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REPORTS OF CASES

DECIDED BETWEEN

APRIL 8, 1983 and JULY 28, 1983

IN THE

Supreme Court of Nebraska

VOLUME CCXIV

DONALD C. PATTON

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By Donald C. Patton, Reporter of the Supreme Court

For the benefit of the State of Nebraska

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CUMULATIVE LIST OF CASES DISPOSED OF WITHOUT OPINION

No. 82-178: **H & H Leasing Co. v. Ford Leasing Development Co.** Motion of appellants for dismissal of appeal sustained; appeal dismissed.

No. 82-275: **Hanna v. Michalek.** Stipulation allowed; appeal dismissed.

No. 82-371: **State v. Atwater.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

Nos. 82-620, 82-621: **Maricle v. Spiegel.** Motion and waiver sustained; appeal dismissed; each party to pay own costs.

No. 82-642: **State v. Tanga.** Motion of appellant to dismiss appeal and waiver of appellee allowed; appeal dismissed.

No. 82-654: **State v. Gordon.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 82-657: **State v. Moore.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 82-681: **State v. Amesbury.** Dismissed for failure to file briefs.

No. 82-696: **State v. Brobst.** Judgment affirmed; see Rule 7A.

No. 82-727: **Smith v. Fettin Roofing Co., Inc.** Affirmed as modified by order of the court.

No. 82-731: **State v. McDaniel.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 82-732: **State v. Matthews.** Motion of appellant for dismissal of appeal sustained; appeal dismissed.

No. 82-734: **State v. Longa.** Motion of appellee

for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

Nos. 82-744, 82-745: **State v. Kwiatkowski.** Motions of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 82-749: **State v. Thompkins.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 82-751: **Stone v. Mavis.** Stipulation allowed; appeal dismissed.

No. 82-761: **Koch v. Nebraska Liquor Control Commission.** Stipulation allowed; appeal dismissed.

No. 82-772: **State v. Guerra.** Affirmed; see Rule 7A.

No. 82-774: **State v. Wilcox.** Affirmed; see Rule 7A.

No. 82-776: **State v. Drake.** Motion of appellant for dismissal of appeal sustained; appeal dismissed.

No. 82-777: **State v. Mister.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 82-781: **Iske v. Papio Natural Resources District.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 82-783: **State v. Morrison.** Affirmed; see Rule 7A.

No. 82-791: **State v. Patterson.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 82-797: **State v. Ross.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 82-803: **Pitsch v. City of Seward.** Motion of appellants to dismiss appeal without prejudice sustained; appeal dismissed without prejudice.

No. 82-807: **State v. Dickey.** Judgment affirmed; See Rule 7A.

No. 82-812: **State v. Bland.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 82-821: **Kuchera v. Beard.** Dismissed for failure to file briefs.

No. 82-832: **State v. Murphy.** Dismissed for failure to file briefs.

No. 82-836: **Widman v. AEL Partnership.** Stipulation allowed; appeal dismissed.

No. 82-837: **Theel v. Theel.** Affirmed as modified by order of the court.

No. 82-845: **State v. Lloyd.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 82-847: **Buchanan v. Hanway.** Motion of appellants for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 82-849: **State v. Ruvalcaba.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 82-850: **Alphson v. Alphson.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 82-852: **Safarik v. City of Weeping Water.** Affirmed as modified by order of the court.

No. 82-853: **Nalley v. Consolidated Freightways, Inc.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 82-857: **State v. Overton.** Judgment affirmed; see Rule 7A.

No. 83-013: **In re Estate of Thun, Tiedtke v. Wayne Hospital Foundation.** Affirmed as modified by order of the court.

No. 83-014: **State v. Sporleder.** Judgment affirmed; see Rule 7A.

Nos. 83-018, 83-019: **State v. Martin.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 83-026: **Lewis v. Perez-Morell.** Dismissed for failure to file briefs.

No. 83-028: **Southeast Nebraska Production Credit Association v. Ough.** Motion of appellant for dis-

missal of appeal sustained; appeal dismissed at costs of appellant.

No. 83-030: **State v. Clausen.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 83-033: **Lieberman v. City of Scottsbluff.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 83-037: **Hochstetler v. DeBacker.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 83-038: **State v. Reha.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 83-041: **State v. Stankoski.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 83-043: **State v. Foreman.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 83-045: **State ex rel. NSBA v. Robert W. Green.** Voluntary surrender of license accepted; judgment of disbarment entered.

No. 83-047: **Dingle v. Nebraska Methodist Hospital.** Stipulation for dismissal of appeal allowed; appeal dismissed; each party to pay own costs.

Nos. 83-053, 83-054, 83-055, 83-056: **Luebbe v. Miller Farms Co., Inc. Fintel v. Miller Farms Co., Inc. Fischer v. Miller Farms Co., Inc.** By order of the court, affirmed as modified as to the appellants Roger Cradick and Rickey Cradick.

No. 83-057: **State v. Evans.** Judgment affirmed; see Rule 7A.

Nos. 83-061, 83-062: **State v. Shryack.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 83-063: **Russell v. Russell.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 83-064: **State v. Penson.** Motion of court-

appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 83-068: **Wright v. Nebraska State Bank.** Motion of appellant for dismissal of appeal sustained; appeal dismissed with prejudice at costs of appellant.

No. 83-074: **State v. Burkhalter.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 83-079: **Suarez v. Hubenka.** Motion of appellant to dismiss appeal sustained; appeal dismissed at costs of appellant.

No. 83-083: **State v. Walter.** Judgment affirmed; see Rule 7A.

No. 83-084: **State v. Murphy.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 83-093: **State v. Russek.** Judgment affirmed; see Rule 7A.

No. 83-103: **Dolson v. Vanice Pontiac Cadillac, Inc.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 83-104: **Riese v. Seamann.** Stipulation allowed; appeal dismissed.

Nos. 83-107, 83-108, 83-109: **In re Estate of Jacobson, Nemesio v. Jacobson.** Settlement agreement of the parties approved; the judgment of the District Court is affirmed as modified in the order of this court.

No. 83-111: **State v. Taylor.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

Nos. 83-116, 83-117: **State v. Jimerson.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 83-120: **State v. Billingsley.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; See Rule 3B(4).

No. 83-121: **Sartain v. Friedenbach.** Motion of ap-

pellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 83-122: **State v. Schaneman.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 83-124: **Shlothauer v. Don Gross Drywall & Acoustics.** Motion of appellee for summary dismissal sustained; appeal dismissed; see Rule 7B(1).

No. 83-127: **State v. Burks.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 83-128: **Stromsburg Bank v. Nuttelman.** Motion of appellee for summary dismissal sustained; appeal dismissed as premature; see Rule 7B(1).

No. 83-143: **Wellman v. Hoffschneider.** Motion of appellant for dismissal of appeal sustained; appeal dismissed.

No. 83-144: **Rankin v. State.** Stipulation allowed; appeal dismissed.

No. 83-147: **State v. Raymond.** Judgment affirmed; see Rule 7A.

No. 83-148: **Kimbrough v. Kimbrough.** Affirmed as modified by order of the court.

No. 83-166: **LeRoy Weyant & Sons v. Harvey.** Stipulation allowed; appeal dismissed.

No. 83-167: **LeRoy Weyant & Sons v. Classic Lanes.** Stipulation allowed; appeal dismissed.

No. 83-175: **Stanczyk v. Central Platte Natural Resource District.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellants.

No. 83-177: **LeBlanc v. Archbishop Bergan Mercy Hospital.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 83-183: **State v. Wilder.** Judgment affirmed; see Rule 7A.

No. 83-184: **Perry v. School District of Plattsmouth.** Joint motion of parties to dismiss appeal sustained; appeal dismissed.

Nos. 83-187, 83-188: **State v. Roberts.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 83-189: **In re Estate of Bridenbaugh, Lesyk v. Georg.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 83-199: **Irmer v. Irmer.** Motion of appellant for dismissal of appeal sustained; appeal dismissed.

No. 83-208: **Albanese v. Transit Authority of the City of Omaha.** Stipulation for dismissal of appeal allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 83-213: **State v. Krutilek.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 83-217: **State v. Cunningham.** Motion of appellant for dismissal of appeal sustained; appeal dismissed.

No. 83-218: **State v. Lloyd.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 83-219: **Brummond v. Brummond.** By order of the court, case dismissed.

No. 83-226: **Kopecky v. Johnson.** Motion of appellee to dismiss appeal sustained; appeal dismissed.

No. 83-227: **State v. Pokorny.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 83-231: **State v. McTee.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 83-232: **Todd v. Grand Island Civil Service Commission.** Stipulation allowed; appeal dismissed.

No. 83-242: **State ex rel. Douglas v. American Midlands, Inc.** Motion of appellee for summary dismissal sustained; appeal dismissed; see Rule 7B(1).

No. 83-244: **Brown v. State.** Motion of appellant for dismissal of appeal sustained; appeal dismissed.

No. 83-245: **Wing v. Wing.** Settlement agreement

approved; affirmed as modified by order of the court.

No. 83-251: **Esslinger v. Benson.** Stipulation to dismiss appeal sustained; appeal dismissed.

No. 83-252: **Henderson v. City of Kearney.** Stipulation allowed; appeal dismissed.

No. 83-256: **State v. Willcoxen.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 83-258: **Muller v. All Nation Insurance Co.** Stipulation for dismissal of appeal allowed; appeal dismissed.

No. 83-262: **Goodman v. Hart.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 83-264: **Timmerman v. Timmerman.** Settlement agreement approved; affirmed as modified by order of the court.

No. 83-265: **State v. Zeigler.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 83-274: **Mayland v. Hilt Truck Line, Inc.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 83-278: **Suttons' N-Arrow Ranch, Inc. v. Engler.** Stipulation of settlement approved; affirmed as modified by order of the court.

No. 83-281: **State v. Jones.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 83-282: **Benbow Industries, Inc. v. Shortt.** Joint motion to dismiss appeal allowed; appeal dismissed.

No. 83-283: **Siebken v. Jorgensen.** Stipulation for dismissal of appeal allowed; appeal dismissed.

No. 83-286: **Baxter v. Webber.** Motion of appellee for summary dismissal sustained; appeal dismissed; see Rule 7B(1).

No. 83-288: **Haugner v. Haugner.** Motion of appellant for dismissal of appeal sustained; appeal dismissed.

No. 83-291: **Pallesen v. Board of Education.** Stipulation allowed; appeal dismissed.

No. 83-292: **Yahnke v. Black.** Stipulation allowed; appeal dismissed at costs of appellant.

No. 83-294: **Commercial National Bank & Trust Co. v. Jones.** Motion of appellee for summary dismissal sustained; appeal dismissed; see Rule 7B(1).

No. 83-299: **State v. Bell.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 83-313: **State v. Talbot.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 83-318: **State v. Stanley.** Motion of appellant to dismiss appeal sustained; appeal dismissed at costs of appellant.

No. 83-323: **French v. Penhaus, Inc.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 83-326: **Jurgens v. Jurgens.** Stipulation allowed; appeal dismissed.

No. 83-338: **Hogeland v. Hogeland.** Motion of appellant for dismissal of appeal sustained; appeal dismissed.

No. 83-340: **Farmers Union Cooperative Ins. Co. v. Bartlett.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 83-348: **Parr v. Parr.** Affirmed as modified by order of the court in accordance with the stipulation of settlement filed by the parties.

No. 83-364: **Utsumi v. City of Grand Island.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 83-367: **State v. Billups.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 83-368: **Kleveland v. Kleveland.** Affirmed as modified by order of the court.

No. 83-381: **State v. Smith.** Stipulation allowed; appeal dismissed.

No. 83-384: **Omeco-St. John Co. v. State Tax Commissioner.** Stipulation allowed; appeal dismissed.

No. 83-469: **State v. Luther.** Motion and waiver sustained; appeal dismissed.

IN MEMORIAM

LAWRENCE M. CLINTON

And now, on this twenty-eighth day of April 1983, at the hour of ten a.m., the Supreme Court of the State of Nebraska is hereby convened in special Term of Court for the purpose of receiving resolutions in memory of Lawrence M. Clinton, a former Justice of this court who departed this life on the twentieth day of December 1982.

CHIEF JUSTICE NORMAN KRIVOSHA.

On behalf of the court, I would like to publicly thank Mr. Robert A. Barlow for his service as chairman of the committee selected to present such resolutions. The members of the committee will be presented to the court as their resolutions are offered to the court, or as introduced by Mr. Barlow.

HONORABLE ROBERT A. BARLOW.

MAY IT PLEASE THE COURT, AND THE FAMILY AND FRIENDS OF JUSTICE LAWRENCE M. CLINTON:

I wish to acknowledge the presence here today of Judge Donald Brodkey, former member of this court, former Justice; Judge Herbert A. Ronin, former Judge of the District Court of the Third Judicial District; and Dean Rodney Shkolnick of Creighton University, where Judge Clinton received his legal education.

The committee appointed by this court to present a memorial service in memory of the late Honorable Lawrence M. Clinton, for over ten years a Justice of this court, respectfully tenders this tribute to his distinguished service on this court.

The members of the bar and bench I will call upon at this time will relate the accomplishments of a great jurist, an accomplished lawyer, a dedicated family man, and their memories of a loyal friend.

HONORABLE EDWARD A. DONAHOE.
MEMBERS OF THE COURT:

I was recalling that I first met Larry the day I entered grade school in 1922 in Sidney, Nebraska, Saint Patrick's Academy. At that time Larry was already in the second grade, being a year ahead of me all through the years out there in Sidney. After we got out of high school, Larry stayed for a year in Sidney, and later we went down to Omaha to attend Creighton Law School. In looking back over all of those years, I am reminded of three things about Larry.

The first remembrance is particularly of his scholarship and dedication to all of his undertakings. Even as a young boy in grade school and high school, he was a scholar; applied himself thoroughly to everything. I recall particularly that his dad and his mother were both hard-working pillars of the community, and they had apparently instilled in Larry the dedication that he always had for all of his work and his study.

Secondly, I recall too that Larry was one who would never do or say anything that would hurt or offend anyone in any way. I recall particularly, as a young boy, when Larry had every provocation to engage in a fight—there was quite a gang around—Larry would say, "No, this is not the way to settle anything." And, by golly, everybody really, I think, admired him for it, and that was really the type of guy that Larry was. Even as a young boy he seemed to have the maturity that quite often does not reach the rest of us until we are at a little older age.

And, thirdly, you might know that with anyone with those qualities and high moral principles they

would never do anything themselves that would ever reflect unfavorably or be wrong. In my entire lifetime, I think I never knew Larry to engage in anything that was not right down the line. I remember particularly of one year when we were rooming in the same roominghouse in Omaha, in our second year of college, and the old Irish lady that operated it would come up once in a while to see if we were violating some of the rules. When we would hear her coming up the steps, the other fellow and I would disconnect the electric heater and cap the bottles of wine and hide them in Larry's room, because we knew there would never be a check made in there.

In recalling Larry and his wonderful wife, the dedication to his scholarship and his family, and his profession and his work, I think the old adage surely applies here, that "they really broke the mold when they made Larry."

I thank the court, as a body, for the opportunity to make these few reminiscences.

HONORABLE JOSEPH A. TROIA.

MAY IT PLEASE THE COURT:

I am deeply honored and grateful for the opportunity to say a few words on behalf of my good friend and colleague, the late Justice Lawrence M. Clinton. He was truly a great lawyer, judge, and family man. I am sorry I do not have sufficient command of the English language to adequately express in words the respect, profound affection, and unwavering friendship I have always had for my very good friend, Larry Clinton. These feelings will always remain in my heart and mind.

I knew Larry not only as a Justice but as a fellow student, lawyer, and friend. His abilities and accomplishments as a lawyer and as a Justice have been and will be adequately covered by others here today. Suffice to say, he was truly a remarkable man.

The occasion to observe intimately the develop-

ment of a man of true greatness throughout his adult life is a genuine privilege. When a man of greatness is a friend of the observer for nearly fifty years, it is only fitting that the observer be permitted, with pardonable pride, to enjoy the greatness of his friend.

Thus it is that I recall my meeting Larry Clinton as a fellow student at Creighton University. The association of a city boy from Omaha and the country boy from the small, western town of Sidney, Nebraska, soon flourished into a friendship which persisted and became more firm and mature as the years and decades passed—until the untimely death of Justice Lawrence M. Clinton of the Supreme Court of the State of Nebraska.

During our undergraduate days, deep in the Great Depression, Larry Clinton worked long hours at his studies and at the menial tasks in the Student Union of Creighton University.

In 1937 we entered law school, again at Creighton. He continued to work part time as many hours as possible to earn his way through college. In his quiet, humble manner, he became increasingly scholarly. As he pursued his studies, his virtues, patience, and deliberation became more and more apparent. He was an honor student and was selected as a member of the honorary legal fraternity known as Servientes Ad Legem. He loved the law and was knowledgeable about its history, philosophy, and traditions.

We both graduated from Creighton University School of Law in 1940, and were admitted to the practice before this honorable court on July 1, 1940. By this time it was quite obvious that Larry Clinton had all the tools and temperament necessary for a successful practice of law, and he returned to his hometown of Sidney, Nebraska. His practice of law was short-lived because of World War II. He joined the Armed Forces and served from 1941 to 1945 and obtained the rank of captain. In 1946 he returned to Sidney, again to practice law.

Throughout the years that followed, our relationship flourished and developed into a friendship which very few people have the good fortune to experience in their lifetimes. I was favored to observe the making of a singularly qualified Justice of the Supreme Court of the State of Nebraska, and I was very gratified by his ascension to the appellate bench. His distinguished service on the Supreme Court is a matter of permanent record.

Even though his manner was dignified and courtly, he retained the simple, unspoiled, humane manner which set him apart during his lifetime. He was the same everywhere and to everybody. Larry was a man who made and retained many friends. He enjoyed being with his friends and classmates and was always concerned about them.

A few years ago a very good friend and classmate of ours suffered a heart attack, and even though Judge Clinton was ill himself with a heart problem, he would insist that we visit with this friend as often as possible and have lunch with him.

On the occasions we drove to Grand Island to visit our friend and classmate, Judge Clinton would look around the countryside and admire the beautiful Nebraska farms. He would make comments as to the corn, soybean, and sorghum crops, and relish the thought of being a part of such a great nation. He loved this country, particularly the State of Nebraska.

In recent years we attended various ethnic festivals and church dinners in the smaller Nebraska towns. He was particularly fond of attending the church festival at Saints Peter and Paul in Abie, Nebraska. This dinner and festival is usually held on the third Sunday in October each year. Judge Clinton and his wife Virginia would drive to Wahoo and park their car. My wife Dorothy and I would drive to Wahoo, pick them up, and we would drive on to Abie together. This was the last social func-

tion we attended together before his death in December.

I will always remember that day in Abie. Virginia was wearing a cowgirl hat, blouse, skirt, and boots—dressed like a true Western Cowgirl. I remember how Larry delighted in teasing her throughout the afternoon about her dress and appearance—and each time he made a remark, his eyes would light up and sparkle, and a smile would cross his face.

He was a very devoted and loving father and husband, and was immensely proud of his wife and their four children.

In 1980 Judge Clinton was awarded the Outstanding Achievement Award by Creighton University at its commencement exercises. Being the humble man that he was, he felt sure there was someone else more deserving, but he was very proud and honored to receive the award we all knew he so richly deserved.

Judge Clinton, although small in physical stature, was a great man and will remain a monument of humanity to all who knew him. He may have passed on and disappeared from our presence, but his thoughts and acts will survive and leave an indelible stamp on all of us—especially this court.

I am grateful for having had the opportunity to be a small part of his life. His friendship meant a great deal to me, and there will always be a void in my life without him. But, because of the kind of a man he was and the quality of the life he lived, I know he has passed on into a world of peace and contentment.

HONORABLE JAMES A. LANE.

MR. CHIEF JUSTICE, JUDGES OF THE SUPREME COURT, MRS. CLINTON AND MEMBERS OF THE FAMILY, LADIES AND GENTLEMEN:

Our words are a poor substitute to describe the deeds of the man we honor here today. Lawrence

M. Clinton was born to a pioneer family of Cheyenne County, Nebraska, on March 25, 1915. He attended elementary school and high school at Saint Patrick's in Sidney. Thereafter, he attended Creighton University for four years of undergraduate school. He showed his industry by working, as well as attending school, throughout this entire period.

This brings us to the time when Larry and I first met almost half a century ago in the halls at Creighton. A friendship was formed, which endured to the time Judge Clinton recently left us. It was a rich and rewarding relationship for me.

During our undergraduate years, we saw each other from time to time, but later, during the three years of law school, our friendship became closer as we attended the same classes and school functions. Larry already exhibited those characteristics and qualities which were the foundation for his later success in his daily life, his practice of law, and the judiciary. He had integrity, warmth, scholarliness, and common sense. Not surprisingly, during law school a number of his schoolmates had already predicted that he would make a fine Judge.

Subsequent to graduation, and after taking the Nebraska state bar examination, Larry returned to Sidney to enter the practice of law. I went to Ogallala for the same purpose. Sometime along the line there he went into partnership with Pat Heaton, with whom the court is well acquainted. The war years intervened almost immediately, with both of us taking time out for service requirements. Larry was the second young man to volunteer for military service in World War II from Cheyenne County. After the war Larry came back to Sidney and I to Ogallala, where only seventy miles separated us. It is understandable that our paths crossed many times throughout the following years. It was, for the most part, on opposing sides in the practice of law. A few times we were on the same side of the table.

Larry was a fine lawyer and a great adversary in

his trial practice. His thorough preparation, grasp of the issues, and attention to detail made it a difficult encounter every time we came up against him.

He gave up a remunerative and successful legal practice to do what I think he had always wanted to accomplish: to be a Judge on the highest court in the state. He was appointed to the Supreme Court bench in 1971, and he served with distinction until his death December 20, 1982. His great and permanent contributions to the law, through his work as a Judge, are etched in his opinions, which live on for our guidance.

Many were the times while Judge Clinton sat on the bench here that I stopped to pass the time of day with him. I found he never changed. He remained the same perceptive, considerate, and warm human being that he had always been.

Judge Clinton was also a success in life away from the law. He was a Christian gentleman, a good father, a loving husband, and, I say for myself and a multitude of others, a kind, understanding, and considerate friend. We will all miss him so very much. He will be remembered, for as it has fittingly been said, "WHAT WE DO ONLY FOR OURSELVES DIES WITH US; WHAT WE DO FOR OTHERS AND THE WORLD REMAINS, AND IS IMMORTAL."

HONORABLE J. HAMMOND MCNISH.

MAY IT PLEASE THE COURT:

In spite of the solemnity and dignity of this occasion, I cannot escape the feeling that we are engaged in a sort of clandestine operation, because I know if we had asked Larry's permission to conduct this proceeding we would not have received it.

I had the great good fortune to know Larry from the time I was three years old and he was five, in Sidney, Nebraska. We lived on the same side of town, and although we went through different school systems, we were the best of friends. I cherished that friendship because, even at the early age, it was

apparent that he was someone very special.

We formed, after World War II, a partnership that endured for twenty years without a single dispute or a single discordant word. It was, of course, one of the great privileges of my life to be associated with and to be subjected to the powerful influences of this remarkable man.

One of our more memorable cases involved a breach of contract. Our client had sent in, to a direct mail supplier, the sum of two dollars for some special razor blades. When these razor blades did not arrive, he sought legal counsel. Unfortunately, he had a great deal of time on his hands, making it possible for him to stop in almost daily for progress reports and lengthy reiterations of the legal principles involved. Apparently, the case was beyond our abilities, because my recollection is that we got neither the razor blades nor the two dollars back. Even so, the client was mollified. He was understandably impressed with Larry's frankness, with his efforts, with his sincerity; and even in a losing cause Larry's character and his personality made a strong impact on this person and he later became a client in more important matters.

We all know that Larry's brilliance, perseverance, instinctive feel for the law, and incredible industry led to a seat on the Supreme Court. His success was especially gratifying to me, because I was aware this was a goal he had long cherished. It was truly an appropriate reward for an exceptional apprenticeship.

I realize only too well that these rambling reminiscences, which are very dear to my heart, do little to give a meaningful picture of the man we memorialize today. They cannot give life to those qualities that distinguished him from those who are merely successful. Those are powerful, pervading, intangible forces that are difficult to define but easy to recognize. Although tempted to enlarge on these traits, I am reminded of the admonition that one can

not and should not attempt to render the song of the bird in words.

His deeds live after him; they speak more eloquently than words. The forces derived and flowing from his profound talents will benefit mankind in a myriad of ways, even though he is now gone, just as they inspired and uplifted us while he lived.

HONORABLE THOMAS D. BROWER.

HONORABLE MEMBERS OF THE COURT, VIRGINIA, MEMBERS OF THE FAMILY AND FRIENDS:

I was acquainted with Justice Clinton mainly through the practice of law at Kimball and Sidney, Nebraska, and through more frequent social contacts at the same places, and here in Lincoln, Nebraska. I really feel more at ease in referring to Justice Clinton as "Larry," because my contacts occurred principally prior to his being a Judge.

I knew him in two capacities: as a competing practicing attorney and as a friend. As a lawyer, he was darn good. He was tough in the sense that you better well be prepared because he was going to be prepared. As a friend, he was one who liked to have a glass of wine; he talked about the Huskers, talked about baseball; and he played a "so-so" game of golf.

Larry was a no-nonsense person in the practice of law. I learned early in my associations with him at Sidney that, in any conversation about your client or his client, you better well be prepared. He had an answer for everything. As a matter of fact, I used to kid him a little bit, and I had a private nickname for him—it was "last-word Clinton." And he retaliated by referring to me on more than one occasion as being "dumb" tough. Anyway, in all of these exchanges we were always able to back off and laugh at one another and enjoy a friendly relationship. This, to me, in the practice of law, is most rewarding. The ability to be an advocate and at the same

time to be a friend to the attorney on the other side takes a special person. And Larry Clinton was this special type of person.

Larry, of course, was duty-bound, duty-aware, all the time. He served this court and the State of Nebraska in a very unselfish manner. He wrote more than the usual number of dissenting opinions, showing an interest and treading on where many would have given up. He wrote those dissenting opinions out of his deep concern for the public and what was right, though at times I suspected he might have been trying to live up to what I thought his nickname was: "last-word Clinton."

His sense of public duty was uncompromising. I remember a particular episode at Scottsbluff, Nebraska. Larry was then on the court and living here in Lincoln, and had been visiting out at Sidney. He and Virginia had come over to Scottsbluff to visit. Both of them looked tired, as usual. So my wife and I offered to let them use our cabin property in the mountains for a little R and R. And Larry turned us down. He was most concerned with his position on the court and using a cabin owned by a Nebraska lawyer. He said that this was "just not fitting or proper." So, that following day, we were out on the golf course and on tee No. 1 and ready to take off, and I turned and just glanced at Larry and said, "Say, it would be most fitting and proper if I should win this game"; and I said, "It would look terrible if you would win, people would think that you owed me something." He looked at me, and he kind of chuckled, and said, "You know, I just don't think we'll keep a permanent record of this score."

Anyway, Larry really wanted to give himself for what was right. Larry's denial of my cabin use is illustrative of this feeling he had of serving us, and not really seeking out power or attention or advantage for just himself. Truly, Larry was a man who felt he had a responsibility to serve, and he did truly serve us.

HONORABLE ROBERT A. BARLOW.

The last member of the committee, Ivan Van Steenberg of Kimball, Nebraska, is one of those fortunate members of the bar who is wintering in Arizona, and not able to be here. Ivan wrote a letter, and I would like to read it.

> Dear Bob:
>
> Larry and I first met when he started practicing law in Sidney after World War II. We cemented our friendship when we attended many legal seminars together in Boulder, Colorado, at the University of Colorado, over a period of ten years or so.
>
> I don't recall of ever being an adversary of Larry, but I recall handling several cases with him.
>
> When oil was discovered in Cheyenne County in 1949 and in Kimball County in 1951, we worked together in educating ourselves in oil law.
>
> Larry always impressed me with his ability to grasp and develop new ideas. He loved the law. He was an intelligent man. To me, he was the personification of integrity.
>
> I will miss him.
>
> Sincerely,
> Ivan Van Steenberg.

ASSOCIATE JUSTICE LESLIE BOSLAUGH.

The appointment of Judge Lawrence M. Clinton to this court by Governor Exon, on February 5, 1971, completed a rotation in office for the court that commenced with the election of Judges Spencer and my-

self in 1961. Judge Clinton signed the oath of office on March 23, 1971, and commenced his duties as a member of this court.

Judge Clinton succeeded the late Judge Edward F. Carter, one of the most eminent members of this court that have served the state, and he served well. He was selected from an outstanding list of nominees supplied to the Governor, and it was an honor to be selected from that group to serve as a member of the court.

Of all the traits of character Judge Lawrence Clinton possessed, perhaps his indomitability was the most striking.

Coming of age in a Depression, and faced with the realization that he had only himself to rely on for educational expenses, he persisted and secured his college and professional training. A recitation of his various employments and accommodations, always given with humor, would daunt an otherwise courageous person.

Through his military career as a combat officer and the establishment of a law practice, the sheer indomitability of his character shone through. Difficulties that might persuade other men to retire from the field were mere obstacles.

And of his career on the bench, with which we are most familiar, perhaps the overriding evidence of that indomitability was triumph over his physical condition. He had no intention and would not permit heart problems to be either excuses or obstacles to the appropriate discharge of his duties as a Judge of the Supreme Court.

I talked with Judge Clinton at about three o'clock on the afternoon of December 20, 1982. There was a matter pending before the court which we wanted to discuss, but he explained that he had a doctor's appointment and it would be necessary to postpone our conference until Tuesday morning. He was cheerful, although somewhat apologetic about the postponement, and we ended the conversation fully in-

tending and expecting to carry on our discussion on the following morning.

Others have spoken of other attributes of character; but for we who served with him, he was an example of the triumph of human will—an example of courage we will not soon forget.

CHIEF JUSTICE NORMAN KRIVOSHA.

On behalf of myself, personally, and as Chief Justice of this court, I join with others in memorializing Justice Lawrence M. Clinton, who departed this life on December 20, 1982. It is a duty performed with a heavy heart. He died as he had lived—dignified and without fanfare. It was his hallmark during all of his life. He cared little for the formalities that attracted others, always keeping on a straight and steady course. Even when he was uncertain of his position, he grasped his uncertainty with clear understanding. He knew what it was that he did not understand. He knew exactly what he believed was right, exactly what he believed was wrong, and exactly what he was uncertain of. He was never compelled to waste either time or energy in attempting to determine the direction he should follow. The direction he sought may have been in conflict with that which others sought, but it was always a clear and precise path.

Even those who might take issue with him always knew precisely where Justice Clinton stood and why you disagreed with his view; though, to be sure, more often than not you agreed with his scholarly analysis. He was a dedicated, thorough, and committed student of the law, who literally devoted his life to the name of the law. It was in this commitment that he gave his life, still laboring in the name of justice, at a time when others, for personal reasons, might have sought to do otherwise. His unswerving concern for those truly in need stood as an inspiration for us all.

As he was devoted to the law, so too was he de-

voted to his belief in God. He clearly understood the role man was designed to perform and his purpose in life. He was, without question, God's humble servant, prepared to do God's bidding, whatever that might be for him. It may very well have been Justice Clinton whom the Psalmist had in mind when he wrote:

> O Lord, what is man that Thou shouldst notice him?
> What is mortal man that Thou shouldst consider him?
>
> Man is like a breath;
> His days are like a passing shadow.
>
> He flourishes and grows in the morning;
> He fades and withers in the evening.
>
> O teach us how to number our days,
> That we may attain a heart of wisdom.
>
> Mark the innocent, look upon the upright;
> For there is a future for the man of peace.
>
> Surely God will free me from the grave;
> He will receive me indeed.
>
> My flesh and my heart fail,
> Yet God is my strength forever.
>
> The dust returns to the earth as it was,
> But the spirit returns to God who gave it.

During his lifetime Justice Clinton did indeed learn how to number his days that he might obtain a heart of wisdom. On December 20, 1982, the spirit of Lawrence Clinton returned to his God who gave it. The memory of his spirit will abide with us for time to come.

HONORABLE ROBERT A. BARLOW.

Your committee moves, as Resolutions in Memory of Justice Clinton, that a transcript of the proceedings here today be included in the official records of this court.

CHIEF JUSTICE NORMAN KRIVOSHA.

Motion granted. We are adjourned.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

HELEN MARIE NUSZ, APPELLANT, V. WELLS MANUFACTURING CORPORATION ET AL., APPELLEES.

332 N.W.2d 204

Filed April 8, 1983. No. 82-043.

Evidence: Appeal and Error. The exercise by the trial court of its discretion in ruling on the admission or rejection of evidence will generally not be reviewed by an appellate court, unless it is clearly or plainly shown that the trial court abused its discretion.

Appeal from the District Court for Douglas County: KEITH HOWARD, Judge. Affirmed.

Michael G. Helms of Schmid, Ford, Mooney & Frederick, for appellant.

Terrence D. O'Hare and J. Scott Paul of Boland, Mullin & Walsh, for appellee.

KRIVOSHA, C.J., WHITE, and CAPORALE, JJ., and SPRAGUE, D.J., and COLWELL, D.J., Retired.

WHITE, J.

At issue in this appeal is the refusal of the trial court to admit into evidence a deep-fat fryer manufactured by appellee Wells Manufacturing Corporation. The appellant, Helen Marie Nusz, alleged in her petition that the fryer was defectively manufactured and/or assembled. The petition further alleged that by reason of a defect in a locking mechanism, the heating element, which was designed to swing up and remain up during cleaning, released itself and fell, injuring the hand of the appellant.

The spring mechanism, if operating properly, pulled a support bar similar to a kick stand back into a fixed position. The bar would then have to be released by a deliberate act of pushing the heating element back, pulling the support bar forward, and allowing the element to be lowered into the well of the fryer. The appellant maintained throughout trial that the spring mechanism was defective on the fryer because it failed to pull the support bar back when the heating element was raised. Thus, the bar had to be placed back in a support position manually and had a tendency to slip out from under the weight of the heating element.

The trial court excluded the fryer from evidence for the reason that the witnesses were not able to testify that the machine was in the same condition as when it was delivered, or at the date of the accident, although by inference the description of the accident coincided with a defective spring placement and the repairman that fixed the fryer after the accident could remember generally the position of the spring. We hold that it was not prejudicial error to exclude the fryer from evidence.

The evidence presented to the jury consisted of extensive testimony concerning the alleged faulty placement of the spring, a demonstration performed on the actual fryer, a demonstration fryer which was almost identical, and finally a video tape of the actual fryer at the place of appellant's employment, which showed the general characteristics of the support bar. The video tape was shown to the jury during trial and again during deliberation.

Nebraska law is clear that " ' "The exercise by the trial court of its discretion in ruling on the admission or rejection of evidence will generally not be reviewed by an appellate court, unless it is clearly or plainly shown that the trial court abused its discretion.

" ' "Application of this principle has been made to rulings relating to the reception of evidence the ad-

missibility of which turns upon its relevancy, evidence collateral to the main issue, or which bears remotely on issues involved; and to rulings relating to cumulative evidence, opinion evidence, evidence concerning a matter of common knowledge, and evidence which is otherwise competent but is claimed to have a tendency to excite undue prejudice." ' " *Stephen v. City of Lincoln,* 209 Neb. 792, 796, 311 N.W.2d 889, 893 (1981); *Westover v. Kerr,* 168 Neb. 494, 96 N.W.2d 421 (1959).

From a search of the record we conclude that the evidence offered was cumulative, that its admission was directed to the sound discretion of the trial court, and there was no abuse of discretion. *Shover v. General Motors Corp.,* 198 Neb. 470, 253 N.W.2d 299 (1977); Neb. Rev. Stat. §§ 27-401 and 27-402 (Reissue 1979).

The judgment of the trial court is affirmed.

AFFIRMED.

OMAHA COUNTRY CLUB, APPELLANT, V. CITY OF OMAHA ET AL., APPELLEES.

332 N.W.2d 206

Filed April 8, 1983. No. 82-135.

1. **Municipal Corporations: Annexation.** Annexation of territory by a metropolitan city pursuant to Neb. Rev. Stat. § 14-117 (Reissue 1977) is a legislative matter. However, courts have the power to inquire into and determine whether the conditions exist which authorize the annexation thereof.
2. **Annexation: Words and Phrases.** The use of land for agricultural purposes does not necessarily mean it is rural in character. It is the nature of its location as well as its use which determines whether it is rural or urban in character.

Appeal from the District Court for Douglas County: D. NICK CAPORALE, Judge. Affirmed.

John W. Delehant of Kutak Rock & Huie, for appellant.

Herbert M. Fitle, City Attorney, Charles K. Bunger, and Denise Hill, for appellees.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, and HASTINGS, JJ., and COLWELL, D.J., Retired.

COLWELL, D.J., Retired.

Ordinance No. 29536, enacted by the defendant City of Omaha, Nebraska, on July 28, 1981, annexed a 477-acre tract of land adjacent to its north boundary. Plaintiff's petition for an injunction was dismissed; it appeals, assigning as error that a part of the land annexed is rural in character and was annexed in violation of Neb. Rev. Stat. § 14-117 (Reissue 1977), which provides in part: "This grant of power shall not be construed as conferring power upon the council to extend the limits of a metropolitan city *over any agricultural lands which are rural in character.*" (Emphasis supplied.)

"Annexation of territory by a metropolitan city pursuant to section 14-117 . . . is a legislative matter. However, courts have the power to inquire into and determine whether the conditions exist which authorize the annexation thereof." (Syllabus of the court.) *Wagner v. City of Omaha,* 156 Neb. 163, 55 N.W.2d 490 (1952). " 'Rural' means of or pertaining to the country as distinguished from a city or town, whereas 'urban' means of or belonging to a city or town. In many of the cities and villages throughout the state there are tracts which are only partially developed as residential areas wherein substantial parts of the land are used for agricultural purposes but which tracts are, in fact, urban in character. It was clearly not the intention of the Legislature, if such an area develops outside the boundaries of a metropolitan city, to prevent such city from annexing it." *Id.* at 168, 55 N.W.2d at 494.

The annexed area is generally bounded on the south by an old railroad right-of-way, on the west by 72d Street, on the north by State Street, and on the east by 60th Street. There are three excepted

tracts: (1) A commercial area in the southeast corner, (2) S.I.D. 190 in the northeast corner, and (3) An area on the mid-north boundary containing three luxury-class residences.

Included in the annexed area are these tracts: Two hundred and forty acres leased and occupied by plaintiff as a private social club, providing golf, swimming, tennis, trapshooting, and other recreation; an owned 24.5-acre north-south rectangular tract in the northwest corner, which it leases exclusively for grain farming; and an owned 34.5-acre irregular tract on the east side, also leased exclusively for grain farming. On the south side of the golf course there is a 10-acre wooded area, described as a tree farm, and also a 15-acre tract, owned by Harvey Hayes, leased for grain farming. Both of these tracts abut the main road leading to the country club; they are also near five small platted areas. In the southwest corner there are two residential areas, served by S.I.D. 99 and S.I.D. 121; a small residential area in the southeast corner; and several residences adjacent to the golf course.

The surrounding land has various uses. South of the old railroad right-of-way is the new Immanuel Hospital and medical complex, and next to Immanuel, on the east, is a developed residential area. On the west and north sides, the land is undeveloped, generally used for farming and pasture. On the east, the land is both developed and undeveloped. On all sides, except the south, there are several small tracts used for the raising of hogs, horses, and birds; the evidence is not clear whether these were business or hobby situations. At the northwest corner there are areas zoned for parking and commercial, but they are not developed.

The annexed area has available electric, water, gas, and sewer services. All of the roads around and in the area are hard surfaced. Seventy-second Street, on the west, is a four-lane street connecting

with the Interstate highway a short distance north of State Street.

Two witnesses testified: Harvey Hayes, president of the Omaha Country Club, Inc., and Blythe Kubovec, Omaha city planner.

Plaintiff's evidence shows that the annexed and surrounding areas were not growing either commercially or as residence areas in comparison with other parts of Omaha. For example, at the time of trial in November 1981 there were 135 houses in the area, which was an increase of only 8 houses in 3 years. The availability of land for development is not shown in the record. Plaintiff argues that this lack of growth and the presence of only a few platted areas show that rural and agricultural use is dominant.

"The use of land for agricultural purposes does not necessarily mean it is rural in character. *It is the nature of its location as well as its use which determines whether it is rural or urban in character.*" (Emphasis supplied.) *Sullivan v. City of Omaha,* 183 Neb. 511, 514, 162 N.W.2d 227, 229-30 (1968); *Voss v. City of Grand Island,* 186 Neb. 232, 182 N.W.2d 427 (1970).

Not to be overlooked in weighing the evidence and making independent findings is the dominant location and use of plaintiff's private club that is clearly urban in character.

Plaintiff's concern relates to the two tracts it owns. The 24.5-acre tract abuts the golf course; it has access to both 72d Street and State Street. The 34.5-acre tract is near and accessible to the golf course; it has access to 60th Street. Plaintiff's evidence was that it was its plan to use this latter tract to add nine holes to its golf course. The location of these two tracts imposes an urban character upon them. The present use of the 10- and 15-acre tracts to the south of the golf course does not overcome their urban character.

" 'The burden is on the one who attacks an or-

dinance, valid on its face and enacted under lawful authority, to prove facts to establish its invalidity.' " *Bierschenk v. City of Omaha,* 178 Neb. 715, 718, 135 N.W.2d 12, 14 (1965).

Having considered the location and uses of all of the included tracts of land, we find that the annexed area was urban in character and that the ordinance was a lawful exercise of the city's powers.

AFFIRMED.

McCOWN, J., dissenting.

Eighty-four acres of the land involved in the annexation here is concededly used as agricultural land and has never been used as anything but agricultural land. The majority opinion now determines that because that land may be intended for future nonagricultural use, it is therefore no longer agricultural land, but instead is urban in character. The possibility, or even probability, that agricultural land may become urban in the future does not alter its present character.

In addition, the majority opinion simply states that a country club "is clearly urban in character." Historically, country clubs were so named because they were located in the country. While obviously a country club is not agricultural land, neither is its land necessarily urban or rural. It might be said to be neutral in character and would be subject to classification in accordance with the land surrounding it. Some country clubs are obviously urban, but others are equally obviously rural. In the present case virtually all the land to the west and north, and even some to the south of the country club here, is still unplatted agricultural land. For purposes of annexation a country club is characterized by its use of land and buildings, not by its membership.

In my view the case of *Wagner v. City of Omaha,* 156 Neb. 163, 55 N.W.2d 490 (1952), is controlling, and it has not been overruled. In that case the total number of acres and the percentage which was unplatted agricultural land are almost identical to

those in the present case, but the urban residential portion of the proposed annexation and the proportion of such land to agricultural were much greater than they are here.

In *Wagner* this court held that the purpose of the statute was to prevent annexation by a metropolitan city of agricultural areas which are rural in character. The court concluded that the city did not have authority to extend its boundary to unplatted agricultural lands, rural in character, and that it was not for the court to determine what portions of an area might properly be annexed because the drawing of boundary lines is a legislative act. This court said: "In view of the foregoing we have come to the conclusion that the city, by including these agricultural lands which are rural in character in the area sought to be annexed, exceeded the authority granted it by section 14-117, R.S. 1943. Since we have no authority to revise the boundary line of the city, as extended by the ordinance, we find that its doing so makes the entire ordinance invalid." *Id.* at 170, 55 N.W.2d at 495.

I can find no reasonable distinction between the case at bar and *Wagner*. I would reverse.

RUTH VAN WINKLE, APPELLANT, V. ELECTRIC HOSE & RUBBER CO., A NEBRASKA CORPORATION, APPELLEE.

332 N.W.2d 209

Filed April 8, 1983. No. 82-690.

1. **Workmen's Compensation.** Compensation may be recovered for emotional or psychological conditions which are proximately caused by a work-related injury and result in disability.
2. _____. Issues of causation in compensation cases are to be determined by the finder of fact.
3. **Workmen's Compensation: Appeal and Error.** Findings of fact made by the compensation court after rehearing will not be set aside unless clearly wrong.
4. **Workmen's Compensation.** Where there is nothing more than con-

flicting medical testimony, this court will not substitute its judgment for that of the Workmen's Compensation Court.

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

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

Stephen W. Kay of Kay & Kay, for appellee.

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

PER CURIAM.

This is an appeal in a proceeding under the Workmen's Compensation Act. The plaintiff, Ruth Van Winkle, was injured on May 20, 1981, while employed as an electricator at Electric Hose & Rubber Co. She felt something "pop" in her lower back while pushing a tub full of rubber hose during the course of her employment. In this proceeding plaintiff sought permanent and total disability benefits on the basis that the back injury which she suffered resulted in a hysteric conversion reaction which has left her paralyzed from the waist down.

After the initial hearing before a single judge, the cause was dismissed. On rehearing before a three-judge panel of the Workmen's Compensation Court, plaintiff received an award for temporary total disability for 9 weeks on the basis of the injury to her back. The court held that plaintiff had not sustained her burden of proof on the issue of the causal relationship between the injury and the conversion reaction. Thus, there was not sufficient evidence to warrant an award of permanent and total disability benefits.

It is undisputed that plaintiff sustained an injury to her back during the course of her employment. A myelogram revealed plaintiff had lesions at vertebrae L4-5 and L5-S1 suggesting herniated discs. It is likewise undisputed that the paralysis from which plaintiff suffers is out of proportion to the indications

given by the myelogram, and is a result of a "hysteric conversion reaction." The issue to be determined on this appeal is whether the compensation court erred in determining that a causal nexus between the injury and the conversion reaction had not been proven. This requires an examination of the medical testimony in the record regarding the causation issue.

A conversion reaction occurs when a person who is under some type of stress handles anxiety by developing a physical defect. There is no organic basis to explain the disorder exhibited. Compensation may be recovered for emotional or psychological conditions which are proximately caused by a work-related injury and result in disability. *Lee v. Lincoln Cleaning & Dye Works,* 145 Neb. 124, 15 N.W.2d 330 (1944); *Davis v. Western Electric,* 210 Neb. 771, 317 N.W.2d 68 (1982); *Erving v. Tri-Con Industries,* 210 Neb. 339, 314 N.W.2d 253 (1982). Issues of causation in compensation cases are to be determined by the finder of fact. *Hyatt v. Kay Windsor, Inc.,* 198 Neb. 580, 254 N.W.2d 92 (1977); *Aguallo v. Western Potato, Inc.,* 208 Neb. 66, 302 N.W.2d 41 (1981).

The findings of fact made by the compensation court after rehearing will not be set aside unless clearly wrong. *Davis v. Western Electric, supra.* Where there is not sufficient competent evidence in the record to warrant the order or judgment of the compensation court, or the findings of fact do not support the same, the Supreme Court must modify, reverse, or set aside the decision of the compensation court. Neb. Rev. Stat. § 48-185 (Reissue 1978); *Davis v. Western Electric, supra; Riha v. St. Mary's Church & School, Inc.,* 209 Neb. 539, 308 N.W.2d 734 (1981).

In the present case the plaintiff's condition was evaluated by several physicians. The depositions of these doctors were received in evidence at the rehearing.

Dr. Wendell Fairbanks, a physician who regularly examined defendant's employees when they sustained injuries on the job, examined plaintiff 7 days after her accident. Plaintiff testified that she had worked full shifts on the 2 days following the accident, but was in pain. She did not return to work after that time. When she was seen by Dr. Fairbanks, she complained of numbness in her leg. He hospitalized her at that time. Her condition did not improve, and by July she had little mobility in her legs. Dr. Fairbanks diagnosed her condition as a conversion reaction. He had no opinion as to the nature of the triggering mechanism for the reaction.

Dr. Louis J. Gogela, a neurosurgeon, examined plaintiff at the request of Dr. Fairbanks. He hospitalized her. Dr. Gogela testified that the paralysis was psychogenic in origin, as there was no apparent organic cause. Dr. Gogela testified that persons exhibiting a particular personality pattern are predisposed to this type of problem. He was unable to formulate an opinion as to whether this paralysis was due to a preexisting personality pattern, or an opinion as to how much effect the injury may have had in bringing about the conversion reaction.

Dr. Richard C. Sposato, a medical neurologist, examined plaintiff at the request of Dr. Gogela. He diagnosed her condition as paraparesis of a conversion reaction type. He testified that, in his opinion, there was no relationship between the on-the-job injury and the paraparesis. He testified he did not have an opinion as to what the triggering mechanism was.

Dr. Sposato requested a psychologist, Dr. Vernon Fisher, to read the Minnesota Multiphasic Personality Inventory (MMPI) which the nursing staff administered to plaintiff. This is a broad-range personality test measuring different aspects of, for example, mood and behavior. Dr. Fisher's diagnostic impression, after he read plaintiff's MMPI, was that she was suffering from "psychophysiologic or con-

version disorder with mild to moderate depression and anxiety in a dependent, hysteroid personality." Dr. Fisher did not have an opinion as to the cause of her paralysis, but he felt that the test indicated a predisposition for this type of event.

Plaintiff was also examined by Dr. Ernest W. Beehler, a neurosurgeon. He hospitalized her. He diagnosed plaintiff as suffering from a conversion reaction. He testified to the following: "Q. And, doctor, did you have an opinion based upon reasonable medical certainty as to the cause of the functional overlay [conversion reaction]? A. I think you're getting into the realm of psychiatry there. Q. So you have no opinion? A. Well, sort of, but I think a psychiatrist might feel differently. But we see some people who have organic problems who don't handle them well and then start adding a lot of frosting either because somebody doesn't pay enough attention to them or they're not getting the situation corrected soon enough. So this — I think that in her case it was related to the original problem." Dr. Beehler also testified, "Had it not been for the injury she wouldn't have had the conversion reaction."

Dr. Beehler was of the opinion that the paralysis may have been a means of holding her husband. He felt that this marital problem was a factor but was not directly related to the conversion reaction.

Dr. Jack D. Hornby, a psychiatrist, read another MMPI answered by the plaintiff, and examined her records. He testified that plaintiff was predisposed to suffering a conversion reaction. He stated that "It is quite possible chronologically, that the injury that she suffered at the Electric Hose & Rubber Factory could have contributed to a — to the development of this type of neurotic disorder which she was predisposed to prior to the injury." Dr. Hornby had never met with plaintiff.

Plaintiff was also examined by Dr. William T.

Warmath, a neurosurgeon. He did not have an opinion as to the cause of plaintiff's disorder.

This review of the evidence reveals that Dr. Fairbanks, Dr. Gogela, Dr. Fisher, and Dr. Warmath were unable to formulate an opinion as to the cause of plaintiff's condition. Dr. Fisher did state that she had a predisposition to this type of event. Dr. Sposato testified that he did not know what had caused the conversion reaction, but it was his opinion that her paralysis was not related to her employment injury. Dr. Beehler testified that there was a relationship but added the disclaimer, "I think a psychiatrist might feel differently." Dr. Hornby, a psychiatrist who had never examined or met with the plaintiff, testified that there was a possible chronological relationship between the injury and the conversion reaction. Dr. Hornby testified in qualified terms: "It is quite possible . . . that the injury . . . could have contributed" to the reaction.

The plaintiff was required to prove by a preponderance of the evidence that her disability was the result of a work-related accident. *Riha v. St. Mary's Church & School, Inc.*, 209 Neb. 539, 308 N.W.2d 734 (1981). Where there is nothing more than conflicting medical testimony, this court will not substitute its judgment for that of the Workmen's Compensation Court. *Id.* In the present case the finding that plaintiff did not meet her burden of proof is supported by the record. The finding that there was no causal relationship between her employment and the conversion reaction is supported directly by the testimony of Dr. Sposato. The decision of the compensation court was not clearly wrong.

Plaintiff had been paid compensation for 9 weeks of temporary total disability at the time of the rehearing. The compensation court found that it could not determine without indulging in speculation and conjecture the extent of disability resulting from the injury beyond that period due to the presence of the

conversion reaction. An award of compensation can not be based on speculation and conjecture. *Erving v. Tri-Con Industries,* 210 Neb. 339, 314 N.W.2d 253 (1982); *McCann v. Holy Sepulchre Cemetery Assn.,* 205 Neb. 444, 288 N.W.2d 45 (1980). The award requires the defendant to provide any future medical care necessitated by the back injury. Dr. Beehler had indicated that he would have performed surgery on the injury demonstrated on the myelogram but for the conversion reaction. The award made is supported by the record.

Plaintiff also assigns as error the failure to tax the cost of the deposition of Dr. Hornby, taken on behalf of plaintiff, to the defendant as costs. The court ordered the defendant to pay the costs of the depositions of Drs. Fairbanks and Beehler. The deposition of Dr. Beehler had been taken in defendant's behalf. The plaintiff claims that the failure to award the cost of the Hornby deposition was an oversight.

Under the circumstances of this case we believe the cost of the deposition of Dr. Hornby should be taxed to the defendant as costs. The judgment is, in all other respects, affirmed.

AFFIRMED AS MODIFIED.

DENNIS MOORE AND LOIS MOORE, APPELLANTS, V. PUGET SOUND PLYWOOD, INC., APPELLEE.

332 N.W.2d 212

Filed April 8, 1983. No. 82-723.

1. **Warranty.** A description of goods which becomes a basis of the bargain creates an express warranty that the goods conform to the description.
2. **Uniform Commercial Code: Limitations of Actions.** The period of limitations contained in Neb. U.C.C. § 2-725(2) (Reissue 1980) does not apply to express warranties.
3. **Pleadings.** Pleadings frame the issues upon which a cause is to be tried and advise the adversary as to what he must meet.
4. _____. It is the facts well pleaded, not the theory of recovery nor legal conclusions, which state a cause of action.

5. **Breach of Warranty: Notice.** A purchaser must plead and prove that he gave timely notice of a breach of warranty.
6. **Principal and Agent: Notice.** Apparent authority of an agent may exist beyond termination of the principal-agency relationship when notice of the termination has not been given.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Reversed and remanded with directions.

Duane M. Katz, for appellants.

Gerald L. Friedrichsen of Fitzgerald, Brown, Leahy, Strom, Schorr & Barmettler, for appellee.

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

CAPORALE, J.

Dennis and Lois Moore, plaintiffs-appellants herein, brought an action in the municipal court of the city of Omaha for damages against Puget Sound Plywood, Inc., defendant-appellee, alleging that Puget Sound breached an implied warranty. The municipal court dismissed plaintiffs' petition and the District Court affirmed that action. In this appeal the Moores assign as error the holding that the period of limitations began to run on the date of delivery, and the finding and holding that the Moores failed to prove proper notice of the breach. Although we do not agree with the parties' and lower courts' analyses of the case, we do agree with the Moores' arguments of error and reverse the judgment of the District Court.

Puget Sound had manufactured certain lauan siding which the Moores purchased during the construction of their house in 1970-71. In October 1977 the Moores noticed some "problems" with its appearance. The problem, delamination, had gotten severe enough by 1979 that they began to investigate what could be done to remedy the situation. They first attempted to contact their supplier but found that it had gone out of business. Another lumber

dealer directed them to Rehcon, Inc., which had been engaged by Puget Sound, since at least December 1976, to make investigations and undertake remedial work for Puget Sound on homes which had delaminating siding. On March 13, 1980, Rehcon terminated its relationship with Puget Sound because of an "inability to develop a satisfactory working relationship." The record does not reveal that Puget Sound took any steps to make the public aware that Rehcon was no longer its agent, nor does it appear that Puget Sound appointed anyone else to represent it. On June 24, 1980, Mr. Moore complained to Rehcon about the subject siding. This action was filed on April 24, 1981. The president of Puget Sound testified that the particular species of lauan tree used by it in the making of the siding involved was not susceptible to being glued together with the resin which Puget Sound was then using. Accordingly, some of the lauan siding was defective in that it delaminated relatively quickly. In other words, it came apart. The parties agreed that the municipal court could take judicial notice that "generally siding, when it's put on, is supposed to take, last the life of the house." The evidence establishes that the damages are $4,550, the cost of remedying the defect by replacing the siding.

The Moores argue substantially to the effect that where a seller impliedly warrants the future performance of a product, the statute of limitations is extended until the breach is or should have been discovered. Puget Sound in essence argues that an implied warranty is by its very nature incapable of such extension, since the period of limitations must toll at tender of delivery, regardless of the purchaser's lack of knowledge of the breach. In our view an appropriate analysis of this case makes it unnecessary for us to determine at this time whether the period of limitations specified in Neb. U.C.C. § 2-725 (Reissue 1980) precludes recovery.

This analysis is required by reason of the opera-

tion of Neb. U.C.C. § 2-313(1)(b) (Reissue 1980) as delineated in *England v. Leithoff,* 212 Neb. 462, 323 N.W.2d 98 (1982), decided after the municipal court trial herein. That opinion foreshadows the outcome of this case. We held therein that an oral representation concerning the origin of goods, made in the course of a sale, constitutes an express warranty under § 2-313(1)(b), which provides, among other things, that any description of goods which becomes a part of the basis of the bargain creates an express warranty that the goods shall conform to the description. According to the parties, the description of the goods as "siding" carried with it the representation that it would last the lifetime of the house. Therefore, the requisite elements of § 2-313(1)(b) are present; that is, the description of the goods became a part of the bargain and created in the minds of the parties the expectation that the siding would last the lifetime of the house. Section 2-725(2) provides in part: "A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered." The instant breach did not occur upon tender of delivery since, in light of the expectations of the parties, the warranty herein necessarily extended explicitly to future performance.

The case of *Grand Island School Dist. #2 v. Celotex Corp.,* 203 Neb. 559, 279 N.W.2d 603 (1979), relied upon by Puget Sound, is not factually apposite here. Therein, discovery could, and in fact did, occur shortly after completion of the construction project; that is, the plaintiff knew about the defect prior to the tolling of the period of limitations but failed to act until after it had tolled. In this case, discovery could occur at any time between installation and the "life" of the house. The Moores acted

within a reasonable period of time after they discovered the latent defect.

We recognize the Moores plead the legal conclusion that the warranty was an implied rather than an express one. However, the facts pled and the evidence adduced pursuant to those factual allegations establish otherwise. Pleadings frame the issues upon which a cause is to be tried and advise the adversary as to what he must meet. *B. C. Christopher & Co. v. Danker,* 196 Neb. 518, 244 N.W.2d 79 (1976). However, it is the facts well pleaded, not the theory of recovery or legal conclusions, which state a cause of action. *Blaha GMC-Jeep, Inc. v. Frerichs,* 211 Neb. 103, 317 N.W.2d 894 (1982); *Newman Grove Creamery Co. v. Deaver,* 208 Neb. 178, 302 N.W.2d 697 (1981). The facts well pleaded in this case served to put Puget Sound on notice of what it was called upon to meet; it was in no way misled by the word "implied."

The Moores' second assignment of error relates to the lower courts' holdings that they failed to prove proper notice to Puget Sound as required by Neb. U.C.C. § 2-607(3)(a) (Reissue 1980). That section provides that where a tender has been accepted, the buyer must, within a reasonable time after he discovers or should have discovered any breach, notify the seller of the breach or be barred from any recovery. We have held that a purchaser must plead that he gave timely notice of the breach. *Timmerman v. Hertz,* 195 Neb. 237, 238 N.W.2d 220 (1976). The Moores did so plead. The question is, then, whether the evidence supports that allegation. The June 24, 1980, written complaint to Rehcon was given within a reasonable time of the initial discovery in 1977 and the determination in 1979 that the problem was severe enough to warrant action. It is true that by the time of that complaint Rehcon no longer had any relationship with Puget Sound. However, that fact is not in and of itself determinative. *Webster v. Wray,* 17 Neb. 579, 24 N.W. 207 (1885),

rev'd on other grounds 19 Neb. 558, 27 N.W. 644 (1886), presented a situation wherein the defendant had put his son in charge of a ranch, allowed the son to buy and sell stock for him, and paid debts which the son had contracted, without objection. In an action by the plaintiff, who sought the payment of certain contracts from the defendant father, we observed that the proof failed to show that any notice of the alleged termination of the son as agent was given either generally or specifically. In holding the father responsible we said that while the rule is that an agent must act within the scope of his authority, yet when the agent's acts affect innocent third parties, the principal will be bound to the extent of the apparent authority conferred upon the agent. The teaching of *Webster* is that apparent authority may exist beyond termination of the principal-agency relationship when notice of the termination has not been given. In *Howe v. Provident Loan & Investment Co.,* 130 Neb. 469, 475, 265 N.W. 255, 258 (1936), we reiterated language from prior cases which said: " 'Where a principal has, by his voluntary act, placed an agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in presuming that such agent has authority to perform a particular act, and therefore deals with the agent, the principal is estopped as against such third person from denying the agent's authority.

" 'Whether or not an act is within the scope of an agent's apparent authority is to be determined under the foregoing rule as a question of fact from all the circumstances of the transaction and the business.' " More recently, in *Wolfson Car Leasing Co., Inc. v. Weberg,* 200 Neb. 420, 264 N.W.2d 178 (1978), we said that apparent or ostensible authority to act as an agent may be conferred if the alleged principal affirmatively, intentionally, or by lack of ordinary care causes third persons to act upon the ap-

parent agency. Under the facts and circumstances of this case, Mr. Moore's notice to Rehcon was notice to Puget Sound. Each of the Moores' two assignments of error are meritorious. The judgment of the District Court is reversed and the matter remanded with directions that judgment be entered in favor of the Moores in the sum of $4,550.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA EX REL. NEBRASKA STATE COUNCIL #32, AFSCME, APPELLEE, V. CITY OF HASTINGS, APPELLANT.

332 N.W.2d 661

Filed April 15, 1983. No. 81-778.

1. **Mandamus.** Before a court is warranted in granting a peremptory writ, it must appear that the relator has a clear legal right to the performance of the duty by the respondent. To warrant the issue of mandamus against an officer to compel him to act, it must be established that (1) the duty must be imposed upon him by law, (2) the duty must still exist at the time the writ is applied for, and (3) the duty to act must be clear.
2. **Statutes.** Statutes are not open to construction as a matter of course. It is not our province to read meaning into a statute not warranted by the language.

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

Michael E. Sullivan, for appellant.

Thomas F. Dowd of Dowd & Fahey Law Offices, for appellee.

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

WHITE, J.

This case arises on a petition for writ of mandamus filed by relator-appellee, Nebraska State Council #32, AFSCME, to compel the respondent-appellant, City of Hastings, to withhold monthly

dues from the pay of city employees who are members of relator's union. The facts are not in dispute and the judgment of mandamus was issued on the pleadings.

Relator is the certified bargaining agent for a unit of employees of the City of Hastings, Nebraska. Relator, by its attorney, requested that pursuant to the requests signed by a number of the employees in the unit, the respondent deduct the sum of $10 per month from the pay of the requesting employees. The city refused and suit was filed.

Involved in this action is the interrelation of two statutes, Neb. Rev. Stat. § 48-224 (Reissue 1978) and § 48-816 (Cum. Supp. 1982).

Section 48-224 provides: "Any employee of the State of Nebraska, any municipal corporation, or any public body or agency created by the laws of this state, who desires to participate voluntarily in any employee organization, credit union, or any community charity or public welfare plan approved by the Governor and the Director of Administrative Services, in the case of employees of the State of Nebraska or by the duly elected governing body of such municipal corporation or other public body or agency, may execute an order authorizing the withholding from any wages or salary paid to such employee of a sum each month or pay period and the same to be paid to the designated recipient thereof."

Section 48-816 provides in part: "When an employee organization has been certified as an exclusive collective bargaining agent or recognized pursuant to any other provisions of this act, the appropriate public employer shall be and is hereby authorized to negotiate collectively with such employee organization in the settlement of grievances arising under the terms and conditions of employment of the public employees as provided in this act, and to negotiate and enter into written agreements with such employee organizations in determining

such terms and conditions of employment, including wages and hours."

The questions succinctly stated are (1) whether the certification of the relator establishes that the respondent has approved the relator, and (2) if the respondent has approved the relator, is there a mandatory duty to withhold dues and transmit them to relator under § 48-224?

At the time of the passage of § 48-224, 1967 Neb. Laws, Ch. 571, § 1, p. 1878, the political subdivisions of this state were not empowered to recognize and bargain with labor organizations as the exclusive collective bargaining agents of their employees. In 1969 the Legislature passed L.B. 15, which amended Neb. Rev. Stat. §§ 48-801 et seq. (Reissue 1968), granting such power to the state and its subdivisions. 1969 Neb. Laws, Ch. 407, p. 1405.

The amendment by the Legislature appears to have been in response to the decision of *American Federation of State, Co., & Mun. Emp. v. Woodward,* 406 F.2d 137 (8th Cir. 1969), which held that neither Nebraska's Constitution nor its statutes limited union membership to private employment. Therefore, public policy warranted its extension to public employment.

The relator argues that by virtue of its certification as the exclusive bargaining unit of its members and the fact that respondent already has bargained with it, the city has approved of it within the meaning of § 48-224. The relator maintains that once approval is obtained, § 48-224 is directive to the respondent to check off dues from its employees and remit them to relator.

However, before a court is warranted in granting a peremptory writ, it must appear that the relator has a clear legal right to the performance of the duty by the respondent. To warrant the issue of mandamus against an officer to compel him to act, it must be established that (1) the duty must be imposed upon him by law, (2) the duty must still exist

at the time the writ is applied for, and (3) the duty to act must be clear. *State ex rel. Blome v. Bridgeport Irr. Dist.,* 205 Neb. 97, 286 N.W.2d 426 (1979).

An examination of the legislative history shows that § 48-224 contemplated only formal approval by the city council and does not mention implied approval by bargaining or certification as alternatives, for the obvious reason that at the time of its passage, no provisions existed in the statutes for *any* type of approval for a public employee collective bargaining unit.

While there is no question that automatic dues checkoffs are the proper subject of collective bargaining, it does not follow, absent a direct command from the Legislature, that the City of Hastings must automatically allow a dues checkoff simply by certifying the union and agreeing to bargain with it.

We are unable to discern such a direct command or even one reasonably inferable from the statutes involved. Statutes are not open to construction as a matter of course. It is not our province to read meaning into a statute not warranted by the language. *Watson v. City of Omaha,* 209 Neb. 835, 312 N.W.2d 256 (1981).

In addition, upon a further reading of amendments to the statute, we note that the language in § 48-816 states in part: "To bargain in good faith shall mean the performance of the mutual obligation of the employer and the labor organization to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, *but such obligation does not compel either party to agree to a proposal or require the making of a concession.*" (Emphasis supplied.) The amendment to § 48-816 was in effect at the time of this dispute, and it is certainly indicative of an existing legisla-

tive intent not to force collective bargaining concessions upon the parties by statute.

We therefore hold that the City of Hastings did not approve of the union within the meaning of § 48-224, and even if the city were to approve of the union formally by resolution, in the absence of a directive by the Legislature, the checkoff of dues is not mandatory but, rather, is a subject for collective bargaining.

The conclusions of law of the trial court were in error. The trial court's action in issuing the writ of mandamus is hereby reversed.

REVERSED.

KRIVOSHA, C.J., dissenting.

I must respectfully dissent from the majority opinion in this case. As the majority notes, to a large extent, the decision in this case is dependent upon an interpretation of Neb. Rev. Stat. § 48-224 (Reissue 1978), which provides: "Any employee of the State of Nebraska, any municipal corporation, or any public body or agency created by the laws of this state, who desires to participate voluntarily in any employee organization, credit union, *or* any community charity *or* public welfare plan approved by the Governor and the Director of Administrative Services, in the case of employees of the State of Nebraska or by the duly elected governing body of such municipal corporation or other public body or agency, may execute an order authorizing the withholding from any wages or salary paid to such employee of a sum each month or pay period and the same to be paid to the designated recipient thereof." (Emphasis supplied.)

It appears to me that a simple reading of that section makes a distinction between employee organizations and credit unions, on the one hand, and community charity or public welfare plans on the other. That is to say, it appears to me that a reading of the section in question makes it clear that deductions for employee organizations or credit

unions are mandatory when requested by an employee and only community charity or public welfare plans require approval. If that were not the case, then the sentence would have read, "who desires to participate voluntarily in any employee organization, credit union, community charity, or public welfare plan approved . . . ." By placing a comma and an "or" between "employee organization, credit union," on the one hand, and "any community charity or public welfare plan," on the other, it appears clear to me that the Legislature was limiting approval to the latter and not to the former. Such a distinction by the Legislature would appear to make sense. It is difficult to imagine how or why one would require approval by the Governor of a voluntary deduction to a credit union which has already been licensed by the State of Nebraska. On what basis could the Governor refuse to approve the deduction? One can imagine why the state might desire to grant the right to approve community charity or public welfare plans so as to avoid the expense of making deductions and payments to multiple charities both within and without the community. The arguments which support permitting approval for community charity or public welfare plans do not support a similar argument for either employee organizations or credit unions.

The majority argues that this right of "checkoff" is a matter which should be made a part of the bargaining process, but because both employee organizations and credit unions run together in the sentence and appear before the second phrase concerning community charity or public welfare plans requiring approval, one is at a loss to understand how employees, particularly those who have not sought certification, are to bargain with the Governor for approval on deductions for credit unions. I would have been inclined to hold that approval is limited to community charity or public welfare plans and does not apply to either employee

organizations or credit unions, and would have, therefore, granted the request for the peremptory writ.

MONARCH INDUSTRIES, INC., A CORPORATION, APPELLANT, V. CALDWELL MANUFACTURING COMPANY, A CORPORATION, AND CHIEF INDUSTRIES, INC., A CORPORATION, APPELLEES.

332 N.W.2d 664

Filed April 15, 1983. No. 81-898.

Summary Judgment. Where a motion for summary judgment has been duly noticed for hearing, it should be rendered forthwith, if upon the hearing it appears from the pleadings, depositions, and admissions on file, together with the affidavits, if any, that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

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

Jacobsen, Orr & Nelson, for appellant.

Denzel R. Busick of Luebs, Dowding, Beltzer, Leininger & Smith, for appellees.

KRIVOSHA, C.J., WHITE, and CAPORALE, JJ., and SPRAGUE, D.J., and COLWELL, D.J., Retired.

SPRAGUE, D.J.

Plaintiff-appellant, Monarch Industries, Inc., hereinafter referred to as Monarch, brought this action against the defendants-appellees, Caldwell Manufacturing Company and Chief Industries, Inc., hereinafter referred to as Caldwell and Chief, for damages as a result of the collapse of three grain bins which Monarch had installed in South Dakota in 1975 and 1976.

The grain floor substructures were purchased from Caldwell. Chief was sued as the successor in interest to Caldwell.

Monarch alleged that each of the three bins collapsed because the grain floor substructures which it had purchased from Caldwell were defective.

Defendants admitted that the building materials were delivered during 1974 and 1975 and that the grain bins were constructed. They alleged that the cause of the collapse was the negligence of Monarch in constructing the bins.

Caldwell and Chief moved for summary judgment. On September 24, 1981, the District Court of Buffalo County sustained the motion for summary judgment. On November 11, 1981, the court overruled the motion for new trial. This appeal follows.

In considering the motion for summary judgment the trial court made three specific findings: (1) The partial collapse of the grain bins was principally caused by the improper installation and the insufficient support of the drying floors; (2) The drying floor supports were not installed in accordance with the manufacturer's manual; and (3) The erection of the grain bins and installation of drying floors were not performed by the defendants, or either of them, but by the plaintiff.

In arguing the motion for summary judgment both parties relied primarily upon the depositions of William V. Coyle, Delano Loseke, and Ray F. Wilson, Jr. Mr. Coyle had been consulted by Mission Farms and subsequently by Monarch about the cause for the collapse of the grain bins. Mr. Loseke was the site foreman for Monarch in the construction of the bins. He supervised placement of the floor substructures. Mr. Wilson was a former employee of Caldwell who was later employed by Monarch.

A summary of the deponents' testimony establishes that there were no inherent design or manufacturing defects in the floor substructures, and that the plans and specifications for construction furnished by Caldwell were of proven design.

The depositions further establish that Monarch failed to follow the plans and specifications in con-

struction of the bins, and that this failure resulted in the subsequent collapse.

A careful reading of the depositions leads this court to conclude there is no evidence that the materials and plans furnished by Caldwell were defective. The court further concludes that the proximate cause of the collapse of the bins was a deviation from the manufacturer's plans by Monarch. There is no genuine issue of material fact.

Where a motion for summary judgment has been duly noticed for hearing, it should be rendered forthwith, if upon the hearing it appears from the pleadings, depositions, and admissions on file, together with the affidavits, if any, that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Neb. Rev. Stat. § 25-1332 (Reissue 1979); *Watters v. Foreman*, 204 Neb. 670, 284 N.W.2d 850 (1979).

AFFIRMED.

IN RE ESTATE OF ELIZABETH M. SCHMITZ, DECEASED. AVA M. SHIELDS, APPELLANT, V. ARDIS E. HINSHAW, PERSONAL REPRESENTATIVE OF THE ESTATE OF ELIZABETH M. SCHMITZ, DECEASED, APPELLEE.

332 N.W.2d 666

Filed April 15, 1983. No. 81-925.

1. **Wills.** The cardinal rule in construing a will is to ascertain and effectuate the intention of the testator if such intention is not contrary to the law.
2. **Decedents' Estates: Wills.** The right to dispose of one's property by will at death is a valuable right which is favored by the law, and it will be sustained whenever possible.
3. **Wills.** In searching for the intention of the testator the court must examine the entire will, consider each of its provisions, give words their generally accepted literal and grammatical meaning, and indulge the presumption that the testator understood the meaning of the words used.
4. **Wills: Perpetuities.** The rule against perpetuities prohibits only

the creation of future interests or estates which, by possibility, may not become vested within a life or lives in being and 21 years, together with the period of gestation when necessary to cover cases of posthumous birth.

5. _____: _____. While the rule against perpetuities prevails over intention, a document should be interpreted, if feasible, to avoid the conclusion that it violates the rule.

6. _____: _____. Where the language of a will leaves the court in doubt whether the rule has been transgressed, the doubt may within reasonable limits be resolved in favor of the construction that the future estate constitutes a vested rather than a contingent remainder.

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

Sarah Jane Cunningham of Cunningham Law Office, P.C., for appellant.

Fred T. Hanson of Hanson & Hanson, for appellee.

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

KRIVOSHA, C.J.

This appeal concerns the last will and testament of Elizabeth M. Schmitz and a certain trust created by the will. Specifically, it concerns whether the provisions creating the trust are void because the trust's termination clause violates the rule against perpetuities. Both the county court of Red Willow County, Nebraska, and the District Court for Red Willow County, Nebraska, found that the provisions in question did not violate the rule against perpetuities. Our examination of the record likewise convinces us that the provisions in question do not violate the rule against perpetuities, and for that reason we affirm.

The testator, Elizabeth M. Schmitz (Schmitz), died on December 24, 1980, and her last will and testament was admitted to probate on January 27, 1981. The court found that Schmitz left, as her heirs and devisees, her two daughters, Ardis E. Hinshaw

and Ava M. Shields; four grandsons, Robert E. Hinshaw, H. Cecil Hinshaw, Robert J. Shields III, and John C. Shields; two granddaughters, Ava N. Duba and Anne E. Bowman; one great-grandson, Brandon E. Hinshaw; and three great-granddaughters, Carly May Duba, Kelli Rae Hinshaw, and Lori Ann Bowman.

The two provisions in question are contained in paragraphs 6 and 7 of Schmitz' will. Paragraph 6 of the will provides as follows: "DISPOSITION OF FARMS AND EQUIPMENT. All of my real estate, together with the machinery and equipment on my farms, I devise to a trust to be called the ELIZABETH M. SCHMITZ TRUST for the purpose of managing the same and paying the net income of the same to my said daughters, in equal shares, if they survive me, and if either of them is deceased, or upon the death of either, that right to share the income shall pass to their issue in trust by right of representation."

Paragraph 7 of the will provides for the termination of the trust as follows: "TERMINATION OF THE TRUST. In no event shall the trust continue beyond the lives of the issue of the trustor, living at the date this trust becomes effective, and, after the death of the last of such persons, then for the period required for a descendant to reach the age of 21 or the age of majority, as that age may be determined by law at the relevant time, whichever is reached first. Upon termination of the trust the corpus shall vest in the then income beneficiaries in the proportions in which they are then entitled to the income."

There is, of course, no problem with regard to paragraph 6 of the will. It simply creates a trust for both the daughters of Schmitz and, upon their death during the term of the trust, for their issue, who the county court determined to be the various grandchildren and great-grandchildren earlier named. This is in conformance with Neb. Rev. Stat. § 30-2209(23) (Reissue 1979), which defines issue as

meaning all of a decedent's lineal descendants of all generations.

Turning then to the termination clause, we find that the trust is to terminate when all of the issue of Schmitz, living at the date of her death, die and "then for the *period required for a descendant* to reach the age of 21 or the age of majority, as that age may be determined by law at the relevant time, whichever is reached first." (Emphasis supplied.) It is this clause which gives rise to the controversy and requires interpretation.

In attempting to construe the provisions of a will we are directed by certain rules of construction. "The cardinal rule in construing a will is to ascertain and effectuate the intention of the testator if such intention is not contrary to the law." *Slocum v. Hevelone,* 196 Neb. 482, 484, 243 N.W.2d 773, 776 (1976). Moreover, the right to dispose of one's property by will at death is a valuable right which is favored by the law, and it will be sustained whenever possible. See *Brown v. Applegate,* 166 Neb. 432, 89 N.W.2d 233 (1958). "Where a possible construction of the words in a will leads to a highly improbable result, the court will lean toward a construction that will carry out the natural intention of the testator." *Olson v. Sampson,* 208 Neb. 18, 21, 302 N.W.2d 32, 34 (1981). "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." *Gaughen v. Gaughen,* 172 Neb. 740, 745, 112 N.W.2d 285, 288 (1961).

With these general rules in mind we now turn to an examination of the will, particularly in light of the rule against perpetuities. "The rule against perpetuities prohibits only the creation of future interests or estates which, by possibility, may not become vested within a life or lives in being and 21

years, together with the period of gestation when necessary to cover cases of posthumous birth." *Gade v. Descendants of Unitt,* 197 Neb. 713, 715-16, 250 N.W.2d 644, 647 (1977). See, also, *Hauschild v. Hauschild*, 176 Neb. 319, 126 N.W.2d 192 (1964); *Gillan v. Wilson*, 124 Neb. 893, 248 N.W. 646 (1933). If a provision of a will violates the rule against perpetuities (that is to say, if the interest does not vest within lives in being plus a maximum of 21 years), the provision is void and must fail.

The appellant, Ava M. Shields, who is one of the daughters of Schmitz, maintains that paragraph 7 of her mother's will violates the rule against perpetuities because paragraph 7 requires, as a condition of terminating the trust, that some descendant of Schmitz *in fact* must reach either the age of majority or 21 years, whichever first occurs. Shields argues that it is conceivable that after the death of all of the lives in being, none of the subsequent descendants of those lives in being might reach the age of majority or 21 years of age, thereby making it impossible for the trust to ever terminate. If Shields is correct in her interpretation of the clause in question and a descendant of Schmitz must in fact live to reach the age of majority or 21 years of age before the trust may terminate, then Shields would be correct. The trust might not vest within lives in being plus 21 years.

We believe, however, that her reading of the provision is not correct. In interpreting the will, emphasis must be placed upon the words "required to reach" and not upon the question of whether in fact any descendant does reach that age. The phrase in paragraph 7, "for the period required for a descendant to reach the age of 21 or the age of majority," is merely a method of measuring a period of time without regard to whether an individual is in fact alive. The period required for a descendant to reach the age of majority or 21 years of age is certain and is the same whether any descendant is

alive or not. No one need be alive for the required period to expire.

Were we to accept the interpretation urged by Shields, we would have a situation in which there would arise both the possibility that the trust could never terminate and that it would be in violation of the rule against perpetuities. We perceive of no reason why the testator, who is presumed to desire that she die testate as to all of her property, would not want the trust to ultimately terminate and the proceeds distributed to her descendants. See *Dunlap v. Lynn,* 166 Neb. 342, 89 N.W.2d 58 (1958). We cannot perceive that she would have drafted an instrument which might require the trust to remain in existence, though none of her descendants were alive to receive the benefits, and would violate the rule against perpetuities, if such an interpretation could be avoided. This notion is in keeping with the statement contained in 61 Am. Jur. 2d *Perpetuities, Etc.* § 8 at 15 (1981), where it is noted: "While the rule against perpetuities prevails over intention, a document should be interpreted if feasible to avoid the conclusion that it violates the rule. Thus, although the rule against perpetuities is not a rule of construction but a rule of property, yet if there is any ambiguity in the deed or will, or if there are two possible constructions, one of which would permit effect to be given to the whole instrument and the other of which would result in defeating the instrument, in whole or in part, preference will be accorded to the construction which will uphold the deed or will. Where the language of a will leaves the court in doubt whether the rule has been transgressed, the doubt may be within reasonable limits resolved in favor of the construction that the future estate constitutes a vested rather than a contingent remainder.

"Indeed, the maker of a deed or will has been held conclusively presumed to have intended a limitation

to take effect within the lawful period, unless the contrary is expressly and plainly declared."

Given the choice between the interpretation suggested by Shields, which results in violating the rule against perpetuities and voiding the provisions of the will, and that offered by the personal representative, which results in carrying out the obvious intent of Schmitz, we opt for the latter.

For all of the above reasons, we believe that both the county court initially and the District Court on appeal were correct in their interpretation, and the judgment finding that the last will and testament of Elizabeth M. Schmitz does not violate the rule against perpetuities must be upheld.

AFFIRMED.

TERRY W. TANK ET AL., APPELLANTS, V. STEVEN M. PETERSON, PERSONAL REPRESENTATIVE OF THE ESTATE OF DONALD E. PETERSON, DECEASED, ET AL., APPELLEES.

332 N.W.2d 669

Filed April 15, 1983. Nos. 82-010, 82-022.

1. **Decedents' Estates: Insurance.** A liability contract, although an asset of an estate, creates a contractual right which vests only when a liability claim against insured ripens into judgment.
2. _____: _____. Tort claims filed against an estate under the liability insurance exception do not affect the interests of the beneficiaries under the estate and thus present no obstacle to an orderly and exact administration of the estate.
3. _____: _____. To the extent of liability coverage, nothing in Neb. Rev. Stat. §§ 30-2401 et seq. (Reissue 1979) affects any proceeding to establish liability of a decedent or personal representative for which he is protected by liability insurance.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Reversed and remanded.

Welsh, Sibbernsen & Roach, for appellants.

William G. Line and John F. Kerrigan of Kerrigan, Line & Martin, for appellees.

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

WHITE, J.

Plaintiffs, Terry W. Tank, Tamara Tank-Rabe, and Gerald Eskilsen, guardian of Traci Tank, a minor, appeal a summary judgment dismissing their claims against defendants, Steven M. Peterson, personal representative of the estate of Donald E. Peterson, deceased, and Douglas F. Steenblock, a partner, doing business as Don Peterson & Assoc. Steel Bldg. Co. We reverse and remand.

The material facts are essentially undisputed. On November 25, 1979, Willis H. Tank and Marva Lea Tank were passengers along with three others in a 1968 Piper aircraft piloted by Donald E. Peterson. The plane was owned by Don Peterson & Assoc. Steel Bldg. Co., a partnership consisting of Donald E. Peterson and Douglas F. Steenblock. The aircraft was on its way from Columbus, Nebraska, to Fremont, Nebraska, when it crashed shortly after takeoff, killing all aboard instantly.

On February 6, 1980, the personal representative of the Tank estates filed a statement of claim in the county court for Dodge County, Nebraska, against the estate of Donald E. Peterson, deceased. The claims were based upon the negligence of Donald E. Peterson as the pilot of the aircraft, and sought money damages of $1 million from either the estate of Donald E. Peterson and/or the owners of the aircraft.

On February 8, 1980, Steven M. Peterson, personal representative of the estate of Donald E. Peterson, filed a notice of disallowance of claim.

On April 8, 1980, the personal representative of the Tank estates filed a petition for hearing and allowance of claim in the county court and the defendant

Peterson filed an answer shortly thereafter. The plaintiffs then filed, at a later date, a lawsuit in the District Court for Dodge County, Nebraska, alleging the same causes of action as the petition filed in county court.

On May 26, 1981, the defendants filed demurrers and motions to make more definite and certain in each respective wrongful death action. It appears from the record that the plaintiffs were advised by defense counsel that the liability insurance carrier was providing insurance coverage in full force and effect in contrast to its earlier position of denying coverage under the policy. Plaintiffs then dismissed the claims in the county court in order to proceed in the District Court.

On August 17, 1981, the defendants withdrew their motion to make more definite and certain and the District Court overruled their demurrers. The defendants subsequently filed a motion for summary judgment on the ground that the plaintiffs' consolidated wrongful death actions in the District Court were barred by the nonclaim statute, Neb. Rev. Stat. § 30-2486 (Reissue 1979). The trial court granted the defendants' motion and this appeal followed.

The defendants contend that the plaintiffs' cause of action has become barred by the voluntary dismissal of their county court actions, which were timely filed within the 60-day limitation of § 30-2486, and therefore they may not thereafter maintain a civil action against the insurer of the decedent on the theory that the proceeds of the insurance policy are not assets of the estate.

The provisions of the Nebraska Probate Code at the time these actions were commenced provided two methods of presenting a claim against a decedent's estate: Under § 30-2486(1), a claim could be presented by filing a written claim statement with the court, or under § 30-2486(2), a claim could be presented by commencement of a proceeding in any

court having jurisdiction of the personal representative. The plaintiffs presented their claims in the county court under § 30-2486(1) by filing a written claim which is, in turn, limited by § 30-2486(3), which states as follows: "If a claim is presented under subsection (1), no proceeding thereon may be commenced more than sixty days after the personal representative has mailed a notice of disallowance . . . ."

The plaintiffs in this case voluntarily dismissed the county court actions after the 60-day time limitation of § 30-2486(3) had passed and were therefore barred from any claims they had against the assets of the estate. However, the plaintiffs are not barred from maintaining an action against the decedent's insurer to the extent there is insurance coverage available. Neb. Rev. Stat. § 30-2485(c) (Reissue 1979) clearly sets forth the law in the State of Nebraska as follows: "(c) Nothing in this section [article 24] affects or prevents: (1) any proceeding to enforce any mortgage, pledge, or other lien upon property of the estate; or (2) *to the limits of the insurance protection only, any proceeding to establish liability of the decedent or the personal representative for which he is protected by liability insurance.*" (Emphasis supplied.)

The comments to § 30-2485 elaborate even further, stating: "Tort claims normally will involve casualty insurance of the decedent or of the personal representative, and so will fall within the exception of subparagraph (c)."

The Nebraska probate provisions and comment cited herein are the same as those of the Uniform Probate Code. In construing the Nebraska provisions we have also looked to the decisions of sister states which involved identical issues and code provisions as those in the instant case.

In *Matter of Estate of Daigle,* 634 P.2d 71 (Colo. 1981), Mr. Daigle was the pilot of an airplane in which a Mr. Snyder was riding as a passenger. The

plane crashed, resulting in the deaths of both men. The wife of Mr. Snyder, on behalf of herself and her children, filed claims against the Daigle estate for wrongful death. The administrator disallowed the claims because they had been barred by the nonclaim statute.

While the insurance company in *Daigle* conceded the applicability of the insurance exception to the wrongful death claim, the insurer still maintained that the insurance exception violated equal protection of the law. In finding that there was not an equal protection violation, the *Daigle* court stated at 78: "A liability insurance contract, although an asset of an estate, creates a contractual right which vests only when a liability claim against the insured ripens into judgment. . . . Tort claims filed against an estate under the liability insurance exception 'do not affect the interests of the beneficiaries under the estate and thus present no obstacle to an orderly and exact administration of the estate.' . . . Recovery in such instances is limited to the liability insurance proceeds. Neither the claims of general creditors nor the interest of heirs and devisees will be adversely affected by the liability insurance exception."

Similarly, in *Matter of Estate of Chase,* 125 Ariz. 270, 609 P.2d 85 (1980), the plaintiff White and the deceased Chase were involved in an automobile accident in which Chase was the driver and White suffered personal injuries. The plaintiff brought suit after the nonclaim statute had run and the personal representative had been discharged. The Arizona Court of Appeals held that neither the probate claim statute nor the final closing of the estate and discharge of the executrix constituted a bar to the claim insofar as the deceased was protected by liability insurance. The plaintiff was therefore entitled to have the estate reopened for the limited purpose of service of process in the civil action.

The defendants in the case at bar rely heavily on

Wolder v. Rahm, 249 N.W.2d 630 (Iowa 1977), and *Wood v. Andrews,* 616 P.2d 1005 (Colo. App. 1980) (decision interpreting Wyoming law). These cases are easily distinguishable because they did not involve a statutory liability insurance exception to the probate nonclaim statute. In fact, both the *Wolder* and *Wood* cases exemplify the harsh effect of the bar of the nonclaim statute in the absence of a liability insurance exception.

While the plaintiffs did voluntarily dismiss the county court action after the nonclaim statute, § 30-2486, had run and were thus barred from pursuing a claim against the estate, they remain free to proceed against the decedent's insurer to the extent of insurance coverage available.

REVERSED AND REMANDED.

WILLIAM E. ARNOLD, APPELLEE, V. JEANETTE ANN ARNOLD, APPELLEE,
RUSSELL E. ARNOLD ET AL., INTERVENORS-APPELLANTS.
332 N.W.2d 672

Filed April 15, 1983. No. 82-125.

1. **Divorce: Intervention.** The right of third parties to intervene in proceedings for dissolution of marriage is very limited.
2. _____: _____. Intervention may be permitted where it is necessary to procure justice for third persons whose property interest may be adversely affected in the dissolution action.
3. **Intervention.** An intervenor who is not an indispensable party cannot change the nature and form of the action or the issues presented therein.

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

Vince Kirby, for appellants.

Richard E. Mueting of Mueting, DeLay & Stoffer, for appellee Jeanette Arnold.

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

BOSLAUGH, J.

This is an appeal in a proceeding for dissolution of a marriage. The trial court dissolved the marriage, awarded the custody of the minor children to the respondent wife, fixed rights of visitation, divided the property between the parties, and awarded child support to the respondent.

After a decree of dissolution had been entered, but before the property division had been made, Russell E. Arnold and Clara I. Arnold, the parents of the petitioner, filed a petition in intervention. The intervenors alleged that they had an interest in the marital property of the parties and prayed that personal property consisting of contracts, promissory notes, debts, and miscellaneous items described in the petition in intervention be set over to them. The respondent's motion to strike the petition in intervention was overruled.

The trial court ordered the respondent to return certain items of personal property to the intervenor Clara I. Arnold, and ordered that the debt of Culligan of Norfolk, Inc., in the approximate sum of $108,000 to the petitioner and respondent, be set over and paid to the intervenors in full satisfaction of any claim of the intervenors against the petitioner and respondent arising out of the purchase of Culligan of Norfolk and any other claim as alleged in the petition of intervention. The intervenors appeal. There is no other appeal or cross-appeal.

In their assignments of error the intervenors now claim that they should have had judgment against the petitioner and respondent on various notes and debts alleged to be due them.

The jurisdiction of the trial court in proceedings for the dissolution of marriage is controlled by statute. *Sosso v. Sosso,* 196 Neb. 242, 242 N.W.2d 621

(1976). The right of third parties to intervene in such proceedings is very limited. Intervention may be permitted where it is necessary to procure justice for third persons whose property interest may be adversely affected in the dissolution action. See, *Yelkin v. Yelkin,* 193 Neb. 789, 229 N.W.2d 59 (1975); *Kula v. Kula,* 181 Neb. 531, 149 N.W.2d 430 (1967).

Of course it is fundamental that an intervenor takes the action as he finds it and cannot secure relief that is foreign or extraneous to the action. An intervenor who is not an indispensable party cannot change the nature and form of the action or the issues presented therein. *State ex rel. Nelson v. Butler,* 145 Neb. 638, 17 N.W.2d 683 (1945).

The intervenors here attempted to incorporate into the dissolution proceeding a series of law actions between themselves and the petitioner and respondent which were entirely foreign to the division of the marital property between the petitioner and the respondent.

As we view the record, of which only a part has been presented to us, there was no error prejudicial to the intervenors. The judgment is therefore affirmed.

The respondent is allowed the sum of $1,500 for the services of her attorney in this court, to be taxed as costs against the intervenors.

AFFIRMED.

KRIVOSHA, C.J., dissenting.

I must respectfully dissent from the majority opinion in this case. I do so on the basis that I would overrule our previous decisions in *Kula v. Kula,* 181 Neb. 531, 149 N.W.2d 430 (1967), and *Yelkin v. Yelkin,* 193 Neb. 789, 229 N.W.2d 59 (1975). This case points out why we are in error in permitting third parties to intervene in domestic relations cases. On the one hand, the majority notes that the right of third parties to intervene in proceedings for dissolution of marriage is very limited. Yet, we give no guidelines as to the extent of those limits. There-

fore, trial judges are left in the impossible situation of attempting to guess just how far we will go. The law is uncertain enough without our adding to that uncertainty. The third parties in this case, just as in *Yelkin* and *Kula*, were at liberty to bring an independent action seeking to obtain whatever relief may be appropriate, either in law or in equity, if indeed a decision in a divorce action would have adversely affected the property in which they hold an interest. To permit them, however, to complicate what is already a complicated matter does not, in my view, serve any useful purpose. For that reason I would have used this case as an opportunity to overrule both *Kula* and *Yelkin,* and I would have reversed and dismissed the action insofar as the intervention is concerned.

THE FIRST NATIONAL BANK AND TRUST COMPANY OF FREMONT, FREMONT, NEBRASKA, APPELLANT, V. VERNOR L. HUGHES AND DIANA L. HUGHES, HUSBAND AND WIFE, APPELLEES.

332 N.W.2d 674

Filed April 15, 1983. No. 82-127.

1. **Uniform Commercial Code: Actions.** An action under the Nebraska Uniform Commercial Code is one at law.
2. **Directed Verdict.** Upon an appeal from an order sustaining a motion for dismissal at the close of plaintiff's evidence, we must treat as admitted the truth of all material and relevant evidence favorable to plaintiff, and plaintiff is entitled to the benefit of all proper inferences which can reasonably be deduced therefrom.
3. **Uniform Commercial Code: Words and Phrases.** A guarantor is entitled to notice as a "debtor" under the definition of such in Neb. U.C.C. § 9-105(1)(d) (Reissue 1980) as one "who owes payment or other performance of the obligation secured."
4. **Uniform Commercial Code: Notice.** Ambiguous language in a notice sent pursuant to Neb. U.C.C. 9-504(3) (Reissue 1980) is to be construed against the drafter of the language.
5. _____: _____. Compliance with the notice provisions of the Uni-

form Commercial Code is a condition precedent to the right of a creditor to recover a deficiency judgment.

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

Sidner, Svoboda, Schilke, Wiseman, Thomsen & Holtorf, for appellant.

Jon S. Reid and James D. Benak of Kennedy, Holland, DeLacy & Svoboda, for appellees.

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

CAPORALE, J.

First National Bank and Trust Company of Fremont, plaintiff in the trial court, appeals from the dismissal of its petition seeking deficiency judgments against the defendants-appellees, Vernor L. Hughes and Diana L. Hughes. We affirm.

First National Bank contends as error (1) the finding that the notice it provided for a private sale of collateral was insufficient to support a deficiency judgment and (2) the finding that a creditor seeking a deficiency judgment must comply with Neb. U.C.C. § 9-504 (Reissue 1980) notice requirements for each sale when the collateral at issue is sold in two or more separate private sales.

