under the rule announced today it might well not have caused the removal of its equipment from the employment site in, as it testified, anticipation of the customary refusal of the members of one union to cross the picket line of another union.

One of the values of legal precedent in a society governed by laws is that the certainty created allows a member of that society to accurately and safely anticipate the consequences of specific conduct. While we do not slavishly adhere unnecessarily to precedent for its own sake, the doctrine of stare decisis is based on public policy, is entitled to great weight, and should be adhered to unless reasons therefor do not exist, are clearly erroneous or mischievous, or unless more harm than good will result from doing so. *Lincoln Woman's Club v. City of Lincoln, supra; Nebraska Conf. Assn. Seventh Day Adventists v. County of Hall,* 166 Neb. 588, 90 N.W.2d 50 (1958). Indeed, that we are generally mindful of the disorder which follows sudden departure from clearly established precedent is illustrated by our recent refusal to apply retrospectively the modification of an evidentiary rule. *Langfeld v. Department of Roads, ante* p. 15, 328 N.W.2d 452 (1982).

There is nothing in this record to justify judicial disruption of what has been the settled policy and law of this state for two and one-half decades. By affirming the actions of the Department of Labor and the court below, the majority has permitted an arbitrary administrative usurpation of legislative power.

I would reverse the court below and dismiss the employee's claim.

Cite as 213 Neb. 143

SHIRLEY ANN CAYNOR, APPELLEE, V. DAVID ALAN CAYNOR, APPELLANT.

327 N.W.2d 633

Filed December 17, 1982. No. 82-469.

1. **Records: Appeal and Error.** In the absence of a bill of exceptions it is presumed that the evidence sustained the findings of the trial court. The only issue that can be considered is whether the pleadings support the judgment.
2. **Child Custody: Visitation.** The best interests of the children are the primary concern in the determination of custody and visitation matters.
3. **Criminal Law: Trial: Witnesses.** A prison inmate has no absolute constitutional right to be released from prison so that he can be present at a hearing in a civil action.
4. **Criminal Law: Right to Counsel.** In the absence of a statute there is no authority requiring the appointment of counsel to represent an indigent prison inmate in a private civil matter.

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

David Alan Caynor, pro se.

William L. Monahan, for appellee.

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

PER CURIAM.

The respondent appeals from the order of the District Court overruling his motion for an order requiring the petitioner to deliver his minor children to Virginia Owen, the respondent's mother, for the purpose of transporting the children to the Nebraska State Penitentiary for visitation with the respondent.

The marriage between the petitioner and the respondent was dissolved on July 30, 1980. Custody of the two minor children, April Marie, born January 27, 1979, and Crystal Ann, born April 1, 1980, was awarded to the petitioner "subject to reasonable rights of visitation by the Respondent."

The respondent is presently imprisoned in the Nebraska State Penitentiary. Upon the filing of the

motion, the trial court entered an order requiring the petitioner to appear and show cause on May 14, 1982, why she should not be held in contempt for refusing to provide reasonable visitation. On May 10, 1982, the respondent filed a second motion, requesting that an attorney be appointed to represent him and that the warden be ordered to permit the respondent to be transported to Omaha so that he could appear in person at the hearing on May 14, 1982.

The respondent's motion, filed May 10, 1982, was overruled but without prejudice to the "Penn. authorities to transport this resp. to Omaha if they chose to so do." The matter was continued to May 25, 1982, so that the respondent could present evidence by deposition, written interrogatories, "or other means provided by statute."

No bill of exceptions has been filed in this case. The applicable rule is that in the absence of a bill of exceptions it will be presumed that the evidence sustained the findings of the trial court. The only issue that can be considered is whether the pleadings support the judgment.

In *Casper v. Casper,* 198 Neb. 615, 254 N.W.2d 407 (1977), a case involving a similar question, we pointed out that the best interests of the children are the primary concern in the determination of custody and visitation matters. Such a determination is of necessity one which is factual in nature. Ordinarily, there is no obligation on the custodial parent to transport the children to another city for the purpose of visitation or to deliver the children to a third person for that purpose. On the record presented, there is no basis upon which the judgment of the trial court in this case could be said to be erroneous.

The respondent's contention that he was entitled to the appointment of counsel and an order directing that he be transported to Omaha so that he could appear in person at the hearing on his motion is equally without merit. A prison inmate has no ab-

solute constitutional right to be released from prison so that he can be present at a hearing in a civil action, and there is no authority which requires the appointment of counsel to represent him in a private civil matter. See, *State v. Otey,* 212 Neb. 103, 321 N.W.2d 453 (1982); *Matter of Warden of Wisconsin State Prison,* 541 F.2d 177 (7th Cir. 1976); *Ball v. Woods,* 402 F. Supp. 803 (N.D. Ala. 1975), *aff'd and modified without opinion* 541 F.2d 279 (5th Cir. 1976).

The judgment of the District Court is affirmed.

AFFIRMED.

JERALD JOHNSEN, APPELLANT, V. ROBERT HARPER, APPELLEE,
BATTLE CREEK MUTUAL INSURANCE COMPANY, GARNISHEE-APPELLEE.

328 N.W.2d 192

Filed December 23, 1982. No. 44501.

1. **Insurance: Contracts.** Contracts of insurance, like other contracts, are to be construed according to the meaning of the terms which the parties have used, and if they are clear and unambiguous, their terms will be taken and understood in plain, ordinary, and popular sense.
2. **Insurance: Words and Phrases.** The term "private passenger automobile," as used in the "drive other vehicle" coverage section of an automobile liability insurance policy, is clear and unambiguous and does not include a pickup truck.

Appeal from the District Court for Madison County: MERRITT C. WARREN, Judge. Affirmed.

John R. Thomas and Roger W. Wells of McGrath, North, O'Malley & Kratz, P.C., for appellant.

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

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

HASTINGS, J.

This was an action in garnishment to determine the liability of Battle Creek Mutual Insurance Company to the garnisher, Jerald Johnsen, under a certain policy of automobile liability insurance. Johnsen has appealed from an order sustaining Battle Creek's motion for summary judgment, the effect of which was to determine that no coverage existed under the policy of insurance as to this particular incident. The garnishment action was ordered dismissed.

On May 11, 1978, Johnsen was a passenger on a motorcycle and suffered injuries when the motorcycle was struck by a pickup truck being operated by Robert Harper. The pickup truck was owned by Collins Millwork and was used as a business vehicle, although at the time of the accident Harper was not using it in the course of any employment by Collins. At the time of the accident, Battle Creek had issued a policy of automobile liability insurance to the parents of Robert Harper which did not list the pickup truck as a covered vehicle. The policy did provide coverage to any relative of the named insured with respect to the use of a nonowned automobile "but only with respect to a *private passenger automobile* or trailer . . . ." (Emphasis supplied.) The policy goes on to define a *private passenger automobile* as "a four wheel *private passenger,* station wagon or jeep type *automobile.*" (Emphasis supplied.) The policy defines a utility vehicle as "an automobile, other than a farm automobile, with a capacity of fifteen hundred pounds or less of the pick-up body . . . type . . . ."

As is quite apparent, there was no coverage and no liability on the part of Battle Creek if the pickup truck being driven by Harper at the time of the accident was not a *private passenger automobile.* Both Battle Creek and Johnsen filed motions for summary judgment, Battle Creek contending that there was no issue as to any material fact, and Johnsen

reciting that he was entitled to judgment on the pleadings as a matter of law. However, Johnsen now contends that the trial court erred either in failing to construe the language of the policy as clearly favoring the appellant's position that the vehicle was covered by the policy, or that it should have found the language ambiguous, in which event this court should remand the case for further proceedings.

Although, as suggested in *County of Douglas v. OEA Senior Citizens, Inc.*, 172 Neb. 696, 111 N.W.2d 719 (1961), there is a tacit agreement that the facts are not in dispute in a case where both parties, on the basis of the same record, have moved for summary judgment in their favor, we believe that the record adequately demonstrates that there was no genuine issue of fact.

Contracts of insurance, like other contracts, are to be construed according to the meaning of the terms which the parties have used, and if they are clear and unambiguous, their terms will be taken and understood in plain, ordinary, and popular sense. *Rodriguez v. Government Employees Ins. Co.*, 210 Neb. 195, 313 N.W.2d 642 (1981).

The term "private passenger automobile" is clear and unambiguous and it does not include a pickup truck. "The policy defines 'private passenger automobile' as a 'four wheel private passenger, station wagon, or jeep type automobile.' Even if the phrase 'private passenger automobile' stood alone, the plain and ordinary meaning of these words would exclude a pickup truck. . . . In the present policy, however, the phrase does not stand alone. The policy expressly defines the term 'utility automobile' to mean 'an automobile * * * with a load capacity of fifteen hundred pounds or less *of the pickup body,* * * * not used for business or commercial purposes.' " *Ohio Casualty Insurance Co. v. Tyler,* 85 Ill. App. 3d 410, 413, 407 N.E.2d 77, 79 (1980). See, also, *Hercules Casualty Ins. Co. v. Preferred Risk Ins. Co.*, 337 F.2d 1 (10th Cir. 1964); *Cotton States Mut. Ins. Co. v.*

Hutto, 115 Ga. App. 164, 154 S.E.2d 375 (1967).

We have examined the cases of *State Farm Mutual Automobile Ins. Co. v. Durrett,* 472 S.W.2d 214 (Tex. Civ. App. 1971); *Riker v. Aetna Casualty & Surety Company,* 286 So. 2d 493 (La. App. 1973); *Schilling v. Stockel,* 26 Wis. 2d 525, 133 N.W.2d 335 (1965); and *Detmer v. United Security Insurance Company,* 309 S.W.2d 713 (Mo. App. 1958), cited by appellant Johnsen. They found the term "private passenger automobile" to be ambiguous and construed the contract against the insurance company. We reject such a conclusion under the facts of this case.

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

AFFIRMED.

WHITE, J., participating on briefs.

ILA D. ANDREWS, APPELLANT, V. CITY OF FREMONT, NEBRASKA, APPELLEE.

328 N.W.2d 194

Filed December 23, 1982. No. 81-609.

1. **Municipal Corporations: Actions.** A petition in error is designed to review the decision of the inferior tribunal. It is not to act as a super legislative or administrative agency to come to an independent conclusion.
2. **Courts: Municipal Ordinances: Appeal and Error.** Courts of general jurisdiction will not take judicial notice of municipal ordinances not present in the record, nor will the Supreme Court.
3. **Appeal and Error.** New evidence is not permitted in the appellate court to determine if errors of law occurred in the tribunal giving rise to the error proceeding.

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

Avis R. Andrews of Kuhlman Law Offices, for appellant.

Lyle B. Gill, for appellee.

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

WHITE, J.

This is an appeal from the decision of the District Court for Dodge County, Nebraska, which affirmed a decision by the city council of the City of Fremont, Nebraska, on petition in error and refused to subdivide a tract of land in Chase's Addition to the City of Fremont, Dodge County, Nebraska. The tract is described as the north 66 feet of Lots 3 and 4, Block 34. The portion of Lot 4 owned by the petitioner in error is 66 feet north to south and Lot 4 is 66 feet wide. The portion of Lot 3 owned by petitioner in error measures 66 feet by 74 feet. Before considering the assignments of error, it is well to review the type of action that was presented to the District Court and to this court.

The appellant, Ila D. Andrews, filed a petition in error in the District Court under the provisions of Neb. Rev. Stat. § 25-1901 (Reissue 1979). "A judgment rendered, or final order made, by any tribunal, board or officer exercising judicial functions, and inferior in jurisdiction to the district court, may be reversed, vacated or modified by the district court." The transcript presented to the District Court consists of only two documents. One is a document entitled "APPLICATION TO SUBDIVIDE REAL ESTATE," and provides as follows: "TO THE HONORABLE MAYOR AND CITY COUNCIL FREMONT, NEBRASKA GENTLEMEN: I, ILA D. ANDREWS OWNERS OF THE NORTH 66 FEET OF LOTS 3 AND 4, BLOCK 34, CHASES ADDITION HEREWITH FILE AN APPLICATION TO SUBDIVIDE THE ABOVE INTO TWO (2) LOTS The north 66 feet of Lot 3, Block 34, Chases Addition with front, side and rear yard variances. The north 66 feet of Lot 4, Block 34, Chases Addition with front, side and rear yard variances. Very truly yours . . . ."

The transcript also contains the summary of the

minutes of the meeting of the planning commission on June 16, 1980, as follows: "Attorney Avis Andrews was present, representing Ila D. Andrews, and stated that in 1969 permission was received from the City to move a second house onto this property. The question was raised at the last meeting whether or not there was any authority for the Planning Commission to approve this request. Miss Andrews felt the Planning Commission had the authority to approve as these properties fit into the character of the neighborhood — one for rental and the other the owners home. Not being able to subdivide presents an unreasonable hardship — first it presently restricts her ability to transfer the property; and second this situation existed at the time the ordinance was adopted and now is considered non-compliance.

"Attorney Lyle Gill explained that the City Council passed Ordinance No. 2980 and set forth requirements before a request of this nature could be granted. This ordinance binds everyone in city government, the City Council as well as the Planning Commission. The request does not comply with the requirements of the Ordinance. Moved by Hansen, seconded by Gifford to recommend denial of the request. Roll Call Vote showed all members voting aye — 9 aye. Motion Carried."

The transcript also contains excerpts from the meeting of the city council of Fremont, Nebraska, on June 24, 1980, in part as follows: "The City Clerk read a resolution offered by Councilman Mussack, seconded by Councilman Row permitting Ila D. Andrews permission to subdivide north 66 feet of Lots 3 and 4, Block 34, Chase's Addition into two lots. Avis Andrews, Attorney for Mrs. Andrews spoke in favor of this subdivision. This was denied by the Planning Commission. Roll call vote showed all Councilmen present voting nay — 6 nays. Thereupon the Mayor declared the resolution failed."

The transcript was appropriately filed by the ap-

pellant in the District Court. It did not include a copy of the ordinance under which the application was presented and denied, nor any transcript of evidence other than that summarized at the planning commission hearing. Apparently confusing an action under § 25-1901 with a review de novo, attorneys for both the city and the applicant sought permission to and were allowed to introduce evidence in the District Court consisting of the various ordinances of the City of Fremont and a stipulated set of facts reciting in great detail the facts surrounding the ownership and time sequence of various activities with respect to the subject property. No objection was made to this evidence and, apparently, the District Court considered it in its decision. The trial court and the parties misconstrued the function of a petition in error. A petition in error is designed to review the decision of the inferior tribunal. It is not to act as a super legislative or administrative agency to come to an independent conclusion. First, we observe that the decision not to subdivide the property of the petitioner in error was a judicial decision by the city council, apparently acting as a board of adjustment pursuant to Neb. Rev. Stat. § 19-910 (Reissue 1977), as distinguished from a purely legislative act which must be challenged collaterally. *Scottsbluff Improvement Assn. v. City of Scottsbluff,* 183 Neb. 722, 164 N.W.2d 215 (1969).

As stated before, the transcript which was filed in the District Court, and which is brought to this court on appeal, does not contain the ordinances. Each of the nine assignments of error presented to the District Court and presented to this court refers to the ordinances of the City of Fremont, which simply were not before the District Court and are not before us as they did not appear in the transcript of the proceedings had before the city council of the City of Fremont, and we are powerless to review them. Courts of general jurisdiction will not take judicial notice of municipal ordinances not present in the

record, nor will the Supreme Court. *Dell v. City of Lincoln,* 168 Neb. 174, 95 N.W.2d 336 (1959); *City of Omaha Human Relations Dept. v. City Wide Rock & Exc. Co.,* 201 Neb. 405, 268 N.W.2d 98 (1978).

New evidence is not permitted in the appellate court to determine if errors of law occurred in the tribunal giving rise to the error proceeding. *Dovel v. School Dist. No. 23,* 166 Neb. 548, 90 N.W.2d 58 (1958); *Dlouhy v. City of Fremont,* 175 Neb. 115, 120 N.W.2d 590 (1963).

Where errors assigned require review of evidence in error proceedings, they cannot be considered in the absence of a bill of exceptions. *Lanc v. Douglas County Welfare Administration,* 189 Neb. 651, 204 N.W.2d 387 (1973).

It is important to note, as we held by inference in *Ross v. The Governors of Knights of Ak-Sar-Ben,* 199 Neb. 513, 260 N.W.2d 202 (1977), that the transcript must contain all of the evidence relied on for reversal in the District Court or the question will be limited, as it is here limited, only to whether the transcript supports the judgment of the city council of Fremont, Nebraska. We are unable to determine that it does not, since all the errors claimed relate to the application of evidence to the ordinances and only a bare narrative of the facts is before us and none of the ordinances. Appellant remains free to refile her application for subdivision with the city council and to make a proper record with that tribunal.

Since we have nothing to review, as was the case in the District Court, the decision of the District Court is affirmed.

AFFIRMED.

Cite as 213 Neb. 153

IN RE ESTATE OF MARY FLIDER, DECEASED. WILLARD HANNA ET AL., APPELLEES, V. DARLENE R. WARNICK, APPELLANT.

328 N.W.2d 197

Filed December 23, 1982. No. 81-618.

1. **Wills.** If the will is self-proved, compliance with signature requirements for execution is conclusively presumed and other requirements of execution are presumed, subject to rebuttal. Neb. Rev. Stat. § 30-2430(b) (Reissue 1979).
2. _____. The presumption of due execution arising from the acknowledgment of a self-proved will may be attacked by proof of fraud or forgery affecting the acknowledgment or affidavit. Neb. Rev. Stat. § 30-2430(b) (Reissue 1979).
3. _____. In the absence of proof that the formalities required by the statute were not complied with, the presumption of due execution raised by the acknowledgment is conclusive.
4. _____. Due execution means the signing of the will by the testator, and the attestation. Testamentary capacity is not a component of due execution under the statute.
5. **Jury Instructions: Appeal and Error.** The giving of an incorrect instruction which may have affected the result unfavorably to the party complaining constitutes reversible error.
6. **Wills.** A prior will, executed when the testator's testamentary or mental capacity was and is unquestioned, and as to which the existence of undue influence is not charged, and which conforms substantially as to the results produced to the instrument contested, may be considered as competent evidence for the purpose of refuting charges of undue influence or want of testamentary or mental capacity by showing that the testator had a constant and abiding scheme for the distribution of his property.

Appeal from the District Court for Pawnee County: ROBERT T. FINN, Judge. Reversed and remanded for a new trial.

Richard T. Halbert, for appellant.

Thomas L. Morrissey, for appellees.

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

BOSLAUGH, J.

This is an appeal in a will contest involving the will of Mary Flider, deceased. The will, which was executed February 11, 1977, was admitted to probate

in the county court. Upon appeal to the District Court the will was denied probate.

The proponent, Darlene R. Warnick, was a niece of the deceased and is the personal representative and sole beneficiary named in the will. She has appealed.

The contestants, Willard Hanna and Lorene M. Herman, are heirs of the testatrix. They alleged that the will had not been executed as required by law, that the testatrix lacked testamentary capacity, and that the will was the result of undue influence.

Attached to the will was an acknowledgment signed by the testatrix and the witnesses, which complied with Neb. Rev. Stat. § 30-2329 (Reissue 1979). This constituted the will a "self-proved will." See *In re Estate of Camin,* 212 Neb. 490, 323 N.W.2d 827 (1982). At the trial the attorney who prepared the will testified on behalf of the proponent regarding the formalities of the signing and witnessing of the will. The contestants produced no evidence challenging either the signatures or the witnessing of the will. The proponent's motion for a directed verdict on the issue of due execution was overruled and the issue of due execution was submitted to the jury.

The proponent assigns as error the trial court's overruling of her motion for directed verdict on the issue of execution. The proponent contends that where the will is self-proved, a conclusive presumption arises that signature requirements have been met. The contestants argue that proof of due execution also requires proof of testamentary capacity, an issue upon which there was conflicting evidence.

Neb. Rev. Stat. § 30-2430(b) (Reissue 1979) prescribes the effect to be given a self-proved will: "If the will is self-proved, compliance with signature requirements for execution is conclusively presumed and other requirements of execution are presumed subject to rebuttal without the testimony of any wit-

ness upon filing the will and the acknowledgment and affidavits annexed or attached thereto, unless there is proof of fraud or forgery affecting the acknowledgment or affidavit."

The comment to the section states that the conclusive presumption applies to such question as whether the witnesses signed in the presence of the testator. It does not preclude proof of lack of testamentary capacity or undue influence.

The purpose of the self-proved provision of the statute is to expedite formal testacy proceedings. A self-proved will may not be contested in regard to signature requirements. *Matter of Estate of Mackaben*, 126 Ariz. 599, 617 P.2d 765 (1980). However, the formal requisites for execution of the will must appear, either preceding the self-proving affidavit or as supplemental in the affidavit. In the absence of proof that the formalities required by the statute were not complied with, the presumption of due execution raised by the acknowledgment is conclusive. See *In the Matter of Sample*, 175 Mont. 93, 572 P.2d 1232 (1977).

Neb. Rev. Stat. § 30-2327 (Reissue 1979) defines "execution" as follows: "Except as provided for holographic wills, writings within section 30-2338, and wills within section 30-2331, every will is required to be in writing signed by the testator or in the testator's name by some other individual in the testator's presence and by his direction, and is required to be signed by at least two individuals each of whom witnessed either the signing or the testator's acknowledgment of the signature or of the will." Under the statute, testamentary capacity is not a component of due execution.

Due execution means compliance with the formalities required by the statute in order to make the instrument the will of the testatrix. The presence of an attestation clause which recites the facts necessary to the validity of a will raises a presumption of due execution. *In re Estate of Kaiser*, 150 Neb. 295, 34 N.W.2d 366 (1948).

Upon the record in this case the proponent was entitled to a directed verdict on the issue of execution. The will being self-proved, and there being no proof of fraud or forgery, a conclusive presumption was raised as to signature requirements, that is, the formalities described in § 30-2327. The jury was not free to find against the proponent on the issue of execution.

The giving of an incorrect instruction which may have affected the result unfavorably to the party complaining constitutes reversible error. *Oban v. Bossard*, 201 Neb. 243, 267 N.W.2d 507 (1978). It was reversible error to submit to the jury an issue upon which no question of fact had been raised and which may have been the basis for the verdict. *Watters v. City of Omaha*, 86 Neb. 722, 126 N.W. 308 (1910); *Simcho v. Omaha & C. B. St. Ry. Co.*, 150 Neb. 634, 35 N.W.2d 501 (1949); *McCarty v. Morrow*, 173 Neb. 643, 114 N.W.2d 512 (1962); *Simet v. Sage*, 208 Neb. 13, 301 N.W.2d 600 (1981).

The proponent also assigns as error the refusal to admit into evidence a prior will of the testatrix. A will drawn and signed by her in 1972 was offered to show that she had a consistent scheme for the disposition of her property and did not lack testamentary capacity and was not subject to undue influence in making the later will. In the 1972 will the testatrix left all of her property to the proponent's parents. At the time the second will was made, the proponent's father was deceased and her incapacitated mother lived with the proponent.

A prior will is admissible in evidence, subject to the following rule: " ' "A prior will, executed when the testator's testamentary or mental capacity was and is unquestioned, and as to which the existence of undue influence is not charged, and which conforms substantially as to results produced to the instrument contested, may be considered as competent evidence for the purpose of refuting charges of undue influence or want of testamentary or mental capaci-

ty by showing that the testator (and grantor) had a constant and abiding scheme for the distribution of his property." ' *In re Estate of Bose*, 136 Neb. 156, 173-74, 285 N.W. 319, 329 (1939). See, also, *Blochowitz v. Blochowitz*, 122 Neb. 385, 240 N.W. 586 (1932); *In re Estate of Wahl*, 151 Neb. 812, 39 N.W.2d 783 (1949). An essential element of this rule was pointed out in an earlier sentence in *Bose* wherein we noted that prior wills, 'as to which there are no substantial claims of testamentary incapacity,' may also be considered in determining the question of testamentary capacity. *In re Estate of Bose, supra* at 170, 285 N.W. at 327." *In re Estate of Camin*, 212 Neb. 490, 503-04, 323 N.W.2d 827, 836 (1982).

The burden of proof is on the proponent to establish adequate foundation for the admission of a prior will in evidence. This includes proof of testamentary capacity at the time the prior will was executed. *In re Estate of Camin, supra.*

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 FOR A NEW TRIAL.

ROBERT MAURER, APPELLANT, V. WALTER D. WEAVER, DIRECTOR OF INSURANCE, STATE OF NEBRASKA, APPELLEE.

328 N.W.2d 747

Filed December 23, 1982. No. 81-624.

1. **Administrative Agencies: Records: Appeal and Error.** The failure of an administrative agency to prepare and transmit to the court a certified transcript of the proceedings had before it within 15 days after service of the petition, pursuant to Neb. Rev. Stat. § 84-917(4) (Reissue 1981), does not, in and of itself, entitle the party seeking review to have the agency's order set aside.
2. _____: _____: _____. Where appeals are taken from an ad-

> ministrative agency to the District Court, pursuant to the provisions of Neb. Rev. Stat. § 84-917 (Reissue 1981), the certified transcript as prepared by the agency and transmitted to the court shall be considered to be before the court and shall, unless objected to by one of the parties, be considered without the need of either party formally offering the record into evidence.

Appeal from the District Court for Lancaster County: SAMUEL VAN PELT, Judge. Reversed and remanded with directions.

Craig F. Swoboda and George O. Rebensdorf of Swoboda & Katz, for appellant.

Paul L. Douglas, Attorney General, and Mel Kammerlohr, for appellee.

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

KRIVOSHA, C.J.

This appeal presents to the court what appears to be two questions of first impression concerning appeals from an administrative agency to the District Court, pursuant to the provisions of the Nebraska Administrative Procedures Act, Neb. Rev. Stat. §§ 84-901 to 84-916 (Reissue 1981). The first question requires us to determine the effect of the failure of the agency from which the decision is being appealed to file in the District Court a full certified transcript of the proceedings before the agency as required by Neb. Rev. Stat. § 84-917(4) (Reissue 1981). The second question requires us to determine whether either party to the appeal is required at the trial before the District Court to mark and offer in evidence the certified transcript prepared by the agency and filed in the District Court.

On August 27, 1979, the Department of Insurance of the State of Nebraska (Department) conducted a hearing on a complaint filed by the Department against the appellant, Robert Maurer. During the course of the hearing, testimony of witnesses was presented, evidence was adduced, and exhibits were

introduced, all apparently pursuant to the provisions of § 84-914. As a result of the hearing, the Department, on September 19, 1979, issued an order suspending Maurer's resident insurance agent's license for 1 year. Pursuant to the provisions of § 84-917 Maurer appealed the Department's order to the District Court for Lancaster County, Nebraska. Within 30 days after the service of the final decision by the Department, Maurer filed a petition for review in the District Court pursuant to the provisions of § 84-917(2). At the same time he also filed a praecipe requesting that a summons be served upon the Director of Insurance as required by § 84-917(2). On November 2, 1979, the Department filed with the clerk of the District Court a certified transcript purporting to be a full and correct copy of the hearing held before the Department on August 27, 1979. The transcript appears to be the verbatim testimony given by the parties at the hearing before the Department.

On March 16, 1980, Maurer filed a document entitled "Motion to Strike" in the District Court. The purpose of the motion was to strike the transcript previously filed by the Department with the clerk of the District Court, for the reason, among other matters, that the transcript, as filed, was not in fact a complete and full transcript and, in particular, did not include the final decision sought to be vacated by the appellant. Following a hearing on the motion the trial court overruled the motion but directed the Department to file a supplemental transcript containing the findings of fact and conclusions of law prepared by the Department and filed in the case. The supplemental transcript was filed with the clerk of the District Court on May 13, 1981. In addition to the findings of fact and order, the supplemental transcript contained all the verbatim testimony as well as all the exhibits.

On June 10, 1981, a further hearing was held before the District Court. At that time Maurer offered into

evidence a certified copy of the Department's rule 26. Neither party offered in evidence the supplemental transcript.

Following the hearing the trial court found that because neither party had marked and offered in evidence the supplemental transcript, the court did not have before it a transcript and bill of exceptions and therefore had nothing to rule upon. The trial court therefore ordered that Maurer's petition on appeal be dismissed and that his license be suspended for a period of 1 year, as earlier ordered by the Department. It is from that order which Maurer has now appealed to this court. We believe, for reasons more particularly set out in this opinion, that the order of the District Court dismissing the appeal must be reversed and the case remanded to the District Court for further proceedings.

In reaching our conclusion we turn first to the question concerning the Department's failure to file a full and complete transcript within the time prescribed by law. Maurer argues that there is an absolute obligation imposed upon the Department to file a complete certified transcript within 15 days after service of the petition by the appellant and that, if the Department fails to do so, the party appealing must prevail. Maurer cites us, however, to no case directly on point previously decided by this court. In essence, Maurer seems to be arguing that if the Department fails to file the transcript within the prescribed time, the District Court has no alternative but to find for the appellant. We are unable to accept that argument. We believe that a more reasonable reading of the statutory provisions governing appeals from administrative agencies would be to the contrary.

Section 84-917 sets out what must be done in order to perfect an appeal to the District Court from an order entered by an agency. Section 84-917(2) specifically provides: "Proceedings for review *shall be instituted* by filing a petition in the district court

of the county where the action is taken within thirty days after the service of the final decision by the agency. All parties of record shall be made parties to the proceedings for review. Summons shall be served as in other actions . . . ." (Emphasis supplied.) Section 84-917(4) then provides: "Within fifteen days after service of the petition *or within such further time as the court for good cause shown may allow*, the agency shall prepare and transmit to the court a certified transcript of the proceedings had before it . . . ." (Emphasis supplied). It appears to us that a simple reading of the statute clearly provides that in order for the District Court to acquire jurisdiction under the Administrative Procedures Act two steps must be taken. The first step is the filing of the petition within 30 days, and the second step is causing a summons to be issued and served within 6 months. See *Leach v. Dept. of Motor Vehicles, ante* p. 103, 327 N.W.2d 615 (1982), The preparation and filing of the transcript under the Administrative Procedures Act, as opposed to error proceedings, while critical to the ultimate disposition of the case, is not jurisdictional. See, Neb. Rev. Stat. §§ 25-1903, 25-1905 (Reissue 1979); *Lanc v. Douglas County Welfare Administration*, 189 Neb. 651, 204 N.W.2d 387 (1973); *Marcotte v. City of Omaha*, 196 Neb. 217, 241 N.W.2d 838 (1976). The Department urges us to sustain the action of the trial court on the basis of our earlier decision in *Lanc v. Douglas County Welfare Administration, supra*. *Lanc* has no application in the instant case. *Lanc* involved an error proceeding brought pursuant to Neb. Rev. Stat. §§ 25-1901 to 25-1908 (Reissue 1979). That proceeding requires the filing of the transcript with the petition and imposes the burden upon the plaintiff in error. In *Lanc* a certified transcript was not filed at all with the District Court, and therefore the District Court did not acquire jurisdiction. Once Maurer filed his petition and his praecipe for summons, the District Court, in the instant case, ac-

quired jurisdiction. Any further action by the agency which was in any manner defective is not sufficient to entitle the appellant to obtain summary relief. The interest of justice could not possibly be served if we were to hold that the failure of the agency to file the transcript within 15 days entitles the appellant to prevail, any more than it would be appropriate to say that the agency's failure to file the transcript within the 15-day period entitles the agency to prevail, as was permitted in this case. Section 84-917(4) contemplates that additional time may be ordered by the court and that failure of the agency to seek that order within the 15-day period does not preclude the court for good cause shown to allow additional time. We believe that the agency's failure to file a complete transcript in the first instance, while certainly not commendable, was not so defective as to preclude the trial court from ordering a supplemental transcript and, upon receiving the supplemental transcript, considering the entire record. We therefore hold that the failure of an administrative agency to prepare and transmit to the court a certified transcript of the proceedings had before it within 15 days after service of the petition, pursuant to § 84-917(4), does not, in and of itself, entitle the party seeking review to have the agency's order set aside. The trial court was correct in ordering a supplemental transcript.

We then turn to the question of who, if anyone, must mark and offer the certified transcript of the proceedings into evidence before the District Court in order for the District Court to review the proceedings. As we have indicated, the trial court held that such a requirement did exist and the failure of one of the parties to take such action precluded the trial court from having before it the certified transcript for review. We believe, however, that neither the provisions of the statute nor sound logic requires such a rule. Section 84-917(5) specifically provides: "The review shall be conducted by the court

without a jury on the record of the agency." No one argues that the record in this case was not ultimately prepared and before the District Court. The argument is that no one performed the magical rite of marking the transcript and reciting the magic words over the paper, to wit, "I offer in evidence exhibit 1." It is clear that, in a trial, evidence must be marked and offered so that both the trial court, in the first instance, and the appellate court, on review, can determine what is the record. But where the record is prescribed by law and both parties, absent objection, agree that the record is lying on the table in front of the court, we cannot believe that if either party refuses to present the record to the court, the record is thereby eliminated and the court's obligation to review the record is waived. Section 84-917(5) does not provide that the review shall be conducted by the court on the record of the agency offered to the court but, rather, "on the record of the agency." It is the record of the agency which § 84-917(4) requires the agency to prepare, certify, and transmit to the court. In effect, the agency, in preparing the certified record and "transmitting it to the court," offers the record in evidence. This apparently was the rationale behind the Legislature's specifically amending the statutes with regard to appeals from county and municipal courts to District Courts and providing that, in such cases, filing the bill of exceptions with the clerk at or before the hearing shall constitute the equivalent of offering the record in evidence unless the court, on objection by a party, excludes all or a part of it. Neb. Rev. Stat. § 24-541.06 (Cum. Supp. 1982). That, undoubtedly, must be the reason why the Legislature provided that the agency was required to prepare "an official record, which shall include testimony and exhibits, in each contested case . . . ." See § 84-913. We therefore hold that where appeals are taken from an administrative agency to the District Court, pursuant to the provisions of § 84-917, the

certified transcript as prepared by the agency and transmitted to the court shall be considered to be before the court and shall, unless objected to by one of the parties, be considered without the need of either party formally offering the record into evidence. Having so concluded, we must therefore remand this case back to the District Court with directions that it now review the supplemental record as filed with the court and determine whether the decision of the Department of Insurance should be affirmed, modified, or reversed.

REVERSED AND REMANDED WITH DIRECTIONS.

RAYMOND YATES, APPELLANT, V. MILDRED GROSH ET AL., APPELLEES.

328 N.W.2d 200

Filed December 23, 1982. No. 81-713.

Contracts: Specific Performance. A party seeking specific performance of an oral contract upon the basis of part performance must prove an oral contract, the terms of which are clear, satisfactory, and unequivocal, and that the acts done in part performance were referable solely to the contract sought to be enforced, and not such as might be referable to some other or different contract, and further that nonperformance by the other party would amount to a fraud upon the party seeking specific performance.

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

Ronald A. Ruff of Ruff & Murphy, for appellant.

Paul D. Merritt, Jr., William P. Mueller, and J. A. Lane of McGinley, Lane, Mueller, Shanahan, O'Donnell & Merritt, for appellees.

KRIVOSHA, C.J., HASTINGS, and CAPORALE, JJ., and RIST, D.J., and COLWELL, D.J., Retired.

COLWELL, D.J., Retired.

Raymond Yates (Ray), plaintiff-appellant, seeks

specific performance of an alleged oral contract with his father, Benjamin Yates (Ben), to give the home farm to Ray. Upon trial, the District Court of Lincoln County dismissed the petition for failure of proof. Plaintiff appeals.

A chronology of events covers the period 1950-78. In *1950*, Ben and his wife, Cora, owned as joint tenants the 960-acre home farm occupied by them and three children including Ray, age 15 years; Ray had quit school without completing the ninth grade. Ray claims Ben orally promised to give him the farm if he would stay at home and work; Ray stayed at home and worked. In *1955*, Ray married and lived on the farm with his parents; Ray contends Ben renewed his promise to give him the farm if he would not leave the farm and seek railroad employment. In *1956*, Ray and Ben began a 50-50 farm partnership. In *1957*, a tornado destroyed the farm buildings; Ray bought the adjoining Snavely farm and both families moved there; title to the Snavely farm was taken in the names of Ray and Ben for convenience to protect Ben who had included the home farm as added security for the Snavely purchase mortgage. In *1965*, Ray bought the Carter farm with joint title vested in the same manner and purposes as the Snavely farm; later Ray bought another farm in his own name. He now owns 2,500 acres of land. In *1968*, Ben and Cora moved to North Platte, Nebraska; on January 1, 1968, Ray and Ben terminated their partnership by written agreement, including a gift to Ray of Ben's interest in the farm machinery, livestock, and supplies; March 1, 1968, the home farm was leased to Ray for 1 year on terms of $2,500 cash and crop rents; Ray continued to occupy the farm under these lease terms until 1978. Ray claims Ben again promised the farm to him. In *1969*, Ben and Cora filed a federal gift tax return reporting gifts to Ray valued at $33,962; September 8, 1969, Ben and Cora executed identical wills. In *1970*, Cora died. Ben died May 28, *1978*, at age 88

years; his 1969 will was admitted to probate October 18, 1978. Material here are the provisions of the will that devised the home farm to four older daughters, Mildred, Florence, Mary, and Gladys as residuary beneficiaries, and the following: "I am not unmindful that I have not provided for my beloved son, Raymond Yates, in this my Last Will and Testament, not from lack of love and affection, but for the reason that I have, during my lifetime in my opinion, given him his full share of my estate."

There is no record of Ray having agreed to any alleged promise or terms of a contract.

It is plaintiff's theory that he relied on his father's oral promises to give him the farm if he would stay at home and do the farmwork; that he did so for 28 years without compensation except groceries, farm expenses, and other miscellaneous items, which was partial performance of the claimed contract. Ray's evidence concerning compensation was evasive and inconclusive.

There is little conflict in the evidence that Ray did occupy the farm up to 1979, and beginning in 1950 his farming duties and responsibilities increased as he matured and Ben's farmwork decreased as he became older. There is conflict in the evidence as to all of the other issues, facts, and circumstances.

Both express and implied contracts have their foundation in the consent of the parties. "An action in contract inevitably rests upon a promise or set of promises. A promise may be stated in words, either oral or written, or may be inferred wholly or partly from conduct." *Clark & Enersen, Hamersky, S., B. & T., Inc. v. Schimmel Hotels Corp.*, 194 Neb. 810, 813, 235 N.W.2d 870, 872 (1975).

The primary error assigned is the finding of the trial court that plaintiff's proof was not clear and satisfactory.

Plaintiff's testimony concerning Ben's oral promises shows: *1950* "Q. Who was present at the time? A. My mother, and dad and me. . . . Q. What was

the agreement? A. The agreement was that I was supposed to get the farm if I stayed home and did the work." *1955* "Q. Who was present? A. My wife was present; my brother-in-law, Harvey Hiatt; my sister, Gladys; and my mother, and my dad. . . . Q. What did your dad say? A. He said if I would stay and continue the farm would sure be mine." Gladys and Harvey Hiatt corroborated this testimony. Gladys Hiatt, another daughter from a previous marriage, was disinherited by the terms of Ben's will. *1968* "Q. All right. Who was present? A. My mother, and me, and my wife and my dad. . . . Q. What was said about the land? A. The land was supposed to be mine. Q. Did your father say how the land was going to get to you when it's mentioned right in this lease agreement that it belongs to him and your mother? A. He supposedly made a will leaving me the land. Q. He told you that at that time? A. Yes, he did."

" 'Equity cases are heard de novo by this court. In determining, however, the weight to be given the evidence, this court will consider the fact that the trial court observed the witnesses and their manner of testifying.' " *Rudolph v. Hartung*, 202 Neb. 678, 686, 277 N.W.2d 60, 64 (1979). " 'It is very proper that the assertion of such a contract, especially when it is claimed to be entirely in parol, should be regarded by the court with grave suspicion, and the establishment thereof required by evidence which clearly indicates the minds of the parties met upon the terms of the contract sought to be established.' " *Id.* at 683, 277 N.W.2d at 63.

"We have consistently required that a party seeking specific performance of an oral contract for the sale of real estate upon the basis of part performance must prove an oral contract, the terms of which are clear, satisfactory, and unequivocal, and that the acts done in part performance were referrable solely to the contract sought to be enforced, and not such as might be referrable to some other or

different contract, and further that nonperformance by the other party would amount to a fraud upon the party seeking specific performance." *Reifenrath v. Hansen*, 190 Neb. 58, 63, 206 N.W.2d 42, 45 (1973); *In re Estate of Layton*, 212 Neb. 518, 323 N.W.2d 817 (1982).

We measure plaintiff's evidence against the above standards. At the outset, it is improbable that Ben would make the claimed promise to a 15-year-old son, particularly where another son, Joseph, had just graduated from the agricultural high school at Curtis, Nebraska. Further, the claimed partial performance is without support during the 1950-57 period, considering Ray's age, experience, and limited resources.

For the 1957-78 period Ray's role and capabilities as a farmer-rancher are established; however, its proof refers to other contracts and the arm's length business relationships of Ray and Ben which discredit plaintiff's claims. Ray and Ben first had a continuous farming partnership until 1968 which included all farming operations, income tax returns, mutual credit arrangements, and both living and working on the farms owned by Ray, Ben, and Cora. This partnership was mutually terminated in writing; Ben and Cora made gifts to Ray. Their next 10-year farm relationship was that of landlord and tenant. Ben's will explained Ray's disinheritance.

Plaintiff's evidence does not meet the standard of clear, satisfactory, and unequivocal proof of the claimed contract and its terms, consideration, partial performance, and the parties' assent thereto, either expesss or implied. Defendants were entitled to judgment on their motion made at the close of plaintiff's case in chief.

It is not necessary to consider plaintiff's other assigned errors.

The briefs do not address the issue of a joint tenant (Cora) not being a contracting party.

The trial court properly dismissed the plaintiff's petition.

AFFIRMED.

GLORIA NOAH, APPELLANT, V. CREIGHTON OMAHA REGIONAL HEALTH CARE CORPORATION AND TRAVELERS INSURANCE COMPANY, APPELLEES.

328 N.W.2d 203

Filed December 23, 1982. No. 82-024.

Workmen's Compensation: Appeal and Error. The findings of fact made by the Nebraska Workmen's Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong. The decision of the compensation court after rehearing must be considered in the light most favorable to the successful party, and every controverted fact must be decided in its favor.

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

James S. Jansen, for appellant.

Patrick B. Donahue of Cassem, Tierney, Adams, Gotch & Douglas, for appellees.

BOSLAUGH, MCCOWN, CLINTON, and WHITE, JJ., and BRODKEY, J., Retired.

CLINTON, J.

This is a workmen's compensation case in which the plaintiff received an award from the one-man Workmen's Compensation Court. Upon rehearing before three members of the court the plaintiff's claim was dismissed.

The accidental injury is alleged to have occurred while the plaintiff was employed as a medical records clerk by the defendant hospital. A detailed review of the conflicting evidence will not serve any useful purpose. We will therefore summarize rather briefly. The injury is alleged to have occurred about June 24, 1980, while the plaintiff was doing

some filing work either while getting down from the stool, walking away from the stool, or as a result of a twisting motion. The plaintiff had a history of prior back problems with previous employers and for some of these complaints she drew workmen's compensation benefits. In this case her principal attending physician was of the opinion that she suffered from a chronic mechanical back problem which preexisted her employment with the defendant; that before the incident of June 24, 1980, she had a 5 percent disability and after the incident she had the same percentage of disability, and that it was not attributable to anything that occurred on June 24, 1980. A second physician, who had little or no knowledge of her prior history, attributed her pain to what occurred on June 24, 1980.

The governing principle is that the findings of fact made by the Nebraska Workmen's Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong. The decision of the compensation court after rehearing must be considered in the light most favorable to the successful party, and every controverted fact must be decided in its favor. Neb. Rev. Stat. § 48-185 (Reissue 1978); *Davis v. Western Electric*, 210 Neb. 771, 317 N.W.2d 68 (1982).

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ERNEST E. HOLLAND, APPELLANT.

328 N.W.2d 205

Filed December 23, 1982. No. 82-035.

1. **Criminal Law: Evidence.** The owner of chattels may testify as to their value in a criminal case.
2. **Evidence: Appeal and Error.** The defendant may not predicate error on the admission of evidence to which no objection was made when adduced.

3. **Verdicts: Appeal and Error.** This court will not interfere with a jury verdict of guilty based upon evidence unless it is so lacking in probative force that the court can say as a matter of law that it is insufficient to support a verdict of guilty beyond a reasonable doubt.

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 Mark D. Starr, for appellee.

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

CAPORALE, J.

Defendant-appellant, Ernest E. Holland, was adjudged guilty, pursuant to a jury verdict, of theft of property valued at over $300 but less than $1,000. He was sentenced to a term of not less than 20 months nor more than 5 years in the Nebraska Penal Complex, and was granted credit for 100 days' prior incarceration time.

In this appeal defendant contends that the evidence was insufficient as a matter of law to sustain the conviction, in that proof of the value of the items taken was inadequate. We disagree; accordingly, the action of the trial court is affirmed.

The items taken were an amateur radio, a citizens band radio, and a Swiss army knife, which the owner acquired by gift in two instances and purchase in the remaining instance. The owner testified as to his opinion of the value of the items on the date of the theft. Defendant argues this evidence is insufficient as a matter of law to establish the element of value inasmuch as there was no testimony as to the purchase price of the items.

It has long been the rule in this jurisdiction that the owner of chattels may testify as to their value in a criminal case. In *State v. Weik*, 206 Neb. 217, 292

N.W.2d 289 (1980), it appears neither the owner nor the other valuation witness testified as to the purchase price of the stolen items, but the evidence was nonetheless found to be sufficient. It is true that in an earlier case, *State v. Rush*, 202 Neb. 425, 275 N.W.2d 834 (1979), evidence as to the purchase price was present. It is also true, as defendant points out, that in *State v. Stowell*, 190 Neb. 615, 211 N.W.2d 130 (1973), we found the evidence insufficient where the owner had acquired the stolen television set by gift and there was no evidence of the purchase price. However, in *Stowell* the owner demonstrated he had no real opinion as to its value at the time of the theft. Such was not the situation in the case at hand.

From these cases, without the citation of any other authority, defendant asks us to adopt a rule which would require evidence of the purchase price of a stolen item in every case of theft. This we refuse to do, as there may well be instances where such evidence is a necessary part of the foundation to be laid for an owner's opinion of value and other instances where it simply is not.

This analysis brings us to the second reason defendant's argument must fail. Even if foundation for the owner's opinion of value in this case were lacking, no objection to the receipt of that evidence was made. The defendant may not predicate error on the admission of evidence to which no objection was made when adduced. *State v. Gore*, 212 Neb. 287, 322 N.W.2d 438 (1982); *State v. Lingle*, 209 Neb. 492, 308 N.W.2d 531 (1981).

In view of the record before us and the verdict of the jury, it is obvious that the jury chose to believe the valuation evidence received. It is not our province to second-guess the jury. This court will not interfere with a jury verdict of guilty based upon evidence unless it is so lacking in probative force that the court can say as a matter of law that it is insufficient to support a verdict of guilty beyond a

reasonable doubt. *State v. Brown*, *ante* p. 68, 327 N.W.2d 107 (1982); *State v. True*, 210 Neb. 701, 316 N.W.2d 623 (1982). The evidence in the record before us is more than sufficient, when believed by the jury, to support the conviction herein.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GERALD J. DAVISON, APPELLANT.

328 N.W.2d 206

Filed December 23, 1982. No. 82-223.

1. **Ordinances: Statutes: Constitutional Law.** Ordinances and statutes are presumed to be constitutional, and their unconstitutionality must be clearly established.
2. **Highways: Motor Carriers: Police Powers.** As a general rule, under its police power, a state may, in the interest of safety and public welfare, restrict the weight of vehicles using its highways by reasonable and nondiscriminatory regulation.
3. **Ordinances: Motor Carriers.** Local regulation which may affect interstate commerce is constitutional only if the local interest is substantial and the police power is reasonably exercised, the burden on interstate commerce is slight, and the regulation does not discriminate against nonresidents or interstate commerce.
4. **Constitutional Law.** A classification having some reasonable basis does not offend against the equal protection clause of the fourteenth amendment merely because it is not made with mathematical nicety or because in practice it results in some inequality. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.

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

Haessler, Sullivan & Inbody, for appellant.

Charles H. Wagner of Edstrom, Bromm, Lindahl & Wagner, for appellee.

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

McCOWN, J.

This is an appeal from a judgment of the District Court affirming the county court conviction of the defendant for operation of a truck upon a city street in Ashland, Nebraska, in violation of a weight limit ordinance of the city of Ashland. The only issue on appeal is the constitutionality of the city ordinance.

On March 20, 1981, the defendant Davison was stopped by police while driving a semitrailer truck on Furnas Street in Ashland, Nebraska. Davison was employed by, and driving a truck owned by, a trucking company which had its headquarters on a north-south highway a short distance west of the Ashland city limits. The company operated four trucks, each licensed for 80,000 pounds in all states west of the Missouri River.

Davison was issued a summons and citation for violation of a city ordinance and resolution which provided: "It shall be unlawful to operate upon any street or alley in the City of Ashland, Nebraska, any truck, truck-tractor, semitrailer, or trailer or combination thereof having a gross weight of more than five (5) tons, except that said vehicles may exceed said limitations if they are being used to deliver goods and/or items to and from residences and/or business in the City of Ashland, Nebraska."

Signs were posted at appropriate locations informing drivers of the weight limit on city streets.

At trial the parties stipulated that Davison had been stopped within the city limits and that the truck was in excess of 5 tons. The defense under the not guilty plea was that the ordinance was unconstitutional.

The mayor of the city testified that before the weight limit was established in 1976 frequent and heavy truck traffic had previously caused substantial damage on certain city streets. He testified that the ordinance was passed to increase safety for the residents and to preserve the roadways for as long as practicable.

The county highway superintendent testified that 6-inch unreinforced concrete roadways such as the street involved will deteriorate under heavy and sustained traffic and that since the construction of the street in 1974 street specifications have changed and now require a thicker roadway for new streets, and the cost to replace the street under present specifications would be approximately $300,000. There was also evidence that not only weight but the frequency of heavily weighted traffic contributes directly to rapid deterioration of the roadway.

Davison's employer testified that he operates four trucks and that his trucks return to headquarters twice a week in wintertime and every day in the summertime, but he did not indicate from which direction the trucks came and went, nor with what frequency any of them would use the city streets. He testified that the alternate legal route to reach a point north of Ashland from his headquarters involves an increase of 4½ miles going one way and approximately 11 miles returning, the difference being occasioned because the trucks cannot negotiate a difficult turn on the return trip, and that the cost of operating the trucks was approximately 90 cents a mile.

The record also shows that the employer's trucks could travel north from their headquarters without any loss of distance and without traveling on city streets except for the fact that the employer's trucks are overweight for three bridges which are located on that road.

The record also shows that through traffic does not have to take circuitous routes to avoid city streets. State and federal highways skirt the edges of town and are not within the weight limit prohibition.

The county court sitting without a jury found that the ordinance was constitutional and fined the defendant $100. On appeal de novo on the record the District Court affirmed the judgment of the county

court and this appeal followed.

The defendant contends that the ordinance violates the U.S. Constitution and constitutes an unreasonable and discriminatory burden on interstate commerce and on nonresidents of the city.

Ordinances and statutes are presumed to be constitutional, and their unconstitutionality must be clearly established. *State v. Austin*, 209 Neb. 174, 306 N.W.2d 861 (1981).

As a general rule, under its police power, a state may, in the interest of safety and public welfare, restrict the weight of vehicles using its highways by reasonable and nondiscriminatory regulation. *State v. Luttrell*, 159 Neb. 641, 68 N.W.2d 332 (1955).

In Nebraska, municipalities have been granted the right to restrict weight limits under Neb. Rev. Stat. § 39,6,189 (Reissue 1978), which provides in part: "Local authorities may also, by ordinance or resolution, prohibit the operation of trucks or other commercial vehicles, or impose limitations as to the weight thereof on designated highways, which prohibitions and limitations shall be designated by appropriate signs placed on such highways."

Local regulation which may affect interstate commerce is constitutional only if the local interest is substantial and the police power is reasonably exercised, the burden on interstate commerce is slight, and the regulation does not discriminate against nonresidents or interstate commerce. *Head v. New Mexico Board*, 374 U.S. 424, 83 S. Ct. 1759, 10 L. Ed. 2d 983 (1963); *Bibb v. Navajo Freight Lines*, 359 U.S. 520, 79 S. Ct. 962, 3 L. Ed. 2d 1003 (1959).

The record in the present case establishes that the vehicular weight limitations of the challenged ordinance are reasonably calculated to achieve the legitimate and substantial interests of the city of Ashland in promoting public safety and preserving public property. The burden on interstate commerce is at most slight, if not virtually nonexistent.

Defendant's argument that trucks headquartered

at the location here must drive additional miles when traveling north is unpersuasive. Local weight limit restrictions have been upheld even though the vehicles involved were required to take an alternative route three times as long as the original route. See, *Carpentersville Ready Mix v. Carpentersville*, 39 Ill. App. 3d 840, 350 N.E.2d 508 (1976); *McCammon v. City of Redwood City*, 149 Cal. App. 2d 421, 308 P.2d 831 (1957).

Finally, the defendant argues that the ordinance is discriminatory because it allows trucks over 5 tons to use the streets if delivering goods and items to or from Ashland.

The ordinance makes no distinction between local or foreign trucks but operates exactly the same as to both. On the evidence in the record the ordinance does not discriminate against interstate commerce in general since through traffic does not have to take any alternative route to avoid the city streets. The alleged "discrimination" has a rational basis and establishes a reasonable classification. A classification having some reasonable basis does not offend against the equal protection clause of the fourteenth amendment merely because it is not made with mathematical nicety or because in practice it results in some inequality. When the classification in such a law is called into question, if any stated facts reasonably can be conceived that can sustain it, the existence of that state of facts at the time the law was enacted must be assumed. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 31 S. Ct. 337, 55 L. Ed. 369 (1911). For cases upholding vehicular weight limits which exempt certain classes of vehicles from the ordinance or statute, see, *Railway Express v. New York*, 336 U.S. 106, 69 S. Ct. 463, 93 L. Ed. 533 (1949); *Sproles v. Binford*, 286 U.S. 374, 52 S. Ct. 581, 76 L. Ed. 1167 (1932); and *Allison v. Med-*

lock, 224 Ga. 37, 159 S.E.2d 384 (1968).

The ordinance involved in the present case represents a reasonable attempt to achieve a substantial and legitimate local interest of the city of Ashland. It imposes a very slight burden, if any, on interstate commerce, and it does not discriminate against nonresidents or interstate commerce. The challenged ordinance is therefore constitutional.

The judgment of the District Court is affirmed.

AFFIRMED.

ALFRED E. MITTELSTADT, APPELLANT, V. DONDRU D. ROUZER, MARION TYE, AND B. J. MCADAMS, INC., A CORPORATION, APPELLEES.

KATHALEEN M. MITTELSTADT, APPELLANT, V. DONDRU D. ROUZER, MARION TYE, AND B. J. MCADAMS, INC., A CORPORATION, APPELLEES.

328 N.W.2d 467

Filed December 23, 1982. Nos. 82-348, 82-349.

1. **Corporations: Venue: Service of Process.** Under the venue statutes, a nonresident defendant corporation "may be found" in any county within the state in which proper service can be had upon its agent.
2. **Corporations: Jurisdiction.** Jurisdiction over a foreign corporation may be exercised by consent of such corporation.
3. **Corporations: Service of Process: Jurisdiction.** By designating an agent upon whom process may be served within this state, a defendant has consented to the jurisdiction in personam by the proper court.
4. **Corporations: Service of Process.** The validity of service under the Motor Carrier Act, 49 U.S.C. § 321(c) (1976) (now 49 U.S.C. § 10330(b) (Supp. IV 1980)), is not limited to causes of action arising out of commerce transacted by a foreign corporation within the state because the act deals with jurisdiction of the person.
5. **Corporations: Service of Process: Jurisdiction.** By appointing a resident agent for service as required by the Motor Carrier Act, 49 U.S.C. § 321(c) (1976) (now 49 U.S.C. § 10330(b) (Supp. IV 1980)), a nonresident corporation has consented to jurisdiction within this state at least as to any cause of action arising out of its activities as a motor carrier in interstate commerce.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Reversed and remanded.

Kenneth Cobb of Cobb & Rehm, P.C., for appellants.

William E. Langdon of Cline, Williams, Wright, Johnson & Oldfather, for appellees.

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

PER CURIAM.

Plaintiffs in these cases have appealed from orders of the District Court dismissing their petitions following the sustaining of the special appearances filed by the defendant B. J. McAdams, Inc.

The plaintiffs, Alfred E. and Kathaleen M. Mittelstadt, are both residents of Nebraska and brought these actions against the defendant McAdams and others for damages arising out of an automobile accident occurring on July 7, 1979, near Flagstaff, Arizona. The petitions alleged that the driver of the truck causing the accident was at the time an employee of and acting within the scope of her employment for the defendant McAdams. Service was obtained upon McAdams, an Arkansas corporation, by summons served on its resident agent living in Omaha, Nebraska. This agent had been appointed to conform to the requirements of the Motor Carrier Act, 49 U.S.C. § 321(c) (1976) (now 49 U.S.C. § 10330(b) (Supp. IV 1980)). That particular section provides in part as follows: "A motor carrier . . . providing transportation subject to the jurisdiction of the [Interstate Commerce] Commission . . . shall designate an agent in each State in which it operates . . . on whom process issued by a court with subject matter jurisdiction may be served in an action brought against that carrier . . . ."

The record discloses that McAdams' trucks travel

through Nebraska as part of its interstate service, logging something less than 3 percent of its total miles within the state. There was no evidence that McAdams owns property in Nebraska, has customers in Nebraska, or has any contacts within the state other than the use of the interstate highway system.

The special appearance was sustained on the ground that the State of Nebraska had no jurisdiction over the defendant. The plaintiffs argue that such jurisdiction vested by reason of Neb. Rev. Stat. § 25-511 (Reissue 1979), § 21-20,114 (Reissue 1977), and §§ 25-536 and 25-408 (Reissue 1979).

Section 25-511 simply defines a method of serving process. It provides in part that "A summons against a corporation may be served . . . by a copy personally served upon the registered agent of the corporation . . . ." Section 21-20,114 states in part that "The registered agent so appointed by a foreign corporation authorized to transact business in this state shall be an agent . . . upon whom any process . . . may be served." However, because McAdams only transacted business in interstate commerce within the state, it was not required to appoint such registered agent provided by Nebraska law. See Neb. Rev. Stat. §§ 21-20,105 and 21-20,112 (Reissue 1977).

The plaintiffs' assertion that the courts of this state may exercise personal jurisdiction over McAdams under the provisions of § 25-536, the so-called "long arm statute," is without merit. The cause of action neither arose from the transaction of business by the defendant within the state, nor was the injury caused by act or omission occurring within the state or outside this state while the defendant regularly did or solicited business within the state, as required by that section.

Also relied upon by the plaintiffs as vesting jurisdiction over the defendant is § 25-408, which provides that an action such as the present one may be brought against a foreign corporation in any county

"where said defendant may be found." Although this is but a venue statute, it suggests the answer to our inquiry.

A defendant "may be found" in any county in which proper service can be had upon its agent. *Juckett v. Brennaman,* 99 Neb. 755, 157 N.W. 925 (1916). Jurisdiction over a foreign corporation may be exercised by consent of such corporation. *Brown v. Globe Laboratories, Inc.*, 165 Neb. 138, 84 N.W.2d 151 (1957). By designating an agent upon whom process may be served within this state, a defendant has consented to the jurisdiction in personam by the proper court. *Esperti v. Cardinale Trucking Corp.*, 263 A.D. 46, 31 N.Y.S.2d 253 (1941). The validity of service under the Motor Carrier Act, 49 U.S.C. § 321(c) (1976) (now 49 U.S.C. §10330(b) (Supp. IV 1980)), is not limited to causes of action arising out of commerce transacted by a foreign corporation within the state because the act deals with jurisdiction of the person. *Esperti, supra.*

In *Normann v. Burnham's Van Service,* 73 So. 2d 640 (La. App. 1954), appears the following language at 646: "There is no question that if plaintiff had caused citation in the suit to be served on the agent designated by appellant [defendant] pursuant to the Federal Act, the action could have been conducted as one in personam, as appellant would have been effectively brought into court by virtue of such citation." See, also, *Sansbury v. Schwartz*, 41 F. Supp. 302 (D.D.C. 1941); *Shapiro v. Southeastern Greyhound Lines*, 155 F.2d 135 (6th Cir. 1946).

However, the defendant has cited to us three cases which it claims are determinative of the issue in its favor: *Clark v. Babbitt Brothers, Inc.*, 260 S.C. 378, 196 S.E.2d 120 (1973); *King v. Motor Lines*, 219 N.C. 223, 13 S.E.2d 233 (1941); and *Davies v. Mahanes*, 88 F. Supp. 550 (D. Md. 1949). We believe that the cases are all distinguishable.

The facts in *Clark* were remarkably similar to those of the instant case. A resident of South Caro-

lina brought suit in a court of that state against a Wisconsin corporation for damages sustained by reason of an accident in Kentucky. Service was had on the defendant's resident agent appointed under the terms of the Motor Carrier Act. In affirming the action of the trial court, which had dismissed the service, the South Carolina court pointed out that the cause of action arose some 2 months *after* the date when the defendant ceased maintaining an agent for the transaction of business, or owning any property or transacting any business within the State of South Carolina.

King involved a situation wherein the residence of both parties and the accident site were all located in Tennessee. The North Carolina court refused to recognize service upon the resident agent appointed under the provisions of the Motor Carrier Act. In doing so, it relied on *Old Wayne Life Ass'n v. McDonough*, 204 U.S. 8, 27 S. Ct. 236, 51 L. Ed. 345 (1907), as "authority for the position that such attempted service will not suffice on a cause of action arising in another jurisdiction." *King*, *supra* at 224, 13 S.E.2d at 234. However, *Old Wayne* did not involve service upon a named resident agent, nor did the cause of action arise out of the interstate operation of a motor carrier. Rather, it was concerned with a corporation which was a nonresident of the forum state and an action on a contract executed in the state of residence of such corporation. Jurisdiction was attempted by service of summons on the insurance commissioner of the forum state as the implied agent for service, the foreign corporation having failed to comply with the laws of that state as to the appointment of a resident agent. The Supreme Court of the United States concluded that "such assent [to service] cannot properly be implied where it affirmatively appears . . . that the business was not transacted in Pennsylvania." *Old Wayne*, 204 U.S. at 22.

Although decided on another ground, the following

language touches on the question of personal jurisdiction: "So interpreted section 321(c) seems to have no proper application to this case *where neither party* to the case *is a citizen or resident of this District*, where the tort sued for did not occur and where the defendant's truck at the time was not engaged in interstate transportation." (Emphasis supplied.) *Davies*, *supra* at 551.

The above three cases are not determinative of this issue. More nearly in point, and a case which contains a most exhaustive review of the authorities in this area of the law, is *State ex rel. v. Latourette*, 186 Or. 84, 205 P.2d 849 (1949). Most, if not all, of the cases cited in this opinion are examined in *Latourette*. This was a proceeding in mandamus to test the validity of service upon a resident agent appointed in Oregon under the provisions of the Motor Carrier Act. The basic action was one in tort brought in the Oregon court by a Washington resident against a Washington carrier and arising out of an accident occurring in Washington. The effect of the Oregon court's holding was that service was valid. The opinion stated: "That question can be stated this way: Does 49 U.S.C.A., § 321(c), mean that one who possesses a cause of action against an interstate motor carrier may sue the carrier in any state in which it had appointed a statutory agent, or does it mean that the suit must be filed in one of the following states: (1) where the cause of action arose; (2) where the plaintiff resides; or (3) where the defendant resides; and if so, which one. . . . The language of 49 U.S.C.A., § 321(c), is sweeping and is free from qualifying passages. Nowhere does it manifest a preference for the state in which a prospective plaintiff dwells, nor for one in which the defendant lives, nor for the one in which the cause of action arose. It treats all states in which a process agent has been appointed with equal impartiality. We have no right to subtract anything from § 321(c) nor to insert prefer-

ences in it which the lawmaker omitted." *Latourette, supra* at 102, 205 P.2d at 857.

We hold that by appointing a resident agent for service as required by 49 U.S.C. § 321(c) (1976) (now 49 U.S.C. § 10330(b) (Supp. IV 1980)) a nonresident corporation has consented to jurisdiction within this state at least as to any cause of action arising out of its activities as a motor carrier in interstate commerce. Whether in this instance venue was properly laid in the District Court for Lancaster County, as provided for in § 25-408, is not before us at this time.

The judgment of the District Court is reversed and the cause is remanded for further proceedings.

REVERSED AND REMANDED.

WHITE, J., concurs in the result.

CHARLES SMITH, APPELLEE, V. FETTIN ROOFING CO., INC., A NEBRASKA CORPORATION, ET AL., APPELLANTS.

328 N.W.2d 470

Filed December 30, 1982. No. 43755.

1. **Corporations: Stock.** Generally, "book value" of the stock in a corporation means the figure obtained by dividing the difference between assets and liabilities by the number of outstanding shares of stock.
2. **Prejudgment Interest.** Generally, a party is not entitled to prejudgment interest where the amount due is not readily determinable by computation from data without reliance on opinion or discretion.

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

Edward F. Carter, Jr., and Barney, Carter & Johnson, P.C., for appellants.

John McArthur and A. James McArthur, for appellee.

BOSLAUGH, MCCOWN, and CLINTON, JJ., and BRODKEY, J., Retired, and DEBACKER, D.J.

PER CURIAM.

This case arises out of a controversy concerning a written contract between the plaintiff, Charles Smith, and the defendant, Fettin Roofing Co., Inc. The contract provided for the repurchase of capital stock of the corporation by the corporation upon the termination of the employment of the plaintiff by the defendant.

The contract, termed an "Employment Agreement," was signed on July 28, 1974. It was executed on behalf of the corporation by Ralph Greb and Marvin G. Hahn, the sole stockholders of the corporation at that time. The contract provided generally that the plaintiff would be employed by the defendant as a roofer. It further provided: "6. During the term of this agreement Employee shall have the option to purchase the same amount of stock in Company as the present two owners own at the time Employee exercises such option priced at the book value at the time the option is exercised. At the time Employee exercises such option the Company will, at its own expense and within forty-five (45) days provide an audit of Company's books to determine the book value of its stock. That if Employee leaves Company, Company will repurchase said stock owned by Employee for the book value at the date of the termination of his employment. At such time Company will provide an audit to determine the book value of such stock."

