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DECIDED BETWEEN

JULY 29, 1983 and DECEMBER 22, 1983

IN THE

Supreme Court of Nebraska

VOLUME CCXV

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. 44358: **Uher v. State.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 82-492: **State v. Leviston.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 82-598: **Reichenberg v. Board of Education.** Motion of appellant to dismiss appeal sustained; each party to pay own costs.

No. 82-624: **Muhlbach v. Muhlbach.** Affirmed as modified by order of the court.

No. 82-671: **In re 1981-82 County Tax Levy, Sayers v. County Board of Equal.** Motion of appellee for summary dismissal sustained; judgment affirmed; see Rule 7B(1).

No. 82-757: **Phillips v. Phillips.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 82-779: **Zyblut v. Davis.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 82-805: **State v. Jacobson.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 82-810: **State ex rel. NSBA v. Rudd.** Judgment of censure and judgment of probation.

No. 82-838: **State ex rel. NSBA v. Haney.** Order of disbarment entered.

No. 83-005: **State v. Hill.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 83-022: **State v. Henderson.** Motion of appellant to dismiss appeal sustained; appeal dismissed at costs of appellant.

No. 83-059: **Herda v. Herda.** By order of the

court, appeal dismissed for lack of jurisdiction.

No. 83-072: **Lincoln Bank East v. Medic-aides, Inc.** Stipulation allowed; appeal dismissed at costs of appellant.

No. 83-075: **Benson v. Hinn.** Stipulation allowed; appeal dismissed at costs of appellant.

No. 83-097: **Lincoln City Employees Union v. City of Lincoln.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 83-114: **State v. Green.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 83-115: **State v. Haynes.** Motion of appellee to dismiss appeal sustained; appeal dismissed.

No. 83-141: **Foreman v. Foreman.** Motion of appellant to dismiss appeal sustained; appeal dismissed at costs of appellant.

No. 83-153: **State v. Eagle Deer.** Judgment affirmed; see Rule 7A.

No. 83-154: **Isherwood v. Isherwood.** Affirmed as modified by order of the court.

No. 83-159: **State v. Billingsley.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 83-171: **State v. Thomas.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 83-178: **Iverson v. Peterson.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

Nos. 83-180, 83-181: **State v. Everett.** Judgment affirmed; see Rule 7A.

No. 83-182: **State v. Cantillo.** Motion of appellant to dismiss appeal with prejudice sustained; appeal dismissed at costs of appellant.

No. 83-185: **State v. Bean.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 83-204: **State ex rel. Condon v. Black.** Stipulation allowed; appeal dismissed.

No. 83-209: **State v. Rolling.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 83-210: **State v. Hager.** Judgment affirmed; see Rule 7A.

No. 83-221: **Owings v. Owings.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 83-230: **State v. Maxey.** Affirmed; see Rule 7A.

No. 83-238: **State v. Brooks.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 83-239: **Heemstra v. Heemstra.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 83-243: **State v. Ganote.** Judgment affirmed; see Rule 7A.

No. 83-247: **State v. White.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 83-250: **Phillips v. Allstate Insurance Co.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 83-257: **Peterson v. Lincoln Production Credit Assoc.** Stipulation allowed; appeal dismissed.

No. 83-261: **In re App. Northwestern Bell Telephone Co.** Motion of appellant to dismiss appeal sustained; appeal dismissed at costs of appellant.

No. 83-273: **Commerce Savings Lincoln, Inc. v. West "O" Retail Shops.** Motion of appellant to dismiss appeal sustained; appeal dismissed at costs of appellant. Motion of appellant for return of cash deposit overruled without prejudice to making application in the District Court after the mandate has been issued in this case. Motion of appellant for return of docket fee overruled for the reason that the statute prohibits the return.

No. 83-280: **Union Bank and Trust Co. v. Tune.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 83-284: **Bartlett v. Bartlett.** Affirmed as modified by order of the court.

No. 83-287: **Kurtzer v. Reardon.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

Nos. 83-289, 83-290: **State v. Edwards.** Judgment affirmed; see Rule 7A.

No. 83-300: **Cornhusker Casualty Co. v. Janzen.** Stipulation allowed; appeal dismissed at costs of appellant.

No. 83-301: **Gerdes v. Gerdes.** Affirmed as modified by order of the court.

No. 83-306: **State v. Miller.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 83-312: **State v. Coffin.** Judgment affirmed; see Rule 7A.

No. 83-317: **State v. Kilgore.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 83-321: **Pratt v. Graham.** Stipulation allowed; appeal dismissed.

No. 83-333: **State v. Miller.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 83-334: **State v. Turnage.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 83-336: **State v. Schriner.** Judgment affirmed; see Rule 7A.

No. 83-341: **State v. Brockman.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 83-343: **State v. Ernest.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

Nos. 83-349, 83-350: **State v. Scott.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

Nos. 83-352, 83-385: **State v. Spale.** Motion of

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

No. 83-353: **Adams v. City of Omaha.** Motion of appellants to dismiss appeal sustained; appeal dismissed at costs of appellants.

Nos. 83-357, 83-358: **State v. James.** Affirmed; see Rule 7A.

No. 83-362: **State v. Sherrod.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 83-363: **State v. Nielsen.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 83-365: **State v. Kallso.** Judgment affirmed; see Rule 7A.

No. 83-369: **State ex rel. Douglas v. Good-Life Pentecostal Church of York.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 83-378: **State v. Garner.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 83-397: **Bass v. Dalton.** Appeal dismissed as premature; see Rule 7A.

No. 83-404: **State v. Davis.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 83-408: **State v. Pokorney.** Stipulation allowed; appeal dismissed.

No. 83-413: **Wiseman v. Wiseman.** Affirmed as modified by order of the court.

No. 83-414: **Shaw v. Shaw.** Affirmed as modified by order of the court.

No. 83-415: **State v. Kaufman.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 83-416: **Raymond v. Barnett.** Stipulation allowed; appeal dismissed.

No. 83-418: **State v. McDonald.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 83-425: **State v. Burley.** Affirmed; see Rule 7A.

No. 83-430: **Carlson v. Vosik.** Stipulation allowed; appeal dismissed at costs of appellant.

No. 83-436: **Kolc v. City of Lincoln.** Dismissed for failure to file briefs.

No. 83-443: **In re Estate of Markus, Markus v. Stengel.** Motion of appellant to dismiss appeal sustained; appeal dismissed at costs of appellant.

No. 83-447: **State v. Hallowell.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 83-449: **State v. Christensen.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 83-450: **State v. Montgomery.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 83-452: **Trailmobile, Inc. v. Utility Midwest Trailer Sales, Inc.** Stipulation allowed; appeal dismissed.

No. 83-455: **Brown v. Thurston.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 83-462: **State v. Carr.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 83-473: **Doremus v. Doremus.** Stipulation allowed; appeal dismissed.

No. 83-475: **Reeves v. Yeaman.** Stipulation allowed; appeal dismissed with prejudice.

No. 83-479: **State v. Prichard.** Affirmed; see Rule 7A.

No. 83-480: **Hallett v. George A. Hormel & Co.** Stipulation allowed; appeal and appeal on cross-appeal dismissed; each party to pay own costs.

No. 83-483: **State v. Karnes.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B(4).

No. 83-484: **Garrett v. Peterson.** Motion of appel-

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

No. 83-491: **State v. Cluck.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 83-499: **Himes v. Carter.** Judgment vacated; case remanded by order of the court.

No. 83-500: **Nebraska Mutual Insurance Co. v. First National Bank & Trust Co.** Motion of appellant to dismiss appeal sustained; appeal dismissed at costs of appellant.

No. 83-502: **State v. Kramer.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 83-512: **Murphy v. Murphy.** Affirmed as modified by order of the court.

No. 83-515: **State v. Detweiler.** Affirmed; see Rule 7A.

No. 83-523: **Peeks v. Cook.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice at costs of appellant.

No. 83-524: **Griffin v. Vandersnick.** Motion of appellant to dismiss appeal sustained; appeal dismissed at costs of appellant.

No. 83-527: **O'Neill Production Credit Assoc. v. Shald.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 83-531: **State v. Teer.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 83-532: **T-V Transmission, Inc. v. County Board of Equalization.** Motion of appellant to dismiss appeal sustained; appeal dismissed at costs of appellant.

No. 83-536: **State v. Martenson.** Affirmed; see Rule 7A.

No. 83-541: **Kauffman v. Kauffman.** Affirmed as modified by order of the court.

No. 83-545: **Jandl v. Jones.** Stipulation allowed; appeal dismissed.

No. 83-557: **State v. Manning.** Motion of court-

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

No. 83-560: **Schmale v. Schmale.** Motion of appellant to dismiss appeal sustained; appeal dismissed at costs of appellant.

No. 83-568: **Keystone Ranch Co. v. Nebraska Public Power & Irrigation District.** Motion of appellees for summary dismissal sustained; see Rule 7B(1).

No. 83-574: **Bredfeldt v. Graves.** Stipulation allowed; appeal dismissed.

No. 83-575: **Schieffer v. Schieffer.** Stipulation allowed; appeal dismissed.

No. 83-578: **State v. Sims.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 83-611: **State v. Montgomery.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 83-614: **Haskell v. Haskell.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 83-620: **Gritzfeld v. Sears, Roebuck & Co.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 83-640: **Markise v. B Enterprises, Inc.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 83-656: **State of Iowa Dept. of Social Services v. Lehman.** Affirmed as modified by order of the court.

No. 83-657: **Brungardt v. Great Plains Insurance Co.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 83-658: **Erickson v. Sands.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 83-668: **Murphy v. Urbanek.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 83-671: **Anderson v. State Dept. of Roads.** Affirmed as modified by order of the court.

No. 83-687: **Modern Farm Equipment Corp. v. Reimann.** Motion of appellant to dismiss appeal

sustained; appeal dismissed.

No. 83-706: **Occidental Savings and Loan Assoc. v. Bruner.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 83-729: **Seamark v. City of Lincoln.** Stipulation allowed; appeal dismissed.

No. 83-735: **Anderson v. Anderson.** Affirmed as modified by order of the court.

No. 83-752: **Napue v. Napue.** Stipulation allowed; appeal dismissed.

No. 83-787: **Fecht v. Milligan Grain Co.** Stipulation allowed; appeal dismissed.

No. 83-794: **Tim Thunn Construction v. Budin.** Stipulation allowed; appeal dismissed.

No. 83-799: **Burgess v. Marathon Realty Corp.** Stipulation allowed; appeal dismissed.

No. 83-817: **SID No. 103 v. Dain, Kalman & Quail.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 83-830: **Bordovsky v. Bordovsky.** Affirmed as modified by order of the court.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

UNITED WAY OF THE MIDLANDS, APPELLEE, V. DOUGLAS COUNTY BOARD OF EQUALIZATION, DOUGLAS COUNTY, NEBRASKA, APPELLANT.

337 N.W.2d 103

Filed July 29, 1983. No. 81-766.

1. **Taxation: Charities.** Property is not used for financial gain or profit to either the owner or user if no part of the income from it is distributed to the owner's or user's members, directors, or officers, or to private individuals.
2. _____: _____. Concurrent ownership and use of property in a single entity is not required in order for property to qualify for a charitable exemption from taxation.
3. _____: _____. Lease of property to a charitable organization by a charitable organization for substantially less than its fair rental value is a use of the property for a charitable purpose.
4. _____: _____. Vacant space in property owned by a charitable organization is exempt from taxation if it is intended for a charitable use, the dominant use of the property as a whole is for exempt purposes, and the conditions under which it is held preclude its use for commercial purposes.

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

Donald L. Knowles, Douglas County Attorney, and Rockford G. Meyer, for appellant.

Norman H. Wright of Fraser, Stryker, Veach, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellee.

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

MORAN, D.J.

The Douglas County Board of Equalization ap-

peals the District Court's decree determining that real estate owned by United Way of the Midlands was exempt from taxation for the year 1979. We affirm.

At trial the facts were stipulated. The pertinent portions of the stipulation are: United Way is a nonprofit, charitable organization as defined by the laws of Nebraska and the United States. It owns real estate in Omaha known as the A. C. Nelson Center for Community Services. United Way acquired the property with donated funds subject to certain terms and conditions, including one condition that prohibits the building from being used for commercial purposes. The building contains approximately 27,704 square feet of space. In 1978 United Way leased 5,256 square feet of space in separate leases to Omaha Council of Campfire Girls and Greater Omaha Community Action. These organizations are recognized as nonprofit, charitable organizations under the laws of Nebraska and the United States. The lease rental was $3 a square foot which was about one-half the fair market rental value for similarly constructed and situated properties. The lease obligated United Way to provide air conditioning, heat, water, janitor and elevator service, and repainting for the leased space. Gross rental income in 1978 was $20,008. The cost of services United Way was obligated to furnish for the leased space was $11,600. United Way occupied and used 14,948 square feet of space for its charitable purposes. It had 6,258 square feet of vacant space which it held for lease to charitable or nonprofit agencies as required by a condition of the grant. The remaining 1,250 square feet was common area.

The board of equalization determined that the space United Way used for its charitable purposes was exempt from taxation and that the portions of the property attributable to the leased space and the vacant space were subject to real property taxation as recommended by the county assessor. The par-

ties did not dispute the exemption of the common area. The District Court decreed that all the property was exempt from taxation.

Neb. Const. art. VIII, § 2, states in pertinent part: "The Legislature by general law may exempt . . . property owned and used exclusively for educational, religious, charitable, or cemetery purposes, when such property is not owned or used for financial gain or profit to either the owner or user."

In Neb. Rev. Stat. § 77-202 (Reissue 1976) the Legislature by general law declared such property exempt from taxation, using the precise language found in the Constitution.

Statutes exempting property from taxation are to be strictly construed, and the burden of proving the right to exemption is upon the claimant. *Lincoln Woman's Club v. City of Lincoln*, 178 Neb. 357, 133 N.W.2d 455 (1965). This does not mean that there should not be a liberal construction of the language used in order to carry out the expressed intention of the fundamental lawmakers and the Legislature, but, rather, that the property which is claimed to be exempt must come clearly within the provisions granting such exemption. *Y.M.C.A. of Omaha v. Douglas County*, 60 Neb. 642, 83 N.W. 924 (1900).

The policy in providing for tax exemptions for charitable uses is based on the principles that tax exemptions benefit the public generally and the organization performs services which the state is relieved pro tanto from performing. 84 C.J.S. *Taxation* § 215 (1954). See, also, *Y.M.C.A. of Omaha v. Dcuglas County, supra.*

We first deal with the legitimacy of an exemption for the space leased to charitable organizations.

Appellant attempts to dispose of the issue by contending that since United Way received income from the property, it is "used for financial gain or profit to either the owner or the user" and therefore fails to meet the constitutional and statutory require-

ments for exemption from taxation. Brief of Appellant at 10.

It is true that in this case the difference between rentals received and cost of services furnished by United Way was $8,408. However, this does not alone disqualify the space from the exemption. See *House of the Good Shepherd v. Board of Equalization*, 113 Neb. 489, 203 N.W. 632 (1925).

Neb. Rev. Stat. §§ 21-1901 et seq. (Reissue 1977) make up the Nebraska Nonprofit Corporation Act. Section 21-1901(3) defines a not-for-profit corporation as a "corporation no part of the income of which is distributable to its members, directors or officers." As a Nebraska nonprofit corporation, United Way is burdened by that restriction on the distribution of its income, and there is no evidence that it has violated the statute in that respect. In *City of McAllen v. Ev. Luth. Good Sam. Soc.*, 530 S.W.2d 806 (Tex. 1975), the court said that the proscription against an institution's realization of "gain or profit" refers to gain or profit by private individuals or the accrual of distributable profits.

In *Doane College v. County of Saline*, 173 Neb. 8, 112 N.W.2d 248 (1961), the college rented college-owned faculty housing to faculty members at fair market rental rates. The college credited income from rentals after expenses to the endowment fund. This court denied exemption from property tax, having determined that the faculty housing was not exclusively used for educational purposes. However, we said that the evidence established that the faculty housing units were not owned or used for financial gain or profit to either the owner or user.

From the foregoing we deduce the rule to be that property is not used for financial gain or profit to either the owner or user if no part of the income from the property is distributed to the owner's or user's members, directors, or officers, or to private individuals. Applying the rule to the evidence in this case, it is clear that there was no financial

gain or profit to either the owner or users of the leased space.

Was the leased space owned and used exclusively for charitable purposes? While we have said that it is the exclusive use of property that determines its exempt status, *Nebraska Conf. Assn. Seventh Day Adventists v. Bd. of Equalization*, 179 Neb. 326, 138 N.W.2d 455 (1965), the Constitution and statute also require that the property be owned for an exempt purpose. In our examination of the Constitution and the statute, we find no requirement that the ownership and use must be by the same entity. In fact, reference to "either the owner or user" in the last part of the sentence of the constitutional provision quoted indicates to us that ownership and use may be by separate entities.

In *Sisters of Charity, etc. v. County of Bernalillo*, 93 N.M. 42, 596 P.2d 255 (1979), the owner of the property, a charitable organization, leased a portion of its property to a wholly owned subsidiary which was also a charitable organization with the same purposes. The court granted exemption from taxes under those circumstances. The court said: "The recent trend in the United States is consistent with our holding. The notion that ownership and operation of the subject property must coincide in a single legal entity in order for property to qualify for a charitable exemption has been rejected in recent years in a number of other jurisdictions." (Citations omitted.) *Id.* at 45, 596 P.2d at 258.

Ownership by United Way, a charitable organization, is undisputed; therefore, the ownership test is met.

We have two "uses" in this case: the lessee charitable organizations' use of the leased space and United Way's use of the leased space for income. The exclusive use of the space for charitable purposes by Omaha Council of Campfire Girls and Greater Omaha Community Action is not questioned. The real issue is whether United Way's

"use" of the leased space by leasing it to charitable corporations at substantially less than fair market rental rates is an exclusive use of that space for charitable purposes by United Way.

There are no Nebraska cases on point. Leases of space for business purposes have resulted in a denial of exemption in such cases as *Y.M.C.A. of Omaha v. Douglas County*, 60 Neb. 642, 83 N.W. 924 (1900), and *Young Men's Christian Ass'n v. Lancaster County*, 106 Neb. 105, 182 N.W. 593 (1921). However, this court has also held inferentially that charges to teachers of a percentage of their salaries as rent for houses they occupied on or near school grounds did not defeat an exemption from taxes, because the property was used for school purposes. *Nebraska Conf. Assn. Seventh Day Adventists v. Bd. of Equalization*, *supra*. We determined in that case the dominant use of the houses was educational, because faculty members were required to live in their assigned residences and they used them for student meetings and counseling.

We conclude that the rental agreed to by the parties in this case shows the use of the property was not for a business purpose but, rather, for a charitable use. The result of the leases was financial assistance to the charitable organizations, which aided them in the performance of their charitable activities.

Exclusive use of property for exempt purposes is required, and it has been established in this case. That the use is by different entities is of no consequence.

The final question is whether the vacant space held for lease has exempt status.

In *First Christian Church of Beatrice v. City of Beatrice*, 39 Neb. 432, 58 N.W. 166 (1894), we held that property leased commercially while funds were being accumulated for the construction of a church edifice did not qualify for tax exemption. We said that an intention to use property in the future for an

exempt purpose is not a use of the property for religious purposes. This case is still the law on the facts presented. In the case before us, a condition of United Way's grant prohibits the use of the building for commercial purposes. The grant also requires United Way to lease space only to charitable or nonprofit organizations. The facts here are similar to the not unusual situation of unused rooms in a charitable hospital or in the dormitory of an educational institution. Oftentimes a qualified organization acquires or maintains building space in reasonable anticipation of full occupancy for an exempt purpose but cannot do so because of economic conditions or other legitimate reasons.

Here, the dominant use of the building as a whole is for charitable purposes. That, coupled with the conditions of the grant under which it is held, makes United Way's use of the vacant space exclusively for charitable purposes.

While there are no cases on point, our holding is consistent with *Lincoln Woman's Club v. City of Lincoln*, 178 Neb. 357, 133 N.W.2d 455 (1965), where we allowed an exemption although a building was not used for exempt purposes full time. See, also, *Academy of the Sacred Heart v. Irey*, 51 Neb. 755, 71 N.W. 752 (1897).

AFFIRMED.

IN RE APPLICATIONS OF NEBRASKA PUBLIC POWER DISTRICT.
NEBRASKA PUBLIC POWER DISTRICT, APPELLEE, V. NEBRASKA SAFE ENERGY ALTERNATIVES, INC., ET AL., APPELLANTS,
NEBRASKA ELECTRIC GENERATION AND TRANSMISSION COOPERATIVE, INC., INTERVENOR-APPELLEE.

337 N.W.2d 107

Filed July 29, 1983. No. 82-326.

1. **Nebraska Power Review Board: Appeal and Error.** Upon review of an order of the Nebraska Power Review Board, this court is guided by the rule that determination of what is consistent with the public convenience and necessity is a question of fact peculiarly for the determination of the board. This court may question only whether the board acted within the scope of its authority and if the order complained of is supported by the evidence and is reasonable and not arbitrarily made.
2. **Nebraska Power Review Board: Words and Phrases.** The word "may," as used in rule 28 of the Revised Rules of Practice and Procedure of the Nebraska Power Review Board (1975), relating to the conducting of an investigation by such board on its own motion, makes such investigation discretionary and not mandatory.
3. **Records: Appeal and Error.** Although the Nebraska Power Review Board may not be required to follow the technical common-law rules of evidence in ruling on offered evidence which may possess probative value, nonetheless neither that agency on initial hearing nor this court on review is required to sift through a voluminous record made in a hearing other than the one under consideration to determine whether such record contains anything probative of the particular issue under consideration. In such case the proponent of the evidence is required to index and designate that evidence which it feels is relevant in accordance with the rules of the agency.
4. **Evidence.** As a general rule, evidence presented at a hearing to determine what might be in the public interest in one state is not necessarily pertinent to a consideration of that issue in another state.
5. _____. A determination of the relevancy of evidence generally rests within the sound discretion of the trial tribunal.
6. **Collateral Estoppel.** As a general rule, collateral estoppel may be applied if the identical issue was decided in a prior action, there was a judgment on the merits which was final, the party against whom the rule is to be applied was a party or in privity with a party to the prior action, and there was an opportunity to fully and fairly litigate the issue in the prior action.

7. **Statutes: Issue Preclusion.** Even though two statutes appear to be identical, issues arising under these statutes are not necessarily the same so as to give rise to the rule of issue preclusion, because the policy under such statutes may be different.
8. **Public Utilities: Proof.** What constitutes public convenience and necessity is primarily a fact question with a number of imponderables to be taken into consideration. The facts in each case must be separately considered, and from those facts it must be determined whether public convenience and necessity require a given utility service to be performed.
9. _____: _____. The grant or denial of an application of a utility company, based on public convenience and necessity, by the administrative agency charged with the responsibility for supervising such industry requires the exercise of administrative and legislative functions.
10. **Issue Preclusion: Proof.** For the purposes of invoking the rule of issue preclusion, the determination of the public convenience and necessity in one state is not an identical issue to a similar determination in another state.

Appeal from the Nebraska Power Review Board. Affirmed.

Jewell, Otte, Gatz & Collins, for appellants.

Gene D. Watson and John C. McClure, for appellee NPPD.

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

HASTINGS, J.

This litigation originated with the filing by the Nebraska Public Power District (NPPD), a public corporation and political subdivision of the State of Nebraska, of two applications with the Nebraska Power Review Board (Board), requesting authorization to construct a 500 kV transmission line and a 500/345 kV substation in northeast Nebraska as a part of the proposed "MANDAN Project."

The "MANDAN Project" is a proposed international and interstate transmission facility which includes, in the United States, a transmission line extending from the Canadian border that connects to substations in North Dakota, South Dakota, and Ne-

braska. The line is to connect at the United States-Canadian border with a transmission line to be constructed by the Manitoba Hydro-Electric Board of Manitoba, Canada. The purpose of the project is to allow for a seasonal diversity exchange of electric power and energy between summer-peaking utilities such as NPPD, on the one hand, and Canadian utilities, on the other, whose peak demand historically has been in the wintertime. Canada's surplus power is hydro generated, a renewable resource with alleged resulting economic cost control for the benefit of the applicant's power and energy customers.

Protests were filed by the Nebraska Safe Energy Alternatives, Inc., and several individuals, claiming that the applications for construction of the MANDAN Project would not serve the public convenience and necessity; that the construction would not be economically feasible and would result in a duplicity of services; that the safety of the project had not been demonstrated, nor the environmental impact established; and that the State of South Dakota had not granted permission to the applicant to build the connecting extension of the lines across that state. The Nebraska Electric Generation and Transmission Cooperative, Inc., was permitted to intervene in support of the application.

Following a 2-day evidentiary hearing commencing on January 27, 1982, the Board made detailed findings which favored the applications, and it approved the same. The protestants Nebraska Safe Energy Alternatives, Inc., and Howard Wheeler, its president, have appealed that decision to this court. The errors assigned are: (1) The Board erred in refusing to conduct an independent investigation into the merits of the proposed project; (2) The Board erred in sustaining objections to the offer by the protestants of certain testimony originally offered before the South Dakota Public Utilities Commission hearings relating to the "Mandan Line" as proposed across the State of South Dakota; (3) The Board

erred in failing to give full faith and credit to the decision of the South Dakota Public Utilities Commission's decision, and in determining that the doctrines of collateral estoppel and res judicata as to that decision did not apply to the hearing before the Board; (4) The Board's orders of approval are not supported by the evidence and are unreasonable and arbitrarily made; and (5) The Board has exceeded its authority in the manner in which it has acted.

We will consider the last two assignments of error first. Neb. Rev. Stat. § 70-1014 (Reissue 1981) provides that, following hearings on applications such as these, the Board may approve or deny the applications; but before approval may be granted, "the board shall find that the application will serve the public convenience and necessity, and that the applicant can most economically and feasibly supply the electric service resulting from the proposed construction or acquisition, without unnecessary duplication of facilities or operations."

In its orders granting the applications the Board found that "The proposed 'MANDAN Project' will serve the public convenience and necessity, and the applicant, NPPD can most economically and feasibly supply the electric service resulting from the proposed construction without unnecessary duplication of facilities or operations." Clearly, the findings satisfy the statutory requirements, which quite obviously are limited to the public convenience and necessity of the citizens of this state.

Upon review of an order of the Nebraska Power Review Board, we are guided by the rule that determination of what is consistent with the public convenience and necessity is a question of fact peculiarly for the determination of the Board. This court may question only whether the Board acted within the scope of its authority and if the order complained of is supported by the evidence and is reasonable and not arbitrarily made. *Lincoln*

Electric System v. Terpsma, 207 Neb. 289, 298 N.W.2d 366 (1980).

Although not conceding the point, the protestants do not seriously argue that the record as made does not support the findings and order of the Board. We see nothing to be gained by setting forth in detail the evidence submitted to the Board. It was peculiar to this case and would serve no precedential purposes.

The Board did find from the evidence that Manitoba Hydro is an electric utility with increasing winter power and energy demands, whereas NPPD in the same manner is realistically looking at increased summer demands. Such demands, the Board found, were supported by persuasive evidence based on planning and forecasting. The Board determined that the MANDAN Project would not duplicate existing facilities. Also examined in detail by the Board were the five alternatives proposed by NPPD to meet its future needs, including the MANDAN Project, oil-fired generation units, coal-fired generation units, pumped-hydro storage units, and purchased power, and concluded that the MANDAN Project would provide the most economical alternative, representing a savings to the taxpayers of *Nebraska* of $568 million, in 1980 dollars, over the 1987-2005 time frame.

Suffice it to say, disregarding for the moment the excluded testimony, our examination of the record leads us to conclude that the evidence supports the findings made by the Board and clearly establishes that the projects approved by the Board will serve the public convenience and necessity, and are neither arbitrary nor capricious.

However, we must now determine whether evidence excluded by way of the absence of an independent investigation on the part of the Board would alter our conclusion. We have no way of knowing what evidence such an investigation would disclose, and, normally, in the absence of an offer of proof as to excluded evidence, no error can be determined.

Therefore, it is necessary for us to consider whether such an investigation was of a mandatory nature so as to require us to conclude that its absence per se made the action of the Board arbitrary and without authority.

Statutory law makes no provision for such an investigation. Rule 28 of the Revised Rules of Practice and Procedure of the Nebraska Power Review Board (1975) provides in part: "The Board *may* at any time on its own motion, make a formal or informal investigation into any matter within its jurisdiction, or order any hearing which the Board is authorized, either by law or inherent power, to conduct. *In the event* of an investigation, the Board may request the attendance of any party. *In the event* of such request . . . ." (Emphasis supplied.) Webster's Third New International Dictionary, Unabridged (1968), defines *may* as "2 a : have permission to."

In recent years this court has on occasion been asked to construe the meaning of the word *may*, as used in statutes or rules. In *State ex rel. Hubbard v. Northwall*, 150 Neb. 894, 896-97, 36 N.W.2d 282, 283-84 (1949), we said: "The word 'may' is used in the statute. The word on its face denotes a discretionary power in the board. . . .

. . . .

". . .'Without doubt the word "may" in public statutes should be construed as "must" whenever it becomes necessary, in order to carry out the intent of the legislature, but in all other cases this word, like any other, must have its ordinary meaning.' " See *Flood v. Keller*, 214 Neb. 797, 336 N.W.2d 549 (1983). Paraphrasing further the language of *Hubbard* at 897, 36 N.W.2d at 284, there is nothing in the rule cited in the instant case which could give rise to any conclusion that the Board intended other than to lodge in itself the discretion to conduct or not con-

duct an independent investigation. There is no merit to the protestants' first assignment of error.

At the request of the protestants they were permitted to tender their evidence in opposition to the applications first and then leave the hearing. None of their evidence consisted of live testimony, but was all documentary in nature, and all of it was excluded on objection by NPPD. The protestants claim that because rule 23 of the Revised Rules of the Board, *supra*, provides in part that the Board is not bound to follow the technical common-law rules of evidence and that evidence shall be admissible which possesses probative value, the Board erred in its ruling.

The evidence offered by the protestants consisted of several volumes of testimony originally presented at a hearing before the South Dakota Public Utilities Commission. Their offer included:

52 pages of testimony of Whitfield A. Russell, including both questions and answers, and preprepared statements, tables and graphs, relating in part to the feasibility of other potential alternatives to the "MANDAN Project";

17 pages of testimony by Stephen P. Flanagan, an associate of Whitfield A. Russell, together with supporting tables, purporting to be rebuttal testimony on the question of need of the MANDAN transmission facility;

41 pages of testimony by John W. Wilson, contesting the validity of NPPD's load-forecasting models, which are identified in the record as consisting of only exhibit 5, but in fact his testimony is included in both exhibits 5 and 6;

the testimony of James Weaver, which is identified in the protestants' offer as exhibit 6, but, as previously indicated, covers that of John W. Wilson;

exhibit 7, identified in the record as testimony of Stephen P. Flanagan, referred to in the brief as testimony of James Weaver, which in fact contains tes-

timony by Dale Osborn, a Miss Eide, Paul Seeley, and James Weaver;

exhibit 8, 130 pages of testimony which is represented in the record to be testimony of Whitfield A. Russell, and stated in the brief to be testimony of Stephen P. Flanagan, but which in fact contains partial testimony of Robert M. Spahn and of John W. Wilson;

testimony of James Drzemiecki, identified in the record as appearing variously in exhibits 9, 9a, and 10, which in fact is found in exhibit 10, concerned, in part at least, with the electrical energy needs of center pivot irrigation as compared to gravity flow; and

the 102-page document labeled "Findings of Fact, Conclusions of Law, and Decision and Order Denying Permit," entered by the Public Utilities Commission of the State of South Dakota on January 14, 1982.

From a reading of the rather laborious description of the proffered evidence, it must be apparent that it presented to the trial tribunal and this court a series of confusing and conflicting exhibits. A fair reading of rule 24 of the Revised Rules of the Board, previously mentioned, would seem to require that where voluminous documents are offered in evidence it is necessary that the relevant portions thereof be plainly designated and indexed so as to be distinguished from the irrelevant portions. Neither the administrative agency hearing a case in the first instance nor this court on review should bear the burden of sifting through a voluminous record in order to determine whether there is anything probative of the particular issue to be determined.

Furthermore, it is doubtful that evidence presented in a hearing to determine what might be in the public interest in one state is relevant to a consideration of that issue in another state. A determination of the relevancy of evidence generally rests within the sound discretion of the trial tribunal.

State v. Martin, 198 Neb. 811, 255 N.W.2d 844 (1977). The Board did not err in rejecting the offered evidence.

The order of the Public Utilities Commission of the State of South Dakota, dated January 14, 1982, related to a hearing seeking permission to construct the "MANDAN Project" across the State of South Dakota. In that order, the South Dakota commission had found that NPPD had failed to establish the public convenience and necessity of the "proposed trans-state transmission facility . . . in any area or areas which will receive electrical service . . . from the facility, regardless of the state or states in which such area or areas are located." This offer was also rejected by the Board. What we have just declared regarding the testimony of the various witnesses at that South Dakota hearing applies with equal effect to this document. However, the protestants insist that such order must be afforded full faith and credit by the Board and that the doctrines of res judicata or issue preclusion and collateral estoppel apply to these proceedings. We do not agree.

Assuming that we afford "full faith and credit" to the order of the South Dakota commission, the question still remains, Does the doctrine of issue preclusion apply where the regulatory commissions of two sovereign states are charged with the responsibility of determining the public convenience and necessity as to each state of an application to furnish electrical service? We believe that the obvious answer is no.

The protestants rely heavily on *Bowen v. United States*, 570 F.2d 1311 (7th Cir. 1978), in support of their position. However, that case involved a fact question as to whether the pilot of an airplane at the time of a crash had violated a safety regulation by flying his airplane into a known icing condition without having deicing equipment on his aircraft, contrary to federal aviation rules. In a license suspension hearing the National Transportation Safety

Board answered the question in the affirmative and entered an order suspending the pilot's license. In a suit by this same pilot against the United States of America, alleging negligence on the part of the air traffic controllers, the same issue as to whether the pilot had violated a safety regulation was presented to the court. The court simply held that the doctrine of collateral estoppel by reason of issue preclusion applies to a final administrative determination as well as a judicial finding. That does not answer the question here, i.e., Was the *identical* issue to be decided by the Board previously decided by the South Dakota commission?

We have said in *Peterson v. The Nebraska Nat. Gas Co.*, 204 Neb. 136, 139, 281 N.W.2d 525, 527 (1979): "It is now generally held that collateral estoppel may be applied if the *identical* issue was decided in a prior action, there was a judgment on the merits which was final, the party against whom the rule is to be applied was a party or in privity with a party to the prior action, and there was an opportunity to fully and fairly litigate the issue in the prior action." (Emphasis supplied.)

The issue to be decided by the Board was whether this application "will serve the public convenience and necessity [of the State of Nebraska], and that the applicant can most economically and feasibly supply the electric service . . . without unnecessary duplication of facilities or operations." § 70-1014. Of course, the bracketed portion of the quotation does not appear in the section cited. It is, nevertheless, a truism.

The Nebraska Power Review Board was created by Neb. Rev. Stat. §§ 70-1001 et seq. (Reissue 1981). Section 70-1001 provides that in order "to provide the *citizens of the state* with adequate electric service . . . it is the policy of *this state* to avoid and eliminate conflict and competition . . . and eliminate the duplication of facilities and resources . . . ." (Emphasis supplied.) Section 70-1003 establishes

"an independent board to be known as the Nebraska Power Review Board . . . ." Section 70-1012 requires that permission to construct generation or transmission facilities (within the state) must be secured from the Board.

As stated in K. Davis, Administrative Law Text, *Res Judicata* § 18.04 at 363 (3d ed. 1972): "What appears to be an identity of issues may not be when the two cases arise under different statutes; even if the two statutes appear identical, the policy under them may differ." See, also, *Pacific Seafarers, Inc. v. Pacific Far East Line, Inc.*, 404 F.2d 804 (D.C. Cir. 1968); *Thompson v. Flemming*, 188 F. Supp. 123 (D. Or. 1960).

There is nothing in the record to indicate that the standard for determining "public convenience and necessity" in South Dakota is the same as it is in Nebraska. Even so, what constitutes "public convenience and necessity" is primarily a fact question with a number of imponderables to be taken into consideration. The facts in each case must be separately considered, and from those facts it must be determined whether public convenience and necessity require a given service to be performed. *Utilities Comm. v. Coach Co. and Utilities Comm. v. Greyhound Corp.*, 260 N.C. 43, 132 S.E.2d 249 (1963).

The grant or denial of an application of a utility company, based on "public convenience and necessity," by the administrative agency charged with the responsibility for supervising such industry requires the exercise of administrative and legislative functions. *Furstenberg v. Omaha & C.B. Street R. Co.*, 132 Neb. 562, 272 N.W. 756 (1937).

The determination of the "public convenience and necessity" in Nebraska is not an issue which is identical to a similar determination made in another state.

The order of the Nebraska Power Review Board is affirmed.

AFFIRMED.

NEBRASKA LEAGUE OF SAVINGS AND LOAN ASSOCIATIONS ET AL., APPELLANTS, V. RAY A. C. JOHNSON, AUDITOR OF PUBLIC ACCOUNTS OF THE STATE OF NEBRASKA, ET AL., APPELLEES.

337 N.W.2d 114

Filed July 29, 1983. No. 82-333.

1. **Banks and Banking.** Mutuality in membership is basic and essential in a savings and loan association.
2. **Banks and Banking: Statutes.** An act of a savings and loan association must conform with the statutes governing the existence and activities of savings and loan associations. Any act not authorized by such statutes is beyond the powers conferred upon a savings and loan association.
3. **Political Subdivisions.** A political subdivision of Nebraska has only that power delegated by the Legislature. A grant of power to a political subdivision is strictly construed.

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

William A. Tinstman, for appellants.

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

William B. Brandt of Brandt, Horan & Hallstrom, for amicus curiae Nebraska Bankers Association, Inc.

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

SHANAHAN, J.

The plaintiffs, Nebraska League of Savings and Loan Associations, Commercial Federal Savings and Loan Association, and Nebraska State Savings and Loan Association, brought an action against the defendants, Ray A. C. Johnson, Auditor of Public Accounts of the State of Nebraska, Donald J. Mathes, State Investment Officer of the State of Nebraska, and Paul L. Douglas, Attorney General of the State of Nebraska, in which the plaintiffs sought a declaratory judgment that a political subdivision, after signing a waiver of membership in a mutual

savings and loan association, can deposit funds in such association. The District Court dismissed the petition and we affirm that judgment.

Article XI, § 1, of the Nebraska Constitution provides: "No city, county, town, precinct, municipality, or other sub-division of the state, shall ever become a subscriber to the capital stock, or owner of such stock, or any portion or interest therein of any railroad, or private corporation, or association." As we determined in *Nebraska League of S. & L. Assns. v. Mathes*, 201 Neb. 122, 266 N.W.2d 720 (1978), article XI, § 1, of the Nebraska Constitution prohibits the deposit of funds by subdivisions of the State of Nebraska in mutual savings and loan associations except those funds authorized under article XV, § 17(2), regarding investment of retirement or pension funds.

After *Mathes*, *supra*, savings and loan associations in Nebraska solicited deposits from political subdivisions. Before any deposit, however, a political subdivision had to sign an "ACKNOWLEDGMENT AND WAIVER," namely: "The undersigned [depositor] desires to deposit funds with [depository savings and loan]. Depositor acknowledges that it will not, as a result of such deposit, become a member of [depository savings and loan] or obtain any voting or other membership rights, and hereby specifically waives any such rights." By using the waiver from a political subdivision, savings and loan associations believe they have avoided the prohibition contained in *Mathes*.

In 1980 the Attorney General of Nebraska published an opinion which in substance stated that the waiver was ineffectual and that political subdivisions of Nebraska were still prohibited from depositing funds in savings and loan associations. After the Attorney General's opinion, political subdivisions withdrew funds from savings and loan associations and declined to deposit funds in any such association.

The plaintiffs filed their petition for a declaratory judgment that political subdivisions of Nebraska could deposit funds in a savings and loan association as a result of the waiver and that deposits of a political subdivision pursuant to such waiver do not violate article XI, § 1, of the Nebraska Constitution. The plaintiffs additionally requested an injunction against the state officers (Auditor of Public Accounts, State Investment Officer, and Attorney General) restraining such officers from prohibiting deposits by political subdivisions in savings and loan associations and from "informing, advising, instructing, or in any other way representing" that such deposits violated article XI, § 1, of the Nebraska Constitution. From the dismissal of the petition, the plaintiffs appeal and assign as error the trial court's holding that political subdivisions have no authority to execute the waivers; failing to rule that the waivers removed any constitutional objection to deposits by a political subdivision in a savings and loan association; and denying the declaratory judgment in favor of the plaintiffs.

The question presented in this appeal is, What is the result of the waiver executed by a political subdivision regarding any deposit in a savings and loan association?

In *Mathes, supra*, this court clearly set forth some of the essential rights of a member in a savings and loan association: "A deposit in a mutual savings and loan association . . . constitutes the acquisition of an ownership interest and a right to share in the control and the profits or losses on liquidation of the mutual savings and loan association." *Id.* at 125, 266 N.W.2d at 722.

In *Family Savings v. Stewart*, 232 Md. 424, 429, 194 A.2d 118, 121 (1963), the Supreme Court of Maryland made a similar observation that members of a savings and loan association "have the same rights as stockholders in ordinary corporations for profit . . . . In other words, the members or shareholders own

the association and are entitled to conduct its affairs through their officers and Board of Directors."

As early as 1931 in *Saunders v. State Savings & Loan Ass'n.*, 121 Neb. 473, 478, 237 N.W. 572, 574 (1931), the law of Nebraska was stated: "The basic and essential principle of a savings and loan association is mutuality. . . . Members, whether borrowers or nonborrowers, have a mutual interest in its affairs, and, sharing alike in its earnings, must share alike in its losses." As expressed in 12 C.J.S. *Building & Loan Assoc.* § 4 at 750 (1980): "Associations of this nature are mutual benefit organizations, as their main and indeed essential characteristic is perfect mutuality, reciprocity, and equality of all their members."

In *McPherson v. Railway Ass'n*, 93 Colo. 155, 159-60, 25 P.2d 388, 389 (1933), the Supreme Court of Colorado required mutuality among members: "The controlling principle of the association is mutuality among its shareholders; all must fare alike; one shareholder cannot profit at the expense of another. . . . 'The truth is that there is implied, in the very essence of the building association scheme, an agreement between the members of every association, in the light of which all other agreements, and all rules and by-laws, must be read, and to which they must be conformed: and that is the agreement that all burdens shall be equally borne, as well as all profits equally shared,—that the whole enterprise shall be conducted and the rights and obligations of the participants in it shall be adjusted upon a basis of strict mutuality, equality and fairness.' "

It is axiomatic that a savings and loan association can act only in accordance with the powers validly granted by the Legislature. See *Mich. Sav. & Loan v. Finance Comm.*, 347 Mich. 311, 79 N.W.2d 590 (1956). As expressed in *State ex rel. Cleary v. Hopkins Street B. & L. Asso.*, 217 Wis. 179, 185, 257 N.W. 684, 686 (1935): "The respondents were created by the state . . . at a time when without question the

state had plenary power to create and to control the powers of these corporations. . . . They have only the powers emanating from the state."

The waiver in question also must be read in conjunction with the appropriate state and federal statutes governing the existence and activities of a savings and loan association. Neb. Rev. Stat. §§ 8-301 to 8-355 (Reissue 1977) govern state savings and loan associations, while the "Thrift Institutions Restructuring Act," 12 U.S.C.A. §§ 1461 et seq. (1980), governs federal savings and loan associations. Under Nebraska statutes, members are owners of the association (§ 8-303); vote for directors of the association (§ 8-304); and are involved in liquidation of the association (§§ 8-338 and 8-339; see, also, Neb. Rev. Stat. § 8-1,110 (Reissue 1977)). The "Thrift Institutions Restructuring Act" provides in part: "All savings accounts and demand accounts shall have the same priority upon liquidation. Holders of accounts and obligors of an association shall, to such extent as may be provided by its charter or by regulations of the Board, be members of the association, and shall have such voting rights and such other rights as are thereby provided." Act of Oct. 15, 1982, Pub. L. No. 97-320, 1982 U.S. Code Cong. & Ad. News (96 Stat.) 1496.

From a reading of the foregoing statutes, state and federal, we determine that a depositor is a member of a savings and loan association. Pursuant to the waiver under examination in this appeal, a depositor does not acquire any proprietary interest in a savings and loan association, and, therefore, the depositor neither controls the association nor participates in liquidation of a savings and loan association. Also, mutuality in membership is the hallmark of a savings and loan association. The waiver used in this case results in disparity among depositors—even to the point that the interests of some depositors are adverse to the interests of the other depositors, e.g., voting and nonvoting deposi-

tors and depositors excluded from liquidation of a savings and loan association. In savings and loan associations with these waivers, to paraphrase Orwell, all interests are mutual, but some interests are more mutual than others. Such disparity among depositors destroys the mutuality essential in a savings and loan association. Nullification or waiver of mutuality creates an association with characteristics in conflict with laws governing savings and loan associations. Any agreement for nullification or waiver of membership or mutuality is beyond the powers conferred upon a savings and loan association. See, *Bertche v. Loan & Inv. Ass'n of Mo.*, 147 Mo. 343, 48 S.W. 954 (1898); *Meroney v. Loan Association*, 116 N.C. 882, 21 S.E. 924 (1895). The waiver in question contravenes the laws governing and prescribing activities of a savings and loan association, and is void.

Another impediment to the waiver arises from the nature of a political subdivision of Nebraska. Political subdivisions " 'are purely entities of legislative creation. They do not exist independent of some action of the legislative department of government bringing them into being. All the powers which they can possess are derived from the creator. Unlike natural persons they can exercise no power except such as has been expressly delegated to them, or such as may be inferred from some express delegated power essential to give effect to that power.' " *Metropolitan Utilities Dist. v. City of Omaha*, 171 Neb. 609, 614, 107 N.W.2d 397, 401 (1961). See, also, *Garver v. City of Humboldt*, 120 Neb. 132, 231 N.W. 699 (1930). Traditionally, Nebraska has required strict construction regarding the authority granted to a political subdivision. See *Metropolitan Utilities Dist. v. City of Omaha, supra.*

The plaintiffs have not presented any cogent argument that a political subdivision should be permitted to deposit funds in a savings and loan association as an exercise of an expressly or inferentially granted

power. Under the circumstances, execution of the waiver proposed by the savings and loan associations is beyond the powers granted by the Legislature to political subdivisions of Nebraska.

In conclusion, the waiver in question is beyond the powers granted to a savings and loan association, and execution of the waiver is beyond the powers granted to a political subdivision. Our decision, however, relates to mutual savings and loan associations only. For these reasons the judgment of the District Court is affirmed.

AFFIRMED.

BANK OF VALLEY, A CORPORATION, APPELLEE, V. DUANE C. SHUNK, APPELLANT.

337 N.W.2d 118

Filed July 29, 1983. No. 82-481.

1. **Ratification: Agents.** An affirmance of an unauthorized transaction can be inferred from a failure to repudiate it.
2. _____: _____. Ratification of an agent's unauthorized acts may be made by overt action or inferred from silence and inaction.

Appeal from the District Court for Saunders County: BRYCE BARTU, Judge. Reversed and remanded with directions.

David J. Lanphier of McGill, Koley, Parsonage & Lanphier, for appellant.

Richard J. Butler of Ginsburg, Rosenberg, Ginsburg, Cathcart, Curry & Gordon, for appellee.

BOSLAUGH, MCCOWN, WHITE, HASTINGS, CAPORALE, and SHANAHAN, JJ.

WHITE, J.

This case was before this court previously at 208 Neb. 200, 302 N.W.2d 711 (1981). The summary judgment for the plaintiff, Bank of Valley, was reversed and remanded for further proceedings. After trial

there was a verdict followed by a judgment entered for the plaintiff bank. The defendant, Duane C. Shunk, appeals, seeking to reverse the judgment. Our prior decision in this case contains a sufficient statement of the facts except as to some details which will be mentioned in the body of this opinion.

The defendant's only assignments of error on appeal are that the trial court erred in (1) failing to instruct on the issue of estoppel of the bank to deny that its president acted outside the scope of his authority, and (2) failing to instruct regarding the bank's ratification of its president's activities. The trial court's instruction Nos. 5 and 6 state as follows: "INSTRUCTION NO. 5 Your verdict will be for the plaintiff in the sum of $25,000, together with accrued interest unless the defendant proves by a preponderance of the evidence each and all of the following propositions: A. That Peter L. Heintzelman made misrepresentations with intent to deceive Duane Shunk for the purpose of inducing Duane Shunk to execute the promissory note; B. That Peter L. Heintzelman made such misrepresentations as the agent of the plaintiff, Bank of Valley; C. That Duane Shunk justifiably relied upon the misrepresentations; D. That as a proximate result of the misrepresentations Duane Shunk executed the promissory note, EXHIBIT 3.

"If the defendant has failed to establish any one or more of the foregoing-lettered propositions by a preponderance of the evidence, your verdict will be for the plaintiff.

"On the other hand, if the defendant has established by a preponderance of the evidence all of the above-lettered propositions, then your verdict will be for the defendant."

"INSTRUCTION NO. 6 The acts or omissions of an agent are the acts or omissions of a principal only when the agent is acting within the scope of his authority.

"An agent is acting within the scope of his au-

thority when he is performing services for which he has been engaged or while he is doing anything which is reasonably incidental to his service. The test is not necessarily whether the specific conduct was expressly authorized or forbidden by the principal, but rather whether such conduct should have been foreseen from the nature of the service and the duties relating to it, and was brought about, at least in part, by a desire to serve the principal."

The instructions by the trial court informed the jury that its verdict could be for the defendant only if it found that the bank's president, Peter L. Heintzelman, was acting within the scope of his authority as the bank's agent at the time any alleged misrepresentation took place. We find these instructions to be correct, but incomplete.

It is a well-established principle of law that an affirmance of an unauthorized transaction can be inferred from a failure to repudiate it. Restatement (Second) of Agency § 94 (1958); *Kresha v. Kresha*, 211 Neb. 92, 317 N.W.2d 776 (1982); *Drainage District v. Dawson County Irrigation Co.*, 140 Neb. 866, 2 N.W.2d 321 (1942).

Ratification of an agent's unauthorized acts may be made by overt action or inferred from silence and inaction. *Kresha*, *supra*.

In the instant case, Robert Pease, vice president and director of the bank, reviewed the daily transactions and was aware of the fact that Heintzelman, the bank president, had obtained $75,000 from the defendant and two other bank customers, Don Rogert and Wilmer Mattson, in order to repay illegal loans that Heintzelman had made to himself from bank assets, and that Heintzelman was in financial difficulty. Pease contacted and met with Kermit Wagner, a bank holding company officer who acted as the bank's consultant, on February 23, 1977, to discuss the illegal loans from the bank to Heintzelman as well as the loans involving the three bank customers. A meeting between Heintzelman,

Pease, Wagner, and Wayne Woodberry, an accountant, was held on February 25, 1977. Heintzelman disclosed the extent of his indebtedness at $350,000 and Wagner requested Heintzelman's resignation, which was received.

After the meeting, Pease advised Rogert, Mattson and the defendant of Heintzelman's financial problems. Pease took possession of Mattson's $25,000 check and prepared an agreement. The agreement was drafted to complete the transaction between the bank customers so each would owe $25,000 rather than Rogert owing $50,000, since Rogert had advanced the money for Mattson. The agreement also contained language which exculpated the bank from any liability in completing its president's actions. The defendant and the two other bank customers refused to sign the agreement. "Lake Aero, Inc.," a Rogert company, was filled in as payee on Mattson's check and the check was delivered to Rogert, thereby completing the transaction of Heintzelman. Heintzelman then issued a new note to Mattson for $25,000 and a note to Rogert for $25,000.

The bank thereafter refused to cancel the notes, and the assets of the estate of Heintzelman's mother were used to repay Heintzelman's other indebtedness to the bank. This suit was then brought against defendant Shunk for the $25,000 note given to the bank.

In the case of *Thomas v. City Nat. Bank of Hastings*, 40 Neb. 501, 58 N.W. 943 (1894), a Mr. Elsmore and a Mr. Knowlton made and delivered promissory notes to Mr. Paul. Mr. Paul in turn gave the notes to the bank in payment of his debt to the bank. The bank's president sold the notes for value to the plaintiff and placed the bank's guaranty on the notes. The bank kept the proceeds of the sale and used them to retire the outstanding debt from Mr. Paul. Mr. Elsmore and Mr. Knowlton became insolvent

and the plaintiff sued the bank upon its guaranty on the notes. The bank defended on the ground that its president acted outside the scope of his authority and the guaranty was made by him individually rather than on behalf of the bank. This court held that where the bank has retained and enjoyed the proceeds of the transaction, it amounted to a ratification of the president's acts. The *Thomas* case has not been cited by this court since that date, but its logic remains sound and is in harmony with our more recent cases upon the subject of ratification. The bank's completion of the transaction of its president and retention of the proceeds in this case amounted to a ratification of his acts. Thus, we have in effect also decided the estoppel issue by finding ratification, because the president's act is now the act of the bank as its agent whether or not he acted originally within the scope of his authority. See *Drainage District v. Dawson County Irrigation Co.*, 140 Neb. 866, 2 N.W.2d 321 (1942).

Since we are unable to determine the basis of the jury's verdict, i.e., whether the jury found that Heintzelman made misrepresentations to the defendant in the first instance, the cause must again be reversed and remanded to submit the entire issue to the jury, together with an instruction that if the misrepresentations were in fact made, the bank has ratified the transaction.

REVERSED AND REMANDED WITH DIRECTIONS.

HAROLD S. MYERS AND WILLIAM G. CAMPBELL, APPELLANTS, V. THE BANK OF NIOBRARA, A NEBRASKA STATE BANKING CORPORATION, APPELLEE.

336 N.W.2d 608

Filed July 29, 1983. No. 82-495.

Subrogation: Guaranty. The general rule is that a surety or guarantor is entitled to be subrogated to the benefit of all the security and

means of payment under the creditor's control, and, therefore, in the absence of *assent*, *waiver*, or estoppel he is generally released by an act of the creditor which deprives him of such right.

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

Frank A. Taylor of Kutak Rock & Huie, for appellants.

John M. Peebles, for appellee.

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

HASTINGS, J.

Harold S. Myers and William G. Campbell, the plaintiffs, commenced this action by filing a petition for declaratory judgment in the District Court of Knox County. They sought to have the District Court declare that any obligation they had under guaranty agreements with the defendant, Bank of Niobrara, be discharged due to the bank's actions.

The bank answered and counterclaimed for the amount it claims is due it under the guaranty agreements between the bank and the plaintiffs. The District Court found in favor of the bank, awarding $14,586.65. We affirm.

On appeal the plaintiffs assign three errors to the decision of the District Court. They claim the court erred in its interpretation of the guaranties given by plaintiffs to the bank; the court erred in failing to consider evidence showing the bank improperly released and surrendered the collateral which secured the loans guaranteed by the plaintiffs; and the court erred in failing to find that the evidence and relevant law completely discharged plaintiffs' obligations under these guaranties.

A brief discussion of the relevant facts will aid in an understanding of this appeal. On September 16, 1976, the plaintiffs each executed and delivered to the bank loan guaranty agreements guaranteeing subsequent loans made to one Frank Brown up to

$30,000. On September 18, 1976, Frank Brown, doing business as Brown Seed & Supply Co., borrowed $26,920.27 from the Bank of Niobrara. This loan was secured by a security interest in the warehouse receipts covering the seed and grain purchased with the money loaned. Under the agreement between the bank and Brown, Brown was to store the seed and grain purchase with Nytco Services, Inc., a bonded warehouse. When Brown wanted to sell some of this collateral, he would tender a check for 85 percent of the purchase price to the bank, and the bank would then order Nytco to release the desired seed or grain.

Two other loans were made to Brown, for $2,023 on October 4, 1976, and for $10,004.50 on October 7, 1976, under the same arrangement. A renewal loan of $21,780.62 was extended on April 26, 1977, which replaced the outstanding balance of the prior loans between Brown and the bank. Another renewal loan of $13,481.36 was extended on March 23, 1979. A final renewal loan of $14,586.65, which is evidence of the debt at issue here, was extended on January 2, 1980.

On or about May 1, 1980, Brown declared bankruptcy, and the bank made demand upon the plaintiffs, under the guaranty agreements, to pay the sum of $14,586.65 due under this final renewal note.

Plaintiffs claim the bank improperly released the collateral which secured the loans made to Brown. From the record it appears that the bank released the vast majority, if not all, of the collateral in the possession of the warehouseman, Nytco.

Plaintiffs argue that because the bank released the collateral it thereby deprived plaintiffs of the ability to proceed against that collateral to satisfy any debt incurred as a result of these guaranties. Plaintiffs claim their obligation is therefore discharged.

It may be true that if a secured party, such as the bank, impairs a guarantor's ability to satisfy any obligation arising under the agreement of guaranty by

releasing the collateral securing that loan, said guarantor's obligation is then released. However, we find we need not reach this question, as the plaintiffs waived any right to object to such release.

The loan guaranty agreement on its face waived any objection and assented to the acts of the bank. In relevant part it reads: "For Value Received and to enable Frank Brown of Stuart, Nebrsaka [sic], hereinafter designated as 'Debtor,' to obtain credit, from time to time, of Bank of Niobrara, Niobrara, Nebraska, we hereby request said Bank to extend to said Debtor such credit as said Bank may deem proper, and we hereby jointly and severally guarantee the full and prompt payment to said Bank at maturity, and at all times thereafter, and also at the time hereinafter provided, of any and all indebtedness, liabilities and obligations of every nature and kind of said Debtor to said Bank, and every balance and part thereof, whether now owing or due, or which may hereafter, from time to time, be owing or due, and howsoever heretofore or hereafter created or arising or evidenced, to the extent of Thirty Thousand and no/100 - - - - - Dollars . . . .

"All diligence in collection, and all presentment for payment, demand, protest, notice of protest, and notice of non-payment, dishonor and default, and of the acceptance of this guaranty, and of any and all extensions of credit hereunder, are hereby expressly waived.

"The granting of credit from time to time by said Bank to said Debtor in excess of the amount of this guaranty and without notice to the undersigned, is hereby authorized and shall in no way affect or impair this guaranty.

"Authority and consent are hereby expressly given said Bank from time to time, and without any notice to the undersigned, to give and make such extensions, renewals, indulgences, settlements and compromises as it may deem proper with respect to any of the indebtedness, liabilities and obligations covered by this guaranty, including the taking or

releasing of security and surrendering of documents." (Emphasis supplied.)

A more clear and absolute guaranty can hardly be imagined. This guaranty expressly authorized the bank to extend additional credit and release the security for these loans without notice to the plaintiffs. In short, plaintiffs waived any objections to the bank's action in this case by signing these agreements.

As we said in *Custom Leasing, Inc. v. Carlson Stapler & Shippers Supply, Inc.*, 195 Neb. 292, 298, 237 N.W.2d 645, 649 (1976), a case cited to us by both parties: "The general rule is that a surety or guarantor is entitled to be subrogated to the benefit of all the security and means of payment under the creditor's control and, therefore, in the absence of *assent*, *waiver*, or estoppel, he is generally released by an act of the creditor which deprives him of such right." (Emphasis supplied.)

It cannot be doubted that in this case the plaintiffs assented to the actions taken by the bank and waived any objections by signing the loan guaranty agreements. We therefore find the decision of the District Court to be correct, and affirm that decision.

AFFIRMED.

DARRYL D. JAMESON, APPELLANT, V. V. WILLIAM GIACALONE, APPELLEE.

337 N.W.2d 120

Filed July 29, 1983. No. 82-515.

1. **Partnerships: Actions: Promissory Notes.** A suit by a partner to collect on a note representing his contribution to the partner's capital account is an action at law, and ordinarily such action may not be turned into an equitable action for an accounting by a cross-petition.
2. **Judgments: Appeal and Error.** The findings of a court in a law action have the effect of a jury verdict and will not be set aside unless clearly wrong.

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

Anderson, Strasburger, Klein, Peterson and Swan, for appellant.

Charles J. Cuypers of Sherwood Law Office, for appellee.

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

WHITE, J.

Appellant, Darryl D. Jameson, filed suit to recover on a note given by appellee, V. William Giacalone as his contribution to the partnership capital account. Appellee answered, admitting the execution of the note and nonpayment but alleging by amended cross-petition that he was entitled to certain setoffs and to damages by reason of appellant's alleged misconduct which resulted in the failure of the partnership enterprise. In effect, the appellee asked for an accounting.

We note at the outset that this is a law action. In *Fleischer v. Broders*, 178 Neb. 723, 730, 135 N.W.2d 5, 10 (1965), we said: "That a party has a right to bring an action on a note by one partner for advance to another for the purpose of carrying his obligations under the partnership agreement and to further its interest is well established. Linch v. Linch, 145 Neb. 792, 18 N.W.2d 98. Ordinarily recovery on said note may be had, without regard to the status of the partnership accounts, and ordinarily such action may not be turned into an equitable action for accounting by cross-petition. Linch v. Linch, *supra*."

The cause was tried to the court, and therefore the findings of the trial court have the effect of a jury verdict and will not be set aside unless clearly wrong. *Quinn v. Godfather's Investments*, 213 Neb. 665, 330 N.W.2d 921 (1983).

The trial court found that the note was executed, not paid, and found for appellant in the principal

amount of $9,075, with interest as provided in the note. The trial court also found that the partnership payments on a pickup truck originally owned by appellant, transferred to the partnership, and at dissolution transferred back to appellant should be charged to appellant in the amount of $2,814.

The trial court also found appellee was entitled to be credited with payment by personal funds of a partnership debt in the amount of $750 and, further, that appellant was properly chargeable with withdrawals of $2,928.

The trial court also found that the appellee was damaged in the amount of the balance of his debt to the partner of $5,487. The effect of these findings was to completely offset the judgment for appellant on the note, so that neither party recovered from the other.

Having examined the record, we are satisfied that there is evidence to support the trial court's findings. It would serve no purpose to detail the misconduct of appellant in the discharge of his duties as a partner and in his personal life, which the trial court could and did find resulted in the destruction of the partnership reputation and the dissolution of the partnership.

AFFIRMED.

RICHARD SPILINEK AND HILDA SPILINEK, HUSBAND AND WIFE, APPELLEES, V. ALVIN R. SPILINEK AND ELLEN SPILINEK, HUSBAND AND WIFE, APPELLANTS.

337 N.W.2d 122

Filed July 29, 1983. No. 82-524.

1. **Equity: Appeal and Error.** In equity cases we review the record de novo and reach an independent conclusion without reference to the conclusion reached by the trial court; except, however, that where credible evidence is in conflict we give weight to the fact that the trial court saw the witnesses and observed their demeanor while testifying.

2. **Boundaries: Acquiescence.** The rule of recognition and acquiescence embodied in Neb. Rev. Stat. § 34-301 (Reissue 1978) is separate and distinct from the theory of adverse possession.
3. **Boundaries: Acquiescence: Estoppel.** In order for the estoppel created by recognition and acquiescence to operate, there must be an assent, by words, conduct, or silence, in a line as the boundary.
4. **Boundaries: Damages.** Neb. Rev. Stat. § 34-103 (Reissue 1978) does not authorize assessment of one-half the cost of surveying a disputed boundary line to the other party.
5. **Statutes.** No interpretation is needed to ascertain the meaning of plain and unambiguous statutes; in the absence of anything to indicate the contrary, words used in a statute will be given their ordinary meaning.

Appeal from the District Court for Howard County: JOSEPH D. MARTIN, Judge. Affirmed as modified.

Robert E. Wheeler of Stowell & Wheeler, P.C., for appellants.

O. Wm. VonSeggern, P.C., of Cunningham, Blackburn, VonSeggern, Livingston, Francis & Riley, for appellees.

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

CAPORALE, J.

Plaintiffs-appellees, Richard Spilinek and Hilda Spilinek, husband and wife, brought an action against Richard's nephew and his wife, Alvin R. Spilinek and Ellen Spilinek, to settle a disputed boundary by placing it at the true line as determined by survey. They also prayed that a lawful division fence be erected on that line. The defendants-appellants counterclaimed and prayed that the boundary be fixed at a certain fence line. The trial court fixed the boundary at the true line, ordered defendants to remove, at their sole cost, the fence erected by them on plaintiffs' land, directed that each side pay one-half of the cost of plaintiffs' survey, and directed that the parties share equally the cost of erecting a lawful division fence at the true line. We affirm as modified.

The action is a special one brought under Neb.

Rev. Stat. § 34-301 (Reissue 1978). Such cases are tried under the equity jurisdiction of the District Court and appealed in conformity with the rules of equity. As such, we review the record de novo and reach an independent conclusion without reference to the conclusion reached by the trial court; except, however, that where credible evidence is in conflict we give weight to the fact that the trial court saw the witnesses and observed their demeanor while testifying. *Hardt v. Short-Line Irr. Dist.*, 214 Neb. 612, 335 N.W.2d 292 (1983); *Cofer v. Kuhlmann*, 214 Neb. 341, 333 N.W.2d 905 (1983); *Spilinek v. Spilinek*, 212 Neb. 811, 326 N.W.2d 170 (1982); Neb. Rev. Stat. § 25-1925 (Reissue 1979).

In accordance with the foregoing rules we determine that the plaintiffs own the northern 40-acre tract of land. The defendants own the contiguous southern tract, which extends beyond the eastern boundary of plaintiffs' land. The northern tract has been owned by plaintiffs continuously since 1936; the defendants have owned the southern tract since December of 1980. Prior thereto it had been owned, since the 1930s, by various members of the Marshalek family. The Marshaleks and plaintiffs, unlike the defendants and plaintiffs (see, also, *Spilinek v. Spilinek*, *supra*), got along well with each other. It had been the custom of the plaintiffs and the Marshaleks to erect temporary fences from time to time extending from the southeast to the southwest cornerposts of plaintiffs' land. In the spring of 1975 Martin Marshalek removed the rotted southeast cornerpost which plaintiff Richard Spilinek and his son Roland later replaced. In doing so Richard and Roland made no particular effort to locate the replacement post exactly where the original southeast cornerpost had been, as no attempt was being made to establish a boundary. The purpose was only to erect something to which a fence might be tied. Their concern at that time was to make certain that they did not encroach upon the Marshaleks' land and

to place the post approximately where it had been. The southwest cornerpost rotted out in approximately 1974. Thereafter the west ends of the temporary fences were tied to one of Richard's gateposts. Some time prior to his purchase of the land Alvin had discussed with Richard the fact that he (Alvin) wished to erect "half a fence." Richard replied that when Alvin had made the purchase Alvin should see Richard and "we'll put the fence in." In May of 1981 the defendant Alvin, without any further discussion with Richard and without causing any survey to be made, erected one-half of the subject fence and tied it to the southeast cornerpost which had been replaced by Richard and his son. In August of that year Alvin became aware that plaintiffs had caused a survey to be made, but nonetheless erected the second half of the fence without reference to that survey.

Defendants assign as error the determinations (1) that the boundary should be established along the true line and not along the existing fence line, and (2) that defendants are liable for one-half the cost of plaintiffs' survey. Defendants also imply the court erred in determining they should bear the cost of removing the fence and that each party should share equally the cost of constructing a lawful fence on the true line.

The essence of defendants' contention is that the "fence line" has been recognized and acquiesced in by the parties and their grantors for more than 10 consecutive years, and, therefore, it, and not the true line, establishes the boundary between plaintiffs' and defendants' land. They cite in support of that contention § 34-301; *Shirk v. Schmunk*, 192 Neb. 25, 218 N.W.2d 433 (1974); and *McGowan v. Neimann*, 139 Neb. 639, 298 N.W. 411 (1941). The statute, in pertinent part, provides: "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 recog-

nized and acquiesced in by the parties or their grantors for a period of ten consecutive years . . . ." *Shirk v. Schmunk*, *supra*, was an action to quiet title to accretion land, brought under the pertinent statute, wherein we held the fact that a permanent fence, constructed as a boundary line between the two properties, had been in continuous existence for more than 10 years established that plaintiffs' predecessor, who claimed ownership of all the land up to the fence, had obtained title to the disputed property by adverse possession. *McGowan v. Neimann*, *supra*, establishes the scope of § 34-301 to contemplate actions to determine disputed boundaries of real estate whether the boundaries were known at one time and lost, or otherwise.

McGowan does not assist in the factual analysis required by this case. Defendants' reliance upon *Shirk* is misplaced. *Shirk* was resolved under the theory of adverse possession. We have held that the rule of recognition and acquiescence embodied in § 34-301 is separate and distinct from the theory of adverse possession. *Hakanson v. Manders*, 158 Neb. 392, 63 N.W.2d 436 (1954). Therein, this court indicated that in order for the estoppel created by recognition and acquiescence to operate, there must be an assent, by words, conduct, or silence, in a line as the boundary. We stated therein that the act of placing a row of trees on one's own property, even under the mistaken impression that the plantings were on the boundary line, did not of itself establish a mutual recognition and acquiescence in the mistaken line as the boundary. In *Bender v. James*, 212 Neb. 77, 321 N.W.2d 436 (1982), we recognized that the doctrine of acquiescence involves more than a mere establishment of a line by one party and the taking of possession by him; it involves the idea that the other party, with knowledge of the line so established and the possession taken, assents thereto as the boundary. We found therein that changing the direction of crop rows where there had never been a boundary dis-

pute and where the parties' predecessors in title had always gotten along with one another did not constitute notice of the establishment of a boundary line prejudicial to the interests of one of the parties and an acquiescence thereto. We therefore denied a claim of ownership based upon acquiescence. In *Hausner v. Melia*, 212 Neb. 764, 326 N.W.2d 31 (1982), we stated that in order to claim a boundary line by acquiescence both parties must have knowledge of the existence of a line as the boundary.

The record before us does not demonstrate that plaintiffs and the defendants' predecessors in title considered the stringing of temporary fences from the replaced southeast cornerpost to establish the boundary line of their respective properties. The trial court was therefore correct in establishing the boundary at the true line as determined by the survey.

The situation is otherwise, however, with respect to assessing one-half the cost of plaintiffs' survey to defendants. We find no authority for such assessment, and counsel have directed us to none. Plaintiffs' argument that the language of Neb. Rev. Stat. § 34-103 (Reissue 1978), that "Any landowner who shall erect a division fence may demand and collect by civil suit from such adjoining landowner one half the reasonable value of such division fence," authorizes the trial court's action is imaginative, but without merit. The reasonable value of a division fence cannot be said to include the cost of determining where the division fence should be located. No interpretation is needed to ascertain the meaning of plain and unambiguous statutes; in the absence of anything to indicate the contrary, words used in a statute will be given their ordinary meaning. *Hill v. City of Lincoln*, 213 Neb. 517, 330 N.W.2d 471 (1983); *County of Douglas v. Board of Regents*, 210 Neb. 573, 316 N.W.2d 62 (1982).

Since defendants have erected a fence on plaintiffs' land, it is obvious they must bear the cost of

removing it. See *George Rose Sodding & Grading Co., Inc. v. City of Omaha*, 187 Neb. 683, 193 N.W.2d 556 (1972), *appeal on remand* 190 Neb. 12, 205 N.W.2d 655 (1973), stating that the cost of removing sewage pumped without permission onto plaintiff's property was an element of plaintiff's damages.

The above-cited portion of § 34-103 disposes of defendants' claim that the trial court erred in requiring them to pay one-half the reasonable value of the division fence which it directed be erected in accordance with Neb. Rev. Stat. § 34-102 (Reissue 1978), which provides in part: "When two or more persons shall have lands adjoining, each of them shall make and maintain a just proportion of the division fence between them . . . ."

We therefore affirm the trial court's judgment but modify it by striking therefrom the assessment to defendants of one-half the cost of plaintiffs' survey.

AFFIRMED AS MODIFIED.

McCOWN, J., concurs in the result.

VILLAGE OF MORRILL, NEBRASKA, A MUNICIPAL CORPORATION, APPELLANT, V. ROOSEVELT PUBLIC POWER DISTRICT, A RURAL PUBLIC POWER DISTRICT, APPELLEE.

337 N.W.2d 125

Filed July 29, 1983. No. 82-532.