This action under the Nebraska Uniform Commercial Code was one at law, *Koperski v. Husker Dodge, Inc.*, 208 Neb. 29, 302 N.W.2d 655 (1981), tried without a jury. The trial court sustained the Hugheses' motions for dismissal at the close of First National Bank's evidence. In that posture of the case we must treat as admitted the truth of all material and relevant evidence favorable to First National Bank, and it is entitled to the benefit of all proper inferences which can reasonably be deduced therefrom. *Plummer v. National Leasing Corp.*, 173 Neb. 557, 114 N.W.2d 21 (1962). See, also, *Flakus v. Schug*, 213 Neb. 491, 329 N.W.2d 859 (1983).

At the relevant time Vernor L. Hughes was president of Central Auto & Truck Supply, Inc., a corporation. Diana L. Hughes was its secretary. On or about October 23, 1978, First National loaned Central Auto $57,000. The loan was evidenced by a promissory note and by a security agreement tying the loan to the security of the assets of Central Auto. Each of these documents was executed by Central Auto through Mr. Hughes as its president. On the same date, Mr. and Mrs. Hughes both executed and delivered to First National a personal guaranty for the above-described indebtedness of Central Auto. Default subsequently occurred and Central Auto later filed a bankruptcy proceeding. The trustee in bankruptcy abandoned the secured assets of Central Auto, and First National obtained possession of them. On April 1, 1981, First National sent a letter reading as follows to the Hugheses' residence:

"Mr. Venor [sic] Hughes, President
"Central Auto & Truck Supply
"1558 East 5th
"Fremont, NE. 68025

"RE: Loan #869930
Collateral: Financing Statement 5-9-74

"Dear Mr. Hughes:

"This is to notify you that, in connection with the repossession of the above collateral involved in the abovee [sic] account, you may redeem said collateral and terminate the contract relating thereto by payment of $51,417.90 plus interest and expenses any time prior to the sale of said collateral on the date designated below. It is possible for this sum to increase should further expenses of any nature be incurred by our bank.

"In the event you are not able to fully redeem the collateral or make suitable arrangements for redemption, the collateral will be sold at private sale on or after April 10, 1981 at the present place of

storage which is 245 East 5th St., and First National Bank & Trust Company of Fremont.

"Local, State and Federal laws permitting, you will be held liable for any deficiency declared owing after disposal of this collateral."

The corporate inventory and exhaust display racks were sold by private sale on April 10, 1981. On April 14, 1981, again by private sale, First National sold a 1973 pickup truck. On April 21, 1981, a pegboard and four metal shelves were sold by private sale. A final private sale occurred on May 22, 1981, when a 1975 Plymouth station wagon owned by the corporation was sold. On October 15, 1981, First National sent a letter addressed to Vernor L. Hughes and Diana L. Hughes, as well as Central Auto & Truck Supply, in care of Vernor L. Hughes, president, giving notice of a public sale of the remaining collateral. That notice made specific reference to the personal guaranty executed by the Hugheses.

Section 9-504(1) provides that after default a secured party may sell the collateral. Section 9-504(3) provides as follows: "Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor, if he has not signed after default a statement renouncing or modifying his right to notification of sale. In the case of consumer goods no other notification need be sent. In other cases notification shall be sent to any other secured party from whom

the secured party has received (before sending his notification to the debtor or before the debtor's renunciation of his rights) written notice of a claim of an interest in the collateral. The secured party may buy at any public sale and if the collateral is of a type customarily sold in a recognized market or is of a type which is the subject of widely distributed standard price quotations he may buy at private sale."

Each guarantor is entitled to notice as a "debtor" under the definition of such in Neb. U.C.C. § 9-105(1)(d) (Reissue 1980) as one "who owes payment or other performance of the obligation secured . . . ." The April 1 notice in this case makes no reference to the guaranty; indeed, it makes reference only to the "Financing Statement 5-9-74," in fact a security agreement dated May 24, 1974, a document which was signed individually by neither Mr. Hughes nor Mrs. Hughes. In that regard the notice fails to apprise either Mr. or Mrs. Hughes that a personal deficiency judgment might be sought against any one of them in his or her capacity as guarantor of the corporation's debt. Secondly, as between Mr. Hughes and Central Auto, the matter as to whom the notice was sent is ambiguous. The interest of Mr. Hughes in this context conflicts with that of the corporation. It cannot be said that the notice, as addressed, unmistakably advises Mr. Hughes personally that he is the "you" who may be held "liable for any deficiency declared owing after disposal of this collateral." To assume that Mr. Hughes would know that a deficiency could not be obtained against the bankrupt Central Auto is to assume something not supported by the record before us. Although the statement that ambiguous language is to be construed against the drafter of the language is generally applied in the case of insurance policies, *Niemeyer v. Estate of Tichota,* 191 Neb. 484, 215 N.W.2d 885 (1974), the reasoning behind that rule is

equally applicable to notices of the nature involved here.

It is the rule in this jurisdiction that compliance with the notice provisions of the Uniform Commercial Code is a condition precedent to the right of a creditor to recover a deficiency judgment. *First Nat. Bank & Trust Co. v. Hermann,* 205 Neb. 169, 286 N.W.2d 750 (1980); *DeLay First Nat. Bank & Trust Co. v. Jacobson Appliance Co.,* 196 Neb. 398, 243 N.W.2d 745 (1976); *Bank of Gering v. Glover,* 192 Neb. 575, 223 N.W.2d 56 (1974). The failure to give the requisite notice is an absolute bar to recovery. *DeLay First Nat. Bank & Trust Co. v. Jacobson Appliance Co., supra*; *Citizens State Bank v. Sparks,* 202 Neb. 661, 276 N.W.2d 661 (1979). As we said in *Bank of Gering v. Glover, supra* at 580, 223 N.W.2d at 59: "If the creditor wishes a deficiency judgment, he must obey the law. If he does not obey the law he cannot secure a deficiency judgment."

Having determined that there was no notice to the guarantors against whom the deficiency judgments are sought, we need not consider First National Bank's remaining assignment of error concerning whether a separate notice is required for each private sale.

The trial court was correct in dismissing First National Bank's petition at the close of its evidence.

AFFIRMED.

BOSLAUGH, J., dissenting in part.

In my opinion, the notice to Vernor L. Hughes was sufficient.

MCCOWN, J., and COLWELL, D.J., Retired, join in this dissent.

CEDARS CORPORATION, APPELLANT, V. VALLEY HO CORPORATION AND FOX AND COMPANY, APPELLEES.

332 N.W.2d 52

Filed April 15, 1983. No. 82-322.

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

John D. Sykora of the Law Offices of John D. Sykora, for appellant.

Frederick S. Cassman of Abrahams, Kaslow & Cassman, for appellee Valley Ho.

Irving B. Epstein of Viren, Epstein, Leahy & Coren, for appellee Fox and Company.

KRIVOSHA, C.J., WHITE, CAPORALE, and SHANAHAN, JJ., and EMPSON, D.J.

PER CURIAM.

The court, having reviewed the pleadings in this case and having considered the briefs and argument of counsel, finds that the appeal is without merit. The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DONALD CLARENCE KOWALSKI, APPELLANT.

332 N.W.2d 678

Filed April 15, 1983. No. 82-335.

Criminal Law: Sentences. The punishment for a criminal act should, in all circumstances, be commensurate with the offense.

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

Ronald J. Albin, for appellant.

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

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

WHITE, J.

The defendant, Donald Clarence Kowalski, was informed against in the District Court for Madison County, Nebraska, on count I, second degree forgery, Neb. Rev. Stat. § 28-603(3) (Reissue 1979), a Class IV felony; count III, second degree forgery, § 28-603(4), a Class I misdemeanor; and count IV, attempted second degree forgery, § 28-603(4) and Neb. Rev. Stat. § 28-201 (Reissue 1979), a Class II misdemeanor. In addition, the information in count II charged that the defendant was an habitual criminal, Neb. Rev. Stat. § 29-2221 (Reissue 1979), and alleged six previous convictions of felonies for which the defendant was sentenced to a term of 1 year or more in the Nebraska Penal and Correctional Complex.

A jury convicted the defendant of all three substantive counts. At the enhancement hearing, certified copies of the judgments of conviction were introduced and received into evidence by the trial court. The court found the defendant to be an habitual criminal. The court, after reviewing the presentence report, sentenced the defendant to a term of 10 years on count I, second degree forgery, a felony; 1 year on count III, second degree forgery, a misdemeanor; and 6 months on count IV, attempted second degree forgery, a misdemeanor. The sentences were to be served concurrently with the sentence received in count I.

Defendant appeals and assigns three alleged errors, only two of which are discussed: (1) The sentence is excessive; (2) The judgment is not supported by the evidence; and (3) The court erred in admitting proof of prior convictions because of insufficient foundation. Assignment of error (3) is not discussed in the brief and will not be considered, ex-

cept to note in passing that the certified copies appear to be fully in compliance with Neb. Rev. Stat. § 25-1285 (Reissue 1979) and each discloses that the defendant was afforded counsel in each proceeding. See Neb. Ct. R. 9D(1)d (Rev. 1982). *Johnson v. Johnson,* 209 Neb. 317, 307 N.W.2d 783 (1981).

The evidence establishes that the defendant wrote four checks, three at Jake's Bar in Norfolk, Nebraska, and a fourth at the ABC Bowl bar, also in Norfolk. The checks were drawn on the account of Thomas Block.

The first two checks were cashed at Jake's Bar for a total of $150, and employees refused to cash a third check after becoming suspicious. The proprietor of Jake's Bar then followed the defendant to the ABC Bowl bar and, after watching the defendant attempt to pass the fourth Thomas Block check, demanded and received the $150 that the defendant had obtained from Jake's Bar. The proprietor then returned the two checks that the defendant had previously cashed. Norfolk police arrived shortly thereafter and arrested the defendant.

Thomas Block testified that his checkbook, which was recovered from the floorboard of the police cruiser directly under the seat where defendant was sitting, had been stolen from him or lost by him the previous week at a Norfolk lounge, that he did not know the defendant, that the signature on each of the checks was not his, and that he had given no one permission to draw checks on his account. Though several witnesses, especially the barmaid at Jake's Bar, could not positively identify the defendant as the person who presented the Thomas Block checks, a number of witnesses did so. The overwhelming evidence of the guilt of the defendant renders the argument that the evidence was insufficient absolutely frivolous. The assignment is totally without merit.

The assertion that the sentence was excessive also borders on the frivolous. The defendant's 10-year

enhanced sentence under § 29-2221(1) is the minimum. The maximum term is 60 years. The defendant has previously been convicted and sentenced for burglary twice, escape twice, robbery, and use of a firearm to commit a felony. The punishment imposed is commensurate with the offense. *State v. Foutch,* 196 Neb. 644, 244 N.W.2d 291 (1976).

The judgment and sentence of the trial court should be affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DONALD G. DUSH, APPELLANT.

332 N.W.2d 679

Filed April 15, 1983. No. 82-351.

1. **Blood, Breath, and Urine Tests.** Before the State may offer in evidence the results of a breath test for the purpose of establishing that a defendant was at a particular time operating a motor vehicle while having ten-hundredths of one percent or more by weight of alcohol in his body fluid, the State must prove the following: (1) That the testing device or equipment was in proper working order at the time of conducting the test; (2) That the person giving and interpreting the test was properly qualified and held a valid permit issued by the Nebraska Department of Health at the time of conducting the test; (3) That the test was properly conducted in accordance with a method currently approved by the Nebraska Department of Health; and (4) That there was compliance with all statutory requirements.
2. _____. Evidence that the result of a breath test showed a concentration of alcohol in the blood greater than ten-hundredths of one percent does not create a presumption of guilt, but may be sufficient to make a prima facie case on the issue of blood alcohol concentration.
3. **Jury Instructions.** It is error to refuse requested instructions containing correct propositions of law which are applicable to the issues in the case and which are not covered in the instructions given to the jury.

Appeal from the District Court for Merrick County: JOHN M. BROWER, Judge. Reversed and remanded.

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

Paul L. Douglas, Attorney General, and Melvin K. Kammerlohr, for appellee.

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

BOSLAUGH, J.

The defendant was convicted in the county court of operating a motor vehicle while under the influence of alcoholic liquor or any drug; or when he had ten-hundredths of one percent or more by weight of alcohol in his body fluid as shown by chemical analysis of his blood, breath, or urine. He was sentenced to 9 months' probation, including a fine of $100. Upon appeal to the District Court the judgment was affirmed.

He has appealed to this court and contends that the trial court erred in failing to sustain his motion to suppress, in admitting the result of a breath test into evidence, in failing to give the instructions requested by him, and in giving instructions to which he objected.

The record shows that the defendant was arrested shortly after midnight on February 22, 1981. The defendant and his wife had attended a dance at the New Havens Ballroom in Merrick County, Nebraska. While at the dance the defendant admitted that he had consumed three or four bottles of beer. As he was driving home, a deputy sheriff observed that the defendant failed to come to a complete stop at a stop sign at a railroad crossing in Havens. The deputy sheriff stopped the defendant's vehicle and had the defendant perform three or four "field tests," but a preliminary breath test was not performed. The defendant was arrested and taken to Central City, Nebraska, where a breath test was made by the sheriff on an "Intoximeter Mark IV,"

an approved device. The test indicated a blood alcohol content of .167 percent.

The defendant was charged in the alternative in this case and could have been found guilty either on the basis that he was under the influence of alcoholic liquor or had ten-hundredths of one percent or more alcohol in his body fluid. In addition to the results of the breath test there was testimony as to what the defendant had been doing during the day, his conduct at the dance, and his driving from the parking lot to the place where he was stopped. The deputy sheriff and the sheriff testified concerning their opinion as to whether the defendant was intoxicated. A number of lay witnesses called by the defendant testified that in their opinion the defendant was not intoxicated. Although the evidence was in conflict, the evidence of the State was sufficient, if believed, to support a finding of guilt beyond a reasonable doubt.

The result of the breath test performed by the sheriff was received in evidence over objection. The defendant contends that there was insufficient foundation for admission of the test.

In *State v. Gerber,* 206 Neb. 75, 291 N.W.2d 403 (1980), we held that before the State may offer in evidence the results of a breath test for the purpose of establishing that a defendant was at a particular time operating a motor vehicle while having ten-hundredths of one percent or more by weight of alcohol in his body fluid, the State must prove the following: (1) That the testing device or equipment was in proper working order at the time of conducting the test; (2) That the person giving and interpreting the test was properly qualified and held a valid permit issued by the Nebraska Department of Health at the time of conducting the test; (3) That the test was properly conducted in accordance with a method currently approved by the Nebraska Department of Health; and (4) That there was compliance with all statutory requirements. Before the re-

sult of a machine breath test is admissible in evidence, the foundation evidence must show (1) that the test has been performed according to methods approved by the Department of Health and (2) the test was administered by a person holding a valid permit. Neb. Rev. Stat. § 39-669.11 (Reissue 1978). The permit issued to the sheriff was received in evidence, and there is no contention that he was not authorized to administer the test.

A copy of the regulations adopted by the Department of Health following the decision in the *Gerber* case was received in evidence. The record shows generally that the test was performed in accordance with the regulations. The testimony of the sheriff covered the calibration of the machine, the testing of the NALCO standard, the test of the machine before the breath test was administered, and the method which he used in performing the test.

The defendant called Dr. Robert Prokop, who testified as an expert witness concerning the problems involved in using breath tests as an indication of blood alcohol content. In the *Gerber* case we commented on the reliability of a Breathalyzer test and the possibility that a test result showing a minimum concentration might result in a wrongful conviction. The result of the test in this case, .167 percent, is sufficiently in excess of the .10 percent minimum that it was properly admitted as evidence of guilt.

The defendant argues that the statute is invalid because the effect of the statute is to create a presumption of guilt by the test. Section 39-669.11 merely provides that a test made in compliance with the statute is admissible. Such evidence does not create a presumption of guilt, but may be sufficient to make a prima facie case on the issue of blood alcohol concentration. *State v. Gerber, supra.*

The defendant submitted a number of requested instructions, some of which were not given. At the instruction conference the defendant objected to a number of instructions which were given to the jury.

Although, for the most part, the instructions given were complete, in some instances they differed from the text of the instructions contained in Nebraska Jury Instructions. For example, instruction No. 6, relating to the presumption of innocence and the burden of proof, did not advise the jury that the "burden never shifts." The defendant specifically requested that the trial court give NJI 14.05, which in part instructs the jury: "The burden of proof is *always* on the state to prove beyond a reasonable doubt *all of the material elements* of the crime charged, and *this burden never shifts.*" (Emphasis supplied.) Whenever an applicable instruction may be taken from Nebraska Jury Instructions, that is the instruction which should be given to the jury. *State v. Samuels,* 205 Neb. 585, 289 N.W.2d 183 (1980).

The defendant specifically requested that the following Nebraska Jury Instructions be given: No. 14.50, relating to circumstantial evidence; No. 14.61, relating to impeachment and prior inconsistent statements; and No. 14.56, relating to opinion testimony by nonexpert witnesses. All of these requested instructions were applicable under the facts and circumstances of the case and were not included in any of the instructions which were given. It was the duty of the trial court to give the requested instructions, and the failure to do so was prejudicial error. See, *State v. Lewis,* 177 Neb. 173, 128 N.W.2d 610 (1964); *Pierce v. State,* 173 Neb. 319, 113 N.W.2d 333 (1962); *Powder River Live Stock Co. v. Lamb,* 38 Neb. 339, 56 N.W. 1019 (1893).

The failure to properly instruct the jury requires that the judgment be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. HARRY K. DOFNER, APPELLANT.

332 N.W.2d 683

Filed April 15, 1983. No. 82-399.

1. **Convictions: Appeal and Error.** The task of this court in cases where a defendant has been convicted of a crime is to determine whether the evidence is such that it is sufficient to support the finding of guilt beyond a reasonable doubt.
2. _____: _____. The determination as to whether the evidence is sufficient to support a finding of guilt beyond a reasonable doubt cannot be made in the absence of a record which tells us clearly with what crime defendant has been charged so that we may know whether the pleadings support the judgment.

Appeal from the District Court for Sarpy County: ROBERT T. FINN, Judge. Reversed and remanded.

James P. Miller and Owen A. Giles, for appellant.

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

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

CAPORALE, J.

Defendant-appellant, Harry K. Dofner, appeals from a conviction for writing a bad check in violation of Neb. Rev. Stat. § 28-611(3) (Reissue 1979). We reverse.

The relevant statute, in pertinent part, provides as follows:

"(1) Whoever obtains property, services, or present value of any kind by issuing or passing a check or similar signed order for the payment of money, knowing that he has no account with the drawee at the time the check or order is issued, or, if he has such an account, knowing that he does not have sufficient funds in, or credit with, the drawee for the payment of such check or order in full upon its presentation, commits the offense of issuing a bad check. Issuing a bad check is:

"(a) A Class III felony if the amount of the check or order is one thousand dollars or more;

"(b) A Class IV felony if the amount of the check or order is three hundred dollars or more, but less than one thousand dollars;

"(c) A Class I misdemeanor if the amount of the check or order is seventy-five dollars or more, but less than three hundred dollars; and

"(d) A Class II misdemeanor if the amount of the check or order is less than seventy-five dollars.

. . . .

"(3) Whoever otherwise issues or passes a check or similar signed order for the payment of money, knowing that he has no account with the drawee at the time the check or order is issued, or, if he has such an account, knowing that he does not have sufficient funds in, or credit with, the drawee for the payment of such check or order in full upon its presentation, commits a Class II misdemeanor."

As will be seen, the record in this case is far from a model of clarity. It appears, however, that on October 2, 1981, the defendant was informed against in the following words and figures: "On or about the 15th day of July, 1981, at or near 16512 Hilo Circle, Omaha in Sarpy County, Nebraska, said Harry K. Dofner, did then and there obtain property, services or other present value by issuing or passing a check or similar signed order for the payment of money, knowing that he had no account or insufficient funds with the drawee at the time the check or order was issued, the value of said check or similar signed order being $305.00, in violation of Section 28-611(1), R.R.S. Nebraska. (Class IV Felony)." On January 14, 1982, the defendant appeared with counsel before a judge of the Nebraska Second Judicial District Court, Sarpy County, and entered a plea of not guilty. On January 27, 1982, the State was granted leave to file, instanter, an amended information, hereinafter referred to as the first amended information. That first amended information is not con-

tained in the transcript, but from the colloquy reflected by the bill of exceptions, we conclude defendant was charged with issuing a bad check of "more than 75, but less than 300," which the court characterized as a Class I misdemeanor. The judge concluded that the parties were not in agreement as to a plea bargain which had previously been discussed by them, and rejected defendant's guilty plea. That judge then sustained the State's motion to withdraw the first amended information, noting that it had never been filed. At 8:58 a.m. on March 12, 1982, another amended information was filed, hereinafter referred to as the second amended information. That second amended information reads as follows: "On or about the 15th day of July, 1981, at or near 16512 Hilo Circle in Sarpy County, Nebraska said Harry K. Dofner did then and there issue or pass a check or similar signed order for the payment of money, knowing that he has no account with the drawee at the time the check or order is issued, or if he has such an account, knowing that he does not have sufficient funds in or credit with, the drawee for the payment of such check or order in full upon its presentation, in violation of Section 28-611 (3) R.R.S. Nebraska. (Class II, Misdemeanor)." At 9:15 of that morning, proceedings were had before a second judge of the aforesaid court upon, according to the judge's comments, the "motion of the County Attorney to withdraw the amended Information." Although no such motion appears either in the bill of exceptions or in the transcript, the judge stated that the county attorney's "motion to withdraw the amended Information is granted." The matter later proceeded to trial before a third judge. It appears defendant was not entirely satisfied with his trial attorney's services.

At the close of the State's evidence the following dialogue took place between the trial judge and defendant's trial counsel: "THE COURT: You have a motion? MR. ADDISON: Do you want to make

it? A motion to dismiss. THE COURT: I'll sustain your motion as to the felony charge, but not as to the misdemeanor. . . ."

Defendant makes four assignments of error. He asserts, on the one hand, that the trial court erred in finding defendant guilty of an amended information which had been withdrawn. On the other hand, he contends error by the trial court in its treatment of § 28-611(3) as a lesser-included offense of § 28-611(1); in its allegedly unconstitutional construction of § 28-611(3) by failing to require an intent to defraud; and in its failure to dismiss the entire proceeding when it dismissed the charge based on § 28-611(1).

The State asserts this is a prosecution for a Class II misdemeanor for issuing an insufficient or no account check in violation of § 28-611(3).

We share defendant's confusion. We are uncertain from the state of the record before us whether the trial court thought it was trying the defendant under the original information charging a violation of § 28-611(1) and that § 28-611(3) is a lesser-included offense thereof, or whether it was trying the defendant under an information charging a violation of § 28-611(3), as the State contends.

The task of this court in cases where a defendant has been convicted of a crime is to determine whether the evidence is such that it is sufficient to support the finding of guilt beyond a reasonable doubt. See, *State v. Holland,* 213 Neb. 170, 328 N.W.2d 205 (1982); *State v. Brown,* 213 Neb. 68, 327 N.W.2d 107 (1982). That determination cannot be made in the absence of a record which tells us, as well as the defendant, clearly with what crime defendant has been charged. In a very real sense, the question in this case becomes whether the pleadings support the judgment. We cannot know whether they do unless we first know what the pleadings are. The state of the record before us does not allow us to make that determination with the degree of certainty required.

In view of the foregoing determination it is unnecessary for us to discuss further the defendant's assignments of error. The judgment of conviction is reversed and the matter remanded for further proceedings.

REVERSED AND REMANDED.

KRIVOSHA, C.J., dissenting.

While I agree with the majority in its conclusion that the trial court was in error, I believe that the instant action should not be remanded for further proceedings but, rather, should be dismissed. As noted by the majority, the trial court sustained a motion to dismiss as to a felony charge but proceeded to find the defendant guilty of a misdemeanor, for which it appears no complaint was ever filed. It may very well be that the trial court did indeed try the defendant on the felony charge and erroneously found him guilty of a lesser-included offense. We simply cannot tell from the state of the record. On that basis it occurs to me that to try the defendant again on any charge arising out of this transaction, for which the trial court has already sustained a motion to dismiss as to the felony charge and therefore has rendered a judgment on the merits, is double jeopardy, in violation of the fifth amendment to the U.S. Constitution and Neb. Const. art. I, § 12. See *In re Resler,* 115 Neb. 335, 212 N.W. 765 (1927).

STATE OF NEBRASKA, APPELLEE, V. JAMES DEAN WELSH, APPELLANT.

332 N.W.2d 685

Filed April 15, 1983. No. 82-403.

1. **Search and Seizure.** Facts improperly obtained may nevertheless be admissible in evidence if knowledge of the facts is gained from an independent source.
2. **Search Warrants: Affidavits.** Where an affidavit used for the purpose of obtaining a search warrant includes both illegally ob-

tained facts as well as facts derived from independent and lawful sources, a valid search warrant may issue if the lawfully obtained facts, considered by themselves, establish probable cause to issue the warrant.

3. **Criminal Law: Appeal and Error.** In reviewing a criminal case this court will not set aside the verdict of guilty if, taking the view most favorable to the State, there is sufficient evidence to support the verdict.

Appeal from the District Court for Sheridan County: PAUL D. EMPSON, Judge. Affirmed.

David T. Schroeder, for appellant.

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

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

KRIVOSHA, C.J.

The appellant, James Dean Welsh, was convicted by a jury in the District Court for Sheridan County, Nebraska, of theft by unlawful taking or disposition, contrary to Neb. Rev. Stat. § 28-511(1) (Reissue 1979). Following a presentence investigation, Welsh was ordered to pay a fine of $2,000 plus the costs of prosecution. Welsh has appealed to this court, setting out a number of assignments of error. We have thoroughly examined the record and conclude that Welsh's assignments are without merit. Therefore, the conviction, judgment, and sentence should in all respects be affirmed.

Before proceeding to examine the assignments of error, a brief statement of facts is necessary. The record reveals that in March of 1981 Welsh entered into an oral agreement with J. Conrad Bauer in which Welsh agreed to sell Bauer a 10-tower pivot irrigation system for a total purchase price of $36,000. This agreement was later modified by changing the sale to a 7-tower pivot irrigation system at an agreed price of $28,500. On April 22, 1981, Bauer gave Welsh a downpayment of $7,200. About June

16, 1981, Welsh delivered the 7-tower system to Bauer and received payment from Bauer of $18,300, leaving a balance of $3,000 due and owing. In July of 1981 Welsh submitted a bill to Bauer for the balance due, plus an additional $1,586 for test pumping a well and one other item not here involved. Bauer refused to pay the balance due and a dispute developed. Welsh claimed that in August of 1981 he conferred with an attorney concerning possible repossession of certain of the property in the possession of Bauer. Welsh concedes that on November 24, 1981, while accompanied by some employees, he removed parts from the pivot irrigation system previously sold to Bauer and returned them to his shop. He did not notify Bauer that he had taken them at that time. Bauer reported the apparent theft of the parts, and an investigation by the county sheriff and a member of the Nebraska State Patrol followed. On December 1, 1981, the Nebraska state patrolman interviewed Frances Jackson, a coowner of the land upon which the system had been installed. She reported to the patrolman that on November 30, 1981, Welsh told her that he had taken the parts in question. Later that afternoon the sheriff and the patrolman went to Welsh's place of business in Hay Springs, Nebraska, to discuss the matter with Welsh. After attempting to locate Welsh, they entered a part of the building open to the public. They were still unable to locate Welsh. After calling out for him several times, the patrolman opened a closed door leading to a backroom and saw what he believed to be the missing parts. Still unable to locate Welsh, they left the premises.

The following day, on December 2, 1981, Welsh telephoned the sheriff and told him that he had the irrigation equipment and intended to sell it to pay the balance due. On December 3, 1981, the patrolman returned to Welsh's place of business to interview Welsh. Welsh agreed to walk to the patrol car but refused at that time to give the officer a taped

statement. The patrolman then advised Welsh of his *Miranda* rights, and then advised him that he was investigating a theft that had been reported to him by Bauer. Welsh told the officer that he, Welsh, had a signed contract with Bauer, giving Welsh an interest in the missing parts. When the patrolman asked Welsh if he had obtained a court order before repossessing the parts, Welsh admitted that he had not. The officer then asked Welsh if he could see the contract, and Welsh produced a photocopy of the contract. The patrolman asked for permission to photograph the equipment, but Welsh refused to allow him to do so without a search warrant.

On December 4, 1981, the patrolman submitted an affidavit to the county court for Sheridan County, Nebraska, seeking a search warrant. The affidavit alleged that the patrolman had received information from the sheriff of Sheridan County, Nebraska, concerning the theft of the equipment; that the patrolman had interviewed Bauer and been advised that Bauer had purchased the equipment from Welsh; that the patrolman had talked to Welsh on December 3d and Welsh told the patrolman that he had taken the parts; that the patrolman asked Welsh if he could photograph the parts, and that while Welsh told the patrolman that the parts were present within his business premises, the patrolman could not photograph them and would not be permitted to look at the parts unless or until the patrolman produced a search warrant. The affidavit further recited that 3 days earlier, on December 1, the patrolman and the sheriff observed the parts at Welsh's place of business. The affidavit finally recited that on December 4, 1981, the patrolman interviewed Bauer, who told him that he, Bauer, had not signed any written contract with Welsh and that the signature on the contract was forged. Based upon the allegations of the affidavit, a search warrant was issued and the missing parts were found in Welsh's place of business. In fact, they were in the same lo-

cation that the patrolman and the sheriff had observed them on December 1st. The parts were seized and removed from the premises and an information was filed charging Welsh with theft by unlawful taking pursuant to § 28-511(1).

Welsh's first assignment of error is that the trial court should have sustained his motion to suppress because the warrantless search made by the patrolman and the sheriff on December 1, 1981, was in violation of Welsh's fourth amendment rights. Welsh maintains that this illegal search on December 1, 1981, not only affected the admissibility of the parts seized on December 4 but, as well, tainted all of the evidence obtained by the patrolman, including Welsh's own statements given to the patrolman, on December 3, 1981. Even if we concede that the officer's entry into Welsh's closed area without a search warrant was in violation of his fourth amendment rights (see *See v. City of Seattle*, 387 U.S. 541, 87 S. Ct. 1737, 18 L. Ed. 2d 943 (1967)), Welsh's claim of error is without merit. While it is true that the U.S. Supreme Court decision in *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963), not only requires the suppression of the illegally obtained evidence but the "fruit of the poisonous tree" as well, not all evidence obtained is considered to be "fruit of the poisonous tree," and such evidence may be admitted if there is sufficient independent basis for the discovery of the evidence. In *Wong Sun* the U.S. Supreme Court specifically made that distinction when it observed that the constitutional question under the fourth amendment must be examined in light of whether the evidence to which objection is made has been come at by exploitation of the illegally obtained evidence or, instead, by means sufficiently distinguishable to be purged of the primary taint. In practice, the U.S. Supreme Court has declined to adopt a per se or "but for" rule that would make inadmissible any evidence which somehow came to light through a

chain of causation that began with an illegal activity. See *Brown v. Illinois,* 422 U.S. 590, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975). See, also, *State v. Anderson and Hochstein,* 207 Neb. 51, 296 N.W.2d 440 (1980). Specifically, in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 40 S. Ct. 182, 64 L. Ed. 319 (1920), *reaff'd* in *Nardone v. United States*, 308 U.S. 338, 60 S. Ct. 266, 84 L. Ed. 307 (1939), the U.S. Supreme Court held that facts improperly obtained may nevertheless be admissible in evidence if knowledge of the facts is gained from an independent source. The application of the independent source rule in the context of a search warrant does not offend the underlying purpose and objectives of the exclusionary rule. See *United States v. Giordano*, 416 U.S. 505, 94 S. Ct. 1820, 40 L. Ed. 2d 341 (1974). In a long line of cases both the U.S. Supreme Court and other federal courts called upon to examine this question have held that where an affidavit used for the purpose of obtaining a search warrant includes both illegally obtained facts as well as facts derived from independent and lawful sources, a valid search warrant may issue if the lawfully obtained facts, considered by themselves, establish probable cause to issue the warrant. *United States v. Giordano, supra*; *Grimaldi v. United States*, 606 F.2d 332 (1st Cir. 1979), *cert. denied* 444 U.S. 971, 100 S. Ct. 465, 62 L. Ed. 2d 386; *United States v. Marchand*, 564 F.2d 983 (2d Cir. 1977); *United States v. Plotkin*, 550 F.2d 693 (1st Cir. 1977), *cert. denied* 434 U.S. 820, 98 S. Ct. 61, 54 L. Ed. 2d 76; *United States v. Armedo-Sarmiento*, 545 F.2d 785 (2d Cir. 1976); *United States v. DiMuro*, 540 F.2d 503 (1st Cir. 1976), *cert. denied* 429 U.S. 1038, 97 S. Ct. 733, 50 L. Ed. 2d 749 (1977); *United States v. Koonce,* 485 F.2d 374 (8th Cir. 1973); *James v. United States*, 418 F.2d 1150 (D.C. Cir. 1969).

An examination of the search warrant in this case discloses that even if the observations made by the officers are disregarded, there were more than

ample independent facts contained in the affidavit which would have justified the court in granting a search warrant. Specifically, there is the statement, "The affiant then asked Dean Welsh if he could photograph the parts at the place of business owned and controlled by Dean Welsh in Hay Springs, Nebraska. Dean Welsh told the affiant the parts were present within his business premises, but he told affiant that he would not allow them to be photographed and would not allow affiant to look at them until or unless affiant produced a search warrant." This statement alone would have been sufficient to have established probable cause for the court to issue the warrant in question.

Furthermore, the record is clear that the statements made by Welsh to the state patrolman concerning the location of the parts in question were voluntarily made by Welsh at a time when Welsh clearly was not in custody. The statement by Welsh to the officer was not in response to any questioning by the officer, nor did the officer act in any manner that would reasonably elicit such an incriminating response from Welsh. Welsh clearly initiated the conversation in question and volunteered the information.

Welsh argues that his statements were inadmissible as being "fruit of the poisonous tree." The difficulty with that position, however, is that at the time that Welsh made the statements to the state patrolman, he was not aware that the patrolman and the sheriff had already seen the equipment. It was not until after Welsh advised the patrolman that he had the equipment and the officer asked if he might photograph it that Welsh inquired as to how the officer knew the equipment was in the building. Welsh's statements to the officer upon which the search warrant was based were clearly voluntarily made by Welsh, independent of any knowledge the officer had, and they cannot, under any circumstance, be considered to be fruit of a poisonous tree. *People v.*

Johnson, 70 Cal. 2d 541, 450 P.2d 865, 75 Cal. Rptr. 401 (1969), *cert. denied* 395 U.S. 969, 89 S. Ct. 2120, 23 L. Ed. 2d 758; *Wickline v. Slayton*, 356 F. Supp. 140 (E.D. Va. 1973). When one disregards that portion of the affidavit establishing the officer's personal observation of the parts, there still remain more than sufficient facts justifying the granting of the search warrant. The trial court was correct in refusing to suppress the statements made by Welsh and the parts obtained by reason of the lawfully issued search warrant.

Welsh further argues that the verdict was contrary to the law as well as to the facts. Welsh admitted that he took the parts and admitted he intended to deprive Bauer of the use of the parts until he received payment. His sole defense to the charge was his belief that he was able to repossess it under the terms of a sales contract. However, it was shown that Bauer had never signed the contract and that, in fact, Welsh had forged his signature on the document. If the jury believed all of that, there was sufficient evidence to justify its finding Welsh guilty of the crime charged. We have oftentimes held that in reviewing a criminal case this court will not set aside the verdict of guilty if, taking the view most favorable to the State, there is sufficient evidence to support the verdict. See *State v. Stickelman*, 207 Neb. 429, 299 N.W.2d 520 (1980). Welsh's assignment therefore, concerning the sufficiency of the evidence, is without merit.

We have examined the balance of Welsh's assignments of error and find them all to be without merit. The judgment of the trial court and the sentence are in all respects correct and must be affirmed.

AFFIRMED.

ERSPAMER ADVERTISING COMPANY, A NEBRASKA CORPORATION, APPELLEE, V. DEPARTMENT OF LABOR OF THE STATE OF NEBRASKA ET AL., APPELLANTS, AND RICHARD G. PAULSON, APPELLEE.

333 N.W.2d 646

Filed April 15, 1983. No. 82-421.

1. **Employment Security Law: Appeal and Error.** An appeal to this court under the Employment Security Law is heard de novo.
2. **Employment Security Law: Independent Contractors.** The standards prescribed in Neb. Rev. Stat. § 48-604(5) (Reissue 1978) are not exclusive in determining whether an individual is an employee or an independent contractor.
3. _____: _____. Control or the right of control is the chief criterion in the determination of whether one acts as an independent contractor.
4. **Statutes: Judicial Construction.** Generally, 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 determination of its intent.
5. **Statutes.** An exemption becomes meaningless if it does not exempt anything from the statutory provisions.

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

Pamela A. Mattson, for appellants.

Joseph J. Skudlarek of Schumacher, Skudlarek, Raynor & Smith, for appellee.

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

BOSLAUGH, J.

The Department of Labor has appealed from the judgment of the District Court reversing the determination by the Nebraska Appeal Tribunal that Richard G. Paulson, a salesman of advertising specialties for the appellee, Erspamer Advertising Company (Erspamer), was an employee.

In October 1980 Richard G. Paulson entered into a "salesman agreement" with Erspamer, a company which sells advertising specialties. The contract provided that (1) Erspamer could designate the

salesman's territory; (2) compensation was to be on a commission basis only; (3) commissions were payable on a monthly basis and not due until the customer had paid; (4) bonuses would be paid under certain circumstances; (5) errors would be charged against the salesman's account; (6) all samples remained the property of Erspamer; (7) the salesman was deemed an independent contractor and no income would be withheld for tax purposes nor would social security or unemployment taxes be paid by Erspamer; (8) the salesman was to pay all traveling expenses and must carry automobile insurance; (9) no advance would be made; (10) Erspamer would not be liable for delay in filling orders; (11) the salesman agreed not to compete; and (12) the agreement could be terminated at the option of either party.

Paulson testified that he was paid on a straight commission basis and determined his own hours. He could set his own prices. No office or telephone was provided by Erspamer, and Paulson did not receive a car or expenses. Paulson could have sold outside the agreed upon territory and was free to work for another while he was under contract with Erspamer. Paulson did not have to report in to the office, but could mail his orders in.

On March 27, 1981, Paulson terminated his arrangement with Erspamer and decided to seek salaried employment because he was "financially unsuccessful as a commission salesman." Paulson then filed a claim for unemployment benefits.

On April 8, 1981, Paulson was notified of the claims deputy's determination that Paulson would not receive benefits on the basis of the wages earned at Erspamer, since his relationship had been on a straight commission basis. Benefits to Paulson were then charged against a prior employer, Blue Cross/Blue Shield, and were based on the amount of wages earned there. A reduction was assessed because he had voluntarily left his employment there.

On April 23, 1981, Erspamer was notified by the chief of contributions that the deputy's determination had been reversed. Paulson was now determined to be an employee, rather than an independent contractor, of Erspamer. Erspamer was assessed for a contribution, and benefits to Paulson were to be based on the amounts he earned at Erspamer. The benefits to Paulson were less than those which were based on his Blue Cross wages. Again, a reduction in benefits was assessed because he had voluntarily left Erspamer.

Erspamer appealed from the decision of the chief of contributions to the Nebraska Appeal Tribunal, which affirmed the determination that Paulson was an employee of Erspamer.

Erspamer then appealed to the District Court, which found that Paulson was an independent contractor. The Department of Labor appeals from that decision. The review here is de novo on the record. Neb. Rev. Stat. § 48-640 (Reissue 1978). *Glionna v. Chizek,* 204 Neb. 37, 281 N.W.2d 220 (1979); *Heimsoth v. Kellwood Co.,* 211 Neb. 167, 318 N.W.2d 1 (1982). We are required to retry the issues of fact involved in the findings complained of and reach an independent conclusion.

The only issue on the appeal is whether Paulson was an employee or independent contractor. Neb. Rev. Stat. § 48-604(5) (Reissue 1978) provides: "Services performed by an individual for wages shall be deemed to be employment, unless it be shown to the satisfaction of the commissioner that (a) such individual has been and will continue to be free from control or direction over the performance of such services, both under his contract of service and in fact, (b) such service is either outside the usual course of the business for which such service is performed or such service is performed outside of all the places of business of the enterprise for which such service is performed, and (c) such individual is

customarily engaged in an independently established trade, occupation, profession, or business."

The department reasons that the beneficent purpose of the unemployment compensation act requires that § 48-604(5) be construed such that a person will be deemed an employee (and thus entitled to benefits) more readily than if the common-law test is used. Erspamer contends that the ABC test is merely a codification of the common-law test of independent contractor.

The test for determining whether a person is an employee or an independent contractor as expressed in § 48-604(5) is known as the "ABC test." W. Malone, M. Plant & J. Little, Cases and Materials on Workers' Compensation and Employment Rights 505 (2d ed. 1980). The Department of Labor urges that the three conjunctive criteria of this test are the only ones which may be considered in determining status for purposes of unemployment compensation. Only if each factor is met can one be deemed an independent contractor. In contrast, the common-law test for independent contractor includes many factors which are to be considered and weighed in making the determination, no one of which may be conclusive.

Generally, control or the right of control is the chief criterion in the determination of whether one acts as an independent contractor. *Maricle v. Spiegel,* 213 Neb. 223, 329 N.W.2d 80 (1983). "However, even the employer of an independent contractor may, without changing the status, exercise such control as is necessary to assure performance of the contract in accordance with its terms." *Stephens v. Celeryvale Transport, Inc.*, 205 Neb. 12, 20, 286 N.W.2d 420, 425 (1979).

The Restatement (Second) of Agency § 220 (1958) lists the following ten factors to be considered in determining whether a person is an employee or an independent contractor: "(2) In determining whether one acting for another is a servant or an independent

contractor, the following matters of fact, among others, are considered:

"(a) the extent of control which, by the agreement, the master may exercise over the details of the work [A of the ABC test];

"(b) whether or not the one employed is engaged in a distinct occupation or business [C of the ABC test];

"(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

"(d) the skill required in the particular occupation;

"(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

"(f) the length of time for which the person is employed;

"(g) the method of payment, whether by the time or by the job;

"(h) whether or not the work is a part of the regular business of the employer [B of the ABC test];

"(i) whether or not the parties believe they are creating the relation of master and servant; and

"(j) whether the principal is or is not in business."

This issue was addressed by this court in *Hill Hotel Co. v. Kinney*, 138 Neb. 760, 763, 295 N.W. 397, 398 (1940). In that case we said: "While there is a diversity of views among the courts on this subject and the opinions are not always unanimous, the weight of authority is that legislatures in enacting unemployment compensation statutes did not intend to depart from the common-law definition of 'independent contractor.' "

In *Hill Hotel Co.*, *supra*, we quoted with approval from *Washington Recorder Pub. Co. v. Ernst*, 199 Wash. 176, 91 P.2d 718 (1939) (in effect overruled in *Sound Cities Gas & Oil Co. v. Ryan*, 13 Wash. 2d 457, 125 P.2d 246 (1942)). We said at 762-63, 295 N.W. at

398: "The provisions quoted from the Nebraska statute are found in the unemployment compensation law of Washington and in construing them the supreme court of that state said:

" 'In the Restatement of the Law of Agency, nine different items are recited as the principal elements to be considered in determining which relationship exists. In the enactment of the unemployment compensation statute, the legislature selected or picked out three elements to be considered. The legislature did not say, nor is the language capable of that interpretation, that each of those elements must exist one hundred per cent in order to establish the relationship of independent contractor. * * *

" 'The courts have never held that, in the determination of the relationship of independent contractor, there must be an absolute and complete freedom from control. The common law test and the statutory test are the same. * * *

" 'In drafting the statute, the legislators attempted to codify the common law. They intended that the common law test of employment relationship should likewise be the test under the unemployment compensation act.' *Washington Recorder Publishing Co. v. Ernst*, 199 Wash. 176, 91 Pac. (2d) 718, 124 A.L.R. 667."

After noting that the common-law definition was adopted in the workmen's compensation laws, the opinion states at 764, 295 N.W. at 399: "In both the workmen's compensation law and the unemployment compensation law, the lawmakers legislated on labor problems and it should not be held without sound reasons that they intended to vary the status of independent contractors under the two intimately related statutes. The point in controversy was elaborately argued by counsel on each side with reference to statutes, opinions of courts and rulings of preliminary tribunals. It was earnestly insisted on behalf of claimant that the legislature had power to change the common law adopted in this state and

make legislative definitions applicable to new enactments; that such power was exercised in the present instance, but that, even if the common-law tests are applied, claimant is entitled to an allowance for unemployment compensation under the facts. Though the argument is plausible, the rulings quoted from the supreme court of Washington seem to be based on better reasons and precedents and are adopted for the purpose of a decision on this appeal."

The department argues that *Hill Hotel Co.*, *supra*, is not controlling on the issue and in effect urges that the decision in the *Hill* case be overruled.

Generally, 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 determination of its 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). See *State v. Hocutt*, 207 Neb. 689, 300 N.W.2d 198 (1981).

While the department cites authority in support of its position, see, e.g., *Sound Cities Gas & Oil Co.*, *supra*, we are not persuaded to ignore this general rule and overrule the decision in *Hill Hotel Co.* See *Lincoln Woman's Club v. City of Lincoln*, 178 Neb. 357, 133 N.W.2d 455 (1965).

As at the time *Hill Hotel Co.* was decided, there is conflicting authority on the issue of the construction to be given the ABC test. However, the following statement from W. Malone, M. Plant & J. Little, *supra* at 505, reveals two additional reasons to reaffirm the decision in *Hill Hotel Co.*: "At one time more than half the states utilized a tax scheme that basically covered 'any service' performed by an individual. To be exempt from taxes with respect to remuneration paid a worker, an employer had to show that the worker: (A) was free from control or direction over the performance of his services, both under his contract of service and in fact; and (B) the

service was either outside the usual course of the business or was performed outside of all the places of the enterprise; and (C) the worker was engaged in an independently established trade, occupation, profession or business. . . . Although this so-called 'ABC test' was intended to broaden coverage beyond that provided by the common law master-servant test, the controlling importance of the master-servant test in the federal unemployment tax act has apparently caused it to fall into disuse."

The Employment Security Law is designed to cover "any service" except services exempted under the ABC test. § 48-604(1) and (5). As the above-quoted paragraph implies, the effect of this scheme is that all services performed will be covered if the ABC test is broadly interpreted. It is difficult for a situation to exist which meets each of the conjunctive elements of the ABC test. See, e.g., *Ross v. Cummins,* 7 Ill. 2d 595, 131 N.E.2d 521 (1956) (commission salesmen are employees); *Dep't v. Charlie's Barber Shop*, 230 Md. 470, 187 A.2d 695 (1963) (lessees of barbershop chairs are employees); *Young etc. v. Indiana Emp. Sec. Bd.*, 134 Ind. App. 263, 187 N.E.2d 489 (1963) (taxi drivers are employees). The exemption becomes meaningless if it does not exempt anything from the statutory provisions.

A second reason to hold that § 48-604(5) is a codification of the common law rests in the fact that the Federal Unemployment Tax Act defines "employee" as "any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of employee." I.R.C. §§ 3121(d)(2) and 3306(i) (1976).

Although the system is a complicated one, unemployment insurance is a coordinated federal-state program. Simply put, the program is financed from two taxes imposed on employers based upon wages paid for employment: one tax payable to the federal government and the other payable to the state.

A credit is available against the federal tax based on the amount of state tax paid into a state unemployment system. State taxes are deposited in the U.S. Treasury and placed into the state's benefit account. Benefits are payable only through state law. Those who must contribute are defined in both state and federal statutes. If no state law existed, the entire federal tax would be due from employers and no benefits would be payable to residents of that state. If no state tax were due, the entire federal tax would be deposited into the Treasury General Fund, not the state account.

The federal law establishes standards which must be met by the state law before the state can enter the program. For example, each state must create an agency with full powers to cooperate with the federal authorities. See, 26 U.S.C. §§ 3301 et seq. (1976); 42 U.S.C. §§ 502 et seq. (1976); 29 U.S.C. § 49 (1976) (the Wagner-Peyser Act); 1B Unempl. Ins. Rep. (CCH) ¶ 1001 (Sept. 22, 1980); W. Malone, M. Plant & J. Little, *supra* at 498-500.

Under this scheme an employer would not be held liable to pay federal taxes for one not an employee under common-law rules, but might be liable under a state's ABC test. *Central New York Insulating Co. v. United States,* 138 F. Supp. 236 (N.D. N.Y. 1956) (salesman is independent contractor). To avoid such situations some courts and legislatures have attempted to harmonize state and federal regulation where possible. See *Pioneer Potato Co. v. Div. of Employment Security,* 17 N.J. 543, 547, 111 A.2d 888, 890 (1955): "The state statutes form an integral part of the national plan and are designed to work closely with the federal legislation." The New Jersey court stated that there is an obvious need to harmonize state law with the federal act. See, also, *Space v. Div. of Employment Sec.*, 60 N.J. Super. 380, 159 A.2d 131 (1960). See, also, *Smith v. Arizona Dept. of Economic Sec.*, 128 Ariz. 21, 623 P.2d 810 (1980), in which the Legislature enacted a change to

conform with federal law. In that case truckers were held to be independent contractors. In W. Malone, M. Plant & J. Little, *supra*, the authors comment at 504: "Because of the close nexus between the state and federal taxes, state statutes typically track the exact language of the federal unemployment tax act in defining who pays the tax." Since taxes are payable only for those who are employees, the definition of that term is an important consideration in determining who must pay the tax.

In the present case Erspamer exercised little control over Paulson's hours, method or manner of performance, or the prices he charged. Paulson was free to hold another job and was free to expand his territory if he so desired. The occupation of salesman does not require a particular skill, nor is it usually performed by a specialist. Erspamer provided the salesman's samples but did not provide a car, a phone, or office space to its salesmen. Paulson performed his work off the premises of Erspamer's place of business. The contract was of no specific duration and was terminable at the option of either party. Payment was not on a salary basis but was on a commission or percentage of the sale basis. The contract provided that the relationship was that of independent contractor; no withholding or social security taxes were paid by Erspamer in Paulson's behalf.

After weighing and considering these factors, we conclude that Paulson was an independent contractor of Erspamer. While not conclusive of such status, weight must be given the contractual understanding of the parties. Paulson was not on a salary; Erspamer exercised little control over Paulson's performance and provided no facilities or transportation to Paulson. These factors considered together sustain a finding that Paulson was an independent contractor.

For cases applying these principles, see, *Maricle v. Spiegel*, 213 Neb. 223, 329 N.W.2d 80 (1983) (fran-

chise owner as independent contractor); *Stephens v. Celeryvale Transport Co.*, 205 Neb. 12, 286 N.W.2d 420 (1979) (tractor lessee as independent contractor); *Meyer v. State Farm Mut. Auto. Ins. Co.*, 192 Neb. 831, 224 N.W.2d 770 (1975) (agricultural worker); *Voycheske v. Osborn*, 196 Neb. 510, 244 N.W.2d 74 (1976) (maintenance worker).

The judgment of the District Court is affirmed.

AFFIRMED.

WHITE, J., participating on briefs.

KRIVOSHA, C.J., dissenting.

I regret that I must respectfully dissent from the majority opinion in this case. The majority has declared that the standards prescribed in Neb. Rev. Stat. § 48-604(5) (Reissue 1978) are not exclusive in determining whether an individual is an employee or an independent contractor. In my view the majority is in error. Absent the statute, the right of action would not here exist. For the majority to therefore suggest that a statutory right may be expanded by incorporating common-law definitions, not for the purpose of gleaning intent but, rather, for the purpose of defining an otherwise statutorily defined term, defeats the very purpose of the statutory action. A reading of § 48-604(5) makes it clear that the Legislature was intending to broaden the definition of employee and narrow the definition of independent contractor. The common-law definitions of employee and independent contractor for common-law causes of action cannot be used to expand a statutory right in which the term is clearly defined. There is no ambiguity in this act requiring interpretation by us, and the majority's use of such common-law definitions is, in my view, misplaced. In my view we were wrong in *Hill Hotel Co. v. Kinney,* 138 Neb. 760, 295 N.W. 397 (1940), and we are wrong here.

STATE OF NEBRASKA EX REL. PAUL L. DOUGLAS, ATTORNEY GENERAL, APPELLANT, V. ASSOCIATED GROCERS OF NEBRASKA COOPERATIVE, INC., A NEBRASKA COOPERATIVE CORPORATION, ET AL., APPELLEES.

332 N.W.2d 690

Filed April 21, 1983. No. 81-887.

1. **Summary Judgment.** The moving party is not entitled to summary judgment except where there exists no genuine issue as to any material fact and where, under the facts, he is entitled to judgment as a matter of law.
2. _____. Summary judgment is an extreme remedy and should be awarded only when the issue is clear beyond all doubt. Any reasonable doubt touching the existence of a material issue of fact must be resolved against the moving party.
3. _____. Upon a motion for summary judgment the court examines the evidence not to decide any issue of fact but to discover if any real issue of fact exists. In this respect the court should take that view of the evidence most favorable to the party against whom the motion is directed, giving to that party the benefit of all favorable inferences which may reasonably be drawn from the evidence.

Appeal from the District Court for Scotts Bluff County: ALFRED J. KORTUM, Judge. Reversed and remanded for further proceedings.

Paul L. Douglas, Attorney General, and Dale A. Comer, for appellant.

Jim Zimmerman of Atkins, Ferguson, Zimmerman, Carney & Law, for appellees Wilson, Thomas, and Associated Grocers.

Paul F. Hofmeister of Van Steenberg, Brower, Chaloupka, Mullin & Holyoke, for appellees Alexander Supermarket and Zemanek.

Lynn D. Hutton, Jr., P.C., for appellees Gillette Dairy and Simmon.

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

MCCOWN, J.

This is an antitrust proceeding by the State of Ne-

braska against the defendants under the Nebraska Consumer Protection Act, alleging conspiracy in illegal restraint of trade. The State sought injunctive relief, penalties, and damages. The District Court entered summary judgment in favor of defendants, dismissed plaintiff's petition, and awarded attorney fees and expenses to defendants. The State has appealed.

The petition alleges a conspiracy and actions in restraint of trade and commerce with reference to the marketing of milk and dairy products in Scotts Bluff County, Nebraska, primarily in the cities of Scottsbluff, Mitchell, and Gering.

The defendant Associated Grocers of Nebraska Cooperative, Inc. (Associated), is engaged in the business of wholesale sales of grocery products, including milk and dairy products, to Nebraska retail grocers. The individual defendant Jess W. Wilson is the manager of dairy sales for Associated. The individual defendant James W. Thomas is general manager for Associated.

The defendant Gillette Dairy West, Inc. (Gillette), is a Nebraska corporation engaged in the operation of dairy facilities and wholesale sale of milk and dairy products to Nebraska retail grocers. The individual defendant Robert L. Simmon is the general manager for Gillette.

The defendant Alexander Supermarkets, Ltd. (Alexander), is a Nebraska corporation engaged in the business of retail sales of grocery items and dairy products, with stores located in Scottsbluff and Mitchell, Nebraska.

The individual defendant Glen Zemanek is the owner and operator of Alexander. Associated is a wholesale supplier of milk and dairy products to Alexander and Zemanek at the Scottsbluff store, and Gillette is a supplier of dairy products to Alexander and Zemanek at both the Scottsbluff and Mitchell stores.

The record consists of the pleadings, interroga-

tories, depositions, and affidavits submitted and considered by the court on the motions for summary judgment.

In the latter part of 1980 Donald Reichert was the operator of Buy Rite Super, Inc., a retail grocery business in Mitchell, Nebraska. In addition to grocery products purchased from Associated, Reichert sold two brands of milk in his store. One was Gillette milk, which Reichert purchased from Ewing Distributing, and the other was Meadow Gold milk. Reichert sold one gallon of Meadow Gold 1 percent milk for $1.79. That price was considerably lower than other retail milk prices in the area and was used to draw customers to Reichert's store.

According to Reichert's testimony each of the individual defendants contacted him during the month of November 1980 in regard to his price for 1 percent milk. On November 18, 1980, defendant Wilson telephoned Reichert and requested him to raise his retail price for Meadow Gold 1 percent milk to $2.19 per gallon in order to get that price in line with other retail grocers in the area. Wilson denies telling Reichert that his prices were too low and testified that his suggestions were only to help Reichert with his cash flow.

On November 19, 1980, the defendant Zemanek, the owner-operator of Alexander, visited Reichert's store. Reichert's version is that Zemanek told Reichert he must raise his retail milk prices or Zemanek would reduce his prices to force Reichert out of business. Zemanek denies making any such statement, although he admits he was in Reichert's store for a price check at that time.

On the same day, defendant Thomas, general manager of Associated, visited Reichert's store. Reichert's testimony was that Thomas asked him to raise his retail milk prices because Thomas was afraid that Zemanek would start a milk price war that would jeopardize Associated's milk program. Thomas denies making any such statement.

On November 19, 1980, the defendant Simmon of Gillette came to Reichert's store and gave Reichert a retail milk price list. Reichert's testimony was that Simmon indicated to Reichert that the price list represented the retail milk prices which Simmon and Zemanek wished Reichert to adopt at his store. Simmon denies telling Reichert that he should move his milk prices up.

Simmon also visited the store a second time in 1980, although the exact date is in dispute. Reichert states that Simmon told him that Simmon had talked to Zemanek and that if Reichert was willing to raise his retail prices, Zemanek would lead and Reichert could follow. Simmon testified that he told Reichert: "I'm surprised you weren't up because I know Glen [Zemanek] would be if you were."

The defendant Thomas also visited the Reichert store again on November 21, 1980. According to Reichert's version of the conversation, Thomas told Reichert that if a milk price war came about as a result of Reichert's low retail milk price, Reichert could be expelled from Associated. Thomas stated that he told Reichert that he could not be expelled for his pricing decisions but that he could be cut off if he did not pay for his groceries.

During the relevant time period here both Simmon and Wilson routinely monitored milk prices in the Scottsbluff area. When one retailer, usually the local Safeway store, changed its milk prices, Simmon and Wilson would prepare a retail price list showing that new price. These price lists were then disseminated to area grocery stores.

During the relevant time frame Zemanek requested Simmon to check Reichert's milk prices to determine if they were low. Following the visits of both men to Reichert's store, Zemanek discussed the situation with Simmon and the president of Gillette. Gillette offered Zemanek a generic milk in cardboard containers at the wholesale price of $1.47 per gallon. For 1 week Zemanek sold this milk for $1.49

per gallon. Zemanek then raised his price to $1.79 per gallon.

In late November 1980 Reichert filed a complaint with the antitrust division of the Nebraska Department of Justice. The department investigated Reichert's complaint, interviewed individuals, and took affidavits. On the basis of the investigation the State of Nebraska filed its petition in this action on December 29, 1980, alleging that the various defendants had entered into a conspiracy in restraint of trade and had attempted to monopolize and conspired to monopolize trade, and that the citizens of Nebraska were injured by the violations alleged.

Motions for summary judgment were filed on behalf of the defendants, and on the basis of the pleadings, depositions, affidavits, and interrogatories, and after submission of briefs and arguments of counsel, the District Court entered summary judgment in favor of each of the defendants and dismissed the plaintiff's petition. The court later awarded attorney fees and expenses to the defendants as prevailing parties pursuant to Neb. Rev. Stat. § 59-1608 (Reissue 1978). The State has appealed.

The defendants contend that even if the State's version of the facts be accepted as true, the evidence is insufficient to raise a jury issue on a charge of conspiracy in restraint of trade. The argument is that there is no direct evidence of any conspiracy or agreement to conspire, and that the defendants are entitled to judgment as a matter of law. We disagree.

The State brought action under the state version of the Sherman Antitrust Act. That act is designated as the Consumer Protection Act, Neb. Rev. Stat. §§ 59-1601 et seq. (Reissue 1978). Section 59-1603 provides: "Any contract, combination, in the form of trust or otherwise, or conspiracy in restraint of trade or commerce shall be unlawful."

A conspiracy need not be established by direct evi-

dence of the acts charged, but may, and generally must, be proved by a number of indefinite acts, conditions, and circumstances which vary according to the purposes to be accomplished. *Hompes v. Goodrich Co.,* 137 Neb. 84, 288 N.W. 367 (1939). See, also, *Adams Dairy Company v. St. Louis Dairy Company,* 260 F.2d 46 (8th Cir. 1958); *Admiral Theatre Corp. v. Douglas Theatre Co.,* 437 F. Supp. 1268 (D. Neb. 1977), *modified* 585 F.2d 877 (1978).

The party alleging a conspiracy in restraint of trade does not have to show any overt act other than the act of conspiracy. *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150, 60 S. Ct. 811, 84 L. Ed. 1129 (1940), *reh'g denied* 310 U.S. 658, 60 S. Ct. 1091, 84 L. Ed. 1421.

Both horizontal price-fixing among wholesalers and vertical price-fixing between wholesalers and retailers are presumed to be in restraint of trade and are per se violations of the antitrust laws. *Catalano, Inc. v. Target Sales, Inc.,* 446 U.S. 643, 100 S. Ct. 1925, 64 L. Ed. 2d 580 (1980).

In the case at bar on the record set out previously, it is obvious that the parties disagreed on nearly every material factual issue in the case. The contents of conversations, the occurrences or nonoccurrences of certain events, and the intent with which individuals took the various actions which they did are all in serious dispute. In addition, the benefit of all favorable inferences which may reasonably be drawn from the evidence must be given to the State.

The case of *Bank of Valley v. Shunk,* 208 Neb. 200, 302 N.W.2d 711 (1981), is controlling here. In that case we held that the moving party is not entitled to summary judgment except where there exists no genuine issue as to any material fact and where, under the facts, he is entitled to judgment as a matter of law.

Summary judgment is an extreme remedy and should be awarded only when the issue is clear beyond all doubt. Any reasonable doubt touching

the existence of a material issue of fact must be resolved against the moving party.

Upon a motion for summary judgment the court examines the evidence not to decide any issue of fact but to discover if any real issue of fact exists. In this respect the court should take that view of the evidence most favorable to the party against whom the motion is directed, giving to that party the benefit of all favorable inferences which may reasonably be drawn from the evidence.

The judgment of the District Court in granting the motions for summary judgment was erroneous. The judgment of the District Court is reversed and the cause is remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WHITE, J., participating on briefs.

STATE OF NEBRASKA EX REL. CHARLES E. SCHULER, APPELLANT, V. FLOYD DUNBAR ET AL., APPELLEES.
333 N.W.2d 652

Filed April 21, 1983. No. 81-915.

1. **Public Meetings.** The purpose of a nunc pro tunc correction is to make the record speak the truth. Its purpose is not to correct oversights or failures in the performance of mandatory acts.
2. **Judgments: Appeal and Error.** The decision of a trial judge on a question of fact in a law action will not be set aside on appeal unless clearly wrong.
3. **Appeal and Error.** In determining whether the findings of the District Court are supported by the evidence, this court must consider the evidence and all permissible inferences therefrom in a light most favorable to the successful party.
4. **Political Subdivisions: Public Meetings.** If no intervening rights of third persons have arisen, a board of county commissioners has power to correct the record of the proceedings had at a previous meeting so as to make it speak the truth, particularly where the correction supplies some omitted fact or action and is done not to contradict or change the original record but to have the record show that a certain action was taken or thing done, which the original record fails to show.

Appeal from the District Court for Loup County: JAMES R. KELLY, Judge. Affirmed.

George Rhodes, for appellant.

Gregory Jensen, for appellees.

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

MCCOWN, J.

This is an action by the relator taxpayer against the three persons who constituted the board of commissioners of Loup County, Nebraska, to have declared void an act of the commissioners taken on January 3, 1978, setting salaries of various county officials for the ensuing term beginning in 1979. The District Court found that the defendants, at their January 3, 1978, meeting, took the equivalent of a rollcall vote with respect to the salary increases and that the record of that action was validly corrected nunc pro tunc, and dismissed the relator's petition.

This is the second appearance of this case in this court. On the previous appeal this court determined that there was not sufficient evidence to support the judgment of the District Court that Neb. Rev. Stat. § 84-1413(2) (Reissue 1981), requiring a rollcall vote of the public body in open session, had been complied with as to the meeting of January 3, 1978. This court said: "There is, therefore, no testimony that a rollcall vote was taken, nor any testimony as to how a particular member voted or whether a member abstained." *State ex rel. Schuler v. Dunbar,* 208 Neb. 69, 75, 302 N.W.2d 674, 678 (1981). The court therefore remanded the cause for further proceedings.

Upon remand to the District Court the parties stipulated that the evidence from the previous trial should be admitted into evidence. The defendants then adduced additional evidence, the relator adduced rebuttal evidence, and the matter was submitted to the court.

The record now reflects that on January 3, 1978, the three defendants, who constituted all the members of the board of county commissioners, met at the county courthouse to consider and discuss increases in the salaries of county officials for the ensuing term. The original minutes of that meeting show that all three commissioners were present and that they "set" specified new salaries for the terms of office beginning January 1979. The original minutes do not indicate whether a motion was made and seconded, whether a rollcall vote was taken, or whether the votes were recorded in any manner.

The board of county commissioners met again on January 10, 1978, and at that meeting the minutes of the January 3, 1978, meeting were read and approved. On December 6, 1978, the relator filed the petition in this proceeding, alleging that the salary increases approved at the January 3, 1978, meeting of the board were void because no rollcall vote had been taken or recorded.

On January 15, 1979, after the present action had been commenced, the following action was taken: "Motion made by Pollard, seconded by Schrup the [sic] the minutes of the January 3, 1978 meeting of the Loup County Commissioners be corrected to reflect the vote of the Board on the action taken in setting the salaries of the county officials for the terms of office beginning January 4, 1979, said vote being yes, unanimous."

The above-quoted words were then typed on the bottom margin of the original minutes of the January 3, 1978, meeting under the previously affixed signature of the county clerk. Also on the margin was the handwritten phrase, "As corrected January 15, 1979."

At the original trial in 1979 there was no direct evidence as to what actually occurred at the meeting of January 3, 1978, except the original minutes. This court held that the corrective action of January 15, 1979, was the sole support for the trial court's finding

and that the nunc pro tunc amendment, standing alone, was insufficient to satisfy the requirements of § 84-1413(2).

At the trial on remand the individual who was county clerk at the time of the January 3, 1978, meeting testified. She outlined the procedures followed at county board meetings and testified that decisions were reached by mutual agreement, and that to her knowledge there had been only one nonunanimous decision by the board during her tenure as county clerk.

With respect to the meeting of January 3, 1978, the former clerk testified that all three of the commissioners agreed to the figures that were presented. When asked as to the actual words that were used in reaching the agreement, she answered: "I can't say word for word, it would be just more of a feeling that they just agreed, you know; Do you agree with this? Yes. But, I can't say that that is the words that they said."

The clerk prepared the minutes for the January 3, 1978, meeting, and when asked whether, in her capacity as county clerk, she showed in the minutes any action taken by the board that they had not discussed and agreed upon, she responded, "No."

At the conclusion of the second trial the District Court found that the defendants, at their January 3, 1978, meeting, took the equivalent of a rollcall vote with respect to the salary increases and that their action on January 15, 1979, which amended the January 3, 1978, minutes nunc pro tunc, was correct. The District Court therefore dismissed the relator's petition and the relator has appealed.

On this appeal the relator contends that the recording of the rollcall vote at the time the vote is taken is a separate, mandatory condition and that a failure to record at the time renders void any action premised on the vote. The relator therefore argues that such a mandatory recording requirement cannot be met by a nunc pro tunc amendment correct-

ing the original minutes. Neither the applicable statutes nor the common law supports the relator's contention.

Section 84-1413(2) provides in part: "Any action taken on any question or motion duly moved and seconded shall be by roll call vote of the public body in open session, and the record shall state how each member voted, or if the member was absent or not voting."

Neb. Rev. Stat. § 84-1414(1) (Reissue 1981) provides in part: "Any motion, resolution, rule, regulation, ordinance or formal action of a public body made or taken in violation of any of the provisions of sections . . . 84-1413 . . . shall be declared void by the district court." The statutory language indicates that it is the failure to *make* or *take* the vote in accordance with the statute rather than the failure to record a properly taken vote which will result in a declaration of invalidity.

Section 84-1413(2) does not require the record to state that the vote was by rollcall, but requires only that the record show if and how each member voted. Neither does the statute set a time limit for recording the results of a vote, after which no corrections of the record can be made.

As a general rule a public body may, at a subsequent meeting, if no intervening rights of third persons have arisen, order the minutes or record of its own proceedings at a previous meeting to be corrected according to the facts, so as to make them speak the truth, although the record has once been approved. 56 Am. Jur. 2d *Municipal Corporations, Etc.* § 179 (1971).

The purpose of a nunc pro tunc correction is to make the record speak the truth. Its purpose is not to correct oversights or failures in the performance of mandatory acts. *State ex rel. Schuler v. Dunbar,* 208 Neb. 69, 302 N.W.2d 674 (1981).

On the basis of the evidence the trial judge found that the commissioners took the equivalent of a roll-

call vote with respect to the salary increases and that the nunc pro tunc correction of the January 3, 1978, minutes was correct. The decision of a trial judge on a question of fact in a law action will not be set aside on appeal unless clearly wrong. *Blaha GMC-Jeep, Inc. v. Frerichs,* 211 Neb. 103, 317 N.W.2d 894 (1982).

In determining whether the findings of the District Court are supported by the evidence, this court must consider the evidence and all permissible inferences therefrom in a light most favorable to the successful party. *Graff v. Farmers Mut. Home Ins. Co.,* 211 Neb. 13, 317 N.W.2d 741 (1982). On the record in the case at bar it cannot be said that the determination of the District Court was clearly wrong.

The fact finder has determined that all statutory requirements for taking valid action on the salary increases at the meeting of January 3, 1978, had been complied with, except recording the vote. A failure to include in the record facts which actually occurred ought not to make otherwise valid action permanently void and unchangeable.

The relator maintains that four decisions of this court mandate that a failure to record the vote at the time the vote is taken renders the action void and unalterable. The cases cited are *Payne v. Ryan,* 79 Neb. 414, 112 N.W. 599 (1907); *Beverly Land Co. v. City of South Sioux City,* 117 Neb. 47, 219 N.W. 385 (1928); *Village of McGrew v. Steidley,* 208 Neb. 726, 305 N.W.2d 627 (1981); and *City of Valentine v. Valentine Motel, Inc.,* 176 Neb. 63, 125 N.W.2d 98 (1963). *Payne, Beverly,* and *McGrew* involved situations in which this court specifically found that the required action had not been taken by the public body and therefore the attempted nunc pro tunc amendments were improper because they did not reflect what actually occurred.

In *Valentine* the statute involved required that if a resolution of annexation was adopted by a two-thirds vote of all the members of the city council, "the

resolution, and the vote thereon, shall be spread upon the records of the council or board." Neb. Rev. Stat. § 17-407 (Reissue 1962) (now repealed). The minutes actually recorded at the time show only that a resolution for annexation was offered and seconded. As this court said: "No vote was called for or recorded, and there was no declaration of the passage of the resolution. The mayor did not sign the resolution or the minutes. At this point, we observe that an inspection by an interested party of the minutes spread upon the record would have revealed a failure of legal adoption of the resolution." *Id.* at 65, 125 N.W.2d at 100.

In *Valentine* the taking of the action and compliance with all the statutory requirements were necessary conditions precedent to the filing of a petition in District Court for annexation of the property involved, but in that case the petition for annexation was filed in the District Court before any change in the council record had been made. The *Valentine* case is distinguishable from the case now at bar.

In the case at bar the statute requires only that the record shall state how each member voted or if the member was absent or not voting. The statute requires that a proper vote be *taken* as a prerequisite to the validity of the action. It does not require that the proper vote be *recorded* as a separate condition of validity. If, in fact, the vote was properly taken, the failure to properly record it at the time it was done does not make the action void.

To the extent that *State ex rel. Schuler v. Dunbar,* 208 Neb. 69, 302 N.W.2d 674 (1981), held that the recording of the rollcall vote at the time of the vote is a separate, mandatory condition of validity and cannot thereafter be corrected, the opinion is disapproved.

In the case at bar the minutes of the January 3, 1978, meeting were subsequently corrected to reflect what actually occurred at that meeting. We hold that if no intervening rights of third persons have

arisen, a board of county commissioners has power to correct the record of the proceedings had at a previous meeting so as to make it speak the truth, particularly where the correction supplies some omitted fact or action and is done not to contradict or change the original record but to have the record show that a certain action was taken or thing done, which the original record fails to show.

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

AFFIRMED.

WHITE, J., participating on briefs.

VIRGINIA JOYCE WILLIAMS, TRUSTEE OF THE ESTATE OF MICHELLE ANN WILLIAMS, A MINOR, ET AL., APPELLEES, V. NEBRASKA WESLEYAN UNIVERSITY ET AL., APPELLEES, STEVEN STANLEY ET AL., APPELLANTS.

332 N.W.2d 694

Filed April 21, 1983. No. 82-019.

1. **Partition: Estates.** A life tenant cannot compel partition of real estate over the objection of remaindermen.
2. _____: _____. Where a life tenant seeks to compel partition against remaindermen who are minors, it is the duty of the court to determine whether partition is in the best interests of the minors. If partition is not in the best interests of the minor remaindermen, it should be denied.

Appeal from the District Court for Richardson County: ROBERT T. FINN, Judge. Reversed and remanded with directions.

Richard L. Halbert, for appellants Stanleys.

Pierson, Ackerman, Fitchett & Akin, for appellees Virginia and Robert Williams.

Lantzy & Parsons, for guardian ad litem.

BOSLAUGH, MCCOWN, WHITE, HASTINGS, and CAPORALE, JJ., and COLWELL, D.J., Retired.

BOSLAUGH, J.

This is an action to partition an 80-acre tract of farmland located in Richardson County, Nebraska. In 1947 the property was conveyed by Allie M. Spivey, its then owner, subject to a life estate in the grantor, to "Ellenore M. Williams, for her use and enjoyment during her natural life with remainder at her death to her son, Robert Lewis Williams, for his use and enjoyment, as hereafter limited, during his natural life and with remainder at his death in fee simple title in equal shares to the issue of his body then living, provided and upon condition that if there shall be no such issue, then such remainder at his death shall go in fee simple title to Nebraska Wesleyan University, at Lincoln, Nebraska, to be sold by said University, and the proceeds used in the construction of some useful building for school purposes as a memorial to my late husband, J. F. Spivey, and provided and upon condition further that said Robert Lewis Williams shall not convey, mortgage or encumber his said life estate, and Nancy Jane Schmelling, of Kearney, Nebraska, hereby constituted his trustee of income from said real estate, shall collect and hold such income and shall distribute to him such part thereof as she shall determine his needs require until he shall attain the age of twenty-five (25) years, and thereafter such part thereof, but not less than one-half of such income, as she shall determine his needs require until he shall attain the age of thirty (30) years, at which time she shall turn over to him any balance, and said trusteeship shall terminate, and provided that any successor trustee shall have like powers, and shall not be related by blood or marriage to said Robert Lewis Williams."

The grantor and Ellenore M. Williams are deceased. The plaintiff Robert Lewis Williams, now 40 years of age, is the present life tenant. He is married to Virginia Joyce Williams. They have two minor daughters, Michelle Ann Williams, 16 years of

age, and Christina Ellenore Williams, 15 years of age. Virginia Joyce Williams, as trustee of the estate of the minor children, and as their next friend, appears as a plaintiff in the action.

The defendants are Nebraska Wesleyan University; all persons having or claiming any interest in the property, real names unknown; and Steven Stanley, Pamela Stanley, his wife, and Delpha Stanley, lessees of the property.

On July 2, 1981, the trial court appointed Simon Lantzy as guardian ad litem for the minor Williams children. Upon the motion of the guardian ad litem the children were stricken as party plaintiffs and the guardian ad litem authorized to intervene in their behalf and file an answer. The guardian ad litem filed an answer on behalf of the minor children, objecting to the partition of the property and alleging that there was no necessity for a partition of the property and that it was in the best interests of the minor children that the property not be partitioned.

The trial court found that the best interests of the minor children would be served by a partition and sale of the real estate, and granted partition. A referee was appointed, and in the event of a sale distribution of proceeds was to be made as follows:

"A. Costs and fees, to be determined by the Court, shall be paid from the gross sale proceeds.

"B. A sum in gross determined to be equivalent to the value of the life estate, subject to the other payments required by this decree, shall be set off to the life tenant from the net sale proceeds.

"C. The refund due the tenants in possession upon a sale of the real estate shall be deducted and paid from the value of the life estate.

"D. The amount due Nebraska Wesleyan University upon a sale of the real estate shall be deducted and paid from the value of the life estate.

"E. As proposed by the life tenant, a sum shall be deducted and paid from the value of the life estate, into a trust to be established for the benefit of the

remaindermen, whether presently living or unborn. The principal and income shall be used to purchase life insurance on the life of the life tenant. The amount of insurance will be determined by this Court and will approximate the value of the life estate.

"F. The balance, after deducting the value of the life estate, shall be paid into a trust to be established for the benefit of the remaindermen, whether presently living or unborn, to be invested until distributed to those then entitled to take, upon the death of the life tenant."

The guardian ad litem and the tenants have appealed. The tenants have no interest in the property other than that provided in a written lease dated April 11, 1979. The lease is a 14-year lease for $14,000, all of which was paid during the first year of the lease. The lessor, Robert Williams, is required to pay the real estate taxes which now amount to approximately $800 annually. In the event of a sale of the property the lessees are entitled to a pro rata refund of prepaid rent plus interest.

A life tenant cannot compel partition of real estate over the objection of remaindermen. *Dixon v. Dixon,* 189 Neb. 212, 202 N.W.2d 180 (1972). See, also, *Weddingfeld v. Weddingfeld,* 109 Neb. 729, 192 N.W. 227 (1923). Here, the remaindermen were minors and objection to partition was made in their behalf by the guardian ad litem.

The controlling principle in this situation was stated in *Miller v. Lanning,* 211 Ill. 620, 622, 71 N.E. 1115, 1116 (1904), as follows: "When a court of equity is called upon by a bill to partition lands in which infants are interested, it is the duty of the chancellor to ascertain whether the partition will result beneficially to such infants or to their detriment, and if it is found that it will not be for their best interests, partition should be denied. *Ames v. Ames,* 148 Ill. 321 [36 N.E. 110]; *Hartmann v. Hartmann,* 59 id. 103."

Robert Williams, the life tenant and father of the children who are the remaindermen, has proposed a scheme whereby the net proceeds from the sale of the property would be divided between the life tenant and the remaindermen upon the basis of an actuarial computation of the value of the life estate. The share of the remaindermen would be held in trust until the death of the life tenant. Payments to satisfy the claims of the tenants and Nebraska Wesleyan University would be made from the life tenant's share. An additional amount would be deducted from the share of the life tenant and placed in trust and used to purchase a policy of life insurance insuring the life of the life tenant with the remaindermen as beneficiaries, the amount of insurance to approximate the value of the life estate. This plan was adopted by the trial court in the order granting partition.

There is an appraisal in the record which indicates the value of the property at the time of the appraisal was $152,000. A sale of the property at this time would deprive the remaindermen of any possible future benefit from an increase in the value of the real estate.

There is no expense to the remaindermen and little risk of loss so long as their interest is in the real estate. By substituting trusts and life insurance policies for their interest in the real estate, new factors of risk and expense are introduced. What was certain becomes somewhat uncertain, and to what extent no one can at this time predict.

As we view the record it does not support a finding that it is in the best interests of the remaindermen to partition the property. The judgment of the District Court is therefore reversed and the cause remanded with directions to dismiss the petition.

The original conveyance contained a condition "that said Robert Lewis Williams shall not convey, mortgage or encumber his said life estate." No issue has been raised concerning the effect of this

restriction and we express no opinion concerning it.

The guardian ad litem is allowed the sum of $1,500 for his services in this court, to be taxed as costs against the plaintiff Robert Williams.

REVERSED AND REMANDED WITH DIRECTIONS.

KIRK C. RICHARDSON, APPELLANT, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, ET AL., APPELLEES.

333 N.W.2d 656

Filed April 21, 1983. No. 82-046.

1. **Administrative Law: Appeal and Error.** Administrative findings are required in order to inform the accused of the exact nature of the findings against him and to give a reviewing court a clear view of the basis of the administrative agency's action to permit a review of the sufficiency of the evidence.
2. **Administrative Law.** Administrative findings may be express or implied.
3. **Statutes: Administrative Law: Constitutional Law.** Language of a statute or regulation which conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices will not be held to be unconstitutionally vague or overbroad on those grounds.
4. **Administrative Law: Appeal and Error.** The standard of review which must be followed in an appeal from an error proceeding is based solely on the record originally created by the administrative tribunal, and if that record discloses the tribunal acted within its jurisdiction and its findings are supported by some competent evidence, its decision must be sustained.

Appeal from the District Court for Douglas County: D. NICK CAPORALE, Judge. Affirmed.

Mark S. Trustin of Paul E. Watts & Associates, and Larry R. Taylor, Emil M. Fabian and Barbara J. Thielen, for appellant.

Herbert M. Fitle, City Attorney, and Kent N. Whinnery, for appellees.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, and HASTINGS, JJ., and BRODKEY, J., Retired, and COLWELL, D.J., Retired.

HASTINGS, J.

The plaintiff, Kirk C. Richardson, had been an officer of the police division of the Omaha Department of Public Safety. By letter dated May 22, 1981, from the acting chief of police, he was ordered suspended and dismissed from employment. Richardson prosecuted an appeal to the personnel board of the City of Omaha, and following a hearing that appeal was denied by a vote of 4 to 0. An error proceeding was then prosecuted to the District Court of Douglas County, which affirmed the decision of the personnel board.

On appeal to this court the plaintiff assigns the following errors: (1) That the District Court erred by affirming the decision of the personnel board; (2) That the court erred by holding that the personnel board acted consistently with the law set forth in *Ostler v. City of Omaha,* 179 Neb. 515, 138 N.W.2d 826 (1965); (3) That the court erred in failing to find that chapter I, §§ 1 and 7, of the police rules and regulations were unconstitutional; and (4) That the court's decision is contrary to law and not supported by the evidence.

There is no dispute as to the facts presented to the personnel board. A corporation known as Kitchen Classics was owned and operated by one Trudy Richardson, wife of the plaintiff. The plaintiff was the secretary of this corporation and had some limited involvement in the business. Plaintiff cosigned a Small Business Administration loan which pledged the family home as collateral; he occasionally hauled cabinets from the manufacturers to Omaha; he occasionally helped in running the business; and on occasion he cashed checks paid to the business for kitchen cabinets.

Kitchen Classics began having financial problems in the fall and winter of 1980-81. In January and February of 1981 a Mrs. Juranek and a Mrs. Wilshusen placed orders with Trudy Richardson for kitchen cabinets. Contracts were signed and the

cabinets were paid for in advance by check. One check was made out to Kitchen Classics; the other was made out in blank. These checks were eventually endorsed and cashed by Kirk C. Richardson, using his police credentials as identification. He testified that he assumed the checks were in payment of cabinets ordered by these people. Of the funds obtained from these checks, some were delivered to the cabinet factory in Tennessee for cabinets for someone; $700 was converted to cash for his expenses in going to Tennessee; and $6,000 was taken by Richardson to the county attorney, which he knew was not going to be used to buy cabinets for the customers.

By late February 1981 both Juranek and Wilshusen became concerned about the delivery of their cabinets, and after some investigations they felt their orders would not be delivered. Neither party received her cabinets or her money back. They then filed complaints with the Douglas County attorney's office and criminal charges were brought against the Richardsons. Kirk was arrested on May 21, 1981, and charged with three counts of theft by deception, a felony, as a result of these transactions. Following a preliminary hearing, he was bound over to District Court.

Kirk C. Richardson was suspended on May 21, 1981, and dismissed June 20, 1981, from the Omaha police force for violation of the rules and regulations of the department of public safety, police division, i. e., chapter I, § 1, which reads: "In general this section regulates the conduct of officers and employees of the Police Division while on or off duty, whether in uniform or plain clothes.

"Any act or omission that is not in accord with the general and accepted code of moral or ethical conduct is covered by this regulation," and chapter I, § 7, which reads: "Any officer or employee whose actions or conduct are such as to cause him to be charged, bound over, indicted, or held to answer for

a serious criminal matter, provided such charge is not frivolous and wholly without foundation, shall be subject to disciplinary action."

As stated above, the personnel board and the District Court both upheld this dismissal.

Richardson urges his dismissal was improper, claiming the guidelines set forth by this court in *Ostler v. City of Omaha, supra,* were not followed by the personnel board. The *Ostler* case dealt with the suspension and demotion of the chief of police, C. Harold Ostler, by the public safety director of the City of Omaha. This action was appealed to the personnel board, which affirmed the director's decision. Ostler, by petition in error, claimed, among other things, that the personnel board's decision was improper under the home rule charter of the City of Omaha, in that the board failed to make sufficient written findings. The District Court agreed, sustained the petition in error, and we affirmed that judgment.

Ostler had been charged with violating various portions of the city code and of the rules and regulations of the department of public safety, police division.

The findings of the board in that case were so indefinite that there was no way to determine which sections of the code and/or rules Ostler actually violated. This court said: "The mandate to reduce the findings to writing is a matter of substance. We construe its intention to be to inform the accused of the exact nature of the finding against him. A specific finding is particularly important where, as here, at least a portion of the alleged misconduct is based upon hearsay and alleged remarks appearing in the public press on different occasions. As the district court so well phrased it: 'The critical events in suit span more than three months, and the evidence, years.' . . . It is one thing to make a finding in the language of the statute, which we have held permissible in interpreting decisions of state

administrative agencies. [Citation omitted.] It is quite a different matter, however, to merely refer to the number of the section of the code which might be violated, without particularizing the nature of the violation when the code requires written findings." *Id.* at 522-23, 138 N.W.2d at 831-32.

In *County of Lancaster v. State Board of Equalization & Assessment*, 181 Neb. 738, 150 N.W.2d 886 (1967), citing *Ostler*, we said: " 'The principal motivating force [as to the requirement for findings] is the need of the reviewing court for a clear view of the basis for the agency's action, * * *.' . . . Unless we know the facts found by the State Board, we cannot reasonably pass on the sufficiency of the evidence." *Id.* at 741, 150 N.W.2d at 888.

We do not have the benefit of the findings made in *Ostler*. However, we believe that an examination of those made in the instant case will demonstrate their adequacy. The initial order of dismissal originated from the police division of the department of public safety, which order notified Richardson of his dismissal effective June 20, 1981, as a result of action taken under chapter I, §§ 1 and 7, of the rules and regulations, which rules were then set out in full. The order then recited in some detail the facts supporting such action. This included a specification of a May 21, 1981, arrest as the result of a warrant issued through the county attorney's office charging three felony counts of theft by deception. It further specified that the warrant resulted from complaints received in regard to the business practices of Richardson and his wife in the operation of a kitchen cabinet business, and that Richardson had obtained property by deceptive practices from Leo J. Juranek, Gary Herse, and Lola Wilshusen, the property of each having a value of over $1,000.

The decision and findings of the personnel board recited the fact of the order of the police division suspending and dismissing Richardson effective June 20, 1981, for violations of chapter I, §§ 1 and 7,

of the rules and regulations, and then set forth said sections verbatim. The decision concluded with a finding that Richardson "was in violation of Chapter I, Sections 1 and 7 of the Rules and Regulations of the Police Division of the Public Safety Department," and an order that the appeal be denied.

It is quite apparent that the personnel board considered and passed on the findings of fact made by the acting chief of police and, in affirming such action, impliedly adopted those findings as its own. An examination of the testimony before the board reveals that the only facts considered were those surrounding the obtaining by Richardson of money as set forth in the initial discharge order and the resulting filing of charges. It is clear that Richardson knew exactly with what he was charged before the board hearing and fully understood the reason for his dismissal, and that this court has a clear conception of the basis for the board's action and the rationale of the District Court's affirmance. Administrative findings may be express or implied. *County of Lancaster v. State Board of Equalization & Assessment, supra.*

Richardson also seeks to have chapter I, §§ 1 and 7, declared unconstitutionally vague and overbroad, and thereby overturn his dismissal. The language used in chapter I, § 7, is plain and clear. If an officer is charged with a "serious criminal matter," as long as it is not frivolous, that officer shall be subject to plenary action. While there may be hypothetical situations put to this court under which this regulation may seem vague and overbroad, the facts in this appeal do not present such a case. As previously stated, Richardson was arrested, charged, and bound over on three felony counts of theft by deception. There can be no doubt that this presents a serious criminal matter. Section 7 clearly applies in this case and cannot be said to be vague or overbroad on these facts. "The language here challenged conveys sufficiently definite warning as to

the proscribed conduct when measured by common understanding and practices. The Constitution requires no more." *United States v. Petrillo*, 332 U.S. 1, 8, 67 S. Ct. 1538, 91 L. Ed. 1877 (1947).

Richardson cites *United States v. Harriss*, 347 U.S. 612, 74 S. Ct. 808, 98 L. Ed. 989, (1954), in support of the proposition that a regulation is vague, broad, and indefinite in its meaning if it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden . . . ." *Id.* at 617. However, that case goes on to state at 618: "On the other hand, if the general class of offenses to which the statute is directed is plainly within its terms, the statute will not be struck down as vague, even though marginal cases could be put where doubts might arise." We believe that chapter I, § 7, passes constitutional muster. *CSC v. Letter Carriers*, 413 U.S. 548, 93 S. Ct. 2880, 37 L. Ed. 2d 796 (1973).

Finally, Richardson argues that the charges brought against him are frivolous and therefore are not a proper basis for disciplinary actions against him under § 7.

The standard of review in error proceedings is well established. The court's review is solely on the record created by the tribunal whose action is being reviewed. If the record shows the tribunal acted within its jurisdiction and its findings are supported by some competent evidence, its decision must be sustained. *Caniglia v. City of Omaha*, 210 Neb. 404, 315 N.W.2d 241 (1982); *Harnett v. City of Omaha*, 188 Neb. 449, 197 N.W.2d 375 (1972). There is evidence in the record showing Richardson's involvement in this case on which these charges could be based.

Richardson attempts in a motion to remand to call our attention to the fact that the criminal charges filed against him have now been dismissed. It should be sufficient to state that such evidence is not contained in the bill of exceptions and may not be considered by us on appeal. However, we would hasten to add that dismissal of the charges, in and of itself,

in view of the record before us, does not permit us to say as a matter of law that the original charges and bindover were "frivolous and wholly without foundation."

At this time we need not consider the constitutionality of chapter I, § 1, of the rules and regulations of the department of public safety, police division, since § 7 clearly applies in this case and is a sufficient basis on which the personnel board could base its decision.

For the foregoing reasons, the judgment of the District Court was correct and is affirmed.

AFFIRMED.

DARLENE JEFFRES, APPELLEE, V. COUNTRYSIDE HOMES OF LINCOLN, INC., A NEBRASKA CORPORATION, APPELLANT.

333 N.W.2d 754

Filed April 21, 1983. No. 82-109.

1. **Police Officers and Sheriffs: Public Officers and Employees.** A judicial officer, whether of a court of limited or general jurisdiction, is not liable in a civil action for acts performed in his judicial capacity, if he has acquired and does not exceed the jurisdiction conferred by law. He is not liable in damages for mere error of judgment while acting within his jurisdiction, but he is not protected if he assumes to act beyond the scope of his authority.
2. _____: _____. Sheriffs and constables are not relieved from liability for acts of negligence, but are bound by the same rule of negligence that a civilian is bound by under like circumstances. A peace officer may be held liable for negligent or wrongful acts causing damage to property. If an officer, in executing a writ of restitution or possession, wantonly or carelessly and roughly handling chattel property injures it, he is liable for the damage caused.
3. _____: _____. The fact that an officer acts in good faith will not itself protect him from liability for negligence.
4. _____: _____. Ordinarily, a judgment or order of a court having apparent jurisdiction, if valid on its face, protects a sheriff or constable from liability for any proper or necessary act done in its execution.

5. _____: _____. The immunity enjoyed by an official in executing a writ or order of the court generally extends to those rightfully aiding the officer, but such persons are liable for their negligent acts which result in damage to persons or property.
6. **Judgments: Appeal and Error.** The judgment of a trial court in an action at law where a jury has been waived has the effect of a verdict of a jury and should not be set aside unless clearly wrong; in determining the sufficiency of the evidence to sustain a judgment, that evidence must be considered most favorably to the successful party and every controverted fact must be resolved in that party's favor and he is entitled to the benefit of any inferences reasonably deducible from it.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Terrance A. Poppe of Hecht, Sweet, Alesio & Morrow, P.C., for appellant.

Douglas McArthur of McArthur, Lamb, Lyford, Gilmore & Janssen, for appellee.

BOSLAUGH, MCCOWN, and HASTINGS, JJ., and BRODKEY, J., Retired, and RIST, D.J.

BRODKEY, J., Retired.

Countryside Homes of Lincoln, Inc., a Nebraska corporation, (hereinafter referred to as Countryside Homes), one of the defendants below, appeals to this court from a judgment rendered against it in the District Court of Lancaster County in favor of the plaintiff-appellee, Darlene Jeffres (hereinafter referred to as Darlene). In her brief on appeal Darlene states that her name was incorrectly spelled "Jeffries" in the original petition, but that the correct spelling of her surname is "Jeffres." Darlene brought this action to recover damages to her mobile home, which she alleged resulted from the negligent conduct of Countryside Homes while assisting a constable of the municipal court of Lincoln, Nebraska, acting pursuant to a writ of restitution, in the towing and removal of her mobile home from

premises restored to the Gaslight Mobile Home Park (hereinafter referred to as Gaslight), her previous landlord, which had previously obtained a judgment against her in a forcible entry and detainer trial in the municipal court of Lincoln, Nebraska.

After the filing of the negligence petition in the Lancaster County District Court, the constable, Harold Wiese, and the city of Lincoln were made additional parties defendant to the action, but these defendants were later dismissed by the court on motions for summary judgment filed by them. The dismissal of these additional defendants was not appealed from, and therefore the correctness of the District Court's order of dismissal, particularly its dismissal of the constable from the action, is not an issue in this appeal. The court's order of dismissal does not specifically state the basis or grounds for dismissing the constable, but it is fair to assume that it was based on the constable's claim of some type of governmental or quasi-judicial immunity, inasmuch as in his answer to the third-party complaint filed by Countryside Homes against him and the city of Lincoln, the constable alleges, among other things, "that at all times relevant hereto, this third party defendant acted in good faith and is immune from the claims asserted in the third party complaint." We add, in passing, that this is the only place in all the pleadings filed in the action where the word "immune" or "immunity" is mentioned.

Darlene's negligence action against Countryside Homes was tried to the court, pursuant to a waiver of jury, on August 12 and 13, 1981. The trial court entered its judgment on November 17, 1981, holding that Countryside Homes acted negligently when moving Darlene's mobile home, that its conduct was the proximate cause of damage to Darlene's mobile home, and that the damage to the mobile home was in the amount of $6,300, for which it entered judgment and costs in favor of Darlene and against

Countryside Homes. The trial judge was requested to make detailed findings of fact, and did so in his seven-page judgment order. Among such findings of fact is the following: "Wayne Matthes' [the manager of Countryside Homes] impression that Countryside Homes was not liable because defendant was assisting the Municipal Court constable in removing plaintiff's mobile home from the rental lot is a mistake as to what the law is and is not a legal defense in this case."