Approximately 6 months after the date of the employment contract the plaintiff decided to purchase stock in the corporation. It was agreed between the plaintiff, Greb, and Hahn that the plaintiff would purchase 1,045 shares at $14.40 per share at that time. The plaintiff paid $14,000 in cash and was given a credit of $1,048 by the corporation, which was supposed to represent a one-third share of the

profits for 4 months. A memorandum signed by Greb and Hahn at that time, dated "2-10-75," provided: "Freeze Shares @ 14.40 for Smitty to by [sic] 455 Shares at the end of 1977 from His profits out of Company or from his on persenal [sic] Money." The plaintiff purchased the remaining 455 shares of stock in 1976 and paid $6,480 in cash to the corporation. The plaintiff, Greb, and Hahn then owned equal amounts of stock in the defendant corporation.

In 1976 Hahn withdrew from the corporation. Hahn's stock was purchased by the corporation for $44,295 and is now held as treasury stock.

In 1977 a controversy developed between Greb and the plaintiff over the plaintiff's work performance on some of the jobs. On April 13, 1977, Greb, as president of the corporation, wrote to the plaintiff requesting immediate termination of his employment and the keys to all of the premises and equipment of the company. Three or four days later, the plaintiff wrote a note to Greb stating: "Ralph, here is your keys. About your letter I going to go through with it. Smitty."

The principal issue in this case is the determination of the "book value" of the plaintiff's stock in the corporation at the time his employment was terminated. The contract provided that the defendant at such time "will provide an audit to determine the book value of such stock."

There is no substantial dispute between the parties as to the meaning of the term "book value." Generally, "book value" of the stock in a corporation means the figure obtained by dividing the difference between assets and liabilities by the number of outstanding shares of stock. See, 18 Am. Jur. 2d *Corporations* § 219 (1965); Annot., 51 A.L.R.2d 606 (1957). There is, however, a substantial dispute in this case as to how it should be computed.

It is undisputed that the defendant did not provide an audit to determine the book value of the plain-

tiff's stock. The plaintiff was provided with a balance sheet prepared by Clarence C. Knosp. Knosp was an employee of American Stores Packing Company, but also practiced public accounting. He had done accounting work for the defendant since 1971 or 1972.

The balance sheet prepared by Knosp showed the book value of the stockholders' equity to be $49,691.69 as of April 30, 1977.

The plaintiff employed Gerald S. Grant, a certified public accountant, to examine the records of the defendant and determine the book value of the stock as of April 30, 1977. Grant testified that his examination of the records of the defendant was in the nature of a "limited examination" rather than an audit because there were certain items, such as inventory, that could not be independently verified by him as of April 30, 1977. A bank reconciliation was made, and accounts payable and accounts receivable were verified. Grant was unable to determine original cost of equipment or satisfy himself as to the original issuance of capital stock. The examination which he made, to the extent it was made, was made in accordance with generally accepted auditing standards.

The balance sheet prepared by Grant showed the book value of the stockholders' equity as of April 30, 1977, to be $100,972.

The difference between the values established by Knosp and Grant is over $50,000. It is impossible to reconcile all of the differences between the two balance sheets, but the major differences are explained in the testimony.

Grant discovered an error in accounts receivable that defendant concedes increased assets by approximately $11,400. Grant included $7,267 for work in progress. Knosp claimed there were no unbilled accounts receivable. Grant included $37,268 for "Income Taxes Refundable," due to the net operating loss of the defendant amounting to approxi-

mately $97,000 for the first 4 months of 1977. Grant explained that if the books were closed as of April 30, 1977, such an item should be included to correctly reflect the income tax liability status of the corporation as of that date. Since the business of the defendant is seasonal in nature, the income received in the profitable months during the balance of the year offset the loss during the first 4 months and resulted in a small profit being realized for the entire year. The plaintiff, however, was entitled to the benefit of the potential income tax credit as of April 30, 1977, because the operating loss was deducted from surplus or undistributed profits accumulated in prior years in computing book value.

The trial court found that the book value of the plaintiff's stock was $51,073.34 and that the plaintiff should recover prejudgment interest on that amount from April 30, 1977. In addition to that amount, the trial court found that the plaintiff should recover $4,011.85 for accounting expense.

Upon review de novo we determine that the book value of the plaintiff's stock as of April 30, 1977, was $50,486, and the plaintiff is entitled to recover that amount from the defendant. We find that the plaintiff is not entitled to prejudgment interest because the amount due the plaintiff was not "determined or readily determinable by computation." It was not liquidated because the amount due could not be determined from data without reliance upon opinion or discretion. See *Estate of Ruwe v. Ruwe,* 190 Neb. 663, 211 N.W.2d 610 (1973).

The plaintiff is entitled to recover the $4,011.85 accounting expense he incurred because it was the obligation of the defendant to furnish the audit. The defendant is not entitled to a credit for one-half of the expense of the audit, as claimed by the defendant, because it was the obligation of the company to furnish the audit.

The judgment of the District Court is modified to provide that the plaintiff shall recover $50,486 with-

out prejudgment interest as the book value of his stock; and as so modified it is affirmed.

AFFIRMED AS MODIFIED.

CLINTON, J., not participating.

RUSSELL L. KOERNER, APPELLANT, V. ROCHELLE A. PERRELLA, APPELLEE.

328 N.W.2d 473

Filed December 30, 1982. No. 44046.

Evidence: Appeal and Error. Where evidence is conflicting or where reasonable minds may draw different inferences or conclusions from the evidence, it is within the province of the jury to decide the issues of fact, and the Supreme Court will not set aside or direct a verdict in such a situation.

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

William L. Gilmore and Debra K. Lyford of McArthur, Lamb, Lyford, Gilmore & Janssen, for appellant.

Patrick W. Healey of Healey, Brown, Wieland, Kluender, McCord & Atwood, for appellee.

KRIVOSHA, C.J., WHITE, and CAPORALE, JJ., and MURPHY and WHITEHEAD, D. JJ.

WHITEHEAD, D.J.

This is an action for damages and personal injuries resulting from an automobile-motorcycle collision. Plaintiff Koerner, in his petition, alleges that the negligence of the defendant was the proximate cause of the accident and resulting injury. Defendant Perrella, in her answer, alleged that the proximate cause of the collision and the resulting injuries was the negligence of the plaintiff. The matter was tried to a jury and the jury returned a verdict in favor of the defendant Perrella. The plaintiff has appealed.

The collision involved in this case occurred on Cotner Boulevard near the intersection of 64th Street and Cotner Boulevard. On August 7, 1979, at approximately 4:15 p.m., the defendant was operating her automobile, a green 1975 AMC Gremlin, southbound on Cotner Boulevard, heading toward her apartment at 6425 Dudley Street. The plaintiff was traveling in the same direction, with the defendant's automobile in front of him while he was riding on his motorcycle. Defendant testified it was her intention to pull in a driveway located on the west side of Cotner between Orchard and Dudley Streets which led to a parking lot immediately adjacent to her apartment.

The parties proceeded along at a point where the southbound lane begins to widen to provide for a left turn lane onto Dudley Street. The plaintiff testified that the defendant's automobile appeared to move to the left. The defendant then turned her automobile sharply, making a right-hand turn into the driveway. The plaintiff, who was in the southbound lane, collided with the defendant's vehicle, the plaintiff's motorcycle colliding with the right passenger door at a point near the hinges. The plaintiff testified that there were no turn signals or any warning; the defendant testified that prior to the accident she had slowed to about 10 miles per hour, that her turn signals were working, and that she automatically uses her turn signals.

Plaintiff testified that he first saw the defendant's car as he was proceeding southwest on Cotner when it was in front of the Derby station south of Dudley. He said that at that time he was going 30 to 35 miles per hour and the Gremlin was going slowly. Plaintiff then observed a friend in the Derby station on the left side of the street. He acknowledged that he took at least a few seconds to check out his friend in the Derby station. He believed he had honked, and when he had looked back the defendant's auto was in the left lane and he was approximately 15 or 20 feet

behind it, was unable to stop, and collided with defendant's auto. The matter was submitted to a jury and the jury returned a verdict for the defendant. The plaintiff appeals. We affirm.

The plaintiff raises a number of grounds for appeal in his motion for new trial and the assignments of error cited in his brief, which may be condensed to three grounds: (1) That the trial court erred in instructing the jury on the comparative negligence; (2) That the trial court erred in failing to instruct the jury that the defendant was negligent as a matter of law; and (3) That the weight and sufficiency of the evidence was clearly contrary to the verdict received.

The plaintiff contends that the court should not have submitted the issue of contributory negligence to the jury. The issue was well pled by the defendant in this matter, and this court has stated repeatedly, in the interpretation of Neb. Rev. Stat. § 25-1151 (Reissue 1979), that " 'It should be noted here that the final provision of the comparative negligence statute requires that "all questions of negligence and contributory negligence shall be for the jury." *While that language obviously does not affect the court's right to decide a case as a matter of law, it does emphasize the fact that the determination of questions of negligence and contributory negligence and the comparative measuring of them are basically factual issues which are generally for determination by the jury.'* (Emphasis supplied.)" (Emphasis supplied.) *C. C. Natvig's Sons, Inc. v. Summers,* 198 Neb. 741, 747-48, 255 N.W.2d 272, 277 (1977).

In the present case, even assuming that the defendant was guilty of negligence as a matter of law for failing to signal her right-hand turn, the degree of negligence as compared to the possible negligence on the part of the plaintiff remains in dispute. There was testimony as to the plaintiff's lack of lookout and conflicting testimony as to whether or not the

defendant had signaled, and, therefore, the issue was proper for submission to the jury. It should be noted that prior to submission of the matter the instructions were submitted to all counsel for comment, and each individual instruction was reviewed by counsel for objection. No objection was reflected in the record as to alleged erroneous instructions. The failure to object to instructions after they have been submitted to counsel for review will preclude raising an objection on appeal. *Beveridge v. State,* 183 Neb. 406, 160 N.W.2d 229 (1968); *Libbey-Owens Ford Glass Co. v. L & M Paper Co.,* 189 Neb. 792, 205 N.W.2d 523 (1973).

Another contention of the plaintiff is that the weight and sufficiency of the evidence was clearly contrary to the verdict received. This court has on numerous occasions stated that where evidence is conflicting or where reasonable minds may draw different inferences or conclusions from the evidence, it is within the province of the jury to decide the issues of fact and the Supreme Court will not set aside or direct a verdict in such a situation. See, *Mustard v. St. Paul Fire & Marine Ins. Co.,* 183 Neb. 15, 157 N.W.2d 865 (1968); *Libbey-Owens Ford Glass Co. v. L & M Paper Co., supra.*

In the case at bar the jury returned its verdict in favor of the defendant and there was competent evidence to support that verdict. The verdict of the jury will not be disturbed unless it is clearly wrong. The judgment of the District Court was correct and is affirmed.

AFFIRMED.

Cite as 213 Neb. 193

WESLEY PEARCE, APPELLEE, V. ELIC CORPORATION, A NEBRASKA CORPORATION, APPELLANT.

329 N.W.2d 74

Filed December 30, 1982. No. 44460.

1. **Contracts: Waiver: Proof.** A written contract may be waived in whole or in part, either directly or inferentially, and the waiver may be proved by express declarations manifesting the intent not to claim the advantage, or by so neglecting and failing to act as to induce the belief that it was the intention to waive.
2. **Contracts: Waiver.** Conditions precedent in a contract may be waived.
3. _____: _____. A provision in a written contract that a waiver of the conditions and terms of the agreement must be in writing may be waived by acts or conduct.
4. _____: _____. The general rule is that the assertion of the invalidity of a contract is nullified by the subsequent acceptance of benefits growing out of the contract claimed to have been breached.
5. _____: _____. Where a contracting party, with knowledge of a breach by the other party, receives money in the performance of the contract, he will be held to have waived the breach.
6. **Contracts: Parol Agreement.** A written executory contract may be modified by the parties thereto at any time after its execution and before a breach has occurred, without any new consideration; and the terms of a written executory contract may be changed by a subsequent parol agreement before a breach thereof.
7. **Contracts: Parol Evidence.** The parol evidence rule relates only to agreements made prior to or contemporaneous with the written agreement and does not apply to parol agreements made after a written agreement.

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

Jeffrey A. Silver, for appellant.

Sutter & Olson, for appellee.

BOSLAUGH, MCCOWN, CLINTON, and WHITE, JJ., and BRODKEY, J., Retired.

BRODKEY, J., Retired.

Defendant below, ELIC Corporation (hereinafter referred to as ELIC), has appealed to this court from a judgment entered against it by the District Court for Lancaster County, Nebraska, in an action

brought against the defendant by the plaintiff, Wesley Pearce, to recover certain "overwrite" commissions alleged to be due him by defendant. The case was tried to a jury, which returned a verdict in favor of Pearce in the amount of $7,832.57, and which also returned a verdict in favor of Pearce and against ELIC on ELIC's cross-petition. The trial judge subsequently reduced the judgment to $7,174, and this appeal followed. We affirm.

It appears from the record that plaintiff was engaged as a general agent for D.I.S. Corporation (hereinafter referred to as D.I.S.) under an agreement dated April 1, 1977, he having been associated prior to that time with that corporation since 1970. D.I.S. at that time was engaged in the marketing of credit life and credit accident and health insurance programs for various insurance companies, and D.I.S. received a commission based on premiums received from such insurance companies. Under the agreement of April 1, 1977, Pearce was engaged by D.I.S. to solicit participants in the company's insurance programs; to provide advisory services in connection with the operation of the company's insurance programs; to distribute materials and printed supplies for the conduct of the company's insurance programs; and to make reports and receive and remit funds to the company collected in connection with the company's insurance programs. D.I.S. was a marketing arm for Empire Life Insurance Company and Great Plains Insurance Company. By virtue of an exchange of stock, D.I.S. was merged into a holding company, ELIC, the defendant herein, in 1979, and D.I.S. was dissolved. Mr. Anthony J. Bianchi testified that he was president of ELIC, was also president of Great Plains Insurance Company and Empire Life Insurance Company, which were "all underneath the ELIC umbrella," and was also president of D.I.S.

In the early part of 1978 Great Plains Insurance Company commenced writing a new type of insur-

ance policy of mechanical breakdown insurance which would, in effect, continue the warranty on an automobile and protect it from damage resulting from a mechanical breakdown. This type of insurance was also known and referred to as VIP. At that time D.I.S. was the marketing arm for the insurance for Great Plains.

On July 21, 1978, Pearce and D.I.S. entered into an addendum to the April 1, 1977, agreement previously referred to, which provided, among other things, that in addition to his other commission income Pearce was to receive "an overwrite ('Overwrite') equal to 5% of gross premiums received on Great Plains Insurance Co., Inc. automobile Mechanical Breakdown Program (herein called 'Mechanical Program') written through those automobile dealers delineated in Exhibit 'A' to this Agreement, as of March 1, 1978. However, as a condition precedent to Pearce's receipt of the Overwrite, Pearce must produce net premium (after cancellations) from the sale of credit life insurance and credit accident and health insurance in excess of $67,500.00 per month, which figure is hereinafter referred to as 'Overwrite Quota.' The Overwrite Quota must be satisfied by July 30, 1979 (on business to be reported in August, 1979) in order for Pearce to be eligible for the Overwrite. Company shall deposit the Overwrite in a commercial bank, the choice of which shall be at Company's discretion, as long as said commercial bank is in Omaha, Nebraska. The Overwrite shall be payable to Pearce commencing August 20, 1979, and each month thereafter provided Pearce satisfies the Overwrite Quota. In other words, it is the intention of the parties that if Pearce does not satisfy the Overwrite Quota, he shall not be entitled to receive the Overwrite."

In his petition filed in the District Court for Lancaster County, plaintiff alleged, among other things, that ELIC was the owner of all outstanding stock of D.I.S., a Nebraska corporation, and alleged the

agreement of July 21, 1978, between plaintiff and D.I.S., and the terms thereof; further alleged that subsequent to the execution of the addendum, the defendant waived the condition precedent and paid plaintiff for "overwrite" commissions for 1978 and, further, acknowledged indebtedness to the plaintiff for such commissions for 1979, both orally and in writing, and that the plaintiff had received his 5 percent "overwrite" commissions for 1978 but that the defendant refused to pay plaintiff the overwrite commissions for the calendar year 1979 in the amount of $7,174, although requested to do so; and prayed for judgment against the defendant for that amount.

In its answer filed to plaintiff's petition, defendant generally denied the allegations of such petition and alleged that any payment for "overwrite" commissions for 1978 was an "advance," pending a determination of whether plaintiff would satisfy the "overwrite quota," and further alleged that plaintiff had failed to satisfy the "overwrite quota" for 1979 and was therefore not entitled to receive commissions thereon. Defendant also filed a cross-petition in which it alleged that on May 15, 1979, plaintiff was paid an advance "overwrite" commission of $4,610.52, but that at no time during 1979 did plaintiff satisfy the "overwrite quota"; that defendant had made demand upon the plaintiff for the repayment of such "advances," but that plaintiff had failed and refused to pay said amount; and prayed for judgment against the plaintiff for $4,610.52.

In his reply to defendant's answer, plaintiff denied that the payment of the "overwrite" commission by defendant to plaintiff for 1978 was an "advance," as claimed by the defendant, but that it was paid for services rendered by the plaintiff and said payment constituted a waiver of the condition precedent contained in the addendum, and further alleged that the defendant had acknowledged indebtedness to the plaintiff for the "overwrite" commission for 1979 and had thereby waived the condition precedent.

For answer to defendant's cross-petition plaintiff further denied that the "overwrite" commission in the sum of $4,610.62 was an "advance."

As previously stated, the jury found for the plaintiff both on his petition and also for the plaintiff on defendant's cross-petition.

As stated in defendant's brief on appeal, the issue tried in the court below was whether ELIC waived the condition precedent of the "overwrite quota" and, if so, the amount, if any, of the damages to Pearce resulting therefrom, in addition to whether the amount previously paid to Pearce was an advance and his responsibility to repay said amount. In its assignments of error, defendant contends that the trial court erred in failing to find as a matter of law that the condition precedent in the addendum could not be waived; that the court also erred in allowing testimony to be adduced with reference to negotiations for the purchase of Pearce's insurance agency, in violation of ELIC's motion in limine, which, incidentally, was never formally ruled upon by the court; and also that the court erred in permitting parol evidence with respect to negotiations leading up to the execution of the addendum.

A large number of exhibits were offered and received in evidence in the case. These consisted largely of correspondence between the plaintiff and Anthony J. Bianchi, the president of the various companies previously referred to; and even without the benefit of supporting testimony of the witnesses who testified at the trial, they are most persuasive, are sufficient to support the verdict of the jury and the judgment entered thereon by the trial court, are sufficient to establish a waiver of the condition precedent contained in the addendum with reference to the "overwrite quota," and also are sufficient to establish a subsequent modification of that agreement. We review the pertinent documentary evidence adduced at the trial.

Under date of September 14, 1978, D.I.S. wrote

plaintiff a letter stating: "Enclosed please find a photo copy of the savings account we opened on your behalf. This $2,738.00 represents the V.I.P. Commissions thru August according to the Adendum [sic] dated July 21, 1978.

"If you have any questions on this, please let me know."

Under date of May 15, 1979, Mr. Bianchi wrote plaintiff, on ELIC stationery, as follows: "Wes, here is your VIP commission on all business dated through 12/31/78. This check also includes interest accrued as of this date of 5/15/79.

"*We will still owe you for business production in 1979* and you'll please have to wait til I return to set up the payment.

"Marlene tells me you have been given production sheets through 12/31/78." (Emphasis supplied.)

Next, on July 27, 1979, Mr. Bianchi wrote plaintiff, also on ELIC stationery, stating, among other things, as follows: "So, the bottom line is that effective August 1, we are terminating our Agency Agreement with you. The contract calls for a 90 day notice and so this allows you three months to line up other companies and switch the business." In a letter to plaintiff, dated August 2, 1979, on ELIC stationery, Mr. Bianchi stated, among other things, as follows: "Just for the record, this is to rescind the termination letter dated July 27, 1979. However, as we discussed, it now looks as though we will terminate as of January 1, 1980 with a 90-day notice to you in the latter part of September. . . . *It looks like your dealers have produced VIP this year to June 1st of $60,161 and I will be sending you a check accordingly in the next couple of days.*" (Emphasis supplied.)

Then, on August 17, 1979, Mr. Bianchi wrote a letter to plaintiff, on Empire Life Insurance Company stationery, stating: "*The check to you for the override [sic] on the V.I.P. business will be forthcoming.* We find though that we will need you to sign a new contract or assignment since the old contract is with

D.I.S. . We will be in contact with you when the assignment is ready for your signature.

"Thank you for your patience." (Emphasis supplied.)

In the next letter from Mr. Bianchi to plaintiff, under date of September 27, 1979, also on ELIC stationery, after informing Mr. Pearce that he will give him formal notice of termination on or about October 1, 1979, which will bring about a termination date of January 1, 1980, Bianchi further states: "Let me correct your September 13th letter on one point. *We are not offering to buy your agency as compensation for the termination. We are just offering to buy your agency if it would be a help to you on January 1, 1980.* I understood that you wanted to consider going into another business. If so, we were giving you a possible way to sell your agency." (Emphasis supplied.)

The above language becomes material in connection with the claim of defendant's counsel that during trial the court erred in permitting evidence of the offer to purchase the business as being an offer to compromise or settle a claim. Then, on September 28, 1979, Mr. Bianchi wrote the plaintiff two separate letters, one being on Great Plains Insurance Company stationery and the other on Empire Life Insurance Company stationery, each letter advising Pearce of the company's intention to terminate his agreement with it effective 90 days from that date. Finally, under date of July 14, 1980, a statement was sent to Mr. Pearce, apparently for the first time, for a refund of the moneys previously "advanced" to him as "overwrite" commission, as follows: "Amount due ELIC Corporation as advances on Great Plains Insurance Co., Inc. 'overwrite' commission: $4,610.52."

We also note that in a letter written on D.I.S. stationery, dated July 21, 1978, Mr. Bianchi states, among other things, as follows: "Now, Wes, let me put something down very clearly. You mention that

the 5% overwrite on Mechanical Breakdown is 'due me'. We do not feel this way, we do not feel that we owe you this in any way. We can discuss this at length but our decision is irrevocable."

There is also in the record testimony of Mr. Pearce and his wife to the effect that between Christmas of 1978 and January of 1979, at a social party at the home of Mr. Bianchi, a discussion was had between plaintiff and Mr. Bianchi with reference to ELIC buying out D.I.S., among other matters. We quote verbatim from the record: "And the third conversation that we talked about was the V.I.P., and I said, 'Do you mean things are going to get better? Isn't it about time I started getting paid for the Mechanical Breakdown that we've installed and I've been servicing?' And he said, 'Yes, after the first of the year I'll get ahold of the accounting people and we'll bring the figures up to date and we'll start paying you on a regular basis for the V.I.P.' " Plaintiff also denied in his testimony that Mr. Bianchi had at any time ever told him that such pay was to be an "advance." Plaintiff's testimony was substantiated in every respect by the testimony of his wife, and their testimony was before the jury at the trial. We believe that the evidence in the record was sufficient to justify the jury in concluding that the defendant waived the precondition of the "overwrite quota," both expressly and also by its actions in the payment of the commissions due for 1978 to the plaintiff, which were accepted by him.

The following well-established rules of law are applicable to the facts of the instant case. A written contract may be waived in whole or in part, either directly or inferentially, and the waiver may be proved by express declarations manifesting the intent not to claim the advantage, or by so neglecting and failing to act as to induce the belief that it was the intention to waive. *Advance-Rumely Thresher Co. v. Bartzat,* 114 Neb. 35, 206 N.W. 7 (1925); *Alpirn v. H. Epstein & Son,* 138 Neb. 311, 293 N.W. 103

(1940); *Wolf v. Tastee Freez Corp.*, 172 Neb. 430, 109 N.W.2d 733 (1961); 17 Am. Jur. 2d *Contracts* §§ 390 and 392 (1964); 17A C.J.S. *Contracts* §§ 491 and 492(1) (1963). Even conditions precedent in a contract may be waived. 17A C.J.S., *supra* § 491; 17 Am. Jur. 2d, *supra* § 392. Even a provision in a written contract that a waiver of the conditions and terms of the agreement must be in writing may be waived by acts or conduct. 17A C.J.S., *supra* § 492(1); *Bettelheim v. Hagstrom Food Stores,* 113 Cal. App. 2d 873, 249 P.2d 301 (1952); *Boston Insurance Co. v. Barnes,* 120 Ga. App. 585, 171 S.E.2d 626 (1969). The general rule is that the assertion of the invalidity of a contract is nullified by the subsequent acceptance of benefits growing out of the contract claimed to have been breached. *McLeod v. Crawford,* 176 Neb. 513, 126 N.W.2d 663 (1964); *Wegner v. West,* 169 Neb. 546, 100 N.W.2d 542 (1960); *Einot, Inc. v. Einot Sales Co., Inc.,* 154 Neb. 760, 49 N.W.2d 625 (1951). It is also the general rule that where a contracting party, with knowledge of a breach by the other party, receives money in the performance of the contract, he will be held to have waived the breach. 17 Am. Jur. 2d *Contracts* § 396 (1964); 17A C.J.S., *supra* § 492(1). In *Einot, Inc. v. Einot Sales Co., Inc., supra,* we held that where a party to a contract, with full knowledge of the facts and with knowledge of a breach by the other party, receives money in the performance of the contract, the breach will be deemed to have been waived. See, also, *Wegner v. West, supra; Robinson Outdoor Advertising Co. v. Wendelin Baking Co.,* 145 Neb. 112, 15 N.W.2d 388 (1944). A written executory contract may be modified by the parties thereto at any time after its execution and before a breach has occurred, without any new consideration; and the terms of a written executory contract may be changed by a subsequent parol agreement before a breach thereof. *W. Wright, Inc. v. Korshoj Corp.,* 197 Neb. 692, 250 N.W.2d 894 (1977); *Jenkins v.*

Watson-Wilson Transp. System, Inc., 183 Neb. 634, 163 N.W.2d 123 (1968); *Bowman v. Wright*, 65 Neb. 661, 91 N.W. 580 (1902).

Under the rules set out above, we believe it is clear that there was a waiver by the defendant of the condition precedent relative to the quota requirement, both expressly and also by conduct, particularly by the reception of the benefits by the defendant and reception of the money paid to it by way of premiums and the commissions paid thereon to the plaintiff for 1978. The waiver amounted to a modification of the previous contract to the extent that the condition was eliminated. No issue is raised in this appeal as to the amount of the commission claimed due by the plaintiff, of which there is evidence in the record; the dispute is as to whether the commissions were payable at all.

We now comment briefly on certain contentions and objections made by defendant in its brief. Defendant contends that the court violated the parol evidence rule in allowing testimony of subsequent oral modifications and waivers of the original agreement. Defendant overlooks the fact that the modification or waiver in this case was made subsequent to the execution of the written agreement. The rule in this state is that the parol evidence rule relates only to agreements made prior to or contemporaneous with the written agreement and does not apply to parol agreements made after a written agreement, which is the situation in this case. See *Jenkins v. Watson-Wilson Transp. System, Inc.*, *supra*.

Defendant also raises as error the action of the court in admitting evidence adduced by Wesley Pearce concerning certain negotiations to purchase his agency. We have previously commented on the evidence relating to the purchase of the agency, and only wish to add that the court sustained defendant's objection to the testimony, ordered it stricken, and told the jury to disregard the statement. The rule is

that when evidence is improperly received, but immediately ordered stricken and the jury is instructed to disregard it, any error is cured. *Danner v. Walters,* 154 Neb. 506, 48 N.W.2d 635 (1951); *Sheridan v. Dudden Implement, Inc.,* 174 Neb. 578, 119 N.W.2d 64 (1962).

Defendant also objected to the admission of exhibit 8 (the letter of September 27, 1979), which it claims contains no relevant evidence necessary to prove Pearce's allegations. We do not agree. Exhibits 8, 9, and 10 were offered and received simultaneously for the purpose of showing the termination history of the plaintiff as to each of the three companies. Proof of the termination date was necessary to establish a cutoff point for the computation of damages. Even if considered as inadmissible, we believe it was harmless, as the verdict was supported by sufficient competent evidence.

We also wish to add that the testimony with reference to the language of the addendum was not offered for the purpose of modifying the agreement, but had reference and pertinence to the subsequent waiver of the terms of the agreement, and as such was properly received.

We have examined all of defendant's assignments of error and believe that they are not meritorious. In view of what we have stated above in this opinion, we conclude that the verdict of the jury, and the judgment entered thereon by the court, was correct and must be affirmed.

AFFIRMED.

ELIZABETH HOLLY, APPELLANT, V. CHARLES MITCHELL, APPELLEE.

328 N.W.2d 750

Filed December 30, 1982. No. 81-598.

1. **Negligence: Evidence.** Where reasonable minds may draw dif-

ferent conclusions and inferences from the evidence as to the negligence of the defendant and the contributory negligence of the plaintiff and the degree thereof when one is compared with the other, the issues must be submitted to the jury.

2. **Pedestrians.** A pedestrian crossing at a regular crosswalk with the right-of-way has a right, until he has notice or knowledge to the contrary, to assume that others will respect his right-of-way.
3. **Pedestrians: Negligence.** Even though a statute grants the right-of-way to a pedestrian crossing a street in the crosswalk, it does not excuse contributory negligence on his part.
4. **Jury Instructions: Appeal and Error.** Instructions should be considered together, and if, when considered as a whole, they correctly state the law, error cannot be predicated thereon.
5. **Verdicts: Appeal and Error.** It is presumed in a jury trial that controverted facts were decided by the jury in favor of the successful party, and its finding based on conflicting evidence will not be disturbed unless clearly wrong.

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

Martin A. Cannon and Cynthia G. Irmer of Matthews, Cannon & Riedmann, P.C., for appellant.

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

BOSLAUGH, MCCOWN, CLINTON, and WHITE, JJ., and BRODKEY, J., Retired.

BRODKEY, J., Retired.

Elizabeth Holly, plaintiff and appellant herein, appeals to this court from the verdict of the jury in favor of the defendant, Charles Mitchell, in an action brought by the plaintiff in the District Court for Douglas County, Nebraska, in which the plaintiff sought damages from the defendant for personal injuries sustained by her as a result of a car-pedestrian accident which occurred on September 26, 1979, at approximately 4:30 p.m., at 15th and Douglas Streets in Omaha, Nebraska. In her petition she alleged that she was a pedestrian in a crosswalk on Douglas Street at the east side of its intersection with 15th Street and that defendant had been northbound on 15th Street and turned onto Douglas

Street while plaintiff was in the crosswalk, striking her and causing serious injuries as set forth in her petition. Plaintiff alleged defendant was negligent in failing to keep a proper lookout, in driving at an excessive rate of speed for the conditions then and there existing, and in failing to yield the right-of-way to plaintiff, who alleges she was in the crosswalk at the time. By way of answer to plaintiff's petition, the defendant admitted the happening of the accident at the time and place in question but denied all other allegations and, further answering, alleged that the sole proximate cause of the accident and resulting injuries was the negligence or contributory negligence of the plaintiff herself, which negligence was more than slight and sufficient in law to bar her recovery. In her reply, plaintiff specifically denied that she was in any manner contributorily negligent. The matter was submitted to the jury on the issues of the negligence of the defendant and the contributory negligence of the plaintiff, and their comparative negligence, and, as stated above, the jury found for the defendant.

In her brief on appeal to this court, plaintiff makes four assignments of error which she contends require that the judgment of the trial court be reversed and that she be given a new trial. Summarizing, these are that (1) the trial court erred in submitting the question of defendant's negligence to the jury because the evidence shows that he was negligent as a matter of law; (2) the trial court erred in submitting the issue of plaintiff's contributory negligence to the jury when there was no evidence of contributory negligence; (3) the trial court erred in submitting to the jury instruction Nos. 13 and 13a, with reference to the relative duties of the parties in regard to keeping a proper lookout, which instructions plaintiff claims were prejudicially harmful to her; and (4) the trial court erred in refusing to give to the jury certain proposed instructions submitted by the plaintiff. We affirm the ver-

dict of the jury and the judgment entered thereon by the trial court.

By way of factual background, it appears from the record in this case that both 15th Street and Douglas Street in the city of Omaha are one-way streets, Douglas Street being one way eastbound and having three lanes or perhaps four in addition to the parking lanes on each side of the street. Fifteenth Street intersects Douglas Street at right angles and is a one-way northbound street, also having multiple lanes but slightly narrower than Douglas Street, which the evidence establishes was approximately 68 feet wide. There are traffic lights at the intersection on the north and east sides of the intersection, with the usual green, yellow, and red lights thereon. There is no traffic light on the south side of the intersection, but there is a "walk" and "don't walk" signal for southbound pedestrian traffic in the crosswalk on the southeast corner of the intersection, and there is also a "green arrow" signal for right turns for northbound traffic.

The crosswalk from the northeast corner to the southeast corner of the intersection is approximately 12 feet in width. At the time of the accident, plaintiff, who was approximately 75 years of age, was with her sister on the northeast corner of the intersection and intended to and did commence to cross the east crosswalk in a southerly direction with the intention of taking a bus to her home, the bus stop being on the east side of the southeast corner of the intersection, the buses facing in a northerly direction at that location and being next to the east curb of the street. Plaintiff and her sister had come from south Omaha and had been to a cafeteria on the north side of Douglas Street for dinner and had their transfers for their bus ride to their respective homes. At or shortly before the time of the accident in question, the defendant was driving his automobile north on 15th Street and stopped his automobile in the second lane from the curb behind another

car which was also stopped for the red light facing them. When the traffic light facing them changed from red to green, the car ahead of him moved out and made a right turn onto Douglas Street and Mitchell made a right turn behind that car. Before turning, he testified he observed the crosswalk area but saw no one while turning and saw people standing on the northeast corner of the intersection but saw no one in the crosswalk. At the time he crossed the crosswalk the speed of his vehicle was about 4 to 5 miles per hour. As he was moving out of the intersection he heard the sound of something bumping his car on the left side at the rear. He immediately stopped his automobile; and while the testimony was conflicting, it appears that only the left rear portion of the car was still in the crosswalk. A passenger in his automobile, one Willie Williams, confirmed the testimony of the defendant and in addition testified that he saw the plaintiff walk into the side of the defendant's car, at which time all of the defendant's car was east of the crosswalk except the rear quarter panel. Terry R. Campbell, a witness for the plaintiff, was a policeman who investigated the accident. He testified that he had interviewed the plaintiff at the hospital following the accident and that he had asked her what had happened. He was asked as to what she told him, and he replied, "The pedestrian, Holly, stated that she saw her bus at the bus stop, and it was necessary for her to catch that particular bus to avoid a 45-minute wait. She stated that she crossed the street and, 'made a run for it,' to avoid cars that were coming, but one car hit her." Plaintiff's sister, Alma Logsdon, who was with the plaintiff at the northeast corner of the intersection prior to the plaintiff starting to cross the street, was asked: "Q. How was it that you knew that she saw the bus? Did she tell you that as she was crossing the street?" Her answer was: "A. Well, I think when the bus was standing there when we started to cross the street she said, 'Well, there's

the bus,' and away she went." While plaintiff testified that she had a green light in her favor as she stepped off the curb (although there is no green light facing her in crossing from the north side of the street going south in the crosswalk), and that she had a green "walk" sign in her favor before she entered the crosswalk, there is also evidence in the record to the effect that in traversing the street she looked backward to look at her sister who was a slower walker than she was, and also looked west on Douglas Street to observe approaching traffic. She was asked: "Q. Did you ever see Mr. Mitchell's vehicle before the accident? A. Did I ever see— Q. Mr. Mitchell's vehicle? A. No." She also admitted that there was no obstruction between her and defendant's vehicle. There is also evidence in the record from which the jury could conclude that plaintiff, as she was crossing the street, was looking down into her purse to get her fare or transfer. She was asked: "Q. Is it possible that just before you came into contact with the Mitchell car you might have been looking down into your purse trying to get change for your bus or trying to get a transfer just before you came into contact with the Mitchell car, is that possible? A. I don't think so. I usually have my bus fare ready or transfer. Q. Do you remember which hand you were carrying your purse and your shopping bag in? Did you have a shopping bag, too? A. Yes, I think I did. Left hand. Q. And you had both of them in the left hand, didn't you? Your purse and shopping bag? A. Right. I did when I was getting my transfer—when I had to get my transfer. Q. Wasn't that while you were crossing the street? A. No. Q. When was it? A. When I got to the corner. . . . Q. All right. Didn't you have to look down into your purse when you went to get the bus fare or the transfer? A. Well, I *usually* had it in my hand ready. Q. But if it was in your purse then you'd have to look down, would you not? A. Yeah, but I'd usually have it ready when I'm

going to make that transaction." (Emphasis supplied.)

Plaintiff's sister, Alma Logsdon, was asked on cross-examination: "Q. Did your sister have a purse with her? A. Yes, sir. Q. And did the contents of that purse spill out on the street? A. Some of it did. Q. As a matter of fact, you were the one who kind of helped pick up the contents of the purse, aren't you? A. Yes, sir. Q. And did you pick up the purse itself, also? A. Yes, sir. Q. And it was open, was it not? A. Yes."

There is also testimony in the record to the effect that as plaintiff crossed the street, she was walking at a rapid pace, but she denied telling the police officer that she had crossed the street and "made a run for it" to avoid cars that were coming.

On the basis of the above evidence, including admissions against interest introduced during the trial, the trial court submitted the questions of the negligence of the defendant, the contributory negligence of the plaintiff, and the comparison thereof to the jury, which, as previously stated, found for the defendant.

Our review of the record convinces us that there were numerous disputed questions of fact involved in this case touching on both the issue of the defendant's negligence and the plaintiff's contributory negligence, and that the court properly submitted the issue to the jury. The facts pointing in either direction were not so clear cut as to require the court to make a finding of liability and direct a verdict as to the negligence of either party. The law is well established in this state that where reasonable minds may draw different conclusions and inferences from the evidence as to the negligence of the defendant and the contributory negligence of the plaintiff and the degree thereof when one is compared with the other, the issues must be submitted to the jury. *Sullivan v. Geo. A. Hormel and Co.,* 208 Neb. 262, 303 N.W.2d 476 (1981); *Ybarra v. Wassenmiller,* 206 Neb.

164, 291 N.W.2d 725 (1980); *Treffer v. Seevers,* 195 Neb. 114, 237 N.W.2d 114 (1975); *Middleton v. Nichols,* 178 Neb. 282, 132 N.W.2d 882 (1965).

Counsel for plaintiff argues, however, that under the statutes of Nebraska in effect at the time of the accident, the plaintiff, who he contends was a pedestrian within a crosswalk, had the right-of-way over the defendant motorist who was required to yield to her, and, also, that since the plaintiff was a pedestrian facing a "walk" signal, it was required that she be given the right-of-way by defendant even though the signal may have changed during her crossing of the street. See Neb. Rev. Stat. §§ 39-614 and 39-615 (Reissue 1978). Plaintiff further contends that the court in its instructions failed to instruct on plaintiff's right-of-way as a pedestrian while crossing the street in the crosswalk, and, further, that the court erred in its instructions in telling the jury that the right of a pedestrian to the lawful use of the street or highway is in all respects equal to that of a person driving an automobile. On the contrary, the law in this state is well established that a pedestrian crossing at a regular crosswalk with the right-of-way has a right, until he has notice or knowledge to the contrary, to assume that others will respect his right-of-way. *Zawada v. Anderson,* 181 Neb. 467, 149 N.W.2d 329 (1967); *Miller v. Moeller,* 183 Neb. 508, 162 N.W.2d 224 (1968); *Dunlap v. Coleman,* 201 Neb. 148, 266 N.W.2d 527 (1978).

However, the law is also well settled that even though a statute grants the right-of-way to a pedestrian crossing a street in the crosswalk, it does not excuse contributory negligence on his part. *Farag v. Weldon,* 163 Neb. 544, 80 N.W.2d 568 (1957); *Laurinat v. Giery,* 157 Neb. 681, 61 N.W.2d 251 (1953); *Corbitt v. Omaha Transit Co.,* 162 Neb. 598, 77 N.W.2d 144 (1956); *Laux v. Robinson,* 195 Neb. 601, 239 N.W.2d 786 (1976).

Plaintiff specifically complains of instruction Nos. 13 and 13a given to the jury by the court, and con-

tends that such instructions were inaccurate and misled the jury. Instruction No. 13 given by the court is as follows: "The right of a pedestrian to the lawful use of a street or highway is in all respects equal to that of a person driving an automobile, but each person or vehicle on the street or highway must so exercise his right to use it as not to injure others and must exercise such caution as an ordinarily prudent person would exercise under like circumstances. In other words, the rights of pedestrians and motor vehicles on a public street or highway are equal and each is obliged to act as a reasonably prudent person would with respect to the movements of the other. A person having the right of way is nevertheless obligated to exercise ordinary care for his own safety and to avoid an accident." Instruction No. 13a given by the court is as follows: "If a pedestrian is lawfully in a crosswalk, such a pedestrian is not required to anticipate that another may violate such pedestrian's right-of-way, and such a pedestrian has a right to assume that her right-of-way will be respected by such a vehicle until such time as she is given actual knowledge of facts which indicate that the driver intends to violate her right-of-way.

"It is the duty of a driver of a motor vehicle and of a pedestrian to keep a proper lookout in the direction of anticipated danger. The duty to keep a lookout implies a duty to see that which is in view and to act with due care in accordance with the circumstances."

Also, in instruction No. 14, the jury was given verbatim the language of the statutes previously referred to.

We believe that the instructions given by the court were correct and represented an amalgamation of the various statutes and case law previously set out in this opinion. There is no showing in the record that the instructions given in any way misled or confused the jury. We have held that instructions

should be considered together, and if, when considered as a whole, they correctly state the law, error cannot be predicated thereon. *Zawada v. Anderson, supra.* We have also held that where instructions are not inconsistent or contradictory but, considered together, correctly state the law, the judgment will not be reversed because one does not state the entire law on the subject, unless it appears that the jury was misled. *Schram v. Lowden,* 144 Neb. 851, 15 N.W.2d 42 (1944). As stated above, we believe that the instructions given by the court were correct, and there is no showing in the record that the jury was in any way misled by such instructions.

While the basis on which the jury rendered its verdict for the defendant does not appear from the record, i.e., whether because of lack of negligence of the defendant or more than slight contributory negligence of the plaintiff, it is presumed in a jury trial that controverted facts were decided by the jury in favor of the successful party, and its finding based on conflicting evidence will not be disturbed unless clearly wrong. *Nisi v. Checker Cab Co.,* 171 Neb. 49, 105 N.W.2d 523 (1960).

Plaintiff has also assigned as error failure of the court to give the jury the instructions requested by her. We have examined the requested instructions and believe that they were substantially given in the instructions actually given the jury by the court. This assignment of error is without merit.

In view of what we have stated above, we conclude that the judgment entered by the trial court was correct; and no reversible error appearing in the record, such judgment must be affirmed.

AFFIRMED.

AMERICAN STORES PACKING COMPANY, A DIVISION OF ACME MARKETS, INC., APPELLEE, V. JUDITH E. JORDAN, APPELLANT.

328 N.W.2d 756

Filed December 30, 1982. No. 81-691.

1. **Civil Rights: Discrimination: Appeal and Error.** An appeal to the District Court from an order or decision of the human rights commission of a city of the primary class in an employment discrimination case is heard as in equity and without a jury.
2. **Equity: Appeal and Error.** In an appeal in an equity action it is the duty of this court to try issues of fact de novo upon the record and to reach an independent conclusion thereon without reference to the findings of the District Court.
3. **Civil Rights: Discrimination: Appeal and Error.** To sustain a charge of discrimination in employment where there is no charge of a universal discriminatory practice or system, complainant, in the record, must establish that the employer intentionally engaged in acts that discriminated against complainant in violation of the statutory prohibitions.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Affirmed.

Terry K. Barber of Johnston, Barber & Wherry, for appellant.

J. Taylor Greer of Woods, Aitken, Smith, Greer, Overcash & Spangler, for appellee.

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

MCCOWN, J.

This is an action by the complainant, Judith Jordan, alleging that she was discharged from her employment because of unlawful racial discrimination. On appeal from an order of the human rights commission of the city of Lincoln, Nebraska, reinstating complainant, the District Court found that complainant's discharge was for just and sufficient cause unrelated to race or color. The District Court reversed the order of the human rights commission and dismissed the complaint. Complainant has appealed.

Jordan, a black woman, was employed by American Stores Packing Company on October 28, 1974. After a probationary period she obtained a seniority date of January 1, 1975. During the period of her employment with American Stores she worked chiefly in the bacon department as an arranger on the bacon slice line. Two arrangers work on each bacon slice line, one on each side of the conveyor belt. The arrangers arrange the bacon slices on a card and then place the arranged cards of bacon on another conveyor belt leading to a vacuum packing machine.

On Wednesday, January 28, 1976, Jordan was working as an arranger on the south side of a bacon slice line and Maxine Lehnherr, a white woman, was working across from her as the arranger on the north side of the line. Lehnherr had previously suffered an on-the-job accident, which caused some nerve and blood vessel injury to her right shoulder, and she found it painful for her to work at her usual position on the north side of the line because of the reaching and stretching of her right arm and shoulder on that side. Lehnherr had a letter from her doctor recommending that she avoid repeated use of her right arm and shoulder.

During work on January 28, Lehnherr asked the supervisor of the shift if she could trade positions with Jordan because her right arm was painful. The supervisor asked Jordan if she would mind trading positions with Lehnherr at the next break and Jordan said she would not mind.

Before the break, however, another employee, Delores Napue, told Jordan that she should not have to switch positions because she had seniority over Lehnherr, and also told Jordan that a posted notice forbade trading jobs by the employees. Jordan told the supervisor of her conversation with Napue, and the supervisor advised her that he did not think seniority mattered in the particular situation but he had another employee switch positions with

Lehnherr and permitted Jordan to stay at her regular position.

On Thursday, January 29, the shift supervisor checked with his superior and with the personnel director of the company with respect to the situation and was informed by the personnel director that a supervisor could change work assignments without regard for seniority whenever the change was required for medical reasons. Later on the same day Jordan, without seeking permission, voluntarily changed sides with another employee who was having trouble working on the north side of the line.

On Friday, January 30, Lehnherr's right arm was still bothering her and she asked the supervisor if she could change sides of the line. The supervisor asked Jordan to change and told her that seniority did not matter and ordered her to change positions with Lehnherr. Jordan refused, and the supervisor told her to either change positions, go to the personnel office, or go home.

Jordan went to the personnel office where the associate personnel director informed her that she was required to follow the supervisor's order. Jordan then talked to her union steward, who also advised her to change sides. After approximately 25 minutes of discussion Jordan agreed to change sides with Lehnherr and returned to work.

On Monday, February 2, Lehnherr and Jordan went to work again on the same line, with Lehnherr on the north side. Lehnherr's arm again began to pain her and she again requested a change. The supervisor ordered Jordan to change sides but she refused. The supervisor ordered her to change positions or to leave the plant. Both the union shop steward and the business agent of the union advised Jordan to follow the supervisor's order. Jordan refused and left the plant at midshift after approximately 4 hours of work.

On February 3 the personnel director held a hearing regarding the incidents of January 30 and Febru-

ary 2. Jordan, two union representatives, and the supervisor were all present. The only reasons given by Jordan for her refusal to change sides were that her seniority gave her the right to choose sides and that there was a posted notice forbidding employee job trading. At the conclusion of the hearing the personnel director informed Jordan that she was suspended without pay pending further investigation.

Following an additional hearing on February 13, 1976, the personnel director informed Jordan that she was discharged for insubordination for her conduct on January 30 and February 2 in violation of rules 26 and 42 contained in the employees' handbook.

On February 6, 1976, Jordan filed a complaint with the human rights commission of the city of Lincoln alleging that the actions of American Stores Packing Company constituted an unlawful employment practice because it discriminated against her on account of race or color in violation of Lincoln Municipal Code § 11.08.040 (1973). That ordinance provides in part: "It shall be an unlawful employment practice for an employer: . . . to discharge any individual, or otherwise to discriminate against any individual with respect to his . . . conditions or privileges of employment, because of such individual's race, color . . . ."

The commission concluded there was reasonable cause to believe the charge was valid and a formal hearing was had before the commission in several sessions, concluding on May 2, 1978. Evidence establishing the facts outlined above was introduced and received. Jordan introduced evidence of five alleged racially discriminatory statements or incidents occurring between employees, some of which may have been overheard by supervisory personnel. The employer introduced evidence tending to establish that the discharge of Jordan was for legitimate and necessary business reasons and for just and

sufficient cause unrelated to any racial discrimination.

The evidence also showed that Jordan had filed a complaint with the Nebraska Equal Opportunity Commission in 1975 alleging racial harassment by American Stores, and complaints in February of 1976 with both the Nebraska Equal Opportunity Commission and the federal Equal Employment Opportunity Commission, also alleging racial harassment by American Stores. In all three cases the commissions had found there was no probable cause to believe that the charges were true and dismissed the complaints.

On June 6, 1978, the human rights commission entered its order finding that an atmosphere of racial antagonism existed at the American Stores plant as evidenced by five racially discriminatory statements or incidents occurring among employees, and found that the management was aware of the racially antagonistic atmosphere. The commission made no finding as to whether Jordan's conduct on January 30 and February 2, 1976, constituted insubordination, nor whether she was discharged because of her race. The commission ordered Jordan reinstated and awarded her one-half of the wages she would have earned after her discharge.

The employer appealed to the District Court and Jordan cross-appealed. The cross-appeal requested the award of full back pay rather than one-half. On June 26, 1981, after trial de novo on the record made before the human rights commission, the District Court found the evidence insufficient to establish any violation, either intentional or unintentional, of Lincoln Municipal Code, Ch. 11.08 (1973). The court also found complainant's conduct constituted insubordination and that her discharge was for just and sufficient cause, unrelated to race or color. The District Court therefore reversed the order of the human rights commission and dismissed the complaint. The complainant has appealed.

An appeal to the District Court from an order or decision of the human rights commission of a city of the primary class in an employment discrimination case is heard as in equity and without a jury. The District Court is to determine anew all questions raised before the commission and may reverse or affirm, wholly or partly, or may modify the order or decision brought up for review. See Neb. Rev. Stat. § 15-1205 (Reissue 1977).

In an appeal in an equity action it is the duty of this court to try issues of fact de novo upon the record and to reach an independent conclusion thereon without reference to the findings of the District Court. *Schupack v. McDonald's System, Inc.*, 200 Neb. 485, 264 N.W.2d 827 (1978).

In *Duffy v. Physicians Mut. Ins. Co.*, 191 Neb. 233, 214 N.W.2d 471 (1974), in an employment discrimination case under a state statute containing language identical to the municipal ordinance involved here, this court held that to sustain a charge of discrimination where there is no charge of a universal discriminatory practice or system, complainant, in the record, must establish that the employer intentionally engaged in acts that discriminated against complainant in violation of the statutory prohibitions.

It is clear in the present case that the charge related solely to the discharge of the individual complainant. Lincoln Municipal Code § 11.08.150(c) (1973) states that the human rights commission "shall determine that the respondent has intentionally engaged in or is intentionally engaging in any unlawful employment practice" before ordering any affirmative action.

The commission in this case failed to find that the respondent had intentionally engaged in discriminatory conduct and also failed to make any finding as to whether the complainant's conduct constituted insubordination. There is no evidence in the record that the management of the employer intended to

discriminate against the complainant because of her race, nor that it intentionally or unintentionally discriminated against her because of her race. There can be no reasonable doubt that the complainant's conduct constituted repeated insubordination.

The record fully supports the conclusion that the employer's conduct in suspending and discharging the complainant was motivated by sound business reasons and not by unlawful discriminatory motives.

The District Court was correct in all respects and the judgment is affirmed.

AFFIRMED.

JANET LEROYCE MILLER, APPELLANT, V. DONIVAN MICHAEL MILLER, APPELLEE.

328 N.W.2d 210

Filed December 30, 1982. No. 82-487.

1. **Actions: Demurrer.** The pendency of another action does not ipso facto require that a demurrer be sustained.
2. **Actions: Plea in Abatement.** Generally, the pendency of a former action for the same cause between the same parties and in the same court constitutes a good plea in abatement.
3. _____: _____. The general rule that pendency of a prior action between the same parties for the same cause may be pled in abatement of a subsequent action will not be sustained where the prior action is pending in a court of a foreign or different jurisdiction.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Reversed and remanded.

Jay L. Welch and Douglas R. Semisch of Rickerson & Welch, for appellant.

Steven J. Lustgarten, P.C., of Lustgarten & Roberts, for appellee.

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

CAPORALE, J.

In this appeal petitioner-appellant, Janet LeRoyce Miller, challenges the order of the trial court sustaining the demurrer of respondent-appellee, Donivan Michael Miller, and dismissing her petition. We reverse.

Petitioner alleged that the parties have been domiciled in Nebraska since their marriage, December 4, 1971; alleged the other statutory requirements for a dissolution of marriage action, calling the court's attention to the fact that the parties in this action were parties to a dissolution of marriage action pending in California which had not become final; alleged that the California action had been initiated by petitioner less than 12 months after she had traveled from Nebraska to California as the result of fraud practiced upon her by respondent; alleged that petitioner had been absent from Douglas County, Nebraska, less than 18 months; and prayed for dissolution of the marriage together with other relief, including that petitioner be awarded custody of the parties' two minor twin children and that respondent be temporarily and permanently enjoined from relying upon any order, award, or decree in the California proceedings.

Respondent demurred only on the ground that there was another action pending between the parties for the same cause. Neb. Rev. Stat. § 42-353(5) (Reissue 1978) requires that a petition for dissolution of marriage recite whether the petitioner is a party to any other pending action for divorce, separation, or dissolution of marriage and, if so, that it state where such action is pending. Neb. Rev. Stat. § 25-806 (Reissue 1979) provides that "The defendant may demur to the petition only when it appears on its face . . . (3) that there is another action pending between the same parties for the same cause . . . ."

It does not necessarily follow, however, that the pendency of another action ipso facto requires that

the demurrer be sustained and the second action dismissed.

In *Flaxel v. Flaxel,* 101 Neb. 799, 165 N.W. 159 (1917), the wife filed an action for divorce in Platte County in which, pursuant to notice, the court ordered the husband to pay the wife certain suit and maintenance money. Thereafter, the husband pled in the Platte County suit that he had previously filed a suit for divorce against the wife in Butler County and asked that the Platte County suit be dismissed and that its order entered therein be set aside. The Platte County District Court dismissed the action and modified the order with respect to maintenance but refused to vacate the order for payment of suit money. In affirming the Platte County District Court we said at 800-01, 165 N.W. at 160: "When two actions are pending in different courts of competent jurisdiction between the same parties and for the same cause, the pendency of the first action will be sufficient ground for a plea in abatement to the second action, and if final judgment is entered upon the merits in the first action, such judgment will be a bar to further proceedings in the second action. The pendency of the first action is a fact which may be pleaded in bar or in abatement to the second action, and when so pleaded the court has jurisdiction to try and determine that issue. It cannot therefore be said that the court did not have jurisdiction to enter the order for suit money upon motion and due notice to the defendant. He suggests that, if the court in one county has jurisdiction to entertain an action where another action between the same parties and for the same cause is pending in another county, this plaintiff 'might have gone into each and every judicial district in the state of Nebraska and repeated the performance.' But the law does not allow such vexatious litigation, and furnishes ample remedies if it is attempted." We have stated in a variety of other cases that, generally, the pendency of a former action for the same cause between the same

parties and in the same court constitutes a good "plea in abatement." *Cahoon v. First Nat. Bank,* 112 Neb. 462, 199 N.W. 830 (1924); *Stearns v. Nebraska Building & Investment Co.,* 109 Neb. 657, 192 N.W. 330 (1923); *Spencer v. Johnston,* 58 Neb. 44, 78 N.W. 482 (1899). The two actions involved here, however, are not in the same court; indeed, they are pending in courts of different and sovereign jurisdictions. The general rule that pendency of a prior action between the same parties for the same cause may be pled in abatement of a subsequent action will not be sustained where the prior action is pending in a court of a foreign or different jurisdiction. 1 C.J.S. *Abatement and Revival* § 63 (1936). See, also, 1 Am. Jur. 2d *Abatement, Survival, and Revival* § 5 (1962). It must be concluded, therefore, that the pendency of the California action does not bar the present action and the demurrer ought not have been sustained, nor the petition dismissed.

It may be that under the provisions of the Nebraska Child Custody Jurisdiction Act, Neb. Rev. Stat. §§ 43-1202 et seq. (Cum. Supp. 1982), or for other reasons, the court below may conclude that it should defer to the California court. It may also be that any dissolution finally granted by the California court would not be enforceable under the provisions of the Nebraska Uniform Divorce Recognition Act, Neb. Rev. Stat. §§ 42-341 et seq. (Reissue 1978). However, those questions are not properly presented by the status of the pleadings in this case and cannot be determined at this time.

The order of the court below is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

Cite as 213 Neb. 223

VERNETTA MARICLE, APPELLEE AND APPELLANT, V. RICHARD A. SPIEGEL, DOING BUSINESS AS SPIEGEL OIL COMPANY, ET AL., APPELLANTS AND APPELLEES, MOBIL OIL CORPORATION, A CORPORATION, APPELLEE.

329 N.W.2d 80

Filed January 7, 1983. No. 44283.

1. **Parties: Appeal and Error.** An appellee can not cross-appeal against another appellee.
2. **Pleadings.** The decision to allow or deny an amendment to the pleadings lies within the discretion of the trial court.
3. **Negligence.** The doctrine of last clear chance applies where there is negligence of the defendant subsequent to the negligence of the plaintiff, and the defendant's negligence is the proximate cause of the injury.
4. _____. Last clear chance is applicable only to excuse the contributory negligence of a plaintiff.
5. **Trial: Evidence: Appeal and Error.** Generally, a proper objection to the receipt of evidence is required to preserve for review any error in the overruling of a motion in limine.
6. _____: _____: _____. A defendant can not predicate error on the denial of a motion in limine when his objection to the evidence was sustained.
7. **Motor Vehicles: Evidence.** The admissibility of the speed of a vehicle shortly before a collision rests largely in the discretion of the trial court.
8. **Photographs: Appeal and Error.** The admission or rejection of photographs in evidence is largely within the discretion of the trial court. In the absence of a showing of an abuse of discretion, error may not be predicated upon such a ruling.
9. **Pleadings: Damages: Waiver.** Failure to plead mitigation of damages waives the defense.
10. **Negligence: Pleadings.** Recovery can not be had for acts of negligence not alleged in the petition.
11. **Evidence:** Proof as to the tax consequences of a personal injury damages award is not admissible.
12. **Verdicts: Appeal and Error.** A verdict will not be set aside unless it is against the weight of the evidence, or appears to have been the result of passion, prejudice, mistake, or disregard of the rules of evidence or the law.
13. _____: _____. A jury verdict will not be disturbed on appeal unless it is clearly erroneous.
14. **Contracts: Independent Contractors.** Generally, control, or the right of control, is the chief criterion in determining whether someone acts as an independent contractor.

Appeal from the District Court for Boone County:

JOHN C. WHITEHEAD, Judge. Affirmed.

Jewell, Otte, Gatz & Collins, for appellants and appellees Spiegel.

Robert P. Chaloupka of Van Steenberg, Brower, Chaloupka, Mullin & Holyoke, for appellee and appellant Maricle.

Timothy J. Pugh of Boland, Mullin & Walsh, for appellee Mobil Oil.

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

PER CURIAM.

These cases arose out of an automobile accident which occurred on August 2, 1979, in Boone County, Nebraska. Chip Maricle was severely injured when his pickup truck collided at a rural intersection with a Mobil tank truck owned by the defendant Richard A. Spiegel and driven by the defendant Rick A. Spiegel. An action was brought by Vernetta Maricle as guardian and conservator of Chip Maricle to recover damages for his personal injuries. A separate action was brought by Vernetta Maricle as the wife of Chip Maricle for loss of consortium and personal damages she suffered as a result of the injuries to her husband. The actions were consolidated for trial and have been docketed in this court as one appeal.

The jury could find that the accident occurred when Rick A. Spiegel, in the course of his employment, failed to stop the westbound truck at a stop sign before entering the intersection. The pickup driven by Maricle was southbound and had the right-of-way. There was conflicting evidence with regard to the speed of the Maricle vehicle. Both eyewitness and expert testimony was admitted on the issue. There was also conflicting evidence as to the founda-

tion upon which the expert testimony was based, most notably the presence or absence of skid marks caused by the Maricle vehicle.

Plaintiff also sought recovery for Chip Maricle's injuries against Mobil Oil Corporation.

The case was submitted to the jury upon issues of negligence and contributory negligence. The jury returned a verdict in the amount of $1,500,000 for the personal injuries of Chip Maricle, and $200,000 to Vernetta Maricle for her damages. The jury returned a verdict in favor of Mobil Oil Corporation.

The defendants (Spiegel) appealed, and the plaintiff appeals from the judgment in favor of Mobil. Although the plaintiff has denominated her appeal as a cross-appeal, since she filed notices of appeal, the matter will be treated as an appeal. The plaintiff and Mobil are appellees and an appellee can not cross-appeal against another appellee. *Buffalo County v. Richards,* 212 Neb. 826, 326 N.W.2d 179 (1982); *Hansen v. Hasenkamp,* 192 Neb. 530, 223 N.W.2d 44 (1974).

Spiegel assigns as error the trial court's overruling of a motion to amend defendants' answer to conform to the proof, to include the defense of "last clear chance." Spiegel argues that Maricle had the last clear chance to avoid the accident. Neb. Rev. Stat. § 25-852 (Reissue 1979) permits the court, in furtherance of justice, to amend the pleadings to conform to the proof. The decision to allow or deny an amendment lies within the discretion of the trial court. *Mahoney v. May,* 207 Neb. 187, 297 N.W.2d 157 (1980).

Generally, last clear chance has been described as: "[T]he rule implies that one charged with negligence knew the person injured was in a place of danger and negligently failed to avoid injuring him. . . .

. . . .

"The doctrine . . . applies where there is negligence of the defendant subsequent to the negligence

of the plaintiff and the defendant's negligence is the proximate cause of the injury." *Parsons v. Berry,* 130 Neb. 264, 267-68, 264 N.W. 742, 744 (1936). See, *Roby v. Auker,* 149 Neb. 734, 32 N.W.2d 491 (1948); *Loudy v. Union P. R. R. Co.,* 146 Neb. 676, 21 N.W.2d 431 (1946); *Malcom v. Dox,* 169 Neb. 539, 100 N.W.2d 538 (1960).

A more detailed definition is given in *Bush v. James,* 152 Neb. 189, 195, 40 N.W.2d 667, 672 (1950): "We said, in Carter v. Zdan, 151 Neb. 185, 36 N.W.2d 781: 'In order to recover under the doctrine of last clear chance there must be sufficient evidence to sustain a finding that the party invoking the doctrine was by his own negligence immediately before the accident in a position of peril from which he could not escape by the exercise of ordinary care; that the party against whom it is asserted knew or ought to have known of the other's peril; that the party against whom the doctrine is invoked had the present ability with the means at hand to avoid the accident without injury to himself or others; that the failure to avoid the accident was due to a want of ordinary care on the part of the person against whom the doctrine is invoked and that such want of ordinary care was the proximate cause of the accident; and that the negligence of the party imperiled is neither active nor a contributing factor in the accident. * * * The doctrine has no application unless the person claiming its benefit puts himself in the position of admitting that immediately before the accident he found himself in a place of peril through his own negligence from which he could not escape by the exercise of ordinary care.' "

Prosser describes "last clear chance" as the "most commonly accepted modification of the strict rule of contributory negligence." He states that the doctrine worked well in the older-day attempt to fix liability upon the "last human wrongdoer," but that it is out of line with modern concepts of proximate cause. He adds that a few courts have attempted to

recognize a last clear chance in favor of the defendant, "but since this comes out at exactly the same place as the defense of contributory negligence without the doctrine at all, and is calculated only to bewilder the jury with incomprehensible instructions, most courts have rejected any such idea." W. Prosser, Law of Torts, *Negligence: Defenses* § 66 at 427-29 (4th ed. 1971). See, also, Annot., 32 A.L.R.2d 543 (1953).

It was not an abuse of discretion for the trial court to overrule the motion to amend the pleadings. See *Rawlings v. Andersen*, 195 Neb. 686, 240 N.W.2d 568 (1976). Last clear chance is applicable only to excuse the contributory negligence of the plaintiff. To permit defendant to raise it as a defense would permit him to place the issue of contributory negligence before the jury in two different ways and confuse the jury. See, e.g., *Ballard v. Rickabaugh Orchards, Inc.*, 259 Or. 200, 485 P.2d 1080 (1971).

Furthermore, the doctrine of last clear chance is factually inapplicable, as the negligence of the party seeking to invoke it was active and continuing as a contributing factor up to the time of injury. See *Roby v. Auker, supra.*

Spiegel next argues that the trial court's overruling of his motion in limine and the admission and exclusion of certain evidence was prejudicial and deprived Spiegel of having a fair trial.

Plaintiff sought to introduce evidence concerning Maricle's safe driving habits. The defendants' objection was sustained. The defendants can not predicate error on the denial of the motion in limine when the objection to the evidence was sustained.

Spiegel made a motion to exclude evidence of the speed of the Maricle vehicle 1 mile from the site and evidence of Maricle's safe driving habits. Generally, a proper objection to the receipt of evidence is required to preserve for review any error in the overruling of a motion in limine. See, *Twyford v.*

Weber, 220 N.W.2d 919 (Iowa 1974); *Vorthman v. Keith E. Myers Enterprises,* 296 N.W.2d 772 (Iowa 1980); Annot., 63 A.L.R.3d 311 (1975).