1. **Contracts.** A written contract expressed in unambiguous language is not subject to interpretation or construction and the parties' intention must be determined from its contents.
2. **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.
3. **Actions: Contracts.** A suit for money had and received is based upon a notion that where one person has money to which in equity and good conscience another is entitled, the law creates a promise by the former to pay to the latter.

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

R. L. Gilbert, for appellant.

Steven C. Smith of Van Steenberg, Brower, Chaloupka, Mullin & Holyoke, for appellee.

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

KRIVOSHA, C.J.

The appellant, Village of Morrill, Nebraska, a municipal corporation (Morrill), appeals from an order entered by the District Court for Scotts Bluff County, Nebraska, dismissing a suit for money had and received, filed by Morrill against Roosevelt Public Power District (Roosevelt), a public power district. We affirm.

Morrill owns and operates an electrical distribution system, purchasing electricity at wholesale and selling it at retail to residents of Morrill and a few farms located near Morrill. Roosevelt also owns and operates an electrical distribution system and sells electricity at retail in the rural areas in Scotts Bluff and adjacent counties. In addition, Roosevelt sells some electricity at wholesale to municipalities such as Morrill which, in turn, resell the electricity. Roosevelt purchases its electricity from Tri-State Generation and Transmission Association, Inc., an association of public power districts located in Colorado, Wyoming, and Nebraska.

Until 1975 Morrill purchased all of its electricity from the U.S. Bureau of Reclamation. Due to increased loads and the unavailability of additional electricity from the bureau, on May 5, 1975, Morrill entered into a contract with Roosevelt for the purchase of supplemental electrical energy. Paragraph 6(a) of the contract provided: "The Buyer shall pay the Seller for supplemental electric service furnished hereunder, to be applied to the monthly billing figures determined pursuant to Article 5

hereof, the monthly rate under which the Seller purchases electric service at wholesale from Tri-State Generation and Transmission Association, Inc. increased by ten percent (10%), which monthly rate is set forth in Tri-State's Schedule A (revised March 22, 1974), attached hereto and made a party [sic] hereof. The Buyer agrees that if at any time the rate under which the Seller purchases electric service at wholesale is modified by Tri-State by a revised or superseding schedule, said revised or superseding schedule shall replace the schedule then in effect hereunder." Under this contract the seller was Roosevelt and the buyer was Morrill.

Thereafter, from time to time, Tri-State revised its schedule A and, accordingly, Roosevelt adjusted its charges to Morrill. On July 21, 1976, Tri-State established a schedule of rates for wholesale firm power service for resale at wholesale to non-REA beneficiaries. Morrill was such a non-REA beneficiary customer of Roosevelt, as were three other municipalities in the Roosevelt service area. By reason of the revision, Roosevelt was charged one rate for energy purchased for resale to its retail customers (A-5) and another rate for energy purchased for resale to non-REA act beneficiaries such as Morrill (R-1).

Morrill now argues that the R-1 rate was inapplicable to Morrill and that it should have been charged under the revised schedule A-5 and not the R-1. Morrill further argues that amounts paid by Morrill to Roosevelt under the R-1 rate in excess of those provided for by schedule A-5 should be refunded to Morrill. The basis of Morrill's argument is that under its contract with Roosevelt it was to pay on the basis of a schedule A rate established when the contract was entered into or modified or revised from time to time, and not on the basis of a new schedule derived for non-REA act beneficiaries. Morrill maintains that the R-1 rate is neither a modification nor a revision of the rate previously charged

Morrill but, rather, a "new rate" and therefore not applicable to Morrill.

We believe that the argument is simply without any basis. Clearly the agreement between Roosevelt and Morrill is that Morrill will pay to Roosevelt for energy an amount equal to that charged by Tri-State to Roosevelt, plus an additional 10 percent. Morrill concedes that Tri-State charged Roosevelt for energy supplied to Morrill under the R-1 rate. Morrill's position is that that is Roosevelt's problem and not Morrill's.

Each party to the contract urges us to consider extrinsic evidence in an effort to interpret the contract. We think that is not necessary. The language of the contract is clear and unambiguous. It is a familiar rule of law that a written contract expressed in unambiguous language is not subject to interpretation or construction and the parties' intention must be determined from its contents. *Clemens Mobile Homes, Inc. v. Anderson*, 206 Neb. 58, 291 N.W.2d 238 (1980). Morrill agreed to pay Roosevelt whatever Roosevelt was charged by Tri-State, plus an additional 10 percent. That language is clear and unambiguous. Furthermore, the language of the contract recognized that there would be changes made in the rate schedules.

If Morrill believed that Tri-State's charges to Roosevelt for Morrill's energy were discriminatory or improper, its remedy was to challenge the rate and not sue for money had and received. In *York County Rural Public Power Dist. v. O'Connor*, 172 Neb. 602, 608, 111 N.W.2d 376, 379 (1961), we said: "[T]he 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." See, also, *McGinley v. Wheat Belt P.P. Dist.*, 214 Neb. 178, 332 N.W.2d 915 (1983).

A suit for money had and received, on the other hand, is based upon a notion that where one person

has money to which in equity and good conscience another is entitled, the law creates a promise by the former to pay to the latter. See, *Barker v. Wardens & Vestrymen of St. Barnabas Church*, 171 Neb. 574, 106 N.W.2d 858 (1961); *Nebraska State Bank v. Sherlock*, 180 Neb. 772, 145 N.W.2d 573 (1966).

Having conceded that Tri-State charged Roosevelt under R-1 for Morrill's energy and that Roosevelt paid Tri-State pursuant to R-1, until the rate was changed Morrill was obligated to pay as billed. If the rate established by Tri-State under its R-1 was discriminatory, a fact we do not decide, the proper remedy was a suit to challenge the rate and not a suit for money had and received.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOHN B. DAUGHERTY, APPELLANT.

337 N.W.2d 128

Filed July 29, 1983. No. 82-596.

Criminal Law: Witnesses: Prior Convictions. In a criminal proceeding the right to inquire of a defendant of a previous conviction is for the purpose of attacking the credibility of the witness. If, in response to a question whether the defendant has ever been convicted of a felony, or a crime involving dishonesty or false statements, the defendant answers yes, the inquiry should end. It is improper to inquire into the nature of the crime or the details of the offense.

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

Thomas C. Lansworth of Bauer, Galter & Geier, for appellant.

Paul L. Douglas, Attorney General, and Marilyn B. Hutchinson, for appellee.

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

WHITE, J.

Appellant was charged in the county court for Sheridan County, Nebraska, with three counts of third degree assault, a Class I misdemeanor, Neb. Rev. Stat. § 28-310(1) (Reissue 1979). A jury returned a verdict of guilty as to all counts, and appellant was sentenced to consecutive terms of 6 months on count I, 6 months on count II, and 30 days on count III. On appeal to the District Court for Sheridan County that court affirmed the judgment. We reverse and remand.

On appeal several errors are urged, but we shall discuss only one, to wit, that the trial court erred in overruling objections to questions by the prosecution relating to a previous conviction of the appellant for illegal possession of a firearm after the appellant admitted the conviction. Neb. Rev. Stat. § 27-609 (Reissue 1979) provides in part: "(1) For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination, but only if the crime (a) was punishable by death or imprisonment in excess of one year under the law under which he was convicted or (b) involved dishonesty or false statement regardless of the punishment."

Prior to the effective date of the Nebraska Evidence Rules on January 1, 1976, the area of inquiry into past convictions for felonies was controlled by Neb. Rev. Stat. § 25-1214 (Reissue 1964): "A witness may be interrogated as to his previous conviction for a felony, but no other proof of such conviction is competent except the record thereof."

In *State v. Lang*, 197 Neb. 47, 50, 246 N.W.2d 608, 611 (1976), we noted that under Rule 609 "Evidence of conviction of a crime is, in some respects, more limited, but is not restricted to felonies as such."

No case has arisen since the adoption of the rules of evidence concerning the scope of the inquiry allowed. "Under section 8848, Comp. St. 1922 [identical to § 25-1214], providing that a witness may be interrogated as to his previous conviction for a felony, but that no other proof is competent except the record thereof, a defendant in a criminal prosecution becoming a witness in his own behalf may be asked on cross-examination whether he has previously been convicted of a felony, and if he answers in the affirmative further examination along that line should cease. If he answers in the negative, he may be impeached only by the record of his conviction." (Syllabus of the court.) *Vanderpool v. State*, 115 Neb. 94, 211 N.W. 605 (1926).

The purpose of Rule 609 is to allow the prosecution to attack the credibility of a testifying defendant, not to retry him for a separate crime or prejudice the jury by allowing unlimited access to the facts of an unrelated crime, as the court in *Vanderpool* stated at 99, 211 N.W. at 607: "The right to inquire as to a previous conviction rests on the statute and is for the purpose only of affecting the credibility of the witness. A fair interpretation of the statute seems to permit the question whether the witness has ever been convicted of felony. If the witness answers in the affirmative the inquiry should end there, and thereafter it is improper to inquire into the nature of the crime or the details of the offense."

The county court, having permitted the prosecutor to inquire into the facts and circumstances of the previous felony, including an inquiry as to why the appellant pled guilty and whether there had been other charges filed, committed error. In our view, prejudicial error.

The appellant did not deny that the incident involved here took place but maintained that he acted in self-defense. His credibility was an important issue in the case. To permit it to be impeached be-

yond the express limits of the statute cannot be presumed to be harmless.

REVERSED AND REMANDED FOR A NEW TRIAL.

HASTINGS, J., concurring.

I am in full agreement with the result reached by the court in this instance. Also, I acknowledge that in this case we were faced with the situation where evidence of only one prior crime had been offered for impeachment purposes, and the author of the majority opinion quite properly limited his discussion to that single issue.

However, to the extent that one may misread this opinion as interpreting Neb. Rev. Stat. § 27-609 (Reissue 1979) to limiting the introduction of but *one* prior crime for impeachment purposes, I hasten to register my disagreement. No cases seem to have squarely faced this question. However, in *Swain v. State*, 621 P.2d 1181 (Okla. Crim. 1980), which construed a statute very similar to § 27-609, the court stated that it was not error to have allowed the prosecutor to impeach the defendant with his prior *convictions* for armed robbery and forgery.

Also, the Court of Appeals in *United States v. Rivers*, 693 F.2d 52 (8th Cir. 1982), spoke in terms of impeachment by evidence of prior *convictions* under Rule 609(a) of the Federal Rules of Evidence.

A determination of this question must be postponed to a later date when that issue is squarely presented.

BOSLAUGH, J., joins in this concurrence.

G. WILLIAM ORR, M.D., ET AL., PLAINTIFFS, V. DONALD L. KNOWLES ET AL., DEFENDANTS.
M. JOHN EPP, M.D., ET AL., PLAINTIFFS, V. CHARLES THONE ET AL., DEFENDANTS.

337 N.W.2d 699

Filed July 29, 1983. No. 82-752.

Certified Questions from the U.S. District Court for the District of Nebraska. Judgment entered.

Lawrence I. Batt and Thomas P. Kenny of Garber & Batt, for plaintiffs Orr et al.

Michael T. Levy and Michele Wheeler of Levy & Lazer, P.C., for plaintiffs Epp et al.

Paul L. Douglas, Attorney General, and Frank J. Hutfless, for defendants.

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

HASTINGS, J.

This matter comes before us pursuant to Neb. Rev. Stat. § 24-219 (Cum. Supp. 1982) as 18 certified questions of law from the U.S. District Court for the District of Nebraska. The main thrust of these questions is a request that we interpret Neb. Rev. Stat. § 28-347 (Cum. Supp. 1982) as it stands, and in light of other relevant provisions found under Nebraska law.

Section 28-347 reads: "(1) Except as provided in this section, no physician shall perform an abortion upon a minor without first having given at least twenty-four hours actual notice to one of the parents or the legal guardian, if any, of the minor as to the intention to perform such abortion. If such parent or guardian does not receive actual notice, the notice requirements of this section may be satisfied by sending notice to such parent or legal guardian by certified mail to the last-known address of such parent or guardian as indicated by the minor seeking

the abortion at least forty-eight hours prior to the performance of such abortion, computed from the time of mailing.

"(2) The district court or any judge thereof in the county in which the minor resides or the abortion is to be performed or, in the absence from the county of such district judge the county court or a judge thereof, shall, upon it appearing satisfactorily to the court or judge by the affidavit or testimony of the petitioning minor that the minor is mature enough to make the abortion decision independently or that notification would not be in the minor's best interests, waive the notice requirements of subsection (1) of this section. A petitioning minor may initiate and participate on her own behalf in any proceeding brought pursuant to this subsection and the court may appoint a guardian ad litem for the petitioning minor. The court shall maintain confidentiality as to all proceedings brought pursuant to this subsection. The court shall expedite all proceedings filed by a minor pursuant to this subsection and shall render a decision within twenty-four hours of the initial proceeding on such petition.

"(3) This section shall not apply when an emergency situation exists such that continuation of the pregnancy provides an immediate threat and grave risk to the life or health of the pregnant minor and the attending physician so certifies by affidavit."

This statute has been attacked by the plaintiffs, two physicians and several pregnant minors. In considering its constitutionality, the U.S. District Court certified the following questions to this court for decision:

1. "Will the duties and responsibilities of a guardian ad litem who may be appointed for a minor under the authority of Section 28-347(2) be coextensive with those of an attorney representing a minor in the judicial proceeding authorized by that section; if not, in what respects will the duties and responsibilities differ?"

A review of Nebraska law indicates that there is no clear statement of what the duties or role of a guardian ad litem is. Several Nebraska statutes dealing with minors provide for the appointment of guardians ad litem.

In cases involving termination of parental rights, Neb. Rev. Stat. § 42-364(4) (Reissue 1978) provided in part as follows: "Such guardian ad litem shall forthwith personally investigate the facts and circumstances on all matters pertinent to the best interests and welfare of the children. If it appears to the guardian ad litem that the best interests and welfare of the children may require the termination of the parental rights of one or both parents, he shall apply to the court in writing or orally on the record for such termination." This statute was changed in 1982 and now provides that whenever termination of parental rights is placed in issue, the District Court shall transfer jurisdiction to a juvenile court unless a showing is made that the District Court is a more appropriate jurisdiction. "If no such transfer is made the court shall forthwith appoint an attorney as guardian ad litem to protect the interests of any minor children." § 42-364(4) (Cum. Supp. 1982). We do not believe that this amendment significantly alters the nature of the duties of the guardian ad litem as provided for in the earlier statute.

Neb. Rev. Stat. § 43-104.06 (Reissue 1978) provides for the appointment of a guardian ad litem for children in paternity actions. That statute states: "Only upon the appointment of a guardian ad litem for the child, and a finding that the claimant is a fit person, is able to properly care for the child, and that the child's best interests will be served by granting custody of the claimant, shall custody be granted to the claimant." Again, under this statute it seems the guardian ad litem is to somehow participate in the determination of what is in the best interests of the child.

Generally speaking, a guardian ad litem appears

to be an individual who steps into the position of the minor and, after considering the alternatives, asserts the right of the minor as the guardian ad litem sees fit. Discussing the role of such a guardian, it has been stated:

"However, he is more than a nominal representative appointed to counsel and consult with the trial court, and he has all the duties, powers, and responsibilities of counsel who represents a party to litigation. On the other hand, the functions of a guardian ad litem are merely ministerial and not judicial or quasi-judicial, and his sole function as a representative is to control and manage the action. So, a report submitted by him should only set forth facts, accompanied by any point desired to be urged on behalf of the infant and recommendations to the court, and he should not act in the capacity of commissioner or master to make a report on which the decree is based. The findings contained in his report are not binding upon persons who are not represented by him. In any event, a decree is not rendered void by reason of the fact that it is based on the report of a guardian ad litem.

"It has been stated that the only purpose of a guardian ad litem appointed to represent infants in an action affecting a marriage is to determine which available alternatives are in the best interests of the infant. In a probate proceeding, the concurrent obligation of a guardian ad litem to the court and all the parties imposes a higher degree of objectivity on him than is imposed on an attorney for an adult client. Accordingly, he may not take a stance which, in effect, prevents the court or other parties from having full knowledge of material evidence which he has secured and deems pertinent to the issues affecting his ward. A guardian ad litem or a next friend may not make an election for an infant without the consent of the court; but it may be done with the consent of the court." 43 C.J.S. *Infants* § 234 at 610 (1978).

It seems from these statutes and this general discussion that the role of a guardian ad litem is something akin to the role of an attorney acting as legal counsel, but it is somewhat different. The Code of Professional Responsibility establishes that an attorney must zealously represent the wishes of his or her client. See Canon 7. It is not the role of an attorney acting as counsel to independently determine what is best for his client and then act accordingly. Rather, such an attorney is to allow the client to determine what is in the client's best interests and then act according to the wishes of that client within the limits of the law. EC 7-7.

In response to this first question, based upon the above discussion, we feel the duties and responsibilities of a guardian ad litem, as provided under § 28-347(2), are *not* coextensive with those of an attorney who might represent a minor in proceedings under this section. A guardian ad litem is to determine the best interests of the minor without necessary reference to the wishes of the minor.

2. "Is the filing of the petition for judicial waiver the 'initial proceeding' as that term is used in Section 28-347(2)?"

On the face of this statute it appears that a minor seeking to terminate her pregnancy has two options: first, to notify her parents, or, second, to obtain a court order stating she is mature enough to decide the question of whether her pregnancy will be terminated or not. In pursuing this latter course it seems she must petition the court for such an order. The statute states: "The court shall expedite all proceedings filed by a minor pursuant to this subsection and shall render a decision within twenty-four hours of the *initial proceeding* on such petition." (Emphasis supplied.) § 28-347(2). Giving this section its plain meaning, it would seem that this initial proceeding on the petition would occur sometime after the filing of the petition. To have a proceeding

on the petition, the petition certainly must be already filed.

In addition to the fact that a straight reading of § 28-347(2) supports this view, to require or interpret it otherwise would be impractical. If the filing of the petition was the "initial proceeding" in this matter, a decision of the court would have to be forthcoming within 24 hours of that filing. As a practical matter this would be difficult if not impossible for the courts to comply with. This would mean the filing of the petition, the hearing on the petition, and the decision of court would all have to occur within 1 day. The judicial system as it stands is not equipped to operate in this fashion. This could not be the interpretation intended by the Legislature. As such, we find that the filing of the petition in a proceeding under this statute is not the "initial proceeding" in this matter.

3. "Is the requirement of Section 28-347(2) that the court maintain confidentiality as to all proceedings brought pursuant to that subsection an exception to Section 84-712 and a special exception to Section 24-311?"

Neb. Rev. Stat. § 84-712 (Reissue 1981) provides: "Except as otherwise expressly provided by statute, all citizens of this state, and all other persons interested in the examination of the public records, as defined in section 84-712.01, are hereby fully empowered and authorized to examine the same, and to make memoranda and abstracts therefrom, all free of charge, during the hours the respective offices may be kept open for the ordinary transaction of business."

Neb. Rev. Stat. § 24-311 (Reissue 1979) provides: "All judicial proceedings of all courts established in this state must be open to the attendance of the public unless otherwise specially provided by statute."

While both these statutes state that judicial proceedings and records are matters of public interest,

neither statute is absolute. Both provide that exceptions may be created by express and special provisions.

Section 28-347(2) expressly provides: "The court shall maintain confidentiality as to all proceedings brought pursuant to this subsection." While it is not exactly clear what is meant by confidentiality in this statute, some meaning may be found by a reading of the other relevant abortion statutes.

Neb. Rev. Stat. § 28-333 (Reissue 1979), since declared unconstitutional, provides that no person shall disclose any of the information contained in a consent form required under that statute.

Neb. Rev. Stat. § 28-343 (Reissue 1979) provides that the information contained in the Bureau of Vital Statistics form required under that statute is not to be available to the public. This section states in relevant part: "The abortion reporting form required under this section shall not include the name of the person upon whom the abortion was performed. The abortion reporting form required under this section shall be confidential and shall not be revealed except upon the order of a court of competent jurisdiction in a civil or criminal proceeding."

Finally, Neb. Rev. Stat. § 28-345 (Reissue 1979) provides that reporting forms of the Department of Health shall be confidential. "Under no circumstances shall the compilations of information include the name of any attending physician or identify in any respect facilities where abortions are performed."

While the Legislature might have been more explicit or clear when stating the meaning of confidentiality under § 28-347(2), we feel it is reasonable to infer from a reading of these other statutes that the Legislature intended to keep the proceedings under this section private and not a matter of public record. Therefore, we find that the language of § 28-347(2) does create exceptions to §§ 84-712 and

24-311. The text of and attendance at such proceedings are not open to the general public.

4. "Does Section 25-301 require that the Section 28-347(2) proceeding be brought in the name of the petitioning minor?"

5. "In light of Sections 25-301 and 304, may a minor, as a matter of right, bring an action under Section 28-347(2) in a fictitious or assumed name or must she first obtain court permission to do so?"

We shall handle these two questions together. Neb. Rev. Stat. § 25-301 (Reissue 1979) states: "Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section 25-304."

Neb. Rev. Stat. § 25-304 (Reissue 1979) provides: "An executor, administrator, guardian, trustee of an express trust, a person with whom or in whose name a contract is made for the benefit of another, or a person expressly authorized by statute, may bring an action without joining with him the person for whose benefit it is prosecuted. Officers may sue and be sued in such name as is authorized by law, and official bonds may be sued upon the same way, and assignees of choses in action assigned for the purpose of collection, may sue on any claim assigned in writing, but such assignee shall be required to furnish security for costs as in case of nonresident plaintiffs."

Section 25-301 establishes an absolute requirement that all actions be brought in the name of the real party in interest. The only allowable exceptions to this rule are set forth in § 25-304. Section 28-347 does not fit within any of these exceptions.

We see nothing in these two statutes which would give a petitioning minor the right or ability to bring an action under § 28-347(2) in a name other than the minor's real name or the name under which she is commonly known. We realize that in certain cases a court may in its discretion allow a party to bring an action in a fictitious name in order to afford that

party an opportunity to pursue a sensitive issue without public scrutiny. The matters addressed by § 28-347(2) may qualify for such treatment.

Before a petitioning minor may pursue an action under § 28-347(2) under a fictitious name, she must receive approval from the relevant court. To hold otherwise not only would be contrary to § 25-301 but would present an unworkable situation. If a minor were allowed to proceed under a fictitious name without first gaining approval of the relevant court, and that minor was declared not mature enough to make the requisite decision without parental consent, she could simply proceed to file in another court under another fictitious name until she received the ruling she desired. There would be no record containing the real name of the minor. Under such a situation there would be no way of obtaining any aspect of finality to the court's decision. Such a situation is contrary to the doctrine of res judicata or issue preclusion, and cannot be allowed.

6. "Is a guardian ad litem appointed under Section 28-347(2) a 'legal guardian' as that term is used in Section 28-347(1)?"

Section 28-347(1) requires 24-hour notice be given "to one of the parents or the legal guardian, if any, of the minor as to the intention to perform such abortion." This legal guardian seems to be an alternative to the parents. That is, if for some reason a minor is not under the care and custody of her parents, that minor will have a guardian to act in the role of the parents. Such a view is in keeping with other Nebraska statutes.

Neb. Rev. Stat. § 30-2608 (Reissue 1979) provides: "The father and mother are the natural guardians of their minor children and are equally entitled to their custody and to direct their education, being themselves competent to transact their own business and not otherwise unsuitable. If either dies or is disqualified for acting, or has abandoned his or her family, the guardianship devolves upon the other.

The court may appoint a guardian for a minor if all parental rights of custody have been terminated or suspended by circumstances or prior court order."

The powers of such a guardian are the same as a parent. See Neb. Rev. Stat. § 30-2613 (Reissue 1979). The legal guardian then is much the same as a parent.

A guardian ad litem, as set out under question 1, is different than a parent or legal guardian. As pointed out above the guardian ad litem only has the power to act in the single situation for which he or she is appointed.

A general statement on this point is found at 43 C.J.S. *Infants* § 234 at 611 (1978): "A guardian ad litem or next friend ordinarily does not have the powers of a trustee or guardian, and he does not replace a general guardian for all purposes. He is not entitled to the custody of the person or property of the infant. Furthermore, he is not accountable to the court except for the faithful discharge of his duties. He may be endowed with powers similar to those of the general guardian for the purposes of the litigation at hand." In short, the legal guardian is not the same as the guardian ad litem, as provided for in this statute.

7. "Are all petitioning minors in Section 28-347(2) entitled to free, court-appointed counsel as a matter of right?"

8. "Are all indigent petitioning minors in Section 28-347(2) entitled to free, court-appointed counsel as a matter of right?"

These two questions will be considered together. First of all, it should be pointed out that the statute does not provide for the appointment of legal counsel for any minor. This statute only provides for the appointment of a guardian ad litem.

No case has been found which deals directly with the question of the right to appointed counsel in proceedings such as these. The closest analogous situation found is that of termination of parental rights.

In such cases the right to appointed counsel for indigent criminal defendants established in *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963), and *Argersinger v. Hamlin*, 407 U.S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972), has been expanded to the area of civil litigation.

In *State v. Caha*, 190 Neb. 347, 208 N.W.2d 259 (1973), this court discussed the right to counsel for indigent parents in a termination of parental rights case. Relying heavily on a New York Court of Appeals decision, we said: "In a very similar case the New York Court of Appeals held that an indigent parent was entitled to the assistance of counsel at the expense of the State. . . . The New York court said: 'In our view, an indigent parent, faced with the loss of a child's society, as well as the possibility of criminal charges (Family Ct. Act, §§ 1014, 1052, 1055; Penal Law, Consol. Laws, c. 40, § 260.10), is entitled to the assistance of counsel. A parent's concern for the liberty of the child, as well as for his care and control, involves too fundamental an interest and right . . . to be relinquished to the State without the opportunity for a hearing, with assigned counsel if the parent lacks the means to retain a lawyer. To deny legal assistance under such circumstances would — as the courts of other jurisdictions have already held . . . constitute a violation of his due process rights and, in light of the express statutory provision for legal representation for those who can afford it, a denial of equal protection of the laws as well. As the Federal District Court wrote in the very similar Cleaver case . . . "whether the proceeding be labelled 'civil' or 'criminal,' it is fundamentally unfair, and a denial of due process of law for the state to seek removal of the child from an indigent parent without according that parent the right to the assistance of court-appointed and compensated counsel. * * * Since the state is the adversary * * * there is a gross inherent imbalance of experience and expertise between the parties if the

parents are not represented by counsel. The parent's interest in the liberty of the child, in his care and in his control, has long been recognized as a fundamental interest. * * * Such an interest may not be curtailed by the state without a meaningful opportunity to be heard, which in these circumstances includes the assistance of counsel." ' " *Id.* at 349-51, 208 N.W.2d at 260-61.

The same result has been reached by several of the federal courts. See, *Lassiter v. Department of Social Services*, 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981); *Davis v. Page*, 640 F.2d 599 (5th Cir. 1981). The courts in these cases rely on the fact that a substantial right is involved and the fact that the indigent individual involved faces the state as an adversary which will surely be represented by legal counsel. Under the idea of fundamental fairness such individuals must themselves be represented by counsel before being deprived of their rights.

In proceedings under § 28-347(2) there is no doubt that a minor's fundamental right to privacy is involved. *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973). The major and controlling difference between the termination of parental rights cases and proceedings under § 28-347(2) is that the latter proceedings are not adversarial in nature. This statute does not provide that the state or anyone else will contest the minor's claim that she is mature enough to make the abortion decision herself. Rather, she will present evidence, and the judge will then make the decision as to her maturity. Since there is no adversarial aspect to these proceedings, we find that no petitioning minor, indigent or otherwise, is entitled to free court-appointed counsel as a matter of right in proceedings under § 28-347(2).

9. "If the court finds under Section 28-347(2) that the minor is mature enough to make the abortion decision independently, may it refuse to waive pa-

rental notification based on a finding that a parent's, or its own, contrary decision is a better one?"

Section 28-347(2) states in relevant part: "The district court or any judge thereof in the county in which the minor resides or the abortion is to be performed . . . *shall*, upon it appearing satisfactorily to the court or judge by the affidavit or testimony of the petitioning minor that the minor is mature enough to make the abortion decision independently or that notification would not be in the minor's best interests, waive the notice requirements of subsection (1) of this section." (Emphasis supplied.)

Basically, what this statute provides is that if the court finds, based upon the evidence adduced, that a minor is mature enough to make this decision, or that notice to that minor's parents is not in that minor's best interest, then that court shall waive the notice requirements of § 28-347(1).

As we have said in the past, "As a general rule, in the construction of statutes, the word 'shall' is considered mandatory and inconsistent with the idea of discretion." *Moyer v. Douglas & Lomason Co.*, 212 Neb. 680, 685, 325 N.W.2d 648, 651 (1982). The effect of using "shall" in this statute is that once a judge finds the minor is mature enough, or notice to her parents would not be in her best interests, that judge must waive the notice requirements of subsection (1). Therefore, once a court makes such a finding, it may not refuse to waive the notice requirements.

10. "Would a physician violate Section 28-347(1) if he or she performed an abortion upon a minor whom the physician reasonably and in good faith, though erroneously, believed to be nineteen or more years of age or had been married?"

This section, on its face, does not discuss whether a physician's good faith belief as to a person's age is a defense. Ideally, if the Legislature had intended such good faith to be a defense, it would have expressly so provided in the statute.

Some guidance on this question may be found

when viewing other Nebraska statutes. Neb. Rev. Stat. § 28-805 (Reissue 1979) creates the offense of debauching a minor. That statute nowhere sets forth any good faith defense as to the age of the minor. Under that statute it is not a defense if a person in good faith believes that the minor involved is of the age of majority.

In contrast, under the Nebraska Liquor Control Act there is a prohibition against selling liquor to minors. Neb. Rev. Stat. § 53-180 (Cum. Supp. 1982). In Neb. Rev. Stat. § 53-180.07 (Reissue 1978) the Legislature specifically provided a defense for the seller of alcoholic beverages to minors, who in good faith relied on written proof falsely showing the minor to be of majority age.

The import of these two statutes in the instant case is that, under the statute prohibiting the debauching of minors, no good faith defense for the violator is provided under the statute, and, in fact, the good faith belief of the violator as to the age of the minor is not a defense. Under the Nebraska Liquor Control Act the Legislature chose to allow such a defense, and specifically provided one. On this basis, we feel that if the Legislature had intended the good faith belief of the physician as to the age of the minor to be a defense under § 28-347(1), it would have so provided, as was done under the Nebraska Liquor Control Act. Therefore, we find that a physician's good faith belief as to the minor's age is not a defense under § 28-347(1).

11. "For the purposes of Section 28-347, is a woman's minority to be determined by the law of the state of her residence, if it is other than Nebraska?"

We feel the minority status of women seeking to obtain abortions in Nebraska should be controlled by Nebraska law. An analogous situation may be once again found under the Nebraska Liquor Control Act. Under that act a minor is defined as any male or female under the age of 20 years. Neb. Rev. Stat. § 53-103(23) (Cum. Supp. 1982). If an individual from

outside Nebraska, who is less than 20 years of age, enters Nebraska and attempts to purchase alcoholic beverages, he or she may not lawfully do so. This is true even if this person under the age of 20 has reached majority in his or her home state and is therefore able to lawfully purchase alcoholic beverages in that state.

Since these abortions are to be performed in Nebraska, under the laws and jurisdiction of this state, we feel Nebraska law is controlling as to the age of majority for purposes of this statute.

12. "Is the court to disregard in interpreting Section 28-347(2) all parental objections of which it may become aware during the hearing that are not based exclusively on what would serve the minor's best interests?"

In answering this question, we simply say yes. This statute, on its face, sets forth what a court is to consider under subsection (2). The court is to consider evidence of maturity and the best interests of the minor; nothing else. Such parental objections as set out in this question are not proper for consideration by the court in reaching its decision.

13. "Does the Nebraska law permit a minor to obtain a court order under Section 28-347(2) without parental notification?"

Yes; this statute on its face does provide for such a procedure.

Questions 14 through 18 relate to the matter of appeals taken from decisions rendered under § 28-347(2), whether such appeals will be expedited, and whether this court will provide special rules for such appeals. These questions will be discussed together.

First of all, the only direction found in the statute itself is in its provision that "The court shall expedite all proceedings . . . and shall render a decision within twenty-four hours of the initial proceeding on such petition." § 28-347(2). We believe that "the court" refers to the trial court and not to the court on appeal.

Secondly, the timetable for appeals is prescribed by statute. "Any party may appeal from the . . . final order of the county . . . court to the district court of the county where the county . . . court is located." Neb. Rev. Stat. § 24-541.01(1) (Cum. Supp. 1982).

"(1) In order to perfect an appeal from the county . . . court the appealing party shall within thirty days after the rendition of the judgment . . .

"(a) File . . . a notice of appeal; and

"(b) Deposit . . . a docket fee . . . .

"(2) Satisfaction of the requirements . . . of this section shall perfect the appeal and give the district court jurisdiction of the matter appealed . . . ." Neb. Rev. Stat. § 24-541.02 (Cum. Supp. 1982).

"Upon perfection of the appeal the clerk of the county . . . court shall transmit within ten days to the clerk of the district court a certified copy of the transcript and the docket fee, whereupon the clerk of the district court shall docket the appeal." Neb. Rev. Stat. § 24-541.04(1) (Cum. Supp. 1982).

"A . . . final order made by the district court may be reversed . . . by the Supreme Court . . . ." Neb. Rev. Stat. § 25-1911 (Reissue 1979).

"The proceedings to obtain a reversal . . . shall be by filing in the office of the clerk of the district court . . . within one month after . . . the making of such final order . . . a notice of intention to prosecute such appeal . . . and . . . by depositing . . . the docket fee required by law . . . ." Neb. Rev. Stat. § 25-1912 (Cum. Supp. 1982).

It is true that it is within this court's discretion, under its rule-making authority, to decide what class of cases shall be advanced or expedited once they are placed on the docket. However, we are not prepared to state, and we do not state, that we will alter the procedural steps to perfect an appeal, which we have previously said are jurisdictional. *Nebraska State Bank v. Dudley*, 203 Neb. 226, 278 N.W.2d 334 (1979).

Our answer to question 17, whether a decision of the county court is appealable to the District Court or to this court, would seem to be unimportant at this juncture. Outside of cases involving the authority of a county judge to issue a temporary injunction in the absence of the district judge, the only case remotely on point is *Kingman v. Davis*, 63 Neb. 578, 88 N.W. 777 (1902). In that case this court, through Commissioner Pound, stated in effect that the Supreme Court can not review the rulings of the county court directly, but can only review the judgment of the District Court rendered on appeals therefrom. We believe that reasoning to be applicable here.

Judgment is entered accordingly.

JUDGMENT ENTERED.

STATE OF NEBRASKA, APPELLEE, V. ALFRED S. LOPEZ, APPELLANT.

337 N.W.2d 130

Filed July 29, 1983. No. 82-767.

1. **Criminal Law: Habitual Criminals.** Two or more prior convictions arising out of the same set of circumstances may not be used to impose an enhanced penalty pursuant to Neb. Rev. Stat. § 29-2221 (Reissue 1979).
2. **Verdicts.** A verdict of a trier of fact in a criminal proceeding will be sustained if, taking the view most favorable to the State, there is evidence to support it.

Appeal from the District Court for Lincoln County: HUGH STUART, Judge. Reversed and remanded.

John P. Murphy, Lincoln County Public Defender, for appellant.

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

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

WHITE, J.

This is an appeal from the District Court for Lincoln County, Nebraska. The appellant, Alfred S. Lopez, was convicted of second degree sexual assault, Neb. Rev. Stat. § 28-320(1)(a) (Reissue 1979), a Class III felony, and of second degree assault, Neb. Rev. Stat. § 28-309(1) (Reissue 1979), a Class IV felony. The appellant was found to be a treatable mentally disordered sex offender. The court further found that the conviction of second degree assault was the third conviction of a felony and found the appellant to be an habitual criminal. Appellant was sentenced to a term of 10 years, with credit for time spent in the county jail prior to sentence.

Two errors are assigned: (1) The evidence is insufficient to sustain the verdict; and (2) The court erroneously enhanced the sentences.

We will discuss the second assignment of error first. The trial court sentenced the appellant pursuant to our holding in *State v. Pierce*, 204 Neb. 433, 283 N.W.2d 6 (1979), that two prior convictions arising out of the same set of circumstances may be used to impose an enhanced penalty pursuant to Neb. Rev. Stat. § 29-2221 (Reissue 1979). However, *State v. Pierce* was reconsidered and overruled in *State v. Ellis*, 214 Neb. 172, 333 N.W.2d 391 (1983). The sentence of the court was therefore erroneous, and the cause must be remanded to the District Court for resentencing.

With respect to the first assignment of error we have said: " '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)." *State v. Ellis*, *supra* at 174, 333 N.W.2d at 393.

Section 28-320 provides in part: "(1) Any person who subjects another person to sexual contact and (a) overcomes the victim by force, threat of force, express or implied, coercion, or deception . . . is guilty of sexual assault in either the second degree or third degree.

"(2) Sexual assault shall be in the second degree and is a Class III felony if the actor shall have caused serious personal injury to the victim."

Section 28-309 provides in part: "(1) A person commits the offense of assault in the second degree if he: (a) Intentionally or knowingly causes bodily injury to another person with a dangerous instrument . . . ."

The appellant does not argue the sufficiency of the evidence to establish that it was the appellant who was the actor in the attack on the victim. Rather, he argues strenuously that so far as the sexual assault charge is concerned, "there was no serious personal injury to the victim," and on the second degree assault there was not sufficient proof of "bodily injury." A limited recitation of the facts is necessary.

At approximately 1 a.m. the victim left a girl friend's house in North Platte and drove her car to another address in North Platte to see a boyfriend. As she drove she observed a car following her. After parking the car near the boyfriend's residence she left the car. The following car, which the victim assumed was that of an acquaintance of her boyfriend, parked behind her car. As she walked toward the house she was seized from the rear, a

hand was placed over her mouth, and the other hand held a knife pressed to her throat. She was forced across the street, with the knife now at her back and the other hand still over her mouth, into a backyard of a residence in the area. The victim was instructed to disrobe and the attacker rubbed her genital area. The victim was still in the grasp of the attacker and was instructed to move to another area where the attacker again touched the genital area. The victim lay down as instructed, and when the attacker attempted to lie on her, the victim poked a finger into the attacker's eye and was struck by the closed fist of the attacker on the eyes and about the head a total of seven times. The attacker then fled. The victim sustained a severe black eye, bumps and bruises about the head, and a wound on the back from the knife, the knife apparently just cutting the skin and not seriously penetrating. The knife was recovered from the scene and identified by the attacker's housemates, and was offered and received in evidence. The victim suffered headaches for a week and fear of being out at night alone.

The argument that the victim did not suffer bodily injury from a dangerous instrument by reason of the slight wound in the back borders on the frivolous. The evidence clearly supports the jury's finding of guilty of second degree assault.

"Serious personal injury shall mean great bodily injury or disfigurement, extreme mental anguish or mental trauma, pregnancy, disease, or loss or impairment of a sexual or reproductive organ." Neb. Rev. Stat. § 28-318(3) (Reissue 1979).

This court has previously defined the term "great bodily injury." The term "great bodily injury," as employed in the Criminal Code, is not susceptible of a precise definition, but implies an injury of a graver and more serious character than an ordinary battery; and whether a particular case is within the meaning of the statute is generally a question of fact for the jury. *Hallett v. State*, 109 Neb. 311, 190 N.W.

862 (1922); *State v. McDaniels*, 145 Neb. 261, 16 N.W.2d 164 (1944). Accordingly, Black's Law Dictionary 139 (5th ed. 1979) defines a simple battery as one not accompanied by circumstances of aggravation, or not resulting in grievous bodily injury.

It is clear from the evidence adduced at trial that the victim suffered an assault with a knife, that the defendant struck her very hard several times about the head, that she had bruises and abrasions on her face, that she experienced a very sore neck, and that she was wounded with the knife on her back. Furthermore, the victim suffered paranoia and trauma as a result of the attack, and testified that she is fearful of going out alone at night, and is constantly looking to see if someone is following her.

The evidence was sufficient to submit the issue to the jury as to whether the victim suffered severe personal injury. The first assignment of error is without merit.

The trial court erroneously sentenced the defendant to a single term of 10 years on the two counts under an improper application of the habitual criminal statute. The sentence was erroneous and the cause must be remanded for resentencing.

REVERSED AND REMANDED.

FRANK J. WEAR ET AL., APPELLEES, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLANT.

337 N.W.2d 708

Filed August 5, 1983. No. 81-927.

1. **Eminent Domain: Evidence.** Generally, evidence as to the sale of comparable property is admissible as evidence of market value, provided there is adequate foundation to show the evidence is material and relevant. The foundation evidence should show the time of the sale, the similarity or dissimilarity of market conditions, the circumstances surrounding the sale, and other relevant factors affecting the market conditions at the time.
2. **Eminent Domain: Appeal and Error.** Whether properties, the

subject of other sales, are sufficiently similar to the property condemned to have some bearing on the value under consideration, and to be of aid to the jury, must necessarily rest largely in the sound discretion of the trial court. The trial court's determination will not be interfered with in the absence of an abuse of discretion. The exact limits, either of similarity or difference, or of nearness or remoteness in point of time, depend upon the location and character of the properties and the circumstances of the case.

3. **Eminent Domain: Evidence.** The weight and credibility of valuation testimony in a condemnation action are for the jury, and in testing such evidence the condemnee is entitled to have all conflicts resolved in a light most favorable to him.
4. **Eminent Domain: Damages: Appeal and Error.** The amount of damages sustained in a condemnation action is peculiarly a question of a local nature and ordinarily is to be determined by a jury. Where the evidence is conflicting, this court will not ordinarily interfere with the verdict of the jury unless it is clearly wrong.
5. **Attorney Fees.** In the determination of a reasonable attorney fee, the court should consider the importance of and the result of the case, the difficulties thereof, the degree of professional skill demonstrated, the diligence and ability required and exercised, the experience and professional training of the attorney, the difficulty of the questions of fact and law that are raised, and the time and labor necessarily required in the performance of those duties.
6. _____. The court, in awarding a reasonable attorney fee, may consider the actual agreement existing between a litigant and his attorney, including an obligation to pay a contingent fee. While the actual agreement is neither the sole factor nor a factor to be given any greater weight than any of the other factors, it may nevertheless be considered.

Appeal from the District Court for Sarpy County: GEORGE H. STANLEY, Judge. Affirmed.

Paul L. Douglas, Attorney General, Warren D. Lichty, Jr., and Gary R. Welch, for appellant.

J. Thomas Rowen of Miller & Rowen, P.C., for appellees.

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

MCCOWN, J.

This is a condemnation proceeding instituted by the Nebraska Department of Roads to acquire the

land necessary for highway reconstruction in Sarpy County, Nebraska. The jury verdict was for $677,480 and the State has appealed.

The State sought to acquire 18.12 acres of land on the outskirts of Omaha located on the west side of Highway 50 near its intersection with Interstate 80 in Sarpy County, Nebraska. The land taken in fee title was a roughly rectangular tract approximately 1,535 feet north and south by 535 feet east and west, and was located in the southeast corner of a 75-acre tract of land owned by the individual condemnees, who are plaintiffs in this action.

The 75-acre tract was also rectangular, approximately 2,600 feet north and south by 1,250 feet east and west. The State had acquired control of access from the 75-acre tract to Highway 50 in 1962, and had restricted access use to two field entrances to be used for normal farming operations. No other access existed to Highway 50. Twenty-six acres of the 75-acre tract were zoned as general business and the remaining acres were zoned for multifamily dwellings. Of the 18.12 acres actually taken by the State, 13.8 acres were zoned general business and 4.32 acres were zoned for multifamily dwellings.

Prior to the filing of the condemnation action here the plaintiff landowners had prepared and drawn plans for the development of the 75-acre tract for use as a shopping center and condominium apartment complex.

In June 1980 the Nebraska Department of Roads filed a condemnation proceeding in Sarpy County, and on July 10, 1980, the board of appraisers in the county court awarded the property owners $480,942 as damages by reason of the taking. Both the property owners and the State appealed the award to the District Court, and the property owners were designated plaintiffs.

At the trial in District Court the plaintiffs presented Fred Krambeck, a licensed real estate appraiser, as their first witness. Krambeck testified

and gave his opinion as to the amount of damages sustained by the plaintiffs, including the value of the 18.12 acres actually taken and the damages to the remainder of the 75-acre tract. Krambeck testified that his opinion was based upon computations, figures, and plans prepared by Bill Dorner, a registered land surveyor.

Dorner testified that he prepared some of the figures and computations for the plaintiffs' planned development of the 75-acre tract. Dorner admitted that when he prepared the plats he presupposed access to Highway 50. On motion of the State the District Court then struck the testimony of Dorner on the basis that he was not a registered civil engineer and therefore not qualified to prepare the figures and plats offered in his testimony. The court also struck the testimony of Krambeck because his valuations were based on the Dorner figures and the assumption that there was access to Highway 50.

Later in the trial plaintiffs produced the testimony of Robert E. Dreesen, a certified civil engineer who was a partner with Dorner in a 30-person engineering and surveying firm. Dreesen testified that all figures and materials prepared by members of his firm were prepared under the supervision of a licensed engineer and were reviewed and checked for authenticity and accuracy. He testified that he personally reviewed the exhibits and figures prepared by Dorner and that in his opinion the figures and computations were true and accurate. Dreesen also testified that the absence of access to Highway 50 would not affect the feasibility of the Dorner plans, nor the figures reviewed and testified to by Dreesen, even though Dorner had incorrectly presumed access when the plans were prepared.

Paul Merker, a licensed real estate appraiser, also testified on behalf of the plaintiffs. He testified that the commercial and residential zoning of the 75-acre tract represented the highest and best use of the property. He used a market data approach for his

valuations and selected a series of sales of similar properties in the area which he adjusted for differences between them and the subject tract.

In Merker's opinion the fair market value of the entire tract before the taking was $1,044,569, the fair market value of the remainder after the taking was $184,426, and the total damages were $860,143.

Merker testified that the value of the 18.12 acres actually taken was $336,316 and the balance was for damage to the remainder of the tract.

Robert E. Wear, a real estate developer and one of the owners of the land, testified that the development plan for the 75-acre tract had been drawn up prior to the condemnation and that, in his opinion, the plaintiffs sustained approximately $1 million in damages as a result of the taking.

The State's evidence outlined its plan to expand the intersection of Highway 50 and Interstate 80, and also established that the only access from plaintiffs' land to Highway 50 was two field entrances restricted to use for farming purposes.

Attilio Rindone, a licensed real estate appraiser, testified on behalf of the State. In his opinion, using a market data approach and comparative sales, the value of the entire property before the taking was $380,000, the value of the remainder after the taking was $279,000, and the total damages were $101,000.

The jury viewed the premises at ground level and by air, and returned a verdict for the plaintiffs in the sum of $677,480.

At a separate hearing thereafter the District Court granted the plaintiffs attorney fees of $80,000, plus expert witness fees of $1,680, and this appeal followed.

The basic contention of the State on appeal is that the testimony of the expert real estate witness Merker was improper and should have been excluded because his valuations were partially based upon computations prepared by William Dorner, whose testimony had been stricken upon the ground

that he was not a licensed civil engineer. Dorner had also testified that his computations assumed access to Highway 50. The State also contends that Merker's testimony should have been excluded because the evidence did not establish that the comparative sales used by Merker were arm's length transactions between willing buyers and sellers.

The State's position is that because of the admission of the evidence, which the State asserts was improper, the verdict was excessive. Essentially, the State's position is that because Dorner presumed access to Highway 50 when he prepared his computations, a real estate expert witness, such as Merker, who used Dorner's computations and plans, also necessarily assumed there was access to Highway 50 as a basis for all valuation testimony. Therefore, the State argues, Merker's testimony as to the valuation of the land taken or damaged must be excluded. The record does not support the State's position.

Without passing upon the issue of whether Dorner's testimony was properly stricken as incompetent, the testimony of Robert Dreesen, a licensed civil engineer, is in the record to reestablish Dorner's facts and figures and to support Merker's testimony as to damages. Dreesen testified that he had personally reviewed Dorner's figures and plans and that they were accurate, in his opinion. Dreesen specifically testified that his opinion would not be different without access to Highway 50, and that access to Highway 50 would not affect any of Dorner's facts or figures which Dreesen had testified about.

The jury was specifically instructed that the State had previously purchased control of access from the subject property to Highway 50 and was the owner of such rights, and that the only access the plaintiffs had to Highway 50 was by way of two field entrances to be used for movement of farming equipment only. There is no evidence in the record that the jury mistakenly or incorrectly assumed otherwise.

The State also contends that Merker's testimony as to damages was improper because the comparative sales he used were not arm's length transactions between willing buyers and willing sellers. Merker testified that in arriving at a fair market value of the property involved here, he examined 28 comparable sales, noting the date of sale, the number of acres involved, the total consideration, the consideration per acre, the area and the square feet, the consideration per square foot, and the zoning. Out of the 28 sales, Merker selected 4 sales of commercial property and 4 sales of residential property and adjusted those sales for location, size, shape, grading, and zoning so that they could be compared with the property involved here. He testified that he examined the deeds for all the comparable sales and verified the consideration for the sale with at least one of the participants in the transaction.

One of the eight sales was shown to be part of a condemnation action instituted by the State and it was stricken by the District Court because it was not an arm's length transaction. The State's motion to strike the remaining sales on the ground that they were not arm's length transactions was overruled by the court. Counsel for the State stated that testimony would be presented later showing that the sales were not arm's length transactions, but no such evidence was ever presented.

Generally, evidence as to the sale of comparable property is admissible as evidence of market value, provided there is adequate foundation to show the evidence is material and relevant. The foundation evidence should show the time of the sale, the similarity or dissimilarity of market conditions, the circumstances surrounding the sale, and other relevant factors affecting the market conditions at the time. *Clearwater Corp. v. City of Lincoln*, 202 Neb. 796, 277 N.W.2d 236 (1979).

Whether properties, the subject of other sales, are sufficiently similar to the property condemned to

have some bearing on the value under consideration, and to be of aid to the jury, must necessarily rest largely in the sound discretion of the trial court. The trial court's determination will not be interfered with in the absence of an abuse of discretion. The exact limits, either of similarity or difference, or of nearness or remoteness in point of time, depend upon the location and character of the properties and the circumstances of the case. *Langfeld v. Department of Roads*, 213 Neb. 15, 328 N.W.2d 452 (1982).

In the absence of some evidence that the sales were not arm's length transactions, the District Court was correct in refusing to strike the testimony and there was no abuse of discretion.

The weight and credibility of valuation testimony in a condemnation action are for the jury, and in testing such evidence the condemnee is entitled to have all conflicts resolved in a light most favorable to him. *Dawson v. City of Lincoln*, 176 Neb. 311, 125 N.W.2d 908 (1964).

In the case at bar the evidence of the plaintiffs as to the damages suffered by reason of the condemnation range from $860,000 to $1 million. The testimony of the State's expert witness placed the damages at $101,000. The jury saw and heard the witnesses and viewed the premises from the ground and from the air and brought in a verdict for $677,480. The verdict was within the range of the testimony and there is no objection to the instructions.

The amount of damages sustained in a condemnation action is peculiarly a question of a local nature and ordinarily is to be determined by a jury. Where the evidence is conflicting, this court will not ordinarily interfere with the verdict of the jury unless it is clearly wrong. *Danish Vennerforning & Old Peoples Home v. State*, 205 Neb. 839, 290 N.W.2d 791 (1980). The verdict of the jury in the case at bar was not clearly wrong. One of the items of damages

considered by the jury was the cost of purchasing dirt for the grading of the remainder of the land. Wear had apparently planned to use the dirt from that portion of the land taken. While we have doubts as to the correctness of considering this item, the State did not object to such testimony and has not assigned this matter as error. Therefore, we shall not consider it on appeal.

The State also appeals from the award of attorney fees of $80,000 to the plaintiffs pursuant to Neb. Rev. Stat. § 76-720 (Reissue 1981). The State contends the fees are excessive.

The evidence at the hearing on fees established that the plaintiffs had a contingent fee arrangement with their attorney to pay 25 percent of the difference between the highest offer by the State and the final jury verdict. Under that arrangement the contingent fee would have been $119,370. One of the plaintiffs, who was also an attorney, testified that in his opinion, and taking all the factors of the case into account, $90,000 would be a reasonable attorney fee. Plaintiffs' counsel testified as to his duties in connection with the case. A local attorney, acquainted with the work and reputation of plaintiffs' counsel, testified that, taking into account the degree of difficulty and the amounts involved, a sum between $100,000 and $133,000 would be a reasonable attorney fee. The District Court allowed a fee of $80,000.

The State contends that the fee is excessive because the trial court considered the contingent fee arrangement and because the plaintiffs' attorney did not produce a complete record of the amount of time spent in the preparation and trial of the case. In the determination of a reasonable attorney fee, the court should consider the importance of and the result of the case, the difficulties thereof, the degree of professional skill demonstrated, the diligence and ability required and exercised, the experience and professional training of the attorney, the difficulty of the questions of fact and law that are raised, and the

time and labor necessarily required in the performance of those duties.

The court, in awarding a reasonable attorney fee, may consider the actual agreement existing between a litigant and his attorney, including an obligation to pay a contingent fee. While the actual agreement is neither the sole factor nor a factor to be given any greater weight than any of the other factors, it may nevertheless be considered. *Prucka v. Papio Nat. Resources Dist.*, 206 Neb. 234, 292 N.W.2d 293 (1980).

The allowance of a reasonable attorney fee for necessary services performed by an attorney in a condemnation case under the provisions of § 76-720 will not be reversed on appeal to this court in the absence of an abuse of discretion. There was no abuse of discretion here.

The judgment of the District Court and the award of attorney fees and costs are affirmed.

AFFIRMED.

BOSLAUGH, J., dissenting.

A verdict in a condemnation case which is manifestly excessive, clearly wrong, and not supported by the evidence can not be sustained. *Moyer v. Nebraska E. G. & T. Coop.*, 171 Neb. 879, 108 N.W.2d 89 (1961).

The judgment in this case appears to be excessive on its face. The taking amounted to about 25 percent of the area of the tract, but the damages awarded amount to approximately 68 percent of the value of the entire tract, according to the plaintiffs' evidence. The plaintiffs' expert witness, Merker, valued the remainder after the taking at less than 20 percent of the value of the entire tract before the taking. In other words, the remaining 75 percent of the property was worth less than 20 percent of the value of the entire tract.

It further appears that the judgment is excessive because the owners were allowed to recover damages twice for the property taken. They were allowed to recover the value of the land taken plus

the replacement cost of fill dirt that could have been removed from the land taken. The landowners should not be paid for both the value of the dirt and its replacement cost.

When only a part of a tract is condemned, the measure of damages in Nebraska is the value of the property taken plus the difference in the value of the remainder before and after the taking. See *Connor v. State*, 175 Neb. 140, 120 N.W.2d 916 (1963). This rule has been criticized because it may permit a double recovery. See, 1 Orgel, Valuation under Law of Eminent Domain § 64 (2d ed. 1953); *Commonwealth v. Blanton*, 352 S.W.2d 545 (Ky. 1961).

In *Blanton, supra* at 547, the court said: "It must be obvious, however, that if in valuing the land *taken* its use as a specific facility is considered, and the damages for the *taking* are thus computed on the basis that the owner is being deprived of that facility, the loss of the facility taken cannot be again considered as part of the damages to the remainder of the tract. It seems to us that the situation here is no different from that in Smick v. Commonwealth, Ky., 268 S.W.2d 424, where the landowner's garage was taken and paid for, and he sought to recover in addition the expense of building a new garage." (Emphasis in original.) See, also, *P., B. & C. Traction Co. v. Vance*, 234 Ill. 36, 84 N.E. 607 (1908); *State, Dept. of Highways v. Country Club Acres*, 348 So. 2d 138 (La. App. 1977). See, also, cases cited at 4A Nichols, Law of Eminent Domain § 14.06 n.10 and § 14.08 n.24 (3d ed. 1981).

In the present case the landowners were entitled to recover the fair market value of the 18.12 acres of the land taken plus severance damages to the remainder. The evidence of the landowners relating to value can be summarized as follows:

Wear, one of the landowners, testified that the value of the property was reduced $1 million.

Merker, the expert witness, testified to the following values:

Value of entire 75-acre tract	$1,044,569
Value of 18.12 acres taken	336,316
Value of remainder before taking	708,253
Value of remainder after taking	184,426.

Merker testified that the value of the remainder after the taking was diminished because the 18.12 acres taken contained fill necessary to develop the remaining property for commercial and residential use, and that the loss in market value was equal to the cost of obtaining replacement fill.

Merker relied upon estimates compiled by the engineer, Dreesen. Dreesen testified that to develop the remainder, 602,000 cubic yards of fill and 79,865 cubic yards of topsoil would be required; that 392,000 cubic yards of fill and 59,600 cubic yards of topsoil were on the remaining property; and therefore the landowners would be required to purchase and transport 210,000 cubic yards of fill and approximately 20,000 cubic yards of topsoil at a cost of $504,000. Dreesen calculated the onsite grading costs before the taking and subtracted these from the cost of the project when it required fill to be brought in from offsite. It was stipulated that the land taken contained 266,000 cubic yards of fill.

If it is assumed that the grading project was necessary for the development of the remainder, that the development plan was feasible, and that the damage to the remainder was equal to the cost of replacing the fill present on the 18.12 acres, the award made by the jury is still excessive. This is because the landowners were permitted to recover the fair market value of the 18.12 acres which included the value of the fill dirt, and also to recover the cost of procuring replacement fill dirt as a part of the diminution in value of the remainder. Thus, the award resulted in double compensation.

In the present case the value of the land taken included the value of the dirt in place. The landowners can not also recover the cost of replacing the dirt. An analogy can be made to trespass cases in-

volving the removal of dirt. A landowner may recover the diminution in market value of the land *or* the market value of the soil taken but may not recover both. See *City of Atlanta v. Swiney*, 20 Ga. App. 415, 93 S.E. 24 (1917) (syllabus of the court).

If the landowners were entitled to any severance damage for the loss of the dirt on the 18.12 acres, the measure would be the costs necessitated by the transportation of substitute dirt to the site.

HASTINGS, J., joins in this dissent.

STATE EX REL. HILT TRUCK LINE, INC., APPELLANT, V. HARRY "PETE" PETERSON, DIRECTOR OF THE DEPARTMENT OF MOTOR VEHICLES FOR THE STATE OF NEBRASKA, APPELLEE.

337 N.W.2d 133

Filed August 5, 1983. No. 82-310.

Mandamus. Mandamus is available to enforce the performance of a ministerial duty, that is, an absolute duty to act in a prescribed manner upon existence of specified facts.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Reversed and remanded with directions.

Michael O. Johanns of Peterson, Bowman & Johanns, for appellant.

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

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

SHANAHAN, J.

Hilt Truck Line, Inc. (Hilt), requested a writ of mandamus requiring the director of the Department of Motor Vehicles (department) to process Hilt's application for proportional registration of its truck fleet pursuant to Neb. Rev. Stat. § 60-305.09 (Reissue

1978). The trial court denied the writ, finding that the director's granting of a proportional registration is a discretionary duty. Hilt appeals, assigning as errors the court's finding that issuance of the license was discretionary and the court's failing to grant the writ of mandamus.

Hilt, a Nebraska corporation, is an interstate motor common carrier which owns no trailers and leases all of its fleet's tractors from the owner-operators.

In September 1981 Iowa requested the Nebraska Department of Motor Vehicles to investigate whether Hilt was entitled to claim Nebraska as its base jurisdiction. The department audited Hilt's records at 1415 South 35th Street in Council Bluffs, Iowa, where a sign indicated Hilt Truck Line. A Hilt employee requested that the audit be conducted at the Council Bluffs address. The department also investigated 14709 Arbor Street, Omaha, Nebraska, the Hilt business address listed on previous applications for proportional licensing. The investigation showed that this address was the private residence of a Hilt employee and that no phone for Hilt was listed at this address.

In December 1981 Hilt filed an application for proportional registration of its fleet and listed 14709 Arbor Street as its business address. In a December 4 letter to Hilt, the department denied the application, stating that its investigation revealed Hilt "does not meet the criteria of a Nebraska based fleet but rather an Iowa based fleet" under the International Registration Plan (IRP).

On January 7, 1982, Hilt filed proceedings for a writ of mandamus. On January 21, 1982, Hilt sent a letter to the department, stating it had an established place of business at 13626 C Street, Omaha, which satisfied the IRP's criteria necessary for a Nebraska-based fleet. The department wrote to Hilt that it would need to investigate further to determine if the C Street facility qualified "as a principal

place of business as defined by Nebraska statutes."

At trial Thomas Hilt, president of Hilt, testified that the company is leasing a building at 13626 C for office space and that the building has a sign for Hilt Truck Line, Inc. The office has Hilt financial records; is generally open from 8:30-4:30, with a Hilt employee present; and has a phone publicly listed in Omaha under the company name. He also testified that Hilt accrues a majority of its miles in Nebraska.

Harry Peterson, director of the Department of Motor Vehicles, testified that the department, in processing an application for proportional registration, must determine if the registrant has an established place of business in Nebraska under the IRP criteria, and must also determine if the registrant is "properly registered" by having a "principal place of business" in the state pursuant to § 60-305.09. Sandra Bock, the department employee in charge of interstate registration, was of the opinion that Hilt had satisfied the criteria for "established place of business" under the IRP, but further investigation was necessary to determine Hilt's "principal place of business."

The trial court, denying the writ, found the department employed discretion in determining Hilt's "established place of business" under the IRP and in determining if Hilt was "properly registered."

Pertinent statutes of the Motor Vehicle Registration Law are Neb. Rev. Stat. §§ 60-305.03 and 60-305.09 (Reissue 1978). Section 60-305.09(1) states: "Any owner engaged in operating a fleet of apportionable commercial vehicles in this state in interstate commerce may, in lieu of registration of such vehicles under the general provisions of sections 60-301 to 60-344, register and license such fleet for operation in this state by filing a sworn statement with the Department of Motor Vehicles, which shall be in such form and contain such information as the department shall require, declaring the total mile-

age operated by such vehicles in all states and in this state during the preceding year and describing and identifying each such vehicle to be operated in this state during the ensuing license year. The application shall be accompanied by payment of the registration fee determined as provided in this section. Upon receipt of such statement, the department shall determine the total fee payment . . . and shall notify the applicant of the amount of any additional payment required to be made. . . .

. . . .

"Upon completion of such processing and receipt of the appropriate fees, the department shall issue to the applicant a sufficient number of distinctive registration certificates . . . for display on the vehicle . . . identifying it as a part of an interstate fleet proportionately registered. . . .

"The vehicles so registered shall be exempt from all further registration and license fees under sections 60-301 to 60-344 for movement or operation in the State of Nebraska. . . .

"The right of applicants to proportional registration hereunder shall be subject to the terms and conditions of any reciprocity agreement, contract or consent made by the Department of Motor Vehicles.

". . . Each vehicle of a fleet registered by a resident of Nebraska on an apportionment basis shall be considered as fully registered for both interstate and intrastate commerce."

The department has entered into a reciprocal agreement, the International Registration Plan, and consequently applicant's rights to proportional registration are subject to this plan. Under the IRP, "An applicant for proportional registration shall file a uniform application with the Commissioner of the base jurisdiction in lieu of registration under other applicable statutes." Int'l Regis. Plan § IV A.1. (1980).

" 'Base Jurisdiction' means, for purposes of fleet registration, the jurisdiction where the registrant

has an established place of business, where mileage is accrued by the fleet and where operational records of such fleet are maintained or can be made available . . . ." Int'l Regis. Plan § II C.1. (1980).

The commentary for C.1. states in part: "Although 'an established place of business' is not defined, it is construed to mean: '. . . a physical structure owned, leased or rented by the fleet registrant the location of which is designated by street number or road location, and which is open during normal business hours; and in which are located:

"1) a telephone or telephones publicly listed in the name of the fleet registrant,

"2) a person or persons conducting the fleet registrant's business, and,

"3) the operational records of the fleet (unless such records can be made available . . . .)' "

Section 60-305.03 authorizes the director of the Department of Motor Vehicles to enter into reciprocal agreements with other states. "Nonresident owners; trucks and buses; where no reciprocity; fees; all vehicles; reciprocal agreements authorized; terms and conditions; revision; absence of agreement; effect. . . .

"(2) In order to effect the purposes of . . . section 60-305.09, the Director of Motor Vehicles shall have the power, duty and authority to enter into reciprocal agreements with the duly authorized representatives of other jurisdictions . . . granting to vehicles or owners of vehicles which are *properly registered* or licensed in such jurisdictions, and for which evidence of compliance is supplied, benefits, privileges and exemptions from the payment, wholly or partially, of any fees, or other charges imposed upon such vehicles or owners with respect to the operation or ownership of such vehicles under the laws of this state. Such agreements or arrangements shall provide that vehicles registered or licensed in this state when operated upon the highways of such other jurisdictions shall receive exemptions, benefits and

privileges of a similar kind or to a similar degree as are extended to vehicles from such jurisdictions in this state. . . .

"(3) . . . .

"Where no written agreement or arrangement has been entered into with another jurisdiction, or declaration issued pertaining thereto, any vehicle *properly registered* in such jurisdiction, and for which evidence of compliance is supplied, may be operated in this state and shall receive the same exemptions, benefits and privileges granted by such other jurisdiction to vehicles registered in this state.

. . . .

"(7) Properly registered shall mean a vehicle licensed or registered in one of the following: . . . (b) the jurisdiction in which a commercial vehicle is registered, where the operation in which such vehicle is used has a *principal place of business* therein, and from or in which the vehicle is most frequently dispatched, garaged, serviced, maintained, operated or otherwise controlled, and the vehicle is assigned to such principal place of business . . . ." (Emphasis supplied.)

The principal issue is whether the director's granting of a proportional registration is a ministerial task.

Mandamus is available to enforce the performance of ministerial duties of a public official but is not available if the duties are quasi-judicial or discretionary. The general rule is that an act is ministerial if there is an absolute duty to perform in a specified manner upon the existence of certain facts. *Singleton v. Kimball County Board of Commissioners*, 203 Neb. 429, 279 N.W.2d 112 (1979).

In *Little v. Board of County Commissioners*, 179 Neb. 655, 140 N.W.2d 1 (1966), we stated an act may be held to be ministerial even though the person performing it may have to satisfy himself that a certain state of facts exists under which it is his duty to perform the act. In that case the court found the

county board's incorporating a village was a ministerial duty, even though the board had to ascertain that the village was a true village, that the inhabitants were actual residents, and that a majority of the inhabitants had signed the petition. Once the board found these facts existed, the statute required the board to incorporate the village and the board lacked discretion to act otherwise.

In the present case it is clear that, under § 60-305.09(1) and the IRP, the director must determine if the information in the application is correct; if the fees are paid; and if Nebraska is the proper base jurisdiction, which includes ascertaining whether the registrant has "an established place of business" in Nebraska. To satisfy the "established place of business" criteria, the department must find that Hilt is leasing or owns a physical structure, open during normal business hours, which has an address, a publicly listed phone in Hilt's name, a person conducting Hilt's business, and where fleet records can be made available. The department's determinations involve only these findings of fact. Once the department finds these requirements are satisfied, § 60-305.09(1) requires that "the department shall issue to the applicant" his registration certificates, and the department has no discretion to refuse registration. Thus, upon satisfaction of the requirements of § 60-305.09(1), granting a proportional registration is a ministerial duty and the trial court erred in finding such act to be a discretionary duty.

Further, no statute supports the department's position and argument that the director must determine that Hilt is "properly registered" with its "principal place of business" in Nebraska. The phrase "properly registered" and its definition involving "principal place of business" are found in § 60-305.03. See § 60-305.03(2), (3), and (7). That statute refers to Nebraska's granting a nonresident owner a registration exemption if his vehicle is

"properly registered" in a jurisdiction other than Nebraska. "Properly registered" does not refer to vehicles of resident owners. Because Hilt is incorporated in Nebraska, it is a resident of this state regarding the Motor Vehicle Registration Law, and the requirement, "properly registered," as defined by § 60-305.03(7), is not applicable to Hilt. See *Riss & Co. v. Bowers*, 114 Ohio App. 429, 182 N.E.2d 862 (1961) (a domestic corporation is a resident for the purpose of motor vehicle registration laws). Thus, the trial court erred in finding the department was required to determine whether Hilt was "properly registered" and whether Hilt's "principal place of business" was Nebraska.

Granting a proportional registration license is a ministerial duty, and, therefore, mandamus is the proper remedy. The next question is whether Hilt satisfied its burden of proof for the writ. Where the duty to grant a license is ministerial, the court will grant mandamus to compel issuance of the license on the relator's compliance with all the statutory terms and conditions. 55 C.J.S. *Mandamus* § 156 c. (1948); *State, ex rel. Andruss v. Mayor*, 120 Neb. 413, 233 N.W. 4 (1930). Hilt has presented evidence that it had filed a correct application, with its office address, satisfying the IRP's criteria for base jurisdiction, and that it is ready and willing to pay the registration fees. The department presented no evidence to rebut Hilt's compliance with the statutory requirements. Hence, Hilt should be granted a writ of mandamus to compel the director to grant Hilt a proportional registration license.

REVERSED AND REMANDED WITH DIRECTIONS.

INTERNATIONAL ASSOCIATION OF FIREFIGHTERS LOCAL 831, APPELLEE AND CROSS-APPELLANT, V. CITY OF NORTH PLATTE, LINCOLN COUNTY, NEBRASKA, APPELLANT AND CROSS-APPELLEE.

337 N.W.2d 716

Filed August 5, 1983. No. 82-379.

1. **Commission of Industrial Relations: Appeal and Error.** In our review of orders and decisions of the Commission of Industrial Relations, we are restricted to considering whether the order of that agency is supported by substantial evidence justifying the order made, whether it acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or unreasonable.
2. **Commission of Industrial Relations.** The Commission of Industrial Relations' sole function is to settle industrial disputes, and the principal onus in producing evidence is on the parties. The adversary nature of proceedings has been preserved in the commission by the Legislature in providing that proceedings shall conform to the code of civil procedure applicable to District Courts, Neb. Rev. Stat. § 48-812 (Cum. Supp. 1982), by the decision of this court as to burden of proof and, for that matter, by the procedures adopted and followed by the commission itself.
3. **Trial: Evidence.** It is within the sound discretion of a District Court in a civil case to allow a party to withdraw its rest and introduce additional evidence.
4. **Judgments.** It is not the function of an order nunc pro tunc to change or revise a judgment or order, or to set aside a judgment actually rendered, or to render an order different from the one actually rendered, even though such order was not the order intended.

Appeal from the Nebraska Commission of Industrial Relations. Affirmed in part, and in part reversed.

William A. Harding of Nelson & Harding, for appellant.

Baskins & Rowlands, for appellee.

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

WHITE, J.

Defendant, City of North Platte, Nebraska (City), appeals from proceedings had before the Commis-

sion of Industrial Relations (CIR). The plaintiff, International Association of Firefighters Local 831 (Union), is the bargaining agent for employees of the fire department of the defendant City, excluding the chief and battalion commanders who are nonbargaining members. The Union alleged that an industrial dispute existed between the City and the employees of the fire department. The City in its answer admitted the truth of the allegation. After a hearing the CIR entered an opinion and order dated April 27, 1982, establishing wages for firefighters, emergency unit officers, captains, fire marshal aides, and a fire protection specialist. The CIR also altered the conditions of employment by ordering the City to implement a system of dues checkoff and to increase the clothing allowance. The City was also required to pay interest "from the date such increased wages should have been paid to the employees to the date of this Order."

The City argues that the CIR erred in (1) failing to grant the City's motion to dismiss because the Union failed to present a prima facie case of noncomparability; (2) reopening the hearing upon its own motion after the Union had rested and receiving additional evidence offered by the Union, because it constituted a second trial; (3) allowing the Union to use the City's expert witness to prove its case in chief; (4) its selection of the Union's array for comparability purposes; (5) its calculation of overall compensation; (6) rejecting the use of the City's economic variable deflator evidence; (7) granting the Union's application for an order nunc pro tunc; (8) ordering a union dues checkoff procedure; (9) granting the Union's request for temporary relief, since the postimpasse wage increase to nonunit employees did not constitute an unfair labor practice; and (10) ordering the payment of interest as part of its order. We affirm the order of the CIR in part and reverse in part.