Following the overruling of its motion for a new trial, Countryside Homes then appealed to this court. In its brief on appeal appellant alleges as its assignments of error that the lower court erred (1) in not granting quasi-judicial immunity to appellant in its assistance of a court official executing a valid court order; (2) in failing to hold that where appellant acted in good faith in assisting a court official in his execution of a court order, it was immune from liability; (3) in finding appellant's conduct under the circumstances of this case constituted actionable negligence; (4) in its determination of the value of appellee's mobile home immediately before and immediately after it was moved by appellant, to wit, that said home had a market value of $7,200 immediately prior to its being moved by appellant, and a market value of $900 immediately after it was moved by appellant.

We have concluded after reading the record in this case that while some of the testimony and evidence contained therein is conflicting, there is sufficient evidence to sustain the detailed findings of fact by the trial court contained in its judgment order. The scope of review of this court is well set out in our opinion in *Burgess v. Curly Olney's, Inc.,* 198 Neb. 153, 156, 251 N.W.2d 888, 890 (1977), in which we held: " 'The judgment of a trial court in an action at law where a jury has been waived has the effect of a verdict of a jury and should not be set aside unless clearly wrong.

" 'In determining the sufficiency of the evidence to sustain the judgment, that evidence must be considered most favorably to the successful party and every controverted fact must be resolved in that party's favor and he is entitled to the benefit of any inferences reasonably deducible from it.' " In this case we conclude that the trial court was not clearly wrong in its conclusion that Countryside Homes and its employees were guilty of negligent acts in moving Darlene's mobile home and were not protected against liability for such acts and resulting damages by the doctrine of quasi-judicial immunity, as hereinafter discussed; but, on the other hand, we are of the opinion that the trial court erred in its determination of the amount of such damages suffered by the appellee, and we must therefore remand the case to the trial court only for the purpose of the determination of the amount of damages incurred by the appellee.

It appears from the record in this case that Darlene purchased the mobile home in question on June 27, 1975, under a contract reciting a consideration of $9,832.50, and had lived in said home with her children for a period of 4 years prior to eviction, said home being parked in a rental space in Gaslight at 501 West Butler in Lincoln, Nebraska. When she purchased the home the following items were included in the purchase price: one sofa, one chair, two lamps, one coffee table, two end tables, kitchen table and four chairs, refrigerator, stove, three beds, two chests, and two window air-conditioners. The record also reflects that on August 3, 1979, Gaslight commenced a forcible entry and detainer action against Darlene in the municipal court of Lincoln, seeking restitution of the premises occupied by Darlene at 501 West Butler, and obtained a judgment for restitution of the premises on August 20, 1979. Thereafter, a writ of restitution was issued on said judgment, commanding the constable of the municipal court to remove Darlene

from the premises in question, and said writ was placed in the hands of Constable Wiese for execution. Attempts by Darlene to find a new location for her home in other mobile home parks in Lincoln were unsuccessful. Therefore, on August 29, 1979, acting pursuant to the writ of restitution, Constable Wiese contacted the manager at Gaslight to obtain her assistance in removing Darlene's mobile home from the premises, as Constable Wiese was unable to move the home on his own but needed the assistance of a toter to do so. He testified that he told Judy Allison, the manager for Gaslight, that he could hire somebody, or Gaslight could make its own arrangements, which would "cut down the cost," but that, either way, Gaslight would bear the towing costs. He further testified that the manager advised him that she had the men and equipment available and that hiring someone else would not be necessary. Thereafter, someone from Gaslight's office contacted Countryside Homes and requested its services to remove the mobile home. Glen Bomberger, who did the maintenance and towing for Gaslight and who was also associated with Countryside Homes, and Richard Usher, who worked as a serviceman and driver for Countryside Homes, went to the Gaslight office and met Constable Wiese preparatory to removing the home at 501 West Butler, having previously moved another mobile home at a different address. Constable Wiese testified that the only instruction he gave Bomberger and Usher was with reference to where to park the trailer after they removed it, which was to be at First and Belmont Streets, and that he did not give Bomberger or Usher any instruction on how the move should be conducted, as he had no expertise in moving mobile homes and was not qualified to judge the proper procedure to be followed. He admitted, however, that he did not object to the manner in which the home was moved. Both Bomberger and Usher, however, had had considerable experience in moving mobile

homes. Constable Wiese saw Bomberger and Usher remove the skirting from around the mobile home, and stated that it appeared to be in good condition at that time and did not appear to be leaning or tilting.

In his findings of fact contained in his judgment order, the trial judge found: "Mr. Bomberger and Mr. Usher started to move said mobile home by towing it with the toter and had moved said mobile home only five to ten feet when two of the left back tires blew out. The mobile home was leaning to the left at this time and the defendant's employees kept moving it out to the street. The left side of the mobile home caught on a lamp pole which put two gouges in the siding of said mobile home. Plaintiff's mobile home was moved about a quarter of a block at which time defendant's employees stopped and replaced the blown out tires and the rims on the wheels with the blown out tires. Those rims had started to flatten out. The mobile home at this time was leaning to one side. Defendant's employees started towing said mobile home again and after traveling approximately three blocks, the two tires that had been replaced blew out. The trailer started to lean more to one side. Defendant's employees did not stop but continued to tow plaintiff's mobile home approximately two blocks further to the area of First and Belmont Streets. Plaintiff's mobile home was moved a total distance of approximately seven blocks.

"Mr. Bomberger and Mr. Usher who both had experience in moving mobile homes knew or should have known that moving said mobile home with no tire on one axle at the start of said move and then continuing on with the move after other tires had blown out as discussed above was likely to cause damage to said mobile home. They did not exercise ordinary and reasonable care in order to prevent damage to said mobile home when they towed plaintiff's mobile home in the manner discussed immediately above and failed to exercise ordinary and

reasonable care in towing plaintiff's mobile home into a lamp pole. The damage to said mobile home occurred during the move from the rental lot on West Butler Street to the area at First and Belmont Streets." The trial judge, in his order, also found: "Mr. Bomberger and Mr. Usher were acting at the time of said move within the scope of their employment with the defendant Countryside Homes of Lincoln, Inc. The negligence of the defendant's employees was the proximate cause of the damage to said mobile home. The defendant Countryside Homes of Lincoln, Inc., is liable for plaintiff's damages." The evidence in the record amply supports the findings of the trial court, and we conclude that Countryside Homes is liable and responsible for the negligent acts of its employees committed in the course of their employment which resulted in damage to the mobile home, unless, of course, Countryside Homes is excused from such liability under the doctrine of quasi-judicial immunity because of the fact that at the time of such damage its employees were assisting the constable of the municipal court acting under a writ of restitution issued by such court. In that respect Countryside Homes argues that any quasi-judicial immunity extended to court officials in their execution of a valid court order also extends to those persons who, of necessity, assist those court officials, and that where the person assisting a court official in the execution of a court order has acted in good faith pursuant to the command of the court official, he is protected from liability. We shall now discuss those issues and defer discussion of the question of the amount of damages awarded Darlene by the trial judge.

As previously stated, Constable Wiese and the city of Lincoln were dismissed from the action before trial, on their respective motions for summary judgment, and are not involved in this appeal. The reasons for such dismissal are not stated or set out in the court's order of dismissal but were presumably

on the basis of the constable's judicial or quasi-judicial immunity, although not clearly so, as the third-party petition filed in the action also alleges grounds and acts of negligence against the constable. In any event it is clear that there has been no finding or judgment by the court with reference to any negligence on the part of the constable in removing the mobile home from its parking place in Gaslight. However, even assuming for the sake of argument, which we do not admit to be factually correct, that the constable by his actions at that time did commit negligent acts contributing to the injury to the trailer home, we now discuss what the liability of the constable might have been, particularly whether he is protected from liability under the doctrine of quasi-judicial immunity or, on the other hand, is still responsible for his negligent acts in the performance of the duties and authority contained in the writ of restitution; and, further, whether such immunity, if any, should be extended to Countryside Homes, the third party, which assisted him in towing the trailer, or whether such third party should, in any event, be liable for its own independent acts of negligence in towing such trailer.

The general rule with reference to the immunity of public officers from tort liability is set out in Restatement (Second) of Torts § 895D at 411 (1979), as follows: "(1) Except as provided in this Section a public officer is not immune from tort liability. (2) A public officer acting within the general scope of his authority is immune from tort liability for an act or omission involving the exercise of a judicial or legislative function. (3) A public officer acting within the general scope of his authority is not subject to tort liability for an administrative act or omission if (a) he is immune because engaged in the exercise of a discretionary function, (b) he is privileged and does not exceed or abuse the privilege, or (c) his conduct was not tortious be-

cause he was not negligent in the performance of his responsibility." The comments to the above section are enlightening, and we quote certain pertinent statements contained therein, as follows: "*b. Discretionary functions.* The complex process of the administration of government requires that officers and employees be charged with the duty of making decisions, either of law or of fact, and of acting in accordance with their determinations. It has traditionally been explained by the courts that public officers and employees would be unduly hampered, deterred and intimidated in the discharge of their duties, and as a result undesirable shackles would be imposed upon agencies of government, if those who act improperly or even exceed the authority given them were not protected in some reasonable degree by being relieved from private liability. The basis of the immunity has been not so much a desire to protect an erring officer as it has been a recognition of the need of preserving independence of action without deterrence or intimidation by the fear of personal liability and vexatious suits. . . .

"*c. Judicial or legislative functions.* A judge of a court of general jurisdiction or a legislator is given an immunity that is general in character. He is not liable for his discretionary acts or omissions even though he is found to have acted with malicious or other improper motives. . . .

"The immunity may extend beyond judges and legislators. It may apply, for example, to a prosecuting attorney or to a clerk of court or to a legislative official. This immunity existing for these officers, however, usually may not extend to improper motive.

. . . .

"*d. Administrative functions.* A high-level executive officer is usually accorded the same type of immunity as that given the judge and for the same reasons. He, too, must feel free to act in his discre-

tionary decisions as he sees fit, without being subject to influence by the threat of a harassing suit. . . .

. . . .

"*e. Immunity, privilege, nonnegligent conduct.* A preliminary set of distinctions must be drawn, however, before the factors can be properly identified and described. The cases have usually gone on the assumption that if the function in which the officer is engaged is characterized as discretionary, an immunity from tort liability applies and he is not liable. The problem is not so simple. Courts speak of immunity in many types of situations. Thus the existence of an 'immunity' may mean that, so long as an officer acts within the general scope of his authority (see Comment *g*), he is not liable, regardless of his motives and whether he tried to exercise his judgment in good faith or not. . . . This is a full immunity—a true immunity—though it is sometimes called an absolute privilege.

"In a second situation, the existence of the 'immunity' may be treated as meaning that the officer is not liable if he made his determination and took the action that harmed the other party in good faith, in an honest effort to do what he thought the exigencies before him required. . . . If the action against the officer is for an intentional tort in which the officer knows that he is imposing the harm on the other party or is substantially certain to do so, this could properly be called a privilege. But if the action is for negligence, for acting or failing to act, thus creating an unreasonable risk of harm, it would be called an immunity. There are no privileges in a negligence action, since the issues involved are treated in the issue of whether the conduct was negligent. For this reason it seems appropriate to treat the defense as an immunity in both situations. It is a limited immunity, but it is as broad as good faith.

"In a third situation, the existence of 'immunity' may mean that the officer is not liable if his determination to take or not to take the action was rea-

sonable. . . . In an action for negligence, the question of whether the officer acted reasonably is actually one of whether he was negligent or not. The standard of what a reasonably prudent person would do under like circumstances applies. . . . This means that, like the doctor or lawyer, he is held to a higher degree of skill and knowledge and training and expertise, but also that he may be given substantially wider discretion in the exercise of that knowledge and expertise and that he may be held not liable for a 'mere error of judgment.'. . .

"The final situation is one in which the officer is liable unless he was correct in his determination. . . . If the action is for negligence, the conduct is of a kind for which no particular expertise or training is required or in which there has been substituted for the general standard of reasonableness a specific rule of conduct, as in negligence per se. Here, obviously, it is inappropriate to speak of tort immunity.

. . . .

"*f. Factors in determining what is a discretionary function and its consequences.* It should thus be apparent that in a tort action against a public officer the court has the responsibility of determining not only whether he was engaged in exercising a discretionary function but also, if he is, how extensively this circumstance should work in his defense. There is no single test. Attempts to solve the problem by setting forth a precise definition of the term, discretionary function, have been less than helpful. The expression is not only a standard (see Comment *d*); it is also a legal conclusion whose purport is only somewhat incidentally related to the definitions of the two words composing it. . . .

. . . .

"*g. Scope of official authority.* An immunity protects an officer only to the extent that he is acting in the general scope of his official authority. When he goes entirely beyond it and does an act that is not permitted at all by that duty, he is not acting in his

capacity as a public officer or employee and he has no more immunity than a private citizen. . . .

. . . .

"*h. Ministerial acts.* If an act of the official involves less in the way of personal decision or judgment or the matter for which judgment is required has little bearing of importance upon the validity of the act, there is no immunity or privilege. These acts are commonly called 'ministerial,' or sometimes 'operational.' The distinction is always one of degree. Ministerial acts are those done by officers and employees who are required to carry out the orders of others or to administer the law with little choice as to when, where, how or under what circumstances their acts are to be done. Examples of acts held to be ministerial under ordinary circumstances are the preparation of ballots, the registration of voters, the recording of documents and filing of papers, the care of prisoners, the driving of vehicles, the repair of highways, the collection of taxes, the taking of acknowledgments and the dipping of sheep. Yet under particular fact circumstances each of them may be held to involve the exercise of discretionary decision.

"*i. Legislative modifications.* The scope of an officer's liability in tort may be broadened or restricted by legislative action. Two federal statutes illustrate this. [The two acts referred to are the Civil Rights Act and the Federal Tort Claims Act.]

. . . .

"*j. Relationship of public officer's tort immunity to that of the government.* As a general rule, the immunity of a public officer is coterminous with that of his government. But this is not necessarily true. . . ." *Id.* at 412-19.

We now examine the pronouncements of this court with reference to the problem under consideration. At the outset we wish to point out that, apparently, Nebraska law does not agree with the statement in the Restatement with reference to the immunity af-

forded to an official in the performance of ministerial acts. The Restatement's position is that where the judgment or discretion required has little bearing of importance upon the validity of the act, there is no immunity or privilege. In the early Nebraska case of *Atwood v. Atwater,* 43 Neb. 147, 151, 61 N.W. 574, 575 (1895), this court stated: "It is a familiar rule to the bench and the profession, and one of great antiquity, that a judicial officer, whether of a court of limited or general jurisdiction, is not liable in a civil action for acts performed in his judicial capacity, if he has acquired and does not exceed the jurisdiction conferred by law. He is not liable in damages for mere error of judgment while acting within his jurisdiction, but he is not protected if he assumes to act beyond the scope of his authority." In the same case at 154-55, 61 N.W. at 576, this court cited from the Michigan case of *Wall v. Trumbull,* 16 Mich. 228 (1867), as follows: " 'A ministerial officer has a line of conduct marked out for him, and has nothing to do but follow it; and he must be held liable for any failure to do so which results in the injury of another. A judicial officer, on the other hand, has certain powers confided to him to be exercised according to his judgment or discretion; and the law would be oppressive which should compel him in every case to decide correctly at his peril. . . .' "

In the opinion this court also stated at 155-56, 61 N.W. at 576-77: "The remaining question is as to the liability of the marshal for serving the warrant and imprisoning the plaintiff in accordance with the command of the mittimus to him directed by the police judge. Both writs were regular on their face, and the court, or judge, had the jurisdiction to issue the same. This being so, the marshal was protected by the processes for everything he did thereunder within the line of his official duty. But he would be liable for any unnecessary abuse of the plaintiff, or if he exceeded his authority and acted oppressively

in the execution of the writs. The principle is well recognized by the authorities that a ministerial officer, acting under a process regular and valid on its face issuing from a court or tribunal with apparent jurisdiction to issue the same, is protected in obeying it."

The same rule was enunciated by this court in the case of *Koepf v. County of York*, 198 Neb. 67, 251 N.W.2d 866 (1977), in which we held that a ministerial officer, acting under a process regular and valid on its face issuing from a court or tribunal with apparent jurisdiction to issue the same, is protected in obeying it. In that case, which was an action brought under the Political Subdivisions Tort Claims Act, we stated at 72, 251 N.W.2d at 870: "We hold that the Political Subdivisions Tort Claims Act does not extend liability to a subdivision of this state for alleged negligent action of the county attorney in the filing of juvenile petitions.

"Similar and equally convincing arguments exist that the sheriff is also immune. A ministerial officer, acting under a process regular and valid on its face issuing from a court or tribunal with apparent jurisdiction to issue the same, is protected in obeying it. See Atwood v. Atwater, 43 Neb. 147, 61 N.W. 574 (1895). The sheriff's act was ministerial in character. He is immune from liability for carrying out those acts. The county of York, of which the sheriff is an officer, is likewise immune for the same reasons set forth above."

Under the facts of this case as set out in the record, it seems clear that the constable was acting ministerially in executing the writ of assistance issued by the court in the forcible entry and detainer action and that under the rules above stated would have been entitled to claim immunity for his acts legitimately and properly performed in doing so. Would the doctrine of quasi-judicial immunity have protected the constable in this case, even assuming that it had been determined that he was guilty of

negligent acts? We think not. The issue in this case is not the propriety or validity of the court's order but, rather, the manner in which the order was enforced. In her action Darlene does not complain of a "ministerial act," but is requesting redress for the negligent acts of Countryside Homes only. We do not believe the doctrine of judicial immunity is relevant or should be applied in this case. The law is well established that sheriffs and constables are not relieved from liability for acts of negligence, but are bound by the same rule of negligence that a civilian is bound by under like circumstances. 80 C.J.S. *Sheriffs and Constables* § 52, n. 42 at 228 (1953). In 70 Am. Jur. 2d *Sheriffs, Police, and Constables* § 69 at 180-81 (1973), it is stated: "A peace officer may be held liable for negligent or wrongful acts causing damage to property. If an officer, in executing a writ of restitution or possession, wantonly or carelessly and roughly handling chattel property injures it, he is liable for the damage caused. On the other hand, a sheriff is not liable for minor items of breakage caused by the eviction of a tenant, where negligence is not shown, even though the plaintiff's title fails and the landlord may be liable." Likewise, in § 74 of the same treatise, at 184, the rule is stated: "It is a well-settled rule that where an officer takes property by virtue of a writ, and subsequently, through want of proper care or diligence, allows it to be injured, wasted, or lost, or diverted to some other purpose, he is liable for the resulting injury." The following cases from other jurisdictions are similar to the facts of the instant case and support the above rule. In *Snyder v. Hart*, 78 F.2d 237 (D.C. Cir. 1935), it was held that a U.S. marshal, who executed a writ of restitution in the absence of the tenant and with knowledge that the tenant had not received notice of eviction and with 8 days remaining in which to execute the writ, was liable to the tenant for damages for negligently removing household goods onto the sidewalk at a time at which damage by rain was

actually occurring or reasonably to be expected. Likewise, in *Johnson v. Nelson,* 146 Wash. 500, 263 P. 949 (1928), the court held that the sheriff who had, pursuant to a writ of restitution fair on its face, evicted the tenants from the property upon their refusal to deliver possession was not liable to such tenants for breakage of household goods during such eviction, in the absence of evidence of such removal having been accomplished in a negligent manner. And in *The State ex rel. Carroll v. Devitt,* 107 Mo. 573, 17 S.W. 900 (1891), the court held that a writ of possession, though regular on its face, did not relieve the officer executing it from liability for carelessly breaking the tenant's furniture in putting the landlord in possession, the court stating at 576, 17 S.W. at 901: "But notwithstanding the writ of possession was fair and regular on its face, yet this does not and could not authorize the constable, or those acting under his orders, to do as Mrs. Lizzie Buda testified they did do, to-wit, 'handled the furniture very carelessly and roughly and broke some of it.' No writ, however valid or regular on its face, will sanction anything of this sort. An officer who misuses property in such a way as stated becomes a trespasser *ab initio,* and his writ affords him no protection. Cooley on Torts [2 Ed.] 541." In *Luddy v. The People,* 219 Ill. 413, 415-16, 76 N.E. 581 (1905), the court stated: "As a ground of reversal it is contended that plaintiff in error should be protected because he was a duly elected, authorized and acting constable; that the execution was regular upon its face; that he was merely doing his duty; that he had no legal notice of Mrs. Kimball's ownership of the goods until after the sale; also that the evidence does not sustain the verdict. There can be no doubt but that a constable acting in good faith under a writ regular upon its face will be protected in a *reasonable and lawful* performance of his duty, and if that were the only question presented in this case it would be easy of solution. But the fact that a man is

a constable and holds a writ regular on its face does not authorize him to do illegal and unlawful acts under the cloak of such authority. The mere fact that he is an officer should be a sufficient guaranty that he will act lawfully and that people who have to deal with him will be protected in their rights. If he steps over the bounds of his duty and arbitrarily and unlawfully does things which he is prohibited from doing, it is all the more reason why he should be punished for his illegal acts." (Emphasis supplied.) Nebraska case law is to the same effect. In *Brock v. Hopkins*, 5 Neb. 231 (1876), this court held that the clerk of a district court is a ministerial officer and is liable for damages obtained by his "negligently and carelessly" taking insufficient security, but that if he exercises a reasonable degree of care in the performance of his duty, he is not liable, even if the security should prove insufficient. The case of *Kopplekom v. Huffman*, 12 Neb. 95, 10 N.W. 577 (1881), involved a shooting by the sheriff of a prisoner who the sheriff contended was really an escaped prisoner. In that case the court gave a number of instructions, including the following: That if the jury found that Kopplekom shot and broke the plaintiff's leg, and at the time of doing so " 'had a writ of mittimus for the custody of the escaped prisoner Clark, but that he had no other process for the arrest of the plaintiff; that the defendant Kopplekom did arrest and take the plaintiff into his custody, as such sheriff, and against the wish and consent of the plaintiff; that the plaintiff broke loose from the arrest and custody of the defendant Kopplekom, to effect his escape therefrom; that the shooting and injury was done to prevent the plaintiff from escaping, and freeing himself from said arrest and custody; that the defendant mistook the plaintiff for the escaped prisoner Clark. Yet if the jury further find that said defendant Kopplekom might by the exercise of due care and diligence have ascertained that the plaintiff was not said Clark, then the

jury will find for the plaintiff.' " *Id.* at 101, 10 N.W. at 578. The appellate court approved the instruction as correct, and stated at 101, 10 N.W. at 578-79: "Under the pleadings the real question in issue was simply whether in what he did in and about the arrest, and attempted detention, of the defendant in error, he was wanting in that reasonable care and caution which is due to the safety and rights of the innocent. That question was properly presented to the jury by the charge, and we see no reasonable ground of complaint in anything that the court did." In *Shull v. Barton*, 56 Neb. 716, 77 N.W. 132 (1898), this court held that the fact that an officer acts in good faith in approving a replevin bond will not itself protect him from liability for negligence in the premises; and that if he negligently approves a replevin bond signed by insolvent or insufficient sureties, and damages result, he is liable. In *Gilbert v. Rothe*, 106 Neb. 549, 184 N.W. 119 (1921), it was held that a sheriff who levies on the property of a wife under an execution against her husband is liable for resulting damages. And, finally, in *Nash v. City of North Platte*, 198 Neb. 623, 255 N.W.2d 52 (1977), which was an action under the Political Subdivisions Tort Claims Act, based on the failure of the city of North Platte to protect plaintiff's motorcycle which had been detained by the police, this court held that the Political Subdivisions Tort Claims Act, although specifically excluding from its provision any claim arising in respect to the detention of goods or merchandise by any law enforcement officer, does not and was not intended to bar actions based upon the negligent destruction, injury, or loss of goods in the possession of a political subdivision.

From the overwhelming weight of authority cited above, both in Nebraska and nationally, we conclude that although the doctrine of quasi-judicial immunity might protect an officer who is acting under a writ from the court from his actions thereunder, so far as they relate to the question of jurisdiction or

propriety of such actions, or basic policy decisions, it does not protect such official from negligent acts in the performance thereof. As we have heretofore stated, we do not pass upon the correctness of the trial judge's decision, if any, regarding the negligence of the constable in this case, as there is nothing before us as to that issue; but we merely point out that even if Countryside Homes were to be considered an official of the city of Lincoln (which we do not decide) because of its assistance to the constable in towing the mobile home in question, it seems clear that it, too, would be liable for its own negligent acts in so doing.

Appellant in its brief has cited only three cases in support of its contention that the protection of a writ extends not only to the official executing it but also to all persons who assist him at his request. The first of such cases is *Dahl v. Halverson,* 178 Minn. 174, 226 N.W. 405 (1929). That case involved an action by the constable of the municipal court in Fergus Falls who called to his assistance individuals for the purpose of repossessing a piano. Of necessity, they broke a door and took the piano by force. The court in such case did state the rule as above cited. We have Shepardized the above case and find that it has not since been cited elsewhere again. Appellant also cites the case of *Wholesale Elec. v. Robusky*, 22 Ohio St. 2d 181, 258 N.E.2d 432 (1970), in which the Supreme Court of Ohio held that where a writ of possession was valid on its face, the sheriff, his deputy, and moving company and its president acting under the sheriff in removing personal property from the structure were immune from liability for any want of jurisdiction or other defect in proceedings culminating in issuance of the writ. This case obviously dealt with the question of jurisdiction and the validity of the writ in question, which distinguishes it from the facts of the instant case. The only other case discussing the issue before us, and which case is also cited by appellant in its brief, is

Reinecke v. Sheehy, 47 Mich. App. 250, 260, 209 N.W.2d 460, 465 (1973), in which case the court stated: "This immunity extends to those rightfully aiding an officer. 80 CJS, Sheriffs and Constables, § 122, pp 331-332." In its opinion the Michigan court also stated at 259, 209 N.W.2d at 465: "Ordinarily, of course, a judgment or order of a court having apparent jurisdiction, if valid on its face completely protects a sheriff or constable from liability *for any proper or necessary act done in its execution*, even if the judgment or order is otherwise void." (Emphasis supplied.)

Notwithstanding the above cases, we decline to adopt a rule endorsing self-help on the part of landlords or their agents and removing responsibility for any damage caused by the negligence of the officers evicting tenants, and of those who assist them. As stated by appellee in her brief at 19: "[S]uch a proposition would invite chaos."

Our conclusion, therefore, is that the trial judge was not clearly wrong, but in effect was correct in his decision that the appellant was not protected by the doctrine of quasi-judicial immunity. That part of his judgment is correct and will be affirmed.

However, our review of the record has convinced us that the testimony presented with reference to the amount of damages to the mobile home in question leaves much to be desired, and that issue should be remanded for rehearing in the court below. For example, the evidence is clear that when appellee purchased the motor home in question it contained a substantial amount of furniture. The record is also clear that appellee removed all of such furniture before the home was sold at sheriff's sale, and there is no evidence in the record as to the value of the items removed. If these items had any value at all (and they undoubtedly did), the appellant should be given credit for such value, rather than having the damages determined by the application of the price at the sale of $900 only.

We therefore remand this case for further hearing below, limited to the question of damages only, and otherwise affirm the judgment of liability against the appellant.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

BARBARA E. BRENNAN, APPELLEE, V. THOMAS G. BRENNAN AND ALICE C. BRENNAN, APPELLANTS.
332 N.W.2d 696

Filed April 21, 1983. No. 82-113.

1. **Landlords and Tenants: Forcible Entry and Detainer.** An action under the Uniform Residential Landlord and Tenant Act for restitution of the premises is merely possessory, and the question of title to real estate cannot be either tried or determined in the case.
2. _____: _____. An equitable title to real estate and possession thereof may be shown as a defense in an action for restitution of the premises under the Uniform Residential Landlord and Tenant Act.
3. _____: _____. A claim of title is an affirmative defense to an action for restitution of the premises under the Uniform Residential Landlord and Tenant Act.

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

John L. Robinson, for appellants.

Douglas L. Kluender of The Healey Law Office, for appellee.

BOSLAUGH, MCCOWN, and HASTINGS, JJ., and BRODKEY, J., Retired, and GARDEN, D.J.

GARDEN, D.J.

On June 16, 1981, Barbara E. Brennan (hereinafter Barbara), plaintiff-appellee, filed a petition for restitution of premises and rent in the county court of Lancaster County, Nebraska, pursuant to the Uniform Residential Landlord and Tenant Act, Neb. Rev. Stat. §§ 76-1401 et seq. (Reissue 1981). The real

property involved was Lot 22, Block 13, Arnold Heights, Lincoln, Lancaster County, Nebraska, more specifically identified as that portion referred to as 5107 West Luke Street, Lincoln, Lancaster County, Nebraska. The defendants-appellants did not answer or plead to Barbara's petition.

On June 29, 1981, trial was had on Barbara's petition. At that time defendant Thomas G. Brennan (hereinafter Thomas) appeared and testified, contending that he and his wife, Alice C. Brennan (hereinafter Alice), had an ownership interest of some nature in the real estate and were not tenants. After receiving the evidence the Lancaster County Court found generally in favor of Barbara and against Thomas and Alice. On July 1, 1981, the county court entered judgment on the petition and issued a writ of restitution. Thomas and Alice then perfected an appeal to the District Court of Lancaster County.

On appeal to the Lancaster County District Court, judgment was rendered in favor of Barbara. The motion for new trial filed by Thomas and Alice was overruled, and from that decision the appeal by Thomas and Alice has been perfected to this court. We affirm.

In March of 1972 Barbara and Michael Brennan, at that time husband and wife, purchased and became joint owners of real estate in Lincoln, Lancaster County, Nebraska, described as Lot 22, Block 13, Arnold Heights. This property is a duplex, with that portion referred to as 5107 West Luke Street occupied by Thomas and Alice and 5101 West Luke Street occupied by Barbara. In 1979 Michael and Barbara divorced, and Michael quitclaimed any interest he had in the real estate to Barbara. It was stipulated between the parties that as of June 16, 1981, the date of filing of the petition tried before the Lancaster County Court, the abstract of title to the real estate would show that Barbara was the record owner. From July 1980 Thomas and Alice had been paying

Barbara $200 per month as rent on the property. In 1981 Thomas and Alice failed to make the payments for April, May, and June, and at the time of trial rent was due for the full months of April and May and half of June, in the amount of $500. After notice by letter and a notice to quit delivered by Barbara to Thomas and Alice on June 12, 1981, an action was commenced on June 16, 1981, for restitution of the premises and the rent.

Thomas and Alice had lived in half of the duplex since the time that it had been purchased by Michael and Barbara and had made monthly payments to Michael and Barbara and then to Barbara after the divorce through March of 1981. Thomas testified that these payments were toward the purchase of some sort of unspecified interest in the real estate and were not rent. Barbara testified that there was no agreement between herself and Thomas and Alice, as stated by Thomas, and was unaware of any agreement between Michael Brennan and Thomas and Alice. Barbara further testified that the method of calculating the rental amount for each month was based generally on one-half of the cost of the premises. Thomas testified that he was a "silent partner" with Michael in purchasing the property and that Thomas had performed a great deal of maintenance and work on the property as part of his contribution toward his interest. Barbara testified that the work done by Thomas was primarily on the half occupied by Thomas and did not benefit her directly.

Michael Brennan was not called to testify as to the existence of any agreement between himself and Thomas. Neither did Thomas describe the nature of the interest he was to receive, when he was to receive it, and by what sort of instrument he was to be acknowledged as a part owner. Over objection, numerous exhibits were introduced showing the nature and extent of Thomas' labor and expenditures on the property and how he calculated what he felt

he owed Barbara for the use of the duplex side occupied by himself and Alice. At the time of the hearing Thomas and Alice were still in possession of one-half of the duplex. The trial court, after hearing the evidence and observing the witnesses, ruled in favor of Barbara and entered judgment for restitution and for rent in the amount of $500.

For many years it has been clear that an action for forcible entry and detainer is merely possessory, and the question of title to real estate cannot be either tried or determined in the case. *Jones v. Schmidt*, 163 Neb. 508, 80 N.W.2d 289 (1957); *Hogan v. Pelton*, 210 Neb. 530, 315 N.W.2d 644 (1982). An equitable title to real estate and possession thereof may be shown as a defense in an action for forcible entry and detainer. *Jones v. Schmidt, supra*. It has also been recognized that, generally, a claim of title is an affirmative defense. 35 Am. Jur. 2d Forcible Entry and Detainer § 44 (1967). We have previously said that an affirmative defense not pleaded raises no issue. *Columbus Bank & Trust Co. v. High Country Stable*, 202 Neb. 724, 277 N.W.2d 81 (1979).

Although this particular case is brought pursuant to the Uniform Residential Landlord and Tenant Act, the procedures set forth in the statutes are essentially the same as the procedures found at Neb. Rev. Stat. § 24-568 (Reissue 1979) on forcible entry and detainer of nonresidential property. The general rules of interpretation applying to forcible entry and detainer actions also apply to actions brought under the Uniform Residential Landlord and Tenant Act.

The trial court, however, heard the testimony concerning the claim of title, considered it in making its findings of fact, and ruled in favor of plaintiff on plaintiff's petition.

In all cases other than appeals from the small claims court, the District Court shall review the case for error appearing on the record made in the county or municipal court. Neb. Rev. Stat.

§ 24-541.06 (Cum. Supp. 1982). It is not the province of this court to weigh or resolve conflicts in the evidence, the credibility of witnesses, or the weight to be given their testimony. *Commodity Traders, Inc. v. Palmer*, 203 Neb. 667, 280 N.W.2d 49 (1979); *Mustion v. Ealy*, 201 Neb. 139, 266 N.W.2d 730 (1978).

We find no error in the record prejudicial to the defendants. The judgment of the District Court was correct and is affirmed.

AFFIRMED.

DONALD D. ADKISSON, APPELLANT, V. CITY OF COLUMBUS, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE.

333 N.W.2d 661

Filed April 21, 1983. No. 82-115.

1. **Statutes.** A statute should be construed so that an ordinary person reading it would get from it the usual, accepted meaning. Rules of interpretation are resorted to for the purpose of resolving an ambiguity, not of creating it.
2. _____. The obligation of the court in the consideration and application of a statute is to determine and give effect to the purpose and intention of the Legislature as ascertained from the entire language thereof considered in its plain, ordinary, and popular sense. It is the duty of the court to give effect to the whole and each part of the statute if not in conflict with the legislative intent and to reconcile the different provisions of it, if possible, so as to make them logical, harmonious, and sensible.
3. _____. It is a fundamental rule of statutory construction that effect must be given, if possible, to all its several parts. No sentence, clause, or word should be rejected as meaningless or superfluous, if it can be avoided; but the subject of the enactment and the language employed, in its plain, ordinary, and popular sense, should be taken into account in order to determine the legislative will. It is the duty of the court to discover, if possible, the legislative intent from the statute itself.
4. _____. A sensible construction will be placed upon a statute to effectuate the object of the legislation rather than a literal meaning that would have the effect of defeating the legislative intent. In order to determine this intent the reasons for the enactment of the statute and the purposes and objects of an act as obtained from an

examination of the legislative history may be used as guides in an attempt to give effect to the main intent of lawmakers.

5. _____. In construing statutes this court will, if possible, try to avoid a construction which leads to absurd, unjust, or unconscionable results.
6. _____. Where the general intent of the Legislature may be readily discerned, and yet the language in which the law is expressed leaves the application of it in specific instances obscure, doubtful, ambiguous, or uncertain, the courts may have recourse to historical facts or general information in order to aid them in interpreting its provisions.
7. _____. The legislative intention is to be determined from the general consideration of the whole act with reference to the subject matter to which it applies and the particular topic under which the language in question is found, and the intent deduced from the whole will prevail over that of a particular part considered separately. To ascertain such intent, a court will not examine an operative provision without likewise examining the statute as a whole in the light of objects and purposes of the act.
8. _____. A primary rule of construction is that the intention of the Legislature is to be found in the ordinary meaning of the words of a statute in the connection in which they are used and in light of the mischief to be remedied.
9. _____. The reasons for the enactment and the purposes and objects of an act may be guides in an attempt to give effect to the main intent of the lawmakers. The court must look to the object to be accomplished or the purpose to be subserved and place such construction on the statute that will best effect that purpose, rather than one that will defeat it.
10. _____. In construing a statute of doubtful meaning courts may consider all statutes on the same subject.
11. **Firefighters: Pensions.** Pursuant to the provisions of Neb. Rev. Stat. §§ 35-211 and 35-206 (Reissue 1978), as presently enacted, a firefighter, employed by a city of the first class, who becomes permanently disabled in the line of duty and by reason thereof is retired is entitled to receive a pension equal to at least 50 percent of the salary such retiring firefighter is receiving at the time he or she goes upon such pension list.

Appeal from the District Court for Platte County: JOHN C. WHITEHEAD, Judge. Reversed and remanded with directions.

Noren & Burns, for appellant.

Luckey, Sipple & Hansen, for appellee.

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

KRIVOSHA, C.J.

This appeal concerns the appropriate pension to be paid to a firefighter in a city of the first class who has become permanently disabled and is therefore entitled to a pension prior to the time of either reaching the age of 55 or having served for 21 years on the fire department. At the urging of the appellee, the City of Columbus, the trial court concluded that the appellant, Donald D. Adkisson, was entitled to receive a pension from the city in an amount equal to thirteen twenty-firsts of 50 percent of the amount of the salary Adkisson was receiving at the time he was placed on the pension list by reason of his disability. Adkisson, on the other hand, maintained that he was entitled to receive an amount equal to 50 percent of his former salary. We believe that Adkisson is correct and that the decision of the trial court must be reversed.

The facts have been stipulated to by the parties and are without dispute. Adkisson, who was 47 years of age when he was declared permanently and totally disabled by the city, was a 13-year firefighter employed by the city, a city of the first class. At some time prior to May 5, 1981, Adkisson became temporarily totally disabled by reason of an injury incurred while in the line of duty. The city thereafter determined that Adkisson had become permanently disabled and, on May 5, 1981, placed him on the pension list.

The controversy in this case arises by reason of an apparent conflict contained in the statutes pertaining to the pension of firefighters employed by cities of the first class who become disabled in the line of duty. Neb. Rev. Stat. §§ 35-201 to 35-216 (Cum. Supp. 1982). Specifically, § 35-211 provides in part as follows: "In case any such firefighter shall become permanently and totally disabled from accident or

other cause, for the work he or she was doing at the time of such accident or other cause, while in the line of duty, such firefighter shall forthwith be placed upon the roll of pensioned firefighters, at the rate provided for retired firefighters in sections 35-206 and 35-207." There is no dispute that Adkisson became totally and permanently disabled while in the line of duty and that the provisions of § 35-211 as well as § 35-206 apply. Section 35-207 pertains to pensions for survivors of retired firefighters and is not relevant to this discussion. What we must determine is the amount of the pension to be paid to Adkisson under the provisions of § 35-206.

Section 35-206 reads as follows: "Every such city shall pension all such firefighters whenever such firefighters shall have first served in the paid fire department for a period of twenty-one years, shall have obtained the age of fifty-five years, and shall elect to retire from active service and go upon the retired list. Such pension shall be paid by the city in the same manner as firefighters upon the active list are paid and *such pension shall be at least fifty per cent of the amount of salary* such retiring firefighter is receiving at the time he or she goes upon such pension list. *Any firefighter who retires on or after age fifty-five with less than twenty-one years of service shall receive a pension of at least fifty per cent of the salary he or she was receiving at the time of retirement multiplied by the ratio of the years of service to twenty-one.*" (Emphasis supplied.)

Adkisson argues that it is the first two sentences of § 35-206 which apply to him, demanding that he receive a pension of not less than 50 percent of the amount of salary he was receiving at the time he went upon the list. The city, on the other hand, argues that it is the last sentence of § 35-206 which applies to Adkisson and that the city therefore is entitled to reduce the 50 percent by the number of years less than 21 which Adkisson served on the fire

department before becoming disabled. The only thing certain about the section is that it is ambiguous and does require interpretation. Section 35-211 refers to "the rate" in § 35-206. But § 35-206 contains two rates, and the statute, § 35-211, is unclear which of the two rates should apply.

We are guided by certain principles of legislative construction. We are first reminded that a statute should be construed so that an ordinary person reading it would get from it the usual, accepted meaning. Rules of interpretation are resorted to for the purpose of resolving an ambiguity, not of creating it. See *State ex rel. Finigan v. Norfolk Live Stock Sales Co., Inc.*, 178 Neb. 87, 132 N.W.2d 302 (1964). Furthermore, we are advised: "The obligation of the court in the consideration and application of a statute is to determine and give effect to the purpose and intention of the Legislature as ascertained from the entire language thereof considered in its plain, ordinary, and popular sense. It is the duty of the court to give effect to the whole and each part of the statute if not in conflict with the legislative intent and to reconcile the different provisions of it, if possible, so as to make them logical, harmonious, and sensible." *Ledwith v. Bankers Life Ins. Co.*, 156 Neb. 107, 115-16, 54 N.W.2d 409, 416 (1952). Moreover, "It is a fundamental rule of statutory construction that effect must be given, if possible, to all its several parts. No sentence, clause or word should be rejected as meaningless or superfluous, if it can be avoided; but the subject of the enactment and the language employed, in its plain, ordinary and popular sense, should be taken into account, in order to determine the legislative will. It is the duty of the court to discover, if possible, the legislative intent from the statute itself." *Hansen v. Dakota County*, 135 Neb. 582, 585, 283 N.W. 217, 219 (1939).

And, recently, in *Miller v. Peterson*, 208 Neb. 658, 660-61, 305 N.W.2d 364, 366 (1981), we observed: "A sensible construction will be placed upon a statute

to effectuate the object of the legislation rather than a literal meaning that would have the effect of defeating the legislative intent. In order to determine this intent the reasons for the enactment of the statute and the purposes and objects of an act as obtained from an examination of the legislative history may be used as guides in an attempt to give effect to the main intent of lawmakers." It is a fundamental rule of construction that in construing statutes this court will, if possible, try to avoid a construction which leads to absurd, unjust, or unconscionable results. See *State v. Goham*, 191 Neb. 639, 216 N.W.2d 869 (1974).

It is also settled law that where the general intent of the Legislature may be readily discerned, and yet the language in which the law is expressed leaves the application of it in specific instances obscure, doubtful, ambiguous, or uncertain, the courts may have recourse to historical facts or general information in order to aid them in interpreting its provisions. See *Nebraska District of Evangelical Lutheran Synod v. McKelvie*, 104 Neb. 93, 175 N.W. 531 (1919). And in *PPG Industries Canada Ltd. v. Kreuscher*, 204 Neb. 220, 227-28, 281 N.W.2d 762, 767-68 (1979), we said: "The legislative intention is to be determined from the general consideration of the whole act with reference to the subject matter to which it applies and the particular topic under which the language in question is found, and the intent deduced from the whole will prevail over that of a particular part considered separately. . . . To ascertain such intent, a court will not examine an operative provision without likewise examining the statute as a whole in the light of objects and purposes of the act. . . . A primary rule of construction is that the intention of the Legislature is to be found in the ordinary meaning of the words of a statute in the connection in which they are used and in light of the mischief to be remedied."

"The reasons for the enactment and the purposes

and objects of an act may be guides in an attempt to give effect to the main intent of the lawmakers. The court must look to the object to be accomplished or the purpose to be subserved and place such construction on the statute that will best effect that purpose, rather than one that will defeat it." *Seldin Development & Management Co. v. Chizek*, 208 Neb. 315, 319, 303 N.W.2d 300, 303 (1981). In *Ledwith v. Bankers Life Ins. Co., supra* at 122, 54 N.W.2d at 419, we noted: "In construing a statute of doubtful meaning courts may consider all statutes on the same subject."

With these basic rules in mind we examine the history of the statutes in question in an effort to ascertain the legislative intent. As the statutory history indicates, the first two sentences of § 35-206 were enacted in 1943. However, the origin of pensions for permanently disabled firefighters in first-class cities antedates even the adoption of § 35-206 and, as disclosed in § 35-201, was first enacted in 1895. An examination of the relevant statutes discloses that from 1909 until 1975 any firefighter who became permanently disabled while employed by a city of the first class was to be retired and paid a pension equal to the rate for retired firefighters, that is, 50 percent of the salary the firefighter was earning at the time he or she became disabled, without regard to age or years of service. In addition to that, the history of the relevant statutes discloses that before 1975 a firefighter employed by a city of the first class who retired *before* he or she had served 21 years with the fire department and who was not permanently disabled received *no* pension upon retirement. In order for firefighters in a city of the first class to receive a retirement pension, which was computed at 50 percent of the salary they were earning at the time of their retirement, they must have met several requirements, the principal one of which was that the firefighter must have served 21 years at the time the firefighter reached statutory

retirement age. It was not until 1975, through the introduction of L.B. 416, that a firefighter who sought to retire before having served 21 years became eligible for any type of retirement. In 1975 the third sentence of § 35-206, quoted earlier in this opinion, was added so as to provide that a firefighter who had attained at least the age of 55 but who had served less than 21 years could retire and receive a pension computed at 50 percent of the salary he or she was receiving at the time of retirement multiplied by the ratio of the years of service to twenty-one.

At the hearing on L.B. 416 Senator Gary Anderson, the bill's introducer, explained that the provision in question was "to allow someone who cannot get their 21 years service or who elects to retire early to elect to take an actuarially reduced pension based on the number of years service and the amount of money they have paid in." Committee Hearing, Nebraska Retirement Systems Committee, 84th Leg., 1st Sess. 16 (March 3, 1975). The purpose of the act was to permit a firefighter who had reached the age of 55 with less than 21 years of service to *elect* to retire and begin to take a pension. No mention was made anywhere during the debate with regard to a firefighter who was *required* to accept a pension by reason of being declared disabled by the city.

The problem which the bill was attempting to correct was made apparent when a representative of the state firefighters association appeared at a Nebraska Retirement Systems Committee hearing concerning the amendment. The representative offered an example to the committee as to why the amendment was necessary. He said, according to the transcript, "In the city of Columbus there happens to be a Fire Fighter who went on the force at approximately age 40, they have a mandatory retirement age of 60. There is no way that this fire fighter can ever attain any pension benefits because there is no way prior to his retirement that he can accumu-

late 21 years of prior service. So I think that if my memory serves me correctly this particular fire fighter would serve on the force for 17 years, at the end of those 17 years when he has to retire because of a mandatory age 60 in Columbus, he has to retire, the city will give him back his contributions without interest.

"We think in situations such as this that the fire fighter should be entitled to take a retirement benefit, actuarially reduced by the number of years of service that he has in comparison with the 21 years that he is required to have at the present time." *Id.* at 17.

All of the discussion concerning the purpose of the bill, both before the legislative committee and on the floor of the Legislature, concerned itself with attempting to correct a situation where a firefighter continued to work after retirement age but, because the firefighter had not served 21 years by the time of reaching mandatory retirement, was ineligible to receive any retirement benefits.

A further indication that the Legislature never intended that the amendment to § 35-206 have an impact on disability benefits can be found in a comparison of two reports by the Nebraska Retirement Systems Committee, which, among other things, summarized and compared the various retirement systems for political subdivisions throughout the state. The June 1974 report, at 53, describes the disability benefit for duty-related injuries as "50 percent of final salary as a disabled life annuity." This, of course, was before the 1975 amendment. The October 1981 report, at 40, describes the same benefit with precisely the same language. Nothing is added in the 1981 report to indicate that the disability benefit would change with the amount of service years. However, the two reports do note a difference with regard to retirement unrelated to disability. The 1974 report notes that normal retirement is at age 55 and 21 years of service and that there is no provision

for early retirement. In contrast, the 1981 report says that an employee may retire after age 55 with less than 21 years of service, but at a reduced rate.

What is clear from an examination of the history of this matter is that what the Legislature was intending to do in amending § 35-206 in 1975 was to expand the benefits for firefighters, not reduce them. It was seeking to provide some retirement benefits for firefighters who, but for the amendment, would have received nothing upon retirement; it was not attempting to take away from disabled firefighters benefits for which they were already entitled.

Furthermore, when one examines similar Nebraska statutes on the same subject, one quickly discovers that to accept the argument now advanced by the city would be to penalize firefighters in the city and other cities of the first class while not similarly penalizing either policemen in cities of the first class or police and firefighters in other Nebraska communities. Neb. Rev. Stat. § 16-335 (Reissue 1977), first adopted in 1963, provides for a pension to be paid to policemen who become permanently and totally disabled while in the line of duty and prior to reaching the age of retirement. Section 16-335 provides in part: "In case any such policeman shall become permanently and totally disabled from accident or other cause, while in the line of his duty, and said policeman because of such disability is unable to resume the duties he was performing at the time of his injury, such policeman shall forthwith be placed upon the roll of pensioned policemen at the regular retirement pension of fifty per cent of his regular pay, as defined in section 16-330." That is exactly the same rate that was applicable to firefighters in Columbus prior to 1975 and would remain applicable to firefighters in Columbus unless we accept the interpretation of § 35-206 advanced to us by the city. Similar provisions for an absolute 50 percent retirement for disabled police and firemen may also be found for police and firemen in primary

class cities, Neb. Rev. Stat. § 15-1006 (Cum. Supp. 1982), as well as Nebraska State Patrol officers, Neb. Rev. Stat. § 81-2026(2) (Cum. Supp. 1982). We can perceive of no reason why the Legislature would intend to penalize only firefighters in cities of the first class while not similarly limiting either policemen in cities of the first class or police and firemen in other communities throughout the state.

The city argues that the Legislature could not have intended to provide a disabled firefighter with less than 21 years with a better pension because of disability than it would have provided a nondisabled firefighter who elects to retire early. Neither the history of the act nor reason supports that position. Quite to the contrary, it occurs to us that the Legislature did intend to provide firefighters who become disabled in the line of duty with at least 50 percent of their salary. The reason is obvious. Firefighters are called upon frequently to face danger and take chances. One who has only served but a few years on the fire department may, even unconsciously, be restrained from adequately performing his or her duties because of fear that the firefighter's family will be inadequately provided for in the event of disability. The suggestion that our ruling today will encourge fraudulent claims is spurious. After all, it is the governmental subdivision which makes the determination and not the firefighter. Whatever devices are used by the city to avoid fraud by its police officers can be used with regard to its firefighters.

While we concede that more careful draftsmanship of the amendments in question could have avoided all of this difficulty, we nevertheless recognize that the legislative process, like so many other processes today, does not always leave time for careful draftsmanship. Nevertheless, the intent of the act is clear. For these reasons we hold that pursuant to the provisions of §§ 35-211 and 35-206 (Reissue 1978), as presently enacted, a firefighter, employed by a city of the first class, who becomes

permanently disabled in the line of duty and by reason thereof is retired is entitled to receive a pension equal to at least 50 percent of the salary such retiring firefighter is receiving at the time he or she goes upon such pension list. The judgment of the trial court is therefore reversed and the cause remanded with directions to enter judgment in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

HERBERT C. COE, EXECUTOR OF THE ESTATE OF LELAH MILDRED COE, ALSO KNOWN AS MILDRED COE, DECEASED, APPELLEE, V. JOHN A. COVERT, DOING BUSINESS AS DREW'S ANTIQUES AND ART OBJECTS, APPELLANT, AND JACK DREW, APPELLEE.

332 N.W.2d 699

Filed April 21, 1983. No. 82-177.

1. **Decedents' Estates.** Under South Dakota law no sale of any property of an estate of a decedent is valid unless made under an order of the probate court, except as otherwise provided. All sales must be reported under oath and confirmed by the court before title to the property passes.
2. **Decedents' Estates: Executors and Administrators.** Ordinarily, the acts of an executor or administrator in his individual capacity cannot operate as an estoppel against him in his representative capacity.

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

Thomas P. Leary, for appellant.

William Jay Riley and Nick R. Taylor of Fitzgerald, Brown, Leahy, Strom, Schorr & Barmettler, for appellee Coe.

BOSLAUGH, MCCOWN, and HASTINGS, JJ., and BRODKEY, J., Retired, and GARDEN, D.J.

MCCOWN, J.

The plaintiff executor filed this proceeding seeking

to recover personal property of a decedent's estate which had been sold and delivered to the defendant Covert. The District Court sustained plaintiff's motion for summary judgment, enjoined the defendant from selling or transferring the property involved, directed that it be returned to plaintiff, and ordered plaintiff to return to defendant defendant's check representing funds paid for the property. The court retained other issues as to additional property for trial. The defendant Covert has appealed.

Lelah Mildred Coe, a resident of South Dakota, died testate on March 17, 1981. On April 29, 1981, the decedent's will was duly admitted to probate in the Circuit Court of Tripp County, South Dakota, and plaintiff, Herbert C. Coe, was duly appointed executor of his mother's estate. Plaintiff is the sole heir under his mother's will. The will was not contested and the time for filing claims against the estate expired on May 25, 1981, and no claims were filed.

On May 19, 1981, the defendants Covert and Drew traveled to Winner, South Dakota, at the invitation of plaintiff, and purchased some antiques that had belonged to the decedent, Lelah Coe. The defendants were aware that the antiques had belonged to the plaintiff's mother and that she had died in March 1981. The record indicates that plaintiff did not know that court authorization for sale was required, and plaintiff did not tell the defendants that he was the executor of his mother's estate.

The plaintiff and defendant Covert orally agreed to the sale of numerous items for a price of $5,350, and defendant Covert made out a check for that amount payable to the plaintiff individually, and delivered the check to the plaintiff. Defendants Covert and Drew then packed and removed the antiques and took them to Omaha, Nebraska.

The next day the attorney for the estate of Lelah Coe telephoned the defendant Covert and informed him that the plaintiff did not have any authority to sell the estate items. He also informed Covert that

Covert's check had not been cashed, requested Covert to return the antiques, and offered to compensate the defendants for their expenses. Covert refused to return the property.

On the next day, May 21, 1981, the plaintiff filed this action in the District Court for Douglas County, Nebraska, seeking to recover the property from the defendants and to enjoin them from selling or disposing of it. The petition also alleged that the defendants had taken various additional items which were not a part of the oral agreement, without the consent of the plaintiff. A temporary restraining order was entered and extended indefinitely after a hearing on May 27, 1981.

Answers to plaintiff's petition were filed by the defendants. Thereafter, interrogatories were filed and answered and depositions of the defendants were taken.

The plaintiff filed a motion for summary judgment, and the defendant Drew also filed a motion for summary judgment on the ground that he merely accompanied Covert on the trip to South Dakota and that he had no interest in either the estate property or the check. The defendant Covert filed a motion to dismiss plaintiff's petition and dissolve the temporary injunction.

On the basis of the pleadings, affidavits, interrogatories, depositions, and the South Dakota statutes, the District Court sustained defendant Drew's motion for summary judgment and dismissed plaintiff's petition as to him. The court overruled defendant Covert's motion to dismiss and sustained plaintiff's motion for summary judgment.

The District Court found (1) that at the time of the oral agreement of sale between plaintiff and defendant Covert, plaintiff, as executor, did not have an order authorizing the sale of the property, said order being required by South Dakota law; (2) that as a matter of law such a sale is null and void in South Dakota, and such a finding is not against the public

policy of Nebraska; and (3) that as a matter of law where an executor's sale is null and void by reason of lack of required court authorization, the defenses of estoppel, waiver, or clean hands are not applicable.

The District Court ordered that the oral contract of sale between plaintiff and defendant Covert, made on May 19, 1981, be declared void and of no legal effect; ordered that defendant Covert be permanently enjoined from selling or transferring any of the property, and directed him to return all of said property to the plaintiff; and upon return of the property, the plaintiff was directed to return the $5,350 check to Covert.

The District Court also ordered that the issues raised in plaintiff's petition with respect to additional property allegedly taken by Covert but not included in the sale be retained for trial. Covert has appealed.

There is no dispute that this case is governed by the law of South Dakota. The record establishes that plaintiff was the duly qualified executor of the estate of a South Dakota decedent, which estate was in the process of probate, and the property involved here was property of the estate. No authorization or order of the probate court to sell the property was sought or obtained.

S.D. Codified Laws Ann. § 30-22-7 (Rev. 1976) provides: "No sale of any property of an estate of a decedent is valid unless made under order of the circuit court, except as otherwise provided. All sales must be reported under oath and confirmed by the circuit court, before the title to the property passes, except as otherwise provided."

Other sections of the South Dakota statutes require that to obtain court authorization, the executor must file a verified petition showing the sale to be necessary or for the best interests of the estate, and require a hearing, after which the court may issue an order authorizing the sale of all or part of the

estate property if it appears to the court that the sale is necessary or in the best interests of the estate. See S.D. Codified Laws Ann. §§ 30-22-8 et seq. (Rev. 1976).

One exception to the requirement of court authorization is that an executor may sell any property of the estate without a court order if the authority to sell is given in the will of the decedent. There is no such sale authority in the will involved in this case.

The South Dakota Supreme Court has held that the statute providing that no sale of any property of an estate of a decedent is valid unless made under order of the court and confirmed by the court applies to both personalty and realty, and that the sale is of no effect and no title passes unless the sale is confirmed. *Shearn v. Fenton*, 74 S.D. 355, 52 N.W.2d 830 (1952).

The purpose of court approval required by the statute is to protect the estate assets which are in the care and custody of the South Dakota probate court for the benefit of creditors, state and federal taxes, costs of administration, and the estate's beneficiaries. The executor must account to the probate court for the decedent's property, and court supervision of estate sales is necessary to maintain the integrity of the probate proceedings.

The defendant does not seriously dispute that the sale of property by an executor without court authority is ordinarily invalid. Instead, he argues that the plaintiff in this case should be estopped from asserting the invalidity of the sale because of his own conduct. The argument is that he made the sale as an individual and since his conduct estopped him from denying the validity of the sale individually, he may also be estopped as an executor because he is the sole beneficiary under the will.

In the present case the sale was made and the present suit was filed before the time for filing claims in the decedent's estate had expired. Neither is there evidence in the record as to the nature

and extent of decedent's property, nor of any liens, taxes, or costs of administration. The property sold was estate property and the plaintiff had no legal authority to sell it or deal with it as an individual, but only as an executor.

It is generally held that the acts of an executor or administrator in his individual capacity cannot operate as an estoppel against him in his representative capacity. See, 28 Am. Jur. 2d *Estoppel and Waiver* § 121 (1966); 33 C.J.S. *Executors and Administrators* § 150 (1942); *State ex rel. Sorensen v. Citizens State Bank*, 126 Neb. 756, 254 N.W. 402 (1934). We find no peculiar or special equities in the present case which call for a departure from the general rule. The District Court correctly found that the defense of estoppel was not applicable.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOSEPH A. JONES, APPELLANT.

332 N.W.2d 702

Filed April 21, 1983. No. 82-261.

1. **Right to Counsel: Waiver.** The general rule is that an accused may waive his right to counsel where such waiver is made intelligently and understandingly, with knowledge of the right to counsel.
2. **Pleas: Waiver.** A plea of guilty embodies a waiver of every defense to a charge, whether procedural, statutory, or constitutional.

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

James A. Hogan, for appellant.

Paul L. Douglas, Attorney General, and Dale D. Brodkey, for appellee.

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

COLWELL, D.J., Retired.

Defendant appeals his guilty plea conviction of three misdemeanors. His assigned errors relate only to count I, driving under suspension, Motor Vehicle Safety Responsibility Act, Neb. Rev. Stat. § 60-557 (Reissue 1978), a Class III misdemeanor. We affirm.

After an auto accident on April 27, 1981, defendant failed to furnish proof of financial responsibility to the Nebraska Department of Motor Vehicles. Neb. Rev. Stat. § 60-507 (Reissue 1978). On July 9, 1981, the department ordered defendant's operator's license suspended effective August 3, 1981, and sent a copy of that order by U.S. certified mail to defendant at his last known address, 1948 South 10th Street, Omaha, Nebraska; it was returned, marked that delivery was attempted on July 11, 1981, and that the addressee was unknown. On September 25, 1981, defendant was arrested and charged in Sarpy County on count I, driving under suspension; on count II, no motor vehicle registration; and on count III, no valid operator's permit. Later, he appeared without counsel and his conviction was entered on his plea of guilty to all counts. After a presentence investigation he was sentenced to 60 days in jail and suspension of license for 1 year on count I, and fined $25 on both counts II and III. He was represented by counsel in his appeal to the District Court, where his convictions and sentences were affirmed.

Defendant is no stranger to the traffic courts. His record shows that in a 5-year period he received more than 30 traffic-related citations and he had more than 20 court appearances.

Two assigned errors are considered together: (1) Failure to appoint counsel; and (2) Failure to determine a factual basis for the guilty plea.

At arraignment, the county judge informed defendant in detail concerning all of his constitutional rights, along the lines suggested in *State v. Tweedy*, 209 Neb. 649, 309 N.W.2d 94 (1981), including defendant's right to counsel and appointed counsel at public expense. This dialogue followed: "THE COURT: . . . Now, do you understand your rights to a trial and to an attorney? MR. JONES: Yes, Sir. THE COURT: Are you, at this time, ready to waive those rights to proceed, here, to a plea? MR. JONES: Yes. . . . THE COURT: All Right. Then, I will ask you at this time. How do you plead to the charge? MR. JONES: Guilty."

Next, the deputy county attorney briefly reviewed the facts: "It specifically states that he was stopped, in Sarpy county, on the date and time alledged [sic]. He had over due registration, a subsequent check was (indiscernible) indicated that he was suspended for an accident, I believe, in Douglas County. Suspended on the 3rd of August, 1981. THE COURT: Okay. Do you accept that statement, then? MR. JONES: Yes. See they sent the --- THE COURT: All right. I am going to find your plea voluntarily and intelligently entered and I am going to continue this for a pre-sentence investigation, so you will have a chance to put — everything you want to say up to the probation officer and let him give me a report on that, for sentencing purposes. . . ."

The general rule is that an accused may waive his right to counsel where such waiver is made intelligently and understandingly, with knowledge of the right to counsel. *State v. Morford,* 192 Neb. 412, 222 N.W.2d 117 (1974).

The record clearly shows that defendant had knowledge of his right to counsel and court-appointed counsel and that he waived that right intelligently and understandingly.

Defendant argues that the trial judge failed to make a determination of the factual basis for the

plea at the time that it was accepted, particularly complaining that he tried to explain to the judge that he did not receive the notice of suspension. He cites ABA Standards Relating to The Function of the Trial Judge § 4.2(b) (Approved Draft 1972). We have consistently held, "In determining whether a factual basis for a plea of guilty exists, a court is not required to interrogate the defendant. Inquiry of the prosecutor or examination of the presentence report is an alternative." *State v. Daniels*, 190 Neb. 602, 604, 211 N.W.2d 127, 129 (1973); *State v. Leger*, 190 Neb. 352, 208 N.W.2d 276 (1973); *State v. Johnson*, 209 Neb. 308, 307 N.W.2d 525 (1981); *State v. Beach*, 211 Neb. 660, 319 N.W.2d 754 (1982).

The record before us shows that the complaint itself was detailed, the prosecutor briefly summarized the facts that were accepted as true by the defendant, there was a finding that the plea was voluntarily and intelligently made, and the record made at sentencing, including the presentence report, fully informed the judge of the defendant's claim that he did not receive the notice. That record supplies a factual basis.

The third assigned error states, "In order for the appellant to be guilty of driving under a suspended license, he must receive a notice of suspension . . . ." Defendant relies on a part of § 60-507, which states: "*Provided*, notice of such suspension shall be sent by the Department . . . by certified mail to such operator not less than twenty days prior to the effective date of such suspension . . . ." His theory is that proof of actual or constructive receipt of notice is required. No Nebraska cases are cited as authority. He cites *State v. Atwood*, 290 N.C. 266, 225 S.E.2d 543 (1976); *Commonwealth v. Crosscup*, 369 Mass. 228, 339 N.E.2d 731 (1975); and *State v. Foreman*, 54 Ohio Misc. 31, 376 N.E.2d 987 (1978). These three cases are distinguishable, since they involve trials on not guilty pleas, whereas here defendant's conviction was on his plea of guilty that clearly

meets the standards of *State v. Turner*, 186 Neb. 424, 183 N.W.2d 763 (1971).

"[A] plea of guilty, if understandingly and voluntarily entered, is conclusive. . . . [A] plea of guilty embodies a waiver of every defense to a charge, whether procedural, statutory, or constitutional. . . . 'A plea of guilty to a criminal complaint admits that the offense was committed, the time and place of its commission, and the identity of the person committing it, as charged; it is an admission of record of the truth of the charges made; it renders unnecessary the proof of the facts alleged; and it supports a finding of guilt made thereon.' " *Marteney v. State*, 210 Neb. 172, 177, 313 N.W.2d 449, 453 (1981).

Whatever claimed defenses defendant had were waived by his guilty plea.

AFFIRMED.

WHITE, HASTINGS, and CAPORALE, JJ., concur in the result.

G & B COMSTOCK PARTNERSHIP, A COLORADO PARTNERSHIP, APPELLEE, V. VERNON E. LUFT ET AL., APPELLANTS.

332 N.W.2d 705

Filed April 21, 1983. No. 82-360.

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

Philip T. Morgan of Morgan & Morgan, for appellants.

Steven M. Curry of Sampson, Curry & Hummel, for appellee.

KRIVOSHA, C.J., WHITE, CAPORALE, and SHANAHAN, JJ., and EMPSON, D.J.

PER CURIAM.

The court, having reviewed the record in this case,

finds that the errors assigned by appellants are without merit. Having therefore considered the assignments and the record, the court affirms the decision of the trial court.

AFFIRMED.

COUNTY OF ANTELOPE ET AL., PLAINTIFFS, V. DONALD STENBERG, DIRECTOR OF THE DEPARTMENT OF ADMINISTRATIVE SERVICES OF THE STATE OF NEBRASKA, ET AL., DEFENDANTS.

332 N.W.2d 705

Filed April 21, 1983. No. 82-700.

1. **Constitutional Law: Special Legislation.** In the area of economics and social welfare, a state does not violate the equal protection clause merely because the classifications made by its laws are imperfect. If the classification has some reasonable basis, it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality.
2. **Special Legislation.** In reviewing the classification in legislation, the standard used is whether the classification has a rational basis.

Original action. Judgment for defendants.

Vincent Valentino, York County Attorney, and Charles W. Campbell, and Alan L. Brodbeck, Antelope County Attorney, for plaintiffs.

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

William F. Austin, City Attorney, for amicus curiae City of Lincoln.

Herbert M. Fitle, City Attorney, and Timothy M. Kenny, for amicus curiae City of Omaha.

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

WHITE, J.

In this original action the plaintiffs, York County and Antelope County, Nebraska, challenge the constitutionality of 1982 Neb. Laws, L.B. 816, § 4, providing for distribution of state aid to the counties of the State of Nebraska. The challenged portion of that section provides: "*The appropriation provided for in section 77-27,136 for aid to counties* shall be distributed to the various county treasurers of the state ~~as follows:~~

. . . .

". . . *on the basis of the ratio of the total amount of property taxes levied by the particular county for county purposes to the total amount of property taxes levied by all counties for county purposes based on the amounts stated in the most recent certificate of taxes levied statement submitted by each county to the State Board of Equalization and Assessment pursuant to section 77-628.*"

Plaintiffs argue that the formula violates the fourteenth amendment of the U.S. Constitution and article I, § 1, of the Constitution of the State of Nebraska. Plaintiffs further argue certain contentions with respect to the appropriation bill which accompanied L.B. 816. Those contentions are not discussed, as the appropriations were reconsidered, reduced, and reappropriated in L.B. 1, 87th Leg., 1st Spec. Sess. (1982). The issue is moot.

Essentially, we are again dealing with legislative classification as we did in *State ex rel. Douglas v. Marsh*, 207 Neb. 598, 300 N.W.2d 181 (1980).

The standard by which the classification is to be measured against a claim of a violation of the U.S. Constitution was set forth in *Dandridge v. Williams*, 397 U.S. 471, 485, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970): "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Con-

stitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality' *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78. 'The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific.' *Metropolis Theatre Co. v. City of Chicago*, 228 U.S. 61, 69-70. 'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.' *McGowan v. Maryland*, 366 U.S. 420, 426."

The history of the antecedents of L.B. 816 is set forth extensively in *State ex rel. Douglas v. Marsh, supra,* and will not be repeated here. In reviewing our cases on the subject of the Legislature's power to classify, the rule, stated in various ways, reduces itself to a rational standard. See, *State ex rel. Douglas v. Marsh, supra*; *State v. Kelso,* 92 Neb. 628, 139 N.W. 226 (1912); *City of Scottsbluff v. Tiemann,* 185 Neb. 256, 175 N.W.2d 74 (1970).

On any conceivable state of facts, can it be said that the formula in L.B. 816, § 4, is rational and is based on some reason of public policy? We believe it can be so said.

The purpose of L.B. 816 is to partially relieve the property tax burden by shouldering part of the county budget through state revenue sources. The determination that one tax source is to be preferred over another is a classic legislative function. Given this premise, is the method reasonable? Again, we conclude that it is. The property tax burden is lifted in the proportion that the county expenditure bears to the expenditure of all the counties. The formula is not fixed but will necessarily vary from year to year. The method chosen by the Legislature need not be perfect. The amount of the expenditure can at least arguably be related both to population and to total assessed value; certainly, it is related to need. We find no defect in the formula.

We therefore find for the defendants and sustain the constitutionality of 1982 Neb. Laws, L.B. 816, § 4.

JUDGMENT FOR DEFENDANTS.

MARCIA L. HASSING, APPELLEE, V. WILFERD W. WORTMAN, APPELLANT.

333 N.W.2d 765

Filed April 29, 1983. No. 82-039.

1. **Mental Distress.** To recover damages for intentional infliction of emotional distress by outrageous conduct, the plaintiff must show that her emotional distress was severe.
2. _____. The distress must have been so severe that no reasonable person could have been expected to endure it.

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

John R. Doyle, for appellant.

David W. Jorgensen of Nye, Hervert, Jorgensen & Watson, P.C., for appellee.

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

BOSLAUGH, J.

The plaintiff, Marcia Hassing, commenced this action to recover damages for severe emotional distress caused by outrageous conduct of the defendant, Wilferd W. Wortman. The jury returned a verdict in favor of the plaintiff in the amount of $18,120. The defendant has appealed.

The record shows that the parties were married in 1947 and were divorced in 1977. In July 1978 the plaintiff met George Hassing, whom she married in June 1979. The plaintiff alleged that certain of the actions of her ex-husband following the time she began to date Hassing caused her severe emotional distress. The behavior complained of ceased in October 1979.

The plaintiff testified that beginning in July 1978 Wortman began driving by her house 10 to 15 times a month. The drive-bys continued for a period of several months and increased, then diminished, in frequency. She stated that on one occasion she saw

Wortman crawling in the bushes outside her home. She also testified that on another occasion when she and George were out on a date Wortman attempted to force their car over to the side of the road. On another occasion Wortman entered her home through an unlocked door, after receiving no response to the doorbell. The plaintiff then called the police and the defendant was arrested.

Wortman had an investigation made of George Hassing and visited his two ex-wives. He visited the plaintiff at her place of employment, a grade school, to tell her what he had learned. Wortman mailed her a letter he received from the investigating service which contained information about Hassing's car registrations and driver's license.

Wortman testified that he sent out a Christmas letter to relatives which summarized his marriage and divorce from the plaintiff. In that letter he indicated that the plaintiff was pregnant when they married and implied that he may not have been the father. Wortman also wrote letters to the plaintiff about an inheritance of Hassing's and Hassing's liability to his ex-wives. Wortman further wrote to the plaintiff's supervisor regarding her relationship with Hassing and revealed some of the information about Hassing which Wortman had obtained. Wortman sent the plaintiff another letter indicating that he knew certain intimate details about her relationship with Hassing. Wortman prepared yet another letter entitled "Meet George Walter Hassing, Jr.," which contained information about George Hassing. Wortman gave copies of this letter to some of the neighbors of the plaintiff.

Wortman approached two members of the local school board about a plan whereby the plaintiff would learn that the board might not renew her teaching contract. Wortman felt that such knowledge would dissuade George Hassing from continuing his relationship with the plaintiff. Both men refused to participate.

The plaintiff testified that she had a security guard at her wedding in June 1979, and that she was afraid of Wortman. She testified that she had consulted a psychiatrist on two occasions but stopped going, as she decided to "handle this on my own." The charge for the visits amounted to $120. The plaintiff testified that the actions of Wortman embarrassed and humiliated her, and caused her to worry and lose sleep.

The evidence shows that the street on which Marcia Hassing lived is on a route which Wortman could take on his way to and from work. The plaintiff testified that the things Wortman found out about George Hassing through the investigations were true and that she had known about them, and that none of Wortman's actions placed her job in jeopardy. Wortman testified that the family members to whom he sent the Christmas letter knew about Marcia's premarital pregnancy.

Wortman testified that after his 1977 divorce from the plaintiff they attempted a reconciliation and that they had, at one point, planned to remarry. Wortman testified that he did not intend to cause the plaintiff to suffer mental anguish.

Wortman contends that a verdict should have been directed in his favor because his conduct did not amount to the extreme and outrageous conduct required for this tort.

In order to recover the plaintiff must show that the extreme and outrageous conduct of the defendant intentionally or recklessly caused her to suffer severe emotional distress. *Paasch v. Brown*, 193 Neb. 368, 227 N.W.2d 402 (1975); *Davis v. Texaco, Inc.*, 210 Neb. 67, 313 N.W.2d 221 (1981); Restatement (Second) of Torts § 46 (1965).

In describing what constitutes extreme and outrageous conduct, this court has said: "Liability has been found only where the conduct has been so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and to be

regarded as atrocious and utterly intolerable in a civilized community. There is no occasion for the law to intervene in every case where some one's feelings are hurt. A defendant is never liable where he has done no more than to insist upon his legal rights in a permissible way, even though he is well aware that such insistence is certain to cause emotional distress." *Paasch v. Brown, supra* at 370, 227 N.W.2d at 404 (language from the Comment to § 46 of the Restatement).

In *Davis v. Texaco, Inc., supra*, we said: " 'The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities . . . .' " (quoting Comment d to § 46 of the Restatement). In that case we also said that "the conduct necessary to support such a claim [must exceed] 'that which a reasonable person could be expected to endure.' " *Id.* at 70, 313 N.W.2d at 223 (quoting *Meyer v. Nottger*, 241 N.W.2d 911 (Iowa 1976)).

Examples of such behavior can be found in W. Prosser, Law of Torts, *Infliction of Mental Distress* § 12 (4th ed. 1971). Among them are threatening a schoolgirl with prison and public disgrace unless she signs a confession of immoral misconduct; mishandling or mutilation of corpses; and various repeated and high-pressure tactics by collection agencies. See, e.g., *LaSalle Extension University v. Fogarty*, 126 Neb. 457, 253 N.W. 424 (1934) (collection tactics).

It is doubtful whether the defendant's actions in this case amounted to extreme and outrageous conduct. He did not threaten the plaintiff's safety in any way. The information about Hassing which was revealed to the plaintiff was known to her. He revealed her premarital pregnancy only to relatives who already knew of the situation. His actions did not cause her distress at the prospect of losing her job. That he drove by her house frequently is not alone an intentional, outrageous act. While the de-

fendant acted in a childish, irresponsible, and inconsiderate fashion, it is doubtful whether his conduct constituted a sufficient basis upon which liability could be imposed, on the plaintiff's theory of the case.

For cases holding that there was no outrageous conduct sufficient to warrant liability, see, *Paasch v. Brown*, *supra*; *Davis v. Texaco, Inc.*, *supra*; *American Road Serv. Co. v. Inmon*, 394 So. 2d 361 (Ala. 1981); *Watts v. Golden Age Nursing Home*, 127 Ariz. 255, 619 P.2d 1032 (1980).

Before the plaintiff could recover she was required to prove that she had suffered "an extreme disabling emotional response." *Davis v. Texaco, Inc.*, *supra* (quoting *Anderson v. Continental Ins. Co.*, 85 Wis. 2d 675, 271 N.W.2d 368 (1978)). The distress must have been so severe that no reasonable person could have been expected to endure it. *Davis v. Texaco, Inc.*, *supra*. In *Freedom Homes of Texas, Inc. v. Dickinson*, 598 S.W.2d 714, 718 (Tex. Civ. App. 1980), the court said, "In order to recover for mental anguish, it is necessary to show something more than mere worry, anxiety, vexation or anger . . . ."

In a recent decision the Minnesota Supreme Court emphasized the extreme degree of mental distress which a plaintiff must suffer before the conduct becomes actionable. In *Hubbard v. United Press Intern., Inc.*, 330 N.W.2d 428, 439 (Minn. 1983), the court said: "In explaining both the extreme nature of the conduct necessary to invoke this tort, and the necessary degree of severity of the consequent mental distress, the Restatement's commentary emphasizes the limited scope of this cause of action, and clearly reflects a strong policy to prevent fictitious and speculative claims. Because this policy has long been a central feature of Minnesota law on the availability of damages for mental distress, our adoption of the Restatement formulation as the standard for the independent tort of intentional in-

fliction of emotional distress does not signal an appreciable expansion in the scope of conduct actionable under this theory of recovery. The operation of this tort is sharply limited to cases involving particularly egregious facts."

The court further stated at 440: "Similarly, the primary evidence of Hubbard's emotional distress was his own testimony that 'because of' UPI's conduct he 'had been depressed,' that he had become 'physically ill in terms of throwing up, and had stomach disorders,' and that he had developed a skin rash and high blood pressure. Despite this testimony about his problems, Hubbard never missed work, never filed a claim for workers' compensation, and never saw a doctor until June 1980, and went then only because he had the flu. Medical evidence as to Hubbard's injuries is conspicuously absent from the record. The extent of the 'injury' proven by this record does not exceed that of any employee who experiences an employer's criticism or reproof concerning job performance. Accordingly, the jury should not have been permitted to find that the distress was so severe that no reasonable person could be expected to endure it. Restatement (Second) of Torts § 46 comment j (1965)." In footnote 9 at 440, the court further stated: "We have previously noted the need for trial courts to carefully scrutinize evidence presented by plaintiffs in support of their claims regarding the cause and the severity of alleged emotional distress absent a contemporaneous physical injury. In *Johnson v. Sampson*, 167 Minn. 203, 208 N.W. 814 (1926), we emphasized that: '[T]here is always a possibility of trumped-up claims if there may be a recovery where no evidence of bodily injury can be discovered immediately. However, the matter is in the control of the trial courts, and verdicts for plaintiffs for any substantial amounts, when based chiefly on proof of subjective symptoms, will not usually be al-

lowed to stand. 167 Minn. at 207, 208 N.W. at 816.' "

In *Fletcher v. Western National Life Ins. Co.*, 10 Cal. App. 3d 376, 397, 89 Cal. Rptr. 78, 90 (1970), the court stated, "Severe emotional distress means, then, emotional distress of such substantial quantity or enduring quality that no reasonable man in a civilized society should be expected to endure it." Plaintiff, disabled father of eight, had been badgered into a compromise agreement regarding his disability payments. The court found his distress was severe.

"Emotional distress passes under various names such as mental suffering, mental anguish, nervous shock, and includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, embarrassment, anger, chagrin, disappointment, and worry. However, it is only when emotional distress is extreme that possible liability arises." *Roberts v. Saylor*, 230 Kan. 289, 294, 637 P.2d 1175, 1180 (1981). In the *Roberts* case the plaintiff had brought suit for malpractice. That action was settled. The plaintiff subsequently required further surgery, to be performed by a different doctor. As she was being prepared for that surgery the doctor whom she had sued entered the room and said in a hostile voice, " 'I don't like you, I don't like you . . . I wanted to tell you that before you went in there.' " The plaintiff then sued the doctor for intentional infliction of emotional distress.

In evaluating plaintiff's emotional distress, the court said: "Next we will consider the second threshold question. Was the emotional distress evidenced by plaintiff such that reasonable fact finders might differ as to whether it was genuine and so severe and extreme that no reasonable person should be expected to endure it?

"Plaintiff's deposition testimony as to the nature and extent of her emotional distress was as follows:

" 'Q. Well, what other damages, or what is it that you're claiming by way of damages in this case;

how have you been injured or damaged by what occurred that day?

" 'A. Because I'm upset about it; I'm still upset. I was upset then and I'm still upset.

" 'Q. Well, is that all?

" 'A. When I seen him down there I was afraid that maybe he would come in there and try to do something to me, I didn't know.

" 'Q. You were going to sue him anyway?

" 'A. No, no, no, no.

" 'Q. Well, other than being upset, you were already upset before he ever said this. Is there anything else?

" 'A. Upset before?

" 'Q. You said you were always upset about this, and you were upset before he came in, isn't that right?

" 'A. I just got partially calmed down from what he said to me the time before, and then he came back again and started harassing me again this last time.

" 'Q. Well, my question is, in what way do you claim that you've been injured or damaged by what occurred while you were in the hospital on that day, January of this year?

" 'A. I'm nervous from all of it. I don't know what kind of damage you're talking about.

" 'Q. I'm trying to find out—I'm not talking about any, I'm trying to find out—

" 'A. Didn't do no bodily harm to me.'

"Then on cross-examination by her own attorney plaintiff testified that as a result of defendant's conduct she was scared and didn't want to go into surgery.

"The surgery was performed successfully. Although she expressed a continuing concern and nervousness resulting from the incident, such was the total extent of her emotional distress. There is no indication that psychiatric or further medical treat-

ment or medications were necessary or that she was unable to function in a normal way thereafter.

"After a careful review of the entire record it is apparent that plaintiff's emotional distress resulting from the incident was not so severe that no reasonable person should be expected to endure it. There can be little doubt that plaintiff did express fright, embarrassment and worry but this appears of the nature which is not actionable. The emotional distress suffered by her was resentment and upset which normally results from acts and criticism which are inconsiderate and unkind. The law should not intervene where someone's feelings merely are hurt.

"Accordingly we hold that neither threshold requirement was shown to have been met and summary judgment in favor of defendant was proper." *Id.* at 295-97, 637 P.2d at 1181.

In *Vicnire v. Ford Motor Credit Co.*, 401 A.2d 148, 155 (Me. 1979), the court said: "In the instant case, the presiding justice set aside the jury's verdict awarding plaintiff $5,000 in compensatory damages for mental suffering on grounds that '[t]here was no evidence of severe or substantial mental suffering, no evidence of objective symptomatology.' A careful review of the record compels agreement with the presiding justice's conclusion. The sole evidence of plaintiff's emotional distress was his own testimony that he felt 'kind of down' and 'mad' and 'nervous for about a month.' As a matter of law that evidence could not support a verdict for plaintiff on a theory of negligent infliction of mental distress, since Vicnire suffered no illness or bodily harm (*i.e.*, no objective symptomatology) as a result of his alleged distress. Even were the jury to conclude that defendant by extreme and outrageous conduct intentionally or recklessly inflicted mental distress upon Vicnire, there is no evidence that his alleged mental distress rose to that degree of severity that is required by the law to justify imposing liability upon

defendant. This jury heard no evidence from which it could conclude that plaintiff's mental distress was so 'severe' that 'no reasonable man could be expected to endure it.' In short, the presiding justice's order setting aside the jury's verdict of $5,000 in compensatory damages for emotional distress was entirely proper."

In *Poulsen v. Russell*, 300 N.W.2d 289, 297 (Iowa 1981), the court said: "On the facts of this case, we conclude that Poulsen has failed to present substantial evidence of severe and extreme emotional distress upon which a reasonable trier of fact could conclude that he had established this element. Our prior cases indicate that the plaintiff must present more evidence than that he felt bad for a month. *E.g., Meyer*, 241 N.W.2d at 915-16 (sufficient evidence to go before jury where plaintiff was nauseous, had difficulty breathing, and suffered acute myocardio ischemia); *Northrup*, 204 N.W.2d at 855 (substantial evidence of distress where plaintiff cried, lost weight, suffered abdominal cramps); *Blakeley v. Shortal's Estate*, 236 Iowa 787, 20 N.W.2d 28 (1945) (plaintiff had difficulty sleeping, was nervous, restless, and did not return to scene of tort for some time).

"The only evidence Poulsen presented was about his distress at the ending of the relationship. There is no evidence of any distress during the deterioration of the relationship. While he was understandably upset over selling out to Russell, he has not presented substantial evidence of severe emotional distress. *See Vicnire v. Ford Motor Credit Co.*, 401 A.2d 148, 155 (Me. 1979) (plaintiff's testimony that he felt 'kind of down,' 'mad,' and 'nervous for about a month' not substantial evidence of severe emotional distress); *Harris v. Jones*, 281 Md. 560, 572, 380 A.2d 611, 617, 86 A.L.R.3d 441, 453 (1977) (testimony that plaintiff was 'shaken up' and felt 'like going into a hole and hide' not sufficient). For most members of the community, especially those engaged in life in

the commercial world, 'a certain toughening of the mental hide is better protection than the law could ever be.' Margruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 Harv. L. Rev. 1033, 1035 (1936). *See Hatfield v. Max Rouse & Sons Northwest*, 100 Idaho 840, 850, 606 P.2d 944, 954 (1980)."

The plaintiff in this case testified that she was "embarrassed and humiliated" by the defendant's conduct. She further testified: "Q Other than this particular embarrassment and humiliation from the disclosure of this, was there any other feelings — emotional problems that you may have had from the publication of these letters? A Well, I have worried a great deal about it. Q What do you mean worried, Mrs. Hassing? A It has kept me awake. . . .

. . . .

"Q Does it affect your life, Mrs. Hassing? A Yes. Q Happen on a day-to-day basis? A Yes. Q Tell us how that affects your life. A It makes me nervous. It makes me cry. I feel badly.

. . . .

"Q Tell the jury how these acts have affected you other than what you've just testified. A They make me very angry. Q What do you mean by being angry? A I'm angry that my past history has been told. Q Other than anger, do you have any other feelings that have come from these acts? A I have fear. Q Fear of what? A Fear of retaliation.

. . . .

"Q Do you have any difficulties as a result of these acts that have been testified to, any other physical aspects of your life? A I have sleepless nights. I am always looking out the window at night when I get up. I am worried whenever I hear noises that I'm not familiar with. I'm concerned about the surveillance.

. . . .

"A I have had emotional distress at the time

these letters came and other letters, all of these things because it created a problem in my marriage. Q With who? A With my husband. Q When these things would come, would it cause difficult problems with you and Mr. Hassing? A Yes, it would. Q Cause arguments? A Yes, it would cause arguments, hard feelings, misunderstandings, tension."

Plaintiff further testified on cross-examination: "Q Mrs. Hassing, have you undergone any medical treatment since July 14, 1978? A Yes. Q And with whom? A Dr. Murray. Q How many times did you see Dr. Murray? A Twice. Q Did he dismiss you then? A No.

. . . .

"Q Why haven't you gone back if he didn't dismiss you? A I decided I was going to have to handle this on my own. Q Have you handled it on your own? A Yes. Q Without the help of Dr. Murray? A Yes. Q What kind of doctor is Dr. Murray? A Psychiatrist.

. . . .

"Q Have you sought any other medical treatment since July of 1978? A No. Q How many days of school did you miss last year? A Five. Q What was the occasion of those? A Colds, flu. Q And the year before? A The same. Q Five days? A I expect; I don't know for sure. I'm guessing. Q But because of colds and flu? A Yes."

The record in this case fails to show the extreme emotional distress for which recovery may be had in this type of action. The absence of any medical testimony in this case and the absence of any evidence that the plaintiff's job performance was adversely affected is of some significance. The plaintiff failed to prove that she had suffered emotional distress so severe that no reasonable person could have been expected to endure it. *Davis v. Texaco, Inc.*, *supra*.

It is unnecessary to consider the other assignments of error.

The judgment of the District Court is reversed and the cause remanded with directions to dismiss the petition.

REVERSED AND REMANDED WITH DIRECTIONS.

WHITE, J., dissenting.

Among the most treasured of the rights a citizen possesses is the right to privacy, the right to be left alone. The accidental intrusions on one's right to be left alone necessitated by the complications of an urbanized society are burden enough to bear by any reasonably sensitive person. The deliberate harassing intrusions, repeated frequently and for a continued period, are savage, uncivilized, and outrageous. I reject outright the conclusion that the conduct here is not sufficiently horrid to be classified as outrageous. The law must and should provide protection from this absurd conduct and not be seen to stand helplessly by, wringing its hands. Often the most effective method of teaching good manners is the money judgment.

I also reject the implication that recovery cannot be had in the absence of expert testimony by mental health personnel. The ability to withstand outrageous conduct, that might in another person cause physical and mental collapse, ought not to be a reason to bar recovery. The conduct is the same; the mental and physical conditions of the victims may vary. The conclusion that expert evidence of disability is required is not supported by *LaSalle Extension University v. Fogarty*, 126 Neb. 457, 253 N.W. 424 (1934).

The jury was properly instructed. I would leave its decision, that the plaintiff suffered severe emotional distress, undisturbed and affirm this judgment.

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

CAROL J. RUNTY, APPELLEE, V. HARVEY D. RUNTY, APPELLANT.
333 N.W.2d 389

Filed April 29, 1983. No. 82-054.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Affirmed.

Bauer, Galter & Geier, for appellant.

Healey, Brown, Wieland, Kluender, McCord, Atwood and Jacobs, for appellee.

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

PER CURIAM.

The court, having reviewed this marriage dissolution case de novo as it is required to do, agrees with the result reached by the trial court. Therefore, the judgment of the trial court is in all respects affirmed.

AFFIRMED.

LOU ANN PATTERSON, APPELLEE, V. RAYMOND R. OYE AND JEANETTE E. OYE, APPELLANTS.
333 N.W.2d 389

Filed April 29, 1983. No. 82-084.

1. **Boundaries.** A tree, standing directly upon the line between adjoining owners so that the line passes through it, is the common property of both parties, whether marked or not; and trespass will lie if one cuts and destroys it without the consent of the other.
2. **Boundaries: Injunction.** An injunction will be granted to prevent one adjoining owner from injuring or destroying trees that are growing on the boundary line.

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

Owen A. Giles, for appellants.

Jonathan R. Breuning of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, for appellee.

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

COLWELL, D.J., Retired.

The District Court restrained defendants, Raymond R. Oye and Jeanette E. Oye, from further removing bushes growing on a common boundary line between them and plaintiff, Lou Ann Patterson, and assessed $400 in trespass damages against defendants. Raymond had removed about 48 feet of bushes at the north end of the boundary line before plaintiff objected. Efforts to compromise failed, and this suit followed.

Plaintiff alleges a cause of action in trespass for damages and a second cause for injunctive relief. The case was presented to and considered by the court on equitable principles, *Hein v. M & N Feed Yards, Inc.*, 205 Neb. 691, 289 N.W.2d 756 (1980), and full relief of all issues was given. *Kuhlman v. Cargile*, 200 Neb. 150, 262 N.W.2d 454 (1978).

The principal question is whether the parties share common ownership in the row of bushes along or near their common boundary line.

There is little conflict in the following. The parties own and occupy abutting residential properties in Omaha, Nebraska, in an area developed in 1955. The Patterson property is at 218 South 94th Street, and defendants' property is directly west at 219 South 95th Street. Their backyards abut on a straight 132-foot north-south line. Plaintiff's property is higher at the boundary line. Truman Clare built plaintiff's house in 1955 and sold it to plaintiff in 1972. In 1956 defendants' grantor, Elmer V. Larsen, completed defendants' house; at that time there was no landscaping at or near the common boundary line. Larsen planted lilac bushes and bridal wreath on the south one-third of the boundary line. Clare

planted grass up to the boundary line; he said the bushes were planted on the boundary line. Both Larsen and Clare said that the bushes contributed to their privacy and it improved the general appearance of their properties. When Larsen sold his property in 1973, the bushes were at least 6 feet high, and they had spread out by natural volunteer growth. At that time other forms of vegetation and bushes grew in the line of bushes. Clare said that he did some maintaining and trimming of the bushes; however, it was permissive and he never claimed ownership. A registered land surveyor established the location of the true boundary line as shown on exhibits.

From other evidence in conflict, the court could find the removed bushes had been growing on the boundary line. At the time of trial in September 1981, the remaining bushes were 12 to 18 inches in diameter at the base growing on the boundary line, untrimmed, spread out, and intermingled with other bushes, vegetation growth, and trees. There was expert evidence that the expense of replacing the bushes was from $300 to $1,500. Between 1973 and August 1, 1977, both parties cared for and maintained the bushes; plaintiff's care was limited. Plaintiff considered the bushes to be growing on the boundary line and that they were common property; she said that they provided privacy and they added to the aesthetic value of the property. Defendants claimed that they owned the bushes since their grantor had planted them, that they had done most of the caring for the bushes, and that in 1973 plaintiff told Raymond that she thought the hedge was his. Defendants described the bushes as ugly; there is some evidence that Raymond intended to destroy the remaining bushes and build a rock wall along the boundary line in order to divert drainage water from plaintiff's property. At the time of trial, neither party had planted any replacement shrubs in the boundary line area.

Defendants claim as a defense that they owned the bushes since they were planted and growing on their side of the boundary line, citing *Jurgens v. Wiese*, 151 Neb. 549, 38 N.W.2d 261 (1949). The evidence does not support that defense.

" 'A tree, standing directly upon the line between adjoining owners, so that the line passes through it, is the common property of both parties, whether marked or not; and trespass will lie if one cuts and destroys it without the consent of the other.' . . .

" 'An injunction will be granted to prevent one adjoining owner from injuring or destroying trees that are growing on the boundary line . . . .' " *Weisel v. Hobbs*, 138 Neb. 656, 662, 294 N.W. 448, 451 (1940). See, also, Annot., 26 A.L.R.3d 1372 (1969).

In *Weisel* our court said at 663, 294 N.W. at 452: "In the case at bar, where the trunk of the tree *impinges* upon the lot line, and when the respective owners have for years jointly cared for the tree, and divided the expenses of protecting it . . . then each has an interest in the tree sufficient to demand that the owner of the other portion shall not destroy the tree." (Emphasis supplied.) Further, in *Weisel* the court considered the interests of the parties in the tree, and their equities. One party claimed the tree was a nuisance and dangerous and the other party said the tree provided needed shade. The court concluded that the equities favored shade benefits.

"An injunction will not be granted unless the right is clear, the damage irreparable, and the remedy at law inadequate to prevent a failure of justice." *Muchemore v. Heflin*, 187 Neb. 217, 219-20, 188 N.W.2d 713, 714 (1971).

" '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).

We find that on August 1, 1977, plaintiff and de-

fendants owned in common the bushes growing on their common boundary line and that defendants wrongfully removed and destroyed about 48 feet of those bushes, for which the trial court properly assessed $400 in damages. We further find that defendants may harm, damage, or destroy some or all of the remaining bushes growing on the boundary line, which would cause irreparable damage to plaintiff and unnecessary litigation, and that the terms of the court's injunction are equitable.

Defendants argue that the injunction terms, restraining them from "damaging or destroying the hedge currently existing . . . or any hedges subsequently planted thereon, or taking any actions whatsoever which are unreasonably dangerous to the continued good health and existence of such hedges or taking any actions whatsoever in violation of Plaintiff's joint ownership interest . . .," will impose years of unreasonable future hardship and abuse from plaintiff. Defendants are reminded that the law provides avenues of relief in the event they feel aggrieved. Where there is a change of circumstances they may apply to the court to vacate or modify the decree. *Board of County Commissioners v. Scott*, 178 Neb. 53, 131 N.W.2d 711 (1964). Whenever there is a question of interpreting the terms of the injunction decree, they can and should apply to the court for direction. *Kasparek v. May*, 174 Neb. 732, 119 N.W.2d 512 (1963).