Spiegel objected on the basis of relevancy to the admission of eyewitness testimony that Maricle's speed was 35-40 m.p.h. 1 mile from the intersection. The objection was overruled. The admissibility of the speed of a vehicle shortly before a collision rests largely in the discretion of the trial court. *Schwarting v. Ogram,* 123 Neb. 76, 242 N.W. 273 (1932). However, this rule of discretion generally does not permit admission unless there can be drawn a reasonable inference that the speed continued until impact (if points are of close proximity) or there is evidence from which such inference could be drawn (if points are more remote). *Prince v. Petersen,* 144 Neb. 134, 12 N.W.2d 704 (1944); *Shields v. County of Buffalo,* 161 Neb. 34, 71 N.W.2d 701 (1955); *Sandrock v. Taylor,* 185 Neb. 106, 174 N.W.2d 186 (1970).

In the present case there is evidence from which a reasonable inference of continued speed to the point of impact could be drawn. Those factors are the age and type of vehicle driven by Maricle, the distance the witness observed the vehicle (2 blocks), and the presence of a ½-mile uphill grade north of the intersection. The accident reconstruction expert called by the plaintiff in rebuttal testified that the information as to the speed of the Maricle vehicle 1 mile from the intersection was important. Under the circumstances in this case the evidence was properly admitted.

Spiegel argues that the admission of expert testimony regarding speed offered by the plaintiff on rebuttal amounted to an abuse of discretion. The plaintiff attempted to introduce expert testimony that the speed of the Maricle vehicle could not have increased dramatically from the point it was observed by the witness to the point of impact, due to the uphill grade. The expert based his opinion on a test drive performed with his own car. Spiegel's

first objection to the opinion was overruled. However, when the expert testified as to the basis for his opinion, Spiegel's objection was sustained, the testimony was ordered stricken, and the jury was instructed to disregard the testimony. Any error which may have occurred in the admission of this testimony was cured by striking it and instructing the jury. See *Palma v. Barta,* 203 Neb. 459, 279 N.W.2d 130 (1979).

Spiegel next assigns as error the admission of several photographs as being prejudicial and cumulative. Photos of Maricle in his hospital bed and of Maricle before and after the accident, together with the family, are at issue. Maricle argues that the photos were relevant evidence of the deterioration in his physical condition. " 'The admission or rejection of photographs in evidence is largely within the discretion of the trial court. In the absence of a showing of an abuse of discretion, error may not be predicated upon such ruling.' " *Rowedder v. Rose,* 188 Neb. 664, 669, 199 N.W.2d 18, 21 (1972), quoting *Peterson v. Skiles,* 173 Neb. 470, 113 N.W.2d 628 (1962).

In *Schmailzl v. State,* 176 Neb. 617, 126 N.W.2d 821 (1964), the issue was similar to the one presented here. The court said: "The State assigns as error the introduction of certain family photographs, contending that their purpose was to arouse the sympathy of the jury. . . .

"The photographs offered, while taken for family purposes, did have probative value. . . . The trial court did not abuse its discretion in admitting the photographs. They are within the ambit of the rule announced in Anderson v. Evans, 164 Neb. 599, 83 N.W.2d 59: 'The possibility that the photographs might have a tendency to create sympathy in favor of one party should not render them inadmissible as proof of an issue on the trial.' " *Id.* at 623-24, 126 N.W.2d at 825.

On cross-examination of a doctor and the ambu-

lance driver, Spiegel attempted to inquire into the use or nonuse of a seatbelt and the effect that it would have had on Maricle's injuries. No evidence had been received regarding the presence of a seatbelt and, if so, whether Maricle had used it. Objections to the questions were sustained. Spiegel argues on appeal that the use of seatbelts is relevant to the issue of mitigation of damages and the evidence was wrongfully excluded.

There are no Nebraska cases regarding the pleading of mitigation of damages. In the following cases mitigation of damages was held to be an affirmative defense, required to be set forth in the pleadings. *Consolidated Mtg. & Finance Corp. v. Landrieu,* 493 F. Supp. 1284 (D.D.C. 1980); *Toushin v. Gonsky,* 77 Ill. App. 3d 508, 395 N.E.2d 1124 (1979); *Iowa Power & Light Co. v. Bd. of Water Works, Etc.,* 281 N.W.2d 827 (Iowa App. 1979); *Peeples v. Sargent,* 77 Wis. 2d 612, 253 N.W.2d 459 (1977); *Sprecher v. Weston's Bar, Inc.,* 78 Wis. 2d 26, 253 N.W.2d 493 (1977). Spiegel's failure to plead waives the defense.

Some courts have found that failure to use a seatbelt presents a question as to whether the plaintiff used due care. See, e.g., *Truman v. Vargas,* 275 Cal. App. 2d 976, 80 Cal. Rptr. 373 (1969). Recent cases include *Brodvin v. Hertz Corp.,* 487 F. Supp. 1336 (S.D.N.Y. 1980), in which the court held that nonuse of a seatbelt "can be considered by a jury in determining whether the plaintiff in an accident case exercised due care to avoid or mitigate injury to himself." *Id.* at 1338. These cases indicate that failure to use a seatbelt is relevant to the issue of due care, and thus to the issue of contributory negligence. In Spiegel's answer, specific acts of contributory negligence were enumerated, but failure to use a seatbelt was not alleged. " 'A recovery cannot be had for acts of negligence not alleged in the petition. The rule is the allegata and probata must agree.' " *Edmunds v. Ripley,* 172 Neb. 797, 808, 112

N.W.2d 385, 392 (1961); *Lund v. Holbrook,* 153 Neb. 706, 46 N.W.2d 130 (1951).

Spiegel assigns as error the rejection of the offer of proof as to the tax consequences of a personal injury damages award. He relies on *Ott v. Frank,* 202 Neb. 820, 277 N.W.2d 251 (1979), as standing for the proposition that such tax consequences may be brought out in evidence. The case does not support his contention, but merely permits inquiry into the projected tax liability of the decedent, had he lived, when computing damages in a wrongful death action.

Generally, the courts have taken three positions on the admissibility of tax liability for personal injury awards. The majority position is that tax savings should not be deducted and that the jury should not be instructed with regard to taxes. A second position is that to fail to permit reduction due to tax savings overcompensates the plaintiff. A third approach finds the evidence relevant on a case-by-case basis. See D. Dobbs, Remedies § 8-8 (1973).

There are no Nebraska cases on the issue. A recent case finding such evidence inadmissible is *Eriksen v. Boyer,* 225 N.W.2d 66 (N.D. 1974). The court said at 73-74: "Boyer asserts that the court erred in refusing to give a requested instruction to the effect that damages awarded to the plaintiff are not taxable to him as income. We hold that the court was clearly correct in refusing the instruction. We adhere to the majority rule that it is improper to instruct the jury that an award of damages is not subject to income tax and that such tax should not be considered in fixing the amount of damages. . . . We agree with the statement of the Illinois Supreme Court in Hall v. Chicago & North Western Ry. Co., 5 Ill. 2d 135, 151, 125 N.E.2d 77, 86 (1955):

" 'It is a general principle of law that in the trial of a lawsuit the status of the parties is immaterial. Thus, what the plaintiff does with an award, or how

the defendant acquires the money with which to pay the award, is of no concern to the court or jury. Similarly, whether the plaintiff has to pay a tax on the award is a matter that concerns only the plaintiff and the government. The tortfeasor has no interest in such question. And if the jury were to mitigate the damages of the plaintiff by reason of the income tax exemption accorded him, then the very Congressional intent of the income tax law to give an injured party a tax benefit would be nullified.

. . . .

" 'We are of the opinion that the incident of taxation is not a proper factor for a jury's consideration, imparted either by oral argument or written instruction. It introduces an extraneous subject, giving rise to conjecture and speculation.' "

The offer of proof was properly rejected.

Spiegel's final assignment of error is that the verdict was excessive. The rule in Nebraska is that a verdict will not be set aside unless it is against the weight of the evidence, or appears to have been the result of passion, prejudice, mistake, or disregard of the rules of evidence or the law. *Palma v. Barta,* 203 Neb. 459, 279 N.W.2d 130 (1979); *Caradori v. Fitch,* 200 Neb. 186, 263 N.W.2d 649 (1978).

Chip Maricle was 32 years of age at the time of the accident. He was married and had two children. He was engaged in a farming partnership with his father. His average annual income from 1978 to 1980 was in excess of $37,000. He is permanently totally disabled as a result of his injuries and is presently confined to a nursing home. The damages awarded totaled $1,700,000. There was evidence that Maricle's loss of income and medical expenses alone will amount to $1,540,586.14. As we view the record, the verdict was not excessive.

Maricle appeals from the judgment in favor of Mobil, arguing that the verdict was against the weight of the evidence. A jury verdict will not be disturbed on appeal unless it is clearly erroneous,

against the preponderance of the evidence, and so clearly contrary to the findings that it is the duty of the reviewing court to correct it. *Krug v. Laughlin,* 208 Neb. 367, 303 N.W.2d 311 (1981); *Lintner v. Roos,* 202 Neb. 476, 276 N.W.2d 93 (1979).

The jury was properly instructed that Mobil was not liable if Spiegel's relationship to Mobil was that of an independent contractor. Generally, control, or the right of control, is the chief criterion in determining whether someone acts as an independent contractor. See *Todd v. Boals,* 187 Neb. 51, 187 N.W.2d 284 (1971). Other factors include the independence the workman enjoys, the degree of supervision of the work, whether tools are provided by the workman or the other party, and the method of payment. See *Meyer v. State Farm Mut. Auto. Ins. Co.,* 192 Neb. 831, 224 N.W.2d 770 (1975).

The evidence clearly supports the jury verdict. Spiegel hired his own employees and paid them from his own account. He withheld taxes from their wages. Billings to and payments from customers were handled by Spiegel. Mobil did not direct Spiegel in the control of the employees. Mobil had a marketing representative who visited Spiegel regularly; however, his directives were considered by Spiegel more advisory than as commands. Spiegel set his own prices and did not feel compelled to use company advertising.

There being no error, the judgments of the District Court are affirmed.

AFFIRMED.

WHITE, J., participating on briefs, concurs in the result.

THE OMAHA FISH AND WILDLIFE CLUB, INCORPORATED, APPELLEE, V. COMMUNITY REFUSE DISPOSAL, INC., AND RONALD B. ROOTS, APPELLANTS.

329 N.W.2d 335

Filed January 7, 1983. No. 44485.

1. **Zoning: Ordinances: Comprehensive Development Plans.** A comprehensive development plan is merely a policy statement that may be implemented by a zoning resolution. It is the zoning resolution which has the force of law. If there is a conflict between a comprehensive plan and a zoning ordinance, the zoning ordinance contains the controlling provisions when questions of a citizen's property rights are at issue.
2. **Zoning: Ordinances.** The operation of a commercial sanitary landfill is not a recognized incidental use to a farming operation so as to be considered an accessory use under zoning ordinances.
3. **Pleadings.** The pleadings frame the issues between the parties, and the evidence must be confined to those issues.
4. **Zoning.** In order for an expenditure to have been made in good faith reliance upon improper zoning of a property, it must appear that the expenditures were made before any question as to the validity of the zoning was raised.

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

Herbert J. Elworth of Casey & Elworth, and Croker, Huck & McReynolds, for appellants.

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

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

HASTINGS, J.

The defendants have appealed from an order of the District Court permanently enjoining them from operating a solid waste disposal area on certain real property located in Cass County. On appeal to this court, the defendants assign as error that the court (1) incorrectly found that the Cass County zoning ordinance prohibited operation of a licensed solid waste disposal landfill in an area zoned "A" Rural and Public Use District; (2) failed to find that the

particular site was immune from zoning control because the use as a landfill operation was in the performance of a governmental function not subject to zoning control; and (3) wrongfully revoked the approval granted by the Cass County officials under circumstances where the defendants had incurred substantial expense in good faith reliance upon such approval. We affirm.

The waste disposal area is located on farmland within Section 33, Township 13 North, Range 12 East of the 6th P.M. in Cass County, Nebraska, leased by defendants from the owner. It contains a large ravine which the defendants propose to fill with solid, baled waste material hauled under contract from the city of Omaha. Once filled, it is the intent of the owner of the property to reconvert this land to agricultural use.

The plaintiff is a nonprofit club owning recreational land 1 mile northeast of the landfill site. This land is located just south of the Platte River and consists of several small recreational lakes and various campgrounds. The plaintiff contests the defendants' use of the land in question as a violation of the Cass County zoning ordinance.

On October 4, 1978, the defendants made application to the Nebraska Department of Environmental Control for a license to operate a solid waste disposal area. As required by Neb. Rev. Stat. § 81-1518 (Reissue 1981), a hearing was had before the board of commissioners of Cass County on November 6, 1978. Notice of such hearing was published once in The Plattsmouth Journal on October 26, 1978. The result of that hearing was that a motion was passed that the "board approve the site as presented." It was not until June of 1979 that the plaintiff learned of the proposed use to be made of the property by the defendants. The plaintiff protested this use to the Cass County board by letters dated July 20, 1979, and November 6, 1979, and in person at a meeting of the board held on July 3, 1979. It was the plaintiff's po-

sition that in order to operate a landfill on the premises a change of zoning was required, which necessitates a more elaborate and extensive notice procedure. However, these protests were to no avail and this action was filed on December 6, 1979. Following the sustaining of a demurrer and dismissal of the petition, that action of the trial court was appealed to this court. We reversed and remanded for further proceedings. *Omaha Fish and Wildlife Club, Inc. v. Community Refuse, Inc.*, 208 Neb. 110, 302 N.W.2d 379 (1981). The present proceeding followed.

The Cass County zoning ordinance is set up on a permissive basis, i.e., each district is outlined to allow only certain uses. The land in question is zoned "A" Rural and Public Use District. Article IV of the ordinance discusses what is a permissive use in an "A" Rural and Public Use District. Section 402 of that article states in part: "A building or premises shall be used only for the following purposes: 1. Single family dwellings . . . 2. Farming . . . 3. Lumbering . . . [4. does not appear.] 5. Publicly owned or operated properties . . . 6. Public parks . . . 7. Railroad tracks . . . 8. Single-family dwellings. 9. Churches . . . 10. Public elementary and high schools . . . 11. Cemeteries . . . 12. Hospitals . . . 13. Accessory building and uses customarily incident to any of the above uses . . . ." Nowhere is it stated that landfills are permitted uses in an "A" Rural and Public Use District. Article VIII of the zoning ordinance describes "I" Industrial District regulations, which permit a use "for any purpose not in conflict with any resolution of Cass County regulating nuisances or laws of the State of Nebraska; provided . . . that no . . . occupancy permit shall be issued for any of the following uses . . . until and unless the location . . . shall have been approved by the Board of Commissioners, after report by the Cass County Planning Commission. . . . Rendering and storage of dead animals, offal, garbage, or waste products." In addition, article XI pro-

vides Additional Use regulations, which provide that "The Board of Commissioners may, by special permit after public hearing, authorize the location of any of the following . . . uses in any district from which they are prohibited . . . 17. Industrial uses upon which the Board is required to pass under Article VIII."

The defendants advance three reasons why the maintenance of a solid waste disposal landfill is not prohibited in an area zoned "A" Rural and Public Use District. In the first place, they argue, nowhere in the six districts originally contained in the zoning ordinance is there any provision for the allowance of utilities and services. However, they say these uses consistently are allowed in all districts throughout the county, e.g., water, gas, and sewer lines, and telephone and electric power lines. The Cass County comprehensive plan states that "Utilities and services, as defined in this report, include water, sanitary and storm sewers, solid waste disposal, electric power, natural gas, and telephone service." Therefore, they conclude, having allowed the enumerated utility services, the county must permit the operation of a solid waste disposal service in all districts. Of course, it cannot seriously be contended that the *providing* of electricity, gas, water, sewers, and like utilities is not "accessory . . . uses customarily incident to any of the . . . uses" permitted by "A" Rural and Public Use District regulations. However, generating electricity, manufacturing gas, treating water, or processing sewage is quite another matter. As stated in *Stones v. Plattsmouth Airport Authority,* 193 Neb. 552, 554-55, 228 N.W.2d 129, 131 (1975): "A comprehensive development plan is merely a policy statement that may be implemented by a zoning resolution. . . . It is the zoning resolution which has the force of law. . . . If there is a conflict between a comprehensive plan and a zoning ordinance, the zoning ordinance contains the controlling provisions when questions of a

citizen's property rights are at issue." The zoning ordinance plainly does not authorize the operation of a solid waste disposal area in an "A" Rural and Public Use District, anything in the comprehensive development plan to the contrary notwithstanding.

Next, it is contended that a landfill is an accessory use as a reclamation project on agricultural land. The defendants cite the case of *Schlueter v. County of St. Clair,* 19 Ill. App. 3d 470, 311 N.E.2d 735 (1974), which involved an attempt to utilize a landfill operation to fill an open strip mine area. In allowing such an operation contrary to the plain language of the zoning ordinance, the court stated "that the land in question could not at present be used productively for agricultural purposes but could be reclaimed for productive agricultural use by the operation of a sanitary landfill; that expert scientific evidence established that ground waters and neighboring water wells would not be contaminated or affected by the operation of the landfill; that no appreciable increase in traffic would result; that surrounding property values would not be diminished; that the operation of a landfill could result in the reclamation of the strip-mine property and should appreciate the surrounding property." *Id.* at 473, 311 N.E.2d at 737. We would only point out that the evidence relied upon by the Illinois court is not present in this record. Additionally, the operation of a *commercial* sanitary landfill as a part of a farming operation would hardly be considered an "accessory use" which is "a recognized incidental use" within the meaning of *Kitrell v. Board of Adjustment,* 201 Neb. 130, 266 N.W.2d 724 (1978).

Finally, the defendants claim that the operation of a landfill under a license from the Department of Environmental Control is a "public operation" within the meaning of subsection 5 of article IV of the zoning ordinance. We should add parenthetically that the record does not disclose that the department has actually issued the permit. The exact language

of the ordinance permits "Publicly *owned* or *operated* properties." (Emphasis supplied.) The landfill operation with which we are here concerned is neither publicly owned nor operated. We believe that the plain language of the zoning ordinance does not permit the operation of a commercial solid waste landfill operation, and as a result thereof it is prohibited.

The second assignment of error suggests that because the defendants have contracted to perform certain services for the city of Omaha in the disposal of baled refuse, somehow it is performing a governmental function not subject to zoning control. We do not find it necessary to examine the various authorities, such as *Witzel v. Village of Brainard,* 208 Neb. 231, 302 N.W.2d 723 (1981), in support of such a contention. This was not an issue raised by the pleadings, nor does the record disclose that the case was tried on that theory. The pleadings frame the issues between the parties, and the evidence must be confined to those issues. *Era v. Sapp Bros. GMC, Inc.,* 189 Neb. 366, 202 N.W.2d 750 (1972). We would observe that Neb. Rev. Stat. § 14-102(28) (Reissue 1977) does provide that metropolitan cities "shall have power by *ordinance* . . . to make contracts for the removal or disposal of garbage . . . ." (Emphasis supplied.) However, no such ordinance appears in the record. Other than a passing reference to a contract with the city of Omaha to haul garbage, neither is a written contract to that effect contained within the evidence adduced. The second assignment of error is without merit.

The defendants' final argument concerns itself with the matter of detrimental reliance. That is, they claim that the grant of permission to an occupier of land for a particular use, coupled with the incurrence of substantial expense and obligation in good faith reliance thereon, gives rise to a vested right in such occupier for such use of the land, even though it may be in violation of the zoning ordi-

nances. In support of their argument the defendants cite us to the case of *A. C. Nelsen Enterprises, Inc. v. Cook,* 188 Neb. 184, 195 N.W.2d 759 (1972).

In *Nelsen* the city of Omaha had revoked a certificate of occupancy issued to the plaintiff authorizing it to use certain premises for the retail sale of mobile homes. The property was zoned C-1, which permitted the use of the premises for auto sales, auto laundries, department stores, filling stations, etc., but not for the display and sale of mobile homes. This use was restricted to a C-6 zoning district, which allowed 18 specified uses, all but two of which were also allowed in C-1 districts. The certificate as originally issued recited that the property had been inspected and was suitable for the proposed use, was properly zoned, and complied with all regulations and ordinances. Some 3 months later, Nelsen was advised that the certificate had been issued in error and was void, and that it would have to discontinue that business activity.

The record in *Nelsen* disclosed that before revocation of its permit, the plaintiff had leased the premises for a 3-year term at a total rental of $18,000 and, in addition, had expended approximately $12,000 in preparing the premises for its intended use. In setting aside the revocation of the permit, we said: "In this case, there was no mistake of fact. It is seriously questionable that there was even a mistake of law. The certificate of occupancy was lawfully issued by the municipal officer having authority to issue it and in accordance with the departmental interpretation of the zoning laws which had been in effect for some years. . . . [T]here was substantial good faith expenditure of funds and change of position in reliance upon the certificate issued.

"Where a certificate of occupancy or building permit has been issued lawfully, even though in accordance with a questionable interpretation of the zoning ordinances or regulations, courts have generally held that it may not arbitrarily be revoked, par-

ticularly where the permittee has incurred substantial expenses and liabilities in reliance upon it. . . .

. . . .

"We therefore hold that where a certificate of occupancy has been properly obtained in accordance with zoning statutes and ordinances, it may not be arbitrarily revoked where the certificate holder has incurred substantial expenses, commitments, and obligations in good faith reliance upon the certificate." *Id.* at 186-88, 195 N.W.2d at 761-62.

There are a number of factors which distinguish the present case from *Nelsen.* Here, no permit was ever issued, although it is clear that the Cass County commissioners approved the proposed site for the requested use. However, nothing was granted "in accordance with the . . . interpretation of the zoning laws which had been in effect for some years." As a matter of fact, it was the testimony of the Cass County zoning administrator that the county had no jurisdiction as far as zoning of landfills was concerned and that he had never expressed an opinion to anyone else as to that fact. It was the October 15, 1979, written opinion of the Attorney General in response to a request from the Department of Environmental Control which first notified the county officials that it was the county governing body, not the state department, which was to determine the adequacy of or compliance with local zoning ordinances.

There is evidence in the record that the defendants spent somewhere between $25,000 and $60,000 in engineering and legal fees for the development of this project sometime after approval of the site by the county and prior to the filing of this lawsuit in December of 1979. More importantly, however, is the exact time frame within which the expenditures were made. At one point in the record, when asked if he was saying that $60,428.74 in expenses was incurred subsequent to the board approval and prior to the filing of the lawsuit, Ronald B. Roots answered:

"I'd say it in my way is prior to the lawsuit based on all the approvals I had." At another point in his testimony, Mr. Roots said that he had incurred legal expense of $5,261.20 in legal fees "through these hearings and up to September [sic] 10th when this suit was brought." He also mentioned a commitment on the lease of approximately $6,500 on October 1, 1979, and engineering and soil sampling totaling $25,929.63 as of December 10th, 4 days after this action was filed. Any contract obligation to the city of Omaha was incurred sometime after December of 1980.

In short, the defendants have failed to establish that their expenditure of funds was in good faith, i.e., that it was made before the question of improper zoning was raised. According to a copy of the July 3, 1979, proceedings of the Cass County commissioners, they were, at that time at least, aware that a substantial question existed. In a somewhat similar case we said that "the appellant had not established any vested right to use these premises for the purpose here contended when the change was made. Consequently, we find that the ordinance passed on December 30, 1948, which eliminated the use of the premises for that purpose, lawfully extinguished his permit and any rights he may have had thereunder." *City of Omaha v. Glissmann,* 151 Neb. 895, 904, 39 N.W.2d 828, 834 (1949).

For the foregoing reasons, we find that the judgment of the District Court was correct and is affirmed.

AFFIRMED.

LAMMERS LAND AND CATTLE COMPANY, INC., A NEBRASKA CORPORATION, APPELLANT, V. GERALD HANS ET AL., APPELLEES.

328 N.W.2d 759

Filed January 7, 1983. No. 44494.

1. **Motions to Strike.** It is not the function of a motion to strike to raise the merits of the cause or defense. However, a motion to strike which embodies the substance of an answer may, by waiver of the opposing party, be treated as an answer.
2. **Pleadings.** Under Nebraska statutes, "The pleadings are the written statements by the parties of the facts constituting their respective claims and defenses." Neb. Rev. Stat. § 25-801 (Reissue 1979). "The rules of pleading formerly existing in civil actions are abolished and hereafter the forms of pleading in civil actions in courts of record, and the rules by which their sufficiency may be determined, are those prescribed by this code." Neb. Rev. Stat. § 25-802 (Reissue 1979). "The only pleadings allowed are (1) the petition by the plaintiff; (2) the answer or demurrer by the defendant; (3) the demurrer or reply by the plaintiff; and (4) the demurrer to the reply by the defendant." Neb. Rev. Stat. § 25-803 (Reissue 1979).
3. **Pleadings: Judgments.** The court, in every stage of an action, must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect.
4. **Judgments: Debtors and Creditors: Conveyances.** An action in the form of a creditor's bill or to set aside a conveyance in fraud of creditors cannot generally be founded upon a dormant judgment.
5. **Judgments: Collateral Attack.** A judgment which is not void is not subject to collateral attack, but a void judgment may be attacked at any time in any proceeding.
6. **Real Estate: Judgments: Collateral Attack.** A sale of real estate to satisfy a dormant judgment is, as to the judgment debtor, voidable only and cannot be attacked in collateral proceedings.
7. **Judgments.** When a judgment becomes dormant, the lien is lost as to the judgment debtor's grantee and is not revived by the new execution.
8. **Collateral Estoppel.** The principle of collateral estoppel may bar a party from raising a defense he might otherwise have.

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

John Thomas of Thomas & Peebles, for appellant.

Robert G. Scoville of Ryan & Scoville, for appellees.

BOSLAUGH, MCCOWN, CLINTON, and WHITE, JJ., and BRODKEY, J., Retired.

CLINTON, J.

This is an action brought in the District Court for Cedar County by Lammers Land and Cattle Company, Inc., to quiet title to 80 acres of land in Cedar County which we will refer to hereafter as "Blackacre." The petition alleged that plaintiff was the owner of Blackacre by virtue of a quitclaim deed from Jerome Lammers dated April 1, 1969, and had been in continuous, notorious, exclusive, and adverse possession of Blackacre since that time except as otherwise alleged in the petition.

We summarize the petition, omitting those matters we deem not necessary to a determination of the issues made on the appeal. The petition alleges that the defendants Mark Hans and Cynthia Hans claim title by virtue of two deeds from the personal representatives of the estates of Mary Lammers and Ignatz Lammers, respectively, and that the above deeds are void because the personal representatives of the two estates acquired their purported titles at execution sales pursuant to judgments which had become dormant by lapse of time. The judgments are identified in the petition as having been entered in case Nos. 5986 and 6017 in the District Court for Cedar County. The petition also alleges that a decree of the District Court for Cedar County in case No. 6147, wherein the above-described conveyance from Jerome Lammers to the plaintiff, Lammers Land and Cattle Company, Inc., was declared null and void as being a fraudulent conveyance to avoid the claims of creditors, was itself void because the underlying judgment lien was dormant at the time the decree was entered.

The defendants Hans and others filed a motion to strike the petition. The substantive portions of the

motion to strike the petition were as follows: "[M]ove the Court to strike the Petition of the Plaintiff herein for the reason that same is a collateral attack on the judgment of this Court in Case No. 6147, the judgment of this Court confirming the sale of the real estate herein involved in Case No. 6017 and in Case No. 5986 in this Court and is a further collateral attack upon the orders of sale of said real estate and the final decrees entered in the Estate of Mary Lammers, deceased, Probate No. 3667 and the Estate of Ignatz A. Lammers, deceased, Probate No. 3931 in the County Court of Cedar County, Nebraska."

The trial court granted the motion to strike and the plaintiff has appealed to this court, making various assignments of error which we restate in the form of issues: (1) May a motion to strike be used to raise the merits of the cause pleaded? (2) Will a dormant judgment support a petition for a creditor's bill or a petition to set aside a conveyance in fraud of creditors? (3) Is a conveyance in fraud of creditors wholly void or is it good as between the parties subject only to the creditor's lien? (4) What is the legal effect of an execution sale of real estate based upon a dormant judgment?

The very brief (except for exhibits) bill of exceptions contains the offer of the defendants' attorney of the court file in case Nos. 6017, 6147, and 5986 from the District Court for Cedar County as well as the court files in the county court of Cedar County containing the proceedings in the estates of Mary Lammers and Ignatz Lammers, respectively. The plaintiff made no objection to the offer of these exhibits which were received in evidence and considered by the court in its ruling on the motion. The plaintiff offered no evidence.

The nature of the issues presented on appeal requires that we first examine the question raised by the use of the "motion to strike." At common law, a motion to strike could be used for many purposes,

including raising the merits of the plaintiff's cause. 71 C.J.S. *Pleading* §§ 450 et seq. (1951). Under our statutory rules of pleading, the purposes of a motion to strike are much more limited. Pleadings pertaining to the substance of the cause or defense are prescribed. "The pleadings are the written statements by the parties of the facts constituting their respective claims and defenses." Neb. Rev. Stat. § 25-801 (Reissue 1979). "The rules of pleading formerly existing in civil actions are abolished and hereafter the forms of pleading in civil actions in courts of record, and the rules by which their sufficiency may be determined, are those prescribed by this code." Neb. Rev. Stat. § 25-802 (Reissue 1979). "The only pleadings allowed are (1) the petition by the plaintiff; (2) the answer or demurrer by the defendant; (3) the demurrer or reply by the plaintiff; and (4) the demurrer to the reply by the defendant." Neb. Rev. Stat. § 25-803 (Reissue 1979). In *Christopherson v. Christopherson,* 177 Neb. 414, 129 N.W.2d 113 (1964), we held that the code of civil procedure covers the proper pleadings in this jurisdiction and that litigants should confine themselves to those pleadings and procedures approved in this jurisdiction. However, defects in pleadings may be waived by failure to make timely objection or raise the objection in an appropriate manner. *Frederick v. Buckminster,* 83 Neb. 135, 119 N.W. 228 (1909) (failure to file demurrer); *Professional Collection Service v. Coble,* 200 Neb. 683, 264 N.W.2d 686 (1978) (failure to object to error in caption); *Gilbert v. Vogler,* 197 Neb. 454, 249 N.W.2d 729 (1977) (failure to move to make the petition more definite and certain).

Both the petition and the "motion to strike" consist largely of legal and factual conclusions. It is apparent that by the motion the defendants sought to plead an affirmative defense of res judicata. In support of that defense the defendants offered the court files previously identified in this opinion. To

each offer the plaintiff stated no objection. The plaintiff then raised the question of whether the issues had been made in a proper manner, that is, by treating the motion to strike as a motion to dismiss. However, both parties proceeded to argue the merits of the issues raised, including plaintiff's claim of dormant judgments and plaintiff's claim of the court's lack of "jurisdiction" to enter a judgment setting aside the conveyance as fraudulent.

We find and hold that by failure to object to the introduction of evidence in support of the motion, the plaintiff waived objections to the form of the "pleadings," as well as to the conclusional nature of its allegations. "The court in every stage of an action must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect." Neb. Rev. Stat. § 25-853 (Reissue 1979).

We, therefore, proceed to examine the legal sufficiency of the evidence supporting the court's judgment. From the evidence introduced, the court could find the following facts. Ignatz Lammers conveyed Blackacre to his son, Jerome, reserving a life estate in himself. On April 1, 1969, Jerome Lammers, by quitclaim deed, conveyed Blackacre to the plaintiff corporation. Ignatz Lammers thereafter died on December 4, 1969.

In case No. 6017, the personal representative of the estate of Mary Lammers (decedent being the mother of Jerome Lammers and the wife of Ignatz Lammers), on May 22, 1969, obtained a judgment in the District Court for Cedar County, Nebraska, against Jerome Lammers upon a promissory note. This case was appealed to this court and affirmed May 22, 1975. *Becker v. Lammers,* 193 Neb. 839, 229 N.W.2d 557 (1975).

On May 22, 1969, in case No. 5986, Ignatz Lammers obtained a judgment upon a petition which alleged that Jerome Lammers was in possession of certain

land under a contract of purchase and that he was in default, had abandoned the contract and thereafter remained in possession as a tenant, and had failed to account for rents and profits. In that case Ignatz Lammers had obtained a judgment against Jerome Lammers in the sum of $22,929.04. This case was appealed to this court and on May 22, 1975, the judgment was affirmed. *Lammers v. Lammers,* 193 Neb. 836, 229 N.W.2d 555 (1975). June 19, 1969, was the date of the last execution issued in either of the above cases. Immediately after that execution was returned unsatisfied, the personal representative of Mary Lammers' estate brought an action, case No. 6147, to set aside the conveyance of April 1, 1969, as being in fraud of creditors. A judgment setting aside the conveyance and holding it for "naught" was entered November 17, 1977. There apparently was no appeal from that judgment.

Orders of revivor of the two monetary judgments had been entered on December 21, 1978. Thereafter, the sheriff levied upon Blackacre in case Nos. 6017 and 5986, and sold it at a sheriff's sale. The personal representatives of Ignatz Lammers' estate purchased, on behalf of the estate, a three-fifths interest, and the personal representative of Mary Lammers' estate purchased a two-fifths interest therein. The total purchase price was $71,600, being apparently the total amount accumulated on both judgments. Consequently, no equity remained for distribution to either the plaintiff or Jerome Lammers. Jerome Lammers appeared in the confirmation proceeding and objected to confirmation. The court confirmed the sale on June 20, 1979, and on July 25, 1979, the sheriff conveyed Blackacre to the personal representatives of the two estates in the interests previously described. There was no appeal from the orders of revivor or from the order of confirmation.

Two principles of law underlie plaintiff's argument on the merits. The first is that a decree in a

creditor's bill for an action to set aside a conveyance as in fraud of creditors is *void* when the creditor relies upon a judgment which has become dormant before the decree is entered, even though the action was commenced before the judgment became dormant. The plaintiff cites several Nebraska cases which clearly hold that as a general rule a dormant judgment cannot support a creditor's bill. *Flagg v. Flagg,* 39 Neb. 229, 58 N.W. 109 (1894); *Johnson v. Parrotte,* 46 Neb. 51, 64 N.W. 363 (1895); *Cotton v. First Nat. Bank of Superior,* 51 Neb. 751, 71 N.W. 711 (1897); *Predohl v. O'Sullivan,* 59 Neb. 311, 80 N.W. 903 (1899); *Halmes v. Dovey,* 64 Neb. 122, 89 N.W. 631 (1902); *Bank of Miller v. Moore,* 98 Neb. 843, 154 N.W. 731 (1915); *Fisher v. Woodard,* 103 Neb. 253, 170 N.W. 907 (1919); *Rich v. Cooper,* 136 Neb. 463, 286 N.W. 383 (1939). However, in each of the cases cited, the court overturned the judgment in the creditor's bill action on direct appeal; none of the cases cited hold that the judgment is void and thus subject to collateral attack. The rule is that a judgment which is not void is not subject to collateral attack, but a void judgment may be attacked at any time in any proceeding. *Stanton v. Stanton,* 146 Neb. 71, 18 N.W.2d 654 (1945); *Drainage District No. 1 v. Village of Hershey,* 139 Neb. 205, 296 N.W. 879 (1941).

In case No. 6147, the District Court had subject matter jurisdiction and jurisdiction of the parties. Its judgment may have been erroneous because of the dormancy of the underlying judgment; however, it was not void and there was no appeal from that judgment. It therefore bound the parties.

The second legal principle upon which the plaintiff relies is that under the provisions of Neb. Rev. Stat. § 36-401 (Reissue 1978) (since repealed and replaced by the Uniform Fraudulent Conveyance Act, Neb. Rev. Stat. §§ 36-601 et seq. (Cum. Supp. 1982), effective July 19, 1980), the conveyance sought to be set aside is good as between the parties and subject only

to the lien of the creditor who attacks it. Our cases so hold. *United States Nat. Bank of Omaha v. Rupe,* 207 Neb. 131, 296 N.W.2d 474 (1980). Plaintiff asserts that in case No. 6147 the only attacking creditor was Mary Lammers' estate; therefore, the conveyance is good as against the other creditor here involved, Ignatz Lammers' estate. If we accept the plaintiff's premise, the sale to the personal representative of Mary Lammers' estate is still good.

However, even as to the sale to Ignatz Lammers' representatives, the plaintiff must overcome another hurdle which is applicable to both creditors. A sale of real estate to satisfy a dormant judgment is, as to the judgment debtor, voidable only and cannot be attacked in collateral proceedings. *Link v. Connell,* 48 Neb. 574, 67 N.W. 475 (1896); *Harvey v. Godding,* 77 Neb. 289, 109 N.W. 220 (1906); *Becker v. Linton,* 80 Neb. 655, 114 N.W. 928 (1908). It is void as to one who has acquired title from the judgment debtor for consideration before the reviving execution is issued. *Harvey v. Godding, supra.* When the judgment becomes dormant, the lien is lost as to the judgment debtor's grantee and is not revived by the new execution. *Harvey v. Godding, supra;* Neb. Rev. Stat. §§ 25-1515, 25-1305 (Reissue 1979).

Thus, we reach the question of whether the plaintiff can collaterally attack the sale to the personal representatives of Ignatz Lammers' estate. We hold that it cannot. The conveyance which was set aside in case No. 6147 is the same conveyance upon which the plaintiff relies to assert its right to quiet title as against the sale to Mary Lammers' estate. Principles of collateral estoppel apply. Plaintiff was not an innocent purchaser for consideration, as the judgment in the action to set aside the fraudulent conveyance shows. The District Court properly held that the defense of res judicata was applicable and effective.

AFFIRMED.

Cite as 213 Neb. 251

STATE OF NEBRASKA EX REL. GREGORY A. MERCURIO, JR., APPELLEE, V. BOARD OF REGENTS OF THE UNIVERSITY OF NEBRASKA, APPELLANT.

329 N.W.2d 87

Filed January 7, 1983. No. 44511.

1. **Evidence.** The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if all originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith. Neb. Rev. Stat. § 27-1004 (Reissue 1979).
2. _____. Secondary evidence of the contents of a writing, the original of which would have been competent evidence, may be admitted into evidence if it is shown by satisfactory proof that the originals have been lost or destroyed in the absence of bad faith, malice, or fraud.
3. **Colleges and Universities: Evidence: Appeal and Error.** In the absence of some evidence of arbitrary behavior or bad faith, courts will not substitute their judgment for the necessarily discretionary judgment of a school or university as to a student's educational performance.
4. **Mandamus.** Before a writ of mandamus may issue, the relator must show clearly and conclusively that he is entitled to the particular relief requested; that the respondents are legally obligated to act; and the duty to act must be imposed by law and must be clear.

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

Richard R. Wood, General Counsel for the University of Nebraska, and John C. Wiltse, and David L. Buelt of Ellick, Spire & Jones, for appellant.

Paul LaPuzza, for appellee.

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

MCCOWN, J.

This is an action by a student for a writ of mandamus requiring the respondent Board of Regents to remove a failing grade from the transcript of his grade record at the University of Nebraska. The District Court found that the respondent had a

duty to produce for the relator his educational records and had not done so, and issued a peremptory writ of mandamus ordering respondent to remove from the student transcript of the relator the transcribed grade of "F" in the biochemistry course involved. This appeal followed.

In the summer of 1978 Gregory A. Mercurio, Jr., a graduate student, enrolled in a biochemistry course which was conducted as a part of the graduate studies program at the University of Nebraska Medical Center in Omaha. The class consisted of 177 students and was taught by several faculty members. Dr. Ruegamer, chairman of the biochemistry department and chief lecturer in the course, served as overall faculty coordinator. Grades for the course were based upon three multiple-choice examinations. For the three regularly scheduled examinations students recorded their answers to the multiple-choice questions by blackening circles on computer answer sheets. The answer sheets were identified by each student's name and social security number, which he or she wrote on the answer sheet. The answer sheets were then computer graded. The result was a computer printout showing the percentage score each student had received.

Students unable to take a regularly scheduled examination were allowed to take a makeup examination. Approximately six to eight students normally took the makeup examination. A student taking the makeup examination recorded answers directly on the examination booklet, which was then hand graded by a faculty member immediately after the examination had concluded.

Each student's score on each examination for the regularly scheduled or makeup examination was then recorded on his or her separate grade record sheet maintained by the biochemistry department. The score recorded was taken directly from the computer-graded or hand-graded examination booklet. Following the examination, although the re-

sults were not distributed, students could find out their scores by asking the secretary for the biochemistry department.

Mercurio was unable to take the first regularly scheduled examination and, instead, took the makeup examination on August 4, 1978. This examination was hand graded and a score of "F-42" was entered on Mercurio's grade record sheet. Mercurio took the two last regularly scheduled examinations on August 26 and September 6, 1978, respectively. Grades of "56-F" for the August 26 examination and "69.3-C" for the September 6 examination were recorded on Mercurio's grade sheet. Mercurio's average for all three examinations was 56 percent. The biochemistry department grading committee established a grade of 60 percent as the dividing line between a "D" and an "F." That cutoff point was determined without knowledge as to how any particular student had performed in the course. Mercurio received the only failing grade in the class.

On September 15, 1978, Mercurio, having learned of his failing grade, met briefly with Dr. Ruegamer. Mercurio advised Ruegamer that he felt he had made a transposition error in filling in his answers on the answer sheet for the second examination. Dr. Ruegamer agreed to review the matter and meet with Mercurio again.

At the second meeting, Ruegamer reviewed Mercurio's answer sheet for examination No. 2 with him and told Mercurio that he and other members of the department had undertaken an elaborate review of the examination booklet and the materials supplied by Mercurio, and that both Dr. Ruegamer and another faculty member had inspected and hand graded Mercurio's answer sheet and both reached the same 56 percent result as the computer grade. Dr. Ruegamer also explained that the department could not make any grade adjustments based upon a

transposition error after examinations had been handed in and graded.

Mercurio then sought to commence a grade appeals procedure within the university to review his grade in the biochemistry course. He was informed that a new procedure for grade appeals was being written but was not yet completed. The new procedure went into effect in May 1979 and Mercurio filed his appeal. When the appeal was filed, Dr. Ruegamer discovered that Mercurio's answer sheet for examination No. 2 was missing and had apparently been lost at some time after the second meeting between Dr. Ruegamer and Mercurio. That answer sheet has never been found. A hearing was scheduled before the grade appeals committee for September 18, 1979. A dispute arose between Mercurio and the grade appeals committee about the proper procedures to be used at the hearing.

On September 17, 1979, Mercurio filed a petition in the District Court for an alternative writ of mandamus requiring that the respondent Board of Regents conduct the grade appeals hearing in accordance with statutory provisions for administrative agency hearings and that the formal rules of evidence applicable to district court proceedings be followed. At the suggestion of the trial court the parties reached a compromise as to the procedural difficulties and Mercurio's grade appeals hearing was held by the committee in March 1980. The District Court retained jurisdiction to insure that the hearing would comply with the requirements of due process.

In preparing for the grade appeals hearing the parties discovered that all of the makeup examination booklets for the first examination were also missing. Mercurio's answer sheet for the last regular examination was available and was furnished to Mercurio, together with the other educational records except for the two examination booklets. The grade appeals committee heard the appeal despite

the absence of Mercurio's two answer sheets and concluded that Mercurio's failing grade should remain on the transcript. Mercurio appealed to the vice president for academic affairs, who affirmed the decision of the grade appeals committee.

On October 31, 1980, Mercurio filed an amended petition in the District Court seeking an alternative writ of mandamus requiring that the respondent remove the "F" from his student transcript. Mercurio alleged that he was entitled to inspect his educational record and that respondent was obligated to produce all materials used in determining Mercurio's final grade, and that respondent failed to produce his answer sheets for examination Nos. 1 and 2 and that the absence of those records prohibited him from successfully appealing his grade or challenging the educational records, thus depriving him of due process of law.

Show cause hearings were held before the District Court on November 20, 1980, and again on February 25, 1981. The court received into evidence Mercurio's grade sheet containing his scores for all three examinations; a computer printout listing all of the students' scores for examination No. 2, including Mercurio's 56 percent score; the audio tape from the grade appeals hearing; and copies of the grade appeals procedure adopted by the university. Various witnesses testified to the facts outlined above and a faculty member testified as to his knowledge that Mercurio had received a 42 percent grade for makeup examination No. 1.

Mercurio testified that he had called the departmental secretary shortly after taking the makeup examination No. 1 and was informed of his grade, but that he did not contact the department to find out his grade after examination No. 2. He also testified that he went to the departmental office after examination No. 3 and received his score on that test. The departmental secretary also testified that she recorded Mercurio's scores on all three examina-

tions directly from his answer sheets to his grade sheet.

The trial court held that under the federal educational rights and privacy act, 20 U.S.C. 1232(g) (1976), and regulations thereunder (45 C.F.R. § 99 (1981)), and paragraph 5.3 of the bylaws of the Board of Regents and the grade appeals procedure adopted thereunder, the board had a duty to produce Mercurio's educational records for his review and use at the hearings. The court also determined that the federal regulations prohibit destruction of such educational records where there is outstanding a request for review, and that the board had a duty to produce the documents pertaining to examination Nos. 1 and 2.

The court concluded that there was no satisfactory explanation by the board as to why the documents could not be produced and entered a peremptory writ of mandamus requiring the board to remove from the student transcript of Mercurio the transcribed grade of "F" in the course entitled Biochemistry 510/810. The trial court refused supersedeas as untimely. The grade was expunged in compliance with the writ and this appeal followed.

On appeal Mercurio contends, as the trial court found, that because the board could not produce two of Mercurio's three examination papers, the board must expunge from the record his failing grade in a biochemistry course. The argument is that because the university had a duty to grant Mercurio the right to inspect and review his educational records and also was obligated not to destroy records when there was an outstanding request to inspect and review them, therefore the failure of the university to produce the two specific records entitled Mercurio to have his grade expunged. We disagree.

The federal educational rights and privacy act and regulations thereunder, together with the bylaws of the University of Nebraska and the grade appeals procedure of the University of Nebraska Medical

Center, grant to a student the right to inspect and review his educational records, and prohibit the destruction of records when there is an outstanding request to inspect and review them. They also provide for a hearing in cases where a student wishes to challenge the accuracy of his educational records.

The basic problem with Mercurio's contention is that it treats the original document as the only admissible evidence of the contents of the document. The argument also assumes, in spite of the evidence, that the absence of the document was the result of bad faith, malice, or fraud on the part of the university. There is no evidence of bad faith, malice, or fraud on the part of the university, the faculty, or the board in this record.

The only real issue in this case is whether Mercurio's grades on the two missing examination papers and his consequent failing grade for the course were accurate or inaccurate. Neb. Rev. Stat. § 27-1004 (Reissue 1979) provides in relevant part: "The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if:

"(1) All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith . . . ."

Secondary evidence of the contents of a writing is generally admissible where it is shown that the original writing has been lost or destroyed. This state has followed the general rule. In *In re Estate of Baker,* 144 Neb. 797, 806, 14 N.W.2d 585, 590-91 (1944), this court said: "Of course, the rule is that secondary evidence of the contents of a letter or telegram, the original of which would have been competent evidence, cannot be given unless some legal excuse is shown for failing to produce the original. If it is shown by satisfactory proof that the originals have been lost or destroyed one of the principal objections to secondary evidence at once disappears and such evidence becomes admissible. Their loss

or destruction need not be proved beyond the possibility of mistake as the court is vested with a judicial discretion in the matter and it is enough if the testimony satisfies the court of the fact with reasonable certainty. If they are accidentally destroyed by a party without fault secondary evidence may be given of their contents, and even if their destruction is voluntary secondary evidence of their contents may be given if the circumstances accompanying the act are free from suspicion of intent to defraud and consistent with an honest purpose."

In the case at bar the testimony of various faculty and administrative personnel was uncontradicted that they had examined the missing documents, hand graded them, and that that grade was directly transferred to the grade record sheet of Mercurio. There is simply no evidence of bad faith, malice, or fraud. If we accepted Mercurio's argument, any student who received a failing grade in any course who discovered one of his examination papers was missing from the university records could have his grade expunged because the record had been lost, misplaced, or destroyed. The secondary evidence as to the missing documents in the present case was given by witnesses under oath and subject to the rigors of cross-examination, and it was more than sufficient to establish the accuracy and validity of the grading of the missing documents.

In the absence of some evidence of arbitrary behavior or bad faith, courts will not substitute their judgment for the necessarily discretionary judgment of a school or university as to a student's educational performance. See, *Depperman v. University of Kentucky,* 371 F. Supp. 73 (E.D. Ky. 1974); *Greenhill v. Bailey,* 378 F. Supp. 632 (S.D. Iowa 1974), *reversed on other grounds* 519 F.2d 5 (8th Cir. 1975); *Connelly v. University of Vermont and State Agr. Col.,* 244 F. Supp. 156 (D. Vt. 1965).

Before a writ of mandamus may issue, the relator must show clearly and conclusively that he is enti-

tled to the particular relief requested; that the respondents are legally obligated to act; and the duty to act must be imposed by law and must be clear. *Singleton v. Kimball County Board of Commissioners,* 203 Neb. 429, 279 N.W.2d 112 (1979); *State ex rel. Newbold v. County of Buffalo,* 202 Neb. 813, 277 N.W.2d 246 (1979).

In the present case the relator has failed to show that he is clearly and conclusively entitled to the particular relief requested and granted and that the respondent board was legally obligated to act. Although we do not determine whether Mercurio had an adequate remedy at law, mandamus was not appropriately granted on the evidence in this case. The writ of mandamus is vacated. The judgment is reversed and the cause of action dismissed.

WRIT OF MANDAMUS VACATED.
REVERSED AND DISMISSED.

CAPORALE, J., not participating.

DARREL W. SIMONDS, APPELLEE, V. BOARD OF EXAMINERS FOR LAND SURVEYORS ET AL., APPELLANTS.
329 N.W.2d 92

Filed January 7, 1983. No. 81-638.

1. **Administrative Law: Appeal and Error.** Where factfindings under criteria in Neb. Rev. Stat. § 84-917(6)(e) (Reissue 1981) are involved, we review the decision of the District Court only to determine that it and the board have applied the proper criteria, and it is in this sense that we review de novo.
2. _____: _____. The substantial evidence standard of review of decisions of administrative agencies requires the reviewing court to search the entire record to determine whether, on the basis of all the testimony and exhibits before the agency, it could fairly and reasonably find facts as it did.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Affirmed as modified.

Paul L. Douglas, Attorney General, and Frank J. Hutfless, for appellants.

James E. Gordon of Ginsburg, Rosenberg, Ginsburg, Cathcart, Curry & Gordon, for appellee.

BOSLAUGH, MCCOWN, CLINTON, and WHITE, JJ., and BRODKEY, J., Retired.

PER CURIAM.

Defendants, the Board of Examiners for Land Surveyors and James L. Brown (Brown), appeal the judgment of the District Court of Lancaster County that reversed the board's order revoking the surveying license of the plaintiff, Darrel W. Simonds.

Simonds is a registered land surveyor with 34 years' experience. He was part-time county surveyor for Johnson County and Seward County. Neb. Rev. Stat. § 23-1901.01 (Reissue 1977).

The Board of Examiners for Land Surveyors consists of five registered land surveyors. Brown is the Nebraska State Surveyor, appointed by the Board of Educational Lands and Funds, Neb. Rev. Stat. § 84-407 (Reissue 1981), and by statute he is the ex officio secretary to defendant board, Neb. Rev. Stat. § 81-8,110.03 (Reissue 1981).

In 1979 Brown conducted official investigations concerning surveying work and records of Simonds in Johnson and Seward Counties, and each county was assessed fees, Johnson County $6,262.61 and Seward County $944.32, payable to the State Treasurer for the Surveyors' Cash Fund, Neb. Rev. Stat. § 84-409 (Reissue 1981). In 1980 formal charges were brought against Simonds by the board, pursuant to Neb. Rev. Stat. § 81-8,123 (Reissue 1981): "The board may, upon its own motion, and shall, upon the sworn complaint in writing of any person, investigate the actions of any land surveyor. It shall have the power to revoke or suspend any registration under the provisions of sections 81-8,108 to 81-8,127, when the land surveyor has been found guilty of any

of the following practices: (1) Fraud or deceit in obtaining a registration; (2) negligence or incompetency in the performance of his duties; or (3) misconduct in the performance of his duties." No standards for "incompetency," "negligence," or "misconduct" are included in the statute.

Incompetency refers to a demonstrated lack of proficiency, skill, or ability to perform the professional duties and functions of a licensed land surveyor. Misconduct of a land surveyor is that conduct that violates those standards of professional behavior which have been established through professional experience. See *Vivian v. Examining Board of Architects,* 61 Wis. 2d 627, 213 N.W.2d 359 (1974). A land surveyor "must exercise that degree of care which a surveyor or civil engineer of ordinary skill and prudence would exercise under similar circumstances . . . ." 58 Am. Jur. 2d *Occupations, Trades, and Professions* § 78 at 962 (1971).

Notice was given to Simonds for hearing before examiner Joseph H. Badami, attorney, Lincoln, Nebraska. The notice contained detailed charges that we summarize: *In Seward County* Simonds negligently and incompetently, in 1(a), located a ¼ corner; in 1(b), determined a ¼ corner 26.6 feet west of the true position; in 1(c), located a 1/16 corner 9.4 feet east of the true position; in 1(d), located a 1/16 corner 3.2 feet west of the true position; and, in 1(e), failed to file survey records showing corners found and set as required by Neb. Rev. Stat. § 81-8,122.01 (Reissue 1981). *In Johnson County* Simonds negligently and incompetently, in 2(a), located ¼ corners; in 2(b), failed to perpetuate corners, contrary to Neb. Rev. Stat. §§ 23-1907 and 23-1908 (Reissue 1977); and, in 2(c), failed to designate corners, contrary to § 81-8,122.01. Simonds, in 3, was guilty of misconduct, having filed a record of a found corner that was later changed to show a temporary corner.

A 2-day hearing was had, attended by Simonds. The examiner filed the evidence with the board and

his full report summarizing the evidence, finding evidence of errors made by Simonds, some corrected, some explained, and some unexplained, but in his opinion none so substantial as to warrant a finding of either negligence or incompetence; rather, that there was a disagreement between two surveyors. He recommended a reprimand.

On January 19, 1981, the board met in regular formal session, after notice. Simonds did not attend the meeting. Brown was present at the hearing in his official capacity as ex officio secretary. The board considered the Simonds' proceedings first in executive session with Brown present, and then in formal session it made findings that Simonds was guilty of each charge except 1(c); however, item 1(b) was changed to show "east" of the true position instead of "west," as was contained in the original charge. The board ordered revocation of Simonds' surveyor's certification. Notice of these findings and the board's order was sent to Simonds over Brown's signature as secretary; later, similar findings and notice were executed over the signatures of the board in compliance with Neb. Rev. Stat. § 81-8,125 (Reissue 1981).

Simonds filed his petition on appeal, Neb. Rev. Stat. § 84-917 (Reissue 1981), alleging his substantial rights had been prejudiced because the order (1) was not supported by competent, material, and substantial evidence; (2) was arbitrary and capricious; (3) was contrary to the evidence and the findings of the hearing officer; and (4) was contrary to constitutional due process.

Section 84-917(6) provides review by the District Court on the record: "The court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioner may have been prejudiced because the agency decision is: (a) In violation of constitutional provisions; . . . (c) Made upon unlawful procedure; . . .

(e) Unsupported by competent, material, and substantial evidence in view of the entire record as made on review . . . ."

Upon trial, the District Court vacated the order of the board and reinstated Simonds' registration certificate upon findings that the substantial rights of Simonds had been prejudiced and that the board's decision was not supported by competent, material, and substantial evidence.

Defendants appeal, assigning general error that the decision was contrary to the law and the evidence. "[W]here fact findings under criteria [§ 84-917](6)(e) are involved, we review the decision of the District Court only to determine that it and the commission have applied the proper criteria, and it is in this sense that we review de novo." *The 20's, Inc. v. Nebraska Liquor Control Commission,* 190 Neb. 761, 765, 212 N.W.2d 344, 347 (1973).

The establishment and perpetuation of reliable land corners, monuments, plats, and surveys, together with their official records, are historically of public concern, necessary for the orderly transaction of public affairs and business, and require high standards of care on the part of qualified surveyors.

Simonds' petition and the record present criteria other than substantial evidence, including § 84-917(6)(a), violation of constitutional provisions, and § 84-917(6)(c), unlawful procedures, in conducting hearings and in making findings of fact.

The substantial evidence standard of review of decisions of administrative agencies requires the reviewing court to search the entire record to determine whether, on the basis of all the testimony and exhibits before the agency, it could fairly and reasonably find facts as it did. See, *Winship v. Brewer School Committee,* 390 A.2d 1089 (Me. 1978); *United States v. Bianchi & Co.,* 373 U.S. 709, 83 S. Ct. 1409, 10 L. Ed. 2d 652 (1963).

Brown's testimony generally supports the specific factual allegations made against Simonds, including

measurements; irregular location of monuments and corners; inaccurate corners; temporary corners shown as found corners, contrary to statutes; failure to sign and file tie cards in the county records (§ 81-8,122.01); and contemporary markers shown as historical markers.

Simonds filed a detailed written response to each charge, supplemented by plats, records, and drawings, explaining his acts and surveying procedures. This response, and his testimony, was that the measurements, established corners, and monuments were properly fixed and determined, considering the existing county records, his statutory duty to correct county records, original U.S. Government surveys, general statutory county surveyor duties (§ 23-1907), information known to him, and accepted surveying procedures; that Brown's records and procedures were incorrect; and that the tie cards in question were only temporary and the failure to sign and identify them was a "typographical" error.

Francis Rotter, Cass County surveyor, and Henry Graff, Chief Deputy Lancaster County surveyor, testified for plaintiff that they generally approved Simonds' surveying procedures, including his correction of county records, except the use of temporary tie cards.

The board can utilize its experience and technical knowledge in evaluating the evidence. Neb. Rev. Stat. § 84-914(5) (Reissue 1981). Applying the rule in *The 20's, Inc., supra,* it is for the board to weigh the evidence and accept one version thereof. Our review shows that there was substantial evidence to support the board's findings and conclusions.

Simonds argues that the board's order did not make findings of fact required by Neb. Rev. Stat. § 84-915 (Reissue 1981): "Every decision and order adverse to a party to the proceeding, rendered by an agency in a contested case, shall be in writing or stated in the record and shall be accompanied by findings of fact and conclusions of law. The find-

ings of fact shall consist of a *concise statement* of the conclusions upon each contested issue of fact. . . ." (Emphasis supplied.)

Here, the findings of fact were a restatement of each original charge made against Simonds, followed by the word "Guilty." At most, the objection to those findings is a matter of form. "It is not required that the findings be so specifically made as to set out the items of evidence upon which they are based . . . ." *Doran v. Johns,* 186 Neb. 321, 324, 182 N.W.2d 900, 903 (1971). The findings were concise statements relating to the statutory unauthorized practice of either negligence, incompetence, or misconduct in the performance of his duties. § 81-8,123.

Simonds further contends that Brown's full participation in the board's adjudication process was unlawful and prejudicial to him.

"The combination in the same person of the functions of investigation or advocacy and the function of deciding is a recognized evil . . . ." 2 Am. Jur. 2d *Administrative Law* § 412 at 223 (1962). That is not to say that such a combination is of itself a denial of due process; rather, all of the existing circumstances must be considered to determine if the procedures provided did assure fundamental principles of justice and fair play. The federal Administrative Procedure Act generally prohibits an employee engaged in an investigative function from participating in the decision process. 5 U.S.C. § 554(d) (1976).

State Surveyor Brown had certain statutory prehearing duties to make investigations, surveys, and reports. Those duties, coupled with his testimony in the revocation hearing, present a question of preserving the impartial nature of the proceedings. Under the record here, those described duties and testimony were impartially performed in an open adversary proceeding, and there was no prejudice. See 2 Am. Jur. 2d, *supra* § 412.

There were further post hearing circumstances

that are suspect. At the January 19 hearing of the board, Brown was present at all times; he participated in the proceedings, although he did abstain from voting. The official minutes prepared by Brown show that it commenced at 9:22 a.m.; present were the five board members, Brown's secretary, and the board's attorney. Simonds was not present. Brown moved the board adjourn to executive session. Neb. Rev. Stat. § 84-1410 (Reissue 1981). The board returned to formal session at 12:15 p.m., and Brown announced, "Because I have been a witness . . . I as State Surveyor and Ex-Officio Secretary of the Board withdraw from participation in the vote of the Board to determine the guilt or innocence of Darrel W. Simonds and further, I shall take no part in the determination of the Board's action against Darrel W. Simonds, if he is found guilty of the charges brought against him."

The official taped record shows that Brown made the nonparticipation statement prior to the executive session. Thereafter, the taped record is silent as to any board proceedings until 2 p.m., when other routine business was conducted.

Brown's statement that he would not participate in the voting was a recognition of the board's duty to provide a fair and impartial hearing and that his further participation in the proceedings tended to deny such. However, Brown did continue his presence throughout all of the adjudicative proceedings, refraining only from voting. The record is silent as to his participation, if any, in the executive session proceedings.

The consideration of Simonds' case in closed executive session apparently was contrary to § 84-1410, since there is no showing of either necessity or the reasons enumerated in (1)(a), (b), or (c).

There is an accumulation of unlawful procedural circumstances here that affects the substantial rights of Simonds. First, Brown conducted the investigations, prepared the revocation charges, and

testified in support of those charges. Standing alone, those circumstances were not prejudicial to Simonds. Next, Brown was present and participated in all of the formal adjudicative session of the board, except voting, when the charges against Simonds were considered, evidence reviewed, findings and decision made, and order entered. Brown was present during the extended executive session wherein the board considered Simonds' case, apparently contrary to the purposes and provisions of § 84-1410. The official decision and order of revocation made by the board was prepared by Brown.

The participation of Brown in his official capacity at the January 19 hearing and his presence during the executive session of the board were irregularities that tended to prejudice the substantial rights of Simonds. Under other circumstances it might have required a finding that the proceeding was fundamentally unfair to Simonds. Considering the record as a whole, we conclude that the circumstances in this case do not require that the order of the board be reversed for that reason.

After a full review of the record, we modify the judgment of the District Court vacating the order of revocation. The judgment is modified to provide for the suspension of Simonds' certificate of registration for a period of 30 days, commencing upon the filing of the mandate in the District Court, and the judgment as modified is affirmed.

AFFIRMED AS MODIFIED.

BRODKEY, J., Retired, concurs in the result.

JOAN V. HEINZMAN, AN INDIVIDUAL, APPELLANT, V. COUNTY OF HALL, APPELLEE.
JOAN V. HEINZMAN, AN INDIVIDUAL, APPELLANT, V. CITY OF GRAND ISLAND, APPELLEE.

328 N.W.2d 764

Filed January 7, 1983. Nos. 81-692, 81-693.

1. **Pleadings: Appeal and Error.** The court must accept the facts as set forth in the petition and may not notice or consider extrinsic matters in determining whether a pleading states a cause of action.
2. **Public Officers and Employees.** Where the salary or compensation of a public officer is fixed by statute, no judicial action in that respect is required of the board of county commissioners and, in such a case, the provisions of Neb. Rev. Stat. § 23-135 (Reissue 1977) do not apply.
3. **Termination of Employment: Constitutional Law.** Under the U.S. Constitution, one must first establish a property interest in a position in order to establish procedural due process rights in a dismissal from employment.
4. _____: _____. The establishment of a property interest in employment requires a legitimate claim of entitlement to it that stems from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.
5. **Termination of Employment: Public Officers and Employees.** Under Nebraska law it is a settled principle that government employment, in the absence of legislation, can be revoked at the will of the appointing officer.
6. _____: _____. Where a person is employed during the pleasure of two governmental agencies, either one may discharge unless otherwise specified in the contract of employment.

Appeal from the District Court for Hall County: JOSEPH D. MARTIN, Judge. Affirmed.

LeRoy W. Sievers and Arlen W. Langvardt of Peterson, Bowman & Johanns, for appellant.

Stephen L. Von Riesen, Hall County Attorney, and Greg Thomas, for appellee Hall County.

Keith Sinor, City Attorney, for appellee City of Grand Island.

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

WHITE, J.

Appellant, Joan V. Heinzman, files these appeals from the orders of the District Court for Hall County, Nebraska, sustaining the demurrers to her amended petitions. The cases have been consolidated for purposes of this appeal.

Assuming all well-pleaded facts, as distinguished from mere conclusions, as true, the following may fairly be gathered from the allegations of the petitions.

In May 1967, pursuant to a joint resolution of the county board of supervisors for Hall County and the city council of Grand Island, Nebraska, Heinzman was appointed civil defense director for Hall County and the City of Grand Island. The joint resolution is attached to the petitions and incorporated by reference in the petitions and provides in part: "WHEREAS, it is the desire and intent of the (Board of County Supervisors) for Hall County and/or the (City Council) of Grand Island, Nebraska, to establish a City-County Civil Defense Organization.

"NOW, THEREFORE, BE IT RESOLVED BY SAID BOARD OF SUPERVISORS AND (CITY COUNCIL):

"1. That there is hereby established within said City-County a Joint Organization for Civil Defense to be operated in conformity with the Nebraska Civil Defense Act of 1951, as amended. This organization will be known as the Grand Island-Hall County Civil Defense Agency.

"2. That, reposing great confidence in his integrity and ability Mrs. Joan V. Heinzman, whose address is . . . is hereby appointed director of Civil Defense for said City-County organization, to serve during the pleasure of this City Council and Board of Supervisors or until a successor is duly appointed.

"3. That Hall County Treasurer will be responsible for the receipt and disbursement of all Civil Defense Funds, where funds are provided for Civil Defense purposes."

On May 29, 1980, a determination was made by the county board to terminate the employment of Heinzman. Heinzman was paid for the month of May 1980 and not thereafter.

A claim was submitted by Heinzman to the Hall County Board of Supervisors on August 27, 1980, for salary for the months of June, July, and August 1980, and for alleged "Employment benefits including unused vacation, compensatory time, and sick leave as of August 31, 1980." No provision of a contract of employment that included specific benefits for those last items was alleged by Heinzman.

The City of Grand Island did not take concurrent action in terminating Heinzman's employment. Heinzman was not notified before the fact of the termination or afforded an opportunity to be heard.

Heinzman further alleges that she had a property interest in her job, the firing was not in good faith, and it was a violation of her fourteenth amendment rights.

The case raises a number of interesting questions, only a few of which were briefed by the parties. (1) Is there any factual basis alleged for the recovery of fringe benefits by Heinzman? (2) Was the claim against the county filed within the statutory 90-day period prescribed by Neb. Rev. Stat. § 23-135 (Reissue 1977)? (3) Did Heinzman satisfactorily allege a continued expectation of employment such as to give rise to the level of a constitutional right to notice and hearing before termination? (4) Was the employment lawfully terminated by the county board without the assent of the city council of Grand Island?