In our review of orders and decisions of the CIR,

we are restricted to considering whether the order of that agency is supported by substantial evidence justifying the order made, whether it acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or unreasonable. *General Drivers and Helpers Union v. City of West Point*, 204 Neb. 238, 281 N.W.2d 772 (1979); *Metro. Tech. Com. Col. Ed. Assn. v. Metro. Tech. Com. Col. Area*, 203 Neb. 832, 281 N.W.2d 201 (1979).

The Union filed a petition with the CIR on August 24, 1981, which set forth two causes of action. In its first cause of action the Union alleged that an industrial dispute existed between itself and the City in regard to the negotiations of a new collective bargaining agreement. The Union also alleged that the scale of wages and conditions of employment lacked comparability to the prevalent scale maintained for the same or similar work of workers exhibiting like or similar skills under the same or similar work conditions.

In its second cause of action the Union alleged that on August 4, 1981, the City passed an ordinance whereby all nonunion city employees, including nonunion employees within the fire department, were granted a wage increase of 9.28 percent with longevity pay and that this action of the City constituted an unfair labor practice. The Union prayed for a temporary order prohibiting the City from implementing the wage increase and requiring the City to grant all members of the bargaining unit the 9.28 percent wage increase and applicable longevity pay.

A hearing was held on the Union's request for temporary relief on September 3, 1981. The CIR's temporary order did not enjoin the City from implementing the increases in wages and longevity pay to nonunion city employees, but did grant interest at 12 percent in the event its final order contained a wage increase or longevity pay for union members.

The City filed an amended answer which incorporated the defenses from its first answer that the pe-

tition failed to state a claim upon which relief could be granted and that the CIR was without jurisdiction. In addition, the City alleged in its counterclaim that wages and fringe benefits paid to bargaining unit personnel were above the prevalent scale and should be decreased.

The trial of this matter was commenced on October 23, 1981, during which counsel for the Union presented a three-city array consisting of Fremont, Norfolk, and Grand Island, Nebraska, to enable the CIR to determine if North Platte was below the prevalent wage scale. The Union originally intended to include Scottsbluff and Hastings, Nebraska, in its array, but the two cities had not reached an agreement with their respective fire departments at the time of trial. At the conclusion of the Union's case the City moved to dismiss on the ground that the Union's three-city array was insufficient to establish a prima facie case of wage noncomparability. The CIR overruled the City's motion, and the City presented evidence of economic variables with respect to the array presented by the Union. After the presentation of its evidence the City renewed its motion to dismiss. The CIR reserved ruling on the City's motion and recessed the hearing, to be reopened only upon motion of the CIR.

On January 20, 1982, the Union moved to reopen the hearing to allow further testimony. The Union alleged that both of the cities of Scottsbluff and Hastings had reached agreement with their fire departments. The City filed a motion in opposition to reopening the hearings. Both motions were overruled, but the CIR ordered, upon its own motion, that the hearing be reopened, and allowed the introduction of additional evidence. Both the City and Union were granted leave to present additional evidence.

A second pretrial conference was held, at which time the Union stated that it intended to call the City's expert witness at the hearing. The City then

filed a motion in opposition to the Union calling the City's expert witness, which was overruled by the CIR on March 9, 1982.

The hearing was reopened on March 10, 1982. The Union added the cities of Scottsbluff and Hastings to the array proposed before the hearing was recessed. The City proposed three arrays. The first array was identical to the Union's and consisted of wage comparisons between fire departments in Fremont, Grand Island, Hastings, Norfolk, and Scottsbluff, Nebraska. The second array was a 200-mile radius around North Platte which consisted of Scottsbluff, Columbus, Norfolk, Hastings, and Grand Island, Nebraska, and Hays, Kansas. The third array had a 225-mile radius consisting of Beatrice, Scottsbluff, Columbus, Norfolk, Hastings, Fremont, and Grand Island, Nebraska, Hays and Great Bend, Kansas, Cheyenne, Wyoming, and Greeley, Colorado.

At the conclusion of the hearing the CIR, based upon the Union's five-city array, ordered the wages for the union members increased, a dues checkoff system, an increase in clothing allowance for shift personnel, and interest to be paid from the date of the temporary order.

After the conclusion of the hearing the Union applied to the CIR for an order nunc pro tunc to correct the order of the CIR which failed to consider a uniform allowance for the fire marshal aide and fire protection specialist, who were not shift personnel but who were hourly personnel. On May 18, 1982, the CIR granted the Union's request of an order nunc pro tunc.

We find it unnecessary to address the City's first assignment of error in light of our rulings regarding its other assignments of error. We therefore will consider first whether the CIR erred in reopening the hearing upon its own motion after both parties had rested, and allowing the introduction of additional evidence.

In *General Drivers and Helpers Union v. City of*

West Point, 204 Neb. 238, 281 N.W.2d 772 (1979), the trial between the parties had been closed when the CIR initiated and conducted its own investigation of the matter. In reversing the order and judgment of the CIR, we stated at 242, 281 N.W.2d at 775-76: "[T]he CIR's sole function is to settle industrial disputes, and the principal onus in producing evidence is on the parties. The adversary nature of proceedings has been preserved in the CIR by the Legislature in providing that proceedings shall conform to the code of civil procedure applicable to District Courts, section 48-812, R.R.S. 1943; by the decision of this court as to burden of proof, Lincoln Fire Fighters Assn. v. City of Lincoln, *supra*; and, for that matter, by the procedures adopted and followed by the CIR itself. The result is that the CIR cannot, in a section 48-818, R.R.S. 1943, case, obtain evidence on its own motion unless the moving party has first made a prima facie case by satisfying the burden of proof of establishing noncomparability with prevalent conditions. Therefore, we must disregard the evidence obtained by the CIR on its own motion and are left with findings not supported by substantial evidence, resulting in the entry of an unjustified order which is therefore arbitrary, capricious, and unreasonable."

It is within the sound discretion of a District Court in a civil case to allow a party to withdraw its rest and introduce additional evidence. *Meyer v. City of Grand Island*, 184 Neb. 657, 171 N.W.2d 242 (1969). The instant case is easily distinguished upon its facts from *General Drivers and Helpers Union v. City of West Point*, *supra*. The trial in *General Drivers* was completed when the CIR initiated and conducted its own investigation into the facts in contravention of the adversarial process. The CIR itself attempted to meet the association's burden of proof in *General Drivers*, and thereby failed to conform to the code of civil procedure. In the instant case the trial was merely recessed and was reopened pursuant to the

CIR's reservation of the right to do so on the record. Here, the parties themselves gathered and introduced further evidence and the reopening of the hearing was proper under the rules of procedure applicable in civil cases. Further, the Union's witnesses gave comprehensive descriptions of all the jobs within the fire department, stated wage information with reference to job descriptions, skills, and requirements, and provided evidence of fringe benefits paid by unions within the three-city array prior to the recess.

The City contends that the reopening of the hearing allowed the Union to correct the deficiencies in its case and that such action was inherently prejudicial. While we do not find it necessary to decide whether, in fact, the Union's proof was deficient or whether a three-city array was suitable because of our finding that the hearing was properly reopened, we note that the City was at all times prior to and at the time of trial aware of the fact that the Union intended to utilize a five-city array that had been used in prior CIR cases. The only reason the Union was not able to do so was a problem with Scottsbluff and Hastings not reaching a collective bargaining agreement before trial. The City refused to reveal the content of any of its arrays to the Union during contract negotiations. During trial the City rested shortly after the Union and did not introduce any of its arrays into evidence. The CIR reopened the hearing when Hastings and Scottsbluff had reached bargaining agreements. The City was not helpful in providing any information, and therefore the CIR did not abuse its discretion when it determined that under the circumstances reopening the case demonstrated itself to be indispensable to the merits and justice of the cause. See *Lewelling v. McElroy*, 148 Neb. 309, 27 N.W.2d 268 (1947).

The City also complains that the CIR erred in allowing the Union to call the City's expert witness to testify. We do not agree. After the CIR entered its

order of February 5, 1982, which reopened the hearing, the Union took the deposition of James Jensen, the City's expert witness in Denver, Colorado. Testimony from that deposition indicated that Mr. Jensen possessed relevant information regarding prevalent wages and fringe benefit rates. Accordingly, the Union announced at the pretrial conference held on March 2, 1982, that it wished to call the City's expert witness as a witness in its case in chief. After objection by the City the CIR entered an order allowing the Union to call the City's expert as its own witness. Neb. Rev. Stat. § 27-402 (Reissue 1979) states that "all relevant evidence is admissible" except as excluded by federal or this state's statutes or Constitution. Similarly, Neb. Rev. Stat. § 27-501 (Reissue 1979) states that no person has the privilege to "(1) Refuse to be a witness; or (2) Refuse to disclose any matter; or (3) Refuse to produce any object or writing; or (4) Prevent another from being a witness or disclosing any matter or producing any object or writing."

This court is unaware of any Nebraska cases involving the compelling of an expert witness to testify, nor has either party cited us to any such case. We therefore look to other jurisdictions and note that there is a conflict of authority as to when and under what circumstances an expert witness retained by one party may be compelled or will be allowed to testify to a matter of opinion upon request of the opposing party. See the annotation on the topic of compelling experts to testify in 77 A.L.R.2d 1182 (1961).

In a case very similar to the facts in this case, the Supreme Court of South Dakota in *State Highway Commission v. Earl*, 82 S.D. 139, 143 N.W.2d 88 (1966), reversed the trial court ruling which had precluded the state from eliciting the opinion testimony of the landowners' appraiser. In so holding, the South Dakota court stated at 142, 143 N.W.2d at 89: "It is generally held to be the duty of every citizen to

respond to a subpoena. No distinction, in this respect, exists between an ordinary and an expert witness. Nor can the expert demand compensation beyond ordinary witness fees as a condition precedent to his attendance. 8 Wigmore, Evidence, § 2203, p. 140. Also, ordinary and expert witnesses may be compelled to testify, unless privileged, to any relevant factual matter within their knowledge, but it is beyond the duty of a witness to make preliminary preparations, perform professional services, make scientific tests, or listen to testimony in order to qualify or testify as an expert."

The South Dakota court conducted an overview of all the conflicting cases on the subject and, in concluding that no privilege was available to prevent the testimony, stated: "The purpose behind our attorney-client privilege is to encourage a client to freely communicate with his attorney without fear of disclosure. Obviously its protective mantle does not extend to an appraiser of real property. He is not an attorney and the appraisal process of inspecting property, examining public records, comparing sales, and applying knowledge, training and experience in forming an opinion of value does not involve a confidential 'communication made by the client'. The mere fact the expert may have communicated his opinion of value to either the attorney or client does not make it a privileged communication.

. . . .

"In the present action the expert appraisal witness employed by defendant was willing to testify for the State which offered to pay his expert witness fees and expenses. The fact he was previously employed by defendant to appraise the subject property did not create a contractual or proprietary right in either defendant or the expert to suppress or withhold from evidence this expert's formed opinion. He should have been allowed to testify under the circumstances. To deny it constituted reversible error." *Id.* at 147-48, 143 N.W.2d at 92-93.

In the instant case Mr. Jensen was not subpoenaed to testify at trial but appeared voluntarily. However, even if he had been subpoenaed, he was not called upon to make any additional investigation and was merely asked to express opinions he had already formed prior to the trial.

The trial performs a truth-seeking function in settling controversies between the parties. It runs contrary to that function to suggest that unfavorable evidence in the form of an expert's opinion may be kept from either party in the interest of justice and to prevent prejudice.

The City next argues that the CIR erred in selecting the Union's array for comparability purposes. From the evidence the CIR determined that a five-city array consisting of Fremont, Grand Island, Hastings, Norfolk, and Scottsbluff "is an appropriate array for the determination of this matter." The record contains substantial evidence that the units selected were sufficiently similar and had enough like characteristics or qualities to make comparison appropriate. See *Fraternal Order of Police v. County of Adams*, 205 Neb. 682, 289 N.W.2d 535 (1980). The contested five-city array was one of three selected for presentation to the CIR by the City. It is difficult for this court to determine how error can be assigned by the City when one of its proffered arrays was selected by the CIR for the determination of prevalent conditions. All of the experts at trial testified that the five-city array was sufficient for purposes of comparison, and we find no abuse of discretion.

The City also maintains that the CIR erred in its calculation of overall compensation because the evidence demonstrated that the City was above the prevalent scale in the payment of fringe benefits. We do not find this to be a correct reflection of the evidence with regard to the five-city array. Mr. Jensen computed a cash-cost benefit analysis of fringe benefits for the five-city array for the fire-

fighter position. His figures showed that it would take an increase in fringe benefits at the midpoint of $225.70 per year to reach comparability.

The CIR considered each fringe benefit separately from the evidence introduced by the parties at trial. While the CIR found that some fringe benefits offered by North Platte, such as life insurance premiums and floating holidays, were superior to those of other cities, it found some fringe benefits, such as the uniform allowance, were inferior. Therefore, the CIR ordered the City to increase the uniform allowance by $120 which was below the prevalent scale. We find the action of the CIR in this regard to be supported by substantial evidence and not arbitrary or unreasonable.

The City claims that the CIR erred in rejecting the use of economic variable deflator evidence offered by the City. In its decision the CIR stated that it was rejecting the evidence because the City did not establish any connection between median family income or per capita income and firefighter wages.

Dr. Jerome Sherman, a professor of finance at Creighton University, testified that all economic variables, such as wage levels, were tied up to either median family income or per capita income. Yet, on the City's exhibit 39, the city of Norfolk had the lowest median family income and the highest per capita income of the five-city array. We therefore agree with the CIR that no direct correlation was shown between per capita or median family income and firefighter wages.

The City next contends that the CIR erred in granting the Union's application for an order nunc pro tunc. We agree.

After the hearing had been concluded the Union applied for an order nunc pro tunc to correct the order of the CIR because it did not increase the uniform allowance for hourly personnel.

In the recent case of *Continental Oil Co. v. Harris*, 214 Neb. 422, 424, 333 N.W.2d 921, 923 (1983), we

stated 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." The order nunc pro tunc enlarged the rights fixed by the CIR's order of April 27, 1982, by granting a uniform allowance to hourly employees of the fire department where none had previously been provided for. This portion of the order is reversed.

The City next contends that the CIR erred in ordering a mandatory dues checkoff. In *State ex rel. Council #32 v. City of Hastings*, 214 Neb. 20, 332 N.W.2d 661 (1983), we stated that there is no question that automatic dues checkoffs are the proper subject of collective bargaining. Here, the parties reached an impasse in negotiations. The CIR properly assumed jurisdiction of the industrial dispute, and its order of dues checkoff was within its statutory authority.

The City also argues that the CIR erred in granting the Union's request for temporary relief, since the postimpasse wage increase to nonunit employees did not constitute an unfair labor practice.

This case constitutes one of the more flagrant examples of bad faith bargaining by a city with its employees.

Neb. Rev. Stat. § 48-819.01 (Cum. Supp. 1982) provides that when a party to an industrial dispute does an act which interferes with, restrains, or coerces employees in the exercise of their rights under Neb. Rev. Stat. § 48-837 (Reissue 1978), the CIR has authority to enter "such temporary or permanent or-

ders as the commission may find necessary to provide adequate remedies to the injured party or parties, to effectuate the public policy enunciated in section 48-802, and to resolve the dispute."

Section 48-819.01 was enacted as a result of our decision in *University Police Officers Union v. University of Nebraska*, 203 Neb. 4, 17-18, 277 N.W.2d 529, 537 (1979), where we held that the CIR had no authority "to make findings with regard to unfair labor practices or direct a public employer to take any more action than is necessary to preserve and protect the status of the parties' property and public interest involved pending final determination of the issues."

The record reveals that the City was dilatory throughout negotiations, while the Union made a good faith effort to bargain. The City refused to show the Union any of its comparability pay figures, and while negotiations were in progress the City enacted a 9.28-percent across-the-board wage increase to nonunion employees of the type disfavored by this court in *AFSCME Local 2088 v. County of Douglas*, 208 Neb. 511, 304 N.W.2d 368 (1981), *supp. op.* 209 Neb. 597, 309 N.W.2d 65 (1981). The pay raise was given to nonunion employees of the fire department both above and below the ranks of the union members but narrowly avoided raising the salary in the same classification.

The City was well aware of the impact of its actions, as evidenced by the answer of Richard Grady, the North Platte city administrator, to questions propounded to him at trial. "Q. Now, were there discussions during that meeting especially from Councilman McGuire who was on the City negotiating team for this year attempting to arrive at an agreement with the fire union regarding the possibility that the City could be subject to an unfair labor practice lawsuit if the City gave nonunion employees an across-the-board 9.28 percent increase? A. Yes, I believe there was. Q. And is it fair to say that

Councilman McGuire brought it to the whole Council's attention that he had been advised by the City's attorney that they were leaving themselves wide open for an unfair labor practice lawsuit if the across-the-board increase was given to nonunion City employees, in the general terms as what you said? A. Yes. Q. And notwithstanding that discussion and the apprehension by Councilman McGuire, the City Council did go ahead and grant the 9.28 across-the-board increase for nonunion employees plus longevity pay and gave the Fire Department union no increase? A. Yes."

The City was aware of the fact that members of the Union were at least entitled to an 8-percent increase in salary based on an informal telephone survey of comparability pay. The actions of the City constitute an attempt to force the Union to accept less than they were entitled to because they were members of a bargaining unit. The award of interest was therefore highly appropriate in this instance and within the statutory authority of the CIR under § 48-819.01.

We find the Union's assignments on cross-appeal to be without merit.

The order of the CIR is affirmed in part and reversed in part.

AFFIRMED IN PART, AND IN PART REVERSED.

JAMES B. BELTZER AND BERNICE BELTZER, HUSBAND AND WIFE, APPELLANTS, V. WILLEFORD FARMS, INC., A NEBRASKA CORPORATION, AND N & W, INC., A NEBRASKA CORPORATION, APPELLEES.

337 N.W.2d 406

Filed August 5, 1983. No. 82-404.

1. **Deeds: Merger.** The rule or doctrine of merger is that upon the delivery and acceptance of an unambiguous deed, all prior negotiations and agreements are deemed merged therein. This rule

is equally applicable where prior oral negotiations result in a written contract.

2. _____: _____. The presence of fraud or mistake of fact is a recognized exception to the general rule that prior negotiations and agreements are merged into the final written contract of sale or deed.

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

Thomas H. Delay of Mueting, Delay & Stoffer, for appellants.

Brogan & Stafford, P.C., for appellees.

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

HASTINGS, J.

This appeal involves the sale of certain parcels of land located in Pierce and Antelope Counties, Nebraska, by the defendants to the plaintiffs. At the end of the introduction of evidence by plaintiffs, the defendants moved that a verdict be directed in their favor. The court granted this motion and dismissed plaintiffs' petition.

On appeal the plaintiffs assign three errors to this ruling by the trial court. They are: (1) The court erred in its application of the doctrine of merger, because it is an affirmative defense which was not pleaded by the defendants; (2) The court erred in finding that fraud was not shown by plaintiffs' evidence; and (3) The court erred in directing the verdict in this case because a question of fact on a material issue remained for determination by the jury. As will become more clear hereafter, we only need to consider the last assignment of error.

A brief summary of the relevant facts will aid in the understanding of this decision. On November 2, 1978, the defendants listed 10 quarter sections of land located in Pierce and Antelope Counties for sale with the Thor real estate agency.

William Willeford was the president of Willeford Farms, Inc., and vice president of N & W, Inc., both family-dominated corporations which owned the land offered for sale. He testified that he gave Thor specific information about the land, particularly concerning the irrigation wells and pumps. This information included statements that the wells on quarter sections Nos. 2, 5, and 6 had a pumping capacity of 900 gallons per minute. He also said that he had stated to the listing agent that the 10 quarter sections contained 1,260 acres of irrigated land.

Willeford admitted that such information was given to the agent because he thought it would be of interest to anyone who might be considering a purchase of the land. He agreed that the productivity of a farm is important to a prospective buyer and that there was a definite difference in the ability of an irrigated farm to produce crops as opposed to a dryland farm.

This same witness also admitted that he never again test pumped the wells after their initial installation in 1974 and that, as a matter of fact, in 1974 he had registered these wells with the State of Nebraska and represented that the well on quarter section No. 2 had an 800-gallon-per-minute capacity, No. 5, 900 gallons per minute, and No. 6, 700 gallons per minute.

John Thor of the Thor real estate agency testified that he made up a sales brochure from the information given to him by Mr. Willeford, a copy of which he assumed he had sent to James Beltzer. Thor agreed that he had relied on the information given him by Willeford in making up his sales brochure and in composing his advertising.

Mr. Beltzer testified that he did in fact receive a copy of the sales brochure which contained information regarding the number of acres under irrigation and the capacity of the wells; that he believed that information; and that he relied on it in making his decision to purchase the property.

Following certain negotiations, a contract was entered into between the parties whereby Beltzer agreed to buy the 10 quarter sections for a total price of $1,564,000. That agreement related to title, possession, and total quantity of land to be sold, and no reference was made as to the number of acres which were irrigated or the pumping capacity of the various wells.

On January 17, 1979, two additional agreements were drafted and signed, which superseded the original agreement, in effect making the transaction an exchange involving certain land owned by Beltzer located in Hall County, Nebraska. The Hall County land was to be deeded to the defendants as a major part of the consideration for the transfer of the 10 quarter sections. Again, these later agreements made no reference to the quantity of irrigated land or the capacity of the wells. Deeds conveying the 10 quarter sections were delivered to Beltzer on March 5, 1979, which deeds contained only the description of the 10 quarters and the usual covenants of warranty.

According to the further testimony of Mr. Beltzer, he became aware of troubles with the irrigation systems in the spring of 1980. He was earlier aware of the possibility of a discrepancy in the number of acres actually under irrigation.

The testimony in the record is undisputed that as of the spring of 1978 the number of acres under irrigation, by actual measurement, was 1,209.02 and that as of December of 1978 the pumping capacity of the well on quarter section No. 2 was 650 gallons per minute, No. 5, 750 gallons per minute, and No. 6, 650 gallons per minute. Although this specific information was not obtained by Mr. Beltzer until shortly before the trial of this action in April of 1982, he apparently did have reason to believe there were deficiencies in the land which he had purchased much earlier, and he had discussed this matter with Mr. Willeford in the fall of 1980.

Not having come to a satisfactory resolution of the

problem, on May 4, 1981, the Beltzers filed a petition claiming that the oral representations and warranties made by the defendants and relied upon by the Beltzers in entering into the written contracts were false and misleading. They sought as damages the difference between the value of the premises as represented and the actual value of the land conveyed. In their amended answer the defendants generally denied the claims of the plaintiffs, and denied any firm representations of irrigated acreage or pumping capacities of the wells. Nowhere did the defendants raise the doctrine of merger in their answer.

At the close of the plaintiffs' evidence the defendants moved for a directed verdict in their favor. The court made the following ruling: "I am of the opinion that there has been no fraud shown. This was a sale of land engross [sic] for a fixed sum. I am of the opinion that the doctrine of merger applies. I am of the opinion that the plaintiff has failed to make out a case, that the defendant or both defendants are entitled to a directed verdict, and a dismissal of plaintiff's petition at plaintiff's cost and it will be so ordered. I will direct such a verdict immediately after lunch when the jury returns. I base that on the doctrine of merger." The court thereafter directed a verdict in favor of the defendants.

Stated simply, the rule or doctrine of merger is that upon the delivery and acceptance of an unambiguous deed, all prior negotiations and agreements are deemed merged therein. *Bibow v. Gerrard*, 209 Neb. 10, 306 N.W.2d 148 (1981). The rule is equally applicable where prior oral negotiations result in a written contract. 17 Am. Jur. 2d *Contracts* § 260 (1964). However, the presence of fraud or mistake of fact is a recognized exception to the general rule that prior negotiations and agreements are merged into the final written contract of sale or deed. *Ludwig v. Matter*, 210 Neb. 87, 313 N.W.2d 234 (1981). At the very least, the record raises a reasonable

question as to whether a mistake of fact existed which should have been submitted to the jury.

The judgment of the District Court is reversed and the cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

DAVID NORTH ET AL., APPELLANTS, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, ET AL., APPELLEES.

337 N.W.2d 409

Filed August 5, 1983. No. 82-429.

1. **Employer and Employee: Wages.** Work not requested but permitted is worktime and compensable.
2. _____: _____. When an employer retains a hold on employees during lunchtime so that the employees are not actually at liberty to leave, the lunchtime constitutes compensable time.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Reversed and remanded.

S. Caporale, for appellants.

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

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

WHITE, J.

This is an action by six employees of the City of Omaha brought to recover wages claimed due them for time worked before the regular starting time and for work performed while on call during lunch periods. The trial was bifurcated by agreement of the parties, and any determination of wages due was postponed until after a determination of whether the City was responsible for such wages. The District Court for Douglas County determined that the employee plaintiffs were not entitled to any additional

wages and dismissed the action. We reverse and remand for further proceedings.

The parties stipulated that the plaintiffs either did occupy or were at the time of trial occupying the position of auto repair foremen in the department of public works of the City of Omaha, central garage division, and were classified as a (12MC) under the city ordinance.

The ordinances of the city pertinent to this controversy were also introduced. "*Sec. 23-251. Hours of work.* (a) Eight (8) hours shall constitute a day's work and five (5) calendar days shall constitute a week's work for all municipal employees, except: (1) Firefighting personnel assigned to twenty-four (24) hour duty shifts, (2) Professional, supervisory or administrative employees in civilian classifications assigned to pay range (15MC) and above . . . (d) For civilian positions in pay ranges (15MC) and above . . . which are professional, supervisory or administrative in character, the normal work week of forty (40) hours generally applies; but the compensation is intended to be appropriate for the class regardless of variation in the time that may be required to satisfactorily fulfill the responsibilities of the position in each class."

"*Sec. 23-253.* . . . Overtime worked by municipal employees shall be compensated by pay or compensatory time off in accordance with the following procedures: (a) *Civilian personnel*: Work performed in excess of forty (40) hours per week shall be compensated at the rate of time and one-half for the number of hours of overtime worked, provided that temporary or seasonal employees; professional, supervisory or administrative personnel assigned to pay range (15MC) or above, and employees who are furnished living quarters on city property, shall be exempt from overtime compensation. Holidays shall be counted as days worked in computing overtime."

The effect of all the stipulations was that plaintiffs

were entitled to overtime compensation for hours worked in excess of 8 hours per day and 40 hours per week. The dispute in the trial court was whether they were required to work additional time before a shift and during lunchtime.

The evidence is not seriously in dispute. Through long custom, automotive foremen are expected to report for work 30 minutes before the start of a shift at the central garage to open the shop, to prepare the shop, to prepare work orders for equipment, and to assign mechanics to specific work. The aim is to have all mechanics working at the time the shift starts.

The Department of Public Works garage bills other departments for work prepared for them and aims for a billing percentage for mechanical work of 95 percent. The remaining 5 percent not billed is allowable cleanup time and storing of tools.

A half hour lunch is provided. Although a clerk is present during the shift, her lunch period is the same as the other employees. Her duties include answering the telephone and referring calls for service to the foreman, who alone has the authority to dispatch mechanics to make onsite repairs of disabled equipment.

As in the case of the preshift reporting, no specific command exists requiring foremen to eat their lunch on the garage premises, except the oral directive that the office shall be attended throughout the shift, including the lunch period. Since the foreman or his delegate is the only person who could dispatch mechanics or equipment, the reasonable conclusion of the foremen is that they are required to eat lunch on the premises and to perform their duties as needed.

The trial court, in determining that the preshift reporting time was not compensable, placed reliance on a decision of the U.S. District Court for Nebraska. *McComb v. C. A. Swanson & Sons*, 77 F. Supp. 716 (D. Neb. 1948). There, the judge pointed out that

the Portal-to-Portal Act amended the Fair Labor Standards Act by excluding "activities which are preliminary to or postliminary to said principal activity." *Id.* at 731. The case is distinguishable. At issue in *McComb* was time spent by employees changing into and out of a working uniform. In the instant case the work performed was substantially the same as that performed during the shift, determining what had to be done and assigning people to do it. The same can be said of the lunch period. To suggest that the absence of a written rule specifying what lunchtime is to be had in the garage is determinative, while at the same time acknowledging that the office must be attended, and presumably by authoritative persons present to take action, is to ignore reality. The salient fact exists that a foreman or his delegate must be present to perform essentially the same duties as he is required to perform in his shift activity.

Substantial authority exists for the proposition that work not requested but permitted is worktime and compensable, *Handler v. Thrasher*, 191 F.2d 120 (10th Cir. 1951); *Republican Pub. Co. v. American Newspaper Guild*, 172 F.2d 943 (1st Cir. 1949), and for the proposition that when an employer retains a hold on employees during lunchtime so that the employees are not actually at liberty to leave, the lunchtime constitutes compensable time. *Glenn L. Martin Nebraska Co. v. Culkin*, 197 F.2d 981 (8th Cir. 1952); *F. W. Stock & Sons v. Thompson*, 194 F.2d 493 (6th Cir. 1952); *Thompson v. Iowa Beef Packers, Inc.*, 185 N.W.2d 738 (Iowa 1971).

It is absolutely clear from the record that the plaintiffs were working during the disputed time at functions ordinarily performed during shift hours and, under the clear reading of the city ordinances, were entitled to be compensated for that time.

REVERSED AND REMANDED.

CAPORALE, J., not participating.

ELDON L. BAKER, APPELLANT AND CROSS-APPELLEE, V. BLUE RIDGE INSURANCE COMPANY, A CORPORATION, APPELLEE AND CROSS-APPELLANT.

337 N.W.2d 411

Filed August 5, 1983. No. 82-462.

Rules of Evidence: Compromise and Settlement. Under Rule 408 of the Nebraska Evidence Rules (Neb. Rev. Stat. § 27-408 (Reissue 1979)), evidence of compromise and offers to compromise is inadmissible. This exclusion extends to evidence that any party to the litigation has settled a claim with a third party concerning the same transaction or subject matter involved in the litigation where such evidence is offered.

Appeal from the District Court for Sherman County: DEWAYNE WOLF, Judge. Reversed and remanded for a new trial.

Andrew J. McMullen of McMullen & Lowe, for appellant.

Teresa K. Luther and David H. Hahn of Knapp, Mues, Anderson & Beavers, for appellee.

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

SHANAHAN, J.

Eldon L. Baker sued his insurance company, Blue Ridge Insurance Company, on a policy covering hail damage to Baker's corn crop. A jury returned a verdict in favor of Baker in the amount of $16,800. Baker appeals from the District Court's denial of a new trial. We reverse the judgment of the District Court and remand for a new trial.

The policy issued to Baker contains a formula or method for determining the amount payable for a loss, namely: "LOSS PAYMENT. a. The amount payable per acre shall be the limit of insurance applying on the date of the loss multiplied by the percentage the crop yield is reduced because of the loss. However, the amount payable may not exceed the actual cash value of the portion of the crop destroyed by perils insured against. b. If a crop loss

is also covered by other insurance, we will pay only the proportion of the loss that our limit of insurance bears to the total amount of insurance, except that no Federal Crop Insurance policy shall be prorated with this policy."

At trial Blue Ridge called one of its adjusters, a Dale Ingram, to testify regarding the crop loss on Baker's farm. Ingram testified about hail damage sustained by a neighbor in a cornfield adjacent to Baker's field. The same hailstorms which damaged Baker's fields damaged the fields of the neighbor. Ingram was asked about the neighbor's loss: "Do you remember what percent due to loss you came up with?" to which, over objection of Baker's attorney, the adjuster responded that a "final adjustment was . . . at 16%." This answer was then followed by "Q And that loss was settled? A Yes, it was."

Later in the trial, Baker called Tim Vonderfecht, who testified about the crop loss sustained by Baker on account of hail. Vonderfecht was manager of the local ASCS office in Sherman County. On cross-examination Vonderfecht was asked about Baker's claim for federal crop insurance on fields insured by Blue Ridge for hail damage. When the various aspects of Baker's claim for federal crop insurance had been explored, counsel for Blue Ridge then asked: "What was the dollar figure that you paid Mr. Baker for his losses?" There was an objection by Baker's counsel, which was overruled, and Vonderfecht proceeded to answer: "On the one farm was $1,418.36. The other was $18,169.20."

In his appeal Baker assigns as error the admission of evidence concerning the settlement with Baker's neighbor and the amounts for which Baker settled his claim under federal crop insurance. Such assignments of error are based upon Neb. Rev. Stat. § 27-408 (Reissue 1979): "Rule 408. Compromise and offers to compromise. Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valu-

able consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. . . ."

Various reasons have been suggested for excluding evidence regarding compromise of a claim. First, there is the theory that such evidence is irrelevant because the transaction is motivated by a desire for peace rather than from the strength or weakness of a claim. Second, there is a public policy consideration favoring compromise of disputes. Consequently, evidence of negotiations and compromise or settlement of a claim is inadmissible. See, *United States v. Contra Costa County Water Dist.*, 678 F.2d 90 (9th Cir. 1982); *Fidelity & Deposit Co. of Md. v. Hudson United Bank*, 493 F. Supp. 434 (D. N.J. 1980). "Settlements are favored because they reduce judicial backlog and bring disputes to a prompt conclusion." *Hatfield v. Max Rouse & Sons Northwest*, 100 Idaho 840, 846, 606 P.2d 944, 950 (1980). As expressed in *Reichenbach v. Smith*, 528 F.2d 1072, 1074 (5th Cir. 1976): "With today's burgeoning dockets and the absolute impossibility of Courts ever beginning to think that they might even be able to hear every case, the cause of justice is advanced by settlement compromises sheparded [sic] by competent counsel, whose experience as advocates makes them reliable predictors of litigation were it pursued to the bitter end." Offers to compromise or settlement of a claim between the parties is inadmissible. This exclusion extends to settlements, negotiations, and offers to compromise made by either of the parties with or to third persons concerning a cause of action relative to the same transaction or same subject matter involved in the litigation at hand. See *Bigelow v. Spec Comm Floors*, 77 A.D.2d 464, 433 N.Y.S.2d 931 (1980).

The harm to be avoided by exclusion of evidence

regarding a compromise was described in *Hawthorne v. Eckerson Co.*, 77 F.2d 844, 847 (2d Cir. 1935): " 'The rule against allowing evidence of compromise is founded upon recognition of the fact that such testimony is inherently harmful, for the jury will draw conclusions therefrom * * * in spite of anything which may be said by the judge in instructing them as to the weight to be given such evidence.'

. . . .

"Settlements have always been looked on with favor, and courts have deemed it against public policy to subject a person who has compromised a claim to the hazard of having a settlement proved in a subsequent lawsuit . . . arising out of the same transaction. [Citation omitted.]"

In the present case the percentage of reduction in the crop yield is an essential element in the proof of Baker's claim. Evidence of a percentage used to settle a neighbor's claim was inadmissible to establish the corresponding element of Baker's claim or to invalidate any proof offered by Baker regarding that aspect of his claim. The amount of the settlement of Baker's claim for federal crop insurance can only have been injected into the lawsuit for an invidious innuendo that Baker had already been paid enough for hail damage to his crops.

The evidence concerning the settlements was inadmissible, and it was error to place such evidence before the jury.

Blue Ridge has cross-appealed and claims error because the trial court did not direct a verdict in favor of Blue Ridge at the conclusion of Baker's case in chief. A defendant who moves for a directed verdict at the close of the plaintiff's evidence and, upon the overruling of such motion, proceeds with trial and introduces evidence waives any error in the ruling on the motion for directed verdict. *Boardman v. McNeff*, 177 Neb. 534, 129 N.W.2d 457 (1964). Blue Ridge introduced evidence after the denial of its motion for a directed verdict. Therefore, there is no

question before the court regarding Blue Ridge's motion for directed verdict.

On account of the errors regarding inadmissible evidence, the judgment of the District Court is reversed and this matter is remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

STATE OF NEBRASKA, APPELLEE, V. MERLE KUNTZELMAN, APPELLANT.

337 N.W.2d 414

Filed August 5, 1983. No. 82-513.

1. **Criminal Law: Double Jeopardy.** A distinction exists between an offense and the unlawful act out of which it arises, it being possible that two or more distinct offenses may grow out of the same transaction or act; and the rule that a person cannot be twice put in jeopardy for the same offense has no application where two separate and distinct crimes are committed by one and the same act, because the constitutional inhibition is directed to the identity of the offense and not to the act.
2. **Homicide: Photographs.** In a homicide case photographs are generally admitted for the purpose of identification to show the condition of a body and to indicate the nature and extent of wounds or injuries. They may also be admitted to establish malice and intent.
3. **Homicide: Self-Defense.** The use of deadly force shall not be justifiable unless the actor believes that such force is necessary to protect himself against death, serious bodily harm, kidnaping, or sexual intercourse compelled by force or threat, nor is it justifiable if (a) the actor, with the purpose of causing death or serious bodily harm, provoked the use of force against himself in the same encounter, or (b) the actor knows that he can avoid the necessity of using such force with complete safety by retreating.

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

L. William Kelly III, of Kelly & Kelly, for appellant.

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

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

WHITE, J.

This is an appeal from the District Court for Boone County, Nebraska, in which the defendant was charged with and convicted of two felony counts, murder in the second degree and use of a firearm in the commission of a felony. He was sentenced to a term of 20 years on the second degree murder count and a consecutive term of 5 years on the offense of use of a firearm in the commission of a felony. Defendant appeals and assigns three errors: (1) The court erred in submitting to the jury the offenses of murder in the second degree and the use of a firearm in the commission of a felony, contending that since they arose out of the same act the defendant has been placed in double jeopardy; (2) The trial court erred in admitting seven photographs showing the deceased's body before and during the autopsy proceedings; and (3) The trial court erred in failing to submit the defendant's claim of self-defense to the jury. We affirm.

The evidence shows that the incident which gave rise to the conviction and this appeal occurred at or around St. Edward, Nebraska. The victim and four companions spent the afternoon of August 30, 1981, engaged in drinking large quantities of beer at the home of the victim and in a pickup truck while generally traveling the county roads of Boone and Nance Counties, Nebraska. On that same Sunday the defendant, Merle Kuntzelman, left home around 2:30 p.m. and went to the home of a Gary McBride for an afternoon of watching television. The evidence does not disclose that any of the McBrides or the defendant drank any alcoholic liquor or ingested any narcotics. After concluding their viewing of the television football game, two other McBride brothers, David and Sam, arrived and Sam announced that his automobile had stalled near an intersection

in St. Edward, Nebraska. The defendant took the McBrides in his van to the business place of Sam's employer where a wrecker truck was secured. The two vehicles were then driven to the scene, and the car was retrieved and brought to the McBride residence. Present at this time were the defendant, age 23, and the McBride brothers, Sam, Gary, and David, all close in age to the defendant.

Shortly after the McBrides backed the wrecker truck and the towed car into the driveway at the McBride residence, the pickup truck in which the victim and his four companions were riding arrived back in St. Edward and drove by the area of the McBride home. At this time David McBride had gone into the house. Gary and Sam McBride were in the wrecker and the defendant had been watching them back the car into the driveway. As the pickup truck drove around the second time, obscenities were shouted from the pickup truck at the McBrides and appeared to be most specifically directed toward the defendant.

There was a history of animosity and hostility between the defendant and the victim, Daniel Wilson, and his companions. Ross Davidson, driver of the pickup, had on a previous occasion accused the defendant, who at the time was driving a car, of forcing a motorcycle on which Davidson was riding off the highway and into a ditch. Subsequent thereto, Davidson chased an automobile driven by Kuntzelman for an extended period and shot out a window, with what is described in the evidence as a BB gun, for which offense Davidson was arrested and fined.

Davidson, the victim, and the three other companions left the parked pickup truck and were advancing onto the McBride premises. As the group approached, the defendant and two brothers, Gary and David McBride, got into defendant's van and the third brother, Sam, was standing beside the wrecker, which was backed into the driveway. The group advanced on the van. The defendant locked

the doors and drove away but not before the van had been pummeled somewhat and the windshield wiper on the passenger side bent. They intended to go to the automobile salvage yard and give Sam McBride, who was driving the wrecker, a ride back after he had returned the wrecker. The salvage yard was approximately nine blocks away from the McBride residence. After waiting 4 to 5 minutes for the wrecker to arrive, the defendant concluded that Sam might be in some danger from the victim and his four companions. He thereupon left the automobile salvage yard and made a slight detour to his home, where he secured a 12-gauge shotgun and three shotgun shells, which he loaded into the magazine. When he arrived back at the McBride residence, he got out of his van with the shotgun, which he had taken from a case. At that time Elbert Anderson, one of the participants, opened the door of the wrecker and was attempting to push or strike Sam McBride through the open door, and another of the victim's companions was pounding on Mrs. McBride's car. At a time when the victim was approximately 25 feet away, the defendant put one round in the chamber and shouted "get out of here." The gun was then discharged over the heads of the victim and the others into a tree. At a time ranging from 10 to 30 seconds he again repeated "get out of here" and discharged the gun for the second time. The victim then made a statement to the defendant, which the defendant and others characterized as a smart-aleck statement such as "You haven't the courage to shoot me," or words to that effect, whereupon the victim advanced from his position of 25 feet from the defendant to a point about 12 to 14 feet from him. The shotgun was discharged a third time, striking Daniel Wilson below the left shoulder, killing him instantly. At the time of the discharge the victim was not armed, nor were any of his companions. They carried no weapon of any kind, and,

according to witnesses, the victim did not have his fist clenched.

In support of his first assignment of error, while conceding that the rule in Nebraska is otherwise, defendant urges this court to adopt the rule of the Missouri court in *State v. Haggard*, 619 S.W.2d 44 (Mo. 1981), which stated at 51: "Until such time as the Supreme Court of the United States declares clearly and unequivocally that the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution does not apply to the legislative branch of the government, we cannot do other than what we perceive to be our duty to refuse to enforce multiple punishments for the same offense arising out of a single transaction." The rule in Nebraska is as follows: "This court has held that a distinction exists between an offense and the unlawful act out of which it arises, it being possible that two or more distinct offenses may grow out of the same transaction or act; and the rule that a person cannot be twice put in jeopardy for the same offense has no application where two separate and distinct crimes are committed by one and the same act, because the constitutional inhibition is directed to the identity of the offense and not to the act." *State v. Robinson*, 202 Neb. 210, 214, 274 N.W.2d 553, 555-56 (1979). The U.S. Supreme Court in *Whalen v. United States*, 445 U.S. 684, 100 S. Ct. 1432, 63 L. Ed. 2d 715 (1980), held that multiple punishments could be imposed for the same offense without running afoul of the double jeopardy guarantee of the fifth amendment to the Constitution where it was specifically authorized by state statute. The defendant has cited no sound reason why our long-established rule should be changed. We decline to do so.

Passing to the second assignment of error, we are again faced with an overabundance of prosecutorial zeal in direct defiance of our prior cases disfavoring the admission of gruesome photographs. The prosecution offered, and the trial court admitted, seven

photographs of the victim. The first and second photographs showed the victim fully clothed, one at the scene and one in the autopsy room prior to removal of clothing and exposure of the wounds. The third and fourth photographs showed the defendant's unclothed body with severe shotgun wounds in the upper left chest area. The fifth, sixth, and seventh photographs show the details of the puncture marks at or about the lung area, the empty body cavity showing pellet marks in the spine, and a removed lung showing damage to the lung by pellets. The cause of death was never a substantial issue in this case. Ample eyewitnesses were presented that testified the deceased met his death as a result of the discharge of a firearm. Defendant, however, acknowledges that each of the photographs was used to present the testimony of the pathologist who performed the autopsy to support his conclusion that the deceased met his death as the result of the pellets discharged from the defendant's shotgun. Once again, we are unable to state conclusively that the trial court abused its discretion in admitting the photographs. We held in *State v. Robinson*, 185 Neb. 64, 68, 173 N.W.2d 443, 446 (1970): "Such evidence is generally admitted for purposes of identification to show the condition of a body and to indicate the nature and extent of wounds or injuries. . . . It is also admitted to establish malice and intent." We further held in *State v. Williams*, 205 Neb. 56, 67, 287 N.W.2d 18, 25 (1979): "In a homicide case, photographs of the victim, upon proper foundation, may be received in evidence for purposes of identification, to show the condition of the body, the nature and extent of wounds or injuries, and to establish malice or intent." We find that the District Court did not abuse its discretion in admitting the photographs.

The third and final assignment of error relates to the court's refusal to give the self-defense instruction based on Neb. Rev. Stat. § 28-1409 (Reissue

1979). It reads in part: "(4) The use of deadly force shall not be justifiable under this section unless the actor believes that such force is necessary to protect himself against death, serious bodily harm, kidnapping or sexual intercourse compelled by force or threat, nor is it justifiable if: (a) The actor, with the purpose of causing death or serious bodily harm, provoked the use of force against himself in the same encounter; or (b) The actor knows that he can avoid the necessity of using such force with complete safety by retreating . . . ." The defendant testified that the shooting was accidental and that he intended to shoot above the victim rather than at him. The defendant voluntarily left the scene and returned after securing a shotgun, provoking the exchange himself and coming within subsection 4(a) of § 28-1409. In addition, the defendant voluntarily returned to the scene knowing that he could again safely retreat in the van if he chose to do so, thereby invoking the prohibition of subsection 4(b) of the same section. Further, the defendant did not introduce evidence that, by reason of the circumstances, it was necessary to protect himself against death, serious bodily injury, kidnapping, or sexual intercourse compelled by force or threat.

The testimony of the defendant's psychiatrist, taken on its face, indicates only that the defendant intended to use the weapon to scare the victim and his companions into leaving the McBride premises. On the second shot, by reason of a low mental ability he panicked and was in shock when he discharged the third shot in the direction of the victim. The shock was not from a fear of impending harm, even though he was admittedly scared. It was simply a shock that his ruse to secure the departure of the victim and his companions had failed. Although the conduct of the victim and his companions was not exemplary and to some extent they provoked the occurrence of the incident, the use of deadly force against a threatened minor brawl or fight, without

weapons, between persons of equal or superior size cannot be justified.

The judgment and sentence of the trial court are affirmed.

AFFIRMED.

JOSIE J. KLITZING, APPELLEE AND CROSS-APPELLANT, V. MARY DIDIER AND JOHN DIDIER, APPELLANTS AND CROSS-APPELLEES.

337 N.W.2d 418

Filed August 5, 1983. No. 82-593.

1. **Actions: Pleadings.** New and distinct matter not maintainable as a counterclaim under statutory provisions and not involved in a proper determination of the subject matter of the original suit must be litigated in a separate action.
2. **Torts: Damages: Pleadings.** A claim for damages for tort cannot be used as a setoff against actions on contracts or suits on promissory notes secured by real estate mortgages.
3. **Parties.** Indispensable parties to a suit are those who not only have an interest in the subject matter of the controversy but also have an interest of such a nature that a final decree cannot be made without affecting their rights or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Affirmed in part, and in part reversed and dismissed.

George A. Sommer, for appellants.

Robert G. Simmons, Jr., of Wright, Simmons & Selzer, for appellee.

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

MCCOWN, J.

This is an action by Mary Didier against Josie Klitzing on a promissory note and mortgage. Josie Klitzing filed a counterclaim alleging that Mary had

committed a fraud upon Stephen Crouse, and had also conspired with Stephen Crouse to defraud Josie Klitzing in connection with a different land sale transaction. The District Court found that Josie Klitzing was indebted to Mary Didier on the note and mortgage in the sum of $5,680 and entered judgment in that amount, together with interest. The court also found that Mary Didier committed a fraud upon Stephen Crouse and had retained the fruits of the fraud. The court then entered judgment for Josie Klitzing against Mary Didier for $5,680 plus interest and ordered that the judgments be offset against each other. Mary and John Didier have appealed and Josie Klitzing has cross-appealed.

In July 1981 the plaintiff, Josie Klitzing, filed a petition against Mary Didier and John Didier, her husband, Stephen H. Crouse and Paula Crouse, his wife, and Patrick Douglas Crouse and Jarolyn Crouse, his wife, to void and set aside two deeds to 1,480 acres of ranch land. The deeds were executed in 1980. One deed was a warranty deed executed by Josie Klitzing to Stephen H. Crouse, and one was a quitclaim deed executed by Mary Didier to Stephen H. Crouse.

On August 14, 1981, the defendant Mary Didier filed a counterclaim against the plaintiff, Josie Klitzing, on a promissory note and mortgage for $22,720 dated May 6, 1974. The note and mortgage were executed and delivered in connection with the purchase and sale of 320 acres of land from Mary Didier to Josie Klitzing, the deed for which was executed on May 6, 1974.

On October 8, 1981, the plaintiff, Josie Klitzing, dismissed her petition without prejudice. The counterclaim of Mary Didier against Josie Klitzing therefore became in effect a plaintiff's petition and the action proceeded accordingly. The Crouses were no longer parties.

Josie Klitzing answered Mary's counterclaim and admitted the execution of the note and mortgage, but alleged that they were without consideration

and based upon mutual mistake. She also pleaded estoppel and undue influence.

Josie Klitzing also filed a cross-petition seeking to set aside the 1980 deeds referred to in her initial petition, and alleging that Mary Didier had committed fraud against Stephen Crouse, and that Mary Didier and Stephen Crouse had conspired to defraud Josie Klitzing in connection with the 1980 deeds.

Some further facts may be appropriate. Josie Klitzing is the mother of Mary Didier, formerly Mary Crouse. Mary Didier is the mother of Stephen Crouse. In 1956 Josie Klitzing and Mary Didier acquired 1,480 acres of land in Box Butte County. On December 6, 1968, Josie Klitzing and Mary Didier executed an agreement providing that Mary Didier would deed her one-half interest in all but 320 acres of land to Josie Klitzing, and in return Josie Klitzing would deed to Mary Didier Josie's one-half interest in the 320 acres and cancel certain debts of Mary's to Josie. Deeds were executed and recorded pursuant to the agreement, but the memorandum of agreement was not recorded.

On May 6, 1974, Josie Klitzing purchased the 320 acres of land owned by Mary Didier from Mary and her husband, John. Josie Klitzing executed a note and mortgage for $22,720 to Mary Didier as a part of the purchase price. The deed from the Didiers and the mortgage were recorded in May 1974. The note and mortgage are the note and mortgage involved in Mary Didier's claim against Josie Klitzing. Various payments were made by Josie Klitzing to Mary Didier over the years and the principal balance as of the time of trial was $5,680, plus interest from May 1, 1980, at the rate of 6 percent per annum.

On January 22, 1980, Josie Klitzing entered into a contract to sell the entire 1,480 acres of land to Stephen Crouse for the sum of $148,000, with payments to be made periodically over a term of years. When Stephen's attorney examined the abstract he discovered that in 1975 Mary Didier had recorded an

agreement of April 1968 between Mary Didier and Josie Klitzing which had been superseded by the December 1968 agreement. Stephen's attorney advised him to obtain a quitclaim deed from Mary Didier of any interest she might have in the property. On August 15, 1980, Mary Didier agreed to relinquish all interest in the 1,480 acres to Stephen for $60,000, with $10,000 to be paid down and the balance in yearly installments. At the time of trial $19,000 had been paid. On the same date, Mary Didier executed a quitclaim deed to Stephen to be held in escrow until Stephen's land contract with Josie Klitzing was completed. Although Josie Klitzing knew of Stephen's agreement to pay Mary Didier $60,000 for a quitclaim deed and although she insisted that Mary had no interest in the land, Josie proceeded with her contract with Stephen and on November 20, 1980, conveyed the 1,480 acres of land by warranty deed to Stephen for $148,000, payable in periodic payments.

The present proceedings were commenced in July 1981. The case was tried to the court and during the trial the Didiers filed a motion to dismiss Josie Klitzing's cause of action for fraud and conspiracy to commit fraud on the ground that all necessary parties were not joined. That motion was overruled.

On July 6, 1982, the District Court found that Josie Klitzing was indebted to Mary Didier on the promissory note in the sum of $5,680 with interest thereon at the rate of 6 percent per annum from May 1, 1980. The court specifically found that the execution of the note was not due to undue influence, mistake, or any other reason and entered judgment accordingly. The court then found that Mary Didier had committed a fraud upon Stephen Crouse and that she had retained the fruits of the fraud. The court found that the benefit received by Mary Didier was the sum of $5,680 with interest at 6 percent per annum from May 1, 1980.

The District Court therefore entered judgment for Mary Didier against Josie Klitzing for $5,680 and

judgment for Josie Klitzing against Mary Didier in the sum of $5,680, and directed that the judgments offset each other. Mary Didier has appealed and Josie Klitzing has cross-appealed.

On appeal Mary Didier contends that an equitable claim of fraud in a different transaction cannot be asserted as a counterclaim or cross-petition, nor be offset against an action on a promissory note, which is an action at law. She also asserts that a finding of fraud committed upon a third person who is not a party to a lawsuit is erroneous and that the District Court erred in failing to dismiss Josie's cause of action for fraud or conspiracy to commit fraud.

Josie Klitzing contends that a judgment for fraud may be offset against a judgment on a promissory note and that Stephen Crouse is not a necessary party. She also contends on her cross-appeal that she should recover from Mary Didier the $19,000 paid by Stephen Crouse to Mary Didier.

Because of the dismissal of Josie Klitzing's original petition, Mary Didier's counterclaim became the petition in this case and Mary became, in effect, the plaintiff. Although denominated a cross-petition, Josie Klitzing's cause of action was, in effect, a counterclaim for fraud in equity involving a separate and distinct transaction.

Neb. Rev. Stat. § 25-813 (Reissue 1979) provides in part: "The counterclaim mentioned in section 25-812 must be one in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action, and arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, or connected with the subject of the action." In the case at bar Mary Didier's cause of action was an action at law on a promissory note executed by Josie Klitzing in 1974. Josie's counterclaim for fraud and conspiracy concerned a completely different transaction or transactions which occurred in 1980. Josie's counterclaim was in equity and was not germane

to the issue involved in the action at law on the promissory note.

New and distinct matter not maintainable as a counterclaim under statutory provisions and not involved in a proper determination of the subject matter of the original suit must be litigated in a separate action. *The Tilden Bank v. Retzlaff*, 188 Neb. 834, 199 N.W.2d 734 (1972). In *Retzlaff* this court said: "The subject matter of the original petition was the simple issue of the determination of the validity of a promissory note and mortgage and the amount due thereon. From what we have said it appears that new and distinct matter not necessary for the determination of these issues was injected into the case by the purported cross-petition. The alleged conspiracy is not connected with the original foreclosure petition, and the new issues sought to be injected into the case are not necessary for a just and complete resolution of the issues raised in the petition to foreclose the note and mortgage. It is an attempt to litigate a tort action for conspiracy, a completely independent cause of action, serving to distort and confuse the resolution of the action to determine the validity of a contract and the mortgage security therefor." *Id.* at 837, 199 N.W.2d at 736.

Retzlaff specifically held that a claim for damages for tort cannot be used as a setoff against actions on contracts or suits on promissory notes secured by real estate mortgages.

In the present case the action on the promissory note is in contract and Josie Klitzing's counterclaim for fraud and conspiracy sounds in tort. The trial court found that the only fraud committed by Mary Didier was against Stephen Crouse, who was not a party to the action.

Insofar as Josie's counterclaim for fraud is concerned, Stephen Crouse was an indispensable party. Indispensable parties to a suit are those who not only have an interest in the subject matter of the controversy but also have an interest of such a na-

ture that a final decree cannot be made without affecting their rights or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience. *Shepoka v. Knopik*, 197 Neb. 651, 250 N.W.2d 619 (1977).

In the present case the real estate involved in Josie's fraud claim was acquired by Stephen Crouse under the 1980 deeds, and is now owned by him. The fraud was allegedly committed against him by Mary, and by him and Mary against Josie, and no final decree could be made in connection with Josie's counterclaim without affecting the rights of Stephen Crouse.

The motion of Mary Didier to dismiss Josie's cause of action for fraud and conspiracy to commit fraud on the ground that an indispensable party was not joined should have been granted. The fraud claim also involved an improper setoff and counterclaim.

The judgment in favor of Mary Didier and against Josie Klitzing is affirmed. The judgment in favor of Josie Klitzing and against Mary Didier for fraud is vacated and the cause of action is dismissed.

AFFIRMED IN PART, AND IN PART REVERSED AND DISMISSED.

WHITE and HASTINGS, JJ., concur in the result.

SHANAHAN, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. KENNETH JAMES KANGER, APPELLANT.

337 N.W.2d 422

Filed August 5, 1983. No. 82-607.

1. **Criminal Law: Weapons: Words and Phrases.** An instrument not specifically enumerated in Neb. Rev. Stat. § 28-1202(1) (Reissue 1979) may be a "deadly weapon" if in the manner it is used or in-

tended to be used it is capable of producing death or serious bodily injury.

2. _____: _____: _____. The question of whether an object or weapon not specifically enumerated in Neb. Rev. Stat. § 28-1202(1) (Reissue 1979) was a "deadly weapon" is a question of fact to be decided by the trier of fact.
3. **Criminal Law: Verdicts: Appeal and Error.** In a criminal case tried to the court without a jury, the findings of the court have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong, and the verdict must be sustained if there is substantial evidence, taking the view most favorable to the State, to support it.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Scott P. Helvie, for appellant.

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

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

MCCOWN, J.

The defendant, a prison inmate, was convicted of carrying a concealed weapon in violation of Neb. Rev. Stat. § 28-1202 (Reissue 1979) and sentenced to 8 months' imprisonment to be served consecutively to the sentence he was already serving. The defendant has appealed.

On August 11, 1981, the defendant was an inmate of the Lincoln Correctional Center, residing in "A" pod. On that morning the officers at the center arranged to conduct a search of "A" pod and of the inmates incarcerated there. The prisoners, including the defendant, were allowed to eat breakfast and returned to their living units before the search was announced. The inmates of pod "A" were instructed to come out of their living quarters and ordered to go to an area near the yard where they were to be patted down prior to entering the prison yard.

The defendant lined up with the other inmates for

the pat-down search. A corrections officer found a homemade knife concealed under the defendant's sock, pants, and part of his boot. The knife had an overall length of 9 inches. The blade was made from a metal ruler and was approximately 5½ inches long on the sharpened side and 3½ inches long on the unsharpened side, and had a plastic handle with a handguard. At no time during the lineup or the search did the defendant attempt to reach for the knife or resist the search for or removal of the knife.

The defendant was charged with having a dangerous instrument concealed on or about his person, to wit, a knife with a blade greater than 3½ inches in length, said knife being a dangerous instrument capable of inflicting cutting, tearing, or stabbing wounds.

The defendant pleaded not guilty and waived his right to a jury trial. A stipulation was entered into for use at the trial in which it was stipulated that if the defendant were to testify on his own behalf at trial he would testify that the homemade knife was given to him approximately 2 days before the search by another inmate because the other inmate feared a shakedown search of his own cell block. The defendant kept the knife in his cell, and upon hearing of the search of his own pod he decided to hide the knife in his sock with the intention of getting it out of his cell and into the yard where he could throw it away. He would also testify that he had no intention of using the knife as a weapon and that his sole reason for having the knife was to get it out of his cell and discard it.

On the basis of the evidence at trial the court found beyond a reasonable doubt that the knife was a deadly weapon as defined by Neb. Rev. Stat. § 28-109 (Reissue 1979). The trial court specifically found that the inmates of the correctional center, including the defendant, could have no use for a knife such as that found on the defendant's person except

to use such an instrument as a deadly weapon. The court also found that under the evidence "there can be no situation involving innocent concealment." The defendant was found guilty and sentenced to 8 months' imprisonment, with the sentence to be served consecutively to any other sentence then being served.

On this appeal the sole issue is whether the trial court was in error in finding that the knife concealed upon the defendant's person was a "deadly weapon" within the meaning of §§ 28-1202 and 28-109(7).

Section 28-1202(1) provides in pertinent part: "[A]ny person who carries a weapon or weapons concealed on or about his person such as a revolver, pistol, bowie knife, dirk or knife with a dirk blade attachment, brass or iron knuckles, or any other deadly weapon, commits the offense of carrying concealed weapons."

Section 28-109(7) provides: "Deadly weapon shall mean any firearm, knife, bludgeon, or other device, instrument, material, or substance, whether animate or inanimate, which in the manner it is used or intended to be used is capable of producing death or serious bodily injury."

In *State v. Valencia*, 205 Neb. 719, 290 N.W.2d 181 (1980), this court sustained the constitutionality of § 28-1202(1) against the challenge that the term "any other deadly weapon" was so vague and overbroad as to render the statute unconstitutional. This court held that the Legislature, in enacting § 28-1202(1), designated certain weapons such as revolvers, pistols, bowie knives, dirks or knives with a dirk blade attachment, and brass or iron knuckles as deadly weapons *per se*, and the manner of the actual or intended use of such deadly weapons is immaterial. This court also held that with reference to the phrase "or any other deadly weapon," it is the element of actual or intended use which renders the words "other deadly weapons" sufficiently definite to provide citizens an opportunity to conform their

conduct to the statute, and to distinguish between situations involving culpable concealment and those involving innocent concealment.

Valencia also specifically held that the question of whether an object or weapon not specifically enumerated in § 28-1202(1) was a "deadly weapon" is a question of fact to be decided by the trier of fact.

In the present case, in the context of a prison environment and the evidence in this case, there can be no serious doubt that a homemade knife of the kind shown by the evidence here was used or intended to be used in a manner which was capable of producing death or serious bodily injury. Any other conclusion would ignore reality. The defendant's own testimony establishes his knowledge that such a weapon was forbidden and that he knew his possession of it could not be innocent. The fact finder is not required to accept defendant's explanation that he did not intend to use the knife as a deadly weapon, nor his explanation as to why it was in his possession.

In a criminal case tried to the court without a jury, the findings of the court have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong, and the verdict must be sustained if there is substantial evidence, taking the view most favorable to the State, to support it. *State v. Cowan*, 204 Neb. 708, 285 N.W.2d 113 (1979).

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. KEVIN ISAAC RIFE, APPELLANT.

337 N.W.2d 724

Filed August 5, 1983. No. 82-659.

1. **Confessions.** To be admissible, a statement or confession must be free and voluntary. It must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, how-

ever slight, nor by the exertion of any improper influence. The determination of whether a statement was voluntarily made necessarily turns on the consideration of the totality of the circumstances in any particular case.

2. **Confessions: Appeal and Error.** A finding of the trial court that a statement of an accused is voluntary will not ordinarily be set aside on appeal unless the finding is clearly erroneous.
3. **Venue: Appeal and Error.** A motion for a change of venue in a criminal case is addressed to the sound discretion of the trial court, and its ruling will not be disturbed on appeal unless a clear abuse of discretion is shown.
4. **Juror Qualifications.** The true object of challenges, either peremptory or for cause, is to enable the parties to avoid disqualified persons and secure an impartial jury. When that end is accomplished, there can be no just ground for complaint against the rulings of the court as to competency of the jurors.
5. **Motions for Mistrial: Juror Qualifications.** In the absence of a showing of prejudice, a trial court is correct in denying a motion for mistrial. Opportunity for prejudice or disqualification of jurors does not raise a presumption that prejudice or disqualification exists.
6. **Video Tapes.** Admission of video tapes is generally within the trial court's discretion, subject to the same requirements for admission of still photographs.
7. **Homicide: Photographs.** In a homicide case photographs of the victim, upon proper foundation, may be received in evidence for purposes of identification, to show the condition of the body, the nature and extent of the wounds and injuries, and to establish malice or intent.
8. _____: _____. A photograph which illustrates or makes clear some controverted issue in a homicide case may be received even if it is gruesome, where a proper foundation has been laid.

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

Richard J. Bruckner, for appellant.

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

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

WHITE, J.

This is an appeal from the District Court for Sarpy County, Nebraska, from a verdict of guilty to second degree murder and a sentence of 30 years. Appel-

lant appeals and assigns that the trial court erred in (1) failing to sustain appellant's motion to suppress statements given by appellant to the Bellevue police; (2) failing to sustain appellant's motion for change of venue or continuance; (3) failing to grant a mistrial based upon jury misconduct during the trial; (4) failing to grant a mistrial based upon the introduction and viewing by the jury of a video tape of the murder scene; (5) allowing prejudicial and inflammatory photographs and testimony into evidence; and (6) failing to give appellant's requested instruction regarding *Miranda* warnings. We affirm. A statement of the facts is necessary.

On Saturday night, January 23, 1982, Lori Lappin and two friends attended a party in Bellevue, Nebraska, arriving home at 1 a.m. Edel Cook remained behind at the apartment she shared with Lori and went to work at the Crown Court restaurant, which was also in Bellevue, on Sunday morning, January 24, 1982. Lori left the apartment with her boyfriend, Mark Hensley, that day at 1:30 p.m. and did not return until 8 p.m. Upon opening the door they discovered the body of Edel Cook on the sofa against the north wall in the living room. There was a large amount of blood on the face of Edel and the north wall of the apartment. Edel's body was covered with a quilt which left uncovered her feet at one end and from the shoulders up at the other end. Edel's face did not have normal symmetry and had the appearance of being crushed from a severe beating. There was a deep laceration extending across her throat, and a serrated steak knife was found on the floor near the sofa. Around Edel's body were pieces of a ceramic vase and mug which had been broken. These pieces were lying next to and underneath Edel's body and also on the floor in front of the couch and by the hallway on the south side of the couch.

The shorts that Edel had been wearing at the time of her death had been cut in two at the crotch area

and her panties had been partially pulled down, with blood smeared in the area of her thighs. The Bellevue police were called.

The police could find no visible signs of forced entry or attempted forced entry into the building, and the lock on the apartment door was in good working order. In a kitchen drawer the plastic divider that contained knives was stained with blood, as was one steak knife in the drawer. The bathroom sink and faucet were stained with blood.

During the ensuing police investigation, Kevin Isaac Rife, a friend of the deceased, was interviewed by Det. David Carlson of the Bellevue police at approximately 2:30 a.m. on Monday, January 25, 1982. The interview lasted 25 minutes and related to the fact that appellant worked with the victim at Crown Court and was living in the apartment building next door, and to the appellant's activities on the date of the homicide, Sunday, January 24, 1982. Appellant was not a suspect at the time the interview took place, and he told police that he was at his parents' home in Bellevue all day Sunday until 7 p.m.

On Wednesday, January 27, 1982, Detective Carlson and Officer Joseph Jeanette questioned appellant's parents, Mr. and Mrs. Carl Rife, in an attempt to verify appellant's whereabouts on the date of the murder. They ascertained that appellant had been at his parents' home until 3 p.m., when his mother dropped him off at his apartment.

At 9:15 a.m. on Thursday morning, January 28, 1982, Officer Jeanette and Det. Dick Warren went to appellant's apartment to discuss the discrepancy regarding appellant's whereabouts on Sunday, the day of the murder. The appellant stated that he was nervous and scared when police came over and he just told them that he was not at his apartment that day. The officers then read the appellant his rights per *Miranda*. The appellant consented to a search

of his apartment, and the officers asked him if he would come to the police station at 1 p.m. so he could be fingerprinted and interviewed by Detective Carlson.

At approximately 1:15 p.m. on Thursday, January 28, 1982, the appellant met Detective Carlson at the Bellevue police station to be fingerprinted, which took roughly 20 minutes. Following the fingerprinting, Detective Carlson directed the appellant to an interview room, where he was again advised of his *Miranda* rights. Detective Carlson filled in the appellant's name, address, date of birth, highest grade of education, and that the interview was being conducted in connection with a homicide. The rights advisory form was handed to the appellant and he was asked to read the top portion that had been filled in. Detective Carlson testified that appellant appeared to read the top portion of the form and he then read to appellant each of his rights from a blank form and asked him to follow along on the filled-in form. Appellant was further directed to answer aloud after each question and mark his answer under each question in the space provided. The appellant acknowledged that he was aware of each of his rights and stated that he was willing to make a statement and waive the services of an attorney.

Detective Carlson confronted the appellant with several statements he had made that conflicted with information the Bellevue police had. The appellant was questioned for about 15 minutes. When asked, "Why are you telling all these lies?" the appellant responded, "Because I killed Edel." The questioning continued for 45 to 50 minutes to determine the details of the murder. The appellant stated he saw Edel's car outside and a light on in her apartment. He went in and Edel gave him some acid or speed, and he began to freak out. At this time Edel was on the couch and rolled over as if she were going to go to sleep. He became angry and hit Edel several times over the head with a vase, until it shattered.

He then picked up a larger vase, and as he struck her again the second vase also broke. The appellant stated that he realized what he had done and that if Edel lived he would be in big trouble. He went into the kitchen to get a knife, took the knife out of the top drawer in the kitchen, and went back to Edel and cut her throat twice from left to right. He then went into the bathroom to wash the blood from his hands.

Detective Carlson obtained a tape cassette recorder upon which the appellant and he repeated basically the same conversation. Appellant was again read his *Miranda* rights. The tape-recorded statement was concluded at approximately 3:25 p.m. The appellant was asked to make a written statement pertaining to the crime, and to sign it. The appellant agreed. The appellant was furnished a meal and was then questioned again at 9:30 p.m. to clear up inconsistencies about the drugs he had taken and whether or not he had sexually assaulted Edel. The appellant was again given the *Miranda* warnings. In the 9:30 p.m. confession, which was taped, the appellant stated that he had not taken any drugs and that he had cut Edel's shorts with the knife, after her throat had been cut, and placed his middle finger in her vagina. Appellant did not at any time request an attorney or that the questioning stop. The appellant was charged with first degree murder, subsequently convicted of second degree murder, and sentenced to 30 years of hard labor.

We will discuss the assignments in order.

"To be admissible, a statement or confession must be free and voluntary. It 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. The determination of whether a statement was voluntarily made necessarily turns on the consideration of the totality of the circumstances in any particular case." *State v. Hunsberger*, 211 Neb. 667, 669-70, 319

N.W.2d 757, 759 (1982); *State v. McDonald*, 195 Neb. 625, 240 N.W.2d 8 (1976).

A finding of the trial court that a statement of an accused is voluntary will not ordinarily be set aside on appeal unless the finding is clearly erroneous. *State v. Thompson*, 198 Neb. 48, 251 N.W.2d 387 (1977).

The appellant argues that "Detective Carlson did not bother to read the Rights Advisory form to appellant. He felt appellant understood it because his eyes traveled over the paper." Brief for Appellant at 31. This contention is simply not borne out by the record. Appellant was verbally advised of his constitutional rights on at least four separate occasions. Both the testimony of the appellant and Detective Carlson concur that appellant was asked to read the top portion of the advisory form, which contained information personal to himself, and then was verbally advised of his constitutional rights and asked to acknowledge yes or no after each question.

The appellant also argues that because the police knew before they questioned him that he was 5 feet 2 inches tall, weighed 109 pounds, lost his hair due to a thyroid condition, was a follower and very timid, that these facts, coupled with a small, windowless interrogation room, rendered his confession involuntary under the totality of the circumstances. We do not agree. The trial court found that the appellant was at all times fully advised of his constitutional rights during questioning, and found that he freely and intelligently chose to waive those rights. Appellant's alleged requests to speak to his parents could not be construed as a request for an attorney. The appellant did not sound intimidated during his two taped confessions, and, in fact, he went to great lengths to duplicate for Detective Carlson the surprised sound of the victim's voice when he first struck her about the head with the vase before she lost consciousness. There were no leading questions asked or promises or threats made to the appellant

in return for his confession. The finding of the trial court is amply supported by the record. The question of whether the appellant's statements were voluntary was also submitted to the jury under full and complete instructions. The first assignment is without merit.

The appellant next alleges that the trial court erred in failing to grant his motion for a change of venue or continuance. A motion for a change of venue in a criminal case is addressed to the sound discretion of the trial court, and its ruling will not be disturbed on appeal unless a clear abuse of discretion is shown. *State v. Boyer*, 211 Neb. 139, 318 N.W.2d 60 (1982); *State v. Anderson and Hochstein*, 207 Neb. 51, 296 N.W.2d 440 (1980); *State v. Williams*, 205 Neb. 56, 287 N.W.2d 18 (1979).

An examination of the newspaper clippings and affidavit in support of the motion reveal no animosity or hostility directed toward the appellant. While the substance of the appellant's confession was discussed, the appellant made no effort to have the hearing closed, and the information that was disseminated was nothing more than that conventionally reported in news accounts of a trial, with the exception of one article. The Bellevue Leader published an extensive article in regard to the suppression hearing prior to its completion. The July 7, 1982, article quotes extensively from direct interview comments made to the Bellevue Leader by Deputy Sarpy County Attorney John Irwin: "Irwin expressed his confidence in the confession obtained from Rife by these officers and the techniques used with the alleged murderer. 'They're good witnesses, good policemen and they follow good techniques. . . They did their job just fine. There's nothing you could find that they did wrong (in regard to obtaining a confession from Rife.)' "

The public comments by Mr. Irwin appear to constitute a serious violation of Canon 7, DR 7-107(B)(3) and (5), of the Code of Professional Responsibility,

which provides: "A lawyer or law firm associated with the prosecution or defense of a criminal matter shall not, from the time of the filing of a complaint, information, or indictment, the issuance of an arrest warrant, or arrest until the commencement of the trial or disposition without trial, make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to:

. . . .