Defendants' other claimed error was not supported by authority, and it is without merit.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROY L. ELLIS, APPELLANT.
333 N.W.2d 391

Filed April 29, 1983. No. 82-191.

Criminal Law: Habitual Criminals. In order to warrant the enhancement of the penalty under the Nebraska habitual criminal statute, Neb. Rev. Stat. § 29-2221 (Reissue 1979), the prior convictions, except the first conviction, must be for offenses committed after each preceding conviction, and all such prior convictions must precede the commission of the principal offense.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Reversed and remanded with directions.

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

Roy Ellis, pro se.

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

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

KRIVOSHA, C.J.

This appeal once again presents the question of how the habitual criminal statute, Neb. Rev. Stat. § 29-2221 (Reissue 1979), should be interpreted. The appellant, Roy L. Ellis, was informed against in a three-count amended information. The first count charged him with the robbery of property of Kentucky Fried Chicken from the personal protection of one Nick Gann, in violation of Neb. Rev. Stat. § 28-324 (Reissue 1979), a Class II felony. The second count charged Ellis with the use of a firearm to commit the felony, in violation of Neb. Rev. Stat. § 28-1205 (Reissue 1979), a Class III felony. The third count charged him with being an habitual criminal, in violation of § 29-2221. The jury found Ellis guilty as charged of robbery and use of a firearm. Section 29-2221 provides in part: "Whoever

has been twice convicted of crime, sentenced and committed to prison . . . shall, upon conviction of a felony committed in this state, be deemed to be an habitual criminal . . . ." Following the findings of guilty by the jury, the trial court received evidence on the issue as to whether Ellis was an habitual criminal. The evidence so received established that Ellis had once before been convicted of robbery *and* the use of a firearm in its commission. The trial court determined that these previous convictions could be considered as two separate convictions for purposes of the Nebraska habitual criminal statute, § 29-2221, even though they were imposed at the same time, and found Ellis to be an habitual criminal. The District Court then sentenced Ellis to consecutive terms of 12 to 15 years and 10 years on each of the two substantive counts.

Ellis has filed two briefs in this case. One is filed by his court-appointed attorney, assigning as error the fact that the trial court was wrong in not dismissing the habitual criminal charge against Ellis because his two prior felony convictions used as the basis to find him an habitual criminal occurred simultaneously as part of one transaction. Ellis has likewise filed a brief, pro se, alleging that his federal constitutional right to due process of law was violated when the State's representative allowed false testimony by its own witness to go uncorrected, even though the testimony was unsolicited by the State's representative.

We first address Ellis' pro se assignment of error, because it is wholly without merit and can be disposed of easily. An examination of the record discloses that the matters about which Ellis complains concern testimony given by one Devern Rasco. Ms. Rasco testified at the trial as a witness on behalf of the State and identified Ellis as the one who had robbed the Kentucky Fried Chicken where she was employed. While there are some minor discrepancies in Ms. Rasco's testimony, an examination of the

entire record discloses that they are indeed minor in nature and concern collateral details. At best, they go to the credibility of the witness and not to Ellis' due process rights. This court does not resolve questions of credibility. "In determining the sufficiency of the evidence to sustain a conviction in a criminal prosecution, it is not the province of the Nebraska Supreme Court to resolve conflicts in the evidence, pass upon the credibility of witnesses, determine plausibility of explanations, or weigh the evidence, as such matters are for the jury. The verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it." (Syllabus of the court.) *State v. True*, 210 Neb. 701, 316 N.W.2d 623 (1982). Moreover, "[a] verdict by a trier of fact in a criminal proceeding will be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it." *State v. Hilker*, 210 Neb. 810, 812, 317 N.W.2d 82, 84 (1982). As we have already indicated, Ellis' claim that his federal due process has been violated is frivolous, and the assignment of error is without merit and must be overruled.

The error assigned by Ellis' court-appointed counsel, however, poses a more difficult problem. By a divided court, with three justices dissenting, this court recently held, in *State v. Pierce*, 204 Neb. 433, 283 N.W.2d 6 (1979), that the habitual criminal statute could be applied to an individual even though the two previous offenses occurred on the same date and were prosecuted in the same information and resulted in concurrent sentences. As the dissent in *State v. Pierce* indicated, this holding is the minority view in the United States.

On further reflection, we now believe that we were in error in our holding in *State v. Pierce*, and it should be overruled. An examination of § 29-2221, the habitual criminal statute, makes it clear that what the Legislature was attempting to accomplish when it enacted the habitual criminal statute was to

grant to a sentencing court the ability to enhance the penalty for a criminal who committed a felony which, when considered alone, did not permit a sentence of at least 10 years but, because of the repetitive nature of the crime, was deserving of an enhanced penalty of at least 10 years' imprisonment. Section 29-2221 appears clear on its face that its purpose is to permit the trial court to sentence one, who has already been given two chances and failed, to a minimum sentence of 10 years and a maximum sentence of 60 years, regardless of what the sentence for the crime committed might otherwise be. If the statute involved in the particular crime already provides for a sentence of imprisonment longer than a minimum of 10 years or a maximum of 60 years, the habitual criminal statute has no application. The statute specifically provides for that result when it provides that the penalty set out in the habitual criminal statute shall apply in sentencing if "no greater punishment is otherwise provided by statute, in which case the law creating the greater punishment shall govern." Obviously, one who commits, for instance, the act of murder, even though it may be a third offense, is not charged with being an habitual criminal nor sentenced under the provisions of § 29-2221, because the statutes in question already provide for a greater sentence.

We believe that the purpose of enacting the habitual criminal statute is to serve as a warning to previous offenders that if they do not reform their ways they may be imprisoned for a considerable period of time, regardless of the penalty for the specific crime charged. See *Dye v. Skeen, Warden*, 135 W. Va. 90, 62 S.E.2d 681 (1950). As noted by the dissent in *State v. Pierce*, *supra* at 444, 283 N.W.2d at 12: " 'Recidivist statutes are enacted in an effort to deter and punish incorrigible offenders. * * * They are intended to apply to persistent violators who have not responded to the restraining influence of conviction and punishment.' State v. Conley, 222

N.W.2d 501 (Iowa, 1974). 'It is the *commission* of the second felony *after conviction* for the first, and the *commission* of the *third* felony *after conviction* of the second that is deemed to make the defendant an incorrigible.' (Emphasis supplied.) Coleman v. Commonwealth, 276 Ky. 802, 125 S.W.2d 728 (1939). Finally, '* * * where the sequence of prior convictions is in issue, the rule followed in the majority of jurisdictions is that each successive felony must be committed after the previous felony conviction in order to count towards habitual criminal status.' State v. Carlson, 560 P.2d 26 (Alaska, 1977). See, also, Faull v. State, 178 Wis. 66, 189 N.W. 274 (1922); Washington v. United States, 343 A.2d 560 (App. D.C., 1975); Hutchinson v. State, 481 S.W.2d 881 (Tex. Crim. App., 1972); Cooper v. State, 284 N.E.2d 799 (Ind., 1972); Holst v. Owens, 24 F.2d 100 (5th Cir., 1928); Karz v. State, 279 So.2d 383 (Fla. App., 1973); State v. Mitchell, 2 Wash. App. 943, 472 P.2d 629 (1970); State v. Lohrbach, 217 Kans. 588, 538 P.2d 678 (1975); Moore v. Coiner, 303 F. Supp. 185 (N.D., W. Va., 1969); Hill v. Boles, 149 W. Va. 779, 143 S.E.2d 467 (1965); State v. Sanchez, 87 N.M. 256, 531 P.2d 1229 (1975); Annotation, 24 A.L.R.2d 1247." (Emphasis supplied.) For a collection of the cases, see Annot., 24 A.L.R.2d 1247 (1952).

We believe we should join the majority of jurisdictions in their interpretation of the habitual criminal statute, and now, therefore, declare that in order to warrant the enhancement of the penalty under the Nebraska habitual criminal statute, § 29-2221, the prior convictions, except the first conviction, must be for offenses committed after each preceding conviction, and all such prior convictions must precede the commission of the principal offense. For that reason we believe that the decision of the trial court finding the defendant Ellis to be an habitual criminal must be set aside and the matter remanded to the District Court for further sentencing in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

WHITE, J., dissenting.

State v. Pierce, 204 Neb. 433, 283 N.W.2d 6 (1979), is overruled and, as the reason for its demise, the majority determines that habitual criminal statutes " ' ''are enacted in an effort to deter and punish incorrigible offenders [and] are intended to apply to persistent violators who have not responded to the restraining influence of conviction and punishment.'' ' '' That such statutes are enacted to punish incorrigible offenders is obvious, but the deterrent effect, if any, may as logically be said to consist solely of the loss of opportunity to commit crimes because of the longer incarceration. The majority has chosen to substitute doubtful sociological assumptions (without any legislative history to show that the Legislature shared its view) for the logical construction of a statute as set forth by the majority in *Pierce*. The majority in *Pierce* suggested that the prevailing view in this case should appropriately have been addressed to the Legislature. We now have eliminated that cumbersome task from the appellant.

BOSLAUGH, J., joins in this dissent.

CAPORALE, J., dissenting.

I join in Judge White's dissent, and add the observation that, generally, 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 determination of its intent. *Erspamer Advertising Co. v. Dept. of Labor*, *ante* p. 68, 333 N.W.2d 646 (1983). See, also, *State v. Hocutt*, 207 Neb. 689, 300 N.W.2d 198 (1981).

MIKE MCGINLEY ET AL., APPELLANTS, V. WHEAT BELT PUBLIC POWER DISTRICT, A PUBLIC CORPORATION AND POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, ET AL., APPELLEES, RICHARD W. DUNN ET AL., INTERVENORS-APPELLEES.

332 N.W.2d 915

Filed April 29, 1983. No. 82-273.

1. **Public Utilities: Rates.** The reasonableness or unreasonableness of rates charged or action taken by the board of directors of a public power district is a proper matter for judicial examination and review.
2. _____: _____. Persons receiving similar service under similar circumstances cannot be charged for such service in an arbitrary, designed, dissimilar manner.
3. _____: _____. A dissimilar rate may not be imposed for similar service solely on the basis that the additional source of the power or energy is more costly than previous sources. All of the sources must properly be blended into a rate which results in all customers obtaining the same service under the same conditions being charged the same rate.
4. _____: _____. A discrimination may arise from a mere inequality in rates, but an overcharge arises only where the rate charged is unreasonable in and of itself, irrespective of the rate exacted of others, or when it is in excess of the rate established for the particular customer or business. In a suit for overcharges the rate paid by others is immaterial. It is only in suits for damages for discrimination that rates charged others are important.

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

Wright, Simmons & Selzer, for appellants.

John Peetz, P.C., for appellees Wheat Belt P.P. Dist. et al.

Steven C. Smith of Van Steenberg, Brower, Chaloupka, Mullin & Holyoke, for intervenors-appellees.

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

KRIVOSHA, C.J.

The plaintiffs in this action, electric customers of Wheat Belt Public Power District, appeal from an order entered by the District Court for Cheyenne County, Nebraska, which dismissed their petition. Following the institution of the suit by the plaintiffs, certain other customers of Wheat Belt Public Power District intervened in the action and joined with Wheat Belt in defending the action. For reasons set out in this opinion, we reverse and remand.

The record reveals that Wheat Belt Public Power District is a public corporation and political subdivision created pursuant to Chapter 70, article 6, of the statutes of the State of Nebraska. As a public electric utility, it is one of 25 members of Tri-State Generation & Transmission Association, a multistate wholesale distributor of electric energy. Originally, Tri-State was a transmitting facility only, which acquired all of its power from the U.S. Bureau of Reclamation and, later, from Basin Electric Power Cooperative. Due to increasing load growth among its members, Tri-State exceeded its power allocations in the early 1970s and was faced with the decision whether to buy power from a third source or to become a generating facility. This load growth was primarily caused by an increased use of seasonal irrigation in the Tri-State area. The increased peak loads of seasonal users resulted in voltage drops due to high loads and insufficient generating capacity.

In order to meet the rising power demands of its members and to stabilize voltage problems, Tri-State chose to become a generating facility and began construction of a peaking unit which would provide energy during periods of high seasonal demand. The unit was constructed at Wray, Colorado, and came on line in 1975. In 1977 Tri-State constructed a second peaking unit at Burlington, Colorado.

On February 3, 1975, Tri-State informed Wheat Belt that a surcharge or "ratchet" would be charged

all customers of Tri-State, including Wheat Belt. Tri-State advised Wheat Belt that the ratchet would be assessed on the basis of Wheat Belt's summer peak demand. Wheat Belt considered three alternatives to deal with the imposed ratchet: (1) Refuse to add new irrigation customers and thereby stop irrigation growth; (2) Allocate the ratchet equally among all irrigation customers; (3) Create two classes of irrigation customers based on the date the customer requested service. The last alternative was apparently based upon Wheat Belt's notion that it was the new customers who were causing the increased summer peak demand, thereby causing the imposition of the ratchet.

On May 19, 1975, the Wheat Belt board of directors announced that there would be two classes of irrigation customers in the future. One class, called "Rate Class 75" would be all customers who were receiving service from Wheat Belt before February 3, 1975, or who had notified Wheat Belt before February 3, 1975, that they desired service and who were put in service before August 15, 1975. A second class, to be called "Rate Class 76," would consist of those customers put in service after August 15, 1975, that had not been committed to by February 3, 1975. The rationale for the subclassification was to protect the old customers from having to pay any increased cost associated with Tri-State's construction of the peaking units, on the theory that they "were not creating a major problem." Because the members of Rate Class 76 were assessed the greatest portion of the ratchet, the rates for similar service for the two classes of customers were significantly different. The evidence discloses, as an example, that in 1976 the charge per horsepower for members of Rate Class 75 was $.39, while the members of Rate Class 76 obtaining identical service paid $5.02 per horsepower. This difference continued throughout the years, and in 1981, while the members of Rate Class 75 consumed 31,830.5 horsepower, their charge per

horsepower was only $5.75, while members of Rate Class 76, who used 11,198 horsepower, were charged a rate of $17.15 per horsepower. The evidence conclusively established that the only difference between consumers in Rate Class 76 and those in Rate Class 75 was the date upon which they requested service. The consumptive characteristics of both classes were shown to be similar in all respects. Both classes of customers raised similar crops in the same geographical area, used the energy in the same way, and had identical energy and horsepower demand charges assessed. While Wheat Belt maintained that there were higher horsepower motors used by consumers in Rate Class 75, it was demonstrated that there are almost as many high horsepower motors in Rate Class 76 as there are in Rate Class 75. The load factor was also shown to be the same for the two classes and, despite the fact that members of Rate Class 75 were placed on a voluntary, unmonitored rotation schedule in which each well was to be operated only 2 out of 3 days, there was evidence that both classes were irrigating in the same way and that many Rate Class 75 customers simply did not comply with the rotation policy. The evidence further disclosed that in addition to allocating the principal portion of the ratchet to consumers in Rate Class 76, Wheat Belt also allocated a ratchet-free block of U.S. Bureau of Reclamation power only to consumers in Rate Class 75.

The plaintiffs presented expert testimony at trial regarding the propriety of the ratchet allocation formula used by Wheat Belt. Donald Salow, a consulting engineer specializing in utility operations and rate setting, testified that customers in both Rate Class 75 and Rate Class 76 receive equal benefits from construction of the peaking unit. After analyzing the two rate classes Salow concluded that there were no differences in cost of service which would warrant this disproportionate ratchet allocation. In addition, Wheat Belt's practice of allocating

the benefit of ratchet-free Bureau of Reclamation power entirely to Rate Class 75 was characterized by Salow as a "deviation" from the norm that was, in his opinion, unfair and unreasonable. He also testified that if none of the Tri-State members had added new customers or had little or no load growth after the peaking units were constructed, the existing customers would have simply paid for the debt retirement through higher energy and demand charges.

Henry Rice, a consulting engineer and former employee of Nebraska Public Power District, testified that exit and entry into a system should make no difference between customers who take similar service under similar conditions. In his opinion, the present ratchet allocation between Rate Class 75 and Rate Class 76 was neither proper, reasonable, fair, nor nondiscriminatory.

Intervenors' expert, Stephen Brown, testified that although it is possible to allocate the ratchet equally among all irrigators, Wheat Belt's formula nevertheless was an equitable distribution consistent with the philosophy of charging those who create the cost with the payment of the cost.

Before turning our attention to the principal issue involved in this appeal, there are several preliminary matters which need to be considered. The first issue is the propriety of various members of Rate Class 75 intervening in this action. An examination of their briefs and the record makes it quite clear that their interests in this matter were identical with the action taken by Wheat Belt and were being fully and completely presented by Wheat Belt. They therefore did not have a direct interest different than Wheat Belt's. The fact that their rate would be affected if Wheat Belt's action in setting the two rates was declared invalid was not sufficient to permit them to intervene. In *Cornhusker Electric Co. v. City of Fairbury*, 131 Neb. 888, 270 N.W. 482 (1936), we held that a ratepayer's allegation that his rates

would be increased if the challenged rate was not maintained was not so direct an interest as to entitle the ratepayer to intervene. Also, in *Noble v. City of Lincoln*, 158 Neb. 457, 471, 63 N.W.2d 475, 484 (1954), we said: "Taxpayers are not qualified to intervene in matters of public interest that are prosecuted or defended for a governmental subdivision by its proper officials. Best & Co., Inc. v. City of Omaha, 149 Neb. 868, 33 N.W.2d 150; City of Omaha v. Douglas County, 125 Neb. 640, 251 N.W. 262; State ex rel. Randall v. Hall, 125 Neb. 236, 249 N.W. 756." It appears to us that the rationale underlying that rule applies equally to a case challenging a rate established by a governmental subdivision. The intervenors did not have such direct interest that was not otherwise being adequately protected by Wheat Belt and should not have been permitted to intervene. Cases of this nature are sufficiently complicated without adding interlopers.

A second issue, raised by Wheat Belt, is the propriety of the court reviewing the action of Wheat Belt in setting the rates. Wheat Belt argues that rate making is wholly a legislative function and that the courts, therefore, have no right to impose their judgment in place of that of the elected body. That question has already been answered by this court contrary to Wheat Belt's position. In *Erickson v. Metropolitan Utilities Dist.*, 171 Neb. 654, 659, 107 N.W.2d 324, 327 (1961), this court said: "In the performance of the functions under the power granted by the statute the district in the matter of service rendered and rates to be charged therefor, the question of whether or not the district has acted unreasonably and arbitrarily has been recognized as a matter proper for judicial examination and review."

And specifically in *York County Rural Public Power Dist. v. O'Connor*, 172 Neb. 602, 607-08, 111 N.W.2d 376, 379 (1961), we said: "If the plaintiff district is to be operated in a successful and profitable manner, someone must determine the rate neces-

sary to permit it to do so. Section 70-655, R.R.S. 1943, requires plaintiff's board of directors to make that decision. It also provides that the rates be fair, reasonable, and nondiscriminatory. In the case of a dispute between the plaintiff and its customers as to the reasonableness of the rates charged, who has the authority to review the action of the board of directors? Section 70-656, R.R.S. 1943, provides: 'The Nebraska State Railway Commission shall have no jurisdiction over the rates, tolls, rents and charges of districts organized under sections 70-601 to 70-679.' If the railway commission does not have authority, who does? We have previously answered this question. . . . We find that the reasonableness or unreasonableness of rates charged or action taken by the board of directors of a public power district is a proper matter for judicial examination and review." There appears therefore to be no question in this jurisdiction that the trial court, in the first instance, and this court, on appeal, properly have jurisdiction to review the rates fixed by Wheat Belt. Were it otherwise, the action of a board such as Wheat Belt would not be subject to review. That simply could not be.

Having thus disposed of the preliminary matters, we turn to the merits of the case. The issue in this case is, to some extent, controlled by statute. Neb. Rev. Stat. § 70-655 (Reissue 1981) imposes upon Wheat Belt the duty of setting rates which "shall be fair, reasonable, nondiscriminatory, and so adjusted as in a fair and equitable manner to confer upon and distribute among the users and consumers of commodities and services furnished or sold by the district the *benefits* of a successful and profitable operation and conduct of the business of the district." (Emphasis supplied.) That is, not only must the district, in establishing rates, do so in a manner which is fair, reasonable, and nondiscriminatory but it must likewise adjust the rates so as to confer *upon and among* the users of these services the benefits of

a successful and profitable operation. Obviously, the ingredients which go into making a successful and profitable operation are not isolated to a particular source or a particular date in time but, rather, come about by reason of a mixture of things. The rates to be charged users of electricity are a blend of both demand charges and energy charges and likewise are the melding of various sources available to Wheat Belt. While it is true that an entire class may be charged a rate other or different than another class, if indeed the increased cost of providing the service can be identified with that class, the class itself may not be subdivided dependent solely upon the date on which the service was provided. Were this to be otherwise, then a utility could impose upon a single, newly constructed building the entire cost of obtaining a new source of energy required by reason of the addition of the building to the service, even though the nature of the service is in all respects identical to all other commercial customers in the community. Such a rate formula is beyond comprehension. In *Erickson v. Metropolitan Utilities Dist.*, 171 Neb. 654, 667-68, 107 N.W.2d 324, 331 (1961), we said: " 'The rule forbidding unjust discrimination has been variously expressed: The charges must be equal to all for the same service under like circumstances. A public service corporation is impressed with the obligation of furnishing its service to each patron at the same price it makes to every other patron for the same or substantially the same or similar service. . . . "The common law upon the subject is founded on public policy which requires one engaged in a public calling to charge a reasonable and uniform price to all persons for the same service rendered under the same circumstances." ' " Permitting rates to be based upon the sole requirement that the utility must obtain additional energy would result in a chaotic rate formula which of necessity would discriminate. As we have asked, could a utility charge

a new building a higher rate simply because additional energy in the blend costs more than an early block? Or could a city charge individual homeowners who obtain similar service different rates based solely on the date they were connected to the system? We know of no authority to support that view. Likewise, one is hard pressed to imagine that if the next block of energy purchased by Wheat Belt should cost less than the current block of energy, the next newest customers of Wheat Belt would be charged a lower rate than the current users. That is obviously what the Legislature considered when it required a utility governed by Chapter 70, article 6, to confer upon and among the users the benefits of a successful operation. The benefits are to be conferred in a nondiscriminatory fashion. These benefits include the benefits of earlier-acquired lower cost energy.

This is not a case in which Wheat Belt has been compelled to expend capital funds to extend service to customers not previously receiving service. This is a question of Wheat Belt determining that the least expense block of power it purchases belongs to the first customers and the most expense block of power to the later customers, though Wheat Belt cannot show how or where any particular block of power is transmitted. The significance of this distinction was pointed out in the case of *Contractors & Builders Ass'n v. City of Dunedin*, 329 So. 2d 314 (Fla. 1976). The *City of Dunedin* case involved a challenge to a municipal ordinance dealing with water and sewer system connection fees. The amount of the connection charges varied depending upon the time at which the connection to the utility system was made. In striking down the charge the Florida court said at 320-21: "Users 'who benefit especially, not from the maintenance of the system, but by the extension of the system . . . should bear the cost of that extension.' *Hartman v. Aurora Sanitary District*, *supra*, 177 N.E.2d at 218. On the other hand, it

is not 'just and equitable' for a municipally owned utility to impose the entire burden of capital expenditures, including replacement of existing plant, on persons connecting to a water and sewer system after an arbitrarily chosen time certain.

. . . .

". . . For purposes of allocating the cost of replacing original facilities, it is arbitrary and irrational to distinguish between old and new users, all of whom bear the expense of the old plant and all of whom will use the new plant."

It is clear that as new users come on the line they are nevertheless required to pay for the cost of bonds issued for old plants already built which, if Wheat Belt's position is correct, presumably may not provide the new customers with any energy. Somehow there does not seem to be any hesitancy to impose upon new users costs which were incurred before they became users. Yet, in the instant case, there is some notion that the new user should be required to pay the greatest portion of the surcharge, even though the nature of the service being provided is identical between the two classes. Persons receiving similar service under similar circumstances cannot be charged for such service in an arbitrary, designed, dissimilar manner. Courts which have been called upon to review this matter have made a distinction between the cost of providing service not previously provided and source of service. See, *U.S. Steel Corp. v. Com., Public U. Com'n*, 37 Pa. Commw. 195, 390 A.2d 849 (1978); *Mountain States Legal Fn. v. Utah Pub. Serv.*, 636 P.2d 1047 (Utah 1981); *Utilities Com. v. Mead Corp.*, 238 N.C. 451, 78 S.E.2d 290 (1953); *State ex rel. DePaul Hosp. S. of N. v. Public Serv. Com'n*, 464 S.W.2d 737 (Mo. App. 1970); *State ex rel. McKittrick v. Public Service Comm.*, 352 Mo. 29, 175 S.W.2d 857 (1943). This is not to say that in a proper case a customer may not be charged for the additional cost of extending the service to a point where the service had not previ-

ously been provided. We do not pass on that issue. It is only to say that a dissimilar rate may not be imposed for similar service solely on the basis that the additional source of the power or energy is more costly than previous sources. All of the sources must properly be blended into a rate which results in all customers obtaining the same service under the same conditions being charged the same rate.

Wheat Belt argues that our earlier decision in *City of Scottsbluff v. United Tel. Co. of the West*, 171 Neb. 229, 106 N.W.2d 12 (1960), justifies its action in the present case. We believe Wheat Belt misreads the decision. In the *United Tel. Co.* case, the city of Scottsbluff enacted an ordinance imposing an occupation tax on the telephone company based upon service *in* Scottsbluff. The telephone company surcharged *all* of its customers *in* Scottsbluff a pro rata portion of the Scottsbluff-imposed occupation tax. The city objected and argued, in effect, that the telephone company was required to absorb the tax imposed in Scottsbluff. In approving the action of the telephone company, we merely said that if the city of Scottsbluff wished to raise funds by taxing the telephone company in its city, it was not discriminatory to require *all* of the users in the taxed area to pay the cost of the tax so imposed. That is not at all similar to the present case. We therefore find that the action of Wheat Belt in establishing two different subclasses of irrigation customers and asessing the bulk of the ratchet imposed by Tri-State against members of Rate Class 76 was arbitrary and discriminatory and must be set aside.

Having therefore found the rate invalid, we are now confronted with determining the proper relief to be granted. Members of Rate Class 76 have asked this court to render judgment for the members of Rate Class 76 in an amount equal to the difference between what members of Rate Class 75 paid and what members of Rate Class 76 paid. Were we to do that we would be in effect granting to members of

Rate Class 76 the same unjust and arbitrary rate which was granted to members of Rate Class 75 and which we have now declared invalid. Such relief is not appropriate in a case of this nature. Rate Class 76 has failed to recognize the difference between an overcharge and a discriminatory rate. The difference was carefully explained by the Supreme Court of Texas in *United Gas Corp. v. Shepherd Laundries, Inc.*, 144 Tex. 164, 170, 189 S.W.2d 485, 487-88 (1945), when the court said: "[A] discrimination may arise from a mere inequality in rates but an overcharge arises only where the rate charged is unreasonable in and of itself, irrespective of the rate exacted of others, or when it is in excess of the rate established for the particular customer or business. In a suit for overcharges the rate paid by others is immaterial. It is only in suits for damages for discrimination that rates charged others are important." The evidence in this case does not support a claim that the rate itself was unreasonable or included items not properly included. The problem here was that the proper costs were misallocated.

While there are cases to be found where damages such as requested by the plaintiffs herein have been awarded, they are cases generally where both a statute authorizes such damages and the evidence supports such damages. Neither factor is present in this case.

Our reading of the various cases decided throughout the United States on this issue convinces us that the proper action to take in a case of this nature, absent specific evidence of individual damages, is to require the board of directors of Wheat Belt to set a proper rate for the service rendered. This would permit Wheat Belt to exercise the expertise which is better left to it than to the courts, and in effect would require Wheat Belt to merely perform the duties imposed upon it under the provisions of § 70-655. That duty is to set a rate for the period in question which is fair, reasonable, and nondiscriminatory and which

confers upon and distributes among the users and consumers the benefits of a successful and profitable operation. The only way to do that is to require Wheat Belt to set a rate for members of Rate Class 75 and Rate Class 76 in the same amount and in the same fashion and to refund or credit to customers in Rate Class 76 any overcharge which may result. For that reason, we reverse and remand the instant case to the District Court with directions to order Wheat Belt to recompute the rate for the period in question in such amount as to impose charges upon members of Rate Class 75 and Rate Class 76 in an identical amount, and in a fair, equitable, and nondiscriminatory manner. We recognize, of course, that in doing this Wheat Belt is unable to collect additional charges from members of Rate Class 75 for the years already involved and will simply have to absorb those losses in future rates.

REVERSED AND REMANDED WITH DIRECTIONS.

WHITE, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. JOHN S. ROBISH, APPELLANT.

332 N.W.2d 922

Filed April 29, 1983. No. 82-292.

1. **Search Warrants.** Affidavits for search warrants must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. Technical requirements of elaborate specificity once exacted under common-law pleadings have no proper place in this area.
2. **Search Warrants: Probable Cause.** In evaluating the showing of probable cause necessary to support a search warrant, only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause.
3. _____: _____. Probable cause exists where the facts and circumstances within the officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to war-

rant a man of reasonable caution in the belief that an offense has been or is being committed.

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

Ralph A. Smith, for appellant.

Paul L. Douglas, Attorney General, and Dale A. Comer, for appellee.

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

KRIVOSHA, C.J.

The appellant, John S. Robish, having waived a jury trial, was convicted following a bench trial of one count of possession of cocaine, in violation of Neb. Rev. Stat. § 28-416(3) (Reissue 1979), and one count of possession of marijuana with intent to deliver, in violation of Neb. Rev. Stat. § 28-416(1)(a) (Reissue 1979). Following the preparation of a presentence report, Robish was sentenced to imprisonment on count I for a period of 3 years, and on count II for not less than 3 nor more than 5 years, the sentences to be served concurrently. He was also fined $10,000 on count II.

He assigns two errors: one, that the trial court erred in failing to suppress evidence which was obtained as a result of an allegedly illegal search warrant, and, two, that the sentence is excessive. For reasons more particularly set out herein, we believe that both assignments are without merit and the conviction and sentence should be affirmed.

Robish's principal complaint with regard to the search warrant is based upon a rather involved argument to the effect that the affidavit upon which the search warrant was issued was obtained on the basis of false and misleading information. Appellant alleges in his brief at 9: "The 'affidavit and application' which was used to convince the judge to issue the search warrant in question, was made up

almost entirely of material misstatements. Simply put, the vast majority of those things which were set out in the affidavit as being facts were *not true.*" While there does exist a dispute over the veracity of the affidavit used to obtain the search warrant, there is little or no dispute over the material facts in the case.

On August 5, 1981, Officer Joseph Nepodal of the vice and narcotics unit of the Omaha Police Department received a tip from an unidentified informant advising that Robish would be receiving a large shipment of marijuana. Officer Nepodal met with the informant for approximately 15 minutes on August 5 and for 25 minutes on August 7. On August 13, 1981, the informant contacted Officer Nepodal and told him that the shipment had arrived. Police then set up surveillance around Robish's house and observed people leaving the residence. One was carrying a large cardboard box and another a bag of some sort. The two drove off in separate cars, both of which were stopped by the police. The car with the box was driven by Robish's brother, Ron Robish, and the car with the bag was driven by another, who it appears had no involvement in the case. Ron Robish's vehicle was searched pursuant to a search warrant which had earlier been obtained, and the marijuana was found in a box in his car. The parties dispute who said what to whom about the existence of marijuana at the Robish house, but apparently Ron Robish advised Sgt. Jack O'Donnell that there may be 30 pounds of marijuana still in the Robish home.

Reports from the various officers came to Lt. Robert Olson of the Omaha Police Department, who was supervising the investigation. Olson and other police personnel then prepared an application and affidavit seeking to obtain a search warrant for the Robish residence and two vehicles owned by Robish. The affidavit itself was signed by Officer Richard Griffith of the Omaha Police Department, although

Griffith appeared to have no personal knowledge of the contents of the affidavit. In fact, Griffith's affidavit did not represent that he had personal knowledge, but only that he had just and reasonable grounds to believe that there was concealed or kept on the Robish property marijuana and cocaine. The basis for his belief was the information given to Lieutenant Olson by Officer Nepodal and the various other officers who observed the house and stopped the two vehicles.

Meanwhile, Robish was arrested when he was seen leaving his home. At the police station he told Sergeant O'Donnell where to find marijuana in the house and where to find cocaine in one of the cars. Armed with the search warrant, the police found marijuana in the basement of the house and cocaine in the car.

In attempting to determine whether the affidavit submitted by Officer Griffith was sufficient to justify the issuance of the warrant or was invalid, as claimed by Robish, we are bound by certain basic principles heretofore articulated both by this court and by the federal courts. In *State v. Payne*, 201 Neb. 665, 668, 271 N.W.2d 350, 352 (1978), we said: "It has been well established that affidavits for search warrants . . . must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. Recital of some of the underlying circumstances in the affidavit is essential. Where these circumstances are detailed, where reason for crediting the source of the information is given, and when a magistrate has found probable cause, the court should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense manner. Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolu-

tion of doubtful or marginal cases in this area would be largely determined by the preference to be accorded to warrants." And in *State v. Stickelman*, 207 Neb. 429, 433, 299 N.W.2d 520, 523 (1980), we said: "The rule is well established that, in evaluating the showing of probable cause necessary to support a search warrant, only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause." Probable cause has been defined as reasonable suspicion founded upon articulable facts. See *State v. Anderson*, 204 Neb. 186, 281 N.W.2d 743 (1979). In *Anderson*, *supra* at 195, 281 N.W.2d at 748, we said: " 'Probable cause exists where the facts and circumstances within the officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. . . .' "

With these principles in mind we have reviewed the affidavit filed by Officer Griffith and meticulously examined each and every claim regarding the affidavit made by Robish. Our examination convinces us that the claims of untruthfulness raised by Robish are statements that are neither deliberate falsehoods nor made with reckless disregard for the truth. Absent that finding, the affidavit cannot be set aside and the warrant cannot be said to have been improperly issued.

In *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978), the U.S. Supreme Court ruled that criminal defendants could challenge the validity of search warrants based on affidavits only if the affidavit contained statements that were deliberate falsehoods or made with reckless disregard for the truth. The test articulated in *Franks* for determining whether the defendant was entitled to a hearing to examine the contents of the affidavit for a search warrant is three-pronged. First, the challenger is to attack *only* the veracity of the affiant,

and not of any other informant. Second, he or she must make a "substantial preliminary showing," including allegations of "deliberate falsehood or a reckless disregard for the truth," supported by an offer of proof. Finally, if these requirements are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required. See, also, *State v. Stickelman*, *supra*.

Here, the defendant received a full hearing on his challenge to the truthfulness of the affidavit. The burden then settled on him to prove by a preponderance of the evidence that some material allegation of the affidavit constituted deliberate falsity or reckless disregard for the truth. Such proof is needed to require the court to set aside the false material and test the affidavit for probable cause on the basis of the remaining allegations. See *Franks v. Delaware*, *supra*. However, in testing for falsity under *Franks*, "[a]llegations of negligence or innocent mistake are insufficient." *Id.* at 171; *State v. Stickelman*, *supra*.

Our review of the entire record in this case leads us to the conclusion that most, if not all, of the claims of Robish involve matters which are not untrue or, at best, if mistaken, are immaterial. In any event, none of the claims can be said to be as the result of deliberate falsehoods or reckless disregard for the truth, and, at best, may be the result of some negligence or innocent mistake. This is not to imply that the police may avoid their responsibility by selecting an uninformed officer to make an affidavit based upon deliberately untrue statements or reckless disregard of the truth. We simply do not have that situation here. Should we be presented with that situation at another time, we shall address it accordingly. See *Franks v. Delaware*, *supra*. In any event, considering all of the facts as set out in the affidavit, the claims are insufficient to have required the court

to suppress the evidence obtained by reason of the warrant. The trial court was justified in determining that there was probable cause to issue the warrant. The first assignment of error is therefore overruled.

Turning then to the matter of the sentence, we are once again confronted with the well-established rule that this court will not disturb on appeal a sentence imposed within statutory limits, absent evidence of an abuse of discretion by the trial court. *State v. True*, 210 Neb. 701, 316 N.W.2d 623 (1982). This court is simply unable to say that the sentence of the trial court constituted an abuse of discretion. For that reason the sentence must be affirmed.

Having therefore found that the assignments of error must be overruled, the conviction and sentence are affirmed.

AFFIRMED.

COUNTY OF KNOX, APPELLANT, V. CITY OF CREIGHTON, APPELLEE.

333 N.W.2d 395

Filed April 29, 1983. No. 82-312.

1. **Pleadings.** For purposes of determining the sufficiency of a petition to state a cause of action, we must accept as true all facts well pleaded, but we do not accept as true facts not well pleaded, nor do we accept as true conclusions of law or of the pleader.
2. **Municipal Corporations: Zoning: Eminent Domain.** A municipality having the power of eminent domain is not subject to its own zoning ordinances with respect to governmental projects for the construction of which it has the power to condemn.
3. **Injunction.** When there is clear proof of its necessity and practicability, a mandatory injunction may be granted.

Appeal from the District Court for Knox County: MERRITT C. WARREN, Judge. Reversed and remanded.

Steven A. Scholer, Knox County Attorney, and, on briefs, John Thomas, former Knox County Attorney, for appellant.

Frank Roubicek, City Attorney, for appellee.

McCOWN, CAPORALE, and SHANAHAN, JJ., and BRODKEY, J., Retired, and COLWELL, D.J., Retired.

PER CURIAM.

The County of Knox, plaintiff in the court below, appeals from the order of the trial court dismissing its amended petition against the defendant-appellee, City of Creighton, on the ground the petition fails to state a cause of action. We reverse.

The operating factual allegations of the county's petition state: It is the agency properly entrusted with the responsibility of enforcing the city's zoning and development regulations; the city was denied the building permit for which it had applied; but the city nonetheless erected a large industrial storage building for the storage of machinery and tools in a manner and place such as to violate its own zoning and municipal development regulations. The petition prays for injunctive relief, including correction of the violation and prevention of the "unlawful use of the land." The city demurred on the ground that the petition fails to state a cause of action. The county elected to not plead further; as a consequence, its amended petition was dismissed and this appeal followed.

For purposes of determining the sufficiency of a petition to state a cause of action, we must accept as true all facts well pleaded, but we do not accept as true facts not well pleaded, nor do we accept as true conclusions of law or of the pleader. *Roadrunner Development v. Sims*, 213 Neb. 649, 330 N.W.2d 915 (1983).

The city appears to proceed on the basis either that the county's petition establishes on its face that the erection and use of the building in question is within the city's power of eminent domain or that a city may never be subject to its own zoning and development regulations, and, therefore, the petition

fails to state a cause of action. The city's assumptions are not correct.

It is true that *Witzel v. Village of Brainard*, 208 Neb. 231, 302 N.W.2d 723 (1981), holds that a municipality having the power of eminent domain is not subject to its own zoning ordinances with respect to governmental projects for the construction of which it has the power to condemn. Since the municipality in *Witzel* already owned the land in question, it is the power to condemn which is deemed important, not the exercise thereof. Also, *Seward County Board of Commissioners v. City of Seward*, 196 Neb. 266, 242 N.W.2d 849 (1976), holds that a county's zoning ordinances do not apply to a city and its airport authority seeking to condemn land to devote to a nonconforming use as an airport inasmuch as the power of eminent domain is inherently superior to the exercise of the power to zone. In both of those cases the power of eminent domain existed and the governmental bodies involved were held to be immune from zoning ordinances on that ground. That is not to say, however, either that there are no other grounds upon which to exempt governmental bodies from their own zoning ordinances or that they are always necessarily exempt therefrom. A number of bases for exempting governmental entities from zoning regulations exist. Among these are the concept of sovereign immunity or preemption; or that the use is in furtherance of a governmental, as distinguished from a proprietary, purpose; or that upon a balancing of interests, an exemption better serves the public. 4 Rathkopf, The Law of Zoning and Planning Ch. 53 (4th ed. 1956); 82 Am. Jur. 2d *Zoning and Planning* §§ 149-51 (1976).

The county's petition does not on its face establish that the city has the power to condemn the land and erect thereon the structure in question. It cannot be said, therefore, that it fails to state a cause of action under the rule applied in *Witzel* and *Seward County*, *supra*.

Whether the county's cause of action as pleaded is subject to the defense that the city is immune from its own zoning ordinances because the use is within its power of eminent domain, or some other defense, we cannot anticipate. Neither is it necessary for us to determine at this stage whether a governmental entity is always, under any and all circumstances, exempt from its own zoning and planning ordinances.

Nor is the city correct in arguing that no cause for injunctive relief has been stated because the building has, as the petition shows, already been erected and injunctive relief is therefore not available. When there is clear proof of its necessity and practicability, a mandatory injunction may be granted. *Boschulte v. Elkhorn River Drainage District*, 102 Neb. 451, 167 N.W. 730 (1918), *reh'g denied*, but opinion corrected with regard to unrelated issue, 102 Neb. 451, 169 N.W. 240. See, also, *Meierhenry v. Smith*, 208 Neb. 88, 302 N.W.2d 365 (1981), holding injunction to be a proper means of preventing the maintenance of a free-standing CB radio antenna in violation of a restrictive covenant; *City of Sidney v. Lieberman*, 178 Neb. 755, 135 N.W.2d 452 (1965), affirming an injunction to prevent a particular use; *City of Beatrice v. Williams*, 172 Neb. 889, 112 N.W.2d 16 (1961), holding it to be proper, under statutory authority, to require removal of part of a building which had been built in violation of setback requirements; *City of Lincoln v. Foss*, 119 Neb. 666, 230 N.W. 592 (1930), enjoining a particular use. It should be noted, however, that if the erection and use of the structure in question were found to be within the city's power of eminent domain, an injunction would not lie. See *Danish Vennerforning & Old Peoples Home v. State*, 191 Neb. 774, 217 N.W.2d 819 (1974), holding that when the power of eminent domain applies, the appropriate remedy is damages, not injunctive relief.

We conclude the trial court erred in sustaining the

city's demurrer and in dismissing the county's petition. The matter is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

CITY OF CRETE, NEBRASKA, A MUNICIPAL CORPORATION, APPELLANT, V. COUNTY OF SALINE, NEBRASKA, ET AL., APPELLEES.

332 N.W.2d 926

Filed April 29, 1983. No. 82-325.

Appeal and Error: Moot Question. An appellate court may properly decline to express an opinion on a mere abstraction or to determine a moot case.

Appeal from the District Court for Saline County: ORVILLE L. COADY, Judge. Appeal dismissed.

Steven J. Reisdorff, City Attorney, for appellant.

J. Patrick McArdle of Steinacher & Vosoba, and Robert H. Conner, Saline County Attorney, for appellees.

KRIVOSHA, C.J., WHITE, CAPORALE, and SHANAHAN, JJ., and EMPSON, D.J.

KRIVOSHA, C.J.

The City of Crete, a municipal corporation, appeals from a judgment entered by the District Court for Saline County, Nebraska, finding that the city was not exercising zoning jurisdiction over a tract of land located outside the city limits of the city but within 1 mile, pursuant to the provisions of Neb. Rev. Stat. § 19-2501 (Reissue 1977). The record discloses that in December of 1976 various owners of land located outside the city limits of the city filed an application with the county requesting that the county designate the tract of land, consisting of some 21.64 acres, as an industrial area, pursuant to § 19-2501. A hearing was had by the county at a reg-

ular meeting on January 18, 1977. A certificate was presented to the county, signed by the Crete city clerk, certifying that the city was not presently exercising zoning jurisdiction over any area outside the city limits, including the area for which the industrial area designation was being sought.

After considering the evidence the county passed a resolution finding that the tract of land designated in the application was suitable for use as an industrial area; that it was a contiguous tract of land containing 20 acres or more of which no part was within the boundaries of any incorporated city or village; that proper notice had been given of the hearing; that the city had not been exercising zoning control outside its corporate limits; that the city had not complied with the provisions of article 9 of Chapter 19 of the statutes of Nebraska, as amended, regarding the designation of the area outside the corporate limits of the city into zoning districts; and that the area should be and was ordered and designated as an industrial area.

Thereafter, on February 8, 1977, the city filed a petition in the District Court seeking an injunction and declaratory judgment against the county and the industrial tract owners. The single issue decided was whether the county could designate this area an industrial area, pursuant to § 19-2501. As we have already indicated, the trial court found in favor of the county and against the city.

During the course of oral argument before this court, the parties advised the court that in 1982, and subsequent to the filing of this suit, the county withdrew its designation of the land as an industrial area. A lawsuit has been filed as a result of that action, and trial is now pending before the District Court. It is apparent from the statements made to this court that the issues involved in the instant case have now become moot and this court is without the ability to grant any relief to the city other than to render an advisory opinion. This the court has tra-

ditionally been unwilling to do. In *State ex rel. Spillman v. Dunbar State Bank*, 119 Neb. 571, 572, 230 N.W. 452 (1930), we said: " 'Courts properly decline to express an opinion on a mere abstraction, and may act on their own motion in dismissing an appeal involving only an inquiry of that nature.' " And, likewise, in *Henderson v. School Dist. of Scottsbluff*, 184 Neb. 858, 860, 173 N.W.2d 32, 34 (1969), we said: " 'An appellate court may properly decline to express an opinion on a mere abstraction or to determine a moot case * * *.' " For other cases similarly holding, see *Deines v. Schwind*, 89 Neb. 122, 130 N.W. 1051 (1911); *McCarter v. Lavery*, 101 Neb. 748, 164 N.W. 1054 (1917); *State v. Trainor*, 91 Neb. 848, 137 N.W. 876 (1912). The issues sought to be resolved by the city will undoubtedly be presented in the case presently pending in the District Court. If and when that matter is presented to us, we may then properly pass upon the merits. For that reason the appeal is dismissed.

APPEAL DISMISSED.

STATE OF NEBRASKA, APPELLEE, V. JAMES RAY MOORE, APPELLANT.

333 N.W.2d 397

Filed April 29, 1983. Nos. 82-329, 82-330.

Post Conviction: Appeal and Error. A motion to vacate a judgment and sentence under the Post Conviction Act cannot be used as a substitute for a direct appeal nor to secure a further review of issues already litigated.

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

James Moore, pro se.

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

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

MCCOWN, J.

This is a post conviction proceeding. The District Court, after review of the files and records of the case, found that the defendant was entitled to no relief and that an evidentiary hearing was not required. The court therefore denied defendant's motion for post conviction relief and this appeal followed.

The facts in these cases are set out at length in the defendant's direct appeals. *State v. Moore*, 208 Neb. 240, 302 N.W.2d 728 (1981). In that case this court held that where delayed consecutive sentences for sexual offenses are pronounced, credit for time served under a prior sexual sociopath commitment based on the same sexual offenses is to be applied to the first sexual sentence to be served. Only excess credit, if any, is to be applied to any consecutive sexual sentence to be served later. Credit shall not be applied on any sentence until the defendant commences to serve the sentence.

In this post conviction proceeding the defendant again raises the same issues as were raised in his direct appeal. He contends he is entitled to full credit on each consecutive sexual offense sentence for the full time he was confined as an untreatable sexual sociopath. That contention was answered and decided in the direct appeal.

The District Court in this post conviction proceeding specifically found that the issue upon which defendant's motion for post conviction relief was based had been previously raised and litigated in defendant's direct appeal. That issue, having been decided by this court upon direct appeal, cannot be relitigated in a motion for post conviction relief.

A motion to vacate a judgment and sentence under the Post Conviction Act cannot be used as a substi-

tute for a direct appeal nor to secure a further review of issues already litigated. See, *State v. Peery*, 208 Neb. 639, 305 N.W.2d 354 (1981); *State v. Freeman*, 212 Neb. 278, 322 N.W.2d 437 (1982).

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL ROY, APPELLANT.

333 N.W.2d 398

Filed April 29, 1983. No. 82-527.

1. **Rules of Evidence: Hearsay.** A statement relating to a startling event made while the declarant was under the stress of the excitement caused by the event constitutes an exception to the general rule that hearsay is not admissible into evidence.
2. **Rules of Evidence: Hearsay: Words and Phrases.** Statements made under the immediate force of the circumstances and not as afterthoughts are admissible into evidence as an "excited utterance" exception to the hearsay rule.
3. **Constitutional Law: Rules of Evidence: Hearsay.** Where hearsay statements admitted into evidence have sufficient indicia of reliability to afford the trier of fact a satisfactory basis for evaluating their truth, they do not violate the right of confrontation.
4. **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.

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

John P. Murphy, Lincoln County Public Defender, for appellant.

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

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

CAPORALE, J.

The defendant, Michael Roy, appeals from the judgment of conviction entered by the trial court pursuant to the jury's verdict of guilty on a charge

of first degree sexual assault by the defendant upon his 2-year-old stepdaughter.

Defendant claims the trial court erred in allowing an emergency room nurse's aide to testify as to the victim's response of "daddy" to the query, "Who hurt you?" and in failing to sustain defendant's motion in limine with respect to statements made by him in connection with a polygraph examination. We find no error, and affirm the judgment of the trial court.

As to the first assignment of error, the relevant facts are that when the child's mother returned home from work sometime after 3 a.m., she found the child in the girl's bedroom "covered in blood and feces." The child was brought whimpering into the emergency room of Great Plains Medical Center at North Platte sometime between 4 and 5 a.m. Examination revealed she had multiple bruises about her body and was bleeding from the vaginal area. While being examined, the child asked several times whether the examiners were going to hurt her "any more." When asked, within 15 or 20 minutes after being brought to the hospital, who had hurt her, the child replied as stated previously.

On those facts we reject defendant's arguments that the child's response was inadmissible as hearsay which violated his rights of confrontation under the sixth amendment to the U.S. Constitution and article I, § 11, of the Nebraska Constitution.

A statement relating to a startling event made while the declarant was under the stress of the excitement caused by the event constitutes an exception to the general rule that hearsay is not admissible into evidence. Neb. Rev. Stat. §§ 27-802 and 27-803 (Reissue 1979). In precode cases we expressed that thought by holding statements made under the immediate force of the circumstances and not as afterthoughts to be admissible. *Crunk v. Glover*, 167 Neb. 816, 95 N.W.2d 135 (1959); *Bowers v. Kugler*, 140 Neb. 684, 1 N.W.2d 299 (1941).

United States v. Nick, 604 F.2d 1199 (9th Cir. 1979), approved the admission, over hearsay and confrontation clause objections, of the mother's testimony concerning a 3-year-old sexual assault victim's statements concerning the incident, including identification. As in the instant case, the mother in *Nick* discovered the child an unknown period of time after the assault. The Ninth Circuit Court held the trial court properly concluded that the child was suffering distress from the assault when he made the statements, and therefore the testimony was properly admissible under the excited utterance exception to the hearsay rule. The *Nick* court also held that the availability of cross-examination is not the sole criterion by which to test the admissibility of hearsay over objections based on the right of confrontation. In this context the essential confrontation issue is whether the hearsay is, under all the circumstances, sufficiently reliable and trustworthy and whether there is a demonstrated need for the evidence; the availability of cross-examination is simply one of the means by which the quality of reliability is tested. The case of *United States v. Iron Shell*, 633 F.2d 77 (8th Cir. 1980), *cert. denied* 450 U.S. 1001, 101 S. Ct. 1709, 68 L. Ed. 2d 203 (1981), held that the confrontation clause was not violated where the hearsay statements admitted into evidence had sufficient indicia of reliability to afford the trier of fact a satisfactory basis for evaluating the truth of the prior statements. That court held that the trial court did not abuse its discretion in admitting the testimony of a police officer concerning a 9-year-old victim's statements made somewhere between 45 minutes and 1 hour and 15 minutes after the assault. The court stated that neither the lapse of time between the startling event and the out-of-court statements nor the fact that the statements were made in response to a question were dispositive in the application of the excited utterance exception. Rather, it held that the trial court must weigh those factors

together with other factors, including the age and physical and mental condition of the declarant, the characteristics of the event, and the subject matter of the statements. The court said that the admission into evidence of hearsay statements having sufficient indicia of reliability to afford the trier of fact a satisfactory basis for evaluating their truth does not violate the confrontation clause.

Defendant seeks to read *California v. Green*, 399 U.S. 149, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970), admitting an inconsistent preliminary hearing statement into evidence; *Nelson v. O'Neil*, 402 U.S. 622, 91 S. Ct. 1723, 29 L. Ed. 2d 222 (1971), involving an out-of-court statement by a codefendant; and *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980), approving the use of an unavailable witness' preliminary hearing testimony, to make the right of confrontation turn solely upon the opportunity to cross-examine. We do not so read those cases. We read them to hold only that providing an opportunity to cross-examine is one means of satisfying the right of confrontation. We do not read them to hold that the right of confrontation precludes the receipt into evidence of otherwise admissible hearsay. As stated in *Dutton v. Evans*, 400 U.S. 74, 91 S. Ct. 210, 27 L. Ed. 2d 213 (1970), the constitutional right of confrontation does not require that no hearsay evidence per se be produced; the hearsay rule and the confrontation clause are not to be equated; the hearsay rule does not prevent a witness from testifying as to what he has heard—instead, it is a restriction on the proof of fact through extrajudicial statements; and the mission of the confrontation clause is to advance practical concern for the accuracy of the truth determination process in criminal trials by assuring that the trier of fact has a satisfactory basis for evaluating the truth of the prior statement.

We conclude that the tender age of the victim, her battered physical condition, the startling nature of the event and attendant hospital trip and examina-

tion, and the fact that the response was elicited in connection with the child's fear of further injury resulted in the response having been made under the stress of the excitement caused by the event, and created sufficient indicia of reliability to qualify the response as an excited utterance such as to overcome both the hearsay and right of confrontation objections. We therefore hold that the trial court did not abuse its discretion by admitting the response into evidence.

Defendant's second assignment of error relates to the trial court's rulings on his motion in limine. That motion asked the court to direct that no mention be permitted as to any statement made by the defendant before, during, after, or as the result of a polygraph examination administered to him, or as to any evidence obtained as the result thereof. The court's rulings in that regard sustained the motion with respect to any mention that there had been a polygraph examination; stated that if any part of the interview were going to be used, it would have to be transcribed so it could "see the questions before and the questions afterwards"; and further provided that the material "under proper conditions . . . may be used for impeachment." That ruling is obviously different than the ruling in *State v. Williams*, 212 Neb. 860, 326 N.W.2d 678 (1982), wherein we held that the trial court erred in overruling defendant's motion in limine which sought to prevent the State from impeaching the defendant by referring to inadmissible prior petit larceny convictions. In *Williams* the prosecutor not only represented that he intended to use such improper evidence to impeach the defendant but the trial judge stated that such impeachment would be permitted. Unlike that situation, the record in this case does not establish unequivocally that the trial court would allow impeachment of the defendant through the use of inadmissible evidence. Accordingly, this case is controlled by the rule of *Maricle v. Spiegel*, 213 Neb. 223, 329 N.W.2d 80

(1983), that, 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. The defendant elected to not take the stand; therefore, there were no questions to which objections were improperly overruled. Consequently, there is no basis for predicating error on the trial court's rulings on the motion in limine.

AFFIRMED.

McCOWN, J., concurs in the result.

MERVIN McKENZIE, APPELLEE, V. LADD TRUCKING COMPANY, A CORPORATION, APPELLANT.

333 N.W.2d 402

Filed April 29, 1983. No. 82-603.

1. **Courts: Appeal and Error.** As provided for in Neb. Rev. Stat. § 24-541.06 (Cum. Supp. 1982), all cases other than small claims which are appealed from the municipal or county courts are reviewed by the District Court for error appearing on the record.
2. **Judgments: Appeal and Error.** Findings of fact made by the trial court have the effect of a jury verdict and will not be set aside on appeal unless clearly wrong.
3. _____: _____. A judgment which is clearly against the weight of the evidence constitutes error and must be set aside on appeal.
4. **Rules of the Road: Motor Vehicles.** The duty to maintain a proper lookout implies the duty to see what is in plain sight.
5. _____: _____. Conditions blocking visibility impose upon a driver the duty to exercise a degree of care commensurate with the existing conditions, including waiting to proceed until it can be done in safety.
6. **Rules of the Road: Motor Vehicles: Negligence.** When a motorist, being in a place of safety, sees, or by the exercise of reasonable care could have seen, the approach of a moving vehicle and moves from the place of safety into the path of such vehicle and is struck, such motorist's own conduct constitutes negligence more than slight, as a matter of law, and precludes recovery.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Reversed and remanded with directions.

Michael W. Pirtle of McCormack, Cooney, Mooney & Hillman, for appellant.

Robert C. Guinan of Guinan & Kolenda, for appellee.

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

HASTINGS, J.

This was an action for damages resulting from a March 26, 1981, collision between trucks owned by the plaintiff, Mervin McKenzie, and the defendant, Ladd Trucking Company. It was brought in the municipal court of Omaha. Trial to the court alone, held on February 11, 1982, resulted in a judgment in favor of the defendant on its counterclaim, in the amount of $811.23. On appeal the District Court entered an order reversing the judgment of the municipal court and remanding the case with directions to enter judgment in favor of the plaintiff in the stipulated amount of damages of $2,835. The defendant has appealed to this court.

The rule as to this type of an appeal is found in Neb. Rev. Stat. § 24-541.06 (Cum. Supp. 1982), which provides in part as follows: "(1) In all cases other than appeals from the Small Claims Court, the district court shall review the case for error appearing on the record made in the county or municipal court. The district court shall render a judgment, which may affirm, affirm but modify, or reverse the judgment or final order of the county or municipal court. If the district court reverses, it may enter judgment in accordance with its findings, or remand the case to the county or municipal court for further proceedings consistent with the judgment of the district court."

The parties seem to be in agreement as to the standard of our review. In a law action the findings of fact made by the trial court have the effect of a jury verdict and will not be set aside on appeal

unless clearly wrong. *Atlas Steel & Wire Corp. v. L & M Constr. Chemicals, Inc.*, 212 Neb. 16, 321 N.W.2d 64 (1982). Conversely, it is elementary that when a judgment is clearly against the weight of the evidence it should be set aside. *Pospichal v. Wiley*, 163 Neb. 236, 79 N.W.2d 275 (1956). The error urged by the defendant, and obviously found to exist by the District Court, was that the judgment of the municipal court was clearly against the weight of the evidence.

The facts are not complicated, but are somewhat difficult to describe with any degree of brevity. The accident occurred on the premises of Conagra, located south of "C" Street and west of 29th Street in Omaha. The plaintiff arrived at these premises with his 2½-ton International straight truck loaded with wheat. He entered the area from the east on "C" Street, headed west, then backed into the probing area located just south and parallel to "C" Street. Samples of his wheat were taken for testing and he then awaited his turn to unload. The scale, which was to have been his next stop, was located more or less directly in front of him, to the west, and to drive through the scale it necessitated the plaintiff, or anyone in his position, to drive north and west in a semicircle, pulling across "C" Street extended, before heading straight south across the scale.

While waiting to unload, the plaintiff testified that he observed the defendant's truck, a Kenworth semitractor and trailer, facing east on "C" Street, parallel with the plaintiff's truck and approximately 15 feet to the north, and with the rear end of the defendant's rig approximately 30 feet to the east of the rear end of the plaintiff's truck. When a truck immediately ahead of the plaintiff pulled onto the scale to commence the unloading process, the plaintiff started forward so as to be the next in line. The plaintiff said that before he moved he knew that the Ladd rig was stopped. He proceeded forward at about 2 miles an hour, when he heard the impact,

which turned out to be between the right front of the plaintiff's box and the right rear of the corner of the defendant's trailer. The plaintiff stated that he heard no horn honking and was not able to see the defendant's vehicle moving toward him because it was on his blind side.

On cross-examination the plaintiff said he had first seen the defendant's rig when it came off the scale and pulled into the position that he had described earlier. He also admitted that he knew that empty trucks have preference on the scale and that there was an area to the northwest where trucks back into in order to be loaded with wheat. He stated that he had traveled about 50 feet before being struck by the defendant's vehicle.

The defendant's driver testified that he too drove into the Conagra lot on "C" Street, proceeding in a westerly direction, and stopped to await his turn to drive onto the scale. He claims that the plaintiff came over to him and asked if he was trying to cut into the line. He testified he explained to the plaintiff that he was waiting to get his truck weighed, and would then pull off the scale, up the street, and back in to get loaded. The defendant's driver said he explained to the plaintiff just what maneuvers he was going to make after coming off the scale, including the backing to the northwest to get loaded. He stated that he then pulled onto the scale, pulled off, and saw the vehicle ahead of the plaintiff pull onto the scale behind him. He then drove back to his original position, heading east, immediately shifted to reverse, and started back. He claims that the plaintiff then left his position and the accident occurred. He agreed that although the plaintiff was parked just before he, the defendant's driver, started to back up, he could not see him while he was backing. He thought he only backed approximately 5 feet before the collision. He also gave as his opinion that when he pulled into position to back up, his vehicle was about 15 feet north of the plain-

tiff, parallel, and with the front end of the plaintiff's truck being about even with the back end of his.

Each of these drivers was obligated to maintain a proper lookout while operating his vehicle. *Clark Bilt, Inc. v. Wells Dairy Co.*, 200 Neb. 20, 261 N.W.2d 772 (1978). The duty to look implies the duty to see what is in plain sight. *Thomas v. Owens*, 169 Neb. 369, 99 N.W.2d 605 (1959). Conditions blocking visibility impose upon a driver the duty to exercise a degree of care commensurate with the existing conditions, including waiting to proceed until it can be done in safety. *Central Constr. Co. v. Republican City School Dist. No. 1*, 206 Neb. 615, 294 N.W.2d 347 (1980). When a motorist, being in a place of safety, sees, or by the exercise of reasonable care could have seen, the approach of a moving vehicle and moves from the place of safety into the path of such vehicle and is struck, such motorist's own conduct constitutes negligence more than slight, as a matter of law, and precludes recovery. *Thomas v. Owens*, *supra*.

In this case each driver was aware of the presence and location of the other's vehicle. Each driver knew the general custom of usage of the premises. Each driver proceeded to move into the path of the other at a time when each admitted that his visibility in that direction was blocked. Each driver was guilty of contributory negligence more than slight, as a matter of law, and should not recover in this instance.

The judgment of the District Court is reversed and the cause is remanded with directions to dismiss both the petition and the counterclaim.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL IVAN HUNT, APPELLANT.

333 N.W.2d 405

Filed April 29, 1983. No. 82-640.

Criminal Law: Sentences. While Neb. Rev. Stat. § 29-2260 (Reissue 1979) lists grounds to be considered by the sentencing court, it does not control its discretion.

Appeal from the District Court for Otoe County: RAYMOND J. CASE, Judge. Affirmed.

William B. Zastera, for appellant.

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

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

KRIVOSHA, C.J.

The appellant, Michael Ivan Hunt, has appealed from a sentence imposed by the District Court for Otoe County, Nebraska. For reasons more particularly set out, the sentence is affirmed.

On June 21, 1982, Hunt pled guilty to a charge of second degree murder in violation of Neb. Rev. Stat. § 28-304 (Reissue 1979). Murder in the second degree is a Class IB felony punishable by imprisonment of not less than 10 years, or life.

Hunt had originally been charged with first degree murder in violation of Neb. Rev. Stat. § 28-303 (Reissue 1979), which is a Class I or IA felony punishable by either life imprisonment or death. Following a presentence investigation the trial court sentenced Hunt to life imprisonment. He now maintains that the trial court erred in sentencing him to life without making specific findings, consistent with Neb. Rev. Stat. § 29-2260 (Reissue 1979). Hunt also maintains that the sentence was excessive and therefore an abuse of discretion. Both arguments border on the ludicrous and make this appeal wholly frivolous.

The murder was a brutal killing and without any

justification. The victim was stabbed 14 times by Hunt, after which Hunt slit his throat at least 5 times and then smothered him in a pool of mud. The perpetration of the murder was done solely in an attempt to preclude Hunt from being identified as the individual who stole the victim's car. To suggest that a sentence of life in this case was excessive is silly. Hunt is fortunate that he was not convicted of first degree murder. Perhaps but for his age, such would have been the case and he could have been ordered executed. This court has held on numerous occasions that in the absence of an abuse of discretion a sentence imposed by the trial court within the statutory limits will be affirmed on appeal. *State v. Carey*, 199 Neb. 288, 258 N.W.2d 141 (1977). There is no evidence of any abuse of discretion and a claim to the contrary must be summarily disregarded.

Likewise, Hunt's contention that the trial court was obligated to make specific findings before imposing the sentence is without merit. Section 29-2260 is a directive to the trial court as to the factors to be considered by the trial court in imposing the sentence. There is, however, no requirement that the court make specific findings, as suggested by Hunt. The facts of this case clearly indicate that a lesser sentence would have been most inappropriate. Moreover, § 29-2260(2) provides that "Whenever a court considers sentence for an offender convicted of either a misdemeanor or a felony, the court *may* withhold sentence of imprisonment . . . ." (Emphasis supplied.) It is clear that the statute is to serve as a guideline for the court but is not mandatory. In *State v. Machmuller*, 196 Neb. 734, 738, 246 N.W.2d 69, 72 (1976), we said: "[W]hile section 29-2260, R.R.S. 1943, lists grounds to be considered by the sentencing court, it does not control its discretion." If, indeed, § 29-2260 does not control the discretion of the trial court, then the failure of the trial court to make specific findings cannot be error or grounds

for reversal. The sentence of the trial court is affirmed.

AFFIRMED.

RONALD NOVOTNY, APPELLANT, V. ELECTRIC HOSE & RUBBER COMPANY, A NEBRASKA CORPORATION, APPELLEE.

333 N.W.2d 406

Filed April 29, 1983. No. 82-685.

1. **Evidence: Appeal and Error.** In a law action it is not within the province of the Supreme Court to weigh or resolve conflicts in the evidence. The credibility of witnesses and the weight to be given their testimony are for the trier of fact.
2. **Workmen's Compensation: Appeal and Error.** Findings of fact made by the Nebraska Workmen's Compensation Court after rehearing will not be set aside on appeal unless clearly wrong.
3. **Workmen's Compensation: Evidence.** In testing the sufficiency of evidence to support findings of fact made by the Nebraska Workmen's Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party.
4. **Expert Witnesses.** Triers of fact are not required to take the opinions of experts as binding on them.

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

Jim Zimmerman of Atkins, Ferguson, Zimmerman, Carney & Law, and Sampson, Forney & Dobrovolny, for appellant.

Stephen W. Kay of Kay & Kay, for appellee.

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

MCCOWN, J.

This is a workmen's compensation case. The Workmen's Compensation Court, on rehearing, found that the plaintiff failed to prove that his disability was caused or aggravated by an incident or accident arising out of and in the course of his em-

ployment and dismissed the petition. Plaintiff has appealed.

The plaintiff, Ronald Novotny, was employed by the defendant, Electric Hose & Rubber Company, as a vulcanizer. As a part of his duties plaintiff operated an overhead crane which he testified was malfunctioning when carrying a full load. To start the crane moving the plaintiff had to rock the reel back and forth and push with his body against the reel.

Plaintiff testified that on September 14, 1981, in the middle of his shift his back began hurting. He continued to work that day and the next, but on September 16 he left work before his shift was over due to pain in his back.

The plaintiff visited Dr. Shannon, a physician, on September 17, and saw Dr. Forney, his family physician, on September 20. Dr. Forney hospitalized the plaintiff for examination and testing on September 20. The initial diagnosis was low back pain of uncertain etiology, and Dr. Forney felt that plaintiff's complaints seemed out of proportion to the physical findings. The X-rays and examination and testing revealed no significant abnormality, and plaintiff was discharged from the hospital on September 25, 1981.

Dr. Shannon testified that plaintiff told him that the back pain had started 4 days before the examination, and also testified that plaintiff had denied knowledge of any specific accident or time of injury and had given no history of trauma. The doctor had no opinion as to the causal connection between the back pain and plaintiff's employment.

Dr. Forney, plaintiff's family physician, testified that plaintiff's injury was possible low back sprain, and that plaintiff also had a congenital condition of scoliotic deformity and a probable degenerative disc disease. Dr. Forney testified that, in his opinion, the injury was job related, but also testified that plaintiff had consulted him for lower back pain on

several occasions in 1977, and on another occasion in September 1979, following an automobile accident in which plaintiff had received contusions and abrasions to his lower back. Dr. Forney also testified that he could not recall that the plaintiff mentioned any specific injury or incident that may have caused his back pain at the time he saw plaintiff at the hospital on September 20, 1981.

On October 12, 1981, Dr. Forney signed a claim form for medical expense benefits for plaintiff's treatment. The form indicates degenerative disc disease as the nature of the sickness or injury, and the question of whether the sickness or injury arose out of the plaintiff's employment was answered "no."

Dr. Woodward, an orthopedic surgeon, first saw the plaintiff on February 16, 1982. He diagnosed plaintiff's injury as a low back strain and placed him in a cast. Dr. Woodward testified that plaintiff's injury was consistent with a strain suffered at work while pushing a crane, but stated that the causal connection between plaintiff's injury and his employment rested primarily upon plaintiff's statements.

All insurance forms filled out and signed by the plaintiff prior to February 12, 1982, referred to the back injury as being nonwork related.

An industrial nurse for the defendant testified that she asked the plaintiff on September 17, 1981, and again on September 21, 1981, when she visited him at the hospital, as to when he thought he might have injured his back, and in what manner. On both occasions plaintiff told her that he did not know how or when he could have injured his back.

Several fellow employees of the plaintiff testified that plaintiff had stated to them that his back was hurting before their work shift started on September 14, 1981, and another employee testified that she saw the plaintiff playing football in his yard on the after-

noon of September 27, 1981, 2 days after plaintiff was released from the hospital.

Plaintiff filed his petition in the Workmen's Compensation Court in December 1981, and on March 11, 1982, a single judge of the Workmen's Compensation Court found that the plaintiff was temporarily totally disabled and entitled to rehabilitation services. Following rehearing before a three-judge panel of the Workmen's Compensation Court, the court found that the plaintiff had failed to prove that his disability was either caused or aggravated by an incident or accident arising out of or in the course of his employment, reversed the order of the one-judge court, and dismissed plaintiff's petition.

On appeal the plaintiff contends that the Workmen's Compensation Court should have disregarded the testimony of certain employees as incredible, and also erred in failing to consider the testimony of Dr. Forney that plaintiff's injury was work related.

Under the Nebraska Workmen's Compensation Act, the claimant has the burden of proof to establish by a preponderance of the evidence that an unexpected and unforeseen injury was in fact caused by the employment. There is no presumption from the mere occurrence of such unexpected or unforeseen injury that the injury was in fact caused by the employment. The presence of a preexisting disease or condition enhances the degree of proof required to establish that the injury arose out of and in the course of employment. *Newbanks v. Foursome Package & Bar, Inc.*, 201 Neb. 818, 272 N.W.2d 372 (1978).

In a law action it is not within the province of the Supreme Court to weigh or resolve conflicts in the evidence. The credibility of witnesses and the weight to be given their testimony are for the trier of fact. *Trout v. Olson Bros. Mfg. Co.*, 209 Neb. 477, 308 N.W.2d 522 (1981).

Findings of fact made by the Nebraska Workmen's Compensation Court after rehearing will not

be set aside on appeal unless clearly wrong. In testing the sufficiency of evidence to support findings of fact made by the Nebraska Workmen's Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. *Newbanks v. Foursome Package & Bar, Inc.*, *supra*.

Triers of fact are not required to take the opinions of experts as binding on them. *Davis v. Western Electric*, 210 Neb. 771, 317 N.W.2d 68 (1982).

Issues of causation are for determination by the fact finder, and there is ample evidence in the record in the present case to sustain the finding of the Nebraska Workmen's Compensation Court. The plaintiff failed to meet his burden of proving that his injury and disability arose out of and in the course of his employment, and the determination of the Workmen's Compensation Court was not clearly wrong.

AFFIRMED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. WILLIAM E. TOMEK, RESPONDENT.

333 N.W.2d 409

Filed April 29, 1983. No. 83-077.

Original action. Judgment of suspension.

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

PER CURIAM.

This matter came on upon the complaint filed against the respondent, William E. Tomek, of David City, Nebraska, by the Committee on Inquiry of the Third Judicial District.

The respondent has filed with this court a conditional admission of guilt of the formal charges filed against him.

Respondent is charged with a violation of Canon 1, DR 1-102(A)(1)(4)(6), Canon 5, DR 5-103(A)(1)(2) and 5-104(A), Canon 6, DR 6-101(A)(3), and Canon 9, DR 9-102(A)(1)(2) and (B)(1)(2)(3)(4), and with a violation of his license to practice law as provided in Neb. Rev. Stat. § 7-104 (Reissue 1977).

In the complaint it is charged that while acting as the personal representative in an estate matter, the respondent withdrew $25,651.70 from the estate funds without notice to or authority or approval of the county court of Platte County, Nebraska, and that in three reports filed with the court by the said respondent as personal representative of the estate, he failed to disclose said withdrawal. In another matter the respondent was retained to represent a client in a property loss action. Respondent received a $75 check from his client to cover court filing costs and other costs of the action. However, no lawsuit was ever instituted on behalf of the client, despite repeated assurances from respondent that the lawsuit had been filed and was progressing toward either settlement or trial.

The conditional admission of guilt reflects that the funds from the estate were repaid and that the check received for court filing costs and other costs was never cashed and was returned by the respondent to his client.

Upon due consideration, it is ordered by the court, based upon the charges described in the complaint and the respondent's conditional admission of guilt, and the approval thereof by the Counsel for Discipline, that said William E. Tomek be, and he hereby is, suspended from the practice of law for a period of 1 year, said suspension to commence on May 1, 1983.

JUDGMENT OF SUSPENSION.

DOUGLAS CORBIN, APPELLANT, V. MANN'S INTERNATIONAL MEAT SPECIALTIES, INC., APPELLEE.

333 N.W.2d 668

Filed May 6, 1983. No. 81-802.

Invitor-Invitee. A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Reversed and remanded.

Michael A. Nelsen of Schmid, Ford, Mooney & Frederick, for appellant.

Joseph S. Daly and P. Shawn McCann of Sodoro, Daly & Sodoro, for appellee.

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

MORAN, D.J.

The defendant, Mann's International Meat Specialties, Inc., secured a jury verdict in its favor in a personal injury action, and the plaintiff, Douglas Corbin, appeals from the order overruling his motion for a new trial. We reverse and remand for a new trial.

Corbin was injured after slipping and falling on an icy sidewalk leading from Mann's parking lot to its meat processing plant. Corbin, an inspector employed by the U.S. Department of Agriculture, had gone to the plant to inspect it. Mann's wanted the plant inspected so that it could secure USDA approval necessary for opening and commencement of business. The temperature was below freezing and the streets were icy when Corbin drove to the plant and parked his car in the plant parking lot at about 6 a.m. Aware of the icy conditions, he carefully walked on the icy sidewalk to get into the plant. While working in the plant he mentioned to the plant

supervisor that the sidewalks were in bad shape and needed treatment. Corbin's supervisor arrived and Corbin told him he did not think the plant was in shape to open. The supervisor left and was to return around noon to determine whether the plant could be opened. After doing some work in the USDA office in the unheated building, Corbin became cold and left the building, retracing the route he took when he entered, and returned to his car. While warming up in his car, he saw a plant secretary slip and fall on the icy sidewalk. After getting warm, Corbin decided to return to the plant to finish his work before his supervisor returned at noon. Corbin testified he left his car and cautiously walked on the same sidewalk to reenter the plant. As he did so, he slipped and fell, sustaining the injuries for which he seeks recovery in this case.

Corbin complains of jury instruction No. 8. The instruction is similar to NJI 8.22, and the critical part is as follows: "If you find all the following conditions are true, the defendant had a duty to use reasonable care:

"(a) There was a condition on the walkway leading to defendant's plant involving an unreasonable risk of harm to plaintiff, which defendant knew of, or, in the exercise of reasonable care, should have discovered; and

"(b) Defendant had no reasonable ground to believe that plaintiff could discover that condition or realize the risk involved, or that he would fail to protect himself against the danger; and

"*(c) Plaintiff did not know or, from facts known to him, could not reasonably have been expected to know of the condition and risk involved.*" (Emphasis supplied.)

Since Corbin knew of the ice and that it was dangerous, he correctly argues that paragraph (c) amounted to a directed verdict against him.

The jury was instructed on the issue of whether Corbin was contributorily negligent. It is possible

the verdict was reached on that ground, but we cannot speculate that it was.

After the trial of this case this court determined that an invitor can be liable for a dangerous condition on his land which is known to an invitee. *Tichenor v. Lohaus*, 212 Neb. 218, 322 N.W.2d 629 (1982). In that case this court reaffirmed the applicability of Restatement (Second) of Torts § 343 (1965) and adopted § 343 A. The pertinent parts of these sections state: "A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

"(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and

"(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it," § 343; and "(1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, *unless the possessor should anticipate the harm despite such knowledge or obviousness*," (emphasis supplied) § 343 A.

In *Tichenor* we pointed out that subsection (b) of § 343 contains alternatives, and although the danger may be open and obvious or known, the possessor of land may be liable if he should expect that the invitee will fail to protect himself against it. We also said that a complete statement of the rules applicable to liability of possessors of land for dangerous conditions known or discoverable by the possessor includes § 343 A. We quoted commentary *f.* to that section: " 'There are, however, cases in which the possessor of land can and should anticipate that the dangerous condition will cause physical harm to the invitee notwithstanding its known or obvious danger. In such cases the possessor is not relieved of the duty of reasonable care which he owes to the invitee

for his protection. This duty may require him to warn the invitee, or to take other reasonable steps to protect him, against the known or obvious condition or activity, if the possessor has reason to expect that the invitee will nevertheless suffer physical harm.

" 'Such reason to expect harm to the visitor from known or obvious dangers may arise, for example, where the possessor has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it. Such reason may also arise where the possessor has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk. In such cases the fact that the danger is known, or is obvious, is important in determining whether the invitee is to be charged with contributory negligence, or assumption of risk.' " *Tichenor* at 223, 322 N.W.2d at 632-33.

W. Prosser, Law of Torts, *Invitees* 394 (4th ed. 1971) notes that an exception exists to the usual rule that a possessor has no obligation to protect the invitee against dangers which are known to him. The exception arises in cases in which the possessor, as a reasonable man, should anticipate an unreasonable risk of harm to the invitee notwithstanding his knowledge, warning, or the obvious nature of the condition.

The adoption in *Tichenor* of § 343 A reflects the modern view. See Annot., Modern Status of the Rule Absolving a Possessor of Land of Liability to Those Coming Thereon for Harm Caused by Dangerous Physical Conditions of Which the Injured Party Knew and Realized the Risk, 35 A.L.R.3d 230 at 254 (1971).

The question is whether § 343 A could apply to the facts of this case. The evidence showed Corbin's

employment required him to be at Mann's plant. His employer sent him there on the day he was injured. Mann's owner, anxious to secure USDA approval necessary for commencement of operations that day, wanted him at the plant. Corbin's supervisor planned to return to review the situation, and, when injured, Corbin was returning to the plant to complete the work necessary for the supervisor's final review. Based on these facts Mann's could have had reason to expect that Corbin would proceed as he did because to a reasonable man in Corbin's position the advantages of doing so would outweigh the apparent risk.

We conclude that a jury question was presented as to whether Mann's adequately fulfilled its duty, and under the circumstances paragraph (c) in instruction No. 8 was prejudicially erroneous. It was patent error which requires a reversal. *Barta v. Betzer*, 190 Neb. 752, 212 N.W.2d 352 (1973).

Paragraph (c) of the instruction should have reflected the language in § 343 A, which makes Corbin's knowledge of the danger not fatal to recovery if the jury found Mann's should have anticipated the harm despite Corbin's knowledge.

REVERSED AND REMANDED.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY AND MARK A. KWASNIESKI, APPELLEES, V. RANCE LYNN FITZGERALD AND MICHAEL MASSEY, APPELLANTS, AND AMERICAN FAMILY INSURANCE GROUP, APPELLEE.

334 N.W.2d 168

Filed May 6, 1983. No. 81-914.

1. **Motor Vehicles: Certificate of Title.** In accordance with the provisions of Neb. Rev. Stat. § 60-105(1) (Reissue 1978), no person acquiring a motor vehicle from the owner thereof shall acquire any right, title, claim, or interest in or to such motor vehicle until he

shall have had delivered to him physical possession of such motor vehicle and a certificate of title duly executed.

2. _____: _____. While it may be true that a certificate of title is not conclusive evidence of ownership, it is likewise true that absent a duly executed certificate of title, ownership may not be established.
3. _____: _____. A purchaser who receives possession of an automobile without obtaining the certificate of title thereto, as required by our statute, acquires no title or ownership therein.
4. _____: _____. Where a purchaser contracts to buy an automobile and takes possession thereof without objection and uses the automobile, such use is a use with the permission of the owner until such time as a certificate of title thereto is issued to the purchaser.

Appeal from the District Court for Douglas County: D. NICK CAPORALE, Judge. Reversed and remanded with directions.

Timothy J. Pugh of Boland, Mullin & Walsh, for appellant Fitzgerald.

Cynthia G. Irmer of Matthews, Cannon & Riedmann, P.C., for appellant Massey.

Donald D. Schneider of Ray C. Simmons, P.C., for appellees State Farm and Kwasnieski.

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

KRIVOSHA, C.J.

This appeal presents to the court what appears to be a case of first impression. The question presented is, When does the seller of an automobile cease to be its owner within the meaning of a standard automobile insurance policy which provides coverage to both the named insured and those operating the vehicle with the named insured's permission? The trial court, concluding that the question was one of fact, submitted the issue to the jury, which found for the appellee State Farm Mutual Automobile Insurance Company (State Farm). For reasons more particularly set out in this opinion, we believe that the question in this case was one of law and not of fact and should have been decided against State

Farm. We must therefore reverse the decision of the trial court.

Appellee State Farm filed a declaratory judgment action naming itself and its insured, Mark A. Kwasnieski, as plaintiffs. The defendants were Rance Lynn Fitzgerald and Fitzgerald's automobile carrier, American Family Insurance Group (American Family). Also named as a party defendant was Michael Massey, who was seriously injured as the result of an accident involving Fitzgerald who, at the time of the accident, was driving a pickup truck he was purchasing from Kwasnieski. The record establishes without conflict that on Wednesday, October 4, 1978, Kwasnieski, who was the owner of a certain 1975 Chevrolet pickup truck insured by State Farm, agreed to sell the pickup to Fitzgerald for $5,500. On Friday, October 6, 1978, Fitzgerald went to Kwasnieski's home and gave to Kwasnieski a two-party bank check. The two filled out and signed a sales tax certificate, an odometer certificate, and the back of the certificate of title to the pickup truck. Both Fitzgerald and Kwasnieski testified that they realized their signatures needed to be notarized but that no notary was present. Instead, both agreed that Kwasnieski's father could take the certificate of title the following Monday to a notary public with whom he worked. The parties agreed that Fitzgerald would pick up the certificate of title on Monday night after it had been notarized. After the two signed the certificate of title they left it on a table in the Kwasnieski home. Later that evening Kwasnieski and his father put it on a shelf where they normally place the mail. There is no testimony about handing the title to the father or to Fitzgerald. Kwasnieski testified that after Fitzgerald left with the truck, Kwasnieski still had the registration and certificate of title in his home and that both were accessible to him.

After the documents were signed and the check exchanged, Kwasnieski handed the keys to the

pickup to Fitzgerald and said, "Here you go." Nothing was said by either party about giving Fitzgerald permission to drive the pickup or about restricting the scope of his use.

Late Saturday night, October 7, 1978, Fitzgerald, while driving the pickup truck, was involved in an accident in which Massey was injured. The record discloses that at the time of the accident Fitzgerald and the pickup truck were covered by an insurance policy issued by American Family, which Fitzgerald had procured before he went to the Kwasnieski home.

On Monday morning, October 9, 1978, Kwasnieski's father took the title certificate to his office where it was notarized. That same morning, Kwasnieski called his State Farm agent and told him to cancel his policy of insurance retroactive to 12:01 a.m., Saturday, October 7. The certificate of title was actually picked up by Fitzgerald on Tuesday night, October 10, 1978. Massey subsequently filed suit against Fitzgerald, and Fitzgerald or American Family asked State Farm to defend the suit, but State Farm refused. The declaratory judgment action was then brought by State Farm for the purpose of determining whether State Farm's coverage applied to the accident and whether State Farm was under any obligation to defend.

As we have already indicated, the trial court, concluding that the question of ownership was a question of fact, submitted to the jury special findings. The jury was requested to make two findings. The first question submitted was: "Who was the owner of the pickup at the time of the accident between Fitzgerald and Massey?" A second question was submitted to the jury regarding whether the vehicle was being driven by Fitzgerald with permission from Kwasnieski. Because, however, the jury found that Fitzgerald was the owner of the vehicle at the time of the accident, the jury did not address the second question.

As we have already indicated, this appears to be a question of first impression in this jurisdiction, and, while logic and reason might compel one to reach the same conclusions reached by both the trial court and the jury, it appears that the statutes and case law of the State of Nebraska compel us to reach a contrary conclusion.

The State Farm policy is a standard form automobile policy and provides that it will "pay on behalf of the *insured* all sums which the *insured* shall become legally obligated to pay as *damages* because of (A) *bodily injury* sustained by other *persons*, and (B) *property damage*, caused by accident arising out of the ownership . . . of the *owned motor vehicle*; and to defend . . . any suit against the *insured* alleging such *bodily injury* or *property damage* . . . ." The policy defines the insured to be "the named insured" and "any other *person* using the *owned motor vehicle*, PROVIDED THE OPERATION AND THE ACTUAL USE OF SUCH VEHICLE ARE WITH THE PERMISSION OF THE NAMED INSURED OR SUCH SPOUSE AND ARE WITHIN THE SCOPE OF SUCH PERMISSION . . . ." The provisions of the American Family insurance policy owned by Fitzgerald are identical to the State Farm policy. The State Farm policy further provides: "The definition of *insured* does not apply to Use of Non-Owned Automobiles."

State Farm argues that the pickup truck was not owned by its insured, Kwasnieski, at the time of the accident on Saturday evening and therefore the coverage of the policy does not apply. To answer that question, however, we must look beyond the terms of the policy and examine the laws in effect, which form a part of the policy as if they were expressly referred to and incorporated in the policy. See *Turpin v. Standard Reliance Ins. Co.*, 169 Neb. 233, 99 N.W.2d 26 (1959).

Unless it can be said as a matter of law that the attempt by Kwasnieski to transfer title to Fitzgerald

on Friday, October 6, 1978, was ineffective, it seems clear that the parties intended ownership to transfer. We are afraid that the laws of the State of Nebraska, as written and as previously interpreted by this court, prevented the transfer of ownership from taking place until a duly executed and properly notarized certificate of title was delivered by Kwasnieski to Fitzgerald. Neb. Rev. Stat. § 60-105(1) (Reissue 1978) provides in part as follows: "No person . . . acquiring a motor vehicle . . . from the owner thereof . . . shall acquire *any right, title, claim, or interest* in or to such motor vehicle . . . until he shall have had delivered to him physical possession of such motor vehicle . . . and a certificate of title . . . duly executed in accordance with the provisions of this act . . . . No court in any case at law or in equity shall recognize the right, title, claim, or interest of any person in or to any motor vehicle . . . sold or disposed of . . . unless there is compliance with this section." (Emphasis supplied.) The form which the certificate of title must take is provided by statute in Neb. Rev. Stat. § 60-114 (Reissue 1978), and notarization of the signatures is one of the requirements. Reading § 60-114 together with § 60-105, it is clear that a "duly executed" certificate of title requires the seller's signature to be notarized and that absent such notarization the document has not been "duly executed." See *Loyal's Auto Exchange, Inc. v. Munch*, 153 Neb. 628, 45 N.W.2d 913 (1951). It must follow, therefore, that a purchaser who receives possession of an automobile without also obtaining a certificate of title properly notarized and duly executed in accordance with the statutes then in effect acquires no "right, title, claim, or interest in or to" a motor vehicle, see, *First Nat. Bank & Trust Co. v. Ohio Cas. Ins. Co.*, 196 Neb. 595, 244 N.W.2d 209 (1976), and *Loyal's Auto Exchange, Inc. v. Munch*, *supra*, and does not thereby become the owner of the vehicle in question.

State Farm argues that a certificate of title is not

conclusive as to the matter of ownership and evidence may be offered to rebut the presumption. In support of its position it cites to us cases such as *Weiss v. Union Ins. Co.*, 202 Neb. 469, 276 N.W.2d 88 (1979), and *First Nat. Bank & Trust Co. v. Ohio Cas. Ins. Co.*, *supra*. It is true that in both the *Weiss* case and in the *First Nat. Bank* case, as well as others, we have held that the certificate of title is not in itself *conclusive* of ownership. Evidence may be introduced to show that even though the certificate of title may be in a particular party, it is the intention of the parties that title should not yet have passed to that party. *Weiss*, *supra*. That, however, is not the situation in the instant case. What we have said previously is that the fact that an automobile may be titled in an individual does not conclusively establish that such individual *is* the owner of the vehicle, and evidence may be introduced to show a contrary intent on the part of the parties. While it may be true that a certificate of title is not conclusive evidence of ownership, it is likewise true that absent a duly executed certificate of title, ownership may not be established. This is the reason for our statement in *Weiss v. Union Ins. Co.*, *supra* at 473, 276 N.W.2d at 92, when we said: "Union takes the position that the mere signing of the above statements under oath by the buyer and the seller constitutes 'delivery' of the executed certificate of title regardless of the intent of the parties to the sale. This may be the rule when an innocent third party has relied on a duly executed certificate of title to his detriment. Garbark v. Newman, 155 Neb. 188, 51 N.W.2d 315. In the absence of such circumstances, this court has consistently held that, while the execution of the certificate of title is the exclusive method of conveying title to a motor vehicle, the certificate is not in itself conclusive of ownership."

One may argue that such a result is too strict an interpretation of the certificate of title act. In *Loyal's Auto Exchange, Inc. v. Munch*, *supra* at

633-34, 45 N.W.2d at 918, we quoted with approval from the case of *Crawford Finance Co. v. Derby*, 63 Ohio App. 50, 25 N.E.2d 306 (1939), wherein it was said: " 'On the other hand, from the whole scheme of the Certificate of Title Act, especially the sections quoted above, it is apparent that the Legislature intended to set up one and only one method by which liens on or titles to a motor vehicle could be acquired.' " Because the Ohio act is identical to the Nebraska act we can conclude that the Nebraska Legislature likewise intended to set up one and only one method by which titles to a motor vehicle could be acquired. The language of the statute is clear beyond question. That is undoubtedly the reason why, in *Loyal's Auto Exchange, Inc. v. Munch*, *supra* at 638, 45 N.W.2d at 920, we said: "A purchaser who receives possession of an automobile without obtaining the certificate of title thereto, as required by our statute, acquires no title or ownership therein."

The significance of the certificate of title was examined by us in *Wolfson Car Leasing Co., Inc. v. Weberg*, 200 Neb. 420, 425, 264 N.W.2d 178, 182 (1978), where we said: "The passage of title of the automobile is so inherent in the transfer of the vehicle we cannot divorce the question of plaintiff's negligence from the Certificate of Title Act. The evidence is clear that Harry Wolfson, and not Silliman, had control of the certificates of title. Since no legal ownership is acquired without a duly notarized certificate and Wolfson retained such control, we cannot say from the record that Wolfson was negligent and therefore responsible for defendants' losses."

We are simply not at liberty to ignore the provisions of § 60-105, but, rather, we are obligated to give all of the words their plain and ordinary meaning in order to determine the legislative will. See *Pettigrew v. Home Ins. Co.*, 191 Neb. 312, 214 N.W.2d 920 (1974). In light of the statute we must conclude that when the Legislature provided that no person shall acquire any right, title, claim, or interest in or to a

motor vehicle until he shall have delivered to him a certificate of title duly executed and that absent such delivery no court in any case at law or in equity shall recognize the right, title, claim, or interest of any person in or to such motor vehicle, the Legislature specifically meant just that. To hold otherwise would be to ignore the plain meaning of the statute, a practice we should not follow.

In the instant case there is no dispute regarding the evidence. The parties agree that there is no evidence which would support the idea that the parties intended that the instrument should take effect on Friday evening. Both Fitzgerald and Kwasnieski testified that they agreed on Friday night that the tax certificate would have to serve as Fitzgerald's proof of title until the certificate was properly notarized and delivered the following Monday. The parties agree that the purported notarization did not occur until the following Monday. Also, no evidence exists which would support a finding that the certificate was delivered Friday night. The question as to where legal title and therefore ownership resided on Saturday evening was a matter of law and not a question of fact. The court should have properly directed a verdict on that issue in favor of Fitzgerald and against State Farm and Kwasnieski, when requested by Fitzgerald.

Furthermore, under the facts in this case, the court should have found as a matter of law that because Kwasnieski was still the legal owner of the vehicle, Fitzgerald of necessity was operating the vehicle with Kwasnieski's permission at the time of the accident. In *Turpin v. Standard Reliance Ins. Co.*, 169 Neb. 233, 99 N.W.2d 26 (1959), we were asked to declare the rights of various parties under an omnibus clause identical to the clauses involved in this case. In *Turpin* the seller and named insured was the owner of a car for which he was still paying off a purchase money loan. When the seller went into the Marine Corps, he told Turpin that he

could drive the car while the seller was in the Marine Corps if Turpin would continue to make the payments. Turpin then had an accident with the vehicle. The certificate of title was never assigned to Turpin. In addressing the issue of "permission" we cited with approval the case of *Brewer v. DeCant*, 167 Ohio St. 411, 149 N.E.2d 166 (1958), saying at 248, 99 N.W.2d at 35: " 'Under the Ohio Certificate of Title Act, a change in ownership of an automobile is not consummated until a certificate of title is issued in the name of the purchaser. * * * Where a purchaser contracts to buy an automobile and takes possession thereof from an automobile dealer and uses the automobile, such use is a use with the permission of the dealer until such time as a certificate of title thereto is issued to the purchaser.' " The court, assuming that the parties had contracted for the sale of the car, held that the buyer's possession and use was with the seller's permission. Here, Kwasnieski was still the legal titleholder to the vehicle until the certificate of title was duly executed and delivered to Fitzgerald. Kwasnieski as owner had the right to refuse to deliver the vehicle to Fitzgerald. By delivering the vehicle to Fitzgerald before delivering title, Kwasnieski in effect granted to Fitzgerald permission to drive the motor vehicle. No other conclusion can be reached. For other jurisdictions reaching similar conclusions see, *Garlick v. McFarland*, 159 Ohio St. 539, 113 N.E.2d 92 (1953), *Maryland Cas. Co. v. American Family Insurance Group*, 199 Kan. 373, 429 P.2d 931 (1967), and *Harbor Ins. Co. v. Paulson*, 135 Cal. App. 2d 22, 286 P.2d 870 (1955).

Under the evidence in this case, it must be found that at the time of the accident in question Kwasnieski was still the owner of the pickup truck and Fitzgerald was operating it with his permission. Therefore, the provisions of the State Farm policy apply.

The decision of the trial court is therefore re-

versed and the cause remanded with directions for the trial court to hold further proceedings consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

BOSLAUGH, J., concurs in the result only.

WHITE, J., participating on briefs.

IN RE APPLICATION OF HUNT TRANSPORTATION, INC. NEBRASKA PUBLIC SERVICE COMMISSION, APPELLEE, V. HUNT TRANSPORTATION, INC., APPELLANT.