In considering the first issue, we are unable to find in the records any allegations of a contract, oral or written, dealing with employment benefits. The petitions requesting those benefits were clearly insufficient. It seems elementary that if recovery is sought on a contract of employment, the terms of the contract must be alleged. The court must ac-

cept the facts as set forth in the petition and may not notice or consider extrinsic matters in determining whether a pleading states a cause of action. *Tennyson v. Werthman,* 167 Neb. 208, 92 N.W.2d 559 (1958). The contention of appellant is without merit on this point.

The second issue involves the time limit for filing a claim under § 23-135. The appellant maintains that under a term of continuing service, such as her position as civil defense director, it is unreasonable to require her to continuously file claims before the expiration of each 90-day period in order to maintain an ongoing claim for accrued salary after her termination.

We find it unnecessary to reach this issue because we do not find § 23-135 to be applicable to the facts of this case. In a somewhat similar case, this court in *McCollough v. County of Douglas,* 150 Neb. 389, 34 N.W.2d 654 (1948), held that the claim of a District Court deputy clerk for salary arrearages did not arise ex contractu and therefore the statutory time limitation of § 23-135 did not apply.

In the *McCollough* case at 394, 34 N.W.2d at 658, we cited *Mitchell v. County of Clay,* 69 Neb. 779, 96 N.W. 673 (1903), for the proposition that " 'County Commissioners act quasi judicially in passing upon claims against the county, whenever their action is not merely a formal prerequisite to the issuance of a warrant, but involves the determination of questions of fact, upon evidence or the exercise of discretion in ascertaining or fixing the amount to be allowed.' " This court also cited *Hansen v. Cheyenne County,* 139 Neb. 484, 297 N.W. 902 (1941), which held that where the salary or compensation of a public officer is fixed by statute, no judicial action in that respect is required of the board of county commissioners and that, in such a case, the provisions of § 23-135 do not apply.

With regard to appellant's claim under the fourteenth amendment of the U.S. Constitution, one must

first establish a property interest in a position in order to establish procedural due process rights in a dismissal from employment. *Board of Regents v. Roth,* 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972); *Perry v. Sindermann,* 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972).

The establishment of a property interest in employment requires a "legitimate claim of entitlement to it" that stems "from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents, supra* at 577.

Under Nebraska law it is a settled principle that government employment, in the absence of legislation, can be revoked at the will of the appointing officer. *Nebraska Dept. of Roads Employees Assn. v. Department of Roads,* 189 Neb. 754, 205 N.W.2d 110 (1973); *Nevels v. State,* 205 Neb. 642, 289 N.W.2d 511 (1980). In the absence of an employment contract for a fixed term, an employee is terminable at will. *Stewart v. North Side Produce Co.,* 197 Neb. 245, 248 N.W.2d 37 (1976). The appellant has failed to allege facts which establish that she was deprived of a right to a hearing prior to her termination under the fourteenth amendment of the U.S. Constitution or any state law. Other than the bare allegation of a "property right" in the continuation of employment, Heinzman alleged no facts which give rise to a constitutionally protected right of notice and hearing. The joint resolution under which appellant was employed stated merely that she was "to serve during the pleasure of this City Council and Board of Supervisors or until a successor is duly appointed," and established no expectations that employment would be continued longer than the hiring parties wished it to continue. "At pleasure" in employment contracts has been interpreted to mean that the hiring authority has absolute power to remove. *Stebbins v. Police Commissioners,* 196 Mass. 365, 82 N.E. 42 (1907).

Counsel at oral argument asserted that an understanding had existed between the county board and Heinzman which gave rise to the continued expectation. We have searched the amended petitions and if there were such representations they were not alleged. The contention of the appellant is without merit.

The only remaining question dispositive of these appeals is whether the concurrent act of the city council was necessary in order for the discharge of Heinzman to be effective.

The establishment of a joint civil defense agency is authorized by Neb. Rev. Stat. § 81-829.46 (Reissue 1981) and by the provisions of the Interlocal Cooperation Act, Neb. Rev. Stat. §§ 23-2201 et seq. (Reissue 1977).

Section 81-829.46 provides that each county or city "shall be within the jurisdiction of . . . a local or *interjurisdictional* civil defense organization which is headed by a director . . . ." (Emphasis supplied.)

The accomplishment of the formation of an interjurisdictional civil defense agency is governed by § 23-2204. The agreement shall provide: "(3) . . . (a) Its duration; (b) The precise organization, composition, and nature of any separate legal or administrative entity created thereby together with the powers delegated thereto, provided such entity may be legally created; (c) Its purpose or purposes; (d) The manner of financing the joint or cooperative undertaking and of establishing and maintaining a budget therefor; (e) The permissible method or methods to be employed in accomplishing the partial or complete termination of the agreement and for disposing of property upon such partial or complete termination . . . ."

The agreement provided that the employment was "during the pleasure" of Hall County and the City of Grand Island.

It is a reasonable construction of the joint resolution that either of the parties may discharge, and

the discharge is effective as to both hiring entities. To hold otherwise would be to subject the members of one of the subdivisions to the complete will of the members of the other body, an intention not discernible from the words of the resolution or from the Interlocal Cooperation Act.

The appellant was lawfully terminated in May 1980.

The decision of the trial court is correct and is affirmed.

AFFIRMED.

KRIVOSHA, C.J., concurs in the result.

STATE OF NEBRASKA, APPELLEE, V. ALLEN DEAN MILLER, APPELLANT.

328 N.W.2d 769

Filed January 7, 1983. No. 81-698.

1. **Implied Consent Law: Blood, Breath, and Urine Tests.** Neb. Rev. Stat. § 39-669.09 (Reissue 1978) does not require the officer to inform the person to be tested of his privilege to request an independent test.
2. **Criminal Law: Evidence.** In a criminal prosecution any testimony, otherwise competent, which tends to dispute the testimony offered on behalf of the accused as to a material fact is proper rebuttal testimony.
3. **Evidence: Witnesses.** A hypothetical question is not improper simply because it includes only a part of the facts testified to.
4. **Motor Vehicles: Expert Witnesses.** An opinion of vehicular speed is proper, provided a sufficient foundation is laid to show the expertise of the witness, as well as specific knowledge of the underlying facts to deal with the question in issue.
5. **Implied Consent Law: Blood, Breath, and Urine Tests.** The use of an anticoagulant as a preservative for a blood sample is not a foundational requirement for the admission of evidence relating to test results, and the failure to use an anticoagulant goes only to the weight and credibility of the evidence.

Appeal from the District Court for Douglas County: PAUL J. HICKMAN, Judge. Affirmed.

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

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

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

PER CURIAM.

The defendant was convicted of motor vehicle homicide and sentenced to imprisonment for 1½ to 5 years. He has appealed and assigns as error the admission into evidence of the results of a blood test made following the accident, the admission of rebuttal testimony offered by the State, and the instructions to the jury.

The record shows that at about 10:30 p.m. on April 30, 1981, the defendant was operating a motorcycle in a westbound direction on Maple Street in Omaha. At the intersection of 63rd and Maple Streets, the motorcycle collided with a pedestrian, Marguerite Bostrom. Mrs. Bostrom suffered severe head and internal injuries and was pronounced dead at Immanuel Hospital.

Miller was also injured in the accident and was taken to the Methodist Hospital emergency room where he was questioned by a police officer, who detected alcohol on Miller's breath. Miller was then arrested for operating a motor vehicle while under the influence of intoxicating liquor. The officer read Miller the Nebraska implied consent advisory form and advised him of his *Miranda* rights. The officer also advised Miller that he could choose either a blood or a urine test to determine the level of alcohol in his system. Miller chose a blood test.

A hospital technician was directed to draw a blood sample, and the sample was taken by the officer to police headquarters and refrigerated. The time elapsed between the taking of the sample and refrigeration was about 1½ hours. The chemist who tested the sample testified that on May 4, 1981, a blood alcohol level of 0.14 percent was measured. A retest on May 18, 1981, showed the level to be 0.15

percent. The chemist indicated that there was not a true deviation between the test results.

The evidence as to the blood test was received over objection at the trial. The defendant contends the evidence was not admissible because (1) the defendant was not advised that he could choose to have a separate test performed by the physician of his choosing and (2) the test as performed did not meet Department of Health regulations, in that no anticoagulant or preservative was present in the sample and that the chemist failed to use potassium carbonate in the testing.

Neb. Rev. Stat. § 39-669.09 (Reissue 1978) provides 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. The person tested shall be permitted to have a physician of his choice evaluate his condition and perform or have performed whatever laboratory tests he deems appropriate in addition to and following the test administered at the direction of the law enforcement officer."

In *Zadina v. Weedlun,* 187 Neb. 361, 190 N.W.2d 857 (1971), we held this statute does not require the officer to inform the person to be tested of his privilege to request an independent test. See, also, *State v. Wahrman,* 199 Neb. 337, 258 N.W.2d 818 (1977); *State v. Sommers,* 201 Neb. 809, 272 N.W.2d 367 (1978); *State v. Brittain,* 212 Neb. 686, 325 N.W.2d 141 (1982).

Rule 3 of the rules and regulations of the state Health Department, relating to analyses for the determination of the alcohol content of body fluids and the breath under the driving-while-intoxicated law, provides that blood samples must be collected in a container having an anticoagulant-preservative in it.

It is undisputed that the defendant's blood was collected in a tube which did not contain such a substance. Expert testimony was admitted through the chemist to the effect that the presence of the preservative inhibits yeast growth, which in turn might affect the alcohol content. On this particular sample, however, a test was performed and it revealed no presence of yeast. The expert witness further testified that in locally drawn and tested samples, refrigeration of the sample was more important than a preservative in guaranteeing reliable test results. A pathologist testified that whether the preservative was present or not made no difference in the test results.

In *State v. Fox,* 177 Neb. 238, 128 N.W.2d 576 (1964), we held that the effect of an improper amount of anticoagulant on the test results goes only to the weight and credibility of the evidence.

Rule 3 also regulates the types of methods approved for measuring blood alcohol. An approved method is termed direct injection into a gas chromatograph. This method requires the injection of an internal standard, but the addition of potassium carbonate is not required. The defendant argues that the tester's failure to use potassium carbonate while using a gas chromatograph violated rule 3.

The chemist called by the State testified that he used the method in which an internal standard was injected into the gas chromatograph. The evidence does not show noncompliance with the prescribed method.

We find no error in the admission into evidence of the results of the blood test.

On rebuttal the State was allowed to introduce testimony of an accident reconstruction expert indicating that the defendant's speed at the time of the accident was 70 m.p.h. The defendant argues this evidence was irrelevant and there was insufficient foundation for the testimony.

The manner in which the defendant operated his

vehicle was relevant to the charge. In *State v. Hilker,* 210 Neb. 810, 317 N.W.2d 82 (1982), we held that a violation of Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1982) can be proven in any of three ways, among them operating a motor vehicle "while under the influence of alcoholic liquor." This phrase was defined in *O'Neill v. Henke,* 167 Neb. 631, 638, 94 N.W.2d 322, 329 (1959), as: " ' '"[A] person is under the influence of alcoholic liquor if such person is under such influence of intoxicating liquor to such an extent as to have lost to an appreciable degree the normal control of his body or mental faculties, and to the extent that there is an impairment of the capacity to think and act correctly and efficiently." ' "

The defendant had introduced testimony as to the speed of the motorcycle. " 'In a criminal prosecution, any testimony, otherwise competent, which tends to dispute the testimony offered on behalf of the accused as to a material fact is proper rebuttal testimony.' " *Lipscomb v. State,* 162 Neb. 417, 420, 76 N.W.2d 399, 401-02 (1956). See, also, *State v. Pratt,* 197 Neb. 382, 249 N.W.2d 495 (1977).

The witness was experienced in accident reconstruction. He testified in response to a hypothetical question based on the following factors: (1) weight of the cycle and victim, (2) a test drive over the area, (3) review of the police and autopsy reports, (4) photographs taken, (5) weather and road conditions, and (6) resting place of the victim. This information was supported by the testimony of the witness and other witnesses.

In *Hawkins Constr. Co. v. Matthews Co., Inc.,* 190 Neb. 546, 558-59, 209 N.W.2d 643, 651 (1973), we stated: "In an overlapping argument the defendants assail the form of the hypothetical question and particularly because it omitted the testimony of Pechar, who observed the collapse. A hypothetical question should fairly reflect the proven facts. Great latitude is allowed the trial judge in ruling on admissibility of such a question. A hypothetical

question is not improper simply because it includes only a part of the facts testified to. Landis & Schick v. Watts, 84 Neb. 671, 121 N.W. 980. An expert witness in giving an opinion has a right to confine the facts that he recites to those which are believed to be true, or which are believed to be material to the issue. The question of what facts are relevant to the determination is one of the basic ones upon which experts in any given field may differ."

The particular issue of expert testimony of vehicular speed was dealt with in *Herman v. Lee,* 210 Neb. 563, 570-71, 316 N.W.2d 56, 61 (1982), as follows: "Since the adoption of the Rules of Evidence, opinions as to vehicular rates of speed have been elicited in two other cases before us. In *Nickal v. Phinney,* 207 Neb. 281, 298 N.W.2d 360 (1980), a licensed professional engineer with a degree in mechanical engineering and experience in accident reconstruction was permitted to testify as to the speed of plaintiff's motorcycle. His personal knowledge of underlying data included measurements, skid marks, degree of rotation of defendant's pickup, weight of vehicles, road surface conditions, coefficient of friction between the tires and the pavement, change of grade, and other facts. In *Belitz v. Suhr,* 208 Neb. 280, 303 N.W.2d 284 (1981), we held it was error to allow an investigating officer that arrived on the scene an hour after an accident to testify as a lay witness that plaintiff's speed exceeded what was safe for road conditions. The rule to be gleaned from these two cases is that an opinion of vehicular speed is proper, provided a sufficient foundation is laid to show the expertise of the witness, as well as specific knowledge of the underlying facts to deal with the question in issue.

"No exact standard is possible for fixing the qualifications of an expert or skilled witness, and the ruling of a trial judge receiving or excluding an opinion will be reversed on appeal only when a clear abuse of discretion is shown. *Northern Nat. Gas Co.*

v. Beech Aircraft Corp., 202 Neb. 300, 275 N.W.2d 77 (1979); *Danielsen v. Richards Mfg. Co., Inc.*, 206 Neb. 676, 294 N.W.2d 858 (1980); *State v. Loveless*, 209 Neb. 583, 308 N.W.2d 842 (1981)."

There was no abuse of discretion in the admission of the expert testimony. A sufficient foundation was laid showing both his qualifications and knowledge. The hypothetical question posed met the criteria set out in *Hawkins Constr. Co., supra.*

The defendant submitted a requested instruction based upon an interpretation of *State v. Gerber*, 206 Neb. 75, 291 N.W.2d 403 (1980), which was the same as that requested in *State v. Brittain*, 212 Neb. 686, 325 N.W.2d 141 (1982).

In the *Brittain* case we said at 693-94, 325 N.W.2d at 146: "Finally, the defendant objects to the court having given its own instruction No. 11, and refusing to give the defendant's requested instruction No. 1. These instructions relate to the requirements of *Gerber, supra* . . . . [T]he defendant's proposed instruction stated that if the jury found from the evidence that 'the State has failed to prove any one of these four facts you must totally disregard any testimony or evidence received regarding the blood test itself and the results of the blood test.'

"In refusing the defendant's offered instruction, the court relied upon *State v. Fox*, 177 Neb. 238, 249, 128 N.W.2d 576, 582 (1964), in which we said: 'It is obvious from the record that all the statutory foundational requirements for the admission of the result of the blood analysis have been met, and such evidence was competent and properly admitted. There is nothing in the statutes which, either expressly or inferentially, prohibits the use of an anticoagulant for the purpose of preserving the blood during the interim from withdrawal until the test. Any evidence to the effect that the alcoholic content of the defendant's blood might have been affected by the presence of an improper amount of anticoagulant in the test tube, or by the use of an antiseptic to cleanse

the arm before injection with the syringe and needle, would have no effect upon the admissibility of the test, but, rather, such evidence would go only to the weight and credibility of the test.'

"The defendant insists that *Fox, supra,* is no longer the law in Nebraska, having been overruled by the language of *Gerber, supra,* as set forth earlier in this opinion.

"We do not interpret *Gerber* in this fashion. Both cases deal with the reception of evidence, not proof of facts. Both cases impose certain foundational requirements before the test may be admitted. These requirements were satisfied in the case at bar. Neither case required that the jury reexamine the trial court's ruling on the admissibility of the tests. The defendant was not entitled to the proposed instruction and there was no error in refusing to give it."

The *Gerber* case requires compliance with *methods* of the state Department of Health. In rule 3, "method" is defined and distinguished from "technique" as follows: "(b) Methods and techniques approved by the Department of Health are defined as:

"i. *METHOD* means the name of the principle of analysis. The method may be a *LABORATORY METHOD,* which in these rules and regulations means a method of chemical analysis not using a specifically designed alcohol testing device.

"ii. *TECHNIQUE* means a set of written instructions which describe the procedure, equipment, and equipment preventive maintenance necessary to obtain an accurate alcohol content test result."

The requirements for the container in which the blood is drawn is a "technique" rather than a "method." Failure to comply with a technique is not a failure to prove a foundational element, but affects weight and credibility only. See, also, *State v. Scott,* 206 Neb. 451, 293 N.W.2d 114 (1980); *State v. Kolar,* 206 Neb. 619, 294 N.W.2d 350 (1980).

There being no error, the judgment of the District Court is affirmed.

AFFIRMED.

KRIVOSHA, C.J., dissenting.

I take the opportunity to file a dissent in this case for the limited reason that I was not a member of the court when we decided the case of *State v. Wahrman,* 199 Neb. 337, 258 N.W.2d 818 (1977). Had I been a member of the court at that time, I would have joined in the dissent of Judges White and McCown. I specifically write now to express my view that I disagree with the rule of law first declared by us in *Zadina v. Weedlun,* 187 Neb. 361, 190 N.W.2d 857 (1971), and repeated again in *State v. Wahrman, supra,* to the effect that when an officer requests an individual to give either a blood or urine sample, pursuant to the provisions of Neb. Rev. Stat. § 39-669.09 (Reissue 1978), the individual need not be advised that the statute entitles the individual to have a physician of his choice present to evaluate his condition and perform or have performed whatever further laboratory tests he deems appropriate in addition to that requested by the officer. It is no longer generally acceptable in American jurisprudence to merely suggest that all persons are presumed to know the law and, therefore, nothing more is ever required. The underlying philosophy which motivated the U.S. Supreme Court to establish the *Miranda* warnings makes that clear. See *Miranda v. Arizona,* 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). It does not appear to me to impose an unreasonable burden upon a police officer, who must in the first instance request the test, to further advise an individual that he has a right to select a physician of his choice to perform whatever laboratory tests the physician deems appropriate, particularly in view of the fact that, absent the accused's physician, the tests are conducted completely out of the view of the accused and the results establish the violation, with nothing more. Unless

the individual has been advised of his rights, I have difficulty in seeing how he can knowingly waive them. We have, in a host of cases, now made it clear that before an individual may waive a constitutional right, he must understand that he had that right in the first place and that he knowingly waived the right. See *Schneckloth v. Bustamonte,* 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973). I would opt for a rule which requires the officer to advise the individual of his rights under the provisions of § 39-669.09.

WHITE, J., joins in this dissent.

LANGEL CHEVROLET-CADILLAC, INC., APPELLANT, V. MIDWEST BRIDGE & CONSTRUCTION COMPANY, APPELLEE.

329 N.W.2d 97

Filed January 7, 1983. No. 81-724.

1. **Construction Contracts: Damages.** In general, where a construction contractor follows plans and specifications supplied by the owner which later prove to be defective or insufficient, he is not responsible to the owner for loss or damage resulting therefrom as a consequence of the defectiveness or insufficiency of such plans and specifications.
2. **Prejudgment Interest.** Prejudgment interest is allowable only where the amount of the claim is liquidated; conversely, where reasonable controversy exists as to the plaintiff's right to recover or as to the amount of such a recovery, the claim is considered to be unliquidated and prejudgment interest is not allowed.
3. **Costs.** Where each party obtains judgment against the other, each party should pay the costs of the other.

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

Tim Engler and Murray Ogborn of Nelson & Harding, for appellant.

David A. Domina of the Domina Law Firm, for appellee.

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

CAPORALE, J.

In this appeal the plaintiff-appellant, Langel Chevrolet-Cadillac, Inc. (Langel), seeks recovery of further damages for an alleged breach of a contract by the terms of which defendant-appellee, Midwest Bridge & Construction Company (Midwest), was to construct a concrete parking lot at the location of an automobile dealership owned by Langel. The suit, in substance, alleges breach of express and implied warranties in the failure to properly design and construct the parking lot in a workmanlike manner, with resulting inadequate and improper drainage. We affirm as modified.

After trial, the jury returned a verdict for Langel in the amount of $10,000, on which the District Court entered judgment. The District Court also entered judgment upon a directed verdict, without prejudice to any cause which Langel might have to recover damages from Midwest, in the amount of $8,000, which amount was the balance still due and owing on the contract. The trial court also awarded Midwest prejudgment interest on its $8,000 judgment and ordered each party to pay its own costs.

Langel urges that the trial court erred in refusing to instruct the jury to the effect that the implied warranty of fitness for a particular purpose would necessarily include the legal duty to design the parking lot at issue in a manner which would allow for "proper drainage"; further, that the court below erred when it gave an instruction regarding the liability of a contractor when such contractor has agreed to perform a given undertaking in accordance with prescribed plans; and, finally, that the court erred in directing a verdict for Midwest in the amount of the $8,000 sought in its cross-petition, in granting prejudgment interest thereon, and in ordering each party to pay its own costs.

Langel sought to construct and operate a facility from which to sell and repair automobiles at Norfolk, Nebraska. The process included the construction of a building on the site, followed by the construction of a parking lot, together with related work. Midwest was engaged on three separate occasions to do work. The first involved clearing the site for construction of the building and lot, this phase primarily consisting of removing vegetation; subsequently, Midwest was hired to bring in fill for the building area of the site; and finally, Midwest was hired to construct the parking lot.

The agreement for the construction of the parking lot would appear to be primarily oral in nature, although it was also memorialized in a brief written memorandum (which in reality was little more than a price list) dated September 19, 1978. Evidence was adduced, much of it in conflict, concerning the various communications between the parties as to the construction and design of the parking lot. The conflicts in the evidence are such that a jury could properly find the parking lot was in fact designed by Langel.

The trial court properly instructed the jury that Langel claimed Midwest was hired to design and construct the parking lot; that Midwest constructed the lot in a defective manner, such that the lot failed to drain properly; and that Midwest thus breached both express and implied warranties of workmanship and fitness for the intended purpose. The trial court also properly instructed the jury that Midwest denied Langel's claims and alleged it properly constructed the lot. After setting forth Langel's burdens of proof under its various theories of recovery, the trial court correctly instructed the jury as to the elements of express and implied construction warranties and as to what constitutes the circumstances under which certain warranties are implied. It then instructed as follows:

"Where a contractor makes an absolute and un-

qualified contract to perform a given undertaking, it is the general rule that he assumes the risks attending the performance of the contract. But where he makes a contract to perform a given undertaking in accordance with prescribed plans and specifications, this rule does not apply. Under such a contract he is not permitted to vary from prescribed plans and specifications even if he deems them improper and insufficient; and therefore cannot be held to guarantee that work performed as required by them will be free from defects, or withstand the action of the elements, or accomplish the purpose intended.

"Where the contract specifies what he is to do and the manner and method of doing it, and he does the work specified in the manner specified, his engagement is fulfilled, and he remains liable only for defects resulting from improper workmanship or other fault on his part."

We first address Langel's contention that the trial court erred by its refusal to instruct the jury that Midwest's implied warranty of fitness for a particular purpose included an implied duty to design the parking lot in a fashion which would allow for proper drainage. The refusal did not constitute error, as Langel's request does not state the law in this jurisdiction under the evidence in this case. The authority from other states which Langel cites is unconvincing. Such consists of three North Dakota cases and one Minnesota case, all of which have differing factual bases for the results reached by the respective courts. In *Carlson Homes, Inc. v. Messmer,* 307 N.W.2d 564 (N.D. 1981), the factual recitation in the opinion indicates that the basis of the construction contract was a set of written plans of some detail in nature which were *not* later modified orally. In *Air Heaters, Inc. v. Johnson Elec., Inc.,* 258 N.W.2d 649 (N.D. 1977), the "design" was an express term of the contract, that is, the "design" was a specifically bargained-for element of

detriment for which consideration was given. In *Dobler v. Malloy,* 214 N.W.2d 510 (N.D. 1973), the court sets forth a four-part test required in order for liability to attach in a situation such as this. One of the four parts was that the owner have furnished no plans, designs, specifications, details, or blueprints. The record indicates that this was not the case here. Rather, the owner, on a number of occasions, gave direct and specific instructions as to the ultimate design and lay of the parking lot, even after construction had begun. Finally, in *Robertson Lumber Co. v. Stephen Farmers Co-op. Elev. Co.,* 274 Minn. 17, 143 N.W.2d 622 (1966), the court found specifically that the buyer had only specified the type of construction to be used, relying on the builder for the design thereof and all other details of construction. Therefore, that opinion is not relevant. Also, the court utilized the same four-part test set out in *Dobler, supra;* that test is not met in this matter for the reasons just enumerated. Since the instruction requested and now assigned as error does not express the law in this state and does not even in truth and fact express the law for this set of facts in the jurisdictions cited, it follows that the trial court's refusal to instruct in such a fashion was not error.

Langel's second assignment of error alleges an erroneous instruction as regards the liability of the contractor where the contractor agrees to perform a given undertaking in accordance with prescribed plans and specifications. We note, and Langel concedes, that the general rule is that where a construction contractor follows plans and specifications supplied by the owner which later prove to be defective or insufficient, he is not responsible to the owner for loss or damage resulting therefrom as a consequence of the defectiveness or insufficiency of such plans and specifications. See, e.g., *Farmers Mut. Home Ins. Co. v. Roberts & Dybdahl, Inc.,* 206 Neb. 651, 294 N.W.2d 369 (1980); *Fuchs v. Parsons Constr. Co.,* 172 Neb. 719, 111 N.W.2d 727 (1961).

However, Langel would contend that *State v. Commercial Casualty Ins. Co.*, 125 Neb. 43, 248 N.W. 807 (1933), would shift liability in this case. This is not so. Not only does *Commercial* not speak in terms of the contractor having made an express warranty as to the sufficiency of the builder's plans, as Langel claims it does, but the factual situation therein is completely different from that which we have here. In *Commercial* the State had had its own engineers prepare *all* the terms, plans, and specifications for the project. The contractor was limited to constructing the project as set forth therein. That case is therefore not apposite here.

Further, Langel argues that when it "orally" ordered changes in the plans and specifications, such as they were, for the project, Midwest necessarily warranted expressly to Langel that drainage on the modified lot would still be adequate and proper. A reading of the testimony of Midwest's employee Broders indicates that, while the matter was peripherally discussed, nothing was said or done that would rise to the level of an express warranty regarding drainage. Rather, this point is governed by *Fuchs, supra,* wherein we stated the law to be as contained in the trial court's instruction quoted above. This rule was cited later with approval in *Farmers Mut. Home Ins. Co., supra.*

The instruction given by the court correctly stated the law, and while the proffered paragraph concerning the shift of liability when a contractor has expressly warranted that an owner's plans and specifications are sufficient for the purposes intended may be technically correct, the evidence in the record before us indicates that its exclusion was correct. While there were conversations between Langel and Midwest's employee Broders in regard to various oral modifications of the plan, none of these conversations come close to rising to the level of an express warranty as to the sufficiency of the changes directed by Langel. Therefore, an instruction as to

such a shift of liability would have been improper.

Langel's third assignment of error concerns the directed verdict, without prejudice to its right to recover damages, entered in favor of Midwest on its cross-petition in the amount of $8,000, essentially the amount yet unpaid on the contract price. It is the rule in this jurisdiction that a contractor who has substantially performed his contract is entitled to the contract price less any damages proved to have been occasioned by the less than full performance. *Rickertsen v. Carskadon,* 172 Neb. 46, 108 N.W.2d 392 (1961). See, also, *Nebraska Plumbing Supply Co. v. Payne,* 84 Neb. 390, 121 N.W. 243 (1909). The parties stipulated that the contract entered into was substantially completed. Therefore, the trial court was justified in directing a verdict in favor of Midwest, without prejudice to Langel's ability to prove such damages, if any, as might have been occasioned by any breach by Midwest.

Next to be considered is Langel's claim that the trial court erred in awarding Midwest prejudgment interest on its cross-petition in the amount of $8,000. We agree with Langel. It is the rule in this jurisdiction that prejudgment interest is allowable only where the amount of the claim is liquidated; conversely, where reasonable controversy exists as to the plaintiff's right to recover or as to the amount of such a recovery, the claim is considered to be unliquidated and prejudgment interest is not allowed. *Philip G. Johnson & Co. v. Salmen,* 211 Neb. 123, 317 N.W.2d 900 (1982). See, also, *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). In this case the amount of Midwest's claim was reasonably disputed and therefore necessarily unliquidated. Notwithstanding the pretrial stipulation of the parties that the contract had been substantially performed, the amount was subject to an offset by the damages claimed, and ultimately proved, by Langel. Therefore, Midwest was

not entitled to the prejudgment interest ordered by the court below.

The final point urged as error by Langel is the order of the lower court that each party pay its own costs. It is the rule in this jurisdiction that where it is not otherwise provided, costs should be allowed as a matter of right to the plaintiff upon a judgment in his favor in an action for the recovery of money only. Neb. Rev. Stat. § 25-1708 (Reissue 1979). At first blush it would appear that Langel was entitled to recover costs against Midwest. A more mature reflection upon the situation, however, indicates that such is not the case. Midwest was tantamount to a plaintiff on its counterclaim for the unpaid amount of the contract price; the fact that it is procedurally permitted by statute to bring its cause as a counterclaim should not preclude its recovery of costs when it in fact prevails on such counterclaim. See Neb. Rev. Stat. §§ 25-811 et seq. (Reissue 1979).

There is a division of authority as to how to assess costs in a situation of this nature. One approach is to award costs to whomever recovers the largest "net" judgment. That is, in a situation such as the one at bar, Midwest would be deemed the "net" taker, and would recover costs. For example, see *Owen Jones & Sons, Inc. v. C. R. Lewis Company,* 497 P.2d 312 (Alaska 1972). Another theory is that each party pays the costs of the other where a defendant prevails on his counterclaim after having been sued by a plaintiff. See *Spicuglia v. Green*, 302 So. 2d 772 (Fla. App. 1974). Finally, a third approach is for the court to simply address the "totality of the litigation," and to decree costs accordingly. See *Nataros v. Fine Arts Gallery of Scottsdale,* 126 Ariz. 44, 612 P.2d 500 (1980). We believe the just and well-reasoned rule, however, to be that in a situation such as the case at bar each party should pay the costs of the other. This would seem to be consistent with § 25-1708 and with certain Nebraska cases, *infra*, decided prior to the implemen-

tation of our modern rules of procedure. It is unlikely that in streamlining litigation there was any intent to routinely preclude a defendant who asserts his counterclaim, after having first been brought into litigation by a plaintiff, from recovering his costs in the event that he prevails on his counterclaim and is thereby effectively a plaintiff thereon within the meaning of § 25-1708. Older Nebraska cases which would seem to support this approach, although they of course do not address it as such, include *Ricenbaw v. Kraus,* 157 Neb. 723, 61 N.W.2d 350 (1953); *Stewart v. Spade Township,* 157 Neb. 93, 58 N.W.2d 841 (1953); and *Miller v. Henderson,* 76 Neb. 383, 107 N.W. 586 (1906).

Not inconsistent with this analysis is *Shellenbarger v. Shellenbarger,* 137 Neb. 762, 291 N.W. 95 (1940), cited by Langel. That case merely reiterated the statutory rule that § 25-1708 applies to actions for recovery of money only and that Neb. Rev. Stat. § 25-1711 (Reissue 1979) does not apply to such actions, but rather only to "other" actions. In view of this analysis, the correct order of the trial court would have been not for each party to pay its own costs but, rather, that each party pay the costs of the other.

In view of the foregoing analysis, the actions of the court below are affirmed as modified.

AFFIRMED AS MODIFIED.

VAL-U CONSTRUCTION COMPANY OF SOUTH DAKOTA, INC., A CORPORATION, APPELLEE, V. CONTRACTORS, INC., A CORPORATION, APPELLANT.

328 N.W.2d 774

Filed January 7, 1983. No. 81-753.

1. **Corporations: Presumptions.** Generally, there is a presumption that the acts of corporate officers pertaining to ordinary business transactions are authorized by the corporation. This presumption

does not apply when an officer diverts or pledges corporate property as security for a personal debt.

2. _____: _____. When a corporate officer acts outside the scope of ordinary business, no presumption of authority arises and the other party to the transaction must make an inquiry into the officer's authority.
3. **Uniform Commercial Code: Security Interests.** One without authority to encumber the property of another can not grant a valid security interest in such property.

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

Paul R. Elofson of Abrahams, Kaslow & Cassman, for appellant.

Douglas E. Quinn of Thompson, Crounse and Pieper, for appellee.

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

BOSLAUGH, J.

This case arises out of a security agreement in which Fred Valandra, the president of Val-U Construction Company of South Dakota, Inc., a corporation, pledged a 1979 Chevrolet van, the property of the corporation, as security for a personal loan to him from Contractors, Inc.

On June 29, 1981, the plaintiff, Val-U Construction Company, commenced this action in replevin to recover title to and possession of the van from the defendant, Contractors, Inc. The trial court found that the loan from the defendant was made to Valandra in his personal capacity and that the defendant had no valid security interest in the van. The defendant was ordered to deliver title and possession of the van to the plaintiff. The defendant has appealed.

The evidence shows that on September 17, 1980, pursuant to a loan agreement between Valandra and the defendant, Valandra executed a promissory note in the amount of $5,000 in favor of the defendant and signed a security agreement granting the defendant a security interest in the 1979 Chevrolet van.

Valandra also signed a "disclosure statement of loan" listing himself as debtor, although the security agreement listed the plaintiff as the debtor. The check, note, and disclosure statement were not signed by Valandra in his corporate capacity. The defendant issued its check for $5,000 payable to Valandra. The certificate of title to the van, issued to the plaintiff, was delivered to the defendant.

On March 10, 1981, a check for $5,250 drawn on the plaintiff's account by Valandra, and payable to the defendant, was delivered to the defendant. A notation on the check indicated it was for loan repayment. The check was returned by the payor bank marked "Endorsement missing." On March 17, 1981, payment was stopped on all items presented for payment on the plaintiff's account. The bank stopped payment on the check and the defendant received no payment on the loan.

The defendant repossessed the van following the stop payment order and it was sold at a private sale to a third party. The buyer was unable to pay the purchase price and returned the title to the defendant.

There was no evidence as to whether the acts of Valandra were in excess of his corporate authority or were subsequently ratified by the corporation.

The evidence supports the finding that the loan to Valandra was made in his personal capacity. The check from the defendant was payable to him personally. The note listed his home address rather than his business address, and the note and disclosure statement were signed by Valandra in his personal capacity. The finding that the loan was made to Valandra personally was not against the weight of the evidence and was not clearly wrong.

Generally, there is a presumption that the acts of corporate officers pertaining to ordinary business transactions are authorized by the corporation. *Geyer v. The Walling Co.*, 175 Neb. 456, 122 N.W.2d 230 (1963); *Koepplin v. Pfister Hybrid Co.*, 179 Neb.

423, 138 N.W.2d 637 (1965). However, this presumption does not apply when an officer diverts or pledges corporate property as security for a personal debt.

In *Burke v. Munger,* 138 Neb. 74, 292 N.W. 53 (1940), it was held that officers may not pay their personal debts by transfer or encumbrance of corporate property. This same conclusion had been reached in an earlier case, *Bordy v. Goodman-Buckley Trust Co.,* 131 Neb. 342, 268 N.W. 286 (1936). This rule is also stated at 19 C.J.S. *Corporations* § 773 (1940).

When a corporate officer acts outside the scope of ordinary business, no presumption of authority arises and the other party to the transaction must make an inquiry into the officer's authority. In *Electronic Development Co. v. Robson,* 148 Neb. 526, 535, 28 N.W.2d 130, 136-37 (1947), this court said: " 'It is true that a corporation can act only by its agents, and the presumption is that an act pertaining to its ordinary business, when performed by its president, secretary or general manager, is legally done and is binding upon the corporation, yet no such presumption prevails, when the act done by such officers does not fall within the scope of the powers conferred upon and usually exercised by them as part of the ordinary business of the corporation.' "

In *Scottsbluff Nat. Bank v. Blue J Feeds, Inc.,* 156 Neb. 65, 54 N.W.2d 392 (1952), a corporate vice president who was authorized by resolution to borrow "in the name of the Corporation" but only "on behalf of the Corporation" borrowed money in the corporate name and deposited the proceeds in his personal account. We held that the lender bank had a duty of inquiry and investigation to ascertain its own authority and that of the officer. The general rule is that express authority to borrow does not permit an agent to take the proceeds for his own use and behalf. Such action constitutes a sufficient warning of lack of authority.

In *Bank of Benson v. Gordon,* 103 Neb. 508, 511, 172 N.W. 367, 368 (1919), this court stated: "It is within the apparent scope of the authority of a president and general manager of a trading corporation to indorse a negotiable instrument that is payable to the order of the corporation, only in furtherance of the business of such corporation. Where such instrument is indorsed by a corporate officer in the corporate name and given as collateral security for a loan to himself individually, . . . this it seems is sufficient to put the lender on inquiry as to the actual authority of the corporate officer to make such transfer."

There was no presumption that Valandra was authorized to grant a security interest in corporate property as collateral for a personal loan. The fact that Valandra sought to grant a security interest in corporate property for a loan in which the proceeds were payable to himself imposed a duty on the defendant to ascertain Valandra's authority.

One without authority to encumber the property of another can not grant a valid security interest in such property. To create a valid security interest, by a security agreement, Neb. U.C.C. § 9-203 (Reissue 1980) requires that the debtor sign the security agreement, that value be given, and that the debtor have rights in the collateral. Although the code permits a security interest to be taken in property owned by a third party, the authority to encumber the property must be established under other rules of law. See Comment to Neb. U.C.C. § 9-112 (Reissue 1980). Generally, an authorization to encumber the property of another is required before the requisite "rights in the collateral" arise in the obligor-debtor.

In *Gen. Motors Accept. Corp. v. Wash. Tr. Co.,* ____ R.I. ____, ____, 386 A.2d 1096, 1098-99 (1978), the Rhode Island Supreme Court stated: "The phrase 'rights in the collateral' as used in § 6A-9-204(1) has no clear definition. However, the code recognizes

that a debtor who does not own the collateral may nonetheless use the collateral for security, thereby acquiring 'rights in the collateral,' when *authorized* to do so by the actual owner of the collateral." (Emphasis supplied.)

In *Clearfield State Bank v. Contos,* 562 P.2d 622, 624 (Utah 1977), the Utah Supreme Court in interpreting § 9-112 held: "It will be noted that that section does not apply to a situation . . . where the debtor . . . pledges someone else's . . . property *without authority* to do so. It applies to situations where the owner of property, though not the debtor, *is willing* that his property be pledged to secure the indebtedness of another; and it provides for the protection of his property rights." (Emphasis supplied.) See, also, *Towe Farms, Inc. v. Cent. Iowa Prod. Credit,* 528 F. Supp. 500 (S.D. Iowa 1981). The finding of the District Court that the defendant had no valid security interest in the van is supported by the record.

The judgment of the District Court is affirmed.

AFFIRMED.

CLINTON, J., concurs in the result.

STATE OF NEBRASKA, APPELLEE, V. DEAN HOHNSTEIN, APPELLANT.

328 N.W.2d 777

Filed January 7, 1983. No. 82-225.

1. **Arson: Proof.** Under Neb. Rev. Stat. § 28-502 (Reissue 1979), arson in the first degree does not require proof that some part of the building was ignited. It is sufficient if the evidence shows there was some damage to the building.
2. _____: _____. The fact that a building was constructed of nonflammable materials does not prevent proof of first degree arson under Neb. Rev. Stat. § 28-502 (Reissue 1979), since it is only necessary to show that some damage to the building resulted from the fire.
3. **Criminal Attempt: Proof.** Proof of the actual commission of an offense is sufficient to sustain a conviction for attempt.

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

George A. Sommer, for appellant.

Paul L. Douglas, Attorney General, and Frank J. Hutfless, for appellee.

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

BOSLAUGH, J.

The defendant was convicted of attempted arson in the first degree and sentenced to imprisonment for 3 to 5 years. He has appealed and assigns as error the sufficiency of the evidence to sustain the conviction, the giving of an instruction on attempted arson, and that the sentence was excessive.

On June 17, 1981, the defendant was a prisoner in the Scotts Bluff County jail, serving terms of imprisonment for the sale of marijuana and forgery. On that date the prisoners in the area in which the defendant was housed became discontented with various aspects of the way the jail was being operated. The defendant suggested the inmates flood the area by stopping up the toilets. This was done until water covered much of the floor. The inmates then began throwing lighted matches at a magazine, which caught on fire. The defendant threw matches at the magazine, and also threw a book and a pair of men's undershorts on the resulting fire in the walkway between the cells. After a jailer extinguished the first fire, some of the prisoners started a second fire. The defendant did not participate in the second fire.

As a result of the fires, the area was smoke-filled, and the paint on one of the bars was scorched. The damage to the structure of the jail was slight. The jail supervisor testified that he believed the smoke presented a risk of carbon monoxide poisoning.

The information charged the defendant with first degree arson by "intentionally damag[ing] a build-

ing by starting a fire or causing an explosion, when another person was present in the building at the time and he knew that fact." The defendant relies upon the common-law concept of arson and argues that proof was required that some part of the building was ignited. He also argues that an intent to burn can not be demonstrated when the building is nonflammable.

Neb. Rev. Stat. § 28-502 (Reissue 1979) provides: "(1) A person commits arson in the first degree if he intentionally damages a building by starting a fire or causing an explosion, when another person is present in the building at the time and either (a) the actor knows that fact, or (b) the circumstances are such as to render the presence of a person therein a reasonable probability.

"(2) Arson in the first degree is a Class II felony."

The defendant's argument finds no support in the statute. Section 28-502 requires only damage to a building as a result of a fire ignited when another person is present in the building. It is clear from the evidence that the fire damaged the building and the defendant intended such a result.

Similar conclusions have been reached by other courts in interpreting comparable statutes. In *Romo v. State,* 593 S.W.2d 690 (Tex. Crim. App. 1980), prisoners were involved in setting a fire in a jail in much the same manner as in the present case. In assailing his conviction for arson, the defendant argued that intent to commit arson could not be found when the building was nonflammable. In rejecting this contention, the court said: "Appellant places great emphasis on the fact that the building was constructed of nonflammable materials. He argues that intent to damage or destroy cannot be inferred unless the building is made of flammable materials. Appellant overlooks the fact that the statute reads '*damage* or destroy' [Emphasis added]. Material need not be combustible to be

damaged by fire. A fire may produce scorching and smoke damage without igniting the surrounding materials. Furthermore, the Legislature removed the requirement under prior law that the building be ignited in fact." *Id.* at 693.

In *Smith v. State,* 140 Ga. App. 200, 230 S.E.2d 350 (1976), a defendant appealed his conviction for first degree arson. He raised an argument similar to that raised in the case at bar. In affirming the conviction the court stated: "It was shown at the trial that the only damage to the building was heavy smoke damage which required special machinery to remove it from the building. The jail itself was not charred or burned. Code § 26-1401 provides in part that 'A person commits arson in the first degree when, by means of fire or explosive, he knowingly damages: . . .' The phrase 'knowingly damages' is not further defined by the statute. It is defendant's contention that this requires proof of charring or burning of the building itself. We do not agree. The verb 'damages' is an ordinary word and when it is used in a statute it must be given its ordinary signification. Code § 102-102(1). Webster defines 'damage' as 'To hurt; impair.' Thus, causing smoke damage to the jail building falls within this definition and constitutes arson in the first degree if the other elements of the crime are present."

The defendant relies on *Harms v. State,* 147 Neb. 857, 25 N.W.2d 287 (1946), and *State v. Keeton,* 199 Neb. 405, 259 N.W.2d 277 (1977). At the time the *Harms* case was decided, a statute was in force, Neb. Rev. Stat. § 28-504.01 (1943), which required the ignition of a building as an element of first degree arson. The statute involved in *State v. Keeton, supra,* contained a similar requirement. See Neb. Rev. Stat. § 28-504.01 (Reissue 1975). These cases are not controlling here.

The evidence in this case on each element of the crime was sufficient for the jury to find the defendant guilty beyond a reasonable doubt. As stated in

Matter of Appeal in Pima Cty. Juv. Act No. J-37390-1, 116 Ariz. 519, 522, 570 P.2d 206, 209 (1977): "An intent or animus against the property itself or its owner is not an element of common law arson." The State also proved beyond a reasonable doubt that damage resulted to the building, that others were present in the building, and that defendant acted to start a fire.

In this case defendant was convicted of attempted arson. The statute dealing with criminal attempt provides: "(1) A person shall be guilty of an attempt to commit a crime if he:

"(a) Intentionally engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or

"(b) Intentionally engages in conduct which, under the circumstances as he believes them to be, constitutes a substantial step in a course of conduct intended to culminate in his commission of the crime.

"(2) When causing a particular result is an element of the crime, a person shall be guilty of an attempt to commit the crime if, acting with the state of mind required to establish liability with respect to the attendant circumstances specified in the definition of the crime, he intentionally engages in conduct which is a substantial step in a course of conduct intended or known to cause such a result.

"(3) Conduct shall not be considered a substantial step under this section unless it is strongly corroborative of the defendant's criminal intent." Neb. Rev. Stat. § 28-201 (Reissue 1979).

The evidence established that the defendant took more than a substantial step toward the completion of the attempted crime. This was sufficient evidence to sustain the verdict. See *State v. Sodders,* 208 Neb. 504, 304 N.W.2d 62 (1981). See, also, *State v. Gallegos,* 193 Neb. 651, 654, 228 N.W.2d 615, 617 (1975), wherein this court stated that "In every case where an attempt is charged, proof of the actual

commission of the offense establishes the attempt."

The defendant argues that the instructions were erroneous because they failed to inform the jury that arson and attempted arson require a burning of the building. As stated above, this is not the law in Nebraska at this time. The jury was properly instructed as to the elements of arson and attempted arson.

Defendant's final assignment of error is that the sentence is excessive. A sentence within the statutory limits will not be disturbed on appeal in the absence of evidence showing an abuse of discretion by the trial court. *State v. McNichols,* 210 Neb. 875, 317 N.W.2d 95 (1982). Attempted arson in the first degree is a Class III felony, the maximum penalty for which is 20 years' imprisonment, $25,000 fine, or both. See Neb. Rev. Stat. §§ 28-105, 28-201, 28-502 (Reissue 1979).

The defendant is 20 years of age. His juvenile record commenced in 1976. He was serving separate 6-month sentences for forgery and delivery of a controlled substance at the time of the commission of this crime.

Although the damage to the building was slight, any fire in a confined area, particularly a prison, poses a serious risk to the safety of others. The sentence was not excessive. The judgment is affirmed.

AFFIRMED.

MUTUAL BENEFIT LIFE INSURANCE COMPANY OF NEW JERSEY, APPELLANT, V. RICHARD CHISHOLM, APPELLEE.

329 N.W.2d 103

Filed January 14, 1983. No. 44521.

1. **Insurance: Estoppel.** An insurer that gives one reason for its con-

duct and decision as to a matter involved in controversy cannot, after litigation has begun, depend upon another and different ground.

2. **Summary Judgment.** Under Nebraska law the primary purpose of the summary judgment statute, Neb. Rev. Stat. § 25-1332 (Reissue 1979), is to pierce sham pleadings and to dispose of, without the necessity and expense and delay of trial, those cases where there is no genuine claim or defense.
3. _____. Summary judgment should be rendered forthwith if the pleadings, depositions, and admissions are on file, together with the affidavit, if any, showing that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.
4. **Insurance.** The issuance of a life policy is dependent upon the health of the applicant, and a willful and intentional failure of an application to disclose, in response to direct and clear inquiry, that which the company had the right to know for the purpose of determining the true state of health of the applicant, and whether or not it would accept the risk, cannot be considered other than fraudulent.

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

Raymond M. Crossman, Jr., of Crossman & Norris, for appellant.

Everett Inbody of Haessler, Sullivan & Inbody, and John Haessler, for appellee.

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

PER CURIAM.

This is an action by plaintiff-appellant, Mutual Benefit Life Insurance Company of New Jersey (Mutual Benefit), for rescission of a group life insurance contract on the life of Freddie R. Long (insured) on the ground of fraudulent misrepresentation by the insured in his application for insurance. Defendant-appellee, Richard Chisholm (Chisholm), generally denied the allegations and cross-petitioned to recover the proceeds as beneficiary of the life insurance policy. Chisholm then filed a motion to strike portions of Mutual Benefit's petition and also filed a motion for summary judgment. The trial

court sustained both motions and entered judgment for the defendant on the cross-petition. This appeal followed, with Mutual Benefit making the following assignments of error: (1) The trial court erred in sustaining Chisholm's motion to strike paragraph 6 of Mutual Benefit's second amended petition; and (2) The trial court erred in entering a summary judgment dismissing Mutual Benefit's second amended petition and awarding Chisholm $102,000 plus interest and attorney fees. We affirm.

Chisholm is the beneficiary of a group life insurance policy issued on March 6, 1978, by Mutual Benefit on the life of Freddie R. Long. The insured was 27 years old at the time the policy was issued and was eligible for group coverage by virtue of his active status in the Nebraska National Guard.

In the application for group life insurance question 13 asked if the applicant "ever had heart trouble, chest pain, high blood pressure, cancer, diabetes, kidney trouble, stomach trouble, a nervous or mental disorder *or other chronic trouble?*" (Emphasis supplied.) The insured answered "No."

Question 15 asked if the applicant "in the past five years, had any surgery, treatment, observation or routine examination in doctor's office, hospital, clinic, or sanitarium?" The question further provided instructions which stated: "For routine physical examinations indicating *only* good health for you . . . state 'routine exams' beside your 'yes' answer." The applicant checked a box beside the word yes, and stated "Routine Exams."

The insured died in an automobile accident on July 30, 1978. The beneficiary, Chisholm, provided Mutual Benefit with proof of death on August 28, 1978. Mutual Benefit began an investigation and on November 10, 1978, denied Chisholm's claim and attempted to rescind its coverage under the policy. The sole reason advanced for Mutual Benefit's refusal to pay over the proceeds of the policy was the insured's answer to question 15 on the application.

The letter of declination set forth the following: "When Mr. Long signed his application 2/17/78, he indicated only routine exams. Information now on file indicates that Mr. Long received treatment at York General Hospital in November, 1976. Our Medical Underwriting Department advises had we known of this medical history at the time of application we would have not issued group term life coverage in his behalf."

On February 14, 1979, Mutual Benefit filed its original petition in an action to rescind the policy issued to Freddie R. Long on the ground of misrepresentation. The only allegation of misrepresentation contained in the petition was the failure of the insured to disclose the treatment he received at York General Hospital as stated in the declination letter. Mutual Benefit maintained this single theory of misrepresentation throughout discovery, as evidenced by its answers to interrogatories. After minor amendments were made to the petition by Mutual Benefit, Chisholm filed an answer and cross-petition, generally denying the allegations and, in addition, alleging that Mutual Benefit was estopped to raise any defense other than that set forth in its declination letter.

Mutual Benefit filed its second amended petition on September 8, 1980, which contained a new allegation of misrepresentation by the insured. The new paragraph 6 alleged that the insured had falsely answered question 13 because he did not disclose alcoholism "as evidenced by his convictions for 'driving while under the influence of alcohol' " and an "Order of Probation from the District Court of York County, Nebraska."

Chisholm moved to strike paragraph 6 on the grounds that Mutual Benefit was raising a new issue that it was estopped to raise and also that the allegations were based on convictions that would not be admissible in a nonrelated civil matter. The District Court granted the motion to strike. Mutual

Benefit chose not to replead and Chisholm answered and cross-petitioned to the second amended petition as stricken.

Chisholm then filed a motion for summary judgment. The record considered by the trial court consisted of Mutual Benefit's second amended petition as stricken, appellee's answer and cross-petition, certain answers to interrogatories, and portions of depositions. The court found that, based upon the pleadings and evidence submitted on the motion, there was no genuine issue as to any material fact and Chisholm was entitled to judgment as a matter of law. It is from these rulings by the trial court that Mutual Benefit appeals.

Mutual Benefit argues that although it may have changed its allegations of misrepresentation, it has not taken a position contradictory or inconsistent with its original position and, therefore, should not have been estopped from raising the issue of the insured's alleged alcoholism in its second amended petition. Mutual Benefit maintains that its investigation indicated that alcohol may have been a causative factor in the insured's November 1976 accident and also in the July 1978 accident which claimed his life. Therefore, its added allegation concerning the misrepresentation of alcoholism on question 13 of the application constituted the same material misrepresentation as the insured's failing to report the automobile accident on question 15 of the application in which alcohol may have been involved.

We believe that Mutual Benefit is estopped from mending its hold by the raising of any defense other than that upon which it rejected Chisholm's claim in its declination letter of November 10, 1978. Our reason for so holding is that on no occasion prior to the second amended petition did Mutual Benefit ever state that the insured's misrepresentation of alcoholism was a basis for its denial of the claim. Rather, what appears from the record is that Mutual Benefit was relying solely on the failure of the insured to re-

port the treatment he received at York General Hospital as a result of the November 1976 automobile accident. Mutual Benefit stated in its declination letter that had its medical underwriting department "known of this medical history at the time of application we would have not issued group term life coverage in his behalf." It is obvious that Mutual Benefit stood on this theory for denial of the claim until the following testimony of James B. McKelvey, supervisor of Mutual Benefit's medical underwriting department, was obtained in deposition. "Q [by Mr. Crossman] If he had told you, as reflected on Exhibit 7, [the York General Hospital report] that he had had an automobile accident which had caused his hospitalization, what would you have done? . . . Q (By Mr. Crossman) Go ahead and answer. A If he had just indicated 'automobile accident,' we would have probably issued the coverage. Q Would you have asked for the hospital records that were involved in the automobile accident? A It depends, really, how recent it was at the time of the application. Q Well, suppose he had said that, 'On November 23, 1976, I had an automobile accident and I was hospitalized,' and his application was on February 17, 1978. . . . A No, I wouldn't have. Q (By Mr. Crossman) You would not have asked for the hospital record? A No."

It was not until after Mr. McKelvey's deposition was taken that Mutual Benefit proffered the new and different allegation of the insured's misrepresentation of his alleged alcoholism.

Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground and put his conduct upon another and a different consideration. *O'Neil v. Union Nat. Life Ins. Co.*, 162 Neb. 284, 75 N.W.2d 739 (1956); *Hamblin v. Equitable Life Assurance Society*, 124 Neb. 841, 248 N.W. 397 (1933).

An insurer that gives one reason for its conduct

and decision as to a matter involved in controversy cannot, after litigation has begun, defend upon another and different ground. *Serven v. Metropolitan Life Ins. Co.,* 132 Neb. 637, 272 N.W. 922 (1937); *Moore v. Washington National Ins. Co.,* 135 Neb. 29, 280 N.W. 221 (1938).

In the instant case, whether or not Mutual Benefit subjectively intended to rely on the alleged alcoholism of the insured as a defense from the outset of this litigation is irrelevant. There is nothing before this court involving this second allegation of misrepresentation until the second amended petition of Mutual Benefit. Chisholm was not made expressly aware of this second defense in the letter of declination, nor was it even remotely implied as contended by Mutual Benefit. We therefore conclude that the only defense available to Mutual Benefit in this action is that raised in the letter previously referred to.

Mutual Benefit's second assignment of error is that the trial court should not have granted summary judgment and dismissed its action against Chisholm.

Under Nebraska law the primary purpose of the summary judgment statute, Neb. Rev. Stat. § 25-1332 (Reissue 1979), is to pierce sham pleadings and to dispose of, without the necessity and expense and delay of trial, those cases where there is no genuine claim or defense. *Okeson v. Jack Dempsey Drywall, Inc.,* 207 Neb. 847, 301 N.W.2d 356 (1981); *French v. Cornwell,* 202 Neb. 569, 276 N.W.2d 216 (1979).

Summary judgment should be rendered forthwith if the pleadings, depositions, and admissions are on file, together with the affidavit, if any, showing that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Okeson, supra; Negus-Sweenie, Inc. v. Beaver Lake Corp.,* 202 Neb. 671, 276 N.W.2d 668 (1979).

The issuance of policies is dependent upon the health of the applicant, and a willful and intentional failure of an application to disclose, in response to direct and clear inquiry, that which the company had the right to know for the purpose of determining the true state of health of the applicant, and whether or not it would accept the risk, cannot be considered other than fraudulent. *Gillan v. Equitable Life Assurance Society,* 143 Neb. 647, 10 N.W.2d 693 (1943).

All Mutual Benefit requested in question 15 was whether there had been any treatment of the insured by a doctor in the past 5 years and whether the examination was routine. The evidence showed that while there had been an automobile accident, the insured's hospitalization at York General Hospital on November 23, 1976, was for minor injuries for which the prognosis was good. Mutual Benefit's own underwriting department stated that the injuries were of no underwriting concern. We therefore agree with the finding of the trial court that the insured had a routine examination as reflected in his answer to question 15 of the application and that no misrepresentation occurred.

Mutual Benefit has failed to plead and prove the requisite elements of misrepresentation as set forth by this court in *Carpenter v. Sun Indemnity Co.,* 138 Neb. 552, 293 N.W. 400 (1940). If Mutual Benefit wanted additional underwriting information as to the insured's driving record and use of alcohol, it should have asked the pertinent questions.

The decision of the District Court in granting summary judgment was correct and is hereby affirmed. The appellee is entitled to an award of attorney fees in this court under Neb. Rev. Stat. § 44-359 (Reissue 1978). The fee is fixed at $1,500.

AFFIRMED.

WHITE, J., participating on briefs.

CAPORALE, J., concurring.

I agree that Mutual Benefit did not ask the proper questions to elicit information concerning Mr.

Long's drinking habits. That circumstance, together with Mutual Benefit's own testimony that the injuries sustained in the automobile accident were not of underwriting concern, leads me to concur in the result reached in this case.

My misgiving arises from the confusion which appears to surround the restated rule that once an insurer gives a reason for its conduct and decision, it cannot, after litigation has begun, change its ground and put its conduct upon another and different consideration. The cases cited by the majority certainly establish that the rule exists and has been applied in insurance cases. Indeed, the rule has been applied in certain noninsurance cases as, for example, situations in which no objective evidence of some later asserted reason existed. See, *Kucera v. Kavan,* 165 Neb. 131, 84 N.W.2d 207 (1957); *Powers v. Bohuslav,* 84 Neb. 179, 120 N.W. 942 (1909); *Frenzer v. Dufrene,* 58 Neb. 432, 78 N.W. 719 (1899). See, also, *Tate & Ehrhardt v. Loney,* 85 Neb. 559, 123 N.W. 1050 (1909).

I respectfully suggest, however, that such a rule makes no sense in the absence of showing detrimental reliance upon the prior statements or conduct. The rule, after all, is one of estoppel. Estoppel ordinarily requires as one of its elements proof that the party asserting the doctrine has been prejudiced by good faith reliance upon the statements or conduct of the other party. *Lovell v. City of Kearney,* 200 Neb. 478, 263 N.W.2d 867 (1978); *Christian v. Geis,* 193 Neb. 146, 225 N.W.2d 868 (1975); *Willan v. Farrar,* 176 Neb. 1, 124 N.W.2d 699 (1963). I would make clear that, as an element of the rule, good faith detrimental reliance upon an insurer's prior statements or conduct must be shown.

BOSLAUGH and MCCOWN, JJ., join in this concurrence.

RONALD SCHROLL, APPELLANT, V. KEVIN FULTON, A MINOR CHILD, ET AL., APPELLEES.

328 N.W.2d 780

Filed January 14, 1983. No. 81-657.

1. **Jurors.** A party who fails to challenge the jurors for disqualification and passes the jurors for cause waives any objection to their selection.
2. **Motions for New Trial.** A motion for new trial on the ground of surprise is properly overruled where a request for a continuance for that reason was not made at the trial.
3. **Evidence: Appeal and Error.** 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.
4. **Verdicts: Appeal and Error.** A jury verdict based upon conflicting evidence will not be set aside unless clearly wrong.

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

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

Jacobsen, Orr & Nelson, for appellees.

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

MCCOWN, J.

The plaintiff, Ronald Schroll, brought this civil action against Kevin Fulton, a minor, and his parents for damages resulting from an assault and battery. The jury returned a verdict for the defendants and the plaintiff has appealed.

This action was initially filed by the plaintiff against two minor defendants, Kevin Fulton and David Shotkowski, and their respective parents. The defendants' pleadings later established that Shotkowski and his parents had paid $7,500 to Schroll and his wife and obtained a full release. A motion in limine to prohibit the introduction of any evidence of the payment or release was sustained prior to trial, and the action continued only against the defendant Fulton and his parents. Self-defense

was affirmatively pleaded by Fulton.

The plaintiff was a vocational agriculture teacher at the public high school in Loup City, Nebraska. On May 22, 1978, the defendant Kevin Fulton and David Shotkowski, who had just graduated from the high school, went to the plaintiff's classroom to inquire about the grades they had each received from the plaintiff in a farm management class which both of them had just completed. The two students approached plaintiff's desk and the plaintiff told them to go to the office and get a pass. From this point on the evidence is conflicting and confusing.

Plaintiff testified that defendant Fulton suddenly lunged at the plaintiff, knocking him onto the floor, where he was beaten and kicked by both Fulton and Shotkowski. Fulton testified that plaintiff shoved him and that he shoved back and plaintiff fell back over a chair and onto the floor, where Fulton saw Shotkowski kicking the plaintiff. Fulton testified that he did not strike the plaintiff and that he did not remember kicking him. Shotkowski did not testify.

The plaintiff sustained multiple bruises and contusions, principally to the head and upper body, and was hospitalized for 2 days.

The jury returned a verdict in favor of the defendants. Following the overruling of motions to set aside the verdict and for new trial, the plaintiff has appealed.

Plaintiff first contends that several husbands and wives were on the jury panel, in violation of Neb. Rev. Stat. § 25-1601 (Reissue 1979). There was no evidence, however, that any statutorily disqualified person actually served as a juror at the trial.

Plaintiff's counsel had the original jury panel list by April 23, 1981, a revised list by July 2, and the trial did not commence until July 6, 1981. No objection was made as to the presence of married couples on the panel until after the trial was completed. Neb. Rev. Stat. § 25-1637 (Reissue 1979) requires that the challenge to a jury array must be made in any

event before the jury is sworn to try the case.

A party cannot voluntarily take his chances with a jury and then obtain another trial on the ground that the jury was irregularly called. A party who fails to challenge the jurors for disqualification and passes the jurors for cause waives any objection to their selection. *Regier v. Nebraska P. P. Dist.,* 189 Neb. 56, 199 N.W.2d 742 (1972). No possibility of prejudice has been shown in the present case.

Plaintiff also contends that the trial court erroneously overruled a motion for new trial on the ground of newly discovered evidence. The ground for the motion was that the plaintiff had had a subpoena issued for Lyle Garwood, a teacher at the high school who had been a witness to at least a part of the assault and battery incident. The subpoena was never served and Garwood misunderstood the date of trial and did not appear. Plaintiff's counsel knew what his testimony was to be but failed to see that the subpoena was properly served.

Obviously, Garwood's testimony was not newly discovered evidence which plaintiff's counsel could not, with reasonable diligence, have discovered and produced at trial, within the meaning of Neb. Rev. Stat. § 25-1142 (Reissue 1979). When plaintiff's counsel discovered at trial that Garwood would not be present, he failed to move for a continuance or make any timely application for relief until after the jury verdict, when it was too late.

A motion for new trial on the ground of surprise is properly overruled where a request for a continuance for that reason was not made at the trial. *Kehm v. Dumpert,* 183 Neb. 568, 162 N.W.2d 520 (1968).

Finally, the plaintiff contends the defendant Fulton was guilty of perjury because his version of the facts was in conflict with the expected testimony of Garwood. Garwood's testimony could only serve to discredit or impeach Fulton, but a mere conflict in evidence is not proof of perjury. There is no merit to plaintiff's contention.

A jury verdict based upon conflicting evidence will not be set aside unless it is clearly wrong. It is not within the province of the Supreme Court to weigh or resolve conflicts in the evidence. The credibility of witnesses and the weight to be given their testimony are for the trier of fact. *Merten v. Pedersen,* 199 Neb. 34, 255 N.W.2d 869 (1977).

Where a party has sustained the burden and expense of a trial and has succeeded in securing the judgment of a jury on the facts in issue, he has the right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured. *Schreves v. D. R. Anderson Constructors, Inc.,* 206 Neb. 433, 293 N.W.2d 106 (1980). The evidence in the case now before us is sufficient to support the verdict and there was no prejudicial error.

The judgment of the District Court is affirmed.

AFFIRMED.

CLINTON, J., not participating.

NEVA RICHARDS, APPELLANT, V. DOUGLAS COUNTY, NEBRASKA, ET AL., APPELLEES.

328 N.W.2d 783

Filed January 14, 1983. No. 81-714.

1. **Mental Health.** Since 1976, only mentally ill dangerous persons are subject to involuntary commitment.
2. **Political Subdivisions Tort Claims Act: Appeal and Error.** The findings of fact made by the District Court in an action under the Political Subdivisions Tort Claims Act will not be disturbed on appeal unless clearly wrong.

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

Richard J. Schicker of Schicker & Leahy, for appellant.

Donald L. Knowles, Douglas County Attorney, and Thomas E. Brown, for appellee.

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

BOSLAUGH, J.

The plaintiff, Neva Richards, was severely injured when she was stabbed seven times by Theodore LaBute while attending a church service at the Pathway of Light Cathedral in Omaha, Nebraska, on December 21, 1977. The attack was entirely unprovoked. LaBute had a history of mental illness and was a stranger to the plaintiff.