"3. The existence or contents of any confession, admission, or statement given by the accused or his refusal or failure to make a statement.

. . . .

"5. The identity, testimony, or credibility of a prospective witness."

However, the record shows that the trial court was thorough in its questioning in order to insure that none of the veniremen had a preconceived notion of the appellant's guilt because of the media coverage, and no person was allowed to serve on the jury who was a subscriber to the Bellevue Leader, or who had read the article.

The appellant has failed to show that the jury was not impartial. Further, counsel accepted the jury without exhausting all of his peremptory challenges. Thus, counsel must have been satisfied that the jurors were fair and impartial. *The People v. Speck*, 41 Ill. 2d 177, 242 N.E.2d 208 (1968); *State v. Lejeune*, 248 La. 682, 181 So. 2d 392 (1965), *cert. denied* 385 U.S. 845, 87 S. Ct. 37, 17 L. Ed. 2d 77 (1966).

In *Bufford v. State*, 148 Neb. 38, 42-43, 26 N.W.2d 383, 386 (1947), this court stated: "The true object of challenges, either peremptory or for cause, is to enable the parties to avoid disqualified persons and secure an impartial jury. When that end is accomplished there can be no just ground for complaint against the rulings of the court as to competency of the jurors."

The trial court did not abuse its discretion in denying a change of venue or a continuance. The motion for a continuance was attached to the motion for a change in venue, as an alternative remedy. We note from the record that appellant's motion for a continuance was more in the nature of a procedural step to preserve his right to complain of the pretrial publicity rather than a genuine desire to have the trial delayed to permit the advance effect of publicity to wane. We make this conclusion based upon the fact that appellant's counsel was satisfied with the court's ruling which took the combined motion under advisement until it could be determined whether an impartial jury could be selected. Once the jury was impaneled, the appellant did not renew his motion for a continuance before the start of trial. Each time the motion was argued, the appellant's counsel stressed the need for a change in venue but did not discuss the need for a continuance. The second assignment is without merit.

During the trial one of the jurors indicated that she had watched a television report on Omaha channel 3. The appellant complains that the trial court erred in failing to grant his motion for mistrial based upon this alleged juror misconduct. There is no showing in the record of the content of the television report. One other juror during trial was found to have had the same employer as the appellant and the deceased. The juror stated to the court that she had worked there on the late shift, after the murder had occurred, as an auditor. The parties agreed to excusing her, and an alternate juror replaced her. In the absence of a showing of prejudice, the trial court was correct in denying the motion for mistrial. Opportunity for prejudice or disqualification of jurors does not raise a presumption that prejudice or disqualification exists. *State v. Beasley*, 183 Neb. 681, 163 N.W.2d 783 (1969).

The appellant next argues that the trial court erred in admitting color photographs of the de-

ceased and a black and white video tape which showed the body as it was discovered at the crime scene. The basis for appellant's contention is that in addition to the relevancy of the exhibits being outweighed by their prejudice, the photographs and video tape were also unnecessarily cumulative because the autopsy report had been stipulated to.

Admission of video tapes is generally within the trial court's discretion, subject to the same requirements for admission of still photographs. *State v. Brooks*, 30 Wash. App. 280, 633 P.2d 1345 (1981).

Only four of the still photographs offered into evidence were pictures of the deceased and could be considered gruesome. Other photographs of the crime scene will not be discussed, due to the fact that counsel for the appellant also introduced a proof sheet or series of small photographs of the crime scene himself.

Two of the color photographs at issue show the head area of the body of Edel Cook as it was found shortly after police were summoned to her apartment. Detective Warren, who was the first person to the crime scene after the murder was reported, testified that both photographs accurately depicted the body as he saw it on January 24, 1982. The third photograph and duplicate slide were taken just prior to the autopsy of the deceased. The pathologist testified that the photograph and slide would be helpful in assisting him in explaining his findings to the jury. The slide was shown to the jury, but only the photograph was permitted to go to the jury room. As the jury viewed the slide the pathologist pointed out that the deceased had received several blows to the face resulting in multiple fractures of the top portion of the skull, with the brain exposed, fracture of the nasal bones, broken teeth, and severe hemorrhaging about the head. He concluded that Edel Cook was still alive from her head wounds but died as a result of a deeply penetrating laceration in her neck, which severed her windpipe, trachea, and

jugular vein. He testified that his conclusion regarding the cause of death was based upon the fact that the neck wound was covered with a red, foamy material that occurs when the trachea is severed and a person is still breathing. The last still photograph depicts the body of Edel Cook and is illustrative of the fact that she was sexually assaulted at the time of her death. The video tape showed the body as it was discovered at the crime scene.

In a homicide case photographs of the victim, upon proper foundation, may be received in evidence for purposes of identification, to show the condition of the body, the nature and extent of the wounds and injuries, and to establish malice or intent. *State v. Jones*, 213 Neb. 1, 328 N.W.2d 166 (1982); *State v. Williams*, 205 Neb. 56, 287 N.W.2d 18 (1979).

The appellant does not challenge the foundation laid for the video tape or photographs, and we are not persuaded that the relevance was outweighed by the prejudice they may have caused. A photograph which illustrates or makes clear some controverted issue in a homicide case may be received even if it is gruesome, where a proper foundation has been laid. *State v. Jones, supra*; *State v. Partee*, 199 Neb. 305, 258 N.W.2d 634 (1977).

Each of the photographs and the video tape that were admitted into evidence were relevant to prove the condition of the victim's body, the cause of death, intent and malice, and to corroborate the confession of the appellant that he was intimately familiar with the details of the murder.

The appellant stipulated that the body that was found was indeed Edel Cook and that the death certificate concerning Edel Cook could be introduced into evidence without further foundation. We have searched the record and are unable to find any stipulation to the cause of death in the autopsy, nor that the appellant had the requisite intent or malice for

the crime. Further, appellant does not cite this court to any such stipulation.

Under similar facts the Washington Court of Appeals held that the admission of five photographs and a video tape of a murder victim was not an abuse of discretion on the grounds that they were gruesome or that they were unnecessary because the defendant was willing to stipulate that the victim died of gunshot wounds. *State v. Tharp*, 27 Wash. App. 198, 616 P.2d 693 (1980), *aff'd* 96 Wash. 2d 591, 637 P.2d 961 (1981).

Further, we are unable to find anything in the record to show that the photographs or video tape were unnecessarily cumulative or admitted solely to influence the passions of the jury. There was no abuse of discretion.

Finally, the appellant urges this court to find reversible error by the trial court's failure to add to the NJI 14.52A to include "(e) That the interrogation may terminate at anytime he (the accused) may desire." Brief for Appellant at 40.

We held in *State v. Price*, 202 Neb. 308, 275 N.W.2d 82 (1979), that a court, even if requested, is not required to give NJI 14.52A. The appellant was given the benefit of submitting to the jury questions of law concerning the admissibility of a confession under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). He will not be heard to complain that the court did not submit additional questions of law to the jury. The assignment is without merit.

The judgment is affirmed.

AFFIRMED.

Cite as 215 Neb. 145

STATE OF NEBRASKA, APPELLEE, V. LEO A. MILLER, JR., APPELLANT.

337 N.W.2d 424

Filed August 5, 1983. No. 82-711.

1. **Lesser-Included Offenses.** A lesser-included offense is one which is necessarily established by proof of the greater offense.
2. _____. To be a lesser-included offense, the elements of the lesser offense must be such that it is impossible to commit the greater without at the same time having committed the lesser.
3. _____. Criminal trespass is not a lesser-included offense of burglary.

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

Robert M. Cook, for appellant.

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

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

PER CURIAM.

After trial to a jury the defendant was convicted of burglary and sentenced to imprisonment for 10 years after having been determined to be an habitual criminal. He has appealed and contends the trial court erred in refusing his request to instruct the jury as to the lesser-included offense of criminal trespass.

The record shows that the defendant was found inside Ted's Cafe in Norfolk, Nebraska, at about 1:30 a.m. on July 4, 1982. The cafe had been closed since about 2:30 p.m. on July 3. The screen on the outside rear door had been torn away and the glass in the door had been broken. A file cabinet in the cafe had been ransacked and moneybags in one of the drawers had been moved about. The owner had checked the cafe shortly before the defendant was found in the cafe and nothing had been disturbed at that time.

The defendant testified that on the night of the

burglary he was upset over his relationship with his girl friend. He had been drinking heavily and smoking marijuana. He did not recall the events of the evening, nor why he entered the cafe. He testified that he did not believe he intended to steal anything, as he had other money with him. When asked why he was in Ted's Cafe, he answered, "I believe I wanted to get sent to jail. I had no place to go. I came back from Colorado to find out my girlfriend is seeing another guy. I just felt like there was nothing left." On cross-examination he admitted that he had broken into Ted's Cafe and stolen money from the cash register in 1977.

The jury was instructed only as to the elements of burglary. The defendant requested that the jury be instructed on criminal trespass in the first and second degrees, but the requested instructions were refused. The defendant was found guilty of burglary and, because of three prior burglary convictions, was found to be an habitual criminal pursuant to Neb. Rev. Stat. § 29-2221 (Reissue 1979).

The principal issue on the appeal is whether criminal trespass is a lesser-included offense of burglary. The test for determining whether a lesser-included offense exists was stated in *State v. Lovelace*, 212 Neb. 356, 359, 322 N.W.2d 673, 675 (1982). " 'A lesser included offense is one which is necessarily established by proof of the greater offense. [Citation omitted.] To be a lesser included offense, the elements of the lesser offense must be such that it is impossible to commit the greater without at the same time having committed the lesser. [Citation omitted.] . . . .' " See, also, *State v. Mackey*, 200 Neb. 549, 264 N.W.2d 430 (1978); *State v. Colgrove*, 197 Neb. 375, 248 N.W.2d 780 (1977).

In *Lovelace*, *supra*, we held that the determination of whether an offense is a lesser-included offense is controlled by the elements of the crimes as set forth in the statutes and not by the facts presented in the particular case at issue. All elements of the lesser

offense must be included in the greater offense.

The statutes involved in the present case provide: "(1) A person commits burglary if such person willfully, maliciously, and forcibly breaks and enters any real estate or any improvements erected thereon with intent to commit any felony or with intent to steal property of any value." Neb. Rev. Stat. § 28-507 (Reissue 1979).

"(1) A person commits first degree criminal trespass if, knowing that he is not licensed or privileged to do so, he enters or secretly remains in any building or occupied structure, or any separately secured or occupied portion thereof." Neb. Rev. Stat. § 28-520 (Reissue 1979).

"(1) A person commits second degree criminal trespass if, knowing that he is not licensed or privileged to do so, he enters or remains in any place as to which notice against trespass is given by:

"(a) Actual communication to the actor; or

"(b) Posting in a manner prescribed by law or reasonably likely to come to the attention of intruders; or

"(c) Fencing or other enclosure manifestly designed to exclude intruders." Neb. Rev. Stat. § 28-521 (Reissue 1979).

"It is an affirmative defense to prosecution under sections 28-520 and 28-521 that:

"(1) A building or occupied structure involved in an offense under section 28-520 was abandoned; or

"(2) The premises were at the time open to members of the public and the actor complied with all lawful conditions imposed on access to or remaining in the premises; or

"(3) The actor reasonably believed that the owner of the premises or other person empowered to license access thereto would have licensed him to enter or remain; or

"(4) The actor was in the process of navigating or attempting to navigate with a nonpowered vessel any stream or river in this state and found it neces-

sary to portage or otherwise transport the vessel around any fence or obstructions in such stream or river." Neb. Rev. Stat. § 28-522 (Reissue 1979).

The defendant contends that both burglary and criminal trespass require proof that the defendant entered the premises with no right to be on the premises. Thus, criminal trespass is a lesser-included offense of burglary, since criminal trespass must necessarily be proven to establish burglary.

It is possible to commit burglary without also committing criminal trespass because of the peculiar provisions of the criminal trespass statute. For example, it is possible to burglarize an abandoned building, but the fact that the building was abandoned is an affirmative defense to trespass under § 28-522. Since it is *possible* to commit the greater offense without at the same time committing the lesser, the lesser offense is not included within the greater under the rule of *State v. Lovelace*, 212 Neb. 356, 322 N.W.2d 673 (1982).

The trial court was not required to instruct as to either first degree or second degree criminal trespass. The judgment of the District Court is affirmed.

AFFIRMED.

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

NANCY LEE KULLBOM, APPELLANT, V. TERRENCE L. KULLBOM, APPELLEE.

337 N.W.2d 731

Filed August 12, 1983. No. 82-231.

Equity: Interest. A court of equity has a reasonable discretion to allow or withhold interest as is reasonable and just, except in cases where it is recoverable as a matter of right.

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

Warren S. Zweiback and Patricia A. Lamberty of Zweiback, Kasher, Flaherty & DeWitt, P.C., for appellant.

Steven J. Lustgarten, P.C., of Lustgarten & Roberts, for appellee.

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

PER CURIAM.

This case was heard previously in *Kullbom v. Kullbom*, 209 Neb. 145, 306 N.W.2d 844 (1981).

Neb. Rev. Stat. § 45-103 (Cum. Supp. 1982) provides that interest on all decrees and judgments for the payment of money shall be from the date of the rendition thereof at the rate provided for in Neb. Rev. Stat. § 45-104.01 (Cum. Supp. 1982), which, at the present time, is 14 percent per annum.

In the decree in the instant case appellee was ordered to pay $37,566.75 of his pension and profit-sharing trusts to appellant as part of the property division. The appellee was not required to make any part of the $37,566.75 payment until he received a distribution from the trusts and the trial court did not award any interest on the appellant's share of the trusts.

In the case of *Cumming v. Cumming*, 193 Neb. 601, 228 N.W.2d 296 (1975), the respondent was awarded $37,000 from the petitioner's share of her father's estate. The $37,000 payment was necessary to bring the property division to the level determined by the trial court. The payment was to be made "not later than such time as petitioner received $60,000 or more from her father's estate." *Cumming* at 604, 228 N.W.2d at 298. In ordering interest at 8 percent on the payment, this court stated: "In the decree here, although any part or all of the $37,000 *may* be paid at any time, none of it is required to be paid until the petitioner receives the distribution of her share from her father's estate. A court of equity

has a reasonable discretion to allow or withhold interest as is reasonable and just, except in cases where interest is recoverable as a matter of right." *Cumming* at 605, 228 N.W.2d at 299.

We therefore hold that interest on the $37,566.75, or any unpaid balance thereof, from appellee to appellant shall accrue from the date of the December 14, 1979, divorce decree, which was when the District Court should have assigned to appellant her share of appellee's pension and profit-sharing trusts.

REVERSED AND REMANDED WITH DIRECTIONS.

SHANAHAN, J., dissenting.

I respectfully dissent.

We should keep in mind that interest is compensation allowed by law for the use, detention, or forbearance of money or its equivalent. See, *Peters Trust Co., Trustee, v. Hecht*, 118 Neb. 390, 224 N.W. 866 (1929); 45 Am. Jur. 2d *Interest and Usury* § 1 (1969).

In *Kullbom v. Kullbom*, 209 Neb. 145, 306 N.W.2d 844 (1981) (*Kullbom I*), this court determined that the marital estate included Terrence's vested interest in pension and profit-sharing trusts; that Nancy and Terrence were each entitled to one-half of the value of the trusts; and that the trusts had a value of $75,133.25. This court then stated in *Kullbom I*: "We conclude that an equitable division of the marital property requires that Nancy be awarded 50 percent of the stipulated value of the trusts in question, in the amount of $37,566.75. However, since it is obvious that the appellee will not receive the value of such trusts until some unspecified time in the future, we conclude that *he should not be required to pay Nancy the additional sum represented by her share of the trusts until he receives it . . . .*" (Emphasis supplied.) *Id.* at 154, 306 N.W.2d at 849. The decision in *Kullbom I* did not impose on Terrence a present obligation to pay Nancy any specific amount based on the value of the trusts. There was no monetary judgment granted to Nancy. Rather, after de-

termining the value of Nancy's interest, the court in *Kullbom I* imposed a trust on distributions made to Terrence from the pension and profit-sharing trusts. This "fixed percentage" method also preserves Nancy's one-half of any increase attributable to her interest in the trusts. See, *Pinkowski v. Pinkowski*, 67 Wis. 2d 176, 226 N.W.2d 518 (1975); *Bloomer v. Bloomer*, 84 Wis. 2d 124, 267 N.W.2d 235 (1978). In this manner, when there is any distribution to Terrence or his designees, Nancy will be entitled to her proportionate share of any distribution from the trusts.

The majority relies on *Cumming v. Cumming*, 193 Neb. 601, 228 N.W.2d 296 (1975), for support of its action. In *Cumming* the petitioner was entitled to a share in her deceased father's estate. The decree of dissolution required the petitioner to pay her husband $37,000 when the petitioner's distributive share was assigned from her father's estate. This court in *Cumming* held: "[I]nterest on the $37,000 payment, or any unpaid balance thereof, from petitioner to respondent *shall accrue from the date of the decree of distribution assigning to petitioner her share of* [*her father's estate*]." (Emphasis supplied.) *Id.* at 605, 228 N.W.2d at 299. The situation in *Cumming* is no different from *Kullbom I*, because both cases involve assessment of interest on distributions receivable at an unspecified time in the future.

Assessing interest from the date of the decree of dissolution in *Kullbom I* may deprive Nancy of interest earned by the trusts at a rate greater than the statutory rate borne by judgments. Equity would better be served by the assessment of interest at the statutory rate from the date when Nancy is entitled to receive her proportionate share of any distribution from the trusts. With the problems created by the assessment of interest in *Kullbom II*, *Kullbom III* is a possibility.

KRIVOSHA, C.J., joins in this dissent.

NORTHPORT IRRIGATION DISTRICT, APPELLEE, V. J. MICHAEL JESS, DIRECTOR, DEPARTMENT OF WATER RESOURCES, ET AL., APPELLANTS.

337 N.W.2d 733

Filed August 12, 1983. No. 82-378.

1. **Equity: Appeal and Error.** An action in equity is reviewed de novo without reference to the findings of fact made by the trial court.
2. **Waters.** A watercourse is defined by statute as any depression or draw 2 feet below the surrounding lands and having a continuous outlet to a stream of water, or river or brook.
3. _____. To constitute a watercourse it must appear that the water usually flows in a particular direction and by a regular channel, having a bed with banks and sides, and usually discharging itself into some other body or stream of water. It may sometimes be dry. It need not flow continuously, but it must have a well-defined and substantial existence.
4. _____. In order for a watercourse to exist there must be a permanent supply of water from similar conditions, such as rainfall or snowmelt, which will always produce a flow of water in the same channel and that these conditions will reoccur with some degree of regularity.
5. _____. The corpus of running water in a natural stream is not the subject of private ownership. Such water is classed with light and the air in the atmosphere. It is publici juris, or belongs to the public. A usufructuary right, or right to use it, exists, and the corpus of any portion taken from the stream and reduced to possession is private property so long only as the possession continues.
6. **Res Judicata: Proof: Judgments.** Where different proof is required, a judgment in one action does not preclude another action.

Appeal from the District Court for Morrill County: ROBERT R. MORAN, Judge. Reversed and dismissed.

Paul L. Douglas, Attorney General, and G. Roderic Anderson, for appellants.

Winner, Nichols, Meister, Douglas and Kelly, for appellee.

Carol E. Dinkins, Assistant Attorney General, Jacques B. Gelin and David C. Shilton, for amicus curiae United States of America.

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

WHITE, J.

This is an appeal of a permanent injunction against the director and division engineer of the Nebraska Department of Water Resources (State) from requiring the plaintiff, Northport Irrigation District (Northport), to obtain an appropriation permit to pump water from the Upper Dugout Creek into its canals for irrigation. In granting the injunction the trial court found that (1) the United States of America was granted the right under its appropriation No. 768 from the State of Nebraska to recapture seepage and return flow from its project lands; (2) the decision in *United States v. Tilley*, 124 F.2d 850 (8th Cir. 1941), recognized that this appropriation entitled the United States to recapture seepage and return flow before it reaches the North Platte River and that this decision is res judicata as to the issues in this case; and (3) pursuant to contract, Northport is entitled to the rights of the United States under appropriation No. 768.

Northport installed a pump in the Upper Dugout Creek near Bridgeport, Nebraska, and began pumping water from Upper Dugout Creek into canal laterals to serve its district on July 21, 1981. No right of appropriation had been granted to Northport to the waters flowing in the Upper Dugout by the State. The State issued an order to Northport to stop pumping without an appropriation permit on July 22, 1981. Northport complied and filed this action seeking an injunction against the State.

The primary issue in this case is whether seepage waters from lands under an irrigation project or canal, which drain into a natural watercourse, may be collected by the appropriator from the natural watercourse and be applied to further beneficial use by the project or canal, or whether once the waters have returned to a natural watercourse they become public waters and are subject to administration by the State. We will first discuss whether Upper Dugout is a natural watercourse, and then whether all

waters contained in Upper Dugout are public waters.

This action is an action in equity which is reviewed de novo without reference to the findings of fact made by the trial court. *Barry v. Wittmersehouse*, 212 Neb. 909, 327 N.W.2d 33 (1982).

The Northport Canal crosses the top one-third of Upper Dugout Creek in an east-west direction. Upper Dugout Creek itself flows in a north-south direction and empties into the North Platte River to the south. The stream is approximately 11 miles long, and is fed by a spring in the north that directs the flow to the south but is only large enough to supply the top 4 miles of Upper Dugout Creek with a constant flow of water. Prior to the start of construction on the Northport Canal in 1920, the remaining southern portion of Upper Dugout Creek contained water only after a rainfall, although there was testimony that another small spring from Bratten or Braddon Creek formerly flowed into the center of Upper Dugout before it was artificially dammed. Since the canal began flowing in 1926, the lower portion of Upper Dugout Creek has never had a dry measurement and flows year round. The evidence was quite clear that the only reason for the increased flow was due to seepage waters from lands irrigated by the canal which, through percolation or drainage, had found their way into Upper Dugout Creek.

Northport concedes that "there's no question here about whether there's a reasonably definite channel." Upper Dugout Creek flows in a well-defined channel cut in the soil by the action of the water. The creek has 2- to 3-foot-high natural banks and a 2- to 3-foot-wide bed consisting largely of gravel and sand. On all the maps and plats introduced into evidence, which varied from those originally surveyed and platted in 1877 until the present, Upper Dugout Creek is clearly shown as a creek in a well-defined channel. The photographs offered further serve to

illustrate the well-defined and substantial existence of the watercourse.

A watercourse is defined by statute as "Any depression or draw two feet below the surrounding lands and having a continuous outlet to a stream of water, or river or brook shall be deemed a watercourse." Neb. Rev. Stat. § 31-202 (Reissue 1978).

" ' "To constitute a water course, it must appear that the water usually flows in a particular direction; and by a regular channel, having a bed with banks and sides; and (usually) discharging itself into some other body or stream of water. It may sometimes be dry. It need not flow continuously; but it must have a well defined and substantial existence. * * * there is a broad distinction between a stream and brook, constituting a water course, and occasional and temporary outbursts of water occasioned by unusual rains or the melting of snows, flowing over the entire face of a tract of land, and filling up low and marshy places, and running over adjoining lands, and into hollows and ravines which are in ordinary seasons destitute of water and dry." ' " *Barry v. Wittmersehouse*, *supra* at 912-13, 327 N.W.2d at 35, quoting from *Mader v. Mettenbrink*, 159 Neb. 118, 65 N.W.2d 334 (1954).

The de novo review reveals that Upper Dugout Creek had permanent source headwaters in the north and possibly another in Bratten Creek before its flow to Upper Dugout Creek was dammed. The Upper Dugout Creek headwaters flowed in a southerly direction, with a final discharge into the North Platte River. While the lower portion of Upper Dugout Creek was often dry except for rainfall before the building of the canal, we do not believe that this fact alone negates the existence of a natural watercourse. " 'Those who are acquainted with the streams and water courses of the arid Rocky Mountain region of this country, draining as they do to steep, mountainous areas, with their swift currents running over gravelly and rocky bottoms, know that

often in the dry summer months many of them are entirely dry, at least upon the surface. All of them, nevertheless, have well-defined beds, channels, banks, and currents of water, at least the greater portion of the year, and are in every respect water courses to which water rights may attach. But it would be plainly impracticable in this western part of the country to require that, in order to constitute a water course upon which rights may attach, there must be a continuous, uninterrupted, and perennial flow of water during the entire year, and from year to year. Hence the requirement of the law is that in order to constitute a water course the stream need not flow all of the time.'

. . . .

" ' ' "Where water, owing to the hilly or mountainous configuration of the country, accumulates in large quantities from rain and melting snow, and at regular seasons descends through long, deep gullies or ravines upon the lands below, and in its onward flow carves a distinct and well-defined channel, which even to the casual glance bears the unmistakable impress of the frequent action of running water, and through which it has flowed from time immemorial, such a stream is to be considered a water course, and to be governed by the same rules." ' "
Hoefs v. Short, 114 Tex. 501, 273 S.W. 785, 787-88 (1925).

In order for a watercourse to exist there must be a permanent supply of water from similar conditions, such as rainfall or snowmelt, which will always produce a flow of water in the same channel and that these conditions will reoccur with some degree of regularity. 1 Kinney, A Treatise on the Law of Irrigation and Water Rights § 302 (2d ed. 1912). This court is not concerned by the evidence which indicated that a portion of the banks of Upper Dugout Creek had been repaired. A natural stream or watercourse does not lose its natural character as

such merely by artificial improvements. 1 Kinney, *supra* at § 301.

We therefore find that Upper Dugout Creek comports with the statutory definition of a watercourse and subsequent cases of this court that have interpreted said statute.

The issue remains as to whether waters which have returned to a natural watercourse become public waters subject to administration by the State.

The right of Nebraska citizens to use the waters flowing in this State is protected by §§ 4, 5, 6, and 7 of article XV of the Constitution of Nebraska, which state as follows: "Sec. 4. . . . The necessity of water for domestic use and for irrigation purposes in the State of Nebraska is hereby declared to be a natural want. (Adopted, 1920.)

"Sec. 5. . . . The use of the water of every natural stream within the State of Nebraska is hereby dedicated to the people of the state for beneficial purposes, subject to the provisions of the following section. (Adopted, 1920.)

"Sec. 6. . . . The right to divert unappropriated waters of every natural stream for beneficial use shall never be denied except when such denial is demanded by the public interest. Priority of appropriation shall give the better right as between those using the water for the same purpose, but when the waters of any natural stream are not sufficient for the use of all those desiring to use the same, those using the water for domestic purposes shall have preference over those claiming it for any other purpose, and those using the water for agricultural purposes shall have the preference over those using the same for manufacturing purposes. Provided, no inferior right to the use of the waters of this state shall be acquired by a superior right without just compensation therefor to the inferior user. (Adopted, 1920.)

"Sec. 7. . . . The use of the waters of the state for power purposes shall be deemed a public use and shall never be alienated, but may be leased or other-

wise developed as by law prescribed. (Adopted, 1920.)"

Neb. Rev. Stat. § 46-203 (Reissue 1978) establishes a "first in time is first in right" seniority system for water appropriations. Priority of appropriations dates from the filing of the application in the office of the Department of Water Resources, under Neb. Rev. Stat. § 46-205 (Reissue 1978).

Appropriation by the public requires an application to the Department of Water Resources setting forth certain information, such as the applicant's name, the source from which the water shall be appropriated, the amount of water for which appropriation is desired, the location from which the diversion will be made, the estimated time for completion of the diversionary structure, the point in time at which beneficial application of the water will be made to the land, the purpose for which the diverted water will be applied, and any additional facts required by the department. Neb. Rev. Stat. § 46-233 (Reissue 1978). The Department of Water Resources must then record the application, examine it for sufficiency, and either deny or approve it with or without conditions. Neb. Rev. Stat. §§ 46-233 and 46-235 (Reissue 1978). The applicant is given 6 months after approval of an application to file a plat of the area and to commence construction of the diversion works. Failure to comply with these requirements of Neb. Rev. Stat. §§ 46-237 and 46-238 (Reissue 1978) works a forfeiture of the appropriation and all rights thereunder.

"The corpus of running water in a natural stream is not the subject of private ownership. 'Such water is classed with light and the air in the atmosphere. It is *publici juris* or belongs to the public. A usufructuary right or right to use it exists, and the corpus of any portion taken from the stream and reduced to possession is private property so long only as the possession continues. These principles were borrowed by the common law from the civil law and

in turn were borrowed by the law of appropriation from the common law.' " *Rock Creek Ditch etc. Co. v. Miller*, 93 Mont. 248, 258, 17 P.2d 1074, 1076 (1933). In accord, see, *Rogers v. Petsch*, 174 Neb. 313, 117 N.W.2d 771 (1962), and *Slattery v. Dout*, 121 Neb. 418, 237 N.W. 301 (1931), which hold that a landowner does not have an exclusive right to use waters to the injury of senior appropriators. There are approximately 20 senior appropriators downstream from Upper Dugout Creek who would be adversely affected by the issuance of an injunction in this case. This court is concerned that these prior appropriators should have been joined as necessary parties to this lawsuit. This issue was neither briefed nor argued by counsel for either side. However, we find it unnecessary to comment further in view of our ruling in this case.

Northport's contention that, by bringing canal seepage water into the watershed of Upper Dugout Creek, it has become entitled to the use of that excess water for the district is simply untenable. While the *Rock Creek* case cites an exception to the general public ownership rule for an appropriator who by his own exertions increases the available supply of water in a stream and therefore has the right to appropriate it, the exception "contemplates the increase of a stream occasioned through the exertions of man directed to that end, and does not contemplate accessions to the stream through the process of nature, as by percolating waters." 93 Mont. at 262, 17 P.2d at 1078. This argument is without merit.

Northport's arguments that the case of *United States v. Tilley*, 124 F.2d 850 (8th Cir. 1941), is res judicata upon the issues in this case, or that Northport was a privy to a prior appropriation, are also without merit. To provide water for Northport and other irrigation districts in Nebraska, the United States applied for and obtained water appropriation permit No. 768 from the State of Nebraska in 1904,

which permitted the diversion of 230 cubic feet per second of water from the North Platte River. In 1912 the United States posted and recorded a notice of appropriation which claimed "all unappropriated surface, surplus, waste, seepage, return, drainage or developed waters flowing in any and all of said streams, creeks, arroyos, gulches, ravines, depressions and drainage channels within the limits of the North Platte Project of the United States Reclamation Service." In 1918 the United States entered into a contract with the Northport Irrigation District. Under the contract the United States claimed all waste, seepage, spring, and percolating water arising within the district. In 1941 the United States appealed a decision of the U.S. District Court for the District of Nebraska in which one of the defendants was A. C. Tilley, state engineer and head of the Department of Roads and Irrigation of the State of Nebraska. The Eighth Circuit Court reversed the District Court and found that certain drains below the Tri-State Canal were "developed for the express purpose of collecting and removing the seepage," *United States v. Tilley*, *supra* at 861, and therefore the United States should be able to collect that seepage and reapply it to the land without a new appropriation. The decision was based upon the previous case of *Ramshorn Ditch Co. v. United States*, 269 F. 80 (8th Cir. 1920), in which the Eighth Circuit Court held that the United States was entitled to collect seepage in a particular drain without a new appropriation if it was within a reasonable time after the seepage began. Northport claims to be in privity with the United States by virtue of its contract for the purchase of the Northport Canal and therefore the *Tilley* and *Ramshorn* cases are res judicata on the instant issues.

We do not find either the *Tilley* or *Ramshorn* cases to be controlling or dispositive of the issues before this court.

Where different proof is required, a judgment in

one action does not preclude another action. *Suhr v. City of Scribner*, 207 Neb. 24, 295 N.W.2d 302 (1980). The present case involves a different canal and a different watercourse. The *Ramshorn* case also relied upon Rev. Stat. §§ 3426 and 3427 (1913), which statutes have since been repealed. Federal law specifically defers to state appropriation laws in determining the right of the United States to appropriate water within a state. National Irrigation Act of 1902, 43 U.S.C. §§ 371 et seq. (1976); *California v. United States*, 438 U.S. 645, 98 S. Ct. 2985, 57 L. Ed. 2d 1018 (1978).

The appropriation permit granted by the State of Nebraska to the United States defines the appropriation rights which Northport possesses in natural flow waters within the State of Nebraska. Neb. Rev. Stat. § 46-231 (Reissue 1978). Appropriation permit No. 768 lists only the North Platte River as the source of the water. No mention was made in the appropriation permit of diversion or appropriation from the waters in Upper Dugout Creek. A change of point of diversion was sought by Northport in 1979 and no mention was made in the application, order, or map that Northport considered Upper Dugout Creek as a source of water.

Northport also relies on the notice of appropriation filed by the United States, which it maintains is support for its right to appropriate water from Upper Dugout Creek. We are unable to find any Nebraska statute, past or present, which has permitted the United States to appropriate water merely by filing a notice of an intent to do so and posting said notice by several creekbeds. Further, while the notice mentions other creeks by name, it fails to refer to Upper Dugout Creek or even the range or township within which it is located.

Even assuming arguendo that Northport did have a valid appropriation permit, it would have terminated from nonuse. The waters from the Northport Canal have seeped into the watershed of Upper Dug-

out Creek for over 55 years without recapture. As mentioned previously, there are now several downstream appropriators with senior rights to the water. These water users have been granted appropriation permits based on the seniority appropriation system. A filing date must be supported by use. Neb. Rev. Stat. § 46-229 (Reissue 1978). Nonuse for over 3 years terminates the right by statutory cancellation proceedings. Neb. Rev. Stat. § 46-229.02 (Reissue 1978). In *State v. Nielsen*, 163 Neb. 372, 79 N.W.2d 721 (1956), this court held that where the evidence shows that irrigation rights have not been used for more than 10 years, the provisions of Neb. Rev. Stat. § 25-202 (Reissue 1979) cause the clear loss of the appropriation right, independent of any cancellation proceeding.

For all of the above reasons the judgment is reversed and the cause dismissed.

REVERSED AND DISMISSED.

GEORGIA I. LACEY, APPELLANT, V. JOHN D. LACEY, APPELLEE.

337 N.W.2d 740

Filed August 12, 1983. No. 82-380.

1. **Divorce: Alimony: Child Support.** A court, in an appropriate case, may require sufficient security to be given for the payment of alimony and child support awards.
2. **Judgments.** As a general rule, a party recovering a judgment has a right to proceed to enforce it.

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

Mitchell & Demerath, for appellant.

Jacobsen, Orr & Nelson, for appellee.

BOSLAUGH, WHITE, and HASTINGS, JJ., and BROWER and MCGINN, D. JJ.

McGINN, D.J.

This is an appeal from the trial court's determination that the provisions of Neb. Rev. Stat. § 42-371(5) (Reissue 1978) are not applicable to monetary property settlement judgments. We reverse.

The case arises from a dissolution of marriage. The appellant, Georgia I. Lacey, filed a petition for dissolution in Buffalo County District Court against the appellee, John D. Lacey, on April 30, 1979. After extended negotiations the parties entered into a property settlement agreement, under which the appellant received a residence, a car, and other personal property. To further balance the property interests of the parties, the appellee was required to pay, together with interest, the sum of $450,000 in biannual installments over a 5-year period. The agreement also contained an acceleration clause.

The District Court approved this agreement and incorporated its provisions in the decree of dissolution issued July 30, 1981. The appellee neglected to make the first installment payment of $25,000, which was due on September 1, 1981, but approximately 45 days later paid the appellant $10,000. He refused to pay further on the judgment.

Thereafter, the appellant exercised the acceleration clause of the agreement and executed. She alleges that the appellee responded by transferring property to third parties in order to frustrate collection efforts.

The appellant subsequently filed a motion for additional security under § 42-371(5), which states that "The court may in any case, if it finds it necessary, order a person required to make payments under sections 42-347 to 42-379 to post sufficient security with the clerk to insure payment. Upon failure to comply with the order the court may also appoint a receiver to take charge of the debtor's property to insure payment." The motion was denied.

As with other matters relative to a dissolution

action, we try this case de novo, with "weight to the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the opposite." *Tavlin v. Tavlin*, 194 Neb. 98, 104, 230 N.W.2d 108, 112 (1975). See, also, *Cole v. Cole*, 208 Neb. 562, 304 N.W.2d 398 (1981); *Witcig v. Witcig*, 206 Neb. 307, 292 N.W.2d 788 (1980).

Under Neb. Rev. Stat. § 42-365 (Reissue 1978), "When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property as may be reasonable" under the circumstances of the case. See, also, *Cole v. Cole, supra*; *Grummert v. Grummert*, 195 Neb. 148, 237 N.W.2d 126 (1975).

The Nebraska Legislature has long given specific statutory authorization for a court, in an appropriate case, to require sufficient security to be given for the payment of alimony and child support awards. If such a directive was not complied with, a receiver could be appointed to help insure that such payments were made. See, Neb. Rev. Stat. § 42-323 (1943); Comp. Stat. § 1538 (1922); Rev. Stat. §§ 1589 and 1590 (1913); Rev. Stat. Ch. XVI, § 26 (1866). See, also, *Detter v. Erpelding*, 176 Neb. 600, 126 N.W.2d 827 (1964); *Ford v. Ford*, 101 Neb. 648, 164 N.W. 577 (1917); *Swansen v. Swansen*, 12 Neb. 210, 10 N.W. 713 (1881).

With the implementation of 1972 Neb. Laws, L.B. 820, however, the Legislature has conclusively included monetary property settlement judgments, even if such judgments had not been previously included. In *Grosvenor v. Grosvenor*, 206 Neb. 395, 400, 293 N.W.2d 96, 100 (1980), this court said, "Section 25 of L.B. 820, codified as § 42-371, provides, in part: 'All judgments and *orders for payment of money under this act* shall be liens upon property as in other actions . . . .' (Emphasis supplied.) This obviously includes money judgments in lieu of property division in kind." By the language of

§ 42-371(5) itself, a court may order a person to post sufficient security with the clerk in *any* deserving case.

This court has long recognized that an "order requiring security to be given and the one appointing a receiver are both somewhat extraordinary and drastic remedies." *Ford v. Ford, supra* at 650, 164 N.W. at 578. See, also, *Casselman v. Casselman*, 204 Neb. 565, 284 N.W.2d 7 (1979). Reasonable security for payment of alimony, child support, or monetary judgments under this section should, therefore, only be invoked when compelling circumstances require it. See, e.g., *Wheeler v. Wheeler*, 193 Neb. 615, 228 N.W.2d 594 (1975).

If such an order is made and not complied with, then the court, in appointing a receiver, should put into the hands of the receiver only so much of the spouse's property "as appears necessary to be held to make sure the payments due and to become due." *Ford v. Ford, supra* at 650, 164 N.W. at 578. See, also, *Bruening v Bruening*, 143 Neb. 335, 9 N.W.2d 399 (1943).

The trial court erred in refusing to require the appellee to give sufficient security for payment of the monetary property settlement embodied in the decree. We are convinced that the appellee will not pay the award until such an order is made. The record in this case illustrates an almost total failure of the appellee to make payments in accordance with the decree, and the appellant has gone to considerable trouble and expense in order to secure those payments.

"As a general rule, a party recovering a judgment has a right to proceed to enforce it." 49 C.J.S. *Judgments* § 585 at 1071 (1947). See, also, 27B C.J.S. *Divorce* § 300(3) (1959). Here, the Legislature, through the enactment of § 42-371(5), has afforded an avenue for the courts to do so.

REVERSED.

RONALD W. KNIGHT, APPELLANT, V. H & H CHEVROLET, A NEBRASKA CORPORATION, APPELLEE.

337 N.W.2d 742

Filed August 12, 1983. No. 82-405.

Bailment: Negligence: Proof: Case Overruled. In a bailment for hire or a mutually reciprocal bailment case, in the absence of statutory or contractual provisions to the contrary, once bailor proves delivery of property to bailee in good condition and failure to redeliver upon timely demand, the burden is irrevocably fixed upon bailee to prove by a preponderance of the evidence that he has exercised due care to prevent the loss, damage, or destruction of the property. This principle applies to all bailment for hire cases, whether brought in tort or in contract, in which bailee has exclusive control over the property at the time it was lost, destroyed, or damaged. *Nash v. City of North Platte*, 198 Neb. 623, 255 N.W.2d 52 (1977), and its predecessors are overruled.

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

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

Ronald F. Krause of Cassem, Tierney, Adams, Gotch & Douglas, for appellee.

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

MCCOWN, J.

This is a bailment action brought by the plaintiff bailor to recover for the loss of his automobile while it was in the possession of the defendant bailee for purposes of repair. The jury returned a verdict in favor of the defendant and the plaintiff has appealed.

On Wednesday, May 28, 1980, the plaintiff, Ronald W. Knight, delivered his 1980 Corvette automobile to the premises of the defendant, H & H Chevrolet, to have some warranty repair work done. Plaintiff talked to the defendant's service adviser, who had the plaintiff fill out a service order for the repair work and told plaintiff that the repairs should be

completed by Friday, May 30. The plaintiff left his automobile and keys with the service adviser.

On Friday, May 30, the service adviser telephoned the plaintiff and told him that it was necessary to order parts and that the repair work would be delayed. The service adviser also told plaintiff that the car was drivable and that plaintiff could pick up the car while the parts were on order. The plaintiff did not pick up his car and the car was moved into a fenced lot located alongside the defendant's garage.

On Saturday, May 31, the service adviser observed plaintiff's car parked in the fenced lot. He searched the car to make sure that the keys were not in it and that the doors were locked. It was the defendant's practice to keep keys either in the car or in the "tower" inside the garage.

The service adviser knew that a Corvette was a "high risk" automobile susceptible to theft and vandalism, and testified at trial that he intended to move the automobile into the garage for safekeeping over the Memorial Day weekend but became busy with other customers and forgot to move the car.

The open lot in which plaintiff's automobile was placed was surrounded by a Cyclone fence topped with barbed wire and had two gates, each of which was chained and padlocked when the garage was closed. The lot is located at a busy intersection in Omaha, Nebraska.

Plaintiff's automobile was apparently stolen from the defendant's lot on Sunday morning, June 1, 1980. A witness dining at a restaurant located across the street from the lot observed a young man walk up to the Corvette, hesitate at the door, enter the car, and, after a short time, drive the car around the garage and out of sight.

On Monday morning, June 2, the defendant's employees discovered that a chain securing one of the gates to the fenced lot had been cut. A visual inventory by the employees failed to disclose that plaintiff's automobile was missing.

On Wednesday, June 4, 1980, the service adviser was ready to commence repairing the plaintiff's automobile but was unable to find the car. The service adviser assumed that plaintiff had picked up his automobile and telephoned the plaintiff to have him return the car, only to learn that plaintiff had not picked up his car.

A thorough search of the garage premises failed to locate either the car or the keys, and neither the vehicle nor the keys have ever been found. The police were contacted, and on Saturday, June 7, 1980, the service adviser notified the plaintiff that his car had been stolen and could not be found.

Following demand and refusal, this bailment action was commenced. The third amended petition, on which the case was tried, alleged that plaintiff had delivered the Corvette to the defendant, that the defendant had impliedly promised to return the car after completing the repair work, and that the defendant had breached its implied promise by failing to timely redeliver the car. The defendant's answer alleged that the loss of the plaintiff's automobile was proximately caused by the intervening independent acts of an unknown thief and that defendant was not negligent.

The case was tried to a jury. The parties stipulated at trial that plaintiff's automobile had a fair and reasonable value of $12,500, and that the transaction between the plaintiff and the defendant constituted a bailment for hire or mutually reciprocal bailment, and the jury was so instructed.

Over the plaintiff's objections the jury was also instructed: "Before the plaintiff can recover against the defendant in this case, the burden is upon the plaintiff to establish by a preponderance of the evidence each and all of the foregoing [sic] propositions:

"1. That the theft or loss of the plaintiff's Corvette automobile was due to the negligent acts or omissions by the defendant, and that the negligent

acts or omissions by the defendant was [sic] a direct and proximate cause of plaintiff's loss or a proximately contributing cause to [sic] said loss."

The jury brought in a verdict for the defendant and the plaintiff has appealed.

The issue on this appeal is whether or not the instruction placing upon the plaintiff the burden of proving the defendant's negligence was correct. The plaintiff contends that the bailment action here was pleaded in contract and did not allege negligence and that the defendant's pleading that it was not negligent placed the burden upon the defendant of proving the lack of negligence. Plaintiff argues, on several grounds, that in a bailment for hire case the burden of proving negligence on the part of the bailee should not rest upon the bailor but, instead, the burden of proving that it was not negligent should rest on the bailee.

The defendant contends that the traditional rule placing the overall burden on the bailor to prove the bailee's negligence was correct. The conflicting contentions require a reexamination of the rules governing the burden of proof in bailment for hire cases.

In Nebraska the traditional rule was last pronounced in *Nash v. City of North Platte*, 198 Neb. 623, 255 N.W.2d 52 (1977), in which this court held: "In an action for the bailee's failure to exercise required care whereby bailed property becomes lost, destroyed, or injured, the plaintiff has the burden of proving the negligence of the bailee which proximately caused the loss or injury. . . . The loss or injury of bailed property while in the hands of the bailee ordinarily creates a presumption of negligence. Generally, the effect of this rule is not to shift the ultimate burden of proof from bailor to bailee, but merely to shift the burden of proceeding or going forward with the evidence; the ultimate burden of establishing negligence is on the bailor and remains on him throughout the trial."

It will be noted that the holdings in *Nash* are made in the context of a bailment action based on negligence rather than on a contract action, although the bailee's negligence is critical in both.

As early as 1902 this court held that in an implied contract bailment for hire case the burden is on the *bailee* to show that property entrusted to his care was lost without negligence on his part. *Sulpho-Saline Bath Co. v. Allen*, 66 Neb. 295, 92 N.W. 354 (1902).

The seemingly conflicting results may be typical of the situation in many states which have generally followed the traditional rule. Those states allocated the burden of proof on the issue of negligence or lack of it on the basis of the pleadings. In a contract action the burden was upon the bailee to prove that the goods had been lost without fault on its part, and in a tort action for negligence the burden was upon the bailor to prove that the bailee was negligent. The burden of proof was predicated on the art of pleading and sometimes confused the burden of proof with the burden of going forward with the evidence. The application of the rule produced conflicting results.

A great many courts and legal writers have considered the policy issues involved, and a substantial number of states have adopted a rule as to the burden of proof in bailment cases which is applicable, regardless of whether the liability is predicated in tort or on contract. See, *Knowles v. Gilchrist Co.*, 362 Mass. 642, 289 N.E.2d 879 (1972); *Low v. Park Price Company*, 95 Idaho 91, 503 P.2d 291 (1972); *Clack-Nomah Flying Club v. Sterling Aircraft, Inc.*, 17 Utah 2d 245, 408 P.2d 904 (1965); *National Surety Corp. v. Todd County Dairy Co-op.*, 269 Minn. 298, 130 N.W.2d 511 (1964). See, also, Recent Cases, *Bailments—Allocation of the Burden of Proving the Bailee's Negligence*, 43 Mo. L. Rev. 90 (1978); Comment, *Burden of Proof of Bailee's Negligence in Connec-*

tion with His Failure to Redeliver, 8 Hastings L. J. 89 (1956).

Courts which have adopted the newer rule have almost universally agreed that where the property is in the sole possession of the bailee, the bailee may well be the only party in a position to explain the circumstances under which the property was lost or damaged; in such circumstances it would be unfair to require the bailor to prove negligence on the part of the bailee. Additional policy reasons for placing the burden of proof on the bailee are set out in *Knowles* and *Low, supra*.

Nebraska U.C.C. § 7-403 (1980), in dealing with warehousemen or carriers bailment obligations, provides in relevant part: "(1) The bailee must deliver the goods to a person entitled under the document who complies with subsections (2) and (3), unless and to the extent that the bailee establishes any of the following:

. . . .

"(b) damage to or delay, loss or destruction of the goods for which the bailee is not liable."

The drafters of the Uniform Commercial Code left it optional with each state adopting the code whether the burden of proving negligence should be upon the bailor or the burden of proving reasonable care upon the bailee. The official text contained additional bracketed language at the end of (1)(b) which would have had the effect of placing the burden of establishing negligence on the bailor. When the Nebraska Legislature enacted the section it omitted the bracketed language and clearly placed the burden of proof on the bailee.

In the absence of some compelling reasons it seems clear that courts should avoid the inconsistency of having one rule for bailees subject to the Uniform Commercial Code and a different rule for other bailees for hire. Logic as well as fairness dictates adoption of the newer rule as to burden of proof in bailment for hire cases.

We therefore hold that in a bailment for hire or a mutually reciprocal bailment case, in the absence of statutory or contractual provisions to the contrary, once bailor proves delivery of property to bailee in good condition and failure to redeliver upon timely demand, the burden is irrevocably fixed upon bailee to prove by a preponderance of the evidence that he has exercised due care to prevent the loss, damage, or destruction of the property.

This principle applies to all bailment for hire cases, whether brought in tort or in contract, in which bailee has exclusive control over the property at the time it was lost, destroyed, or damaged.

With respect to holdings as to the burden of proof in bailment cases, *Nash v. City of North Platte*, 198 Neb. 623, 255 N.W.2d 52 (1977), and its predecessors are overruled.

In the present case the jury was instructed that the burden of proving negligence on the part of the bailee was upon the bailor and that the bailor could not recover without sustaining that burden of proof. In view of the foregoing discussion that instruction was erroneous, and the judgment must be reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

LEO ANDERSEN, APPELLEE, V. CLYDE S. FRANCISCO ET AL., APPELLANTS.

337 N.W.2d 746

Filed August 12, 1983. No. 82-461.

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

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

Smith, Smith & Boyd, for appellee.

BOSLAUGH, MCCOWN, WHITE, HASTINGS, CAPORALE, and SHANAHAN, JJ.

MCCOWN, J.

This is an action for specific performance of a contract to purchase real estate. The District Court granted specific performance and ordered the defendants to execute a warranty deed upon payment of the balance due on the real estate contract, plus interest. The sellers have appealed.

On September 20, 1969, plaintiff agreed to purchase and the defendants agreed to sell approximately 189 acres of farmland situated in Dakota County, Nebraska. The total purchase price was $28,650. The downpayment was $3,000 and $6,500 was payable by the assumption of a first mortgage, and the remaining principal balance was payable $6,000 on March 1, 1970, and $2,000 each March 1 thereafter until paid in full, with interest at 6 percent from March 1, 1970, payable on each March 1 thereafter.

Plaintiff made the $3,000 downpayment, assumed the mortgages, and on February 23, 1970, paid the $6,000 principal payment. The defendants became concerned about income tax consequences and on March 24, 1970, the parties executed an amendment to the contract which provided that instead of paying $2,000 on principal each March 1 beginning in 1971 until the balance of the purchase price was paid on March 1, 1977, the plaintiff agreed to pay no principal payments until March 1, 1976, and to pay $2,000 on that date and a like amount each March 1 thereafter through March 1, 1982, with the balance of the purchase price due on March 1, 1983. All other terms of the original contract remained unchanged.

Over the years the plaintiff timely tendered all sums due under the contract as amended to the defendants, but the defendants refused to cash the checks. Plaintiff has been in possession of the premises since 1969 and has paid all real estate taxes since that time. Plaintiff has improved the premises and

the $6,500 first mortgage lien has been paid in full.

In 1980 plaintiff filed this action for specific performance, praying for delivery of a warranty deed upon payment to the defendants of all moneys due and owing under the contract. Trial to the District Court was had in February 1982. On June 4, 1982, the District Court found that plaintiff had paid the $3,000 downpayment and the $6,000 principal payment due March 1, 1970, and had assumed the $6,500 mortgage, leaving a principal balance due on the $28,650 contract of $13,150, with interest at 6 percent per annum from March 1, 1970, in the sum of $9,673.36. The court also found that defendants had made a $533.33 mortgage payment for which they were entitled to credit. The District Court therefore entered judgment directing specific performance of the contract as amended and ordered defendants to deliver a warranty deed upon payment of $23,356.69. Defendants have appealed.

On appeal defendants contend that plaintiff's action is barred by the applicable statute of limitations and that plaintiff is guilty of laches. The record does not support defendants' contentions.

Upon a complete review of the record de novo this court agrees with the determination of the District Court.

AFFIRMED.

KRIVOSHA, C.J., participating on briefs.

CITY OF GERING, A MUNICIPAL CORPORATION, APPELLANT AND CROSS-APPELLEE, V. PATRICIA G. SMITH COMPANY (FORMERLY A. C. SMITH COMPANY, INC.), A CORPORATION, APPELLEE AND CROSS-APPELLANT.

337 N.W.2d 747

Filed August 12, 1983. No. 82-497.

1. **Contracts: Acceptance of Work: Waiver.** An express or implied acceptance of work as in compliance with a building contract oper-

ates as a waiver of defective performance, but this rule is inapplicable where the acceptance was under protest or induced by fraud, or where the defects were latent and unknown to the owner.

2. _____: _____: _____. Ordinarily, the acceptance of performance after a default in performance waives the right to rely upon the default.
3. **Principal and Agent: Presumptions.** It is the duty of an agent to communicate to his principal all the facts concerning the service in which he is engaged that come to his knowledge in the course of his employment, and this duty, in a subsequent action between his principal and a third person, he is conclusively presumed to have performed.
4. **Attorney Fees.** It is the practice in this state to allow the recovery of attorney fees only in such cases as are provided for by law, or where the uniform course of procedure has been to allow such recovery. As a general rule of practice in this state, attorney fees are allowed to the successful party in litigation only where such allowance is provided by statute.

Appeal from the District Court for Scotts Bluff County: ALFRED J. KORTUM, Judge. Affirmed in part, and in part reversed and remanded with directions to dismiss.

Holtorf, Kovarik, Nuttleman, Ellison, Mathis & Javoronok, P.C., for appellant.

John Wright of Wright, Simmons & Selzer, for appellee.

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

KRIVOSHA, C.J.

The City of Gering, Nebraska, a municipal corporation, appeals from a judgment in the amount of $26,214 entered by the District Court for Scotts Bluff County, Nebraska, in favor of the City of Gering (City). The damages were awarded by the court, a jury having been waived, for alleged defective work performed by the A. C. Smith Company, Inc., for the City, and the City maintains that the award of damages is inadequate. The appellee, Patricia G. Smith Company, a corporation, formerly A. C. Smith Company, Inc. (Smith), has cross-appealed, maintaining

that the City, through its engineer, accepted the work with knowledge of the alleged defect and thereby waived any right to damages. In addition, Smith maintains that it is entitled to attorney fees pursuant to the terms of a contract entered into between the City and Smith. The trial court denied such fees. Because we believe that the trial court was in error in regard to the matter of waiver but correct with regard to the matter of attorney fees, we affirm in part and in part reverse.

The facts which give rise to this action involve the construction of a four-phase outfall sewer system constructed by the City. The planning and construction of the system, which relies upon gravity to move the sewage, began in 1973. Phase I, the lowest part of the system which empties into the Gering sewer lagoons, was completed in 1974. Phase II, which is an extension of phase I and which empties into phase I, was completed in 1975. Phase III, a further extension of the outfall sewer system which empties into phase II, was completed in 1975. Phase IV, the project involved herein, was designed to consist of 1,850 lineal feet of 21-inch sewer main. At its low end phase IV connects to the phase II sewer main, and at the high end it terminates in an inverse gravity siphon, to which is connected a sewer system built to serve a subdivision known as Pathfinder Subdivision. Also connected to phase IV, but at points in the middle, are sewers serving another subdivision which was added later.

Each phase of the system was designed and engineered by M. C. Schaff & Associates, Inc. Following the letting of bids, Smith was awarded the project for phase IV at a price of $47,070. The contract entered into between the City and Smith was a mimeographed document prepared by the City, containing several blank lines which were to be filled in by Smith to reflect the dollar figures agreed upon between the parties. No other terms of the contract

were subject to negotiation, but were, rather, a part of the bid process.

Certain of the relevant terms of the contract, which apparently were standard provisions for contracts entered into by the City, provided as follows:

"INTERPRETATION OF CONTRACT DOCUMENTS.

"The interpretation of all contract documents and plans, the inspection and approval of all materials and work, and all tests for the determination of guarantee shall be made by the Engineer, or under his direction."

"TESTING.

". . . Before final acceptance of the sewers, all parts of the sewers shall be clean, shall comply with all Contract Documents, and shall be in condition acceptable to the Engineer and the proper municipal authorities."

"DEFENSE COST.

"The Owner and the contractor agree that in the event either of them institutes a law suit against the other under this contract, the plaintiff in such law suit will pay to the defendent [sic] a portion of the defense cost including investigations, engineering fees, attorney fees, expert witness fees, and any other expenses of the defense which may be incurred. Such portion of the defense cost shall bear the same relation to the total defense cost as a dollar amount of the plaintiff claim which were [sic] not sustained by the court, bears to the total dollar amount of the plaintiff's claim. The plaintiff shall pay such portion of the defense cost to the defendent [sic] within thirty days after the defendent [sic] furnished the plaintiff with an itemized listing of the defense cost incurred."

Smith finished the construction of the sewer in November of 1976. On December 7, 1976, the engineer, M. C. Schaff & Associates, filed a certificate of completion, which stated as follows: "I hereby certify that Outfall Sewer - Phase IV and Sanitary

Sewer District No. 76-S5, providing for construction of sanitary sewer, under the contract between A.C. Smith Company, Inc., Contractor, and the City of Gering, Nebraska, has been fully completed according to the terms and stipulations of said contract, and I recommend that the work be accepted." The certificate was signed by M. C. Schaff as president of M. C. Schaff & Associates, Inc.

On December 13, 1976, the city council of the City of Gering, by resolution, made the following findings: "3. The Special Engineer in charge has filed a Certificate that the work has been completed in accordance with the terms of the contract and that he recommends that the City accept the work.

"4. The City of Gering does hereby find that the work has been completed and that the Certificate of Completion is on file and that the City does hereby accept the work."

The record is without dispute that the sewerline, as built by Smith, had a sag in it. But for this defect, there were no other complaints about the quality of the materials provided or workmanship done.

It further appears to be established without dispute that at least one construction engineer working on the project for Schaff knew that the sag existed before the engineer approved the project and the city council accepted it. He testified that others in the Schaff firm surveyed the completed project and that elevations indicating the sag were put on a set of "as-built plans" drawn up before the certificate of completion was submitted to the city council. Sometime after June 8, 1978, the City of Gering employed Wells Engineers, Inc., to review a plan prepared by Schaff for rebuilding phase IV to correct the sag. During the course of the trial, a dispute developed as to how the sag could have been more easily repaired and what should be the proper measure of damages. However, because we believe that this case must be disposed of on the issue of waiver,

we need not consider the matter of damages.

The law is clear and generally without dispute that "An express or implied acceptance of work as in compliance with a building contract operates as a waiver of defective performance, but this rule is inapplicable where the acceptance was under protest or induced by fraud, or where the defects were latent and unknown to the owner." 17A C.J.S. *Contracts* § 514(2)a at 840 (1963). As we noted in *Peckham v. Deans*, 186 Neb. 190, 192, 181 N.W.2d 851, 853 (1970): "Ordinarily, the acceptance of performance after a default in performance waives the right to rely upon the default." See, also, *Wegner v. West*, 169 Neb. 546, 100 N.W.2d 542 (1960).

While the City officials testified that they did not know of the defect before they voted to accept the work and had not seen the "as-built plans" which showed the existence of the sag, the uncontroverted evidence in the case established that the existence of the sag was at least known to the engineering firm before it prepared the certificate and urged acceptance of the work by the City. Gene Acklie, a project engineer for Schaff, testified that he personally knew of the existence of the sag before certification and that his knowledge was based upon a survey done by other employees of Schaff. Knowledge of the agent Schaff was knowledge of the principal, the City of Gering. In *Modern Woodmen of America v. Colman*, 68 Neb. 660, 664, 94 N.W. 814, 816 (1903), we said: "It is the duty of an agent to communicate to his principal all the facts concerning the service in which he is engaged that come to his knowledge in the course of his employment, and this duty, in a subsequent action between his principal and a third person, he is . . . conclusively presumed to have performed. This is the foundation of the doctrine, necessary to the public safety, that notice to an agent is notice to his principal." Thus, in the instant case, the knowledge of the engineer, acting as agent of the City, is knowl-

edge to the City. See, *Fuchs v. Parsons Constr. Co.*, 172 Neb. 719, 111 N.W.2d 727 (1961); *Omaha v. Hammond*, 94 U.S. 98, 24 L. Ed. 70 (1876).

The finding by the trial court, which we do not disturb on appeal, that the officials of the City did not in fact see the "as-built plans" or have actual knowledge of the sag does not affect the matter of waiver where the uncontroverted evidence is that with knowledge of that fact the engineer for the City of Gering executed the certificate of completion, certifying that the work had been "fully completed according to the terms and stipulations of said Contract" and that the engineer recommended that the work be accepted. The purpose of having such a certificate, according to the contract, is to both advise the City that the work it sought to have done was properly completed and to advise the contractor that the work as done was acceptable. If the City intended to object to the work because of the sag, a fact known to the City's engineer, it had to do so before accepting the work in reliance upon its engineer's certificate. The City has neither pled nor attempted to prove that acceptance by the City was induced by fraud on the part of Smith or was under protest by the City. The City may have some quarrel with its engineer, a fact we do not decide. What is clear, however, is that there was acceptance with knowledge and therefore waiver. The trial court should have found that the City waived the defect and could not thereafter seek to recover damages for it.

Smith, by way of cross-appeal, urges us to enforce the provisions of the City's contract which provide that in the event either of the parties institutes a lawsuit against the other and the party instituting the suit does not recover all damages sought, the defendant should be entitled to the cost of defense as determined in accordance with the terms of the contract. While this court has recently reexamined its position with regard to the awarding of attorney

fees and has, in limited instances, now made an exception (see *Holt County Co-op Assn. v. Corkle's, Inc.*, 214 Neb. 762, 336 N.W.2d 312 (1983)), we nevertheless continue to adhere to our long-standing rule first stated by us in *Higgins v. Case Threshing Machine Co.*, 95 Neb. 3, 7, 144 N.W. 1037, 1039 (1914), wherein we said: "It is the practice in this state to allow the recovery of attorneys' fees only in such cases as are provided for by law, or where the uniform course of procedure has been to allow such recovery. As a general rule of practice in this state, attorneys' fees are allowed to the successful party in litigation only where such allowance is provided by statute." See, also, *Gates v. Howell*, 211 Neb. 85, 317 N.W.2d 772 (1982). Thus, absent a statute or evidence of long-standing custom, we are not prepared to extend our prohibition concerning the allowance of attorney fees beyond that which we have recently provided in the *Holt County Co-op Assn. v. Corkle's, Inc.*, case, even though the contract provides for such fees. We do so on the basis of our earlier holdings to the effect that such contracts are contrary to public policy and therefore invalid. *Dow v. Updike*, 11 Neb. 95, 7 N.W. 857 (1881); *Security Co. v. Eyer*, 36 Neb. 507, 54 N.W. 838 (1893). See *Dodge v. Tulleys*, 144 U.S. 451, 12 S. Ct. 728, 36 L. Ed. 501 (1892). See, also, *Occidental Sav. & Loan Assn. v. Venco Partnership*, 206 Neb. 469, 293 N.W.2d 843 (1980). The trial court's refusal to award attorney fees in this case was correct.

The judgment of the trial court is therefore affirmed in part and in part reversed, and the cause is remanded with directions to dismiss.

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

MARVIN V. MILLER, PERSONAL REPRESENTATIVE OF THE ESTATE OF FRANK J. JANECEK, DECEASED, APPELLANT, V. ROBERT JANECEK, APPELLEE.

337 N.W.2d 752

Filed August 12, 1983. No. 82-498.

1. **Decedents' Estates: Principal and Agent.** Generally, one who assumes gratuitously to control or manage the property of another must account to the beneficiaries of the person whose property he has assumed to control or manage.
2. **Principal and Agent.** Generally, the loss of capacity by a principal terminates the authority of an agent.

Appeal from the District Court for Saunders County: BRYCE BARTU, Judge. Reversed and remanded for a new trial.

Marvin V. Miller, pro se.

Robert E. Sullivan of Haessler, Sullivan & Inbody, for appellee.

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

BOSLAUGH, J.

This case arises out of a controversy concerning a savings account and a checking account in the First National Bank of Wahoo, Nebraska. The accounts were owned by Frank J. Janecek, who died on January 3, 1978. This action was commenced by the personal representative of the estate of the deceased to recover the amounts remaining in the accounts at the time of the death of Frank J. Janecek.

The defendant, Robert Janecek, is a son of the deceased. The record shows that on December 27, 1973, the deceased had the defendant's name "added" to the accounts so that the defendant could "take care" of the business of the deceased. After that date the accounts were titled in the names of the deceased and the defendant "WROS."

The transcript filed in this court does not include a copy of the defendant's answer, but it is apparent from the defendant's brief that he claims the pro-

ceeds from the accounts under Neb. Rev. Stat. § 30-2704(a) (Reissue 1979), which provides in part: "Sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intention at the time the account is created. . . ."

The trial court originally sustained the defendant's motion for summary judgment on jurisdictional grounds. That judgment was reversed in *Miller v. Janecek*, 210 Neb. 316, 314 N.W.2d 250 (1982). Upon remand the trial court sustained the defendant's motion for a directed verdict at the close of the plaintiff's evidence and dismissed the petition. The plaintiff has again appealed to this court.

The plaintiff's theory of the case is that one who assumes gratuitously to control or manage the property of another must account to the beneficiaries of the person whose property he has assumed to control or manage. In *Nebraska Power Co. v. Koenig*, 93 Neb. 68, 75, 139 N.W. 839, 842 (1913), we said: "A person gratuitously or officiously assuming as agent or trustee to control or manage the property or interests of another is as firmly bound by the implied terms of his confidential relation as one who is regularly employed and paid."

The evidence shows that the defendant had no written power of attorney or other formal authorization from the deceased or any court to manage his affairs. During the lifetime of the deceased, the defendant did not assert any claim of ownership over the accounts, although the defendant deposited funds of the deceased in the accounts and withdrew funds from the accounts to pay expenses of the deceased.

The evidence further shows that the deceased was in poor health during the last years of his life and, at some time between December 27, 1973, and his death on January 3, 1978, became incompetent to transact business. The defendant, however, continued to transact business for the deceased and deposited

funds of the deceased in the account until his death. On December 27, 1977, a week before the death of the deceased, the defendant sold grain belonging to the deceased and deposited $3,054.93 in the checking account. That account had a balance of $971.75 on January 3, 1978. The savings account had a balance of $4,955.91 on that date.

Generally, the loss of capacity by a principal terminates the authority of an agent. See, Restatement (Second) of Agency § 122 (1958); *Watkins v. Hagerty*, 104 Neb. 414, 177 N.W. 654 (1920).

The deceased was survived by four children: the defendant and Leonard Janecek, his sons, and Leona Germain and Judith Freeborn, his daughters. The decedent's will bequeathed the personal property of the deceased and the residue of his estate to the daughters, share and share alike.

In determining whether there was sufficient evidence to present a question for the jury, the trial court was required to view the evidence in the light most favorable to the plaintiff, resolve all disputed matters in his favor, and give him the benefit of all reasonable inferences that could be drawn from the evidence.

The evidence which has been summarized was sufficient to present a question for the jury, and the defendant's motion for a directed verdict should have been overruled. The judgment of the District Court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

LEON DAVIS, APPELLANT, V. THEON PHILLIPS, APPELLEE.

337 N.W.2d 754

Filed August 12, 1983. No. 82-507.

1. **Negligence: Proximate Cause: Juries.** If the evidence shows

that a plaintiff's conduct may be negligent and a proximate cause of the accident, the issue of contributory negligence must be submitted to the jury.

2. _____: _____: _____. Although a defendant is negligent as a matter of law, the plaintiff's negligence which is a proximate cause requires a factual determination by the jury whether the negligence of the plaintiff is more than slight in comparison with the negligence of the defendant.

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

Frank Meares, for appellant.

Robert G. Fraser and Joseph E. Jones of Fraser, Stryker, Veach, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellee.

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

SHANAHAN, J.

Leon Davis sued Theon Phillips for damages on account of a motorcycle-automobile accident. From a verdict in favor of Phillips, Davis appeals. We affirm.

The collision of the Davis motorcycle and the Phillips automobile occurred at the intersection of 24th and Pinkney Streets in Omaha shortly before 10 p.m. on July 2, 1980.

Twenty-fourth Street runs north-south and intersects Pinkney, an east-west street. At the intersection 24th Street has four lanes. The curb lanes on either side of 24th Street south of the Pinkney intersection are used for parking. At the crosswalk on the south side of the intersection there are pedestrian-operated traffic lights to assist in crossing 24th Street. Twenty-fourth Street is 43 feet 4 inches and Pinkney Street is 22 feet 4 inches. Weather conditions were not a factor in the accident. There is no evidence concerning the posted speed limit at the scene of the accident.

Theon Phillips was driving his two-door 1972 Malibu south on 24th Street and approaching the Pinkney

intersection. The traffic light at the intersection was red as Phillips approached and prepared to make a left turn to proceed east on Pinkney. Phillips stopped in the inside lane on 24th Street, that is, the lane nearest the center, and waited for a green light. Opposite Phillips was a northbound car stopped at the intersection and signaling for a left turn to proceed west on Pinkney. Phillips observed lights of other vehicles behind the left-turning vehicle. There was no traffic to the right of Phillips and no traffic northbound at the right of the left-turning vehicle opposite Phillips. After the light turned green, Phillips, signaling for a left turn, "eased" into the intersection simultaneously with the oncoming and left-turning automobile which had been stopped at the intersection.

At this time, behind the automobile turning left in front of Phillips, there were three other automobiles northbound on 24th Street. In the last northbound automobile on 24th Street was Chesley Pierce, Jr. Pierce had slowed his car to approximately 5 miles per hour as he approached the intersection and observed three cars ahead of him. The car immediately ahead of Pierce was stopped but was not signaling for any turn. At this point Leon Davis, 22 years of age, was traveling north on his 1974 Honda 550, that is, northbound on 24th Street, and approaching the intersection of Pinkney Street. According to Davis, the traffic light at the intersection was green as he approached. Approximately 40 to 50 feet south of the intersection, Davis, operating his cycle at 10 to 15 miles per hour in first, or low, gear, came up behind the Pierce automobile, moved from the center lane to the curb lane, and "kicked" the cycle into second gear. There were no cars in the curb lane. Davis was not aware that Phillips was making a left turn onto Pinkney Street and increased the speed of his cycle to 20 miles per hour after changing lanes. As Davis was accelerating his cycle, he was passing the three cars

which were stopped in the center lane behind the left-turning vehicle.

Pierce testified that all northbound traffic on 24th Street was using the inside or center lane and that, as the Davis cycle passed Pierce's automobile, it increased its speed and then collided with the Phillips vehicle in the intersection. Pierce testified that the Davis cycle was 30 to 35 feet from Pinkney at the time it pulled around Pierce's car. Also, Pierce testified that Davis tried to brake the cycle and stop before colliding with the Phillips automobile. Davis had no knowledge that Phillips was turning left at the intersection. Phillips did not see the Davis cycle until "it was up in the air over me."

Photographs of Phillips' car and Davis' cycle showed extensive property damage. Damage to the Phillips car was located generally at the right door area just behind the front wheel. The frame was bent on the Phillips automobile, which was a "total loss." The front wheel and handlebars of the Davis cycle were demolished.

The District Court instructed the jury that Phillips was guilty of negligence as a matter of law because Phillips had failed to yield the right-of-way to Davis and had failed to maintain a proper lookout. The trial court also instructed the jury concerning the particulars alleged by Phillips to be contributory negligence on the part of Davis, that is, unreasonable speed under the circumstances and a lack of control and lookout. The trial court instructed the jury regarding the effect of any contributory negligence upon a verdict, including the effect of comparative negligence of the parties. The jury returned a verdict in favor of Phillips. Davis in his appeal claims that the District Court committed error in submitting Phillips' specifications of contributory negligence, especially the question of Davis' speed; that the trial court should have directed a verdict in favor of Davis on liability; and that only the issue of damages should have been submitted to the jury.