333 N.W.2d 883

Filed May 6, 1983. No. 82-004.

1. **Public Service Commission: Motor Carriers.** The provisions of Neb. Rev. Stat. §§ 75-301 to 75-322.01 (Reissue 1981) do not apply to the transportation of passengers or property by motor carriers for hire engaged in intrastate commerce of supplies or merchandise being transported by motor vehicle from or to any ranch, dairy, feedlot, or farm for use thereon when originating at or destined to a neighboring trading point or points.
2. _____: _____. A shipment intended to be delivered to a farm under Neb. Rev. Stat. § 75-303(6) (Reissue 1981), but where actual delivery is frustrated by an act of God, is exempted as provided therein, and it is not necessary that the bill of lading show the farm as consignee.
3. **Public Service Commission: Appeal and Error.** The rule is well established that on an appeal to the Supreme Court from an order of the Nebraska Public Service Commission, administrative or legislative in character, the only questions to be determined are whether the commission acted within the scope of its authority and whether the order complained of is reasonable and not arbitrarily made. However, a different rule is applied in the event that there has been the application of incorrect rules of law to the facts of the case or evidence showing that the commission has exceeded its authority, in which case the action of the commission would be illegal, arbitrary, and unreasonable.
4. **Public Service Commission: Motor Carriers.** The entitlement to an exemption under Neb. Rev. Stat. § 75-303 (Reissue 1981) will deny the Public Service Commission its jurisdiction over a qualified exempt carrier.
5. **Public Service Commission: Judgments.** Courts are without authority to interfere with findings and orders of the Public Service

Commission, except where it exceeds its jurisdiction or acts arbitrarily.

Appeal from the Nebraska Public Service Commission. Reversed.

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

Paul L. Douglas, Attorney General, and Shanler D. Cronk, for appellee.

BOSLAUGH, MCCOWN, and HASTINGS, JJ., and BRODKEY, J., Retired, and GARDEN, D.J.

BRODKEY, J., Retired.

Respondent below, Hunt Transportation, Inc., appeals to this court from the findings and order of the Nebraska Public Service Commission, appellee herein, and hereinafter referred to as "Commission," which order was entered on November 10, 1981, following a hearing on an order to show cause filed July 21, 1981, directing Hunt Transportation, Inc., Omaha, Nebraska, to show cause, if any there be, why its certificate of public convenience and necessity should not be revoked. In its order of November 10, 1981, the Commission found that the respondent had violated certain of the Commission's rules and regulations (1) by failing to confine its operations to those authorized under its certificate, and (2) by failing to charge and collect rates and issue and deliver freight bills as prescribed by the Commission. The Commission also found that the violations were not willful, but ordered the respondent to instruct its drivers of the authority held by the respondent and to explain the exemptions under which they apparently often haul, and to cease and desist from operations such as those carried out in this manner. The Commission also found that an order to cease and desist from such operations should be issued to the respondent to prevent operations of the nature described. In its order the Commission stated: "IT IS, THEREFORE, ORDERED by the

Nebraska Public Service Commission that the Order to Show Cause in the matter of the Hunt Transportation, Inc., Omaha, Nebraska, be sustained"; and "IT IS FURTHER ORDERED that Hunt Transportation, Inc. cease and desist from conducting operations outside its authority and from failing to charge and collect rates prescribed by the Commission." We reverse.

Involved in this appeal is the interpretation of Neb. Rev. Stat. § 75-303, and specifically § 75-303(6) (Reissue 1981), which reads as follows: "The provisions of sections 75-301 to 75-322.01 shall apply to the transportation of passengers or property by motor carriers for hire engaged in intrastate commerce except: . . . (6) To supplies or merchandise being transported by motor vehicle from or to any ranch, dairy, feedlot, or farm for use thereon when originating at or destined to a neighboring trading point or points." So far as we have been able to ascertain, the above-quoted section has never heretofore been interpreted by the Commission or this court.

The facts in this case are not in any real dispute by the parties; and, as we view it, the question in this appeal is one of law, and also whether or not the Commission exceeded its authority. Respondent Hunt was charged with transporting one load of plastic pipe and irrigation equipment from Grand Island, Nebraska, to Beemer, Nebraska, without the proper authority and for failing to charge and collect the proper rate. Hunt does not deny that it did carry a load of plastic irrigation pipe from Gifford-Hill & Company, Inc., in Grand Island to the Stan Ortmeier Co. in Beemer, Nebraska. Nor does Hunt deny that such a shipment is not authorized by its certificate. The crux of Hunt's position is its claim that it did not need certificate authority for the shipment because such shipment was exempt from Commission regulation under § 75-303(6), quoted above, which provides that a shipment is exempt if it is of

"supplies or merchandise being transported by motor vehicle from or to any ranch, dairy, feedlot, or farm for use thereon when originating at or destined to a neighboring trading point or points."

Hunt claims that notwithstanding the actual delivery was made to a business in Beemer, Hunt intended to deliver it directly to a farm site, but that its intention was frustrated by an act of God, namely, a rainstorm, which made the fields too soft for truck tires. Therefore, Hunt claims that, of necessity, it had unloaded the irrigation pipe at the pipe installer's place of business, the Stan Ortmeier Co. in Beemer. It should be noted, however, that the installer was the one that placed the shipment order, was the consignee named on the bill of lading, and was the one that apparently paid the freight bill.

There is support in the record for Hunt's claim with regard to the intended delivery. Both Hunt's primary witness and the acting director of the motor transportation department, one of the Commission's witnesses, testified as to the existence of a shipping manifest indicating that delivery was scheduled to go to the farm. There was also testimony by Hunt regarding its normal procedure in delivering irrigation pipe to a farm. Basically, this procedure entailed the truckdriver meeting the pipe installer's crew at a prearranged and easily discoverable meeting place and then following them to the particular farm.

The Commission apparently accepted Hunt's claim of intended delivery to the farm, and the opinion of the Commission contains several elements that suggest that the Commission actually accepted the claim of such intended delivery. First, in its opinion the Commission states: "However, it is the terms of the bill of lading that determines the nature of a shipment, not the physical unloading of the shipment." Such a holding would be irrelevant if the intended delivery argument was not accepted. It is also significant that the Commission found the viola-

tion was not willful and that the order entered was a cease-and-desist order, not a revocation of Hunt's certificate.

Before deciding whether the fact situation posed constitutes an exemption, we will first examine the scope of review of this court in this case. The rule is well established that on an appeal to the Supreme Court from an order of the Nebraska Public Service Commission, administrative or legislative in character, the only questions to be determined are whether the Commission acted within the scope of its authority and whether the order complained of is reasonable and not arbitrarily made. See, for example, *Neb. Public Service Commission v. Grand Island Mov. and Stor. Co., Inc.*, 203 Neb. 356, 278 N.W.2d 762 (1979); *Herman Bros., Inc. v. Spector Industries, Inc.*, 209 Neb. 513, 308 N.W.2d 720 (1981); *Dilts Trucking, Inc. v. Peake, Inc.*, 197 Neb. 459, 249 N.W.2d 732 (1977); *Nebraska Railroads of Omaha v. Nebco, Inc.*, 194 Neb. 322, 231 N.W.2d 505 (1975). However, different rules are applied in the event that there has been the application of wrong rules of law to the facts of the case or evidence showing that the Commission has exceeded its authority. In *Dilts*, *supra*, which was a "color of authority" case, we stated: "If the Commission erred in its conclusion that Dilts was not a 'color of authority' case and *neglected or refused to apply the law applicable to such cases*, then it would appear that the Commission erred in the determination of what law was applicable in the instant case, and *its order would be illegal* and entitle the applicant to a further hearing before the Commission for a reconsideration of the evidence in the light of the correct principles of law.

. . . .

"We are of the opinion that under the facts of this case the action of the Commission was illegal, arbitrary, and unreasonable in light of the fact that it did not consider the application in accordance with applicable principles of law, which are that an appli-

cant who has been operating under color of authority need not make the same showing that an applicant who has never operated must make, and that there is a presumption that the proposed service is or will be required by the present or future public convenience and necessity." (Emphasis supplied.) *Id.* at 466-67, 471-72, 249 N.W.2d at 737, 739.

Unfortunately, we have been unable to find any legislative history to aid us in the interpretation of the exemption provided for in § 75-303(6). The more recent cases do not provide much more assistance. The recent case of *In re Application of Gordon Trucking, Inc.*, 210 Neb. 830, 317 N.W.2d 85 (1982), mentions a similar exemption, but provides little guidance. The entire relevant portion of that opinion reads: "At the conclusion of the hearing the commission noted that the motor transportation to farms and ranches is exempt from regulation under § 75-303(5) . . . ." *Id.* at 832, 317 N.W.2d at 86. A more extended treatment of § 75-303(5) is given in *Livestock Carriers Div. of M. C. Assn. v. Midwest Packers Traf. Assn.*, 191 Neb. 1, 213 N.W.2d 443 (1973). In that case we held that the Public Service Commission properly dismissed an application by the Livestock Carriers Division of the Motor Carriers Association to regulate the transportation of livestock in intrastate commerce. While that case dealt with a different section of the statutes, it is definitely helpful, in that it establishes that an exemption under § 75-303 will deny the Public Service Commission its very jurisdiction over a qualified exempt carrier. Therefore, if we determine that Hunt was entitled to the benefit of the exemption referred to, the Public Service Commission would have no jurisdiction in this case and its order would have to be reversed.

In view of the lack and vague generality of the usual interpretive aids, we are forced to construe the statute in question according to its bare terms. Four elements of the exemption can be identified

and will be dealt with in order. First, the goods being transported must be "supplies or merchandise." There can be no real dispute but that the plastic irrigation pipe in question constitutes supplies or merchandise.

Second, the goods must be *going* "from or to" a ranch, dairy, feedlot, or farm. The problem in this case is that the goods did not actually go to a farm, but they were *intended* to go there and would have but for the rainstorm. The Commission's solution to this problem would require the bill of lading to identify a farm site as the consignee. This suggestion is not without problems of its own. First, there is a conceptual difficulty in forcing an exempt shipment to comply with a regulation in order to be exempt. As *Livestock Carriers*, *supra*, indicated, the Commission has no jurisdiction at all over exempt shipments. There might also be practical problems with a rule making the exemption dependent on the terms of the bill of lading. For example, if the terms of the bill of lading control, would a shipment consigned to a farm but actually delivered to a dealer be exempt? In fact, a requirement dependent on the terms of the bill of lading might be inconsistent with the statutory terms. For example, if a bill of lading consigned the goods to a business entity but delivery was actually made to the farm, there would be literal compliance with the statute but the interpretive rule would not allow the exemption. More importantly, we point out that the statute in question nowhere by its terms requires the name of the consignee to be shown on the bill of lading. We think the better rule would allow the shipment in question to be considered as going to a farm. This rule would be more in accord with the evident legislative desire and intent to benefit the farmer. Although we believe it would be improper to require the bill of lading to show a farm as consignee, we suggest that freight companies might be well advised to note something to that effect on their bills of

lading as an exercise of prudence and foresight. They should not assume that they will be able to establish an "intended delivery" in the same manner as was done in the instant case.

The third requirement of the exemption is that the goods be "for use thereon" (i.e., on the farm). Appellee strenuously urges that the use in this case was not a farm use. Appellee characterizes this transportation of irrigation pipe to the farm as not for the use of the farmer but for the use of the pipe installer. This argument lacks credulity, and it is not apparent why, if there were two uses, they must be considered mutually exclusive. Appellee argues that allowing Hunt an exemption in this case will effectively deregulate the shipment of all farm supplies in the state by carriers simply timing the delivery of the goods to the farm supplier with the supplier's delivery to the farmer. This threat is purely hypothetical, and the facts indicate that although Hunt has made numerous deliveries directly to the farm and has availed itself of this exemption, this is the only case involved where the delivery has been made to the installer because delivery to the farm was not possible. If any change in the statute as it is presently written is desirable, we suggest that it should be done by the Legislature.

The fourth and final requirement of the exemption is that the goods be going to or from a "neighboring trading point or points." While it may be conceded that the Legislature inserted this language as a type of limitation on the exemption, we are of the opinion that the limitation does not apply in this case. Although there were other pipe vendors closer to Beemer than Grand Island, we are not convinced that that fact alone is dispositive. The statute does not say the nearest neighboring trading point. While there is a dearth of cases interpreting and defining the meaning of the term "trading point" or "trade area," we note that in the case of *Val Vu v. Lacey*, 31 Colo. App. 55, 497 P.2d 723 (1972), that court held

that the phrase "trade area," as defined in the Colorado Unfair Practices Act, did not restrict price competition for alcoholic beverages to the immediate area of the business and that a retail liquor dealer in Boulder County was entitled to meet prices offered by Denver merchants. Without attempting to define "neighboring trading point" for all cases, we hold that on the facts of this case a neighboring trading point was involved.

In conclusion it appears that the shipment in question was exempt under the statute referred to and did not require certificate of authority; therefore, the transportation charges were not subject to Commission control but were subject to negotiation between the parties. The failure of the Commission to find an exemption under the facts of this case constituted a misapplication of the proper law to this case. Also, as stated in *Shanks v. Watson Bros. Van Lines*, 173 Neb. 829, 832, 115 N.W.2d 441, 444 (1962): "Courts are without authority to interfere with findings and orders of the railway commission [now Public Service Commission] *except where it exceeds its jurisdiction or acts arbitrarily.*" (Emphasis supplied.)

According to the rationale of *Dilts* and *Shanks*, therefore, the Commission's decision was illegal and arbitrary and beyond the jurisdiction of the Commission. The order of the Commission must therefore be and hereby is reversed.

REVERSED.

KENNETH W. MILLER AND FRANCES MILLER, HUSBAND AND WIFE, APPELLANTS, V. RUSSELL L. MCMILLEN, APPELLEE.

333 N.W.2d 887

Filed May 6, 1983. No. 82-007.

1. **Deeds.** An otherwise effective conveyance of property transfers

the entire interest which the conveyor has and has the power to convey, unless an intent to transfer a less interest is effectively manifested.

2. _____. Neb. Rev. Stat. § 76-238 (Reissue 1981) is designed to protect a subsequent purchaser even though there was a prior conveyance or transaction concerning the property, provided the subsequent purchaser recorded his title first, and provided further that the subsequent purchaser was a bona fide purchaser without notice of any other claims to the property.

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

Richards & Richards, for appellants.

Martin, Mattoon, Matzke & Mattoon, for appellee.

BOSLAUGH, McCOWN, and HASTINGS, JJ., and BRODKEY, J., Retired, and GARDEN, D.J.

GARDEN, D.J.

This is an action seeking to enjoin a purchaser from taking possession of certain farmland by one claiming under an alleged 20-year lease.

A de novo review of the record reflects that on July 28, 1980, Oscar Glover, president of Railroad Car Service Corporation, met with the appellant Kenneth W. Miller at Miller's attorney's office in Chappell, Nebraska, for 2 or 3 hours to discuss obtaining an option to purchase a right-of-way for the Sidney and Lowe Railroad across the south half of Section 31, Township 15 North, Range 49 West of the 6th P.M., Cheyenne County, Nebraska, owned by the appellants, Kenneth W. Miller and Frances Miller, husband and wife. Kenneth W. Miller was represented by his attorney, Robert E. Richards, but Mr. Glover had no attorney present. Although Miller would not sell a right-of-way across his land for the railroad, he had discussed with Glover a trade for other land. As a result of the conference on July 28, 1980, the parties entered into and executed an agreement entitled "Option to Trade Real Estate" which was prepared by Miller's attorney. This option provides that the appellants would convey to Railroad

Car Service Corporation approximately 90 acres of land owned by them out of the above-described land, the exact location to be determined by a survey, in consideration for the conveyance to the Millers by Railroad Car Service Corporation of a quarter section (160 acres of land), acceptable to the Millers, to be purchased by the corporation. The option also provides that the corporation "agrees to enter into a farm lease with Millers to farm the part of the real estate that is not being used by CORPORATION as a railroad and related facilities for a term of twenty (20) years from the date the option is exercised . . . ."

The option was never recorded in the real estate records of Cheyenne County, Nebraska.

On December 18, 1980, the appellants signed a letter agreement addressed to Railroad Car Service Corporation agreeing that they would accept certain land in trade for the 90 acres which they had agreed to convey to Railroad Car Service Corporation in the option. The letter specified who was to receive the wheat crop to be harvested during the coming summer (1981) from both parcels of land. The letter did not contain any "lease" or reference to, or agreement to make, a lease to the Millers on the 90 acres they were trading to Railroad Car Service Corporation.

On January 20, 1981, the trade of land was completed by an exchange of warranty deeds between the Millers and Railroad Car Service Corporation. The Miller deed to Railroad Car Service Corporation did not reserve any leasehold interest, nor is there any reference to a lease or a right to a lease in the deed. Both deeds recited that the consideration is "Exchange of Property." Both deeds were recorded in the real estate records of Cheyenne County, Nebraska. The Miller to Railroad Car Service Corporation deed was recorded on January 21, 1981.

The railroad track which was constructed by

Railroad Car Service Corporation included a 7,243-foot-long "loop" used to turn trains around. The specifications for the design of the loop were established by the Burlington Northern Railroad. Originally, Railroad Car Service Corporation wanted to construct the loop as close to the Burlington as possible. This plan would have placed the loop on the land acquired from the Millers, which is adjacent to the main line of the Burlington Northern.

The Burlington Northern determined and established the percentage degree of curvature of the loop specifications and that the loop had to be a very gradual curve. For this reason it was necessary for Railroad Car Service Corporation to move the location of the loop from land acquired from the Millers to land later acquired from the appellee, Russell L. McMillen.

In order to acquire a location for the railroad track loop, it was necessary for Railroad Car Service Corporation to acquire 292 acres from McMillen. McMillen required a payment of $125,000 and conveyance of the unused balance of the Miller land as consideration for the 292 acres of land needed by Railroad Car Service Corporation for location of the loop.

On May 20, 1981, Railroad Car Service Corporation conveyed by corporation warranty deed to Russell L. McMillen 77.97 acres of the former Miller land in exchange for approximately 292 acres where the loop was constructed. The deed to McMillen of the former Miller land contains no reference to any lease claimed by Miller and no reservations of any leasehold interest, and was recorded May 29, 1981.

McMillen went into possession and farmed the 77.97 acres of land that formerly was owned by the Millers during the entire summer of 1981, without any notice or knowledge that Miller claimed a leasehold interest in the land. McMillen, during the summer of 1981, summer-fallowed the land and performed three farming operations on it, consisting of

two discings and one sweeping with a rod attachment to prepare for planting. He did his last summer fallow operation during the latter part of August 1981, and then was served with the restraining order in this case on September 1, 1981. There is no evidence that McMillen had any actual or constructive notice of the Millers' claim that they had a leasehold interest in the land until McMillen was served with the restraining order, after he had farmed the land for the complete summer of 1981.

Trial was had and the trial court found as follows: "1. That the land here involved was initially acquired from plaintiffs by Railroad Car Service Corporation (hereinafter The Corporation) for use for a 'railroad and railroad related facilities', specifically for the construction of a railroad track 'loop' and such purpose was known to plaintiffs.

"2. That plaintiffs were aware, and the contract here involved makes clear, that any rights plaintiffs had to a farm lease were limited to that portion of the land, if any, not used by The Corporation for a 'railroad and related facilities'.

"3. That through no fault of or design by either plaintiffs or The Corporation, the land proved not suitable for the purpose for which it had been acquired, i.e., the construction of the required track 'loop'.

"4. That upon discovering the unsuitability of the land for the purpose for which it had been acquired, The Corporation promptly traded 77.97 acres thereof for land fit for that purpose and did, in fact, construct the required 'loop' and related facilities upon the latter land.

"5. That, considering the totality of the circumstances here involved, the trading of 77.97 acres of the land was, and is, in fact a user of that portion of the land for 'a railroad and railroad related facilities' and that plaintiff has no right to a farm lease over the 77.97 acres so used."

The trial court then dissolved and set aside the

temporary injunction previously ordered and dismissed appellants' petition at appellants' cost.

The appellants assigned as error the finding of the trial court that the 77.97 acres of land are being used as "a railroad and related facilities"; that there was no valid farm lease on the acreage in question between the corporation and appellants; and in overruling the appellants' motion for new trial. For reasons hereinafter set forth, it is not necessary to discuss the first and second assignments of error.

It is undisputed in the trial record that McMillen was a bona fide purchaser for value of the 77.97 acres from Railroad Car Service Corporation. The record further reflects conclusively that the real estate in dispute was unimproved farmland. There were no facts adduced that would have put McMillen on either actual or constructive notice that the Millers claimed any interest whatsoever in the land. The Millers conveyed to Railroad Car Service Corporation on January 20, 1981. Four months later, Railroad Car Service Corporation conveyed to McMillen. The record is devoid of any acts by the Millers during that period of time that would be consistent with possession on their part. The Millers were in a position to protect their claimed leasehold interest in the 77.97 acres in question by a timely recording of the option or by reserving a leasehold interest in the deed to Railroad Car Service Corporation. This they failed to do. Neb. Rev. Stat. § 76-104 (Reissue 1981) provides as follows: "An otherwise effective conveyance of property transfers the entire interest which the conveyor has and has the power to convey, unless an intent to transfer a less interest is effectively manifested. No words of inheritance or other special words are necessary to transfer a fee simple."

As a result of the Millers' failure to act, McMillen was justified in relying on the recorded deed that reflected Railroad Car Service Corporation as the sole owner of the 77.97 acres.

Neb. Rev. Stat. § 76-238 (Reissue 1981) provides: "All deeds, mortgages and other instruments of writing which are required to be or which under the laws of this state may be recorded, shall take effect and be in force from and after the time of delivering the same to the register of deeds for recording, and not before, as to all creditors and subsequent purchasers in good faith without notice; and all such deeds, mortgages and other instruments shall be adjudged void as to all such creditors and subsequent purchasers without notice whose deeds, mortgages or other instruments shall be first recorded; *Provided*, that such deeds, mortgages and other instruments shall be valid between the parties."

In *Karmann v. Haase*, 191 Neb. 839, 842, 218 N.W.2d 242, 245 (1974), we said: "Fundamental to the law of registry is the principle of establishing priority of title. Section 76-238, R.R.S. 1943, is designed to protect a subsequent purchaser even though there was a prior conveyance or transaction concerning the property, provided the subsequent purchaser recorded his title first, and provided further that the subsequent purchaser was a bona fide purchaser without notice of any other claims to the property."

As between the Millers and Railroad Car Service Corporation, a dispute may exist concerning the purported 20-year lease. No such issue exists between the Millers and McMillen. As a bona fide purchaser for value, without notice, either actual or constructive, of the claims of the Millers, McMillen took title to the 77.97 acres from Railroad Car Service Corporation free and clear of the 20-year lease referred to in the option between the Millers and Railroad Car Service Corporation. The action of the trial court in dissolving the temporary injunction and in dismissing the appellants' petition was correct and is affirmed.

AFFIRMED.

Cite as 214 Neb. 251

RANGER DIVISION, RYDER TRUCK LINES, INC., APPELLANT AND CROSS-APPELLEE, V. FLOYD E. BAYNE, APPELLEE AND CROSS-APPELLANT.

333 N.W.2d 891

Filed May 6, 1983. No. 82-038.

1. **Equal Opportunity Commission: Appeal and Error.** On appeal of a review by the District Court of an order of the Equal Opportunity Commission, the Supreme Court does not try the facts and will not disturb the District Court's findings if they are supported by substantial evidence; however, the District Court in the first instance and the Supreme Court on appeal must reach independent conclusions with respect to questions of law.
2. **Constitutional Law: Discrimination.** The federal government has not undertaken to preempt the right of the several states to legislate in the area of discriminatory employment practices.
3. **Constitutional Law: Motor Carriers.** The federal government's power to regulate commerce among the states does not exclude all state regulation of the subject.
4. **Motor Carriers.** The federal government has the power to establish qualifications with respect to drivers employed by an interstate carrier.
5. _____. Where there exists a direct conflict between state and federal action affecting interstate commerce, state power must yield to federal power.
6. **Motor Carriers: Discrimination.** 49 C.F.R. § 391.41 (1978) constitutes a per se bona fide occupational qualification defense for a charge of discrimination brought under Neb. Rev. Stat. § 48-1104 (Reissue 1978) against an interstate carrier.

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

Peter Reed Corbin and Cindy L. Anderson of Corbin & Dickinson, and David R. Buntain of Cline, Williams, Wright, Johnson & Oldfather, for appellant.

Murphy, Pederson, Piccolo & Anderson, for appellee.

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

CAPORALE, J.

Appellant, Ranger Division, Ryder Truck Lines, Inc. (Ranger), seeks to reverse the order of the District Court affirming the final order of the Nebraska Equal Opportunity Commission (Commission) which found that Ranger had discriminated against appellee, Floyd E. Bayne. Bayne cross-appeals, asserting, on the one hand, that the District Court lacked jurisdiction and, on the other hand, that it should have awarded him an attorney fee.

Ranger contends the District Court erred by (1) holding that the Federal Motor Carrier Safety Regulations do not provide a per se bona fide occupational qualification defense for it as an interstate carrier subject to regulation by the U.S. Department of Transportation, Federal Highway Administration (DOT), and (2) holding that Ranger's reliance on the Federal Motor Carrier Safety Regulations was not a rational basis in fact for its refusal to employ Bayne.

We agree with Ranger's argument in connection with its first assignment of error, reverse the order of the District Court, and dismiss Bayne's cross-appeal.

We address first the cross-appeal. Bayne complains that since he did not personally receive a copy of the petition on appeal to the District Court, but rather a copy was sent to his attorney of record before the Commission, he was not notified of the commencement of the appeal as allegedly required by the applicable statute, Neb. Rev. Stat. § 48-1120(2) (Reissue 1978). That subsection of the statute provides: "(2) Such proceeding shall be initiated by the filing of a petition in such court, together with a transcript of the record upon the hearing before the commission and the service of a copy of such petition upon the commission and upon all parties who appeared at the hearing. Thereupon the court shall have jurisdiction of the proceeding and of the question determined therein." The statute

prima facie requires service of a copy of the petition upon the appropriate parties. It does not require any particular form of service of such petition. Therefore, since the requisite petition was served on appellee's attorney by mail, as provided for in Neb. Rev. Stat. § 25-534 (Reissue 1979), substantial compliance was had with § 48-1120(2). Bayne proposes an ingenious argument, but one without substance, to the effect that he had no attorney of record in the District Court at the relevant time, since the petition constituted the first entry of the case into that court. This may be true in a limited technical sense, but in no way was Bayne or his attorney without a full awareness of the fact that the case was being appealed to the District Court, as routinely provided for in § 48-1120(2). "The statute requiring notice to be served . . . must, of course, be substantially complied with; but, since the sole object of the appeal is to enable parties to obtain justice, we see no reason for judging harshly or condemning for trivial faults, the proceeding by which it is sought to transfer the cause to the appellate court." *Jarvis v. Chase County*, 64 Neb. 74, 75, 89 N.W. 624, 625 (1902). Since we find that the District Court's order must be reversed, we need not consider the question as to the nonallowance of an attorney fee.

We now turn to Ranger's appeal. This court does not try the facts and will not disturb the District Court's findings on review of a commission order if the District Court's findings are supported by substantial evidence. *Farmer v. Richman Gordman Stores, Inc.*, 203 Neb. 222, 278 N.W.2d 332 (1979); *Snygg v. City of Scottsbluff Police Dept.*, 201 Neb. 16, 266 N.W.2d 76 (1978); *Duffy v. Physicians Mut. Ins. Co.*, 191 Neb. 233, 214 N.W.2d 471 (1974). However, this court has the obligation to reach independent conclusions with respect to questions of law. See *Phelps County Savings Co. v. Dept. of Banking & Finance*, 211 Neb. 683, 320 N.W.2d 99 (1982), holding that, on remand, an administrative agency, although

it may enforce legislative policy committed to it, must follow the court's determinations as to questions of law. See, also, *The 20's, Inc. v. Nebraska Liquor Control Commission*, 190 Neb. 761, 212 N.W.2d 344 (1973), indicating that questions of law in administrative matters are for the court.

The relevant stipulated facts are that Ranger is an interstate motor carrier transporting special commodity freight. As such it is subject to regulation by DOT, including 49 C.F.R. § 391.41 (1978), which provides: "(a) A person shall not drive a motor vehicle unless he is physically qualified to do so and, except as provided in § 391.67, has on his person the original, or a photographic copy, of a medical examiner's certificate that he is physically qualified to drive a motor vehicle.

"(b) A person is physically qualified to drive a motor vehicle if he -

"(1) Has no loss of a foot, a leg, a hand, or an arm, or has been granted a waiver pursuant to § 391.49;

"(2) Has no impairment of the use of a foot, a leg, a hand, fingers, or an arm, and no other structural defect or limitation, which is likely to interfere with his ability to control and safely drive a motor vehicle, or has been granted a waiver pursuant to § 391.49 upon a determination that the impairment will not interfere with his ability to control and safely drive a motor vehicle."

Bayne had, due to an accident in November of 1949, lost part of his thumb and all of the fingers of his right hand. He nonetheless worked as a driver for a number of employers from 1952 through 1977 and had a good safety record. On January 16, 1978, he applied for employment with Ranger at its Omaha terminal. A physician examining Bayne on behalf of Ranger first certified him as qualified for employment as a driver, but later stated in a letter that she had not been aware of the pertinent regulation set forth above and that in view of that regulation Bayne was in fact not qualified. Two other

physicians wrote that Bayne was qualified, as the disability, in their opinion, did not interfere with his ability to operate a motor vehicle. Bayne has never sought to obtain a waiver under the provisions of 49 C.F.R. § 391.49 (1978) and related regulations. His contention is that his disability does not impair his ability to control and safely operate a motor vehicle and that that alone is the determining factor.

Neb. Rev. Stat. § 48-1104 (Reissue 1978) provides that it is an unlawful employment practice for an employer to refuse to hire or otherwise discriminate against an individual because of such individual's disability. Neb. Rev. Stat. § 48-1111 (Reissue 1978) provides, however, that denial of employment when a disability reasonably precludes the performance of particular employment is not an unlawful employment practice. There is no evidence in the record before us that Bayne's disability in fact renders him unable to perform the employment he sought. The threshold question, therefore, becomes whether the language of § 391.41, absent a waiver, constitutes a per se bona fide occupational qualification and whether, if so, it provides a defense to an action brought against Ranger under the statutes of this state.

The second portion of that question is readily answered, as the parties have stipulated that Ranger is a regulated interstate carrier. It is true that the federal government has not undertaken to preempt, under the supremacy clause (article VI, cl. 2) of the U.S. Constitution, the right of the several states to legislate in the area of discriminatory employment practices. 42 U.S.C. § 2000e-7 (1976). It is further true that the federal government's power under article I, § 8, cl. 3, of the U.S. Constitution to regulate commerce among the states does not exclude all state regulation of the subject. *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 94 S. Ct. 383, 38 L. Ed. 2d 348 (1973). Nonetheless, *Morris v. McComb*, 332 U.S. 422, 68 S. Ct. 131, 92

L. Ed. 44 (1947), instructs us that the federal government has the power to establish qualifications with respect to drivers employed by an interstate carrier. Where there exists a direct conflict between state and federal action affecting interstate commerce, state power must yield to federal power. See *United Workers v. Laburnum Corp.*, 347 U.S. 656, 74 S. Ct. 833, 98 L. Ed. 1025 (1954).

Although we have found no judicial construction of § 391.41 in the context of the present inquiry, and counsel have directed us to none, we find the following two cases helpful. Although the employer in *Boynton Cab Co. v. ILHR Department*, 96 Wis. 2d 396, 291 N.W.2d 850 (1980), was not subject to DOT's regulations, the court nonetheless found its refusal to hire a one-handed driver in reliance upon § 391.41, in light of its safety obligations as a common carrier, to be justified. That court interpreted the subject regulation as providing, in essence, that a person is not physically qualified to drive a motor vehicle carrying passengers for a motor carrier engaged in interstate commerce if that person lacks the use of a hand or arm. *Monnier v. United States Dept. of Transp.*, 465 F. Supp. 718 (E.D. Wis. 1979), held that a DOT regulation which prohibited an insulin-dependent diabetic from driving commercial vehicles in interstate commerce was not arbitrary and capricious, and, therefore, one aggrieved thereby was not entitled to a due process hearing to show his personal qualification to the contrary. We, as did the Wisconsin Supreme Court, read § 391.41, absent a waiver, as constituting a per se disqualification for Bayne.

That conclusion, when coupled with the fact that, as discussed above, Ranger is subject to § 391.41, mandates a finding that the regulation constitutes a valid defense for Ranger to the complaint filed against it under the statutes of this state.

Having reached that result, we need not address Ranger's second assignment of error. The order of

the District Court affirming the final order of the Commission is reversed.

REVERSED.

KRIVOSHA, C.J., dissenting.

I must respectfully dissent from that portion of the majority's opinion which makes Bayne's physical condition a per se defense. In doing so I believe we have redrafted the language of both Neb. Rev. Stat. § 48-1111 (Reissue 1978) and 49 C.F.R. § 391.41 (1978). It is not the absence of a digit which makes one ineligible to drive, but the driver's inability to control and safely drive a vehicle because of the absence of a digit. That must, in each case, be a fact decision which in the first instance the employer should be required to investigate. The finders of fact in this case found that Bayne was not unable to safely operate a motor vehicle. We should not disturb that finding by making Bayne's physical condition a per se defense.

I am authorized to state that White, J., joins in this dissent.

DANIEL L. DIETER ET AL., APPELLANTS, V. KENNETH HAND ET AL., APPELLEES.

333 N.W.2d 772

Filed May 6, 1983. No. 82-157.

1. **Principal and Agent: Negligence: Liability.** An employee of a corporation, whose negligence causes injury, is jointly and severally liable, with the corporation, in an action for damages caused by such injuries.
2. _____: _____: _____. Before an employee becomes liable for an act or omission alleged to have constituted negligence, with resultant injury to a third person, it must appear that the employee has agreed to perform such act for his employer and has assumed the performance of it.
3. _____: _____: _____. Individual employee liability does not extend to render an employee liable to a third person for a loss sustained by the latter as the result of the employee's failure to per-

form a duty owing only to his employer, unaccompanied by any act or omission constituting a breach of his duty owing to a third person.

4. _____: _____: _____. The determination of whether a particular employee owed a duty of due care to a third person in the position of the plaintiff is a question of law and depends upon the circumstances of the particular case.
5. **Demurrer.** In reviewing the sustaining of a demurrer this court must treat the facts alleged in the petition as undisputed.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Reversed and remanded for further proceedings.

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

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

BOSLAUGH, MCCOWN, and HASTINGS, JJ., and BRODKEY, J., Retired, and GARDEN, D.J.

MCCOWN, J.

This is an action at law by Daniel L. Dieter and Cornhusker Casualty Company against the defendants, as individual agents and employees of a public power district, to whom the district had entrusted the care and maintenance of an electric power line, for injuries resulting from defendants' failure to exercise reasonable care in the performance of their duties.

The District Court sustained a demurrer to plaintiff's amended petition. Plaintiff elected to stand on the amended petition, and the petition was dismissed. Plaintiff has appealed.

Plaintiff's amended petition alleged that on December 26, 1979, Dieter was making a truck delivery of meat to a grocery store in Shelton, Nebraska. He parked the truck in the alley behind the store. An electric transmission line owned, operated, and maintained by Nebraska Public Power District, which was sagging, came in contact with the top of his truck. When Dieter attempted to open the metal

doors of the truck, he received an electrical shock. He suffered injuries to his right hand and arm and was totally disabled for 44 weeks.

The petition alleged that the electric transmission line was under the supervision, maintenance, and control of the individual defendants. The line had been permitted to sag to a height which brought it into contact with the top of the truck, and the insulation of the line had become frayed and worn, exposing the wire so that current could escape to objects contacting the line or coming near enough to it to permit arcing from the line to such objects.

The defendant Hand, a resident of Shelton, Nebraska, was the local manager of the public power district in Shelton, and the district had erected and maintained the electrical transmission line involved.

The defendant Legat, a resident of Kearney, Nebraska, was the district manager of the public power district for the subdistrict, which includes Shelton.

The petition alleged that the two individual defendants, at all relevant times, had been charged by the public power district, and had undertaken with it, to supervise, inspect, repair, and maintain the electric power transmission lines of the Nebraska Public Power District, including those in Shelton, and that each of them and both of them jointly and severally were guilty of negligence in specified particulars.

The petition alleged that the defendants were negligent in failing to inspect, maintain, repair, and replace the transmission line at a safe height above vehicles, and in permitting the insulation to become frayed, worn, and broken when they knew, or in the exercise of reasonable care should have known, that the transmission line was sagging, frayed, worn, and broken, and that said defects created a danger of electrical shock to persons using the alley. As a proximate result of defendants' negligence, Dieter suffered permanent injuries.

The defendants demurred to plaintiff's amended petition on the ground that it failed to state a cause of action against either of the defendants.

The District Court sustained the demurrer and, after plaintiff elected to stand on the amended petition, dismissed the action. This appeal followed.

The defendants contend that the plaintiff's exclusive remedy for plaintiff's injuries is an action against the public power district under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1977). Because the time for making claim and filing suit against the district under that act had already expired, defendants assert that plaintiff has no cause of action against any individual officer, agent, or employee of the power district for his own individual negligence. Defendants' position is that the present action against the individual defendants is only an attempt to circumvent statutory time limitations of the tort claims act. The record indicates that the District Court apparently sustained the demurrer on these grounds.

An employee of a corporation whose negligence causes injury is jointly and severally liable, with the corporation, in an action for damages caused by such injuries. *Fonda v. Northwestern Public Service Co.*, 134 Neb. 430, 278 N.W. 836 (1938). Courts have not generally imposed individual employee liability in cases where the employee was not in charge of, nor actually did, the work. In the *Fonda* case this court adopted the statement that " 'It is not the agent's contract with his principal which exposes him to or protects him from liability to third persons, but his common-law obligation to so use that which he controls as not to injure another. That obligation is neither increased nor diminished by his entrance upon the duties of agency, nor can its breach be excused by the plea that his principal is chargeable.' " *Id.* at 439, 278 N.W. at 840.

The common-law rule of joint and several liability was not changed by the adoption of the Political

Subdivisions Tort Claims Act. The act was designed to waive the common-law governmental immunity from suit and to provide for uniform procedures for the bringing of tort claims against political subdivisions. The waiver of immunity of the political subdivision did not decrease a claimant's rights against individual defendants for their own negligence. The language of the tort claims act supports the conclusion that tort claims can still be brought against individual employees of a political subdivision for their own negligence.

Section 23-2408 provides: "Final judgment in any suit under this act shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the political subdivision whose act or omission gave rise to the claim; *Provided*, this section shall not apply if the court rules that the claim is not permitted under this act."

In the case at bar there has been no final judgment in an action under the Political Subdivisions Tort Claims Act, but the District Court, in ruling on the demurrer, has in effect determined that the claim is not now permitted under the act. If the act was designed to foreclose suits against employees for their own personal negligence, then the section would be meaningless.

The common-law duty of every person to use due care so that he does not act or use that which he controls so as to negligently injure another person, as applied to employee negligence situations, is ordinarily expressed in terms of whether a duty of reasonable care was owed to the third person or only to the employer, rather than upon distinctions of "misfeasance," "nonfeasance," "commission," or "omission."

The determination of whether a particular employee owed a duty of due care to a third person in the position of the plaintiff is a question of law and depends upon the circumstances of the particular

case. The rule does not extend to render an employee liable to a third person for a loss sustained by the latter as the result of the employee's failure to perform a duty owing only to his employer, unaccompanied by any act or omission constituting a breach of his duty owing to a third person. Before the employee can be held liable there must be some reason why he should be called upon to act and thus use proper care to prevent injury to the third person, or some relationship between the parties calling that duty into existence. It is not sufficient merely that the employee agrees with the employer to perform such duties; in such case the employee has obligated himself to no one except the employer to perform such duties, and for a failure to perform them no one but the employer has the right to complain.

Before an employee becomes liable for an act or omission alleged to have constituted negligence, with resultant injury to a third person, it must appear that the employee has agreed to perform such act for his master and has assumed the performance of it. 53 Am. Jur. 2d *Master and Servant* § 449 (1970); see, also, Restatement (Second) of Agency § 354 (1958); Restatement (Second) of Torts § 324 A (1965); *Pester v. Holmes*, 109 Neb. 603, 191 N.W. 709 (1923); *Norwood v. Carolina Power & Light Co.*, 74 F. Supp. 483 (1947).

Schaefer v. D & J Produce, 62 Ohio App. 2d 53, 403 N.E.2d 1015 (1978), expresses criteria for imposing individual liability upon corporate officers or employees: " '1. The principal or employer owes a duty of care to the third person (which in this sense includes a co-employee), breach of which has caused the damage for which recovery is sought.

" '2. This duty is delegated by the principal or employer to the defendant.

" '3. The defendant officer, agent, or employee has breached this duty through personal (as contrasted with technical or vicarious) fault. The breach occurs when the defendant has failed to dis-

charge the obligation with the degree of care required by ordinary prudence under the same or similar circumstances—whether such failure be due to malfeasance, misfeasance, or nonfeasance, including when the failure results from not acting upon actual knowledge of the risk to others as well as from a lack of ordinary care in discovering and avoiding such risk of harm which has resulted from the breach of the duty.

" '4. With regard to the personal (as contrasted with technical or vicarious) fault, personal liability cannot be imposed upon the officer, agent or employee simply because of his general administrative responsibility for performance of some function of the employment. He must have a personal duty towards the injured plaintiff, breach of which specifically has caused the plaintiff's damages. If the defendant's general responsibility has been delegated with due care to some responsible subordinate or subordinates, he is not himself personally at fault and liable for the negligent performance of this responsibility unless he personally knows or personally should know of its non-performance or malperformance and has nevertheless failed to cure the risk of harm.' " *Id.* at 60-61, 403 N.E.2d at 1020-21. Other courts have adopted the criteria. See, e.g., *Nine v. Harper*, 371 So. 2d 320 (La. App. 1979).

In the case at bar the court sustained a general demurrer to plaintiff's amended petition. On reviewing the sustaining of a demurrer this court must treat the facts alleged in the petition as undisputed. *Cizek v. Cizek*, 201 Neb. 4, 266 N.W.2d 68 (1978).

The plaintiff's amended petition is sufficient to state a cause of action against the individual defendants, even though the allegations state the possible duty owed to the plaintiff by the defendants in very broad terms. The allegations are so broad and nonspecific as to the details of the individual defendants' involvement in the supervision, inspection, repair, and maintenance of the transmission line that

it cannot be determined on the present record whether an individual duty of care to avoid injuring the plaintiff existed or was breached by either or both defendants.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

BOSLAUGH, J., dissenting.

In my opinion the facts alleged in the amended petition were not sufficient to establish a duty owed to the plaintiffs by the defendants.

ALBERT E. INTERHOLZINGER AND FRANK INTERHOLZINGER, APPELLANTS, V. ESTATE OF GEORGE DENT, JR., DECEASED, ET AL., APPELLEES.

333 N.W.2d 895

Filed May 6, 1983. No. 82-180.

1. **Final Orders: Appeal and Error.** An order dismissing one theory of recovery while a second theory of recovery arising out of the same cause of action, that is, the same set of operative facts, remains pending for trial is not a final appealable order.
2. **Summary Judgment: Final Orders: Appeal and Error.** A summary judgment dismissing one cause of action is a final appealable order notwithstanding the fact another cause of action still pends for trial.
3. **Limitations of Actions: Time.** The point at which a statute of limitations commences to run must be determined from the facts of each case; a cause of action accrues, and the statute of limitations begins to run, when the aggrieved party has the right to institute and maintain suit, even though such plaintiff may be ignorant of the existence of the cause of action.
4. **Torts: Actions: Time.** Without injury there is no cause of action; injury occurs in a tort action as soon as the act or omission takes place.
5. **Contracts: Fraud.** In the absence of fraud one who signs an instrument without reading it, when he can read and has an opportunity to do so, cannot avoid the effect of his signature merely because he was not informed of the contents of the instrument.
6. **Summary Judgment.** Summary judgment may properly be granted where there exists no genuine issue as to any material fact, the ultimate inferences to be drawn from those facts are

clear, and the moving party is entitled to judgment as a matter of law.

Appeal from the District Court for Lincoln County: JOHN D. KNAPP, Judge. Affirmed in part, and in part reversed and remanded with directions.

Martin A. Cannon of Matthews, Cannon & Riedmann, P.C., for appellants.

Joseph F. Bataillon of Sodoro, Daly & Sodoro, for appellees.

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

CAPORALE, J.

This proceeding is a legal malpractice action wherein Albert E. Interholzinger and Frank Interholzinger, plaintiffs, appeal from the trial court's summary judgment in favor of the Estate of George Dent, Jr., and Maupin, Dent, Kay, Satterfield, Girard, and Scritsmeier, a partnership, defendants-appellees. The Interholzingers claim the trial court erred in finding that their action is barred by the period of limitations. We affirm in part and reverse in part.

The pleadings, depositions, and documents received in evidence on the hearing upon the defendants' motion for summary judgment reveal that, since at least the early 1930s, the plaintiffs were involved in the operation of what became North Platte Packing, Inc. (or Company, the record is not clear), a corporation in which the plaintiffs herein were the sole stockholders. For a variety of reasons, including the advancing age of the Interholzingers and the dwindling profitability of the operation, they attempted to sell the business. At the time this decision was reached, certain land in fact owned by the plaintiffs personally was titled in the corporation for reasons which are not material to this action. A sale was negotiated by their longtime attorney, the late George Dent, Jr., whose instructions were to ex-

clude the private land from the sale of the packing plant business. Mr. Dent negotiated a sale of the corporation's stock to Eastern Oil, Inc., for $350,000. Eastern Oil paid $25,000 of that sum to Mr. Dent, to be held in escrow pending certain approval from the U.S. Department of Agriculture. That purchase agreement, bearing a December 1976 dateline, excluded the private land in question from the assets to be sold. Although Mr. Dent obtained deeds from North Platte Packing conveying the private land to the plaintiffs personally, those deeds were neither delivered to plaintiffs nor recorded.

Notwithstanding the fact that the purchase agreement was never executed by Eastern Oil, it took possession of the packinghouse premises and operated the business until March or April of 1977, when it abandoned the operation. According to Ruth Interholzinger, Albert Interholzinger's wife, Mr. Dent advised the plaintiffs in March or April of 1977 that since the sale to Eastern Oil had not been consummated, North Platte Packing was still owned by the plaintiffs and that the debts incurred by Eastern Oil must now be taken over by plaintiffs. On June 7, 1977, the plaintiffs herein signed a listing agreement in Mr. Dent's office with Edward W. Johannesen which empowered Johannesen to sell the packing operation recently abandoned by Eastern Oil, together with their private land and other properties. That document listed the private land along with various other corporate assets. Albert Interholzinger testified he did not read the listing agreement, saying that although he knew how to read, he was virtually blind and physically unable to do so. Frank Interholzinger did not state whether he read the listing agreement. The private land was sold on July 12, 1978, at which time plaintiffs signed North Platte Packing deeds conveying the private land; the proceeds therefrom, along with other funds, were used to partially satisfy North Platte Packing's debts.

This lawsuit was filed on July 30, 1979; the fourth amended petition alleges two causes of action, the first for money had and received by the deceased George Dent, Jr., in the sum of $25,000, and the second for Mr. Dent's alleged negligence in the practice of law. That second cause of action takes an uncertain and dispersive approach, claiming that virtually everything Mr. Dent did in connection with negotiating the sale to Eastern Oil constituted various separate and independent acts of negligence. The evidence and arguments, however, focus upon the following specific allegations of negligence:

"9. In instructing and advising the plaintiffs, after the 'Eastern Oil, Inc.' people absconded, that they could not salvage the land from the corporation, and requiring them as corporate officers to offer it for sale by the corporation;

"10. In permitting said lands to be so sold and the proceeds paid to corporate creditors."

We agree with the trial court that specification 10 above is merely descriptive of the foreseen consequences of specification 9. Specification 10, therefore, adds nothing.

Following the filing of an answer, which in essence denies the allegations of plaintiffs' fourth amended petition, the defendants filed a motion for summary judgment. The trial court sustained the motion as to the negligence cause of action and overruled it as to the cause for money had and received.

We must first address the claim of the defendants that inasmuch as one of plaintiffs' causes of action is still pending in the trial court, there has been no final appealable order. That position is taken in reliance upon four recent cases of this court. *Lake v. Piper, Jaffray & Hopwood Inc.*, 212 Neb. 570, 324 N.W.2d 660 (1982); *P. R. Halligan Post 163 v. Schultz*, 212 Neb. 329, 322 N.W.2d 657 (1982); *Knoell Constr. Co. v. Hanson*, 208 Neb. 373, 303 N.W.2d 314 (1981); *Martin v. Zweygardt*, 199 Neb. 770, 261 N.W.2d 379 (1978).

That reliance is misplaced. *Lake* held only that, as a general rule, where a plaintiff is allowed to continue the prosecution of a cause on his own behalf but is denied class action status, there has been no final order. *Knoell Constr. Co.* involved an order overruling a motion for leave to amend pleadings, clearly interlocutory in nature. In *Martin v. Zweygardt* the District Court vacated a county court judgment and remanded the cause for a new trial. We held the general rule to be that a judgment of reversal with remand for further proceedings is not final for the purpose of appeal. None of those cases are apposite to the situation presented to us in this case. We are not confronted with the denial of class status, the refusal to allow the amendment of a pleading, or the remanding of a case for further proceedings. We are confronted with a suit presenting two separate factual occurrences. Not only did Mr. Dent receive and hold money, he also performed legal services. Although the facts relevant to the claim of money had and received may indeed overlap in some measure with those relevant to the claim of negligence, there are, nonetheless, two separate and distinct factual occurrences with separate and self-contained alleged breaches, along with separate and self-contained remedies therefor. *Kohler v. Ford Motor Co.*, 187 Neb. 428, 191 N.W.2d 601 (1971), states it is the general facts upon which the right to recover is based that determine a cause of action; that is to say, a cause of action consists of the set of facts on which a recovery may be had. A cause of action, in a general sense, is a claim or subject matter upon which an action may be maintained. 1 C.J.S. *Actions* § 8(b) (1936). This case differs, therefore, from *P. R. Halligan Post 163 v. Schultz*, *supra*, wherein we held an order dismissing one theory of recovery while a second theory of recovery based upon the same cause of action, that is, the same set of operative facts, remained pending for trial did not constitute a final appealable order.

The distinction is that in *Halligan* there was but one factual sequence, the burning of a building; this gave rise to but one cause of action although two different legal theories of recovery, one theory based on statute and the other grounded in negligence. Therefore, *Halligan* presented a single cause of action with two theories of recovery, whereas this case presents two separate causes of action, each cause incidentally having its own theory of recovery. The summary judgment dismissing plaintiffs' cause of action for alleged legal malpractice is a final appealable order notwithstanding the fact that the separate and distinct cause of action for money had and received still pends for trial.

We must therefore consider plaintiffs' claim that their action is not barred by the period of limitations set forth in Neb. Rev. Stat. § 25-222 (Reissue 1979), which provides: "Any action to recover damages based on alleged professional negligence or upon alleged breach of warranty in rendering or failure to render professional services shall be commenced within two years next after the alleged act or omission in rendering or failure to render professional services providing the basis for such action; *Provided*, if the cause of action is not discovered and could not be reasonably discovered within such two-year period, then the action may be commenced within one year from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier; *and provided further*, that in no event may any action be commenced to recover damages for professional negligence or breach of warranty in rendering or failure to render professional services more than ten years after the date of rendering or failure to render such professional service which provides the basis for the cause of action."

The relevant questions, then, are: Was there an act of malpractice? If so, when did it occur and when did plaintiffs' cause of action accrue?

The most chronologically recent act of alleged legal negligence within the reach of specification 9 above was the failure of Mr. Dent, not having completed the conveyance of the subject land from North Platte Packing to plaintiffs before Eastern Oil incurred debts, to advise plaintiffs they had a right to litigate whether such land was in fact a part of the corporate assets so as to be available to North Platte Packing's creditors.

We have stated that the point at which a statute of limitations commences to run must be determined from the facts of each case; a cause of action accrues, and the statute of limitations begins to run, when the aggrieved party has the right to institute and maintain suit, even though such plaintiff may be ignorant of the existence of the cause of action. *Jones v. Johnson*, 207 Neb. 706, 300 N.W.2d 816 (1981); *T. S. McShane Co., Inc. v. Dominion Constr. Co.*, 203 Neb. 318, 278 N.W.2d 596 (1979); *Jirka v. Prior*, 196 Neb. 416, 243 N.W.2d 754 (1976). In *Kohler v. Ford Motor Co., supra*, we observed that without injury there is no cause of action at all. Injury, however, does not mean that the nature and extent of damages must be known. Injury occurs in a tort action as soon as the act or omission takes place. *Grand Island School Dist. #2 v. Celotex Corp.*, 203 Neb. 559, 279 N.W.2d 603 (1979).

In our analysis we must first determine, then, when plaintiffs knew, or should have known, that their personal interests, because of Dent's failure to remove their private land from the assets of North Platte Packing, were being sacrificed to North Platte Packing's creditors.

There is nothing in Ruth Interholzinger's testimony as to the meeting which occurred in March or April of 1977, wherein Mr. Dent told plaintiffs they would have to take over the debts, which need have put plaintiffs on notice that their private land was going to be involved. A reading of the June 7, 1977, listing agreement, however, would have advised the

plaintiffs that their private land was still North Platte Packing's property. Under our law, in the absence of fraud one who signs an instrument without reading it, when he can read and has the opportunity to do so, cannot avoid the effect of his signature merely because he was not informed of the contents of the instrument. *Erftmier v. Eickhoff*, 210 Neb. 726, 316 N.W.2d 754 (1982); *Commodity Traders, Inc. v. Palmer*, 203 Neb. 667, 280 N.W.2d 49 (1979). There is nothing in the record to suggest that Mr. Dent was attempting to deceive the plaintiffs as to the true nature of the situation, there was no fraud, and there is nothing before us which excuses Frank Interholzinger from reading the document he signed, if he failed to do so. He is charged with knowledge of its contents and is bound thereby. As to Frank Interholzinger, the limitations clock began to run on June 7, 1977, the day he signed the listing agreement.

The situation as to Albert Interholzinger is, however, otherwise. There is nothing before us which contradicts his statements that he was physically unable to read the 1977 listing agreement and therefore did not do so. Neither is there anything before us which establishes its contents were explained to him. The evidence does not conclusively establish he knew or did not know at that time that the private land was to be sold as part of North Platte Packing.

Summary judgment may properly be granted where there exists no genuine issue as to any material fact, the ultimate inferences to be drawn from those facts are clear, and the moving party is entitled to judgment as a matter of law. *Galyen Petroleum Co. v. Hixson*, 213 Neb. 683, 331 N.W.2d 1 (1983); *First National Bank v. Rose*, 213 Neb. 611, 330 N.W.2d 894 (1983); *Snyder v. Nelson*, 213 Neb. 605, 331 N.W.2d 252 (1983). This is such a case as to Frank Interholzinger. However, since reasonable inferences from the evidence support different conclusions concerning the state of Albert Interhol-

zinger's knowledge, summary judgment is not appropriate as to him. The issue properly should be decided in bifurcated proceedings, as contemplated by Neb. Rev. Stat. § 25-221 (Reissue 1979).

The summary judgment in favor of the defendants as to plaintiff Frank Interholzinger is affirmed. The summary judgment in favor of the defendants as to the plaintiff Albert Interholzinger is reversed and the cause remanded for further proceedings.

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

SHANAHAN, J., not participating.

TIMOTHY J. MURPHY, APPELLANT, V. WARD JUSTUS, APPELLEE.

333 N.W.2d 670

Filed May 6, 1983. No. 82-213.

1. **Negligence.** The duty to maintain a proper lookout is a part of the duty to use due care imposed upon a person using steps leading from the front porch of an apartment house.
2. **Negligence: Invitor-Invitee.** An invitee must ordinarily take notice of changes in floor levels, steps, or other obstacles which are plainly visible to one who takes the trouble to look.

Appeal from the District Court for Douglas County: KEITH HOWARD, Judge. Affirmed.

Peter C. Bataillon of Sodoro, Daly & Sodoro, for appellant.

Richard C. Gordon of Walsh, Walentine, Miles, Fullenkamp & O'Toole, for appellee.

BOSLAUGH, MCCOWN, and HASTINGS, JJ., and BRODKEY, J., Retired, and COLWELL, D.J., Retired.

BOSLAUGH, J.

The plaintiff, Timothy J. Murphy, was injured on June 23, 1979, when he fell on the front steps of an apartment house at 1705 Park Avenue in Omaha, Ne-

braska, owned by the defendant, Ward Justus. This action was brought to recover the damages resulting from his injuries. The jury returned a verdict for the defendant and the plaintiff has appealed.

The apartment house is a fourplex which faces west on Park Avenue and there are three concrete steps leading from the front porch to a sidewalk that runs west from the steps. There is an iron railing on each side of the steps that extends from the porch to the bottom step. The plaintiff had lived in an apartment on the first floor of the apartment house for about 90 days and was familiar with the steps leading to the front porch. He had been up and down the steps at least twice a day during that time.

The plaintiff testified that between 7:15 and 7:30 a.m., he left his apartment to go to work. It was a clear day. "[A]s I started down the steps my foot went out from under me. As I reached for the railing it gave way, when I tried to get ahold of it to balance myself I ended up on the bottom of the steps with my foot underneath me." The plaintiff testified that it was his right foot that slipped and he grabbed the railing at the south side of the steps with his left hand. If the handrail had not given way, he would have been able to "right" himself. He thought he slipped on the first step, but it could have been the second one. He "ended up" on the landing or the sidewalk with his right leg bent up underneath him. The plaintiff testified he was looking "down in front of me" as he was walking down the steps. He further testified the steps were "cracked, patched, chipped off, and patched" and were "sandy and dirty." The plaintiff's evidence indicated the upright which supported the handrail was broken where it should have been fastened to the bottom step.

The petition alleged the defendant was negligent in failing to properly repair and maintain the steps and handrail and in failing to warn the plaintiff of

the condition of the steps and handrail. The answer alleged the plaintiff was negligent in failing to keep a proper lookout and in failing to use the handrail. The case was submitted to the jury on issues of negligence in regard to the handrail and contributory negligence in failing to keep a proper lookout at the time of the fall.

The plaintiff contends the trial court erred in failing to direct a verdict as to liability; in failing to submit an issue as to the negligent condition of the steps; and in submitting contributory negligence to the jury.

The evidence as to the condition of the handrail was in sharp conflict. The defendant's evidence was to the effect that the handrail was inspected following the accident and was found to still be firmly attached to the bottom step, although some of the concrete at that point had broken away from the surface of the bottom step.

There was evidence that the handrail at the west end could be moved back and forth sideways, that is, north and south, several inches to as much as 4 inches, but was otherwise stable.

There was no evidence as to any defective condition concerning the steps other than the testimony that the surface was "sandy and dirty." This was insufficient to make a jury issue on the condition of the steps. The conflict in the evidence concerning the condition of the handrail presented a question for the jury.

Instruction No. 2 summarized the allegations of the parties in regard to the issues of negligence and contributory negligence. Instruction No. 4 advised the jury as to the burden of proof on contributory negligence and proximate cause. Instruction No. 5 advised the jury concerning the comparative negligence rule.

At the instruction conference the plaintiff objected to instruction Nos. 4 and 5 on the ground there was no evidence that the plaintiff "had anything to do

whatsoever with contributing to the condition of the rail." There was no contention by the defendant that the plaintiff had anything to do with contributing to the condition of the handrail. It was the defendant's contention that the handrail was not defective and the plaintiff was negligent in failing to use the handrail while going down the steps.

In regard to the plaintiff's obligation to use ordinary care in walking down the steps, the duty to maintain a proper lookout is a part of the duty to use due care. *Krantz v. Marge's Mufflers, Inc.*, 184 Neb. 838, 172 N.W.2d 624 (1969). As the court stated in *Corrigan v. Younker Brothers, Inc.*, 252 Iowa 1169, 1175, 110 N.W.2d 246, 249 (1961): "[A]n invitee must ordinarily take notice of changes in floor levels, steps or other obstacles which are plainly visible to one who takes the trouble to look . . . ." In *Whitcomb v. State Fed. Sav. & Loan Assn.*, 190 Neb. 26, 29, 205 N.W.2d 652, 654 (1973), we said: "The plaintiff was familiar with the entranceway in which she fell. She had entered the building on numerous occasions and at least once after the entrance had been reconstructed. She was fully aware that there was a slight step or raise in the entrance. The threshold was open and obvious to all persons entering or leaving the building. Notwithstanding her knowledge of, and ability to see what was plainly before her, she failed to look and in some manner stumbled and fell. 'One who is capable of understanding and discretion and who fails to exercise ordinary care and prudence to avoid defects and dangers which are open and obvious is negligent or contributorily negligent.' Omaha Nat. Bank v. Omaha P.P. Dist., 186 Neb. 6, 180 N.W.2d 229. See, also, Mendoza v. Aguilera, *supra*; Costello v. Simon, *supra*."

The evidence as to exactly how the plaintiff fell on the steps is quite vague. The petition alleged that the plaintiff had "stumbled on a crack in the steps," but there was no evidence to support that allegation.

The plaintiff was unsure whether he slipped on the first or second step and did not explain why he slipped. One inference that can be drawn from the evidence is that he does not know. There was medical testimony to the effect that due to a previous injury it was possible for the plaintiff's knee to "give" and not support the plaintiff's weight on that side of his body. As to lookout, his only testimony was that he was looking "down in front of me," with no explanation as to whether he was watching the steps or something else.

When the evidence is viewed in the light most favorable to the defendant, the jury could have concluded that the plaintiff fell on the steps because he was not paying sufficient attention to what he was doing when he went down the steps. If the jury believed the defendant's evidence and found that the handrail was not defective or a proximate cause of the plaintiff's fall, then it could conclude that the plaintiff's negligence was the proximate cause of the accident. The plaintiff himself testified that he would have been able to "right" himself if the handrail had not given way.

There being no error, the judgment is affirmed.

AFFIRMED.

DONALD R. RUDOLF, APPELLEE, V. TOMBSTONE PIZZA CORPORATION, A FOREIGN CORPORATION, APPELLANT.

333 N.W.2d 673

Filed May 6, 1983. No. 82-327.

1. **Employer and Employee: Words and Phrases.** Under the Nebraska Wage Payment and Collection Act an employee is "any individual permitted to work by an employer"; an employer is anyone "employing any person as an employee"; and wages are "compensation for labor or services rendered by an employee."
2. **Employer and Employee.** The criteria for determining whether one is an independent contractor or an employee include the right of control, the independence the workman enjoys, the degree of

supervision of the work, whether tools are provided by the workman or the other party, the method of payment, and the contractual understanding between the parties.

3. **Employer and Employee: Wages.** Under the Nebraska Wage Payment and Collection Act an employer may deduct, withhold, or divert a portion of an employee's wages only when required to do so by state or federal law, or order of a court, or when authorized by a written agreement with the employee.

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

Robert K. Silverman of Silverman & Silverman, for appellant.

Ronald F. Krause of Cassem, Tierney, Adams, Gotch & Douglas, for appellee.

BOSLAUGH, MCCOWN, and HASTINGS, JJ., and BRODKEY, J., Retired, and COLWELL, D.J., Retired.

BOSLAUGH, J.

The plaintiff, Donald R. Rudolf, commenced this action under the Nebraska Wage Payment and Collection Act, Neb. Rev. Stat. §§ 48-1228 to 48-1232 (Reissue 1978), to recover commissions due him from the defendant, Tombstone Pizza Corporation. The defendant counterclaimed for amounts alleged to be due it for inventory shortages and insufficient fund checks received from customers.

In early March 1980 the plaintiff met with Chad Patterson, Tombstone's district sales manager, to discuss a job as a route salesman. The compensation was to be on a commission basis at 9 cents a pizza, or $275 per week, whichever was greater. The $275 was understood to be a guaranteed minimum and the plaintiff was to receive $15 for each new account he developed. A truck and fuel were to be furnished by the defendant. The plaintiff began work for Tombstone on March 17, 1980. At that time there was no written agreement between the parties and the plaintiff was not informed about the defendant's practices regarding inventory shortages or bad checks received from a customer.

The plaintiff was trained by Patterson, his supervisor, for 2 weeks. The nature of the job was to call on new and existing accounts and to service these accounts. The inventory of frozen pizza was kept in a warehouse to which the plaintiff, Patterson, the deliverymen, and another salesman had a key, but the plaintiff was responsible for the inventory. The plaintiff saw Patterson about once a week and was directed in all of his job responsibilities by Patterson.

In June 1980 the plaintiff attended a training program at the defendant's main office in Medford, Wisconsin. At that time he signed a written agreement prepared by the defendant which provided: "I, _____, *as an employee* of Tombstone Pizza Corporation, agree to the following terms and conditions throughout *the course of my employment*. My signature at the bottom represents the company's assurance that I am in agreement with these terms and conditions:

"(1) Throughout *the course of my employment*, the delivery truck, all products, ovens, signs, advertising materials, carry-out bags and other materials and equipment used in *the course of my employment* and paid for by Tombstone Pizza Corporation shall remain the property of Tombstone Pizza Corporation.

"(2) That upon termination of *employment*, I agree to the following:

"(a) To return all unsold products, pizza ovens, signs, advertising material, carry-out bags, the delivery truck and other materials and equipment paid for by Tombstone Pizza Corporation. I further agree to pay all monies due Tombstone Pizza Corporation from the sale of its products or such payment will be made via a reduction in commission checks.

"(b) I will immediately discontinue the use of all trade names, trademarks, signs, forms of advertising, indicative of Tombstone Pizza, its symbols or trademarks or its products.

"(c) I will for one year from the date of termination refrain from selling, either directly or indirectly, any pizza products in the territory I was assigned to through *the course of my employment*, nor will I directly or indirectly interfere with any business or trade carried on by Tombstone Pizza Corporation with its customers.

"(d) I will immediately submit to Tombstone Pizza Corporation a complete and accurate list of all customers I was servicing at my date of termination." (Emphasis supplied.)

Through August 1980 the plaintiff reported more overages than shortages on his inventory reports. However, in September inventory shortages began to develop. Beginning in late September 1980 the defendant began applying the plaintiff's checks to his account in order to reduce the amount of shortage. At the time the first payment was withheld, the plaintiff was unaware that this was the defendant's practice. Also, several insufficient fund checks were charged against the plaintiff's account. The plaintiff was unaware of this practice until the first occurrence.

There was no direct evidence as to the cause of the inventory shortages. The shortages were charged against the plaintiff's account regardless of fault because the plaintiff was responsible for the inventory. However, on cross-examination, the plaintiff testified that the shortages began to appear shortly after the second route salesman was given access to the inventory. The defendant's evidence disputed this.

The plaintiff testified that he quit his employment with the defendant; the defendant alleged that the plaintiff was fired. In any event, the plaintiff's employment ended on October 24, 1980. The net amounts due the plaintiff for 4 weeks had been applied to the shortages up to that date. The defendant also advised the plaintiff that all amounts withheld from the commission for the payment of taxes

would be applied to the shortages. The total amount withheld, excluding amounts paid for insurance, was $1,078.19. The shortage remaining at the time of trial was $1,296.14.

Trial was had to the court, which found that the plaintiff was an employee of the defendant and that the defendant had no right to withhold payments due the plaintiff. The trial court awarded the plaintiff $1,078.19 and attorney fees in the amount of $539.10. The defendant was ordered to pay an additional $1,078.19 to the clerk to be distributed to the common schools of the State of Nebraska as provided in § 48-1232. The counterclaim was dismissed.

The defendant contends that the Nebraska Wage Payment and Collection Act was not applicable because the plaintiff was not an "employee" of the defendant.

The pertinent sections, §§ 48-1229 and 48-1230, provide: "As used in sections 48-1228 to 48-1232, unless the context otherwise requires: (1) Employer shall mean any individual, partnership, association, joint stock company, trust, corporation, the administrator or executor of the estate of a deceased individual, or the receiver, trustee, or successor thereof, employing any person as an employee, except that employer shall not be construed to include the state;

"(2) Employee shall mean any individual permitted to work by an employer; and

"(3) Wages shall mean compensation for labor or services rendered by an employee, including fringe benefits, when previously agreed to and conditions stipulated have been met by the employee, whether the amount is determined on a time, task, fee, commission, or other basis."

"Except as otherwise provided in this section, each employer shall pay all wages due its employees on regular days designated by the employer or agreed upon by the employer and employee. Thirty days' written notice shall be given to an employee before regular pay days are altered by an employer.

An employer may deduct, withhold, or divert a portion of an employee's wages only when the employer is required to or may do so by state or federal law or by order of a court of competent jurisdiction or the employer has written agreement with the employee to deduct, withhold, or divert. Whenever an employer separates an employee from the payroll, the unpaid wages shall become due on the next regular pay day or within two weeks of the date of termination, whichever is sooner."

Section 48-1231 of the act permits an "employee" to whom "wages" are owed to sue the "employer" for payment. By statutory definition an employee is "any individual permitted to work by an employer." An employer is anyone "employing any person as an employee." The act applies if an individual in the employ of another has a right to "wages" as defined in the statute.

We think it is clear that the plaintiff was an "employee," an "individual permitted to work" by the defendant; that the defendant was an employer employing the plaintiff as an "employee"; and that the amount due the plaintiff was "wages," "compensation for labor or services rendered by an employee." The Nebraska Wage Payment and Collection Act was applicable in this case.

The defendant contends that the act was not applicable because the plaintiff was an independent contractor. If this were the statutory criterion, the conclusion still would not be supported by the record. The nature of the contractual relationship between the parties is an issue for determination by the fact finder. See, *Curry v. Bruns*, 136 Neb. 74, 285 N.W. 88 (1939); *Stephens v. Celeryvale Transport, Inc.*, 205 Neb. 12, 286 N.W.2d 420 (1979); *Barton v. Hobbs*, 181 Neb. 763, 151 N.W.2d 331 (1967). The criteria for determining whether one is an independent contractor or an employee include the right of control, the independence the workman enjoys, the degree of supervision of the work, whether tools are provided by the

workman or the other party, the method of payment, and the contractual understanding between the parties. *Maricle v. Spiegel*, 213 Neb. 223, 329 N.W.2d 80 (1983); *Meyer v. State Farm Mut. Auto. Ins. Co.*, 192 Neb. 831, 224 N.W.2d 770 (1975). See, also, Restatement (Second) of Agency § 220 (1958).

In the present case the contract was denominated as one of "employment." The defendant controlled and supervised the plaintiff's work activities. All supplies, including the truck and fuel, were furnished by the defendant. Payment was made on a guaranteed basis. Under these rules the finding that the plaintiff was an employee was not clearly wrong. Findings of fact by the trial court have the force and effect of a jury verdict and will not be set aside unless clearly wrong. *Graff v. Farmers Mut. Home Ins. Co.*, 211 Neb. 13, 317 N.W.2d 741 (1982).

The defendant further contends that the finding that the defendant did not have the right to withhold commissions owed to the plaintiff was unsupported by the evidence. Section 48-1230 of the act requires a written agreement before an employer may deduct, withhold, or divert an employee's wages.

The finding that no written agreement existed authorizing the defendant to deduct, withhold, or divert the plaintiff's commissions is supported by the record. The written agreement provided that a reduction in commission checks would be made if a salesman did not turn over all moneys due the defendant from the sale of its product. There was no direct evidence as to the cause of the inventory shortages and no proof that missing pizzas had been sold. The agreement was silent as to what would be done in the event of inventory shortages or bad checks. The plaintiff testified that he did turn over all moneys from the sale of the product.

Since there was no written agreement authorizing the withholding of commissions for inventory shortages, the counterclaim was properly dismissed.

The plaintiff is allowed the sum of $500 for the services of his attorney in this court.

The judgment is affirmed.

AFFIRMED.

FRANCIS ANDERSON, APPELLEE AND CROSS-APPELLANT, V. CLEMENS MOBILE HOMES, INC., A CORPORATION, AND JERALD E. CLEMENS, INDIVIDUALLY, APPELLANTS AND CROSS-APPELLEES.

333 N.W.2d 900

Filed May 6, 1983. No. 82-382.

1. **Accounting: Equity.** An action for an accounting may, under one set of circumstances, find its remedy in an action at law and, under another, find it within the jurisdiction of equity.
2. _____: _____. Where the intimate relationships of the parties are involved, an adequate remedy is available only within the equitable jurisdiction of the court.
3. _____: _____. The relationships between the minority and majority shareholders of a two-shareholder corporation are such that an adequate accounting remedy is available only within the equitable jurisdiction of the court.
4. **Equity: Appeal and Error.** In an equitable proceeding we review the record de novo and reach an independent conclusion without being influenced by the findings of the trial court, except, however, that where credible evidence is in conflict, we must give weight to the fact that the trial court saw the witnesses and observed their demeanor while testifying.
5. **Equity.** Where a situation exists which is contrary to the principles of equity and which can be redressed within the scope of judicial action, a court of equity will devise a remedy to meet the situation.
6. **Corporations: Actions.** As a general rule, a shareholder suing on behalf of a corporation for wrongs done to it must first seek to persuade the officers and directors to bring the action; however, he is not required to make such an effort if it would have been unavailing.
7. **Corporations.** Although an officer or a director of a corporation is not necessarily precluded from entering into a separate business because it is in competition with the corporation, his fiduciary relationship to the corporation and its stockholders is such that if he does so he must prove by a preponderance of the evidence that he did so in good faith and did not act in such a manner as to cause or

contribute to the injury or damage of the corporation, or deprive it of business; if he fails in this burden of proof, there has been a breach of that fiduciary trust or relationship.

8. _____. A director or other corporate officer cannot acquire an interest adverse to that of the corporation while acting for the corporation or when dealing individually with third persons.
9. **Corporations: Accounting.** Although the burden is ordinarily upon the party seeking an accounting to produce evidence to sustain the accounting, where another is in control of the books and has managed the business, that other is in the position of a trustee and must make a proper accounting.
10. **Corporations.** Generally, no corporate opportunity exists if the corporation is by itself financially unable to undertake such.
11. _____. A corporate officer has no specific duty to use or pledge his personal funds to enable the corporation to take advantage of a business opportunity.
12. _____. In order to be a corporate opportunity, the business must generally be one of practical advantage to the corporation and must fit into and further an established corporate policy.
13. _____. Corporate ratification of unauthorized acts may be inferred from inaction.

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

James R. Hancock of James R. Hancock, P.C., for appellants.

Rick L. Ediger of Raymond, Olsen, Ediger & Ballew, P.C., for appellee.

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

CAPORALE, J.

This action was instituted by appellee, Francis Anderson, the minority shareholder of Clemens Mobile Homes, Inc., a Nebraska corporation, against the corporation and its majority and only other shareholder, Jerald E. Clemens, the defendants-appellants. The action sought an accounting and liquidation of the corporation. The trial court decreed that Anderson was a 20-percent owner of the corporation, that as such he was entitled to a judgment of $88,746, and terminated Anderson's ownership in the corporation. The corporation and Clemens appeal from that de-

cree. Anderson cross-appeals, claiming the decree should have included an accounting for additional properties and transactions. We affirm the decree of the trial court and dismiss the cross-appeal.

It is necessary that we first determine the scope of review available to the parties in this case. An action for an accounting may, under one set of circumstances, find its remedy in an action at law and, under another, find it within the jurisdiction of equity. Where the intimate relationships of the parties are involved, an adequate remedy is available only within the equitable jurisdiction of the court. *Philip G. Johnson & Co. v. Salmen*, 211 Neb. 123, 317 N.W.2d 900 (1982) (finding an action for an accounting between partners to be equitable in nature). We determine that the relationships between the minority and majority shareholders of a two-shareholder corporation are such that an adequate remedy is available only within the equitable jurisdiction of the court. See *Donahue v. Rodd Electrotype Co. of New England, Inc.*, 367 Mass. 578, 328 N.E.2d 505 (1975) (holding that stockholders in a close corporation owed one another the same fiduciary duty as that owed by one partner to another in a partnership). Having resolved that this proceeding is equitable in nature, we review the record de novo and reach an independent conclusion without being influenced by the findings of the trial court, except, however, that where credible evidence is in conflict, we must give weight to the fact that the trial court saw the witnesses and observed their demeanor while testifying. *Craig v. Kile*, 213 Neb. 340, 329 N.W.2d 340 (1983); *Barry v. Wittmersehouse*, 212 Neb. 909, 327 N.W.2d 33 (1982); *Philip G. Johnson & Co. v. Salmen, supra*; *Doyle v. Union Ins. Co.*, 202 Neb. 599, 277 N.W.2d 36 (1979), *appeal as to other issue* 209 Neb. 385, 308 N.W.2d 322 (1981); Neb. Rev. Stat. § 25-1925 (Reissue 1979).

The appellants' seven assignments of error may be summarized as follows: The trial court erred in

(1) failing to give effect to a buy-sell agreement among the shareholders and corporation; (2) permitting Anderson to maintain the action in his own name; (3) determining that Anderson owned 20 percent of the capital stock of the corporation; and (4) determining that the corporation and Clemens personally owed money to Anderson.

The corporation was organized by Clemens as its sole shareholder in April of 1971. Its primary business was the sale of mobile homes, although from time to time other ventures were also undertaken. In the fall of that year Anderson, Clemens' brother-in-law, became an employee and, although no stock certificates were ever issued to him, a one-sixth owner of the corporation. Although Anderson and Clemens' wife served as officers and directors, the evidence establishes that Clemens, as the controlling shareholder, was at all times the corporation's chief operating officer and operated the corporation as though it were his own personal business. Anderson remained an employee of the corporation until May 1973, when he resigned as such. After Anderson resigned his employment he was removed, without his knowledge, as an officer and director.

Appellants' first assignment of error is based upon the buy-sell agreement entered into among the two shareholders and the corporation shortly after Anderson became employed by and invested in the corporation. In *Clemens Mobile Homes, Inc. v. Anderson*, 206 Neb. 58, 291 N.W.2d 238 (1980), we held that the subject agreement became operative during Anderson's lifetime only if he elected to sell his stock. Appellants contend that the institution of the instant action by Anderson triggered operation of the buy-sell agreement. In their answer appellants allege that the corporation ceased functioning as such, had no assets, had its affairs wound up and the creditors discharged, and had gone out of business. Notwithstanding those allegations, Clemens testified the corporation has a bank account and has been

kept alive because of the existence of contingent liabilities. Although one generally may not seek an involuntary dissolution of a corporation to avoid the consequences of a buy-sell agreement, the evidence here establishes that Anderson was forced out of the corporation by Clemens' failure to consider Anderson's interests. Where a situation exists which is contrary to the principles of equity and which can be redressed within the scope of judicial action, a court of equity will devise a remedy to meet the situation. See *Tarnow v. Carmichael*, 82 Neb. 1, 116 N.W. 1031 (1908). We conclude that, under the circumstances of this case, the buy-sell agreement does not apply, inasmuch as Clemens abused his position as controlling shareholder and acted in less than good faith in failing to treat the corporation as an entity separate and apart from himself, and that Anderson will receive equitable treatment only through an accounting. The trial court was therefore correct in determining that the buy-sell agreement does not apply.

Nor is there any merit in appellants' claim that this proceeding is in the nature of a derivative suit and as such cannot be maintained by Anderson in his own name. Although the general rule is that a shareholder suing on behalf of a corporation for wrongs done to it must first seek to persuade the officers and directors to bring the action, *Kowalski v. Nebraska-Iowa Packing Co.*, 160 Neb. 609, 71 N.W.2d 147 (1955), he is not required to make such an effort if it would have been unavailing. See *Fisher v. National Mtg. Loan Co.*, 132 Neb. 185, 271 N.W. 433 (1937), *modified in other respects* 133 Neb. 280, 274 N.W. 568 (so holding with respect to the need for a demand upon other shareholders). One cannot seriously contend that Clemens would have caused an action to be brought requiring that he account to the corporation. The trial court was therefore also correct in requiring Clemens and the corporation to

account to Anderson and in terminating Anderson's ownership in the corporation.

We consider next the question of the extent of Anderson's ownership of the corporation. Although there is a conflict in the evidence as to whether and why Anderson's ownership interest changed from his original position as a one-sixth owner, we are persuaded that, as shown by the income tax return for the fiscal year ending March 31, 1973, Anderson became the equitable owner of 20 percent of the corporation.

We come now to a consideration of the rationale for and computation of the amount awarded to Anderson. It has been held that although an officer or a director of a corporation is not necessarily precluded from entering into a separate business because it is in competition with the corporation, his fiduciary relationship to the corporation and its stockholders is such that if he does so he must prove by a preponderance of the evidence that he did so in good faith and did not act in such a manner as to cause or contribute to the injury or damage of the corporation, or deprive it of business; if he fails in this burden of proof, there has been a breach of that fiduciary trust or relationship. *Electronic Development Co. v. Robson*, 148 Neb. 526, 28 N.W.2d 130 (1947); *Frank H. Gibson, Inc. v. Omaha Coffee Co.*, 179 Neb. 169, 137 N.W.2d 701 (1965). The general rule is stated to be that a director or other corporate officer cannot acquire an interest adverse to that of the corporation while acting for the corporation or when dealing individually with third persons. 3 W. Fletcher, Cyclopedia of the Law of Private Corporations § 861 (rev. perm. ed. 1975).

Although the burden is ordinarily upon the party seeking an accounting to produce evidence to sustain the accounting, where another is in control of the books and has managed the business, that other is in the position of a trustee and must make a proper accounting. *Baum v. McBride*, 152 Neb. 152,

40 N.W.2d 649 (1950). Here, Clemens had control of the books of the corporation and managed the business. A review of the evidence in accordance with the rules stated above establishes a failure by Clemens to account for a variety of assets and a failure to explain a number of ambiguous entries in the ledgers of the corporation. We further view the evidence as establishing that Clemens realized a personal profit on the sale of land purchased with corporate funds, realized personal profits on business ventures operated through the corporation or financed with corporate funds, charged the corporation with losses on ventures he had effectively treated as his own, borrowed corporate funds for his own use, and paid himself a dividend, all without reference to Anderson's interest in the corporation.

It is true that Clemens, and on occasion other members of his family, personally guaranteed loans in connection with his activities. It is also true, as argued by Clemens, that, generally, no corporate opportunity exists if the corporation is by itself financially unable to undertake such and that a corporate officer has no specific duty to use or pledge his personal funds to enable the corporation to take advantage of a business opportunity. *Miller v. Miller*, 301 Minn. 207, 222 N.W.2d 71 (1974); *A. C. Petters Co. v. St. Cloud Enterprises*, 301 Minn. 261, 222 N.W.2d 83 (1974). It is also true, again as argued by Clemens, that in order to be a corporate opportunity, the business must generally be one of practical advantage to the corporation and must fit into and further an established corporate policy. *Equity Corp. v. Milton, et al.*, 43 Del. Ch. 160, 221 A.2d 494 (1966). One difficulty with applying those principles of law to the instant matter is that it is not at all clear that the corporation would have been unable to take advantage of opportunities usurped by Clemens without the personal guarantees, particularly if Clemens had not routinely borrowed corporate funds for personal expenditures. Moreover, both corpo-

rate personnel and funds were used in the acquisition and operation of various ventures. Under such circumstances as these, Clemens cannot now be heard to complain that the corporation would have been unable to take advantage of the opportunities he saw, nor may he now argue that some opportunities might not have been within established corporate policies.

On his cross-appeal Anderson complains first that the trial court erred in holding he was estopped from claiming that the corporation rather than Clemens owned certain real estate. Although the evidence is far from being free of confusion, we conclude Anderson acquiesced in the leasing of the real estate in question by Clemens and his wife to the corporation; Anderson is thereby now estopped from claiming that the corporation owned it. See *D & J Hatchery, Inc. v. Feeders Elevator, Inc.*, 202 Neb. 69, 274 N.W.2d 138 (1979), restating the general rule that corporate ratification of unauthorized acts may be inferred from inaction. Anderson next complains that Clemens wrongfully terminated the lease with the corporation, as a consequence of which Anderson suffered a loss. Although Anderson attempted to estimate the value of that loss by reference to sales prices and rental payments made by various entities at various times, we agree with the trial court that competent evidence as to the fair value of the lease to the corporation is lacking.

We conclude the trial court correctly computed the accounting among the parties and affirm its decree in all respects.

AFFIRMED.

BARBEL U. CHILDERS, APPELLANT, V. LCW APARTMENTS, A PARTNERSHIP, DOING BUSINESS AS LAKE CANDLEWOOD APTS., APPELLEE.

333 N.W.2d 677

Filed May 6, 1983. No. 82-435.

1. **Evidence: Appeal and Error.** The reception of evidence is within the broad discretion of the trial court, and in order to authorize reversal of a judgment on account of the rejection of such evidence, there must have been a clear abuse of discretion.
2. **Evidence: Negligence.** Though prior incidents occurring on the premises might ordinarily be admissible to establish notice on the part of defendant, the evidence offered of such incidents must also show a substantial similarity to the incident which is the subject of the trial.
3. **Negligence.** Two acts of independent source are not concurrent in causing an injury if one of them merely furnishes a condition by which such injury is made possible and, later, such injury occurs through the independent operation of the other.

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

Warren C. Schrempp and Frederick C. Gray of Schrempp, Lefler, Hoagland & Gray, for appellant.

Michael G. Helms of Schmid, Ford, Mooney & Frederick, for appellee.

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

WHITE, J.

This negligence action to recover for personal injuries, medical expenses, lost wages, and pain and suffering was filed by appellant, Barbel U. Childers, in the District Court for Douglas County against the appellee, LCW Apartments, a partnership, doing business as Lake Candlewood Apts. The matter was submitted to a jury and a verdict for the appellee was returned. This appeal followed.

On November 16, 1980, the appellant (hereafter Childers) was a tenant in the Lake Candlewood Apts. (hereafter Candlewood), a large complex over several acres at 120th Street between Blondo and

Dodge Streets in Omaha, Nebraska. Childers was employed as a field representative for Taco John's. Her duties required her to travel extensively, and she actually spent only 4 to 5 days a month in her apartment. Childers had landed at the Omaha airport, picked up her car, and drove it to a parking lot furnished for tenants at the northwest corner of the complex. She parked the car and was in the process of unloading luggage when she was brutally assaulted by two men intent on stealing her car. She was struck and kicked repeatedly; her car and purse were stolen. The conclusion of the above incident was seen by a tenant, and the rescue squad and police were summoned.

The theory on which Childers brought this action was the alleged negligence of Candlewood in failing to provide adequate lighting at the parking lot area to insure the security of the area. The extent and the quality of the lighting at the parking area was disputed at trial and in this regard will not be reviewed by us except to note that a jury finding concerning the adequacy of lighting is supported by the evidence.

The assignments of error are of two categories: (1) The trial court erred in refusing to permit witnesses to testify as to criminal acts in the complex other than the immediate area in which Childers was assaulted and robbed, and in also refusing to permit witnesses to testify as to complaints of lighting inadequacy in other than the immediate area; and (2) The trial court erred in refusing to give Childers' proposed instruction No. 2, which is identical to NJI 3.42, relating to concurrent cause.

Implicit in the appeal is the assumption that the law of Nebraska imposes a duty upon a landlord to protect a tenant from the criminal activities of third persons. We have discovered no authority to that effect in Nebraska, nor have the parties cited any to us. There is no cross-appeal, and the instruction as submitted by the trial court was that "The landlord

is not intended to be an insurer of the safety of his tenant against the criminal activities of third persons. A landlord has a duty to take reasonable steps to protect a tenant only from foreseeable criminal acts committed by intruders on the premises, and the standard of care to be used by the landlord in the discharge of such duty is that of reasonable care . . . ." This instruction is accepted as the law for the purposes of this appeal.

Courts have variously held such a duty exists or that no such duty exists. See Annot., 43 A.L.R.3d 331 (1972). We merely point out that this is not before us and it is not appropriate to pass on the matter where it is not directly in issue.

In considering assignment 1, we note that ordinarily the reception of evidence is within the broad discretion of the trial court, and in order to authorize reversal of a judgment on account of the rejection of such evidence, there must have been a clear abuse of discretion. *Nusz v. Wells Mfg. Corp.*, *ante* p. 1, 332 N.W.2d 204 (1983); *Shover v. General Motors Corp.*, 198 Neb. 470, 253 N.W.2d 299 (1977); *Ripp v. Riesland*, 180 Neb. 205, 141 N.W.2d 840 (1966); *Crecelius v. Gamble-Skogmo, Inc.*, 144 Neb. 394, 13 N.W.2d 627 (1944).

Though prior incidents occurring on the premises might ordinarily be admissible to establish notice on the part of defendant, the evidence offered of such incidents must also show a substantial similarity to the incident which is the subject of the trial. See, *Evers v. Evers*, 146 Neb. 104, 18 N.W.2d 673 (1945); 32 C.J.S. *Evidence* §§ 578, 583, 584 (1964).

The evidence of burglaries, theft, and vandalism cannot be said to be so similar that their exclusion can be said to be an abuse of discretion by the trial judge.

The trial court also refused an offer of proof of complaints of inadequate lighting in other areas of the complex. While less clear, on the balance we hold that the refusal of the offer and the exclusion

of the evidence did not constitute an abuse of discretion or the denial of a fair trial to Childers. The assignment of error is without merit.

Childers asserts that the alleged inadequate lighting was active and therefore a concurrent cause which, operating with the tortious conduct of the two robbers, proximately caused her injuries and consequent damages.

The basic question is not whether concurrent acts of negligence render either or both of the tortious actors liable, but whether the alleged negligence of both actors was active and entitled Childers to the instruction. Restatement (Second) of Torts § 439 (1965).

We have held that the following are conditions and not active negligence: The placement of a barricade directing traffic to another lane 150 feet from a construction project, *Bruno v. Gunnison Contractors, Inc.*, 176 Neb. 462, 126 N.W.2d 477 (1964); power line with which a lowered flagpole came in contact, *Connolley v. Omaha Public Power Dist.*, 185 Neb. 501, 177 N.W.2d 492 (1970); a landlord's unrepaired fence (tenant's horses escape and collide with vehicle on highway), *Bringewatt v. Mueller*, 201 Neb. 736, 272 N.W.2d 37 (1978).

We cannot distinguish between an inadequate fence, an overhanging wire, a barricade placement, and alleged inadequate lighting. All are passive and not active. The appellant was not entitled to the instruction requested. The judgment of the trial court was correct and is affirmed.

AFFIRMED.

Cite as 214 Neb. 295

IN RE INTEREST OF J.C.G. AND T.R.G., CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. T.L.G., NATURAL MOTHER, APPELLANT.

333 N.W.2d 680

Filed May 6, 1983. No. 82-499.

Parental Rights. An order terminating parental rights under Neb. Rev. Stat. § 43-209 (Reissue 1978) must be supported by clear and convincing evidence.

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

Spencer W. Dillon, for appellant.

Donald L. Knowles, Douglas County Attorney, and W. Mark Ashford, for appellee.

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

WHITE, J.

This is an appeal from the separate juvenile court for Douglas County, Nebraska, of an order terminating parental rights of a natural mother to her two minor children. We affirm.

J.C.G. and T.R.G., born June 22, 1973, and June 28, 1975, respectively, were born to the natural mother out of wedlock and have different fathers. The children first were introduced into the juvenile court system in August 1976 when J.C.G. was 3 and T.R.G. was 1. The occasion was the natural mother's conviction for forgery and 2-year sentence to the Women's Reformatory at York, Nebraska. Neither of the putative fathers has acknowledged his child, and only one has ever contributed limited, minimal support to the natural mother or the minor children. The children have been in foster home care since that time, nearly 7 years.

After her release some progress was made in rehabilitation. The natural mother obtained a job and visited her children on occasion. The progress was

ended abruptly when the natural mother was arrested, convicted, and sentenced for robbery of a federally insured bank. She was incarcerated in Texas and was released on March 5, 1981, and employed in Omaha as a computer reservation operator and lived in a halfway house while on parole. Visits were infrequent with the children.

In January 1982 the natural mother vanished and a federal warrant for violation of parole was issued. Shortly after the time of the hearing on termination she was in custody of federal authorities at the Douglas County Corrections Center. She made no attempt to contact her court-appointed attorney or the court. Her whereabouts were discovered by her attorney, who filed a motion for new trial. Again, after notice was served, she did not contact anyone, although there is some suggestion that she may have been moved to a federal institution during the interval between the termination hearing and the hearing on the motion for new trial.

An order terminating parental rights under Neb. Rev. Stat. § 43-209 (Reissue 1978) must be supported by clear and convincing evidence. *In re Interest of Hill*, 207 Neb. 233, 298 N.W.2d 143 (1980).

The petition charged in 1976 at count IV that J.C.G. and T.R.G. lacked proper parental care by reason of the faults or habits of the natural mother. Since that petition, nearly 7 years have elapsed and the natural mother has been in three separate penal institutions, twice for serious crimes and once for violation of parole.

The separate juvenile court exercised considerable restraint in attempting to preserve the natural mother's rights as a parent, especially since it is the best interests of the minor children that the law holds to be of utmost importance. Seven years of criminal violations, separation, and foster care are enough. Especially pertinent are these words from *State v. Souza-Spittler*, 204 Neb. 503, 511, 283 N.W.2d 48, 52 (1979): " '[W]e will not gamble with

the child's future; she cannot be made to await uncertain parental maturity.' "

The decree terminating parental rights is affirmed.

AFFIRMED.

IN RE INTEREST OF JEFF AUFENKAMP, A CHILD UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. JEFF AUFENKAMP, APPELLANT.

333 N.W.2d 681

Filed May 6, 1983. No. 82-525.

1. **Juvenile Courts: Appeal and Error.** An adjudication order of a juvenile court that determines that a juvenile is a juvenile as described in Neb. Rev. Stat. § 43-202(3) (Reissue 1978) is appealable.
2. _____: _____. The standard of review of a juvenile proceeding in this court is de novo upon the record.
3. _____: _____. The findings of fact made by the juvenile court will be accorded great weight because it heard and observed the witnesses. Those findings will be affirmed unless they are against the weight of the evidence or there is clear abuse of discretion.
4. **Trial.** It is within the sound discretion of the trial court whether a party may be permitted to withdraw its rest.
5. **Evidence: Appeal and Error.** The admission of immaterial or irrelevant evidence in a trial to the court is not reversible error.
6. _____: _____. Evidence which should not have been admitted by the trial court will be disregarded by this court in a de novo review.
7. **Juvenile Courts.** The juvenile court has broad discretion as to the disposition of a child found to be delinquent.
8. _____. It is within the jurisdiction and discretion of the juvenile court to order a juvenile who is eligible for commitment to the Youth Development Center to be placed in the Youth Development Center temporarily for the purpose of evaluation preliminary to a dispositional hearing.

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

Don J. Sixta of Krafta & Sixta, P.C., for appellant.

Dean Skokan, Dodge County Attorney, and Patrick W. Meyer, for appellee.

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

BOSLAUGH, J.

This is an appeal in a juvenile proceeding. The juvenile, Jeff Aufenkamp, appeals from an order of the District Court affirming the June 2, 1982, order of the county court finding that the appellant was a juvenile as described in Neb. Rev. Stat. § 43-202(3) (Reissue 1978), and the June 22, 1982, order directing that the appellant be placed in the Youth Development Center at Geneva, Nebraska, for an evaluation preliminary to a dispositional hearing in the juvenile court. Section 43-202(3) (now repealed) related to juveniles charged with violating state laws.