This action was brought against Douglas County, Nebraska, to recover damages for the injuries the plaintiff sustained in the stabbing incident. The plaintiff's theory of the case was that an employee of the county had negligently failed to accept and process an "application" for involuntary commitment of LaBute presented by his mother, Mary Theresa LaBute, on or about December 5, 1977.

The fourth amended petition specifically alleged as follows: "11. The direct and proximate cause of the stabbing of Plaintiff by Theodore LaBute was the negligence of the Defendant in the following particular: The clerk of the Douglas County Board of Mental Health failed and neglected to accept and process the Petition of Involuntary Commitment of Theodore LaBute when the same was prepared and presented by Mary D. LaBute on or about December 6, 1977 when it was evident that Theodore LaBute represented a serious threat of harm to himself or others and came within the provisions of 83-1009 R.R.S."

Neb. Rev. Stat. § 83-1009 (Reissue 1981) defines the term "mentally ill dangerous person" as follows: "Mentally ill dangerous person shall mean any mentally ill person or alcoholic person who presents:

"(1) A substantial risk of serious harm to another person or persons within the near future, as manifested by evidence of recent violent acts or threats

of violence or by placing others in reasonable fear of such harm; or

"(2) A substantial risk of serious harm to himself within the near future, as manifested by evidence of recent attempts at, or threats of, suicide or serious bodily harm, or evidence of inability to provide for his basic human needs, including food, clothing, shelter, essential medical care, or personal safety."

The case was tried upon depositions and other documentary evidence. The trial court found generally for the defendant and dismissed the petition. The order overruling the plaintiff's motion for new trial contained these findings: "The Court finds that plaintiff failed to prove negligence on the part of the defendant by a preponderance of the evidence.

"The Court further finds that assuming the truth of Mary La Bate's [sic] testimony that she went to the offices of the Douglas County Board of Health with the intention of initiating committment [sic] proceedings the evidence is clear that she voluntarily abandoned all efforts to initiate those proceedings by leaving said offices before filing a petition or application for committment [sic]."

The evidence shows that Mrs. LaBute appeared at the office of the board of mental health in Douglas County on or about December 27, 1977, 5 or 6 days after the stabbing incident, and was successful in having her son involuntarily committed. Toby Raznick, an assistant secretary to the board of mental health, with 10 years' experience in that job, assisted Mrs. LaBute with her "application" on that occasion. Mrs. LaBute claims that Mrs. Raznick was the employee she talked to on December 5. Mrs. Raznick testified that she had never seen Mrs. LaBute prior to December 27, 1977. Mrs. Raznick further testified that she had never rejected any "application" or preliminary form for involuntary commitment and had no authority to do so.

Mrs. Raznick testified that the procedure for an involuntary commitment commences with an ex-

planation of the requirements for an involuntary commitment. The person seeking an involuntary commitment of another is given a printed explanation of the requirements for an involuntary commitment. If the person seeking the commitment believes they qualify, he is then asked to fill out an "application," or preliminary form, which requests the essential information concerning the person to be committed, together with the facts concerning overt acts within the last 90 days which he believes show the person to be committed is mentally ill and dangerous to himself or other persons. After the form has been completed, the county attorney's office is notified and the person seeking the commitment is interviewed. The decision as to whether a petition will be filed is made by the office of the county attorney.

Mrs. LaBute testified that she obtained the "application," or preliminary information form, from the county employee and partially completed it, but was unable to list any overt acts which demonstrated that her son was dangerous to others.

Although Mrs. LaBute testified that the employee told her, "I don't think you have a case," she also testified that when the employee gave her the form the employee stated, "Do you understand that he must be dangerous to himself or a danger to others, or you have no case?"

Since 1976, only mentally ill dangerous persons are subject to involuntary commitment. Neb. Rev. Stat. § 83-1037 (Reissue 1981). See, also, *Petersen v. County Board of Mental Health,* 203 Neb. 622, 279 N.W.2d 844 (1979).

It is clear from the evidence that Mrs. LaBute did not believe her son was dangerous. When asked what he had done to hurt someone, Mrs. LaBute said she "didn't know of anything that he had done in that way." When asked specifically if she had any reason to believe Ted was dangerous to others, she said "No."

Mrs. LaBute further testified that to her knowledge Ted had never done anything to indicate he was dangerous to others. She said: "He was very passive and very helpful, friendly, gentle. He was kind to animals and people." She said Ted had never attacked anyone, that she knew of, and had not threatened anybody.

Deo LaBute, the father of Theodore, testified to the same effect. He said he never thought that his son would cause physical harm to or assault anybody or cause physical harm to himself.

With respect to the information form that Mrs. LaBute partially completed, she testified, "I don't know whether I left the paper, I had started to fill it out and I don't know if I left [it] there or threw it away or what happened." Mrs. LaBute admitted that the employee did not tell her not to complete the form. She testified that after the employee gave her the form, she "filled as much as I could, and on the form I noticed that I had to, you know, write the things that he had done that I considered dangerous. And the things he had done that were irrational more than dangerous. So I didn't complete the form. I didn't feel it was of any use." Mrs. LaBute then left the office.

The findings of fact made by the District Court in an action under the Political Subdivisions Tort Claims Act will not be disturbed on appeal unless clearly wrong. *Hume v. Otoe County,* 212 Neb. 616, 324 N.W.2d 810 (1982); *Watson v. City of Omaha,* 209 Neb. 835, 312 N.W.2d 256 (1981); *Miles v. School Dist. No. 138,* 204 Neb. 105, 281 N.W.2d 396 (1979).

The record in this case fully supports the findings made by the trial court. The judgment of the District Court is therefore affirmed.

AFFIRMED.

CLINTON, J., not participating.

ALICE BROWN, APPELLANT, V. OTIS GLEBE, APPELLEE.
328 N.W.2d 786

Filed January 14, 1983. No. 81-735.

1. **Foreclosure: Presumptions.** Sheriff's deeds are specially covered by Neb. Rev. Stat. §§ 77-1901 et seq. (Reissue 1981) and, unlike the provisions for tax certificates, there is no section establishing a presumption regarding service, as is true in the case of a treasurer's deed.
2. **Foreclosure: Liens.** A decree of foreclosure of a tax lien is of no effect as against the persons who were, at the time of the foreclosure, in actual possession and who were not made parties defendant in the action and had no notice or knowledge of the suit.

Appeal from the District Court for Douglas County: D. NICK CAPORALE, Judge. Reversed and remanded with directions.

Walter M. Calinger of Wall, Wintroub & Weiner, for appellant.

James P. Miller, for appellee.

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

KRIVOSHA, C.J.

The appellant, Alice Brown, filed this suit on November 6, 1980, seeking to remove a cloud on the title to certain property allegedly owned by Brown in Omaha, Douglas County, Nebraska. The appellee, Otis Glebe, had acquired title to the Brown property in October of 1971 after securing a sheriff's deed to the property and holding it for 2 years prior to confirmation as provided by the provisions of Neb. Rev. Stat. §§ 77-1903 and 77-1913 (Reissue 1981). Following trial, the trial court quieted title to the property in Glebe under certain conditions. For reasons set out more particularly in this opinion, we believe that, on the basis of the record before us, the decision of the trial court was in error and its judgment must be reversed and the cause remanded.

The record discloses that in 1955 Brown acquired title to certain real estate in Omaha, Douglas

County, Nebraska, described as Lot 5, Block 42, Kountze Place, an Addition to the City of Omaha, Douglas County, Nebraska. Brown acquired title to the property by warranty deed from the previous owners and has been in continuous physical possession of the property since that date.

The record further discloses that Brown failed to pay some, if not all, of the real estate taxes on the property between the date of its purchase in 1955 and 1970. The county attorney thereafter proceeded to foreclose on the property pursuant to the provisions of Neb. Rev. Stat. § 77-1918 (Reissue 1981). Glebe purchased the property at the tax foreclosure sale for $310. As already noted, at the time the tax foreclosure proceedings were brought in 1971, Brown was in actual possession of the property, and according to her testimony was never served with notice of the foreclosure action. For reasons which are not at all clear, Glebe refused to introduce into evidence the sheriff's return filed in the foreclosure action showing service on Brown, if in fact such service was made. Brown continued to live on the property after the sheriff's sale and made monthly rental payments to Glebe, under what she described as "protest." Glebe, having apparently taken a lesson from Brown, likewise failed to pay any taxes on the subject property, and on November 7, 1977, Brown obtained a county treasurer's certificate of tax sale after paying $965.45 in satisfaction of delinquent city and county taxes for the years 1973 through 1977. This was pursuant to the provisions of Neb. Rev. Stat. § 77-1809 (Reissue 1981).

In 1980 Brown filed this suit to quiet title to the property and prayed for equitable relief. One ground for relief was that the sheriff's deed issued to Glebe should be set aside due to the fact that she was not served and therefore his deed was void, or, in the alternative, that title be quieted in her favor by foreclosing her tax certificate pursuant to the provisions of Neb. Rev. Stat. § 77-1831 (Reissue 1981).

Following trial, the District Court held that Glebe was the title owner of the property by virtue of the sheriff's deed dated November 1, 1973. It also found that the tax certificate purchased by Brown was merely a lien upon the property and ordered that the property be sold unless Glebe pay to Brown the amount of the lien within 20 days after entry of the decree. Glebe in fact paid the required sum into the court registry within the 20 days and Brown perfected this appeal.

Since this is an equitable action, difficult as that may be to glean from the facts of this case, it is the duty of this court to try the issues de novo on the record and reach independent conclusions without being influenced by the findings of the trial court. See, *Sturm v. Mau,* 209 Neb. 865, 312 N.W.2d 272 (1981); *Bartlett v. Kloepping,* 195 Neb. 755, 240 N.W.2d 592 (1976). The first issue which must be addressed is whether the record shows that Brown was served in the foreclosure action. The only evidence in this record concerning service on Brown is Brown's own uncontradicted and unimpeached testimony that she never received service of process with regard to the foreclosure. Glebe argues that there is a presumption of validity pursuant to the provisions of Neb. Rev. Stat. § 77-1842 (Reissue 1981), and therefore Brown must overcome the presumption by evidence greater than her own unsupported statements. Unfortunately, Glebe is simply in error in this regard. It is true that § 77-1842 establishes various presumptions of validity. The difficulty, however, is that the provisions of § 77-1842 have no application in the instant case. Glebe has failed to recognize that there are two separate and distinct methods for the handling of delinquent real estate taxes. One method is set out in Chapter 77, article 18, and deals with what are commonly referred to as "treasurer's certificates" or "treasurer's deeds." See Neb. Rev. Stat. §§ 77-1801 to 77-1863 (Reissue 1981). A second method is contained in Chapter 77, article 19, and

deals with what are commonly referred to as "sheriff's deeds," following a traditional foreclosure. See Neb. Rev. Stat. §§ 77-1901 to 77-1941 (Reissue 1981). The methods are neither the same nor duplicative of each other, and the provisions of Chapter 77, article 18, are not interchangeable with the provisions of Chapter 77, article 19, though Glebe attempts to make them so. Sheriff's deeds are specially covered by §§ 77-1901 et seq. and, unlike the provisions for tax certificates, there is no section establishing a presumption regarding service, as is true in the case of a treasurer's deed. There is no authority in this court to transfer a portion of one statute to another.

Because no presumption as to service is created by statute, the uncontroverted and unimpeached testimony of Brown that she was never served stands unrebutted. That defect is fatal to this action. In *Gage v. Bani,* 141 U.S. 344, 357, 12 S. Ct. 22, 35 L. Ed. 776 (1891), the U.S. Supreme Court, speaking on this matter of evidence of service, said: "[T]he evidence should be clear and convincing that it was given, as required by law . . . ." In the instant case not only is there an absence of any evidence concerning the fact that proper service was had but, rather, the clear and convincing evidence is to the contrary. This requires a holding that the deed held by Glebe is void. A decree of foreclosure of a tax lien is of no effect as against the persons who were, at the time of the foreclosure, in actual possession and who were not made parties defendant in the action and had no notice or knowledge of the suit. See, *Winkle v. Mitera,* 195 Neb. 821, 241 N.W.2d 329 (1976); *Harris v. Heeter,* 137 Neb. 905, 291 N.W. 721 (1940). Absent service on a party in possession, the trial court obtains no jurisdiction over the person and the order is totally void and may be subject to collateral attack. *Sileven v. Tesch,* 212 Neb. 880, 326 N.W.2d 850 (1982). Because the record as presented to us establishes that Brown was never given

notice of the tax foreclosure, as she was entitled to receive, the District Court's order foreclosing the property against Brown and issuing the sheriff's deed was void ab initio. *Winkle v. Mitera, supra.* Because the judgment granting Glebe title by virtue of the sheriff's deed was void ab initio, title to the questioned real estate must be quieted in Brown, the record titleholder. However, because this is an equitable proceeding, we believe Brown must, as a condition of obtaining a decree quieting title to the questioned property in her, pay Glebe the amount of the purchase price paid by Glebe at the void sale, plus interest. See *Loney v. Courtnay,* 24 Neb. 580, 39 N.W. 616 (1888). This she must do within 20 days of the issuance of the mandate in this matter. Due to our holding in this case, we need not consider any other claims made by the parties hereto.

REVERSED AND REMANDED WITH DIRECTIONS.

CLINTON and CAPORALE, JJ., not participating.

CHAPMAN COMPANY, INC., APPELLEE, V. WESTERN NEBRASKA BROADCASTING CO., INC., ET AL., APPELLANTS.

329 N.W.2d 107

Filed January 14, 1983. No. 81-744.

Brokers. Where a broker and the owner of a business enter into a brokerage agreement which contains an extension clause entitling the broker to the payment of a commission in the event a sale occurs after termination of the brokerage agreement, but during the extension period, to any prospect solicited by the broker during the contract period, the broker must show some minimal causal connection between the efforts of the broker and the ultimate sale before the broker may receive the compensation.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Reversed and remanded for a new trial.

Thomas D. Brower and Paul E. Hofmeister of Van

Steenberg, Brower, Chaloupka, Mullin & Holyoke, for appellants.

Harris & Lippstreu, for appellee.

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

KRIVOSHA, C.J.

The instant appeal presents to the court a question of first impression concerning the proper interpretation of a broker's contract for the sale of a business. Following trial to a jury a verdict was returned by the jury in favor of the broker, Chapman Company, Inc., and against the owners of radio station KEYR in the amount of $21,650. For reasons which we more particularly set out in this opinion, we believe that the instruction given by the court to the jury was erroneous and therefore the verdict of the jury must be set aside and a new trial granted.

The undisputed record discloses that the appellants, Western Nebraska Broadcasting Co., Inc. (Western), Guy W. Embree (Embree), and Richard W. Baumgartner (Baumgartner), jointly referred to as (Western), owned and operated radio station KEYR in Terrytown, Nebraska. At some point they determined that they wished to sell the station and listed it with the appellee, Chapman Company, Inc. (Chapman), a broker engaged in the business of selling radio stations. In connection with this listing Western signed an exclusive brokerage agreement with Chapman on August 11, 1977. The agreement gave Chapman the exclusive right to sell the stock of Western and gave Western the right to terminate the contract at any time after the contract had been in effect 60 days, upon giving 30 days' notice. The evidence discloses the agreement to be a fairly simple document, setting out that Western was desirous of selling all of its stock for the price of $380,000. Under the terms of the agreement Chapman was likewise to perform certain activities on behalf of

Western for the purpose of selling the stock. The agreement provided for a schedule of compensation to be paid by Western to Chapman in the event of a sale. The agreement further contained a provision which is the issue of this lawsuit. The contract specifically provided that even if the agreement was terminated, "[o]n any sale during the ensuing 12 months to a prospect *solicited* by Broker during the authorization, Broker is to be paid the same commission." (Emphasis supplied.) The agreement does not define the term "solicit," and it is this absence of a definition which causes the difficulty. The provision quoted is what is generally referred to in the trade as an "extension clause" and, according to the evidence, is intended to protect the broker in the event that he obtains a purchaser for the owner and the parties simply delay closing until after the listing agreement expires. See, *Whiting v. Johnson,* 64 Wash. 2d 135, 390 P.2d 985 (1964); Annot., 51 A.L.R.3d 1149 (1973).

The evidence further discloses that in January of 1977 Chapman had been contacted by a James Bickling, who was interested in buying a radio station in the Montana, Minnesota, North Dakota, or South Dakota areas. At this same time Bickling also contacted four other radio station brokerage firms advising them of his interest in purchasing a radio station in that four-state area. On January 24, 1977, he completed and returned Chapman's "buyer outline" form in response to a request for more specific information. Over the next 1½ years, Bickling received numerous mailings from all five brokers with regard to various radio properties. In August of 1977, pursuant to the broker agreement, Chapman initiated a mass mailing to 171 potential buyers, including Bickling, announcing that KEYR was available for purchase. Bickling denies ever receiving this initial offering letter. It is, in any event, undisputed that he made no response to such letter even if, in fact, he received it.

On January 12, 1978, Western notified Chapman of its desire to terminate the listing contract with Chapman, effective March 1, 1978. Following receipt of the notice Chapman sent out a second mass mailing on January 16, 1978, to an additional 152 people, bringing the total number of names on its mass mailing list to 323. This list was later mailed to Western in response to Western's request for a list of "prospects."

On March 16, 1978, Embree and Baumgartner listed KEYR with another radio brokerage firm by the name of Dan Hayslett & Associates. The evidence discloses that, by sheer coincidence, Hayslett had purchased the assets of a brokerage firm that Bickling had contacted in January of 1977. The assets purchased by Hayslett included a mailing list which contained Bickling's name as a potential buyer of radio stations.

On April 3, 1978, Hayslett sent out letters and brochures to buyers it thought might be interested in purchasing KEYR. This mailing was received by Bickling and, according to Bickling's testimony, was the first notice he had that KEYR was for sale. Shortly thereafter, Bickling contacted Hayslett and preliminary negotiations began. The final agreement for the purchase of KEYR was signed on August 28, 1978, and the sale was consummated on November 1, 1978. Chapman admittedly was in no way involved with any of these negotiations or with the completion of the sale of KEYR to Bickling.

In September of 1978 Chapman read of the sale of KEYR in BROADCASTING MAGAZINE. As a result of that, he wrote a letter to Embree and Bickling requesting payment of the broker's commission as provided for in the listing contract. He maintained that Bickling was one of the 323 individuals that Chapman had "solicited" during the term of the agreement and that by reason of the extension clause he was entitled to be paid. Embree and Baumgartner rejected the claim and instead paid

the commission to Hayslett. Thereafter, Chapman instituted this action. While a number of issues are raised, both by Western and by Chapman, the seminal question which must be addressed is whether Chapman "solicited" Bickling within the meaning of the broker agreement so as to entitle Chapman to a commission in the amount of $21,650 when Bickling purchased KEYR from Western through Hayslett. Chapman argues that under the terms of the agreement all Chapman was required to do to earn its commission was to "solicit" or "contact" someone who purchased the station during the 12-month period, even if Chapman had no other contacts with the purchaser. The determination of the question in this case, therefore, depends upon the correctness of the trial court's instruction No. 7. By instruction No. 7, the trial court instructed the jury as follows: "The word 'solicit' means 'to ask, to urge, to appeal (for something), to invite, to try to obtain or to furnish information designed to persuade a person to do a particular act.' 'Solicit' does not imply successful solicitation or require a response. Solicitation does not require any particular form nor does it require a particular degree of earnestness or persistance [sic]." If instruction No. 7 correctly reflects the law in Nebraska, then the verdict of the jury was correct. If, however, the instruction was not correct because the jury needed to be instructed that something more than an unsuccessful and unresponsive solicitation was required, then the verdict must of necessity be set aside. As we indicated at the outset, we believe that the instruction was not correct and therefore the judgment must be set aside.

Investigation discloses that there appears to be no specific Nebraska decision deciding what the word "solicit" in a business brokerage contract of this type means. In construing extension clauses other courts have generally resorted to two approaches in determining whether the broker is entitled to the commission claimed by reason of the "extension

clause." One group, though by far the minority, has taken the position that the broker need only establish that his activities and efforts met or measured up to the conditions specified in or required by the language of the clause in question. These courts have made it clear that the parties to a listing contract are free to frame their agreement in whatever terms they may see fit, provided that such terms are neither unlawful nor contrary to public policy, and that in so doing they may make a broker's right to compensation depend upon the happening of any designated event or upon the fulfillment of any particular set of circumstances, even though neither the event nor the circumstances result in procuring a purchaser. The theory of those cases apparently is that if the owner wishes to impose a greater obligation on the broker, he should specify it in the agreement. See, *Galbraith v. Johnston,* 92 Ariz. 77, 373 P.2d 587 (1962); *Leonard v. Fallas,* 51 Cal. 2d 649, 335 P.2d 665 (1959); *Delbon v. Brazil,* 134 Cal. App. 2d 461, 285 P.2d 710 (1955); *Wright & Kimbrough v. Dewees,* 52 Cal. App. 42, 197 P. 957 (1921); *Moore v. Holman Real Estate Co.,* 129 Ark. 465, 196 S.W. 479 (1917). In essence, this is the position which Chapman convinced the trial court to take and which is now urged upon us.

The majority of the courts, however, have not been willing to accept so unlimited a definition for the word "solicit" in a broker's agreement. Instead, the majority of courts have held that before a broker may be entitled to a commission, the broker must ordinarily be able to establish at least some causal connection between the broker's actions and efforts in regard to the listed property and the ultimate sale made to the purchaser under an extension contract of the type involved herein. While those courts have not gone so far as to require a showing that the broker was the "procuring cause" of the sale, unless the contract contained specific language making it incumbent upon the broker to be the pro-

curing cause, they have required more than just a blanket mailing even to a selected group. The nexus between the broker's efforts and the ultimate sale will vary with the language of the clause in question. In every instance, however, more is required than a mere unresponded to solicitation by mass mailing, as was done in this case. See, *Harkey v. Gahagan,* 338 So. 2d 133 (La. App. 1976); *Lloyd Hammerstad, Inc. v. Saunders,* 6 Wash. App. 633, 495 P.2d 349 (1972); *Korstad v. Hoffman,* 221 Cal. App. 2d 805, 35 Cal. Rptr. 61 (1963); *Mellos v. Silverman,* 367 So. 2d 1369 (Ala. 1979).

As we indicated at the outset, there appears to be no Nebraska case directly on point. In attempting to reach what we perceive to be an appropriate balance between protecting the rights of the broker, on the one hand, under such a "soliciting contract" and yet providing the owner of the property with some reasonable protection, on the other, we believe that the better-reasoned cases by far are those which have required that before a broker may recover for "soliciting" the broker must show some causal relation between his efforts and the ultimate sale. The language of the Louisiana Court of Appeals in the case of *Harkey v. Gahagan, supra* at 135, best explains that reason when it points out: "The purpose of the extension clause in a real estate listing contract is to insure the realtor's right to a fee when the property owner sells the property subject to the listing after the expiration of the primary term to a purchaser who had been located or otherwise interested in the property by the realtor's effort. The realtor does not have to be the procuring cause in order to activate the extension clause. He need not have been involved in active negotiation with the purchaser at the time of the expiration of the primary term. However, his activities must have been the cause of creating some minimal interest in the purchaser which contributed to bringing about the eventual sale." We see little difference between a

contract to sell real estate and a contract to sell a business. We believe that this notion that the broker must have been "the cause of creating some minimal interest in the purchaser" is indeed the appropriate balance between the argument made by Chapman, on the one hand, that consenting adults ought to be permitted to enter into unambiguous agreements as they choose and the argument of appellants, on the other hand, that merely permitting one to send out a mass mailing should be insufficient to constitute a solicitation sufficient to entitle a broker to receive a commission. Obviously, were we to adopt the position taken by Chapman, and apparently accepted by the trial court, every broker need only send out a letter to every individual on a mass mailing list and thereafter be protected from any sale which might occur during the extension period. We believe that such a rule would serve no useful purpose and would only burden the owner's right to dispose of his property in spite of the original broker's inability to provide an interested buyer. We believe that the minimal contact rule is the rule which provides the best balance, and we now adopt that rule for this jurisdiction. The rule, therefore, in this jurisdiction is to the effect that where a broker and the owner of a business enter into a brokerage agreement which contains an extension clause entitling the broker to the payment of a commission in the event a sale occurs after termination of the brokerage agreement, but during the extension period, to any "prospect solicited by the broker during the contract period," the broker must show some minimal causal connection between the efforts of the broker and the ultimate sale before the broker may receive the compensation. Because of our holding, we must find that the court's instruction No. 7 was erroneous, and therefore we must reverse the judgment and remand this action back to the District Court with instructions to retry the case

in accordance with this decision.

REVERSED AND REMANDED FOR A NEW TRIAL.

CLINTON, J., not participating.

MARIAN G. PFLASTERER, APPELLANT, V. SAM KOLIOPOULOS, APPELLEE.

328 N.W.2d 789

Filed January 14, 1983. No. 81-755.

1. **Res Judicata.** The scope of the res judicata bar encompasses not only the issues actually litigated in the prior proceeding but also those issues which could have been raised; any right, fact, or matter in issue and directly adjudicated in a prior proceeding, or necessarily involved in the determination of such action before a competent court in which the judgment or decree was rendered upon the merits, is conclusively settled by such a judgment and may not again be litigated between the parties or their privies, whether the claim, demand, purpose, or subject matter of the two suits would or would not be the same.
2. _____. A former action bars all those issues which could have been raised upon the same facts sought to be presented in a subsequent action.

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

Ben F. Shrier, for appellant.

Martin A. Cannon and Cynthia G. Irmer of Matthews, Cannon & Riedmann, P.C., for appellee.

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

CAPORALE, J.

This is the third in a series of cases involving the estate of Theodore N. Ganaros, deceased (Ganaros). In the first case, *Pflasterer v. Omaha Nat. Bank,* 201 Neb. 427, 268 N.W.2d 104 (1978), we determined that an agreement existed between Ganaros and his daughter Marian G. Pflasterer, plaintiff-appellant in the instant appeal, to will all but $28,000 of dece-

dent's estate to Pflasterer. We held she was entitled to specific performance of that agreement and impressed a trust on the assets of the estate for Pflasterer's benefit. In the second case, *Omaha Nat. Bank v. Koliopoulos,* 204 Neb. 752, 285 N.W.2d 496 (1979), hereinafter referred to as *Koliopoulos I,* we rejected the executor's effort to set aside the transfer by Ganaros of his 255 shares of the capital stock of Ted's Enterprises, Inc., (all of the shares owned by Ganaros) to his nephew Sam Koliopoulos, the defendant-appellee herein. We stated that Ganaros was competent to carry out his "long-held desire to see that his nephew eventually owned all shares of Ted's Enterprises, Inc." *Id.* at 753-54, 285 N.W.2d at 498. We observed that the subject stock transfer occurred after the making of the contract which we enforced in the first case, and specifically stated we did not decide, the issue not being presented, any rights as between Pflasterer and Koliopoulos.

In this action Pflasterer seeks to impress a constructive trust on the 255 shares of capital stock in Ted's Enterprises, Inc., which were the subject of *Koliopoulos I.* Pflasterer asserts herein that the transfer occurred without adequate consideration, that Koliopoulos was therefore not a bona fide third party purchaser, and thus he should be declared to be a constructive trustee in equity for Pflasterer's benefit. Koliopoulos answered with a number of alternative defenses, including the affirmative defense that, as a result of *Koliopoulos I,* this action is barred by the doctrine of res judicata. The District Court found for Koliopoulos on the general issues of the propriety of the transfer of the capital stock; the sufficiency of consideration, if required; and the presence or absence of intent to defraud Pflasterer. The trial court dismissed Pflasterer's petition and this appeal followed.

Pflasterer assigns as error the findings that her father could properly dispose of the stock at issue in

his company during his lifetime without receiving fair and adequate consideration therefor; that the conveyance from her father to Koliopoulos did not constitute a fraudulent conveyance with an intent to defraud; and, finally, that there was fair and adequate consideration to support the transfer at issue.

We conclude, for the reasons set forth hereinafter, that this case is barred by virtue of the final judgment rendered in *Koliopoulos I*. We, therefore, affirm the trial court's judgment. Such disposition makes unnecessary any consideration of Pflasterer's assignments of error.

The record establishes *Koliopoulos I* was instituted by the executor of Ganaros' estate at Pflasterer's specific and written behest. Not only are the very same shares of capital stock of Ted's Enterprises, Inc., involved in both *Koliopoulos I* and this case, but among the reasons given by Pflasterer to the executor for instituting *Koliopoulos I* and seeking to set aside the transfer was the claim that there existed "no *real* consideration for the transfer." (Emphasis in original.) The *Koliopoulos I* petition alleged, among other things, that there had been no consideration for the transfer and prayed for an order directing Koliopoulos to "deliver, assign, transfer and convey" the shares of capital stock to Pflasterer. The bill of exceptions in *Koliopoulos I*, received in evidence in this case, establishes that although Pflasterer's evidence therein was directed toward her father's mental and physical condition at the relevant times, Koliopoulos' evidence bore on the consideration issue as well, at least to the extent of touching upon the financial condition of Ted's Enterprises, Inc., and the inducements proffered by Ganaros to Koliopoulos at certain relevant times in order to persuade Koliopoulos to return to the business operated by Ted's Enterprises, Inc. However, as will be seen by the body of case law discussed *infra*, it matters not whether the evidence in *Koliopoulos I* actually addressed consideration as an issue.

Our most recent review of the elements of res judicata is found in *Brommer v. City of Hastings,* 212 Neb. 367, 322 N.W.2d 787 (1982). We said therein that the scope of the res judicata bar encompasses not only the issues actually litigated in the prior proceeding but also those issues which could have been raised. We also said that any right, fact, or matter in issue and directly adjudicated in a prior proceeding, or necessarily involved in the determination of such action before a competent court in which the judgment or decree was rendered upon the merits, is conclusively settled by such a judgment and may not again be litigated between the parties or their privies, whether the claim, demand, purpose, or subject matter of the two suits would or would not be the same. In the earlier case of *DeCosta Sporting Goods, Inc. v. Kirkland,* 210 Neb. 815, 316 N.W.2d 772 (1982), we had said that a right or fact in issue and directly adjudicated in an action in which a judgment has been rendered upon the merits is, by that judgment, conclusively settled and may not again be relitigated between the parties and their privies. We also said that, generally, the rule of res judicata is grounded upon public policy requiring a termination of litigation and on the general belief that a person should not be vexed more than once for the same cause of action. In *Vantage Enterprises, Inc. v. Caldwell,* 196 Neb. 671, 244 N.W.2d 678 (1976), we held that a suit on express contract effectively barred a subsequent action on quantum meruit based upon the same facts and evidence. We said therein that to constitute res judicata, the former suit must be founded on the same cause of action as the latter suit and that the general test to determine the identity of causes of action is whether the same evidence will sustain both the present and former actions. The above-cited cases teach that a former action bars all those issues which could have been raised upon the same facts sought to be presented in a subsequent action.

Therefore, if Pflasterer and the executor of Ganaros' estate were privies, or if Pflasterer may be otherwise bound by the bank's action in bringing *Koliopoulos I,* then res judicata will necessarily bar this proceeding. Even if the same issues had not been raised and evidence thereon adduced in both suits, such could have been done since the general aim of *Koliopoulos I* was to set aside the inter vivos transfer of the subject capital stock by the deceased Ganaros to Koliopoulos, and it is that very same result, based upon the very same set of facts, which is sought in the instant case.

Although it is true that Omaha National Bank in *Koliopoulos I* was acting as an executor, for purposes of that suit per se the bank is more properly characterized as having acted as a trustee for the benefit of Pflasterer. This was by virtue of the fact that in *Pflasterer v. Omaha Nat. Bank,* 201 Neb. 427, 268 N.W.2d 104 (1978), we found said bank to be a constructive trustee of the assets of the estate for the benefit of Pflasterer. "It is a well-established principle of law that a trustee, who holds title to property, may defend for the beneficiary; and, when the title is attacked and the trustee defends with the knowledge and consent of the beneficiary, the beneficiary will be concluded by the result of the litigation to the same extent as the trustee is concluded by it. . . . [The beneficiary] is as effectually bound by the decisions in the two former cases as if he had been a party thereto." *Van Etten v. Passumpsic Savings Bank,* 79 Neb. 632, 637, 113 N.W. 163, 165 (1907). Pflasterer not only had knowledge of and gave consent to trustee Omaha National Bank to prosecute *Koliopoulos I* but in fact served an express written demand upon it to so do; she is necessarily bound by that proceeding and may not now litigate issues which could have properly been raised, and in fact were raised, at that time. This is but a variation on the more general principle enunciated in *Drainage District v. Kirkpatrick-Pettis Co.,* 140 Neb.

530, 538, 300 N.W. 582, 587 (1941), in which we stated: " 'In many instances, persons not made nominal parties to the action or proceeding are, nevertheless, represented by such parties, and therefore are, in the absence of collusion, bound by the judgment. . . .' "

In arguing for a contrary result Pflasterer apparently relies on our observation in *Koliopoulos I* that "No issue being here presented as to any rights as between Pflasterer and Koliopoulos, none is decided." 204 Neb. at 755, 285 N.W.2d at 498. Her reliance is misplaced. To say we do not decide an issue which is not presented is not to say that its presentation in a future action may not be barred by applicable legal principles.

AFFIRMED.

CLINTON, J., dissents.

ROBERT B. PLUMB AND ELEANOR M. PLUMB, APPELLEES, V. PHILLIP G. RUFFIN, DOING BUSINESS AS TOWN AND COUNTRY MARKET, APPELLANT.

328 N.W.2d 792

Filed January 14, 1983. No. 81-756.

1. **Restrictive Covenants.** Property owners in a subdivision affected by restrictive covenants are not estopped from preventing a most flagrant violation of those restrictions simply because they had earlier failed to take steps to stop a slight deviation from the strict letter of such restrictions.
2. _____. In determining whether the character of a neighborhood has so changed that the existing restrictive covenants can no longer be enforced, the test ordinarily is whether the original purpose and intention of the parties creating the restrictions are no longer of substantial benefit to the residents. The question is not whether suitable persons will in the future purchase property in the addition, but whether the restrictions still preserve to the addition its character of a residence district.
3. _____. An agreement restricting the use of land in a certain tract, imposed thereon by a common grantor under a general improvement plan, intended for the mutual benefit of all grantees therein,

may be enforced in equity by any subsequent grantee in such tract, who purchased with reliance on the general plan, against any other subsequent grantee taking with notice of the restrictions.

4. **Restrictive Covenants: Injunction.** In a suit brought to enforce restrictive covenants, the plaintiff is entitled to an injunction without a showing of actual damages or that irreparable injury will result from a continued violation of the restrictive clause.

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

Joseph Polack of Polack & Woolley, P.C., for appellant.

Harry B. Otis of Gaines, Otis, Haggart, Mullen & Carta, for appellees.

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

HASTINGS, J.

The defendant, Phillip G. Ruffin, doing business as Town and Country Market, has appealed from an order of the District Court which enjoined him from constructing a convenience store on his property. Certain protective covenants affecting such property prohibited commercial developments. He assigns as error, first, that the plaintiffs themselves are also in violation of the protective covenants and therefore have no standing in equity to bring this action, and, second, that the property has become commercial in nature notwithstanding the protective covenants.

The plaintiffs, Robert B. and Eleanor M. Plumb, are the owners of Lot 5, Block 6, Rockbrook Heights, an Addition to the City of Omaha, which lot is located at the southeast corner of 108th and Oak Streets. They have been owners of this property since 1959. At that time, they built and have maintained on that property a four-plex living unit which also contains an additional fifth apartment in the basement for the caretaker. The defendant acquired title to Lots 1, 2, 4, and 5, Block 5, Rockbrook Heights, by deed dated November 7, 1980. These

four lots lay directly north of and across Oak Street from the plaintiffs' property. Construction of a convenience-type store and service station, which it is proposed will operate 24 hours per day, was commenced by the defendant. That gave rise to this litigation.

In July of 1955 certain protective covenants affecting Rockbrook Heights Addition were drafted and later filed in the office of the Douglas County register of deeds. As to Lot 5, Block 6, and Lots 1, 2, 4, and 5, Block 5, these properties may be used for schools and playgrounds, single-family dwellings, and three-family or four-family dwellings, "but said lots shall be used or occupied for no other purpose." Lot 3, Block 5, is located immediately north of the defendant's property. It consists of the remainder of Block 5, and is equivalent in size to 10 normal-sized lots. According to the protective covenants it may be used for certain commercial purposes, including retail stores and filling stations.

These various covenants are to run with the land and shall be binding for a period of 25 years, "at the expiration of which time they shall be automatically extended for successive periods of ten (10) years unless they are changed . . . by written agreement among the then owners of a majority of the said lots . . . ." The covenants also specifically authorize any person owning land in the subdivision to bring an action in equity to prevent anyone from attempting to violate any of their provisions.

There also appears of record a partial release and amendment to the protective covenants, the effect of which is to permit commercial use of Lots 1, 2, 4, and 5, Block 5, the defendant's property. Although this instrument is dated August 2, 1955, it was not filed of record until September 12, 1960, some 16 months after the plaintiffs had acquired title to their property.

In an effort to accommodate the plaintiffs, the defendant had proposed to alter his plans so as to place

the improvement mostly on Lots 2 and 4 and leave a portion of Lots 1 and 5, located immediately north of the plaintiffs' property, as a buffer area.

The defendant attempted to show that the neighborhood surrounding the lots in question had changed to such an extent that the original purpose and intention of the parties in creating the restrictions could no longer be accomplished. This consisted of testimony that Lot 3 of Block 5 contained commercial establishments, as did Rockbrook Village Plaza located immediately west and north of the defendant's lots. However, the remaining portions of Rockbrook Heights remain as residential property. There is no evidence in the record that the areas being used as commercial areas are being utilized other than in accordance with the original restrictions made at the commencement of this development.

The defendant's contention that the plaintiffs, by a technical violation of the covenants themselves in permitting a fifth living unit in the basement for a caretaker, have somehow waived enforcement of the covenants against the defendant is answered by *Pool v. Denbeck,* 196 Neb. 27, 241 N.W.2d 503 (1976). In that case this court said: " 'As a rule, nonobjection to trivial breaches of a restrictive covenant does not result in loss of the right to enforce the covenant by injunction, and acquiescence in violations * * * which are immaterial and do not affect or injure one will not preclude him from restraining violations thereof which would so operate as to cause him to be damaged. . . .'

" ' "Plaintiffs are not estopped from preventing a most flagrant violation of the restrictions on account of their theretofore failure to stop a slight deviation from the strict letter of such restrictions." ' " *Id.* at 34, 241 N.W.2d at 507-08.

The defendant cites *Reed v. Williamson,* 164 Neb. 99, 82 N.W.2d 18 (1957), in support of his proposition that where the character of a neighborhood has so changed that the restriction is of no value to the land

intended to be benefited, an injunction will not lie. However, quoted with approval in *Reed* is the following language from *Southwest Petroleum Co. v. Logan,* 180 Okla. 477, 71 P.2d 759 (1937): " 'The test ordinarily is whether the original purpose and intention of the parties creating the restrictions pursuant to the general scheme has been so destroyed by the changed conditions, without fault on the part of those who seek to be relieved, that the restrictions are no longer of substantial benefit to the residents, and the original purpose cannot be reasonably effected by the granting of an injunction. * * * From our examination of the entire record we conclude that the addition still has substantial value to the lot owners for residential purposes. . . . The question is not whether suitable persons will in the future purchase property in the addition, but whether the restrictions still preserve to the addition its character of a residence district.' " *Id.* at 118, 82 N.W.2d at 28-29.

As pointed out earlier in this opinion, there have been no changed conditions; the area has developed as was intended by the original developers of the subdivision, and that part intended to be commercial remains commercial, and that portion designated as residential stays as such.

Again, quoting from *Reed:* " 'It has long been an established principle that an agreement restricting the use of land in a certain tract, imposed thereon by a common grantor under a general improvement plan, intended for the mutual benefit of all grantees therein, may be enforced in equity by any subsequent grantee in such tract, who purchased with reliance on the general plan, against any other subsequent grantee taking with notice of the restrictions.' " *Id.* at 114, 82 N.W.2d at 27.

The defendant also argues that the plaintiffs have failed to adduce any evidence of damages, other than the fact that their bedroom windows will overlook a 24-hour commercial operation. However, as

stated in *Wessel v. Hillsdale Estates, Inc.*, 200 Neb. 792, 799, 266 N.W.2d 62, 67 (1978): " 'Ordinarily, in a suit brought for that purpose, the plaintiff is entitled to an injunction without a showing of actual damages or that irreparable injury will result from a continued violation of the restrictive clause.' "

From a de novo review of the record, we conclude that the judgment of the District Court was correct and is affirmed.

AFFIRMED.

CLINTON, J., not participating.

JOHN L. CRAIG, PERSONAL REPRESENTATIVE OF THE ESTATE OF HERMAN F. DETLEFS, DECEASED, APPELLANT, V. WAYNE KILE AND WILLENE KILE, APPELLEES, THOMAS DETLEFS ET AL., INTERVENORS-APPELLANTS.

JOHN L. CRAIG, PERSONAL REPRESENTATIVE OF THE ESTATE OF HERMAN F. DETLEFS, DECEASED, APPELLANT, V. LAVERNE L. QUADHAMER AND SHIRLEY M. QUADHAMER, APPELLEES, THOMAS DETLEFS ET AL., INTERVENORS-APPELLANTS.

329 N.W.2d 340

Filed January 14, 1983. Nos. 81-760, 81-824.

1. **Undue Influence.** The elements necessary to be established to warrant the rejection of a written instrument on the ground of undue influence are: (1) That the person who executed the instrument was subject to undue influence; (2) That there was opportunity to exercise undue influence; (3) That there was a disposition to exercise undue influence for an improper purpose; and (4) That the result was clearly the effect of such undue influence.
2. _____. It is not mere influence that makes a conveyance unlawful but *undue* influence as established in the law.
3. **Undue Influence: Deeds.** The court, in examining the matter of whether a deed was procured by undue influence, is not concerned with the rightness of the conveyance, but only with determining whether it was the voluntary act of the grantor. The fact that the grantor has others who are proper subjects to receive his bounty can be considered by the court only as it bears upon the validity of the conveyance.

4. **Mental Competency: Proof.** In order to set aside an instrument or instruments for want of mental capacity on the part of the person executing such instruments, the burden of proof is upon the party so asserting to establish that the mind of the person executing such instruments was so weak or unbalanced when the instruments were executed that he could not understand and comprehend the purport and effect of what he was doing.
5. **Parties: Intervention.** An intervenor may not change the issues but must accept the case as the intervenor finds it.

Appeal from the District Courts for Kearney and Franklin Counties: BERNARD SPRAGUE, Judge. Affirmed.

Rodney A. Osborn of Person, Dier, Person & Osborn, for appellant Craig.

Graten D. Beavers and Knapp, Mues, Sidwell, Anderson, Shofstall & Beavers, and Daniel M. Placzek and Luebs, Dowding, Beltzer, Leininger & Smith, for intervenors-appellants.

Jacobsen, Orr & Nelson, for appellees.

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

KRIVOSHA, C.J.

These two actions were originally filed by the conservator of Herman F. Detlefs to set aside certain deeds made by Detlefs during his lifetime. One deed conveyed title to the northeast quarter of Section 29, Township 5 North, Range 15 West of the 6th P.M., Kearney County, Nebraska, to Wayne Kile, and a second deed conveyed title to the west half of Section 22, Township 4 North, Range 14 West of the 6th P.M., Franklin County, Nebraska, to LaVerne L. Quadhamer and Shirley M. Quadhamer, husband and wife. Detlefs reserved a life estate in each tract of land. Before the actions were completed, Detlefs died and the actions were revived by John L. Craig as personal representative of the estate of Herman F. Detlefs, deceased. Because of the location of the real estate, the Kile action was filed in Kearney

County, Nebraska, and the Quadhamer action filed in Franklin County, Nebraska. However, by stipulation of the parties, the cases were consolidated for trial. The intervenors Thomas Detlefs and Fred Detlefs are the surviving brothers of Detlefs, and the intervenors Thomas G. Schmidt and Bernice L. Ross are a nephew and niece of Detlefs and the children of Detlefs' deceased sister. Following trial to the court, the court entered judgment in favor of Kile and Quadhamer and against the appellant Craig and intervenors-appellants, in effect finding that the deeds executed by Detlefs conveying land to Kile and Quadhamer were not the result of either undue influence exerted upon Detlefs or due to the fact that Detlefs was mentally incompetent when the deeds were executed. In reviewing this appeal, we are mindful that as an equity action we are required to examine the record de novo and reach our own independent conclusions without regard to the conclusions reached by the District Court. *Schuller v. Schuller,* 191 Neb. 266, 214 N.W.2d 617 (1974); *McDonald v. McDonald,* 207 Neb. 217, 298 N.W.2d 136 (1980).

These are never easy cases to review, and one must be extremely cautious that in reviewing the record isolated pieces of evidence are not taken out of context. We recognize further that if there is an irreconcilable conflict in a material issue, the Supreme Court will, in determining the issue, consider the fact that the trial court had the opportunity to observe the witnesses and their manner of testifying. *In re Estate of Saathoff,* 206 Neb. 793, 295 N.W.2d 290 (1980).

We have now carefully examined the record and, based upon our own examination of the record, conclude, as the trial court did, that the deeds were not executed by Detlefs at a time when he was incompetent, nor were they the result of undue influence. For that reason, we believe that the judgment of the trial court must be affirmed.

The record discloses that Detlefs, at the time he executed the two deeds on April 11, 1978, was an 80-year-old bachelor living in Upland, Nebraska. He had never married and his only surviving heirs at law were his two brothers, his niece, and his nephew, all of whom Detlefs apparently thought had done quite well and were not in need of assistance from him. As a matter of fact, Detlefs had, prior to conveying the property to Quadhamer and Kile, executed several wills and several codicils. In each will he acknowledged that his sole surviving heirs were his brothers and his niece and nephew, but that "All of them are well provided for and therefore I have concluded that it is advisable for me to make token bequests to each of them . . . ." As a result thereof, Detlefs made certain specific bequests to his family, to several friends and neighbors, including Quadhamer and, later, Kile, and then left the balance of his estate to various charities named in the will. If anything can be gleaned from the various wills and codicils, it would seem to be that Detlefs did not intend to make the intervenors the recipients of the bulk of his estate, and that annually he changed his mind about how his property should be devised upon his death. While this record does establish a picture of a man inclined to change his mind, it does not establish a man either incompetent or easily subject to another's will.

The record discloses that Quadhamer and Kile had known and been friends of Detlefs for a number of years prior to April 11, 1978, and both of them performed personal tasks for Detlefs for which they apparently received little or no compensation. These requests might consist of taking him shopping or to the doctor or driving him to South Dakota to visit his farmland. Detlefs conceded in his deposition taken prior to his death that Kile and Quadhamer were friends of his and performed a number of tasks which he asked them to do. He further conceded that neither Quadhamer nor Kile ever asked him to

convey land to them. Specifically, Detlefs said: "Q. Did Mr. Kile ever ask you to deed any real estate to him? A. No, that I recall. Q. Did Mr. Quadhamer ever ask you to deed real property to him? A. Ask me what? Q. Did he ever ask you to give him some real estate? A. No, they never bothered me about that. . . . Q. Did Laverne Quadhamer or Wayne Kile make any promise to you in order to get you to give them the deed? A. No, they didn't."

While there is some conflict in the evidence, one can find from the evidence that in January of 1975 Detlefs requested Quadhamer to assist him in retaining the services of a lawyer in order to draft a new will. Quadhamer made inquiry of coworkers about attorneys in the Kearney area and was referred to Kent Schroeder, an attorney practicing in Kearney. Subsequently, Mr. Detlefs was taken by Quadhamer to Schroeder's office where, after a conversation between Schroeder and Detlefs, a will was prepared. Subsequently, two codicils, a limited power of attorney, and the two deeds involved herein were prepared by Schroeder for Detlefs. Additional wills and codicils were prepared by attorney William Meier of Minden, Nebraska.

The evidence discloses that in late March or early April of 1978 Detlefs conferred with Schroeder with regard to the possibility of deeding the parcels of real estate involved herein to Quadhamer and Kile to avoid the possibility of an attack on his will. He had earlier provided in either his will or a codicil that the property in question should pass to Quadhamer and Kile upon his death. The evidence discloses that Schroeder requested Quadhamer to leave the room and then discussed at some length with Detlefs the various possibilities, attempting thereby to determine if the decision to deed the property was voluntary on Detlefs' part. The appellants argue that Quadhamer's influence in this matter is clearly established by reason of a note in one of Schroeder's

files indicating that Quadhamer had called Schroeder's secretary to tell her that Detlefs wanted to convey the property to Quadhamer and Kile but reserve a life estate. However, when one examines the entire record one finds that reserving a life estate was one of the possibilities which Schroeder had discussed with Detlefs and which Detlefs was asked to think about and then advise Schroeder. The evidence discloses that it was not uncommon for Detlefs to have Quadhamer make telephone calls for him. Therefore, the evidence concerning the note is not sufficient to establish by clear and convincing evidence that the conveyance was the result of undue influence as alleged by the appellants.

The evidence further discloses that the deeds were then drafted by Schroeder, and Detlefs came back to his office to execute them. Schroeder was not present in the office, but his secretary testified that she reviewed the deeds in detail with Detlefs and asked whether he understood what he was doing. He indicated that he did. He then executed the deeds and asked that they be delivered to the grantees.

On April 24, 1978, on the advice of attorneys William Meier and Jesse Adkins, Detlefs requested the appointment of a conservator, and his petition thereafter was granted. His conservator subsequently instituted these proceedings seeking to have the deeds set aside.

As we indicated at the outset, cases of this nature are not easy to resolve. Nevertheless, there are certain specific standards required to be met. There would be no certainty to conveyances if all that an individual had to do after conveying property was to have a second thought and seek to have the conveyance set aside on the basis that he had been unduly influenced to execute the deeds. In *McDonald v. McDonald,* 207 Neb. 217, 220-21, 298 N.W.2d 136, 138 (1980), we set out the various factors and elements necessary to establish a case of undue influence, saying: " ' "The elements necessary to be estab-

lished to warrant the rejection of a written instrument on the ground of undue influence are: (1) That the person who executed the instrument was subject to undue influence; (2) that there was opportunity to exercise undue influence; (3) that there was a disposition to exercise undue influence for an improper purpose; and (4) that the result was clearly the effect of such undue influence." ' "

We made it clear, however, in the case of *In re Estate of Saathoff,* 206 Neb. 793, 295 N.W.2d 290 (1980), that it is not mere influence that makes a conveyance unlawful but *undue* influence as established in the law. In *Saathoff, supra* at 799, 295 N.W.2d at 295, quoting from the case of *Kolc v. Krystyniak,* 196 Neb. 16, 241 N.W.2d 348 (1976), we said: " '[The] undue influence which will void a . . . (gift) is an unlawful and fraudulent influence which controls the will of the donor.' " Furthermore, in *Saathoff, supra* at 799, 295 N.W.2d at 295, we said: " 'The court, in examining the matter of whether a deed was procured by undue influence, is not concerned with the rightness of the conveyance, but only with determining whether it was the voluntary act of the grantor. The fact that the grantor has others who are proper subjects to receive his bounty can be considered by the court only as it bears upon the validity of the conveyance.' " See, also, *Rule v. Roth,* 199 Neb. 746, 261 N.W.2d 370 (1978). The mere fact that there are living relatives who are denied property in favor of friends is not sufficient to set aside a conveyance. "In order to set aside an instrument or instruments . . . for want of mental capacity on the part of the person executing such instruments, the burden of proof is upon the party so asserting to establish that the mind of the person executing such instruments was so weak or unbalanced when the instruments were executed that he could not understand and comprehend the purport and effect of what he was doing." *Dunbier v. Rafert,* 170 Neb. 570, 589, 103 N.W.2d 814, 827

(1960). See, also, *McDonald v. McDonald, supra.* Furthermore, we have previously said that mere suspicion, surmise, or conjecture does not warrant a finding of undue influence, but there must be a solid foundation of established facts on which to rest the inference of its existence. This is particularly true where the parties are well aware of the existence of the contested deed shortly after its execution. See *Zych v. Zych,* 183 Neb. 708, 163 N.W.2d 882 (1969).

Intervenors-appellants rely, to a large extent, upon the existence of Detlefs' thyroid condition as the basis for their allegation that he was susceptible to undue influence and was not competent at the time that he executed the deed. However, when one reads his deposition, one is inclined to reach a different conclusion. Detlefs was able to sufficiently describe what took place and to even suggest what the medical cause of his lack of capacity was due to—factors which one truly incompetent is not able to do. Further, Detlefs' physician was not able to testify that, in his opinion, on the day on which the deeds were executed and conveyed Detlefs was either incompetent or acted as a result of undue influence. He indicated that he might be somewhat lethargic or might have some difficulty in reading. At best, however, these were suppositions and fall short of meeting intervenors-appellants' burden. There was simply insufficient evidence to establish by clear and convincing evidence that the action taken by Detlefs in conveying the land to Quadhamer and Kile was not intended by him.

Appellants seek to establish that Schroeder was Quadhamer's lawyer and therefore Detlefs was without independent advice. The record, however, simply does not support that contention. According to Schroeder's own testimony, he had not previously represented Quadhamer and, in fact, the only other work he ever did for Quadhamer was the preparation of a will for Quadhamer and his wife after Detlefs prepared a will leaving the property to

Quadhamer. The record is clear that Schroeder did act as Detlefs' attorney and did carefully go over with him the various actions, satisfying himself that Detlefs understood what he was doing and that he desired to accomplish the results obtained. In *McDonald v. McDonald,* 207 Neb. 217, 223, 298 N.W.2d 136, 139 (1980), we said: " 'The mere fact that the grantee procures an attorney to prepare the deed does not prove that the deed was obtained by improper means.' "

Finally, appellants argue that evidence showing that Quadhamer paid Schroeder's bill as well as the revenue stamps and the filing costs indicates that this was all planned by Quadhamer and Kile and totally unknown by Detlefs. The record simply will not support that claim. The attorney fee for both deeds was $25 and the revenue stamps paid, at least on the Quadhamer property, were $.55. In view of the fact that Detlefs had just given to Quadhamer and Kile real estate of substantial value, one would not be surprised to find that they did not ask Detlefs to reimburse them for these minor costs. While one may question the wisdom of the grantor in conveying his property to Quadhamer and Kile, one cannot say from the evidence that the appellants have established by clear and convincing evidence that at the time the deeds were executed Detlefs was incompetent or that the conveyance was as a result of undue influence.

As a further basis for reversal, intervenors-appellants argue that the trial court erred in refusing to permit them to amend their petition of intervention to add two alleged reasons for setting aside the deeds, to wit, (1) fraud and mistake, and (2) failure of delivery. The trial court was not in error in denying to intervenors their request to amend the petition in intervention for several reasons. In the first instance, an intervenor may not change the issues but must accept the case as the intervenor finds it. *Drainage District v. Kirkpatrick-*

Pettis Co., 140 Neb. 530, 300 N.W. 582 (1941). Furthermore, permitting or refusing amendments to pleadings is a matter within the sound judicial discretion of the trial court, and unless it is made to clearly appear that the court has abused this discretion and the party has thereby been deprived of an opportunity to make his case or defense, the Supreme Court will not interfere. *State ex rel. Sorensen v. Farmers State Bank*, 127 Neb. 139, 254 N.W. 728 (1934); *Omaha & R. V. R. Co. v. Moschel*, 38 Neb. 281, 56 N.W. 875 (1893). In the instant case the record discloses that even though fraud and mistake and failure of delivery were not made specific issues by the pleadings, the matters were gone into at trial and there was evidence that the deeds were ordered delivered by Detlefs. The issues of fraud and mistake were gone into under the issue of undue influence, and we therefore do not believe that the trial court erred in denying to the intervenors their request to amend.

A review of the entire record discloses that there was simply insufficient evidence to establish by clear and convincing evidence that the deeds were executed under either undue influence or while the grantor was incompetent, and the judgment of the trial court should be affirmed.

AFFIRMED.

CLINTON, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. DENNIS LINN PARSONS, ALSO KNOWN AS PETER DENNIS LINN, ALSO KNOWN AS PETER PARSONS, APPELLANT.

328 N.W.2d 795

Filed January 14, 1983. No. 82-123.

1. **Miranda Rights: Words and Phrases.** "Custodial interrogation," within the meaning of the *Miranda* rule, means questioning initiated by law enforcement officers after a person has been taken into

custody or otherwise deprived of his freedom of action in any significant way.

2. **Miranda Rights.** Police officers are not required to administer *Miranda* warnings to everyone whom they question, nor is the requirement of warnings to be imposed simply because questioning takes place in the station house or because the questioned person is one whom police suspect.
3. _____. *Miranda* warnings are required only when there has been such a restriction on a person's freedom as to render him in custody.
4. **Confessions.** Voluntary statements made while an individual is in custody but which are not the product of police interrogation are admissible at trial.

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

Dennis Linn Parsons, pro se.

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

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

CLINTON, J.

Defendant Dennis Parsons was charged under Neb. Rev. Stat. § 28-416 (Reissue 1979) with possession of marijuana with intent to distribute, found guilty by a jury, and sentenced to 18 months' to 4½ years' imprisonment. On appeal to this court defendant makes the following assignments of error: (1) The trial court erred in admitting into evidence incriminating statements defendant made to an officer prior to his receiving *Miranda* warnings. (2) The trial court erred in not granting various motions for a directed verdict, as the evidence was insufficient to establish the crime charged. We affirm.

Before considering the assignments of error, we will set forth a summary of the evidence. At the suppression hearing, Gerard Ruiz, a Nebraska State Patrol officer, testified that on October 8, 1981, at about 3 a.m., he picked up the defendant because he was walking on the Interstate. Defendant had been frantically waving to attract the officer's attention.

Defendant told Ruiz that he had been riding in a car with Marvin Huntington, that he jumped out when Huntington said the car held four containers of marijuana, and that Huntington then tried to run over him. Defendant asked the officer to help him; Ruiz took him to the Lexington Police Department so he could sleep, and dispatched information on Huntington's car. The officer testified that, as a sleeper, defendant was locked in a cell so that he could not walk about the jail. He was not under arrest.

About 6 a.m. Huntington was found and brought to the police station, where the defendant briefly confronted Huntington about the attempt to "run him over." The officer testified it appeared a fight might develop and the two were put in separate cells.

Bruce Haney, an investigator for the Nebraska State Patrol, testified that at about 9:20 a.m. he spoke with the defendant and at that time viewed him as the assumed victim. The subject matter of the interview was defendant's accusations against Huntington. After the interview, Haney, unsure if defendant was the victim or a suspect, told the defendant he must stay for further questions and returned him to his cell. Haney next interviewed Huntington, who denied having any marijuana and asked to talk to the defendant. Defendant was brought into the room and Huntington asked the defendant if he had told Haney that there was marijuana in the car. Defendant said he had, and again accused Huntington of trying to run over him. When defendant had left, Huntington admitted he had marijuana in his car but said it belonged to the defendant. As Haney was returning Huntington to his cell, Huntington again told Haney that it was the defendant's fault the marijuana was in the car. Defendant called Haney to come over to his cell, and both Haney and Huntington went to the defendant's cell. Defendant, without being asked any questions,

admitted he was responsible for the marijuana. At that point Haney interrupted the defendant's discussion and read to him the *Miranda* warnings. Huntington, after defendant made the admission, said, "See, I told you that he would talk." The admission above described was received in evidence at the trial and is the basis of defendant's first assignment of error.

At trial, Huntington testified that defendant arranged for them to haul the marijuana north from Texas, that defendant helped load the car, and that defendant had ridden along from Texas. Officer Haney testified that defendant admitted responsibility for the marijuana and that a search of Huntington's car revealed four 5-gallon buckets holding more than 16 pounds of marijuana. Defendant put on no witnesses in his defense.

On the first assignment of error, defendant argues that the trial court should have excluded his statements to Haney because he made those statements prior to receiving *Miranda* warnings and as a result of custodial interrogation.

Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), forbids the prosecution from introducing defendant's statements stemming from "custodial interrogation" unless defendant has first been given *Miranda* warnings. The U.S. Supreme Court defined "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* at 444.

First we examine whether defendant was in custody in the *Miranda* sense. *Oregon v. Mathiason,* 429 U.S. 492, 97 S. Ct. 711, 50 L. Ed. 2d 714 (1977), emphasizes that custody under *Miranda* requires restricting one's freedom of movement, for only then does a coercive environment exist which requires *Miranda* warnings. Consequently, a suspect interrogated in a police station who is free to leave is not

in custody. See, also, *United States v. Tobin,* 429 F.2d 1261 (8th Cir. 1970).

Based on the above principle, the evidence would support the conclusion that defendant was not in custody in the *Miranda* sense until Officer Haney ordered him to remain at the station. Until that time, the defendant's freedom was not restricted, for he was considered the assumed victim and free to leave if he so requested. However, defendant was clearly in custody after his first interview with Haney when Haney told him that he had to stay for further questions.

We now look at the question of whether defendant, once in custody, was subjected to interrogation or whether he made the statements voluntarily. If a statement is voluntarily made and not a product of interrogation, it is admissible. *Miranda v. Arizona, supra.* See, also, *United States v. Voice,* 627 F.2d 138 (8th Cir. 1980). *Rhode Island v. Innis,* 446 U.S. 291, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980), elaborates on the meaning of interrogation under *Miranda,* stating that *Miranda* applies "not only to express questioning, but also to any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Id.* at 301. In *Innis, Miranda* rules were extended to the functional equivalent of interrogation. *State v. Bridgeman,* 212 Neb. 469, 323 N.W.2d 102 (1982).

Applying these principles, the evidence is sufficient to support the conclusion that the admission was voluntary and not the consequence of custodial interrogation. It is clear the statement was not made in response to any question by the officer, for no question was asked. Moreover, the record fails to establish that Haney spoke or acted in a manner that would reasonably elicit an incriminating response from the suspect. Hence, the statement was voluntary and thus admissible.

In defendant's second assignment of error, he

claims that the evidence was insufficient to establish the crime charged. A verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Woodruff,* 205 Neb. 638, 288 N.W.2d 754 (1980). Circumstantial evidence to establish that possession of a controlled substance was with intent to distribute or deliver may consist of the quantity of the substance. *State v. Turner,* 192 Neb. 397, 222 N.W.2d 105 (1974). Here, the record supports the verdict; the evidence showed the defendant was in possession, and his possession of 16 pounds of marijuana was sufficient to support a factual finding of his intent to distribute.

AFFIRMED.

ROGER KUBICEK AND THRESA KUBICEK, APPELLEES, V. MIKE SACHS AND AUDREY SACHS, APPELLANTS.

329 N.W.2d 111

Filed January 14, 1983. No. 82-510.

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

Dan D. Stoller, for appellants.

Roger Kubicek and Thresa Kubicek, pro se.

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

PER CURIAM.

The court, having reviewed the record, finds that the judgment of the trial court should be affirmed. The judgment is affirmed.

AFFIRMED.

Cite as 213 Neb. 355

THOMAS S. MITCHELL, APPELLANT, V. COUNTY OF DOUGLAS, NEBRASKA, APPELLEE.

329 N.W.2d 112

Filed January 21, 1983. No. 81-613.

1. **Statutes: Legislature.** The court, in considering the meaning of a statute, should, if possible, discover the legislative intent from the language of the act and give it effect.
2. **Statutes.** In construing a statute, the court must look to the objects to be accomplished, the evils and mischiefs sought to be remedied, or the purpose to be served, and place on the statute a reasonable or liberal construction which will best effect its purpose rather than one which will defeat it.

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

Jerome A. Merwald, for appellant.

Donald L. Knowles, Douglas County Attorney, and Rockford G. Meyer, for appellee.

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

KRIVOSHA, C.J.

The appellant, Thomas S. Mitchell, appeals from an order of the District Court for Douglas County, Nebraska, dismissing Mitchell's petition in error. We affirm.

Mitchell was employed as a deputy sheriff by the County of Douglas. On August 5, 1980, while running a "combat action course," he suffered a myocardial infarction which resulted in his being totally disabled and unable to perform his duties with the Douglas County sheriff's office. Mitchell filed a claim with the county, seeking to obtain coverage for his injury under a specific program established by the county and known as the "Injured on Duty Policy." The policy, adopted by resolution on November 25, 1975, by the Douglas County Board of County Commissioners, specifically provided that if certain conditions were met, members of the Douglas County sheriff's office would be eligible to re-

ceive disability payments equal to 100 percent of their total salary for the first 5 years of disability and 70 percent of their total salary thereafter.

The county board's resolution creating the program specifically provided in relevant part as follows: "WHEREAS: (a) The Douglas County Sheriff's Office is desirous of the County implementing an Injured on Duty Policy for members of the Douglas County Sheriff's Office, such injury causing total disability. (b) To be considered totally disabled the individual must be unable to perform the duties of his occupation and receive no earnings for performing other work or service. (c) The Injured on Duty Plan causing total disability for the Sheriff or one of his Deputies would pertain only to injuries received by employees of the Douglas County Sheriff's Office while performing duties for and in behalf of Douglas County. (d) The Injured on Duty Plan is established for Douglas County Sheriff's employees *only while performing a high-risk duty in the course of their employment.* If there be a discrepancy as to whether or not the injury was received during high-risk duty, a three-man panel is established to make the final determination." (Emphasis supplied.) Neither the resolution nor any supplementary material adopted by the county board defined "high-risk duty." Following Mitchell's injury a dispute developed as to whether Mitchell's injury was due to a "high-risk duty" within the terms of the resolution, and pursuant to the resolution an evidentiary hearing was conducted on March 4, 1981, before the designated panel. On March 17, 1981, the panel concluded that Mitchell's claim should be denied.

The transcript of the hearing before the panel discloses that Mitchell, who was 40 years of age at the time of his heart attack and who weighed 215 pounds, was required on the day in question to negotiate a combat action course, which consisted of running along a designated course and firing a sidearm at various targets. The course was designed to

simulate the stress which an officer might encounter in an emergency situation so that his accuracy with a firearm could be tested under somewhat realistic conditions. The stress was generated by reason of having to fire for accuracy and from peer pressure to perform well. The day that Mitchell ran the course the temperature was in the mid to upper 80s and the humidity was high. He ran the course once without exhibiting any adverse symptoms, but he failed to pass; so he was required, after a rest of 10 minutes or less, to run it a second time. This time he passed, but he began to sweat heavily and complained that he was short of breath. He later went into cardiac arrest and suffered the myocardial infarction.