The circumstances are sufficient in this case to require that a jury resolve the issues of reasonable speed, control, and lookout on the part of Davis. Although it is true that there was no evidence of the precise trajectory of the airborne cycle from which the jury might mathematically deduce the actual rate of speed, the fact that the forces involved in the collision transformed the motorcycle into a missile is a circumstance from which a jury could infer a high rate of speed. Whether such speed was unreasonable under the circumstances was a question for the jury. Congestion at the intersection was a circumstance indicating a likelihood that Davis might be required to reduce the speed of his cycle—even stop, if traffic using the intersection so demanded. Davis, however, increased the speed of his cycle as he pulled into the curb lane and passed the cars standing behind the left-turning automobile. Whether the speed of the Davis cycle during such maneuver was reasonable under the conditions was a question for the jury. When Davis pulled to the right, he placed a row of automobiles between himself and Phillips. This reciprocal obstruction for Davis and Phillips was, likewise, a factor for the jury regarding questions about proper speed, control, and, obviously, lookout. Davis' abortive attempt to "brake" his motorcycle had to be examined by the jury in terms of reasonable speed under the existing conditions, coupled with control and lookout. The issue of Davis' contributory negligence on account of speed, control, and lookout was submitted to the jury with proper instructions. See, *Schanaman v. Ramirez*, 206 Neb. 212, 292 N.W.2d 39 (1980); *Treffer v. Seevers*, 195 Neb. 114, 237 N.W.2d 114 (1975); *Edmunds v. Ripley*, 172 Neb. 797, 112 N.W.2d 385 (1961).

Concerning Davis' claim that a directed verdict on the liability should have been granted so that only the question of damages was submissible to the jury, the evidence has to be accepted in the light most favorable to Phillips. Controverted facts must be re-

solved in favor of Phillips, who is entitled to every reasonable inference which can be drawn from the evidence. *Treffer v. Seevers, supra.* Reasonable but different inferences or conclusions may be drawn from the evidence presented regarding the factors of speed, control, and lookout as such bear upon any question of Davis' contributory negligence. Therefore, there is no reversible error in submitting to the jury the defense of contributory negligence. In view of the comparative negligence statute, Neb. Rev. Stat. § 25-1151 (Reissue 1979), the question regarding the degrees of negligence of the litigants, i.e., gross versus slight, was a factual determination for the jury, notwithstanding that Phillips was guilty of negligence as a matter of law. See, *Hilferty v. Mickels*, 171 Neb. 246, 106 N.W.2d 40 (1960); *Schanaman v. Ramirez, supra*; *Schmidt v. Orton*, 190 Neb. 257, 207 N.W.2d 390 (1973); *Treffer v. Seevers, supra.*

The question of Davis' contributory negligence was given to the jury and answered by the verdict. There is no error and, therefore, the judgment of the District Court is affirmed.

AFFIRMED.

FERN VIOLET NELSON, APPELLEE, V. SCOTT H. YOUNG ET AL., APPELLANTS.

337 N.W.2d 757

Filed August 12, 1983. No. 82-516.

Joint Ventures. In a joint venture each of the parties must have an equal voice in the control of the agencies used therein, and the mere pooling of property, money, assets, skill, or knowledge does not create the relationship.

Appeal from the District Court for Washington County: DARVID D. QUIST, Judge. Affirmed in part, and in part reversed and remanded with directions.

Harry B. Otis of Gaines, Otis, Haggart, Mullen & Carta, for appellants.

Thomas A. Otepka of Gross, Welch, Vinardi, Kauffman & Day, P.C., for appellee.

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

BOSLAUGH, J.

This action arises out of a collision between an automobile owned and operated by the plaintiff, Fern Violet Nelson, and a farm tractor owned by the defendant Malcolm D. Young and operated by the defendant Scott H. Young. The plaintiff sought damages for personal injuries and the damage to her automobile. The defendants counterclaimed for personal injuries sustained by Scott H. Young in the accident, and for damages to the tractor and disk which was attached to the tractor at the time of the collision.

The jury returned a verdict for the plaintiff in the amount of $13,284.90. The defendants have appealed, and contend that the trial court erred in failing to find as a matter of law that the plaintiff was negligent, that the defendant Scott H. Young was not negligent, that the defendants were not engaged in a joint venture, and in failing to instruct the jury as requested by the defendants.

The accident happened at about 7:35 a.m. on April 24, 1979, at the intersection of Highway 31 and county road 136 in Washington County, Nebraska, approximately 1.3 miles south of Kennard, Nebraska. The weather was bright and clear. Highway 31 is a two-lane concrete highway, 24 feet in width, which runs generally northeast and southwest. County road 136 is a gravel road running generally east and west.

The plaintiff turned onto Highway 31 from a gravel road at a point approximately 650 feet north of where the accident happened. She testified that when she was about 200 feet north of the intersection and proceeding in a southerly direction at approximately 30 to 35 miles per hour, she saw the farm

tractor stopped in the northbound lane of Highway 31.

There were two cars in front of the plaintiff which were proceeding in a southerly direction on Highway 31. According to the plaintiff, Scott H. Young waited until these two cars had passed through the intersection and then turned the tractor to the left in front of the plaintiff. The plaintiff applied her brakes and tried to pass to the left, or east, of the tractor, but was unable to do so because there was a northbound car approaching the intersection from the south. The front of the plaintiff's automobile struck the right rear wheel of the tractor, causing it to overturn and slide to the south.

Scott H. Young testified that he had stopped the tractor in the northbound lane of Highway 31 at about the south edge of the intersection. After the two cars approaching from the north had passed through the intersection, he looked in all directions and saw no traffic approaching the intersection. He then proceeded to make a left turn onto the county road. The tractor was moving at between 2 and 6 miles per hour and the front of the tractor was on the county road when the impact occurred. The rear wheels were on the west side of Highway 31 and the disk had just cleared the centerline of Highway 31. Scott did not see the plaintiff's automobile until a few seconds, "four seconds possibly," before the impact.

The exhaust pipe of the tractor is located toward the left side of the tractor and extends from the hood in a vertical position for approximately 2½ feet. It is an obstruction to the vision of the driver operating the tractor and may explain why Scott Young did not see the plaintiff's automobile before commencing his turn to the left.

The evidence is in conflict in a number of particulars and presented issues of negligence and contributory negligence for the jury. The defendants' assignments of error that the trial court should have found the plaintiff negligent as a matter of law and

the defendant Scott Young not negligent as a matter of law are without merit.

The amended petition alleged that the defendants were engaged "in a sharecropping enterprise" which they "jointly control," and by reason thereof the negligence of Scott Young was imputed to Malcolm Young. The trial court submitted this issue to the jury.

The evidence is that Malcolm Young owns a 50-acre tract of farmland which is farmed by Scott Young, his son. Malcolm Young furnished the land and the farm machinery. The cost of seed, fertilizer, and herbicide was shared equally, and the crop was divided equally. The defendants contend that the arrangement was in the nature of a farm lease rather than a joint venture.

The plaintiff relies on *Fangmeyer v. Reinwald*, 200 Neb. 120, 263 N.W.2d 428 (1978), in which we held the evidence presented a jury question as to whether the defendants were engaged in a joint venture. In that case we emphasized that in a joint venture each of the parties must have an "equal voice" in the control of the agencies used therein, and the mere pooling of property, money, assets, skill, or knowledge does not create the relationship. See *Soulek v. City of Omaha*, 140 Neb. 151, 299 N.W. 368 (1941).

The evidence in this case is that although the defendants conferred in regard to the farming operation, the decisions were made by Scott Young. Such evidence does not establish joint or equal control and will not support a finding that the defendants were engaged in a joint venture. The judgment against Malcolm D. Young must therefore be reversed.

The trial court instructed the jury in regard to Neb. Rev. Stat. § 39-636 (Reissue 1978), which provides as follows: "The driver of a vehicle who intends to turn to the left within an intersection or into an alley, private road, or driveway shall yield the right-of-way to any vehicle approaching from the op-

posite direction which is within the intersection or approaching so close as to constitute an immediate hazard."

The defendants requested an additional instruction which, after quoting the relevant provisions of § 39-636, stated: "If you find from the evidence that the defendant Scott Young turned his vehicle to left within the intersection of Highway 31 and County Road 136 at a time when the plaintiff's vehicle was not within the intersection or approaching so close as to constitute an immediate hazard, you will find that such defendant had the right of way and that the plaintiff had a duty to exercise due care to avoid a collision with him by yielding such right of way. Failure to yield such right of way under the circumstances constitutes evidence of negligence on the part of the plaintiff." The trial court refused to give the requested instruction, and the refusal is assigned as error.

The instruction which the trial court gave was adequate so far as § 39-636 is concerned. The requested instruction attempted to resolve the matter of right-of-way upon the basis of the distance of the plaintiff's vehicle from the intersection, without stating that the speed of the two vehicles and the combined length of the tractor and disk should be considered in determining whether the plaintiff's vehicle was so close as to constitute an immediate hazard. Under the facts in this case the trial court was not required to give the requested instruction.

The judgment of the District Court as to the defendant Scott H. Young is affirmed; the judgment as to the defendant Malcolm D. Young is reversed and the cause remanded with directions to dismiss the petition as to the defendant Malcolm D. Young.

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

SPENCER HOLIDAY HOUSE, INC., A CORPORATION, APPELLANT, V. COUNTY BOARD OF EQUALIZATION OF GAGE COUNTY ET AL., APPELLEES.

337 N.W.2d 759

Filed August 12, 1983. No. 82-528.

1. **Taxation: Valuation.** All tangible property and real property in this state, not expressly exempt therefrom, shall be subject to taxation, and shall be valued at its actual value. Such actual value shall be taken and considered as the taxable value on which the levy shall be made.
2. _____: _____. Nothing in Neb. Rev. Stat. § 77-112 (Reissue 1981) requires a county assessor or county board to use all of the factors set forth therein to arrive at a proper valuation. Instead, they may use such factors or a combination thereof which they determine to be applicable in determining actual value under the Constitution of Nebraska
3. **Taxation: Appeal and Error.** In reviewing actions of a board of equalization in determining the actual value of property, the applicable statute, Neb. Rev. Stat. § 77-1511 (Reissue 1981), requires such appeals to be heard as in equity, with a determination anew of all questions raised before the county board relating to the amount of the assessment of the property, except that the court shall affirm the action taken by the board unless evidence is adduced establishing that the action of the board was unreasonable or arbitrary.
4. _____: _____. The presumption that a board of equalization has faithfully performed its official duties disappears when there is competent evidence on appeal to the contrary, and from that point on the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon evidence, unaided by presumption, with the burden of showing such value to be unreasonable resting upon the appellant on appeal from the action of the board.
5. _____: _____. In appeals from actions of the county board of equalization in determining the actual value of property, the burden is upon the taxpayer to show by clear and convincing evidence that the board's determination as to actual value is incorrect and invalid.
6. _____: _____. In an appeal to the county board of equalization or to the District Court, and from the District Court to this court, the burden of persuasion imposed on the complaining taxpayer is not met by showing a mere difference of opinion unless it is established by clear and convincing evidence that the valuation placed upon his property when compared with valuations placed on other similar property is grossly excessive and is the result of a systematic exercise of intentional will or failure of plain duty, and not mere errors of judgment.

Appeal from the District Court for Gage County: WILLIAM B. RIST, Judge. Affirmed.

John F. Akin of Pierson, Ackerman, Fitchett, Akin & Hunzeker, for appellant.

Jerry L. Shelton, Deputy Gage County Attorney, for appellees.

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

PER CURIAM.

This is an appeal by Spencer Holiday House, Inc., appellant, from the decision of the District Court of Gage County which affirmed the Gage County Board of Equalization's (board) determination of the actual value of appellant's property for the year 1981. The appellant assigns as its single error the District Court's finding that the board's determination of actual value was correct.

The appellant owned the Spencer Holiday House, which is a motel located in Beatrice, Nebraska, consisting of 65 units or rooms, 51 of which were constructed in 1965 and 14 of which were constructed in 1974. In addition to these rooms this facility has a restaurant, lounge, coffeeshop, kitchen, meeting rooms, registration lobby, and an administrative office. The basic construction of this facility is a reinforced concrete slab foundation, concrete block with decorative brick facing or glass curtain exterior walls, and concrete slab roofing.

Hubert Kreuzberg, the Gage County assessor, determined the actual value of this property, which was then set by the board. Kreuzberg's testimony on direct examination established his vast experience and expertise in the area of property valuation, quite apart from his position as county assessor. It was his testimony that two methods of valuation were used to establish the actual value of this property. To establish the value of the real property on which this motel is located, some 3.62 acres, Kreuz-

berg compared this land to other similar commercial property in the area and established its value by the price set upon that comparable property when sold.

In establishing the actual value of the improvements erected on that real property, the buildings, pool, etc., Kreuzberg stated he used a reproduction cost less depreciation formula. Under that formula Kreuzberg personally examined all of these improvements, determined the replacement cost of these improvements as provided in the state Tax Commissioner's manual, reduced that amount by factoring in a depreciation percentage, ranging from 15 to 50 percent, depending upon the physical conditions of the improvement, and factored in a 10 percent obsolescence percentage. In applying these methods of valuation Kreuzberg and the board determined the actual value of appellant's property to be $585,370.

Appellant offered the testimony of Robert J. Wilson. His testimony also established that he has a great deal of experience in this area and may also be considered an expert in land valuation. Wilson used two formulas, when valuing this property, to determine its actual value. He used the replacement cost less depreciation formula of a flat 25 percent and an obsolescence factor of 40 percent.

Wilson determined the actual value of this property under this formula to be $450,000. He also used an income approach. He employed a capitalization rate of 25 percent. The evidence at trial gave the following explanation and definition of this approach: "Net income is the incentive to the prudent buyer in the market. This portion of the appraisal process analyzes the income expectancy and converts this expected stream of income into an indication of value. The Income Approach consists of two elements, both of which require accuracy of computation and judgment. These two elements are:

"1. The amount of net income per year which

may reasonably be expected over a period of years during which income exceeds expenditure.

"2. The rate and method by which such net income is to be capitalized into a sound estimate of value." Under this approach Wilson determined the actual value of this property to be $430,000.

In explanation of the difference between the two figures arrived at by these experts when using the replacement cost less depreciation method, it was conceded that the difference was due to their different opinions as to the proper depreciation figure to apply. This depreciation figure was set by the judgment and opinion of each appraiser.

Appellant's first, and major, contention is that the board did not apply sufficient criteria or evaluate a sufficient number of factors under the relevant Nebraska statutes. Nev. Rev. Stat. § 77-201 (Reissue 1981) provides: "All tangible property and real property in this state, not expressly exempt therefrom, shall be subject to taxation, and shall be valued at its actual value. Such actual value shall be taken and considered as the taxable value on which the levy shall be made."

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

As discussed above, Kreuzberg and the board used two of the criteria listed under the above statute: reproduction cost less depreciation and comparison with other properties of known or recognized value. Appellant argues that more factors should have been

considered in addition to these, viz, the earning capacity of the property, as Wilson considered in his income approach in determining the actual value of this property.

In *LaGord Assoc. v. County of Cass*, 209 Neb. 99, 306 N.W.2d 578 (1981), we discussed what a county board of equalization must consider under § 77-112 when determining the actual value of a piece of property. In that case the board valued the taxpayer's motel property, using only the replacement cost less depreciation method. The taxpayer objected, claiming the board should have considered more of the factors listed under § 77-112, especially the earning capacity of that property. Discussing that statute, we said: "Nothing in the above statute requires the county assessor or county board to use all of the factors set forth therein. Instead, they may use such factors or a combination thereof which they determine to be applicable in determining actual value under the Constitution of Nebraska." *Id.* at 101, 306 N.W.2d at 579.

As *LaGord* points out, the board in that case did not have to consider all the factors listed under § 77-112, but, rather, only needed to consider those which the board felt were applicable. The board did not have to consider the earning capacity of appellant's property when establishing its actual value.

When reviewing actions of a board of equalization in determining the actual value of property, the standard of review is provided by statute. "The district court shall hear appeals and cross appeals taken under section 77-1510 as in equity and without a jury, and determine anew all questions raised before the county board of equalization which relate to the liability of the property to assessment, or the amount thereof. *The court shall affirm the action taken by the board unless evidence is adduced establishing that the action of the board was unreasonable or arbitrary*, or unless evidence is adduced establishing that the property of the appellant is assessed

too low. Any decision rendered by the court shall be certified to the county treasurer and to the officer charged with the duty of preparing the tax list, and if and when such decision becomes final such officers shall correct their records accordingly." (Emphasis supplied.) Neb. Rev. Stat. § 77-1511 (Reissue 1981). The same standard of review obtains in this court.

When reviewing such actions we have presumed the board has carried out its duties faithfully, but this presumption is not absolute. "The presumption that a board of equalization has faithfully performed its official duties disappears when there is competent evidence on appeal to the contrary, and from that point on the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon evidence, unaided by presumption, with the burden of showing such value to be unreasonable resting upon the appellant on appeal from the action of the board." *Arneson v. Cedar County*, 212 Neb. 62, 64, 321 N.W.2d 427, 428 (1982).

Appellant argues that it has adduced competent evidence (Wilson's testimony) which destroys this presumption. In addition, appellant argues its evidence establishes that the actual value of this property is substantially lower than the figure reached by the board. This, it argues, is particularly evident in light of the diverse results reached when applying the replacement cost less depreciation formula of valuation.

In response to this argument we first point out the proposition that the burden is on the appellant to show by clear and convincing evidence that the board's determination as to actual value is incorrect and invalid. Secondly, as pointed out in the above discussion of the evidence adduced at trial, when applying the replacement cost less depreciation formula the opinion of the assessor plays a major role. As stated above, the only thing that really separated the views of these two experts as to the actual value of

this property when applying this formula was each individual's opinion as to what depreciation percentage should be factored in.

Speaking in the past on what is necessary to meet appellant's burden in cases such as this, we have said: "In an appeal to the county board of equalization or to the District Court, and from the District Court to this court, the burden of persuasion imposed on the complaining taxpayer is not met by showing a mere difference of opinion unless it is established by clear and convincing evidence that the valuation placed upon his property when compared with valuations placed on other similar property is grossly excessive and is the result of a systematic exercise of intentional will or failure of plain duty, and not mere errors of judgment." *Bumgarner v. County of Valley*, 208 Neb. 361, 366, 303 N.W.2d 307, 310 (1981).

The evidence that appellant has offered shows, at best, that there is simply a difference of opinion as to how this property is to be depreciated. The difference in the values given by the experts is simply a difference of opinion. As the above authority indicates, this is not sufficient to meet appellant's burden in its attempt to overturn the action of the board and the decision of the District Court.

We find the valuation of appellant's property and the decision of the District Court to be correct, and the judgment is therefore affirmed.

AFFIRMED.

RUSSELL P. HALBERT, APPELLEE, V. CHAMPION IINTERNATIONAL, DOING BUSINESS AS FEDERAL ENVELOPE, APPELLANT.

337 N.W.2d 764

Filed August 12, 1983. No. 82-574.

1. **Workmen's Compensation: Appeal and Error.** Although disputed,

if there are facts which would justify the finding that appellee sustained an accident arising out of and in the course of his employment, those findings will not be set aside on appeal.

2. **Workmen's Compensation: Proof.** In compensation cases the burden of proof is always upon the claimant to prove by a preponderance of the evidence that the injury was caused to the employee by an accident arising out of and in the course of his employment.

3. _____: _____. Where the inferences are not equally consistent and the more probable conclusion is that for which the claimant contends, then the claimant sustains his burden of proof on the element involved.

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

Patrick B. Donahue of Cassem, Tierney, Adams, Gotch & Douglas, for appellant.

Lyman L. Larsen and William M. Lamson, Jr., of Kennedy, Holland, DeLacy & Svoboda, for appellee.

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

WHITE, J.

This is an appeal from a judgment of the Workmen's Compensation Court on rehearing, finding that appellee, Russell P. Halbert, sustained an accident and disability arising out of and in the course of his employment with appellant, Champion International.

Appellant assigns errors in two categories: (1) That the compensation court erred in finding that appellee sustained an accident arising out of and in the course of his employment; and (2) That the compensation court erred in finding that appellee sustained his burden to establish that the disability was caused by the accident.

The first assignment is without merit. Although disputed, there are facts which, if believed, would justify the finding that appellee sustained an accident arising out of and in the course of his employment. Those findings are not clearly wrong and will not be set aside on appeal. *Novotny v. Electric*

Hose & Rubber Co., 214 Neb. 216, 333 N.W.2d 406 (1983).

The second assignment of error relates to the sufficiency of the testimony of Dr. Lonnie Richard Mercier, an orthopedic surgeon and the only physician whose testimony was offered by the parties. The entire testimony relating to causation is as follows: "Q. Do you have an opinion within a reasonable degree of medical certainty as to what was causing the crampy-type pain in the leg? MR. DONAHUE: I object, lack of foundation. THE WITNESS: If this pain was in the same leg, that is the right leg, which he had pain in at the time that I saw him, then it's *very, very possible* that this was all related to his back problem, and the rupture of the disc with the pain radiating down the leg. That is certainly consistent. Q. So leg pain is consistent with a ruptured disc? A. That's correct. Q. I want you to assume these facts to be true for purposes of my question. I want you to assume that in July of 1981 Mr. Halbert was at work for Federal Envelope Company; at that time he experienced an episode where he was working on a platform, his foot slipped off the platform and he caught himself, but at that time he jerked his back, he experienced a severe pain in his back at the time, thinking it was a muscle pull. For the next one to two weeks he had a progressive weakening of his right foot and leg. He thought it was going to go away. He sought no real medical treatment at that time. Later on he seeks medical treatment, primarily from Doctor Gacke and yourself. Assuming those facts to be true, do you have an opinion within a reasonable degree of medical probability as to whether or not the accident in late July of 1981 was the proximate cause of the back pain and leg pain he was suffering in September of '81 when you saw him. First of all do you have an opinion? A. Yes, I do. Q. Would you give us your opinion, please? MR. DONAHUE: Objection, lack of foundation, and it assumes facts not in evidence. THE WITNESS: I

would say that if there were no other history of injury, other than the July injury, and that the pain in the back continued on fairly consistently, then it is *very probable* that that injury is directly related to his present problem for which I saw him in September of '81. Q. (By Mr. Lamson) So that the injury relates back to this accident in July? A. It would seem, according to that history, yes." (Emphasis supplied.)

The second assignment has two aspects: first, whether the testimony of the claimant's witness that it was "very probable" that the injury related to the accident is legally sufficient to meet the claimant's burden of proof, and second, whether the answer to the hypothetical question must be disregarded as based on an assumed fact shown not to be true. We will discuss the first aspect.

In *Wayne County v. Lessman*, 136 Neb. 311, 322, 285 N.W. 579, 584 (1939), this court said: "In compensation cases the burden of proof is always upon the claimant to prove by a preponderance of the evidence that the injury was caused to the employee by an accident arising out of, and in the course of, his employment. This means that the claimant must show with reasonable certainty that the alleged injury occurred, and that it was caused by an accident. . . ." Further, we stated at 321, 285 N.W. at 584, that it "has been held by this court that we do not recognize the doctrine that, because an injury may probably be the cause of an ailment, the court should so find, for our rule is that awards of compensation are not based upon possibilities or probabilities, but only upon sufficient evidence showing that the claimant has incurred a disability arising out of, and in the course of, his employment, and that this proof must be made by substantial evidence leading either to the direct conclusion or to a legitimate inference that such is the fact. *Saxton v. Sinclair Refining Co.*, 125 Neb. 468, 250 N.W. 655." We have consistently applied the rule. In *Caradori v. Fron-*

tier Airlines, 213 Neb. 513, 329 N.W.2d 865 (1983), we there held that a physician's opinion that the accident "could have" caused the injury was insufficient as a matter of law to carry the employee's burden. See, also, *Hatting v. Farmers Co-op Assn.*, 212 Neb. 242, 322 N.W.2d 423 (1982); *Renshaw v. Merrigol-Adler Bakery*, 212 Neb. 662, 325 N.W.2d 46 (1982); *Narduzzo v. Sunderland Bros.*, 212 Neb. 852, 326 N.W.2d 673 (1982); *Husted v. Peter Kiewit & Sons Constr. Co.*, 210 Neb. 109, 313 N.W.2d 248 (1981).

However clear the concept of "substantial evidence" leading to the direct conclusion of an employment-related disability, see *Saxton v. Sinclair Refining Co.*, 125 Neb. 468, 250 N.W. 655 (1933), we have struggled with the formula by which expert evidence establishes that conclusion. In *Welke v. City of Ainsworth*, 179 Neb. 496, 504-05, 138 N.W.2d 808, 813 (1965), we said: "Where . . . the inferences are not equally consistent and the more probable conclusion is that for which the claimant contends, then the claimant sustains his burden of proof on the element involved." A strong dissent suggested that probabilities were not sufficient to sustain the claimant's burden. In *Lane v. State Farm Mut. Automobile Ins. Co.*, 209 Neb. 396, 308 N.W.2d 503 (1981), we stated: "Although it is frequently stated that medical testimony must be given with 'reasonable medical certainty,' it is sufficient when such testimony is stated in terms of 'probability.' In this connection, 'reasonable certainty' and 'reasonable probability' are one and the same thing." (Syllabus of the court.) The first aspect of the assignment is therefore without merit.

As to the second aspect, the answer of Dr. Mercier poses as a condition to his opinion "that the pain in the back continued on fairly consistently." However, it is conceded that any back pain suffered by the claimant vanished 15 minutes after the accident, to be replaced by a referred pain in the leg. It is also true, as claimant suggests, that on the hospital

admission sheet the claimant was admitted as suffering back pain and that Dr. Mercier further testified that the leg pain resulted from the "rupture of the disc with the pain radiating down the leg."

After a complete reading of the record we are convinced, as was the Workmen's Compensation Court, that the condition of which the claimant complained was at all times known both to the employer and to the examining and treating physicians, including Dr. Mercier. We are convinced that the minor inaccuracy in the hypothesis of Dr. Mercier is not sufficient to warrant striking his evidence. *Campbell v. City of North Platte*, 178 Neb. 244, 132 N.W.2d 876 (1965).

Finding no error, the judgment of the Workmen's Compensation Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JERALD DEAN CROUCH, APPELLANT.

337 N.W.2d 766

Filed August 12, 1983. No. 82-691.

Post Conviction. In order to establish a right to post conviction relief based on a claim of ineffective counsel, the criminal defendant has the burden to prove that counsel failed to perform at least as well as a lawyer with ordinary training and skill in the criminal law or that he failed to conscientiously protect his client's interests. Further, he must show on the record how he suffered prejudice in the defense of his case as a result of the counsel's action during trial.

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

Lawrence W. Stunkel, for appellant.

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

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

WHITE, J.

This is an appeal from the District Court for Saunders County, Nebraska, from the denial of post conviction relief. Appellant, Jerald Dean Crouch, was convicted of one count of robbery and sentenced to imprisonment for a term of from 10 to 20 years. Neb. Rev. Stat. §§ 28-324 and 28-105 (Reissue 1979). The conviction was affirmed by this court in *State v. Crouch*, 205 Neb. 781, 290 N.W.2d 207 (1980). The facts relative to the commission of the crime are stated in that opinion and will not be repeated here.

Essentially, the errors urged by appellant in this cause are identical to those asserted in the original appeal, except in a slightly different context. The same errors are now couched in terms of an alleged sixth amendment violation, i.e., denial of effective assistance of counsel. The errors alleged are as follows: (1) Counsel was ineffective in failing to secure information in possession of the prosecution and in not conducting an independent investigation of witnesses prior to trial; (2) Counsel failed to provide information to the appellant with respect to incriminating statements allegedly made by the appellant and therefore prevented appellant from aiding in his defense or at least making an informed decision as to a plea bargain offer; and (3) Counsel failed to provide effective assistance when he did not pursue and contact rebuttal witnesses whose names were given him by the appellant. We shall discuss the assignments in order.

Assignment (1) deals with the alleged existence of alibi witnesses, one Janet Kimm and two other persons named Calvin and Dave. Contrary to the contentions of the appellant, the evidence indicates, and the trial court believed, that appointed counsel contacted one Janet Kimm, whose name was the only complete name revealed to him. Counsel had a conversation with Janet Kimm. She stated that she did not know of any way her testimony would help the appellant, and she further informed counsel that

while she was acquainted with two other alleged alibi witnesses, Calvin and Dave, she did not know their last names and had not been able to contact them. The appellant did not supply any further identification or whereabouts of Calvin or Dave. The failure to locate Calvin and Dave cannot be said to constitute ineffective assistance of counsel. The assignment is wholly without merit.

Assignment (2): The appellant's evidence indicates that he was never informed that conversations of himself with a codefendant in a Utah jail were overheard by a Nebraska State Patrol investigator and that the information was in the hands of the prosecution; thus, it was either not discussed with appellant by his counsel or appellant's counsel never secured this information. Appointed counsel at the trial stated that it was his recollection that he had such information but that he could not be positive. The trial had occurred over 2 years previous to the post conviction hearing. It was observed by the trial court and by this court in the direct appeal in this case that the cross-examination of the State Patrol investigator was effective, that the evidence was admissible, and that no prejudice was shown. With respect to the alleged failure to convey information sufficient to make a plea bargain, both the appellant and his appointed counsel testified that the appellant at all times maintained his innocence of the charge and that he was not interested in a plea bargain. Counsel was not remiss in his duties by failing to discuss plea bargains after clear instructions from his client that he was not interested in any such bargains.

Assignment (3) relates to the alleged failure of counsel to call as rebuttal witnesses certain persons who would testify to the fact that a codefendant did not suffer from an eye disease such as would have made it impossible for him to drive an automobile at night. This court on appeal and the trial court in the post conviction observed that this evidence was

merely cumulative and the admission of such evidence is addressed to the sound discretion of the trial court. *State v. Keith*, 189 Neb. 536, 203 N.W.2d 500 (1973).

In order to establish a right to post conviction relief based on a claim of ineffective counsel, the criminal defendant has the burden to prove that counsel failed to perform at least as well as a lawyer with ordinary training and skill in the criminal law or that he failed to conscientiously protect his client's interests. Further, he must show on the record how he suffered prejudice in the defense of his case as a result of the counsel's action during trial. *State v. Otey*, 212 Neb. 103, 321 N.W.2d 453 (1982); *State v. Lang*, 202 Neb. 9, 272 N.W.2d 775 (1978).

The evidence against the appellant, as we observed in the original opinion, was overwhelming. He was placed as a participant at the scene of the crime by a codefendant. His codefendant's estranged wife disputed his alibi by also placing him at or near the scene of the crime on the date of the crime. In addition, his own voluntary statement in which he implicated himself and threatened the codefendant was properly admitted in evidence. The appellant has the burden to establish prejudice by the existence of admissible evidence which would have been helpful to him on cross-examination or in his case in chief, providing the evidence could have been discovered by reasonable investigation. *State v. Lang, supra.*

We agree with the trial court that the evidence discloses that counsel made reasonable efforts to discover the existence of alibi witnesses. It is interesting to note that none of the proposed alibi witnesses were called at the post conviction hearing. The record is silent as to what, if anything, they could have said that would have supported the appellant's alibi. The record totally fails to disclose whether the alibi witnesses would have supported the position of the

appellant. The appellant has failed to show prejudice. *State v. Lang, supra.*

We are of the opinion, as was the trial court, that the appellant's assignments of error are not meritorious. The denial of post conviction relief is affirmed.

AFFIRMED.

MARGARET J. HEIRONYMUS, APPELLEE, V. JACOBSEN TRANSFER ET AL., APPELLANTS.

337 N.W.2d 769

Filed August 12, 1983. No. 82-740.

1. **Workmen's Compensation.** One is totally disabled if he is unable to perform any work in which he has the experience or capacity to perform.
2. **Workmen's Compensation: Words and Phrases.** "Total disability" does not mean a state of absolute helplessness; one may be so disabled notwithstanding the fact he is able to obtain trivial, occasional employment under rare conditions at small remuneration.
3. **Workmen's Compensation: Appeal and Error.** Findings of fact made by the Workmen's Compensation Court on rehearing have the same force and effect as a jury verdict in a civil case and, if supported by sufficient evidence, will not be disturbed on appeal unless clearly wrong.
4. **Workmen's Compensation: Evidence.** Issues of causation are for determination by the fact finder.
5. _____: _____. Causation may be established on the basis of medical probability.

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

Walter E. Zink II and Diane Bevans Carlson of Baylor, Evnen, Curtiss, Grimit & Witt, for appellants.

Richard A. Koehler, for appellee.

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

CAPORALE, J.

Jacobsen Transfer and its insurer, Great West Casualty Company, defendants-appellants, challenge the determination of a three-judge panel of the Workmen's Compensation Court that Jacobsen's employee, plaintiff-appellee Margaret J. Heironymus, is entitled to benefits under the Nebraska Workmen's Compensation Act. We affirm.

The appeal questions (1) the nature and extent of plaintiff's disability, if any, (2) whether a causal connection exists between any such disability and the subject accident, and (3) whether plaintiff is entitled to vocational rehabilitation services.

On June 9, 1976, plaintiff suffered injuries as the result of being thrown through the windshield of a freight truck, in an accident arising out of and in the course of her employment as a driver with Jacobsen.

Although the record is quite sketchy, it appears the initial medical concerns were with the fractures of plaintiff's left shoulder and lower left leg. However, in early 1977 plaintiff began to complain of a "funny feeling in her hand," diarrhea, and exhaustion. She also had a history of gastrointestinal discomfort dating back to 1971.

One of her physicians, on December 8, 1978, stated that plaintiff's multiple complaints concerning her left shoulder, left leg, and back were chronic and improving and that her problem was one of pain management. He concluded plaintiff had only partial disability, had a good prognosis, and should remain active so as to gradually resume as normal a lifestyle as possible.

A fair reading of the testimony of another of her physicians is that, in his opinion, it is medically probable that plaintiff, notwithstanding a negative electroencephalogram, suffers a brain seizure disorder as a proximate result of the accident. That disorder produces the hand episodes, diarrhea, and exhaustion. According to this neurologist, plaintiff

presently suffers a 5-percent disability as a consequence of that disorder, which stabilized as of December 6, 1977.

Although the 48-year-old plaintiff has an eleventh grade education and has worked as a retail salesclerk, skilled production worker, busdriver, an automobile front-end alignment mechanic, as well as a truckdriver, she has neither sought nor held any employment since the 1976 accident. She now accompanies her husband on his over-the-road trips and, with some help, does his bookkeeping. She can no longer function as a truckdriver, nor perform without leg pain any task which requires prolonged sitting, standing, or walking. She reobtained her driver's license, which had lapsed following the accident, but rarely drives for personal purposes, and blacked out on one such excursion. She takes medication for the brain seizure disorder.

Plaintiff initially participated in rehabilitation efforts but withdrew from them in a relatively short time.

As to the first issue, although the evidence as to the nature and extent of plaintiff's disability is subject to a contrary evaluation, it cannot be said the compensation court's finding that plaintiff is presently totally disabled as a result of the accident is clearly wrong.

We recently observed that whether one is totally disabled depends upon the inability to perform any work in which he has the experience or capacity to perform. *Shaw v. Gooch Feed Mill Corp.*, 210 Neb. 17, 312 N.W.2d 682 (1981). The evidence in this case, superficial as it is, does support a conclusion that plaintiff cannot perform employment for which she has experience or capacity. The fact she does her husband's bookkeeping does not change the foregoing conclusion, for "total disability" does not mean a state of absolute helplessness. One may be so disabled notwithstanding the fact he is able to obtain trivial, occasional employment under rare condi-

tions at small remuneration. *Camp v. Blount Bros. Corp.*, 195 Neb. 459, 238 N.W.2d 634 (1976); *Brockhaus v. L. E. Ball Constr. Co.*, 180 Neb. 737, 145 N.W.2d 341 (1966). There is no showing that plaintiff could do bookkeeping for anyone except her husband or that she could perform such services without help.

Findings of fact made by the Workmen's Compensation Court on rehearing have the same force and effect as a jury verdict in a civil case and, if supported by sufficient evidence, will not be disturbed on appeal unless clearly wrong. *Halbert v. Champion International, ante* p. 200, 337 N.W.2d 764 (1983); *Renshaw v. Merrigol-Adler Bakery*, 212 Neb. 662, 325 N.W.2d 46 (1982). We may not, therefore, disturb the compensation's court's finding of disability.

Issues of causation are also for determination by the fact finder. *Newbanks v. Foursome Package & Bar, Inc.*, 201 Neb. 818, 272 N.W.2d 372 (1978). Therefore, the only question presented by the second issue in this appeal is the evidentiary standard by which causation may be established. Any earlier doubt that causation may be established on the basis of medical probability was removed by *Halbert v. Champion International, supra.* Marginal as the evidence before us is, it is sufficient to sustain the finding of the compensation court that plaintiff's disability is the result of the 1976 accident.

As to the third issue, Neb. Rev. Stat. § 48-162.01(3) (Reissue 1978) provides in part: "When as a result of the injury he [an employee] is unable to perform work for which he has previous training or experience, he shall be entitled to such vocational rehabilitation services, including retraining and job placement, as may be reasonably necessary to restore him to suitable employment."

Defendants argue that plaintiff has not met the test embodied in that language, for she has failed to prove she is unable to perform work for which she

has previous training or experience. The compensation court's finding that plaintiff is totally disabled necessarily implies a finding that she is unable to return to work for which she has previous training or experience. Accordingly, the award by the compensation court of vocational rehabilitation services was proper.

Of course, should plaintiff refuse to participate in these services without reasonable cause, she will, pursuant to the provisions of § 48-162.01(6), place herself in peril of losing some or all of the compensation payments awarded to her.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. FRANKLIN C. BEACH, APPELLANT.

337 N.W.2d 772

Filed August 12, 1983. No. 82-763.

1. **Evidence: Appeal and Error.** In reviewing cases involving conflicting testimony it is not the province of this court to resolve conflicts in the evidence, pass upon the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact, and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
2. **Polygraph Tests.** Generally speaking, where the mention of a polygraph test was inadvertent and unrequested, the results of any such test, if given, were not disclosed, the reference was properly objected to, and the jury was instructed to disregard such references, no prejudicial error has been committed.
3. **Criminal Law: Evidence: Impeachment.** As a general rule, evidence of prior juvenile adjudications may not be admitted as criminal convictions for the purpose of impeaching the credibility of a witness.
4. **Criminal Law: Constitutional Law: Sentences.** Neither double jeopardy nor the equal protection clause imposes an absolute bar to a more severe sentence upon reconviction. A trial judge is not constitutionally precluded from imposing a new sentence, even though greater than the original sentence, in the light of events subsequent to the first trial that may have thrown new light upon

the defendant's life, health, habits, conduct, and mental and moral propensities, which information may have come to the judge's attention from evidence adduced at the second trial itself, from a new presentence investigation, from the defendant's recent prison record, or possibly from other sources.

5. **Sentences.** Whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for doing so must affirmatively appear from the record and be based upon objective information occurring after the time of the original sentencing proceeding.
6. **Sentences: Appeal and Error.** In the absence of an abuse of discretion by the trial court, this court will not disturb on appeal a sentence imposed within the statutory limits.

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

Steven A. Russell of Jacobsen, Orr & Nelson, for appellant.

Paul L. Douglas, Attorney General, and G. Roderic Anderson, for appellee.

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

HASTINGS, J.

The defendant, Franklin C. Beach, was found guilty of attempted sexual assault in the first degree by a jury in the District Court of Dawson County. The District Court thereafter sentenced him to 1 year at hard labor in the Nebraska Penal and Correctional Complex and fined him $900. The defendant has appealed the conviction.

On appeal defendant has assigned three errors to the decision of the trial court: (1) The court erred in failing to grant a mistrial after a witness for the prosecution made reference to a polygraph test; (2) The court erred in precluding the use of prior juvenile convictions of the prosecutrix for impeachment purposes; and (3) The sentence imposed by the court was excessive.

On August 23, 1980, defendant was employed as a part-time jailer with the Dawson County Sheriff's De-

partment, and had been so employed for the preceding 2 years. On that date defendant worked the night shift, from 11 p.m. on August 23 to 7 a.m. on August 24. At that time the prosecutrix was being held at that facility as a material witness to an armed robbery.

The testimony as to the events that transpired that evening varied greatly. The testimony of the prosecutrix showed the following: At about 12:30 a.m. the defendant went to her cell and woke her. He then released her from her cell and let her watch television in the jailer's station. She testified that they watched television for about an hour and a half. At approximately 2 to 2:30 a.m. the defendant began kissing her. He thereafter led her to another part of the jailer's station, pulled her to the floor on top of him, and rolled over on top of her. He proceeded to fondle her breasts, pulled down her pants, and penetrated her vagina with his penis. She was 14 years old at that time.

The defendant offered contrary testimony. He argued that he let her out of her cell to watch television in the jailer's station. The defendant also testified that he left the jailer's station to use the restroom. As he left the restroom, he ran into the prosecutrix, who, he said, grabbed him and began kissing him, and they fell to the floor. He testified that they were only on the floor for about 1 minute and that nothing happened between them.

After the events occurred on the morning of August 24, 1980, a complaint was made to the Dawson County sheriff, James Joneson, that the prosecutrix had been sexually assaulted by the defendant while in the Dawson County jail. Investigating this complaint, Sheriff Joneson interviewed defendant on September 2, 1980. At that time defendant told Joneson that he had let the prosecutrix out of her cell and allowed her to watch television on the night in question. The defendant also stated the prosecutrix said she would do anything to get her boyfriend,

who was being held for armed robbery in the Dawson County jail at that time, out of jail.

In recalling his conversation with defendant, Sheriff Joneson went on to state: "Starting where we left off, Mr. Beach stated to me that he got up from the jailer's station, went to the rest room, which is located directly to the north of the jailer's station around a partition; that when he came back out of the rest room [the prosecutrix] was standing in a small hallway between the surveillance cameras and the partition between that and the rest room, and that she started kissing him again, and that one thing led to another, and the next thing he knew they were on the floor doing it. I asked him what they were doing. Mr. Beach stated to me — Mr. Beach indicated to me that they were on the floor, that he could not remember if he took her clothes off or if she did. He could not remember if he had his pants clear off or just unzipped. I asked that specific question, 'Did you take your pants clear off or did you have them unzipped?' He could not remember.

"Frank then stated to me that he did not think penetration occurred because she was too small and he did not want to hurt her. Frank then stated to me that he got scared, his hip started bothering him bad and became painful, that he became quite sick by the thought of what he was doing, that he got up and zipped up his pants, allowed her to get her clothes on and then put her back in her cell block."

Joneson wrote down these statements made by defendant during the September 2 interview, read them back to defendant, and defendant signed them as his statement. The defendant disputed the accuracy of the signed statement at trial.

In determining which of these stories is the correct statement of what actually occurred, it seems clear from the verdict of the trial court that the jury believed the prosecutrix and the testimony of Sheriff Joneson. As we have said, when reviewing cases with conflicting testimony such as this, " 'It is not

the province of this court to resolve conflicts in the evidence, pass upon the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.' " *State v. Farr*, 209 Neb. 163, 169, 306 N.W.2d 854, 858 (1981). Although the sufficiency of the evidence to support a judgment of conviction was not raised by the defendant, after examining the record and in light of the foregoing rules, we have no hesitancy in affirming the jury's verdict of guilty.

Turning now to the errors assigned by the defendant, he first complains that a mistrial should have been granted because a witness for the prosecution made reference to a polygraph test. The testimony to which the defendant is referring is that of Sheriff Joneson. At one point in his testimony he explained the steps he took in investigating the complaint. The testimony went as follows: "Q. What was the next thing you did in regard to this investigation [against the defendant]? A. The next thing I did after interviewing [the prosecutrix] was set up a polygraph." At this point defendant's counsel objected and moved for a mistrial. The court denied the defense motion on the basis of *State v. Vrchota*, 212 Neb. 567, 324 N.W.2d 394 (1982). The jury was thereafter instructed to disregard Joneson's response to the prosecution's last question.

The defendant argues that the mention of the word "polygraph" in the same sentence with reference to interviewing the prosecutrix gave rise to an inference that she took and passed a polygraph test, which thereby enhanced the credibility of her testimony in the eyes of the jury.

In *State v. Vrchota, supra*, we were faced with a very similar case. There, a witness made an inadvertent and unrequested reference to a polygraph. In deciding that case we relied on our decision in

State v. Anderson and Hochstein, 207 Neb. 51, 296 N.W.2d 440 (1980), *cert. denied* 450 U.S. 1025, 101 S. Ct. 1731, 68 L. Ed. 2d 219 (1981).

Discussing that case, we said: "In *State v. Anderson and Hochstein*, 207 Neb. 51, 296 N.W.2d 440 (1980), *cert. denied* 450 U.S. 1025, 101 S. Ct. 1731, 68 L. Ed. 2d 219 (1981), a witness mentioned the word 'polygraph' on redirect examination. The witness did not indicate whether he had taken such a test or what the results were. The defense counsel made a timely motion for mistrial. The motion was overruled and the trial judge gave a curative instruction. In holding that the denial of a mistrial was not error, we said: 'The mere mention of the word "polygraph," absent more, does not constitute prejudicial error. Appellants have failed to disclose how or in what manner the use of the word "polygraph" was prejudicial under the circumstances . . . .' *Id.* at 67, 296 N.W.2d at 451.

"Here the reference to the polygraph test was volunteered by the witness, and the result of the test was not disclosed. Prompt objection was made and the trial court instructed the jury to disregard the reference to the lie detector test. There was no further reference to the test." 212 Neb. at 569, 324 N.W.2d at 396.

We see no difference between the *Vrchota* and *Anderson and Hochstein* cases and the one at bar. In all three of these cases the mention of a polygraph test was inadvertent and unrequested; the results of the tests were not disclosed; the reference was properly objected to; and the trial court instructed the jury to disregard the references to the polygraph tests. In those cases the reference was not prejudicial, and we find the reference in this case did not prejudice the defendant. Therefore, we find that the trial court was correct in overruling the defense motion for a mistrial.

Next, defendant argues he was improperly denied the opportunity to introduce prior juvenile adjudi-

cations of the prosecutrix for impeachment purposes. The defendant's complaint is based upon the trial court's granting of the State's motion in limine, precluding the use of any prior juvenile adjudications of the prosecutrix. The defendant claims he was thereby denied his right to effectively confront and cross-examine witnesses.

In support of this argument defendant relies heavily on *Davis v. Alaska*, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). In that case the Supreme Court held that a criminal defendant should have been allowed to introduce evidence that the witness for the State, who implicated and identified the defendant as the perpetrator of the criminal act in question, had a prior juvenile record, and as to the fact that this witness was on juvenile probation at the time he testified.

Although on its face *Davis* may seem to be similar to the one at bar, a careful reading of it shows that it is distinguishable. In *Davis* the defendant claimed the witness for the State testified against the defendant out of fear that his probation would be revoked if he failed to so testify. In that case the defendant sought to introduce the prior juvenile record into evidence, not just to attack the credibility of that witness as a dishonest person but also to show that the testimony of the witness was somehow coerced and motivated by the State's threat of probation revocation. Therefore, it was contended this testimony was not believable.

The case before us presents a different situation. The only use of the prosecutrix's prior juvenile record by the defendant, that we can determine, is to show she is dishonest. The defense wanted to cast her as a dishonest juvenile offender in front of the jury, in hopes that the jury would disbelieve her. No bias or motive would be shown by these prior juvenile adjudications, as was true in the *Davis* case.

Such a use is improper under the Nebraska Evidence Rules. Neb. Rev. Stat. § 27-609 (Reissue 1979)

allows for the use of certain prior criminal convictions for the impeachment of witnesses. Subsection (4) of that statute states: "Evidence of juvenile adjudications is not admissible under this rule." We have interpreted this statute to be a bar to the admission of prior juvenile adjudications for impeachment purposes. See *State v. Caradori*, 199 Neb. 691, 260 N.W.2d 617 (1977). On this basis we find that the trial court's granting of the State's motion in limine was proper.

Finally, defendant claims his sentence was excessive. The defendant initially pleaded guilty to the charge of attempted sexual assault in this case. For this he was sentenced to probation for 3 years. The defendant later sought to withdraw this plea, and in *State v. Beach*, 211 Neb. 660, 319 N.W.2d 754 (1982), we held that he should be allowed to do so, and remanded the case to the District Court for further proceedings. As stated above, the trial court, after the jury found defendant guilty, sentenced him to 1 year in the Nebraska Penal and Correctional Complex and fined him $900.

The defendant argues that to increase his sentence after a new trial penalizes him for exercising his right to appeal. Therefore, it is argued, this increase in sentence is improper, arbitrary, and excessive. In support of this argument defendant primarily relies upon *North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969).

In that case the Supreme Court stated: "It can hardly be doubted that it would be a flagrant violation of the Fourteenth Amendment for a state trial court to follow an announced practice of imposing a heavier sentence upon every reconvicted defendant for the explicit purpose of punishing the defendant for his having succeeded in getting his original conviction set aside. Where, as in each of the cases before us, the original conviction has been set aside because of a constitutional error, the imposition of such a punishment, 'penalizing those who choose to

exercise' constitutional rights, 'would be patently unconstitutional.' . . . But even if the first conviction has been set aside for nonconstitutional error, the imposition of a penalty upon the defendant for having successfully pursued a statutory right of appeal or collateral remedy would be no less a violation of due process of law. 'A new sentence, with enhanced punishment, based upon such a reason, would be a flagrant violation of the rights of the defendant.' . . . A court is 'without right to . . . put a price on an appeal. . . .' " (Citations omitted.) *Id.* at 723-24.

Under the decision in *Pearce* it is clearly improper for a trial court to sentence a defendant to a greater sentence after appeal and retrial simply because the defendant exercised his right to appeal.

It must be pointed out that the Court in *Pearce* also stated: "We hold, therefore, that neither the double jeopardy provision nor the Equal Protection Clause imposes an absolute bar to a more severe sentence upon reconviction. A trial judge is not constitutionally precluded, in other words, from imposing a new sentence, whether greater or less than the original sentence, in the light of events subsequent to the first trial that may have thrown new light upon the defendant's 'life, health, habits, conduct, and mental and moral propensities.' *Williams v. New York*, 337 U.S. 241, 245 [69 S. Ct. 1079, 93 L. Ed. 1337 (1949)]. Such information may come to the judge's attention from *evidence adduced at the second trial* itself, from a *new presentence investigation*, from the defendant's prison record, or possibly from other sources." (Emphasis supplied.) *Id.* at 723.

And, finally: "In order to assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identi-

fiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal." *Id.* at 726.

It seems, by the decision in *Pearce*, the trial court in its discretion could increase the defendant's sentence without violating his due process rights, if such action was justified by reasons affirmatively appearing in the record.

When sentencing the defendant after trial, the trial court made the following statements as to why the defendant's sentence was increased: "Mr. Beach, the perception the Court has in this case is considerably different than when you appeared here before. At that time you had pled guilty to assault with intent to commit first-degree sexual assault, and even though you protested it was the impression of the Court that you had as a matter of fact assaulted this 14-year-old girl with intent to commit statutory rape. However, after listening to the evidence, why, it's my opinion that you actually did rape her. I think that the evidence that was adduced would have supported a charge to go to the jury on the fact that you were guilty of first-degree sexual assault. The county attorney did you a great favor when he charged you with assault, with intent to commit first-degree sexual assault. This is greatly different than the perception that I had when I sentenced you before.

"In addition to that, you were given credit the time before for having pled guilty and having saved the State of Nebraska the time and the expense of having a jury trial. That is no longer true. So that you don't get credit for that saving of money that was present before.

"I do not feel that it would be possible to send you to jail with the situation here. I do not feel that you

would make an *adequate candidate for probation with the attitude that you have.* In addition to that, I feel that it would *depreciate the seriousness of the crime to place you on probation.*

"For all of those reasons, it is the judgment of the Court that you be, and you hereby are, sentenced to the Nebraska Penal and Correctional Complex for a period of one year at hard labor, Sundays and holidays excepted, and that you pay all costs of this prosecution. In addition to that, you are fined in the amount of $900.00. Solitary confinement is no part of this sentence, except for disciplinary reasona [sic] at that institution." (Emphasis supplied.)

As the discussion of the evidence adduced at trial shows, there is support in the record for the court's belief that not only did defendant attempt to sexually assault the prosecutrix but in fact completed the act of sexual assault.

After initially pleading guilty defendant was ordered committed for evaluation to the Department of Correctional Services for a period not to exceed 90 days. After that commitment the evaluation team concluded that incarceration of the defendant was not necessary; rather, they felt he needed long-term counseling. After trial a second presentence report was formulated. The evaluation in this report made a different recommendation: "This Officer has taken into consideration the Defendant's prior record, his stability in the community, the recommendation from the Nebraska Penal and Correctional Complex and also the Defendant's attitude towards the Present Offense in that he has not accepted any guilt in regards to the Present Offense and does not have any remorse. Also, this Officer has taken into consideration the severity of the Present Offense. It appears to this Officer that even though probation was recommended by the Nebraska Penal and Correctional Complex and even though there are certain factors in favor of probation, this Officer believes that anything less than incarceration would depreci-

ate from the seriousness of the offense. Probation is not recommended."

From the record it appears that the trial court's increase in the sentence of defendant was based upon matters which came to light from the evidence adduced at the second trial and on the second presentence report. Such matters as these are specifically provided in *Pearce* as proper bases for increasing a defendant's sentence after retrial. Therefore, we find this increase in sentence was properly within the discretion of the trial court.

Sexual assault in the first degree is defined in relevant part as "(1) Any person who subjects another person to sexual penetration and . . . (c) the actor is nineteen years of age or older and the victim is less than sixteen years of age is guilty of sexual assault in the first degree." Neb. Rev. Stat. § 28-319 (Reissue 1979). The defendant was 34 years of age in August of 1980. Subsection (2) of this statute classifies this offense as a Class II felony.

Neb. Rev. Stat. § 28-201(4)(b) (Reissue 1979) states that the attempt of a Class II felony is a Class III felony. Neb. Rev. Stat. § 28-105 (Reissue 1979) provides the penalty of a Class III felony to be a maximum of 20 years' imprisonment, or $25,000 fine, or both; minimum, 1 year's imprisonment.

The sentence imposed by the trial court is clearly within the statutory sentencing guidelines. As we have stated repeatedly in the past, " 'In the absence of an abuse of discretion by the trial court we will not disturb on appeal a sentence imposed within the statutory limits.' " *State v. Ellefson*, 214 Neb. 747, 754, 336 N.W.2d 88, 92 (1983). We find no abuse of discretion.

We find the sentence imposed by the trial court was within the proper discretionary limits of that court and therefore affirm the judgment and sentence of the trial court.

AFFIRMED.

SIDNEY FEDERAL SAVINGS & LOAN ASSOCIATION, A CORPORTION, APPELLEE, V. ARLO D. JONES ET AL., APPELLANTS, DALTON STATE BANK ET AL., APPELLEES.

337 N.W.2d 779

Filed August 12, 1983. No. 83-086.

1. **Contracts: Vendor and Vendee: Liens.** It is established in Nebraska law that a vendee under an executory land contract is entitled to an equitable lien for such amount which has been paid on the purchase price as against a subsequent creditor or purchaser from the vendors.
2. **Contracts: Vendor and Vendee: Damages.** In a case where performance of a land contract is frustrated by the act or neglect of the vendor, the measure of damages should be the recovery of amounts properly designated as principal and such amounts of interest and value of improvements as exceed the reasonable value of the use of the property.

Appeal from the District Court for Cheyenne County: JOHN D. KNAPP, Judge. Affirmed in part, and in part reversed and remanded with directions.

R. Kevin O'Donnell of McGinley, Lane, Mueller, O'Donnell & Merritt, for appellants.

Thomas M. Sonntag of John Peetz, P.C., for appellee ESU No. 14.

Paul E. Hofmeister of Van Steenberg, Brower, Chaloupka, Mullin & Holyoke, for appellee Dalton State Bank.

No appearance for appellee Sidney Federal Savings.

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

WHITE, J.

This is an appeal from the District Court for Cheyenne County, Nebraska, by appellants, Arlo D. Jones and Leora F. Jones, husband and wife, against appellee Sidney Federal Savings & Loan Association (Sidney Federal Savings), a corporation. The Dalton State Bank, while supportive of the position of

appellants in this case, is an appellee. The District Court determined that the Sidney Federal Savings' mortgage was the first lien on the subject real estate; that the appellee Educational Service Unit No. 14 of the State of Nebraska (ESU No. 14) was entitled to a second lien; and that the Dalton State Bank, Dalton, Nebraska, was entitled to a third lien on the subject real estate. We affirm in part, reverse in part, and remand with instructions.

An understanding of the facts is necessary for a determination of this action.

Arlo D. Jones and Leora F. Jones, as owners of certain real estate in Sidney, Nebraska, by contract agreed to sell the land to ESU No. 14. The land contract was recorded. In order to finance the construction of a building on the property to the design specifications of ESU No. 14, ESU No. 14 executed an agreement whereby it subordinated any priority that it may have been entitled to by reason of the prior execution of the land contract to a certain real estate mortgage executed by the owners, Arlo D. Jones and Leora F. Jones, on the subject property and other property in Sidney, Nebraska. The priority of the first mortgage to Sidney Federal Savings and the validity of the subordination agreement are not questions on appeal. Subsequent to the execution of the subordination agreement and the mortgage and note resulting therefrom, Arlo D. Jones and Leora F. Jones executed, as security for various notes due the Dalton State Bank, a mortgage to the said Dalton State Bank on the same property covered by the Sidney Federal Savings' mortgage. The amounts paid by ESU No. 14 pursuant to its contract of purchase are not disputed, nor is the amount due and owing the Dalton State Bank under various notes which are the subject of foreclosure. In determining the order of priority the court found that ESU No. 14 had an equitable vendee's lien for the total amount paid, including an amount designated as interest on both the land and building contracts.

It is that part of the finding to which the appeal by Arlo D. Jones and Leora F. Jones and the Dalton State Bank is directed. Although several errors are discussed, we shall discuss only the subject of the interest.

It is established in Nebraska law that a vendee under an executory land contract is entitled to an equitable lien for such amount which has been paid on the purchase price as against a subsequent creditor or purchaser from the vendors. *Robinson v. Bressler*, 122 Neb. 461, 240 N.W. 564 (1932). See Annot., 82 A.L.R.3d 1040 (1978). See, also, 92 C.J.S. *Vendor & Purchaser* § 556 d. (1955).

In this case the vendee, ESU No. 14, entered into two agreements with Arlo D. Jones and Leora F. Jones. The first of said agreements was dated November 22, 1971, and was for the purchase of the real estate in Block 19 of Clarkson's Second Addition to Sidney, Nebraska, and the second was an agreement whereby the appellants would erect a steel free-span structure to ESU No. 14 specifications. The second agreement was dated February 1, 1974, and provided that after May 1, 1974, ESU No. 14 should pay on the indebtedness the sum of $852.97 per month. The total indebtedness on both contracts was $123,076.55, and the parties agreed that the contracts as of May 1, 1974, had an unpaid balance of $94,800. To the date of trial ESU No. 14, for the entire period that it occupied the property, had paid $114,782.73, with $47,123.55 designated as principal and $67,659.18 as interest. The unpaid balance of both contracts bore interest at the rate of 9 percent, which the appellants agreed to pay to Sidney Federal Savings. It is undisputed in the record that ESU No. 14 had possession and benefit of the premises for 12 years before the foreclosure proceeding was instituted by Sidney Federal Savings. According to the teachings of *Robinson v. Bressler, supra*, a determination of the propriety of allowing interest payments to be added to an equitable lien ought to be connected with and

be set off against the reasonable value of the defendants' retention of possession of the property. As the court in *Robinson* said at 474, 240 N.W. at 569: "[I]t does not seem right that the plaintiffs should by any computation become chargeable for so much of an excess in favor of the defendants who during the time retained possession and received the rents and profits from the whole property." As between a creditor of, a purchaser from, or the vendor himself, a vendee under an executory land contract has made payments on the property but has also had exclusive possession and the right to use the property, and therefore an offset should be provided to such amount as against payments designated as interest. The amount of the setoff is determined by the reasonable value of the use of the property, which the trial court neglected to do in this case.

Although raised only obliquely by the issues of the case, the allegation by Dalton State Bank that it had a superior lien as against ESU No. 14 brings into issue all amounts claimed by ESU No. 14 as a superior lien to the property. As part of that necessary consideration, the trial court should have considered the value of the reasonable use of the property.

ESU No. 14 suggests there was no evidence as to the reasonable value of the use of the property presented by the appellants. We think the better rule is that in a case where performance of a land contract is frustrated by the act or neglect of the vendor, the measure of damages should be the recovery of amounts properly designated as principal and such amounts of interest and value of improvements as exceed the reasonable value of the use of the property. *Robinson v. Bressler, supra.*

We affirm in part, reverse in part, and remand for proceedings not inconsistent with this opinion.

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

SHANAHAN, J., not participating.

STATE OF NEBRASKA, APPELLEE, v. LYNN M. MOORE, APPELLANT.

337 N.W.2d 782

Filed August 12, 1983. No. 83-195.

Motor Vehicles: Licenses: Sentences. Upon conviction for second offense driving while his license has been suspended, the court shall order the defendant not to operate a motor vehicle for any purpose for a period of 2 years from the date of his final discharge from jail or payment or satisfaction of any fine imposed, whichever is later. Neb. Rev. Stat. § 60-430.01 (Cum. Supp. 1982).

Appeal from the District Court for Lincoln County: HUGH STUART, Judge. Judgment on count I affirmed. Sentence on count II vacated and the cause remanded for resentencing on count II.

Ronald A. Ruff, for appellant.

Paul L. Douglas, Attorney General, and Dale D. Brodkey, for appellee.

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

PER CURIAM.

Upon pleas of guilty to second offense drunken driving and second offense driving while under suspension, the defendant was sentenced to consecutive terms of 30 days in the county jail, with credit for 18 days' incarceration. His driver's license was suspended for 1 year after his release from jail. The pleas were a result of a plea bargain in which the State reduced the charge from third offense drunken driving to second offense.

He has appealed and contends the sentences were excessive.

The defendant is a rancher, 51 years of age. He has had five previous convictions for driving while under the influence of alcoholic liquor and has been sentenced to the penitentiary for breaking and entering and, on two occasions, for writing no-fund checks.

Although the defendant has made some efforts to

reform, and voluntarily placed himself in the Hot Springs, South Dakota, alcoholic treatment center for treatment for alcoholism, his record is such that the prior offenses can not be ignored. In view of his record the sentences were minimal and not excessive.

Neb. Rev. Stat. § 60-430.01 (Cum. Supp. 1982) provides that for second offense driving while his license has been suspended or revoked, the court shall order the defendant not to operate a motor vehicle for any purpose for a period of 2 years from the date of his final discharge from jail. The sentence in this case failed to conform to this requirement.

The judgment on count I is affirmed. The sentence on count II is vacated, and the cause remanded for resentencing.

JUDGMENT ON COUNT I AFFIRMED. SENTENCE ON COUNT II VACATED AND THE CAUSE REMANDED FOR SENTENCING ON COUNT II.

REGNEV, INC., APPELLANT, V. SHASTA BEVERAGES, INC., APPELLEE.

337 N.W.2d 783

Filed August 12, 1983. No. 83-226.

Summary Judgment. Where undisputed facts are reasonably susceptible of different and conflicting inferences or where the ultimate inferences to be drawn from those facts are not certain, summary judgment is not a proper disposition.

Appeal from the District Court for Douglas County: JOHN T. GRANT, Judge. Reversed and remanded.

Monte Taylor of Taylor, Hornstein, Peters & Kluver, for appellant.

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

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

SHANAHAN, J.

Regnev, Inc., appeals from a summary judgment entered in favor of Shasta Beverages, Inc. We reverse and remand.

Regnev's original petition stated in part that "on or about May 30, 1980, [the parties] entered into an express agreement wherein [Shasta] appointed [Regnev] as its representative for the distribution at wholesale of [Shasta's] line of nonalcoholic beverages . . . pursuant to a certain letter of appointment dated May 30, 1980, as expanded by a subsequent letter of appointment dated May 22, 1981." Shasta then filed and the court sustained a motion to make definite and certain, namely, that Regnev set forth the alleged contract between the parties by attaching a copy thereof to the petition. In its amended petition Regnev reiterated the allegation concerning an "express agreement" and the distributorship, but attached to the petition photostatic copies of the letters of May 30, 1980, and May 22, 1981, respectively. The letter of May 30, 1980, from Shasta to Regnev contained the following: "This letter is a follow up on the meeting between yourself and our Shasta Management team in Omaha.

"We are pleased that you are very enthusiastic about representing Shasta in many outlets we are now calling on . . . ." This letter then referred to the various accounts which were assigned to Regnev. The additional letter of May 22, 1981, referred to certain "military accounts" assigned to Regnev and a "redistribution fee" to be paid to Regnev regarding the military accounts. Shasta demurred to the petition, i.e., that the facts alleged in the amended petition did not state a cause of action. The demurrer was overruled and Shasta filed an answer (general denial). Shasta then filed a motion for summary judgment and alleged that "the pleadings demonstrate that the Franchise Practices Act . . . is not applicable and that there is no genuine issue of material fact and that defendant is entitled

to summary judgment of dismissal as a matter of law."

In response to the motion for summary judgment and based on the pleadings only, the trial court determined that the two letters appended to Regnev's petition constituted the entire agreement between the parties and that such agreement did not constitute a franchise agreement which "contemplates or requires the franchisee to establish or maintain a place of business within the State of Nebraska." See Neb. Rev. Stat. §§ 87-403(1) and 87-402(7) (Reissue 1981). The trial court granted summary judgment that any agreement between the parties was not within the purview of the Franchise Practices Act.

The Franchise Practices Act, Neb. Rev. Stat. §§ 87-401 et seq. (Reissue 1981), does not exclude an unwritten agreement regarding a franchise. The act specifically refers to "any arrangement, agreement, or contract, either expressed or implied . . . ." § 87-402(1). The problem in this case is created by Regnev's use of the phrase "pursuant to" in relation to certain letters from Shasta and the alleged franchise agreement. "Pursuant to" can mean "in the course of carrying out." Black's Law Dictionary 1112 (5th ed. 1979). If this interpretation is used, the allegation in question in Regnev's petition can be interpreted to mean "in carrying out the letters for distributorship, a franchise agreement was entered by the parties." The pleading is susceptible to the inference that there may be written documents regarding the distributorship, as reflected by the letters, and a contemporaneous or subsequent agreement with other basic, contractual terms for the franchise. These aspects of any agreement are not shown by the letters which Shasta claims set forth the entire agreement between the parties. There is some uncertainty whether the letters contain the entire agreement between the parties; whether the letters merely reflect an itemization of the accounts to

be serviced by Regnev in conjunction with a franchise agreement; and whether there may be some agreement contemporaneous with or subsequent to the initial letter of May 30, 1980, which refers to the accounts assigned to Regnev. Where the facts alleged are not in dispute but are susceptible of different and conflicting inferences, or where the ultimate inferences to be drawn from those facts are not certain, a summary judgment is not a proper disposition. The benefit of any doubt resulting from such varied inferences goes to the party resisting the motion. See, *Stolte v. Blackstone*, 213 Neb. 113, 328 N.W.2d 462 (1982); *McVey v. Discher*, 122 Ill. App. 2d 408, 259 N.E.2d 300 (1970). A motion for summary judgment is not intended to be a substitute for a motion to dismiss, a demurrer, or a motion for a judgment on the pleadings. See *Healy v. Metropolitan Utilities Dist.*, 158 Neb. 151, 62 N.W.2d 543 (1954).

Therefore, the judgment of the District Court is reversed and this matter is remanded for further proceedings.

REVERSED AND REMANDED.

ROBERT WAYNE TAUTFEST, APPELLANT, V. NANCY KAY TAUTFEST, APPELLEE.

338 N.W.2d 49

Filed August 26, 1983. No. 82-440.

1. **Child Custody: Appeal and Error.** A decree fixing custody of minor children will not be modified unless there has been a change of circumstances indicating that the person having custody is unfit for that purpose or that the best interests of the children require such action.
2. **Modification of Decree: Child Custody.** Under Neb. Rev. Stat. § 42-364 (Reissue 1978), the trial court on its own motion may make subsequent changes or modifications in a decree of dissolution of a

marriage in relation to any minor children and their maintenance when required, but only after notice to the parties and an opportunity to be heard.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Affirmed in part, and in part reversed and remanded with directions.

Miles W. Johnston, Jr., of Johnston, Barber & Wherry, for appellant.

Roy A. Sheaff and John F. Sheaff of Sheaff Law Offices, for appellee.

MCCOWN, CAPORALE, and SHANAHAN, JJ., and BRODKEY, J., Retired, and COLWELL, D.J., Retired.

COLWELL, D.J., Retired.

Robert Wayne Tautfest, petitioner, appeals a child custody modification order awarding physical custody of his daughter, Amy Jo Tautfest, born March 10, 1978, to Henry and Judy Lambert, maternal grandparents. The original decree of October 8, 1979, awarded custody to the mother, Nancy Kay Tautfest, respondent-appellee.

A summary of the pleadings is necessary. On October 30, 1980, Robert filed his application for custody of Amy, alleging that she was in the custody and care of Henry and Judy Lambert, that there were changed circumstances of both parents, and that the best interests of Amy required awarding her custody to Robert. The prayer was for permanent custody. Robert served notice on Nancy and on Henry and Judy Lambert. Nancy's answer denied the allegations and alleged that Robert was unfit, that Nancy and Amy lived with Nancy's parents, Henry and Judy Lambert, and that for Amy's best interests she should remain in that living environment. Nancy and the Lamberts filed their joint counterapplication alleging that Robert was unfit, that Nancy and Amy have lived in the Lambert home for an extended period, and that for Amy's

best interests she should be left in that environment under their joint custody. The prayer was for joint custody and equitable relief. Robert filed no responsive pleading; the issues were tried as if he had filed a general denial, and we will so consider it. Robert made no objection to the Lamberts' intervention; however, they are proper parties. *Harris v. Harris*, 151 Neb. 191, 36 N.W.2d 849 (1949).

The modification decree granted reasonable visitation to Nancy and particular visitation times to Robert. No findings were made as to fitness or change of circumstances of the parents. Nancy did not appeal, and no issue is made that her parental custodial rights are in conflict with the claims of her parents.

Robert assigns as error that (1) there was no evidence of either his unfitness or his forfeiture of parental rights and (2) the best interests of Amy would be served by awarding her custody to him.

There is little creditable dispute of the facts. Following the dissolution, Nancy established a home with Amy in Lincoln, Nebraska. She was employed. In July 1980 she began a live-in arrangement with Jerry Hollandsworth; at the insistence of the Lamberts, Amy went to live with them at their home, 4000 South 35th Street, Lincoln, Nebraska, where Amy remains. Robert continued his visitation privileges. Nancy regularly visited the Lambert home and assisted in Amy's care until October 1980 when she and Jerry went to Las Vegas, Nevada, where they were married. They returned to Lincoln in December 1980.

Robert ceased making his $100 monthly child support payments in September 1980; the total delinquency was $1,700; he claimed that he deposited the child support money in a savings account for Amy, but this was not verified. The Lamberts have furnished all of Amy's financial support. Nancy supported herself and Jerry. Nancy separated from Jerry and moved to the Lambert home in July 1981.

Nancy and Jerry were divorced in 1981. A child born of that marriage was relinquished for adoption. The Lamberts own a four-bedroom home; Henry has a good work record as a tilesetter. Robert has a speech defect that limits his job opportunities; he has remarried. Neither Robert nor his wife has a record of regular employment. Robert's parents help support them. Nancy relies upon the Lamberts for guidance and assistance in the rearing of Amy; however, she controls and supervises Amy's needs and care. Mrs. Lambert testified, "Nancy takes full responsibility of Amy. She does all of Amy's feeding, her bath. She gets along real good with all of us. We all work together with her . . . ." Nancy intends to complete some additional nursing training, and when she is able to support herself she will establish her own home with Amy. A custody investigator's report dated June 22, 1981, recommended that the custody of Amy remain with the Lamberts. An update report of April 16, 1982, makes no recommendations; however, it confirms the evidence that Nancy assumed the care of her child and that she intended to move from the Lambert home.