The order of June 2, 1982, was an adjudication order which determined that the appellant was a juvenile as described in § 43-202(3) and was appealable. See, *Ripley v. Godden*, 158 Neb. 246, 63 N.W.2d 151 (1954); *Krell v. Sanders*, 168 Neb. 458, 96 N.W.2d 218 (1959); *State v. Loomis*, 195 Neb. 552, 239 N.W.2d 266 (1976). The order was final so far as adjudication is concerned and all that remained for the juvenile court to do was determine what disposition should be made of the appellant. Such an order is appealable.

In order to appeal from an order of the county court, a notice of appeal must be filed within 30 days from the rendition of the judgment. Neb. Rev. Stat. § 24-541.02 (Cum. Supp. 1982). Although the appellant failed to file a notice of appeal to the District Court within the 30-day period required by the statute, a notice of appeal was filed on June 23, 1982, by the parents of the appellant. For the purposes of this case we consider the notice of appeal filed by the parents to have been filed on behalf of the appellant and sufficient to vest jurisdiction of the matter in the District Court.

The petition alleged that the appellant was guilty of disturbing the peace and assaulting Annette

McKlem, Dawn Hagmann, and Laura Groene on April 8, 1982. The record shows that on the date alleged the appellant and his girl friend, Toni LeCrone, went to the Galaxy Arcade in Fremont, Nebraska. Toni got involved in a heated verbal exchange with Annette McKlem in the lot outside the arcade. Aufenkamp became involved in the fight and shoved Annette against the wall. She hit the wall, slid to the ground, and sustained bruises. Annette and her friend, Laura Groene, then entered the arcade to make a phone call. The defendant and his girl friend followed them inside. The cashier at the arcade, Dawn Hagmann, requested that the appellant leave, as he and the three girls were arguing. He refused to leave and began to call the cashier vulgar names. The cashier slapped him and he then struck her and pushed her into a video machine, the impact raising a bump on her head. The cashier inquired as to the defendant's name and it was given to her by Laura Groene. The cashier then went to the office to call the police.

The appellant then pushed Laura backward and her head struck a stereo machine. Laura fell to the floor and passed out. The police, who had been summoned by the cashier, arrived, but Aufenkamp had left the premises by that time.

The standard of review of a juvenile proceeding in this court is de novo upon the record. The findings of fact made by the juvenile court will be accorded great weight because it heard and observed the witnesses. Those findings will be affirmed unless they are against the weight of the evidence or there is clear abuse of discretion. *In re Interest of Moen*, 208 Neb. 337, 303 N.W.2d 303 (1981); *In re Interest of Campbell*, 208 Neb. 374, 303 N.W.2d 513 (1981).

Although the evidence was in conflict and the appellant and his witnesses contradicted the testimony of the witnesses called by the county attorney, we find the evidence supports a finding beyond a reasonable doubt that the appellant was guilty of dis-

turbing the peace and assaulting Annette McKlem, Dawn Hagmann, and Laura Groene.

The appellant contends that the record failed to establish that he was a "child under 18 years of age." At the beginning of a hearing held on April 28, 1982, the trial court announced that the appellant had indicated his date of birth was November 19, 1965. No objection was made at that time or at the beginning of the adjudication hearing. After the State had rested at the adjudication hearing, the appellant moved to dismiss because there had been no proof of his age. The county attorney was then allowed to withdraw his rest. The parents were called as witnesses and testified that the appellant was under 18 years of age and his birth date was November 19, 1965. It is within the sound discretion of the trial court whether a party may be permitted to withdraw its rest. *Veik v. The Tilden Bank*, 200 Neb. 705, 265 N.W.2d 214 (1978). See, also, *In re Members*, 74 Ill. App. 3d 575, 393 N.E.2d 521 (1979); *In Matter of D.V.*, 100 Wis. 2d 363, 365 n.1, 302 N.W.2d 64, 65 n.1 (1981). The assignment of error has no merit.

The appellant also claims that he was denied a fair trial because of a number of evidentiary rulings made by the trial court. The assignment of error is without merit for a number of reasons.

The applicable rule was stated in *State ex rel. Weiner v. Hans*, 174 Neb. 612, 616, 119 N.W.2d 72, 75 (1963), as follows: "The hearing before the juvenile court in this case was a trial to the court. The admission of immaterial or irrelevant evidence in a trial to the court is not reversible error. Laurie v. State, *supra*. The review in this court is by trial de novo, and evidence which should not have been admitted by the trial court will be disregarded by this court in arriving at its decision. Krell v. Sanders, 168 Neb. 458, 96 N.W.2d 218."

The appellant's last assignment of error is directed at the predisposition order of June 22, 1982. Such orders are interlocutory in nature and not ap-

pealable. See *Kaba v. Fox*, 213 Neb. 656, 330 N.W.2d 749 (1983).

The juvenile court has broad discretion as to the disposition of a child found to be delinquent. Neb. Rev. Stat. § 43-210(2) (Reissue 1978) authorizes the court to commit the child described in § 43-202(3) to the Youth Development Center. It is within the jurisdiction and discretion of the juvenile court to order a juvenile who is eligible for commitment to the Youth Development Center to be placed in the Youth Development Center temporarily for the purpose of evaluation preliminary to a dispositional hearing.

The appellant has been expelled from school, has been arrested for possession of a firearm, and for being a minor in possession of alcohol. Although the offenses charged in the petition in this case were misdemeanors, the evidence shows that all three of the girls assaulted sustained some injury in the assaults. The offenses charged were of a violent nature. The appellant has demonstrated a tendency toward violence and a disregard for the law. It is important for his future and the protection of society that a disposition be made in this case that is appropriate under the facts and circumstances. An evaluation by personnel trained and experienced in the handling of such cases may well be of benefit to the court in determining what disposition should be made of the appellant.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. DONALD ERKS, APPELLEE.

333 N.W.2d 776

Filed May 6, 1983. No. 83-200.

1. **Confessions.** In determining whether a statement was made voluntarily, the totality of the circumstances must be examined.
2. _____. Factors to be considered in making the determination as to whether a statement was made voluntarily are age, intelligence, education, background, the atmosphere in which the interrogation took place, the demeanor of the interrogation, physical treatment, prior history with the police, and the presence or absence of warnings.
3. _____. A physical condition of the defendant which makes him incapable of understanding the meaning of his statements renders a statement involuntary.
4. _____. Deception by police is not sufficient to make an otherwise valid confession inadmissible, unless it is such as to produce a false or unworthy confession.
5. _____. A confession must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence.

Appeal from the District Court for Seward County: BRYCE BARTU, Judge. Affirmed in part, and in part reversed.

Randy R. Stoll, Seward County Attorney, for appellant.

Brian C. Bennett of Dunlap & Bennett, for appellee.

BOSLAUGH, J.

The State has appealed under Neb. Rev. Stat. § 29-824 (Cum. Supp. 1982) from an order of the District Court of Seward County, Nebraska, suppressing statements made by the defendant Erks to the Seward chief of police.

An information filed December 9, 1982, alleged that Erks, a person more than 19 years of age, had subjected a person of less than 16 years of age to sexual penetration. Erks then moved to suppress statements he had made in an interview with the chief of police on November 28, 1982. Following an

evidentiary hearing the motion was sustained. The only issue on this appeal is whether it was error for the District Court to conclude that the State did not demonstrate that defendant's statements were given freely, voluntarily, knowingly, and intelligently, and to order the statements suppressed.

The record shows that on November 28, 1982, Erks reported to the Seward police that he had been assaulted by his son-in-law, Michael Walker. While investigating that complaint, the police received information from Walker's wife which indicated that Erks had sexually abused his 5-year-old granddaughter. Later that day, when Erks called the police station to check on the progress made on his complaint, Officer Sherman informed him that another matter had come up involving Erks and the granddaughter. Sherman asked Erks to come to the police station to discuss the matter on a voluntary basis.

Erks went to the police station and, following a 20- to 30-minute wait, was taken to the office of the chief of police, Kenneth Zike. Both Sherman and Zike were present. Erks was then given the *Miranda* warnings. The interview, which lasted from 5:15 p.m. to 5:40 p.m., with one break, was taped. During the interview Erks admitted that he had committed the crime with which he is charged.

At the suppression hearing Erks raised several issues with regard to the voluntariness of the statement. The District Court did not state the grounds upon which it based its order to suppress. In determining whether a statement was made voluntarily, the totality of the circumstances must be examined. *State v. Smith*, 203 Neb. 64, 277 N.W.2d 441 (1979). Some factors to be considered in making the determination are age, intelligence, education, background, the atmosphere in which the interrogation took place, the demeanor of the interrogation, physical treatment, prior history with the police, and the presence or absence of warnings. *Wilson v.*

Sigler, 333 F. Supp. 594 (D. Neb. 1971), *aff'd* 449 F.2d 1352 (8th Cir. 1971); *State v. Shaffer*, 96 Wis. 2d 531, 292 N.W.2d 370 (1980).

Erks testified that he had been assaulted on the day of the interrogation, had taken aspirin, prescription pain medication, and cold medication, and was "dizzy." The officers testified that defendant appeared coherent, although nervous and upset. A physical condition of the defendant which makes him incapable of understanding the meaning of his statements renders a statement involuntary. See *State v. Lamb*, 213 Neb. 498, 330 N.W.2d 462 (1983). The record does not reflect that Erks was in such a condition. See, e.g., *People v. Pawlicke*, 62 Ill. App. 3d 791, 379 N.E.2d 798 (1978) (statements by defendant who had ingested drugs, consumed alcohol, and was emotionally upset were not involuntary).

At the start of the interview Erks was given the *Miranda* warnings, and on several occasions throughout the interview stated that he would speak to the police without the presence of an attorney. However, after his initial waiver Erks requested the presence of the county attorney. It was explained to him that this was not possible. Erks continued to talk with police, again indicated his willingness to talk to police without an attorney, and requested counsel only when preparation of a written statement was discussed. The interview was then immediately terminated. It can not be concluded from the record that the request for the county attorney was one for the assistance of counsel. Under these circumstances, Erks waived his right to counsel freely, knowingly, and voluntarily. See, *State v. Keesecker*, 198 Neb. 426, 253 N.W.2d 169 (1977); *State v. Weinacht*, 203 Neb. 124, 277 N.W.2d 567 (1979).

Early in the interview Erks was told: "Is there anything at all to this? . . . I am giving you a chance now because later I'm going to have to testify in Court whether you cooperated or you didn't." Such a statement regarding the cooperation of the defend-

ant is not by itself an inducement such that it would render a confession involuntary. *State v. Muenchau and Brown*, 209 Neb. 552, 308 N.W.2d 824 (1981); *United States v. Curtis*, 562 F.2d 1153 (9th Cir. 1977), *cert. denied* 439 U.S. 910, 99 S. Ct. 279, 58 L. Ed. 2d 256 (1978).

During the interrogation Erks was led to believe the police had a statement from an eyewitness to the crime. In fact, they had no such statement. Deception by police is not sufficient to make an otherwise valid confession inadmissible, unless it is such as to produce a false or unworthy confession. *State v. Stevenson & Jackson*, 200 Neb. 624, 264 N.W.2d 848 (1978). Erks had previously made a confession consistent with the one made following the deception. The deception does not appear to have induced a false confession.

Midway through the interview the police told Erks: "We don't get a dollar more or a dollar less sending you to jail or not, ok? If you need help, Don, my recommendation is let's get you some help." Later, Erks was told: "If we can save embarrassment for the rest of the family, we're going to do it. That's why we got you in first. Normally we go to the people who have made the accusation and get statements from them. We take the victim, the child in and have the Doctor examine and [sic] them all out. We're doing it just reversed trying to save you some embarrassment and to save them some embarrassment. So that's why I'm giving you the opportunity, Don, to tell me the truth."

An interrogation tactic in which the police appear to befriend the defendant and are "on his side" does not in itself render a confession involuntary. See, *White v. State*, ___ Ind. App. ___, 404 N.E.2d 1144 (1980); *State v. Miller*, 76 N.J. 392, 388 A.2d 218 (1978). However, a confession must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influ-

ence. *State v. Smith*, 203 Neb. 64, 277 N.W.2d 441 (1979); *State v. Teater*, 209 Neb. 127, 306 N.W.2d 596 (1981). In the present case, Erks, accused of a crime of a sexual nature, could easily have been influenced to confess by indications that the police who sought to get help for him would also protect him and his family from embarrassment. The trier of fact could find that confessions made in response to these inducements were not made voluntarily. Factfindings by the trial court will not be overturned unless clearly wrong. *State v. Lamb*, 213 Neb. 498, 330 N.W.2d 462 (1983); *State v. Teater*, *supra*.

The statements made by the defendant Erks prior to the time the inducements were made are admissible. The record shows that Erks had waived his rights voluntarily, was capable of making a rational statement from his free will, and was not prompted by threat or inducement. The duration of the interview was short. Erks was not in a coercive atmosphere. He had had prior experience with the police and had spent time in jail for other offenses. The order suppressing those statements was erroneous. Accordingly, that part of the statement is admissible.

However, the District Court was not clearly wrong in finding that the statements made subsequent to the inducements were not made voluntarily. That portion of the statement is ordered suppressed upon trial of this matter.

The judgment is affirmed in part, and in part reversed.

AFFIRMED IN PART, AND IN PART REVERSED.

ADAMS CENTRAL SCHOOL DISTRICT NO. 090, ADAMS COUNTY, AND EDUCATIONAL SERVICE UNIT NO. 9, APPELLEES, V. MARVIN DEIST AND MYRTLE DEIST, APPELLANTS.

334 N.W.2d 775

Filed May 13, 1983. No. 81-773.

1. **Schools and School Districts: Special Education: Appeal and Error.** The courts, in reviewing special education appeal proceedings under Neb. Rev. Stat. §§ 43-661 et seq. (Reissue 1978), are not to make independent findings of their own but must follow the criteria set forth in Neb. Rev. Stat. § 84-917 (Reissue 1981) and determine if the action was supported by substantial and competent evidence and was neither arbitrary nor capricious.
2. **Schools and School Districts: Special Education.** A state which accepts financial assistance from the federal government under the Education for All Handicapped Children Act of 1975, 20 U.S.C. §§ 1401 et seq. (1976), is obligated to provide all handicapped children with a free appropriate public education.
3. _____: _____. A free appropriate public education requires that each handicapped child be given the opportunity to achieve such child's full potential commensurate with the opportunity provided to other children.
4. _____: _____. When a handicapped child is sent home from a school setting and is not allowed to return, such child has been expelled from the school.
5. _____: _____. The expulsion of a handicapped child from school constitutes a change in placement, and when that occurs the procedural protections of the Education for All Handicapped Children Act of 1975, 20 U.S.C. §§ 1401 to 1415 (1976), are to be followed.
6. _____: _____. Local school officials are prohibited, under the Education for All Handicapped Children Act of 1975, 20 U.S.C. §§ 1401 et seq. (1976), from expelling students whose handicaps cause them to be disruptive; in such a case a school may only transfer the disruptive student to an appropriate, more restrictive environment.
7. _____: _____. The burden rests with the local school officials to produce evidence as to whether or not the student involved was expelled for behavior due to such child's handicap.
8. _____: _____. A school district, responsible for providing a "free appropriate public education" to a handicapped child, which fails to furnish adequate facilities and programs to afford such education, is liable to reimburse a parent who, in order to protect the physical and emotional health of such child, does obtain such reasonable services.
9. _____: _____. The state is not obligated under either the Education for All Handicapped Children Act of 1975, 20 U.S.C. §§ 1401

et seq. (1976), or the state care and education of handicapped children legislation, Neb. Rev. Stat. §§ 43-601 et seq. (Reissue 1978), to provide a free appropriate public education beyond the child's 21st birthday.

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

Jacobsen, Orr & Nelson, for appellants.

John F. Recknor of Barlow, Johnson, DeMars & Flodman, for appellees.

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

HASTINGS, J.

This action began as a special education hearing brought pursuant to 20 U.S.C. § 1415 (1976) and Neb. Rev. Stat. § 43-661 (Reissue 1978) before the Nebraska Department of Education. Marvin and Myrtle Deist brought this action on behalf of their son David against Adams Central School District No. 090 (Adams Central), Educational Service Unit No. 9 (ESU No. 9), and the Nebraska Department of Education (NDE), alleging that David had been denied a free appropriate public education. The NDE was dismissed as a party at the administrative level.

After a hearing was held, the hearing officer, Michael Sullivan, found that David had been denied a free appropriate public education. Sullivan ordered the appellees to provide David with a residential placement near his home, to pay for David's past placement in the Hastings Regional Center and the Nebraska Psychiatric Institute, and granted David 16 additional months of free appropriate public education as compensation for education he failed to receive in the past.

Adams Central and others appealed the hearing officer's decision to the District Court of Adams County, Nebraska, which reversed the decision of

the hearing officer. That court found David to be entitled to classroom placement without any residential care other than by his parents; that Adams Central is not liable for the costs of David's placement in the Hastings Regional Center or the Nebraska Psychiatric Institute, as such placement was voluntary and without the consent of Adams Central; and that David is not entitled to 16 months' additional free appropriate public education as compensation for education missed in the past.

The Deists have appealed, assigning several errors in the decision of the District Court. They complain that the District Court erred (1) in holding that a day educational program could provide David with free appropriate public education; (2) by failing to hold that David was unlawfully excluded from public school; (3) by not ordering residential placement for David; (4) by failing to assign primary responsibility for David's education to appellees; (5) in holding that David was voluntarily placed in the Hastings Regional Center and the Nebraska Psychiatric Institute; (6) by denying appellants reimbursement for the cost of that placement; and (7) in denying David any compensatory education.

There is no real dispute as to the facts in this case. David Deist was born July 25, 1963. His early development was fairly normal. In 1966, after David began to exhibit some antisocial behavior, the Deists had him examined by Dr. Frank Menolascino of the Meyer Children's Rehabilitation Institute in Omaha and by Dr. Michael O'Neill of the Norfolk Regional Center. At that time both of these doctors described David as autistic. Twice a week during the next 2 years David received services from the Norfolk Regional Center. When he reached the age of 6 the Deists moved to Hastings, and there David began attending school at the School for the Trainable Mentally Retarded (TMR School) and the Hastings Regional Center, one-half day each. Eventually David attended a full-day program at the TMR School.

When he was 12, in approximately 1976, he developed grand mal epilepsy. The general consensus of the experts who have examined David is that he suffers from autism or organic brain syndrome, mental retardation, and epilepsy.

In the fall of 1977 David began exhibiting increasingly destructive and disruptive behavior at school and at home. As a result of this behavior he became increasingly difficult to handle at school. On approximately December 21, 1977, David was sent home from school early. Mrs. Deist testified that a note was sent home with David stating, in short, that he could not return to school until his behavior was altered.

On December 22, 1977, the Deists met with the local school officials to discuss David's placement. Mrs. Deist testified that it was her understanding from this meeting that David would not be permitted to return to the TMR School and that there was no available suitable placement for David at that time. This was confirmed by the testimony of Don Sutton, supervisor of special education of the trainable mentally handicapped, who said that he was not surprised when David did not come back to school in December because "I think we had requested that they keep him home." He also confirmed that at the meeting with the parents they were told that David was going to have to stay home because he was just unmanageable. On December 28, 1977, unable to care for him at home, the Deists placed David in the Hastings Regional Center.

As early as January 4, 1978, Thom Pickton, a social-emotional consultant at ESU No. 9, who had worked with David, recommended: "The most appropriate or ideal placement for David at this time would be a completely structured 24-hour setting incorporating the use of applied behavioral techniques such as premacking, time-out, contingency management, etc." Pickton also observed that David's aggressive behavior had increased after an increase in

his seizure medication had been prescribed. Similar recommendations calling for a 24-hour-per-day structured program for David were also made by other ESU No. 9 staff members in the first few months of 1978, and Mr. Sutton agreed that ESU No. 9 undertook no actions on the basis of those recommendations. He also conceded that at the January 23 meeting he did have objections to David's returning to the TMR School because he did not think he was ready. No homebound instruction was given to David during the month of January because he could not find any teacher to work with him. After January 30 Mr. Sutton said that he found a friend of his to work with David, a person who at the time was working for a bakery, who was not a certified teacher of any sort but did have a degree in business. Therefore, while at the regional center David received, at best, 2 hours of educational instruction per day.

While in the regional center David deteriorated greatly, losing many of the skills he had mastered prior to his being placed there. Members of the ESU No. 9 staff, Adams Central staff, and the Deists met monthly during David's stay at the regional center to discuss his placement. No alternative placement for David was made, even though it was agreed that the regional center was not the appropriate place for David. Finally, the regional center staff, in May of 1979, informed the Deists that their only option was to move David to the state institution in Beatrice and that this would have to be done by May 10, 1979.

David's parents visited the facilities at Beatrice in April, and Mrs. Deist testified that the children's cottage facilities were nice, modern, and up-to-date, and they seemed to have an adequate staff working with the various group homes. However, when asking about arrangements to place David, they were told that there was a long waiting list, over a year's time. The only thing available, they were

told, was a locked male ward. The parents concluded that this was not a satisfactory placement for their son.

According to the evidence, the Deists were told that David could not remain at the Hastings Regional Center after May 10. At that time the Deists moved David to the Nebraska Psychiatric Institute (NPI) in Omaha. This was done as a result of joint efforts and with the support of ESU No. 9 and Adams Central, although it was the Deists who located this placement and transferred David thereto. David remained in the NPI until the time of hearing, March 10, 1980. There is no evidence in the record indicating what has happened to David since that time.

There are several substantive issues presented on this appeal. First, we must determine the appropriate standard of review in this matter. Neb. Rev. Stat. § 43-666 (Cum. Supp. 1982) provides for appeals from the decision of the hearing officer in cases such as this. It states: "Any party aggrieved by the findings, conclusions, or final decision and order of the hearing officer is entitled to judicial review under sections 84-917 to 84-919. Orders of hearing officers are enforceable in appropriate proceedings in the courts of this . ate."

Neb. Rev. Stat. § 84-917 (Reissue 1981) provides for review of the hearing officer's decision by the District Court. Subsections 5 and 6 of that statute provide how that decision may be reviewed: "(5) The review shall be conducted by the court without a jury on the record of the agency.

"(6) 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;

"(b) In excess of the statutory authority or jurisdiction of the agency;

"(c) Made upon unlawful procedure;

"(d) Affected by other error of law;

"(e) Unsupported by competent, material, and substantial evidence in view of the entire record as made on review; or

"(f) Arbitrary or capricious."

Neb. Rev. Stat. § 84-918 (Reissue 1981) describes this review as "de novo on the record."

When interpreting these statutes we have held that only a limited review of the findings of the agency is provided for. In *The 20's, Inc. v. Nebraska Liquor Control Commission*, 190 Neb. 761, 212 N.W.2d 344 (1973), we had an opportunity to determine the meaning of "de novo" review under these statutes: "The plaintiff contends that the provisions of section 84-918, R.R.S. 1943, providing for de novo review in this court, mean that we examine the record and reach an independent conclusion without reference to the findings of the commission or those of the District Court. The commission contends that our review of its decision is governed by the criteria of section 84-917(6), R.R.S. 1943, as is the review by the District Court.

"The statute does not make clear which meaning is intended. We believe the commission's contention is essentially correct. If, for example, under criteria (6)(e) there is before the commission substantial evidence which would support a finding either way, neither the District Court nor this court should disturb the commission's finding. In such a case and where fact findings under criteria (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." 190 Neb. at 764-65, 212 N.W.2d at 346-47.

Under these statutes the courts are only to give limited review to determine if the agency's decision was supported by competent evidence, if it was arbitrary or capricious, etc. The reviewing court may

not make independent findings of its own. This being the applicable standard of review in this matter, we need only determine if the hearing officer applied the proper rules of law in this case to reach a decision which is supported by competent evidence in the record.

The laws governing the educational rights of the handicapped are found in both federal and state law. The Education for All Handicapped Children Act of 1975 (the Act), 20 U.S.C. §§ 1401 et seq. (1976), represents the federal body of law, and the care and education of handicapped children is provided for in Neb. Rev. Stat. §§ 43-601 et seq. (Reissue 1978) on the state level. The Act is a funding statute under which the federal government supplies financial assistance to the states for the education of handicapped children. By accepting these funds the state implicitly agrees to meet certain criteria and requirements. See *Monahan v. State of Neb.*, 491 F. Supp. 1074 (D. Neb. 1980), *aff'd in part and rev'd in part* 645 F.2d 592 (8th Cir. 1981). In short, the Act requires each state that accepts these funds to provide all handicapped children with a free appropriate public education.

"The Act provides for funds to be distributed to the states electing to participate under its provisions. In making the election a state has to satisfy the Commissioner of Education that it 'has in effect a policy that assures all handicapped children the right to a free appropriate public education.' 20 U.S.C. § 1412." *Hines v. Pitt County Bd. of Ed.*, 497 F. Supp. 403, 405 (E.D. N.C. 1980). It is interesting to note that the court in *Hines* points out in a footnote that all states have elected to accept these federal funds except New Mexico.

Defining what a free appropriate public education is, § 1401(18) states: "The term 'free appropriate public education' means special education and related services which (A) have been provided at public expense, under public supervision and direction,

and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title."

The specific requirements in each given case, when determining what is appropriate, will, of course, depend upon the needs and abilities of each individual involved. " 'This standard would require that each handicapped child be given the opportunity to achieve his full potential commensurate with the opportunity provided to other children.' " *Springdale School Dist. #50 v. Grace*, 656 F.2d 300, 304 (8th Cir. 1981).

In this case the record contains a great deal of evidence concerning what is the appropriate educational setting for David. As pointed out above, Thom Pickton and other ESU No. 9 staff members recommended a 24-hour structured environment for David when he first left the Adams Central schools. Dr. John McGee testified that he worked with David while at the NPI. Dr. McGee is the special assistant to the director of the Meyer Children's Rehabilitation Institute and project director for the Nebraska Chapter for the Society of Autism in the development of programs for autistic children and adults, and has had 12 years' experience in teaching and working with handicapped children and adults. When asked what type of educational program David would most benefit from, Dr. McGee said: "A- . . . From my working with David and observing other people like David around the country and other programs around the country, my recommendation would be that David needs a total educational program. In other words, from the time he gets up in the morning until the time he goes to bed in the evening, during that thousand minute waking day David should be in a developmental educational structured, intensive kind of program. The way

functionally or practically I would see that working would be, number one, he should be in a highly structured classroom setting with a well trained teacher, and we've some teachers who through minimal intensive practical training pick up the skills that a person with his needs requires. So, he would be in that kind of classroom setting working on, I think, a mix of cognitive skills, academic skills, prevocational skills, self-care types of skills. And then, in conjunction with that, a concurrent educational program in an out-of-home community based, residentional [sic] facility that would work in conjunction with the classroom setting which David was in and would reinforce a lot of the things that he was involved in, so that you would end up with a total educational program. David does need structure, there's no doubt about it. David needs a type of setting where he can be involved in learning all day long. And I think if we were to do that, that across time that degree of structure he needs would decrease but at the onset we need that type of flexibility built into his program. Q- And I guess it's my understanding from what you have been saying is that the residential component of the program is an integral part of the whole educational program for David. A- No doubt about it."

When asked if this type of environment could be provided in the home, Dr. McGee said he felt a home situation could not offer a sufficiently controlled environment to facilitate David's needs. Testimony was also taken from a Dr. Michael O'Neill. He is a certified general and clinical psychologist and is an adviser to the Nebraska Society for Autistic Children. Dr. O'Neill had worked with David at the Norfolk Regional Center. When asked his opinion as to whether a residential component would be an integral part of a structured education for David, he said: "A- I think that a residential program would be essential to his education at this point. Q- Can you explain the reason for that feeling? A- The

kinds of learning that David needs will be very difficult to accomplish in simply a classroom setting. While it may be possible to achieve some control over his behavior and his skill level within the classroom, within the confines of the classroom, experience and research with autistic children has shown a considerable difficulty they have in generalizing to the rest of their world experience. They seem to be able to discriminate areas that they need to behave and learn and areas that it's unnecessary for them. If David is to establish any of the skills and competencies set out in the I.E.P. as a part of his general level of functioning, that will have to be on a twenty-four hour a day basis."

Finally, the testimony of Dr. Frank Menolascino was taken in deposition form. He is associate director of the Nebraska Psychiatric Institute and has been associated therewith for 20 years. He worked a great deal with David while at the NPI. Dr. Menolascino's opinion is in accord with Dr. McGee's and Dr. O'Neill's as to what David's needs are, that is, a residential, group-home type setting. The evidence recommending David be given this type of educational setting is uncontradicted by any other evidence in the record.

On the basis of this evidence the hearing officer Sullivan found "residential placement in or near this community [Hastings, Nebraska] is a necessary element of free and appropriate public education to which David Deist is entitled to under the law." This finding is permissible under the law.

"It is clear that the Act contemplates residential placement under some circumstances, and that when a residential placement is necessary for educational purposes, 'the program, including non-medical care and room and board, must be at no cost to the parents of the child.' 45 C.F.R. § 121a.302." *Kruelle v. Biggs*, 489 F. Supp. 169, 173 (D. Del. 1980). See, also, *Gladys J. v. Pearland Independent School Dist.*, 520 F. Supp. 869 (S. D. Tex.

1981). This finding is supported by the substantial evidence set out above that was before the hearing officer.

As pointed out above, review by this court and the District Court in this case is limited. We are only to determine if the hearing officer's decision is supported by the evidence, is proper under the applicable law, and if it is arbitrary or capricious. We determine, on a review of the entire record, that the decision of the hearing officer granting residential placement to David Deist is permissible under the law, is supported by substantial and competent evidence, and is neither arbitrary nor capricious. Therefore, we find that portion of the hearing officer's order which granted David residential placement was proper, and it is reinstated.

We turn now to the question of whether the Deists should be reimbursed for the costs they incurred while David was in the Hastings Regional Center and the NPI. To answer this question we must first determine if David's removal from the Adams Central schools was voluntary, a suspension, or an expulsion.

As pointed out above, Mrs. Deist testified that on the day David was sent home in December of 1977 she had a note indicating the school would not allow him to return. She also testified that after the meeting of December 22, 1977, with the school officials it was her impression that David could not return to school. Mr. Don Sutton, supervisor of the school David attended, testified that he shared the belief that David could not return to school. Mr. Sutton also testified as to a meeting held on January 23, 1978. He said that at that time he felt David could not return to school. On February 16, 1978, another meeting was held to consider alternatives for David. At that time return to the TMR School was not considered as a possible alternative. Meetings like these continued throughout 1978, at which alternatives for David's education were discussed. His return to the

TMR School was never offered as an alternative. This evidence clearly supports the hearing officer's finding that David was expelled from the TMR School.

When a handicapped child is expelled, this constitutes a change in placement. When a change in placement occurs, the procedural protections of the federal act, §§ 1401 to 1415, are to be followed. *S-1 v. Turlington*, 635 F.2d 342 (5th Cir. 1981). These procedures were not followed in this case.

Also, local school officials are prohibited, under the federal act, from expelling students whose handicaps cause them to be disruptive. In such a case the school may only transfer the disruptive pupil to an appropriate, more restrictive environment. *Doe v. Koger*, 480 F. Supp. 225 (N.D. Ind. 1979); *Stuart v. Nappi*, 443 F. Supp. 1235 (D. Conn. 1978). In this case there is no evidence which definitely states what caused David's disruptive behavior, although there is some indication that it may have been due to the increase in the medication he was taking. The lack of such evidence does not give rise to an inference that expulsion was appropriate. Rather, the burden is on the state to produce evidence as to whether the student involved was expelled for behavior due to his handicap or not. *S-1 v. Turlington, supra.*

In light of the above authority David was not only expelled but he was expelled improperly. The question now becomes what relief, if any, may be afforded the Deists in light of this improper expulsion. The case of *Boxall v. Sequoia U. High Sch. Dist.*, 464 F. Supp. 1104 (N.D. Cal. 1979), gives some guidance. In that case Frank Boxall tried to obtain an educational placement with the local school district for his autistic son. The district informed Boxall that no program was available for his son, and denied him any placement. For 2 years after this denial Boxall paid a private tutor to work with his son. Finally, Boxall brought an action under, among other federal

statutes, the Education for All Handicapped Children Act of 1975 and the Rehabilitation Act of 1973, as did the Deists in this case. Boxall sought to secure a free appropriate public education for his son and to recover the cost of the private tutor.

Discussing whether this cost was recoverable or not, the court said: "First, the Education of the Handicapped Act again provides its own complementary remedies. As noted before, it expressly contemplates a private right of action to review the decision on what constitutes an appropriate education for a handicapped person. It is not completely clear from the wording of the statute whether it implies an action for damages. Section 615(e)(2) of the Act, 20 U.S.C. § 1415(e)(2) simply gives aggrieved individuals the right to bring a civil action. *See also* 45 C.F.R. § 121a.511. Some light is shed, however, by the available legislative history of this right to review, which was adopted initially by the Conference Committee. It was not originally part of the Senate bill, and the House provision was also somewhat different. The Committee Report indicates that no limitation on damages actions was intended. It states that: 'Such action may be brought in any State court of competent jurisdiction or in any district court of the United States and in any such action the court shall receive the records of the due process hearing (and where appropriate the records of the review of such hearings), shall hear additional evidence at the request of any party, shall make an independent decision based on the preponderance of the evidence, and *shall grant all appropriate relief.* [Emphasis added.]' Joint Explanatory Statement of the Committee of Conference, in Senate Conference Report No. 94-455, p. 50, *reprinted* in [1975] U.S. Code Cong. and Admin. News, pp. 1425, 1503. This statement suggests very strongly that, when appropriate, compensatory damages may be awarded. Since this action is under the Education of the Handicapped Act as well as the Rehabilitation Act,

the court does have the authority to award damages." *Id.* at 1112.

Viewing the legislative history of the federal act and the *Boxall* decision, it seems that compensatory relief may be appropriately granted under the Act. Such a position is in keeping with Nebraska law. See Neb. Rev. Stat. § 43-662.01 (Cum. Supp. 1982), which states that "the hearing officer shall prepare a final decision and order directing such action as may be necessary."

To determine when compensatory relief may be granted, the decision in *Doe v. Koger*, 480 F. Supp. 225 (N.D. Ind. 1979), is helpful. *Doe* presented a case where a handicapped child was expelled from school. The expulsion was appealed. One of the issues raised was whether or not the child or his parents could recover damages. That court concluded that this issue need not be reached at that time, but added in dicta that possible recovery depended upon the answer to three questions: "Whether the plaintiff is entitled to compensation depends on whether the school has caused him to lose any education. Whether the school has caused the plaintiff to lose any education depends on whether he would have been expelled even if the appropriate procedures had been followed. And whether he would have been expelled even if the appropriate procedures had been followed depends on whether his propensity to disrupt was the result of his inappropriate placement." *Id.* at 229.

In the present case the hearing officer found the school did cause David to lose education; that he would not have been expelled if the appropriate procedures had been followed; and that his propensity to disrupt was due to his placement. There is evidence in the record to support these findings. As pointed out above, David was improperly expelled from the TMR School, as the appropriate procedures under the Act were not followed. No alternative

placement was offered by the school district. This deprived David of education.

All the evidence at the hearing relevant to what placement David needs states that he needs a structural residential placement, not what he received at the TMR School. Dr. Menolascino testified that David made great strides while at the NPI in reducing or eliminating the disruptive behavior. From this the hearing officer could find that David's propensity to disrupt was the result of his inappropriate placement. If the proper procedures had been followed this inappropriate placement would have been discovered. Under the idea of "appropriate education" the answer then would have been to offer David a different placement rather than simply expel him from school.

From this evidence the hearing officer could find that the three elements from *Doe* are present in this case. Since there would be evidence present from which the hearing officer could find the test from *Doe* had been met in David's case, it would be proper for him to find that the Deists are entitled to compensation for moneys expended for David's placement.

The appellees in their brief cite the case of *Loughran v. Flanders*, 470 F. Supp. 110 (D. Conn. 1979), in support of the proposition that damages are not permissible under the Education for All Handicapped Children Act of 1975. That case was, in part, an action in tort alleging negligence on the part of the individual school board members because a child's learning disabilities were not properly diagnosed, and, as a result, that negligence has made it virtually impossible for the student to function at his full intellectual capacity. In rejecting that contention the court said: "The thrust of federal legislation in the field of special education has been to provide financial assistance to the states, in their effort to provide each one of their handicapped children with an appropriate education. Recognition of a pri-

vate remedy for damages, as alleged in this instance, would compel these programs to shift their focus. Insulation of school officials from liability would take precedence over the implementation of innovative educational reforms. Recognition of the plaintiff's claim would cause special education programs to suffer, since administrators would balk at implementing new curricula and techniques for fear of exposing themselves to liability should these innovations fail." *Id.* at 115. The case which we have under consideration does not involve innovative action; it involves inaction, and is one for reimbursement, not for general damages.

Also cited by appellees is the case of *Jaworski v. Rhode Island Bd. of Regents for Ed.*, 530 F. Supp. 60 (D. R.I. 1981), which did in fact seek reimbursement for the parents because of a failure to provide a proper placement of a handicapped child. The court relied on *Anderson v. Thompson*, 658 F.2d 1205 (7th Cir. 1981), in concluding that "the better view is that money damages are *not generally available* under the EAHCA." (Emphasis supplied.) *Id.* at 64.

Anderson did say that. However, the following quotation from *Anderson* is particularly applicable to the instant case: "Although we hold that the statute was not intended generally to provide a damage remedy for an incorrect placement decision, we can envision at least two exceptional circumstances in which a limited damage award might be appropriate. In those situations it is likely that Congress, though generally requiring that a child remain in his current placement, 20 U.S.C. § 615(e)(3), would have intended the parents take action to provide the necessary services for their children without awaiting the outcome of lengthy administrative and judicial proceedings. Parents should then be compensated for the costs of obtaining those services that the school district was required to provide.

"The first such circumstance was addressed in *Tatro v. Texas*, 516 F. Supp. 968 (N.D. Tex. 1981).

There a child's physical health would have been endangered had the parents not made alternative arrangements to those offered by the school system. . . . In our view, when a court subsequently determines that the services in dispute were necessary to protect the physical health of the child and also were services that should have been provided by the school district, the district court has the statutory authority to recompense parents for the costs of those services the school district failed to provide." *Id.* at 1213-14.

Although criticized by the *Jaworski* court, nevertheless *Monahan v. State of Neb.*, 491 F. Supp. 1074 (D. Neb. 1980), contained this language: "The Education of All Handicapped Children Act specifically creates a private cause of action which may be brought in federal court. In resolving such lawsuits, the Court is empowered by the Act to 'grant such relief as the court determines is appropriate.' 20 U.S.C. § 1415(e)(2). This language indicates that the Court has broad authority in granting relief under the Act. This conclusion is reinforced by the Act's legislative history, which states that 'the court . . . shall grant *all* appropriate relief.' *Joint Explanatory Statement of the Committee of Conference*, S. Rep. No. 94-455, 94th Cong., 1st Sess., at 50, *reprinted in* U.S. Code Cong. and Admin. News, at p. 1503 (1975). This language in the Act and its legislative history strongly suggest that the Court may award damages under the Act when such relief is deemed to be appropriate. *Boxall v. Sequoia Union High School District*, 464 F. Supp. 1104, 1112 (N.D. Cal. 1979). Moreover, recovery of the cost of tuition in the instant case would further the Act's purpose. This expenditure for tuition was allegedly made because of the defendant's failure to comply with the Act's procedural requirements. If these claims are proved, recovery of this cost will further the Act's purpose of ensuring that all handicapped children receive a free appropriate education. In other

words, the defendants would be required to pay the costs of Daniel's education and thus provide Daniel with a free education as the Act requires. *Compare Loughran v. Flanders*, *supra*, 470 F. Supp. at 115 (which held that a plaintiff could not recover damages for emotional injury or future lost earnings because such recovery would hinder fulfillment of the Act's purpose.) Thus, this Court finds that if Monahan proves his claim under the Act, an award of damages may be appropriate to compensate him for the cost of the George Norris placement." *Id.* at 1094.

We conclude that a school district, responsible for providing a "free appropriate public education" to a handicapped child, which fails to furnish adequate facilities and programs to afford such education, is liable to reimburse a parent who, in order to protect the physical and emotional health of such child, does obtain such reasonable services.

We therefore reverse the order of the District Court and reinstate that of the hearing officer regarding the reimbursement to the Deists of their cost incurred in placing David in the NPI and the Hastings Regional Center.

Turning to the issue of compensatory education, we find no support for the findings of the hearing officer in the relevant law. The Act, by its clear and unambiguous language, limits eligibility to children ages 3 to 21. § 1412(2)(B). There is no authority under this statutory scheme by which the hearing officer could grant free appropriate public educational benefits to David beyond his 21st birthday. As such, this grant was an abuse of the hearing officer's discretion. That portion of the District Court's opinion which overrules the grant of compensatory education by the hearing officer is affirmed.

AFFIRMED IN PART, AND
IN PART REVERSED.

McCOWN, J., dissenting.

Where institutional care of a child is required for

all purposes because of a physical or mental condition, I see no reason why such expenses should not be allocated between educational purposes and other purposes rather than to attribute the entire cost to education and charge it to a local school district.

Prior to the federal act and federal aid, Nebraska could and did furnish such noneducational institutional care to children and paid all the costs. Parents who were financially able to contribute to such care were required by statute to reimburse the state for a portion of such costs.

The acceptance of financial assistance from the federal government and enactment of the Nebraska special education statutes have now shifted such costs to the local school districts on the theory that residential institutional care required because of the physical or mental condition of a child and necessarily required for all purposes is actually required only for educational purposes. Such institutional care is now classified as "an appropriate public education."

The state appears to recognize some sort of duty to relieve the local school districts of some portion of the financial burden, but the federal act and regulations require that nonmedical care, and room and board incorporated as part of an appropriate educational program, must be at no cost to parents regardless of their financial ability.

The state generally excludes a right of reimbursement to school districts for residential care and allows it in specified cases only where the program has been previously approved by the State Department of Education. Parents are responsible only for medical and dental services. See Neb. Rev. Stat. §§ 43-626, 43-645, and 43-651 (Reissue 1978).

Where the physical or mental condition of a child requires residential institutional care of the child in any event and for all purposes, and is the same condition which creates a right to special education, the total cost of institutional care ought to be allocated

between educational purposes and other purposes. A rigid interpretation of the special education statutes may well be disastrous for a small local school district.

DOUGLAS L. KLUENDER, PERSONAL REPRESENTATIVE OF THE ESTATE OF GLENN R. GRAY, DECEASED, APPELLANT, V. PETE MATTEA, DOING BUSINESS AS PETE'S AUTO DAMAGE APPRAISERS, AND SAHLING KENWORTH, INC., A NEBRASKA CORPORATION, ET AL., APPELLEES.

334 N.W.2d 416

Filed May 13, 1983. No. 81-831.

1. **Verdicts: Appeal and Error.** In the absence of prejudicial error as a matter of law, a jury verdict supported by competent evidence must be affirmed.
2. **Jury Instructions.** A trial court is not required to give a proffered instruction upon a subordinate issue or which unduly emphasizes a part of the evidence in a case.
3. _____. The trial court must eliminate all matters not in dispute and submit to the jury only the controverted questions of fact upon which the verdict must depend.
4. _____. As a general rule, NJI 3.01, "A person may assume that every other person will use reasonable care and perform in accordance with the law until the contrary reasonably appears," is an instruction given only where there is an issue as to contributory negligence.
5. **Appeal and Error.** A party cannot be heard to complain of error which such party was instrumental in bringing about.
6. **Negligence: Jury Instructions.** In an action involving alleged concurrent negligence, if there is neither pleading nor proof of negligence proximately causing the plaintiff's injuries on the part of one not a party to the action, the trial court need not give that portion of NJI 3.42 reading, "It is no defense that all those who might have been held responsible are not made parties to this action."
7. **Jury Instructions.** Generally, the trial court is not required to instruct negatively.
8. **Evidence: Witnesses.** An illustrative experiment is admissible if a competent person conducted the experiment, an apparatus of suitable kind and condition was utilized, and the experiment was conducted fairly and honestly.

9. _____: _____. Where a person, without reasonable explanation, changes his testimony concerning the material facts on a vital issue, such change clearly being made to meet the exigencies of pending litigation, the testimony is discredited as a matter of law and should be disregarded.
10. _____: _____. The rule of discreditation of testimony does not apply where the witness offers a rational or sufficient explanation for the change in testimony.
11. **Evidence: Appeal and Error.** The trial court has a wide discretion in determining whether evidence relating to illustrative experiments should be received. A judgment will not be reversed unless there has been a clear abuse of discretion.

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

William A. Wieland of The Healey Law Office, for appellant.

Richard D. Sievers, for appellee Mattea.

Jeffrey H. Jacobsen, for appellee Sahling Kenworth.

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

HASTINGS, J.

This was a wrongful death action brought by Douglas L. Kluender, personal representative of the estate of Glenn R. Gray, deceased, against Pete Mattea, doing business as Pete's Auto Damage Appraisers, and Sahling Kenworth, Inc., a Nebraska corporation. Damages were sought arising out of a motor vehicle accident which occurred on July 16, 1975. It was alleged that the accident was caused by reason of a defective steering gear cross-shaft which fractured due to normal driving fatigue, causing the decedent to lose control of the tractor-trailer which he was driving. As a result, it was alleged, he collided with a gas transport truck, by reason of which he suffered fatal injuries.

It was plaintiff's theory that this same tractor, while being driven by someone else, had been involved in a rollover accident in Kansas on May 28,

1975. The damage had been inspected by the defendant Mattea, who made a written detailed estimate of necessary repairs, and the defendant Sahling had actually performed the repairs according to that estimate. The plaintiff postulates that this cross-shaft was partially fractured in the May 28 accident and that both defendants were negligent in failing to inspect and discover that damage and in failing to warn of the defect or failing to replace the damaged part. The case was submitted to a jury on the plaintiff's theory, which returned a verdict in favor of both defendants. A motion for a new trial was overruled and this appeal followed.

The plaintiff has assigned as error on the part of the trial court its failure to give certain of plaintiff's requested instructions and the admission into evidence of certain of the defendants' scientific tests and accompanying expert opinion based upon what the plaintiff claims was materially changed or altered testimony.

Detailed testimony was offered as to the facts and circumstances of the first, or Kansas, accident, as well as the inspections and repairs made and not made by the defendants. It must be assumed that the jury considered all such evidence, and it is therefore unnecessary for us to detail that evidence.

The fatal accident, the one of July 16, 1975, occurred around 2 o'clock in the morning. According to the driver of the other vehicle involved, and the only eyewitness, Henry Angle, he observed the headlights of an oncoming vehicle in its proper lane. That vehicle was approximately 1½ miles away. Both Angle and the driver of the other vehicle, who turned out to be the plaintiff's decedent, dimmed their lights. However, when the vehicles were about 200 feet apart, Angle observed the decedent's vehicle all of a sudden start moving over into the other lane and coming right toward him. Immediately thereafter, the collision occurred between the left front corner of the decedent's tractor and the left front

corner of the other vehicle. The impact tore the left front wheel of Angle's truck loose, as well as the front axle, the catwalk off the left side, and also tore out the left-hand side of the rear axle. As to the decedent's tractor, in the words of the witness Angle, "the left front wheel was broken off, and then he went into the ditch and the fifth wheel came loose, made a terrible mess out of everything."

Because the primary issue in this case is whether the cross-shaft was partially fractured in the May 28 accident and then gave way completely because of fatigue, thereby causing the fatal accident, or whether control was lost because of some other factor and the shaft was completely and initially fractured in the fatal accident, the greater portion of the record is devoted to the testimony of various expert witnesses, their examinations, scientific experiments, and theorizations. The theories of both sides were submitted to the jury and it accepted that of the defendants. No claim is made that there is no competent evidence to support the verdict, and in the absence of prejudicial error in one or more of the claims made by the plaintiff, the verdict and judgment must be affirmed. *Diesel Service, Inc. v. Accessory Sales, Inc.*, 210 Neb. 797, 317 N.W.2d 719 (1982).

Plaintiff first complains of the failure of the trial court to give his requested instruction No. 16. This instruction in effect would have directed the jury that the violation of any regulation would not of itself be negligence, but only evidence of negligence to be taken into consideration with all other facts and circumstances. According to the plaintiff, this instruction was necessary because counsel for one of the defendants, on cross-examination of Robert Wenzl, the owner of the tractor and decedent's employer, inquired as to whether the Department of Transportation and Federal Highway Administration regulations required regular inspections of the vehicles being operated on the road. After several

objections voiced by plaintiff's counsel, the witness answered that drivers are required to make daily vehicle inspections, and the maintenance shop or mechanics were not required by regulations to make any inspections. He did agree that the drivers were required to make daily inspection reports which included the steering system, not by detailed observations of every joint, but by merely turning the steering wheel.

A copy of these federal regulations, exhibit 40, was introduced in evidence by the plaintiff and received by the court. Those regulations, 49 C.F.R. § 396.7 (1978), provided that "every driver shall prepare such a report in writing at the completion of his day's work or tour of duty, which report shall list any defect or deficiency of the motor vehicle discovered by said driver or reported to him as would be likely to affect the safety of operation of the motor vehicle . . . ." Those same regulations contain a suggested "Driver's Vehicle Condition Report" form containing approximately 40 items such as lights, fuel, brake lines, cooling system, clutch, brakes, transmission, steering, etc., with boxes alongside each item and directions that a "check" mark be placed beside each item which is satisfactory and an "x" beside those which are not. § 396.9. There is nothing in the regulations describing in what manner an inspection of the steering shall be made. There is nothing in the evidence suggesting that Wenzl or any of his employees had violated these regulations by failing to make out the regular inspection reports.

The deficiency in the plaintiff's position is that there was neither pleading nor proof of a violation of federal regulations. A trial court is not required to give a proffered instruction upon a subordinate issue or which unduly emphasizes a part of the evidence in a case. *Bowley v. Airport Authority*, 186 Neb. 292, 182 N.W.2d 911 (1971). As a matter of fact, the trial court must eliminate all matters not in dispute and

submit to the jury only the controverted questions of fact upon which the verdict must depend. *Ferlise v. Raznick*, 202 Neb. 745, 277 N.W.2d 94 (1979). It was not error to fail to give the tendered instruction.

It is next contended by the plaintiff that the trial court erred in failing to give its requested instruction No. 11, "A person may assume that every other person will use reasonable care and perform in accordance with the law until the contrary reasonably appears." This is similar to NJI 3.01. Again, the plaintiff argues that the defendants raised the issue of what, if any, obligation others than the defendants had to make further inspections, i.e., did the deceased driver or his employer or fellow employees have any obligation to doublecheck the defendants' work?

In the first place, although contributory negligence on the part of the plaintiff's decedent was originally alleged in the pleadings, before final submission to the jury that allegation was deleted at the request of the defendants. A reference to the authorities cited under NJI 3.01 will disclose that this instruction is essentially applicable in contributory negligence situations.

Secondly, as previously pointed out, there was neither pleading nor proof that others than the defendants had failed to inspect the damage or the repairs. The closest that anyone got to making that suggestion was plaintiff's counsel himself when, in reading from the federal regulations which he introduced, he inquired of Mr. Wenzl: "Were you aware of the following provisions: 'No motor carrier shall permit or require a driver to drive nor shall any driver drive a motor vehicle which has been damaged in an accident or by other cause, until inspection has been made by a person qualified to ascertain the nature and extent of the damage and the relationship of such damage to the safe operation of the motor vehicle, nor shall such motor vehicle be operated until such person has determined it to be in

a safe operating condition.' " However, in the first place no answer to the question appears in the record, nor does the record disclose that such inspections were not made. Secondly, a party cannot be heard to complain of error which such party was instrumental in bringing about. *Foreman & Clark of Nebraska, Inc. v. City of Omaha*, 203 Neb. 746, 280 N.W.2d 892 (1979).

Finally, as to claimed instructional errors, the plaintiff contends that the court's instruction No. 12, based on NJI 3.42, was incomplete. That is the concurrent negligence instruction, which was given as follows: "Where the independent acts or omissions to act of two or more persons combine to proximately cause an injury indivisible in its nature, each such act or omission to act is itself a proximate or concurrent cause, and any one or more of such persons may be held responsible for the entire injury. This is true even though one may have been more negligent than the other." Not given was the last sentence of NJI 3.42, which appears in parentheses: "It is no defense that all those who might have been held responsible are not made parties to this action." That portion was requested by the plaintiff but refused by the trial court.

Again, the plaintiff's theory is that the defendants raised the issue of the failure of Wenzl or his employees to make appropriate inspections of the tractor following the repairs necessitated by the first accident. What we have said previously in this regard is equally applicable here and dispositive of the plaintiff's complaint. There simply was no evidence of the omission from the lawsuit of any additional parties who might have been held responsible, and therefore no support in the record for the giving of such an instruction. Generally, the trial court is not required to instruct negatively. *Gee v. Dinsdale Brothers, Inc.*, 207 Neb. 224, 298 N.W.2d 147 (1980).

Finally, we consider the admission of certain of the defendants' scientific tests and the testimony of

their expert witness, Douglas Thurley. Thurley was the chief engineer and later, until 1976, plant manager of Gemmer Division of Ross Gear Company, which manufactures the worm and roller steering gear used in most mediumweight and heavy-duty trucks, and that involved in this accident. As of the date of trial he was director of product reliability for Ross Gear.

Available to the parties was the cross-shaft and roller assembly retrieved from the wrecked tractor driven by the decedent in the fatal accident, exhibit 22. This shaft was fractured at right angles, through the splines which fit into the pitman arm. As previously suggested, the primary issue in this lawsuit was when, why, and how the fracture occurred. In an effort to shed some light on those questions, a series of two impact tests were performed by Mr. Thurley at the Ross Gear plant in La-Fayette, Indiana, on June 10, 1981. Present at those tests, which were video taped, were counsel for the defendants, as well as counsel for the plaintiff and his expert witness, Richard Large.

As testified to by Mr. Large, in the first test a hydraulic ram was attached to the end of the pitman arm. The ram was then withdrawn so as to apply a twisting force to the cross-shaft. However, the rotation was not sufficient to cause a complete fracture, so the ram was repositioned, a new load was applied, and the fracture was completed. On the second test the hydraulic ram was repositioned so that it could be pulled farther, but the initial force again was not sufficient to cause a complete break, and it was necessary to move the ram and apply a second force to cause separation. An examination of the fractured shafts, exhibits 56 and 57, reveals 90-degree breaks similar in appearance to that on exhibit 22.

In the first test the evidence disclosed that the initial force applied to the cross-shaft was 104,000 inch-pounds; that the shaft broke to an unknown

depth and the ram bottomed out, following which the repositioning was done and a second torque of 11,500 inch-pounds was applied. In the second test a similar initial torque was applied, followed by a second application of 2,000 inch-pounds. The plaintiff therefore argues that this proves his contention that the shaft in the fatal accident had been cracked in the May 28 accident, following which a driving maneuver, such as crossing railroad tracks, applied the second unusual pressure, causing the complete fracture.

However, in his testimony Mr. Thurley indicated that the reason for the failure to completely fracture the shafts in these two tests was due to the shortness of the stroke of the hydraulic ram. Additionally, he gave as his opinion, assuming that in the fatal accident the left side of the axle had been driven back 3 feet, that that would exceed any travel that was present on the test machine, and with sufficient force the pitman arm would either be torn off the shaft or the shaft would fracture at the pitman arm.

At a later time, following the video-taped session, Mr. Thurley conducted three additional tests or experiments. Basically, the same physical setup was employed. In the first test an initial impact load of 102,000 inch-pounds was applied. This twisted the cross-shaft but did not fracture it. Thereafter, a fatigue test was performed wherein a series of 162,420 cycles with a load of 21,000 inch-pounds each were applied to the shaft before it twisted off. According to the witness Thurley, the purpose of this test was to demonstrate what a shaft would look like if it were impacted sufficiently in an accident so as to crack and twist it, and then were to go back into service and fail due to a combination of fatigue and the prior damage. This particular shaft fractured at a 45-degree angle. According to the witness, this test also demonstrated that after an impact sufficient to twist a shaft, it would still be capable of performing 50-plus years of "dry parking."

Two facts should be pointed out at this time. The tractor in which the decedent was killed had only been driven about 12,000 miles of normal over-the-road straight-down-the-highway driving between the May 28 accident and the fatal accident. Secondly, "dry parking" is very difficult to do. It requires a force of 21,000 inch-pounds to turn the front wheels of a vehicle to full lock while standing still, and this is considered the maximum load ever applied in normal usage.

In the second test eight successive load forces were applied to the shaft, beginning with 68,000 inch-pounds and ending with 104,000 inch-pounds. This resulted in a shaft which was literally cracked right through so that one end of the shaft was moved away from the other end and yet still stuck together. Following that, 21,000 inch-pounds of fatigue were applied and it required 99,390 cycles before the shaft fell apart. According to Mr. Thurley, this was equivalent to 33 years of "dry parking." The fracture on this shaft was also at about a 45-degree angle.

The final test that Mr. Thurley ran involved four initial impacts beginning with 89,300 inch-pounds and ending with one of 105,250 inch-pounds, after which 177,370 fatigue cycles of 21,000 inch-pounds were applied before the shaft fell apart. Mr. Thurley gave as his opinion that the shaft in question failed as the result of a single overload.

During the course of Mr. Thurley's testimony, he examined the cross-shaft taken from the tractor driven by the decedent, and described the twist in the splines. He said: "And so if you were to twist the output shaft about fifteen degrees, which is, just eyeballing it, what that looks like, you literally move the Pitman arm fifteen degrees off center but the gear is still on center, but you move the Pitman arm fifteen degrees out of the straight-ahead position." His conclusion in that regard was that with a cross-shaft having such a twist in it, the steering wheel

would have 6 inches of play in it which would cause the vehicle to wander and it would be necessary to adjust the drag link by 2.6 inches in order to successfully operate the tractor.

Later on in his testimony, Mr. Thurley was asked these questions and gave these answers: "Q . . . You've said a fifteen-degree twist in this shaft for Mr. Gray's truck today, and at the time of your deposition in Indiana, I believe you said a five- or ten-degree twist? A Right. Q How do you account for the difference? A Well, we were eyeballing the serration, the visible twist in the serration. But as more twist goes into that shaft, because you've got all that body of bearing diameter that is twisted up — Q When you were talking about a five- to ten-degree twist, in your deposition, were you talking simply about the — what one can see of the splines? A Right. Q All right. Now, Mr. Thurley, when you twist a piece of metal, do you have what is called the barber-pole effect? A Oh, some people might refer to that. . . . So if I were to put a Pitman arm on here and start to twist that shaft, I twist the serrations here. That's assuming that I twist them to the point that they take a permanent set and don't come back. And what happens is that this is only the physically visible evidence of a twist which actually goes up around that shaft like a barber pole. So that you're looking at some twist here but there's more twist in this area up here, as well, which doesn't show up visibly. Q Is it correct then, that although all the twists that you can see is in the splines, that actually the metal twists on back of the splines? A Yeah, you're actually twisting from this solid body back here, so this has all got some twist in it. Q And if these splines went all the way back to the solid body, they twist — A They should look something like that barber pole. Q And so if you look purely at this, just the splines, is that where you see the five- to ten-degree bend — A That's what I was looking at,

just about eyeballing between the difference of the serrations — Q Then where do you get the additional — up to fifteen? A It's taken up in the body of the bearing, or the shaft, the body of the shaft."

On foundational examination by plaintiff's counsel, Mr. Thurley agreed that his testimony at trial was different than that which he gave in his June 10, 1981, deposition regarding the amount of twist in the cross-shaft.

Plaintiff also complains of the use by Mr. Thurley of the "dry parking" illustration as a test factor. His counsel inquired of the witness on cross-examination: "Q Well, is using a dry park rating a realistic way of testing steering mechanism? A We believe so, yes. Q Okay. Do you think it's a realistic use by the driver of the steering mechanism? A The dry park? Q Yes, sir. A Well, he does dry park the vehicle and we don't want the gear to break while he's dry parking it. *So it's realistic testing.* Q I'm going to call your attention to your deposition, page 76. I asked you this question back there in LaFayette. 'Sir, the dry steering condition really isn't a realistic use of the driver or his steering mechanism, is it?' Did I ask you that? A That's right. Q Did you give the answer: 'In real life, no, I suppose not, because the guy would quit, you know. He would do something to get it rolling, to reduce the load, yes.' You gave that answer, didn't you? A Right. . . . [B]ut I've seen gears that have been destroyed by that maneuver [dry parking]. Q All right. So when they take one of these shafts and give it 177,370 licks of dry turning, that really doesn't duplicate what one driver does in his lifetime, does it? A No. Q As a matter of fact, you'd probably have to have the lifetime of three drivers on that steering gear to make it right? A Right." (Emphasis supplied.)

The plaintiff concedes that evidence relating to an illustrative experiment is admissible if a competent person conducted the experiment, an apparatus of

suitable kind and condition was utilized, and the experiment was conducted fairly and honestly. *Shover v. General Motors Corp.*, 198 Neb. 470, 253 N.W.2d 299 (1977).

The tests complained of were conducted by the same person, with the same equipment, and in basically the same manner as those first two tests which the plaintiff approved of and introduced in evidence. It is true that the first series of tests were utilized to apply a single initial force sufficient to cause instantaneous fracture. It is apparent that due to either lack of sufficient impact or shortness of travel, such result was not obtained. In the second series of tests it would appear that the purpose was to test the plaintiff's theory of an initial force creating a partial fracture, followed by a series of fatigue incidents whose cumulative effect was to cause the final, fatal fracture. In comparing the two series of tests we see nothing about the second series which was any more unreliable than the first, and the plaintiff simply cannot have it both ways.

His principal objection seems to rest on the claimed change in testimony on the part of Thurley. He relies on *Momsen v. Nebraska Methodist Hospital*, 210 Neb. 45, 313 N.W.2d 208 (1981), in which, in a syllabus point, we said: "Where a party, without reasonable explanation, changes his testimony concerning the material facts on a vital issue, such change clearly being made to meet the exigencies of pending litigation, the testimony is discredited as a matter of law and should be disregarded." The defendants argue that, as stated by this court in *Insurance Co. of North America v. Omaha Paper Stock, Inc.*, 189 Neb. 232, 202 N.W.2d 188 (1972), this rule applies only to a party-witness, and " 'contradictory statements of nonparty witnesses under circumstances disclosed in this case are not governed by this rule and such contradictions may be submitted to the jury as affecting the weight of the evidence and the credibility of the witnesses.' " *Id.* at 235,

202 N.W.2d at 190. However, the plaintiff answers that an expert witness called by a party litigant is clearly aligned with the party calling him, and an alteration of testimony by that expert witness to meet the exigencies of the case falls clearly within the *Momsen* rule.

We need not decide that issue. *Momsen* unequivocally states that it must be "clearly apparent the party has made the change to meet the exigencies of the pending case, and that there is no rational or sufficient explanation for the change in testimony. The rule would not, for example, necessarily apply in an automobile case where a party in his deposition testifies to his estimate of certain distances and then before trial, after a visit to the scene and viewing landmarks, makes measurements and changes his estimates." *Id.* at 55, 313 N.W.2d at 213.

As to the degree of twist in the cross-shaft, we believe that the witness offered a rational or sufficient explanation for the change in testimony. The witness stated that his estimate was made by just "eyeballing" the shaft. Plaintiff's counsel conceded during argument that no one had accurately measured the twist. Thurley explained how 5 to 10 degrees of the twist appeared in the splines, whereas the additional 5 degrees were added when he considered the "barber pole" effect on the shaft on beyond the splines. We do not agree that his testimony should have been excluded under the *Momsen* rule.

We do not understand Mr. Thurley's testimony regarding "dry parking" as indicating that it is a realistic, ordinary, everyday maneuver performed by truckdrivers or that it is necessary that such be the case. We understand the position of the witness to be that "dry parking" is a maximum force maneuver to be used in testing the reliability of the steering equipment, and if a nearly separated shaft would still tolerate from 30 to 50 years of such maneuvers, it would be unusual to expect a series of

lesser fatiguing operations to cause such separation in a period of 1 month of normal driving.

"The trial court has a wide discretion in determining whether evidence relating to illustrative experiments should be received. [Citations omitted.] A judgment will not be reversed on account of the admission or rejection of such testimony unless there has been a clear abuse of discretion." *Shover v. General Motors Corp.*, *supra* at 474, 253 N.W.2d at 303. There was no clear abuse of discretion in this case.

The judgment of the District Court is affirmed.

AFFIRMED.

MAURINE COFER, CONSERVATOR FOR ARTHUR M. QUALLEY, ET AL., APPELLEES, V. WILLARD D. KUHLMANN, APPELLANT.

333 N.W.2d 905

Filed May 13, 1983. No. 82-052.

1. **Pleadings.** The court may, before or after judgment, in furtherance of justice, amend any pleading, when the amendment does not change substantially the claim or defense, by conforming the claim or proceeding to the facts proved. Neb. Rev. Stat. § 25-852 (Reissue 1979).
2. **Pleadings: Proof.** No variance between the allegation in a pleading and the proof is to be deemed material unless it have actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Neb. Rev. Stat. § 25-846 (Reissue 1979).
3. **Equity: Boundaries: Appeal and Error.** An action to establish boundaries under Neb. Rev. Stat. § 34-301 (Reissue 1978) is an equity action triable de novo on the record on appeal to this court.
4. **Equity: Appeal and Error.** In an appeal in an equity action, when the evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite.
5. **Adverse Possession.** The burden is on one who claims title by adverse possession to prove by a preponderance of the evidence

that he has been in actual, continuous, exclusive, notorious, and adverse possession under a claim of ownership for the statutory period.

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

Schneider & Nisley, P.C., for appellant.

Murphy, Pederson, Piccolo & Anderson, for appellees.

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

MCCOWN, J.

This is an action in equity under Neb. Rev. Stat. § 34-301 (Reissue 1978) to establish the corners and boundaries between the land of the plaintiffs and the land of the defendant. The District Court determined that the boundary between the lands was the thread of the old south channel of the North Platte River and entered judgment accordingly. The defendant has appealed.

Arthur M. Qualley, appearing through his conservator, and his three daughters, Marilyn Humphrey, Helen Bishop, and Maurine Cofer, are the plaintiffs in this action. The plaintiffs are joint tenants of land lying north and east of the North Platte River in Lincoln County, Nebraska, together with all accretions thereto in the North Platte River to the south and west of said land to the thread or centerline of the North Platte River. Plaintiffs and their predecessors in title have had the continuous ownership and possession of the land for over 50 years.

Defendant is the owner of land which borders plaintiffs' property on the opposite bank of the river, together with accretions in the river to the north and east of defendant's land to the thread or centerline of the riverbed.

In 1870, when government surveyors mapped the North Platte River in this area, there was only one

channel and there were no islands in the river. As the years passed the character of the river changed. Upriver dams, electric works, bridges, and, finally, Kingsley Dam, completed in 1941, greatly changed the seasonal flow of the river and altered the direction and force of the riverbed channels. Numerous new and additional channels, sandbars, and islands were established in the riverbed, including a substantial island which formed in the river between the property of the plaintiffs and the defendant. By 1978 the island was over 100 acres in size, was covered with permanent vegetation, and was separated from the banks of the river by channels on the north and south sides of the island. The determination of the boundary lines of the parties with respect to the island is the basis for this action.

Plaintiffs pleaded that they owned the land to the thread or centerline of the river, and alleged that line was also the geographical centerline as designated by a government survey plat recorded in 1890, based on an 1870 U.S. survey. Plaintiffs also alleged that the defendant and his predecessors in title had recognized the geographical centerline as the true boundary and acquiesced in it for over 50 years. The defendant denied that allegation. The 1890 plat showed only a single channel, which is now the south channel of the river.

Witnesses for the plaintiffs testified as to their personal observations of the depth, direction, and flow of the river channels, and the development and use of the island over more than 50 years. These witnesses agreed that at least from the 1930s through the early 1970s the main channel of the river was always located against the south bank of the stream.

Plaintiffs' witnesses also testified that beginning about 20 years ago several private earthen dams had been constructed in the river upstream from the disputed property, including a dam constructed in 1974 by the defendant on a small channel that had previously crossed the island. The witnesses all agreed

that the construction of the earthen dams, especially the one built by the defendant in 1974, had caused the main channel of the river to be diverted from the south bank to the north bank.

Plaintiffs' evidence established that plaintiffs and their predecessors had used the island continuously for recreation, hunting, and trapping, and to pasture animals and gather fruit. Plaintiffs had occasionally leased the island to others for hunting, trapping, and for pasture. Plaintiffs' evidence also established that on various occasions over the years they had called the sheriff to remove trespassers from the island.

In general, the defendant testified that the main flow of the river had always been in the north channel and that during the 1950s and 1960s the south channel was often dry. Witnesses for the defendant testified that in their experience the deepest channel of the river was on the north side of the island. Most of the defendant's witnesses testified as to a more recent time than the plaintiffs' witnesses concerning conditions on the river.

The defendant admitted that he had constructed a dam on the island in 1974. He testified that there was a barbed wire fence on the north side of the island which he began to maintain in the 1950s, but had not kept up in the last couple of years. Defendant testified that he had also run cattle on the island, burned off the willows, spread grain seed, given permission to hunters to use the land, and "run off" trespassers.

Following trial the District Court found that the allegations in plaintiffs' petition that they owned to the "thread" or "Geographical Center Line" of the river was an erroneous conclusion of the pleader, and the terms were not synonymous. The court found that the term "Geographical Center Line," under Nebraska law, does not establish the thread of the stream, nor establish boundaries, unless by agreement of the parties.

The court therefore interpreted the pleadings to mean that the plaintiffs prayed that the boundary should be the thread of the stream. The court also found that the thread of the stream was contiguous to the south bank of the North Platte River and that it had been diverted by forces other than by nature to the north bank of the river.

The District Court then decreed that the thread of the old south channel of the North Platte River is the thread of the stream, and fixed, determined, and established that line as the boundary, and ordered the boundary line to be surveyed and platted at plaintiffs' expense.

Thereafter, plaintiffs moved for leave to amend the petition to conform the pleadings to the facts proved at trial and to the judgment rendered thereon. The trial court sustained plaintiffs' motion, and an amended petition was filed alleging that the plaintiffs owned accretion lands in the river to the thread of the stream and that the thread of the stream had been diverted from the south bank to the north bank by forces other than nature. Defendant's motion for a new trial was overruled and the defendant has appealed.

The defendant first contends that the plaintiffs' allegations that the "Geographical Center Line" was the true boundary line constituted a judicial admission against plaintiffs' interests and that the plaintiffs were therefore not entitled to the benefit of any evidence which was contrary to that allegation. The defendant takes the position that the court erred in allowing the plaintiffs to introduce evidence as to the thread of the stream or that the true boundary was the thread of the stream in the south channel, and also in allowing the plaintiffs to amend their petition to conform to the evidence.

The record established that the "Geographical Center Line" referred to and identified in plaintiffs' petition was the geographical centerline of 1890 which was, at that time, identical to the thread of

the stream or the centerline of the stream, and the conclusion of the pleader that the terms were currently still the same was clearly incorrect and an erroneous conclusion of law.

Neb. Rev. Stat. § 25-852 (Reissue 1979) provides that the court, in furtherance of justice, may amend any pleading, when the amendment does not change substantially the claim or defense, by conforming the claim or proceeding to the facts proved. Such an amendment may be made even after the evidence has been closed. *Greenberg v. Bishop Clarkson Memorial Hospital*, 201 Neb. 215, 266 N.W.2d 902 (1978).

Neb. Rev. Stat. § 25-846 (Reissue 1979) provides in part: "No variance between the allegation in a pleading and the proof is to be deemed material unless it have actually misled the adverse party to his prejudice, in maintaining his action or defense upon the merits."

The record indicates that the parties both presented and tried the case on the theory that the true boundary was to be the thread of the stream, and the bulk of the evidence was concerned with locating the main channel of the river over the years. It cannot reasonably be argued that the defendant was misled or prejudiced in any way.

Under Nebraska law, title to riparian lands runs to the thread of the contiguous stream. Where a river changes its main channel, not by slowly excavating and gradually passing over the intervening space to a new position, but changes it by flowing around intervening land, as by gradually, during many years, deepening a smaller channel which was on the other side of an island until it becomes the main channel, the boundary which was fixed as the original main channel remains, under such conditions, in that original channel. *Valder v. Wallis*, 196 Neb. 222, 242 N.W.2d 112 (1976).

An action to establish boundaries under § 34-301 is an equity action and triable de novo on appeal to this

court. In such appeals, when the evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite. *Cline v. Franklin Pork, Inc.*, 210 Neb. 238, 313 N.W.2d 667 (1981).

The defendant also contends that the trial court erred in failing to find that defendant had acquired title to the island by adverse possession. Whether or not the defendant properly pleaded adverse possession, the trial court permitted both parties to present all available evidence as to their use and enjoyment of the disputed island. The defendant, as the party claiming title by adverse possession, has the burden to prove by a preponderance of the evidence that he has been in actual, continuous, exclusive, notorious, and adverse possession under a claim of ownership for the statutory period. *Hutson v. The Rush Creek Land and Livestock Co.*, 206 Neb. 658, 294 N.W.2d 374 (1980).

The record establishes that both parties used the island on various occasions, and there is no evidence that the defendant's possession was ever exclusive. Neither did the evidence establish that the defendant's nonexclusive possession was continuous for any specific statutory period of 10 years.

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

AFFIRMED.

LaMoine J. Kohl et al., doing business as Kohl Enterprises, appellees, v. State of Nebraska, Department of Roads, appellant.

334 N.W.2d 173

Filed May 13, 1983. No. 82-099.

1. **Eminent Domain.** Normally, a taking by eminent domain does not include the personal property lying on the premises taken, but not affixed thereto.
2. **Eminent Domain: Constitutional Law.** The property of no person shall be taken or damaged for public use without just compensation therefor.
3. **Eminent Domain.** In order to provide just compensation for the taking of personal property by a state or its agency, the rules governing the measure of compensation for real property in a condemnation action apply to that of personal property.
4. _____. Whenever the property is of such character and nature that it has no fair market value in the ordinary sense, its value for the uses and purposes to which it is being devoted and to which it is peculiarly adaptable may be shown.
5. _____. In a condemnation action tried before a jury, the presiding judge rules on the admissibility of evidence and other questions of law, while the jury determines questions of fact, such as the value of the property taken.
6. **Eminent Domain: Expert Witnesses.** The general rule is that an expert witness, when properly qualified, may testify as to the valuation of the property, and the weight and credibility of what the witness considers in coming to his conclusion is for the jury to determine.

Appeal from the District Court for Adams County: Bernard Sprague, Judge. Affirmed.

Paul L. Douglas, Attorney General, and John E. Brown, for appellant.

Conway & Connolly, P.C., for appellees.

Krivosha, C.J., Boslaugh, McCown, White, Hastings, and Caporale, JJ., and Colwell, D.J., Retired.

White, J.

This is a proceeding in eminent domain in which the defendant, State of Nebraska, Department of Roads, took a fee title to .7 acres, a permanent easement to 9.35 acres, the plaintiffs' salvage yard in-

ventory, and all of the salvage yard fixtures and equipment. The purpose of the taking was to increase the right-of-way for U.S. Highway 281 and to prevent the continued operation of an automobile salvage yard on the plaintiffs' property.

The board of appraisers awarded the plaintiffs $209,702.30 as damages for the taking, which they appealed to the District Court. Trial was then held in the District Court solely on the issue of the fair market value of the real estate and personal property taken by the defendant. The jury returned a verdict for the plaintiffs in the amount of $110,000 for the fee title and easement and $280,000 for the personal property and fixtures. The defendant has appealed, claiming only that the District Court erred in the admission of evidence of the market value of plaintiffs' inventory. We affirm.

The plaintiffs, LaMoine J. and Mildred C. Kohl, doing business as Kohl Enterprises, were the owners of 10.05 acres which are rectangular in shape and which lie approximately 1 mile north of the city of Hastings in Adams County, Nebraska. The land is bordered by Highway 281 on the west and a county gravel road on the south.

The evidence at trial revealed that the highest and best use of the plaintiffs' property was the operation of a used car and parts salvage business. Kohl Enterprises had an inventory of approximately 1,835 vehicles, numerous used car parts, fixtures, and buildings. The plaintiffs' salvage business had been in existence since 1966 and had acquired grandfather rights under Neb. Rev. Stat. § 39-2606 (Reissue 1978) of the junkyards act. The 10.05 acres were zoned agricultural at the time of trial, and plaintiffs' salvage yard was being operated as a nonconforming use upon the land.

This case presents the unique issue of what the measure of damages is for the appropriation of an automobile salvage yard's inventory by a state agency in an eminent domain action. Normally,

"A taking by eminent domain does not include the personal property lying on the premises taken, but not affixed thereto . . . ." 27 Am. Jur. 2d *Eminent Domain* § 293 at 103 (1966); 4 Nichols on Eminent Domain § 13.13 (rev. 3d ed. 1979 & Supp. 1982).

The defendant has relied on Neb. Rev. Stat. § 39-2608 (Reissue 1978) as its statutory authority for the taking of the inventory in this case. The plaintiffs have not contested the defendant's authority for the taking on the record before us, they stipulated to the necessity of the taking, and neither side has briefed this issue to the court.

Thus, we are confronted with a situation where the State, whether its agency acted properly or not, has taken and disposed of the personal property of the plaintiffs and must provide just compensation. "Any exercise of the power of eminent domain is subject to the constitutional mandate, 'The property of no person shall be taken or damaged for public use without just compensation therefor.' Art. I, § 21, Constitution of Nebraska." *Campbell v. City of Lincoln*, 182 Neb. 459, 465, 155 N.W.2d 444, 449 (1968).

There is a substantial dispute in the evidence of the expert witnesses as to whether just compensation for the plaintiffs' used automobile inventory was the value of the salable parts on each of the 1,835 automobiles or whether it was the value of the automobiles taken as a bulk sale.

Plaintiffs' first expert witness was a certified public accountant who testified that plaintiffs were on a cash method of accounting because a used automobile as inventory would be an expense in the year it was purchased and not reflect income until parts were removed and sold from it. He compared the plaintiffs' business which did not remove parts from the vehicles until they were sold to other salvage yards which removed the parts immediately in an effort to save space and have as few vehicles on the premises as possible. He noted that the big distinction was the low labor cost in plaintiffs' method of

carrying on their business because they had land available to store the automobiles.

The plaintiffs' son, Brian Kohl, testified that he had worked with his father in the auto parts business since his father purchased the property in 1966. He also stated that he was familiar with every aspect of the business and that in the last 5 years he was more actively involved with the business than was his father. It was Brian Kohl's opinion that the best use for the 1,835 vehicles was for the major salable parts and not crushing, because crushing only occurs once all of the salable parts have been removed. At the time the 1,835 vehicles were taken by the State, the major salable parts had not been removed.

The third expert witness called by plaintiffs was the owner of a used auto parts business in Omaha, Nebraska. He examined each of the 1,835 automobiles and loose parts on plaintiffs' property to determine the fair market value on the basis of major salable parts. His opinion was that the fair and reasonable value of the used auto inventory and loose parts amounted to $770,000 on the date of the condemnation but that the parts would take 20 years to sell.

The accountant was then recalled to the stand to reduce the $770,000 figure to present value. He also determined that the parts would take 20 years to be sold, based upon the expert testimony and past sales by Kohl Enterprises. An interest rate factor of 8 percent was then picked, based upon interest rates of the past 5 to 7 years. He did not consider labor costs in subtracting expenses because the parts were not removed until the time of sale and the majority of parts were removed by the plaintiff and his son Brian. He did subtract real estate taxes, utilities, and wages as expenses. His opinion was that the present value of the 1,835 automobiles and loose parts was approximately $381,000 on the date of the taking.

The plaintiffs rested and the defendant called an

appraiser who gave his opinion that the fair market value of the automobiles and loose parts, if sold as a unit, was $72,980. However, it was the first time that he had appraised a salvage yard or major salable parts on automobiles, and his appraisal was made on the assumption that the salable parts had already been removed from the automobiles, which was contrary to the evidence presented.

The only other expert called by the defendant was not allowed to testify concerning the value of the inventory because he was only qualified as an expert in real estate and not personal property or inventory.

The defendant's primary contention on appeal is that the plaintiffs' inventory was valued by the major parts of each of the 1,835 automobiles rather than as a bulk sale, which is how the property would be sold to a willing buyer. The defendant also makes several other assertions based on this single assignment of error, which will be discussed herein.

In order to provide just compensation for the taking of personal property by a state or its agency, we find no reason not to apply the rules governing the measure of compensation for real property in a condemnation action to that of personal property. It is the general rule that in determining the fair and reasonable value of land taken under the power of eminent domain, the jury may consider what the land was used for at the time of taking, all uses for which it is adapted and to which it might be put, and award compensation based upon the most advantageous use possible. *Graceland Park Cemetery Co. v. City of Omaha*, 173 Neb. 608, 114 N.W.2d 29 (1962).

The record in the instant case was replete with evidence that there was a substantial difference between a salvage yard which buys and sells used automobile parts and a junkyard which buys and sells any type of metal on a per-pound scrap basis. Even the definitions contained in Neb. Rev. Stat. § 39-2602 (Reissue 1978) of the junkyards act so distinguish.

While the words junkyard and salvage yard are often used interchangeably, the evidence in the case at bar clearly revealed that the most advantageous use of the plaintiffs' inventory was for automobile parts and not for a scrap or junk value.

In a case that we find analogous to the case at bar, this court in *Graceland Park Cemetery Co. v. City of Omaha, supra*, sustained a judgment in which cemetery land was valued on an individual per-unit basis rather than upon the value the tract may have had when sold as a whole. In that case we stated at 612, 114 N.W.2d at 32: "[T]hat in the taking of land used for cemetery purposes the measure of damages is not the fair market value of the land for the simple reason that such property has no fair market value. Whenever the property is of such character and nature that it has no fair market value in the ordinary sense, its value for the uses and purposes to which it is being devoted and to which it is peculiarly adaptable may be shown."

While the value of a salvage yard's inventory has not previously been discussed, courts have commented about the unique value of salvage yard property. The Court of Claims of New York in *Innamorato v. State*, 65 Misc. 2d 440, 317 N.Y.S.2d 860, 863 (1971), stated: "By reason of zoning ordinances in the area it is difficult to establish an auto salvage yard where such a business has not been previously operated. Therefore, there is no question but that this particular parcel was more valuable than surrounding land because of its use as a junk yard."

The State of Nebraska, by the passage of the junkyards act, has restricted the number of salvage yards to those previously in existence and required the issuance of a permit in order to start a new operation. The evidence at trial revealed that even prior to the passage of the junkyards act, salvage yards were rarely bought and sold, because they were a stable and profitable investment for the

owner-operator. Salvage yard land may be readily marketable when cleared, but the inventory can only be sold to existing yards.

Thus, we believe that a salvage yard's inventory is not a type of property that is bought and sold on an open market and does not have a reasonable market value within the rule that the fair market value is the price which property will bring when offered by a willing seller to a willing buyer, neither being obligated to buy or sell. We also believe that the plaintiffs used the correct formula for ascertaining the measure of damages, when the market value was not capable of being determined, by finding the total value of the major salable parts on each automobile, subtracting any expenses affecting said value, and reducing to present value for the deferred realization over the 20-year selling period that was determined in this case.

In a condemnation action tried before a jury, the presiding judge rules on the admissibility of evidence and other questions of law, while the jury determines questions of fact, such as the value of the property taken. 30 C.J.S. *Eminent Domain* § 286(2) (1965).

The trial judge admitted all of the relevant evidence that was presented bearing on the value of the inventory. He then instructed the jury to award the plaintiffs the value of the property based upon its most advantageous use. Even if the concept of just compensation did not mandate a separate valuation formula for unique property, the defendant has presented us with no evidence in the record to support its claim that the 1,835 automobiles could only be sold as scrap and not for their salable parts. Defendant's only expert that testified to the value of the inventory did so on the assumption that all of the salable parts had been removed from the automobiles.

It is clear the plaintiffs relied, prior to and during trial, on the valuation formula in *Graceland Ceme-*

tery to guide the jury in determining the value of the property taken.

The defendant further contends that the inventory of the plaintiffs was not valued as of the date of the taking because it would take 20 years to sell all of the parts from the inventory. We find that if the sales period can reasonably be projected over a term of years with the net sale price reduced to present worth, the compensation for the property is measured as of the date of the taking.

The defendant also complains that the plaintiffs' accountant was permitted to capitalize profits in order to arrive at the value of the inventory. In finding this contention to be without merit, we note that the accountant never valued the inventory; all he did was reduce to present value the inventory figure provided by another expert.

Finally, the defendant contends that the 8-percent interest rate utilized to reduce the inventory to present value was speculative, and therefore plaintiffs did not sustain their burden to prove damages by competent evidence per *Dawson v. Papio Nat. Resources Dist.*, 206 Neb. 225, 292 N.W.2d 42 (1980).

The general rule is that an expert witness, when properly qualified, may testify as to the valuation of the property, and the weight and credibility of what the witness considers in coming to his conclusion is for the jury to determine. *Iske v. Omaha Public Power Dist.*, 185 Neb. 724, 178 N.W.2d 633 (1970). The estimate as to what interest rate to use to reduce to present value has never been more than an educated guess on the part of an expert. The testimony of the plaintiffs' accountant was that 8 percent was a reasonable rate based upon the previous 5 to 7 years, and his testimony remained uncontroverted in the record. This contention is also without merit.

AFFIRMED.

VINCE KIRBY, APPELLEE, V. DANIEL J. LISKA, APPELLANT.

334 N.W.2d 179

Filed May 13, 1983. No. 82-336.

1. **Attorney Fees.** Special rules apply to contingent fee contracts between a lawyer and his client. In order for the plaintiff to recover on the basis of an express contract, the evidence must show an agreement which was in compliance with these rules.
2. _____. Evidence to prove an oral agreement for a contingent fee must be clear, convincing, and satisfactory.
3. _____. The nature of the attorney-client relationship demands that the attorney be held to such a standard of proof.
4. _____. As soon as feasible after a lawyer has been employed, it is desirable that he reach a clear agreement with his client as to the basis of the fee charges to be made.
5. _____. No lawyer retained on a contingent fee basis should be too busy to prepare a written instrument precisely detailing all terms of the employment contract.
6. _____. When a lawyer informs a prospective client, at the time he is retained, that his fee will be on a contingent basis, he should clearly indicate the percentage of recovery to be received. In the absence of knowledge and approval by the client, it can not be said that there was a meeting of the minds sufficient to give rise to a contract for a contingent fee.
7. _____. A contingent fee which is not fair and reasonable can not be recovered in an action for attorney fees.
8. _____. Courts have authority to monitor and determine the reasonableness of contingent fee contracts under their inherent power to regulate the bar.
9. _____. A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.
10. _____. A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee.

Appeal from the District Court for Knox County: MARK J. FUHRMAN, Judge. Reversed and remanded.

Kenneth M. Olds of Olds, Swartz and Ensz, for appellant.

Vince Kirby, pro se.

BOSLAUGH, WHITE, and HASTINGS, JJ., and BROWER and MCGINN, D. JJ.

BOSLAUGH, J.

This is a suit for an attorney fee. The plaintiff, Vince Kirby, represented the defendant, Daniel J. Liska, in an action in the District Court of Knox County, Nebraska, involving the title to 726 acres of land owned by the defendant's father, Adolph O. Liska.

The defendant claimed title to the land under a deed executed by his father and mother on June 24, 1975, a time when they were patients in a rest home and under conservatorship. The conservators, who were the defendant's brothers, filed an action on August 21, 1975, to cancel the deed on the grounds that the grantors were incompetent and the deed was the result of undue influence, duress, fraud, and deceit.

The defendant was originally represented by Daniel Jewell. As a result of a merger of law firms, a conflict of interest developed and Jewell formally withdrew from the action on July 19, 1976.

The plaintiff commenced his representation of the defendant sometime after April 1976. The action was never tried but was settled, due primarily to the urging of the parties' mother, pursuant to an agreement between the parties dated May 8, 1977, which resulted in a judgment quieting title to the land in the defendant.

A dispute arose when the plaintiff claimed the right to a contingent fee equal to 30 percent of the value of the land involved in the litigation. The defendant denied that there was any agreement between the parties concerning a contingent fee.

This action was filed on August 11, 1980. The petition alleged that "defendant was advised that it was plaintiff's policy and practice to work on a contingent fee basis and that the usual fee was 30% of the amount recovered after the payment of court costs, depositions, witness fees and other payments made to third parties."

An amended petition filed July 22, 1981, alleged that the plaintiff had represented the defendant pur-

suant to an "oral agreement" and that "the fair and reasonable value of the professional services rendered from the plaintiff to the defendant are $75,000.00."

A second amended petition filed September 22, 1981, alleged that "plaintiff and defendant orally agreed that plaintiff would represent the interests of the defendant in the aforesaid Case No. 9691, on a contingent fee basis; that the defendant was advised that plaintiff's usual contingent fee was 30%, which percentage was not subject to increase but was subject to decrease at the election of the plaintiff." The second amended petition further alleged that "the fair and reasonable value of the professional services rendered from the plaintiff to the defendant are $75,000.00."

The report of a pretrial conference states that the plaintiff advised the court that the petition was filed "under the theory of a breach of oral contract."

A jury was waived and the case tried to the court. The trial court found that the plaintiff and the defendant had orally agreed that the plaintiff would represent the defendant on a contingent fee basis of 30 percent; that the value of the land was $300 per acre; and that the plaintiff was entitled to recover the sum of $65,340. The defendant has appealed.

The defendant contends that the evidence was not sufficient to support the finding that there was an agreement between the parties for a contingent fee; that the amount recovered by the plaintiff was unconscionable; and that there was no evidence as to the reasonable value of the plaintiff's services.

The pleadings which were filed by the plaintiff, as summarized above, were not a model of clarity. It is difficult to ascertain whether the plaintiff, who proceeded pro se, was attempting to recover on the theory of an express contract, or on the basis of quantum meruit, or both. The evidence is almost as indefinite.

The plaintiff's evidence established that it is his

custom to represent clients on a contingent fee basis and that he does not send out bills or keep a record of time expended on a case. There was also evidence to the effect that the original suit to set aside the deed was a likely one for a contingent fee.

The plaintiff testified that the defendant called him late in April 1976 and asked the plaintiff to represent him. Kirby replied that he would like to review the problem and determine the status of the record; that he would represent the defendant; that he "worked only on contingent fee basis"; and that his "usual fee was 30 percent" but that he reserved the right to reduce it in his sole discretion in the event he decided it was not merited or warranted.

On cross-examination Kirby admitted that it was "very possible that at the time he contacted me I didn't discuss the percentage fee." However, Kirby testified that in August of 1976 the defendant was made aware of the fact that Kirby "worked on a percentage basis."

Cleone Warden, the plaintiff's secretary, testified that she was present when the initial conference between the plaintiff and the defendant took place, and again in August of 1976. She testified that in August Kirby said that he would handle the case for the defendant on a contingent fee basis, but she did not recall "any specific amount." Since she made no notation of a different amount, she said that was an indication that a 30-percent contingent fee had been discussed.

The defendant testified that he "didn't even know the meaning of the word [contingent] until after the case had been wound up. I never heard the word nor percentage mentioned. There was no agreement as to percentage or flat fee." He testified that when he inquired about the bill, Kirby told him, "Well, I haven't figured it up yet. Let it go for now."

There are special rules which apply to contingent fee contracts between a lawyer and his client. In

order for the plaintiff to recover on the basis of an express contract, the evidence must show an agreement which was in compliance with these rules.

Evidence to prove an oral agreement for a contingent fee must be clear, convincing, and satisfactory. See, *Becnel v. Montz*, 384 So. 2d 1015 (La. App. 1980); *Mercy Hospital, Inc. v. Johnson*, 390 So. 2d 103 (Fla. App. 1980).

The nature of the attorney-client relationship demands that the attorney be held to such a standard of proof. EC 2-20 of the Code of Professional Responsibility states in part: "Contingent fee arrangements in civil cases have long been commonly accepted in the United States in proceedings to enforce claims. The historical bases of their acceptance are that (1) they often, and in a variety of circumstances, provide the only practical means by which one having a claim against another can economically afford, finance, and obtain the services of a competent lawyer to prosecute his claim, and (2) a successful prosecution of the claim produces a res out of which the fee can be paid. *Although a lawyer generally should decline to accept employment on a contingent fee basis by one who is able to pay a reasonable fixed fee, it is not necessarily improper for a lawyer, where justified by the particular circumstances of a case, to enter into a contingent fee contract in a civil case with any client who, after being fully informed of all relevant factors, desires that arrangement.*" (Emphasis supplied.) EC 2-19 states: "As soon as feasible after a lawyer has been employed, it is desirable that he reach a clear agreement with his client as to the basis of the fee charges to be made. Such a course will not only prevent later misunderstanding but will also work for good relations between the lawyer and the client. *It is usually beneficial to reduce to writing the understanding of the parties regarding the fee, particularly when it is contingent. A lawyer should be mindful that many persons who desire to*

employ him may have had little or no experience with fee charges of lawyers, and for this reason he should explain fully to such persons the reasons for the particular fee arrangement he proposes." (Emphasis supplied.)

In *Carmichael v. Iowa State Highway Commission*, 219 N.W.2d 658 (Iowa 1974), the court examined an oral fee agreement between an attorney and client and found it to be ambiguous. The court charged the costs of the litigation to the attorney, as he was responsible for the contract's uncertain nature. The court stated: "[N]o lawyer retained on a contingent fee basis should be too busy to prepare a written instrument precisely detailing all terms of the employment contract." *Id.* at 665. The court cited EC 2-19.

In *Neville v. Davinroy*, 41 Ill. App. 3d 706, 709, 355 N.E.2d 86, 88-89 (1976), the court said: "The law places special obligations upon an attorney by virtue of the relationship between attorney and client. Those obligations are summed up and referred to generally as the fiduciary duty of the attorney. They permeate all phases of the relationship, including the contract for payment. There can be no question that an attorney's duty to his client includes that of not taking advantage of a client's trust. An attorney must also inform his client of all material facts affecting his employment."

The evidence in this case is not clear, convincing, and satisfactory that Kirby fully disclosed to his client all material terms of the fee agreement or that they were agreed to by the defendant. In *In re DeGraff v. McKesson & Robbins*, 31 N.Y.2d 862, 863, 292 N.E.2d 310, 311, 340 N.Y.S.2d 171 (1972), the Court of Appeals said: "When a lawyer informs a prospective client, at the time he is retained, that his fee will be on a contingent basis, he should clearly indicate the percentage of recovery to be received." It is not clear from the evidence that the exact percentage Kirby would take was ever discussed with

Liska or approved by him. In the absence of such knowledge and approval by the client, it can not be said that there was a meeting of the minds sufficient to give rise to a contract. See *Rybin Investment Co., Inc. v. Wade*, 210 Neb. 707, 316 N.W.2d 744 (1982). By failing to obtain an agreement in writing, Kirby exposed himself to the dangers warned against in the Code of Professional Responsibility.

The plaintiff in this case failed to prove, by clear, convincing, and satisfactory evidence, that there was a meeting of the minds in regard to a contingent fee contract based on 30 percent of the value of the land involved in the litigation. The findings of the trial court that there was an express oral agreement between the parties is not sustained by sufficient evidence and must be set aside.