The first and only issue that we need consider in reviewing this appeal is whether the action of Mitchell in running this combat target-firing course was "high-risk duty" within the meaning of the resolution. If we conclude, as we do, that it was not high-risk duty, then Mitchell was not entitled to additional compensation and the board's action, for whatever reason, was correct. As we indicated at the outset, the county board's resolution does not define "high-risk duty." We are, however, aided by certain rules of construction in attempting to ascertain the meaning of the resolution. We have previously held that this court, in considering the meaning of a statute, should, if possible, discover the legislative intent from the language of the act and give it effect. See, *Freese and Johnson v. County of Douglas,* 210 Neb. 521, 315 N.W.2d 638 (1982); *Otto v. Hahn,* 209 Neb. 114, 306 N.W.2d 587 (1981). We are furthermore advised that one of the fundamental principles of statutory construction is to attempt to ascertain the legislative intent and to give it effect. See *Seldin Development & Management Co. v. Chizek,* 208 Neb. 315, 303 N.W.2d 300 (1981). Also, in construing a statute, this court must look to the objective to be accomplished and the purpose to be

served, and place on it a reasonable construction which will best effect its purpose rather than a construction which will defeat it. *West Nebraska General Hospital v. Hanlon,* 208 Neb. 173, 302 N.W.2d 694 (1981). And, finally, in construing a statute, this court must look to the objects to be accomplished, the evils and mischiefs sought to be remedied, or the purpose to be served, and place on the statute a reasonable or liberal construction which will best effect its purpose rather than one which will defeat it. *School District of Murray v. Lancaster,* 203 Neb. 109, 277 N.W.2d 558 (1979). We believe that the rules of construction used by this court in interpreting legislative action are applicable here and of benefit to us in attempting to determine the meaning of the resolution adopted by the Douglas County board.

In our opinion, the resolution was not intended to either eliminate or duplicate the general workmen's compensation laws of the State of Nebraska applicable to employees of the Douglas County sheriff's office. We must therefore conclude that the county board, in adopting the resolution in question, was attempting to provide some benefit for employees of the Douglas County sheriff's office which would be other or different than that which they would normally have received by reason of their employment under the workmen's compensation laws, and which was intended to provide them with an additional benefit because of doing something more than performing their normal and routine duties. We believe that is the reason the Douglas County board, in adopting the resolution, limited coverage to the sheriff's employees to "only while performing a high-risk duty in the course of their employment." Obviously, if the resolution was intended to cover work normally performed in the course of their employment, it would have been unnecessary to have included the phrase "high risk."

One may argue that just being a deputy sheriff is high risk. Yet, the resolution required that the in-

jury be the result of performing a "high-risk duty" in the course of their employment. The use of the phrase "high-risk duty in the course of their employment" must mean something more than routine employment duties. The question to be answered, then, is whether running the combat course was a high-risk duty. We find no cases in Nebraska which have defined the phrase "high risk." Nevertheless, in looking at the standard dictionary definition, we find that the term "risk" is defined to mean "to expose to hazard or danger." Webster's Third New International Dictionary, Unabridged (1968). We are therefore required to conclude that, in the first instance, the duty being performed which would entitle Mitchell to payment must be something in the course of employment which exposes the officer to a hazard or danger. The term "high" is likewise defined to mean "at or to a great distance or altitude; far up toward the source; in or to a high position, amount, or degree." *Id.* Reading the words together, then, we would interpret the phrase "high risk" under the resolution to mean exposing one to a greater hazard or danger than one would normally encounter in the course of his employment. We believe an example of such high-risk duty for a police officer might be the pursuit of a fleeing felon or attempting to charge a building where a felon has secured himself and is firing at the officers. These, of course, are intended simply as examples of high risk and not intended in any manner to define the term in its entirety. We believe that running an obstacle course, though indeed it may be stressful, cannot be said to be high risk within the meaning of the county's resolution. There is no great hazard or danger that anyone will return the officer's fire, nor can the officer likely be injured except perhaps by his own careless act or, as here, due to a gradual physical infirmity. We cannot believe that in attempting to provide this extraordinary benefit for the members of the sheriff's department the county board could

have intended the action of an officer in performing on a firing range to be considered a high-risk duty, no matter how stressful the experience might be. We therefore believe that the board appointed in the county board's resolution to determine whether the injury was committed while engaged in a high-risk duty was correct in determining that Mitchell was not injured as a result of a high-risk duty, and the District Court was likewise correct in affirming its action. The judgment of the trial court is therefore affirmed.

AFFIRMED.

CLINTON, J., not participating.

ROBERT L. BASS, M.D., APPELLANT AND CROSS-APPELLEE, V. KENNETH R. DALTON, M.D., APPELLEE AND CROSS-APPELLANT.

329 N.W.2d 115

Filed January 21, 1983. No. 81-803.

1. **Partnerships: Accounting: Appeal and Error.** An action for the dissolution of a partnership and an accounting between partners is one in equity and is reviewed in this court de novo on the record.
2. _____: _____: _____. Imposed upon the Nebraska Supreme Court in such a case is the duty to reach an independent conclusion without reference to the findings of the District Court, bearing in mind and according respect and weight to the trial court's superior position as the original finder of fact.
3. **Contracts.** Words used in a contract must be given their plain and ordinary meaning as ordinary, average, or reasonable persons would understand them.
4. _____. A contract must be viewed as a whole.
5. _____. Courts are not free to interpret contracts which are couched in clear and unambiguous language; parties are bound by the terms of a contract even though their intent may be different from that expressed by the agreement.

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

Donald R. Treadway for Treadway & Bird, P.C., for appellant.

Philip T. Morgan for Morgan & Morgan, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and MORAN, D.J.

CAPORALE, J.

Plaintiff-appellant, Robert L. Bass, M.D., appeals from the judgment of the District Court distributing certain partnership assets to defendant-appellee, Kenneth R. Dalton, M.D., who cross-appeals, claiming the trial court erred in directing an accounting of the partnership's income, in assessing the expenses of obtaining same to Dr. Dalton, and in the taxation of the costs of suit to him. We affirm as modified.

Dr. Bass assigns as error (1) the trial court's finding that article XVII of the agreement in question was unambiguous, and (2) the distribution of the partnership assets to Dr. Dalton without any compensation to Dr. Bass therefor.

An action for the dissolution of a partnership and an accounting between partners is one in equity and is reviewed in this court de novo on the record. Imposed upon us in such a case is the duty to reach an independent conclusion without reference to the findings of the District Court, bearing in mind and according respect and weight to the trial court's superior position as the original finder of fact. *Von Seggern v. Von Seggern,* 196 Neb. 545, 244 N.W.2d 166 (1976); *Byram v. Thompson,* 154 Neb. 756, 49 N.W.2d 628 (1951).

In 1958 Dr. Bass joined Dr. Dalton in the practice of medicine at Genoa, Nebraska, where the latter had been practicing since the mid-1940s. During the course of their relationship these two physicians entered into three agreements. The last agreement, the one in question, dated October 6, 1965, designates Dr. Dalton as the first party and Dr. Bass as the second party and, to the extent relevant here, provides as follows:

"XVI.

"It is understood and agreed that if first party

shall decide to retire or in the event of his death, second party shall pay first party or his heirs $40,000.00 representing the value and entire interest of the personal property of said first party.

"XVII.

"It is understood and agreed that if said second party decides to terminate this partnership agreement or fails to perform or in the event of his death that all personal property and interests of whatever kind or nature shall revert to party of the first part.

"XVIII.

"It is understood and agreed that the party of the second part shall continue to carry and pay for personally life insurance in the amount of $20,000.00 made payable to the party of the first part and upon the death of the second party the first party will pay over to second party's wife or heirs said $20,000.00, together with an additional $20,000.00 which shall represent and pay for all of second party's interest in the business, including all personal property, accounts receivable, good will and going concern without any further accounting or obligation on the part of the first party."

Dr. Bass voluntarily left the partnership on May 31, 1980.

In his amended petition Dr. Bass sought a dissolution of the partnership, an accounting for and distribution to him of one-half of all the partnership assets, and other equitable relief. In the course of the proceedings Dr. Bass expanded, by motion, his request for an accounting to include the partnership's "interests, profits and outstanding accounts receivable as of May 31, 1980 . . . ."

Dr. Bass' major claim is that article XVII of the agreement, when read with its other provisions, is ambiguous and must be judicially construed. The claim is without merit.

The words used in article XVII must be given their plain and ordinary meaning as ordinary, average, or reasonable persons would understand them. *Bishop*

Buffets, Inc. v. Westroads, Inc., 202 Neb. 171, 274 N.W.2d 530 (1979); *Rogers v. Neiman*, 187 Neb. 582, 193 N.W.2d 266 (1971). It is true, as argued by Dr. Bass, that the contract must be viewed as a whole. *Dockendorf v. Orner*, 206 Neb. 456, 293 N.W.2d 395 (1980). It is also true, however, that courts are not free to interpret contracts which are couched in clear and unambiguous language; parties are bound by the terms of a contract even though their intent may be different from that expressed by the agreement. *Timmerman Bros., Inc. v. Quigley*, 198 Neb. 129, 251 N.W.2d 877 (1977). The clear meaning of article XVII is that, although the consequences would be different if the partnership were terminated by the death or retirement of Dr. Dalton, termination of the partnership by Dr. Bass resulted in setting over to Dr. Dalton the "personal property and interests" of the partnership without compensation to Dr. Bass therefor. Although the use of the word "revert" may not have been as artful as might be desired, it cannot be said that it renders article XVII ambiguous and subject to interpretation. The trial court was entirely correct in this respect.

We next turn our attention to Dr. Dalton's cross-appeal. The undistributed net profits, under the terms of the agreement in question providing that such shall be divided equally between the parties, are not properly an asset of the partnership but, rather, are a debt of the partnership to the partners. See Neb. Rev. Stat. § 67-340 (Reissue 1981). The trial court was therefore correct in ordering an accounting and in directing a distribution to plaintiff of his share of the net profits or income as of May 31, 1980. The accounting was necessary and beneficial to each of the partners. Accordingly, the expense of obtaining same is to be borne equally by the two partners.

In actions of the type presented here, the court may award and tax costs and apportion the same between the parties as it, in its discretion, may deem

right and equitable. Neb. Rev. Stat. § 25-1711 (Reissue 1979). See *Langel Chevrolet-Cadillac v. Midwest Bridge, ante* p. 283, 329 N.W.2d 97 (1983). In view of the fact Dr. Bass did not succeed in supporting his major claim, and in view of the foregoing apportionment of the expense of obtaining the accounting, we determine that Dr. Bass shall pay the costs of this suit.

AFFIRMED AS MODIFIED.

LORI ANN NYE, APPELLEE, V. GEORGE WAYNE NYE, APPELLANT.

329 N.W.2d 346

Filed January 21, 1983. No. 82-045.

1. **Parental Rights.** An effective forfeiture of parental rights may be effected by the indifference of a parent for a child's welfare over a long period of time.
2. **Child Custody.** While it is true that a parent has a natural right to the custody of his child, the court is not bound as a matter of law to restore a child to a parent under any and all circumstances. The welfare of a child of tender years is paramount to the wishes of the parent where it has formed a natural attachment for persons who have long been in the relation of parents with the parents' approval and consent.
3. _____. It may be said that a natural parent, who by reason of past conduct and defaults has made it necessary to place a minor child in a situation where such child has formed a natural attachment for persons standing in a parental relationship, has approved of and consented to such relationship and has forfeited his or her natural rights to custody.
4. **Guardians Ad Litem: Fees.** A court has both inherent and statutory authority to appoint a guardian ad litem to protect the interests of a minor child engaged in, or affected by, litigation. Along with such authority goes the authority to award fees for such guardian's services.
5. **Guardians Ad Litem: Fees: Costs.** The allowance of a guardian ad litem's fees and costs is discretionary and depends upon a consideration of all the facts and circumstances.
6. **Costs.** Ordinarily, the successful party is entitled to an award of costs, and it necessarily follows in such cases that payment of the same will be taxed to the unsuccessful party.

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

Donald B. Fiedler, for appellant.

Hurt, Gallant & Flores, for appellee.

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

HASTINGS, J.

George Wayne Nye, the respondent-appellant, has appealed from an order of the District Court which denied his application for modification of a marriage dissolution decree. He had requested custody of the minor children of the parties. His principal assignment of error is that the decision of the trial court was contrary to law and the evidence. He also complains of the fact that the entire amount of the fee awarded to the guardian ad litem was taxed to him.

On October 6, 1978, the marriage of the respondent and of Lori Ann Nye, the petitioner, was dissolved. The custody of the minor children, Johnny, born October 14, 1973, and Leonard, born January 11, 1977, was granted to the petitioner. This is the second application for change of custody which has been filed by the respondent.

The first application was filed in May of 1980, and a hearing was held on August 1, 1980. Without reviewing the evidence in detail, it is fair to say that it adequately supports a finding that the petitioner, Lori Ann, was not at that time a fit and proper person to have custody of the children. As a matter of fact, the maternal grandfather and stepgrandmother, Leonard and Anna Strand, had commenced guardianship proceedings in August of 1979, and had had the actual physical custody of the children since at least that time. Mrs. Strand testified that the respondent was not notified of that proceeding because, even though she had inquired of the respondent's mother, she did not know where the respondent

was then living. She also insisted that from shortly after the date of the decree in October of 1978 to the present time, the respondent had had no contact with the children, had never called them on the phone, and had not sent any gifts. She did say that the respondent's mother had inquired about the children on many occasions.

According to the testimony of the respondent at this first hearing, he admitted that his mother had taken the children from their home in Scribner, Nebraska, down to St. Louis, Missouri, in June of 1978. He followed them down the next month. He said that no notification was given to Lori Ann or the Strands that the children were going to be taken to St. Louis. According to the respondent, he did not return the children to Nebraska voluntarily even though he knew of the court's order of August 8, 1978, awarding temporary custody to the petitioner. It was not until sometime in November of 1978, as testified to by the respondent, that the petitioner was able to locate him and the children, with the aid of a private investigator, and he surrendered the children upon order of the police.

It also developed at this first hearing that although the respondent had been ordered by the court to pay child support of $25 per week per child, he had paid but $650 voluntarily. As a part of the August 1, 1980, hearing, he was held in contempt of court and ordered placed in the custody of the sheriff until he had purged himself by payment of all support and costs in full. He complied with that order by the payment of $4,100 on August 12, 1980. During the period of time that he had been failing to make child support payments he had spent $2,650 in legal fees in an attempt to gain custody of the children.

It was on the basis of the foregoing record that the District Court entered an order dated August 4, 1980, finding that neither the petitioner nor the respondent was a fit and proper person to have the custody of the children, and ordered legal custody placed in the

court with physical custody awarded to the Strands. No appeal was taken from that order.

In his petition for change of custody filed in July of 1981, the respondent alleged as a change of circumstances that he was now maintaining his support payments on a regular basis. In addition, he alleged his moral fitness, that by reason of his younger age he was better equipped to raise the children than were the grandparents, and that by law his parental rights were superior to those of the grandparents. Hearing was held on that application in October of 1981.

The evidence adduced at that and earlier hearings generally supported the respondent's claim that he had paid his child support regularly and had obtained and exercised rights of visitation. There was no evidence of the moral or physical unfitness of either the respondent or of the grandparents. The home study evaluation of both homes was quite satisfactory.

However, one rather disturbing factor which had occurred prior to the August 1, 1980, hearing was brought out in these later hearings. That had to do with another effort at self-help on the part of the respondent. He testified that, acting upon the advice of a St. Louis lawyer, he came up to Nebraska in October of 1979 and, without telling anyone, took the children from the babysitter and removed them to St. Louis. At that time he knew that the Strands were actually taking care of the children because he had visited them only the week before. Following the unauthorized removal of the children from the State of Nebraska, Mrs. Strand was forced to go to St. Louis and regain custody by means of a habeas corpus proceeding. According to Mrs. Strand, after that incident the respondent did start calling the children on the phone, but did not ask for visitation. However, court-approved visitations apparently were held in the summer of 1980, Christmas of 1980, and the spring or summer of 1981.

Received in evidence as a part of the 1981 hearings was a written report from the Nebraska Psychiatric Institute, dated June 12, 1981. It indicated that there was an attachment by the children to both the grandparents and the father, that the children were doing well and would continue to do well in the grandparents' home, and would benefit from extended visitations with their father. A later report from NPI, dated August 21, 1981, revealed that the children seemed somewhat unhappy about a recently completed visitation in St. Louis with their father. The report, through the staff psychiatrist, concluded that the "boys would do well to continue living with their maternal grandparents, Mr. and Mrs. Strand," and that it would be best to send them to St. Louis for further visits only if they wanted to go, otherwise "for their father to come to Nebraska" for such visits.

In a January 1981 written report the medical director of the Fremont Mental Health Clinic, a licensed psychiatrist, ventured the opinion that the visitations with the father, by the older boy at least, were anxiety producing and had a negative effect on him. He stated in one report: "The visitation privileges granted the natural father by the court may be beneficial for the father but they are seen to be quite detrimental to this child and at the present time it is this facility's feeling that this child could benefit more by termination of such visits." During the course of this same witness' testimony at an April 1981 hearing, although he agreed that much of the negative feelings attributed to the boy as to his visits with his father came from the recitation of Mrs. Strand, he did not change his previous opinion. He did agree on cross-examination that the fact that the boy had been living with his grandmother for the last 6 years and was more or less forced to visit his father might have been one of the factors creating a separation anxiety disorder.

The guardian ad litem, who had been serving in

such capacity from August of 1980 until the October 1981 hearing, testified. He agreed that the respondent had been meeting his support obligations and would be considered a fit parent. He also ventured the opinion that although there may have been a question at one time as to whether it was the respondent or his mother who really wanted custody of the children, he now felt that the respondent truly did care about them and desired their custody. However, the guardian ad litem also stated that in his opinion the best interests of the children would be served by continuing to allow them to reside with the Strands. He based this on the August 21, 1981, report from the NPI staff psychiatrist, previously mentioned, on conversations with the boys as to their personal desires to remain with the grandparents, and because of the natural attachment which they had formed with the Strands through the circumstances of having lived with them all these years.

There is no evidence adversely reflecting upon the ability of the Strands to take care of these children, other than the fact that they are both in their mid-50s and are not the parents. An in-chambers interview with the children, conducted by the court with the approval of counsel, was not particularly startling. Both children indicated that they cared for both their grandparents and their father and, although they wanted to live with the grandparents, did want to visit with their father on occasion.

Based on the above record, the District Court in its findings reviewed the past delinquencies of the respondent as to child support and the two unauthorized efforts at self-help indulged in by the respondent regarding custody of the children. The court then concluded by pointing to the natural attachment that had developed between the children and their grandparents, made necessary because of the past actions of both the petitioner and the respondent, and found that the best interests of the children

would be served by maintaining custody with the Strands, within the jurisdiction of the court. It is this order which the respondent seeks to reverse as being contrary to the established law of Nebraska.

In support of his position, the respondent relies almost exclusively on *Nielsen v. Nielsen,* 207 Neb. 141, 296 N.W.2d 483 (1980). The majority opinion reviewed the prior authorities and stated the guiding principles in determining child custody to be: "Where the custody of a minor child is involved in a habeas corpus action, the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of a fit, proper, and suitable parent.

"The 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.

"The right of a parent to the custody of his minor child is not lightly to be set aside in favor of more distant relatives or unrelated parties, and the courts may not deprive a parent of such custody unless he is shown to be unfit or to have forfeited his superior right to such custody." *Id.* at 149, 296 N.W.2d at 486.

As stated in the dissenting opinion of *Raymond v. Cotner,* 175 Neb. 158, 169, 120 N.W.2d 892, 898 (1963), "in order to permit the child to remain in an established and developed parental relationship with all that that imports," we will not be "forced to strain the evidence in order to find the blood parent 'unfit.' " However, we are not unmindful of the language in *Gray v. Hartman,* 181 Neb. 590, 595-96, 150 N.W.2d 120, 123 (1967), in which we said that "proper concern for the welfare of a child encompasses something more than dutiful adherence to a court's order as to financial support. . . . 'Children are not chattels,' and to entitle one to parental rights he must show something more than mere indicia of title. . . . He appears now as an absolute stranger to

her, and under the guise of concern for her welfare, has no hesitation in seeking to uproot her at an age when she is approaching the threshold of adulthood. An effective . . . forfeiture of parental rights may be effected by the indifference of a parent for a child's welfare over a long period of time."

Also, in *Haynes v. Haynes,* 205 Neb. 35, 39, 286 N.W.2d 108, 110 (1979), we said: "While it is true that a parent has a natural right to the custody of his child, the court is not bound as a matter of law to restore a child to a parent under any and all circumstances. The welfare of a child of tender years is paramount to the wishes of the parent where it has formed a natural attachment for persons who have long been in the relation of parents with the parents' approval and consent."

Although the respondent in the present case has not specifically approved or consented to the relationship which has developed between the children and their grandparents, he has, by his past conduct and defaults, not only permitted but practically demanded it. As such, we conclude that he has "forfeited his superior right to such custody" which he might otherwise have possessed, and the best interests of the children require that they remain in the custody of the Strands.

The District Court awarded the guardian ad litem the sum of $1,120 as fees and taxed the same to the respondent as costs of this action. The respondent does not complain of the amount of the fees, but only that it was all taxed to him.

The authority of the court to appoint a guardian ad litem to protect the interests of the minor children cannot seriously be questioned. Neb. Rev. Stat. §§ 38-114 and 42-358 (Reissue 1978). The power of the court to award fees for such guardian ad litem is a necessary incident to the power of appointment. The allowance of fees and costs is discretionary and depends upon a consideration of all the facts and circumstances. *Friedenbach v. Friedenbach,* 204 Neb.

586, 284 N.W.2d 285 (1979). Ordinarily, the successful party is entitled to an award for costs, and it necessarily follows in such cases that payment of the same will be taxed to the unsuccessful party. *Kasparek v. May,* 178 Neb. 425, 133 N.W.2d 614 (1965). We find no abuse of discretion by the trial court in taxing costs as it did.

The judgment of the District Court is affirmed.

AFFIRMED.

CLINTON, J., not participating.

WHITE, J., concurring.

I remain committed to the position taken in the dissent in *Haynes v. Haynes,* 205 Neb. 35, 286 N.W.2d 108 (1979). However, the conclusion that the father, by his conduct, has in fact abandoned the child is not an unreasonable one, and for that reason I concur in the judgment.

MCCOWN and CAPORALE, JJ., join in this concurrence.

FLORENCE E. NORDBY, APPELLANT AND CROSS-APPELLEE, V. GOULD, INC., A DELAWARE CORPORATION, APPELLEE AND CROSS-APPELLANT.

329 N.W.2d 118

Filed January 21, 1983. No. 82-092.

1. **Workmen's Compensation.** The statutory scheme found in Neb. Rev. Stat. § 48-121 (Reissue 1978) compensates impairments of the body as a whole in terms of employability and loss of earning capacity but compensates impairments of scheduled members on the basis of loss of physical function.
2. _____. The test for determining whether a disability is to a scheduled member or the body as a whole is not the situs of the injury but, rather, the location of the residual impairment.
3. **Workmen's Compensation: Proof.** The plaintiff bears the burden of establishing a causal relationship between the accident and any disability.

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

Herbert J. Friedman of the Friedman Law Offices, for appellant.

Baylor, Evnen, Curtiss, Grimit & Witt, for appellee.

BOSLAUGH, CLINTON, and HASTINGS, JJ., and CAMBRIDGE, D.J., and COLWELL, D.J., Retired.

PER CURIAM.

In this appeal the plaintiff-appellant, Florence E. Nordby, challenges the award on rehearing of the Nebraska Workmen's Compensation Court which awarded plaintiff, among other benefits, a permanent partial disability of her right arm. Plaintiff argues that she suffers a disability of her body as a whole and should have been compensated accordingly. The defendant-appellee, Gould, Inc., cross-appeals, claiming that plaintiff failed to prove a causal connection between the accident arising out of and in the course of her employment and any disability. We affirm the award of the compensation court and dismiss defendant's cross-appeal.

The plaintiff is a 56-year-old married lady with an eighth grade education who has worked as a manual laborer throughout her employment life. She has been employed by the defendant since 1972, and on the date in question worked as an assembler of small metal pieces. While so employed, on February 4, 1980, she slipped and fell, during the course of which, according to the treating orthopedic surgeon, she struck her right elbow, jammed her right shoulder, and landed on her back. Plaintiff testified that during the fall she struck her elbow, shoulder, head, and back.

Subsequent surgery revealed that the fall caused inflammation and degeneration of the right rotator cuff (shoulder muscle), together with fraying and degeneration of the right bicipital tendon. In the orthopedist's opinion these conditions have produced a 15-percent permanent partial disability of plain-

tiff's right shoulder, a 9-percent permanent partial disability of her body as a whole, secondary to the shoulder problem, limiting plaintiff's ability to use her right arm. Tests performed at the request of a private rehabilitation counselor testifying for the plaintiff tended to support the surgeon's opinion that the impairments limit plaintiff's ability to use her right arm. In the opinion of the rehabilitation counselor, plaintiff is now unemployable. Plaintiff testified she experiences shoulder pain and cannot use her right arm for activities such as lifting, reaching, writing, pushing her vacuum sweeper, or playing yard darts. In sum, she testified she has limited use of her right arm and cannot control her right hand. She testified she has no problems with her neck, back, legs, or left arm but lacks confidence in walking because she feels she cannot control her balance as she cannot use her right arm and hand to steady herself.

The statutory scheme found in Neb. Rev. Stat. § 48-121 (Reissue 1978) compensates impairments of the body as a whole in terms of employability and loss of earning capacity but compensates impairments of scheduled members on the basis of loss of physical function. *Goers v. Bud Irons Excavating,* 207 Neb. 579, 300 N.W.2d 29 (1980); *Scamperino v. Federal Envelope Co.,* 205 Neb. 508, 288 N.W.2d 477 (1980); *Jeffers v. Pappas Trucking, Inc.,* 198 Neb. 379, 253 N.W.2d 30 (1977).

The question presented is whether plaintiff's impairment is to her right arm or to her body as a whole. In one sense an impairment of any part of the body is necessarily, to some extent, an impairment of the whole body. The statute, § 48-121, however, requires that we distinguish between scheduled member impairments and nonscheduled body as a whole impairments.

We resolved the means of making the distinction in *Jeffers v. Pappas Trucking, Inc., supra,* wherein the question was whether a hip injury resulted in a

leg or body as a whole disability. We determined the test was not the situs of the injury but, rather, the location of the residual impairment. Since the plaintiff in *Jeffers* not only walked with a limp but also had disabling pain at his beltline and back, we concluded the disability was to the body as a whole. In the instant case, however, the evidence supports a factual finding, inherent in the compensation court's award, that plaintiff's disability is limited to the loss of use of her right arm. That finding of fact has the same force and effect as a jury verdict in a civil case and, being supported by the evidence, will not be disturbed here unless clearly wrong. *Negrete v. Western Electric Co., Inc.*, 212 Neb. 876, 326 N.W.2d 681 (1982); *Goers v. Bud Irons Excavating, supra.* See, also, *Scamperino v. Federal Envelope Co., supra,* wherein we held the evidence supported a finding that a fracture to the right leg which healed with such a deformity as to affect the hip and rest of the body produced a disability of the body as a whole. In this case there is no finding of the development of such unusual and extraordinary conditions which affected the body as a whole.

The defendant is indeed correct in arguing that the plaintiff bears the burden of establishing a causal relationship between the accident and any disability. *Negrete v. Western Electric Co., Inc., supra.* However, defendant errs in relying on *Husted v. Peter Kiewit & Sons Constr. Co.*, 210 Neb. 109, 313 N.W.2d 248 (1981). The testimony in *Husted* that it was "more likely" than not that the event in question caused the disability was held to be inadequate to establish the element of causation. In the instant case, however, there is no doubt that in the treating orthopedist's opinion the fall caused the disability in question. Defendant's cross-appeal is without merit and is dismissed.

The award of the Nebraska Workmen's Compensation Court on rehearing is affirmed.

AFFIRMED.

CLINTON, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. KEVIN O. KOMOR, APPELLANT.

329 N.W.2d 120

Filed January 21, 1983. No. 82-409.

1. **Sentences: Appeal and Error.** The Nebraska Supreme Court has authority to reduce a sentence when it is excessive and would result in a substantial miscarriage of justice.
2. _____: _____. Only a sentence which is clearly excessive is to be reduced by the Nebraska Supreme Court.
3. _____: _____. The Nebraska Supreme Court will not reduce a sentence imposed within statutory limits absent an abuse of discretion by the trial court.

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

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

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

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

CAPORALE, J.

Defendant-appellant, Kevin O. Komor, was charged with theft of property having a value in excess of $1,000. Upon pleading guilty, he was sentenced to a term of imprisonment at the Nebraska Penal and Correctional Complex for a period of not less than 1 nor more than 3 years. In this appeal, defendant claims the sentence is excessive. For the reasons hereinafter stated, we agree with defendant and reduce the sentence.

On February 22, 1982, the 18-year-old defendant and two acquaintances, one an adult and the other a juvenile, were in the home of the juvenile acquaintance's mother and her boyfriend or husband. While there, the three decided to steal the husband-boyfriend's stereo set. All three participated in the transaction; the defendant helped the other two carry the set out of the house and load it into a truck.

The set was to be sold and the three were to share equally in the proceeds.

The defendant quit school in the 10th grade, admitted to drug and alcohol use, had neither financial obligations nor employment (he stated he supported his habits by the sale of his blood), and had no prior traffic, juvenile, or adult criminal record. The adult coperpetrator dropped out of the ninth grade, denied drug use, had been employed at the time of his presentence investigation for 3 weeks as a dishwasher, had had prior short-term employment at minimal wages, and had a history of juvenile and adult criminal convictions dating to 1977.

Theft of property having a value in excess of $1,000 is a Class III felony for which the maximum permissible punishment is 20 years' imprisonment, a $25,000 fine, or both such imprisonment and fine; the minimum punishment is imprisonment for 1 year. Neb. Rev. Stat. §§ 28-105, 28-511, 28-518(1) (Reissue 1979).

The adult coperpetrator was sentenced by another division of the same sentencing court to 2 years' probation upon the conditions, among others, that he make restitution for one-half of the "loss incurred" and serve 90 days in the Douglas County Department of Corrections.

During the course of the presentence investigation, defendant failed to properly keep two appointments with the investigating probation officer, and on one occasion, after defendant appeared earlier than scheduled, became upset when told to go home and return at the scheduled time and stormed out of the office. The investigating probation officer then recommended against probation.

Neb. Rev. Stat. § 29-2308 (Reissue 1979) provides this court with authority to reduce a sentence on appeal when said sentence is excessive and would result in a substantial miscarriage of justice. We have held that only a sentence which is clearly excessive is to be reduced, *State v. Orner,* 192 Neb. 523,

222 N.W.2d 819 (1974), and that we will not reduce a sentence imposed within statutory limits absent an abuse of discretion by the trial court, *State v. Cook,* 212 Neb. 718, 325 N.W.2d 159 (1982).

Under the circumstances of this case we conclude defendant's sentence is the result of an abuse of discretion by the trial court, is clearly excessive, and if affirmed on appeal would result in a substantial miscarriage of justice. It appears, in the face of the absence of any prior criminal record and the sentence imposed upon defendant's adult coperpetrator, that the court placed undue reliance upon the recommendations of a piqued functionary conducting the presentence investigation and defendant's less-than-exemplary conduct during that investigation. It may be that the defendant will prove himself incapable of successfully carrying out a sentence of probation; however, we deem that, in view of the treatment accorded defendant's coperpetrator, and especially in view of the fact defendant has no prior criminal record, defendant must in any event be given the opportunity to try. Anything other than that would constitute an impermissible disparity of sentences for identical offenses.

The sentence of the trial court is modifed to one of probation for a period of 2 years upon the same conditions as those imposed upon defendant's coperpetrator, James V. Roberts.

AFFIRMED AS MODIFIED.

Cite as 213 Neb. 379

IN RE TESTAMENTARY TRUST OF CLAIR C. CRISS, DECEASED.

UNITED BENEFIT LIFE INSURANCE COMPANY, A CORPORATION, APPELLANT AND CROSS-APPELLANT, V. THE OMAHA NATIONAL BANK, TRUSTEE, APPELLANT AND CROSS-APPELLEE; NINA CARDEN ET AL., APPELLEES AND CROSS-APPELLANTS; CREIGHTON UNIVERSITY, ALSO KNOWN AS CREIGHTON MEDICAL SCHOOL, A CORPORATION, ET AL., APPELLEES AND CROSS-APPELLEES.

329 N.W.2d 842

Filed January 28, 1983. No. 44062.

1. **Trusts: Appeal and Error.** An action to construe a trust indenture will be reviewed in this court de novo on the record.
2. **Wills: Words and Phrases.** A devise to "issue" or "issue of the body" will be construed as meaning lineal descendants, rather than children, in the absence of qualifying words showing a contrary intent.
3. **Wills: Intent.** In order to determine when a class should close under a testamentary disposition, it is necessary to try to ascertain the intent of the testator and, if legally possible, give effect to that intent, determined by a viewing of the entire will.
4. **Wills.** Generally speaking, a will speaks as of the date of death of the testator, and in the absence of anything in the will showing a contrary intention, the number of the class will be determined upon the death of the testator.
5. _____. Whenever the increase in the period of postponement of the closing of a class would render invalid, under the applicable rule against perpetuities, either the disposition of income to the class or part or all of the ultimate disposition of the corpus, then such invalidity is sufficient to prevent the lengthening of the period during which the class can increase in membership.
6. **Wills: Estates.** It is the general rule that in the absence of a controlling equity, or of an express or implied provision in the will to the contrary, where an estate is given to a person for life with a vested remainder in another, the remainder takes effect in possession whenever the prior gift ceases or fails in whatever manner.
7. **Wills: Intent.** A patent ambiguity must be removed by interpretation according to legal principles, and the intention of the testator must be found in the will. In searching for this intention the court must examine the entire will, consider each of its provisions, give words their generally accepted literal and grammatical meaning, and indulge the presumption that the testator understood the meaning of the words used.
8. _____: _____. A clause or provision of a will must, if possible, be

so construed as to give effect to the intention of the testator. If doubtful or ambiguous words, in their ordinary literal sense, appear to be inconsistent with plain and unambiguous language in the same clause or sentence, such words will be so construed, if reasonably possible, as to render the whole clause or sentence intelligible and consistent.

9. **Wills: Estates: Property.** One of the primary incidents of ownership of property in fee simple is the right to convey or encumber it. It is the general rule that a testator may not create a fee simple estate to vest at his death and at the same time restrict its alienation. However, this is not to say that such testator may not, in some situations, create economic incentives in his will encouraging the retention of property, without violating the rule condemning restrictions on alienation.
10. **Wills: Estates.** As a general rule, when an attempted prior interest fails under a will because the person to whom it is limited renounces it, succeeding interests are accelerated, with certain minor exceptions.
11. _____: _____. A testator is presumed to know that his widow might elect to take her share of his estate as provided for by statute and renounce any interest under his will.
12. _____: _____. When a widow elects to take her "forced" or statutory share and renounce her interest under her husband's will, she may well be treated as having predeceased her husband, thereby taking no interest under the will.

Appeal from the District Court for Douglas County: D. NICK CAPORALE, Judge. Affirmed.

Flavel A. Wright and Donald Evans of Cline, Williams, Wright, Johnson & Oldfather, for appellant United Benefit.

Joseph J. Vinardi and William A. Day, Jr., of Gross, Welch, Vinardi, Kauffman & Day, P.C., for appellant Omaha National Bank.

John E. North and David L. Hefflinger of McGrath, North, O'Malley & Kratz, P.C., for appellees Volunteers of America.

Barlow, Johnson, DeMars & Flodman, for appellees Nina Carden et al.

William Jay Riley of Fitzgerald, Brown, Leahy, Strom, Schorr & Barmettler, for appellee Creighton University.

Hird Stryker and Peter J. Vaughn of Fraser, Stryker, Veach, Vaughn, Meusey, Olson & Boyer, P.C., for appellee Hattie B. Munroe Foundation.

Crosby, Guenzel, Davis, Kessner & Kuester, for appellee Leolla Chambers.

Ronald R. Volkmer of McGill, Koley, Parsonage & Lanphier, P.C., guardian ad litem for Florence Home and Fontenelle Home.

Thomas R. Burke, Lyman L. Larsen, and Patricia A. Zieg of Kennedy, Holland, DeLacy & Svoboda, and Frank J. Barrett, for amicus curiae Mutual of Omaha.

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

HASTINGS, J.

The Omaha National Bank (ONB), as trustee of the testamentary trust of Clair C. Criss, deceased, instituted an action in the county court of Douglas County for an order construing the language of the trust indenture. ONB, United Benefit Life Insurance Company (United), a contingent successor to the remainder interest in the corpus of the trust, and "The issue of Nina Carden," named income beneficiaries under the indenture of trust, appealed from the determination of that court to the District Court for Douglas County. Thereafter, United filed a declaratory judgment action in the District Court based on the same issues as those presented in the county court proceeding. The cases were consolidated for trial in the District Court, which affirmed the decision of the county court and dismissed the declaratory judgment action as being duplicative of the county court proceeding.

We believe that it will be more helpful to an understanding of the nature of this litigation to set forth an outline of the pertinent facts, which are undisputed,

before reciting the errors assigned and discussing the applicable law.

Clair C. Criss died on March 9, 1952, leaving surviving him his widow, Mabel L., but no lineal heirs. His will, which was admitted to probate approximately a month later, had been executed by him on January 16, 1942. By the third paragraph of that will he left to his wife all of his real estate, automobiles, household furniture and furnishings, and certain other items of personal property. All of the remainder of his estate, by the terms of the fourth paragraph of his will, he left to his wife, Mabel L. Criss, and ONB, as trustees. His wife was to be paid the net income from the trust, together with such amounts from the principal or corpus of the trust as ONB in its judgment deemed necessary. These payments were to be made to the decedent's wife "quarter annually for life, or until she, by written instrument filed with the Trustees, renounces her right to receive such income." The will went on to provide that "Upon the death of MABEL L. CRISS, the Trustee hereunder shall forthwith deliver all of the Trust Assets to The Omaha National Bank as Trustee under a certain Indenture of Trust between Mabel L. Criss and The Omaha National Bank, dated 15th day of January, 1942, to be administered according to the original and unmodified terms of said Agreement, and upon such delivery this trust shall terminate."

Under article I of that indenture of trust Mabel L. Criss, during her lifetime, was to be paid from income the sum of $200 per month. Article II, section (a), provided that at the death of the donor, Mabel L. Criss, $200 per month from net income was to be paid to each of the following nine individuals or units: Nina G. Engler; Nina Carden; the issue of Nina Carden, as one unit; Mrs. Deane Criss; Minnie Smith and Stella McDonald, as one unit; Sally Mahoney; Margaret Kunce; Leolla Chambers; and Fannie and Leonard Cross, as one unit. Under arti-

cle II, section (b), $5 per month was to be paid to each of the residents of the Florence Home for the Aged and the Fontenelle Boulevard Home. Under article II, section (c), the remaining income, up to a limit of $10,000 per year, was directed to be paid to Creighton Medical School, the Hattie B. Munroe Home, and the Volunteers of America.

Article III provides that upon the death of all nine of the individual or unit beneficiaries named in article II, section (a), the trust shall either terminate or continue in perpetuity, as the circumstances may dictate. The specific pertinent language is as follows: "Upon the death of all the persons and members of all the units, either named or described by class in Section (a) of Article II, this trust shall forthwith terminate and the principal and all unremitted income . . . shall be . . . conveyed, and assigned to, and shall be the absolute property of the UNITED BENEFIT LIFE INSURANCE COMPANY, Omaha, Nebraska. The foregoing provisions of this Article III are upon condition that there shall have been a continuity of stock ownership of the United Benefit Life Insurance Company from the date of its organization to the date of such delivery of the trust assets to the said Company." Then follows the language that perhaps is the most critical in connection with this appeal: "In the event that more than FIFTY PER CENT of the capital stock of such company shall have been subject to a change of ownership other than that occasioned by death within any five-year period subsequent to the death of the Donor and her husband, Clair C. Criss, then a lack of continuity of stock ownership shall be conclusively presumed. In the absence of such a transfer of Fifty Per Cent (50%) or more of such stock upon the conditions and within the time above stated, a continuity of ownership shall be conclusively presumed." Article III goes on to provide in part that "In the event of a failure of such condition relating to continuity of stock ownership, then upon

the death of such last survivor of Section (a) of Article II hereof, this Trust shall continue in perpetuity for the purposes set out in Sections (b) [residents of Florence Home for the Aged and Fontenelle Boulevard Home] and (c) [Creighton Medical School, Hattie B. Munroe Home, and the Volunteers of America] of Article II hereof, and all of the income after the payment of the amounts required by Section (b) shall annually be distributed to the institutions named in Section (c) of Article II."

United is a capital stock company with which Clair C. and Mabel L. Criss had had a close, lifetime association. At its inception, 20,000 shares of stock were issued. By November 11, 1952, as a result of amendments to its articles of incorporation, United had increased its stock issue to 100,000 outstanding shares. On November 11, 1952, 62,500 of those outstanding shares were transferred by way of a stockholders' agreement to Mutual of Omaha Insurance Company.

Following the admission of the will of Clair C. Criss to probate on April 12, 1952, Mabel L. Criss, on February 17, 1953, filed an election renouncing her interest under that will. According to the terms of the will, this removed her from the testamentary scheme of the will and the trust created thereunder, and, therefore, she no longer had any income interest in her husband's estate.

On January 10, 1955, ONB was appointed sole trustee for the trust created by the will of Clair C. Criss. As trustee, ONB retained the trust property and accumulated the income therefrom until April 4, 1978. At that time the trust assets were transferred to ONB as trustee under the trust indenture of January 15, 1942, previously mentioned above. This transfer occurred as a result of the death of Mabel L. Criss on March 19, 1978, changing the trust from that created under the will to that created by the indenture of trust dated January 15, 1942. ONB continued to hold these trust assets until it is deter-

mined which of the parties here involved is entitled to them.

Another critical decision involves the determination of the membership in the class consisting of "The issue of Nina Carden, considered as a unit," i.e., did the class close as of the date of death of Clair C. Criss on March 9, 1952, on the date that Mabel L. Criss filed her renunciation under the will on February 17, 1953, or on the date of death of Mabel L. Criss on March 19, 1978? Nina Carden, who is presently living, had two daughters: Claire Griffin, born on May 1, 1936, and who died on November 17, 1967, and Nina Evans, born on July 19, 1940, and who is still alive. To Claire were born Amy and David, on November 14, 1960, and August 2, 1962, respectively. Nina Evans has four living children, Timothy, twins Michael and Stephen, and Susan, born on October 18, 1962, October 25, 1964, and September 8, 1970, respectively.

In response to the various pleadings filed in county court, that court made the following findings: (1) The condition of continuity of stock ownership in United must occur or fail, and therefore its interest, or that of Creighton, Munroe Home, and Volunteers, as remaindermen, vest, at the death of the last of the nine individual or unit life income beneficiaries under article II, section (a), of the trust indenture; (2) United was a contingent remainderman of article III of the trust indenture, the contingency being the continuity of stock ownership of 50 percent of United's stock, which continuity was destroyed upon the sale of 62.5 percent of United's stock to Mutual of Omaha in November of 1952; (3) Membership in the class of "The issue of Nina Carden" was determined and closed as of the date of death of Clair C. Criss, and subsequently born issue of Nina Carden are not members of that class, thus avoiding any violation of the rule against perpetuities; (4) The continuity of ownership requirement in the indenture of trust does not create an illegal restraint on the alien-

ability of the stock of United; and (5) The nine individual and unit beneficiaries under article II, section (a), of the trust indenture are entitled to the income and increments thereon from the date of death of Clair C. Criss on March 9, 1952, or, in other words, that there should be acceleration of the successor trust to commence at the death of Clair C. Criss.

Upon hearing in the District Court, that court, as previously stated, without making specific findings, determined that the county court possessed jurisdiction to determine the issues presented to it by way of a request for construction of the will and trust indenture. Accordingly, it affirmed the findings and order of the county court, and dismissed the District Court action for declaratory judgment as being duplicative of the county court proceedings.

In its appeal to this court United generally quarrels with the findings and orders of both the county court and District Court, but sets forth the following specific assignments of error: (1) The District Court, rather than the county court, had jurisdiction to hear the declaratory judgment action and therefore the original District Court action should not have been dismissed; (2) The District Court erred in failing to consider the matter de novo on appeal and determine the issues independently of the findings made by the county court; (3) The court erred in closing the class described as "The issue of Nina Carden" on the date of death of Clair C. Criss, thereby excluding all grandchildren of Nina Carden as members of that class; (4) The court erred in refusing to apply the rule set forth in *Askey v. Askey,* 111 Neb. 406, 196 N.W. 891 (1923), and in closing the class of "The issue of Nina Carden" prior to the death of Mabel L. Criss; (5) The court erred in finding that the interest of United was a contingent and not a vested remainder under the rule described in Restatement of Property § 277 (1940); (6) The court erred in finding that the condition which must occur before any interest of Creighton, Munroe Home, and

Volunteers would come into existence did not violate the rule against perpetuities; (7) The court erred in finding that the trust indenture did not unlawfully restrain alienation of United stock; (8) The court erred in determining that a lack of continuity of stock ownership occurred when 62.5 percent of United's stock was transferred to Mutual of Omaha on November 11, 1952, after the death of Clair C. Criss, but before Mabel L. Criss died.

The trustee, ONB, also appealed, objecting only to the order of the lower courts requiring acccleration of the successor trust as of the date of death of Clair C. Criss. Nina Carden and "The issue of Nina Carden" joined in this appeal, both as appellees and cross-appellants, objecting to the closing of the class as of the date of death of Clair C. Criss, thereby excluding all grandchildren of Nina Carden, and to the failure of the trial courts to determine that each required monthly distribution of income to the article II, section (a), income beneficiaries be in the amount of $1,800 per month, regardless of the number of such beneficiaries living at the time of each distribution, rather than being limited to $200 per month to each of the nine individuals or unit members of the class still extant.

Except as noted, we shall attempt to deal with the assignments of error in the order in which they were presented.

JURISDICTION

We need waste no time with this assignment of error inasmuch as the appellant United concedes in its brief that "in any event, it would appear that in this consolidated action the question of the particular jurisdiction involved need not be decided."

DE NOVO REVIEW

Little more attention need be given the second assignment of error. The written judgment order of the District Court recites that the cause came on for trial "upon the appeal de novo from the County Court of Douglas County . . . ." It is only necessary

that we accept the word of the District Court at face value. Furthermore, this matter must be and will be reviewed de novo in this court. Neb. Rev. Stat. § 25-1925 (Reissue 1979); *In re Estate of Layton,* 212 Neb. 518, 323 N.W.2d 817 (1982). Therefore, any error in the method of review by the District Court which might have existed will be cured by our review here.

CLOSING OF THE CLASS OF "THE ISSUE OF NINA CARDEN"

Incorporated in the discussion under this heading are assignments of error numbered (3) and (4), i.e., that the court erred in closing the class on the date of death of Clair C. Criss and erred in refusing to apply the rule set forth in *Askey v. Askey, supra,* by not keeping the class open until the death of Mabel L. Criss.

The effect of closing the class of "The issue of Nina Carden" as of the date of death of Clair C. Criss was to exclude from the benefit of the article II, section (a), income provisions the six great-grandnieces and great-grandnephews of the decedent, born from 8 to 18 years following his death.

The word "issue" is a term of art. The term has been defined as including all lineal descendants. "This court in *Godden v. Long,* 104 Neb. 13, opinion written by Chief Justice Morrissey, held as follows: 'The term "issue," or "lawful issue," in its primary legal sense, means descendants or lineal descendants generally, and not merely children. * * * It is only when it is used in a special instrument, whose context shows that a narrower construction was intended, that its meaning will be limited.'

"The rule in this state and other state and federal jurisdictions seems to be settled that a devise to 'issue' or 'issue of the body' will be construed as meaning lineal descendants, rather than children, in the absence of qualifying words showing a contrary intent." *Wilkins v. Rowan,* 107 Neb. 180, 184, 185 N.W. 437, 439 (1921). However, to permit this class

to remain open and allow in all of the lineal descendants of Nina Carden would violate the rule against perpetuities. This is so because it is entirely possible that additional lineal descendants of Nina Carden might be born later than 21 years after the death of all the "lives in being" which existed at the time of the death of Clair C. Criss. The interest of such descendants thus would not vest, by their birth, within the period permitted under the rule, creating a violation thereof.

In order to determine when the class should close we must try to ascertain the intent of the testator and, if legally possible, give effect to that intent. This intent is to be determined by viewing the entire will. *Olson v. Sampson,* 208 Neb. 18, 302 N.W.2d 32 (1981).

Viewing the will and trust indenture as a whole, there is no express intent evident as to when this class should close. It is clear, however, that in the event a problem arose as to the enforceability of part of this estate plan, the testator nonetheless desired that his plan be effectuated as fully as possible. This intent is evidenced by article XII of the trust indenture: "If any provision of this agreement or the application of such provision to any person or circumstances shall be held invalid, the validity of the remainder of the agreement and the applicability of such provision to other persons or circumstances shall not be affected thereby."

This being the only intent that can be ascertained from the actual wording of the will and trust indenture, the court must resort to general rules of construction to determine what the testator's intent would be if it had been expressed.

There are several Nebraska cases cited by the various parties touching upon some of the questions presented here. Perhaps the one most nearly in point is *Tiehen v. Hebenstreit,* 152 Neb. 753, 42 N.W.2d 802 (1950). That case involved the interpretation of a will not unlike that with which we are

here concerned. In general terms, the will provided a gift of income from a testamentary trust to the two sons and daughter of testatrix. In the event of the death of either son before he had received a full one-third of the estate, the residue of his income interest was to be paid to his children. A principal question that had to be decided was whether or not the provisions of the will relating to the children of the two sons violated the rule against perpetuities. That is to say, it was possible that either of the two sons might beget additional children after the death of the testatrix, and if such afterborn children would come within the terms of the will, the rule as to vesting within a life in being plus 21 years would be violated.

However, in determining when the class of children should close, this court stated: " 'A will speaks as of the date of the death of the testator.' Brandeis v. Brandeis, *supra.*

. . . .

"This brings us then to the provisions of paragraph Fifth and the remainders given to 'the children * * * or the survivor of them' of George and John. The word 'children' as used here is a bequest or devise to a class. ' "Since a will speaks from the date of the testator's death, the number of the class will, in the absence of anything in the will showing a contrary intention, be determined upon the death of the testator." ' Lacy v. Murdock, 147 Neb. 242, 22 N.W.2d 713.

"As we said in Lacy v. Murdock, *supra,* we find nothing in the will which in any way defines, explains, interprets, or qualifies the word 'children.' Unexplained and given its ordinary meaning, it refers to the children of George and John living at the date of the death of the testatrix." *Id.* at 761, 42 N.W.2d at 806. Construing the class of "children" to close as of the date of death of the testatrix, the court concluded that there was no violation of the rule against perpetuities.

In 51 Harv. L. Rev. 254, 291 (1937), Casner, *Class Gifts to Others Than to "Heirs" or "Next of Kin" Increase in the Class Membership,* we find the following language: "The fact that the rule against perpetuities will be violated if the class is allowed to increase in size until the period of distribution in a particular case undoubtedly may influence some courts to restrict the class to persons born when the instrument takes effect. The theory for such a view is that as between two possible constructions the transferor must have intended the one that will make his disposition valid."

The Restatement of Property § 295 (1940) suggests that a class such as we have here should be held open to afterborn members "unless a contrary intent of the conveyor is found from additional language or circumstances . . . ." In discussing how such a contrary intent may be found or inferred from a disposition, Comment *s* to § 295 continues in part in language not dissimilar to that of Professor Casner: "Whenever the increase in the period of postponement thus made would render invalid, under the applicable rule against perpetuities, either the disposition of income to this class, or part or all of the ultimate disposition of corpus, then such invalidity is sufficient to prevent the lengthening of the period during which the class can increase in membership, otherwise made because of the subject matter of the class gift (see § 243, Comment *o*). A 'contrary intent of the conveyor' is inferred, because postponements merely incident to periodic distributions of income are not an indication of the conveyor's intent to have the class increase meanwhile in membership, sufficiently clear to require the resolution of the ambiguities of the conveyance in a manner invalidating a substantial part of its dispositions." *Id.* at 1603.

Such a view gains added support in this case when taken in light of the savings clause found in article XII of the trust indenture set out verbatim above.

This clause manifests the testator's intent that in case a problem of partial invalidity arose under his will and the trust indenture, his estate plan should nonetheless be effectuated as fully as possible. In order to accomplish this plan as the testator intended, this class must be closed so as to avoid problems with the rule against perpetuities. The intent of the testator to close this class may be inferred from the savings clause set forth above, from the reasoning contained in the Restatement, *supra,* and from the rules laid down in *Tiehen v. Hebenstreit,* 152 Neb. 753, 42 N.W.2d 802 (1950). The decision of the lower courts to close the class of "The issue of Nina Carden" as of the date of death of the testator was correct.

United urges, however, that we should apply the rule set forth in *Askey v. Askey,* 111 Neb. 406, 196 N.W. 891 (1923). In that case the testator left his property for the support of his widow until her remarriage or death, and upon her death, to his grandchildren. The widow elected to take under the laws of descent rather than under the will. The controversy was then between those grandchildren born before the widow's election and those born afterwards. In that case the court concluded, in effect, that it was the intention of the testator that the class consisting of his grandchildren shall not close until the death of his widow. However, a portion of the opinion reads as follows: "It is the general rule that *in the absence of a controlling equity, or of an express or implied provision in the will to the contrary,* where an estate is given to a person for life with a vested remainder in another, the remainder takes effect in possession whenever the prior gift ceases or fails in whatever manner." (Emphasis supplied.) *Id.* at 409, 196 N.W. at 892. We would further note that no problem relating to the rule against perpetuities was present in *Askey,* and, accordingly, no "express or implied provision in the will to the contrary" intervened.

THE COURT ERRED IN FINDING THAT THE INTEREST OF UNITED WAS A CONTINGENT AND NOT A VESTED REMAINDER AND IN FINDING THAT THE CONDITION NECESSARY TO ACTIVATE THE INTERESTS OF CREIGHTON, MUNROE HOME, AND VOLUNTEERS DID NOT VIOLATE THE RULE AGAINST PERPETUITIES.

Combined under this heading are assignments of error numbered (5) and (6).

Having determined the issues concerning the article II, section (a), income beneficiaries in this case, we now turn to the interests of the remaindermen. Although we have previously set forth the terms of article III of the trust indenture relating to the vesting of the remainder interests, it perhaps would be useful to do so again. Article III reads in its entirety: "Upon the death of all the persons and members of all the units, either named or described by class in Section (a) of Article II, this trust shall forthwith terminate and the principal and all unremitted income and reserve shall be forthwith delivered, conveyed, and assigned to, and shall be the absolute property of the UNITED BENEFIT LIFE INSURANCE COMPANY, Omaha, Nebraska. The foregoing provisions of this Article III are upon condition that there shall have been a continuity of stock ownership of the United Benefit Life Insurance Company from the date of its organization to the date of such delivery of the trust assets to the said Company. In the event that more than FIFTY PER CENT of the capital stock of such company shall have been subject to a change of ownership other than that occasioned by death within any five-year period subsequent to the death of the Donor and her husband, Clair C. Criss, then a lack of continuity of stock ownership shall be conclusively presumed. In the absence of such a transfer of Fifty Per Cent (50%) or more of such stock upon the conditions and

within the time above stated, a continuity of ownership shall be conclusively presumed.

"In the event of a failure of such condition relating to continuity of stock ownership, then upon the death of such last survivor of Section (a) of Article II hereof, this Trust shall continue in perpetuity for the purposes set out in Sections (b) and (c) of Article II hereof, and all of the income after the payment of the amounts required by Section (b) shall annually be distributed to the institutions named in Section (c) of Article II. In the event, one or more of the institutions and the alternate, if any named therefor, in said Section (c) shall, in the opinion of the Trustee, cease to exist or to perform the work now done by them, the remaining institutions named in said Section (c) shall receive all of the income that otherwise would have been distributable among the three institutions. In the event all of the said named institutions in Section (c) shall, in the opinion of the Trustee, cease to exist or to perform the work now done by them, the Trustee shall annually distribute said income to such charitable, educational, health or welfare institutions as it, in its exclusive discretion, may select and deem most deserving."

Clearly, this provision creates a condition (continuity of stock ownership) which is to determine who will receive the remainder in this case. Before deciding whether or not this condition has been met, we first need to discuss the interests of the parties.

United contends that this bequest creates in it a vested remainder subject to complete defeasance. United further argues that because its interest is vested, the remainder interests of the charities are barred as an executory interest that might not rest within the lives in being existing at the date of Clair C. Criss' death plus 21 years.

As we stated earlier, the class of "The issue of Nina Carden" closed as to members born after the death of the decedent. This makes all the income beneficiaries of article II, section (a), "lives in

being" at the time of the death of the testator for purposes of this estate plan. At the death of the last of these article II, section (a), income beneficiaries, one group of the potential remaindermen will take the residue of this trust. This being so, the question of whether United's interest is vested or not, or whether the charities are executory or contingent, becomes irrelevant. The interest of United or of the charities must vest by possession at the death of the last income beneficiary, a "life in being." Since the interest of one of these parties must vest by possession within this period, there is no violation of the rule against perpetuities. The only real question remaining is which of these two interests is to receive this remainder in light of the continuity of ownership condition.

CONTINUITY OF STOCK OWNERSHIP

This comprises the eighth and last specific assignment of error of United. However, we will consider it ahead of the seventh assignment because, logically, it should be discussed before the question of whether such requirement in the trust indenture constitutes an unlawful restraint on alienation of stock.

There has been a great deal of argument and briefing devoted to the meaning of the clause regarding the 50 percent transfer of stock in the trust indenture. "In the event that more than FIFTY PER CENT of the capital stock of such company shall have been subject to a change of ownership other than that occasioned by death within any five-year period subsequent to the death of the Donor and her husband, Clair C. Criss, then a lack of continuity of stock ownership shall be conclusively presumed." This clause is ambiguous on its face as to when a transfer of 50 percent of this capital stock will mean the condition has failed or not. Being ambiguous on its face, the clause suffers from a patent ambiguity. When faced with such a problem, we have stated: " 'A patent ambiguity must be removed by interpretation according to legal principles and the intention

of the testator must be found in the will. In searching for the intention of the testator the court must examine the entire will, consider each of its provisions, give words their generally accepted literal and grammatical meaning, and indulge the presumption that the testator understood the meaning of the words used. * * * The intention within the ambit of this rule is the one the testator expressed by the language of the will and not an entertained but unexpressed intention.' " *Gretchen Swanson Family Foundation, Inc. v. Johnson,* 193 Neb. 641, 643-44, 228 N.W.2d 608, 610 (1975).

We have also stated with regard to the construction of ambiguous terms: "A clause or provision of a will must, if possible, be so construed as to give effect to the intention of the testator. If doubtful or ambiguous words, in their ordinary literal sense, appear to be inconsistent with plain and unambiguous language in the same clause or sentence, such words will be so construed, if reasonably possible, as to render the whole clause or sentence intelligible and consistent." (Syllabus of the court.) *In re Estate of Creighton,* 91 Neb. 654, 136 N.W. 1001 (1912).

"When there are definite and unambiguous expressions in a will, other expressions that are capable of more than one construction must be so construed, if reasonably practicable, as to harmonize with the plain provisions of the will." *Marsh v. Marsh,* 92 Neb. 189, 195, 137 N.W. 1122, 1124 (1912).

In light of the above-cited authority, it seems we must determine the intent of the testator as contained within the four corners of this will and construe its provisions so as to harmonize them with this intent and with each other. In determining the intent of the testator with regard to the continuity of ownership clause, certain ideas seem clear. This transfer of the trust assets is certainly to occur on the death of the last article II, section (a), income beneficiary. At that time, this trust property will become the property of United, or it will be placed

in perpetual trust for certain charitable institutions. What determines who shall receive this remainder is whether there shall have been a continuity of ownership of 50 percent of the stock of United from the time of its creation until such time when this remainder is delivered to the remainderman or perpetual trust. Stock transfers occasioned by death are excepted from this condition for purposes of changes in ownership. These ideas are unambiguously stated in this will. The question remains: Stock transfers as a result of whose death occurring at what time are not to be considered?

This clause simply states "subject to a change of ownership other than that occasioned by death." The plain meaning of this phrase indicates all transfers which come about as a result of someone's death are not to be considered for the purposes of this condition. This idea is then limited by the language "within any five-year period subsequent to the death of the Donor and her husband, Clair C. Criss." The word "any," as used here, would indicate that more than one 5-year period is contemplated. By contemplating more than one 5-year period, the testator must have intended this to mean that transfers made during a 5-year period after the death of Mabel L. and transfers made during a 5-year period after the death of Clair C., which came about as a result of the death of someone, are not to be considered when determining whether the continuity of ownership condition has occurred or not. To construe this ambiguous phrase in this way, on the one hand, gives a meaning to the terms used therein, while at the same time making it consistent with the other manifestations of the testator's intent. This interpretation is consistent with the idea that some stock transfers are excepted and that there be continuity in ownership of 50 percent of this stock. To construe this language in this fashion keeps the phrase from violating any of the other manifesta-

tions of the testator's intent, and it is therefore adopted by this court.

Was there a transfer of 50 percent or more of the stock in question which has not occurred due to someone's death during a 5-year period following the death of Clair C. and Mabel L. Criss? The record indicates that 62.5 percent of the stock issued by United was transferred by way of a stockholders' agreement on November 11, 1952. While this transfer did occur within a 5-year period following the death of Clair C. Criss, it was not occasioned by someone's death. This transfer came about by reason of an agreement of United's stockholders. This transfer does not fit within the exception stated above. Therefore, the continuity of stock ownership has failed. The trust assets at the death of the last article II, section (a), income beneficiary are to continue in perpetual trust for the benefit of the article II, sections (b) and (c), charities, to be administered according to article III, paragraph 2, of the indenture of trust incorporated into the will of Clair C. Criss, unless such condition created an unlawful restraint on the alienation of United's stock.

RESTRAINT ON ALIENATION

There is no evidence of any illegal restraint on the alienability of this stock due to this clause. At best, the possibility that United would in fact become the remainderman in this case would only create some economic incentive encouraging stockholders to retain their stock. The general rule with regard to improper restraints on alienation is: "One of the primary incidents of ownership of property in fee simple is the right to convey or encumber it. It is the general rule that a testator may not create a fee simple estate to vest at his death and at the same time restrict its alienation. This is because conditions which restrict alienation are repugnant to the very estate the testator has created." *Cast v. National Bank of Commerce T. & S. Assn.*, 186 Neb. 385, 389, 183 N.W.2d 485, 489 (1971).

The continuity of stock ownership clause in no way prevents the stockholders of United from transferring their stock. This doctrine has no application in this case.

ACCELERATION OF INCOME INTERESTS

This is the sole assignment of error raised by the trustee, ONB. It presents the question as to what was the effect of the renunciation by Mabel L. Criss of her interest under the will. Does this renunciation cause the succeeding life income interests to be accelerated? ONB contends that acceleration is inappropriate in this case.

It seems to be agreed that the general rule regarding renunciation in cases such as this calls for an acceleration of any succeeding interests, as stated in the Restatement of Property § 231 (1936): "When an attempted prior interest fails because the person to whom it is limited renounces it, succeeding interests are accelerated except when (a) the terms and circumstances of the limitation manifest a contrary intent (see §§ 232 and 233); or (b) the person renouncing such attempted prior interest effectively claims an interest in derogation of the dispositions sought to be made and thereby causes (i) the application of the attempted prior interest to the satisfaction of the renouncer's new claim; or (ii) the failure of the entire disposition; or (iii) the sequestration of the attempted prior interest in accordance with the rule stated in § 234 (a)." Comment *d* at 964 to that section reads as follows: "Normally renunciation is not manifested until a date subsequent to the time when the creating instrument becomes operative. When, however, such renunciation is manifested, the resulting ineffectiveness operates, for all purposes material in this Chapter, as an ineffectiveness in the inception. This is often described as a case in which the renunciation 'relates back' to the time when the creating instrument became operative."

The trustee points to exceptions to this rule,

arguing that acceleration is inappropriate here. These exceptions are embodied in the Restatement of Property §§ 232 and 233 (1936). Section 232 simply states that succeeding interests should not be accelerated if there is an affirmatively manifested intent that acceleration should not occur in the case of a renunciation. In the present case no such affirmatively expressed intent can be gleaned from this instrument. It has been held by this court that a testator is presumed to know that his widow might elect to take her share of his estate as provided for by statute and renounce any interest under his will. *In re Estate of Stieber,* 139 Neb. 36, 296 N.W. 336 (1941). When a widow elects to take her "forced" or statutory share and renounce her interest under her husband's will, she may well be treated as having predeceased her husband, thereby taking no interest under the will. "When the widow elected to take against the will, the provisions as to her life interest must necessarily be treated as if she had terminated her life estate by death." *McCollum v. McCollum,* 108 Neb. 82, 84, 187 N.W. 783 (1922). Although the holding in *Askey v. Askey,* 111 Neb. 406, 196 N.W. 891 (1923), might seem to contradict such language, such is not the case. Relying upon the further holding in *McCollum, supra,* that the renunciation of the will by the widow will not be allowed to break the testamentary plan further than is absolutely necessary, the *Askey* court simply concluded that, in its opinion, it was not the intention of the testator that "the time of distribution should be accelerated by the happening of some event other than her death, which might terminate her life estate." *Id.* at 410, 196 N.W. at 893.

In light of the foregoing propositions of law, we may assume that Clair C. Criss knew that his wife might renounce under the will. If in such event he intended Mabel L. to be treated as other than predeceasing him, or that these income interests should not be accelerated, the testator would have so

stated. To the contrary, the only intention that can be found in this will is that payment of these income interests is to begin at Mabel L.'s death. Having concluded that her renunciation was tantamount to her death, and finding no intention in the will against acceleration, these income beneficiaries should have begun receiving payments as of the date of death of Clair C. Criss.