"When dissolution of a marriage . . . is decreed, the court may include such orders in relation to any minor children and their maintenance as shall be justified, including placing the minor children in the custody of the court or third parties . . . . Custody and visitation of minor children shall be determined on the basis of their best interests. Subsequent changes may be made by the court *after hearing on such notice* as prescribed by the court." (Emphasis supplied.) Neb. Rev. Stat. § 42-364 (Reissue 1978).

We review these proceedings de novo, Neb. Rev. Stat. § 25-1925 (Reissue 1979), and reach independent conclusions on the issues presented. *Campbell v. Campbell*, 202 Neb. 575, 276 N.W.2d 220 (1979).

"A decree fixing custody of minor children will not be modified unless there has been a change of circumstances indicating that the person having cus-

tody is unfit for that purpose or that the best interests of the children require such action." (Syllabus of the court.) *Ahlman v. Ahlman*, 201 Neb. 273, 267 N.W.2d 521 (1978).

We first consider Robert's application. The evidence shows that there have been some changes in the circumstances of both parents since the dissolution decree; however, such evidence does not support a finding of either unfitness of either parent or forfeiture of rights, or that the best interests of Amy would be served by awarding her custody to Robert. Robert failed to pay child support, and except for a few months Amy has been living with her mother in the Lambert home where Amy received very good care and supervision, although the Lambert support and strong family guidance are factors. Robert's application for custody was properly denied.

Robert's appeal primarily objects to the award of physical custody to the grandparents, arguing that such is contrary to *Nielsen v. Nielsen*, 207 Neb. 141, 296 N.W.2d 483 (1980). We conclude that it is not necessary to consider *Nielsen*; rather, we dispose of that issue on procedural grounds not assigned. Generally, this court only considers errors assigned and discussed; however, by statute and court rule we may note plain error not assigned. Neb. Rev. Stat. § 25-1919 (Reissue 1979); Neb. Ct. R. 9D(1)d (Rev. 1982); *Cockle v. Cockle*, 204 Neb. 88, 281 N.W.2d 392 (1979).

"Under section 42-364, R. S. Supp., 1974, the trial court on its own motion may make subsequent changes or modifications in a decree of dissolution of a marriage in relation to any minor children and their maintenance when required, *but only after notice* to the parties and an opportunity to be heard." (Emphasis supplied.) *Francis v. Francis*, 195 Neb. 417, 421, 238 N.W.2d 468, 470 (1976).

The counterapplication alleged and prayed only that the custody of Amy should be awarded to the applicants "jointly." All of their supporting evi-

dence on that issue was directed to their joint custody. Further, it was a temporary plan until Nancy could support herself.

The only evidence in the record concerning the award of custody to the Lamberts was elicited by the judge: "THE COURT: Would you be willing for you and your husband to have custody of Amy Jo without your daughter having joint custody? THE WITNESS [Judy Lambert]: If that is the way we could have it, yes, but we would like it with her." There was no notice to Robert that there was an issue of the award of physical custody to the grandparents. Robert was entitled to such a notice. Under those circumstances, it was plain error for the court to award physical custody to the Lamberts. The award of physical custody of Amy to the Lamberts is set aside.

From our further de novo review of the counterapplication, we find that Amy's best interests are being served with Nancy as the custodial parent, utilizing the home, financial support, and strong family influences of the Lamberts. The award of joint custody to Nancy and her parents would neither change nor strengthen the original custody order. The counterapplication is dismissed, and the decree of dissolution of October 8, 1979, relating to child custody is reinstated.

Visitation is an issue within the pleadings. The change of the particular times for Robert's visitation is fair and for Amy's best interests, *Heyne v. Kucirek*, 203 Neb. 59, 277 N.W.2d 439 (1979), and that part of the modification order is affirmed.

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

BRODKEY, J., Retired, dissenting.

I must respectfully dissent from the majority opinion. The hearing in this case was held upon the petition filed by Robert Wayne Tautfest, the father, seeking custody of his child Amy Jo, and on the counterapplication of Nancy Kay Tautfest and her

parents, Henry and Judy Lambert, seeking joint custody of Amy Jo. The trial court awarded custody to the Lamberts, but not to Nancy Kay Tautfest. The majority contends that since the counterapplication was made by both Nancy Kay and the Lamberts, the court had no power to award the custody of Amy Jo separately to the Lamberts in view of the provision of Neb. Rev. Stat. § 42-364 (Reissue 1978), which provides that changes in custody may be made by the court after a hearing on such notice as prescribed by the court. In other words, the majority would appear to contend that since the counterapplication was filed by them jointly, the court cannot consider the parties separately and award custody to only one of them. This, to my way of thinking, is a hypertechnical approach and does not solve the problem presented in this appeal. It should also be remembered that marriage dissolution cases, including child custody aspects thereof, are equitable in nature, and equity powers are broad enough to permit the fashioning of a just result without being thwarted by hypertechnical matters.

A careful review of the record in this case convinces me that the best interests of Amy Jo would be served, at least for the time being, by having the custody of Amy Jo remain in the Lamberts, her grandparents, who have been supplying the financial necessities for the support of Amy Jo, and also guidance and counseling. If and when the mother, Nancy Kay Tautfest, completes her education and is prepared to go out into the world and establish a home of her own, and has demonstrated the capacity to support and take care of Amy Jo, then there would be such a change in circumstances that would entitle her to apply for a change in custody of Amy Jo to her. We have held that the judgment concerning the custody of children is necessarily quite subjective in nature and that many factors may be considered in light of the particular circumstances of each individual case; also, that in evaluating the

general concept of the best interests and welfare of the children, great weight will be given to the fact that the trial judge saw and observed the witnesses. *Whitlatch v. Whitlatch*, 206 Neb. 527, 293 N.W.2d 856 (1980). The trial court in this case saw and observed the witnesses and, I am convinced, reached the right result. I would affirm.

WILLIAM P. HARRIS AND EVELYN P. HARRIS, APPELLEES, V. VIOLA EBERHARDT, APPELLANT.

338 N.W.2d 53

Filed August 26, 1983. No. 82-484.

1. **Small Claims Court.** The entire matter in small claims court is on a very informal basis, with a minimum of procedural requirements.
2. **Small Claims Court: Pleadings: Appeal and Error.** Inasmuch as no specific theories of recovery are required to be pleaded in small claims court, that court's decision must be affirmed by the District Court if it can be founded on any theory supported by the evidence.
3. **Pleadings: Waiver.** A general appearance waives any defects in the process or notice, the steps preliminary to its issuance, or in the service or return thereof.

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

W. G. Whitford, for appellant.

No appearance for appellees.

BOSLAUGH, WHITE, and HASTINGS, JJ., and BROWER and MCGINN, D. JJ.

PER CURIAM.

The plaintiffs, William and Evelyn Harris, instituted an action in the small claims court of Madison County, asking judgment in the sum of $1,000 on the ground that "defendant refuses to release savings of plaintiffs." The claim was based on the allegation that the defendant had not returned all of the money which had been entrusted to her by the plaintiff

William Harris. After a trial, at which the parties appeared, the small claims court determined that of the $1,654 placed in confidence with the defendant, she had not returned $874. On appeal the District Court, hearing the case de novo, found that the defendant had not returned $854, and entered judgment accordingly. We affirm.

The defendant has assigned two points of error on appeal to this court. First, the defendant contends that the small claims court and the District Court erred in proceeding on a complaint for money damages which did not state a cause of action.

The entire matter in small claims court is on a very informal basis, with a minimum of procedural requirements. *State ex rel. Simpson v. Vondrasek*, 203 Neb. 693, 279 N.W.2d 860 (1979). Neb. Rev. Stat. § 24-526 (Reissue 1979) provides that "No formal pleadings other than the claim and notice, and the counterclaim or setoff and notice, if appropriate, shall be required in the Small Claims Court . . . ."

This court's holding in *Fuchser v. Jacobson*, 205 Neb. 786, 290 N.W.2d 449 (1980), is pertinent here. In that decision we held that "Inasmuch as no specific theories of recovery are required to be pleaded in Small Claims Court, that court's decision must be affirmed by the District Court if it can be founded on any theory supported by the evidence." *Id.* at 788, 290 N.W.2d at 451. We believe the evidence amply supported the court's finding.

Second, the defendant argues that the small claims court lacked the necessary jurisdiction to try the case, since the mail receipt of the notice was not signed by the defendant. Neb. Rev. Stat. § 24-524(3) (Reissue 1979) provides that "Service by mail shall be complete upon return to the court of the receipt signed by the defendant . . . ."

In this case, however, the defendant did not challenge the sufficiency of the notice before the small claims court, but participated fully on the merits of her cause. These acts constituted a general appear-

ance before that tribunal. *Abel v. Southwest Cas. Ins. Co.*, 182 Neb. 605, 156 N.W.2d 166 (1968); *Ivaldy v. Ivaldy*, 157 Neb. 204, 59 N.W.2d 373 (1953).

This court has long adhered to the general rule that "A general appearance waives any defects in the process or notice, the steps preliminary to its issuance, or in the service or return thereof." 6 C.J.S. *Appearances* § 41 at 67 (1975); *White v. Merriam*, 16 Neb. 96, 19 N.W. 703 (1884); *Cropsey v. Wiggenhorn*, 3 Neb. 108 (1873).

As the Supreme Court of Arkansas said in *Pender v. McKee*, 266 Ark. 18, 35, 582 S.W.2d 929, 938 (1979), "Any defect in the process, the return thereon or the service thereof is cured or waived by the appearance of the defendant without raising an objection, and he is precluded from thereafter taking advantage of the defect." It is immaterial that the defendant was ignorant of the irregularity which rendered the process ineffective. 5 Am. Jur. 2d *Appearance* § 7 (1962).

For the reasons stated above, the decision of the District Court must be affirmed.

AFFIRMED.

LARRY KRANCE, DOING BUSINESS AS KRANCE GRAIN AND LIVESTOCK CO., ET AL., APPELLEES AND CROSS-APPELLANTS, V. WENDELL L. FAEH, APPELLANT AND CROSS-APPELLEE.

338 N.W.2d 55

Filed August 26, 1983. No. 82-486.

1. **Landlord and Tenant.** The same rules apply to a sublessor-sublessee relationship as are applicable to a lessor-lessee relationship.
2. **Landlord and Tenant: Words and Phrases.** A lease is a species of contract for the possession and profits of land and tenements, either for life or for a certain period of time, or during the pleasure of the parties, and the essential elements of a contract must be present.
3. _____: _____. A lease is a hiring or renting of land for a certain time upon a named consideration.

4. _____: _____. The categories of tenant and invitee are by definition mutually exclusive.
5. **Landlord and Tenant.** The rule of caveat emptor applies to leases of real estate, wherein the control passes to the lessee, and, in the absence of fraud, deceit, or concealment, the duty devolves upon the lessee to examine the premises with respect to suitability for his business and with respect to safety.
6. **Landlord and Tenant: Liability.** A landlord is not liable to his tenant for any defects existing in the demised premises at the time of the lease that are perceptible to the senses or that can be discovered by reasonable inspection or examination.
7. _____: _____. A lessor of land who conceals or fails to disclose to his lessee any condition, whether natural or artificial, which involves unreasonable risk of physical harm to persons on the land, is subject to liability to the lessee and others upon the land with the consent of the lessee or his sublessee for physical harm caused by the condition after the lessee has taken possession, if (a) the lessee does not know or have reason to know of the condition or the risk involved and (b) the lessor knows or has reason to know of the condition, and realizes or should realize the risk involved, and has reason to expect that the lessee will not discover the condition or realize the risk.

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

Daniel M. Placzek of Luebs, Dowding, Beltzer, Leininger, Smith & Busick, for appellant.

Michael L. Jeffrey and John C. Hahn of Jeffrey, Jeffrey, Hahn & Hemmerling, P.C., for appellees.

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

BOSLAUGH, J.

This was an action to recover damages for injury to cattle caused by the ingestion of Dyfonate, a highly toxic insecticide.

The defendant, Wendell L. Faeh, is the lessee of an 80-acre tract of farmland in Merrick County, Nebraska. In 1979 he raised corn on approximately 76 acres of the land. The remainder of the tract was occupied by turnrows, a shelterbelt, and two old gravel pits. The plaintiffs operate a cattle feeding

business. Late in 1979 the plaintiffs arranged with the defendant to run cattle upon the corn ground for $2.50 per acre.

In February 1980 the plaintiffs placed 300 head of their cattle upon the defendant's land. Prior to this time, one of the plaintiffs and his men had erected electric fences on the land. The fences extended into and enclosed the turnrows and a part of the shelterbelt area adjacent to the corn ground. Several days after the cattle had been placed on the land, five or six cattle were found dead. A bag of Dyfonate was discovered in some weeds in the area between the cornfield and the shelterbelt. The bag had been trampled open and a part of the contents consumed by the cattle. Twenty-three cattle died as a result of Dyfonate poisoning. Other cattle recovered following treatment by a veterinarian.

The second amended petition alleged four theories of recovery. The case was submitted to the jury on theories of negligence and strict liability. The jury returned a general verdict for the plaintiffs in the amount of $11,311.40.

The defendant has appealed. The principal assignments of error relate to the sufficiency of the evidence to sustain the judgment and the instructions to the jury.

Although the plaintiffs' brief requests that the judgment be affirmed, they have filed a cross-appeal. The plaintiffs allege that the trial court should have instructed the jury to determine the contractual relationship between the parties and that the trial court should have instructed the jury as a matter of law that the relationship between the parties was that of business invitor-invitee.

Instruction No. 2 read in part as follows: "Defendant Faeh leased the premises involved in this action to the plaintiffs. If you find all of the following conditions true:

"1. There was a condition on the premises which

involved an unreasonable risk of harm to the plaintiffs' cattle."

The trial court correctly instructed the jury that as to the land leased by the plaintiffs, the relationship between the parties was that of lessor and lessee. Although in fact the defendant was a sublessor and the plaintiffs were sublessees, the same rules apply to this relationship as are applicable to a lessor-lessee relationship. See 49 Am. Jur. 2d *Landlord and Tenant* § 503 (1970).

The trial court was correct in finding as a matter of law that a lessor-lessee relationship existed between the parties. We said in *Johnson v. City of Lincoln*, 174 Neb. 837, 846, 120 N.W.2d 297, 303 (1963): " 'A lease is a species of contract for the possession and profits of land and tenements, either for life, or for a certain period of time, or during the pleasure of the parties; and the essential elements of a contract must be present,' " quoting 51 C.J.S. *Landlord & Tenant* § 202 b. (1947).

In *Hampton v. Struve*, 160 Neb. 305, 70 N.W.2d 74 (1955), we held that a lease is a hiring or renting of land for a certain time upon a named consideration.

The evidence shows that the plaintiffs paid the defendant $2.50 per acre for the right to enter the property, erect fences upon it, and place their cattle upon the property for grazing. It was undisputed that the cattle could remain upon the ground until the ground thawed. No other conclusion can be reached but that the agreement between the parties amounted to a lease.

When reasonable minds can draw but one conclusion from the facts, the trial court must decide the issue as a matter of law and not submit it to a jury. *Feola v. Valmont Industries, Inc.*, 208 Neb. 527, 304 N.W.2d 377 (1981). Therefore, it was not error for the court to instruct the jury that a lease existed between the parties.

The trial court did not err in refusing to instruct the jury as to the duties of a landowner or occupier

to a business invitee. The categories of tenant and invitee are by definition mutually exclusive. See the definitions given in *Roan v. Bruckner*, 180 Neb. 399, 143 N.W.2d 108 (1966).

There is no direct evidence as to how the bag of Dyfonate happened to be left upon the property. The defendant testified that he had used Dyfonate on this field in 1978. The defendant had farmed several farms in both 1978 and 1979 and he was unsure whether he had used Dyfonate on this particular ground in 1979. Sales invoices from a local supplier indicated he had purchased Dyfonate in both 1978 and 1979.

Although the petition alleged and the answer admitted that the plaintiffs had leased from the defendant the entire 260 acres farmed by the defendant, there is some uncertainty in the record as to the exact area leased by the plaintiffs. The defendant testified that he relied on ASCS measurements in determining the number of acres involved in the agreement. Those measurements do not include the turnrows or shelterbelt. The plaintiffs paid for the use of the corn ground only. The defendant did not expressly prohibit the use of the turnrows and shelterbelt, but testified that he did not expect the plaintiffs to use them. Krance, one of the plaintiffs, testified that a part of the shelterbelt was fenced in so as to provide protection for the cattle in the event of a snowstorm.

The defendant contends that it was error for the trial court to instruct the jury that he, as landlord, had a duty to warn the plaintiffs of a condition which presented an unreasonable risk of harm and of which he or his employees knew or "should have known." The defendant argues that a landlord must warn only of conditions of which he has actual knowledge.

The rules governing the duties owed by a landlord to his tenant have been set forth in several cases. " ' "The rule of *caveat emptor* applies to leases of

real estate, wherein the control passes to the lessee, and, in the absence of fraud, deceit or concealment, the duty devolves upon the lessee to examine the premises with respect to suitability for his business and with respect to safety." ' " *Gehrke v. General Theatre Corp.*, 207 Neb. 301, 304, 298 N.W.2d 773, 775 (1980), quoting *Van Avery v. Platte Valley Land & Investment Co.*, 133 Neb. 314, 275 N.W. 288 (1937). See, also, *Roberts v. Rogers*, 129 Neb. 298, 261 N.W. 354 (1935).

" 'A landlord is not liable to his tenant for any defects existing in the demised premises at the time of the lease that are perceptible to the senses or that can be discovered by reasonable inspection or examination.' " *Roan v. Bruckner*, *supra* at 403, 143 N.W.2d at 111, quoting *Roberts v. Rogers*, *supra*.

Thus, a landlord has no liability for injuries sustained as a result of dangers existing prior to the lease and which were obvious or which should have been discovered upon reasonable investigation by the tenant. A recognized exception to this rule involves "latent defects," that is, one " 'which reasonably careful inspection will not reveal; one which could not have been discovered by inspection.' " *Roberts v. Rogers, supra* at 303, 261 N.W. at 357. "A lessor's duty with respect to latent defects is only to advise the prospective lessee of any such *known* defects, not to repair them." (Emphasis supplied.) *Gehrke v. General Theatre Corp.*, *supra* at 304-05, 298 N.W.2d at 775.

This exception is set forth in Restatement (Second) of Torts § 358 at 243 (1965), as follows: "(1) A lessor of land who conceals or fails to disclose to his lessee any condition, whether natural or artificial, which involves unreasonable risk of physical harm to persons on the land, is subject to liability to the lessee and others upon the land with the consent of the lessee or his sublessee for physical harm caused by the condition after the lessee has taken possession, if

"(a) the lessee does not know or have reason to know of the condition or the risk involved, and

"(b) the lessor knows or has reason to know of the condition, and realizes or should realize the risk involved, and has reason to expect that the lessee will not discover the condition or realize the risk."

While the rule embodied in the Restatement does not adopt an ordinary negligence standard with regard to the lessor's knowledge of the risk involved, neither does it limit a lessor's liability to situations in which he has actual knowledge of the presence of a latent, dangerous condition. Rather, the rule would impose liability for failure to disclose upon the landlord who has knowledge of facts which would lead him to conclude that an unreasonably dangerous, latent defect exists on his property. Enlightenment upon this point is provided in Comment b. to § 358 at 244: "It is not, however, necessary that the vendor have actual knowledge of the condition, or that he be in fact aware that it involves an unreasonable risk of physical harm to persons on the land. It is enough that he has reason to know that the condition exists, as that phrase is defined in § 12(1)—that is, that he has information from which a person of reasonable intelligence, or of his own superior intelligence, would infer that the condition exists, or would govern his conduct on the assumption that it does exist, and in addition would realize that its existence will involve an unreasonable risk of physical harm to persons on the land.

"The lessor must also have reason to believe that the lessee will not discover the condition, or that he will not realize the risk. The lessor is under no duty to warn the lessee of a condition which he reasonably believes that the lessee will discover, or of the extent of the risk involved in an obvious condition, unless he should realize that the lessee is unlikely to appreciate it." See *Lapp v. Rogers*, 265 Or. 586, 510 P.2d 551 (1973), in which § 358 is adopted. See, also,

Richards v. Dahl, 289 Or. 747, 618 P.2d 418 (1980), in which the Restatement rule is cited.

The evidence is that when the cattle were placed in the field there were several inches of snow on the ground. The Dyfonate was in a weedy area, but near areas where both the defendant and plaintiffs had been.

The instruction holding the landlord to a "should have known" standard with regard to his duty to disclose was erroneous, and the instruction should have been phrased in accordance with the language of the Restatement.

The trial court also instructed the jury in part as follows: "The defendant, Wendell Faeh, was carrying on an ultra-hazardous activity if you find that he abandoned Dyfonate, a dangerous instrumentality and toxic chemical, in the field without properly disposing of the same. If you so find he abandoned the Dyfonate, he is liable to the plaintiff [sic], Christensen Cattle Company and Larry Krance, d/b/a Krance Grain and Livestock Company, *however high a degree of care he may have exercised.*" (Emphasis supplied.)

This instruction made the defendant strictly liable for any foreseeable injury caused by his use of Dyfonate, as it was an "ultrahazardous activity." The instruction was erroneous in several respects and should not have been given.

The relationship between the parties was that of lessor-lessee. The only duties owed by the defendant to the plaintiffs were those traditionally owed by a landlord, and which have been detailed above. "The largest single area in which the concept of 'duty' has operated as a limitation upon liability has concerned owners and occupiers of land." W. Prosser, Handbook of the Law of Torts § 57 at 351 (4th ed. 1971). A lease is regarded as the sale of the premises for a term. *Id.* at § 63. Whether the defendant was liable for the presence of a defective

condition upon the land leased had to be determined by the rules appropriate to the relationship created by the lease.

There were issues of fact to be determined by the jury, and the defendant was not entitled to a directed verdict.

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

REVERSED AND REMANDED FOR A NEW TRIAL.

WHITE and SHANAHAN, JJ., concurring.

We concur only for a reason not discussed by the majority.

The trial court found as a matter of law that the appellees were lessees of that part of the appellant's land where the Dyfonate was located. The appellant contends that the site of the Dyfonate is outside the area leased to the appellees. There was evidence to support appellant's assertion. The relationship of the parties determines the rights and duties arising from the use or occupancy of the land. The nature of the relationship should have been submitted to the jury, and it was error not to do so.

JAMES CLARKE, APPELLEE, V. THE BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF OMAHA, IN THE COUNTY OF DOUGLAS, IN THE STATE OF NEBRASKA, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLANT.

338 N.W.2d 272

Filed September 2, 1983. No. 44537.

1. **Schools and School Districts: Words and Phrases.** An act of "immorality" within the meaning of Neb. Rev. Stat. § 79-1260 (Reissue 1981) must be an act which directly relates to a teacher's fitness to teach.
2. **Words and Phrases.** "Immorality" is not necessarily confined to matters sexual in their nature. In a given context the word may be construed to encircle acts which are contra bonos mores, inconsistent with rectitude and the standards of conscience and

good morals. Its synonyms are: corrupt, indecent, depraved, dissolute; and its antonyms are: decent, upright, good, right.

3. _____. The term "immoral" has been defined generally as that which is hostile to the welfare of the general public and contrary to good morals. Immorality has not been confined to sexual matters, but includes conduct inconsistent with rectitude, or indicative of corruption, indecency, depravity, and dissoluteness; or as willful, flagrant, or shameless conduct showing moral indifference to the opinions of respectable members of the community, and as an inconsiderate attitude toward good order and the public welfare.

4. **Schools and School Districts: Words and Phrases.** A teacher commits an immoral act within the meaning of Neb. Rev. Stat. § 79-1260 (Reissue 1981) when he calls several black students in a racially mixed class "dumb niggers."

Appeal from the District Court for Douglas County: D. NICK CAPORALE, Judge. Reversed and remanded with directions.

David M. Pedersen of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, for appellant.

Theodore L. Kessner of Crosby, Guenzel, Davis, Kessner & Kuester, for appellee.

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

KRIVOSHA, C.J.

Appellant, Board of Education of the School District of Omaha (Board), a Class V school district, appeals from an order entered by the District Court for Douglas County, Nebraska, reversing the action of the Board in terminating the employment of one of its permanent teachers, James Clarke. In determining the propriety of the Board's action in terminating Clarke, we must determine whether the act of a teacher calling black students in a racially mixed class "dumb niggers" constitutes "immorality" within the meaning of Neb. Rev. Stat. § 79-1260 (Reissue 1981). The trial court, in reversing the action of the Board, found that Clarke's conduct was insensitive, intemperate, and deplorable, but did not descend to the level of immorality. While we agree completely with the trial court that Clarke's conduct

was indeed insensitive, intemperate, and deplorable, we likewise believe that it was immoral within the meaning of § 79-1260, and therefore we must reverse the action of the trial court.

The facts in the case are without dispute. Clarke admitted in writing that while conducting a racially mixed class at McMillan Junior High School on February 24, 1981, he said to several of his black students, who admittedly had been disruptive, "How many times a day do I have to ask you dumb niggers to stop playing around, stop talking and get to work?" Clarke obviously recognized that his statements were inappropriate because, again according to his own written statement, at the conclusion of the class he apologized to the rest of the class, saying, "I am sorry that the rest of the class, especially the three young ladies present, had to listen to this." The following day, Clarke had a further altercation with one of the black students, in which he kicked the chair out from under the student and invited the student to take a swing at him, saying, again according to his written statement, "I wish you would swing at me because then I would have to defent [sic] myself and I would just love to make a black grease spot out of him [sic] on the floor." Both of these events were brought to the attention of the school administration, which confronted Clarke about the events. Clarke admitted to the principal that he had in fact made the statements alleged by the students. In his written statement Clarke conceded that his conduct and comments were inappropriate.

On March 2, 1981, Dr. Ronald Anderson, the assistant superintendent in charge of personnel, suspended Clarke with pay, pending a complete review of the situation. On March 6, 1981, Dr. Anderson, by letter, informed Clarke that he would recommend to the Board the termination of Clarke's teaching contract. Clarke requested a hearing by the Board, which was granted and which took place on March

27, 1981. At that hearing the superintendent of schools took the position that Clarke should be terminated immediately on the ground of immorality. The Board agreed and voted to terminate Clarke's employment immediately for "immorality."

The controversy exists because of restrictions the Legislature has imposed upon the immediate discharge of permanent teachers such as Clarke. Section 79-1260 provides as follows: "Nothing contained in this section shall prevent the suspension from duty of a permanent teacher in a fourth or fifth class school district, pending a decision on the cancellation of his contract. Cancellation of an indefinite contract may be made for (1) incompetency; (2) physical disability or sickness of any type which interferes with the performance of duty; (3) insubordination, which shall be deemed to mean a willful refusal to obey the school laws of this state, the rulings of the State Board of Education, or reasonable rules and regulations prescribed for the government of the schools of the district by the school board; (4) neglect of duty; (5) immorality; (6) failure to give evidence of professional growth; or (7) justifiable decrease in the number of teaching positions or other good and just cause, but may not be made for political or personal reasons. When the cause of cancellation of an indefinite contract is for immorality or insubordination, the cancellation shall go into effect immediately. For all other causes cancellation shall take effect at the end of the current school term. The decision of a school board to cancel an indefinite contract shall be final."

Under the statute the Board could terminate Clarke's contract for a variety of reasons at the end of his current school year but would be required to pay him for the balance of the year even if he did not teach. An immediate termination, however, could be made only for "immorality" or "insubordination." The Board chose not to rely upon "insubordination" but, rather, upon "immorality," and there-

fore the sole issue presented to us is whether Clarke's actions were "immoral" within the meaning of the statute in question so as to justify immediate termination.

The Board argues that this being an error proceeding, the District Court, in reversing the Board's action, failed to give appropriate weight to the Board's determination that Clarke's conduct was immoral. Generally, in a proceeding in error such as this the order of the administrative body must be affirmed if it acted within its jurisdiction and there is some competent evidence to support its findings. *Kennedy v. Board of Education*, 210 Neb. 274, 314 N.W.2d 14 (1981); *Caniglia v. City of Omaha*, 210 Neb. 404, 315 N.W.2d 241 (1982). However, the District Court was required to determine whether the action of the Board was taken in accordance with law. *Hollingsworth v. Board of Education*, 208 Neb. 350, 303 N.W.2d 506 (1981). In this case the interpretation of the statutory term "immorality" presented a question of law which the District Court was required to determine. See *The 20's, Inc. v. Nebraska Liquor Control Commission*, 190 Neb. 761, 212 N.W.2d 344 (1973). On appeal, therefore, we are still required to determine whether Clarke's actions in the classroom constituted "immorality" within the meaning of § 79-1260.

In attempting to undertake this task we are not unmindful that we move out into dangerous and uncharted waters. Attempting to determine the limits of a term such as "immoral" is not an easy one. It may be suggested by some that no one, not even a court, should attempt to impose upon others his definition of what is moral or immoral. To accept such an argument would make our task perhaps easier, but would result in this court refusing to accept its responsibility. That we cannot do. In a large measure the task presented to us here is somewhat similar to that which courts have faced when called upon to determine the meaning of the term "obscene."

Therefore, the process by which we must determine what is immoral in a given situation is very much like the process we use to determine what is obscene in a given situation, and, as noted by Mr. Justice Stewart in his concurring opinion in *Jacobellis v. Ohio*, 378 U.S. 184, 84 S. Ct. 1676, 12 L. Ed. 2d 793 (1964), may be difficult to define but is obvious on sight.

There is no question that the task presented to us would be made much easier if the Legislature had defined "immorality" as it did "insubordination," when it adopted § 79-1260. Undoubtedly, it did not define the term because, as we have difficulty, so too did it have difficulty in prescribing a limited definition. It is for that reason that we wish to make it clear that our decision here today is not intended to provide an all-inclusive, broad, and general definition of the term "immorality," either generally or within the meaning of § 79-1260, but, rather, only to determine whether, under the facts in this case, Clarke's action was in fact immoral within the meaning of § 79-1260. In attempting to arrive at that answer we must take into account the specific facts presented to us in this case. We must take into account the fact that the school district involved in this case was under a court order to desegregate, and in fact had formally adopted a policy statement on December 3, 1979, which imposed upon all those associated with the Omaha public schools—students, staff, and the general citizenry—certain affirmative obligations. They were in part: "That there be demonstrated, at all times, a respect for others regardless of race, religion, sex, creed, age, personal well being or economic status." Further, "That language of any kind which is disparaging or demeaning to others shall not be tolerated, such as racial, religious, or sexist epithets." The policy statement further called upon staff and students alike to exhibit mature good judgment, respect and sensitivity for others, and warned that violations of the statement would result in disciplinary action being taken,

including termination from duty.

Clarke was aware that this was the avowed position of the school district. And yet, with that policy in mind, Clarke nevertheless, in the presence of a racially mixed class, referred to black students as "dumb niggers." That the statement violated the policy of the school district is without question. We likewise believe that it was immoral within the meaning of § 79-1260. We reach that conclusion not just because the language embarrassed and humiliated the black students but because it likewise instructed the white students, by example, that black students could be referred to as "dumb niggers," when in fact they could not. In referring to black students as "dumb niggers," Clarke was teaching white students present in the classroom that it was not inappropriate to refer to blacks as "dumb niggers."

. Clarke attempts to explain what he meant by using the term, but his explanation fails. By definition, the term "nigger" is an offensive form of the word "Negro," and is used generally to refer to a black person in a derogatory manner. See Webster's Third New International Dictionary, Unabridged 1968. The term, when used by anyone in referring to a black, is, as the trial court suggested, insensitive, intemperate, and deplorable. But when used by a teacher in the classroom, in the presence of students, it is much more. To "teach" means to show how; to accustom to some action or attitude; to direct, to instruct; to train by precept, example, or experience. See, Webster's Third New International Dictionary, *supra*; 85 C.J.S. *Teach* at 1123 (1954); *Ex Parte Bernat*, 255 F. 429 (W.D. Wash. 1918).

As pointed out by the California Supreme Court in the case of *Board of Education v. Swan*, 41 Cal. 2d 546, 552, 261 P.2d 261, 265 (1953): "A teacher . . . in the public school system is regarded by the public and pupils in the light of an exemplar, whose words

and actions are likely to be followed by the children coming under her care and protection." See, also, *Pettit v. State Board of Education*, 10 Cal. 3d 29, 513 P.2d 889, 109 Cal. Rptr. 665 (1973).

As we have suggested, under these circumstances, it sets an example for others to follow, and as such affects the teacher's ability to teach. Therefore, it becomes immoral within the meaning of § 79-1260.

While § 79-1260 does not limit the act of immorality, we believe it must be read to mean that the act of "immorality" must be directly related to a teacher's fitness to teach. See, *Weissman v. Bd. of Educ.*, 190 Colo. 414, 547 P.2d 1267 (1976); *Morrison v. State Board of Education*, 1 Cal. 3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1969); *Erb v. Iowa State Board of Public Instruction*, 216 N.W.2d 339 (Iowa 1974); *Wright v. Superintending Sch. Com., City of Portland*, 331 A.2d 640 (Me. 1975); *In Re Tenure Hearing of Grossman*, 127 N.J. Super. 13, 316 A.2d 39 (1974); *Mtr. of Jerry v. Board of Educ., Syracuse*, 35 N.Y.2d 534, 324 N.E.2d 106, 364 N.Y.S.2d 440 (1974).

While we may not be able to fully and finally define immorality within § 79-1260, we can state that in order for a teacher's conduct to be immoral within § 79-1260 such conduct must be directly related to a teacher's ability to teach, and indicate an unfitness to do so.

The question, more succinctly stated, is whether it is immoral for a teacher to teach white students that it is all right to engage in conduct which is humiliating, painful, and harmful to individuals, which subjects a class of people to public disdain and ridicule, and which is in violation of rules and regulations adopted by the Board for the purpose of putting an end to racial discrimination. Of necessity, such action must be considered to be immoral, just as if Clarke had instructed the students how to cheat on an examination.

To suggest, as urged by Clarke, that immorality within the meaning of § 79-1260 refers to acts involving only physical sexual behavior is to fail to rec-

ognize the very function of a teacher or the meaning of immoral. Immorality has a broader, more encompassing meaning. Webster's Third New International Dictionary, *supra* at 1130, defines "immoral" as "not moral : inconsistent with purity or good morals : contrary to conscience or moral law." In the case of *In re Schneider*, 12 N.J. Super. 449, 458, 79 A.2d 865, 870 (1951), the New Jersey court, in defining immorality, said: " 'Immorality' is not necessarily confined to matters sexual in their nature. In a given context the word may be construed to encircle acts which are *contra bonos mores*, inconsistent with rectitude and the standards of conscience and good morals. Its synonyms are: corrupt, indecent, depraved, dissolute; and its antonyms are: decent, upright, good, right."

In several cases involving immorality as a basis for termination of a teacher's contract, courts have adopted the following definition: " ' "The term 'immoral' has been defined generally as that which is hostile to the welfare of the general public and contrary to good morals. Immorality has not been confined to sexual matters, but includes conduct inconsistent with rectitude, or indicative of corruption, indecency, depravity, dissoluteness; or as wilful, flagrant, or shameless conduct showing moral indifference to the opinions of respectable members of the community, and as an inconsiderate attitude toward good order and the public welfare." ' " *Palo Verde etc. Sch. Dist. v. Hensey*, 9 Cal. App. 3d 967, 972, 88 Cal. Rptr. 570, 573 (1970). See, *Golden v. Board of Ed. of County of Harrison*, 285 S.E.2d 665 (W. Va. 1981); *Board of Education v. Weiland*, 179 Cal. App. 2d 808, 4 Cal. Rptr. 286 (1960). Immorality is defined in 42 C.J.S. *Immorality* at 396 (1944) as follows: "An immoral act or practice; any act or practice which contravenes the Divine commands or the social duties; conduct inconsistent with moral rectitude; the state or quality of being immoral; that which is 'contra bonos mores;' hence, specifically,

unchastity, vice, or wickedness. The term is not necessarily restricted to matters sexual in their nature; but may refer to any course of conduct which offends the moral sense of the community."

And in *Horosko v. Mt. Pl't Twp. S. Dist et al.*, 335 Penn. 369, 372, 6 A.2d 866, 868 (1939), the Pennsylvania Supreme Court defined "immorality," as it pertained to a teacher, as follows: "We hold it to be self evident that, under the intent and meaning of the [school code], immorality is not essentially confined to a deviation from sex morality; it may be such a course of conduct as offends the morals of the community and is a bad example to the youth whose ideals a teacher is supposed to foster and to elevate." See, also, *Orloff v. Los Angeles Turf Club*, 36 Cal. 2d 734, 227 P.2d 449 (1951).

In the case of *Bovino v. Bd. of Sch. Directors of Ind. Area*, 32 Pa. Commw. 105, 377 A.2d 1284 (1977), the Pennsylvania Commonwealth Court held that a teacher who referred to a student as a "slut" and "prostitute" in the presence of other students committed an immoral act within the meaning of their tenured teachers act. In doing so the court said: "Bovino, as is readily discernible from the evidence, called the young female student a 'slut' and 'prostitute.' This language offends the morals of the community and certainly is conduct which does little to foster and elevate the ideals and healthy attitudes the teacher should instill in his students. Such statements are crude and ill-advised when used by a teacher in a public school environment. Thus, we conclude that the determination made by the Secretary that the statements were immoral is well-founded." *Id.* at _____, 377 A.2d at 1288.

It is difficult to imagine how one can argue in this day and age, in view of the efforts made to eliminate discrimination in this country, that statements by a teacher in referring to black students as "dumb niggers" do not offend the morals of the community. As noted by the Supreme Court of Minnesota in the

case of *City of Minneapolis v. Richardson*, 307 Minn. 80, 88-89, 239 N.W.2d 197, 203 (1976): "We cannot regard use of the term 'nigger' in reference to a black youth as anything but discrimination against that youth based on his race. . . . When a racial epithet is used to refer to a person of that race, an adverse distinction is implied between that person and other persons not of his race. The use of the term 'nigger' has no place in the civil treatment of a citizen by a public official." If, indeed, the use of such words does not constitute immorality, we are in greater danger as a country than some even suggest. Laws against discrimination have as their very foundation the notion that it is immoral to racially discriminate against another human, either by deed or by word.

While much to our regret there may have been a time in our history when it was thought appropriate for us to refer to each other as "kikes" or "wops" or "shanty Irish" or "niggers," thankfully we have overcome that disgrace. And those who insist on making such words a part of their vocabulary must be labeled by the public as immoral. For us to take any other position would be to condone such words and action, which no member of this society, let alone a court, should do. Silent indifference to racial discrimination is as much a threat to our society as racial discrimination itself. Either act is immoral in the broader sense.

As noted by the late philosopher and theologian, Abraham Joshua Heschel: "Few of us seem to realize how insidious, how radical, how universal and evil racism is. Few of us realize that racism is man's gravest threat to man, the maximum of hatred for a minimum of reason, the maximum of cruelty for a minimum of thinking." Heschel, *The Religious Basis of Equality of Opportunity—The Segregation of God*, in Race, Challenge to Religion 56 (M. Ahmann ed. 1963). And, as noted by the bishops of the Roman Catholic Church in the United States in their pastoral letter on racism, Brothers and Sisters

to Us 2, 10 (Nov. 14, 1979): "Every form of discrimination against individuals and groups—whether because of race, ethnicity, religion, gender, economic status, or national or cultural origin—is a serious injustice which has severely weakened our social fabric and deprived our country of the unique contributions of many of our citizens.

. . . .

"As individuals we should try to influence the attitudes of others by expressly rejecting racial stereotypes, racial slurs and racial jokes. We should influence the members of our families, especially our children, to be sensitive to the authentic human values and cultural contributions of each racial grouping in our country."

Whatever may be said concerning the population generally is only magnified when dealing with teachers, who, by example, permanently mold the minds of future citizens.

It is apparent that in singling out immorality and insubordination as two grounds for immediate discharge, while limiting all others to discharge at the end of the school year, the Legislature recognized the important differences. Few would argue that calling young black students in a racially mixed classroom "dumb niggers" is not indecent and shameless conduct showing moral indifference to the opinions of respectable members of the community, and as such offends the moral sense of the community, or that such behavior does not directly affect the teacher's fitness to teach. The acts therefore fit the definition of immoral within the obvious meaning of § 79-1260.

There is no doubt that were we able to declare a broad, all-inclusive definition of immoral, it might be better. But it is apparent that, as in the case of obscenity, immorality will have to be determined on a case-by-case basis. While we may not be able to define all that it is within § 79-1260, we are able to say that the actions of Clarke in this case constituted

immorality and that the Board was correct both in its determination and in its action. For reasons stated herein, the judgment of the trial court is reversed and the cause remanded with instructions to reinstate the action of the Board in terminating Clarke's employment immediately.

REVERSED AND REMANDED WITH DIRECTIONS.

SHANAHAN, J., concurring.

I concur that the judgment of the District Court must be reversed and that the action of the Board of Education terminating Clarke's contract must be reinstated.

The issue in this case is whether Clarke's conduct is immoral. This conduct consists of a teacher's racial epithets in a public school, that is, referring to pupils as "dumb niggers" and offering to make a "black grease spot" out of a seventh grade student. Such conduct must be evaluated apart from any policy promulgated by the Board of Education, because Clarke is not charged with insubordination and the Board's policy by itself is not a standard of morality.

Chief Judge Virgil Pittman of the U.S. District Court, Southern District of Alabama, placed *nigger* in societal perspective: "Because of the history of servitude and discrimination against the blacks, the rightfully emerging recognition of their individual dignity, and their pride of race, many blacks are extremely sensitive when whites use this term in any sense." *Allen v. City of Mobile*, 331 F. Supp. 1134, 1145 (S.D. Ala. 1971).

We must, however, assess the teacher's conduct by some standard other than the sensitivity of one who is the object of the racial slur. We have such a standard—one as old as our country itself—namely: "We hold these truths to be self-evident, that all men are created equal . . . ." That truth, acknowledged by the Founding Fathers, has to be more than some revered relic dusted off annually which, like the fireworks of the Fourth, fades into national obscurity

and is relegated to the recesses of American amnesia. In this case the verbal assault is a page from a racist's handbook: pigmentation determines a person's essential qualities such as intelligence and diminishes or restricts a human being's capabilities. The principle of human equality self-evident in 1776 is still valid and perhaps more vital today. If we forget our past, we must wonder about our future.

As a teacher, Clarke had the duty of educating his students. The etymology of *educate* requires that a teacher bring forth what is good for the students individually and for society collectively. In *Goldsmith v. Board of Education*, 66 Cal. App. 157, 168, 225 P. 783, 787 (1924), the role of a teacher was described as " 'so intimate, its duties so delicate, the things in which a teacher might prove unworthy or would fail are so numerous that they are incapable of enumeration in any legislative enactment. . . . His ability to inspire children and to govern them, his power as a teacher, and the character for which he stands are matters of major concern in a teacher's selection and retention.' "

Courts have for some time evaluated the conduct of individuals in terms of good faith, bad faith, or similar criteria. In order to warn against proscribed conduct, courts have also defined *immorality*. "Immorality" is that which is " 'hostile to [the] welfare of the general public.' " See *Warkentin v. Kleinwachter*, 166 Okla. 218, 221, 27 P.2d 160, 163 (1933). *Immoral* has been defined as " 'that which is hostile to the welfare of the general public . . . an inconsiderate attitude toward good order and the public welfare.' " *Board of Education v. Weiland*, 179 Cal. App. 2d 808, 811, 4 Cal. Rptr. 286, 288 (1960); *Board of Trustees v. Hartman*, 246 Cal. App. 2d 756, 55 Cal. Rptr. 144 (1966); *Palo Verde etc. Sch. Dist. v. Hensey*, 9 Cal. App. 3d 967, 88 Cal. Rptr. 570 (1970). Immoral conduct has been described as " 'an act or acts of a nature likely to jeopardize the interest of the public.' " *Lieberman v. Board of Examiners in*

Optometry, 130 Conn. 344, 346, 34 A.2d 213, 214 (1943). It strains imagination that there could be conduct more hostile to the general welfare of society than that found in the present case.

Clarke's conduct did not occur in a vacuum. His actions took place in a racially integrated classroom of a public school. As expressed in *Schenck v. United States*, 249 U.S. 47, 52, 39 S. Ct. 247, 63 L. Ed. 470 (1919), "the character of every act depends upon the circumstances in which it is done." Here, in the course of a disagreement with a black student, Clarke's threat to make a "black grease spot" out of a student intensified the violent act of kicking a chair from beneath the pupil. Such unjustified force can hardly be envisioned under any law, civil or moral, as the proper resolution of any dispute. If unprovoked violence and brutal coercion are means to settle differences, then our society has indeed taken a step backward on its trek toward becoming a more perfect system.

The terms *moral* and *immoral* are contradictories; they are mutually exclusive and have no middle ground. Clarke's very conduct under the circumstances is a definition of immorality. The mind boggles at characterizing Clarke's conduct as moral. Justice Holmes in *Schenck* issued the injunction that none shall falsely shout "fire" in a theater. Analogously, no teacher shall yell "nigger" in a racially integrated public school.

The words of George Moore are most appropriate: "After all there is but one race—humanity."

HASTINGS, J., joins in this concurrence.

MCCOWN, J., dissenting.

The majority opinion contains an eloquent discussion of morality and immorality in an ideal society. The case at hand needs to be placed in proper perspective.

In this case no one questions that Clarke's conduct justified termination of his employment. The conduct was unprofessional and violated a specific pol-

icy statement adopted by the school board and imposed upon the teaching staff. Neither is there any doubt that the school board could have suspended Clarke and removed him from duty so long as it continued the payment of his salary.

Neb. Rev. Stat. § 79-1260 (Reissue 1981) authorizes cancellation of a tenured teacher's contract on eight specific grounds. Only when the cause of cancellation of an indefinite contract is for "immorality" or "insubordination" may the obligation to employ and pay salary be canceled before "the end of the current school term." The word "insubordination" is specifically defined in the statute. "Immorality" stands alone without any definition. "Immorality" is the only cause relied on by the board to justify the immediate termination of Clarke's employment and salary.

The only real question in this case is whether or not a tenured teacher who addresses black students in a racially mixed class as "niggers" is guilty of "immorality" within the meaning of § 79-1260 so as to justify immediate termination of employment and of any obligation to pay salary for the balance of the current school term. This court has now held that it does.

There can be no doubt that the imposition of a criminal fine or penalty for immorality under the circumstances here would be unconstitutional because of the fact that the word "immorality" standing alone is vague, indefinite, and uncertain. Even a noncriminal statute is unconstitutionally vague under the due process clause of the fifth or fourteenth amendments when its language does not convey sufficiently definite warning as to the proscribed conduct when measured by common understanding or practice. See, *Arnett v. Kennedy*, 416 U.S. 134, 94 S. Ct. 1633, 40 L. Ed. 2d 15 (1974); *Keyishian v. Board of Regents*, 385 U.S. 589, 87 S. Ct. 675, 17 L. Ed. 2d 629 (1967).

A noncriminal statute is fatally vague where the

exaction of obedience to a rule or standard is so vague and indefinite as really to be no rule or standard at all, or where the standard is written in such terms that "men of common intelligence must necessarily guess at its meaning and differ as to its application . . . ." *Connally v. General Const. Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926).

The "conduct" which constituted "immorality" in this case consisted of a teacher using one word, "niggers," to describe and address students. The use of that word by a teacher in a classroom context is the "conduct" which the school board asserts constituted "immorality" sufficient to terminate the teacher's employment and salary immediately.

No person, regardless of the degree of his or her intelligence, could reasonably be expected to know that the use of one unspecified word by a teacher to describe and address students in a classroom might be "conduct" constituting "immorality." Much less could any person be reasonably expected to know which word or words might constitute immorality when uttered because the use of those words in a classroom was generally regarded as immoral conduct by a school board or a community. Such a standard is literally no standard at all and obviously varies from community to community, from school board to school board, and from court to court. If a particular word used by a teacher to describe and address students in a classroom is to be classified as moral or immoral, depending upon community standards, there is virtually no way that a teacher can determine which words are proscribed and which words are not. If the use of one unspecified word is immoral in the classroom, then the use of many other words is also immoral, without regard to whether the word itself is moral or immoral, or neither. The results will vary as widely as individual views of morality.

There is no evidence in this record as to which words are regarded as moral or immoral when used

by a teacher in a classroom in any community in Nebraska. The standard of morality may and does vary from community to community. Immorality is a broad term which means widely different things to different people. As the majority opinion points out, pornography may not be readily definable, but it can be recognized when you see it. By analogy it might be said that the majority opinion expresses the view that "immorality" may not be readily definable but it can be recognized when you hear it. The standard is equally vague. If pornography is in the eyes of the beholder, then immorality is in the ears of the hearer in the present context.

It is essential that "immorality" be defined so that it presents a workable, objective standard before the salary of a teacher should be forfeited because an "immoral" word was used in the classroom. This court cannot, under the guise of interpretation, assume to fill in definitions which the Legislature did not spell out. For us to hold, as the majority has now done, that a tenured teacher who addresses black students in a racially mixed class as "niggers" commits an immoral act within the meaning of § 79-1260 in effect has clothed the courts of this state with the power not only to decide what constitutes an immoral act or an immoral word within the concept of a community's accepted standards but also gives courts the power to determine exactly what the accepted standards of morality or immorality in each of the school districts of this state should be.

Traditionally, teachers were held to higher moral standards than society generally. The majority opinion continues that practice. Teachers are entitled to the same constitutional protections afforded to all citizens. In the present case the school board had the right to terminate Clarke's employment. The school board did not have the right to cancel his contract and terminate his salary prior to the end of the 1980-81 school term.

Clarke was guilty of conduct which was "insensitive, intemperate, and deplorable." The use of the deplorable word was also offensive, derogatory, and racist, and it was obviously unprofessional and in violation of direct policy statements of the board. Nevertheless, it did not constitute "immorality" within the meaning of the statute.

The Constitution protects the individual against the tyranny of the majority, whether the majority is the moral majority or the immoral majority. An attempt to ban the use of unspecified words by a teacher in the classroom in the name of morality, under penalty of loss of employment and pay, strikes at the very heart of constitutional liberty.

Clarke's conduct was not "immorality" within the meaning of § 79-1260 so as to authorize immediate termination of his employment and salary by the school board. The judgment of the trial court was eminently correct and should have been affirmed.

BOSLAUGH, J., joins in this dissent.

L. J. VONTZ CONSTRUCTION COMPANY, A NEBRASKA CORPORATION, APPELLEE, V. ALLIANCE INDUSTRIES, INC., A CORPORATION, AND ALLIANCE ELECTRIC COMPANY, DOING BUSINESS AS DAVIS ENGINEERING, A CORPORATION, APPELLANTS.

338 N.W.2d 60

Filed September 2, 1983. No. 82-406.

1. **Witnesses.** A party has the right to cross-examine the witnesses produced by his adversary touching every relation tending to show their interest or bias.
2. **Witnesses: Appeal and Error.** A party has the right to cross-examine a witness with regard to an interest which affects credibility. Failure to permit such inquiry constitutes reversible error if prejudice results to the complaining party.
3. **Witnesses: Evidence.** Evidence relating to a "Mary Carter" agreement should be admitted where the agreement bears upon the bias and credibility of witnesses employed by a party to the agreement.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Reversed and remanded.

John A. Rickerson of Rickerson & Welch, for appellants.

Dennis E. Martin and Edward F. Pohren of Dwyer, O'Leary & Martin, P.C., for appellee.

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

MCCOWN, J.

This is an action to recover damages allegedly sustained by the plaintiff as a result of the breach of express and implied warranties in connection with the purchase and sale of an asphalt mix plant manufactured and distributed by the two defendants. A jury returned a verdict of $755,000 in favor of the plaintiff and the defendants have appealed.

On February 5, 1976, the plaintiff, L. J. Vontz Construction Company, placed an order with T. S. McShane Co., Inc. (McShane), for an asphalt mix plant. McShane, in turn, placed the order with Asphalt Equipment Company, Inc. (Asphalt), which was a distributor of asphalt plants. Asphalt, in turn, placed an order for the basic asphalt mix plant with the defendant Alliance Industries, Inc. (Industries), except certain auxiliary equipment which Asphalt was to furnish. Industries was the distributor of asphalt plants for the defendant Alliance Electric Company (Electric), which was the manufacturer of the plant components.

The total price of the asphalt plant from McShane to the plaintiff was $220,375, $37,400 of which was for a generator and lime storage bin not provided by the Alliance defendants.

The plant was scheduled for delivery in the spring of 1976 but did not arrive at the plaintiff's yard until July 1976. There were difficulties in erecting the plant at the site of an old plant owned by plaintiff and the erection was not completed until August 26, 1976.

The plaintiff was not satisfied with the plant's operation and on December 26, 1976, gave notice to McShane, Asphalt, and Industries that the plant was unsatisfactory and that plaintiff intended to seek damages.

The plaintiff thereafter made repairs to the plant and it operated with some success during the 1977 paving season. In 1978 the problems with the plant recurred and plaintiff decided to purchase a new plant, which was purchased in early 1979.

Plaintiff filed suits against McShane, Asphalt, and the Alliance defendants, the initial petition having been filed in March 1977.

In May 1979 the plaintiff executed a "Covenant Not To Execute" with McShane and Asphalt. The agreement provided that in consideration of a payment of $5,000 from McShane and Asphalt to the plaintiff, the plaintiff would not execute against McShane or Asphalt on any judgment that plaintiff might obtain against them in the actions pending against them and the defendants in this case. The agreement also provided that Asphalt and McShane agreed to pursue vigorously their third-party complaints against the defendants in this case through trial, judgment, and execution and that any net proceeds collected on such claims would be remitted to the plaintiff.

The plaintiff filed its fifth amended petition in this action against the Alliance defendants, Industries and Electric, on April 9, 1982. The petition alleged that the defendants in this case breached express and implied warranties and that the plant was generally defective and unsuitable for its intended use. Plaintiff prayed for actual, incidental, and consequential damages, including the diminished value of the plant, repair costs, liquidated damages, and penalties incurred by the plaintiff because of its inability to complete contracts on time, and for loss of profits.

The defendants' answer denied plaintiff's allega-

tions of negligence or breach of warranties, and alleged that plaintiff misused the asphalt plant and was guilty of negligence and contributory negligence in its use, and that the damages alleged were an improper measure of damages and plaintiff was not entitled to recover any consequential damages.

Trial was had to a jury in April 1982. At the trial T. C. Jones, president of McShane, and A. M. Shurtz, vice president of Asphalt, each of whom had signed the covenant not to execute on behalf of his respective company, were called as witnesses for the plaintiff. The trial court refused to allow the defendants to introduce the covenant not to execute or to examine the witnesses on cross-examination with respect to the agreement. The jury returned a verdict of $755,000 in favor of the plaintiff and the defendants have appealed.

Among numerous assignments of error the defendants contend that the trial court erred in refusing to admit into evidence the covenant not to execute and in refusing to permit the defendants to cross-examine Jones and Shurtz with respect to that agreement.

The defendants argue that the covenant was a "Mary Carter" agreement which gave McShane and Asphalt a direct interest in the action, which affected the credibility of Jones and Shurtz, the corporate officers of McShane and Asphalt, who testified for the plaintiff and against these defendants.

Jones and Shurtz testified at trial as to the type and extent of defects in the asphalt plant, the nature and extent of the express and implied warranties given by the defendants, and as to the agency relationship existing between Industries and Electric. The covenant, signed by Jones and Shurtz, not only provided that Asphalt and McShane would vigorously pursue their third-party complaints against these defendants, but also provided that McShane and Asphalt would remit to the plaintiff the proceeds received to the extent of the amount of the plaintiff's

judgment against them, less the value of McShane's counterclaim and the $5,000 paid as consideration for the covenant not to execute. In the event that McShane and Asphalt did not receive sufficient funds in their third-party claims against the defendants to defray the entire amount of the plaintiff's judgment against them, less McShane's counterclaim and the $5,000, then McShane and Asphalt would remit to the plaintiff the entire amount received on their third-party claims.

In addition to the issues directly testified to by Jones and Shurtz, there were sharply contested issues in the case as to the extent of the damages and the duty to mitigate such damages and the time when the duty to mitigate damages arose.

Matters which affected the credibility of Jones and Shurtz were critical, and the court's refusal to admit the covenant and denial of cross-examination with respect to it were prejudicial. A party has the right to cross-examine the witnesses produced by his adversary touching every relation tending to show their interest or bias. A party has the right to cross-examine a witness with regard to an interest which affects credibility. Failure to permit such inquiry constitutes reversible error if prejudice results to the complaining party. *Hegarty v. Campbell Soup Co.*, 214 Neb. 716, 335 N.W.2d 758 (1983).

Clearly, the covenant not to execute in this case was a "Mary Carter" agreement and it created an interest in the action on the part of McShane and Asphalt and on the part of their corporate officer witnesses who testified as to the defendant's liability and the amount of damages suffered by the plaintiff.

This court has recently held that evidence relating to a "Mary Carter" agreement should be admitted where the agreement bears upon the bias and credibility of witnesses employed by a party to the agreement. *Hegarty v. Campbell Soup Co.*, *supra*. That holding applies a fortiori to the present case where Jones and Shurtz were not only employees of a party

to the agreement but were also corporate officers and the actual signatories of the agreement itself.

The covenant not to execute bore directly upon the bias and credibility of the witnesses as to several critical issues at trial. The trial court erred in refusing to admit the covenant into evidence and in refusing to permit cross-examination of Jones and Shurtz as to the terms of the agreement. The error was clearly prejudicial and requires reversal.

In view of the disposition made, it is unnecessary to consider the defendants' remaining assignments of error.

The judgment of the District Court is reversed and the cause is remanded to the District Court.

REVERSED AND REMANDED.

KRIVOSHA, C.J., concurs in the result.

STATE OF NEBRASKA, APPELLEE, V. CHARLES JESS PALMER, ALSO KNOWN AS CHARLES TINSLEY, ALSO KNOWN AS J. R. KIRKPATRICK, APPELLANT.

338 N.W.2d 281

Filed September 9, 1983. No. 82-548.

1. **Statutes.** In the construction of a statute which is clear and unambiguous, courts cannot supply missing language, and it is not within the court's power to read into a statute meaning which the clear language of the statute does not warrant.
2. _____. Where the language of the statute is plain and unambiguous, no interpretation is needed, and a court is without authority to change such language.
3. **Divorce: Marriage: Appeal and Error.** In an appeal to the Supreme Court from a decree of dissolution, the marital status continues until a final determination is had.
4. **Divorce: Marriage: Witnesses.** During the period after rendition of the decree and before a divorce becomes effective to change the status of the parties, the parties are husband and wife with respect to their competency to testify for or against each other.

Appeal from the District Court for Hall County: RICHARD L. DEBACKER, Judge. Reversed and remanded for a new trial.

John A. Wolf and David Bush, for appellant.

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

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

KRIVOSHA, C.J.

The appellant, Charles Jess Palmer (Palmer), appeals from a jury verdict finding him guilty of felony murder, in violation of the provisions of Neb. Rev. Stat. § 28-303(2) (Reissue 1979), and from the subsequent sentence of death imposed by the trial court. This is the second appearance of this case before this court. See *State v. Palmer*, 210 Neb. 206, 313 N.W.2d 648 (1981) (*Palmer I*). The facts of the case are fully set out in *Palmer I* and for purposes of this appeal need not be repeated here.

Palmer has assigned some 26 alleged errors which he maintains entitle him to a reversal of his conviction. We need not consider all of the errors, because if one of his assigned errors, that the trial court erred in permitting his "former wife," Cheri Palmer, to testify against him, in violation of Neb. Rev. Stat. § 27-505(2) (Reissue 1979), is correct, then we are required by law to once again order a new trial in the case. We have examined the record and find that indeed the trial court did err in permitting Cheri Palmer to testify; therefore, we must reverse the conviction.

Mrs. Palmer did not testify in the first case. This was obviously due to the fact that the Palmers were then still married and she was precluded by the provisions of § 27-505(2), which provide: "During the existence of the marriage, a husband and wife can in no criminal case be a witness against the other. This privilege may be waived only with the consent of both spouses."

The record discloses that on February 24, 1982, following our decision in *Palmer I*, Mrs. Palmer filed

suit for divorce in the Travis County District Court located in Austin, Texas. A decree of divorce was entered by the Travis County District Court on May 12, 1982. On May 25, 1982, the State requested the court to grant a continuance of the Palmer murder trial because, apparently, prosecutors intended to call Mrs. Palmer as a witness but, believing that Palmer would appeal the divorce decree, anticipated that Mrs. Palmer would be ineligible to testify. The trial court denied the continuance and ordered the case to trial. On May 25, 1982, Palmer filed a motion for new trial in the Travis County District Court. On June 8, 1982, when Cheri Palmer testified in the District Court for Hall County, Nebraska, the motion for new trial in the divorce case was still pending in the Texas court; and even without the motion for new trial, this was within the 30-day period after the decree, during which the parties were barred from remarriage. On July 29, 1982, the trial court in Texas overruled the motion for new trial and Palmer filed an appeal with the Texas Court of Civil Appeals. According to the record presently before us, that appeal is still pending.

The question then specifically presented to us is whether Charles Palmer and Cheri Palmer were still husband and wife on June 8, 1982, when Mrs. Palmer testified against Palmer. If they were husband and wife on June 8, 1982, § 27-505(2) clearly precluded Cheri Palmer from testifying without Palmer's consent. One may argue that the underlying basis for the husband and wife privilege no longer existed in this case and therefore the statute should be so interpreted as to permit Cheri Palmer's testimony. This court, however, is without authority to do that. As we have previously noted, in the construction of a statute which is clear and unambiguous, courts cannot supply missing language, and it is not within the court's power to read into a statute meaning which the clear language of the statute does not warrant. See *Omaha Public Schools*

v. Hall, 211 Neb. 618, 319 N.W.2d 730 (1982). Moreover, where the language of the statute is plain and unambiguous, no interpretation is needed, and a court is without authority to change such language. See *State v. Schneckloth, Koger, and Heathman*, 210 Neb. 144, 313 N.W.2d 438 (1981). The Legislature, in adopting § 27-505(2), has barred the testimony of one spouse against another in a criminal case, except as specifically exempted, and we are powerless to ignore its direction.

While at first blush it may appear important to determine which law, Texas or Nebraska, should be applied in determining whether the divorce decree was final and therefore the Palmers no longer spouses, on closer examination it appears to make little difference, because, under either law, the divorce was not final. The law in both Texas and Nebraska seems clear that the relationship of husband and wife continued certainly while the motion for new trial was pending and during the time of appeal. Texas has on two specific occasions directly responded to this question. In the case of *Davis v. The State*, 96 Tex. Crim. 367, 257 S.W. 1099 (1924), the Texas Court of Criminal Appeals reversed a murder conviction because the defendant's wife, who had been granted a divorce, testified on behalf of the State at the trial which occurred while the divorce was pending on appeal. Specifically, the Texas Court of Criminal Appeals held that while a divorce was pending on appeal the wife could not testify against her husband. The rule in *Davis* was reaffirmed by the Texas Court of Criminal Appeals in *Acker v. State*, 421 S.W.2d 398 (Tex. Crim. 1967). As in the *Davis* case, Acker, the defendant, was charged with murder. Shortly after the case was set for trial, the State requested a continuance on the grounds that the only eyewitness, the defendant's wife, was presently in the process of obtaining a divorce so that she might testify against him. When the motion for continuance was overruled, the

State dismissed the criminal charges. The defendant's wife subsequently divorced him and the charges were later refiled. However, at the time of the defendant's criminal trial, the divorce case was pending in a Texas Court of Civil Appeals. The trial court overruled the defendant's motion in limine, as well as his objections at the time of trial to any testimony by his wife. In reversing the defendant's conviction the Texas appeals court specifically concluded that after rendition of a decree of divorce but before the divorce became effective to change the status of the parties, they are husband and wife with respect to their competency to testify against one another. Specifically, the Texas court held that the pendency of the appeal precluded the divorce from becoming effective so as to change the status of the parties. See, also, *Ex Parte J. C. Hodges*, 130 Tex. 280, 109 S.W.2d 964 (1937).

The Texas rule is consistent with the general rule. In 97 C.J.S. *Witnesses* § 80 at 474-75 (1957), the author notes: "Where a decree of divorce is not final, as where there is a writ of error pending, the status of husband and wife continues as far as concerns their competency to testify. During the period after rendition of the decree and before a divorce becomes effective to change the status of the parties, the parties are husband and wife with respect to their competency to testify for or against each other."

While it appears that Nebraska has never directly passed upon this question, it would appear that the laws regarding divorce in Nebraska are such that a similar rule would apply. Neb. Rev. Stat. § 42-372 (Reissue 1978) specifically provides in part: "A decree dissolving a marriage shall not become final *or operative* until six months after the decree is rendered, except for the purpose of review by appeal, and for such purpose only the decree shall be treated as a final order as soon as rendered. If an appeal is instituted within one month, such decree shall not

become final until such proceedings are finally determined. If no such proceedings have been instituted, the court may, at any time within such six months, vacate or modify its decree." (Emphasis supplied.) Furthermore, we have consistently held that in an appeal to the Supreme Court from a decree of dissolution, the marital status continues until a final determination is had. *Lippincott v. Lippincott*, 141 Neb. 186, 3 N.W.2d 207 (1942); *Westphalen v. Westphalen*, 115 Neb. 217, 212 N.W. 429 (1927). Moreover, if one of the parties dies before the 6-month period has expired, the surviving party once again becomes the surviving spouse, entitled to all of the rights and privileges of a surviving spouse. *In re Estate of Waller*, 116 Neb. 352, 217 N.W. 588 (1928).

It would appear that we have no choice but to determine that Cheri Palmer was still the wife of Charles Jess Palmer on June 8, 1982, and as such was barred from testifying against him. Nor can we regard the error as being nonprejudicial. Her testimony was that of an eyewitness to the alleged crime, and we cannot possibly say that her testimony, if inadmissible, was not prejudicial.

This is not the first time this court has been confronted with such a decision. In the case of *Garrett v. State*, 118 Neb. 373, 224 N.W. 860 (1929), this court likewise reversed and remanded for new trial a murder conviction because the trial court permitted a former wife to testify when in fact the decree of divorce was void due to the fact that it had been entered 1 day before the statutory waiting period. In ordering the new trial this court observed at 380, 224 N.W. at 863: "Whether or not the provision is a wise one is not for us to decide. Where a provision is plain and unambiguous in its terms and not susceptible of more than one construction, courts are not concerned with the consequences that may result therefrom but must enforce the law as they find it." Courts are often called upon to decide cases con-

trary to their own views but consistent with the law. That is what the American judicial system is all about. Regardless of how we may feel about the matter, the record clearly discloses that the trial court erred in permitting Cheri Palmer to testify. Because that error was prejudicial to the rights of the defendant, he must be granted a new trial, free of error.

Having thus disposed of this case on this error, we need not consider any of the other alleged errors raised by Palmer. The judgment is reversed and the cause remanded with directions for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

BOSLAUGH, J., dissenting.

The defendant has been tried twice, convicted of first degree murder, and sentenced to death. The majority now holds that the defendant must be tried a third time or set free because the State used the testimony of his divorced spouse in the second trial.

All authorities seem to agree that once a divorce decree becomes "final," a divorced spouse is a competent witness. At the time of the second trial in this case, a judgment had been entered in the trial court divorcing the defendant from his spouse. Because the defendant's appeal in the divorce proceeding was pending, the court holds that the marriage was still "in existence" within the meaning of Neb. Rev. Stat. § 27-505(2) (Reissue 1979).

It seems to me that the relatively few cases that have considered the question and support this result ignore the reason for the rule.

The usual reason given for the rule barring the testimony of one spouse against the other in a criminal proceeding is that "such a policy is necessary to foster family peace." See *Hawkins v. United States*, 358 U.S. 74, 79 S. Ct. 136, 3 L. Ed. 2d 125 (1958). Once a dissolution proceeding has proceeded to judgment and a decree of divorce has been entered, it would seem that there is little family peace to be fostered.

As Chief Justice Burger observed in *Trammel v. United States*, 445 U.S. 40, 52, 100 S. Ct. 906, 63 L. Ed. 2d 186 (1980): "The contemporary justification for affording an accused such a privilege is also unpersuasive. When one spouse is willing to testify against the other in a criminal proceeding—whatever the motivation—their relationship is almost certainly in disrepair; there is probably little in the way of marital harmony for the privilege to preserve. In these circumstances, a rule of evidence that permits an accused to prevent adverse spousal testimony seems far more likely to frustrate justice than to foster family peace. Indeed, there is reason to believe that vesting the privilege in the accused could actually undermine the marital relationship."

The privilege itself has been severely criticized. According to Wigmore, the privilege no longer has adequate reason for retention and is an indefensible obstruction to truth in practice. See 8 J. Wigmore, Evidence in Trials at Common Law § 2228 (1961). In 2 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 505[02] at 505-10 (1982), the author states: "Nevertheless, many leading commentators concluded that the privilege is unjustified, that it does not contribute to marital felicity, is based on the outmoded concept that husband and wife are one, and causes the suppression of relevant evidence, thereby impeding the doing of justice. Wigmore termed the privilege 'a legal anachronism,' McCormick called it 'an archaic survival of a mystical religious dogma,' Hutchins and Slesinger could 'see no reason for sacrificing individual justice . . . to a mythical family unity,' and both the Model Code and the Uniform Rules refused to adopt such a rule."

In *Trammel v. United States*, *supra* at 48-50, the Court noted: "Since 1958, when *Hawkins* was decided, support for the privilege against adverse spousal testimony has been eroded further. Thirty-one jurisdictions, including Alaska and Hawaii, then allowed an accused a privilege to prevent adverse

spousal testimony. 358 U.S., at 81, n. 3 [79 S. Ct. 136, 3 L. Ed. 2d 125 (1958)] (Stewart, J., concurring). The number has now declined to 24. In 1974, the National Conference on Uniform State Laws revised its Uniform Rules of Evidence, but again rejected the *Hawkins* rule in favor of a limited privilege for confidential communications. See Uniform Rules of Evidence, Rule 504. That proposed rule has been enacted in Arkansas, North Dakota, and Oklahoma —each of which in 1958 permitted an accused to exclude adverse spousal testimony. The trend in state law toward divesting the accused of the privilege to bar adverse spousal testimony has special relevance because the laws of marriage and domestic relations are concerns traditionally reserved to the states. See *Sosna v. Iowa*, 419 U.S. 393, 404 [95 S. Ct. 553, 42 L. Ed. 2d 532] (1975). Scholarly criticism of the *Hawkins* rule has also continued unabated."

Some recent cases suggest that divorce or dissolution of the marriage is not necessary to bar the privilege if the facts indicate that in reality there is no marriage to preserve. In *United States v. Brown*, 605 F.2d 389 (8th Cir. 1979), in noting that the privilege is not absolute, the court said at 396: "Clincy was totally unharmed by his wife's testimony. We conclude, moreover, that the marital privilege itself went unscathed in this case. The privilege is not absolute. The Federal Rules of Evidence, Rule 501, concerning privileges in general, requires application of common law principles to privileges as those principles 'may be interpreted . . . in the light of reason and experience.' Privileges are impediments to the search for truth, finding their justification in the priority of societal values they serve. The higher-than-truth value served by the privilege before us is the protection of the marital bond. Where, as here, Mrs. Clincy was with her husband for two weeks and had not seen him for the entire eight months between his leaving her and the date of trial, it is difficult to visualize

how preservation of that value would have required the total exclusion of Mrs. Clincy from the witness stand. See *United States v. Cameron*, 556 F.2d 752, 756 (5th Cir. 1977)."

In *United States v. Cameron*, 556 F.2d 752 (5th Cir. 1977), in holding the testimony of a spouse admissible, the court said at 755-56: "The exclusion of adverse testimony by a spouse is not an absolute privilege. There have been long recognized exceptions, such as exist in prosecutions for crimes committed by one spouse against the other or against the children of either; actions by one of the spouses against an outsider for an intentional injury to the marital relation; or in a criminal prosecution against one spouse in which a declaration of the other spouse made confidentially to the accused would tend to justify or reduce the grade of the offense. McCormick, Evidence, Section 85 (1972). See *Wolfe v. United States*, 291 U.S. 7, 54 S. Ct. 279, 78 L. Ed. 617 (1934); *Funk v. United States*, 290 U.S. 371, 54 S. Ct. 212, 78 L. Ed. 369 (1933). The Federal Rules of Evidence, Rule 501, recognizes no marital privilege per se, but rather recognizes a general privilege which 'shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.'