A contingent fee which is not fair and reasonable can not be recovered in an action for attorney fees. See *Mercy Hospital, Inc. v. Johnson*, *supra*. "The courts have authority to monitor and determine the reasonableness of contingent fee contract under their inherent power to regulate the bar." (Syllabus of the court.) *Wunschel Law Firm, P.C. v. Clabaugh*, 291 N.W.2d 331 (Iowa 1980). See, also, *International Travel, Etc. v. Western Airlines*, 623 F.2d 1255 (8th Cir. 1980). DR 2-106 of the Code of Professional Responsibility provides: "Fees for Legal Services.

"A. A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

"B. A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

"1. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

"2. The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

"3. The fee customarily charged in the locality for similar legal services.

"4. The amount involved and the results obtained.

"5. The time limitations imposed by the client or by the circumstances.

"6. The nature and length of the professional relationship with the client.

"7. The experience, reputation, and ability of the lawyer or lawyers performing the services.

"8. Whether the fee is fixed or contingent.

"C. A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case."

When Kirby accepted employment in the litigation, the case was pending on a motion of the conservators for summary judgment. The record shows that Kirby examined the record, filed some pleadings, wrote some correspondence, conferred with his client, obtained continuances, drafted a settlement offer, and was present when the settlement agreement was signed. The record before us will not sustain an allowance of $65,340 for attorney fees upon the basis of an express agreement or upon a quantum meruit basis. Such an amount is excessive.

The judgment of the District Court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

ABNER RUBIN, APPELLEE, V. PIONEER FEDERAL SAVINGS & LOAN ASSOCIATION, A CORPORATION, APPELLANT.

334 N.W.2d 424

Filed May 20, 1983. No. 82-040.

1. **Breach of Contract: Damages.** The measure of damages for a breach of contract to lend money is usually the difference between the contract interest rate and the increased interest rate the borrower is obligated to pay in procuring a new loan.
2. **Breach of Contract.** The general rule is that the burden rests on the plaintiff to show the fulfillment of a condition precedent to his right of recovery.
3. **Contracts: Rescission.** Rescission by its nature implies the extinction of the contract which leaves the parties without a right of recovery on the contract itself.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Reversed and remanded for a new trial.

Robert A. Green of Morsman, Fike, Davis & Schleich, P.C., for appellant.

Ephraim L. Marks and James M. Woodruff of Marks, Clare, Hopkins, Rauth & Cuddigan, for appellee.

KRIVOSHA, C.J., BOSLAUGH, MCCOWN, WHITE, and HASTINGS, JJ., and COLWELL, D.J., Retired.

PER CURIAM.

The appellant, Pioneer Federal Savings & Loan Association (Pioneer), appeals from a jury verdict in the amount of $45,025.71 entered in favor of the appellee, Abner Rubin, and against Pioneer. The action was originally commenced by Rubin in the District Court for Douglas County, Nebraska, against Pioneer, seeking to recover damages allegedly sustained by Rubin as a result of Pioneer's breach of a contract to lend Rubin money.

The evidence discloses that Rubin and the managing officer and executive vice president and treasurer of Pioneer began negotiating the terms of a

takeout loan in February or March of 1980. After obtaining authorization from Pioneer's board, a commitment letter was prepared. The letter committed Pioneer to loan Rubin $400,000. The loan was to be secured by a first mortgage on an apartment complex to be constructed by Rubin. The commitment was subject to certain conditions, including that the complex, when constructed, would have an appraised value of at least $850,000. Pioneer committed to an interest rate of 14.50 percent, but provided that the rate was to be valid only for a 6-month period beginning March 3, 1980, and ending September 3, 1980. A further provision of the commitment was that the specific improvements, consisting of 40 units, must be substantially completed prior to executing the permanent mortgage. The letter defines "substantially completed" to be 90 percent or more. Specifically, the letter provided in part: "The percentage of completion shall be designated after inspection by Association personnel and the percentage of completion shall be determined by Association personnel at the time it is called for." The letter further provided that the interest rate of 14.50 percent was dependent upon the improvements being 90-percent or more completed within the 6-month time frame. In the event that that condition was not met, then the interest rate was to be adjusted in accordance with a formula contained in the letter. On March 5, 1980, Rubin paid to Pioneer a $4,000 commitment fee and proceeded with the construction of the apartment complex. His next reported contact with Pioneer occurred in the latter part of August 1980, when he had a conversation with Pioneer's secretary. The evidence is in conflict as to exactly what was discussed at that time. According to Rubin, he informed the secretary that the project was 90-percent completed and offered to drive her or someone else from Pioneer to Omaha for an inspection on September 3, 1980. He testified that she called him back a few days later and of-

fered to waive inspection and "take his word for it." They then discussed closing the loan after the first of the year. However, the secretary testified that only the closing date was discussed at that time and that she "didn't remember" discussing the inspection.

Sometime in early December of 1980 Rubin hired a licensed real estate appraiser to inspect the property. As a result of the inspection, Rubin obtained a written appraisal of the property, in the amount of $1.4 million. Rubin forwarded this appraisal to Pioneer. Shortly thereafter, Rubin had an attorney draft a letter to Pioneer, advising that he was ready to close the loan and requesting Pioneer to furnish the necessary documents and schedule the closing date within 10 days. Rubin received no response from Pioneer until February of 1981. In a letter dated February 7, 1981, Pioneer informed Rubin that the loan was ready to close and that, in accordance with the commitment letter, the interest rate would not be 14.50 percent but, rather, 2 percent above the 10-year fixed-rate advance rate from the federal home loan bank. Based on the current quote, Pioneer predicted the rate to be 15.625 percent. In response to that letter Rubin filed suit.

In his petition Rubin alleged that he had a valid and binding commitment from Pioneer; that he had performed and fulfilled all of the conditions required of him to be performed pursuant to the commitment letter, and he was therefore entitled to the loan in accordance with the commitment letter at an interest rate of 14.50 percent; that Pioneer refused to perform the agreement after formal demand was made; and that, by reason of Pioneer's breach, Rubin was compelled to seek other financing "at a substantially higher cost than that provided by the commitment." Rubin prayed for general damages and the return of $4,000, representing his commitment fee, plus interest and costs.

At trial both parties introduced considerable evidence on the question of whether the project was

substantially completed by September 3, 1980. Over Pioneer's objection, the court instructed the jury that Pioneer had failed to inspect the complex prior to that date and thus voluntarily waived its right to make such inspection.

The trial court instructed the jury, in instruction No. 6, in part as follows: "The burden is on the defendant to prove by a preponderance of the evidence that the 40-apartment complex was less than 90% complete on September 3, 1980. If the defendant has proved the foregoing proposition by a preponderance of the evidence, your verdict will be for the defendant."

The court further instructed the jury, in instruction No. 14, in part as follows: "The measure of damages in such event would be the difference between that amount which the plaintiff would be required to pay at 14.5% interest on a $400,000.00 loan for the duration of the loan and what he would be required to repay at an interest rate of 15.625% over the duration of the loan."

And, finally, the court instructed the jury, in instruction No. 15, in part as follows: "The sum of $4,000.00 must be added to the present cash value of the plaintiff's damages." Apparently, it was the court's view that if the jury found for the plaintiff in any amount, it was required to award the commitment fee to the plaintiff, in addition to his damages.

Pioneer has assigned three errors. They are: (1) The trial court erred in instructing the jury that Pioneer had the burden of proving that the complex was less than 90-percent complete on September 3, 1980, and Rubin's noncompliance with that condition of the agreement. (2) The trial court erred in not instructing the jury on the proper measure of damages. (3) The evidence was insufficient to support the verdict.

We shall take up the errors in the order in which they have been assigned. Pioneer's contention that the trial court erred in instructing the jury that

Pioneer had the burden of proving that the complex was *less* than 90-percent complete on September 3, 1980, is correct. Under the terms of the commitment, Pioneer agreed to loan Rubin $400,000 at an interest rate to be determined when the project was substantially completed. Substantially completed was to mean more than 90-percent completed. If this event occurred within the specified 6-month period ending on September 3, 1980, the loan would be made at 14.50 percent. If the project had not reached that stage of completion by that date, the interest rate would then be adjusted upward in accordance with a formula set out in the letter.

Further, Rubin, in his petition, alleged that he had performed all of the conditions required by him to be performed. Pioneer, in its answer, denied that fact, thereby putting the question of full performance in issue. Neb. Rev. Stat. § 25-836 (Reissue 1979) provides: "In pleading the performance of conditions precedent in a contract, it shall be sufficient to state that the party duly performed all the conditions on his part; *and if such allegation be controverted, the party pleading must establish on the trial the facts showing such performance.*" (Emphasis supplied.) In this case Rubin was the party pleading the performance of conditions precedent and, under the clear language of the statute, had the burden of establishing those facts. In *Robinson Outdoor Advertising Co. v. Wendelin Baking Co.*, 145 Neb. 112, 118, 15 N.W.2d 388, 391 (1944), this court said: "In *Bingaman v. Securities Investment Corporation*, 129 Neb. 788, 262 N.W. 859, this court adopted the following general rule: 'The general rule is that the burden rests on the plaintiff to show the fulfilment of a condition precedent to his right of recovery.' Also by statute (Comp. St. 1929, sec. 20-836) where the pleading of performance of a condition precedent in a contract is controverted the party pleading the performance of such condition precedent is required to establish on the trial the facts showing such per-

formance. See *Davidson v. First American Ins. Co.*, 129 Neb. 184, 261 N.W. 144." The most that can be said that Pioneer waived by its earlier action was its right to inspect the project. Waiving its right to inspect the project, however, did not thereby waive a condition of the loan, to wit, that the project in fact be at least 90-percent completed by September 3, 1980. The trial court was in error in placing the burden of proving nonperformance of that condition on Pioneer.

In view of the fact that the case must be remanded for a new trial, we believe we should further comment on Pioneer's second assignment of error. In this respect the trial court erroneously instructed the jury in two aspects. In effect, the trial court instructed the jury that if it found that Rubin had sustained damages and returned damages for Rubin, it should, in addition to that, return to him his commitment fee. That was error. Apparently, Rubin's theory was that he received no value for the commitment, and therefore he should recover his commitment fee as well as his damages. This is not, however, a correct position. Had Rubin elected to rescind the contract by reason of Pioneer's breach, then Rubin would have been entitled to receive back his commitment fee. However, in this case Rubin elected to affirm the contract and seek to collect damages. He cannot, on the one hand, rescind the contract and recover his commitment fee and, on the other hand, affirm the contract and seek to recover damages for its breach. We noted in *Chesnut v. Master Laboratories*, 148 Neb. 378, 386, 27 N.W.2d 541, 547 (1947): " 'One who brings suit upon a contract necessarily asserts that it is valid and enforceable, else he could not derive a cause of action from it. Hence if one is aware of facts which would justify him in rescinding a contract or other transaction into which he has entered, but nevertheless institutes an action upon it, this is an election to affirm it and a waiver of any right of rescission, and the

election so made is final.' " And in *Wegner v. West*, 169 Neb. 546, 100 N.W.2d 542 (1960), we said: "Rescission by its nature implies the extinction of the contract which leaves the parties without a right of recovery on the contract itself." (Syllabus of the court.) See, also, *Anson v. Grace*, 174 Neb. 258, 117 N.W.2d 529 (1962). The trial court should not have submitted to the jury an instruction directing it to return to Rubin the commitment fee in addition to damages.

Likewise, we believe that the portion of the court's instruction No. 14 which we have previously quoted was in error. In effect, the trial court advised the jury that the measure of damages was the difference between 14.5-percent interest on a $400,000 loan and 15.625 percent. The correct measure of damages is as set out in *Shurtleff v. Occidental B. & L. Ass'n.*, 105 Neb. 557, 561, 181 N.W. 374, 375 (1921), where we said: "The measure of damages for a branch [sic] of a contract to lend money is usually . . . the difference between the contract interest rate and the increased interest rate the borrower is obligated to pay in procuring a new loan. There are certain exceptions to this rule, one of which is that, where it appears that the specific purpose for which the loan was made was communicated to the lender at the time the contract was entered into, and where it further appears that the borrower has suffered special damages by the breach, which are pleaded and proved, the damages recoverable are such as may fairly and reasonably be supposed to have been in the contemplation of the parties at the time of making the contract, as the probable result of a breach of it."

Other courts faced with this issue have held that the proper measure of general damages is the additional cost of the substitute loan. See, *Consolidated American Life Ins. Co. v. Covington*, 297 So. 2d 894 (Miss. 1974); *Financial Fed. S. & L. Ass'n v. Continental Ent.*, 338 So. 2d 907 (Fla. App. 1976); *Pipkin*

v. Thomas & Hill, Inc., 298 N.C. 278, 258 S.E.2d 778 (1979); *Bixler v. First Nat. Bank of Oregon*, 49 Or. App. 195, 619 P.2d 895 (1980). It may very well have been that the offer by Pioneer to Rubin of a loan with an interest rate of 15.625 percent was evidence of what Rubin would have had to pay for another loan. But it was, at best, only evidence, and it was for the jury to make that determination. The trial court's instruction in effect directed a verdict for Rubin, at least as to the amount, if the jury determined to find for Rubin in any amount. This was not consistent with even Rubin's petition, wherein he simply alleged that he was required to seek other financing at "a substantially higher cost." It was incumbent upon Rubin to prove his damages and then for the jury to make its determination based upon the evidence presented and the general law, and not upon a specific amount given to it by the court.

For these reasons we believe the verdict of the jury and the judgment of the court rendered thereon must be reversed and the case remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

McCOWN and WHITE, JJ., concur in the result.

CAPORALE, J., not participating.

CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLEE, V. SANITARY AND IMPROVEMENT DISTRICT NO. 287 OF DOUGLAS COUNTY, NEBRASKA, APPELLANT. DAIN, KALMAN & QUAIL MUNICIPAL-NEBRASKA, INC., APPELLEE AND CROSS-APPELLANT, V. SANITARY AND IMPROVEMENT DISTRICT NO. 287 OF DOUGLAS COUNTY, NEBRASKA, ET AL., APPELLANTS AND CROSS-APPELLEES.

334 N.W.2d 429

Filed May 20, 1983. Nos. 82-149, 82-150.

1. **Sanitary and Improvement Districts: Assessments: Appeal and Error.** On appeal of assessments made by a board of a sanitary

and improvement district, there is no presumption of regularity attached to such action. On appeal the District Court, and this court, shall hear and determine such appeals in a summary manner as in a case in equity and shall increase or reduce the assessments as the same may be required to provide that assessments shall be to the full extent of special benefits, and to make the apportionment of benefits equitable.

2. **Appeal and Error: Words and Phrases.** When a court is given the power to review a case "in a summary manner as in equity," that court is given power to review such matter de novo as in other equity actions.
3. **Sanitary and Improvement Districts: Notice: Appeal and Error.** By statute each fiscal agent for a sanitary and improvement district is entitled to notice of the amount and schedule of assessments proposed for improvements and, as such, may become a "person . . . feeling aggrieved" so as to have standing to appeal such action to the District Court.
4. **Standing.** To have standing in a matter the party involved must only show that it has an interest in the matter, such as the possibility of an injury that is different from that of the general public.
5. **Parties: Pleadings: Waiver.** A defect in parties raised by answer rather than by demurrer generally is deemed to have been waived.
6. **Sanitary and Improvement Districts.** When the purpose and effect of a sanitary and improvement district improvement is to improve each individual lot, the improvement is a local one, although there is incidental benefit to the district as a whole; but if the primary purpose and effect is to benefit the entire district, the improvement is not local, although it may incidentally benefit the individual properties.

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

Thomas J. Guilfoyle of Thomas J. Guilfoyle, P.C., for appellant S.I.D.

Herbert M. Fitle, City Attorney, and Charles K. Bunger, for appellee City.

Kenneth C. Stephan of Knudsen, Berkheimer, Richardson & Endacott, for appellee Dain, Kalman & Quail.

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

HASTINGS, J.

The City of Omaha (Omaha) and Dain, Kalman & Quail Municipal-Nebraska, Inc. (DKQ), separately appealed the decision of the board of trustees of Sanitary and Improvement District No. 287 (S.I.D.), sitting as a board of equalization, which determined the general and special assessments to be levied on the property within that district. These two matters were consolidated for trial in the District Court for Douglas County and on appeal to this court. The District Court, in relevant part, agreed with the S.I.D. board that a $195-per-lot fee for connection of the S.I.D. sewer system to the sanitary sewer system of Omaha represents a general obligation of the entire district and should therefore be generally assessed against all property in the district.

The District Court disagreed with the decision of the board to generally assess a refundable portion of the underground electrical power connection fee for each lot. The court found this entire cost must be specially assessed against each individual lot. S.I.D. has appealed the court's decision as to this special assessment of the electrical hookup fee, and DKQ has cross-appealed that portion of the District Court's decision declaring the sanitary sewer hookup fee a general benefit which must be generally assessed against the entire district.

S.I.D. was formed pursuant to a decree filed November 4, 1976, by the District Court of Douglas County. The district is located immediately southwest of the intersection of 168th and Pacific Streets in Douglas County and is commonly referred to as the Rose Garden Estates. The district has been subdivided into 263 lots, Lots 262 and 263 being land reserved for a park. Lots 262 and 263 are not involved in this appeal. Since the inception of the district, various improvements have been made, including the institution of a gas system, land grading, construction of a sanitary sewer system, paving, and the installation of a water system and an under-

ground electrical power system. Dain, Kalman & Quail, acting as fiscal agent for the district, underwrote the construction warrants which S.I.D. used to pay for these improvements.

After these improvements were completed, a statement of their costs was prepared. Based on this statement, the board of trustees of S.I.D., sitting as a board of equalization, determined how these costs should be assessed, specifically against certain property or generally against the district as a whole. These assessments were based upon the recommendations of Thompson, Dreessen & Dorner, and specifically its employee, Charles Riggs, the engineering firm hired by the district to design these improvements and determine their costs.

Omaha and DKQ raised objections to various parts of this assessment schedule. Apparently, the district's board ignored these objections, since no change in the assessment schedule was made. As a result, both the city and DKQ appealed the decision of the board to the District Court for Douglas County. Many objections to these assessments were raised in the District Court, but only two have been appealed.

One such issue involves a $500-per-lot fee for connection to the underground electrical power system. The Omaha Public Power District installed this system and, by their agreement, charged $500 per lot as a connection fee. S.I.D. paid OPPD the entire $500-per-lot charge. By this agreement OPPD would refund $350 for each lot that was built on and connected to this system by February 1, 1983. The record indicates that to date 28 of 261 lots have been built on. Since $350 of this $500 charge was possibly refundable, the board only specially assessed $150 per lot for connection with the electrical system and generally assessed $350 per lot against the district.

Omaha and DKQ argued to the District Court that this entire fee should be specially assessed on each lot, and any refundable portion should simply be

passed on to the individual landowner. The District Court agreed and reversed the decision of the board. The court ordered the entire $500 fee to be specially assessed against each lot. S.I.D. has appealed this portion of the District Court's decision.

Another objection raised in the District Court, and which has been raised in this appeal, deals with a $195-per-lot charge placed on S.I.D. by Omaha. In order for S.I.D. to connect its sewer system to the Omaha sewer system, Omaha charged the district $195 per lot. S.I.D. classified this charge as a general obligation of the district and generally assessed this cost against the entire district. DKQ objected, arguing that this cost should be specially assessed at $195 on each lot. The District Court found that the connection does not confer any special benefit upon each lot, and therefore it held it should be considered a general obligation of the district. DKQ has cross-appealed this portion of the court's decision, claiming this cost should be specially assessed against each lot.

Before determining the propriety of the District Court's decision as to these assessments, we shall deal first with several procedural issues raised by S.I.D. in this appeal. The first issue has to do with the standard of review. S.I.D. claims the decision of the board should be given a presumption of regularity and should not be overturned unless it is clearly wrong, is arbitrary, or capricious. This argument fails under the plain language of the relevant Nebraska statute. Neb. Rev. Stat. § 31-749 (Reissue 1978) sets forth the method of appeal from a decision of an S.I.D. board of trustees sitting as a board of equalization. It provides that the District Court shall hear such appeals, and "The court shall hear and determine such appeal in a summary manner as in a case in equity and without a jury and shall increase or reduce the assessments as the same may be required to provide that the assessments shall be

to the full extent of special benefits, and to make the apportionment of benefits equitable."

We have previously held, when interpreting statutory language granting a District Court the power to review a case "in a summary manner as in equity," that this gives the courts the power to review such matters de novo as in other equity actions. *Petersen v. Thurston*, 161 Neb. 758, 764, 74 N.W.2d 528, 533 (1956). As such, this court and the District Court may fully review the evidence presented and reach conclusions therefrom independent of those reached by the board. In short, we are not limited in our review of this case, and no presumption of validity is given to the board's decision.

S.I.D. also argues that DKQ has no standing. Section 31-749, referred to above, also is relevant to this question. That statute provides in relevant part: "*Notice* of the amount proposed to be assessed for such improvements against each separate piece of property shall be given to each owner of record thereof within five days after the first publication of notice of statement, plat and schedules and, within five days after the first publication of such notice, a copy thereof, along with statements of costs and schedules of proposed assessments, *shall be given to each person or company who*, pursuant to written contract with the district, *has acted as underwriter or fiscal agent for the district* in connection with the sale or placement of warrants or bonds issued by the district. Each owner shall have the right to be heard, and shall have the right of appeal from the final determination made by the board of trustees. *Any person* or any such municipality *feeling aggrieved may appeal* to the district court by petition within twenty days after such a final determination." (Emphasis supplied.)

Clearly, DKQ is entitled to notice under this section. It would be nonsensical to then say it does not have standing to contest or appeal the findings of the board. Clearly, DKQ is in such a position to be con-

sidered a "person . . . feeling aggrieved" by the decision of the board, and therefore has standing in this matter.

Not only does DKQ fit within this statute but, also, it may find standing under the general rule of law. DKQ has acted as the fiscal agent of S.I.D. since it was formed. As such, DKQ has underwritten construction warrants which have enabled the district to erect improvements. In order to retire the warrants, bonds must be issued to replace them. To enable the district to do so, revenue must be raised, by way of special assessments, to create a sinking fund to support this bond issue. In order to retire these warrants underwritten by DKQ, sufficient funds must be raised by way of special assessments by the district. This gives DKQ an interest, and it may suffer an injury different from that of the general public.

To have standing in a matter, the party involved must only show this, that is, an interest in the matter of the possibility of an injury that is different from that of the general public. *First Fed. Sav. & Loan Assn. v. Department of Banking*, 187 Neb. 562, 192 N.W.2d 736 (1971). DKQ's interest in this case is different from the general public's, in that it is in the position of a guarantor on these warrants which are to be retired by special assessment revenues. As such, it has standing to question the determination of what is generally and specially assessed in this case.

S.I.D. has also raised the objection that not all necessary parties have been joined in this action. This was done by way of answer. We need not reach the merits of this argument, since it has not been properly brought before us.

S.I.D. argues that all the landowners of the district should have been joined in this suit as party defendants. Assuming arguendo that this is correct, it is a defect which has existed since the filing of the petition. As such, it should have been attacked by way

of a demurrer and not in the answer. If such a defect in parties is not raised by way of a demurrer, it is waived. Neb. Rev. Stat. § 25-808 (Reissue 1979); *Cromwell v. Ward*, 192 Neb. 178, 219 N.W.2d 446 (1974).

Finally, S.I.D. raises two arguments with regard to the special assessment of the entire underground electrical power charge. First, S.I.D. complains that DKQ's objection only went to that portion which would not be refunded, i.e., $150. The record indicates that DKQ raised objection to these assessments on two occasions.

On February 13, 1981, DKQ objected by stating in a letter to S.I.D.: "We feel that it is not reasonable to expect that the refundable portion on the underground power will be returned to the District on all improved lots in the District. Therefore all lots that are not currently built upon should be specially assessed for underground power. Any lots that qualify for a refund from OPPD would be paid directly to Rose Garden Inc. A separate accounting would be required."

Later, on March 4, 1981, DKQ again objected by way of a letter, stating: "The refundable portion of the cost of underground power which will not be recovered under the District's agreement with Omaha Public Power District, because of failure to develop lots, should be specially assessed against the vacant lots."

These objections refer to more than just the nonrefundable portion of this charge. The argument of S.I.D. that DKQ and Omaha failed to specifically object to this potentially refundable charge being classified as a general obligation is unfounded and frivolous.

S.I.D. also argues that the refundable portion of this charge conveys no special benefit on each piece of property and therefore cannot be specially assessed. S.I.D. argues that since $350 of this charge is refundable, it cannot be a special benefit to this

property. While it may be true that a refundable charge represents no special benefit to a parcel of property, we point out that this fee is no longer refundable. The agreement between OPPD and S.I.D. stated that only those lots built on and connected to this underground power system by February 1, 1983, qualify for a refund. This date has passed, and the per-lot charge for connecting with this electrical system is now $500, without any refund. With this fact in mind, we now consider whether it is appropriate to specifically assess the entire $500-per-lot charge against each lot in the district.

The standard as to when an improvement is considered special or local, as conceded by both parties, is set out in *Hinman v. Temple*, 133 Neb. 268, 270-71, 274 N.W. 605, 607 (1937): " 'Whether an improvement is local or general depends upon the nature of the work, the situation of the improvement, the surrounding conditions, and whether the substantial benefits to be derived therefrom are local or general in their nature. * * * Whether an improvement is local or general is a question of law but whether the facts in a particular case bring an improvement within the definition of a local or general improvement is a question of fact, to be determined from all the facts and circumstances established by the evidence. * * * Whether or not an improvement is local or general depends upon the nature of the improvement and whether the substantial benefits to be derived are local or general in their nature. If its purpose and effect are to improve a locality it is a local improvement although there is incidental benefit to the public, but if the primary purpose and effect are to benefit the public it is not a local improvement although it may incidentally benefit property in a particular locality. * * * The fact that an improvement will be of advantage to the city does not change its character as a local improvement if primarily of material advantage to the adjacent property, and where the improvement enhances the value of ad-

jacent property as distinguished from benefits diffused by it throughout the municipality it is a local improvement.' "

At trial Mr. Charles Riggs, the engineer who recommended to S.I.D. which costs should be specially and generally assessed, testified. It was he who recommended that the $350 charge be generally assessed. On cross-examination he testified that this cost should be generally assessed because it was refundable, and if it were not refundable it should be a specially assessable cost.

Mr. Joseph Berenis, an engineer with the Omaha Public Works Department, also was called to testify. He said, in his professional opinion, the underground power gave a special benefit to each parcel of property in the district and that its entire cost should be specially assessed against each lot.

Clearly, the installation of underground power to this district has specifically benefited each parcel of property. It is also clear from the record that but for the fact that part of this $500 charge is refundable, the entire charge should be specially assessed against each lot. As pointed out above, none of this $500 charge is refundable any longer. Since this improvement does specially benefit each parcel of property and none of the charge for this improvement may be refunded, the entire $500 is therefore specially assessed against each lot, as ordered by the District Court.

Finally, we turn to the issue raised by DKQ in its cross-appeal. It contends this $195 sanitary sewer connection fee should be specially assessed against each lot. The record indicates that the entire cost of constructing the sewer system within the district was specially assessed. In addition to this cost Omaha charged S.I.D. a connection fee on the basis of $195 per lot for the connection of the district's sewer system with that of Omaha. The record also reflects that this $195 per lot represented a fee

charged by Omaha to fund the construction of interceptor and outfall sewers which will service S.I.D., as well as other districts. This money is to be used for the construction of sewer systems outside S.I.D., which will benefit the entire district generally but will not benefit any parcel of property specifically or uniquely.

Under the evidence from the record and the standard from *Hinman v. Temple*, *supra*, it was proper for the District Court to find the $195-per-lot charge should be a general obligation of the district. As such, the decision of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. JOHN DOE, APPELLEE, V. MID-NEBRASKA MENTAL RETARDATION SERVICES, A CORPORATION, ALSO KNOWN AS REGION III, APPELLANT.

333 N.W.2d 909

Filed May 20, 1983. No. 82-201.

1. **Mandamus.** A writ of mandamus may be issued to any inferior tribunal, corporation, board, or person to compel the performance of an act which the law specifically enjoins as a duty resulting from an office, trust, or station.
2. _____. To warrant the issue of mandamus against an officer to compel him to act, (1) the duty must be imposed on him by law, (2) the duty must still exist at the time the writ is applied for, and (3) the duty to act must be clear.

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

William M. Connolly of Conway and Connolly, P.C., for appellant.

Cunningham, Blackburn, VonSeggern, Livingston, Francis & Riley, for appellee.

Cline, Williams, Wright, Johnson & Oldfather, for amicus curiae Region V Mental Retardation Services.

Timothy F. Shaw, for amicus curiae Nebraska Advocacy Services for Developmentally Disabled Citizens, Inc.

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

WHITE, J.

Relator, a mentally retarded person, brought this action in mandamus in the District Court for Hall County, Nebraska, to compel the respondent, Mid-Nebraska Mental Retardation Services, a corporation, to provide services to him as a person entitled to those services pursuant to Neb. Rev. Stat. § 83-1,141 (Reissue 1981).

After trial the court issued a peremptory writ directing respondent to provide the services. Respondent appeals and alleges as error that the District Court improperly directed respondent to provide services to relator when respondent was prevented from doing so due to lack of funds.

We permitted amicus, Region V Mental Retardation Services, to file a brief. Amicus urges us to hold that mandamus was an improper remedy because the duty to provide the services by statute is given to the director of the Department of Public Institutions and the director of the office of mental retardation. The regional offices are the mere agents of these officials. The contention, simply put, is that relator has sued the wrong party. We agree, and accordingly reverse the decision of the trial court and dismiss the action.

The statutory scheme of services to the mentally retarded is as follows: "The Department of Public Institutions shall establish and staff an office of mental retardation and appoint a director for such office." § 83-1,141(2).

The director of the office of mental retardation is given the duty to carry out the policies set forth by Neb. Rev. Stat. § 83-1,142(1) (Reissue 1981): "To carry out the policies and purposes of section

83-1,141, the director of the office of mental retardation shall provide a comprehensive and integrated statewide plan for facilities, programs, and services for mentally retarded persons, establish minimum standards for the operation of any facility or program providing services funded in whole or in part under the provisions of sections 83-1,141 to 83-1,146, provide such assistance as may be necessary to place a mentally retarded person in an appropriate facility or program . . . and promulgate such rules and regulations as are necessary to carry out the provisions of sections 83-1,141 to 83-1,146. . . ."

To facilitate the administration of the program, the directors act through a series of regional agencies, among them the respondent. The agencies are regulated closely by rule of the state office of mental retardation, including accounting, administration, and programs. Their budgets must be submitted to the director of the Department of Public Institutions for his recommendations. The regional agencies are controlled by the director of the Department of Public Institutions and office of mental retardation and clearly have no independent authority and no statutorily imposed duty. The duty imposed by the Nebraska statutes remains on the Department of Public Institutions and the director of the office of mental retardation.

"The writ of mandamus may be issued to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law specifically enjoins as a duty resulting from an office, trust or station." Neb. Rev. Stat. § 25-2156 (Reissue 1979). This statutory criterion has been interpreted to require three distinct elements before mandamus can be granted. " 'To warrant the issue of mandamus against an officer to compel him to act, (1) the duty must be imposed on him by law, (2) the duty must still exist at the time the writ is applied for, and (3) the duty to act must be clear.' " *State ex rel. Blome v. Bridgeport Irr. Dist.*, 205 Neb. 97, 102,

286 N.W.2d 426, 431 (1979), citing *State ex rel. Goetz v. Lundak*, 199 Neb. 585, 260 N.W.2d 589 (1977).

As no duty is imposed by law on the respondent, the writ cannot properly issue.

As this court will not generally issue advisory opinions, any discussion of the defense proposed by respondent in its answer and assigned as error must await an action directed against an appropriate party.

REVERSED AND DISMISSED.

SUPERIOR HYBRIDS COMPANY, INC., APPELLEE, V. ROBERT R. CARMICHAEL, APPELLANT, AND DORSEL J. CARMICHAEL, APPELLEE.

333 N.W.2d 911

Filed May 20, 1983. No. 82-229.

1. **Trusts.** A resulting trust is one raised by implication of law and presumed always to have been contemplated by the parties, the intention as to which is to be found in the nature of their transaction, but not expressed in deed or instrument of conveyance.
2. _____. Where a transfer of property is made to one person and the whole or a part of the purchase price is paid by another, a resulting trust arises in favor of the person by whom such payment is made.
3. _____. The presumption of a resulting trust in favor of the person who provides the consideration is rebuttable by proof of a contrary intention on the part of such person.
4. _____. A resulting trust does not arise where the parties are sufficiently close so as to give rise to a presumption that a gift was intended.
5. **Trusts: Proof.** The burden is upon the one claiming the existence of a resulting trust to establish the facts upon which it is based by clear and satisfactory evidence.

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

Peter L. Harlan of Schrempp and Lefler, for appellant.

Leo A. Knowles and Michael Higgins of McGrath, North, O'Malley & Kratz, P.C., for appellee Superior.

BOSLAUGH, WHITE, and CAPORALE, JJ., and BURKHARD and FINN, D. JJ.

BURKHARD, D.J.

The defendant-appellant, Robert R. Carmichael, hereinafter called Carmichael, appeals from the judgment of the District Court of Dodge County, Nebraska, finding that a resulting trust in favor of the plaintiff should be impressed on the real estate in question and directing the defendants to execute a quitclaim deed within 30 days of the order conveying to plaintiff all of their right, title, and interest in said real estate. Defendant Dorsel J. Carmichael, former wife of Carmichael and hereinafter referred to as Dorsel, has not appealed. The plaintiff, Superior Hybrids Company, Inc., is referred to herein as Superior.

Carmichael, in his sole assignment of error, states that the court erred in declaring a resulting trust over the real estate in question for the benefit of the plaintiff corporation and directing the defendants to convey all of their right, title, and interest in said real estate to the plaintiff. We affirm.

The business of Superior is the retail sale of seed corn and other grains. It was originally organized as an individual proprietorship by Carmichael in 1974 during the course of his marriage to Dorsel. Superior was incorporated in June 1976, and it issued 300 shares of stock equally among Carmichael; Dorsel; Timothy Chapman, son of Dorsel and hereinafter called Chapman; and Revel Chapman, wife of Timothy. The officers were Carmichael, president; Chapman, vice president; and Dorsel, secretary-treasurer.

Superior began its operation from the residence of the Carmichaels in North Bend, Nebraska, but eventually moved to commercial space. In 1978 a flood occurred, causing extensive damage and destroying approximately $50,000 worth of Superior's seed. As a result of the flood, it was necessary for

Superior to obtain a loan of $100,000 from the Small Business Administration (SBA). A note for $75,000 was given by Superior to the SBA on August 3, 1978. The note was signed by Carmichael as president and by Dorsel as secretary. SBA released the funds to Superior to repair or replace real property, to purchase a tract of land, to construct a building, and to pay on an existing business loan with First State Bank of Fremont. The $75,000 loan was used to acquire real estate and to make improvements thereon. The real estate was purchased on a land contract in the individual names of Carmichael and Dorsel. The mortgage given to SBA was to secure the payment of the $75,000 promissory note "signed by Robert R. Carmichael & Dorsel Jane Carmichael in behalf of Superior Hybrids Company Inc." Carmichael and Dorsel also executed a real estate mortgage to SBA to secure the payment of a promissory note in the amount of $25,000 "signed by Robert R. Carmichael and Dorsel J. Carmichael in behalf of Superior Hybrids Company Inc."

All costs in connection with the real estate were paid by Superior. These included payments on the land contract, the SBA loan, real estate taxes, improvements, maintenance, repairs, operating expenses, and utilities. Carmichael did not personally contribute money toward any of these expenses. It is also true that Superior paid numerous personal expenses of Carmichael, Dorsel, Chapman, and Chapman's wife. The real estate was carried on Superior's corporate records and was reported in Superior's annual tax return. Carmichael did not list the real estate on his 1980 tax return and was unable to recall whether or not it appeared on his 1979 return.

On June 30, 1981, the District Court of Dodge County, Nebraska, entered a decree of dissolution of marriage between Dorsel and Carmichael. The decree provided, among other things, for the sale of the real estate in question, with the proceeds to be

divided equally between Dorsel and Carmichael. Dorsel appealed that decision. Subsequently, the present action was instituted by Superior seeking to impose a resulting trust upon the real estate in question.

The court will impose a resulting trust when the circumstances surrounding a conveyance make it clear that the parties intended such a result. " '[A] resulting trust has been defined to be one raised by implication of law and presumed always to have been contemplated by the parties, the intention as to which is to be found in the nature of their transaction, but not expressed in deed or instrument of conveyance.' " *Biggerstaff v. Ostrand*, 199 Neb. 808, 816, 261 N.W.2d 750, 754 (1978). "With respect to the underlying issues involving a resulting trust, the rules in this state have been well established. Where a transfer of property is made to one person and the whole or a part of the purchase price is paid by another, a resulting trust arises in favor of the person by whom such payment is made . . . ." *Jirka v. Prior*, 196 Neb. 416, 423, 243 N.W.2d 754, 759 (1976). The rationale for this rule is that individuals seldom give consideration to receive nothing. *Campbell v. Kirby*, 195 Neb. 610, 239 N.W.2d 792 (1976).

Kollbaum v. K & K Chevrolet, Inc., 196 Neb. 555, 244 N.W.2d 173 (1976), involved a dispute between two minority shareholders and the majority shareholder of K & K Chevrolet, Inc. The premises from which the Chevrolet dealership operated was titled in the names of the two minority shareholders, yet consideration for the real estate had been provided by the corporation. The court also found that K & K paid the taxes on the property, paid no rent on the property, and carried the property as an asset on its books. Additionally, the court noted that the minority shareholders did not list the property as a personal asset on their personal tax returns. The court concluded, in putting all these facts together, that "the evidence is clearly convincing . . . that it

was the intent of the parties that K & K, Inc., provide the consideration for the purchase of the land; that K & K, Inc., actually did furnish the consideration for the land; and it was their continued intention to treat the land as though K & K, Inc., was the owner. The consideration for the purchase was paid by K & K, Inc., and the intention of the parties and the performance of their agreement leave no other conclusion but that the ownership of the land should be vested in the corporation . . . . Under these circumstances, equity will not permit the appellants to assert independent ownership of their naked record title. The District Court was correct in declaring a resulting trust and holding that K & K, Inc., was the owner of the real estate involved." *Id.* at 560, 244 N.W.2d at 176.

It is true, as argued by Carmichael's counsel, that the present case involves a family corporation, whereas *Kollbaum* did not. This is a factor, but not a controlling factor. The present case fits squarely within the *Kollbaum* holding. Superior made the loan payments and the land contract payments; paid the real estate taxes and general operating and maintenance expenses; carried the property on its books as an asset; and reported it on its corporate tax returns. We conclude that a resulting trust existed and that plaintiff is the owner of the real estate involved.

Carmichael contends that the presumption of a resulting trust in favor of the person who provides the consideration is rebuttable by proof of a contrary intention on the part of such person, which, in this case, is Superior. *Campbell v. Kirby*, *supra*. Carmichael reasons that since he was the president of Superior when the real estate conveyance took place and was instrumental in locating the real estate, obtaining the financing, and negotiating the sale, he

was in the best position to articulate the corporate intent of Superior. He testified that the purpose in having the land titled in his name and Dorsel's name was because he wanted personal control of the property, and in case of his death Dorsel would have control of the property; and that it was his intention that Superior would not have legal title to the land but that it would make the mortgage payments to SBA. Carmichael said Dorsel and Chapman were aware of this "situation."

The fact is that there is no contrary intention on the part of Superior, the "person" supplying the consideration. All of its actions, as previously enumerated, manifest a clear intention that a resulting trust should arise. In addition, there are no corporate records to reflect an intent by Superior that the property be other than a corporate asset. Carmichael's argument in this regard is without merit.

Carmichael also contends that a resulting trust does not arise in this case because the parties are sufficiently close so as to give rise to the presumption that a gift was intended. *Olsen v. Best*, 167 Neb. 198, 92 N.W.2d 531 (1958). The evidence in this case, even though a family-held corporation is involved, indicates no gift was intended, and the presumption has been rebutted. All indicia of ownership rest with Superior. " '[T]he fact that the payor manages the property, collects rents, pays taxes and insurance, pays for repairs and improvements, or otherwise asserts ownership, and the acquiescence by the transferee in such assertion of ownership, is evidence to rebut the inference of an intention by the payor to make a gift to the transferee.' " *Zundel v. Zundel*, 278 N.W.2d 123, 129 (N.D. 1979).

The burden is upon the one claiming the existence of a resulting trust to establish the facts upon which it is based by clear and satisfactory evidence. *Biggerstaff v. Ostrand*, 199 Neb. 808, 261 N.W.2d 750 (1978). This Superior has done.

The judgment of the District Court is therefore affirmed.

AFFIRMED.

RODNEY PETSCH, APPELLEE, V. EVA MAE WIDGER ET AL., APPELLANTS.

335 N.W.2d 254

Filed May 20, 1983. No. 82-240.

1. **Adverse Possession.** Adverse possession is recognized as a defense in a proceeding under Neb. Rev. Stat. § 34-301 (Reissue 1978).
2. _____. An adverse claimant must show the extent of his possession, the exact property which was the subject of the claim of ownership, that his entry covered the land up to the line of his claim, and that he occupied adversely a definite area sufficiently described to found a verdict upon the description.
3. _____. One who claims title by adverse possession must prove by a preponderance of the evidence that he has been in actual, continuous, exclusive, notorious, and adverse possession under claim of ownership for a full period of 10 years.
4. **Adverse Possession: Boundaries.** Where a fence is constructed as the boundary line, although it is not the actual boundary line, and the parties claim ownership of land up to the fence for the uninterrupted statutory period, the parties gain title to such land by adverse possession.
5. _____: _____. If the adverse claimant is under no misapprehension as to the location of the boundary line and does not occupy the land with the intent to own it, he will not be deemed to be an adverse possessor.
6. **Adverse Possession.** In Nebraska, intent to assert ownership of the property is a requirement of adverse possession even though, in most cases, it is inferred from the circumstances.
7. _____. An important element to be proved before title is gained through adverse possession is that the claimant must show notice to the true owner. More specifically, the acts of dominion over the land must be so open, notorious, and hostile as to put an ordinarily prudent person on notice that his lands are in the adverse possession of another.
8. _____. Possession of real estate by permission of the owner can never ripen into title by adverse possession unless the change of such possession has been brought home to the true owner.
9. _____. As between parties sustaining parental and filial relationships, the possession of land of one by the other is presumed to be permissive, not adverse.

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

David A. Bergin of Cunningham, Battershell, Shoemaker & Bergin, P.C., for appellants.

Terry E. Savage, for appellee.

BOSLAUGH and CAPORALE, JJ., and SPENCER and BRODKEY, JJ., Retired, and GRANT, D.J.

BRODKEY, J., Retired.

Rodney Petsch, the plaintiff below and the appellee in this court, brought this action in the District Court for Chase County pursuant to Neb. Rev. Stat. § 34-301 (Reissue 1978) for the purpose of establishing the south boundary line to real property belonging to Petsch and the north boundary line to real property belonging to Eva Mae Widger and the other defendants below. So far as material herein, that statute provides: "When one or more owners of land, the corners and boundaries of which are lost, destroyed or in dispute, desire to have the same established, they may bring an action in the district court of the county where such lost, destroyed or disputed corners or boundaries, or part thereof, are situated, against the owners of the other tracts which will be affected by the determination or establishment thereof, to have such corners or boundaries ascertained and permanently established. . . . The action shall be a special one, and the only necessary pleading therein shall be the petition of the plaintiff describing the land involved, and, so far as may be, the interest of the respective parties and asking that certain corners and boundaries therein described, *as accurately as may be*, shall be established. Either the plaintiff or defendant may, by proper plea, put in issue the fact that certain alleged boundaries or corners are the true ones, or that such have been recognized and acquiesced in by the parties or their grantors for a period of ten consecutive years, which issue shall be tried before the district court *under its*

equity jurisdiction without the intervention of a jury, and appeals from such proceedings shall be had and taken in conformity with the equity rules." (Emphasis supplied.) We have also held that adverse possession is recognized as a defense in a proceeding under this section. *Converse v. Kenyon*, 178 Neb. 151, 132 N.W.2d 334 (1965). In his petition filed in the District Court, Petsch alleged that he is the owner in fee simple of certain real property in Chase County, Nebraska, bounded on the south by real property owned by the defendants-appellants in fee simple. He further alleged: "That on March 31, 1978, and again on August 5, 1980, a survey of the South line of the North Half of the North Half (N½N½) of Section 4, Township 6 North, Range 36, was made by Marvin Athey, Chase County Surveyor. Plaintiff alleges that that survey establishes the true boundary and that it conforms to the boundary established by the original Government survey. A copy of said survey is attached thereto and incorporated herein by this reference." Plaintiff prayed that the court "enter an order establishing the South line of the North Half of the North Half (N½N½) of Section 4, Township 6 North, Range 36, West of the 6th P.M., Chase County, Nebraska, to conform to the original Government survey and the subsequent surveys alleged by Plaintiff to show the true boundary between the tracts owned by the parties."

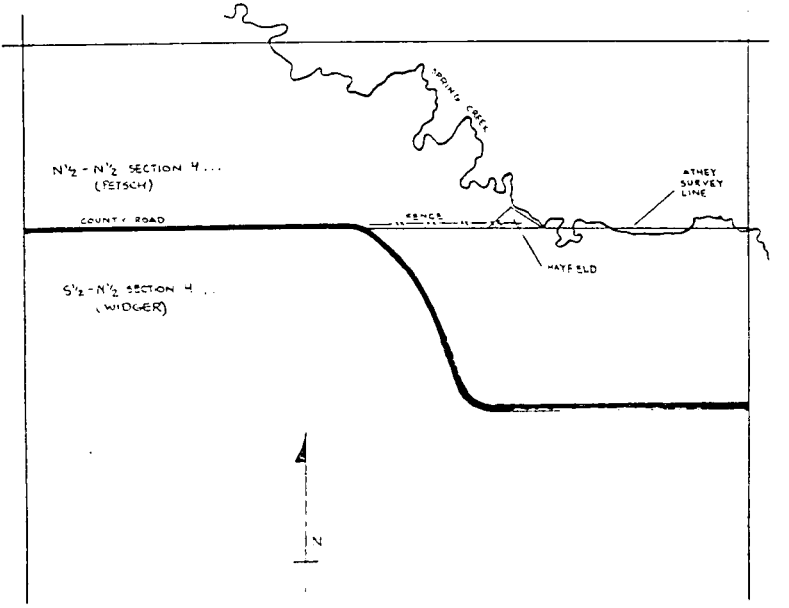
In their answer to the foregoing petition, the defendants denied that the Athey survey line was the true and correct boundary between the tracts of real property, and alleged that a fence located north of the Athey survey line was the true and correct boundary between the tracts of real property, and in connection therewith further alleged: "That defendants have had actual, continuous, exclusive and notorious adverse possession under a claim of ownership of all property south of said fence, which may now have been removed by Plaintiff, for a period of more than Ten (10) years. Therefore, title to said

real property south of the fence should be found to be in the Defendants." They further alleged that by and through their lessee, one Orville Widger, they have harvested hay on certain property north of the alleged boundary, which hay harvesting has continued for a period of more than 10 years, and that they have had actual, continuous, exclusive, notorious, and adverse possession under a claim of ownership of said parcel upon which the hay has been harvested for more than 10 years; therefore the title to said parcel upon which the hay has been harvested should be found to be in the defendants. In their answer the defendants pray that the court enter an order establishing the aforementioned fence as the real and true boundary between the two parcels of real estate and also enter an order that the title to the parcel " 'upon which hay has been harvested' as shown in an attached photograph, is found to be in the Defendants." Petsch filed a reply to the answer of the defendants in the nature of a general denial.

Following a trial to the court, at which evidence was adduced by both the plaintiff and the defendants, the court held that the Athey survey line should be established as the boundary between the two tracts of real property. The defendants then perfected their appeal to this court, their assignments of error being (1) that the court erred in determining that the boundary line should be established as the Athey survey line, and (2) that the court erred in determining that the defendants had not acquired title to the real property between the Athey survey line and the fence line by adverse possession. We affirm.

As an aid to understanding the issues in this case, and for purposes of convenience and illustration only, we have prepared a diagram of the area involved, which contains information taken from the exhibits offered at the trial. As shown, the two major landmarks in Section 4 are the county road and Spring Creek. The southern ditch of the county

road, until it veers south, marks the undisputed portion of the southern boundary of the north half of the north half. The disputed portion of the southern boundary is east of the southward turn in the road. It begins with the fence, shown on the diagram as a dashed line interspersed with "Xes," and extends to the eastern boundary line of Section 4.



Petsch claims that the Athey survey line, which appears on the diagram as a line extending east from the county road, was the true southern boundary of his property. The Athey survey line was established according to "common survey practice" and approximated, as nearly as possible, the original government survey line. Defendants, who we shall hereafter refer to as Widger, did not claim that the line was improperly surveyed, but rather claim to have acquired the land north of the Athey survey by adverse possession. In particular, Widger claimed land up to the fence and land in the triangular area from which he had harvested hay. The

fence's western end was described as "very close" to the turn in the road and at that point was 27.85 feet north of the Athey survey line. On its eastern end, the fence apparently did not reach Spring Creek and at that point was 43.25 feet north of the Athey survey line. The fence was estimated to be between 1,000 and 1,300 feet long. A description even less specific than that given for the fence was given for the triangular area from which Widger claimed to have harvested hay. The description given in Widger's answer was "the parcel 'upon which hay has been harvested.' " The location of this parcel was indicated by a hand-inscribed triangle superimposed on the photocopy of an aerial photograph attached to the answer. No legal description or description by measurements of the hayfield is contained in the record of this case.

It is very important to note that the fence indicated on the diagram referred to above was not the fence originally constructed in the area. The fence indicated on the diagram was not constructed until after Petsch had purchased the property in March of 1977, and hence had been in place for no more than 4½ years at the time of the trial. Although the original fence was apparently in existence for more than 10 years, the date of its original erection was not known and is not shown in the record. It was apparently destroyed about the time that Petsch purchased the property, although there was a conflict in the evidence as to whether this was before or after his purchase.

In deciding this case the trial court stated in part: "Well, I suppose that the parties probably understand from the questions of the court that the problem which concerns me is, first, a person who asserts land under adverse possession bears a terrific burden. He bears a burden to show that the possession is adverse and hostile. Now, that doesn't mean, as Mr. Bergin has said, you don't have to sit there with a gun and hold everybody off. But it does

mean that a possession must be a definite, specific possession of a specific area. And it must be describable by survey means. Now, that doesn't mean that we can't use the Athey survey and say so many feet from his particular line. But it does mean that it has to be a definite figure.

"Now, if we go on the start of the fence I believe that there is some evidence as to about how many feet that fence may be from the survey line, and I am speaking of the original fence, because the second fence doesn't, — that can't be a 10-year possession fence because it has only been there for two years, or three years, or at least not 10 years. That isn't an adverse line. The adverse line is the original fence. The original fence only went east so far, and the best we could come up with is that it went to someplace short of Spring Creek. And then we have an unknown line, at least it is unknown to me to the east corner where we have a corner fence that has been testified to without it being tied-in into either the Athey survey or any other survey whereby the court can make a legal description of the tract to which we are quieting the title on behalf of the defendants.

"It's, as I say, the person claiming by adverse possession has this terrific burden to show specific property claimed for a specific time from beginning through the end and it being more than ten years.

"I just wouldn't know where to draw the line. I can't draw it and particularly from the east side of the fence, which has not been located, to the east boundary. I don't know where it is.

. . . .

"Therefore, it's my feeling that we can't do anything in this case but go on the Athey survey." From what we have quoted above, it is clear that the primary reason the court ruled against the defendants was because of the insufficient description of the adversely claimed property; and we agree with the court that the description of such property

claimed by adverse possession was insufficient under established law in Nebraska.

In *Layher v. Dove*, 207 Neb. 736, 739, 301 N.W.2d 90, 92 (1981), we stated that an adverse claimant "must show the extent of his possession, the exact property which was the subject of the claim of ownership, that his entry covered the land up to the line of his claim, and that he occupied adversely *a definite area sufficiently described to found a verdict upon the description.*" (Emphasis supplied.) See, also, *Pokorski v. McAdams*, 204 Neb. 725, 285 N.W.2d 824 (1979). Defendants contend that *Layher* does not require an exact legal description, but only requires "a description which is sufficient to found a verdict upon the description." Their implication, in our opinion, is not justified and would be inconsistent with the actual wording of the *Layher* opinion; for example, "exact property" and "definite area." The conjunctive wording of the language in *Layher*, to wit, "*and* that he occupied adversely a definite area sufficiently described to found a verdict upon," (emphasis supplied) clearly indicates that a description must not only be sufficient to found a verdict on but must also be "exact" and "definite." We also feel that defendants' reliance upon *Layher* is rather unusual, especially considering that *Layher* involved facts similar to those in the instant case, and in that case this court held that there was not a sufficient description in the record of the property involved.

Defendants also buttressed their argument for a less than exact description by the claim that although they cannot show the exact extent of the possession of their tenant because of an inability to locate the original fence, the present fence is located south of the original one, and therefore they claim there is no possibility that land not acquired by adverse possession would be granted to the defendants. This argument has only a superficial appeal. If accepted, the rule in *Layher* and *Pokorski* could be completely circumvented by showing that the ad-

verse claimant was only claiming less than he truly deserved. Such circumvention would certainly be inconsistent with the decision in *Pokorski*. In addition, we point out that the willingness of an adverse claimant to forgo part of his claim, or the inability to show the full extent of his claim, would at least raise some suspicion as to whether there was adverse possession.

Although we could, and do, dispose of this case on the ground of a lack of an adequate description of the property allegedly held under adverse possession, we also examine the evidence and law with regard to the claim of adverse possession on the part of the defendants and their lessee.

The law is well established in this state that one who claims title by adverse possession must prove by a preponderance of the evidence that he has been in actual, continuous, exclusive, notorious, and adverse possession under claim of ownership for a full period of 10 years. See, for example, *Berglund v. Sisler*, 210 Neb. 258, 313 N.W.2d 679 (1981); *Layher v. Dove*, *supra*; *Barnes v. Milligan*, 200 Neb. 450, 264 N.W.2d 186 (1978). In order to determine in the instant case whether Widger's possession was adverse, it is necessary to examine how the parties in question came to own their respective parcels.

Originally, both the north half of the north half and the south half of the north half of Section 4 were owned by Elmer Ellsworth Widger, Sr., the grandfather of Orville Widger. In his will Elmer Ellsworth Widger, Sr., devised the north half of the north half to Lizzie Widger, who was Orville Widger's stepgrandmother. He also left a life estate in the south half of the north half to Carl Orvil Widger, who was Orville Widger's father. After the death of Carl Orvil Widger the present owners, the defendants in this case, obtained title to the south half of the north half. Also, Russell Widger, the son of Lizzie Widger, obtained title to the north half of the north half after the death of his mother. Russell

Widger was a cousin of Orville Widger. Maridus and Terry Kinder, the children of Russell Widger, obtained title to the north half of the north half following the death of their father. The Kinders were the grantors in the deed of the property to Petsch; however, Russell Widger was apparently the last person to actually farm the ground before Petsch purchased it. We deem the evidence regarding the chain of title as set out above to be determinative, and it has the benefit of being based on relatively undisputed facts.

In support of their position, defendants invoke the rule that where a fence is constructed as the boundary line, although it is not the actual boundary line, and the parties claim ownership of land up to the fence for the uninterrupted statutory period, the parties gain title to such land by adverse possession. *Wiedeman v. James E. Simon Co., Inc.*, 209 Neb. 189, 307 N.W.2d 105 (1981); *Conkey v. Anderson Farms, Inc.*, 205 Neb. 708, 289 N.W.2d 541 (1980); *Shirk v. Schmunk*, 192 Neb. 25, 218 N.W.2d 433 (1974); *Plischke v. Jameson*, 180 Neb. 803, 146 N.W.2d 223 (1966). Defendants apparently ignore that part of the rule that states that the fence must be "constructed as the boundary line," as set out in *Wiedeman* and other cases cited above. It must be remembered that when the original fence was constructed, one man owned the land on both sides of the fence, thus casting serious doubt as to whether the fence was constructed as a boundary fence.

We acknowledge the rule that one can take possession of land under a mistaken idea of the true boundary line and still acquire it by adverse possession. *Cunningham v. Stice*, 181 Neb. 299, 147 N.W.2d 921 (1967). In other words, an adverse possessor can succeed in his claim even if he does not know he is occupying land not included in his deed or chain of title. *Converse v. Kenyon*, 178 Neb. 151, 132 N.W.2d 334 (1965). On the other hand, the rule is well established that if the adverse claimant is under no mis-

apprehension as to the location of the boundary line and does not occupy the land with the intent to own it, he will not be deemed to be an adverse possessor. For example, in *Barnes v. Milligan, supra*, the court used the adverse claimant's knowledge of the true boundary line as evidence that his claim was not adverse.

The common principle underlying these cases is intent to own the land. In Nebraska, intent to assert ownership of the property is a requirement of adverse possession even though, in most cases, it is inferred from the circumstances. *Barnes v. Milligan, supra.* Ordinarily, intent can best be determined by reference to the possessor's acts. *Berglund v. Sisler, supra*; *Nebraska State Bank v. Gaddis*, 208 Neb. 136, 302 N.W.2d 686 (1981). In fact, in most cases intent is simply inferred from the circumstances. *Barnes v. Milligan, supra.* See, also, *Barnes v. Milligan*, 196 Neb. 50, 241 N.W.2d 508 (1976).

The reason that defendants' argument regarding the construction of a fence on a mistaken boundary line is oversimplified in this case is that possession of land up to the fence only establishes defendants' intent to assert ownership, that is, possession up to the fence is a circumstance which allows the inference of intent. This, however, only satisfies one element of adverse possession. Intent satisfies the "hostile" or "adverse" requirement of adverse possession. An equally important element to be proved before title is gained through adverse possession is that the claimant must also show notice to the true owner. The notice requirement and intent requirement are independent; it is the nature of the hostile possession that constitutes the warning, i.e., notice, not the intent of the claimant when he takes possession. *Barnes v. Milligan, supra* 196; *Whaley v. Mingus*, 188 Neb. 351, 196 N.W.2d 516 (1972). More specifically, the acts of dominion over the land must be so open, notorious, and hostile as to put an ordi-

narily prudent person on notice that his lands are in the adverse possession of another. *Wiedeman v. James E. Simon Co., Inc.*, *supra*; *Shirk v. Schmunk*, *supra*; *Whaley v. Mingus*, *supra*. As a practical matter, this only requires the adverse possessor to act like a true owner toward the land. In other words, it is enough if the land is used for the purposes for which it may by its nature be adapted. *Shirk v. Schmunk*, *supra*. It should be remembered that the principal utility of this evidence of ordinary use of the land is not to demonstrate the adverse possessor's subjective intent, but rather to demonstrate that the true owner had notice of the adverse claim; thus the proviso that it is enough "that the land be devoted to the ordinary uses of the adverse claimant *provided the uses are such as to put the true proprietor on notice*." (Emphasis supplied.) *Weiss v. Meyer*, 208 Neb. 429, 433, 303 N.W.2d 765, 767 (1981).

If the instant case were based on the same type of facts as most mistaken boundary fence cases, we would have no trouble in finding the required notice under the facts of this case. In most cases the same facts which supply the inference of intent also serve to show notice, e.g., possession up to a fence constructed on a mistaken boundary. The facts in the case at bar do not do the same double duty. Certainly it is true that Widger's acts *against Petsch* were sufficient notice of adverse possession; indeed, that is the reason that Petsch brought this action. However, since Petsch had not been in possession of the property for a period of 10 years at the time of the trial, it is apparent that if Widger is to succeed, his acts must also have been sufficient notice either to his cousin, Russell Widger, or to his stepgrandmother, Lizzie Widger. A review of the record on these points is fatal to Widger's case.

It is well settled that possession of real estate by permission of the owner can never ripen into title by adverse possession unless the change of such posses-

sion has been brought home to the true owner. *Guynan v. Guynan*, 208 Neb. 775, 305 N.W.2d 882 (1981); *McDermott v. Boman*, 165 Neb. 429, 86 N.W.2d 62 (1957). This is so even where the original owner, who permitted the use, has devised the land to another, who simply continued to permit the use. See *Guynan v. Guynan, supra.*

It is also the rule that permission may be presumed under certain circumstances even though actual permission is not proved. For example, as between parties sustaining parental and filial relationships, the possession of land of one by the other is presumed to be permissive, not adverse. *Chase v. Lavelle*, 105 Neb. 796, 181 N.W. 936 (1921). See, also, *Larson v. Anderson*, 74 Neb. 361, 104 N.W. 925 (1905). Under the broad statement of the rule as set out in *Chase v. Lavelle, supra*, we believe the same rule would apply to more distant relationships such as between grandson and stepgrandmother, or between cousins. The language of *Chase* seems particularly relevant to the instant case: "We think that the evidence, perhaps, shows that he exercised such dominion over the land for about 12 years that, *as between strangers and under different circumstances*, would probably be sufficient to sustain his claim. But, when Anna Lavelle [the true owner] relinquished actual possession of this land, it was to her father, and he held it by her permission . . . . At any rate, her father's occupancy of the land was known to her and was by her permission. And the evidence pretty clearly indicates that Albert [the adverse possessor] practically succeeded to his grandfather's permissive occupancy. If so, such occupancy would not ripen into title, no matter how long continued, until actual notice was brought home to the owner that the possession was adverse." (Emphasis supplied.) *Id.* at 806-07, 181 N.W. at 939-40.

Even if the presumption of permissive possession were not appropriate in this case, there is still an alternative ground for our holding. Certainly when

the fence was constructed by Elmer Ellsworth Widger, Sr., it was not notice to himself that he was adversely possessing against himself. Carl Orvil Widger and Orville Widger both succeeded to Elmer Ellsworth Widger's interest in the property in much the same manner as Albert did to his grandfather's interest in *Chase*. Defendants would contend that once the whole north half was divided by Elmer Ellsworth Widger into the north half and the south half, the possession up to the fence by those in the south half became adverse.

We do not think that this action of dividing the north half, which action the adverse possessors in this case did not even cause to be done, should constitute a change of the possession to adverse possession sufficient to put the true owners on notice. After the division the fence stayed in the same place that it was before the division. Nor did Widger subsequently speak with the other owners about the boundary or order them off the adversely claimed property.

While it is probably true that the defendants have developed some reasonable expectations to the property, that alone cannot justify a verdict in their favor. Without notice to the owner of the north half of the north half, there could be no adverse possession. If the relationship of the former owners or the way the parties acquired their respective titles were different, a different result in this case might be proper. However, under the facts of the instant case, as set out in the record thereof, we conclude that there was no adverse possession.

A review of the record in this case has convinced us that not only was there a failure of proof as to the description of the particular property claimed to have been adversely possessed but also the evidence in the record has failed to establish adverse possession of the property by the defendants as against Petsch, although the burden of proving such adverse possession was on said defendants. For these rea-

sons, the judgment of the trial court must be, and hereby is, affirmed.

AFFIRMED.

LOUIS WEINER, APPELLANT, V. STATE EX REL. STATE REAL ESTATE COMMISSION, APPELLEE.

333 N.W.2d 915

Filed May 20, 1983. No. 82-252.

1. **Administrative Orders: Appeal and Error.** The standard of review to be employed by both the District Court and this court of an order of the Nebraska State Real Estate Commission is whether the order was supported by competent, material, and substantial evidence, and whether the order is arbitrary or capricious.
2. **Administrative Orders: Evidence.** Substantial evidence for purposes of administrative review must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury, and this is something less than the weight of evidence; and the possibility of drawing two inconsistent conclusions from evidence does not prevent an administrative agency's finding from being supported by substantial evidence.
3. **Statutes.** Whether the words of a statute are ambiguous is a question of law for the court.
4. _____. A statute is not open to construction as a matter of course, and, in the absence of anything to indicate the contrary, words must be given their ordinary meaning. It is not within our province to read a meaning into a statute that is not there, nor to read anything direct and plain out of a statute.

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

James T. Gleason of Swarr, May, Smith, Andersen & Jensen, for appellant.

Robert H. Petersen, Special Assistant Attorney General, for appellee.

McCOWN, HASTINGS, and SHANAHAN, JJ., and BRODKEY, J., Retired, and COLWELL, D.J., Retired.

HASTINGS, J.

This is an appeal of a judgment of the District

Court which affirmed an order of the Nebraska State Real Estate Commission. That order found that the plaintiff, Louis Weiner, had violated Neb. Rev. Stat. § 81-885.24(23) (Reissue 1981), and directed that Weiner's license as a real estate broker be suspended for a period of 1 year beginning November 5, 1981. The last 9 months of the suspension was stayed, during which period he was to be placed on probation.

Assigned as errors are the claims that the statute involved is not applicable to this factual situation and that the decision is arbitrary, capricious, unreasonable, and not supported by substantial evidence.

During the year 1980 the plaintiff was a real estate salesperson, licensed by the State of Nebraska, and was employed in Omaha, Nebraska, by Sed Hartman Associates, a licensed real estate broker. The arrangement between the two was that if Weiner handled a deal all by himself he was to receive 100 percent of the commission earned, but if he and Hartman handled the deal together the commission was to be split. Hartman maintained offices on the third floor of the 7801 Building on Pacific Street, and although that was the office out of which Weiner was licensed to work, he maintained an office on 36th and Dodge Streets. Working for Mr. Weiner was a secretary by the name of June Brandon who was not an employee of Hartman's.

The pertinent portion of § 81-885.24 with which we are here concerned is as follows: "The commission may . . . suspend any license . . . whenever . . . the licensee . . . has been found guilty of any of the following unfair trade practices:

. . . .

"(23) Failing by [a] . . . salesperson to place, as soon after receipt as practicable, in the custody of his or her employing broker any deposit money or other money or funds entrusted to him or her by any person dealing with him or her as the representative of his or her licensed broker . . . ."

The standard of review to be employed by both the District Court and this court is whether the order of the commission was supported by competent, material, and substantial evidence and whether the order is arbitrary or capricious. Neb. Rev. Stat. § 84-917(6) (Reissue 1981). " '[S]ubstantial evidence,' for purposes of administrative review, must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury, and this is something less than the weight of evidence; and the possibility of drawing two inconsistent conclusions from evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Wright v. State ex rel. State Real Estate Comm.*, 208 Neb. 467, 477, 304 N.W.2d 39, 44 (1981).

There was evidence in the record from which the commission could have found that sometime in the fall of 1979 Hartman and Weiner together solicited a real estate listing from the owner of the Music Box; that a sale of the property was made to the telephone company on September 5, 1980, on which date the transaction was closed and a check in the amount of $34,500, payable to Louis Weiner Real Estate for realtor's commission, was delivered to Weiner; that Hartman requested that the check be turned over to him, which was refused by Weiner, who instead, along with Hartman, went to the Security National Bank where $5,000 of the total commission was deposited to Hartman's account; that further discussion was had between the two as to a split of the commission; and that sometime on or after October 15, 1980, Weiner paid Hartman an additional $4,500 as a share of the commission on the Music Box deal. These facts formed the basis of one of the complaints.

As to the other complaint, there was evidence in the record from which it could be concluded that for the first time in January of 1981, when he received

an Internal Revenue form 1099, Hartman discovered that Century 21 Wear Co. had paid him $896; that this was for a commission on a property that Weiner had sold; that the money had been paid by means of a personal check made payable to Sed Hartman Real Estate on April 22, 1980, which had been endorsed by handwriting by "JB" and stamp endorsed for deposit to the account of Louis Weiner; and that the endorsements had in fact been placed on the check by Weiner's employee, June Brandon, without any authorization by Hartman, but that Weiner was in fact entitled to all of that commission, and Hartman made no claim to any of the $896.

Although there was some evidence to the contrary, the foregoing conclusions are supported in the record by substantial evidence.

The plaintiff's first assignment of error involves strictly a question of law. He insists that the language of the statute in question is ambiguous and that we must construe the same. Whether words of a statute are ambiguous is a question of law for the court. *Hill v. City of Lincoln*, 213 Neb. 517, 330 N.W.2d 471 (1983). He points to the language of the statute, "to place . . . in the custody of his . . . employing broker any deposit money or other money or funds entrusted to him . . . as the representative of . . . licensed broker," and then to rule No. 6 of the Nebraska State Real Estate Commission, which declares that the "Commission will not enter into disputes between licensees over payment or division of commissions," and concludes that "other money or funds," as stated in the statute, applies only to balances of purchase prices paid on closing, or escrow funds which are the property of the broker's principal.

We do not believe that "to place . . . in the custody of his . . . employing broker" and "other money or funds entrusted to him . . . as the representative of his . . . licensed broker" are restricted in their meaning, as urged by the plaintiff. A statute is not

open to construction as a matter of course, and, in the absence of anything to indicate the contrary, words must be given their ordinary meaning. It is not within our province to read a meaning into a statute that is not there, nor to read anything direct and plain out of a statute. *County of Douglas v. Board of Regents*, 210 Neb. 573, 316 N.W.2d 62 (1982). Refusing to enter a dispute over a division of fees, but requiring that the salesperson turn over all money or funds, including fees, until that dispute is resolved, are two different things. We believe that the statute is not ambiguous and is applicable to the situation here.

Having declared that, it is apparent from our discussion of the record that there was substantial evidence to support the findings of the commission. Furthermore, technical though the one violation might have been, the commission acted within the scope of its authority, and its action was neither arbitrary, capricious, nor unreasonable, and forms no basis for substituting our judgment for that of the commission. Accordingly, we feel compelled to affirm its findings.

The judgment of the District Court is affirmed.

AFFIRMED.

MARGARET G. GREGORY, APPELLEE, V. WILLIE L. DAVIS, APPELLANT.

334 N.W.2d 1

Filed May 20, 1983. No. 82-277.

1. **Paternity: Appeal and Error.** In filiation proceedings tried to the court without a jury, the findings of the trial court have the same effect as a verdict of a jury, and such findings will not be disturbed unless clearly wrong.
2. **Paternity: Proof.** The corroboration of testimony required in filiation proceedings may consist of circumstantial evidence.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Affirmed.

Paul E. Watts of Paul E. Watts & Associates, for appellant.

Clyde A. Christian, for appellee.

McCOWN, HASTINGS, and SHANAHAN, JJ., and BRODKEY, J., Retired, and COLWELL, D.J., Retired.

SHANAHAN, J.

The question before the court is the sufficiency of the evidence concerning Margaret Gail Gregory's claim that Willie L. Davis is the father of her child. Gail commenced proceedings pursuant to Neb. Rev. Stat. §§ 13-101 et seq. (Reissue 1977) for establishment of paternity. A jury was not requested, and the matter was tried to the court as a nonjury case. The District Court for Douglas County entered judgment that Davis was the father of Gail's child and ordered Davis to pay child support. Davis appeals from the establishment of paternity but does not contest the amount of child support ordered by the trial court.

The paths of the parties crossed at a local motorcycle club in Omaha, Nebraska, during the summer of 1977. It was not until the following summer, however, that Gail and Davis began to see each other rather regularly. Both worked for the same employer, and eventually their contact with each other broadened beyond meetings at their place of employment.

At first there were but joint excursions on a motorcycle, until the first real date late in November 1978. What transpired on that first outing is not disclosed in the record. The second date in November, however, found Gail and Davis at a local motel where the parties engaged in sexual relations. According to Davis, after the encounter in November of 1978, Davis' sexual activity with Gail was limited to two separate occasions, namely, intercourse once in De-

cember of 1978 and relations for the last time on January 16, 1979.

Gail's description of the relationship differs substantially from that offered by Davis. Gail acknowledged the sexual interlude at the motel in November 1978 and recounted that the intervals of intercourse increased immensely, to the point that the parties had relations with each other "most every day" during December of 1978 and January of 1979. The last sexual intercourse between the parties occurred in September 1979. Throughout the entire time, December to September, Gail had sexual relations only with Davis. In March 1979 Gail told Davis that she was pregnant. Although Davis offered to pay for an abortion, Gail refused the abortion.

Gail and Davis continued to see each other until the birth of the child in November of 1979. Before the birth, others witnessed Davis patting the stomach of Gail, who was at the time quite obviously pregnant, and asking Gail, "How's my baby?" Davis visited Gail in the hospital shortly after delivery of the child on November 18, 1979. After the birth of the child, Davis at his place of employment displayed a photograph of the youngster and on several occasions stated that he was the father of the child.

In filiation proceedings only a preponderance of the evidence is necessary to sustain establishment of paternity. See *Lockman v. Fulton*, 162 Neb. 439, 76 N.W.2d 452 (1956). The present case was tried to the District Court without a jury, and in such cases the findings of fact made by the trial court must be given the same effect as a jury verdict. As the "trier of fact," the District Court was the sole judge of the credibility of the witnesses and the weight to be given to their testimony. Among the factors entering into the trial court's resolution of any conflicts of evidence were such items as the respective interests of the parties in the lawsuit; the demeanor of witnesses, including the parties, while testifying before

the court; the apparent fairness exhibited by the witnesses; the extent to which the testimony of the various witnesses was corroborated; and the reasonableness or unreasonableness of statements of such witnesses. Cf., NJI 1.41. Our role in appellate review of the decision of the trial court was expressed in *Stauffer v. Wilson*, 182 Neb. 129, 131-32, 153 N.W.2d 454, 456 (1967): "It is not within the province of this court in a law action to resolve conflicts in or to weigh evidence. If there is a conflict in the evidence this court will review the judgment rendered, will presume that controverted facts were decided by the trial court in favor of the successful party, and the findings will not be disturbed unless clearly wrong. . . . The findings of a court in a law action in which a jury is waived have the effect of a verdict of a jury and will not be disturbed on appeal unless clearly wrong."

Davis is correct that evidence in a filiation proceeding, such as that which we are now called upon to review, must conform with the standards set forth in *Lockman v. Fulton, supra* at 443, 76 N.W.2d at 455, where it is stated: "[C]orroboration of the testimony of the prosecutrix is required." The word *corroboration*, as used in cases of this type, simply means independent evidence which tends to strengthen or otherwise to confirm the testimony of the mother of the child whose paternity is in issue. As expressed in *Lockman v. Fulton, supra* at 444, 76 N.W.2d at 456: " '[C]orroboration may consist of the proof of such surrounding facts and circumstances as will support her testimony against the accused as to the principal fact, and as will identify the accused as the party guilty of the crime. It may consist of circumstantial evidence. The conduct and demeanor of the accused may furnish such corroboration.' " *Lockman* continues at 445, 76 N.W.2d at 456: " '[A] sufficient corroboration is shown if opportunity and inclination, on the part of the defendant . . . are shown, and the circumstances

proved by other witnesses tend to corroborate the testimony of [the] prosecutrix.' . . . In other words, circumstances, if material and competent, may corroborate plaintiff's testimony, and opportunity, disposition, or inclination are circumstances which may be considered together with other material and competent facts and circumstances which tend to corroborate her testimony . . . ."

Davis never denied the fact of sexual relations with Gail but, rather, only the frequency, which, according to Gail, was "most every day" from December 1978 to and including September of 1979. Witnesses verified the conduct of Davis during Gail's pregnancy; the inquiry of Davis about the baby during such pregnancy; gifts given by Davis to Gail during her pregnancy; and the general or at least public relationship which existed between the parties before the birth of the child in November 1979. Such additional testimony of the witnesses in this case certainly fulfills the requirement that there be corroboration of Gail's testimony regarding "opportunity and inclination" on the part of Davis. See, *Lockman v. Fulton*, *supra*; *Wade v. Hicks*, 191 Neb. 847, 218 N.W.2d 222 (1974).

Davis has suggested a novel but somewhat dubious defense in this case. According to Davis, there had been but one child fathered by him as a result of his sexual relationship or intimacy with any woman before Gail. Such defense and Davis' credibility in general were found to be lacking.

The judgment of the trial court is therefore affirmed.

AFFIRMED.

Cite as 214 Neb. 413

SADALLAH (SAM) BADRAN, APPELLANT, V. VIRGINIA D. BERTRAND, APPELLEE.

334 N.W.2d 184

Filed May 20, 1983. No. 82-323.

Partnerships. It is a general rule that capital furnished by any partner, in the absence of agreement to the contrary, is a debt owing by the firm to the contributing partner, and necessarily is to be repaid him, if the firm assets are sufficient after paying the firm's liabilities to outsiders. Upon dissolution, where one has contributed capital and another services, the one contributing the capital is entitled to withdraw its value.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Affirmed.

Joseph S. Daly of Sodoro, Daly & Sodoro, for appellant.

Kirk E. Naylor, Jr., for appellee.

McCOWN, WHITE, and SHANAHAN, JJ., and BRODKEY, J., Retired, and COLWELL, D.J., Retired.

COLWELL, D.J., Retired.

Both parties pray for an accounting and distribution of partnership assets remaining after dissolution. The trial court assigned all assets to defendant, Virginia D. Bertrand, as the sole partner-contributor of capital. Plaintiff, Sadallah (Sam) Badran, appeals, claiming his personal business expertise was a contribution of partnership capital. We affirm.

The parties first met in July 1975 at Grand Island, Nebraska, where Sam was selling bedspreads and linens from his car. Shortly thereafter, the parties orally agreed to a partnership type venture, financed by Virginia and promoted by Sam, to sell Indian jewelry and other gift items. On February 12, 1976, they opened the Holdrege Gift Shop, Holdrege, Nebraska. All funds for the purchase of merchandise and early business operations were paid from Virginia's personal funds, except money generated from sales. On June 23, 1976, the parties

executed a partnership agreement, standard in form, prepared by an attorney, effective February 1, 1976, terminating in 2 years. The partnership never made a profit, and the shop was closed in January 1979 when the merchandise was moved to Omaha, Nebraska, where the parties were operating Nasr's Restaurant. Some of the Indian jewelry was displayed at Nasr's and the rest was stored in the trunk of a car owned by Virginia and possessed by Sam. There are no records of any purchases or sales in 1979. On January 7, 1980, Virginia forcibly obtained possession of all the merchandise, which she still has. This suit follows.

"An action for an accounting between partners is an equitable action and on appeal we review the matter de novo. . . .

. . . .

". . . Generally in an accounting action the burden is upon the plaintiff to establish his right to the accounting and his right to a credit on disputed items." *Barthuly v. Barthuly*, 192 Neb. 610, 611, 613, 223 N.W.2d 429, 430, 432 (1974); *Baum v. McBride*, 152 Neb. 152, 40 N.W.2d 649 (1950).

Noticeably absent from the evidence are partnership books, records, inventories, receipts, invoices, checks, and bank records, except copies of income tax forms 1065, for 1976, 1977, and 1978, showing losses totaling $49,692.

Plaintiff's only assignment of error is that the trial court failed to find that his business expertise was a contribution of capital to the partnership. His expertise is described as a vast amount of time, experience, and knowledge as a self-employed salesman.

The partnership agreement provides in part, "(5) The initial capital of the Partnership shall be One Hundred Thousand Dollars . . . and each partner agrees to contribute *cash or property* as follows:

	Amount	Percent
Virginia Bertrand	$50,000.00	50%
Sam Badran	50,000.00	50%

"(6) . . . The partners shall contribute in equal shares any additional capital that they may deem to be necessary . . . with such contributions coming from the net profits of the Partnership unless otherwise agreed.

. . . .

"(12) . . . The net profits of the business shall be divided between the partners equally and they shall in like proportion bear all losses . . . .

. . . .

"(14) . . . No partner shall receive any salary for services rendered to the partnership.

"(15) . . . If any partner shall, with the written consent of the other partners, advance any moneys . . . in excess of the capital . . . the moneys so advanced shall be considered as a loan to the partnership . . . .

. . . .

"(27) Termination: . . . The assets of the partnership shall first be used to pay . . . debts . . . . [T]he remaining assets shall be divided according to . . . their respective capital accounts . . . ." (Emphasis supplied.)

The record is clear that plaintiff contributed no money and that defendant knew that he could not do so; she expected him to contribute his money from future profits. Plaintiff contends that he contributed his business skills and expertise, which was "property." This claim being contrary to the agreement, and there being no competent evidence varying its terms, we look to the conduct of the parties. See *Bard v. Hanson*, 159 Neb. 563, 68 N.W.2d 134 (1955).

Sam had 35 years of experience as an itinerant, self-employed salesman dealing in bedspreads, rugs, and linens. He had no prior experience in Indian jewelry merchandising. His first purchases of jewelry were made through the assistance of his two brothers, who were dealers. An example of his claimed expertise was his ability to buy jewelry at one-third to one-fourth of its retail value, which

Virginia could not do. Virginia does not deny his skill as a merchant; rather, she denies that it was more than that. During the 1976-78 period, when the shop failed to make a profit, plaintiff requested of defendant and obtained money, a car, living quarters, and other family gratuities amounting to more than $80,000, a part being deemed salary by the trial court. His conduct is inconsistent with his claim.

As we view the record, plaintiff performed the services that the parties intended; those services were not unusual considering plaintiff's sales experience, skills, the attending circumstances, and bearing in mind the failure of the venture. We conclude that plaintiff made no contribution to his capital account as required and intended by the partnership agreement.

This leaves the question of the distribution of the remaining partnership assets and the settlement of the partners' rights. *Thorin v. Kurkowski*, 192 Neb. 701, 224 N.W.2d 173 (1974).

" 'It is a general rule that capital furnished by any partner, in the absence of agreement to the contrary, is a debt owing by the firm to the contributing partner, and necessarily is to be repaid him, if the firm assets are sufficient after paying the firm liabilities to outsiders.' . . .

. . . .

" '. . . [U]pon dissolution, where one has contributed capital and another services, the one contributing the capital is entitled to withdraw its value.' " *Baum v. McBride*, 152 Neb. 152, 154-55, 40 N.W.2d 649, 651-52 (1950); Neb. Rev. Stat. § 67-340 (Reissue 1981).

Plaintiff contends that he contributed bedspreads and rugs valued at $6,000. The record shows that defendant paid him $2,800 for these items.

There is little conflict in the following. From September 1975 to December 13, 1978, Virginia paid from personal funds for the purchase of partnership merchandise more than $65,000, and she also ad-

vanced more than $8,800 for equipment, supplies, rent, and utilities, for a total of $73,800. All such payments were made with Sam's knowledge and consent. The ending inventory shown on the 1978 income tax return was $65,600.

There is great conflict in the evidence concerning additional advancements made by Virginia to Sam amounting to more than $80,000. The trial court found a part of these advancements was salary and a partnership debt. Sam admits that during the 1977-78 period he received about $40,000 from Virginia; however, he claims that the money represented either gifts or payment of nonpartnership services. The $40,000 was paid in regular monthly payments, averaging about $1,500 at a time, when Sam had no other source of income and he told Virginia he needed the money for his family.

" 'On an appeal from a judgment in equity, when credible evidence on material questions of fact is in conflict, the Supreme Court will consider the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the other.' " *Truman v. Martin*, 212 Neb. 52, 55, 321 N.W.2d 420, 423 (1982).

We conclude that the $40,000 was a partnership debt owing to the defendant for remuneration paid to plaintiff.

Defendant's contribution of the required $50,000 capital and other advancements of $63,800 make her total contribution $113,800. " 'In settling accounts between partners after dissolution, the following rules shall be observed, subject to any agreement to the contrary: * * * (b) The liabilities of the partnership shall rank in order of payment as follows: (I) Those owing to creditors other than partners, (II) Those owing to partners other than for capital and profits, (III) Those owing to partners in respect of capital . . . .' " *Conklin v. Randolph*, 204 Neb. 332, 340, 281 N.W.2d 913, 917 (1979); § 67-340.

There being no partnership debts and the last

known partnership record value of the assets being $65,600, the trial court properly assigned all remaining partnership assets to defendant.

AFFIRMED.

FRED BEEKMAN, APPELLANT, V. CORNHUSKER FARMS, A PARTNERSHIP, APPELLEE.

333 N.W.2d 918

Filed May 20, 1983. No. 82-332.

1. **Contracts.** An agreement partly written and partly oral may, in legal effect, be regarded in its entirety as a parol contract.
2. **Contracts: Limitations of Actions.** A cause of action is not on an "agreement, contract or promise in writing" within the meaning of Neb. Rev. Stat. § 25-205 (Reissue 1979), providing that an action on any "agreement, contract or promise in writing" can only be brought within 5 years, merely because it is in some way remotely or indirectly connected with the instrument or because the instrument may be a link in the chain of evidence establishing a cause of action.
3. _____: _____. In order for an action to be on an "agreement, contract or promise in writing" within the meaning of Neb. Rev. Stat. § 25-205 (Reissue 1979), providing that an action on any "agreement, contract or promise in writing" can only be brought within 5 years, it must in itself contain a contract or promise to do the thing for nonperformance of which the action is brought.
4. _____: _____. A contract is not an "agreement, contract or promise in writing" within the meaning of Neb. Rev. Stat. § 25-205 (Reissue 1979), providing that an action on any "agreement, contract or promise in writing" can only be brought within 5 years, unless it can be wholly proved by a writing or writings; and if there is anything that must be supplied by parol evidence to make it a binding obligation, it is not an "agreement, contract or promise in writing."
5. _____: _____. An action is not upon an "agreement, contract or promise in writing" within the meaning of Neb. Rev. Stat. § 25-205 (Reissue 1979) if the writing relied upon as the basis of the action contains no promise to do the thing for nonperformance of which the action is brought or states no fact from which the law applies an obligation to do that thing.

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

James G. Sharp of Everson, Noble, Wullschleger, Sutter, Sharp & Korslund, for appellant.

C. Kenneth Spady of McQuillan & Spady, P.C., for appellee.

BOSLAUGH, WHITE, and CAPORALE, JJ., and BURKHARD and FINN, D. JJ.

FINN, D.J.

This is an appeal from the District Court of Chase County, Nebraska. The District Court found for the defendant and against the plaintiff on a contract suit. Plaintiff, in his amended petition, makes claim against the defendant for services rendered pursuant to a written contract. The defendant answered by pointing out, as an affirmative defense, that some of the work done by the plaintiff was not work done under the written agreement and that since the suit was filed more than 4 years after the last payment was made on the agreement the action was barred by the statute of limitations. The District Court made specific findings to the effect that there were modifications to the written contract which were parol, and parol proof was required to prove the modifications. The District Court applied the rule classifying contracts as parol where parol evidence is required to prove the contract. The court then found that the claim of plaintiff was barred by the statute of limitations.

Plaintiff, Fred Beekman, assigns as error the following: (1) The court erred in applying the statute of limitations to the claim of plaintiff for the reason that all work performed by the plaintiff for defendant in 1975 was work done under the agreement. (2) The court erred in finding that modifications to the contract were parol; therefore, the contract is classified as a parol contract.

In 1974 Fred Beekman performed custom farming work for the defendant, Cornhusker Farms, Inc., under a verbal agreement. In the spring of 1975 the

parties entered into a written custom farming agreement, wherein the plaintiff agreed to farm approximately 20 circles of real estate for defendant. This agreement sets forth standard charges per acre for discing, cultivating, offset discing, application of anhydrous fertilizer, rotary hoe, planting corn, picking corn, harvesting (combining), stacking hay, and silage (forage chopping). Evidence submitted at the time of the trial would indicate plaintiff had the agreement drafted, and did so at the request of the Union Bank & Trust Company of Lincoln, Nebraska, because it was about to make a loan so that the plaintiff could purchase additional equipment. As it turned out, during the course of the summer, defendant had more circles of real estate to farm than the 20 circles referred to in the agreement. Some of the farming was done by the plaintiff and some by other custom farmers.

During the course of the farming season, plaintiff and defendant's manager agreed upon the amount of work which had been done, and the agreement was placed on a "purchase order" or "ticket."

A comparison of exhibits 2 and 3, exhibit 3 containing an itemization of the work plaintiff alleges he did for the defendant, with exhibit 1, the custom farming agreement, would indicate that the plaintiff did work for the defendant which was not contemplated under the custom farming agreement. Exhibit 2 is an assignment of interest dated May 30, 1975. This assignment purports to pay to Union Bank & Trust Company a security interest in moneys which are due and will be due for farming services performed by Beekman on 39 quarters for Cornhusker Farms. The custom farming agreement, dated April 22, 1975, referred to farming about 20 circles of real estate. The record would reflect that parol proof was required to prove the subsequent parol agreements for the subsequent modifications to the written custom farming agreement. The question, then, is whether parol modification of a written agreement

results in the entire agreement being treated as a parol agreement for purposes of the statute of limitations.

In *Naeve v. Shea*, 128 Neb. 374, 380, 258 N.W. 666, 668 (1935), the court said: " 'A contract partly in writing and partly oral is, in legal effect, an oral contract. It occurs where an incomplete writing, or one expressing only a part of what is meant, is by oral words rounded into the full contract; or where there is first a written contract, and afterwards it is changed orally.' "

The court cited *Naeve v. Shea* in *Grant v. Williams*, 158 Neb. 107, 114, 62 N.W.2d 532, 536 (1954), wherein this court said: "A contract is unwritten if it cannot be wholly proved by a writing or writings. If there is anything that must be supplied by parol evidence to make it a binding obligation an action upon it is not one on a written instrument. . . ."

. . . .

". . . '* * * if the contract be partly oral and partly in writing or if a written agreement is so indefinite as to necessitate a resort to parol testimony to make it complete, the * * * statute of limitations concerning "contracts not in writing" would be applicable just as though the contract had rested entirely in parol.' "

The record in this case clearly reflects that the custom farming agreement was either modified by subsequent parol agreements which could only be proved by parol evidence or that the claims of plaintiff against the defendant were based upon separate and independent parol agreements; and in either event it would be this court's holding that if the contract be partly oral and partly in writing and the terms thereof so indefinite as to necessitate parol testimony, the statute of limitations pertaining to parol agreements is applicable.

For this reason this court affirms the decision of the lower court.

AFFIRMED.

CONTINENTAL OIL COMPANY, APPELLEE, V. SHELDON J. HARRIS, APPELLANT.

333 N.W.2d 921

Filed May 20, 1983. No. 82-453.

1. **Judgments.** The office of an order nunc pro tunc is to correct a record which has been made so that it will truly record the action had, which through inadvertence or mistake was not truly recorded.
2. _____. It is not the function of an order nunc pro tunc to change or revise a judgment or order, or to set aside a judgment actually rendered, or to render an order different from the one actually rendered, even though such order was not the order intended.
3. _____. An order nunc pro tunc cannot be used to enlarge the judgment as originally rendered or to change the rights fixed by it.
4. _____. An order nunc pro tunc cannot be employed where the fault in the original judgment is that it is wrong as a matter of law, nor can it be employed to allow the court to review and reverse its action with respect to what it formerly did or refused to do.
5. _____. An order nunc pro tunc may be supported by the judge's notes, court files, or other entries of record. It may also be based upon other evidence, oral or written, which is sufficient to establish that the order is required to make the record reflect the truth.

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

Harris, Feldman, Stumpf & Pavel, for appellant.

Thompson, Crounse and Pieper, for appellee.

KRIVOSHA, C.J., WHITE, CAPORALE, and SHANAHAN, JJ., and EMPSON, D.J.

CAPORALE, J.

Sheldon J. Harris, defendant in the court below, appeals from the denial of his motion to vacate a purported order nunc pro tunc. We reverse.

This litigation was instituted by Continental Oil Company (Conoco), appellee herein, to foreclose a real estate mortgage on a parcel of land owned by Harris. At the sheriff's sale following the entry of a decree of foreclosure, Conoco made a purchase bid of $17,607.55. The trial court refused to confirm that

sale on the basis that the bid was inadequate. At a second sale, held on July 22, 1980, Conoco bid a purchase price of $16,686.33; this sale was confirmed by the trial court. However, Harris' subsequent "Motion for Rehearing" (sic) was sustained and a new trial granted. Following that second trial the court below, on July 2, 1981, entered an order providing, among other things, as follows:

"UPON CONSIDERATION, the Court finds that the assessed value of said property is $71,000.00; that there was expert testimony as to value in varying amounts.

"The Court finds from the evidence that the mortgaged premises which was sold at sheriff's sale, had a fair and reasonable value equal to or greater than the amount of the Decree, which was in the amount of $34,783.92, plus costs.

"IT IS THEREFORE, CONSIDERED, ADJUDGED AND ORDERED, that the Order of this Court dated November 19, 1980 be, and hereby is, vacated and set aside.

"IT IS FURTHER ORDERED, that a sale in the amount of $34,783.92, plus the costs of this action be, and hereby is, confirmed by the Court and upon payment of that amount through the Clerk of the District Court the Sheriff of Douglas County, Nebraska is directed to execute and deliver a proper deed in conformity therewith."

Thereafter, Conoco filed a motion for a new trial which asserted, among other grounds: "That in finding that the mortgage premises had a fair and reasonable value equal to or greater then [sic] the amount of the decree, and confirming the sale in the amount of the original decree, the Court ignored the fact that there are outstanding and unpaid real estate taxes upon the mortgage premises, which are not taken into account in the sale amount set forth in the Court's Order of July 2." This motion was heard on August 25, 1981; on August 31, 1981, the court below, without at that time ruling on Conoco's motion

for new trial, entered a purported order nunc pro tunc providing, among other things:

"IT IS THEREFORE CONSIDERED, ORDERED, ADJUDGED AND DECREED that the Court's administrative Order of July 2, 1981, heretofore entered, is modified to the extent that a sale in the amount of $34,783.92, plus the costs of this action, less the amount of the taxes and special assessments outstanding and unpaid on the property as of the date of this Order be, and hereby is, confirmed by the Court . . . ."

Conoco then filed a motion again seeking confirmation of the sheriff's sale held on July 22, 1980, modifying its bid to conform to the purported order nunc pro tunc. Subsequently, Harris filed a motion to vacate the purported order nunc pro tunc. This appeal was taken from the denial of that motion.

Harris assigns as error that the trial court's use of an order nunc pro tunc to correct a judicial, as opposed to a clerical, error was improper; this assignment is correct.

The rules set forth in *Larson v. Bedke*, 211 Neb. 247, 318 N.W.2d 253 (1982), *modified* 212 Neb. 134, 322 N.W.2d 367 (1982), control this case. In summary, *Larson* holds that the office of an order nunc pro tunc is to correct a record which has been made so that it will truly record the action had, which through inadvertence or mistake was not truly recorded. It is not the function of an order nunc pro tunc to change or revise a judgment or order, or to set aside a judgment actually rendered, or to render an order different from the one actually rendered, even though such order was not the order intended. An order nunc pro tunc cannot be used to enlarge the judgment as originally rendered or to change the rights fixed by it. Neither can it be employed where the fault in the original judgment is that it is wrong as a matter of law, nor can it be employed to allow the court to review and reverse its action with respect to what it formerly did or refused to do.

We have previously said that an order nunc pro tunc may be supported by the judge's notes, court files, or other entries of record. It may also be based upon other evidence, oral or written, which is sufficient to establish that the order is required to make the record reflect the truth. *Fisher v. Minor*, 159 Neb. 247, 66 N.W.2d 557 (1954).

The purported order nunc pro tunc changed the rights fixed by the so-called "administrative" order entered July 2, 1981, by, in effect, changing the minimum amount Conoco was required to bid by a sum equal to the taxes and special assessments outstanding. We have nothing before us which demonstrates that the trial court's order of July 2, 1981, whether correct or not, did anything other than to record what the trial judge intended to decree at that time. That being so, any error in that order is a judicial and not a clerical one. Such error cannot be corrected by an order nunc pro tunc.

In view of that determination Harris' remaining assignment of error, that the trial court erred in confirming a foreclosure sale to the mortgagee for an amount less than its foreclosure decree, need not be addressed.