The Restatement § 233, *supra,* states that when a prior interest fails because it is renounced, any succeeding interest subject to an unfulfilled condition precedent shall not accelerate until such condition is fulfilled. In this case the only condition precedent to the interests of the income beneficiaries is the death of Mabel L. Criss. Having indulged the presumption the renunciation is tantamount to death, the only condition precedent to the interests of the income beneficiaries is satisfied. Therefore, this section does not preclude acceleration in this case.

Such a result is not only consistent under the general propositions of law set out in the Restatement but also with several prior holdings of this court. See, *Hauschild v. Hauschild,* 176 Neb. 319, 126 N.W.2d 192 (1964); *In re Estate of Stieber, supra.* The interests of the life income beneficiaries and charities set forth in article II, sections (a), (b), and (c), of the trust indenture are therefore accelerated to take effect at the death of Clair C. Criss on March 9, 1952, as set out in the orders of the county court and the District Court.

"CUMULATION" OF ARTICLE II, SECTION (a), BENEFICIARIES' INTERESTS

For want of a better term, we have applied this heading to the remaining claimed error raised in the cross-appeal of "The issue of Nina Carden." Although we have determined that this class does not consist of any of the grandchildren of Nina Carden, the concept argued would apply to all article II, section (a), beneficiaries.

It is contended that not only are those beneficiaries

entitled to a $200-per-month payment from the time of the death of Clair C. Criss but also, under certain circumstances, to additional income as well. Under the theory proffered, the total bequest of income to article II, section (a), beneficiaries, $1,800 per month, is to be divided among those beneficiaries $200 per month to each of the nine individuals or units. When one unit or individual would cease to exist, the remaining existing units or individuals would divide that no longer existing unit's or individual's share. For example, if only five of the nine original beneficiaries set out in article II, section (a), remained today, they would split the $1,800 between them equally each month, thus receiving $360 each per month.

This argument has no support under the plain terms of the trust indenture. The language which determines the payment of income to article II, section (a), beneficiaries reads as follows: "The fractional interest distributable to each of the above named individuals or units shall be determined on the date of each distribution by the number of the above named individuals or units, or survivors of units who are living on such date. If one member of a unit above described shall be deceased, the surviving member or members *of such unit* shall take the share of the deceased member. The payments hereunder shall, however, be limited to the rate of TWO HUNDRED DOLLARS ($200) per month to each individual or unit. Such monthly payments shall not be cumulative until the payments are commenced under Section (b) hereof." (Emphasis supplied.)

When determining the meaning of language used in a will the court must examine the entire will, consider each of its provisions, and give the words used their generally accepted literal and grammatical meaning. *Olson v. Sampson,* 208 Neb. 18, 302 N.W.2d 32 (1981). The clear and literal meaning of the above-quoted language places an absolute limit

of $200 per month on the income which is to be given to each of the article II, section (a), beneficiaries.

From a de novo review of the record as indicated by the foregoing findings, we determine that the judgment of the District Court, affirming the order of the county court, was correct, and it is affirmed.

AFFIRMED.

CLINTON and CAPORALE, JJ., not participating.

IN RE APPLICATION OF ATS MOBILE TELEPHONE, INC. ATS MOBILE TELEPHONE, INC., APPELLANT, V. NORTHWESTERN BELL TELEPHONE COMPANY, CHARLES P. ODEN, DOING BUSINESS AS NEBRASKA RADIO TELEPHONE SYSTEMS, AND THE LINCOLN TELEPHONE AND TELEGRAPH COMPANY, APPELLEES.

330 N.W.2d 123

Filed January 28, 1983. No. 81-593.

1. **Administrative Hearings: Judicial Notice.** In an administrative hearing an agency may take notice of judicially cognizable facts and in addition take notice of general, technical, or scientific facts within its specialized knowledge. However, parties to such hearings will be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material so noticed so as to be afforded an opportunity to contest the facts so noticed.
2. _____: _____. An agency may utilize its experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to it during any hearing.
3. _____: _____. Even though the method by which an administrative agency takes notice of facts not presented at the hearing may not be technically correct, if the parties had full and fair opportunity to address that subject by cross-examination or otherwise, they may very well not have been prejudiced or unfairly surprised by the notice of facts taken by the agency.
4. **Evidence: Appeal and Error.** A party who objects to testimony on a particular subject may not later claim that it was prejudiced because it had itself foreclosed inquiry into that subject matter.
5. **Public Service Commission: Appeal and Error.** The determination by the Public Service Commission as to whether the granting or rejecting of an application for service is within the public interest is a matter peculiarly within its expertise and involves a

breadth of judgment and policy determination that will not be disturbed by this court in the absence of a showing that the action of the commission was illegal or arbitrary, capricious, or unreasonable.

6. _____: _____. The striking of the balance between the competing interests of legitimate competition and the protection of the public interest as to the authorization of services regulated by the Public Service Commission are matters of legislative and administrative determination peculiarly resting in the judgment of the commission. The determination of the public interest is one that is peculiarly for the determination of the commission, and if there is evidence to sustain the finding this court cannot intervene.

7. _____: _____. If the record supports a decision by the Public Service Commission that an application for service should not be granted because the area proposed for the service is presently receiving or within a reasonable time will receive reasonably adequate service and that granting the application will create a duplication of facilities and is not in the interest of the public as provided by Neb. Rev. Stat. § 75-604 (Reissue 1981), the mere fact that the commission adds to its findings that to grant the particular application will unnecessarily extend the monopoly of the applicant to another area is not a necessary finding to justify the denial of such application; and although it may be an ill-advised statement, and as such objectionable, it does not constitute reversible error under the circumstances.

8. _____: _____. Whether this court agrees or disagrees with the decision of the Public Service Commission on a particular matter is immaterial because it is not the province of this court to weigh or resolve conflicts in the evidence, or the credibility of witnesses. The Supreme Court does not act as an appellate public service commission, but will sustain the action of the commission if there is evidence in the record to support it.

Appeal from the Nebraska Public Service Commission. Affirmed.

Donald H. Erickson of Erickson, Sederstrom, Leigh, Eisenstatt, Johnson, Kinnamon, Koukol & Fortune, P.C., for appellant.

Richard A. Peterson of Peterson, Bowman & Johanns, for appellee Oden.

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

HASTINGS, J.

ATS Mobile Telephone, Inc. (hereinafter ATS),

filed an application with the Public Service Commission (hereinafter Commission) on July 28, 1978, for authority to operate a simulcast wide area one- and two-way mobile telephone service. Objections to this application were raised by the appellees, Northwestern Bell Telephone Company, Nebraska Radio Telephone Systems, and The Lincoln Telephone and Telegraph Company. A hearing was held on this matter by the Commission on October 24 through 27, 1978. The Commission found that ATS made an insufficient showing of public need and interest in this service; that the grant of application No. 32450 of Nebraska Radio Telephone Systems, on May 15, 1979, gave adequate service to the proposed area; that to grant ATS additional frequencies on which to operate is not in the best interest of the public; and that to extend ATS' monopoly over the Omaha market to the Lincoln area is not in the best interest of the public. Therefore, ATS' application was denied by order of the Commission on May 5, 1981. For reasons set forth in greater detail below, we affirm the Commission's denial of this application.

ATS presently operates a one- and two-way mobile telephone and paging service for Omaha and the surrounding 35-mile area. It is operating on 17 of the 27 available radio frequencies. ATS' application proposed the offer of a wide area service. In short, this service would offer mobile telephone and paging service in and between Omaha and Lincoln. In order to facilitate this service ATS would construct two signal sending stations, one in Omaha and one in Lincoln. Each station would have an effective range of 35 miles, thus overlapping the distance between Omaha and Lincoln. This system would also offer local service for any user located in Omaha or Lincoln. Both stations would simulcast signals so a party with this service traveling between Omaha and Lincoln could be reached at any point between the two cities. This system would require the use of four more of the remaining few frequencies avail-

able for use in this area under the rules of the Federal Communications Commission.

ATS has assigned a number of errors to the findings of the Commission. It is claimed that there is no basis in the record to support the decision of the Commission; that the Commission considered evidence outside the record; and that the Commission ignored parts of the record. ATS also claims the Commission improperly applied the "public interest" standard when reaching its decision with regard to the extension of ATS' monopoly to the Lincoln area. ATS argues these to be errors by the Commission requiring reversal.

When urging that the Commission relied on matters outside the record, ATS points to two findings the Commission made in paragraph 14 of its opinion and findings, which reads: "14. The expansion into Lincoln at this time by another radio common carrier is simply not warranted. Application No. 32450 was granted by the Commission on May 15, 1979, which established a radio common carrier in Lincoln, Nebraska. This common carrier will be able to serve the needs of transient two-way mobile subscribers in the Lincoln area. The proposed service can now be provided in the Omaha area by applicant and in the Lincoln area by the carrier authorized under Application No. 32450. To authorize an additional service would result in the unnecessary duplication of facilities. There is no evidence to indicate that the existing service is not reasonably adequate or how in any manner the proposed service would be more beneficial than that presently existing."

ATS argues the grant of application No. 32450, that of Nebraska Radio Telephone Systems, and the service to be provided thereby, is not in the record. This, it is claimed, is therefore an improper basis for the decision of the Commission.

Application No. 32450 was filed by Charles Oden and Nebraska Radio Telephone Systems (hereinafter NRTS) on September 23, 1977. NRTS' applica-

tion requested authority to provide one- and two-way mobile service for the Lincoln-Lancaster County area. A hearing was held and the decision of the Commission on that application was pending at the time of ATS' application and hearing.

Whether these matters were properly relied upon by the Commission in its decision depends upon whether or not the Commission may take judicial notice of them. The rule in Nebraska is set forth by the Administrative Procedures Act, Neb. Rev. Stat. § 84-914(5) (Reissue 1981): "An agency may take notice of judicially cognizable fact and in addition may take notice of general, technical, or scientific facts within its specialized knowledge. *Parties shall be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material so noticed.* They shall be afforded an opportunity to contest the facts so noticed. An agency may utilize its experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to it." (Emphasis supplied.) This act applies to the Public Service Commission by definition. "As used in sections 84-901 to 84-916: (1) Agency shall mean each board, commission, department, officer, division, or other administrative office or unit of the state government authorized by law to make rules . . . ." Neb. Rev. Stat. § 84-901 (Reissue 1981).

The policy behind this rule is clear. Fair warning of the Commission's intention to take notice of a fact or matter not in evidence must be given to the parties so as to allow them to address the matter in question at their hearing. This prevents any prejudice or surprise to the parties. The parties are to be given a chance to comment on or rebut any evidence considered by the Commission when making its decision.

In this case no specific prior notice was given by the Commission of its intention to take note of this application and the service it would provide. None-

theless, the question remains: Did ATS have a full and fair opportunity at its hearing to present evidence on the point and thereby refute the findings of the Commission on this matter?

First, with respect to the Commission's taking notice of the grant of the NRTS application, the record indicates that there was testimony at the hearing as to the existence of this pending application. Charles Oden, owner and general manager of NRTS, testified at length with regard to his application. ATS had a full opportunity to cross-examine him as to that application and put on any evidence it desired with regard to it. ATS had the chance to rebut and comment on this evidence, as is required by § 84-914. Therefore, we find that even though the Commission's method of taking notice of this granted application may have been technically improper, the policy behind that rule has been fully met. Since ATS had a full and fair opportunity to address the matter of NRTS' application, they have not been prejudiced or unfairly surprised by the Commission's taking judicial notice thereof.

Secondly, as to the Commission's finding on what service would be supplied, the Commission found that the grant of the ATS application would only duplicate existing service provided as a result of the granting of NRTS' application. This, ATS claims, has no support in the record and was therefore an improper basis for the Commission's decision.

This argument fails for two reasons: First of all, there was discussion as to whether this service could be offered by two separate entities. Mr. Johnson, chief witness for ATS, on cross-examination testified that the system as proposed by ATS could be offered by two separate entities, one in Lincoln and one in Omaha. After describing in technical detail the workings of the proposed system, Johnson testified as follows: "Q No, I said, if they were independently owned. If the Omaha transmitter and the Lincoln transmitter are independently owned, and

the system is in all other respects identical, it would function just exactly as you've described it, would it not? A Okay. Let's — this — any one of these boxes could be owned by any third party, and it wouldn't change it, as long as the hardware is still configured in this fashion. I mean — Q The answer to my question, then, is yes. A Yes."

Mr. Charles Oden on direct examination agreed that this system could be operated as ATS proposed and yet owned by two separate entities. "Q Now, Mr. Oden, when Mr. Johnson was on the stand, and testified with respect to his diagrams of the paging system, and the two-way system, he testified, as I recall, that the systems, the respective elements of the systems, did not know who owned them, and that the system could operate under independent ownership. Do you subscribe to that view, or — or do you differ with Mr. Johnson in that respect? A No, I — I agree to that view."

There is evidence in the record supporting the finding that this service could be offered by NRTS if its then pending application No. 32450 was granted. NRTS could operate the Lincoln portion of the system while ATS operated the Omaha segment.

Secondly, ATS' complaint that it was deprived of an opportunity to present evidence on the question of whether or not this service would in fact be provided by NRTS is not correct. ATS did in fact have an opportunity to present such evidence if it had chosen to do so at the hearing. After agreeing that this system could be offered by two separate entities, Mr. Oden was asked: "Q Now, that prompts me then to ask, Mr. Oden, what — do you have any intention or, if your own application is granted, as to your willingness to cooperate with ATS, or any other R.C.C., in terms of providing wide area one and two-way mobile telephone service?" This question opened the area up to full examination before the Commission. If ATS had wished to present evidence on this area to show that NRTS was incapable of

providing the same service which ATS proposed, it could have done so. At this point ATS had a full opportunity to deal with the question, thus giving ATS the opportunity to rebut this matter, as the Administrative Procedures Act's judicial notice statute requires. However, counsel for ATS objected to this question and thereby foreclosed the area to further discussion. ATS now complains that it did not have an opportunity to present evidence on this matter at the hearing, when in fact it was its own objection which kept it from being able to do so.

To remand this case to the Commission for further proceedings would give ATS no greater opportunity than it already has had. It had an opportunity to present evidence on the nature of NRTS' application and NRTS' ability and willingness to supply the service in question. Therefore, ATS has not been prejudiced by this action. No reversible error has been committed.

ATS also contests the Commission's finding that there was not a sufficient showing of public need. In support of this application ATS called a number of witnesses, producing a great deal of testimony and exhibits to show public need. Nine private businessmen testified that they would be interested in utilizing the proposed service in their businesses. Four expert witnesses and Mr. Marc Cohen of the Omaha Chamber of Commerce gave evidence showing a great deal of growth in the economic and residential development of, as well as the travel in, the area between Omaha and Lincoln. Mr. Larry Cale was called to testify as to a survey taken of 2,000 present users of ATS' service, 4,558 members of the general public by direct mailing, 72 people surveyed by telephone, and people responding to an advertisement run in the Lincoln Journal-Star. From this newspaper advertisement and the 6,630 people contacted directly, 425 people responded indicating some interest in the wide area service. Mr. Frank Rizzuto, a certified public accountant and the treas-

urer of ATS, testified as to the financial aspects and feasibility of this proposed service.

The Commission found this showing of need to be insufficient to support the allocation of four more channels to ATS. There was evidence in the record that there are few frequencies left unassigned in this area. The Commission simply found that the number of potential users of this system did not justify the allocation and exclusive use of these four frequencies to this proposed service. The Commission determined that the use of these four frequencies for these few interested people simply is not in the best interest of the public. This is a decision to be made by the Commission and not this court.

"As we have often said, this determination by the Commission is a matter peculiarly within its expertise and involves a breadth of judgment and policy determination that will not be disturbed by this court in the absence of a showing that the action of the Commission was illegal or arbitrary, capricious, and unreasonable. The striking of the balance between the competing interests of legitimate competition and the protection of the public interest are matters of legislative and administrative determination peculiarly resting in the judgment of the Commission. [Citation omitted.] . . . 'The determination of the public interest in such a case is one that is peculiarly for the determination of the commission. If there is evidence to sustain the finding of the commission, this court cannot intervene.' " *Robinson v. National Trailer Convoy, Inc.*, 188 Neb. 474, 475-76, 197 N.W.2d 633, 635 (1972).

ATS also complains the Commission misconstrued the public policy of the state when it found that to extend ATS' monopoly over radio and mobile telephone service in Omaha to the Lincoln area is contrary to the best interest of the public. The Legislature has prescribed by statute what the Commission is to consider in cases such as this. "No person, firm, partnership, corporation, cooperative, or

association shall offer telephone service or shall construct a new telephone line in or extend an existing telephone line into the territory of another telephone company without first making an application for and receiving from the commission a certificate of convenience and necessity, after due notice and hearing under the rules and regulations of the commission. Before granting a certificate of convenience and necessity, the commission must find that (1) the territory in which the applicant proposes to offer telephone service is not receiving reasonably adequate telephone service, (2) that the portion of the territory of another telephone company in which or into which the applicant proposes to construct new lines or extend its existing lines is not and will not within a reasonable time receive reasonably adequate telephone service from the telephone company already serving the territory, or (3) the application is agreeable to the subscriber or subscribers and to both telephone companies involved in the matter, will not create a duplication of facilities, and is in the interest of the public and the party or parties requiring telephone service." Neb. Rev. Stat. § 75-604 (Reissue 1981).

The Commission did consider these matters. The territory involved in this case is receiving reasonably adequate service. The Commission found NRTS is able to offer adequate service to this area. The Commission also found that NRTS can extend the service in question here. Finally, the Commission found that the grant of ATS' application would create a duplication of service. There was evidence to support these findings. As discussed above, the testimony of Johnson and Oden supports the findings that NRTS could offer the service here in question. Also, the grant of NRTS' application now enables it to offer this service in conjunction with ATS. Johnson also testified that the proposed service by ATS would offer local mobile service in Omaha and Lincoln, as well as wide area service. Under NRTS'

presently granted authority, this proposal would also duplicate existing local service in Lincoln.

These findings are sufficient to support the denial of the ATS application under § 75-604. The finding that the extension of ATS' monopoly over the mobile telephone service in Omaha to the Lincoln area is not in the best interest of the public was not a necessary finding by the Commission to justify its denial of this application. While it may or may not be objectionable, it is not necessary to this decision and therefore cannot be seen as reversible error. The other findings of the Commission were sufficient under this statute and were supported by evidence in the record.

As we have uniformly held in the past: " 'Whether we agree or disagree with the decision of the commission, however, is immaterial. It is not the province of this court to weigh or resolve conflicts in the evidence, or the credibility of witnesses. The Supreme Court does not act as an appellate public service commission but will sustain the action of the commission if there is evidence in the record to support it.

" 'The issue of public convenience and necessity is ordinarily one of fact and where there is evidence in the record to sustain the Public Service Commission's order, this court cannot say that it is unreasonable and arbitrary. The determination of what is consistent with the public interest, or public convenience and necessity, is one that is peculiarly for the determination of the Public Service Commission.' " *In re Application of Crusader Coach Lines, ante* p. 53, 58-59, 327 N.W.2d 98, 101 (1982).

Since there is competent evidence to support the findings of the Commission, its decision must be affirmed.

AFFIRMED.

CLINTON, J., not participating.

MURL C. MORROW ET AL., APPELLANTS, V. CITY OF OGALLALA, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE.

329 N.W.2d 351

Filed January 28, 1983. No. 81-636.

1. **Municipal Corporations.** Where a city by its charter is invested with certain powers, or the control and regulation of certain matters, and the charter fails to prescribe or direct the mode of exercise of the power so conferred, the council may act by resolution, and it will be as effectual as would an ordinance passed for the same purpose.
2. **Municipal Corporations: Courts.** Courts will not review or inquire into the legislative acts of municipal boards concerning matters within their power as to whether they acted expediently, wisely, or necessarily. Such are matters of purely legislative function, and not of judicial concern.

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

Gregory J. Beal & Associates, P.C., for appellants.

Paul D. Merritt, Jr., of McGinley, Lane, Mueller, Shanahan, O'Donnell & Merritt, for appellee.

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

PER CURIAM.

The plaintiffs are owners and lessees of property abutting 1st Street in Ogallala, Nebraska. On January 27, 1981, the city council of the defendant city adopted a resolution prohibiting parking on 1st Street between East G Street and West H Street. U.S. Highway 30 is routed along 1st Street in that area.

This action was commenced to obtain a declaration that the resolution was void and to enjoin its enforcement. The trial court found that the resolution was valid and dismissed the petition. The plaintiffs have appealed.

The principal assignments of error are that the city was required to act by ordinance rather than by

a resolution and that the resolution was arbitrary, capricious, and unreasonable.

The record shows that 1st Street is the principal east-west arterial street in Ogallala, and between East G Street and West H Street Highway 30 is routed along 1st Street. The area in question is in the business district of the city and the plaintiffs own and operate businesses in the area. The plaintiffs are concerned that the ban on parking along the street in front of their businesses will inconvenience their customers and have an adverse effect on their businesses.

By statute the city is authorized to regulate or prohibit parking upon its streets. Neb. Rev. Stat. § 39-697 (Reissue 1978) and § 17-567 (Reissue 1977). The city had provided by ordinance that the council could prohibit parking on any street by resolution.

There is no express statutory requirement that the designation of streets upon which parking is prohibited be made by ordinance. The plaintiffs contend that this requirement is to be inferred. The contention is without merit.

In *McGavock v. City of Omaha,* 40 Neb. 64, 82, 58 N.W. 543, 549 (1894), this court stated the general rule as follows: "Where the law by which the power to do certain acts or to control and regulate certain matters is conferred upon the city through its council or legislative body, by whatever name it may be designated, does not in any manner limit or direct the mode in which the power granted shall be exercised, the council may choose the method, and its exercise of such control may be by resolution or by ordinance, and the passage of a resolution for that purpose is as valid and will have as much force as if it was done by the enactment of an ordinance, although ordinances are generally passed with more formality." See, also, *Lincoln Street R. Co. v. City of Lincoln,* 61 Neb. 109, 84 N.W. 802 (1901); *Weilage v. City of Crete,* 110 Neb. 544, 194 N.W. 437 (1923).

The record shows that a prior resolution, adopted

May 23, 1966, had directed that 1st Street be marked for two lanes of traffic in each direction. The resolution was based on the assumption that because parking on the south side of 1st Street had been prohibited, there was sufficient width for four lanes of traffic.

Between East B Street and West B Street, 1st Street is 52 to 54 feet in width. East of East B Street and west of West B Street, 1st Street is 63 feet in width. The minimum design standards adopted by the Board of Public Roads Classifications and Standards of the State of Nebraska require that traffic lanes for major arterial municipal state highways be 12 feet in width and parallel parking lanes be 10 feet in width. It is apparent that under this standard there could be no parking on 1st Street between East B Street and West B Street if there were to be two lanes of traffic in each direction. A traffic engineer called as an expert witness by the plaintiffs testified that continuity of traffic lanes was a factor in highway safety.

The record indicates that the matter of parking on 1st Street within the area of the business district had been under consideration for some time. On September 25, 1979, the city had requested a traffic study by the state Department of Roads. The Department of Roads reported the results of that study to the city on September 29, 1980.

The Department of Roads recommended that parking be prohibited on 1st Street from approximately West H Street to East G Street. This would permit two lanes of traffic in each direction and would assist in the orderly flow of traffic and accommodate traffic making left turns off of Highway 30. The department further noted that 1st Street could not be marked for four-lane traffic as long as parking was permitted.

The Department of Roads' recommendation was considered at a joint meeting of the city council and planning commission on November 18, 1980, and

again by the commission at a regular meeting on December 2, 1980. The commission recommended to the council that parking be eliminated and 1st Street be made four-lane traffic.

The matter was again considered by the council at a special meeting on January 20, 1981. The chief of police was present at this meeting and recommended that parking be prohibited. A motion was passed directing that a resolution prohibiting parking be prepared. The resolution in question was adopted at a regular meeting on January 27, 1981.

In addition to the recommendation of the Department of Roads, the council and commission had traffic accident surveys and other reports available to it. The council meetings were open to the public and parties in opposition to the resolution were given an opportunity to present their views to the council.

The plaintiffs argue that the adoption of the resolution was arbitrary because there was no evidence that parking was the direct cause of accidents upon 1st Street; the accident rate was approximately the average for other similar streets in Nebraska; and traffic problems in other parts of the city were not given similar consideration by the council.

The wisdom of the resolution is not before us. The resolution is not subject to revision or control by the courts on the ground of inexpediency, injustice, or impropriety. In *Jones v. Village of Farnam,* 174 Neb. 704, 711-12, 119 N.W.2d 157, 162 (1963), we said: " 'The acts of legislative bodies, whether state or municipal, if performed within the prescribed limits, are not subject to revision or control by the courts on the ground of inexpediency, injustice or impropriety. Such are purely functions of legislative power. Neither will the courts take cognizance over matters involving the wisdom or necessity for the enactment of legislation. The legislative body may alone determine whether a certain piece of legislation is needed or advisable for the general government of the people from whom its power ema-

nates. The concern of the courts is as to the limits of the power, and not the manner or method by which the power is sought to be exercised, if kept within the prescribed limits.' " The resolution was presumptively valid and the burden was on the plaintiffs to show by clear and unequivocal evidence that the resolution was invalid. The plaintiffs failed to meet this burden of proof.

The plaintiffs have no proprietary right to the use of the street in front of their businesses for parking. The city was not bound to accept a particular accident rate on 1st Street and was free to take reasonable action in an effort to assist the orderly flow of traffic on Highway 30 through the business district of the city. The record fails to establish that the resolution was arbitrary, capricious, and unreasonable and did not have a substantial relation to public safety and the general welfare.

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

The judgment of the District Court is affirmed.

AFFIRMED.

CLINTON, J., not participating.

MARCIA CATANIA, APPELLANT AND CROSS-APPELLEE, V. THE UNIVERSITY OF NEBRASKA, A CORPORATE GOVERNMENTAL BODY, APPELLEE AND CROSS-APPELLANT.

329 N.W.2d 354

Filed January 28, 1983. No. 81-733.

1. **Tort Claims Act: Jurisdiction.** The District Court, sitting without a jury, has exclusive jurisdiction to hear, determine, and render judgment on any suit or tort claim defined in the State Tort Claims Act, Neb. Rev. Stat. §§ 81-8,209 et seq. (Reissue 1981).
2. **Tort Claims Act: Appeal and Error.** The findings of the District Court under the State Tort Claims Act will not be disturbed on appeal unless clearly wrong.
3. _____: _____. Where there is a conflict in the evidence, but there is believable evidence to support the findings of the District Court in a claim of this nature, those findings will be affirmed.

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

Martin A. Cannon of Matthews, Cannon & Riedmann, P.C., for appellant.

John R. Douglas of Cassem, Tierney, Adams, Gotch & Douglas, for appellee.

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

HASTINGS, J.

This is the second appearance of this case on appeal. Our former opinion, found at 204 Neb. 304, 282 N.W.2d 27 (1979), involved a question of venue.

The action was brought by the plaintiff, Marcia Catania, under the State Tort Claims Act, Neb. Rev. Stat. §§ 81-8,209 et seq. (Reissue 1981), against the University of Nebraska, a corporate governmental body, more accurately described as the Board of Regents of the University of Nebraska. From a judgment in favor of the university, and dismissing the plaintiff's petition, the plaintiff has appealed. She assigns as error, generally, that the court held that she had not proven negligence or proximate cause by a preponderance of the evidence. The university has cross-appealed, contending that the District Court should have sustained its demurrer, based on a running of the statute of limitations. However, as will become apparent, it will not be necessary for us to consider the cross-appeal.

"The district court, sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on any suit or tort claim as defined in this act." § 81-8,214.

The findings of the District Court under the State Tort Claims Act will not be disturbed on appeal unless clearly wrong. *Watson v. City of Omaha,* 209 Neb. 835, 312 N.W.2d 256 (1981). Although that case was decided under the Political Subdivisions Tort Claims Act, the same principles are applicable un-

der the State Tort Claims Act. *Cortes v. State,* 191 Neb. 795, 218 N.W.2d 214 (1974). In other words, unless, from an examination of the record, we can say that the university was guilty of negligence as a matter of law proximately causing injury and damages to the plaintiff, we must affirm the action of the District Court.

The plaintiff was a student in a golf class offered by the University of Nebraska. At the time of her alleged accident and injury she was participating in an indoor exercise wherein the students were hitting plastic golf balls. Although the defendant does not concede the fact, and the trial court made no finding in that regard, it may be assumed for the purpose of this appeal that the plaintiff was injured by being struck in the eye by one of these balls hit by a fellow student.

Because of inclement weather, the students were practicing indoors in a gymnasium which was approximately 96 by 102 feet in size. There were 26 students, using irons, who were arranged in an oval-circle formation approximately 10 feet from the walls and 8 feet apart. The balls used were made of plastic and simulated the look of real golf balls as compared to the perforated "whiffle" balls or cotton balls. The balls were hit toward the opposite wall or center of the oval. During the course of the practice session, the plaintiff looked up and saw a white mass and felt a pain in her eye, suggesting that she had been struck by one of these balls. Presumably as a result of that impact, she has sustained a near total loss of vision in that eye.

Several witnesses who qualified as experts in the field of physical education testified at this trial. John Schultz, who possessed a Ph.D. in education, gave as his opinion that the oval formation employed in this case, whereby the students are hitting the plastic-type ball toward each other, was inappropriate. He did concede that the most obvious danger to students was the risk of being struck by a swinging golf club.

However, under the circumstances existing in this situation, he said that he would advocate a formation whereby the students would stand in two rows, back to back, approximately 10 yards apart, facing the opposite wall, and hit the balls to that wall. He testified that he was not aware of any recognized textbook on physical education which mentioned any danger in the use of plastic golf balls.

Janette Sayre, another expert in the field of physical education, who held a doctor's degree in physical education, stated that the principal danger in a golf class is the risk of being struck by a swinging club. In her 37 years of teaching golf, she has used the oval formation and believed that it gave the instructor the best view of the class. She testified that the oval formation had certain safety advantages over other formations in that it kept the students away from each other and minimized the danger from being struck by a swinging golf club. It was her opinion that the formation being used by the university class instructor at the time of the plaintiff's injury conformed to the standards of golf instruction.

The instructor in charge of the university's class at the time in question, Doris O'Donnell, had been teaching golf at the college level for almost 25 years. She had a doctorate in physical education. She testified that she had used the oval formation for teaching golf for a number of years. In her opinion the primary danger in a golf class was from being struck by a swinging club. She believed that the oval formation being utilized at the time of the plaintiff's injury conformed to acceptable standards of physical education standards. It was her opinion that the double line formation suggested by the witness Schultz created a greater danger to students than the oval one employed in this case.

It would serve no useful purpose to set forth in greater detail the specifics of the various experts' testimony. It should be obvious from the above de-

scription that there was a direct conflict in their opinions as to whether or not the class was conducted with due regard for the safety of the students. Certainly there was believable evidence which would support a finding of no negligence on the part of the university. As such, we certainly cannot say that the judgment of the District Court was clearly wrong.

The judgment of the District Court is affirmed.

AFFIRMED.

CLINTON, J., not participating.

COLE INVESTMENT COMPANY, A NEBRASKA CORPORATION, ET AL., APPELLANTS, V. CITY OF LINCOLN, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE.

329 N.W.2d 356

Filed January 28, 1983. No. 81-734.

Municipal Corporations: Claims: Appeal and Error. An appeal from the disallowance of a claim against a city of the primary class is perfected by filing a notice of appeal and bond as provided in Neb. Rev. Stat. § 15-841 (Reissue 1977).

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Reversed and remanded for further proceedings.

Woods, Aitken, Smith, Greer, Overcash & Spangler, for appellants.

William F. Austin, City Attorney, and Ernest R. Peo III, for appellee.

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

BOSLAUGH, J.

The plaintiffs appeal from an order of the District Court sustaining the motion of the defendant city to dismiss the plaintiffs' third amended petition.

On May 27, 1980, the plaintiffs filed their "claim" against the city, arising out of the construction of storm sewers in an industrial park pursuant to an executive order of the city authorizing the private construction of the sewers. The claim was denied by the director of finance in a letter to plaintiffs' counsel dated July 2, 1980, which was received by plaintiffs' counsel on July 7, 1980. A notice of appeal and bond were filed with the city clerk on July 8, 1980. A transcript was not requested by the plaintiffs until June 15, 1981, and was filed in the office of the clerk of the District Court on June 18, 1981.

The defendant's motion to dismiss alleged the trial court lacked jurisdiction of the appeal because a transcript of the proceedings before the city had not been filed as required by Neb. Rev. Stat. §§ 15-841 and 23-137 (Reissue 1977), and former Neb. Rev. Stat. § 27-1303 (Reissue 1964).

Neb. Rev. Stat. § 15-842 (Reissue 1977), relating to unliquidated claims against cities of the primary class, provides as follows: "In order to maintain an action for an unliquidated claim, other than a tort claim as defined in section 23-2402, it shall be necessary, as a condition precedent, that the party file in the office of the city clerk within thirty days from the time such right of action accrued a statement of the amount of the claim, giving full name of the claimant, the time, place, nature, circumstances, and cause of the injury or damage complained of. The procedure for the processing and disposition of an unliquidated claim shall be as provided in sections 15-840 and 15-841. No appeal bond shall be required of the city by any court in case of appeal by the city, and judgment shall be stayed pending such appeal."

Neb. Rev. Stat. §§ 15-840 and 15-841 (Reissue 1977) provide as follows: "All claims and accounts payable against the city shall be presented in writing and shall fully and accurately identify the items or services for which payment is claimed. The finance

director shall be responsible for the preauditing and approval of all claims and accounts payable, and no warrant in payment of any claim or account payable shall be drawn or paid without such approval. No claim exceeding the sum of one hundred dollars shall be allowed until published once in a daily newspaper published and of general circulation in the city."

"Any taxpayer of the city, after the allowance in whole or in part of any claim required to be published, or the claimant, after the disallowance in whole or in part of any such claim, may appeal therefrom to the district court of the county in which the city is situated by giving notice of such appeal to the city clerk within three days after such allowance or disallowance and filing with the city clerk within ten days after such decision, a bond in favor of the city, with good and sufficient sureties to be approved by such clerk, conditioned that the appellant shall prosecute such appeal to effect without unnecessary delay and pay all costs that may be adjudged against appellant. In an appeal by a taxpayer in case the claimant finally recovers judgment for as great a sum exclusive of interest as was allowed by the council, such appellant shall pay all costs of such appeal. In an appeal by a claimant in case claimant fails to recover as great a sum exclusive of interest as was allowed by the council, said claimant shall pay all costs. The procedure shall follow the procedure of appeals from the county board to the district court. No warrant shall issue for the payment of any such claim until the appeal is finally determined."

The defendant contends, and the trial court found, that the next to the last sentence of § 15-841 requires that a transcript be filed in the District Court within 30 days. The defendant argues that the language in the statute that "the procedure of appeals from the county board to the district court" adopts by reference the transcript requirement formerly re-

quired in appeals to the District Court from a justice of the peace court. See § 27-1303, repealed in 1972 by § 287 of L.B. 1032.

Section 23-137, relating to appeals from the county board to the District Court, provides for the preparation of a transcript by the clerk of the board, upon the payment of proper fees, and delivery of the transcript to the clerk of the District Court by the clerk of the board. The statute then provides, "and such appeal shall be *entered*, tried, and determined the same as appeals from justice courts . . . ." (Emphasis supplied.) No such language appears in § 15-841.

Section 15-841 provides that a claimant may appeal "by giving notice of such appeal . . . and filing . . . a bond . . . ." We think the reference to "procedure" in § 15-841 relates to matters occurring after the appeal has been perfected and jurisdiction has vested in the District Court.

Neumeyer v. Omaha Public Power Dist., 188 Neb. 516, 198 N.W.2d 80 (1972), involved an appeal in a proceeding in eminent domain. The relevant statute, Neb. Rev. Stat. § 76-715 (Reissue 1981), provided that an "appeal shall be taken by filing a notice of appeal . . . ." We held that the notice of appeal and service of the notice upon all parties bound by the award were jurisdictional, but that the undertaking and transcript were not jurisdictional requirements. We said at 520-21, 198 N.W.2d at 83: "Appellants are required to (1) execute an undertaking with surety and statutory conditions, (2) to do so at the time of filing notice of appeal, and (3) secure the approval of the county judge. These things are to be done in addition to the jurisdictional requirements of sections 76-715 and 76-715.01, R.R.S. 1943. The filing of the undertaking is not provided. There is no clear language relating the execution of the undertaking as a step necessary to vest the district court with jurisdiction and we think none was intended by the Legislature, rather jurisdiction in all eminent do-

main appeal statutes is keyed to the provision in section 76-715, R.R.S. 1943, that such 'appeal shall be taken by filing a notice of appeal.' "

The order sustaining the motion to dismiss was erroneous. The judgment of the District Court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED
FOR FURTHER PROCEEDINGS.

WHITE, J., concurring.

While I concur in the result reached by the majority in this case, I find that I must take a moment to write separately. For reasons more specifically set out in my dissent in the case of *School Dist. No. 17 and Westside Comm. Schools v. State,* 210 Neb. 762, 316 N.W.2d 767 (1982), I believe that the court's continual reference to the requirement that appeals from an action by a city to the District Court must in some manner follow a section of the statutes applicable to justice of the peace courts, which no longer exist, is unsound. For that reason I concur in the result reached by the majority, but disagree with the need for making the distinction which the majority has made herein.

I am authorized to say that KRIVOSHA, C.J., joins in this concurrence.

STATE OF NEBRASKA EX REL. JODY N. VAN CLEAVE AND KATHY L. VAN CLEAVE, APPELLEES, V. CITY OF NORTH PLATTE, LINCOLN COUNTY, NEBRASKA, APPELLANT.

329 N.W.2d 358

Filed January 28, 1983. No. 81-833.

1. **Mandamus.** A verification which is a part of an affidavit upon which a writ of mandamus is sought must be positively verified, and a verification based upon mere belief is inadequate.
2. _____. An action to procure the issuance of a writ of mandamus is

not begun until a motion and affidavit, or a petition verified positively, is filed in the District Court.

Appeal from the District Court for Lincoln County: KEITH WINDRUM, Judge. Reversed and remanded with directions to dismiss.

Richard W. Satterfield, for appellant.

Patrick B. Hays of Clough & Hays, for appellees.

Mattson, Ricketts, Davies, Stewart, Calkins & Duxbury, for amicus curiae League of Nebraska Municipalities.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and MORAN, D.J.

KRIVOSHA, C.J.

The City of North Platte, Nebraska, appeals from an order entered by the District Court for Lincoln County, Nebraska, directing the issuance of a peremptory writ of mandamus requiring the City of North Platte to connect the appellees' property to a water main owned by the city.

On November 2, 1981, the Van Cleaves filed a document entitled "Petition and Affidavit for Writ of Mandamus" in the District Court for Lincoln County, Nebraska. The petition alleged that the Van Cleaves were the owners of certain real estate located in the City of North Platte abutting a water main previously constructed and now owned by the City of North Platte. The petition further alleged, in essence, that the city refused to make the connection unless the Van Cleaves agreed to pay to the city an amount "equivalent to the average current water main assessment amount on water districts on a front foot or square foot basis as appropriate." The Van Cleaves alleged that they offered to pay the normal hookup fee in the amount of $295 but refused to pay the additional charge, computed to be in the amount of $721.54. The petition concluded by alleging that the Van Cleaves had no adequate remedy

at law, that the right of the Van Cleaves to require the City of North Platte to act as requested was clear, and that it was apparent "that no valid excuse can be given for nonperformance."

Without notice, the trial court issued a peremptory writ of mandamus directing the city to connect the Van Cleaves' property to the city water main adjacent to their property. Thereafter, on November 12, 1981, the city filed a document entitled "Motion to Vacate Judgment," alleging that the "City is willing to allow the plaintiffs to connect to its water main provided that the plaintiffs pay to the City its customary and standard charges as determined by the ordinances of the City." The motion to vacate did not make reference to the ordinances, but at the hearing on the motion to vacate there was offered in evidence, without objection, a copy of ordinance No. 2333. The ordinance provided in part: "That a property owner who has not previously shared in water main costs shall not be entitled to make connection to such existing main until he has paid to the North Platte Water Department the current average equivalent water district assessment cost as determined by the manager of the Municipal Light and Water Department. Nothing herein shall be construed to prevent the city from supplying water by separate agreement." The city maintains that, by reason of the existence of ordinance No. 2333, it is entitled to collect the sums requested and that the peremptory writ should not have been issued. Unfortunately, we are not able to reach that issue and do not, by this opinion, pass upon the validity of the ordinance in question.

The right to a peremptory writ of mandamus is dependent upon statute. See Neb. Rev. Stat. §§ 25-2156 to 25-2169 (Reissue 1979). Specifically, § 25-2160 provides in part: "The motion for the writ must be made upon affidavit." The record in this case fails to disclose the filing of such an affidavit, even though the document filed was so entitled. The

petition and affidavit for writ of mandamus filed by the Van Cleaves is verified as follows: "NOW on this 2nd day of November, 1981, before me, the undersigned Notary Public, personally appeared Jody N. Van Cleave and Kathy L. Van Cleave, who being first duly sworn upon oath, signed the above and foregoing Petition and Affidavit and acknowledged that they have read said Petition and Affidavit, know the contents thereof *and the facts alleged therein are true as they verily believe.*" (Emphasis supplied.) A verification which is a part of an affidavit upon which a writ of mandamus is sought must be positively verified, and a verification based upon mere belief is inadequate. In the case of *State ex rel. Roberts v. The Mayor,* 4 Neb. 260 (1876), we said: "Our statute regulating the issuance of this writ, requires the motion therefor to be made upon an affidavit setting forth the facts upon which it is based. *Genl. Stat.,* 640, *Sec.* 649. This application is by petition, verified in the usual mode of verifying a pleading under the code, that the facts stated therein are true as affiant 'verily believes.' This is a fatal defect, and a sufficient reason for denying the motion." What was Gen. Stat. § 649 (1873) is now that portion of § 25-2160 which requires the filing of an affidavit.

In *The State ex rel. Leonard v. School Dists. No. 3 and 4, Clay Co.,* 8 Neb. 98 (1878), we again addressed this issue, saying: "The application for a mandamus in this case is verified upon information and belief. An application verified in this manner, where there is no appearance on the part of the defendants, is sufficient cause for refusing either a peremptory or alternative writ."

In the case of *Little v. Board of County Commissioners,* 179 Neb. 655, 140 N.W.2d 1 (1966), appellants sought a review of the trial court's dismissal of their petition in error. As a part of their argument, appellants urged the court to consider their filings as a petition and affidavit seeking a writ of mandamus.

In rejecting that argument we said at 660, 140 N.W.2d at 4-5: "Appellants urge that if we determine that a petition in error is not the proper remedy, that the pleadings are broad enough to permit mandamus or other appropriate relief. There are several reasons why appellants' contention is without merit. Suffice it to say that even if the petition in error, *which is verified on information and belief,* is broad enough to be interpreted as a petition in mandamus, there is no application by motion supported by affidavit to justify the action pursuant to section 25-2160, R.R.S. 1943. See State ex rel. Krieger v. Board of Supervisors, 171 Neb. 117, 105 N.W.2d 721.

"As we said in State ex rel. Chicago & N. W. Ry. Co. v. Harrington, 78 Neb. 395, 110 N.W. 1016: 'An action to procure the issuance of a writ of mandamus is not begun until a motion and affidavit, or a petition *verified positively,* is filed in the district court, * * *.' " (Emphasis supplied.) It appearing without question that neither a motion and affidavit nor a petition positively verified has been filed, the trial court was without authority to issue the peremptory writ of mandamus. The reason for such a rule should be apparent. The issuance of a peremptory writ of mandamus is an extraordinary action and should not be done unless the trial court is assured that there is someone who represents to the court that the facts presented are true and who may be subject to perjury if it later proves otherwise. We are not able to reach the issue of whether ordinance No. 2333 is constitutional and valid. The judgment of the trial court therefore is reversed and the cause is remanded with directions to dismiss the petition.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

Cite as 213 Neb. 431

LEO MASID, APPELLEE, V. FIRST STATE BANK, APPELLANT.

329 N.W.2d 560

Filed January 28, 1983. No. 81-857.

1. **Equity: Appeal and Error.** A case in equity is reviewed in the Nebraska Supreme Court de novo on the record, subject to the rule that where credible evidence is in conflict on material issues of fact, we will consider the fact that the trial court observed the witnesses and accepted one version of the facts over another.
2. **Easements: Proof.** Prescriptive rights are not looked upon with favor and, generally, must be proved by clear, convincing, and satisfactory evidence.
3. **Easements.** The use and enjoyment which will give title by prescription to an easement is substantially the same in quality and characteristics as the adverse possession which will give title to real estate. It must be exclusive, adverse, under a claim of right, continuous and uninterrupted, and open and notorious for the full prescriptive period.
4. _____. Where adjoining proprietors lay out an alley between their lands, each devoting a part of his land to that way or alley, which is used for the prescriptive period by the respective owners or their successors in title, neither can obstruct or close that part which is on his own land; and in these circumstances the mutual use of the whole of the alleyway is to be considered to be adverse to a separate and exclusive use by either.
5. **Easements: Presumptions.** Where a claimant has shown open, visible, continuous, and unmolested use for the prescriptive period, the use will be presumed to be under a claim of right. The burden then falls upon the owner of the servient estate to rebut that presumption by showing the use to be permissive.
6. **Abandonment: Proof.** Abandonment must be pled and proved, the burden of proof being on the party alleging it.
7. **Easements: Notice.** Possession of land is notice to the world of the possessor's rights therein and of all interests which inquiry of the possessor would have revealed.
8. _____: _____. Where one is put on inquiry, he is charged with notice of all facts as he would have learned by a reasonable inquiry.
9. **Easements: Due Process: Notice.** Due process requires at a minimum that deprivation of property by adjudication be preceded by notice and the opportunity to be heard as is appropriate to the nature of the case.
10. **Easements: Notice.** The whereabouts of a possessor of land are known and as such he is entitled to personal notice of any proceeding which may affect his interest in that land.

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

Raymond, Olsen, Coll & Ediger, P.C., for appellant.

James R. Hancock of the Hancock Law Offices, for appellee.

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

CAPORALE, J.

Defendant-appellant, First State Bank, appeals from the order of the District Court which confirms in plaintiff-appellee, Leo Masid, a prescriptive easement of access over certain of defendant's land, prevents defendant from interfering with the use thereof, and enjoins defendant from maintaining certain structures within the easement. We affirm.

Defendant, in summary, contends the trial court erred in (1) finding plaintiff had proved a prescriptive easement, (2) failing to find a nonuser abandonment of any easement which may have existed, and (3) failing to find that an earlier quiet title decree bound plaintiff.

The matter being equitable in nature, it is reviewed in this court de novo on the record, subject to the rule that where credible evidence is in conflict on material issues of fact, we will consider the fact that the trial court observed the witnesses and accepted one version of the facts over another. Neb. Rev. Stat. § 25-1925 (Reissue 1979); *Spilinek v. Spilinek,* 212 Neb. 811, 326 N.W.2d 170 (1982); *Sturm v. Mau,* 209 Neb. 865, 312 N.W.2d 272 (1981).

We find the facts, in accordance with the foregoing rules, as hereinafter set forth. The lot adjacent to the area in question faces east on Broadway Street between 20th and 21st Streets in Scottsbluff, Nebraska. It was purchased by plaintiff's father in 1926 and was acquired by plaintiff in 1955. Broad-

way Street, from 1926 to the present, has been divided by an island which allows ingress and egress to the property from only one direction. A north-south way or alley, approximately 10 feet wide, has existed adjacent to the west edge of plaintiff's lot. Access to this alleyway was by means of a curb cut at its north end on 21st Street. The Masid family lived on the premises from 1926 to 1936 when they moved, during which period they used the alleyway as an additional means of ingress and egress to the premises. For a period of time thereafter the premises were rented to various residential tenants who used the alleyway in the manner used by the Masids. In approximately 1951 the house was removed and the land was rented for use in connection with adjacent property as a car sales lot. This lessee graded the land back to and across the alleyway, placing all of the land at a uniform grade. The alleyway was further used during this time for ingress and egress. Following the car lot operation, the premises were leased by a drive-in establishment which sold gasoline as a part of its operation. During this later period the alleyway continued to be used for ingress and egress. The premises were vacant for a period which may have begun as early as sometime in 1968 to approximately August of 1979 when plaintiff began to construct the commercial office building presently on the premises. This brick block building, which has two rear doors opening onto the alleyway, was essentially built and enclosed by December 13, 1979. Plaintiff occupied this building and used the rear doors through the alleyway beginning in December of 1979. On December 13, 1979, defendant instituted a quiet title action. A decree entered January 15, 1980, quieted title in defendant to the northwest quarter of the block within which the disputed easement and defendant's land are located. Plaintiff was not made a party to the quiet title action; the decree quiets title to nothing other than the literal "northwest fourth" of the block.

The defendant has fenced, paved, and placed an electrical transformer box within the one-half portion of the disputed alleyway adjacent to its property. The fence and transformer box make it impossible for plaintiff to use the one-half portion of the disputed alleyway adjacent to his property as he had in the past.

Prescriptive rights are not looked upon with favor and, generally, must be proved by clear, convincing, and satisfactory evidence. *Hengen v. Hengen,* 211 Neb. 276, 318 N.W.2d 269 (1982); *Sturm v. Mau, supra; Svoboda v. Johnson,* 204 Neb. 57, 281 N.W.2d 892 (1979). The use and enjoyment which will give title by prescription to an easement is substantially the same in quality and characteristics as the adverse possession which will give title to real estate. It must be exclusive, adverse, under a claim of right, continuous and uninterrupted, and open and notorious for the full prescriptive period. Neb. Rev. Stat. § 25-202 (Reissue 1979); *Svoboda v. Johnson, supra; Fischer v. Grinsbergs,* 198 Neb. 329, 252 N.W.2d 619 (1977); *Jurgensen v. Ainscow,* 155 Neb. 701, 53 N.W.2d 196 (1952). While some of our earlier opinions have included a requirement that the use also be with "the knowledge and acquiescence of the owner of the servient tenement," upon further reflection we now determine that such a requirement is neither necessary nor proper and is now specifically deleted as a requirement for establishing a prescriptive easement.

Our holding in *Fischer v. Grinsbergs, supra,* is largely dispositive of defendant's first assignment of error. We held therein that where adjoining proprietors lay out an alley between their lands, each devoting a part of his land to that way or alley, which is used for the prescriptive period by the respective owners or their successors in title, neither can obstruct or close that part which is on his own land; and in these circumstances the mutual use of the whole of the alleyway is to be considered to be

adverse to a separate and exclusive use by either. No evidence was adduced to the effect that the way at issue was a public alley dedicated in the customary fashion as such; therefore, the rule in *Fischer* applies to this case. We also said in *Fischer* that where a claimant has shown open, visible, continuous, and unmolested use for the prescriptive period, the use will be presumed to be under a claim of right. The burden then falls upon the owner of the servient estate to rebut that presumption by showing the use to be permissive. That presumption was not rebutted by the evidence in this case. We conclude, therefore, that the evidence clearly, convincingly, and satisfactorily establishes an exclusive use which was under a claim of right, continuous and uninterrupted, open and notorious, for the full prescriptive period. The trial court was therefore correct in determining that an easement by prescription came into existence.

The question now becomes whether that easement was abandoned. Abandonment must be pled and proved, the burden of proof being on the party alleging it. *Agnew v. City of Pawnee City,* 79 Neb. 603, 113 N.W. 236 (1907). Defendant did not plead abandonment, nor does the evidence establish it. It is true the evidence is that the land to which the easement is appurtenant was vacant for a period of 11 or 12 years. However, this circumstance, in and of itself, does not establish abandonment. Nonuser for a period sufficient to create an easement by prescription will raise a presumption to defeat the right, but this nonuser is open to explanation and may be rebutted by proof that the owner had no intention to abandon his easement while thus omitting to use it. An intention to abandon an easement cannot be inferred from the mere fact that the premises to which it is appurtenant were vacant for a period of years in excess of the prescriptive period. *Agnew v. City of Pawnee City, supra.* Unlike *Toelle v. Preuss,* 172 Neb. 239, 109 N.W.2d 293 (1961), the

plaintiff herein did not by his own act render the use of the easement impossible, nor did he obstruct it in a manner inconsistent with its further enjoyment. There is no abandonment in this case, even if defendant were to have pled it.

There remains, then, the question of whether the quiet title decree obtained by the defendant is binding upon the plaintiff. The plaintiff was in possession of the land to which the easement was appurtenant, at least by the time the defendant commenced its quiet title action and certainly during its prosecution. Possession of land is notice to the world of the possessor's rights therein and of all interests which inquiry of the possessor would have revealed. *Durfee v. Keiffer,* 168 Neb. 272, 95 N.W.2d 618 (1959); *Blum v. Poppenhagen,* 142 Neb. 5, 5 N.W.2d 99 (1942). Defendant's argument that though plaintiff was in possession of his land he was not in possession of the easement is imaginative, creative, and without substance. Where one is put on inquiry, he is charged with notice of all facts as he would have learned by a reasonable inquiry. *Swanson Petroleum Corp. v. Cumberland,* 184 Neb. 323, 167 N.W.2d 391 (1969). Due process requires at a minimum that deprivation of property by adjudication be preceded by notice and the opportunity to be heard as is appropriate to the nature of the case. The whereabouts of a possessor of land are known and as such he is entitled to personal notice of any proceeding which may affect his interest in that land. See, *Greene v. Lindsey,* 456 U.S. 444, 102 S. Ct. 1874, 72 L. Ed. 2d 249 (1982); *Mullane v. Central Hanover Tr. Co.,* 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950). See, also, *Estate of Colman v. Redford,* 179 Neb. 270, 137 N.W.2d 822 (1965); *School Dist. No. 8 v. State Board of Education,* 176 Neb. 722, 127 N.W.2d 458 (1964). The trial court was entirely correct in holding that defendant's quiet title decree did not bind plaintiff.

None of defendant's assignments of error having

merit, the judgment of the trial court is affirmed.

AFFIRMED.

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

329 N.W.2d 361

Filed January 28, 1983. Nos. 82-303, 82-304, 82-305.

1. **Mentally Disordered Sex Offender: Appeal and Error.** This court will not disturb the District Court finding that an individual is a mentally disordered sex offender presently untreatable unless it can be said that there was no evidence upon which such conclusions could be based and that such declaration was an abuse of discretion.
2. **Physicians and Surgeons: Licenses.** Under the provisions of Neb. Rev. Stat. § 29-2913 (Reissue 1979), an evaluating physician must be licensed to practice medicine in the State of Nebraska.

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

John P. Murphy of Ruff & Murphy, for appellant.

Paul L. Douglas, Attorney General, and Marilyn B. Hutchinson, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and MORAN, D.J.

KRIVOSHA, C.J.

The appellant, Dennis Sell, appeals from an order entered by the District Court for Dawson County, Nebraska, finding Sell to be an untreatable mentally disordered sex offender. On review, we affirm.

This matter was originally before us and is reported in the case of *State v. Sell,* 202 Neb. 840, 277 N.W.2d 256 (1979). The facts of the case are sufficiently set out therein and need not be repeated here. Suffice it to say that Sell was previously determined by the trial court to be an untreatable sexual sociopath, pursuant to the Nebraska sexual

sociopath law, and ordered held in the Nebraska Penal and Correctional Complex. Following that determination, the Nebraska Legislature repealed the sexual sociopath law and replaced it with the provisions of Neb. Rev. Stat. §§ 29-2911 to 29-2921 (Reissue 1979). See 1979 Neb. Laws, L.B. 378. The newly enacted provisions provide that after a person is convicted of a felony sexual offense the court shall order a presentence investigation, which shall include an evaluation to determine whether the defendant is a mentally disordered sex offender. See § 29-2912. Pursuant to the provisions of the mentally disordered sex offender law, the District Court appointed a panel of two physicians licensed to practice medicine and surgery and who have had at least 3 years of special training in treatment of mental disorders. See § 29-2913. Following an examination of Sell, the doctors appointed by the court filed their report, finding Sell to be a nontreatable mentally disordered sex offender. Sell disagreed with the conclusions of the court-appointed panel and, pursuant to § 29-2913, filed a motion requesting that the court appoint two physicians of his choice to complete an evaluation. On February 26, 1982, the court granted the motion of appellant and ordered him to be evaluated by Dr. Robert E. Mitchell of Omaha, Nebraska, and Dr. Berten Mann of Omaha, Nebraska. Dr. Beverley T. Mead of Omaha, Nebraska, was later substituted for Dr. Mann. After the evaluations were completed a hearing was held on March 31, 1982, at which time Sell was present. The court determined that Sell was a mentally disordered sex offender who was presently untreatable and therefore should remain confined at the Nebraska Penal and Correctional Complex.

Sell has assigned two errors. First, Sell maintains that the District Court erred in determining that he was an untreatable mentally disordered sex offender. Also, Sell maintains that the court erred

in refusing to permit him to select a physician of his choice for his evaluation.

The record simply does not support the claim that the court erred in determining that Sell is an untreatable mentally disordered sex offender. All four of the physicians concluded that Sell was an untreatable mentally disordered sex offender. Dr. John D. Baldwin, one of the psychiatrists appointed by the court, stated that Sell "is a mentally disordered sex offender and that this condition is not legally treatable in the State of Nebraska." Dr. Baldwin compared Sell to a "bomb ready to go off." Dr. Robert G. Osborne, the other psychiatrist appointed by the court, likewise concluded that "Sell is a mentally disordered sex offender, and further, that his condition is not treatable." Dr. Osborne concluded his report by observing that "This is obviously a man who has a lifelong pattern of increasingly deviant and dangerous behavior, and though it is true that personality disorders tend to 'burn out' as a person ages, I think it would be foolhardy to consider that he will 'burn out' in the next two or three decades." The physicians appointed at Sell's request also reached the same conclusion. Dr. Mitchell diagnosed Sell as a sexual sadist with an antisocial personality disorder. After noting that Sell's sexual arousal was enhanced by the resistance of his victim, Dr. Mitchell felt that it was "more likely in his case that not only would he commit rape but also be inclined to brutality and serious physical injury." It was Dr. Mitchell's opinion "that this individual does meet the criteria for mentally-disordered sex offender" but was not treatable at this time. Likewise, Dr. Mead, after examining Sell, reached the conclusion that Sell should "still be regarded as untreatable." In our earlier *Sell* case, *supra,* we held that this court will not disturb a District Court finding that an individual is a mentally disordered sex offender presently untreatable unless it can be said that there was no evidence upon which such conclu-

sions could be based and that such declaration was an abuse of discretion. The present record not only provides some evidence from which the trial court could conclude as it did but presents evidence from which no other conclusion could be reached. There is simply no merit in Sell's claim that the trial court erred in determining that he was an untreatable mentally disordered sex offender.

His second claim of error must also be overruled. Though there appears no motion in the record concerning a request by Sell for physicians other than Drs. Mitchell and Mann, later replaced by Dr. Mead, there is a brief discussion between counsel and the trial court found in the bill of exceptions. "MR. MURPHY: We have no evidence, Your Honor, just argument. THE COURT: All right. Argument? MR. MURPHY: Excuse me, Your Honor, there is a motion, or actually something I would like to place on the record. THE COURT: All right. MR. MURPHY: At the time that we requested the Court for further evaluation of Mr. Sell, one of the physicians, licensed physicians, that we wished to have Mr. Sell evaluated by, was by a Dr. Franks. The Court, at that time, advised that the Court read the statute to mean that the physician was to be licensed within the State of Nebraska. We'd simply like to show on the record that we did request that Dr. Franks be one of the physicians, but that request was denied by the Court. THE COURT: The record will so show. The Court determined that the defendant has the choice of psychiatrists, but the Court ruled they had to be licensed in Nebraska. MR. MURPHY: That's all I'd have, then." The narrow question, then, is whether the trial court was correct in concluding that § 29-2913 was to be read so as to mean that the physician selected by either the court or the defendant must be licensed to practice in the State of Nebraska. We believe that a reading of both the mentally disordered sex offender law and the laws of Nebraska

generally with regard to the practice of medicine support the trial court's position. Neb. Rev. Stat. § 71-1,103 (Reissue 1981) provides who may engage in the practice of medicine in the State of Nebraska. The section reads in part: "Every act or practice falling within the practice of medicine and surgery as defined not specially excepted herein, shall constitute the practice of medicine and surgery *and may be performed in this state only by those licensed by law to practice medicine in Nebraska.*" (Emphasis supplied.)

Under the provisions of § 71-1,103, unless an individual falls within a specific exception, the individual may not engage in the practice of medicine in this state unless he or she is licensed by law within this state. If one came into the state from outside Nebraska and attempted to conduct an individual psychiatric examination of the defendant, he would be in violation of § 71-1,103. We cannot believe that the Legislature intended to authorize a physician to conduct a psychiatric examination pursuant to § 29-2913 in violation of § 71-1,103. Had the Legislature intended to permit physicians not licensed to practice medicine and surgery in Nebraska to be so appointed, it would have been unnecessary to include the phrase "licensed to practice medicine and surgery." Simply describing them as physicians who had at least 3 years of special training in treatment of mental disorders would have been sufficient. In view of the language of § 71-1,103 and the exceptions thereto, we must conclude that the Legislature, in § 29-2913, intended "licensed to practice medicine and surgery" to mean licensed in the State of Nebraska. We therefore conclude that the determination by the trial court regarding the appointment of Dr. Franks was correct. There appearing no error in the record, the judgment of the trial court is affirmed.

AFFIRMED.

KERREY'S, INC., A NEBRASKA CORPORATION, APPELLEE, V. NEBRASKA LIQUOR CONTROL COMMISSION, APPELLANT.

329 N.W.2d 364

Filed January 28, 1983. No. 82-636.

1. **Liquor Licenses.** The failure of a local governing body to approve an application for a liquor license does not necessarily constitute a recommendation of denial and, standing alone, is insufficient evidence to support a denial of the application by the Nebraska Liquor Control Commission.
2. **Administrative Hearings: Liquor Licenses.** At a hearing on an application for a liquor license, the burden is upon the applicant to prove its fitness and willingness to provide the service proposed, its ability to conform to the rules of the Nebraska Liquor Control Act, that its management and control exercised over the premises will insure compliance with such rules and regulations, and that the issuance of the license is or will be required by the present or future public convenience and necessity. Although the Liquor Control Commission may consider the recommendation of the local governing body in determining whether or not to issue such license, the burden is not on the applicant to provide evidence of such recommendation.

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

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

Robert F. Peterson of Lydick & Peterson, for appellee.

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

HASTINGS, J.

The Nebraska Liquor Control Commission denied the application of Kerrey's, Inc., for a class C liquor license. On appeal to the District Court, the commission's order of March 25, 1982, was reversed and it was directed to issue the license. The commission has appealed to this court, assigning as error the allocation of the burden of proof by the District Court and the absence of competent evidence to support its order.

The only protest filed as to the plaintiff's application for the 2510 South 132d Street, Omaha, Nebraska, location was a perfunctory jurisdictional one entered by the commission's executive director. The notice of hearing before the commission stated the issues to be decided as: (1) The effect of the absence of a recommendation from the local governing body, and (2) Whether the applicant could demonstrate that the issuance of the license is required by the present or future public convenience and necessity, as provided for in Neb. Rev. Stat. § 53-132 (Cum. Supp. 1982).

Taking up the second issue first, we need mention only two things. First, there was substantial evidence presented by the plaintiff at the hearing before the commission in support of the public convenience and necessity question and no evidence whatsoever in opposition thereto or to the granting of the application. Second, in support of its findings that the application should be denied, the commission mentioned only that the local governing body "was not in favor of the issuance of this license and had as a matter of fact voted to recommend denial." Therefore, it seems quite apparent from the record that, for the purpose of this appeal, we may assume that the applicant has sustained its burden of proving public convenience and necessity.

An examination of the record discloses that the findings of the commission just mentioned are not fully supported by it. There was no formal filing by the city of Omaha with the commission of any document or information touching upon this application. The only reference to any action of the Omaha City Council is contained in the testimony of the sole witness at the hearing, the secretary-treasurer of Kerrey's, Inc. After establishing that he was present at the council meeting at which this particular matter was discussed, the following questions and answers between counsel and the witness occurred: "Q And at the time you were there, what decision did they

render? A They rendered, to my understanding, based on the Omaha City Ordinance, that they could not approve the issuance of a new license. . . . Q It was your understanding, then, that it was only the ordinance that caused them to not be able to make a favorable recommendation. A Yes."

Read in a literal sense, the most that can be said about the action of the Omaha City Council is that it refused to approve the application or that it was not able to make a favorable recommendation. In *Joe and Al's IGA, Inc. v. Nebraska Liquor Control Commission,* 203 Neb. 176, 181, 277 N.W.2d 693, 696 (1979), we said: "In this case, a resolution recommending approval failed to receive a majority vote; it was clearly ineffective to constitute any official action of the governing body; amounted to no recommendation at all; and does not furnish competent evidence upon which to base a denial of a liquor license application by the Commission."

Beyond that, we believe that it is not too much to ask that a local governing body, if it is actually interested in the denial of a license application, furnish the commission with some evidence of official action on its part. "The vote here was clearly ineffective to constitute any *official* action of the governing body." (Emphasis supplied.) *Hadlock v. Nebraska Liquor Control Commission,* 193 Neb. 721, 727, 228 N.W.2d 887, 891 (1975).

It is true, as stated by the commission, that a recommendation of a local governing body that a license should be *denied,* standing alone, provides sufficient evidentiary basis on which the commission might deny an application for a liquor license. *72nd Street Pizza, Inc. v. Nebraska Liquor Control Commission,* 199 Neb. 729, 261 N.W.2d 614 (1978). However, the statement in *Hadlock, supra* at 728, 228 N.W.2d 891-92 is more apropos of this situation: "Here the Nebraska Liquor Control Commission found that the local governing body had recommended denial of the application, and it based its

own decision on that assumed fact. If true, that fact would have constituted valid grounds for denial of the application. However, there is no evidence to support that finding, nor is there any other evidence in the record which could have constituted valid grounds for denial. To the contrary, the evidence established that the purported recommendation of denial by the city counsel [sic] was wholly ineffective to constitute official action by the city. At best it could only be treated as a failure to act. Under such circumstances, the order of denial was arbitrary and unreasonable."