"This reason and experience which the Supreme Court spoke of in *Wolfe*, *Hawkins*, and various other opinions, and which Congress refers to in Rule 501, places on the federal courts the responsibility of examining the policies behind the federal common law privileges so as to alter or amend them when reason and experience demand. If we are to fashion any exception in the case before us we must do so consistent with the rationale for the privilege. In the present case there were a number of factors which indicate that in spite of the legal existence of the marriage, as a social fact it had expired. There was no residence at which both spouses lived; there was a great disparity between the amount of time that

the couple cohabited and the time that one or the other chose not to live together; the husband had a more permanent living arrangement with another partner than with his spouse and, indeed, fathered a child with that person. All these factors cumulatively signify a marriage that was moribund. If the marital privilege is intended to preserve domestic harmony—the most substantial argument that judges and writers today advance in support of it—it is apparent that the present case is not one in which the privilege would serve any such purpose.

"We fashion no broad rule with our holding today as to when the marital privilege should be disallowed. We decide narrowly on the facts as they appear before us. That is, where, as here, the spouse was called to testify only as to objective facts, with no questions allowed as to any communication between the spouses, and where the evidence supported a finding that the marriage was no longer viable and its members had little hope or desire for reconciliation, reason, experience and common sense indicate that the traditional policy reasons for the privilege are non-existent. It was properly disallowed."

See, also, *United States v. Fisher*, 518 F.2d 836 (2d Cir. 1975); *Hudson v. State*, 295 So. 2d 766 (Miss. 1974); *United States v. Ryno*, 130 F. Supp. 685 (S.D. Cal. 1955), *aff'd* 232 F.2d 581 (9th Cir. 1956) (on ground testimony was not prejudicial).

The interest of the State in bringing the defendant to justice in this case should outweigh any hope of reconciliation between the parties after the decree of divorce had been entered in the dissolution proceeding.

McCown, J., joins in this dissent.

Hastings, J., dissenting.

The dissenting opinion of Boslaugh, J., traces the origin and reason for the rule relating to spousal testimonial privilege. When considered against that backdrop, it seems obvious to me that once a court

of competent jurisdiction has entered a decree of dissolution, whether subject to appeal or not, the marriage is no longer in existence within the meaning of Neb. Rev. Stat. § 27-505(2) (Reissue 1979).

Cases like *Lippincott v. Lippincott*, 141 Neb. 186, 3 N.W.2d 207 (1942), and *Westphalen v. Westphalen*, 115 Neb. 217, 212 N.W. 429 (1927), which refer to special circumstances such as property rights, right of inheritance, privilege to remarry, etc., are not applicable to this situation. To insist, for example, that a marriage is still in existence so as to prohibit the testimony of one spouse while the other spouse contests on appeal the amount of an alimony award makes no sense at all.

I do not believe that the testimony of Cheri Palmer should be rejected for the reason given in the majority opinion.

BOSLAUGH, J., joins in this dissent.

ADAMS CENTRAL SCHOOL DISTRICT NO. 090, ADAMS COUNTY, AND EDUCATIONAL SERVICE UNIT NO. 9, APPELLEES, V. MARVIN DEIST AND MYRTLE DEIST, APPELLANTS.

338 N.W.2d 591

Filed September 23, 1983. No. 81-773.

SUPPLEMENTAL OPINION.

Appeal from the District Court for Adams County: FRED R. IRONS, Judge. Motion for rehearing overruled.

Jacobsen, Orr & Nelson, and Timothy F. Shaw and Laura Petovello of Nebraska Advocacy Services, Inc., for appellants.

John F. Recknor of Barlow, Johnson, DeMars & Flodman, for appellees.

Paul L. Douglas, Attorney General, and Harold Mosher, for amicus curiae State of Nebraska.

John P. Heil of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, for amicus curiae School District of Omaha.

Neal Stenburg, for amicus curiae Nebraska Association of School Boards.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

HASTINGS, J.

In syllabus point 3 of our opinion found at 214 Neb. 307, 334 N.W.2d 775 (1983), and in the body of that opinion at 315, 334 N.W.2d at 781, we stated that a free appropriate public education under the Education for All Handicapped Children Act of 1975, 20 U.S.C. §§ 1401 et seq. (1976), requires that each handicapped child be given the opportunity to achieve such child's full potential commensurate with the opportunity provided to other children.

In doing so, we relied on the authority of *Springdale School Dist. #50 v. Grace*, 656 F.2d 300 (8th Cir. 1981), which has now been vacated by the U.S. Supreme Court on the basis of *Hendrick Hudson Dist. Bd. of Ed. v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982). In that latter case the Court said: "The District Court and the Court of Appeals thus erred when they held that the Act requires New York to maximize the potential of each handicapped child commensurate with the opportunity provided nonhandicapped children." 458 U.S. at 200.

We have reviewed our opinion in light of *Rowley*. We agree that we have imposed a more stringent requirement on the state educational system than was envisioned by Congress, as now interpreted by the Supreme Court. However, the record still reveals that David was not receiving an appropriate education, because he was not benefiting educationally from instruction at the TMR School, from which he

had unilaterally been removed by school authorities, nor from the Hastings Regional Center, where he had regressed and from which he was ordered removed, nor from a homebound situation, for which no individualized educational program (IEP) had been finally approved. We therefore believe that our holding in that original opinion was correct.

However, we do, on our motion, modify that opinion by deleting syllabus point 3 and substituting therefor the following: "A free appropriate public education requires that each handicapped child be provided with personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction, which instruction and services must be provided at public expense, must meet the state's educational standards, must approximate the grade levels used in the state's regular education, and must comport with the child's individualized educational program."

We further modify that opinion by deleting at 315, 334 N.W.2d at 781, the following: " ' "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)," and substituting therefore the following: " 'Insofar as a State is required to provide a handicapped child with a "free appropriate public education," we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and must comport with the child's IEP.' *Hendrick Hudson Dist. Bd. of Ed. v. Rowley*, 458 U.S. 176, 203, 102 S. Ct. 3034, 3049, 73 L. Ed. 2d 690 (1982)."

Finally, at 317, 334 N.W.2d at 782, the following

paragraph is deleted: "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." The following is substituted therefor: "On the basis of this evidence the hearing officer Sullivan ordered that David be transferred 'to a residential placement sufficient to meet David's unique needs.' Such order is permissible under the law."

MOTION FOR REHEARING OVERRULED.

COLUMBUS FEDERAL SAVINGS & LOAN ASSOCIATION, A NEBRASKA CORPORATION, APPELLEE, V. SWAILS CONSTRUCTION COMPANY, INC., ET AL., APPELLEES, TONY METCALF ET AL., APPELLANTS.

338 N.W.2d 593

Filed September 23, 1983. No. 82-472.

1. **Liens: Appeal and Error.** A lien claimant has the burden to establish the validity and amount of his lien.
2. **Mechanics' Liens: Statutes.** A mechanic's lien is statutory, and a lien claimant must bring himself within the terms of the statute to establish a lien.
3. **Mechanics' Liens.** The foundation for a mechanic's lien is a contract or agreement with the owner of the property.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Affirmed.

R. Kent Radke of Badami and Radke, for appellants.

David M. Geier of Bauer, Galter & Geier, for appellee Columbus Federal.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, and SHANAHAN, JJ., and GRANT, D.J.

BOSLAUGH, J.

This action was commenced to foreclose a real es-

tate mortgage on Lot 14, Block 1, Briarhurst West Second Addition to the City of Lincoln, Nebraska. The defendant Tony Metcalf claimed a mechanic's lien for labor and materials supplied to the property. The trial court found that the plaintiff's mortgage lien was valid and inferior only to a mechanic's lien in favor of John L. Hoppe Lumber Company. Liens in favor of Yankee Hill Brick Manufacturing Company and Aksarben Trane Heating & Air Conditioning Company were found to be inferior to the mortgage lien of the plaintiff.

The defendant Metcalf has appealed. The only issue on appeal is whether the claimed lien of Metcalf was valid.

The record shows that the property was owned by Swails Construction Company. In 1980 Swails desired to build a house upon the property and obtained a mortgage loan from the plaintiff to finance the construction. Metcalf was an employee of Swails, and Swails and Metcalf entered into an agreement that Metcalf could purchase the completed residence from Swails for cost plus 5 percent. It was further agreed that Metcalf could perform labor upon the property and supply materials, and Metcalf would be compensated as a subcontractor at the time the property was sold, whether Metcalf or some other person was the purchaser.

On April 29, 1980, Metcalf and Swails signed a written purchase agreement in which Metcalf agreed to buy the property from Swails for $65,000. This agreement was used to obtain the loan from the plaintiff. The plaintiff had refused to make a customary construction loan on the property but agreed to make the loan as a conventional 30-year loan with the understanding that the house had been presold to Metcalf.

Sometime early in July 1980, and after construction had commenced, Swails and Metcalf entered into an agreement that Metcalf would not be

"forced" to purchase the property. This agreement was never disclosed to the plaintiff.

Metcalf moved into the property in January 1981 pursuant to an agreement with Swails that Metcalf would pay the mortgage payments directly to the plaintiff as rent for the property. Metcalf made only two or three such payments and has paid nothing since then. This action was commenced August 10, 1981.

A lien claimant has the burden to establish the validity and amount of his lien. *Chicago Lumber Co. v. Horner*, 210 Neb. 833, 317 N.W.2d 87 (1982). A mechanic's lien is statutory, and a lien claimant must bring himself within the terms of the statute to establish a lien. *Ideal Basic Industries, Inc. v. Juniata Farmers Coop. Assn.*, 205 Neb. 611, 289 N.W.2d 192 (1980).

The foundation for a mechanic's lien is a contract or agreement with the owner of the property. See Neb. Rev. Stat. §§ 52-101, 52-102 (Reissue 1978) (now repealed). Under the facts in this case Metcalf was the equitable owner of the property and was not entitled to assert a lien on the property as against the plaintiff. He cannot now claim as a subcontractor and establish a lien on the property superior to that of the plaintiff.

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

AFFIRMED.

LINCOLN GRAIN, INC., A KANSAS CORPORATION, APPELLANT, V. COOPERS & LYBRAND, A PARTNERSHIP, APPELLEE.

338 N.W.2d 594

Filed September 23, 1983. No. 82-473.

Limitations of Actions: Negligence. In order for a continuous relationship to toll the statute of limitations regarding a claim for mal-

practice, there must be a continuity of the relationship and services for the same or related subject matter after the alleged professional negligence.

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

Karen B. Flowers of Bauer, Galter & Geier, for appellant.

Maureen E. McGrath of Kutak Rock & Huie, and Joseph A. Clark III, for appellee.

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

SHANAHAN, J.

On February 24, 1977, Lincoln Grain, Inc. (Lincoln), sued its accountants, Coopers & Lybrand (C & L), for malpractice in rendering audits for fiscal periods ending in 1973, 1974, and 1975. In a trial pursuant to Neb. Rev. Stat. § 25-221 (Reissue 1979), the District Court held that the 2-year statute of limitations of Neb. Rev. Stat. § 25-222 (Reissue 1979) barred Lincoln's claims against C & L regarding 1973 and 1974, and dismissed Lincoln's action for those years. The District Court also concluded that any cause of action for 1975's audit was filed within time. Lincoln has appealed from the trial court's order of dismissal. We affirm.

Lincoln, through its Des Moines office called the "Iowa division," dealt in grain contracts. The Iowa division was a "track office"—an operation for buying grain on contract and selling the contracted grain to processors and exporters. A track office has no physical inventory of grain and never takes possession of the contracted grain.

All original contracts of the Iowa division were kept in Des Moines. Each contract was numbered and indicated the customer, date of shipment, quantity of grain under contract, destination, freight rate, and market price of the grain. At the end of

each month the manager of the Iowa division prepared a list of "open contracts"—transactions where grain had not been settled by delivery and payment as contracted. By this list Lincoln determined whether there was a gain or loss on its contracts, and the result of such computation constituted the "inventory" of the Iowa division. Each of Lincoln's divisions sent its financial statement to Lincoln's main office. These financial statements were then combined into a "yearend" consolidated financial report called a consolidated statement. A consolidated statement reflected only the inventories at the end of the last month of a period to be audited. Lincoln gave its consolidated financial statement to outside auditors, because Lincoln did not have any "internal audit staff." Accountants then conducted an audit based on the consolidated financial statement supplied by Lincoln. For each audit Lincoln's officers also supplied a certification of the divisions' inventories existing on the last day of the period to be audited.

In 1970 Lincoln contacted C & L regarding an audit in 1971. Before any audit was undertaken, C & L required an "engagement letter" which defined the "scope of the audit"—the nature and extent of the work to be done, including validation of information contained in the financial statement supplied by Lincoln, and the amount of the fee for the services to be rendered by the accountant. Without a letter of engagement C & L would not be retained for an audit. Pursuant to separate engagement letters, C & L was hired for audits from 1971 to 1975. During that time and based on information supplied by Lincoln, C & L audited fiscal periods ending on March 31 and June 30 in 1973 and on June 30 in 1974 and 1975, respectively. C & L delivered to Lincoln a written report regarding each of the three audits before 1975, namely, a report delivered on June 29, 1973, for the period ending March 31, 1973; on October 23, 1973, for the period ending June 30, 1973; and on Septem-

ber 27, 1974, for the period ending June 30, 1974.

Late in 1975 Lincoln knew there was some problem involving its Iowa division. Lincoln learned in January 1976 that the financial statements from the Iowa division were inaccurate. In early February 1976 Lincoln estimated its loss from the Iowa division to be at least $432,000. In his letter of resignation on February 6, the manager of the Iowa division acknowledged that the financial reports which he had submitted were inaccurate. On February 18 the treasurer of Lincoln wrote C & L that there was an "overstatement" of the Iowa division's inventory.

In March 1976 Lincoln sent two employees—Ardean Arndt, Lincoln's secretary, and Loyal Steube, a company accountant—to Des Moines to ascertain the reasons behind the inaccurate financial reports from the Iowa division. Lincoln's employees found out that the manager of the Iowa division had altered and misrepresented the number of bushels on the list of open contracts reported to Lincoln and had used the most favorable market price available rather than the true market price applicable to the open contract. In this manner the inventory had been "overstated" and the value of grain subject to contract had been inflated. Lincoln compared the original contracts with the list of open contracts and contacted some buyers for confirmation and validation of the transactions indicated by the contracts. Personnel from Lincoln and C & L attempted to determine the exact extent of the loss attributable to the Iowa division.

Lincoln filed suit on February 24, 1977, and alleged that C & L had not followed proper accounting procedures; that C & L's validation and testing procedure for inventories failed to disclose the distortions and overstatement by the manager of the Iowa division; that such distortion and overstatement misrepresented that the Iowa division was operating at a profit, whereas there were substantial losses during the periods audited; and that proper account-

ing methods and validation of the inventory would have disclosed the losses in sufficient time to rectify the situation without any further loss. To summarize and paraphrase Lincoln's allegations, C & L was negligent in failing to discover and report the misrepresentations regarding operations of the Iowa division.

At the trial on the question of the statute of limitations, Lincoln called an expert witness, Gerald Grant, a certified public accountant. Grant testified that a "continuous engagement" was a "formal engagement for which an auditor is engaged for several fiscal years in a single contract," but acknowledged there was no documentation that C & L's accounting relationship with Lincoln was for more than 1 year. Also, Grant testified that nothing in the relationship indicated the "engagement was other than" for the particular fiscal year designated and that there was a separate report for each of the audited periods. Grant admitted that each report "would stand on its own" and that delivery of the report ends the auditor's work on the fiscal year audited. According to Grant, an auditor has no obligation to make any further inquiry or to perform any additional auditing procedures regarding audited financial statements covered by the report, "unless new matter comes to his attention."

Lynne Sieverling, a partner in C & L, testified that during the periods audited Lincoln acquired new divisions and new subsidiaries so that the "audit work was not exactly the same from year to year."

The statute of limitations applicable to claims for malpractice is § 25-222: "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 . . . ."

Lincoln contends that there is a continuity of relationship with C & L which tolls the statute of limitations for commencement of an action based on negligence in rendering the audit reports. C & L maintains that the statute of limitations commenced to run upon delivery of the audit reports in 1973 and 1974, respectively.

"The traditional rule is that the statute begins to run as soon as the action accrues, and the cause is said to accrue when the aggrieved party has the right to institute and maintain a suit. In a contract action this means as soon as breach occurs, and in tort, as soon as the act or omission occurs." *Grand Island School Dist. #2 v. Celotex Corp.*, 203 Neb. 559, 562-63, 279 N.W.2d 603, 606 (1979).

Because the lawsuit was filed more than 2 years after delivery of the audit reports or financial statements for 1973 and 1974, Lincoln advocates adoption of rules applicable to actions for medical malpractice, i.e., the statute of limitations does not commence to run until the treatment ends. See *Williams v. Elias*, 140 Neb. 656, 1 N.W.2d 121 (1941). The conclusion of the treatment, Lincoln suggests, should be governed by the doctrine of "continuous treatment" expressed in *Borgia v. City of New York*, 12 N.Y.2d 151, 155, 157, 237 N.Y.S.2d 319, 321-22 (1962), "[W]hen the course of treatment which includes the wrongful acts or omissions has run continuously and is related to the same original condition or complaint, the 'accrual' comes only at the end of the treatment. . . . The 'continuous treatment' we mean is treatment for the same or related illnesses or injuries, continuing after the alleged acts of malpractice, not mere continuity of a general physician-patient relationship."

If the doctrine of continuous treatment is to be applied in this case, we must answer a basic question: Was there a continuous relationship between Lincoln and C & L?

C & L rendered services only after Lincoln ac-

cepted the terms of the engagement letter. An engagement letter was indispensable for each of the audits rendered by C & L. Pursuant to each engagement letter, C & L compiled information in the form of noncumulative financial statements or audit reports. This information included the inventory of the Iowa division. The inventory consisted of contracts existing at a given date. These contracts pertained only to a specific fiscal period and were not related to any other interval before or after a current fiscal period to be audited. The inventory existing at the last day of the period audited was neither a factor nor an ingredient of any other audit. Lincoln's inventory, therefore, began anew on the first day of a subsequent fiscal period.

In *Tool v. Boutelle*, 91 Misc. 2d 464, 398 N.Y.S.2d 128 (1977), which was an action for the malpractice of an engineer-surveyor, there was a characterization of "continuous treatment": "[T]he 'continuous treatment' must be a treatment for the same or related condition, continuing after the alleged acts of malpractice; not mere continuity of a general professional relationship . . . . But 'relation' is not the only element which must be found in order for the doctrine to apply; there must also be 'continuity' . . . ." 398 N.Y.S.2d at 130.

"Continuity" means "being continuous . . . state of continuing without essential change." Webster's Third New International Dictionary, Unabridged, 493 (1968). "Continuous" means "stretching on without break or interruption." *Id.* at 494.

Because the inventory peculiar to a track office changed essentially from day to day without connection with any other inventory, past, present, or future, the continuity required for "continuous treatment" is nullified. The subject matter of each audit ceased to exist beyond the last day of the fiscal period being audited. The "condition" was never identical for any two audits rendered by C & L. Any audit by C & L did not refer to any prior audit, was

not based on any information contained in a previous audit, did not incorporate or expand any previous audit, and was not carried forward in any form into any subsequent audit. As admitted by Lincoln's witness, each report "would stand on its own." Each audit was a separate, independent and unrelated transaction or occurrence. Consequently, in the present case the doctrine of "continuous treatment" is not available to suspend the time limit prescribed for the commencement of an action for professional negligence. See *Naetzker v. Brocton Schl. Dist.*, 50 A.D.2d 142, 376 N.Y.S.2d 300 (1975).

Under the circumstances of this case the statute of limitations commenced to run when C & L delivered the audit reports or financial statements to Lincoln. See, *Carr v. Lipshie*, 8 A.D.2d 330, 187 N.Y.S.2d 564 (1959); *Owyhee County v. Rife*, 100 Idaho 91, 593 P.2d 995 (1979); *Alexander & Baldwin, Inc. v. Peat, Marwick, M. & Co.*, 385 F. Supp. 230 (S.D. N.Y. 1974); *Wasserman v. Herwood*, 36 Misc. 2d 522, 232 N.Y.S.2d 730 (1962).

Because suit was not filed within 2 years after Lincoln's receipt of the audit reports in 1973 and 1974, any claims which Lincoln may have had for malpractice in C & L's rendering of those audit reports are barred. The District Court was correct in dismissing the action of Lincoln concerning the years 1973 and 1974, and, therefore, the judgment of the District Court is affirmed.

AFFIRMED.

KRIVOSHA, C.J., and MCCOWN, J., not participating.

BUTTE STATE BANK, A BANKING CORPORATION, APPELLEE, V. E. P. WILLIAMSON, APPELLANT.

338 N.W.2d 598

Filed September 23, 1983. No. 82-523.

1. **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 movant is entitled to judgment as a matter of law.

2. **Uniform Commercial Code: Notice.** A guarantor is a debtor within the meaning of the term as defined in Neb. U.C.C. § 9-105(1)(d) (Reissue 1980) and is entitled to the notice required by Neb. U.C.C. § 9-504(3) (Reissue 1980).

3. _____: _____. An oral message does not satisfy the requirements of Neb. U.C.C. § 9-504(3) (Reissue 1980).

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

Arlen D. Magnuson, on brief, and Jewell, Otte, Gatz & Collins, for appellant.

Forrest F. Peetz of Peetz and Peetz, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, and SHANAHAN, JJ., and GRANT, D.J.

CAPORALE, J.

E. P. Williamson, defendant in the trial court, appeals from an award to the plaintiff-appellee, Butte State Bank, of a deficiency summary judgment on a guaranty. We reverse and remand.

In the posture of this case we are required to determine whether there here exists no genuine issue as to any material fact, whether the ultimate inferences to be drawn from those facts are clear, and whether the bank is entitled to judgment as a matter of law; for it is only under such circumstances that summary judgment may properly be granted. *Swanson v. First Fidelity Life Ins. Co.*, 214 Neb. 654, 335 N.W.2d 538 (1983).

The salient facts are that on May 7, 1977, Dewaine Williamson, the son of defendant herein, was indebted to the bank on past-due promissory notes. On that day defendant, in order to forestall the express intentions of the bank to foreclose on its security agreements covering his son's crop, livestock, and farm equipment, entered into a guaranty agreement covering his son's debt.

By the spring of 1980 it became apparent that the

son's obligation to the bank would not be satisfied. A public auction of the son's assets which were held as security was conducted by the bank at the son's farm in November of 1980.

Defendant knew of the sale by virtue of discussions with his son; however, there was no testimony that the bank had sent notice of the sale to defendant. Defendant testified he received no notice from the bank.

After the proceeds of the sale were applied to the son's debt, this suit was filed against defendant on the guaranty he had signed.

The recent case of *First Nat. Bank & Trust Co. v. Hughes*, 214 Neb. 42, 332 N.W.2d 674 (1983), and its predecessors control the outcome of this case.

Neb. U.C.C. § 9-504(3) (Reissue 1980) requires, with certain exceptions not material here, that notice of a public sale be sent by the secured party to the debtor. A guarantor is a debtor within the meaning of the term as defined in Neb. U.C.C. § 9-105(1)(d) (Reissue 1980). *First Nat. Bank & Trust Co. v. Hughes*, *supra*.

The requirement that notice be "sent" contemplates that the notice be in writing, under the definition of "send" contained in Neb. U.C.C. § 1-201(38) (Reissue 1980). That section tells us that " 'Send' in connection with any writing or notice means to deposit in the mail or deliver for transmission by any other usual means of communication with postage or cost of transmission provided for and properly addressed . . . ." We have held that an oral message does not fit into the above-quoted language. *DeLay First Nat. Bank & Trust Co. v. Jacobson Appliance Co.*, 196 Neb. 398, 243 N.W.2d 745 (1976). We have also stated that § 1-201(38) does not require that the notification actually reach the person to whom it was sent, provided that reasonable steps were taken in sending the notice. *First Nat. Bank & Trust Co. v. Hermann*, 205 Neb. 169, 286 N.W.2d 750 (1980).

Where, as in this case, it is shown that no notice

was received and it is not shown that notice was sent, it must be concluded that the bank failed to show that it had complied with § 9-504(3). As we have stated many times in the past, it is the rule in this jurisdiction that compliance with the notice provisions is a condition precedent to the right of a creditor to recover a deficiency judgment. *First Nat. Bank & Trust Co. v. Hughes*, *supra*; *First Nat. Bank & Trust Co. v. Hermann*, *supra*; *DeLay First Nat. Bank & Trust Co. v. Jacobson Appliance Co.*, *supra*. See, also, *Borg-Warner v. Watton*, *post* p. 318, 338 N.W.2d 612 (1983).

The bank's complaint that the court improperly allowed the untimely amendment of defendant's answer so as to assert lack of notice as a defense is legally insignificant. Compliance with the notice requirements of § 9-504(3) being a condition precedent to the bank's right to recover a deficiency judgment, it was incumbent upon it to have proved the fact, irrespective of defendant's answer.

Having failed to carry its burden of proof, the bank, on the facts elicited in the trial court, is not entitled to a deficiency judgment as a matter of law. The decision of the trial court is reversed and the cause remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

CHURCH OF THE HOLY SPIRIT, A NEBRASKA CORPORATION, APPELLEE, V. BEVCO, INC., A NEBRASKA CORPORATION, DEFENDANT AND THIRD-PARTY PLAINTIFF, AND FIDELITY AND DEPOSIT COMPANY OF MARYLAND, A CORPORATION, APPELLANTS AND CROSS-APPELLEES, UNIVERSAL TERRAZZO & TILE CO., THIRD-PARTY DEFENDANT AND CROSS-APPELLANT.

338 N.W.2d 601

Filed September 23, 1983. No. 82-534.

1. **Actions: Parties.** The general purpose of a third-party action pur-

suant to Neb. Rev. Stat. § 25-331 (Reissue 1979) is to avoid two actions which should be tried together to save the time and cost of a reduplication of evidence, to obtain consistent results from identical or similar evidence, and to do away with the serious handicap to a defendant of a time difference between a judgment against him and a judgment in his favor against the third-party defendant.

2. _____: _____. A third-party claim under Neb. Rev. Stat. § 25-331 (Reissue 1979) may be asserted when a third-party's liability is in some way dependent on the outcome of the main claim or when the third party is secondarily liable to the defendant.
3. _____: _____. A third-party defendant can be bound by the adjudication of the main claim.
4. _____: _____. Proper use of third-party practice will avoid inconsistent verdicts in the main action and the third-party action.
5. **Directed Verdict.** A motion for a directed verdict at the conclusion of all the evidence is judged in the light of the total evidence at the time such motion is made, that is, the evidence as it stands at the close of the trial, and such motion is not determined only on the evidence existing at the time of the initial motion at the close of an adversary's case.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Affirmed in part, and in part reversed and remanded with directions.

Robert J. Becker and Jean A. Mahon-Pettit of Swarr, May, Smith, Andersen & Jensen, for appellants.

Carpenter Fitzgerald & Coe, P.C., for appellee Church.

John F. Thomas of McGrath, North, O'Malley & Kratz, P.C., for appellee Universal.

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

SHANAHAN, J.

The Church of the Holy Spirit (Church) sued its contractor, Bevco, Inc. (Bevco), and Bevco's bonding company, Fidelity and Deposit Company of Maryland (Fidelity), for damages from breach of a construction contract and performance bond, i.e., faulty painting of the Church's parish center. Bevco filed a third-party action against its subcontractor,

Universal Terrazzo & Tile Co. (Universal), which had painted the building's exterior. Bevco counterclaimed against the Church for payment of services rendered under the contract. Universal counterclaimed against Bevco for payment of services rendered under the subcontract. We affirm in part, reverse in part, and remand with directions.

In 1976 the Church entered a written contract with Bevco for construction of a parish center. Bevco subcontracted the exterior painting to Universal for $6,276. This written contract between Bevco and Universal contained: "X. To be bound to the Contractor by the terms of the general conditions of the specifications and addenda, and to conform to and comply with the drawings and specifications and addenda, and to assume toward the Contractor all the obligations and responsibilities that the Contractor assumes in and by the aforesaid documents toward the Owner, in so far as they are applicable to this particular sub-contract"; "XIV. To guarantee his work against all defects of materials or workmanship, as called for in the plans, specifications and addenda, or if no guarantee is called for, then for a period of one year from the date of completion of the work covered by this agreement"; and "Payment to the Subcontractor shall be made propmtly [sic] after the Contractor is paid by the owner."

John Tilly, architect for the Church, inspected the work of the contractors. Between November 11 and December 16, 1977, Universal applied the initial exterior coating of Desco Tonecrete. According to manufacturer's specifications, Desco Tonecrete should be applied and allowed to cure at a minimum temperature of 40° Fahrenheit and the backing of such application should have a maximum of 16-percent moisture content. Universal painted on some days when the temperature was less than 40° Fahrenheit and on other days when it rained or snowed. On December 13 Tilly discovered that Universal was applying the incorrect color of paint and

ordered the painting stopped. It was too late in the year to repaint, and the building's expansion control joints remained open during the winter.

The Church selected another color of paint in May 1978. Universal finished applying the new paint in August, and later in August Tilly rejected Universal's work because there were "color variations" and "bleached-out" areas. To prevent the paint's cracking around expansion control joints, Tilly ordered removal of caulking from those joints in October. In November the Church selected transparent sealer, which Universal later applied in May 1979. Because Universal's application of the sealer was not uniform, Tilly rejected that work. In the fall of 1979 Universal said it would not correct the exterior sealer-coating. Between the fall of 1979 and January 1980 the exterior paint peeled and deteriorated. Such condition has never been corrected.

In January 1981 the Church sued Bevco and alleged Bevco's breach of contract consisted of "improper exterior wall coating and caulking resulting in lack of uniformity in color, thickness and texture, discoloration, cracking, peeling . . . ." Bevco responded by filing an answer admitting the construction contract but generally denying any breach of contract. With its answer Bevco filed a counterclaim against the Church, seeking $16,750 in payment for services rendered under the contract. Bevco then filed a third-party action against Universal, alleging the provisions of paragraphs X and XIV of the subcontract, and further alleging that Universal was liable for any faulty painting. In the third-party action Universal filed an answer containing only a general denial, and also filed a counterclaim against Bevco for payment under the subcontract in the amount of $6,276. Neither Bevco nor Universal raised any affirmative defense regarding the Church's claim for faulty painting.

Tilly, the architect, testified that he did not know the cause of the paint's peeling. The Church also

called an expert witness, painter Leroy Gustafson, who testified that the cost of correcting the condition of the painting was $29,117. Gustafson further testified that moisture entering the uncaulked expansion joints could have caused the poor condition of the painting. At the conclusion of the Church's case Bevco and Universal separately moved to dismiss the Church's claim for faulty workmanship. These motions were overruled.

Bevco called a witness who testified that Universal initially applied the paint when temperatures were below and moisture levels were above the manufacturer's specifications. According to Bevco's witness, Universal's failure to comply with the manufacturer's specifications caused the paint to peel. On account of such condition the Church did not accept the painting and did not pay Bevco. At the conclusion of Bevco's case Universal moved for a directed verdict on Bevco's third-party complaint because Bevco had not paid for the subcontracted painting. The trial court overruled the motion.

During Universal's case in chief, witnesses described the manner of application and the subsequent condition of the paint on the parish center. Universal introduced the manufacturer's written instructions for application of the paint used. At the close of all the evidence Universal again asked dismissal of Bevco's third-party complaint. The trial court overruled Universal's motion regarding Bevco. Then both Bevco and Universal renewed their motions to dismiss the Church's action. The trial court overruled these motions.

The trial court instructed the jury: "Before third-party plaintiff Bevco, Inc. can recover on its Third-Party Petition against third-party defendant Universal Terrazzo and Tile Co., it must first be determined by the jury that the plaintiff is entitled to recover against Bevco, Inc.," and that Bevco must prove the "amount of damages sustained by Bevco" as a result of any breach of the subcontract by Uni-

versal. The court further instructed: "If you find for Bevco on its Third-Party Petition against Universal, it will be your duty to award such damages as will fairly and reasonably, but not excessively, compensate Bevco for damages which it has sustained. The measure of damages is the amount of recovery that is awarded to plaintiff in its Petition against the defendant Bevco for the failure to properly apply the wall covering, if in fact you find such amount is owing." Bevco had requested and the court refused an instruction which included: "[I]f you find that the damages suffered by the Church were caused by the work performed by Universal . . . then you must find Universal liable to Bevco for such damage."

During the course of deliberations, the jury asked additional instruction regarding the third-party action, namely, if the jury found in favor of the Church against Bevco, would such finding "have a bearing on how we are to go" in disposing of Bevco's third-party complaint against Universal? The trial court responded: "This is a question which must be determined by you in light of all the instructions," and no further instruction was given to the jury. The jury returned a verdict in favor of Bevco on its third-party complaint and assessed damages at "$0." The trial court told the jury that the verdict for Bevco on the third-party complaint was "no verdict at all" and "that if [the jury] finds for Bevco, Inc. on its Third-Party Petition [sic], it must assess Bevco's damages." After further deliberations the jury returned a verdict for Bevco against Universal in the amount of $500. The jury also returned verdicts in favor of the Church against Bevco in the amount of $29,117, for Bevco against the Church in the amount of $16,750, and for Universal against Bevco in the amount of $6,276.

Post-trial motions were filed. On account of the performance bond, the Church requested an attorney fee of $12,091.25 pursuant to Neb. Rev. Stat.

§ 44-359 (Reissue 1978). The court allowed an attorney fee of $7,500 as a part of the costs to be paid by Fidelity. Bevco asked the trial court to increase Bevco's judgment against Universal from $500 to $29,117 or grant a new trial on the issue of damages in the third-party action. The trial court set aside the verdict of $500, as requested by Bevco, and granted a new trial in the third-party action on the question of damages. Bevco also requested prejudgment interest on the amount awarded on its counterclaim against the Church, but this request was denied. The Church's judgment against Fidelity was reduced to $12,367, that is, the difference between the damages awarded the Church and the amount awarded Bevco on its counterclaim against the Church.

Bevco assigns as errors of the trial court (1) the refusal to increase Bevco's verdict against Universal from $500 to $29,117 and (2) the disallowance of prejudgment interest on Bevco's counterclaim.

Fidelity claims error in the amount of the attorney fee allowed by the trial court.

Universal contends the trial court erred by (1) failing to sustain (a) Universal's motion to dismiss at the end of the Church's case and (b) Universal's additional motion for dismissal at the conclusion of all the evidence; (2) failing to sustain the motion for a directed verdict against Bevco because Bevco had not paid Universal for work under the subcontract; and (3) granting a new trial to Bevco on the issue of damages sought in the third-party action.

Confusion existed at trial regarding disposition of the third-party action. Therefore, it is necessary to review the nature and function of a third-party action pursuant to Neb. Rev. Stat. § 25-331 (Reissue 1979).

Section 25-331 is patterned on Rule 14 of the Federal Rules of Civil Procedure. See, Statement on Legislative Bill 763, Committee on Judiciary, 77th

Leg. (Feb. 27, 1967); Minutes, Committee on Judiciary, L.B. 763, 77th Leg. (Feb. 27, 1967). "The general purpose of Rule 14 is to avoid two actions which should be tried together to save the time and cost of a reduplication of evidence, to obtain consistent results from identical or similar evidence, and to do away with the serious handicap to a defendant of a time difference between a judgment against him, and a judgment in his favor against the third-party defendant." 3 J. Moore, Moore's Federal Practice ¶ 14.04 at 14-26 (2d ed. 1983). Also, "A third-party claim may be asserted . . . only when third party's liability is in some way dependent on the outcome of the main claim or when the third party is secondarily liable to defendant." 6 C. Wright & A. Miller, Federal Practice and Procedure: Civil § 1446 at 246 (1971).

Availability and proper use of third-party practice was described in *United States v. Joe Grasso & Son, Inc.*, 380 F.2d 749, 751-52 (5th Cir. 1967), as "only in cases where the third party's liability was in some way derivative of the outcome of the main claim. In most such cases it has been held that for impleader to be available the third party defendant must be 'liable *secondarily* to the original defendant in the event that the latter is held liable to the plaintiff.' . . . Stating the same principle in different words, other authorities declare that the third party must necessarily be *liable over* to the defendant for all or part of the plaintiff's recovery . . . or that the defendant must attempt to *pass on* to the third party all or part of the liability asserted against the defendant . . . . Whichever expression is preferred, it is clear that impleader under Rule 14 requires that the liability of the third party be dependent upon the outcome of the main claim." (Citations omitted.) See *Index Fund, Inc. v. Hagopian*, 417 F. Supp. 738 (S.D. N.Y. 1976).

The policy underlying third-party practice is to avoid circuity of actions and multiplicity of suits, as

well as to expedite the resolution of secondary actions arising out of or as a consequence of the same facts involved in the action originally instituted. See *Colton v. Swain*, 527 F.2d 296 (7th Cir. 1975). The basic function of third-party practice is the original defendant's seeking to transfer to the third-party defendant the liability asserted by the original plaintiff. See *Tower Mtg. Corp. v. Reynolds*, 81 F.R.D. 560 (W.D. Okla. 1978). Third-party practice should reduce litigation by "having one lawsuit do the work of two." *Falls Industries, Inc. v. Consolidated Chem. Indus., Inc.*, 258 F.2d 277, 283 (5th Cir. 1958).

In this case the Church claimed faulty painting. In the subcontract Universal indemnified Bevco, viz, Universal assumed "toward [Bevco] all the obligations and responsibilities that the Contractor assumes . . . toward the [Church]." Because Bevco could be liable, and according to the jury was liable, to the Church, an attempt to transfer such liability to Universal was permissible under § 25-331.

A third-party defendant can be bound by the adjudication of the main claim. See, 3 J. Moore, *supra* at ¶ 14.13; *Council Brothers, Inc. v. Ray Burner Company*, 473 F.2d 400 (5th Cir. 1973). Where the third-party plaintiff's claim against the third-party defendant is an outgrowth of the same facts which will determine the main or original claim of the initial plaintiff, the rights of all three parties are focused on a common, factual setting. In the interest of economy—to the parties, court, counsel, and witnesses, as well as the pocketbook in view of the increasing costs of litigation—a final disposition of all claims from such common source should be resolved as far as practicable in one action. See *Powell, Inc. v. Abney*, 83 F.R.D. 482 (S.D. Tex. 1979).

As stated in *Caputo v. U.S. Lines Company*, 311 F.2d 413, 416 (2nd Cir. 1963), an objective of third-party practice is "to make the evidence adduced by the plaintiff against the defendant available as a

basis for the claim of the third-party plaintiff against the third-party defendant. Inconsistent determinations based upon the same evidence at the same trial are logically impossible. The court must follow the verdict of the jury." See, also, *Knell v. Feltman*, 174 F.2d 662 (D.C. Cir. 1949).

Neither Bevco nor Universal raised any affirmative defense regarding any aspect of the entire proceedings. Apart from Bevco's counterclaim against the Church, the only question for the jury regarding the main claim was whether improper application of the paint caused the peeling condition. The jury found that damages were caused by Universal's faulty painting. Although the jury awarded damages to the Church, the trial court's instruction regarding the third-party action confused the jury. The jury awarded Bevco an amount different from the damages awarded to the Church, so that there were inconsistent verdicts. To conclude the question of responsibility for payment of damages caused by the faulty painting, the trial court should have instructed in substance: If there was a verdict for the Church, the jury also *must* return a verdict in favor of Bevco against Universal in the same amount awarded in the Church-Bevco verdict. Bevco's post-trial motion would have corrected the inconsistent verdicts. The District Court erred in overruling Bevco's motion in that regard.

Bevco contends that it is entitled to prejudgment interest on the amount awarded on its counterclaim against the Church. Prejudgment interest on a contract claim is allowed under Neb. Rev. Stat. § 45-104 (Reissue 1978), where the amount is liquidated. A claim is liquidated if the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance upon opinion or discretion. *Classen v. Becton, Dickinson & Co.*, 214 Neb. 543, 334 N.W.2d 644 (1983). Where a reasonable controversy exists as to the plaintiff's right to recover or as to the amount of the recovery,

the claim is generally considered to be unliquidated and prejudgment interest is not allowed. *Classen v. Becton, Dickinson & Co.*, *supra*; *Holt County Co-op Assn. v. Corkle's, Inc.*, 214 Neb. 762, 336 N.W.2d 312 (1983). The poor quality of the painting raised the question whether Bevco could recover any amount from the Church. In view of the faulty painting—a breach of contract—Bevco requested and received an instruction on substantial performance in order to prevail on its counterclaim against the Church. Any possibility of recovery by Bevco depended on the jury's answer to the question, Had Bevco substantially performed its contract with the Church? A reasonable controversy existed regarding the nature and degree of performance by Bevco, and, therefore, the claim was not liquidated. The trial court was correct in denying prejudgment interest on Bevco's counterclaim.

Addressing Fidelity's assignment of error regarding the attorney fee awarded by the trial court, Fidelity believes the attorney fee of $7,500 is excessive, because Fidelity should not have to bear an award of an attorney fee attributable in part to the Church's defense against Bevco's counterclaim. On several occasions we have indicated the factors considered by a court in determining a reasonable attorney fee. See, *Stephens v. Allied Mut. Ins. Co.*, 182 Neb. 562, 156 N.W.2d 133 (1968); *Schmer v. Hawkeye-Security Ins. Co.*, 194 Neb. 94, 230 N.W.2d 216 (1975); *Herrera v. American Standard Ins. Co.*, 203 Neb. 477, 279 N.W.2d 140 (1979). A bonding company's exposure to liability, anticipated or actual, is not among the factors considered by a court in determining the amount of an attorney fee to be awarded in an action on a bond. The possibility that an attorney fee will be substantial in comparison with potential liability "is simply one of the factors the parties have to consider in determining whether to litigate a claim or attempt to settle it." See *Graff v. Farmers Mut. Home Ins. Co.*, 211 Neb. 13, 21, 317

N.W.2d 741, 745 (1982). The trial court did not abuse discretion regarding the attorney fee awarded as a part of the costs taxed to Fidelity.

Universal complains that the trial court should have dismissed the third-party complaint of Bevco, because Bevco had not paid Universal the subcontracted compensation of $6,276. The agreement between Bevco and Universal expressly provided that Universal was entitled to be paid after Bevco was paid by the Church. In turn, the Church was obligated to pay Bevco upon acceptance of the work. Further, Universal did not raise any affirmative defense, such as Bevco's nonperformance of the subcontract. An affirmative defense must be pleaded in a contract action, and a general denial is not sufficient to raise any affirmative defense. *Morearty v. City of McCook*, 119 Neb. 202, 228 N.W. 367 (1929); *Peters v. Wilks*, 151 Neb. 861, 39 N.W.2d 793 (1949). The clear implication of the pleadings is that Bevco performed the subcontract as far as possible but that Universal's faulty workmanship prevented performance of the subcontract. As stated in *Rickertsen v. Carskadon*, 172 Neb. 46, 50, 108 N.W.2d 392, 396 (1961): "If there is a substantial performance, the action may be maintained but without prejudice to any showing of damages on the part of defendant for the failure to receive full and complete performance." Proper performance of the subcontract would have produced payment for the painting. It is untenable that Universal be permitted to use its faulty workmanship to defeat enforcement of the subcontract in which Universal expressly agreed to "guarantee . . . against all defects of . . . workmanship." One cannot profit from or escape liability for his own wrongdoing. See *Keystone Bus Lines v. ARA Services*, 214 Neb. 813, 336 N.W.2d 555 (1983). We affirm the trial court's action in denying the motion to dismiss Bevco's third-party complaint against Universal.

Finally, Universal contends the trial court should

have sustained Universal's motions for a directed verdict on the Church's claim. After Universal's motion for a directed verdict was overruled at the end of the Church's case, a witness described Universal's application of the paint. Such evidence was adduced by Universal's cross-examination of Bevco's witness and as a part of Universal's case in chief. Universal took the risk of aiding the Church's case by presentation of evidence, either in cross-examination of Bevco's witness or in presenting its own case in an attempt to defeat a recovery by the Church. The evidence produced by Universal helped establish the cause of the peeling paint, namely, noncompliance with the manufacturer's specifications for application of the paint. There can be no complaint by Universal that it supplied information to buttress or even prove the Church's cause of action. See *Kentucky Aerospray v. Mays*, 251 S.W.2d 460 (Ky. 1952). "A defendant who moves for a directed verdict at the close of the plaintiff's evidence and, upon the overruling of such motion, proceeds with trial and introduces evidence waives any error in the ruling on the motion for directed verdict." *Baker v. Blue Ridge Ins. Co.*, *ante* p. 111, 114, 337 N.W.2d 411, 412 (1983). See, also, *Bradstreet v. Grand Island Banking Co.*, 89 Neb. 590, 131 N.W. 956 (1911); *Schaffer v. Strauss Brothers*, 164 Neb. 773, 83 N.W.2d 543 (1957). Therefore, there is no question to be reviewed by this court regarding Universal's motion for a directed verdict at the end of the Church's case.

Universal also contends that at the close of all the evidence the trial court should have sustained Universal's second motion for a directed verdict on the question of faulty painting. A motion for a directed verdict at the conclusion of all the evidence is judged in the light of the total evidence at the time such motion is made, that is, the evidence as it stands at the close of the trial, and such motion is not determined only on the evidence existing at the

time of the initial motion at the close of an adversary's case. See, 89 C.J.S. *Trial* § 668 (1955); *Abston v. Medora Grain, Inc.*, 206 Kan. 727, 482 P.2d 692 (1971); *Smith v. Sharp*, 85 Idaho 17, 375 P.2d 184 (1962). When Universal moved for a directed verdict at the conclusion of all the evidence, the existing evidence created a question of fact about which reasonable minds might differ. The evidence supported the jury's finding that there was faulty workmanship of Universal in applying the paint. There is no error in the trial court's overruling Universal's motions for a directed verdict on the Church's claim of faulty painting.

Finally, Universal alleges error in granting a new trial to Bevco in the third-party action. In view of the disposition which we direct concerning the third-party action, we need not dispose of Universal's assignment of error in this regard.

We affirm the following judgments of the District Court: The judgment in favor of the Church against Bevco in the amount of $29,117; the judgment in favor of Bevco on its counterclaim against the Church in the amount of $16,750; the judgment in favor of the Church against Fidelity in the amount of $12,367; the judgment in favor of Universal against Bevco in the amount of $6,276; and the judgment awarding the Church an attorney fee of $7,500 as costs taxed to Fidelity as a part of the judgment on the performance bond covering Bevco.

We reverse the judgment of the trial court's granting a new trial to Bevco regarding the third-party action against Universal. It would be futile to remand for a new trial on Bevco's third-party complaint against Universal, since Universal is already bound by the judgment in the action of the Church against Bevco. Under the circumstances in this case the District Court would be required to direct the jury to return a verdict for Bevco against Universal in the amount of $29,117. Therefore, in addition to reversing the judgment of a new trial

granted to Bevco, we remand this matter to the District Court and direct the District Court to enter judgment in favor of Bevco against Universal in the amount of $29,117 as a result of Bevco's third-party action against Universal.

Concerning costs of the appeal in these proceedings, an attorney fee in the amount of $750 is awarded to the Church and assessed against Fidelity. With the exception of the attorney fee charged to Fidelity in this appeal, the costs of the appeal are taxed to Universal.

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

McCOWN, J., not participating.

WHITE and HASTINGS, JJ., concur in the result.

M. JAMES GANSER, GREGORY W. KALLOS, AND L. HARLAN WEINGART, APPELLANTS, V. COUNTY OF LANCASTER, A BODY POLITIC, AND RICHARD NUERNBERGER, APPELLEES.

338 N.W.2d 609

Filed September 23, 1983. No. 82-550.

Taxation: Valuation: Notice. Neb. Rev. Stat. § 77-1317 (Reissue 1981) does not require formal notice from the county assessor to the landowner that valuation of real estate has been changed as a result of improvements undisclosed at the time of a previous assessment.

Appeal from the District Court for Lancaster County: BERNARD J. McGINN, Judge. Affirmed.

Stanley P. Gushard, for appellants.

Michael G. Heavican and Douglas D. Cyr, for appellees.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, and SHANAHAN, JJ., and GRANT, D.J.

SHANAHAN, J.

M. James Ganser, Gregory W. Kallos, and L. Harlan

Weingart (taxpayers), as owners of real estate in Lancaster County, Nebraska, brought an action against the County of Lancaster and Richard Nuernberger, treasurer of Lancaster County, seeking an injunction barring the collection of real estate taxes claimed to be void. From a dismissal by the District Court for Lancaster County, Nebraska, the taxpayers appeal. We affirm.

Taxpayers own real estate as tenants in common. On May 5, 1976, the taxpayers obtained a building permit for construction of an apartment building on their real estate. Construction of the apartment commenced sometime after July 13, 1977. The apartment was partially occupied in 1978 and construction was completed in 1979. The taxpayers paid all real estate taxes for 1978, 1979, and 1980, in accordance with the tax statements issued in those years. Neither an "information statement" nor a copy of the building permit for the apartment was filed with the county assessor in compliance with Neb. Rev. Stat. § 77-1318.01 (Reissue 1981).

On March 31, 1981, the county assessor issued a notice to the taxpayers that the actual valuation of the real estate for 1981 was increased from $2,345 to $180,910. The taxpayers appealed to the county board of equalization regarding the increased valuation for 1981 and obtained a reduction in valuation to $165,000. After the action by the board of equalization regarding 1981, the county assessor notified the taxpayers that valuations for the real estate had been increased for 1978, 1979, and 1980, as well.

On September 17, 1981, the taxpayers filed an action seeking an injunction to bar collection of the increased taxes for 1978, 1979, and 1980, and claimed that increased taxes were void because the county assessor had failed to send notice that the taxpayers' real estate was assessed at a figure greater than the last previous assessment. See Neb. Rev. Stat. § 77-1315 (Reissue 1981). The county moved to dismiss the action and alleged that the taxpayers had

an adequate remedy at law. Such motion was sustained by the District Court.

The pertinent statute is Neb. Rev. Stat. § 77-1317 (Reissue 1981), namely: "Real property; assessment; omitted lands and improvements in previous years . . . . It shall be the duty of county assessors to cause all lands and improvements . . . that, for any reason, have not been assessed or have escaped taxation for any former year or years when the same were liable to taxation, to be placed upon the tax list and carry out an assessment against such lands equal to, and in accordance with, the assessment that would have been charged against said lands and improvements had they been properly listed and assessed at the time they should have been assessed under the provisions of the general laws governing the assessing and taxation of lands and improvements . . . ."

Neb. Rev. Stat. § 77-1727 (Reissue 1981) states: "No injunction shall be granted . . . to restrain the collection of any tax . . . except such tax . . . levied or assessed for illegal or unauthorized purpose." As expressed in *Touzalin v. City of Omaha*, 25 Neb. 817, 824, 41 N.W. 796, 799 (1889): "Injunctions to prevent the collection of taxes are not favored, and should only be granted where the relief at law is wholly inadequate."

Notwithstanding the provisions of § 77-1727, injunctive relief is available in Nebraska where a tax is void, that is, where the taxing body does not have jurisdiction or power to impose the tax. See, *Morris v. Merrell*, 44 Neb. 423, 62 N.W. 865 (1895); *Rothwell v. Knox County*, 62 Neb. 50, 86 N.W. 903 (1901); *Hemple v. City of Hastings*, 79 Neb. 723, 113 N.W. 187 (1907). In the absence of a void tax or a tax for an illegal or unauthorized purpose, courts of equity should not interfere with the speedy collection of public taxes. See *Stone, State Tax Comm., v. Kerr*, 194 Miss. 646, 10 So. 2d 845 (1942).

The taxpayers do not claim that the county did not

have power to impose a tax on their real estate. The taxpayers do not allege any illegal or unauthorized purpose of the tax imposed and do not claim their property was exempt from taxation. The question is, Is a tax imposed under § 77-1317 void in the absence of formal notice to the landowner that the valuation of the landowner's real estate has been changed as a result of improvements undisclosed at the time of a previous assessment?

When improvements enhance the value of real estate previously assessed, § 77-1317 does not require the assessor to notify the record owner regarding the increased assessment. See *Watson Bros. Realty Co. v. County of Douglas*, 149 Neb. 799, 32 N.W.2d 763 (1948).

Notice of an increased assessment of property previously assessed gives the owner who has relied upon the previous assessment an opportunity to appear before the county board of equalization and to contest the increase in value, if such increase was unwarranted. See *Rosenbery v. Douglas County*, 123 Neb. 803, 244 N.W. 398 (1932). Landowners generally anticipate that improvements on real estate will enhance the value of the land, and, consequently, a change in valuation for taxation can reasonably be expected. After a change in the real estate's condition as a result of improvement, absolute reliance on the previous assessment is neither practical nor justified. If the taxpayers' construction of § 77-1317 is accepted, the assessor must notify the landowner that the real estate has been improved (knowledge of a fact already possessed by the landowner) and that the assessor will execute the official duty of assessing all taxable property (knowledge of the law already charged to the landowner). Such superfluous notification is the "useless thing" avoided in *Watson Bros. Realty Co. v. County of Douglas*, *supra*.

Because an assessment under § 77-1317 regarding omitted lands and improvements does not require

formal notice from the assessor to be valid, any other irregularity in the assessment of the taxpayers' real estate in this case is not a ground for injunctive relief. See *Boettcher v. County of Holt*, 163 Neb. 231, 79 N.W.2d 183 (1956). Neb. Rev. Stat. § 77-1735 (Reissue 1981) provides: "If a person, who claims a tax, or any part thereof, to be invalid for any reason, shall have paid the same to the treasurer . . . as though the same was legal and valid, he may . . . demand the same in writing from the county treasurer to whom paid. If the same shall not be refunded within ninety days thereafter, he may sue such county treasurer for the amount so demanded." The purpose of the foregoing statute is to provide an action at law for the recovery of money paid for taxes which were levied or assessed for an illegal or unauthorized purpose or which were for any reason invalid. See, *Loup River Public Power District v. County of Platte*, 144 Neb. 600, 14 N.W.2d 210 (1944); *Scudder v. County of Buffalo*, 170 Neb. 293, 102 N.W.2d 447 (1960).

" 'An adequate remedy at law means a remedy which is plain and complete and as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.' " *Golden v. Bartholomew*, 140 Neb. 65, 77, 299 N.W. 356, 362 (1941). See, also, *Gamboni v. County of Otoe*, 159 Neb. 417, 67 N.W.2d 489 (1954). A suit in equity will not lie when the plaintiff has a plain and adequate remedy at law. See *Western Union Telegraph Co. v. Douglas County*, 76 Neb. 666, 107 N.W. 985 (1906).

Under the facts present in the taxpayers' petition, the taxpayers have an adequate remedy at law under § 77-1735 that permits a taxpayer's recovery or refund of an invalid tax. The District Court was correct that the taxpayers have an adequate remedy at law. Therefore, the petition for injunctive relief

was properly dismissed. The judgment of the trial court is affirmed.

AFFIRMED.

KRIVOSHA, C.J., not participating.
WHITE, J., concurs in the result.

BORG-WARNER ACCEPTANCE CORPORATION, APPELLEE, V. RALPH WATTON ET AL., APPELLANTS.

338 N.W.2d 612

Filed September 23, 1983. No. 82-561.

1. **Uniform Commercial Code: Security Interests: Notice.** The guaranty itself need not be secured in order to entitle the guarantors to notice. All that need be secured to entitle the guarantor to notice is the debt for which the guaranty is executed.
2. _____: _____: _____. 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.
3. _____: _____: _____. 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. The failure to give the requisite notice is an absolute bar to recovery.
4. **Uniform Commercial Code: Security Interests: Guaranty.** Whatever restrictions may be imposed by law with regard to the debtor are likewise imposed with regard to the guarantor.
5. **Uniform Commercial Code: Notice: Waiver.** The Uniform Commercial Code makes it quite clear that the requirement of giving notice pursuant to Neb. U.C.C. § 9-504(3) (Reissue 1980) may not be waived prior to default.

Appeal from the District Court for Hall County: RICHARD L. DEBACKER, Judge. Reversed and remanded.

Jerry J. Milner of Grimminger, Milner & Lamberty, for appellants.

Thomas J. Garvey and Michael L. Munch of Hascall, Jungers & Garvey, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, and SHANAHAN, JJ., and GRANT, D.J.

KRIVOSHA, C.J.

The appellants, Ralph and Carole Watton and Gwyer Grimminger (Watton-Grimminger), appeal from a judgment entered by the District Court for Hall County, Nebraska, granting summary judgment in favor of Borg-Warner Acceptance Corporation (Borg-Warner) and against Watton-Grimminger. The judgment granted Borg-Warner was in the amount of $16,335.62, together with interest, and grew out of a certain guaranty executed by Watton-Grimminger in favor of Borg-Warner. We believe the trial court erred in entering such judgment, and we reverse and remand.

Borg-Warner brought the original action against Watton-Grimminger to recover a deficiency judgment for the balance due on a certain farm tractor sold by Niagara Equipment Co., Inc. (Niagara Equipment), to a Paul T. Meyer. The retail installment contract, signed by Meyer in favor of Niagara Equipment, was assigned to Borg-Warner, with recourse. In March of 1980 Meyer defaulted on the installment contract. At the time of his default Meyer was still indebted on the tractor in the amount of $36,544.92. In September of 1980 Borg-Warner took possession of the tractor and sold it at auction for $19,000.

It is undisputed that Borg-Warner did not give Watton-Grimminger notice of the sale but, nevertheless, sought to collect the deficiency from Watton-Grimminger by reason of their guaranty agreement. The guaranty agreement had been executed by Watton-Grimminger on February 7, 1978, and specifically provided that "[i]n order to induce [Borg-Warner] to enter into contracts with or extend credit or financing to Niagara Equipment Co., Inc.," Watton-Grimminger guaranteed full and prompt payment of any and every indebtedness, liability, or obligation owed by Niagara Equipment to Borg-Warner. For purposes of resolving this case it is important to further note that Niagara Equipment

signed at least two other documents in favor of Borg-Warner, one before the guaranty was signed and the other one after it was signed. On October 17, 1977, Niagara Equipment executed and delivered to Borg-Warner a document entitled "Inventory Security Agreement and Power of Attorney." By this agreement Niagara Equipment granted to Borg-Warner a security interest in all inventory of Niagara Equipment owned at the time of the execution of the agreement or thereafter acquired. The purpose of the security agreement was "to secure repayment to [Borg-Warner] of all such extensions of credit made by [Borg-Warner] in accordance with this Agreement, and to secure payment of all other debts or liabilities and performance of all obligations of [Niagara Equipment] to [Borg-Warner], whether now existing or hereafter arising."

The second document of importance is a "Retail Finance Agreement" executed April 6, 1979, by Niagara Equipment in favor of Borg-Warner. According to the document, the purpose of the agreement was to set forth the terms and conditions which would govern any purchase of contracts by Borg-Warner from Niagara Equipment. One of those conditions was that all contracts so assigned would grant to Borg-Warner a first lien upon the goods covered by the contract.

The trial court, in granting summary judgment in favor of Borg-Warner and against Watton-Grimminger, specifically found that there was no genuine issue of any material fact and that the guaranty given by Watton-Grimminger was general and unconditional. The court further found that no particular security interest was in existence or "contemplated" in connection with the giving of the guaranty. By reason thereof the trial court, apparently relying upon our decision in *First State Bank v. Peterson*, 205 Neb. 814, 290 N.W.2d 634 (1980), concluded that the guarantors were not entitled to notice. Watton-

Grimminger, on the other hand, maintained that the case was governed by our decision in *DeLay First Nat. Bank & Trust Co. v. Jacobson Appliance Co.*, 196 Neb. 398, 243 N.W.2d 745 (1976), and have now appealed to this court, assigning as error the trial court's failure to so hold.

In every case before summary judgment is granted, the trial court must determine the existence of certain basic principles. As a general rule, the court should sustain a motion for summary judgment if, upon hearing, the pleadings, depositions, admissions on file, and affidavits show 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. *Monarch Industries v. Caldwell Mfg. Co.*, 214 Neb. 26, 332 N.W.2d 664 (1983); Neb. Rev. Stat. § 25-1332 (Reissue 1979). In attempting to reach that conclusion the trial court must examine the evidence, not to decide any issue of fact, but only to discover whether any real issue of fact exists. *Green v. Village of Terrytown*, 189 Neb. 615, 204 N.W.2d 152 (1973). Contrary to the claims made by Watton-Grimminger, we believe that the trial court was correct in determining that there was no genuine issue of fact. That is not the defect in the case. The defect in this case is that the moving party here, Borg-Warner, is not entitled to judgment as a matter of law. Quite to the contrary, it would appear, on appropriate request, Watton-Grimminger are entitled to judgment as a matter of law.

The key question is whether the debt for which the deficiency is now being sought was a secured debt or an unsecured debt. It is true in *First State Bank v. Peterson*, *supra*, we held that "Where no security is taken or contemplated at the time an unconditional guaranty of payment is made, a failure to notify the guarantor of the sale of collateral taken at a later time as security for further indebtedness is not a defense to an action upon the guaranty agreement." (Syllabus of the court.) The evidence, however, in

the *First State Bank* case was entirely different than in the present case. In the *First State Bank* case the guarantor signed an unconditional guaranty agreement, similar to the type involved herein, guaranteeing loans of a lumber company, which were likewise wholly unsecured, at least as to the limit of the guarantor's liability. We said in *First State Bank v. Peterson*, *supra* at 816, 290 N.W.2d at 635: "In this case, no security interest in collateral existed or was contemplated at the time the guaranty agreement was made. The $12,000 loan on October 31, 1973, to the principal debtor, . the lumber company, was made in reliance upon the guaranty." Not so in the instant case. As the evidence discloses, Borg-Warner did not contemplate making any unsecured loans to Niagara Equipment. The inventory security agreement executed before the guaranty was signed had already granted to Borg-Warner a lien on all of Niagara Equipment's inventory, and the retail finance agreement required that all contracts purchased by Niagara Equipment constitute a first lien upon the property. The very contract purchased by Borg-Warner in this case covered secured machinery. Moreover, the answers to request for admissions served on Borg-Warner by Watton-Grimminger established the following facts: "1. [Borg-Warner] contemplated entering into a retail finance agreement with Niagara Equipment Company at the time [Borg-Warner] induced [Watton-Grimminger] to execute a personal guarantee.

"2. [Borg-Warner] contemplated purchasing or receiving an assignment of farm machinery purhase [sic] contracts from Niagara Equipment Company at the time [Borg-Warner] induced [Watton-Grimminger] to execute a personal garantee [sic].

"3. [Borg-Warner] contemplated retaining or requiring a security interest upon the subject matter of farm machinery purchase contracts assigned to, or purchased by [Borg-Warner] from [Watton-Grimminger]."

And, finally, "5. That [Borg-Warner] retained or aquired [sic] a security interest in the said tractor which is the subject matter of this action, at the time it received the assignment or purchase of the contract from Niagara Equipment Company."

It is impossible, under the evidence, to suggest that the parties did not contemplate that the debts which Watton-Grimminger were guaranteeing were not otherwise to be secured debts, unlike the facts in *First State Bank v. Peterson*, 205 Neb. 814, 290 N.W.2d 634 (1980), and, indeed, more like the facts in *DeLay First Nat. Bank & Trust Co. v. Jacobson Appliance Co.*, 196 Neb. 398, 243 N.W.2d 745 (1976). The guaranty itself need not be secured in order to entitle the guarantors to notice. All that need be secured to entitle the guarantor to notice is the debt for which the guaranty is executed. As we recently said in *First Nat. Bank & Trust Co. v. Hughes*, 214 Neb. 42, 46, 332 N.W.2d 674, 677 (1983): "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 . . . .' " And, further, in *First Nat. Bank & Trust Co. v. Hughes*, *supra* at 47, 332 N.W.2d at 677, we said: "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." See, also, *Butte State Bank v. Williamson*, *ante* p. 296, 338 N.W.2d 598 (1983).

As we indicated at the outset, the facts in this case clearly establish that one of the parties was entitled

to judgment as a matter of law. It was not, however, as the trial court concluded, Borg-Warner.

However, Borg-Warner argues that notwithstanding the fact that the guarantors may have been entitled to notice, they waived it in writing and therefore were not entitled to it in any event. We believe that Borg-Warner is in error in that position. As we have previously indicated, a guarantor is a "debtor" under the terms of Neb. U.C.C. § 9-105(1)(d) (Reissue 1980). As such, then, whatever restrictions may be imposed by law with regard to the debtor are likewise imposed with regard to the guarantor. The Uniform Commercial Code makes it quite clear that the requirement of giving notice pursuant to Neb. U.C.C. § 9-504(3) (Reissue 1980) may not be waived prior to default. See Neb. U.C.C. § 9-501(3)(b) (Reissue 1980). Other courts which have considered this matter have likewise so concluded. See, *Norton v. Nat. Bank of Commerce of Pine Bluff*, 240 Ark. 143, 398 S.W.2d 538 (1966); *Commercial Credit Corp. v. Lane*, 466 F. Supp. 1326 (M.D. Fla. 1979); *Barnett v. Barnett Bank of Jacksonville N.A.*, 345 So. 2d 804 (Fla. App. 1977); *Commercial Discount Corp. v. Bayer*, 57 Ill. App. 3d 295, 372 N.E.2d 926 (1978); *Chase Manhattan Bank, N.A. v. Natarelli*, 93 Misc. 2d 78, 401 N.Y.S.2d 404 (1977); *Ford Motor Credit Co. v. Lototsky*, 549 F. Supp. 996 (E.D. Pa. 1982). The evidence in this case establishes as a matter of law that Borg-Warner was not entitled to judgment. Therefore, the judgment of the trial court is reversed and the cause remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Cite as 215 Neb. 325

MARVIN E. SIDEL, SR., APPELLANT, v. SPENCER FOODS, APPELLEE.

338 N.W.2d 616

Filed September 23, 1983. No. 82-608.

1. **Workmen's Compensation.** The statute authorizing an increase in a workmen's compensation award limits the basis for modification to that increased incapacity due solely and only to the compensable accident.
2. **Res Judicata: Judgments: Actions.** The doctrine of res judicata holds that a final judgment on the merits by a court of competent jurisdiction is conclusive upon the parties in any later litigation involving the same action and generally is conclusive as to every question which was or might have been presented and determined in the first action.

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

Michael L. Getty, for appellant.

Dennis R. Riekenberg of Cassem, Tierney, Adams, Gotch & Douglas, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, and SHANAHAN, JJ., and GRANT, D.J.

CAPORALE, J.

Marvin E. Sidel, Sr., appeals from the Nebraska Workmen's Compensation Court's dismissal of his application to modify a previous disability award. We affirm.

In April of 1977 Sidel sustained injury in an accident arising out of and in the course of his employment with Spencer Foods while lifting a tub of slaughterhouse scraps into an auger. He underwent a lumbar laminectomy at the L4-5 level later that month. A cervical fusion was performed in March of 1978 to remedy an unrelated injury. In July 1978 Sidel, while arising from a chair during a coffee-break at work, experienced pain in his lower back.

In April 1979 the Workmen's Compensation Court awarded Sidel a 20-percent permanent partial disability as a result of the April 1977 accident. The

award was affirmed by this court in *Sidel v. Travelers Ins. Co.*, 205 Neb. 541, 288 N.W.2d 482 (1980) (*Sidel I*). That opinion dealt with, among other things, the issue as to what role the July 1978 incident should play in determining Sidel's award. The compensation court had found that Sidel had failed to prove the July incident was either a recurrence of the original injury or that it constituted a new accident arising out of and in the course of his employment. In affirming, this court stated at 547, 288 N.W.2d at 486: "The court specifically found that the injury of July 11, 1978, was not compensable. We have no reason to believe the court considered that or the noncompensable cervical impairment in any way in its determination."

Sidel continued to experience back pain which radiated into his legs. A second lumbar laminectomy and a spinal fusion were performed at the L4-5 level in April of 1980. Further lumbar surgery was performed at the L4-5 level in March of 1981 to re-fuse the spine.

In November 1981 Sidel filed an application to modify the original award of the compensation court, as affirmed by this court, on the basis that his incapacity had increased.

During the course of the rehearing before the three-judge panel of the compensation court on that application, Spencer Foods objected to any testimony by Sidel referring to the July 1978 incident. The objection was sustained on the ground that such testimony was irrelevant. The testimony of Dr. Ries, Sidel's physician, concerning the July 1978 incident was objected to on the same ground. Dr. Ries did testify that if there was a 1978 incident separate and apart from the April 1977 accident, he could not say with reasonable medical probability that Sidel's current problems were "solely due to the 1977 accident." There was no countervailing medical evidence.

The compensation court found Sidel had failed to

prove the increase in his incapacity was due solely to the compensable accident of April 1977, and therefore dismissed his application for modification of the original award.

Sidel's four assigned errors coalesce to claim that the compensation court erred (1) in requiring him to prove his increased incapacity was solely caused by the April 1977 accident, and (2) in excluding direct testimony concerning the 1978 incident while allowing cross-examination concerning that topic.

Authority for modification of certain compensation awards is found in Neb. Rev. Stat. § 48-141 (Reissue 1978), which provides in pertinent part: "'[T]he amount of any . . . award payable periodically for six months or more may be modified as follows: . . . at any time after six months from the date of the . . . award, an application may be made by either party on the ground of increase or decrease of incapacity due solely to the injury . . . .'"

There can be no rational argument but that the foregoing language places upon Sidel the burden of proving by a preponderance of the evidence that the increase in his incapacity was due solely and only to the injury resulting from the original accident. The plain and ordinary meaning of the words used in the statute say, as clearly as the language of this jurisdiction is capable of expressing, that such is his burden. We have so applied the statute in the past. *Pavel v. Hughes Brothers, Inc.*, 167 Neb. 727, 94 N.W.2d 492 (1959); *Chadd v. Western Cas. & Sur. Co.*, 166 Neb. 483, 89 N.W.2d 586 (1958); *Peek v. Ayers Auto Supply*, 157 Neb. 363, 59 N.W.2d 564 (1953); *Ludwickson v. Central States Electric Co.*, 142 Neb. 308, 6 N.W.2d 65 (1942).

It follows, therefore, that the compensation court assigned the proper burden of proof to Sidel. The medical evidence fails to meet that burden.

In a heroic effort to overcome the effects of the foregoing rule of law and evidence, Sidel argues that Dr. Ries ought not have been required to treat the

1978 incident as something separate and apart from the 1977 accident. He therefore urges the compensation court erred in excluding evidence concerning that occurrence.

Since *Sidel I* determined that the 1978 incident was not a recurrence of the injury resulting from the 1977 accident, the compensation court correctly sustained the objections. Admission of evidence seeking to change the characterization of the 1978 incident to be but a part of the 1977 injury would violate the doctrine of res judicata. That doctrine holds that a final judgment on the merits by a court of competent jurisdiction is conclusive upon the parties in any later litigation involving the same action. *Simpson v. City of North Platte*, *post* p. 351, 338 N.W.2d 450 (1983); *Bank of Mead v. St. Paul Fire & Marine Ins. Co.*, 202 Neb. 403, 275 N.W.2d 822 (1979). The bar generally operates as to every question which was or might have been presented and determined in the first action. *Bank of Mead v. St. Paul Fire & Marine Ins. Co.*, *supra*; *Omaha P.P. Dist. v. Natkin & Co.*, 193 Neb. 518, 227 N.W.2d 864 (1975).

Sidel's complaint that the compensation court improperly allowed cross-examination in an area foreclosed on direct examination is not well founded. The first and short answer to this claim is that no objection was made to the cross-examination of Dr. Ries. Moreover, the cross-examination did not, unlike the direct examination, attempt to change the characterization of the 1978 incident into something different than it had judicially been determined to be in *Sidel I*. The cross-examination correctly required Dr. Ries to treat the 1978 incident as *Sidel I* decreed.

The compensation court was correct in all respects.

AFFIRMED.

Cite as 215 Neb. 329

MARY JUNE SMALLEY COCKLE, APPELLEE, V. GEORGE ROBERT COCKLE, APPELLANT.

339 N.W.2d 63

Filed September 23, 1983. No. 82-667.