Accordingly, the order of the trial court overruling Harris' motion to vacate and set aside the order nunc pro tunc is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

IN RE INTEREST OF MARDI AND MENDI BIESECKER, CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. MARLENE BIESECKER, APPELLANT.

333 N.W.2d 923

Filed May 20, 1983. No. 82-455.

1. **Parental Rights.** When natural parents cannot rehabilitate them-

selves within a reasonable time after the adjudication hearing, the best interests of the children require that a final disposition be made without delay.

2. **Juvenile Courts: Appeal and Error.** An appeal of a juvenile proceeding to this court is heard de novo upon the record; and the findings of fact by the trial court will be accorded great weight because the trial court heard and observed the parties and witnesses. The trial court's findings will not be set aside on appeal unless they are against the weight of the evidence or there is a clear abuse of discretion.

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

William G. Line of Kerrigan, Line & Martin, for appellant.

Dean Skokan, Dodge County Attorney, and Marianne Clifford Upton, for appellee.

Richard L. Kuhlman, guardian ad litem.

Thomas B. Thomsen, acting guardian ad litem.

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

PER CURIAM.

Marlene Biesecker became involved with the juvenile authorities on January 26, 1980, at 2 a.m., when she was found passed out in a running automobile in a traffic lane at 16th and Bell Streets in Fremont, Nebraska. She was arrested for driving while intoxicated and failed a preliminary breath test. The officers discovered that Marlene had two children, approximately 9 and 7 years of age, at her home alone. At about 2:30 a.m. the officers arrived at the house. Color photos taken at that time indicated a condition incredibly disorderly and filthy. The scene can best be described as a two-story menage of scattered clothing, garbage, cat and dog feces, litter, dirty pots, pans, and dishes, remains of beer and vodka containers, burned and discarded food, sexually explicit magazines, dirty bed clothing, and odds and ends difficult to describe. This was the sixth arrest

for driving while intoxicated. The children were taken into the temporary custody of the social services department and a petition was filed in the county court that Mendi, born March 12, 1973, and Mardi, born August 14, 1970, lacked proper parental care by reason of the fault or habits of a parent. On April 24, 1980, Marlene appeared with counsel and admitted the allegations of the petition. A court-appointed guardian ad litem, Richard Kuhlman, also appeared and joined in the admissions. The court continued the matter pending preparation of a rehabilitation plan.

On April 29, 1980, at the disposition hearing, the children were ordered placed with Dodge County Social Services in foster care for 6 months, and the court ordered a rehabilitation plan with monthly reports of progress and visitation, and ordered that if satisfactory progress was made the children should be returned to Marlene.

On September 3, 1980, the children were ordered returned to Marlene's custody. The order required evaluations, alcohol treatment, and continuing improvement in housekeeping. The evaluations indicated somewhat emotionally and physically deprived children. Marlene freely admitted being an alcoholic and described animosity toward her father, stepmother, and brother. She entered an alcohol treatment center and was asked to leave. She voluntarily entered the alcohol treatment facility at the Hastings Regional Center. After release from the hospital she abstained from alcohol for 1 week and then resumed drinking. Since that time there have been a series of short abstinences and a return to the habits of the past.

The return of the children was short-lived. Marlene resumed drinking and, on inspection, the home was found to be in the same condition as it was found to be in January 1980. The children were returned to foster care in November and have been in foster care since that time.

In January 1982 Marlene was arrested for the seventh time for driving while intoxicated and was charged with a third offense, pled guilty, and was sentenced to a term of 1 to 3 years at an institution of the Department of Corrections in York, Nebraska, in March 1982.

The court has repeatedly prepared rehabilitation plans and Marlene has repeatedly signed those plans. She has been supervised by a variety of people, counseled by alcohol counselors and social workers, and evaluated by a psychiatrist. Marlene has violated repeatedly each and every plan. While all examiners are unanimous in their view that Marlene is an alcoholic and cannot with safety be allowed to have custody of her children, Marlene remains adamant in her refusal to attend AA meetings or to stop drinking. She has made great progress in keeping a house, only to have that progress evaporate and the housekeeping revert to its old form.

"[W]hen natural parents cannot rehabilitate themselves within a reasonable time after the adjudication hearing, the best interests of the children require that a final disposition be made without delay." *In re Interest of Kain*, 209 Neb. 229, 235, 307 N.W.2d 119, 123 (1981).

The conviction, sentence, and the return to drinking were the reasons given for the order terminating parental rights.

Counsel for Marlene and one of the two guardians ad litem for the children strenuously urge us to consider that Marlene's alcoholism did not prevent her from securing and keeping both a full-time and a part-time job, that she genuinely loves her children, and that termination may be punishing her for a disease and the result of recommendations by disenchanted welfare workers.

There is not present in this record even the slightest sliver of evidence sufficient even to convey a ray of hope that alcohol will not always raise a barrier between Marlene and her children.

We, as were the juvenile court and the District Court, are faced with that dilemma, so common to juvenile cases, of the specter of termination or the limbo of permanent foster care, since custody is not even remotely possible.

The best interests of the children seemed to the juvenile court and the District Court to require termination. We reluctantly agree. "An appeal of a juvenile proceeding to this court is heard de novo upon the record; and the findings of fact by the trial court will be accorded great weight because the trial court heard and observed the parties and witnesses. Also, the trial court's findings will not be set aside on appeal unless they are against the weight of the evidence or there is a clear abuse of discretion." *In re Interest of Kain, supra* at 233, 307 N.W.2d at 122. Childhood is a fragile and vital moment of a life. To require that moment to be spent subject to the whims of an unpredictable and unrepentant practicing alcoholic would be foolish and cruel. We affirm.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DAVID L. HUFFMAN, APPELLANT.

334 N.W.2d 3

Filed May 20, 1983. No. 82-546.

1. **Criminal Law: Appeal and Error.** In determining the sufficiency of the evidence to sustain a conviction in a criminal prosecution, this court does not resolve conflicts in the evidence, pass upon the credibility of the witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of the facts, and its verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
2. **Verdicts: Appeal and Error.** On appeal this court will not interfere with a guilty verdict based upon evidence in a criminal case unless that evidence is so lacking in probative force that it can be said that, as a matter of law, the evidence is insufficient to support a verdict of guilty beyond a reasonable doubt.

3. **Convictions: Proof.** A conviction may rest on the uncorroborated testimony of an accomplice.

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

Robert J. Cashoili, for appellant.

Paul L. Douglas, Attorney General, and Dale A. Comer, for appellee.

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

HASTINGS, J.

Upon a trial to the court, a jury having been waived, the defendant, David L. Huffman, was convicted in the District Court of the Class III felony offense of burglary and was sentenced to a term of imprisonment of from 3 to 10 years. The only assignment of error on his appeal to this court is that there was insufficient evidence to prove the defendant guilty beyond a reasonable doubt.

The rule in this state is that in determining the sufficiency of the evidence to sustain a conviction in a criminal prosecution, this court does not resolve conflicts in the evidence, pass upon the credibility of the witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of the facts, and its verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. True*, 210 Neb. 701, 316 N.W.2d 623 (1982). In other words, we will not interfere with a guilty verdict based upon evidence in a criminal case unless that evidence is so lacking in probative force that it can be said that, as a matter of law, the evidence is insufficient to support a verdict of guilty beyond a reasonable doubt. *State v. Brown*, 213 Neb. 68, 327 N.W.2d 107 (1982).

The defendant argues that the appropriate rule should be that this court, on appeal, must determine whether the record evidence could reasonably sup-

port a finding of guilt beyond a reasonable doubt. He goes on to say: "The relevant question is not whether the courts believe that the evidence at the trial establishes guilt beyond a reasonable doubt, but it is whether, after viewing all the evidence in light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Brief for Appellant at 9-10. This rule was taken from *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979), a federal habeas corpus proceeding where the petitioner claimed that he had been convicted in a state court upon insufficient evidence. The Supreme Court described the appropriate constitutional standard in such a proceeding in the following language: "But this inquiry does not require a court to 'ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt.' *Woodby v. INS*, 385 U.S., at 282 [87 S. Ct. 483, 17 L. Ed. 2d 362 (1966)] (emphasis added). Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Emphasis in original.) *Id.* at 318-19. The defendant's argument to the contrary notwithstanding, we find nothing in that rule inconsistent with or different from the one earlier cited.

An examination of the record leaves no doubt but that the Continental Grain Elevator at Brownville, Nebraska, was broken into during the late evening hours of November 8, 1980, or on the early morning of November 9, and that approximately $75 was missing. The defendant in his brief concedes the fact of the break-in. According to the testimony of William Vinsin, a confessed accomplice, he and the defendant broke into the elevator around 11 o'clock in the evening, crossed the Missouri River bridge, and entered the State of Missouri, where they threw a money pouch taken from the elevator into a

wooded area. The defendant denies any complicity in the burglary but does admit to accompanying Vinsin into the State of Missouri, where they got into some sort of an altercation and were chased back across the bridge into Nebraska.

A conviction may rest on the uncorroborated testimony of an accomplice. *State v. Oglesby*, 188 Neb. 211, 195 N.W.2d 754 (1972). The trial court chose to believe the testimony of Vinsin rather than that of the defendant, and under that view of the evidence there was a rational theory of guilt which supported the judgment of guilty beyond a reasonable doubt.

The statutory penalty provided for this offense is a term of imprisonment of not less than 1 year nor more than 20 years, or a $25,000 fine, or both such fine and imprisonment. A sentence within the statutory limits will not be set aside on appeal absent an abuse of discretion. The defendant has had 25 convictions during the past 18 years, for intoxication, driving while intoxicated, disturbing the peace, assault, resisting arrest, larceny, insufficient fund check, accessory to burglary, and various traffic offenses. The sentence in this case does not reflect any abuse of discretion on the part of the trial judge.

The judgment and sentence of the District Court are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RICK T. EVANS, APPELLANT.

334 N.W.2d 5

Filed May 20, 1983. No. 82-579.

1. **Verdicts: Appeal and Error.** This court will not interfere on appeal with a finding of guilt based on evidence unless it is so lacking in probative force that we can say as a matter of law that it is insufficient to support such finding beyond a reasonable doubt.
2. **Convictions: Proof.** A conviction may rest solely on circumstantial evidence.

3. **Sentences: Appeal and Error.** A sentence imposed within the statutory limits will not be disturbed on appeal absent an abuse of discretion.
4. _____: _____. Information as to alleged discriminatory sentencing not appearing in the record may not be considered by this court on appeal.

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

Anthony S. Troia, for appellant.

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

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

HASTINGS, J.

The defendant, Rick T. Evans, has appealed from a conviction of the February 19, 1982, felony offense of delivery of cocaine, a violation of Neb. Rev. Stat. § 28-416(1)(a) and (2)(a) (Cum. Supp. 1982). The trial was to the court alone, a jury having been waived, and the defendant was sentenced to a term of imprisonment of 1 year. On appeal to this court he assigns as error only that the State failed to prove beyond a reasonable doubt that the defendant did in fact actually deliver the cocaine. Although not assigned as error, the defendant also objects to the court's failure to grant probation and protests the sentence as being excessive.

"This court will not interfere on appeal with a finding of guilt based upon evidence unless it is so lacking in probative force that we can say as a matter of law that it is insufficient to support such finding beyond a reasonable doubt." *State v. Hilpert*, 213 Neb. 564, 575, 330 N.W.2d 729, 736 (1983).

The evidence in this case is relatively simple and straightforward. Only two witnesses testified, both of whom were drug investigators for the Nebraska State Patrol. The defendant did not testify.

Prior to defendant's arrest on February 19, 1982, the first drug investigator testified that he had been dealing in cocaine with a bartender at a certain Omaha restaurant. Arrangements had been made with the bartender to purchase 2 grams of cocaine for $200. The witness saw the bartender come into the restaurant at 5:20 p.m. on that date. The investigator had in his possession one $100 bill and five $20 bills, upon which he had placed his initials. He remained at the restaurant until the defendant arrived at approximately 10:45 p.m.

According to the witness, the defendant immediately went into the restroom, followed by the bartender. The bartender then came right back out, said "He's got it, he's got the coke," asked the investigator for the money, and was given $200, including five of the marked bills. The witness observed no one else enter or leave the restroom. The bartender then reentered the restroom, came back out in about 3 minutes, and handed the witness a sealed plastic bag containing white powder. This was later identified as cocaine. The defendant came out of the restroom shortly thereafter, and the witness, using a body transmitter, advised other officers to arrest the defendant, which they did.

This witness identified exhibit 2 as a photocopy of the marked money which he had given the bartender to purchase the cocaine from the defendant. The other investigator who testified said that in response to the request from the first investigator, he had arrested the defendant in the lobby area of the restaurant and had taken from the defendant's person certain currency which was represented by the photocopy.

Reading the testimony of the two witnesses together, we believe that the trier of the facts could come to no conclusion but that the defendant delivered cocaine to the bartender in return for the payment of $200. A conviction may rest solely on circumstantial evidence. *State v. Keeton*, 199 Neb.

405, 259 N.W.2d 277 (1977). Certainly the evidence is sufficient to warrant our affirmance of the trial court's findings on the basis of the rule laid down in *Hilpert*.

The crime of which the defendant was convicted is a Class II felony, § 28-416(2)(a), the penalty for which is imprisonment for a minimum term of 1 year or a maximum term of 50 years, Neb. Rev. Stat. § 28-105 (Reissue 1979). We have repeatedly held that a sentence imposed within the statutory limits will not be disturbed on appeal absent an abuse of discretion. *State v. Kelly*, 207 Neb. 295, 298 N.W.2d 370 (1980).

The defendant argues that although the sentence was within the statutory limits, the codefendant, the bartender, received a lesser penalty. The answer to that contention is simply that the record is devoid of any such information and we cannot consider that claim. *State v. Kramer*, 203 Neb. 658, 279 N.W.2d 634 (1979). The record discloses no abuse of discretion on the part of the trial court.

The judgment and sentence of the District Court are affirmed.

AFFIRMED.

RICHARD L. EMRY, APPELLEE, V. AMERICAN HONDA MOTOR CO., INC., A CORPORATION, AND RAMER MOTORS, A CORPORATION, APPELLANTS.

334 N.W.2d 786

Filed May 27, 1983. No. 82-050.

1. **Courts: Judgments.** Courts of general jurisdiction possess inherent power to vacate and modify their own judgments at any time during the term at which they were pronounced. This power exists entirely independent of any statute. It is derived from the common law. At common law, judgments were subject to vacation or modification only during the term in which rendered.
2. **Judgments.** After the final adjournment of the term of court at which a judgment has been rendered, the court has no authority or

power to vacate or modify the judgment except for the reasons stated and within the time limited in Neb. Rev. Stat. § 25-2001 (Reissue 1979).

3. _____. In an action to vacate judgment after the adjournment of the term, the applicant must allege and prove that he exercised due diligence and that his failure to secure a proper decision was not due to his fault or negligence.
4. _____. Unavoidable casualty alone does not provide a basis for vacating a judgment after term. That casualty must also be one preventing the party from prosecuting or defending.
5. _____. Lack of diligence or negligence of counsel is not an unavoidable casualty or misfortune.
6. **Attorneys at Law.** Practicing attorneys of other states may be admitted to practice in this state for the purpose of conducting professional business upon the showing that they have associated and appearing with them in the action an attorney who is a resident of Nebraska duly and regularly admitted to practice in the courts of record of this state upon whom service may be had in all matters connected with said action with the same effect as if personally made on such foreign attorneys within this state. Neb. Rev. Stat. § 7-103 (Reissue 1977).
7. **Court Rules: Notice.** Under Douglas County District Court rule 12C the service of notice of an order to show cause and knowledge on the part of local counsel of such order is sufficient compliance with such court rule.
8. **Attorneys at Law.** The purpose of resident counsel joining with nonresident counsel is to insure that the nonresident counsel will be associated with a counsel involved in the litigation who is knowledgeable and familiar with the laws and practices of this state. A resident lawyer should not permit his or her name to be affixed to pleadings or briefs unless he or she intends to be involved in the litigation and familiar with the actions taken by nonresident counsel.
9. **Judgments: Equity.** Neb. Rev. Stat. § 25-2001 (Reissue 1979) is not the exclusive remedy for vacating a judgment after the term has expired, but is concurrent with an independent equity jurisdiction. However, to proceed in equity the litigant must show that he is without a remedy at law. Equity will not afford relief if the complainant has a remedy by statutory proceeding in the original action, and to be entitled to equitable relief a party must not have neglected to avail himself of the statutory remedy.

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

Wayne J. Mark of Fraser, Stryker, Veach,

Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellant American Honda.

R. M. Dustin, for appellant Ramer Motors.

Thomas A. Gleason of Dolan, Davis & Gleason, for appellee.

BOSLAUGH, MCCOWN, and HASTINGS, JJ., and BRODKEY, J., Retired, and RIST, D.J.

BRODKEY, J., Retired.

Defendants below, American Honda Motor Co., Inc. (hereinafter referred to as Honda), and Ramer Motors (hereinafter referred to as Ramer), appeal to this court from an order entered by the District Court for Douglas County vacating an order of dismissal entered at a prior term of the court and reinstating the case to the trial docket, the petition for vacating such prior order of dismissal having been filed and the hearings thereon held during a subsequent term of that court.

On September 5, 1980, the plaintiff below, Richard L. Emry, appellee in this appeal, filed a petition under the provisions of Neb. Rev. Stat. § 25-2001 (Reissue 1979) to vacate an order of dismissal entered on May 2, 1980, at a prior term of court, because of want of prosecution. Plaintiff's original case, filed June 26, 1975, sought damages for personal injuries to the plaintiff, alleging negligence, breach of implied warranty, and strict tort liability as theories of recovery against Honda and Ramer.

The issues actually tried in the court below were: (1) Whether the circumstances of the death of plaintiff's Minnesota counsel constituted an unavoidable casualty under § 25-2001(7); (2) Whether the local District Court rule 12C of Douglas County requires that the order to show cause be mailed to counsel residing outside of the State of Nebraska, where local counsel has been retained, and whether such failure to do so constitutes omission, neglect, or mistake of the clerk of the court under § 25-2001(3);

(3) Whether the evidence was sufficient for a finding by the court under its equity powers that just cause existed to warrant vacation of the order of dismissal and reinstatement of the case on the regular trial docket; and (4) Whether the attorneys for the plaintiff should be required to produce for inspection and review by the defendants and their attorneys all the files and file material relating to the cause, or whether the attorneys' files were protected by the attorney-client privilege.

In its order entered on November 4, 1981, the court granted the petition of the plaintiff to vacate the dismissal order of May 2, 1980, and stated: "It is therefore ordered that the Court's Order of May 2, 1980, dismissing the above-captioned cause for want of prosecution, be and hereby is vacated and set aside and the above-captioned case be and hereby is ordered restored to the list of active cases of this Court."

The court also specifically ruled in that order that the files of plaintiff's counsel were not available for production for the reason that they were confidential files of the lawyer and his client and the court's requiring their production to opposing counsel could jeopardize the rights of the plaintiff and grant the defendants an improper advantage.

In announcing his reasons for his decision, prior to the actual entering of the order in question, the trial judge stated: "Section 25-2001, subparagraph (3) . . . says that a District Court shall have power to vacate or modify its own judgments or orders after the term in which said judgment or orders were made for three causes. For mistake, neglect, or omission of the clerk, and the Court finds that under that section, why, the order dismissing the above-captioned cause entered on May the 2nd of 1980 be and hereby is vacated and set aside and the above case is restored to the trial list."

The trial judge did not specifically mention in his comments his power to vacate under general equita-

ble principles, but undoubtedly considered them, as he stated: "I know that our court rules say that the Daily Record shall be the official notification, but the way the whole thing is handled and run through, why, where there was other counsel of record, and they were not notified by postcard as they were supposed to be, why, I think in the—for the proper administration of justice and fairness of justice, the plaintiff should have his day in court." Defendants thereafter perfected their appeal to this court.

A review of some of the pertinent facts of this case will be helpful. It should be noted that Emry's original counsel, who filed the products liability case against the defendants, withdrew very early in the case, did so with Emry's consent, and did so of record. Emry thereafter obtained new counsel to represent him in the case, the law firm of Taylor & Malone in Minnesota, and Leonard Shefren, who was appointed by them to be their local counsel in Omaha. It appears that Shefren filed a written appearance in the action on behalf of himself and his cocounsel, Taylor & Malone.

Defendants shortly thereafter commenced discovery procedures in the case, and, except for the appearance of Shefren at an examination of the motorcycle, the attorneys for Emry did not respond to defendants' request for discovery. Because of this lack of participation, at least of record, an order to show cause why the case should not be dismissed for want of prosecution was entered on October 7, 1977. Shefren made a timely response to this order, representing to the court that the plaintiff was awaiting expert opinion and the disposition of a companion case in federal court.

Therefore, and without resistance by the defendants, the case was stricken from the dismissal docket. Notwithstanding the fact that the record reveals that such expert opinion became available and the companion case was settled early in the year 1978, there was no further action on this case.

Thereafter, a second order to show cause was issued by the court in February of 1980.

It appears that during this period of inaction several things occurred. First, Emry's principal attorney, William Taylor of Minnesota, became very ill and died in July of 1978. Taylor's partner, Malone, then began to distribute some of Taylor's cases to other attorneys for the reason that he could not handle them all. He contracted Omaha attorney Daniel Dolan and requested that he handle Emry's case because of the fact that Dolan was experienced with the litigation, having handled and settled the companion case in federal court.

Malone forwarded Emry's file to Dolan on August 31, 1979. However, Dolan testified that he did not accept representation of Emry until July of 1980 because he wanted further information with reference to Emry's injuries before accepting the case. When he finally decided to accept the representation of the plaintiff, he found that the case had been dismissed on May 2, 1980, pursuant to the February order to show cause.

He then filed a petition to vacate the dismissal, based upon the unavoidable casualty of Taylor's death and its attendant confusion. Later, he filed a second amended petition to include mistake, neglect, or omission of the clerk in failing to mail notice of the order to show cause to Taylor & Malone in Minnesota.

It should be noted that at no time did Shefren, Taylor, or Malone formally withdraw of record from this case.

While the record in this case is fairly lengthy, there appears to be little in dispute as to the facts. There is obviously no dispute as to the fact that William Taylor, Minnesota counsel, died, with some resulting confusion. The record is clear, however, that nothing was done to move the case forward from the time of Taylor's death in 1978 until the second order to show cause was entered in 1980. With

the possible exception of the appearance of Shefren in response to the first order to show cause, there was nothing done in the case by plaintiff from November of 1975, when the motorcycle was examined, until September of 1980, at which time the petition to vacate the dismissal was filed. Likewise, there is no question that the clerk of the District Court did not mail the notice of the possible dismissal of the action to Taylor & Malone in Minnesota, and that fact was stipulated at the trial.

We now discuss some pertinent rules of law which we believe are applicable to this case under the facts disclosed in the record. In his brief on appeal to this court, counsel for Emry states at 14: "In deciding whether the trial court was correct in its findings and ruling, under § 25-2001(3), certain rules apply. First, the obligation is on the Defendants-Appellants to show that the trial court abused its discretion in so ruling, because the Nebraska law is clear that a trial court has discretionary power, *either during or after term*, to vacate and modify its own judgments and orders." (Emphasis in original.)

While the statement is correct as to the discretion of the court to vacate and modify during the same term, it is not a correct statement as to the power of the court to dismiss after the term has expired. As early as 1899 this court announced, and has since followed, the rule that "Courts of general jurisdiction possess inherent power to vacate and modify their own judgments at any time *during the term* at which they were pronounced. This power exists entirely independent of any statute. It is derived from the common law, and the provisions of the Code of Civil Procedure relating to new trials do not assume to abolish or abridge it." (Emphasis supplied.) *Bradley v. Slater*, 58 Neb. 554, 555, 78 N.W. 1069 (1899).

The same rule was announced in the recent case of *A. Hirsh, Inc. v. National Hair Co.*, 210 Neb. 397, 398-99, 315 N.W.2d 236, 238 (1982), the court stating:

"A district court has inherent power to vacate or modify its own judgment any time during the term in which it is rendered. *Beliveau v. Goodrich*, 185 Neb. 98, 173 N.W.2d 877 (1970); *Fanning v. Richards*, 193 Neb. 431, 227 N.W.2d 595 (1975). '[T]his is a matter that rests in the sound discretion of the [trial] court. But this discretion is not an arbitrary one. It must be exercised reasonably and depends upon the facts and circumstances in each case as shown by the record.' *Beliveau, supra* at 100, 173 N.W.2d at 879; *Morgan v. Weiner*, 173 Neb. 715, 114 N.W.2d 720 (1962)." In *Hirsh* the court held that the granting of plaintiff's motion to vacate the order of dismissal was an abuse of discretion, and reversed the order and remanded to the District Court with directions to reinstate the dismissal order entered on May 2, 1980. See, also, *Johnston Grain Co. v. Tridle*, 175 Neb. 859, 124 N.W.2d 463 (1963); *Lyman v. Dunn*, 125 Neb. 770, 252 N.W. 197 (1934); *Grosvenor v. Grosvenor*, 206 Neb. 395, 293 N.W.2d 96 (1980). In *Grosvenor* we stated at 402, 293 N.W.2d at 100-01: "At common law, judgments were subject to vacation or modification only during the term in which rendered. *Hamaker v. Patrick*, 123 Neb. 809, 244 N.W. 420 (1932); 49 C.J.S. *Judgments* § 229 (1947). In the absence of statutory authority, a court ordinarily has no power to correct, amend, open, or vacate a valid judgment after the expiration of the term. *Hamaker v. Patrick, supra*; *State, ex rel. Spillman, v. Commercial State Bank*, 143 Neb. 490, 10 N.W.2d 268 (1943)."

As early as 1894 this court held in the case of *Ganzer v. Schiffbauer*, 40 Neb. 633, 59 N.W. 98 (1894), that the power of a District Court over its own judgment during the term at which it is rendered is entirely discretionary; but the discretion of the court as to the vacation or modification of a judgment ends with the adjournment of the term at which such judgment was rendered, and neither the court nor the judge has any authority to vacate or modify a

judgment rendered by it after the term at which it was rendered, except for the causes and in the manner prescribed by the statute, and except in the exercise of its general equity powers.

The present statement of the rule is set out in *Lienemann v. Lienemann*, 197 Neb. 449, 453, 249 N.W.2d 902, 904 (1977), as follows: "Our law is well settled. After the final adjournment of the term of court at which a judgment has been rendered, the court has no authority or power to vacate or modify the judgment except for the reasons stated and within the time limited in section 25-2001, R.R.S. 1943."

Also, in *State v. Byrd*, 186 Neb. 330, 331, 183 N.W.2d 234, 235 (1971), we stated: "Section 25-2001, R.R.S. 1943, provides the grounds on which a district court shall have the power to vacate or modify its judgments or orders after the term at which they were entered has expired. The power to modify or set aside a judgment ends with the adjournment of the term at which it was rendered except as provided in section 25-2001, R.R.S. 1943. Meier v. Nelsen, 156 Neb. 666, 57 N.W.2d 273. . . . In an action to vacate judgment after the adjournment of the term, the applicant must allege and prove that he exercised due diligence and that his failure to secure a proper decision was not due to his fault or negligence. Citizens Ins. Co. v. Herpolsheimer Implement Co., 78 Neb. 707, 111 N.W. 606." See, also, *Shipley v. McNeel*, 149 Neb. 793, 32 N.W.2d 636 (1948); *Brown v. Lincoln*, 157 Neb. 840, 61 N.W.2d 836 (1954).

In *Brown*, *supra*, after stating the general rule, this court stated at 841, 61 N.W.2d at 837: "It is plain from the record that no action was taken with reference to the judgment of dismissal during the term at which it was entered. In fact, as hereinbefore stated, one subsequent term of court was permitted to pass by before any attempt was made to have the judgment vacated. No attempt was made to comply with section 25-2001, R.R.S. 1943, and con-

sequently the trial court lost all power or authority to modify or vacate the judgment in the manner in which it purported to do so."

While it is true that plaintiff did attempt to comply with § 25-2001, his first petition to vacate being based on § 25-2001(7), "for unavoidable casualty or misfortune, preventing the party from prosecuting or defending," it is important to note that unavoidable casualty alone does not provide a basis for vacating a judgment after term. That casualty must also be one " 'preventing the party from prosecuting or defending.' " *Norfolk Packing Co. v. American Ins. Co.*, 116 Neb. 118, 122, 216 N.W. 309, 310 (1927).

In the instant case it is true that Taylor's death probably was an unavoidable casualty or misfortune, yet it cannot be said that his death prevented Emry from prosecuting his claim. It would seem that 2 years was certainly a long enough time for the confusion resulting from his death to subside. Even if there were lingering confusion as to who was handling the case, the respective attorneys might have at least recognized that there was confusion and governed themselves accordingly. We believe that this appeal could have easily been avoided; for example, if there had been formal appearances and withdrawals of the attorneys *of record*.

The rule is well established in this state that lack of diligence or negligence of counsel is not an unavoidable casualty or misfortune. *Shipley v. McNeel*, *supra*; *Lyman v. Dunn*, 125 Neb. 770, 252 N.W. 197 (1934).

Plaintiff also attempts to bring himself under the provisions of § 25-2001(3) on the basis of "mistake, neglect, or omission of the clerk, or irregularity in obtaining a judgment or order." He contends that the failure of the clerk to mail notice of the order to show cause to Minnesota counsel was "neglect or omission."

His contention is based on rule 12C of the Douglas County District Court, which reads in part: "Notice

of said order to show cause shall be served on all interested parties by publication in The Daily Record. Counsel residing outside Douglas County shall be served by mail." Plaintiff argues that the only way the clerk could have protected the interests of the plaintiff would have been to mail notice to Taylor & Malone in Minnesota. This argument is based on the assertion that "as a practical matter, the only attorney representing the Plaintiff in February, 1980, was Taylor's associate, Malone." Brief for Appellee at 15.

We find this argument untenable. It must be remembered that the record is clear that plaintiff at that time was represented by counsel of record, who had not withdrawn. Notwithstanding the wording of the court rule referred to, we note that Neb. Rev. Stat. § 7-103 (Reissue 1977) provides for the admission of practicing attorneys of other states to be admitted to practice for the purpose of said business upon the showing that "he has associated and appearing with him in the action an attorney who is a resident of Nebraska duly and regularly admitted to practice in the courts of record of this state upon whom service may be had in all matters connected with said action with the same effect as if personally made on such foreign attorney within this state; *Provided*, regularly licensed practicing attorneys of other states, the laws of which states permit the practice in its courts of attorneys from this state without a local attorney being associated with such attorney, shall not be required to comply with the provisions of this section."

With regard to the proviso, there is no evidence in the record as to what the law of Minnesota is with regard to a reciprocal right or provision, and the existence of such a provision, if such there be, not being pleaded or presented under the Uniform Judicial Notice of Foreign Law Act, Neb. Rev. Stat. § 25-12,101 et seq. (Reissue 1979), cannot be taken as established. The service of notice of the order and

knowledge on the part of local counsel should, we believe, be sufficient, even if we were to consider the failure to serve Minnesota counsel as a technical violation of the act. We also note that Emry's file was transferred to attorney Dolan on August 31, 1979. A technical failure of the clerk to mail notice to Minnesota counsel, in our opinion, was not harmful, as at that time the file had already been transferred to Dolan. There is no reason to presume that Malone would have done anything different upon receiving the mail notice than Shefren in his testimony claims he would have done upon seeing the notice in The Daily Record; that is to say, nothing. In this connection, see, Neb. Rev. Stat. § 25-12,104 (Reissue 1979); *Smith v. Brooks*, 154 Neb. 93, 47 N.W.2d 389 (1951); *Scott v. Scott*, 153 Neb. 906, 46 N.W.2d 627 (1951).

We believe that the comments of Chief Justice Krivosha in his concurring opinion in the case of *Nebraska State Bank v. Dudley*, 203 Neb. 226, 231-32, 278 N.W.2d 334, 337-38 (1979), are particularly pertinent. He stated: "I am in full agreement with the majority opinion in this case. I add this concurring opinion solely for the purpose of highlighting a matter which I believe deserves particular attention. In this case the record indicates that defendants' Iowa attorney was joined by Nebraska counsel. The record further indicates that Nebraska counsel's name appeared on the various pleadings and on the briefs filed in this court. Yet Nebraska counsel did not appear in this court at the time of oral argument, nor does the record indicate when, if at all, Nebraska counsel participated in this matter in the trial court. It is obvious that had Nebraska counsel been more actively involved in the trial of this case, Iowa counsel might not have failed to timely file a motion for new trial.

"The purpose of resident counsel joining with nonresident counsel is obvious. It is to insure that the nonresident counsel will be associated with a coun-

sel involved in the litigation who is knowledgeable and familiar with the laws and practices of this state. By permitting his name to be affixed to a pleading or brief, a resident lawyer represents to this court that he is a part of the litigation and a counsel of record. Accordingly, he should be held accountable for the transaction of the litigation to the full extent as if there were no nonresident counsel. A resident lawyer should not permit his or her name to be affixed to pleadings or briefs unless he or she intends to be involved in the litigation and familiar with the actions taken by nonresident counsel."

We are of the opinion that the failure of the clerk to mail notice of the order to show cause to Taylor & Malone in Minnesota was not sufficient mistake, neglect, or omission to justify vacating the dismissal.

The third and final argument offered by Emry to support the order below involves the jurisdiction of the court in equity. It is true that § 25-2001 is not the exclusive remedy for vacating a judgment after the term has expired. That statute is concurrent with an independent equity jurisdiction. *Shinn v. Shinn*, 148 Neb. 832, 29 N.W.2d 629 (1947); *Norfolk Packing Co. v. American Ins. Co.*, 116 Neb. 118, 216 N.W. 309 (1927); *Kulhanek v. Kulhanek*, 106 Neb. 595, 184 N.W. 139 (1921).

We note at the outset that to proceed in equity the litigant must show that he was without a remedy at law; more specifically, that § 25-2001 could not serve him. *Shipley v. McNeel*, 149 Neb. 793, 32 N.W.2d 636 (1948); *Lindstrom v. Nilsson*, 133 Neb. 184, 274 N.W. 485 (1937). We believe that the language of the court in *Lindstrom* is particularly pertinent in this regard: "This court is committed to the rule that equity will not afford relief if the complainant has a remedy by statutory proceeding in the original action, and that to be entitled to equitable relief a party must not have neglected to avail himself of the statutory remedy. See *Brandeen v. Beale*, 117 Neb. 291, 220

N.W. 298; *Krause v. Long*, 109 Neb. 846, 192 N.W. 729.

"Plaintiff's attorney of record was present on February 9, 1931, when the order of dismissal was entered, and he was fully advised at all times of the action taken. It has been repeatedly held by this court that notice to the attorney of record is notice to the party represented by such attorney. *Marshall v. Rowe*, 126 Neb. 817, 254 N.W. 480; *Goergen v. Department of Public Works*, 123 Neb. 648, 243 N.W. 886.

"No good cause has been shown by plaintiff why proceedings were not instituted to vacate the order of dismissal within the two-year period provided by section 20-2008, Comp. St. 1929. Even after plaintiff discovered the situation, she delayed for a year and a half before taking any action whatsoever, and more than two years before filing her amended petition on which the trial was had. Five separate attorneys or firms of attorneys represented plaintiff up to the time of the dismissal of her action, three of whom withdrew at various times when the case was noted for trial. Each time the defendant had gone to considerable expense in preparing for trial. Defendant was entitled to a final disposition of the suit against him within a reasonable time, and the trial court did not err in dismissing plaintiff's action for want of prosecution, and we find no error in the decree of the equity court in refusing to set aside the order of dismissal." *Id.* at 186, 274 N.W. at 486-87.

The case at bar does not present a situation sufficiently akin to other cases where equity has been used so as to indicate it should be used here. An example of the use of equity in Nebraska in this regard is *Shinn v. Shinn, supra.* There, the court found that a fraud perpetrated on the court would be equitable grounds to vacate a decree of divorce. Another example is *Norfolk Packing Co. v. American Ins. Co., supra.* There, the court found that the destruction of the bill of exceptions, without fault of

the petitioner, did provide a sufficient basis for equitable relief.

Finally, plaintiff calls attention to the case of *Seward v. Churn Ranch Co.*, 136 Neb. 804, 287 N.W. 610 (1939). He claims that this case stands for the proposition that "negligence of an attorney and his failure to perform his duties" does provide an equitable basis to set aside a default judgment. Brief for Appellee at 22-23.

We believe that his interpretation is strained, to say the least. In that case the court specifically decided that what the attorney did was "more than negligence. It amounted to deceit and fraud on his part and misled them [his clients] to their injury. . . . It was a betrayal of trust . . . ." *Seward v. Churn Ranch Co.*, *supra* at 808, 287 N.W. at 612. Certainly, the plaintiff in this case is not contending that his attorneys engaged in such conduct.

Under the facts of the instant case we do not believe equitable relief is warranted.

In view of our conclusions with respect to the issues of the case, it is unnecessary for us to, and we do not, reach the issue of the court's refusal to permit the defendants to have access to the attorneys' files.

We conclude, therefore, that the trial court had no authority under § 25-2001, or in equity, to vacate the previous dismissal of the action, and therefore the order of the District Court so doing must be, and hereby is, reversed and the cause remanded with instructions to reinstate the previous order of dismissal.

REVERSED AND REMANDED WITH DIRECTIONS.

RUBY MENHUSEN, APPELLEE, V.
JAMES DAKE, APPELLANT.
334 N.W.2d 435

Filed May 27, 1983. No. 82-105.

Marriage: Breach of Promise. Any cause of action which may otherwise exist by reason of the breach of a promise to marry is extinguished once the parties begin to cohabit prior to fulfillment of the promise.

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

Kelly & Kelly, for appellant.

Cunningham, Blackburn, VonSeggern, Livingston, Francis & Riley, for appellee.

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

CAPORALE, J.

This appeal by James Dake arises from an action instituted by Ruby Menhusen, appellee, against Dake when he walked away from and ended a living arrangement he had shared with Menhusen. Following a jury trial a judgment in the sum of $17,500 was entered against Dake. We reverse and direct dismissal.

Menhusen's petition alleged that under Dake's promise to marry her, she and he cohabited together as husband and wife until he moved out of the home of the parties and withdrew his promise of marriage, as the result of which she suffered damage. In his answer Dake denied the operative allegations of Menhusen's petition.

The evidence establishes that Menhusen is the divorced mother of six children, two of whom are still minors. Dake has been divorced twice and is the father of a minor child. The parties met in October of 1979 at a department store in Topeka, Kansas, where Dake was employed as a management trainee and Menhusen had taken a second job. The par-

ties began dating and, in February or March of 1980, decided to marry before Dake was to move to Grand Island, Nebraska, for new employment. However, the parties did not marry at that time because Dake pled a lack of time due to preparation for his new job. When Dake moved to Grand Island in April of 1980 he left his 7-year-old daughter with Menhusen. On May 22, 1980, Dake wrote to Menhusen stating he wished to marry her and enclosed a clipping from a Grand Island newspaper carrying an announcement of his new position as a theater manager. That article recited he was married to Menhusen and had three children. Menhusen, those of her children living with her, and Dake's daughter moved to Grand Island at the end of May 1980 and the parties began to live together. Menhusen obtained a driver's license and a practical nursing license under the surname of Dake. She secured employment at a hospital in Grand Island at a lesser salary than she had been earning at a hospital in Topeka. Dake arranged for Menhusen to be covered under health insurance obtained through his employment. The parties held themselves out to their new friends, acquaintances, and others in Grand Island as husband and wife. On October 30, 1980, Menhusen entered the hospital with a cardiac problem. After her return from a short period of hospitalization, Dake unchivalrously left Menhusen and moved out of the home the parties had been occupying. He surrendered possession of his child, who had become a discipline problem, to the child's mother. Such items of personal property as had been acquired by the parties during the period they cohabited were left with Menhusen, and Dake makes no claim to them. Menhusen testified that after Dake left she was no longer covered by any insurance; was in ill health; could not afford to move back to Kansas to be with her family; and that a number of bills, some of which were incurred as the result of her health problems and some of which were incurred to clothe

the children and Dake, remained to be paid. Moreover, she testified that she suffered humiliation and embarrassment by having to explain to her friends, acquaintances, and employer that she was in fact not married. She has been unsuccessful in efforts to get her nursing and driver's licenses changed to reflect her true name.

Among Dake's assignments of error is the contention that the trial court erred in instructing the jury that the issues were whether Dake promised to marry Menhusen, whether he breached that promise, and whether Menhusen was damaged as the proximate result of that breach. Much as our sympathies may rest with Menhusen's plight, we must agree with that contention of error.

This case has been misperceived as one presenting a cause of action for breach of a promise to marry; it is in fact an effort to recover damages for the termination of a living arrangement. That being so, it is unnecessary for us to determine, as suggested by Dake, whether the current rule for the measure of damages in a suit for breach of a promise to marry is outdated and in need of revision. The present rule in that regard recognizes that there are no precise rules for measuring damages, and the amount should be left to the sound discretion of the trier of facts, who may take into account the injury to the plaintiff's health; the effect of the breach on plaintiff's feelings; plaintiff's mental suffering, wounded pride, humiliation, pain, and mortification; and the loss of the pecuniary benefits of the promise to marry. *Kuhlman v. Cargile*, 200 Neb. 150, 262 N.W.2d 454 (1978); *Harsche v. Czyz*, 157 Neb. 699, 61 N.W.2d 265 (1953). For the same reason we need not reconsider in this case whether this ancient common-law cause of action continues to serve a purpose in today's society. See Clark, Law of Domestic Relations § 1.5 (1968).

Although we have approved recovery for seduction achieved through and by reason of reliance upon a

promise to marry, *Ryan v. Oswald*, 134 Neb. 265, 278 N.W. 508 (1938), and *Musselman v. Barker*, 26 Neb. 737, 42 N.W. 759 (1889), we have also observed that a promise of marriage in consideration of sexual intercourse is void. *Rich v. Fulton*, 104 Neb. 262, 177 N.W. 175 (1920).

We now hold that any cause of action which may otherwise exist by reason of the breach of a promise to marry is extinguished once the parties begin to cohabit prior to fulfillment of the promise. Damages which flow from the breach of a promise to marry result directly from the unilateral refusal of the promisor to carry out the promise. Such is not the case once the parties have cohabited prior to marriage. In the latter instance each party has participated in creating a living arrangement and each party has partaken of the responsibility for the conduct and duration of that arrangement. It can then no longer be said that such damages as may flow from the termination of the living arrangement are directly caused by the promisor's breach of the promise to marry.

In view of the foregoing determination, it is unnecessary to discuss Dake's other assignments of error. The judgment of the trial court is reversed with directions to dismiss the suit.

REVERSED WITH DIRECTIONS.

IN RE ESTATE OF REBECCA JO CARLSON, A MINOR CHILD. REBECCA JO CARLSON, A MINOR, BY AND THROUGH HER GUARDIAN AD LITEM, JOHN THOMAS, APPELLANT, V. LARRY CARLSON AND PHYLLIS M. BECK, CONSERVATOR, APPELLEES.

334 N.W.2d 437

Filed May 27, 1983. No. 82-311.

1. **Minors: Conservators.** Neb. Rev. Stat. § 30-2630 (Reissue 1979) grants the county court power to appoint a conservator if a minor owns property which requires management or protection.

2. **Property: Improvements.** In general, in the absence of a statute any permanent improvement placed upon the land of another, by one having no interest or title therein, without the owner's consent, prima facie becomes a part of the realty and belongs to the owner of the fee, although it was placed thereon by mistake or with a view of enforcing an adverse right in land, unless there is an express agreement which takes the case out of the rule, or unless the owner is estopped to claim such ownership.
3. **Property: Minors.** Neb. Rev. Stat. § 30-2637(2) (Reissue 1979) does not permit the adjudication of "best interests" on the basis of an undefined subjective, metaphysical, or intuitive approach to what is fair and equitable without reference to existing rules of law.

Appeal from the District Court for Knox County: MERRITT C. WARREN, Judge. Reversed and remanded with directions.

John Thomas of Thomas and Peebles, guardian ad litem, for appellant.

Mark Behm, for appellee Larry Carlson.

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

PER CURIAM.

This is an appeal by the guardian ad litem of a minor child, Rebecca Jo Carlson. The guardian seeks reversal of an order authorizing the conservator of said minor to sell the child's real estate. We reverse.

The essential facts underlying the proceedings involved are not in dispute. Rebecca Jo Carlson is the only child of Larry Carlson and Sandra Carlson. Rebecca was born on October 26, 1971. On September 28, 1976, Mr. Carlson purchased two and one-half unimproved residential lots in Wausa, Nebraska, at a tax foreclosure sale. He gave the lots to Rebecca as a gift, although he also claims to have thought the title would be in his name as well as in Rebecca's. The Carlsons' marriage was dissolved on April 19, 1977, and custody of Rebecca was given to Mrs. Carlson, who then moved to South Dakota with the child; Mr. Carlson has been meeting his child support obli-

gation faithfully. At approximately the same time as Mr. Carlson began to construct a house on the land in 1978, he made inquiry as to why he had not been receiving tax statements. He then discovered that the taxes were delinquent and that the fee simple title to the realty was solely in Rebecca's name. At that time he had completed a relatively small part of the construction; possibly no more than the concrete footings had been poured. However, he continued to construct a log-cabin type home by, for the most part, his own labor and using precut materials.

On March 30, 1981, Mr. Carlson filed a petition in the county court of Knox County seeking the appointment of a conservator for his daughter. The petition alleged that Rebecca owned the land in question, having acquired it by gift from Mr. Carlson; that he had constructed a house on the property at his own expense; that he had been unaware of his daughter's ownership; suggested the appointment of a particular conservator; and prayed that the conservator be authorized to convey the land to Mr. Carlson. The conservator designated by Mr. Carlson was in fact appointed. She, incredibly enough, merely adopted Mr. Carlson's stance. She caused an appraisal to be made of the value of the lots and filed an application for an order authorizing her to convey the land to Mr. Carlson for its current market value as unimproved land. Following the appointment of Mr. John Thomas of the Nebraska bar as guardian ad litem for Rebecca, a hearing was had which resulted in an order authorizing the sale of the land to Mr. Carlson and investment of the proceeds therefrom. The guardian ad litem appealed to the Nebraska Ninth Judicial District Court, Knox County. That court affirmed the order of the Knox County Court.

In this appeal the guardian ad litem assigns as error both the appointment of a conservator and the order granting authority to convey to Mr. Carlson his daughter's land.

We find the guardian ad litem's first assignment of error to be without merit. Neb. Rev. Stat. § 30-2630 (Reissue 1979) grants the county court power to appoint a conservator if a minor owns property which requires management or protection. The evidence establishes that Rebecca owns property. The evidence that taxes had gone unpaid for some period of time and that someone other than she constructed an improvement on the land clearly establishes that the property is in need of management. Whether the proper conservator has been appointed to so manage it is another question.

The remaining assignment of error, however, is a different matter. In *Williams v. Beckmark*, 146 Neb. 814, 21 N.W.2d 745 (1946); 150 Neb. 100, 33 N.W.2d 352 (1948), we held that the occupants and claimants act, Neb. Rev. Stat. §§ 76-301 et seq. (Reissue 1981), did not apply in the absence of a valid contract to convey. We stated it to be the general rule that in the absence of a statute any permanent improvement placed upon the land of another, by one having no interest or title therein, without the owner's consent, prima facie becomes a part of the realty and belongs to the owner of the fee, although it was placed thereon by mistake or with a view of enforcing an adverse right in land, unless there is an express agreement which takes the case out of the rule, or unless the owner is estopped to claim such ownership. See, also, *Carter v. Brown*, 35 Neb. 670, 53 N.W. 580 (1892), denying reimbursement to one paying taxes and making improvements on land he occupied pursuant to void tax deeds. In *Ohme v. Thomas*, 134 Neb. 727, 279 N.W. 480 (1938), we found the necessary element of good faith lacking and thus denied recovery for expenditures in the construction of a well on a disputed strip of land done when the owner was away and could not protect her rights. Likewise, in *Hammond v. Harrington*, 150 Neb. 1, 33 N.W.2d 293 (1948), we held that good faith was lack-

ing where improvements were made under a deed which had previously been declared void.

In the instant matter, on the one hand Mr. Carlson testified that he had made a gift of the land to his daughter; on the other hand he testified it was his understanding that he too had an interest in the title. Even giving him the benefit of that claimed confusion, there is no question but that he learned at a time when he had very little construction completed that the fee simple title rested solely in his daughter. It can in no sense be said that the structure in question was completed in good faith reliance upon any mistaken notion as to the true ownership of the land. The daughter was incapable of giving consent, no proceedings were instituted in a effort to obtain such consent, and there is nothing which estops those protecting Rebecca's interests from claiming ownership on her behalf.

In reaching their decisions the courts below apparently relied upon Neb. Rev. Stat. § 30-2637(2) (Reissue 1979), which provides: "After hearing and upon determining that a basis for an appointment or other protective order exists with respect to a minor without other disability, the court has all those powers over the estate and affairs of the minor which are or might be necessary for the best interests of the minor, his family and members of his household." That statute does not, however, permit the adjudication of "best interests" on the basis of an undefined subjective, metaphysical, or intuitive approach to what is fair and equitable without reference to existing rules of law. The fear that the relationship between father and daughter might become strained should the law insist upon protecting the child's property rights until she is no longer under the disability of infancy does not justify depriving her of those rights which the law would accord an adult who chooses to insist upon them. Although arising in a different context, the principle involved is not unlike that presented in the recent

case of *Williams v. Nebraska Wesleyan Univ.*, *ante* p. 92, 332 N.W.2d 694 (1983), whereinwe refused the life tenant father a partitioning of real estate against his remaindermen children.

Mr. Thomas agreed to serve as guardian ad litem without compensation. That act and Mr. Thomas' excellent legal performance in this matter reflect great credit upon himself and the practicing bar and is in keeping with the high traditions of the legal profession. We commend him.

The order of the District Court is reversed with directions that the order of the county court authorizing conveyance of the land to Mr. Carlson be vacated and set aside.

REVERSED AND REMANDED WITH DIRECTIONS.

TERI L. KEATING, BY AND THROUGH HER FATHER AND NEXT FRIEND, GERALD H. KEATING, APPELLANT, V. JOSEPH F. KLEMISH, APPELLEE.

334 N.W.2d 440

Filed May 27, 1983. No. 82-321.

1. **Jury Instructions: Appeal and Error.** Ordinarily, the failure to object to instructions after they have been submitted to counsel for review will preclude raising an objection on appeal, unless there is plain error in the record indicative of a probable miscarriage of justice.
2. **Negligence.** Where it is apparent that no one act of the defendant can be separated from the whole of these acts and held to be the independent cause of the accident, under these circumstances each act is not to be segregated and weighed separately to determine whether or not it constituted gross negligence. The several acts are to be considered as a whole.
3. _____. While each of several acts, standing alone, may not exceed the bounds of ordinary negligence, yet, taken together, they may establish gross negligence. In such cases it is for the jury to determine whether a defendant is guilty of gross or ordinary negligence.

Appeal from the District Court for Douglas County: KEITH HOWARD, Judge. Affirmed.

Ronald H. Stave of Stave, Cavel & Coffey, P.C., and Robert F. Peterson of Lydick & Peterson, for appellant.

Joseph K. Meusey of Fraser, Stryker, Veach, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellee.

BOSLAUGH, MCCOWN, and HASTINGS, JJ., and BRODKEY, J., Retired, and COLWELL, D.J., Retired.

COLWELL, D.J., Retired.

Plaintiff-appellant, Teri L. Keating, by and through her father and next friend, Gerald H. Keating, brought suit for personal injuries and damages sustained as a passenger in a one-vehicle accident. Plaintiff alleges gross negligence of defendant, Joseph F. Klemish, the owner-operator. The jury returned a five-sixths defendant's verdict; plaintiff appeals.

The accident occurred about 6:15 p.m. on October 24, 1978, on Wenninghoff Road near Northwest High School, Douglas County, Nebraska; defendant, age 17 years, was driving his 1965 Ford pickup northerly, accompanied by plaintiff, age 15 years, sitting on his right; to her right sat Diane Swigart, age 14 years; next to the right door sat Danny Nichels, age 15 years; and kneeling in the truck box was Kevin Lohr, age 16 years. The road was a winding, dry, concrete surface with white lines on the edge; it was posted for 40 m.p.h. speed; there were five curves; the shoulder of the road was muddy dirt. The truck speed was estimated by defendant and passengers from 40 to 90 m.p.h.; defendant said between 40 and 50 m.p.h., and he admitted to the investigating officer that he was driving northbound on Wenninghoff Road, exceeding a safe speed, when his vehicle went off the road into the mud. As the truck neared the fifth, and sharpest, curve, marked with a warning sign, defendant decreased speed; the right wheels of the truck slipped off the roadway onto the muddy

shoulder. In attempting to return the truck to the traveled surface, defendant could not control the truck and it rolled over. The distance from the point of leaving the roadway to the wrecked truck was about 432 feet. The engine was severed from its mountings, and the truck bed was loosened from the chassis. Plaintiff suffered and incurred serious personal injuries, medical expenses, and other damages. None of the passengers complained about defendant's driving, and they were not concerned about their personal safety until the wheels of the truck left the roadway.

Plaintiff's two principal assignments of error are the giving of instruction Nos. 4 and 8, arguing that these instructions were both confusing to the jury and a misstatement of the law.

Instruction No. 2 (NJI 2.02 A) was a statement of the claims, defenses, and issues of the lawsuit. Particularly, plaintiff charged four allegations of gross negligence: (1) excessive speed, (2) failure of reasonable control, (3) failure to keep a proper lookout, and (4) driving on the roadway shoulder. The jury was advised that defendant admitted the accident occurred but that he denied plaintiff's allegations of gross negligence.

Instruction No. 4 (NJI 2.02 B) required plaintiff to prove four propositions, which we briefly state: (1) gross negligence, (2) proximate cause, (3) damages as a proximate result, and (4) amount of damages. Plaintiff objects to proposition (1), "That the defendant was grossly negligent in one or more of the particulars charged against him in Instruction No. 2, and in accordance with Instruction No. 8," claiming that the referenced instruction No. 8 recites a contrary rule.

Instruction No. 8 (NJI 7.51) provides: " 'Gross negligence' within the meaning of the automobile guest statute is great and excessive negligence, or negligence in a very high degree. It indicates the

absence of even slight care in the performance of a duty.

"Plaintiff has claimed that the defendant was guilty of several acts of negligence which caused the accident. In this respect, no one act is to be segregated and weighed separately to determine whether or not it constituted gross negligence. Instead, the several acts are to be considered as a whole."

Plaintiff contends that instruction Nos. 4 and 8 confused the jury, as evidenced by its inquiry, exhibit A, directed to the judge: "Please reconcile Instruction No. 8 Paragraph 2 'no one act is to be segregated and weighed seperately [sic] to determine -----' to #1 of No. 4 'one or more' as related to the Nos 1 through 4 of instruction #2." The trial judge responded to exhibit A with supplemental instruction No. 2: "Instructions 4 and 8 are to be construed together and with the other instructions. In any case involving a claim of gross negligence, whether gross negligence exists depends on the facts and circumstances. *One act of negligence may or may not constitute gross negligence depending upon circumstances.* Some of the circumstances which may be considered are the other negligent acts, or any one of them, if found to exist." (Emphasis supplied.)

Ordinarily, the failure to object to instructions after they have been submitted to counsel for review will preclude raising an objection on appeal, unless there is plain error in the record indicative of a probable miscarriage of justice. See *Barta v. Betzer*, 190 Neb. 752, 212 N.W.2d 352 (1973).

At the close of the evidence an instruction conference was held, attended by counsel. No objection or substitute instruction was made or offered to either instruction Nos. 2, 4, or 8. The briefs indicate that counsel were present when supplemental instruction No. 2 was prepared, and no objections were made.

"A series of acts of ordinary negligence combined may, under certain circumstances, operate to pro-

duce gross negligence." *Thompson v. Edler*, 138 Neb. 179, 182, 292 N.W. 236, 238 (1940).

" 'It is apparent that no one act of the defendant can be separated from the whole of these acts and held to be the independent cause of the accident. Under these circumstances, each act is not to be segregated and weighed separately to determine whether or not it constituted gross negligence. The several acts are to be considered as a whole. While each of several acts, standing alone, may not exceed the bounds of ordinary negligence, yet, taken together, they may establish gross negligence. In such cases, it is for the jury to determine whether a defendant is guilty of gross or ordinary negligence . . . .' " *Smith v. Damato*, 172 Neb. 811, 815, 112 N.W.2d 21, 24 (1961); *Demont v. Mattson*, 188 Neb. 277, 196 N.W.2d 190 (1972); *Carley v. Meinke*, 181 Neb. 648, 150 N.W.2d 256 (1967).

Jury instructions should be considered as a whole, and the meaning of an instruction or instructions, when taken as a whole, must be considered, and not just the phraseology of a particular part. *Cooper v. Hastert*, 175 Neb. 836, 124 N.W.2d 387 (1963).

When we apply the foregoing authorities to the complained instructions, we find instruction No. 2 tells the jury of plaintiff's four allegations of gross negligence; this is followed by instruction No. 4(1), imposing upon the plaintiff the burden to prove one or more of her allegations of gross negligence. However, the court recognized that there was some evidence supporting each allegation and those acts could not be separated, thus the rule in *Smith v. Damato* was applicable, requiring the giving of instruction No. 8. Whatever lack of understanding the jury may have had concerning instruction Nos. 2, 4, and 8 was explained by supplemental instruction No. 2. Considering the instructions as a whole, there was no error. Further, counsel failed to object to any instruction.

Next, plaintiff asserts error that the court refused

a proposed instruction to determine as a matter of law (NJI 2.08) that (1) defendant was operating his vehicle in excess of the speed limit, (2) defendant was operating his vehicle in excess of a safe speed, (3) defendant lost control of the vehicle, and (4) defendant operated his vehicle on the shoulder of the road, contrary to law. There was some conflict in the evidence on all of these issues, and they were all fact questions for the jury. Plaintiff particularly urges that defendant's statement to the investigating officer, that he was exceeding a safe speed, was a judicial admission.

" 'A judicial admission is a formal act done in the course of judicial proceedings which is a substitute for evidence, thereby waiving or dispensing with the production of evidence by conceding for the purpose of litigation that the proposition of fact alleged by the opponent is true.' " *Vermaas v. Heckel*, 170 Neb. 321, 325, 102 N.W.2d 647, 652 (1960). Defendant's statement to the officer was not a judicial admission.

Lastly, plaintiff claims that the five-sixths jury verdict was void because supplemental instruction No. 2 was a resubmission of the case to the jury and that the jury verdict was thereafter returned before the elapse of 6 hours, contrary to Neb. Rev. Stat. § 25-1125 (Reissue 1979). No authority is cited. The case was submitted to the jury on March 10, 1982, at 11:40 a.m.; the jury question, exhibit A, is dated 3-11-82, 11:15 a.m.; the time of delivery of supplemental instruction No. 2 is not shown; the time that the jury deliberated together on March 11 is not shown; the jury reconvened on March 12, 1982, at 9 a.m., and the verdict was returned 1 hour later. We do not get to the claimed error, since the record before us is incomplete and fails to show the time of deliberation that followed supplemental instruction No. 2.

It is noted that in *Cartwright and Wilson Constr. Co. v. Smith*, 155 Neb. 431, 442, 52 N.W.2d 274, 281

(1952), it was held that the length of time devoted to meals "while the jurors are deliberating upon their verdict cannot be shown for the purpose of proving that they did not deliberate for the prescribed length of time."

AFFIRMED.

STATE OF NEBRASKA EX REL. PAUL L. DOUGLAS, NEBRASKA ATTORNEY GENERAL, AND STEVEN M. CURRY, MERRICK COUNTY ATTORNEY, APPELLEES, V. MARJORIE BIGELOW, DOING BUSINESS AS NEBRASKA CHRISTIAN LIBERTY ACADEMY, APPELLANT.

334 N.W.2d 444

Filed May 27, 1983. No. 82-377.

1. **Attorneys at Law.** The courts of Nebraska look primarily to members of its bar for the conduct of litigation in which they appear.
2. **Motions for Continuance.** A motion for continuance is addressed to the sound discretion of the trial court, and in the absence of a showing of an abuse of discretion, a ruling on such a motion will not be disturbed on appeal.
3. **Appeal and Error.** Errors assigned but not discussed will generally not be considered.
4. **Equity: Appeal and Error.** In an equitable proceeding we review the record de novo and reach an independent conclusion without reference to the conclusion reached by the trial court.

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

Marjorie Bigelow, pro se.

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

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

CAPORALE, J.

In this appeal defendant-appellant, Marjorie Bigelow, seeks to reverse the trial court's order perma-

nently enjoining her from operating "a school in her home." We affirm as modified.

The State of Nebraska instituted this action to enjoin the defendant from violating Neb. Rev. Stat. §§ 79-201 and 79-1701 (Reissue 1981) and rule 14 of the Nebraska State Department of Education (Rev. 1976). In her answer the defendant alleged that she was not subject to the state's laws because of the rights accorded to her sincerely held religious beliefs by the first, ninth, and fourteenth amendments to the U.S. Constitution.

Section 79-201 requires every person residing in a school district within Nebraska who has legal or actual charge or control of any child not less than 7 nor more than 16 years of age to cause such child to regularly attend a public, private, denominational, or parochial school. Section 79-1701 makes all such schools in the state, and the teachers employed or giving instruction therein, subject to Nebraska's general school laws so far as those laws apply to grades, qualifications, and certification of teachers, and promotion of pupils. Neb. Rev. Stat. § 79-1233 (Reissue 1981) requires that teachers hold a permit or certificate issued by the Commissioner of Education. Rule 14 of the Department of Education, promulgated pursuant to the provisions of Neb. Rev. Stat. § 79-328 (Reissue 1981), provides for the approval of public and nonpublic schools and requires, among other things, a variety of applications, inspections, and reports, including attendance reports.

The record establishes that since August of 1980 defendant's daughter, Dawn Bigelow, has received her entire education at home. At the time of trial Dawn was 13 years old. As the sole teacher defendant uses a curriculum provided by mail from the Christian Liberty Academy of Prospect Heights, Illinois. Defendant, who herself has but an eighth grade education, is the sole supervisor of the education which Dawn receives. Neither defendant nor anyone else who is present during Dawn's schooling

holds a teaching certificate or permit. Although daily attendance is taken, no attendance reports are made to the superintendent of schools, nor has defendant, or anyone on her behalf, applied for approval of the school located in her home. When the superintendent of the Palmer Public School became concerned about Dawn's absence from school in September of 1980, he attempted to determine the cause by appearing at the Bigelow residence. The presence of a guard dog made it impossible for him to conduct any investigation or inspection.

The assignments of error discussed in defendant's brief contend that the trial court erred in (1) failing to grant defendant a continuance, (2) enjoining conduct subject to criminal penalties, and (3) applying the laws of this state to defendant.

As to the first assignment of error, defendant argues that the failure to grant her a continuance deprived her of the effective assistance of counsel. The initial statutory answer day in this case was April 27, 1981. On April 24, 1981, Mr. Dana Baker, a member of the bar of this state practicing with Treadway & Bird, P.C., at Fullerton, Nebraska, moved for a 45-day extension of time within which to plead. On May 6, 1981, the trial court granted a 21-day extension. The answer was filed by Mr. Baker on May 15, 1981. On September 14, 1981, the State filed a motion for summary judgment. A hearing was had thereon on October 5, 1981; the motion was overruled on October 15, 1981. On that latter date the trial court also scheduled the State's request for a temporary injunction for hearing on January 13, 1981 (sic). A hearing was had on January 13, 1982, at which time defendant was represented by Mr. Baker and one Daniel Jon Loomis, who was admitted to practice in this state at that time pro hac vice, pursuant to the provisions of Neb. Rev. Stat. § 7-103 (Reissue 1977). Mr. Loomis is a member of the Michigan bar and practices with Gibbs & Craze, Co., L.P.A., an Ohio law firm. The January 13, 1982,

hearing resulted in a January 19, 1982, order which denied the State's request for a temporary injunction and which set this case for trial on the merits beginning at 9 a.m. on February 4, 1982. On February 2, 1982, Mr. Baker filed a motion seeking a continuance. Among the considerations underlying that motion were defendant's as well as Mr. Baker's understanding that Gibbs & Craze was to actually represent the defendant at the trial; that on January 29, 1982, Mr. Baker and the defendant were informed that Gibbs & Craze would not represent the defendant because defendant's case did not fall within the guidelines established by Gibbs & Craze for its practice; that inadequate time remained for Mr. Baker to prepare defendant's constitutional defenses; and that Mr. Baker was unable to secure the presence of lay and expert witnesses. The fact remains, however, that Mr. Baker had actively participated in the case for a period of at least 8 months before trial. Under these circumstances, it cannot be said that Mr. Baker was unfamiliar with the strategies to best be employed on defendant's behalf. Indeed, the record itself convinces us that Mr. Baker examined and cross-examined witnesses knowledgeably and demonstrated a thorough understanding of the issues and law involved. The courts of Nebraska look primarily to members of its bar for the conduct of litigation in which they appear. That is one of the reasons for the requirement of § 7-103, that attorneys admitted to practice in other states associate with members of the Nebraska bar when appearing in this state. See, *Emry v. American Honda Motor Co.*, *ante* p. 435, 334 N.W.2d 786 (1983); *Lincoln Welding Supply v. Inhalation Plastics*, 213 Neb. 862, 331 N.W.2d 804 (1983); *Nebraska State Bank v. Dudley*, 203 Neb. 226, 278 N.W.2d 334 (1979), *appeal dismissed* 444 U.S. 804, 100 S. Ct. 24, 62 L. Ed. 2d 17. Further, a motion for continuance is addressed to the sound discretion of the trial court, and in the absence of a showing of an abuse of discretion, a ruling

on such a motion will not be disturbed on appeal. *Vlcek v. Sutton*, 201 Neb. 555, 270 N.W.2d 906 (1978); *Veik v. The Tilden Bank*, 200 Neb. 705, 265 N.W.2d 214 (1978). The trial court did not abuse its discretion by denying defendant's motion for continuance.

Next we consider defendant's claim that injunctive relief is inappropriate. Neb. Rev. Stat. §§ 79-216 and 79-1707 (Reissue 1981) provide that any person violating §§ 79-201 and 79-1701 shall be guilty of a Class III misdemeanor. Neb. Rev. Stat. § 28-106 (Reissue 1979) provides no minimum penalty for the violation of a Class III misdemeanor but provides for a maximum penalty of 3 months' imprisonment, or a $500 fine, or both. Defendant argues that the State cannot enjoin conduct which subjects her to criminal penalties. This proposition was reviewed and adjudicated adversely to defendant's position in *State ex rel. Douglas v. Faith Baptist Church*, 207 Neb. 802, 301 N.W.2d 571 (1981), *appeal dismissed* 454 U.S. 803, 102 S. Ct. 75, 70 L. Ed. 2d 72, and requires no further comment. She is simply wrong in that regard and misses the point when she argues that she is not a threat to anyone and therefore injunctive relief is improper, such a threat being a necessary prerequisite thereto. She is in fact a real, present, and serious threat to the education of her daughter, a minor in whose education the State of Nebraska has a compelling interest.

As to the third assignment of error, although defendant's answer refers to first, ninth, and fourteenth amendment rights under the U.S. Constitution, she in essence argues only the rights of first amendment religious freedom in her brief. She submits that the laws of Nebraska do not apply to her because they conflict with her sincerely held religious beliefs. Again, the same constitutional claims which defendant makes here were analyzed and adjudicated adversely to her position in *Faith Baptist Church*, *supra*, and its predecessor, *Meyerkorth v. State*, 173 Neb. 889, 115 N.W.2d 585 (1962),

appeal dismissed 372 U.S. 705, 83 S. Ct. 1018, 10 L. Ed. 2d 125 (1963). No useful purpose would be served by restating the legal analyses and rationales for the rulings pronounced therein. Suffice it to say that the opinion of this court in *Faith Baptist Church, supra*, enunciates the law of Nebraska with respect to the constitutional issues presented by this case.

Defendant's conduct constitutes a flagrant violation of Nebraska law. All those who live within the borders of Nebraska are necessarily subject to its law; all those must therefore abide by that law or suffer the consequences of their failure to do so.

Defendant assigns an additional error in the following words: "The District Court erred in allowing adjudication to continue after jurisdiction was challenged when the State Department of Education did not prove from substantive law that it had jurisdiction." Whatever that assignment may mean, it is not discussed in defendant's brief. Errors assigned but not discussed will generally not be considered. Neb. Rev. Stat. § 25-1919 (Reissue 1979); *State v. Hochstetler*, *post* p. 482, 334 N.W.2d 455 (1983); *Flakus v. Schug*, 213 Neb. 491, 329 N.W.2d 859 (1983).

This being an equitable proceeding, we review the record de novo and reach an independent conclusion without reference to the conclusion reached by the trial court. Neb. Rev. Stat. § 25-1925 (Reissue 1979); *Anderson v. Clemens Mobile Homes*, *ante* p. 283, 333 N.W.2d 900 (1983); *Craig v. Kile*, 213 Neb. 340, 329 N.W.2d 340 (1983). That being so, we now modify the trial court's injunction to make clear that defendant may supplement her daughter's education whenever, however, and to whatever degree she may wish, but may nonetheless not operate a school in violation of Nebraska law nor cause Dawn Bigelow to be a truant.

The injunction is therefore modified to read that defendant be, and hereby is, permanently enjoined from operating a school in violation of the laws of

Nebraska and further be, and hereby is, enjoined from preventing Dawn Bigelow, while not more than 16 years of age, from regularly attending a public, private, denominational, or parochial day school operated in compliance with the laws of this sovereign state.

AFFIRMED AS MODIFIED.

RICHMAN GORDMAN STORES, INC., ET AL., APPELLANTS, V. BOARD OF EQUALIZATION OF ADAMS COUNTY, NEBRASKA, APPELLEE.

234 N.W.2d 447

Filed May 27, 1983. No. 82-383.

1. **Taxation: Valuation: Appeal and Error.** An appeal from a county board of equalization involving the valuation of real estate for tax purposes is tried de novo as an equitable proceeding.
2. _____: _____: _____. The review in this court is de novo upon the record.
3. **Taxation: Valuation.** All real property is to be assessed at its actual value. Neb. Rev. Stat. § 77-201 (Reissue 1981).
4. **Taxation: Words and Phrases.** Actual value, market value, and fair market value mean exactly the same thing for purposes of taxation.
5. **State Equalization Board: Taxation: Appeal and Error.** If the effect of an increase in valuation ordered by the State Board of Equalization and Assessment is to raise the assessed value of a particular property above the actual value, the remedy of the taxpayer is before the county board of equalization.
6. **Taxation: Valuation: Presumptions.** Any presumption that the value fixed by the board of equalization was correct disappears when there is competent evidence to the contrary. Once the presumption is destroyed, the burden is upon the taxpayer to show that the value of his property was arbitrarily or unlawfully fixed in an amount greater than actual value. The reasonableness of the valuation then becomes a question of fact to be determined from the evidence.

Appeal from the District Court for Adams County: BERNARD SPRAGUE, Judge. Reversed and remanded with directions.

James A. Beltzer of Luebs, Dowding, Beltzer, Leininger & Smith, for appellants.

Arthur C. Toogood, Adams County Attorney, for appellee.

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

BOSLAUGH, J.

Richman Gordman Stores, Inc., and Hastings Western Mall appeal from a judgment of the District Court affirming the action of the Adams County Board of Equalization dismissing the appellants' protests involving the assessment of real estate for tax purposes in 1980 and 1981.

The property involved is a concrete block building containing approximately 66,000 square feet and erected upon an irregular tract having an area of approximately 7 acres. The property is located on South Burlington Avenue in Hastings, Nebraska, and is owned by Hastings Western Mall, a joint venture. The building was constructed sometime prior to 1976 and was originally occupied by a Tempo store and a number of smaller shops. It is presently occupied by two tenants: Richman Gordman Stores, Inc., which operates a "½ Price Store" on the property, and Nash Finch, Inc., which operates "econofoods" on the property. The Richman Gordman lease obligates the tenant to pay a portion of the real estate taxes.

All real estate in Adams County was reappraised in 1977. The value of the property at that time was determined to be $889,895. In 1979 the State Board of Equalization and Assessment ordered that the value of all residential property, commercial industrial property, and farm structures be increased 29 percent for assessment purposes. In 1980 the property was assessed at $1,160,871.43. In 1981 a dock was installed on the property and the value was increased to $1,164,471.43.

Protests were filed in 1980 and 1981, but the county board of equalization granted no relief. Appeals were taken to the District Court, where the cases were consolidated. The trial court found generally for the county board of equalization and dismissed the appellants' petition.

An appeal from a county board of equalization involving the valuation of real estate for tax purposes is tried de novo as an equitable proceeding. *Hastings Building Co. v. Board of Equalization*, 212 Neb. 847, 326 N.W.2d 670 (1982); *Beaver Lake Assn. v. County Board of Equalization*, 210 Neb. 247, 313 N.W.2d 673 (1981). The review in this court is de novo upon the record.

Although the petition filed in the District Court alleged that the property was assessed in excess of its actual value and its assessment had not been properly equalized with other property, the only issue upon the appeal is whether the property was assessed in excess of its actual value for 1980 and 1981.

All real property is to be assessed at its actual value. Neb. Rev. Stat. § 77-201 (Reissue 1981). Actual value, market value, and fair market value mean exactly the same thing for purposes of taxation. *Id.*; *Beaver Lake Assn.*, *supra*.

If the effect of an increase in valuation ordered by the State Board of Equalization and Assessment is to raise the assessed value of a particular property above its actual value, the remedy of the taxpayer is before the county board of equalization. *S. S. Kresge Co. v. Jensen*, 164 Neb. 833, 83 N.W.2d 569 (1957).

In an appeal from a county board of equalization on the ground that the property has been valued in excess of actual value, the sole issue to be determined is the actual value of the property. *Otradovsky v. Board of Equalization*, 206 Neb. 559, 294 N.W.2d 334 (1980); *Chudomelka v. Board of Equalization*, 187 Neb. 542, 192 N.W.2d 403 (1971).

Any presumption that the value fixed by the board

of equalization was correct disappears when there is competent evidence to the contrary. *Hastings Building Co., supra*; *Beaver Lake Assn., supra.* Once the presumption is destroyed, the burden is upon the taxpayer to show that the value of his property was arbitrarily or unlawfully fixed in an amount greater than actual value. *Hastings Building Co., supra*; *Riha Farms, Inc. v. County of Sarpy*, 212 Neb. 385, 322 N.W.2d 797 (1982); *Rien v. Board of Equalization*, 190 Neb. 481, 209 N.W.2d 144 (1973). The reasonableness of the valuation then becomes a question of fact to be determined from the evidence. *Otradovsky, supra.*

The appellants called as an expert witness Charles A. Douthit, a real estate broker specializing in the appraisal of real estate. Using the market approach, income capitalization, and reproduction cost less depreciation methods, Douthit testified that the value of the property was $845,000 as of December 11, 1981. Douthit testified in detail concerning the methods he used in making his appraisal, and also testified concerning the condition of the building and the parking lot. According to Douthit, the building and parking lot have deteriorated to some extent and require repairs to restore them to a suitable condition.

The county board of equalization called the county assessor and the appraiser who had valued the property in 1977 as witnesses. The county assessor placed a value of $1,519,808 on the building, using the Marshall-Swift manual. This is a cost of reproduction less depreciation method, which amounts to a mathematical computation once the cost of reproduction and rate of depreciation are assumed.

Dean L. Vahlkamp, who was employed by Western Appraisals and Surveys at the time of the 1977 reappraisal, testified that the fair market value of the property was $899,895 as of January 1, 1977. The appraisal made at that time utilized market infor-

mation and other data, such as rentals and expense data, and was a complete appraisal.

Vahlkamp "recalculated" the value of the improvements as of June 1980 by reestimating the replacement cost new and estimating depreciation to be 26 percent. By this method he arrived at a value of $1,193,261 for the improvements. Vahlkamp conceded that he had merely "plugged" figures into a Marshall-Swift formula. In order to determine fair market value for tax purposes, he testified that he would "most definitely" want to go through the income approach and the market data approach.

As we view the record, the only satisfactory evidence of the actual value of the property in 1980 and 1981 was the testimony of the expert witness Douthit. We conclude that the judgment of the District Court is not supported by the evidence.

The judgment is reversed and the cause remanded with directions to fix the actual value of the property for tax purposes in 1980 and 1981 at $845,000.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. RICHARD T. DAVIS, JR., APPELLANT.

334 N.W.2d 450

Filed May 27, 1983. No. 82-519.

1. **Evidence: Appeal and Error.** Generally, the admission of evidence which is not relevant or competent is not reversible error in a trial without a jury.
2. _____: _____. A presumption arises that the trial court, in trying a case without a jury, will consider only such evidence as is competent and relevant, and this court will not reverse a case so tried because evidence was erroneously admitted where there is other material, competent, and relevant evidence sufficient to sustain the trial court's judgment.
3. **Sexual Assault: Proof.** The victim of a sexual assault must be corroborated as to material facts and circumstances which tend to

support his testimony and from which, together with the victim's testimony as to the principal fact, an inference of guilt may be drawn.

4. _____: _____. Corroboration of the principal act constituting the offense is not required.
5. **Robbery: Proof.** The uncorroborated testimony of the victim of a robbery is sufficient to sustain a conviction.
6. **Trial: Evidence.** The determination of the admissibility of evidence is largely within the discretion of the trial court.
7. **Rules of Evidence.** Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
8. **Sexual Assault: Witnesses.** In a prosecution for sexual assault the victim may testify in chief on direct examination, if within a reasonable time under all the circumstances after the act was committed a complaint was made, to the fact and nature of the complaint, but not as to its details; and others may likewise testify in chief to such fact and nature of the complaint, but not as to its details.
9. **Sexual Assault.** In determining whether a complaint was made promptly and voluntarily, all circumstances surrounding the event must be examined.
10. _____. The effect of a delay in making a complaint may be alleviated by proof of a sufficient reason for the delay, such as intimidation or threats.
11. _____. Fear of the attacker and shame may be sufficient mitigating factors to alleviate the delay between the attack and the complaint.
12. _____. There is no hard and fast rule that a complaint in the form of an answer to a question is involuntary.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and James L. Foster, for appellant.

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

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

BOSLAUGH, J.

The defendant was convicted of robbery and two counts of first degree forcible sexual assault. He was sentenced to imprisonment for 11 to 15 years on

the assault counts and 1 to 3 years on the robbery count, all sentences to run concurrently. He has appealed and contends that the evidence was insufficient to support the finding of guilty on each count, and that the trial court erred in admitting testimony relating to a report made by the victim to a detective and testimony concerning a rectal examination of the victim made by a physician.

The victim was an 18-year-old boy, a resident of Omaha, Nebraska, who had "run away" from school. The victim had come to Lincoln with a friend and was staying at an apartment occupied by the defendant and Kimberly Robbins.

The first assault occurred late on the evening of October 2, 1981. The victim testified that the defendant ordered him to remove his clothing. When the victim hesitated, the defendant struck the victim in the face and threatened to beat him if he did not do as he had been told. The defendant then told the victim that he was a slave and the defendant and Mark McClintic, who was staying in the apartment, were his masters.

The victim was wearing an arrowhead necklace. The defendant told the victim to give him the necklace or the defendant would kill him. The victim then surrendered the necklace to the defendant.

The victim was then required to perform fellatio on McClintic and the defendant. After that the victim was ordered to take two blankets and go to the kitchen. The defendant was made to get down on his hands and knees and was assaulted sexually by the defendant and then McClintic. During the assaults, when the defendant and McClintic had difficulty in achieving penetration, the victim was accused of not cooperating and was struck in the rib area and the face. The victim was also burned about the buttocks with a hot frying pan while he was being assaulted by McClintic. After McClintic had finished, the defendant assaulted the victim a second time.

After the victim returned to the living room of the apartment he was burned about the chest three times with lighted cigarettes. Later the victim was beaten on his chest and back with a belt.

The second assault took place on the following night in the bathroom of the apartment. Before that assault the victim was again forced to perform fellatio on the defendant and McClintic.

The victim was allowed to leave the apartment on the following Monday. The defendant warned the victim to not tell the police what had happened; and if he was questioned he was to say "two black guys beat me up."

The defendant was hitchhiking on the Interstate highway when he was picked up by a state patrolman. Because of his injuries he was taken to the hospital where he was examined and photographs of his injuries were made. He was questioned at the hospital by Detective Sorensen and Officer Schneider of the Lincoln Police Department.

At first the victim said that he had been assaulted by two black males. Under questioning by the officers the victim finally stated that he had been assaulted by a white male at the defendant's apartment. The victim was reluctant to admit that he had been sexually assaulted and did not give the details of the assault to Detective Sorensen until later that evening at the police station.

Detective Sorensen asked the victim to submit to a rectal examination by his family physician in Omaha. The examination was made by Dr. Beran on October 8, 1981, after the victim failed to ask the doctor to examine his rectum when he was examined by the doctor on October 6.

A further summary of the evidence is unnecessary. Although the defendant denied that the sexual assaults had taken place, and claimed that the necklace was a gift from the victim, the evidence of the State was sufficient, if believed, to support a finding of guilty beyond a reasonable doubt on all counts.

The testimony of the victim as to the sexual assaults was corroborated by his report to Detective Sorensen; by the testimony of Kimberly Robbins who overheard some of the conversation at the apartment at the time of the first assault; by the testimony of Dr. Beran concerning the rectal examination of the victim; by the evidence concerning the injuries to the victim when he was examined at the hospital; and by the various items of physical evidence seized at the apartment of the defendant, including the necklace which the defendant was wearing when he was arrested.

The general rule is that the testimony of the victim of a sexual assault must be corroborated as to material facts and circumstances which tend to support his testimony and from which, together with the victim's testimony as to the principal fact, an inference of guilt may be drawn. Corroboration of the principal act constituting the offense is not required. *State v. Watkins*, 207 Neb. 859, 301 N.W.2d 338 (1981); *State v. Wounded Arrow*, 207 Neb. 544, 300 N.W.2d 19 (1980).

In the present case there was sufficient corroborative evidence to sustain the finding of guilt. A complaint of sexual assault was made to the investigating officer. The testimony of Kimberly Robbins corroborated certain details of the victim's testimony. The injuries suffered by the victim to his back, chest, face, and buttocks supported his version of the events. The testimony of the examining physician tended to support a conclusion that the victim had been sexually assaulted. Lastly, the physical evidence, the jeans and the blankets, tended to establish that a sexual assault occurred. See, e.g., *State v. Thompson*, 198 Neb. 48, 251 N.W.2d 387 (1977); *State v. Aby*, 205 Neb. 267, 287 N.W.2d 68 (1980), in which similar evidence was held to be sufficient corroboration to sustain a finding of guilt.

So far as the robbery count is concerned, robbery is committed when property is taken from a person

through the use of force, violence, or intimidation. *State v. Welchel*, 207 Neb. 337, 299 N.W.2d 155 (1980). The victim testified that the defendant threatened to kill him if he did not relinquish the necklace, worth $15, during the course of a violent sexual attack. The necklace was found on the defendant's person at the time of his arrest. The victim's testimony alone was sufficient to sustain the conviction as to the robbery. *State v. Franklin*, 209 Neb. 281, 307 N.W.2d 513 (1981).

The remaining assignments of error relate to claimed errors concerning the admission of evidence by the trial court. Before discussing these errors it is important to note that the trial was to the court. Generally, the admission of evidence which is not relevant or competent is not reversible error in a trial without a jury. "It must be remembered that this case was tried to the court and not to a jury. We have often stated that a presumption arises that the trial court, in trying a case without a jury, will consider only such evidence as is competent and relevant and this court will not reverse a case so tried because evidence was erroneously admitted where there is other material, competent, and relevant evidence sufficient to sustain the trial court's judgment." *Barber v. Barber*, 207 Neb. 101, 115, 296 N.W.2d 463, 472 (1980). The rule is applicable in criminal cases. See, *Laurie v. State*, 108 Neb. 239, 188 N.W. 110 (1922); *Peterson v. State*, 157 Neb. 618, 61 N.W.2d 263 (1953); *Peterson v. State*, 163 Neb. 669, 80 N.W.2d 688 (1957).

The defendant claims that the testimony of the investigating officer with regard to the report by the victim was inadmissible.

The general rule is stated in *State v. Evans*, 212 Neb. 476, 481, 323 N.W.2d 106, 109-10 (1982). " 'The rule is well established in this state that in a prosecution for sexual assault, the *prosecutrix may testify* in chief on direct examination, if within a reasonable time under all the circumstances after the

act was committed she made complaint to another, *to the fact and nature of the complaint, but not as to its details*; and that *others may likewise testify in chief to such fact and nature of the complaint, but not as to its details. State v. Chaney*, 184 Neb. 734, 171 N.W.2d 787 (1969); *Sherrick v. State*, 157 Neb. 623, 61 N.W.2d 358 (1953).' " (Emphasis in original.)

The defendant contends that because the victim did not report the first sexual assault until 3 days after it occurred, and 2 days after the last assault took place, the report was not made within a reasonable time. Defendant argues that because the victim did not divulge that he had been sexually attacked until specifically questioned about it by police, the complaint was not voluntary.

In determining whether a complaint was made promptly and voluntarily for the purpose of admissibility, all circumstances surrounding the event must be examined. "[T]he effect of a delay may be alleviated by proof of a sufficient reason for the delay, 'such as intimidation or threats, or lack of opportunity . . . .' . . . We have recently noted that fear of the attacker, shame, and the threat of placement in a foster home were all sufficient mitigating factors to alleviate the delay between the attack and the complaint." *State v. Evans*, *supra* at 481-82, 323 N.W.2d at 110, quoting *Sherrick v. State*, 157 Neb. 623, 61 N.W.2d 358 (1953), and citing *State v. Watkins*, 207 Neb. 859, 301 N.W.2d 338 (1981), and *State v. Aby*, 205 Neb. 267, 287 N.W.2d 68 (1980).

In *State v. Campbell*, 190 Neb. 22, 24, 206 N.W.2d 53, 55-56 (1973), we said: "We have previously rejected any hard and fast rule that a complaint in the form of an answer to a question is involuntary. See State v. Deardurff, 186 Neb. 92, 180 N.W.2d 890."

The record shows that the victim, an adolescent runaway, had been beaten, threatened, and intimidated by his attacker. He was afraid of what might happen to him if he made a complaint. He was ashamed to relate the details of the attack, par-

ticularly in the presence of his mother. In view of these circumstances the delay was not unreasonable. The complaint was not involuntary simply because it took questioning by the officer, outside the mother's presence, to elicit the details of the true nature of the attack.

The defendant next argues that the testimony of Detective Sorensen, with regard to the details of the victim's complaint, was erroneously admitted. The general rule is that the person to whom a complaint is made may not testify as to the details of the complaint for purposes of corroboration of a sexual assault. See *State v. Evans*, *supra*. Here, the testimony of the victim's complaint was also relevant as bearing upon the issue of his credibility.

The defendant further contends that the testimony of Dr. Beran regarding the rectal examination of the victim was not admissible. The defendant argues that the evidence has little probative value because of the remoteness of the examination from the attack.

The determination of the admissibility of evidence is largely within the discretion of the trial court. See *State v. Weible*, 211 Neb. 174, 317 N.W.2d 920 (1982). The result of the examination had probative value in this case. There was no evidence that the injury to the victim's rectum was a result of any other internal or external force. The victim testified that he had been sexually assaulted a number of times over a period of 2 days. This supports an inference that the attacks caused the injury observed by the doctor. " 'Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.' " *Herman v. Midland Ag Service, Inc.*, 200 Neb. 356, 379, 264 N.W.2d 161, 173 (1978). The doctor's testimony tended to establish that the assaults had occurred.

The trial court did not abuse its discretion in admitting the evidence.

There being no error, the judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. BEVERLY J. (PAT) HOCHSTETLER, APPELLANT.

334 N.W.2d 455

Filed May 27, 1983. No. 82-529.

1. **Appeal and Error.** Errors assigned but not discussed will generally not be considered in either civil or criminal cases.
2. **Directed Verdict: Waiver.** The introduction of evidence by the defendant following the overruling of a motion for directed verdict at the close of the State's case waives any error in the ruling on the motion; however, the defendant is not prevented from questioning the sufficiency of the evidence in the entire record to sustain a conviction.
3. **Verdicts: Appeal and Error.** This court will not interfere with a jury verdict of guilty based upon evidence sufficient to support the verdict beyond a reasonable doubt.
4. **Justiciable Issues: Appeal and Error.** In the absence of a present and existing controversy, there is no relief this court may grant; it is not our function to render advisory opinions.

Appeal from the District Court for Greeley County: JAMES R. KELLY, Judge. Affirmed.

Earl D. Ahlschwede of Ahlschwede & Truell, for appellant.

Paul L. Douglas, Attorney General, and Shanler D. Cronk, for appellee.

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

CAPORALE, J.

Following a trial by jury the defendant-appellant, Beverly J. (Pat) Hochstetler, was convicted of exercising control over property owned by another. In this appeal she contends the trial court erred by

(1) failing to grant defendant's motion, made at the close of the State's case in chief, to dismiss the information; (2) failing to grant her motion for a directed verdict made at the close of the State's case in chief; (3) failing to grant a new trial because of newly discovered evidence; and (4) imposing as a condition of probation the requirement that she "refrain totally from acting as her own lawyer, and . . . from representing herself as an attorney or a proctor." We affirm.

In its case in chief the State produced evidence from which the jury could find that during the latter part of April of 1981 defendant called one William Thompson in response to an advertisement he had run offering to purchase scrap iron. Defendant represented she had some old junk machinery owned by her father and that she wished to dispose of it. She directed Thompson to a farm near Scotia, Nebraska, which she occupied and represented she owned, so that Thompson could look over the equipment. During the next several days Thompson removed the equipment from the farm. Defendant executed a bill of sale, in the presence of a notary public, reciting as follows: "I, Mrs. B. J. Hochstetler, do hereby state that I have placed into the hands of Mr. Bill Thompson, Two old tractors, one Farmall, one Massey-Harris, and several pieces of old farm equipment for the purposes of scrapping." Thompson paid defendant a total of $140, $135 of which was for the farm equipment and $5 of which was for a pipe wrench. Leslie Denning, who owned the farm upon which the equipment was located, identified all the missing equipment as his, with the exception of one subsoiler which belonged to a neighbor. At no time had Denning given defendant permission to sell or otherwise dispose of the equipment. The value of Denning's equipment was established at well in excess of $1,000.

At the close of the State's case in chief defendant moved, in the alternative, for either dismissal of the

information against her on the ground the State failed to prove a prima facie case or for a verdict of not guilty on the ground there was a lack of sufficient evidence. Both motions were overruled by the trial court.

Defendant thereafter elected to testify on her own behalf. She confirmed that she rented the Scotia farm site from Denning and that she called Thompson about removing some scrap metal in response to his advertisement. She denied, however, that she showed him any farm equipment, claiming that she only directed him to different piles of scrap metal. She claimed Thompson stated he would have to go back to his home to get something to dig out the piles in order to determine whether he could remove the scrap. She denied seeing Thompson return to the farm to pick anything up. She admitted signing a bill of sale but stated she did not examine it very well, and denied receiving any money from Thompson.

In rebuttal the State called Thompson's son, who testified he accompanied his father to the Scotia farm site, that defendant was present on each of those two trips, and that he saw his father give the defendant money. Thompson's stepdaughter testified that she had accompanied her stepfather to the Scotia farm site on one trip, at which time she saw the defendant.

After that rebuttal testimony the defendant again took the stand and essentially denied that she had ever seen Thompson's son or his stepdaughter at the Scotia farm site.

At the defendant's hearing on her motion for new trial, an affidavit of one Clinton W. John was introduced into evidence. The thrust of the affidavit is that subsequent to defendant's trial Thompson apologized to defendant in words approximated by John as follows: "Pat, I sure am sorry, I had to say them things about you in court. I wouldn't hurt nobody for the world. But I had to say them things to

cover myself." The trial court overruled the motion for new trial and sentenced defendant to probation for a period of 3 years.

Defendant does not discuss in her brief the first assignment of error and we therefore do not address it. Errors assigned but not discussed will generally not be considered in either civil or criminal cases. Neb. Rev. Stat. § 25-1919 (Reissue 1979); *Flakus v. Schug*, 213 Neb. 491, 329 N.W.2d 859 (1983); *State v. Beckner*, 211 Neb. 442, 318 N.W.2d 889 (1982).

As to the second assignment of error the rule is that the introduction of evidence by the defendant following the overruling of a motion for directed verdict at the close of the State's case waives any error in the ruling on the motion; however, the defendant is not prevented from questioning the sufficiency of the evidence in the entire record to sustain a conviction. *State v. Hilpert*, 213 Neb. 564, 330 N.W.2d 729 (1983); *Henggler v. State*, 173 Neb. 171, 112 N.W.2d 762 (1962).

We must therefore determine whether the record as a whole sustains the conviction. Defendant was charged with the crime of theft by taking or exercising control over movable property of another with the intent to deprive him thereof, pursuant to Neb. Rev. Stat. § 28-511(1) (Cum. Supp. 1982). Because the value of the property exceeds $1,000, it was charged as a Class III felony pursuant to Neb. Rev. Stat. § 28-518(1) (Cum. Supp. 1982). Therefore, the essential elements which the State was required to prove were that defendant had exercised control over the equipment owned by Leslie Denning, that she did so with the intent to deprive him of that property, and that the value of the property was over $1,000. If the jury believed the State's evidence each of those elements were established beyond a reasonable doubt. This court will not interfere with a jury verdict of guilty based upon evidence sufficient to support the verdict beyond a reasonable doubt. *State v. Welsh*, *ante* p. 60, 332 N.W.2d 685

(1983); *State v. Holland*, 213 Neb. 170, 328 N.W.2d 205 (1982); *State v. Brown*, 213 Neb. 68, 327 N.W.2d 107 (1982).

As to her third assignment of error defendant acknowledges that any newly discovered evidence such as to warrant a new trial must be so potent in nature that, by strengthening evidence already offered, a new trial would probably result in a different verdict. *State v. Pittman*, 210 Neb. 117, 313 N.W.2d 252 (1981); *State v. Munson*, 204 Neb. 814, 285 N.W.2d 703 (1979). There is nothing in the John affidavit which meets the requirement of that standard. The statements attributed to Thompson lead only to the conclusion that Thompson regretted the need to testify as to the occurrence in question. It certainly does not, as suggested by defendant, compel a finding that Thompson perjured himself in order to preserve his own safety at the expense of defendant's conviction.

We need not determine at this time whether the condition of probation imposed upon defendant, and recited in her fourth assignment of error, is an appropriate one or should be imposed on anything other than a case-by-case basis after the showing of defendant's inability to intelligently represent herself. We have nothing before us which establishes that defendant either wishes, or has sought and been denied, leave to represent herself in any proceeding. In that posture there is no present and existing controversy to resolve with respect to that issue; there is, therefore, no relief which we may grant. It is not our function to render advisory opinions. *City of Crete v. County of Saline, ante* p. 200, 332 N.W.2d 926 (1983); *Ellis v. County of Scotts Bluff*, 210 Neb. 495, 315 N.W.2d 451 (1982); *State ex rel. Douglas v. Ledwith*, 204 Neb. 6, 281 N.W.2d 729 (1979).

AFFIRMED.