We agree that the burden is on the applicant for a liquor license to prove its fitness and willingness to provide the service proposed, its ability to conform to the rules and regulations of the Nebraska Liquor Control Act, that the management and control exercised over the premises will insure compliance with such rules and regulations, and that the issuance of the license is or will be required by the present or future public convenience and necessity, as provided for in § 53-132(2). However, such burden does not necessarily include that of obtaining the approval or recommendation of the local governing body. As demonstrated by the cited case authorities, and § 53-132(3), such evidence may be considered by the commission in making its determination as to whether or not the license application should be approved, and evidence of a recommended denial *may* be sufficient to justify its own denial. In the absence of a statutory requirement to that effect, we will not impose such burden on the applicant by judicial fiat.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. PAUL L. SMITH, APPELLANT.

329 N.W.2d 564

Filed February 4, 1983. No. 81-672.

1. **Prior Convictions: Proof.** In a proceeding to enhance the punishment because of prior convictions, the burden remains on the State to prove such convictions.
2. **Judgments: Prior Convictions: Proof.** A judgment of conviction which would have been invalid to support a sentence of imprisonment in the first instance is not valid to enhance the punishment in a subsequent case.
3. **Prior Convictions: Right to Counsel: Proof.** That defendant's right to counsel was honored in a prior conviction may not be proved by a silent record.
4. **Prior Convictions: Collateral Attack: Case Overruled.** At an enhancement proceeding, a defendant's objection to the reception in evidence of a transcript of a former conviction which fails to show on its face that counsel was afforded or the right waived does not constitute a collateral attack on such prior conviction. To the extent that *State v. Orosco,* 199 Neb. 532, 260 N.W.2d 303 (1977), and *State v. Voight,* 206 Neb. 829, 295 N.W.2d 112 (1980), conflict with this holding, they are overruled.

Appeal from the District Court for Douglas County: PAUL J. HICKMAN, Judge. Reversed and remanded for further proceedings.

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

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

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and MORAN, D.J.

HASTINGS, J.

The defendant, Paul L. Smith, was found guilty by the District Court of third offense driving while intoxicated, a violation of Neb. Rev. Stat. § 39-669.07 (Reissue 1978), and sentenced accordingly. He has appealed to this court and assigns as error the reception into evidence, for enhancement purposes, of certified copies of two prior driving-while-intoxicated convictions. These transcripts of judgment failed to

disclose whether, at the time of such convictions, the defendant was either represented by counsel or had waived the right to counsel.

There is no question concerning the basic conviction which resulted from a jury trial. However, at the hearing to determine whether or not the conviction was a third offense, the only things offered in evidence were two Omaha Municipal Court form transcripts of judgment which indicated the defendant had pleaded nolo contendere in each instance and upon "trial" was found guilty. One offense was in 1972 and the other in 1973. As we have stated above, nothing appears on either transcript to show if the defendant was represented by counsel or if he had waived such representation.

In *State v. Tweedy,* 209 Neb. 649, 654-55, 309 N.W.2d 94, 98 (1981), we said: "[N]o defendant may be imprisoned for any offense . . . absent a knowing and intelligent waiver of his rights . . . . That means that such defendants are entitled to be informed of the nature of the charges against them, the *right to assistance of counsel* . . . . A voluntary and intelligent waiver of these rights must *affirmatively appear from the record.*" (Emphasis supplied.)

By per curiam opinion in *Baldasar v. Illinois,* 446 U.S. 222, 100 S. Ct. 1585, 64 L. Ed. 2d 169 (1980), the Supreme Court held that an uncounseled misdemeanor conviction may not be used to enhance the penalty and convert a subsequent misdemeanor into a felony with a prison term. The concurring opinion of Mr. Justice Marshall perhaps best explains the rationale of the Court. " '[I]ncarceration was so severe a sanction that it should not be imposed as a result of a criminal trial unless an indigent defendant had been offered appointed counsel to assist in his defense,' [citation omitted].

"That petitioner has been deprived of his liberty 'as a result of [the first] criminal trial' could not be clearer. If it had not been for the prior conviction, petitioner could not have been sentenced to more

than one year for the present offense. . . .

". . . It [the subsequent sentence] was imposed as a direct consequence of that uncounseled conviction and is therefore forbidden under *Scott* and *Argersinger*.

"We should not lose sight of the underlying rationale of *Argersinger*, that unless an accused has 'the guiding hand of counsel at every step in the proceedings against him,' [citation omitted] his conviction is not sufficiently reliable to support the severe sanction of imprisonment. [Citation omitted.] An uncounseled conviction does not become more reliable merely because the accused has been validly convicted of a subsequent offense. For this reason, a conviction which is invalid for purposes of imposing a sentence of imprisonment for the offense itself remains invalid for purposes of increasing a term of imprisonment for a subsequent conviction under a repeat-offender statute." *Id.* at 226-28.

We recognize that in *State v. Voight*, 206 Neb. 829, 295 N.W.2d 112 (1980), we held that in a proceeding to show a prior conviction for the purpose of enhancing the penalty in a subsequent conviction, where proof has been made of the defendant's prior conviction, the defendant cannot then collaterally attack that earlier conviction. However, such holding seems to run squarely contrary to the rule laid down in *Baldasar*.

Additionally, we said in *State v. Orosco*, 199 Neb. 532, 260 N.W.2d 303 (1977), that when a defendant collaterally attacks a judgment of conviction the burden is upon him to show the grounds of the claimed invalidity *if it does not show upon the face of the record.* However, in *Burgett v. Texas*, 389 U.S. 109, 88 S. Ct. 258, 19 L. Ed. 2d 319 (1967), the Supreme Court was faced with a situation similar to that of the case here. In a Texas prosecution an attempt was made to utilize a prior Tennessee conviction, the transcript of which failed to show whether the defendant had been represented by counsel or

whether counsel had been waived. The Court said: "In this case the certified records of the Tennessee conviction on their face raise a presumption that petitioner was denied his right to counsel in the Tennessee proceeding, and therefore that his conviction was void. Presuming waiver of counsel from a silent record is impermissible. [Citation omitted.] To permit a conviction obtained in violation of *Gideon v. Wainwright* to be used against a person either to support guilt or enhance punishment for another offense . . . is to erode the principle of that case." *Id.* at 114-15.

In *Voight* and *Orosco* our choice of words was unfortunate. We agree that in an enhancement proceeding, a defendant should not be able to relitigate the former conviction, and to that extent such conviction cannot be collaterally attacked. However, under the present circumstances, the burden remains with the State to prove the prior convictions. This cannot be done by proving a judgment which would have been invalid to support a sentence of imprisonment in the first instance. *Baldasar v. Illinois, supra.* Where a record is silent as to a defendant's opportunity for counsel, we may not presume that such rights were respected. *Burgett v. Texas, supra; State v. Tweedy, supra.* A defendant's objection to the introduction of a transcript of conviction which fails to show on its face that counsel was afforded or the right waived does not constitute a collateral attack on the former judgment. The objection should have been sustained. To the extent that *Voight* and *Orosco* conflict with this holding, they are overruled.

The judgment of the District Court is reversed and the cause is remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

ROBERT J. EASLEY AND KATHRYN L. EASLEY, VALE O. VAN BOSKIRK, ST. THOMAS AQUINAS CHURCH, A CORPORATION, ET AL., APPELLEES AND CROSS-APPELLANTS, V. CITY OF LINCOLN, NEBRASKA, A MUNICIPAL CORPORATION, APPELLANT AND CROSS-APPELLEE.

330 N.W.2d 130

Filed February 4, 1983. No. 81-718.

1. **Public Property: Taxation.** Ordinarily, public property is exempt from general purpose taxation.
2. **Taxation: Political Subdivisions: Special Assessments.** A distinction is recognized between taxation for general purposes and the levying of assessments on specific property for specific benefits conferred upon it by means of an improvement district created by an appropriate governing authority.
3. **Constitutional Law: Political Subdivisions: Special Assessments.** There is no constitutional prohibition against the assessment of a governmental subdivision for special benefits conferred upon its realty as the result of improvements created by an appropriate governing authority.
4. **Leases.** Bare lessees cannot be said to represent fee simple ownership, no matter how long the term of the lease.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Reversed and remanded with directions.

William F. Austin, City Attorney, for appellant.

Michael O. Johanns and John F. Akin, for appellees.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and COLWELL, D.J., Retired.

CAPORALE, J.

This appeal from a collateral attack upon the creating ordinance seeks to reverse the judgment of the trial court in these three consolidated cases which invalidated Business Improvement District No. 1 of the City of Lincoln. We reverse.

Appellant, City of Lincoln, contends the trial court improperly determined that the properties owned by the Board of Regents of the University of Nebraska,

the City of Lincoln, and the County of Lancaster should be excluded from the computation of the assessable front footage; improperly found that protests filed by purchasers under unrecorded land contracts were valid within the meaning of the statute, Neb. Rev. Stat. § 19-4009 (Reissue 1977); and improperly found that protests filed by certain corporate and individual agents signing without a showing of authority were valid. Further, appellees, Robert J. Easley et al., contend in their cross-appeal that the trial court erred in finding protests filed by lessees of certain properties to be invalid.

Pursuant to the provisions of the former Business Improvement District Act, Neb. Rev. Stat. §§ 19-4001 et seq. (Reissue 1977), the City of Lincoln created the district at issue for the purpose of constructing, maintaining, repairing, replacing, and reconstructing certain amenities within designated public rights-of-way in its downtown business area. Section 19-4009 provided then, as does present day Neb. Rev. Stat. § 19-4027 (Cum. Supp. 1982), in pertinent part: "Proceedings for any proposed district shall terminate if protest is made by the owners of over fifty per cent of the assessable front footage in the proposed district."

The parties stipulated that there was a total of 22,571.83 front feet in the district at issue. They agreed that the 900 front feet belonging to the General Services Administration of the federal government should be excluded from the computation of the assessable front footage. That, therefore, leaves a total of 21,671.83 front feet potentially subject to assessment.

The Board of Regents of the University of Nebraska owns 1,047 front feet, the City of Lincoln owns 300 front feet, and the County of Lancaster owns 142 front feet. The question is whether any part of these 1,489 publicly owned front feet should be excluded from the computation of the assessable front footage.

It is axiomatic that, ordinarily, public property is exempt from general purpose taxation. Neb. Const. art. VIII, § 2. However, to say that public property is exempt from taxation is not to say that it is exempt from liability accruing for special assessments levied by reason of special benefits conferred upon the property. A distinction is recognized between taxation for general purposes and the levying of assessments on specific property for specific benefits conferred upon it by means of an improvement district created by an appropriate governing authority. There is, as noted in *Von Steen v. City of Beatrice,* 36 Neb. 421, 54 N.W. 677 (1893), a conflict among the states of our nation concerning the recognition of this distinction. In Nebraska that distinction between the two has been and is recognized. This state does not allow public lands benefited by local improvements to obtain a free ride at the expense of other taxpayers in the improved area. In the case of *City of Beatrice v. Brethren Church of Beatrice,* 41 Neb. 358, 366-67, 59 N.W. 932, 934 (1894), we said: "This court has, therefore, recognized a distinction between taxation for general purposes and assessments on account of special benefits conferred to adjacent property. If no such difference in fact existed, the provisions of section 1, article 9, of our constitution would absolutely prohibit the assessment of lots on account of benefits conferred by public improvements adjacent thereto, for, except as his property is specially benefited, the adjacent lot owner has no more concern with such improvements than has anyone else of the general public. He can only use the improved highway in the same way and for the same purposes as may any other individual. On him would be inflicted the same punishment for obstructions placed thereon as would be visited upon an utter stranger in the city for the same offense, notwithstanding the fact that with his own private means alone this portion of the highway had been rendered fit for the use of the general public. If the

special benefit to his adjacent property presents no ground for its special assessment, it is difficult to see how the legislature has provided for necessary revenue by levying a tax by valuation so that (as required by section 1, article 9, of the constitution) each person shall pay a tax in proportion to the value of his property. The exemptions provided by section 2, article 9, of our constitution have reference solely to the general tax by valuation provided in the immediately preceding section, and have no application whatever to the special assessment or special taxation of property benefited by local improvements as contemplated by section 6 of the same article." Earlier in the same opinion we said at 365, 59 N.W. at 934, quoting *Hanscom v. City of Omaha,* 11 Neb. 37, 7 N.W. 739 (1881): " 'The principle which underlies special assessments is that the value of the property is enhanced to an amount at least equal to the assessment. This principle cannot be departed from without taking private property for public use.' " This comports with basic common sense, since public lands may not necessarily always remain in the hands of the public. A specific parcel may be owned by and used by the public for public purposes for a number of years, receiving the benefit of many special improvements during that time. If the public later sells that parcel, and has not been made to pay for those special improvements during that time, then it has effectively received a free ride at the expense of the other assessed property owners within that improvement area when it (the public) is able to receive a higher price for that parcel at the time it is sold, and only by virtue of the special improvements. In *Brethren Church* we also distinguished *Von Steen, supra,* noting that "*Von Steen v. City of Beatrice* . . . was considered solely with reference to chapter 14, Session Laws of 1887 . . . .

"[N]o reference was made to the provisions of our constitution, and . . . it is easy to believe that the

Von Steen case was presented, and perhaps considered, without special reference to the constitution." *Id.* at 361-63, 59 N.W. at 932-33.

In the case of *Farnham v. City of Lincoln,* 75 Neb. 502, 508, 106 N.W. 666, 668 (1906), we said: "[T]his court, in *City of Beatrice v. Brethren Church* . . . has followed the weight of authority on this question. It was there said:

" 'The consensus of these authorities is that an assessment to reimburse a municipal corporation for such benefit as it has conferred upon an adjacent lot by reason of pavements or sidewalks laid alongside it is not an exercise of power to tax in the generally accepted meaning of that term.'

"It is apparent on the face of the constitution that the framers of that instrument did not use the word taxes and the term special assessments as equivalents of each other, or that either included the other. Section 1, article IX, provides that taxes shall be levied by valuation and proportionate value, except special taxes on the kinds of business therein enumerated. Section 6 of the same article provides that the ordinary revenues of municipalities shall be uniform in respect to persons and property, and contains a special provision that the legislature may authorize corporate authorities of towns and villages to make local improvements by special assessments. Construing these provisions in the case last above recited, we said:

" 'The exemptions provided by section 2, article IX of the constitution, are solely with reference to taxes assessed by valuation for general purposes, and have no applicability to special assessments, or special taxation of property benefited by local improvements under authority of section 6 of the same article.'

"This distinction was again recognized in *Scott v. Society of Russian Israelites* . . . ."

In *Drainage District No. 1 v. Richardson County,* 86 Neb. 355, 125 N.W. 796 (1910), the distinction be-

tween public property exemption from general purpose taxation and nonexemption from special assessment liability was further solidified and the adherence of this jurisdiction thereto was again reiterated. Barnes, J., writing for the court, said that the statute which authorized a governmental unit to assess for benefits conferred as against a highway within the district did not conflict with the constitutional exemption concerning general taxation, nor did it conflict with any rule of law which would otherwise proscribe a state from allowing one of its governmental units to assess another of its governmental units on a special assessment basis. Further, the court said at 357-58, 125 N.W. at 798: "Appellant attacks the power of the drainage district to assess and collect from any political subdivision of the state any sum of money for benefits accruing to a highway from the improvement in question, and contends that such power cannot be granted by the legislature. In support of this contention appellant cites section 2, art. IX of the Constitution, exempting the property of the state, counties and municipal corporations from taxation. The theory of that provision is that all such property belongs to the state, and it would be an idle proceeding for the state to collect a tax levied and assessed upon its own property. It has long been settled in this state that this section has reference only to taxes assessed by a general valuation for general purposes, and has no reference to special taxation of property benefited by the creation of local improvements. *City of Beatrice v. Brethren Church.* . . ." Also of interest is the case of *State v. Cheyenne County,* 127 Neb. 619, 621, 256 N.W. 67, 69 (1934), which said: "In this state we are more specifically committed to the view that 'the taxing power vested in the legislature is without limit, except such as may be prescribed by the Constitution itself.' . . .

"And the proper construction of these constitutional limitations necessarily requires the due appli-

cation of the principle that limitations or restrictions upon the exercise of this essential power of sovereignty can never be raised by implication, but the intention to impose them must be expressed in clear, unambiguous language." This language would further seem to indicate that any prohibition on one governmental unit assessing another in the context of the special benefits conferred situation would have to be express in nature; it could not arise merely by virtue of the otherwise seemingly logical argument that there is no point in one governmental unit paying funds to another, the theory generally used in those jurisdictions which do not recognize the distinction between a general purpose taxation exemption and a special benefit conferred liability.

Also relevant are two other cases which have strong implicative value to support the analysis that property otherwise tax exempt is not to be given a "free ride" with respect to special assessments merely because such property has been, during its period of public ownership, exempted from general purpose taxation. The case of *Lennox v. Housing Authority of City of Omaha,* 137 Neb. 582, 290 N.W. 451 (1940), dealt with a statute creating the housing authority which specifically exempted its bonds and property from taxation and also from special assessments. There would have been no purpose in exempting the bonds and property from special assessments had the general exemption from taxation by itself contained such a meaning.

Scott v. Society of Russian Israelites, 59 Neb. 571, 81 N.W. 624 (1900), dealt with church property. The then chief justice, writing for the court, said that property or premises used exclusively for religious purposes (and therefore ordinarily exempt from taxation) "were not exempt from any special assessment that might be legally levied by the city of Omaha." *Id.* at 575, 81 N.W. at 625. Authority for this rule was found in *City of Beatrice v. Brethren Church of Beatrice,* 41 Neb. 358, 59 N.W. 932 (1894).

If church property constitutionally exempted from general purpose taxation is liable for special assessments, why should not other types of property specifically exempted from general purpose taxation nonetheless be liable for special assessments?

We therefore conclude from the foregoing case law that there is no constitutional prohibition against the assessment of a governmental subdivision for special benefits conferred upon its realty as the result of improvements created by an appropriate governing authority. Indeed, as we said in *Brethren Church, supra,* quoting *Hanscom v. City of Omaha,* 11 Neb. 37, 7 N.W. 739 (1881), such a principle must be adhered to or else it will constitute a taking of private property for public use.

The remaining authority cited to us is not pertinent and is distinguishable either in fact or by the presence of a statute requiring a different result.

In *Herman v. City of Omaha,* 75 Neb. 489, 106 N.W. 593 (1906), the court held that city property was not taxable and therefore could not be included in determining the sufficiency of petitions seeking street improvements. However, it should be noted that the opinion stated the exemption of public property from general purpose taxation did not apply in the case. The opinion then proceeded to analyze the question in terms of the provisions of the Omaha city charter and characterized the assessment at issue as a tax, rather than as a special assessment. The only rule emanating from *Herman*, therefore, is that a city cannot "tax" itself for improvements within its corporate boundaries and cannot petition itself for such improvements. However, as seen in *Brethren Church, supra, Farnham v. City of Lincoln,* 75 Neb. 502, 106 N.W. 666 (1906), and *Drainage District No. 1 v. Richardson County,* 86 Neb. 355, 125 N.W. 796 (1910), a special assessment to compensate for special benefits conferred is not a tax. The *Herman* holding is thus not properly apposite here. It is true, however, that *State v. Several Parcels of Land,*

79 Neb. 638, 113 N.W. 248 (1907), a foreclosure action, relying upon *Herman*, stated a public park belonging to the city of Omaha could not be assessed for special benefits conferred by the establishment of a boulevard adjacent thereto. It appears that *Several Parcels* simply does not, in that respect, comport with the general posture of our other cases.

Cuming County v. Bancroft Drainage District, 90 Neb. 81, 132 N.W. 927 (1911), implied authority for the drainage district to apportion to highways within the district their proportionate share of the cost of drainage on the basis that the statute in question authorized the public owner of the highway to vote at the election creating the district. *Cuming County* thus offers nothing which is in conflict with the general rule found in the cases discussed above.

Fontenelle Forest Ass'n v. Sarpy County, 118 Neb. 725, 226 N.W. 327 (1929), does appear to hold that, absent unmistakable inclusion in the tax laws, this state may not tax its own property; but the opinion is of questionable applicability to this case. The authority relevant to the issue before us which was cited in that opinion refers to exemptions from general taxation and not to the issue of special assessment liability. Further, it is not clear whether the issue decided in that case concerned special assessment liability or exemption from general taxation.

Finally, in *Drainage District No. 1 v. Village of Hershey,* 145 Neb. 138, 15 N.W.2d 337 (1944), we again recognized the general purpose taxation exemption versus the special assessment for special benefit distinction, and again adhered thereto in the context of upholding the constitutionality of an act which enabled the drainage authority to assess a village for benefits conferred to streets and alleys within the district.

It seems clear from the foregoing discussion and analysis of our prior cases that there is no rule or custom in this jurisdiction which prevents one governmental unit, in this case the City of Lincoln

through its Business Improvement District No. 1, from assessing other governmental units, herein the Board of Regents of the University of Nebraska, the municipal corporation constituting the City of Lincoln itself, and the County of Lancaster of the State of Nebraska, for those special benefits conferred upon their respective parcels of land by the subject district. The trial court therefore erred when it excluded the front footage owned by these three governmental units from the computation of the assessable front footage.

In view of the foregoing determination, in order to prevail in this appeal the appellees must establish that the owners of more than 10,835.915 assessable front feet, one-half of the total of 21,671.83, made protest. The parties have stipulated that the owners of 9,374.41 front feet validly protested. The City of Lincoln conceded in its brief in this court that the owner of an additional 232 assessable front feet also validly protested. Therefore, the owners of at least 9,606.41 assessable front feet have validly protested.

The appellees claim that an additional 1,903 front feet have validly protested. From that figure must be subtracted the 232 feet which the City of Lincoln now concedes validly protested, which footage is included in the 9,606.41 front feet upon which the parties now agree. Thus, the validity of 1,671 front feet of protests remains disputed. Of these, 444 feet are accounted for in protests filed by the lessees of certain parcels of land.

Appellees urge that lessees should be treated as "owners" for purposes of protesting under § 19-4009. Appellees further argue that *Chan v. City of South Omaha,* 85 Neb. 434, 123 N.W. 464 (1909), dictates this result. However, this is not so. In that case we held that an executor or an administrator in the possession of and exercising complete control over the real property of his decedent, when his right to so protest was not challenged by the heirs or devisees of the decedent, was an "owner" of real estate with-

in the meaning of the statute concerning the issuance of bonds for street improvements. We also held that a guardian in like control of the real estate of his ward and certain other parties (not relevant here) were "owners" within the meaning of that statute. These rulings can be explained by the fact that while the record owner per se was not protesting, one tantamount to the record owner was acting in the owner's behalf. The full and complete fee simple title had been placed in someone other than the record owner by operation of law; in one case as a transitional convenience (executor), and in the other as a safety measure for a temporary and indefinite term (guardian). Nowhere in that opinion was a mere lessee, one who is in no wise vested with anything approaching the totality of fee simple ownership, treated as or argued to be an "owner."

Appellees further cite *Portsmouth Savings Bank v. City of Omaha,* 67 Neb. 50, 93 N.W. 231 (1903), in support of their position. This case, however, in fact distinguishes between those who hold the full and complete fee simple title to the property and those who do not. The protesting signers were the life tenant and the trustee of the property at issue (the life tenant was also a trustee). We concluded that the right to protest must reside in the trustees of the property; this comports with the instant analysis that those who hold the full fee simple title are the rightful protestants, since, under the terms of the will which created the trust in *Portsmouth Savings Bank, supra,* the trustees were vested with full fee simple title until such time as the death of the life tenant. Appellees also argue that *Offutt Housing Co. v. County of Sarpy,* 160 Neb. 320, 70 N.W.2d 382 (1955), holding that a lessee under a 75-year lease was liable for personal property taxes on the improvements and leasehold interest, treats a lessee as the equivalent of an absolute owner. However, a careful reading of that case indicates we merely said that, for practical purposes, a lease for a term

of 75 years *could* be the equivalent of absolute ownership. Further, the question was considered only in the context of the assessability of private personalty placed on leased public lands. That case, therefore, is inapposite.

Finally, the conceptual delineation between those who have full and complete fee simple ownership as against those who do not was also followed in *Bonner v. City of Imperial,* 149 Neb. 721, 32 N.W.2d 267 (1948), wherein we held, citing with approval *Chan, supra,* that one coowner of a parcel of real estate could object to improvements for himself and the other coowner, and that that objection would be taken to represent the entire ownership interest in the property, unless the other owner caused a contrary showing. Again, our concern was with those who had the totality of the fee simple ownership of the parcel at issue. Bare lessees cannot be said to represent fee simple ownership, no matter how long the term. If the lessee obligates himself to pay assessments, it is a matter of contract by which the lessee has, as part of his bargained-for exchange, agreed to assume the risk of paying special assessments. The fee owner's interest and the lessee's interest may diverge at this point. It may be in the fee owner's interest to see as many special benefits accrue to his property as possible, particularly if the lessee is obligated to pay for them; it may or may not be in the lessee's interest to see those benefits accrue. However, the issue is not who has contractually assumed the risk of paying for these benefits, if any; it is rather who is the "owner" within the meaning of the statute providing for creation of the district. In view of the above case law, only the fee simple owner can be said to be the "owner." The cases from jurisdictions cited to us by the parties on either side of the question are not persuasive in the face of our own law. Accordingly, the protests of the lessees were correctly considered by the trial court to be invalid.

This then leaves but 1,227 front feet of protests (the 1,671 feet of protests claimed to be valid by appellees less the 444 feet of lessee protests) in dispute. If all of these were valid, a fact we do not decide, appellees could, by adding them to the 9,606.41 feet of unquestioned protests, only muster a total of 10,833.41 front feet of valid protests. This would still leave appellees 2.505 feet short of the 10,835.915 required. That being the case, there is no need to consider the remaining issues, and we do not do so.

The judgment of the trial court is therefore reversed with directions to enter judgment in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

STEVE FOWLER, APPELLANT, V. NEBRASKA ACCOUNTABILITY AND DISCLOSURE COMMISSION, APPELLEE.

330 N.W.2d 136

Filed February 4, 1983. No. 81-721.

Constitutional Law: Statutes. A statute proscribing otherwise free speech activity which "harasses" others, without setting forth standards comprising such harassment, is constitutionally infirm as vague because it impermissibly delegates to others, indiscriminately, the resolution, on an ad hoc and subjective basis, of the meaning of such term.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Reversed and dismissed.

Kirk E. Naylor, Jr., for appellant.

Bernard Wishnow, NADC General Counsel, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and COLWELL, D.J., Retired.

HASTINGS, J.

Following a hearing before the Nebraska Accountability and Disclosure Commission, it was determined that the plaintiff, Steve Fowler, had violated the provisions of Neb. Rev. Stat. § 49-14,132 (Reissue 1978), and he was ordered to pay a civil penalty of $100 to the State of Nebraska. He appealed that order, which, after hearing, was affirmed by the District Court. He appeals to this court, assigning as error the unconstitutionality of the statute under the provisions of the first and fourteenth amendments to the Constitution of the United States and the provisions of article I, § 6, of the Constitution of the State of Nebraska.

The Nebraska Political Accountability and Disclosure Act, Neb. Rev. Stat. §§ 49-1401 et seq. (Reissue 1978), contains 138 sections, requiring, among other things, that so-called political action committees file with the commission created by this act a statement reflecting contributions made to any political candidate. § 49-1454. Section 49-14,132 provides in part that "Campaign statements . . . shall not be . . . used by any person for any commercial purpose, for soliciting contributions, ticket sales or other political campaign purposes, or for harassment by a governmental body or any other person." A civil penalty for a violation of this act may be imposed in an amount not exceeding $1,000. § 49-14,126.

During the year 1980 the plaintiff was engaged in a political campaign, seeking reelection as a member of the Nebraska Legislature. One of the issues of that campaign was the amount of contributions to both candidates made by political action committees and the interests which they represented. The plaintiff concedes that he obtained from the records of the Nebraska Accountability and Disclosure Commission certain information relating to contributions made to his opponent's campaign by several political action committees. He then sent a form letter and questionnaire to each of those committees. Gen-

erally, the import of the questionnaire was to ascertain if the decision to support a candidate was approved by the full membership of the organization; whether the decision to support the plaintiff's opponent was based primarily upon a dissatisfaction with the plaintiff's record in the Legislature or a particular interest in his opponent; and whether the decision was based on a particular vote or votes of the plaintiff as a legislator. These letters and questionnaires were mailed to approximately 12 committees.

Apparently only two responses were received by the plaintiff. One committee simply replied that it had filed its report with the commission and therefore felt that it had fully complied with the law. The other response was in considerable detail and seemed to answer the questions submitted. The introductory paragraph of that response was as follows: "Your inquiry and questionnaire addressed to [us] came as a bit of a shock. In fact, it seemed a little like a challenge of our right to support the political candidate of our choice. However, I will assume that it was sincere."

It is on the basis of this activity that the plaintiff was charged with a violation of the statute. Because the written charge and the findings of the commission were couched in general terms, we do not know whether the plaintiff's alleged violation was due to his use of the statement for "other political campaign purposes" or for "harassment."

At the outset, we would observe that little time or effort was devoted by either party in brief or argument to the issue of "other political campaign purposes." *Buckley v. Valeo,* 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976), is cited by both of them. The essential holding of that case, insofar as it is important to a decision here, is that there may be a substantially compelling public interest in the political process to justify a governmental requirement which compels disclosure of financial contributions

vis-a-vis the first amendment right of free speech.

Interestingly enough, a portion of the Federal Election Campaign Act of 1971 (2 U.S.C. § 438(a)(4) (1976)), which was involved in the litigation in *Buckley,* was similar to § 49-14,132 of the Nebraska Political Accountability and Disclosure Act, and read in part as follows: "*Provided,* That any information copied from such reports and statements shall not be sold or utilized by any person for the purpose of soliciting contributions or for any commercial purpose . . . ." *Id.* at 173.

In commenting on that very section of the Federal Election Campaign Act, the defendant quotes, at 11 in its brief, Federal Election Commission Advisory Opinion 1980-101 in part as follows: " 'This exception allows for the use of information copied or otherwise obtained from reports filed with the Commission in newspapers, books or the like, but only if the principal purpose of these communications is not to communicate any contributor information for the purpose of soliciting contributions or for other commercial purposes.' " And at 12 in its brief, defendant quotes Federal Election Commission Advisory Opinion 1980-78 in part as follows: " 'The focus of the proponents of 2 U.S.C. § 438(a)(4) centers on protecting the privacy of the "very public spirited citizens" who make contributions to campaigns. The principal, if not the sole, purpose of the provision was to protect contributor information lists from being used for commercial purposes.' " Similar language is found in *Ohralik v. Ohio State Bar Assn.,* 436 U.S. 447, 98 S. Ct. 1912, 56 L. Ed. 2d 444 (1978): "We agree that protection of the public from these aspects of solicitation [fraud, undue influence, intimidation, overreaching, and other forms of 'vexatious conduct'] is a legitimate and important state interest." *Id.* at 462.

Buckley goes on to explain the governmental interests sought to be vindicated by the disclosure requirements of the Federal Election Campaign Act:

"First, disclosure provides the electorate with information 'as to where political campaign money comes from and how it is spent by the candidate' in order to aid the voters in evaluating those who seek federal office. It allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.

"Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. This exposure may discourage those who would use money for improper purposes either before or after the election. A public armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that may be given in return." *Id.* at 66-67.

The purpose of the rather lengthy quotation from *Buckley* is simply to point out that the very objective to be achieved—publicity as to campaign contributions and how they affect the political process—and that which justifies the governmental interest in interfering with first amendment free speech rights, is the very thing which the Nebraska statute seeks to inhibit.

In *Com. v. Wadzinski,* 492 Pa. 35, 422 A.2d 124 (1980), the defendant was convicted of a violation of a statute which required that no candidate for public office shall make a public statement which makes reference to an opposing candidate without providing in advance to that opposing candidate a copy of the proposed statement. In striking down that statute the court said: "From the foregoing, it is readily apparent that the broad sweep of the Section 1614 notice requirement places a substantial burden on

the candidate's ability to engage in protected political discourse. Further, the inhibitory effect of that requirement will in many cases work directly counter to the governmental interest in providing voter access to accurate information about candidates and to robust debate on the issues. In summary, even a cursory look at the statute's probable operation demonstrates that its potential for suppressing vital last-minute political expression is equally as grave as that considered in *Mills v. Alabama, supra.* It follows from *Mills* that since the governmental interest asserted in support of the statute, although a legitimate and important one, is inadequate to justify the substantial burden imposed on protected speech, the statute must fall." 422 A.2d at 132.

We conclude that § 49-14,132, which prohibits the use of public information for "other political campaign purposes," as it was applied in this case, places an impermissible burden on protected speech and must fall as being overbroad. There remains the question of whether or not the term "harassment," as prohibited by the statute, is also constitutionally unacceptable as vague or overbroad.

Webster's Third New International Dictionary, Unabridged (1968) defines "harass" as follows: "2 a : to tire out (as with physical or mental effort) : EXHAUST, FATIGUE . . . b : to vex, trouble, or annoy continually or chronically (as with anxieties, burdens, or misfortune) : PLAGUE, BEDEVIL, BADGER . . . ."

Both parties rely on *Grayned v. City of Rockford,* 408 U.S. 104, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972). An antinoise ordinance, which was challenged on the grounds of vagueness, read in part as follows: " '[N]o person, while on public or private grounds adjacent to any building in which a school or any class thereof is in session, shall willfully make or assist in the making of any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class thereof. . . .' " *Id.* at 107-08.

Contained in the opinion of Mr. Justice Marshall is an excellent discussion of the ingredients of vagueness. "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. Third, but related, where a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms.' Uncertain meanings inevitably lead citizens to ' "steer far wider of the unlawful zone" . . . than if the boundaries of the forbidden areas were clearly marked.' " *Id.* at 108-09.

The court then went on to conclude: "Although the question is close, we conclude that the antinoise ordinance is not impermissibly vague. . . . Condemned to the use of words, we can never expect mathematical certainty from our language. The words of the Rockford ordinance are marked by 'flexibility and reasonable breadth, rather than meticulous specificity,' [citation omitted] but we think it is clear what the ordinance as a whole prohibits. Designed, according to its preamble, 'for the protection of Schools,' the ordinance forbids deliberately noisy or diversionary activity that disrupts or is about to disrupt normal school activities. It forbids this willful activity at fixed times—when school is in session—and at a sufficiently fixed place

—'adjacent' to the school. Were we left with just the words of the ordinance, we might be troubled by the imprecision of the phrase 'tends to disturb.' However, in *Chicago v. Meyer* . . . [citation omitted] the Supreme Court of Illinois construed a Chicago ordinance prohibiting, *inter alia,* a 'diversion tending to disturb the peace,' and held that it permitted conviction only where there was '*imminent* threat of violence.' " (Emphasis in original.) *Id.* at 109-11.

Interestingly enough, in the instant case, the definition of harassment apparently was delegated to supposed victims "for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." In the defendant Nebraska Accountability and Disclosure Commission's brief, the only suggestion of a standard to determine the meaning of harassment was a statement that "As shown by NADC Ex. 4, ¶¶ 5 to 9, and as found by the Commission and the District Court, the recipients of the letter and questionnaire were 'harassed.' " In other words, "harassment" was present because someone felt "harassed." Defendant obviously has reference to that portion of the letter quoted earlier in which the author said, "Your inquiry . . . came as a bit of a shock," and to the fact that other recipients of the letter discussed what should be done about it.

However, such a contention is completely answered by the case of *Coates v. City of Cincinnati,* 402 U.S. 611, 91 S. Ct. 1686, 29 L. Ed. 2d 214 (1971). The ordinance in question there made it a criminal offense for " 'three or more persons to assemble . . . on any of the sidewalks . . . and there conduct themselves in a manner annoying to persons passing by . . . .' " *Id.* at 611. The Ohio Supreme Court, in upholding the validity of the ordinance, said that " 'The word "annoying" is a widely used and well understood word; it is not necessary to guess its meaning. "Annoying" is the present participle of the transitive verb "annoy" which means to trouble,

to vex, to impede, to incommode, to provoke, to *harass* or to irritate.' " (Emphasis supplied.) *Id.* at 612.

However, the Supreme Court of the United States struck down the ordinance. In pointing out the limited construction placed on the ordinance by the Ohio court, the opinion went on to state: "But the court did not indicate upon whose sensitivity a violation does depend—the sensitivity of the judge or jury, the sensitivity of the arresting officer, or the sensitivity of a hypothetical reasonable man.

"We are thus relegated, at best, to the words of the ordinance itself. . . . In our opinion this ordinance is unconstitutionally vague because it subjects the exercise of the right of assembly to an unascertainable standard, and unconstitutionally broad because it authorizes the punishment of constitutionally protected conduct.

"Conduct that annoys some people does not annoy others. Thus, the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all. As a result, 'men of common intelligence must necessarily guess at its meaning.' [Citation omitted.]" *Id.* at 613-14.

On the basis of the foregoing reasoning, we find that the statute in question is both unconstitutionally vague and overbroad. Consequently, the judgment of the District Court is reversed and the action ordered dismissed.

REVERSED AND DISMISSED.

ANN K. ALBERS, APPELLANT, V. ROBERT J. ALBERS, APPELLEE.

329 N.W.2d 567

Filed February 4, 1983. No. 81-752.

Modification of Decree: Appeal and Error. In actions for the modification of dissolution proceedings, it is the duty of this court to review de novo the determination of the District Court with regard to whether a change in circumstances has occurred which justified the modification of the original decree.

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

Thomas R. Wolff, for appellant.

D. L. Pelton of Pelton, Bertolini & Schroeder, for appellee.

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

WHITE, J.

This is an appeal from the judgment of the District Court for Sarpy County, Nebraska, which modified an award of alimony contained in a decree of dissolution dated May 13, 1974.

The decree provided: "It Is Further Ordered that Respondent is required to pay to the Petitioner as alimony, the sum of $300.00 per month commencing May 1, 1974, until May 1, 1976, and thereafter at a rate of $400.00 per month until the death or remarriage of the Petitioner."

The May 1, 1976, date for the increase of alimony payments was apparently related to a time when the child support obligations of the respondent were reduced or terminated.

The trial court found that good cause was shown "for modifying the order for alimony." Appellant, Ann K. Albers, appeals.

At the time of the dissolution proceeding, appellee, Robert J. Albers, was a member of the U.S. Air Force and was contemplating retirement. He was a

lieutenant colonel with 19 years of service, earning approximately $1,800 per month. Appellee subsequently retired from the service in 1981 and was receiving a military pension at the time of modification of 62½ percent of his highest base pay, plus certain cost-of-living allowances, Veterans Administration educational benefits, and also land contract and bond income which amounted to a total of $2,200 per month.

Appellee was attending college at the time of modification, seeking a degree in industrial arts and education and looking forward to a second career as a high school industrial education teacher.

The parties had two sons, ages 15 and 17, at the time of dissolution. When the hearing on modification was held, the child support obligations had terminated, although one of the children was completing his college education, to which appellee had contributed approximately $183 per month after age 19.

The evidence at the dissolution proceeding showed that appellant was not employed outside the home but was working toward obtaining her college degree. At the modification hearing appellant had graduated from the College of Bellevue with a degree in sociology. She had an income of approximately $700 per month working as a travel consultant, owned her own home, and had savings of approximately $9,000.

The appellee points to the change in circumstances in both his and the appellant's case, which he contends justifies the court's modification of the alimony award.

Appellant argues strenuously to this court that all of the conditions which led the district judge in the dissolution action to make the alimony award were still present at the time of modification and were planned and anticipated by each of the parties, except for the possible remarriage of the appellee.

"[I]n actions for the modification of dissolution

proceedings, it is the duty of this court to review de novo the determination of the District Court with regard to whether a change in circumstances has occurred which justified the modification of the original decree." *Chamberlin v. Chamberlin,* 206 Neb. 808, 814, 295 N.W.2d 391, 395 (1980); *Howard v. Howard,* 196 Neb. 351, 242 N.W.2d 884 (1976).

It is true, as the trial court observed, that this court has not favored lifetime awards for alimony; however, the fact remains that, save and except for the remarriage, all circumstances present at the dissolution hearing were contemplated and kept in mind by the judge who originally made the award. We observed in *Chamberlin v. Chamberlin, supra* at 815, 295 N.W.2d at 395-96: "He had further contended that Helen has shown ability and initiative in her pursuit of employment. It is likewise true that, because of her good stewardship, she has accumulated a considerable amount of assets which will produce income after her impending retirement. However, we do not believe that she should be penalized for using such ability and initiative." We have previously said that the reaching of the age of majority of the children is not a factor to be considered in the reduction of an alimony award. *Chamberlin v. Chamberlin, supra.*

The fact that appellee continues to recognize an obligation to contribute to his natural child's education is a circumstance that, independent of a dissolution of a marriage, is no different from the remainder of the working population that has children.

The trial court declined to point out specifically what change of circumstances existed which justified the modification. We conclude that any changes in circumstances were within the contemplation of the parties, were accomplished by the mere passage of time, and do not arise to the level to justify the change or modification of the order. Accordingly, we reverse.

REVERSED.

McCOWN, J., dissenting.

This case is a classic example of the reasons lifetime awards of alimony are seldom appropriate. Periodic alimony is an award for appropriate maintenance and support, and its continuation or modification is affected by the financial circumstances of both parties. It is not a permanent judgment unaffected by the financial circumstances of either party. To treat substantial permanent changes in a wife's financial circumstances, regardless of the source, as being immaterial simply converts periodic alimony to permanent alimony terminable only by remarriage or death.

BOSLAUGH, J., joins in this dissent.

JASPER FALKNER, APPELLANT, V. NEBRASKA BOARD OF PAROLE AND NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES, APPELLEES.

330 N.W.2d 141

Filed February 4, 1983. No. 82-036.

1. **Criminal Law: Sentences.** A prisoner serving an Iowa sentence who is transferred to Nebraska pursuant to the Interstate Corrections Compact remains subject to the jurisdiction of Iowa.
2. ____ : ____. A Nebraska parole violator who is serving an Iowa sentence imposed for a subsequent offense does not recommence serving his Nebraska sentence until he has been released from custody by Iowa and arrested for the custody of the Nebraska Board of Parole.

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 Lynne Rae Fritz, for appellees.

KRIVOSHA, C.J., BOSLAUGH, McCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and MORAN, D.J.

BOSLAUGH, J.

The plaintiff, a prisoner confined in the penal complex, brought this action to determine the date on which he is entitled to be released from custody.

On August 16, 1972, the plaintiff was sentenced to imprisonment for 7 to 8 years by the District Court of Douglas County, Nebraska. He was paroled on March 16, 1978.

On June 3, 1978, the plaintiff was arrested in Council Bluffs, Iowa. He was sentenced to imprisonment in Iowa for not to exceed 5 years on October 18, 1978. This sentence was later amended to provide that it should run concurrently with any sentence the plaintiff might serve in Nebraska.

A probable cause hearing on revocation of the Nebraska parole was held in Council Bluffs, Iowa, on July 7, 1978. On February 23, 1979, the plaintiff was transferred to Nebraska under the provisions of the Interstate Corrections Compact. The Nebraska parole was revoked at a formal hearing on March 5, 1979. On November 21, 1979, the plaintiff was returned to Iowa.

On December 4, 1980, the plaintiff was paroled by Iowa, released to the custody of Nebraska, and returned to Nebraska. The Department of Correctional Services determined that the plaintiff did not recommence serving his Nebraska sentence until December 4, 1980. The plaintiff contends the time between February 23, 1979, and December 4, 1980, when he was in the physical custody of Nebraska should be credited against his Nebraska sentence. The trial court held that the determination made by the Department of Correctional Services was correct.

Neb. Rev. Stat. § 83-1,123(2) (Reissue 1981) provides: "(2) The time from the date of his declared delinquency until the date of his arrest for the custody of the Board of Parole shall not be counted as any portion of the time served." The issue to be determined is, When was the plaintiff "arrested

for the custody of the Board of Parole"?

Under the provisions of article IV(c) of the Interstate Corrections Compact, Neb. Rev. Stat. § 29-3401 (Reissue 1979), an inmate confined in an institution in a receiving state is at all times "subject to the jurisdiction of the sending State." A receiving state may refuse to return an inmate only if a criminal charge against the inmate is pending in the receiving state. See, § 29-3401, art. V(a); *State ex rel. Jakes v. Nebraska Board of Parole,* 212 Neb. 181, 322 N.W.2d 394 (1982).

We think the decision of the trial court was correct. When the plaintiff was returned to Nebraska on February 23, 1979, he remained subject to the jurisdiction of Iowa. Although confined in Nebraska, he continued to serve the Iowa sentence. The fact that the Iowa sentence was concurrent with any Nebraska sentence was of no consequence here because the plaintiff had not recommenced serving his Nebraska sentence. See *Williams v. State,* 280 N.W.2d 406 (Iowa 1979).

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CLIFFORD C. LUTHER, APPELLANT.

329 N.W.2d 569

Filed February 4, 1983. No. 82-068.

Pleas. A plea of nolo contendere must not only be intelligently and voluntarily made to be valid but the record must affirmatively disclose that the plea was entered understandingly and voluntarily.

Appeal from the District Court for Custer County: JAMES R. KELLY, Judge. Reversed and remanded.

Paine & Huston, for appellant.

Paul L. Douglas, Attorney General, and Frank J. Hutfless, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and MORAN, D.J.

CAPORALE, J.

Defendant-appellant, 71-year-old Clifford C. Luther, was sentenced by the Custer County Court on two counts of third degree sexual assault following nolo contendere pleas. These sentences were subsequently affirmed by the District Court. We reverse.

Among other errors the defendant contends that the District Court erred in finding that the defendant knowingly and voluntarily waived his rights at the time the operative pleas were entered.

The record discloses defendant appeared with counsel at the arraignment before the county court. That court advised the defendant of his constitutional rights. The defendant stated he understood them, and when asked how he would plead he stated: "If I was guilty I'd feel guilty. And I don't feel guilty so I'll plead not guilty." At the scheduled trial, approximately 2 months later, counsel for the parties advised the county court that a plea bargain had been reached. The court was advised by the State that the defendant had agreed to enter nolo contendere pleas to each count in exchange for which the State agreed to request a $700 fine and a year's supervised probation for both counts and to not file other criminal charges. A sketchy factual basis for the charges was recited by the State, and defendant's counsel entered pleas of nolo contendere to each count. The court inquired of defendant's counsel whether the nolo contendere pleas were made willingly and understandingly and whether the defendant understood that he was subject to the same penal provisions as emanate from a guilty plea. Defendant's counsel replied: "That's correct Your Honor." The record fails to reveal any conversations directly between the county judge and the defendant. When the court made inquiry about a

presentence investigation, defendant's counsel advised that the defendant would like to have the matter concluded as quickly as possible to "cut his expenses." A presentence investigation was conducted, which apparently was never shown to defendant or defendant's counsel. At the sentencing hearing the county judge asked defendant's counsel whether he or defendant had anything to say before he pronounced sentence. After a statement by defendant's counsel, the judge sentenced defendant to 30 days in the Custer County jail on each count, the sentences to run concurrently, imposed a $1,000 fine on each count, and imposed supervised probation for a period of 1 year.

In *State v. Turner,* 186 Neb. 424, 183 N.W.2d 763 (1971), we adopted the rule of *Boykin v. Alabama,* 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), to the effect that a plea of guilty must not only be intelligently and voluntarily made to be valid but the record must affirmatively disclose that the plea was entered understandingly and voluntarily. Although the pleas entered here were pleas of nolo contendere rather than guilty, the results emanating from those nolo contendere pleas are substantially the same as those which would have emanated from pleas of guilty. In this jurisdiction a plea of nolo contendere is equivalent to, and places a defendant in the same position as, a plea of guilty. *State v. Kluge,* 198 Neb. 115, 251 N.W.2d 737 (1977); *State v. Abramson,* 197 Neb. 135, 247 N.W.2d 59 (1976). In the context of this case no distinction exists between them.

In *State v. Benson,* 199 Neb. 549, 260 N.W.2d 208 (1977), we made reference to the ABA Standards Relating to Pleas of Guilty and nolo contendere, including the need for the record to demonstrate the voluntariness of the plea. See, also, *State v. Fowler,* 201 Neb. 647, 271 N.W.2d 341 (1978), wherein we again referred to *Boykin* as reviewed in *Turner* and stated that before accepting a guilty plea the judge is expected to examine the defendant to determine

whether he understands the nature of the charge, the possible penalty, and the effect of his plea.

Since the record fails to indicate that the county judge examined the defendant in the manner required by *Turner* at the time the nolo contendere pleas were entered on defendant's behalf, it cannot be said the record demonstrates that the pleas were entered knowingly and understandingly by the defendant.

In view of the foregoing determination we need not consider defendant's other assignments of error.

The judgment of the District Court affirming the sentences imposed by the county court must therefore be reversed and the matter remanded for further proceedings.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. LARRY A. WORKMAN, APPELLANT.

329 N.W.2d 571

Filed February 4, 1983. No. 82-345.

1. **Circumstantial Evidence.** One accused of a crime may be convicted on the basis of circumstantial evidence if, taken as a whole, the evidence established guilt beyond a reasonable doubt.
2. **Criminal Law: Evidence: Proof.** To sustain a conviction for a crime, the corpus delicti must be proved beyond a reasonable doubt.
3. **Arson: Evidence: Proof.** In order to establish the corpus delicti in an arson case, it is necessary that the evidence disclose the burning of the property as charged and that the burning was caused by the willful act of some person criminally responsible.

Appeal from the District Court for Johnson County: ROBERT T. FINN, Judge. Reversed and dismissed.

Raymond P. Atwood, Jr., of The Healey Law Offices, for appellant.

Paul L. Douglas, Attorney General, and Mel Kammerlohr, for appellee.

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

KRIVOSHA, C.J.

The appellant, Larry A. Workman, was found guilty of arson in the second degree in violation of Neb. Rev. Stat. § 28-503(1) (Reissue 1979). He appeals from that order, maintaining that the trial court should have sustained his motion to dismiss, made both at the close of the State's case and again at the close of all the evidence, for the reason that the evidence introduced at the trial was, as a matter of law, insufficient to submit the case to the jury. We have carefully reviewed the record and agree with Workman. For that reason the judgment entered by the trial court, based upon the jury's verdict, is reversed and the action dismissed.

On August 20, 1981, at approximately 3:30 a.m., the Tecumseh Fire Department was called to a fire at 531 Calhoun Street in the city of Tecumseh, Nebraska. An unoccupied residence owned by Workman's brother, LeRoy Workman, was on fire. Further investigation disclosed that the fire originated in a small bathroom closet located near the rear of the house. Authorities were unable to testify as to the source of the ignition of the fire, though there was some belief that the fire was set. In the opinion of a member of the State Fire Marshal's office, the fire was caused by a flammable accelerant present on the floor of the closet area located adjacent to the bathroom. He held to this opinion even though laboratory tests conducted on the debris for accelerants were negative. No one was able to place Workman anywhere near the scene of the fire. However, a member of the Tecumseh Police Department, Patrolman Thomas Sherman, testified that prior to the fire, at about 2:21 a.m., from a distance of 10 or 15 feet, he observed a vehicle 300 or 400 feet from the

residence, bearing license number 48-R198 and registered to Larry Workman. While the State was able to establish that the license plate was issued to Workman, it was unable to establish that Workman owned the vehicle upon which Sherman saw the license plate. Officer Sherman testified that when he observed the vehicle in Tecumseh there were two subjects in the vehicle, but he was not able to observe or identify either person. Officer Sherman further testified that he followed the vehicle out of Tecumseh and that there was no doubt in his mind that the vehicle was dark in color. The evidence established that Workman's vehicle found in Elmwood was light in color. Other than Officer Sherman's testimony as to the presence of Workman's license plate number on a vehicle seen in Tecumseh more than an hour before the fire, there was no other testimony placing Workman at or near the scene of the fire, or at or near Tecumseh. The following morning a member of the State Fire Marshal's office went to Elmwood, Nebraska, where he located the owners of the property. Upon arrival in Elmwood, he saw a vehicle bearing the license number earlier identified by the patrolman. Workman later gave a statement to authorities admitting that he owned the car bearing the license number 48-R198, but claiming that he had not been in Tecumseh for a year and that he had gone to bed at his brother's home in Elmwood at approximately 11 p.m. on the night of the fire.

The evidence offered by the State was, at best, circumstantial. It is true that one accused of a crime may be convicted on the basis of circumstantial evidence if, taken as a whole, the evidence established guilt beyond a reasonable doubt. *State v. Bartholomew,* 212 Neb. 270, 322 N.W.2d 432 (1982). In the case of *State v. Buchanan,* 210 Neb. 20, 28, 312 N.W.2d 684, 689 (1981), we said: "One accused of a crime may be convicted on the basis of circumstantial evidence if, taken as a whole, the evidence es-

tablishes guilt beyond a reasonable doubt. The State is not required to disprove every hypothesis but that of guilt. [Citations omitted.]"

Accepting our statement in *State v. Buchanan,* we believe the evidence in this case is not sufficient to have permitted the jury to find guilt beyond a reasonable doubt. As we noted in *Harms v. State,* 147 Neb. 857, 859, 25 N.W.2d 287, 288 (1946): "To sustain a conviction for a crime the corpus delicti must be proved beyond a reasonable doubt. Maher v. State, 144 Neb. 463, 13 N.W.2d 641." In *State v. Keeton,* 199 Neb. 405, 409, 259 N.W.2d 277, 280 (1977), we held: " 'The corpus delicti in an arson case consists of two elements, the burning of the property and the criminal act of someone in causing the burning.

" 'In order to establish the corpus delicti in an arson case, it is necessary that the evidence disclose the burning of the property as charged, and that the burning was caused by the willful act of some person criminally responsible.' " The mere fact that the property was burned and the origin of the fire unknown is not evidence that it was feloniously set. The presumption is that the fire was not of criminal origin. Evidence of motive alone is not sufficient to sustain a conviction. *Harms v. State, supra.* In the instant case the record not only fails to disclose that the fire was feloniously set but, moreover, fails in any manner to reasonably connect the setting of the fire with Workman. The officer's testimony that more than an hour before the fire he saw Workman's auto plates on a car not owned by Workman, with nothing more, does not constitute sufficient evidence to establish guilt beyond a reasonable doubt. In the instant case the testimony linking Workman to the fire was of so weak or doubtful a character that a conviction based thereon could not have been sustained. The trial court should have sustained the motion for a directed verdict made at the close of the State's case. See *State v. Webb,* 197 Neb. 662, 250 N.W.2d 625 (1977). Having failed to do so, we

reverse the decision of the trial court and order that the action be dismissed.

REVERSED AND DISMISSED.

CLINTON, J., not participating.

FARUQ AL-HAFEEZ, ALSO KNOWN AS RAYMOND L. MOSS, APPELLANT, V. WILLIAM J. FOSTER, SUPERINTENDENT, LINCOLN CORRECTIONAL CENTER, APPELLEE.

329 N.W.2d 573

Filed February 4, 1983. No. 82-441.

1. **Habeas Corpus.** Habeas corpus is not available to attack mere errors at trial from which a direct appeal could have been taken.
2. _____. Unless the granting of relief in a habeas corpus action will result in the immediate release from custody, the petition for such relief is premature.

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

Faruq Al-Hafeez, pro se.

Paul L. Douglas, Attorney General, and Shanler D. Cronk, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and MORAN, D.J.

WHITE, J.

The plaintiff was convicted of sodomy, robbery, and the use of a firearm in the commission of a felony. The conviction was affirmed in *State v. Moss,* 187 Neb. 391, 191 N.W.2d 543 (1971). Post conviction relief was denied by the trial court and the denial affirmed in *State v. Moss,* 191 Neb. 36, 214 N.W.2d 15 (1973).

The plaintiff filed his petition for habeas corpus and relief was denied by the District Court. He appeared pro se. Four issues are raised in this appeal. The first three issues relate to the giving or failure to give certain instructions. The trial record was

not introduced as evidence and the instructions are not before us and cannot be considered. We are unable to say whether the instructions were erroneous or whether, if erroneous, they rose to such a violation of constitutional rights as to deny the defendant a fair trial. Habeas corpus is not available to attack mere errors at trial from which a direct appeal could have been taken. *Schleuter v. McCuiston,* 203 Neb. 101, 277 N.W.2d 667 (1979).

The fourth issue raised is the constitutionality of Neb. Rev. Stat. § 28-1011.21 (Cum. Supp. 1969).

The plaintiff was sentenced to a term of from 10 to 15 years for sodomy, a concurrent sentence of from 25 to 30 years for robbery, and a consecutive term of 5 years for the use of a firearm to commit a felony. If the plaintiff were successful, he would remain subject to incarceration for the unserved portions of the remaining charges. The petition was premature and cannot be granted. *Piercy v. Parratt,* 202 Neb. 102, 273 N.W.2d 689 (1979); *Gamron v. Parratt,* 199 Neb. 163, 256 N.W.2d 867 (1977).

The trial court's denial of relief is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. PAUL L. DOUGLAS, ATTORNEY GENERAL, APPELLEE, V. JOY SPORHASE ET AL., APPELLANTS.

329 N.W.2d 855

Filed February 11, 1983. No. 43206.

Waters: Statutes. The portion of Neb. Rev. Stat. § 46-613.01 (Reissue 1978), to wit, "if the state in which the water is to be used grants reciprocal rights to withdraw and transport ground water from that state for use in the State of Nebraska," may be severed from the rest of the statute because it did not constitute an inducement to the passage of § 46-613.01, does not make the act inoperative, and will not frustrate the intent of the Legislature. The remainder of § 46-613.01, after the unconstitutional portion is stricken, remains a viable statute.

On remand from the U.S. Supreme Court. Judgment of severance.

Richard A. Dudden and Padley & Dudden, P.C., for appellants.

Paul L. Douglas, Attorney General, and G. Roderic Anderson, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and COLWELL, D.J., Retired.

WHITE, J.

The Supreme Court of the United States in *Sporhase v. Nebraska ex rel. Douglas,* ____ U.S. ____, 102 S. Ct. 3456, 73 L. Ed. 2d 1254 (1982), reversed the judgment of this court and remanded the matter to this court, holding that since the reciprocity requirement of Neb. Rev. Stat. § 46-613.01 (Reissue 1978) violates the commerce clause, "[w]e leave to the state courts the question whether the invalid portion is severable." 102 S. Ct. at 3467.

In *State ex rel. Douglas v. Sporhase*, 208 Neb. 703, 305 N.W.2d 614 (1981), this court held that underground water was not an article of commerce in this state, was the subject of public ownership, and thus regulations governing the use of such water, as well as prohibiting its export to nonreciprocating states, did not violate the commerce clause of U.S. Const. art. I, § 8, relying on *Hudson Water Co. v. McCarter,* 209 U.S. 349, 28 S. Ct. 529, 52 L. Ed. 828 (1908).

While declaring that this court erred in holding that underground water was not an article of commerce, the U.S. Supreme Court did not declare illegal the statutory scheme for conservation and preservation of ground water. Rather, on a variety of theories, the Court approved the general scheme, e.g., "unexercised federal regulatory power" and "measures taken by a State to conserve and preserve for its own citizens this vital resource in time

of severe shortage." *Sporhase v. Nebraska ex rel. Douglas,* 102 S. Ct. at 3463-64.

We are then called on to decide purely as a matter of state law whether the emphasized portion of § 46-613.01 is severable. That section provides: "Any person, firm, city, village, municipal corporation or any other entity intending to withdraw ground water from any well or pit located in the State of Nebraska and transport it for use in an adjoining state shall apply to the Department of Water Resources for a permit to do so. If the Director of Water Resources finds that the withdrawal of the ground water requested is reasonable, is not contrary to the conservation and use of ground water, and is not otherwise detrimental to the public welfare, he shall grant the permit *if the state in which the water is to be used grants reciprocal rights to withdraw and transport ground water from that state for use in the State of Nebraska.*" (Emphasis supplied.)

This court has variously expressed the test to be applied in determining whether an unconstitutional clause in a statute may be severed from the remainder. (1) Whether, when absent the invalid portions, a workable plan remains. *Nelsen v. Tilley,* 137 Neb. 327, 289 N.W. 388 (1939). (2) Whether the valid portions of an act can be enforced independently, and where the invalid portions do not constitute such an inducement to the valid parts that the valid parts would not have passed without the invalid parts. *State v. Padley,* 195 Neb. 358, 237 N.W.2d 883 (1976). (3) Whether the severance will do violence to the intent of the Legislature. *Chase v. County of Douglas,* 195 Neb. 838, 241 N.W.2d 334 (1976). (4) Whether a declaration of separability is included in the act, indicating that the Legislature would have enacted the bill absent the invalid portion. *State ex rel. Meyer v. County of Lancaster,* 173 Neb. 195, 113 N.W.2d 63 (1962); *Nelsen v. Tilley, supra.*

All the parties urge the court that the provision is severable in applying the tests described. We agree.

An examination of Chapter 46, article 6, reveals a comprehensive and complete approach to the conservation and beneficial use of ground water. The striking of the provision prohibiting transfer of water to nonreciprocating states does not weaken or otherwise impair the operation of the act. The valid portions present a complete, workable plan independent of the invalid portions.

The parties concede that no legislative history exists which proves or tends to prove that the invalid portions were an inducement to the passage of the act. Indeed, they point to a severability clause in 1969 Neb. Laws, Ch. 9, § 72, p. 145, containing amendments to § 46-613.01 as indicative of a contrary intent.

The briefs of the parties cite at great length the comments in floor debate and committee reports of members of the Legislature. The purpose of § 46-613.01 and the remainder of Chapter 46 was to conserve and apply to beneficial use an important Nebraska resource. No justification exists to assert that this important aim is frustrated by the severance of the invalid portion. On the contrary, the reverse appears to be abundantly clear.

We hold that severance of the portion of § 46-613.01, to wit, "if the state in which the water is to be used grants reciprocal rights to withdraw and transport ground water from that state for use in the State of Nebraska," did not constitute an inducement to the passage of § 46-613.01, does not make the act inoperative, and will not frustrate the intent of the Legislature. The remainder of § 46-613.01, after the unconstitutional portion is stricken, remains a viable statute.

JUDGMENT OF SEVERANCE.

ESTHER BEYNON, APPELLANT, V. BOARD OF EQUALIZATION OF LANCASTER COUNTY, NEBRASKA, APPELLEE.

329 N.W.2d 857

Filed February 11, 1983. No. 81-578.

1. **Taxation: Valuation: Appeal and Error.** In an appeal from property tax valuations set by a board of equalization, the taxpayer has the burden of proving that the value of his property has been arbitrarily or unlawfully fixed by the board of equalization in an amount greater than its actual value, or that its value has not been fairly and proportionately equalized with all other property, resulting in a discriminatory, unjust, and unfair assessment.
2. **Taxation: Valuation: Presumptions.** There is a presumption that a board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action, which presumption remains until there is competent evidence to the contrary.

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

Ira D. Beynon and John H. Sohl, for appellant.

Ron Lahners, Lancaster County Attorney, Michael G. Heavican, and Douglas D. Cyr, for appellee.

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

MCCOWN, J.

This is a direct appeal by the owner of an improved quarter section of agricultural land situated in Lancaster County, Nebraska, from the action of the county board of equalization fixing the valuation of plaintiff's land for tax purposes for 1980. Plaintiff's protest was denied by the county board of equalization, and on appeal the District Court affirmed the action of the county board of equalization.

Plaintiff is the owner of 160 acres of improved agricultural land in Lancaster County, specifically described in the petition. For the 1979 tax year plaintiff's property was initially assessed at the value of $90,900 and lowered by the county board of equalization to a valuation of $83,200.

For the tax year 1980, in accordance with statute, county assessors were directed to use the Nebraska Agricultural Land Valuation Manual, duly promulgated by the Tax Commissioner, to appraise and assess agricultural property for tax purposes. The value placed on plaintiff's property by the county assessor for tax purposes for 1980 was $115,815.

Plaintiff protested the 1980 valuation and sought to reduce the valuation of the property to the 1979 valuation. The Lancaster County Board of Equalization denied the protest and the plaintiff appealed to the District Court.

At the hearing in the District Court plaintiff offered no evidence that the property was valued in excess of its actual value. Neither did the plaintiff present any expert witnesses to testify as to the actual value of plaintiff's land or its value in comparison to other similar properties. Plaintiff's evidence was aimed at discrediting the valuation methods utilized by the county assessor as to plaintiff's property and contending that the 1979 appraisal value was more accurate than the 1980 value obtained by use of the Nebraska valuation manual.

The county assessor testified that the Nebraska Agricultural Land Valuation Manual was used to value plaintiff's property for tax purposes for 1980, and that all agricultural land in the county was valued in the same manner as plaintiff's property. The assessor also testified that the reason plaintiff's 1980 valuation was substantially higher than the 1979 value was that the plaintiff's property was undervalued in 1979.

A licensed appraiser and rural property supervisor for the assessor's office testified that the 1980 assessment of plaintiff's land was not excessive nor out of line with the assessed values of other similar properties in the immediate area. He also testified that, based on a comparison of sales prices of four similar properties in the county, the market value of

plaintiff's property was more than double the assessed value for 1980.

The District Court found that the plaintiff had failed to establish that the action of the board of equalization was unreasonable or arbitrary, and affirmed the action of the board in valuing plaintiff's property for taxation for 1980.

In an appeal from property tax valuations set by a board of equalization, the taxpayer has the burden of proving that the value of his property has been arbitrarily or unlawfully fixed by the board of equalization in an amount greater than its actual value, or that its value has not been fairly and proportionately equalized with all other property, resulting in a discriminatory, unjust, and unfair assessment. *Riha Farms, Inc. v. County of Sarpy,* 212 Neb. 385, 322 N.W.2d 797 (1982).

There is a presumption that a board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action, which presumption remains until there is competent evidence to the contrary. Once there is competent evidence on appeal to the contrary, the presumption disappears and the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon the evidence. *Hastings Building Co. v. Board of Equalization,* 212 Neb. 847, 326 N.W.2d 670 (1982).

In the case at bar the plaintiff makes no contention that her lands have been valued for taxation at more than their actual value. The plaintiff failed to meet the burden of proving that the value of her property was not fairly and proportionately equalized, or that the valuation placed upon her property for tax purposes was unreasonable or arbitrary.

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

AFFIRMED.

WHITE, J., participating on briefs.

CLINTON, J., not participating.