1. **Summary Judgment: Final Orders.** The overruling of a motion for summary judgment is not a final, appealable order.
2. **Collateral Estoppel.** The doctrine of collateral estoppel may be applied where an identical issue was decided in a prior action, there was a judgment on the merits which was final, the party against whom the rule is to be applied was a party or in privity with a party to the prior action, and there was an opportunity to fully and fairly litigate the issue in the prior action.
3. **Res Judicata: Proof: Judgments.** Where different proof is required to establish a cause, a judgment in one action does not preclude another action.
4. **Statutes: Presumptions.** Where the law of a sister state is not presented, it is presumed to be the same as the law of this jurisdiction.
5. **Courts: Jurisdiction.** One who invokes the power of a court on any question other than jurisdiction makes a general appearance such as to confer jurisdiction over himself.
6. **Judgments.** A judgment may be final for some purposes and yet not be final as to other matters.
7. **Foreign Judgments.** It is for the state of rendition to determine whether a judgment is final, even though it has been appealed.
8. _____. A monetary judgment of a sister state will be enforced in this jurisdiction only for the amount for which it is enforceable in the state of rendition.
9. **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 these facts are clear, and the movant is entitled to judgment as a matter of law.

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

Ralph E. Peppard, for appellant.

James T. Blazek of Byrne, Rothery, Gentile & Blazek, P.C., for appellee.

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

CAPORALE, J.

George Robert Cockle, the husband herein, ap-

peals from the granting of a summary judgment to his wife, Mary June Smalley Cockle, registering a judgment she obtained against him in California. We affirm.

This is the second appeal of this controversy to this court. In *Cockle v. Cockle*, 204 Neb. 88, 281 N.W.2d 392 (1979) (*Cockle I*), we ruled that the May 3, 1976, judgment of the Superior Court of California, Monterey County, awarding the wife a percentage of the husband's military retirement pay was not for an amount certain and, therefore, could not be registered. Following that decision, the wife filed a proceeding in the aforesaid California court which resulted in a November 6, 1980, determination that there was due and owing on the 1976 judgment as of September 15, 1980, the sum of $32,419.29.

Thereafter, the wife, pursuant to Neb. Rev. Stat. §§ 25-1587 et seq. (Reissue 1979), filed a petition in the Nebraska Fourth Judicial District Court, Douglas County, praying that the "judgment entered on November 6, 1980, be registered . . . ."

Actual service of the notice of the proceeding resulting in the 1980 California adjudication was had upon the husband in Omaha, where he resides, by U.S. mail. The 1980 ruling of the California court noted that the husband did not appear in person, but was represented by counsel, and that his "[m]otion to terminate retirement payments is hereby denied. Said Judgment is final and conclusive. Said Judgment providing for assignment and continued payments by Defendant [husband] to Plaintiff [wife] remains in full force and effect."

The husband appealed the 1980 determination to the Court of Appeal of the State of California, but did not file a supersedeas bond. Although the wife's brief undertakes to advise us as to the subsequent history of that appeal, the record contains nothing concerning it. We therefore must, and do, ignore all plaintiff says concerning that history.

The operative assignments of error discussed in the

husband's brief are that the trial court erred in not finding (1) this action is barred by the doctrine of res judicata; (2) the judgment sought to be registered is invalid and not final; and (3) the judgment sought to be registered is contrary to law and, therefore, unenforceable.

In an additional purported assignment of error the husband states: "The District Court erred by overruling Defendant's Motion for Summary Judgment in which the Defendant showed the Court that the Plaintiff's action was barred by the Statute of Limitations." Brief for Appellant at 2. The overruling of a motion for summary judgment is not a final, appealable order. *Rehn v. Bingaman*, 157 Neb. 467, 59 N.W.2d 614 (1953). See, also, *Wulf v. Farm Bureau Ins. Co.*, 188 Neb. 258, 196 N.W.2d 164 (1972), holding that an order denying relief on a plea of the statute of limitations is to be treated as an interlocutory order. None of the husband's assignments of error reach the argument in his brief that his demurrer was erroneously overruled because the petition shows on its face that the cause of action was barred by the 5-year period of limitations specified by Neb. Rev. Stat. § 25-205 (Reissue 1979). Therefore, any error in overruling the demurrer, if any error there was, has been waived.

The husband's first operative assignment of error is that the instant cause of action is somehow barred by this court's opinion in *Cockle I*. Before any meaningful analysis of this issue can be made, we must determine what actually is being presented for registration. The wife's petition refers to both the 1976 California judgment and the 1980 adjudication. Both the 1976 judgment and 1980 determination are attached to her petition for registration. The 1980 ruling refers to the 1976 judgment and does no more than determine what was due as of September 15, 1980, under the 1976 judgment. Therefore, it is, under the petition's factual allegations, the 1976 judgment in the amount determined by the 1980 ruling

which is presented for registration, notwithstanding the prayer's sole reference to the 1980 judgment.

The husband argues that *Cedars Corp. v. Sun Valley Development Co.*, 213 Neb. 622, 330 N.W.2d 900 (1983), demands a holding that the doctrine of res judicata forecloses this action. He misreads *Cedars Corp.* It holds that the doctrine of collateral estoppel may be applied where an identical issue was decided in a prior action, there was a judgment on the merits which was final, the party against whom the rule is to be applied was a party or in privity with a party to the prior action, and there was an opportunity to fully and fairly litigate the issue in the prior action. *Cedars Corp.* has no applicability to the case before us, as the issue in *Cockle I* and the issue in the present case are not the same. In *Cockle I* the wife sought to register a judgment in an uncertain amount. Here, she seeks to register the judgment in an amount made certain by a subsequent judicial act. This is, therefore, a case wherein the subject matter at issue is different than that which was at issue in *Cockle I.* Where different proof is required to establish a cause, a judgment in one action does not preclude another action. *Northport Irr. Dist. v. Jess*, *ante* p. 152, 337 N.W.2d 733 (1983); *Suhr v. City of Scribner*, 207 Neb. 24, 295 N.W.2d 302 (1980).

The record, therefore, does not sustain the husband's first operative assignment of error.

The next assignment of error presents two questions: Firstly, whether the 1980 determination of the amount owed is valid in the sense that the California court had in personam jurisdiction over the husband, and secondly, whether, in view of the appeal, the judgment is final such as to be entitled to registration.

No presentation was made to the trial court or to this court concerning California's jurisdictional requirements. Under that circumstance we presume the common and statutory law of California to be the

same as the law of Nebraska. Neb. Rev. Stat. § 25-12,101 (Reissue 1979); *In re Estate of Thompson*, 214 Neb. 899, 336 N.W.2d 590 (1983). It has long been the rule of this jurisdiction that one who invokes the power of a court on any question other than jurisdiction makes a general appearance such as to confer jurisdiction over himself. *State v. Wedige*, 205 Neb. 687, 289 N.W.2d 538 (1980); *Porter v. The Chicago and Northwestern Railway Company*, 1 Neb. 14 (1871). If there had been any doubt as to whether the California court had jurisdiction over the husband in 1980 to determine the amount due under the 1976 judgment, he removed that doubt by filing the motion in the 1980 proceeding seeking relief from the 1976 judgment. There is no claim that the California court lacked jurisdiction to render the 1976 judgment.

As to the second question, a judgment may be final for some purposes and yet not be final as to other matters. It is for the state of rendition to determine whether a judgment is final, even though it has been appealed. Restatement (Second) of Conflict of Laws § 107 and Comment *d* thereto; § 112 and Comment *b* thereto (1971).

The only California law presented to the trial court and to this court is Cal. Civ. Proc. Code § 917.1 (West 1980), which states that the filing of an appeal without the posting of a supersedeas bond does not stay the enforcement of a monetary judgment. According to Restatement (Second) of Conflict of Laws § 101 (1971), a monetary judgment will be enforced in a sister state only for the amount for which it is enforceable in the state of rendition. Not having been superseded, the judgment is therefore enforceable in California and, therefore, in this jurisdiction. Nebraska's enforcement thereof may, of course, be suspended should the judgment be vacated on appeal by the California courts. *Weiss v. Metalsalts Corp.*, 72 N.J. Super. 264, 178 A.2d 240 (1962).

For the reasons discussed above, the husband's

second assignment of error is likewise without merit.

The husband next asserts that the 1976 judgment sought to be registered is contrary to the law declared in *McCarty v. McCarty*, 453 U.S. 210, 101 S. Ct. 2728, 69 L. Ed. 2d 589 (1981), is therefore erroneous, and, consequently, is invalid and unenforceable. *McCarty* held federal law precluded California from dividing military nondisability retirement pay under its community property laws.

The difficulty with this argument from the husband's point of view is that he did not appeal the 1976 judgment setting over a portion of his retirement pay to his wife. He now wishes to take retroactive advantage of a rule which Colonel McCarty established 5 years after the subject judgment was rendered.

The California law, as presented to us by both the husband and wife, is that *McCarty* may not be given retroactive application in cases where the issue of the community nature of a military retirement pension was adjudicated and the judgment became final prior to the date of the *McCarty* decision. *In re Marriage of McGhee*, 131 Cal. App. 3d 408, 182 Cal. Rptr. 456 (1982); *In re Marriage of Fellers*, 125 Cal. App. 3d 254, 178 Cal. Rptr. 35 (1981). Under the principles enunciated previously, the judgment being enforceable in California, it is enforceable in Nebraska.

The husband's third assignment of error is therefore also without merit.

The husband quite correctly argues that summary judgment may properly be granted where there exists no genuine issue as to any material fact, the ultimate inferences to be drawn from these facts are clear, and the movant is entitled to judgment as a matter of law. *Swanson v. First Fidelity Life Ins. Co.*, 214 Neb. 654, 335 N.W.2d 538 (1983). Contrary to his contention, this case falls within the above-stated rule. The trial court correctly granted the wife a

summary judgment registering the 1976 California judgment in the amount determined by the 1980 adjudication.

AFFIRMED.

McCOWN, J., not participating.

DEANNA K. HINZ, APPELLANT, V. GLENN C. HINZ, APPELLEE.

338 N.W.2d 442

Filed September 23, 1983. No. 82-680.

1. **Divorce: Appeal and Error.** On appeal of domestic relations cases, this court is required to make independent conclusions of fact without reference to the conclusion reached by the trial court.
2. **Judgments: Appeal and Error.** As a general rule, a proper judgment will not be reversed even if the trial court did not give the right reason for its rendition.
3. **Child Custody: Sexual Misconduct.** Sexual misconduct is a factor which may be considered in deciding the issue of custody. It may support a finding of a change of circumstances sufficient to conclude that one who had custody is no longer fit for that purpose or that the best interests of the child require such change.

Appeal from the District Court for Thayer County: ORVILLE L. COADY, Judge. Affirmed.

Marsha E. Fangmeyer of Legal Services of SE Nebraska, for appellant.

Joseph F. Chilen of Denney & Chilen, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, and SHANAHAN, JJ., and GRANT, D.J.

HASTINGS, J.

The parties' marriage was dissolved by decree dated June 12, 1980, and custody of the children of the marriage, born on August 10, 1974, November 5, 1975, and December 12, 1977, was awarded to Deanna K. Hinz, the petitioner.

On October 9, 1981, Glenn C. Hinz, the respondent, filed an amended petition for modification, which

was heard by the District Court on June 29, 1982. Following that hearing the court entered an order transferring custody of the children to the respondent. The petitioner has appealed. We affirm.

According to the testimony of the petitioner herself, as well as other witnesses, the petitioner had affairs with several men, including sexual relations, both at her home and at the home of one of the men, many times when the children were present in the house. The respondent testified that on one occasion, after having had visitation with the children, he brought them home and they found the petitioner in bed with a male friend.

There was evidence of the petitioner using vile and obscene language around the children, that the children were also using similar language, and some indication of physical abuse of the children by the petitioner. There was some suggestion that the children were not always kept as neat and clean as they should be, and that at one period of time, at least, they were not being adequately fed.

Apparently, there was no real question about the fitness of the respondent to have custody of the children, other than the fact that he worked a regular job and would require a babysitter on occasions to stay with the children.

The trial court's memorandum opinion supporting its order changing custody of the children emphasized the fact that other than working at one time for a few hours at night, the petitioner was satisfied to live on child support and food stamps. Its memorandum stated that such conduct only indicated a shortsightedness and lack of ambition which will affect the children's security and guidance.

In our review of this case we are required to make independent conclusions of fact without reference to the conclusion reached by the trial court. *Dunne v. Dunne*, 211 Neb. 636, 319 N.W.2d 741 (1982). We therefore need not examine the reasons given by the trial court for reaching the decision that it did, al-

though as a general rule a proper judgment will not be reversed even if the trial court did not give the right reason for its rendition. *Leo A. Daly Co. v. Omaha-Douglas Public Bldg. Comm.*, 212 Neb. 533, 324 N.W.2d 252 (1982).

Sexual misconduct is a factor which may be considered in deciding the issue of custody. It may support a finding of a change of circumstances sufficient to conclude that one who had custody is no longer fit for that purpose or that the best interests of the child require such change. *Dunne v. Dunne*, *supra*.

Having reviewed the record de novo, we find that there has been such a change of circumstances that the best interests of these children require that custody be changed to the respondent. The judgment of the District Court is affirmed.

AFFIRMED.

KRIVOSHA, C.J., concurs in the result.

STATE OF NEBRASKA, APPELLEE, V. CYNTHIA KUCERA, APPELLANT.
338 N.W.2d 443

Filed September 23, 1983. No. 82-792.

1. **Pleas: Waiver.** A defendant who pleads guilty to a misdemeanor in which a sentence of imprisonment is legally permissible is entitled to be informed of the nature of the charges against him, the right to assistance of counsel, the right to confront witnesses against him, the right to a jury trial, and the privilege against self-incrimination, and the record must affirmatively show a voluntary and intelligent waiver of these rights.
2. **Pleas.** The vacation of a conviction following an improper plea of guilty, and a remand for rearraignment, does not subject a defendant to double jeopardy.

Appeal from the District Court for Lancaster County: SAMUEL VAN PELT, Judge. Conviction vacated. Reversed and remanded for further proceedings.

Dennis R. Keefe, Lancaster County Public Defender, and Dorothy A. Walker, for appellant.

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

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, and SHANAHAN, JJ., and GRANT, D.J.

HASTINGS, J.

Upon her plea of guilty the defendant was convicted in the municipal court of Lincoln of the crime of theft of less than $300, and was sentenced to 5 days in jail. On appeal to the District Court, in which she assigned as error only the excessiveness of the sentence, the conviction and sentence were affirmed.

The record in municipal court does not disclose that the defendant was advised of any of her rights at any time during these proceedings. This deficiency was raised for the first time on appeal to this court.

Lest there be any misunderstanding on the part of county courts and municipal courts taking guilty pleas in situations where there is a possibility of a jail sentence, we repeat the following language from *State v. Tweedy*, 209 Neb. 649, 654-55, 309 N.W.2d 94, 98 (1981): "We therefore hold that no defendant may be imprisoned for any offense, whether a traffic infraction, misdemeanor, or felony, absent a knowing and intelligent waiver of his rights as provided for by the *Boykin-Turner* rule. That means that such defendants are entitled to be informed of the nature of the charges against them, the right to assistance of counsel, the right to confront witnesses against them, the right to a jury trial where otherwise authorized, and the privilege against self-incrimination. A voluntary and intelligent waiver of these rights must affirmatively appear from the record."

We do not agree with the defendant that she is en-

titled to a dismissal of the complaint. By vacating her conviction and remanding the case for rearraignment, the defendant is not being subjected to double jeopardy.

The defendant's conviction is ordered vacated, and the cause is remanded to the District Court for further proceedings consistent with this opinion.

CONVICTION VACATED. REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. ROBERT W. PEARSON, APPELLANT.

338 N.W.2d 445

Filed September 23, 1983. No. 83-048.

1. **Evidence: Tape Recordings.** For a tape recording of a telephone conversation between a witness and a defendant to be admissible in evidence, it need only be shown that the conversation is relevant; that it accurately reflected the conversation; that the tapes had not been altered, changed, or erased in any way; and that the voices heard on the tapes were those of the witness and the defendant.
2. _____: _____. The use of profane or obscene language in an otherwise admissible statement or conversation generally does not destroy the nature and meaning of the statement nor make it inadmissible.
3. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal in the absence of a showing of an abuse of discretion.

Appeal from the District Court for Washington County: DARVID D. QUIST, Judge. Affirmed.

Anthony S. Troia, for appellant.

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

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, JJ., and GRANT, D.J.

HASTINGS, J.

Following a jury trial, the defendant was convicted

of the Class III felony offense of delivering cocaine. He was sentenced to a term of imprisonment in an institution under the jurisdiction of the Department of Correctional Services for a period of not less than 5 nor more than 10 years.

He has appealed to this court, assigning as error the admission of certain tapes of telephone conversations and the excessiveness of the sentence. We affirm.

Critical to the conviction of the defendant were two tape recordings of telephone conversations between the defendant and Paul R. Wagner, supervisor with the State Patrol drug division. Wagner testified in substance that he was acquainted with the defendant; that during the 3 or 4 months preceding the calls in question he had approximately 20 phone conversations and 6 personal meetings with the defendant; that he was familiar with his voice; that during the particular calls with which we are concerned Wagner either asked for the defendant or made sure that it was the defendant to whom he was talking by asking, "Is this Bobby?"; and that he was able to identify the voice recorded on the two cassettes as that of the defendant.

For a tape recording of a telephone conversation between a witness and a defendant to be admissible in evidence, it need only be shown that the conversation is relevant; that it accurately reflected the conversation; that the tapes had not been altered, changed, or erased in any way; and that the voices heard on the tapes were those of the witness and the defendant. *State v. Myers*, 190 Neb. 146, 206 N.W.2d 851 (1973).

The defendant also complains that it was prejudicial error to admit the recordings because they contained some obscene language used by the defendant. "The trial court is certainly not required to protect the defendant from his own unfortunate choice of language. The use of profane or obscene language in an otherwise admissible statement or

conversation does not destroy the nature and meaning of the statement nor make it inadmissible." *State v. Lynch*, 196 Neb. 372, 376, 243 N.W.2d 62, 65 (1976).

The maximum sentence permitted by law in the case of a Class III felony is imprisonment for 20 years. The sentence imposed in this case was well within that limitation. A sentence imposed within statutory limits will not be disturbed on appeal in the absence of a showing of an abuse of discretion. *State v. Sims*, 213 Neb. 708, 331 N.W.2d 255 (1983). No abuse of discretion appears here.

The judgment and sentence of the District Court are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROSCO GOODPASTURE, APPELLANT.

338 N.W.2d 446

Filed September 23, 1983. No. 83-050.

1. **Judges.** A motion to disqualify a trial judge on account of prejudice is addressed to the sound discretion of the trial court.
2. **Sentences.** The law is well established in this state that in considering a proper sentence, the trial court is not limited in its discretion to any mathematically applied set of factors. It is necessarily a subjective judgment and includes the observations of the sentencing judge as to the demeanor, attitude, and all facts and circumstances surrounding the life of the defendant.
3. **Convictions: Probation and Parole.** No defendant, once convicted, is entitled to probation as a matter of law.

Appeal from the District Court for Brown County: HENRY F. REIMER, Judge. Affirmed.

W. Gerald O'Kief, for appellant.

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

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, and SHANAHAN, JJ., and GRANT, D.J.

KRIVOSHA, C.J.

The appellant, Rosco Goodpasture, appeals from a judgment entered by the District Court for Brown County, Nebraska, affirming an earlier sentence imposed by the county court of Brown County, Nebraska. We affirm.

Goodpasture was charged with assault in the third degree in violation of Neb. Rev. Stat. § 28-310 (Reissue 1979). This is a Class I misdemeanor, punishable by imprisonment in the county jail for not more than 1 year, a fine not to exceed $1,000, or both a fine and imprisonment. To this charge Goodpasture entered a plea of not guilty. The charge was later amended to disturbing the peace in violation of Neb. Rev. Stat. § 28-1322 (Reissue 1979), a Class III misdemeanor. A Class III misdemeanor is punishable by imprisonment not to exceed 3 months or a fine not to exceed $500, or both a fine and imprisonment. To this amended complaint Goodpasture entered a plea of nolo contendere. After receiving evidence of the crime the county court found Goodpasture guilty as charged and, after obtaining a presentence report, sentenced Goodpasture to a term of imprisonment of 30 days in the Brown County jail. Goodpasture then appealed to the District Court for Brown County, Nebraska, where his conviction and sentence were affirmed.

Goodpasture now assigns several errors. They are: (1) The trial court abused its discretion by allowing an out-of-court interview to take place between the trial judge and the complaining witness; (2) The trial court abused its discretion in failing to inform Goodpasture and his counsel of the out-of-court interview promptly and before the sentencing hearing; (3) The trial court erred in overruling Goodpasture's motion to disqualify the trial judge; and (4) The sentence is excessive. All of the assignments of error are wholly frivolous and must be disregarded by the court.

The record discloses that at some time after Good-

pasture had entered his plea of nolo contendere and had been found guilty by the court, the complaining witness approached the county judge in the parking lot of the county courthouse and attempted to address the judge in an unsolicited, unencouraged manner concerning the case. She was immediately told by the judge to give the information to the probation officer, which she later did.

At the time of sentencing, the trial judge advised both Goodpasture and his attorney that he would not consider any statements made to him by the complaining witness, and would disregard those comments. In addition, defense counsel was given the presentence investigation report and made fully aware of all the information contained in the report before the sentence was imposed. Counsel urged the court to consider imposing a fine and probation. He further suggested a psychological evaluation of Goodpasture to determine a possible drinking problem, if the court was to impose a jail sentence. The court refused to consider an alternative sentence but did grant Goodpasture a week's continuance to allow him to obtain an evaluation from a psychologist and to submit the material to the court for the court's further consideration.

At the subsequent hearing Goodpasture advised the court that he had not obtained the evaluation, but his counsel again urged the court to sentence Goodpasture to probation. Defense counsel also moved to disqualify the trial judge from sentencing Goodpasture because of the contact the trial judge had had with the complaining witness in the parking lot. The trial judge overruled the motion to disqualify himself and proceeded to sentence Goodpasture.

Goodpasture's first assignment of error, that the trial court abused its discretion in permitting an out-of-court interview between the complaining witness and the trial judge, is simply unsupported in the record. Goodpasture's characterization of the trial

judge's encounter with the complaining witness as an "out-of-court interview" totally misconstrues the evidence. The evidence is clear that the judge was merely approached by the complaining witness, who wished to discuss the case with the court. The trial judge properly advised the witness that she should give this information to the probation officer, and excused himself. There is simply no evidence to support any claim that this was an "out-of-court interview" and in any manner improper.

Goodpasture's further claim that the trial court erred in failing to inform Goodpasture or his counsel of the "out-of-court interview" promptly and before the sentencing hearing is likewise unsupported by the record. Before imposing the sentence, the trial court did advise Goodpasture and his counsel of the encounter with the complaining witness and provided Goodpasture with a copy of the presentence investigation. The assignment is simply unsupported by any evidence in the record and does not require further comment.

Goodpasture further maintains that the trial judge erred in not disqualifying himself before imposing the sentence. It is apparently Goodpasture's claim that by permitting the complaining witness to approach the trial judge and thereafter instructing her to speak with the probation officer, the trial judge was so prejudiced as to be disqualified from further serving on the case. In the first instance, a motion to disqualify a trial judge on account of prejudice is addressed to the sound discretion of the trial court. See *Kennedy v. Kennedy*, 205 Neb. 363, 287 N.W.2d 694 (1980). Moreover, the trial court has wide discretion as to what may be considered once guilt has been determined and only the imposition of the sentence remains.

In *State v. Rose*, 183 Neb. 809, 811, 164 N.W.2d 646, 648-49 (1969), we said: "It is a long accepted practice in this state that before sentencing a defendant after conviction a trial judge has a broad discretion

in the sourse [sic] and type of evidence he may use to assist him in determining the kind and extent of punishment to be imposed within the limits fixed by statute. Highly relevant, if not essential, to his determination of an appropriate sentence is the gaining of knowledge concerning defendant's life, character, and previous conduct. In gaining this information, the trial court may consider reports of probation officers, police reports, affidavits, and other information including his own observations of the defendant. A presentence investigation has nothing to do with the issue of guilt. The rules governing due process with respect to the admissibility of evidence are not the same in a presentence hearing as in a trial in which guilt or innocence is the issue. The latitude allowed a sentencing judge at a presentence hearing to determine the nature and length of punishment, other than in recidivist cases, is almost without limitation as long as it is relevant to the issue." See, also, *Maher v. State*, 144 Neb. 463, 13 N.W.2d 641 (1944); *State v. Hylton*, 175 Neb. 828, 124 N.W.2d 230 (1963); *Williams v. New York*, 337 U.S. 241, 69 S. Ct. 1079, 93 L. Ed. 1337 (1949).

And in *State v. Porter*, 209 Neb. 722, 723, 310 N.W.2d 926, 927 (1981), we said: "By the very nature of a presentence investigation report, it is necessary to rely to a great extent upon hearsay information. Furthermore, § 29-2261(3) provides in part that a presentence investigation and report shall include 'any other matters that the probation officer deems relevant or the court directs to be included.' We have held on numerous occasions that before pronouncing sentence a trial judge has broad discretion in the source and type of evidence he may use to assist him in determining the kind and extent of punishment to be imposed within the limits fixed by statute."

And in *State v. Stranghoener*, 208 Neb. 598, 603, 304 N.W.2d 679, 682 (1981), we said: "The law is well established in this state that in considering a proper

sentence, the trial court is not limited in its discretion to any mathematically applied set of factors. It is necessarily a subjective judgment and includes the observations of the sentencing judge as to the demeanor, attitude, and all facts and circumstances surrounding the life of the defendant."

There is no question that the trial court could consider any statements made by the complaining witness once guilt was determined, particularly where, as here, the statements were included in the presentence investigation, a copy of which was given to Goodpasture. Goodpasture has simply confused the situation before trial and conviction with the situation after trial and before sentencing. See, also, *State v. Packett*, 206 Neb. 548, 294 N.W.2d 605 (1980). We are unable to follow the argument tendered by Goodpasture and must overrule his claims of error.

The only other question which needs to be answered is whether the sentence imposed was excessive, although the assignment of error in that regard is not very clear. In view of the fact that the sentence was well within the statutory limits, absent an abuse of discretion disclosed by the record, this court is not inclined to modify or change that sentence. See, *State v. Schmidt*, 213 Neb. 126, 327 N.W.2d 624 (1982); *State v. Ellefson*, 214 Neb. 747, 336 N.W.2d 88 (1983). In this particular case the sentence imposed was one-third of the maximum. Furthermore, the presentence report discloses that Goodpasture had been convicted of either disturbing the peace or disorderly conduct on four earlier occasions.

Goodpasture also argues he should have been placed on probation. Just as the length of the sentence itself will not be disturbed by this court if within statutory limits absent an abuse of discretion, likewise, the refusal of a trial court to grant probation will not be disturbed absent an abuse of discretion. See, *State v. Hellbusch*, 213 Neb. 894, 331 N.W.2d 815 (1983); *State v. Last*, 212 Neb. 596, 324

N.W.2d 402 (1982). No defendant, once convicted, is entitled to probation as a matter of law. See *State v. Johnson*, 209 Neb. 308, 307 N.W.2d 525 (1981). We are unable to find any evidence of an abuse of discretion. For that reason the judgment is in all respects affirmed.

AFFIRMED.

CHARLES BECKENHAUER, APPELLANT, V. MELVIN PREDOEHL ET AL., APPELLEES.

338 N.W.2d 618

Filed September 23, 1983. No. 83-140.

1. **Pleadings.** Allegations in pleadings are privileged if material or pertinent to the controversy in litigation.
2. _____. Where the question of relevancy and pertinency of matters is to be inquired into, all doubt should be resolved in favor of relevancy and pertinency.
3. **Pleadings: Libel and Slander.** If it clearly appears that the allegations in a pleading are not pertinent, material, or relevant to the controversy in litigation, they are not privileged and may serve as the basis for a libel suit.
4. **Pleadings: Questions of Law.** Whether allegations in a pleading are privileged is a question of law.
5. **Pleadings: Libel and Slander.** It is not necessary that the defamatory matter be relevant or pertinent to any issue before the court. It is necessary only that it have some relevance to the judicial function which is being performed.
6. _____: _____. If the defamatory matter has some reference to the subject matter of the litigation, it is privileged.

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

Hurt, Gallant & Flores, for appellant.

Wallace Hopkins of Marks, Clare, Hopkins, Rauth & Cuddigan, and Joseph M. Dea and Diana Merkel, for appellees Predoehl and Cutsor.

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

PER CURIAM.

This is an action for damages for libel, brought by Charles Beckenhauer as plaintiff. The defamatory material was contained in a notice of disallowance of claim filed in proceedings to administer the estate of Herman Melcher, deceased.

The defendant Melvin Predoehl is the personal representative of the deceased. Kenneth L. Michaelis was the attorney representing the personal representative at the time the notice of disallowance of claim was filed. Lauree Cutsor is a sister of the deceased and one of his heirs.

The body of the deceased was discovered at his farm on May 27, 1980, by a neighbor. The county attorney and sheriff were called to the scene, and they in turn asked Kenneth H. Beckenhauer, a lawyer, to come to the farm. At that time Charles Beckenhauer and Kenneth Beckenhauer were partners engaged in the practice of law. The deceased had no relatives living in the vicinity and Kenneth Beckenhauer had handled some legal matters for the deceased.

Kenneth Beckenhauer notified Mrs. Cutsor of the death of her brother and assisted in making some of the arrangements for the funeral. He also talked with Mrs. Cutsor on several occasions but was not employed to commence proceedings to administer the estate.

After administration proceedings had been commenced, Kenneth Beckenhauer filed a claim for services and expenses. The claim was filed on behalf of "Charles B. & Kenneth H. Beckenhauer, attorneys." A notice of disallowance of claim, prepared by Michaelis, signed by Predoehl, and apparently approved by Mrs. Cutsor, was filed in the estate proceeding. The following statement signed by Predoehl was added at the bottom of the form following the certificate of mailing: "The family of Herman A. Melcher, deceased, are in total agreement and state that at no time did any of said family

or relatives of the decedent hire or retain Mr. Beckenhauer or any other Cuming County attorney as their lawyer or as the lawyer for this estate. Other attorneys tried various machinations inorder [sic] to obtain control of this estate.

"The decedent's two surviving siblings are very disenchanted, disgusted, and condemning of the actions of other lawyers in Cuming County who have acted either officiously and/or solicitously to obtain control and money out of this estate. Mrs. Lauree Cutsor, her three sons, and Mr. Raymond Melcher have repeatedly stated that they have very [sic] reason to believe that other attorneys in Cuming County wanted this estate inorder [sic] to indirectly steal from this estate—if not directly.

"The Melcher family are certain that the attorneys prior acted improperly, if not unethically. The Melcher family fear that theft by some Cuming County lawyers was immenent [sic] if it did not already occur. The family states its full confidence in the first attorney retained by Mrs. Cutsor, Mr. Ken L. Michaelis, and they refuse to allow further theft from this estate by attorneys and their lust and greed.

"The Beckenhauer law firm have been overly paid for their work in abstracting and land contracts in the eyes of the Melcher family. Our objection IS TOTAL except for $5.78.

"/s/ Melvin Predoehl P.R.
Melvin Predoehl, Personal Representative"

At the close of the plaintiff's evidence the trial court dismissed the petition on the ground that the statement was privileged. The plaintiff has appealed. The principal issue upon the appeal is whether the statement was privileged.

It is a well-established rule that libelous matter in a pleading which is relevant to, or has some reasonable relation to, the judicial proceeding in which it is filed is absolutely privileged. See, Annot., 38

A.L.R.3d 272 (1971); Restatement (Second) of Torts §§ 586-587 (1977).

In *Simon v. London Guarantee & Accident Co.*, 104 Neb. 524, 528, 177 N.W. 824, 825 (1920), this court said: "[A]llegations in pleadings are privileged if material or pertinent to the controversy in litigation. . . . 'Where the question of the relevancy and pertinency of matters in pleadings is to be inquired into, all doubt should be resolved in favor of relevancy and pertinency.' "

If it clearly appears that the allegations in a pleading are not pertinent, material, or relevant to the controversy in litigation, they are not privileged and may serve as the basis for a libel suit. *Simon v. London Guarantee & Accident Co.*, *supra*. Whether allegations in a pleading are privileged is a question of law.

In *Sinnett v. Albert*, 188 Neb. 176, 179, 195 N.W.2d 506, 509 (1972), we said: "[T]here is an absolute privilege to publish false and defamatory matter in judicial proceedings, where the matter has some relation to the proceeding."

The absolute privilege attaches to defamatory statements made incident to and in the course of a judicial proceeding if the defamatory matter has some relation to the proceeding. It is not necessary that the defamatory matter be relevant or pertinent to any issue before the court. It is necessary only that it have some relevance to the judicial function which is being performed. *Sinnett v. Albert*, *supra*. See, also, *Reller v. Ankeny*, 160 Neb. 47, 68 N.W.2d 686 (1955); *Shumway v. Warrick*, 108 Neb. 652, 189 N.W. 301 (1922).

The real issue in this case is whether the defamatory material was relevant or pertinent to the claim filed by Kenneth Beckenhauer.

It should be apparent to all that the statement was wholly unnecessary to the notice of disallowance of claim and served only to defame members of the bar in Cuming County, Nebraska. Since the defend-

ant Michaelis has been disbarred, it is unnecessary to comment further on the unprofessional nature of the document and the risk and expense to which he subjected his clients.

The Restatement makes it clear that the defamatory matter need not be relevant to any issue before the court, but is privileged if it has some reference to the judicial function the judge is performing. If the defamatory matter has some reference to the subject matter of the litigation, it is privileged. The Restatement, *supra* at Comment *c* at 248, 249.

Tested by the rules which have been stated above, we conclude that the defamatory material contained in the notice of disallowance of claim was privileged. Although admittedly weak, it had some relation to the matter in controversy. The judgment of the District Court is therefore affirmed.

AFFIRMED.

McCOWN, J., not participating.

THOMAS F. SIMPSON ET AL., APPELLANTS, V. CITY OF NORTH PLATTE, LINCOLN COUNTY, NEBRASKA, ET AL., APPELLEES.

338 N.W.2d 450

Filed September 23, 1983. No. 83-174.

1. **Res Judicata: Judgments.** The doctrine of res judicata is based on the principle that a final judgment on the merits by a court of competent jurisdiction is conclusive upon the parties in any later litigation involving the same cause of action.
2. _____: _____. A judgment of dismissal on the merits operates to preclude subsequent relitigation of the same cause of action.
3. **Dismissal and Nonsuit: Judgments.** As a general rule, a dismissal with prejudice is an adjudication on the merits, and where the parties to an action have settled their dispute and agreed to a dismissal, that is a retraxit and amounts to a decision upon the merits.
4. **Actions.** Generally speaking, two cases proceeding on different

theories to redress the same wrong involve the same cause of action.

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

Leonard P. Vyhnalek of McCarthy, McCarthy & Vyhnalek, for appellants.

Richard W. Satterfield, for appellees.

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

PER CURIAM.

The plaintiffs have appealed from the judgment of the District Court, which sustained the defendants' motion for summary judgment and ordered the action dismissed.

This is the second appearance of this case here. Our former opinion, *Simpson v. City of North Platte* (*Simpson I*), may be found at 206 Neb. 240, 292 N.W.2d 297 (1980). In that action the plaintiffs, owners of certain real estate located within the City of North Platte, alleged for their first cause of action that a certain city ordinance, which required the dedication of a strip of land 40 feet off the side of their lot for street purposes before a building permit was issued, was unconstitutional, and prayed for a declaratory judgment to that effect. The second cause of action alleged that the plaintiffs had negotiated a lease covering their property to Colony Foods, Inc., for the purpose of constructing a fast-food restaurant, which required that the Simpsons construct a building and, of necessity, obtain a building permit. The petition further alleged the denial of the permit by the city, the loss of the lease and damages due to the loss of the rental income, as detailed in the petition, and costs of engineering, planning, attorney fees, and abstracting expense. The trial court held that the ordinance was not unconstitutional, sustained a demurrer, and dismissed the plaintiffs' petition. On appeal we disagreed, held

the ordinance to be unconstitutional, and remanded the case for further proceedings.

Sometime after our opinion in *Simpson I* was released, the plaintiffs filed a so-called Section 1983 action (*Simpson II*) in the U.S. District Court for the District of Nebraska against the same parties, who have been and are defendants in the state court actions. The complaint detailed the same set of facts as alleged in the state action, i.e., the ownership of the property, the negotiated lease, the refusal of the city to issue the building permit due to the plaintiffs' refusal to comply with the ordinance, the unconstitutionality of the ordinance, the terms of the lease which was lost, and the attending expenses. The insurance carrier for the city assumed the defense of that action and eventually entered into a compromise settlement, whereby the plaintiffs were paid the sum of $15,000. On May 1, 1981, pursuant to a dismissal with prejudice filed by the plaintiffs, the U.S. District Court ordered the cause of action dismissed.

In the meantime, on September 5, 1980, the plaintiffs filed an amended petition in this action, now called *Simpson III*, which in effect simply dropped the cause of action for declaratory relief regarding the unconstitutionality of the ordinance, and repeated the same language as that found in the original petition relating to the terms of the lease and the losses suffered by the plaintiffs. This language was identical, for the most part, with the allegations contained in the complaint filed in federal court.

In *Simpson III*, the present case, the District Court sustained the defendants' motion for summary judgment, and this appeal followed. The plaintiffs assign as error the sustaining of the motion, the court's finding that there were no facts to be resolved, and the court's determination that the doctrine of res judicata applied. We find that the dismissal of the action in federal court was tantamount

to a judgment on the merits in favor of the defendants, which judgment was res judicata as to the present action.

The doctrine of res judicata is based on the principle that a final judgment on the merits by a court of competent jurisdiction is conclusive upon the parties in any later litigation involving the same cause of action. *Bank of Mead v. St. Paul Fire & Marine Ins. Co.*, 202 Neb. 403, 275 N.W.2d 822 (1979). A judgment of dismissal on the merits operates to preclude subsequent relitigation of the same cause of action. *Durousseau v. Nebraska State Racing Commission*, 194 Neb. 288, 231 N.W.2d 566 (1975). As a general rule, a dismissal with prejudice is an adjudication on the merits, and where the parties to an action have settled their dispute and agreed to a dismissal, that is a retraxit and amounts to a decision upon the merits. *Mensing v. Sturgeon*, 250 Iowa 918, 97 N.W.2d 145 (1959). See, also, *Balley v. Davis*, 75 Idaho 73, 267 P.2d 631 (1954).

The plaintiffs argue that the causes of action are not the same because one was a civil rights action and the present action is in the nature of inverse condemnation. This is not true. Both pleadings alleged a cause of action resulting from loss of the lease and its benefits, and the incurring of certain expenses. The two cases merely proceeded on different theories to redress the same wrong.

A case strikingly similar to the case at bar is *City of Los Angeles v. Superior Court, etc.*, 85 Cal. App. 3d 143, 149 Cal. Rptr. 320 (1978). That was an action seeking damages because of an alleged wrongful seizure of personal property for nonpayment of taxes. Pleading the same facts, but denominating it as a civil rights complaint, the plaintiffs filed an action in federal court which resulted in a verdict for the defendants. The California court held that the two causes of action were the same. "Pragmatically it would be difficult to distinguish the rights asserted in Levy III [state action] from those sought

to be vindicated in Levy II. Reviewing, for example, a document entitled 'Memorandum of Contentions of Fact and Law' filed by Levy in the United States District Court on December 2, 1974, we find its substance to be a paraphrase of the complaint in Levy III. . . . In other words, its constitutional overtones aside, the civil rights action was designed to vindicate precisely the same interests in Levy's personal property that he seeks to vindicate in the matter before us.

". . . The contours of Levy's civil rights action were therefore shaped by his interests in the personal property converted and withheld by the city and county employees—precisely the same rights which the second state action is all about." 149 Cal. Rptr. at 325-26.

There was no disputed fact question, the U.S. District Court case was res judicata, and the action of the District Court here in sustaining the motion for summary judgment was correct.

AFFIRMED.

McCOWN, J., not participating.

KELLY P. RYAN ET AL., APPELLEES, V. BRIAN KOLTERMAN ET AL., APPELLANTS, SAM WRIGHT, JR., ET AL., APPELLEES.

338 N.W.2d 747

Filed September 30, 1983. No. 44547.

Contracts: Foreclosure. An application for the strict foreclosure of a land contract, being in the nature of a forfeiture, is addressed to the sound discretion of the court, and before this relief may be granted it must be clear that the property involved is of less value than the amount due on the contract for its sale or that it would not bring a surplus over the amount due if a sale was ordered.

Appeal from the District Court for Washington County: DARVID D. QUIST, Judge. Affirmed.

Brian Kolterman, pro se.

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

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

DAVIS, D.J.

On November 19, 1979, the appellees Ryan, as sellers, and the appellants Kolterman, as buyers, entered into a contract for a sale of 17 acres of land, more or less, legal title to which was held by the Ryans, and which was improved by 4 acres of boat basin and creek, a 29-pad mobile home park, and a restaurant.

The buyers agreed to pay $280,650 for the real property and $6,350 for personal property, on terms of $50,000 down, $25,000 no later than September 1, 1980, monthly payments of $2,334.30 for 59 months, and the balance of $196,832.09 in one payment 60 months after the first installment became due.

The contract provided that the buyers could make improvements up to the amount of $100,000 without the prior consent of the sellers, it set forth the buyers' right to cure any default at the sellers' expense, and contained an acceleration clause. The deed from the buyers to the sellers was placed in escrow, to be delivered upon the final payment.

The buyers paid $47,500 at the time of closing, since then have paid a total of $9,000 in monthly installments, and were credited the net sum of $4,789 by the sellers, who operated the mobile home park and paid its expenses. No payments were made by the buyers under the contract after October 1, 1980.

The businesses on the property were operating at the time of sale, and it was the buyers' intention to continue their operation and to fulfill their contractual obligations from the income produced.

The evidence showed that the restaurant was closed on October 1, 1980. The marina was not operated during the year 1980, and at the time of trial the boat basin had silted to the degree that dredging

will be required to make it functional. The buyers have unsuccessfully attempted to secure loans and other financing arrangements to meet their obligations to the sellers.

Shortly after their occupancy, the buyers expended sums on reopening expenses totaling $24,038, which included $13,000 in remodeling the restaurant and $11,038 for the digging of a sewer. The sewer contractor was not paid in full by the buyers and has perfected a mechanic's lien on the property in the amount of $7,538. Other valid mechanics' liens total $1,325. The trial court properly found that these liens first attached to the equitable interest of the buyers, but if unpaid were decreed a statutory lien against the property, which was subject to sale in satisfaction.

The sellers brought an equitable action for strict enforcement of the contract of sale, the trial court granted this relief, and the buyers-appellants seek reversal on the grounds that a strict foreclosure was not justified by the evidence.

Mr. Kolterman admitted that the buyers have defaulted on the contract, and testified that at the time of trial they owed, by his reckoning, $255,000 on the contract of sale.

Mr. Kolterman testified, as an owner, that he valued the property at $330,000, without giving his reasons therefor.

An appraiser called on behalf of the buyers testified that while he customarily uses three approaches to valuing property, i.e., cost, market, and income, in this case the buyers offered him no income figures, and he did not use the market approach because in his opinion there had been no sales of comparable property. He testified that under the replacement cost less depreciation method of valuation, he arrived at a figure of $424,000, and depreciated all the assets, including the land, by an arbitrary factor of 20 percent to a present value of $339,000.

One of the sellers' licensed appraisers testified that the value of the land and trailer court was $75,000, and the restaurant and its contents were valued at $150,000, for a total of $225,000.

Another licensed appraiser testified on behalf of the sellers that the value of the property, using a synthesis of the cost less replacement value approach and the income approach, all recognized methods of valuation, was $165,000.

In an executory contract for the sale of real estate, where title has not passed, the vendor upon default by the vendee may treat the contract as an ordinary real estate mortgage and foreclose it as such. *Hendrix v. Barker*, 49 Neb. 369, 68 N.W. 531 (1896); *Jackson v. Phillips*, 57 Neb. 189, 77 N.W. 683 (1898); *First Nat. Bank of Falls City v. Edgar*, 65 Neb. 340, 91 N.W. 404 (1902). He may also bring an action on the contract of sale for strict foreclosure.

The effect of a strict foreclosure is to confirm in the seller his title to property by removing any lien or claim of lien upon it by the buyer. It is in the nature of a forfeiture, in that any sums paid by the buyer on the contract of sale are not reimbursed him.

Applications for strict foreclosure are addressed to the sound discretion of the court and are granted only when it would be inequitable to refuse them based upon the facts of the case before it. *Harrington v. Birdsell*, 38 Neb. 176, 56 N.W. 961 (1893); *Farmers & Merchants State Bank v. Thornburg*, 54 Neb. 782, 75 N.W. 45 (1898). Before the relief is granted it must be clear that the property is of less value than the amount due on the contract for its sale at the time of trial and that it would not bring a surplus over the amount due if a sale was ordered. *Swanson v. Madsen*, 145 Neb. 815, 18 N.W.2d 217 (1945).

At the time of trial the amount owed on the contract was, with interest, $262,624.22. The businesses from whose income the payments were to be

made by the buyers have not been operated since October 1, 1980. The buyers have not paid the taxes on the property or insured it, as was their obligation under the contract of sale. We note their appearance here is in forma pauperis.

Actions in equity on appeal to this court are triable de novo, subject, however, to the rule that when 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. *Masid v. First State Bank*, 213 Neb. 431, 329 N.W.2d 560 (1983); *Spilinek v. Spilinek*, 212 Neb. 811, 326 N.W.2d 170 (1982); *Kleager v. Schaneman*, 212 Neb. 333, 322 N.W.2d 659 (1982).

It is clear, on analyzing the evidence, that the amount due on the contract is greater than the value of the property and that upon sale it would not bring a surplus over the amount due under the contract of sale.

The trial court's order of strict foreclosure giving the appellants 20 days from the date of the entry of the decree to comply with the terms of the contract or be barred from all right, title, interest, and equity of redemption in the property was, under the facts of this case, an appropriate remedy that does not offend justice and equity. The appellants will comply with the terms of the contract of sale within 20 days of the date of filing of the mandate in this matter in the District Court.

AFFIRMED.

BRENDA CRON MOELLER, APPELLANT, V. GARY JOSEPH MOELLER, APPELLEE.

338 N.W.2d 749

Filed September 30, 1983. No. 82-509.

Child Custody. Among the factors considered by a court in determination of custody in dissolution proceedings are moral fitness of the parents; respective environments offered by each parent; the emotional relationship between the child and the parents; the age, sex, and health of the child; the effect on the child of continuing or disrupting an existing relationship; the attitude and the stability of character of each parent; and the capacity to furnish the physical care, education, and needs of the child.

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

Robert G. Pahlke of Van Steenberg, Brower, Chaloupka, Mullin & Holyoke, for appellant.

John L. Robinson, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, and SHANAHAN, JJ., and GRANT, D.J.

PER CURIAM.

Brenda Moeller, mother of Kimberly Moeller, appeals from the District Court for Box Butte County, Nebraska, which entered a decree of dissolution of marriage and awarded custody of Kimberly to the father, Gary Moeller. We affirm.

Brenda and Gary Moeller were married in Alexandria, Louisiana, and Kimberly was born of this marriage. After their marriage the Moellers returned to Nebraska in 1978 and lived in the home of Gary's parents. During that time, Brenda was observed shaking Kimberly violently on several occasions. Once, while Kimberly was watching television, Brenda jerked Kimberly by her arm from a chair and caused injury which required medical attention for Kimberly's sprained shoulder. During this period, Brenda used a ruler to train Kimberly's eating habits. If Kimberly would not finish a predetermined amount of food within a specified time,

Brenda struck Kimberly about her hands and face. The marital problems of Brenda and Gary mounted.

In October 1979 Brenda, with Kimberly, returned to Louisiana to provide postsurgery care for Brenda's mother. During this sojourn, Brenda met Robert Smith and nurtured a relationship with him.

When Gary's father died in December 1979, Brenda returned to Nebraska with Kimberly and remained for 4 months. Brenda was again observed using the ruler and clock method to form Kimberly's eating habits. Kimberly was approximately 2 years old at that time. During this time, the marriage of Brenda and Gary further deteriorated to the point that Brenda returned to Louisiana on April 20. Brenda left Gary a letter which indicated that she was having difficulty handling situations involving pressure and began to "take everything out on Kim, and that's not right. . . . I myself just can't take anymore of this." While in Louisiana, the relationship with Smith was resumed.

In August 1980 Brenda and Kimberly flew to Rapid City, South Dakota, and met Gary. An apparent reconciliation was achieved, and Brenda said she wanted to visit her grandparents for one last time. Upon her return to Louisiana Brenda telephoned Gary that she had changed her mind.

In February 1981 Gary drove to Louisiana, where Brenda told him that she had obtained a Mexican divorce and had married Robert Smith. It later developed that the Mexican divorce was invalid. After some discussion Brenda decided that she would return to Nebraska with Gary, but subsequently changed her mind. Gary returned to Nebraska with Kimberly. On October 27 Brenda commenced proceedings in Nebraska for dissolution of her marriage with Gary and sought custody of Kimberly.

At trial in May 1982, evidence demonstrated that Brenda frequently disciplined Kimberly more harshly than necessary. Witnesses observed bruises on Kimberly's body on various occasions. Brenda ad-

mitted she would "lose [her] patience and [she] would start yelling at [Kimberly] and [she] just got to the point where [she] had no patience with [Kimberly] at all . . . ." A minister who provides a cooperative preschool testified that Gary related well with the other children and got along very well with Kimberly. The environments to be offered by Brenda and Gary, respectively, and the relationship between Kimberly and her parents were the subjects of extensive testimony.

Robert Smith did not testify at trial, because he was working on an offshore oil rig in Africa. No deposition of Robert Smith was offered at trial, and no continuance was sought to permit Robert Smith to testify at the trial.

The trial court determined that the marriage between Brenda and Gary was irretrievably broken and, therefore, dissolved their marriage and awarded custody of Kimberly to Gary, with the right of reasonable visitation granted to Brenda.

An appeal in a dissolution of marriage action is reviewed de novo by this court. *Burnham v. Burnham*, 208 Neb. 498, 304 N.W.2d 58 (1981). The polar star by which all child custody determinations must be guided is the best interests and welfare of the child. *Theye v. Theye*, 200 Neb. 206, 263 N.W.2d 92 (1978); *Moninger v. Moninger*, 202 Neb. 494, 276 N.W.2d 100 (1979); *Broadstone v. Broadstone*, 190 Neb. 299, 207 N.W.2d 682 (1973); *Wible v. Wible*, 209 Neb. 708, 310 N.W.2d 515 (1981); Neb. Rev. Stat. § 42-364 (Reissue 1978). In determining the best interests of the child, " ' "this court will give weight to the fact that the trial judge saw and observed the witnesses and the attitude of the parents at the trial." ' " *Wible v. Wible*, *supra* at 716, 310 N.W.2d at 519, citing *Moninger v. Moninger*, *supra*.

" ' "The judgment concerning the custody of children is necessarily quite subjective in nature. Many factors may be considered in light of the particular circumstances of each individual case. The general

considerations of the moral fitness of the parents, of respective environments offered by each parent, the emotional relationship between the children and their parents, their age, sex, and health, the effect on the children of continuing or disrupting an existing relationship, the attitude and the stability of character of each parent, and the capacity to furnish the physical care and education and needs of the children are some of many factors for the court to consider." ' " *Wible v. Wible*, *supra* at 715-16, 310 N.W.2d at 519.

The instability of Brenda and her inability to meet and cope with adversity and stress were factors which weigh heavily in this decision. Also, Robert Smith is a factor of the environment in which Kimberly would be placed if custody were granted to Brenda. The absence of adequate information regarding Robert Smith and even the absence of Smith himself are also weighed on the balance in determining Kimberly's custody. Rather than place Kimberly in an environment where a large but unknown element relates to Smith, the best interests of Kimberly will be achieved by the known environment existing in custody with Gary. We find that the best interests of Kimberly Moeller require that her custody be placed with Gary Moeller. Therefore, the judgment of the District Court is affirmed.

AFFIRMED.

T-V TRANSMISSION, INC., A NEBRASKA CORPORATION, DOING BUSINESS AS CABLEVISION, APPELLANT, V. COUNTY BOARD OF EQUALIZATION OF PAWNEE COUNTY, NEBRASKA, AND PAWNEE COUNTY, APPELLEES.

338 N.W.2d 752

Filed September 30, 1983. No. 82-530.

Taxation: Property: Appurtenances. Station connects, or house-drops, a part of a cable television distribution system, which are

> actually annexed to the realty or something appurtenant thereto, are appropriated to the use or purpose of that part of the realty with which they are connected; and if the intention of the party making such annexation is to make these articles permanent accessions to the freehold, they become fixtures attached to the real estate of the subscriber and are not subject to taxation as personal property belonging to the cable television company.

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

Charles D. Humble of Ginsburg, Rosenberg, Ginsburg, Cathcart, Curry & Gordon, for appellant.

L. Joe Stehlik, Pawnee County Attorney, for appellees.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, and SHANAHAN, JJ., and GRANT, D.J.

HASTINGS, J.

The plaintiff, T-V Transmission, Inc., has appealed from an order of the District Court which had affirmed the action of the defendant County Board of Equalization of Pawnee County. That board assessed "station connects," or aerial housedrops, as personal property belonging to the plaintiff rather than as fixtures attached to the real estate of each individual homeowner subscriber. Such action on the part of the District Court constitutes the sole assignment of error on the part of the plaintiff.

The plaintiff is engaged in the business of furnishing cable television service to various subscribers in Pawnee County. A power antenna, or head end, is installed out of the noise area of a community, where television signals are then sent through a channel processor, fed into a single cable, and brought into a community by attaching it to existing utility poles or underground cables, which then run by every house in town. This constitutes the television service distribution line or system. The television signal itself is then brought into each house,

where the occupants subscribe to the service, by means of an aerial drop. This is simply a cable with a support wire which runs from the utility pole to the house, where it is attached by means of a house hook. This cable then runs through a grounding block which is attached to a cold water pipe.

The interior cable runs from the grounding block, through the walls of the house, to a wall plate outlet and then is attached to the television set. These interior cables may be strung through an existing house or, upon request of the homeowner, may be built into the walls at the time of initial construction.

Cable service to a particular house is installed and furnished only at the specific request of each individual subscriber. If the subscriber requests that the service be discontinued, a terminator is placed on the aerial drop at the utility pole end, but this lead-in drop and the interior cables are not removed. The former subscriber, if he so desires, may use the materials as a part of his own television antenna system.

The plaintiff has no agreement with its subscribers which would prevent the subscribers' use of these materials, and the plaintiff makes no claim on these cables nor seeks to recover or retrieve them when there has been a disconnection of the service. The plaintiff has no easement across the yards of subscribers to install or remove the cables, and, as a matter of fact, according to the plaintiff's witness, the "station connects," or housedrops, have very little salvage value and are really abandoned by the company. The hope of the plaintiff is, of course, that when a different person occupies that house he will request a reconnection of the service.

Although the subscriber apparently is not billed specifically for the cost of cable installation, the plaintiff does make a trip charge every time it is requested to come on the premises of the homeowner, whether the reason is to make an original installation of the system or to add to or subtract from the

service. In addition, a monthly service charge is made, depending upon the type of service that is furnished.

The basic question involved in this appeal may be quite simply stated to be, Are the "station connects," or aerial drops, together with the enclosed cables, personal property which remain in the ownership of the plaintiff, or are they fixtures affixed to and which become a part of the real estate? The answer would appear to be deceptively simple: " 'In determining this question, the following tests, while not all inclusive, have received general approval, viz.: "1st. Actual annexation to the realty, or something appurtenant thereto. 2d. Appropriation to the use or purpose of that part of the realty with which it is connected. 3d. The intention of the party making the annexation to make the article a permanent accession to the freehold. This intention being inferred from the nature of the articles affixed, the relation and situation of the party making the annexation, the structure and mode of annexation, and the purpose or use for which the annexation has been made." Freeman v. Lynch, 8 Neb. 192; Frost v. Schinkel, 121 Neb. 784. The third test, namely that of "intention," appears by the clear weight of modern authority to be the controlling consideration.' " *Cook v. Beermann*, 201 Neb. 675, 679, 271 N.W.2d 459, 462 (1978).

Research discloses but three reported decisions similar in nature to the instant case, all of which recognized the three-prong test of *Cook v. Beermann, supra*: *Tele-Vue Systems, Inc. v. County of Contra Costa*, 25 Cal. App. 3d 340, 101 Cal. Rptr. 789 (1972); *Bylund v. Depart. of Rev.*, 9 Or. T.R. 76 (1981); and *Hoppe, King County Assessor, v. Televue Systems, Inc.*, Nos. 13386-13390, Board of Tax Appeals, State of Washington, decided July 20, 1976. The latter two administrative agencies ruled that the entire system, from the utility pole to the television set, was a fixture. In the case decided by the

California court, both parties stipulated that the cable from the utility pole to the house was to be treated as personal property belonging to the television company, but the court ruled that the remainder of the system, contrary to the contention of the taxing authority, became a fixture and was a part of the real estate.

We believe that there is little doubt that the entire system, from the utility pole inward, was annexed to the realty and was appropriated solely for the use of the occupants of that realty.

As to the remaining question, concerning the intention of the party making the annexation, we have both the testimony and the practice of the plaintiff that it had no right or intention of removing the property, and in fact had not done so, but had abandoned, in favor of the homeowner, all claim to the property that it might otherwise have had.

The judgment of the District Court is reversed and the cause remanded with directions to enter a judgment in conformity with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

KRIVOSHA, C.J., not participating.

RAMONA J. NORDHAUSEN ET AL., APPELLEES, V. KAREN CHRISTNER AND LOYD CHRISTNER, WIFE AND HUSBAND, APPELLANTS, AND SOPHIA NORDHAUSEN, APPELLEE.

338 N.W.2d 754

Filed September 30, 1983. No. 82-544.

Partition. While it is generally true that there is a presumption in favor of partition in kind, it is likewise true that the character and location of the property, or the amount of the interest sought to be assigned, or both, may be such that it will be presumed that partition in kind cannot be made.

Appeal from the District Court for Chase County: JACK H. HENDRIX, Judge. Reversed and remanded with directions.

Jerry C. Stirtz of Martin, Stirtz & Martin, for appellants.

Guy G. Curtis, for appellees.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, and SHANAHAN, JJ., and GRANT, D.J.

KRIVOSHA, C.J.

This is an appeal from a judgment entered by the District Court for Chase County, Nebraska, directing that certain land owned by the various parties to this action be partitioned in kind, pursuant to the provisions of Neb. Rev. Stat. §§ 25-2170 to 25-21,111 (Reissue 1979). For reasons more particularly set out hereinafter, we reverse and remand with directions.

In July of 1956 Carl Nordhausen, a resident of Chase County, Nebraska, died intestate. He was survived by his widow, Sophia Nordhausen, a son, Vernon Nordhausen, and a daughter, Karen Christner. The following-described real estate was included in the assets of Carl Nordhausen, to wit: the north half and the southwest quarter of Section 15, Township 5 North, Range 36 West of the 6th P.M., Chase County, Nebraska, and the west half of Section 22, Township 5 North, Range 36 West of the 6th P.M., Chase County, Nebraska.

The described property consists of five quarter sections which form a tract in the shape of an inverted "L." Except for the land upon which certain improvements are located, the land in Section 15 is all pastureland, as is the land located in the west half of the west half of Section 22. Together it consists of 613 acres. The land is very rough, with deep gullies and ravines, and is classified by the U.S. Department of Agriculture as class VII pasture, which is the lowest USDA land classification. The remaining property in the west half of Section 22 consists of 178 acres and is all cropland, classified by the U.S. Department of Agriculture as class II cropland, which is the highest classification given by the

USDA to nonirrigated land. The improvements are located on the south edge of Section 15 and consist of a four-bedroom frame residence, a washhouse, a quonset hut, a corral, a barn and well, and a grain elevator. In 1979 Vernon Nordhausen died intestate, leaving his wife, Ramona, and daughters, Sheila Pfeiffer and Sharla Nordhausen, as his sole and only heirs. They, together with Sheila's husband, Dennis, filed a petition seeking partition of the land previously described. Named as defendants were Karen Christner and her husband, Loyd, and Carl Nordhausen's widow, Sophia. During the course of the trial, Sophia Nordhausen stipulated that she would convey her interest to each of the parties. Therefore, her interest in the property can be disregarded.

For more than 12 years the pasture and related improvements have been used and occupied by Karen Christner and her husband, Loyd, who have developed a cow-calf herd. Vernon Nordhausen and his family have used the crop ground. In addition, the Nordhausens have used the residence, the washhouse, and the quonset building.

The trial court, in its effort to perform a Solomon-like division, accepted the report of the referee that the property could in fact be partitioned in kind, and directed that the cropland and all the improvements be assigned to the Nordhausens and the pastureland assigned to the Christners. In making its order the court specifically found that the value of the various lands included in the litigation was somewhere between that testified to by the court-appointed referee and the Christners' expert witness. How the specific amount between the two was arrived at by the court is difficult to determine. Nevertheless, the court valued the property given to the Christners at $180 an acre, for a total value of $110,340. The court further found that the cropland being given to the Nordhausens had a value of $500 per acre, for a total value of $89,000. The court then concluded that the

value of the improvements on the property was $20,500 greater than "the excess of the value of improvements made by the Plaintiffs over the improvements made by the Defendants." In addition to dividing the land in kind, the court directed that the Nordhausens pay to the Christners the sum of $5,000 as "relocation costs."

Anticipating the division in kind, the Christners sought access to the pastureland by requesting the trial court to find that they had a right to use a certain road which ran mostly across land not involved in the partition. The court refused to do so and, instead, ordered that the Christners were to have access into the pasture ground only through a road located north of Section 15. The Christners have now appealed to this court, and have devoted their brief substantially to the question of whether they were entitled to access on a road running parallel to and adjacent to the section line between Sections 15 and 22 and only coincidentally owned by Ramona Nordhausen. During oral argument, the parties conceded that they were uncertain as to how the court could give any consideration to a road located principally upon property not involved in the partition, but they nevertheless pursued their claim. We need not, however, reach that issue, because we believe that, try as it would, the trial court was in error in attempting to partition this property in kind and, instead, should have ordered the entire tract sold.

While it is generally true that there is a presumption in favor of partition in kind, see *Phillips v. Phillips*, 170 Neb. 733, 104 N.W.2d 52 (1960), it is likewise true that the character and location of the property, or the amount of the interest sought to be assigned, or both, may be such that it will be presumed that partition in kind cannot be made. See *Trowbridge v. Donner*, 152 Neb. 206, 40 N.W.2d 655 (1950). The purpose of partition by sale rather than in kind is best described in 2 American Law of Property § 6.26 at 113 (A. Casner ed. 1952), wherein the author

notes: "[S]tatutes usually provide for a sale on partition where a physical partition cannot be made equitably or without manifest injury to any or all of the cotenants. Variations in the terms of the statutes seem to be unimportant, the courts construing them as authorizing a partition by sale when that method will operate more equitably and where a division in kind would work a substantial injury to the cotenants." Courts, as an example, have ordered partition by sale, rather than by kind, where the improvements, once divided, required the construction of bridges or roadways to make the parcel usable, *Conyers v. Conyers et ux.*, 302 Ky. 343, 194 S.W.2d 660 (1946), or where, after partition in kind, the only available purchaser of the tract would be the other former cotenants, *Onderdonk v. Onderdonk*, 269 Md. 563, 307 A.2d 710 (1973), or where the tract of land is such that in dividing the land each party will not receive the same type of land, *Hipshire v. Stapleton*, 57 Tenn. App. 339, 418 S.W.2d 457 (1966).

In the instant case, in order to divide this property in kind, the court gave all of the pasture ground to one party and all of the crop ground to another. That resulted in a division of property which had to be measured by metes and bounds and was not equal in kind. The court then took improvements constructed and used by one of the parties and gave them to the other, even though there is no evidence to indicate that the other party has use for all the improvements. In doing this the court was required to resolve a factual dispute as to the value of both the real property and the improvements. The court concluded that neither party's testimony could be accepted as correct but, rather, some figure in between should be the basis for dividing the property. And then the court ordered that one party pay to the other party $5,000 in cash to compensate for the loss in improvements which were conveyed. In this regard an examination of the record fails to disclose any evidence which can support the granting of a

judgment in the amount of $5,000. Finally, the Christners now have land, access to which, the evidence appears to establish, will be perhaps impossible and at best difficult. The referee testified that the road from the north was hilly and would require the construction of a culvert. The Christners' expert testified that the path was inaccessible to all but vehicles equipped with four-wheel-drive or a short wheelbase.

While we agree that the presumption in favor of partition in kind does still prevail in this jurisdiction and no one of the issues involved in this case is necessarily sufficient to overcome that presumption or to justify ordering partition by sale rather than partition in kind, when all of them are taken together it is apparent that the purpose of partitioning land in kind, under these circumstances, is totally frustrated and perhaps even defeated. Neither party seems content with the result, and both parties have something other than what they appear to want or can use. It appears that this is indeed one of those cases which falls into the exception and in which the trial court, try as it would to give the parties what they wanted, should not have attempted to partition in kind. The judgment of the trial court therefore is reversed and the cause remanded with directions that the property be partitioned by sale, pursuant to the provisions of the Nebraska statutes.

REVERSED AND REMANDED WITH DIRECTIONS.

LEO STRICKER AND WILMA STRICKER, HUSBAND AND WIFE, APPELLEES, V. ALEX KNAUB AND PAULINA KNAUB, HUSBAND AND WIFE, ET AL., APPELLANTS.

338 N.W.2d 757

Filed September 30, 1983. No. 82-558.

1. **Equity: Appeal and Error.** In cases in equity it is this court's duty to retry the issues of fact de novo on the record and reach an

independent conclusion as to what findings of fact are required under the pleadings and all the evidence without reference to those reached by the trial court, except, however, that where the credibility of evidence is in conflict, we must give weight to the fact that the trial court saw the witnesses and observed their demeanor while testifying.

2. **Easements: Proof.** Prescriptive rights are not looked upon with favor and, generally, must be proved by clear, convincing, and satisfactory evidence.
3. _____: _____. The party claiming a prescriptive easement must prove that his user was exclusive, adverse, under a claim of right, continuous and uninterrupted, and open and notorious for the full prescriptive period.
4. _____: _____. Proof of the user must be such that the identity of the thing enjoyed may be determined.
5. _____: _____. A claimed easement must be viewed from both ends of the prescriptive period. The nature and extent or scope of the user must from the beginning be clearly established. At the end of the period it must appear in retrospect that there has been no material change or variance from the limits or course adopted or established at the beginning. A lesser user prevents a right to an easement and a greater user is of no importance until the full prescriptive period has elapsed from the initiation of the greater use. The law requires that the easement must be clearly definable and precisely measured.

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

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

Gary Denton of James R. Hancock, P.C., for appellees.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

CAPORALE, J.

This is an appeal from a decree permanently enjoining the defendants-appellants from discharging their waste, unused irrigation water onto land owned by the plaintiffs-appellees, and dismissing the former's counterclaim for a prescriptive easement and damages. We affirm.

The errors assigned by defendants raise but a sin-

gle issue, Does the evidence meet their burden of proving a prescriptive easement appurtenant to their lands entitling them to discharge their waste, unused irrigation water onto plaintiffs' land?

We review this case in equity, in accordance with the oft-stated rule that in such cases our duty is to retry the issues of fact de novo on the record and reach an independent conclusion as to what findings of fact are required under the pleadings and all the evidence without reference to those reached by the trial court, except, however, that where the credibility of evidence is in conflict, we must give weight to the fact that the trial court saw the witnesses and observed their demeanor while testifying. Neb. Rev. Stat. § 25-1925 (Reissue 1979); *Hardt v. Short-Line Irr. Dist.*, 214 Neb. 612, 335 N.W.2d 292 (1983).

All of the lands in controversy are located in Morrill County, Nebraska, at Section 21, Township 21 North, Range 52 West, of the 6th P.M. Plaintiffs, Leo Stricker and Wilma Stricker, are husband and wife, and own the southeast quarter of the aforesaid section. Defendants all have an interest in the quarter section immediately north of the Stricker quarter, that is, the northeast quarter of the aforesaid section.

Defendant Paulina Knaub owns the west half of the northeast quarter, hereinafter called the Knaub 80. Her husband, Alex Knaub, manages the land and is also a defendant. Defendant Marie Schmunk is the owner of the east half of that northeast quarter, hereinafter called the Schmunk 80. Her husband, Jake Schmunk, who has died and is a party herein by his wife as the personal representative of his estate, also had an interest in the Schmunk 80. Defendants Randy Meter and Reinhold Meter lease and farm both the Knaub 80 and the Schmunk 80.

The Schmunk 80 has been owned by the Schmunk family since 1923. The Knaub 80 has been farmed by the Schmunks since that same year, but ownership thereof was not acquired by David Schmunk,

the patriarch of the Schmunk survivors, until 1941. Defendants Paulina Knaub and Marie Schmunk are the daughter and daughter-in-law, respectively, of David Schmunk.

Excess irrigation waters flow upon the Stricker land from two sources on defendants' land. The lower half of the Schmunk 80 inclines to the south and is irrigated, primarily with water supplied by an irrigation district, by means of a lateral running east to west across that 80. Excess irrigation waters collect at the end of the crop rows which border on the north boundary of the Stricker land. Prior to 1973, excess irrigation waters from the Schmunk 80 at times meandered south directly onto the grassland in the northeast portion of the Stricker land. At other times the excess waters gathered at the end of the crop rows and flowed west on the Schmunk 80 through the draw or swale on the Knaub 80 and thence down the draw onto the Stricker quarter. In 1973 the Strickers placed this northeast portion of their section under cultivation. Thereafter, the excess irrigation water from the Schmunk 80 crossed over their border and found its way through a shelterbelt on the Stricker farm into the draw. Such was the situation when this litigation was commenced sometime prior to March 17, 1982, when the amended petition contained in the transcript was filed.

The Knaub 80 presents a somewhat different situation. Prior to the spring planting on that 80, a narrow, shallow ditch is dug down the center of that portion of the draw or swale, described above, to the point where the draw crosses onto the Stricker land. Crops are then planted in east-west rows across the draw and irrigated, with water supplied by the irrigation district and wells, by means of north-south laterals running along the eastern and western borders of the Knaub 80. Excess irrigation waters gather in the ditch in the center of the draw and flow south down the draw and across the Stricker farm.

The crops planted across this draw have varied during the years. Beets, beans, and corn have been the most frequently planted crops. The irrigation techniques and amounts of water placed on the land likewise have varied through the years, depending upon the crops planted and the rainfall. When corn is the crop, irrigation begins in early July and consists of 4 to 10 irrigations. If beans are planted, irrigation begins earlier in the summer but is less frequent due to a shorter growing season. If beets are planted, irrigation usually begins in July and continues until October when the irrigation district shuts off its supply of water. At times, when the crop is beets, irrigation continues with the use of well water after the irrigation district has discontinued supplying water. In addition to these variations the last of two wells drilled to supply supplemental irrigation water on the Knaub 80 was drilled some 6 or 7 years prior to the institution of this litigation. The relatively recent use of nitrate fertilizers also required more water than did the earlier phosphate fertilizers.

In 1981 the draw on the Stricker side was graded and planted to grass. This grassy waterway extends on both sides of the center of the draw from the north border to the south border of the Stricker land. At this same time a center pivot irrigation system was installed.

The center pivot crosses the grassy waterway during its sweeps. Cement paths were installed for the pivot to cross over the southern end of the waterway. River rock was placed in the pivot tower tracks crossing the northern end of the waterway. On several occasions the center pivot became stuck in the waterway which becomes soggy from the irrigation waters running from the Schmunk 80 and Knaub 80. On several occasions the center pivot became stuck on the cropland after rains as well.

After an unsuccessful effort by the Strickers to have the discharge of excess irrigation water onto

their land voluntarily stopped, this action followed. The defendants counterclaimed, praying that an easement appurtenant to the Knaub and Schmunk 80s be quieted in the present owners, and for damages arising from the restraining orders previously entered herein.

While this lawsuit is framed in legal theory as one for an injunction based upon a nuisance or continuing trespass, defended by the assertion of a prescriptive right, it is in essence a contest to determine who will bear the cost of keeping the Strickers' center pivot irrigation system functional. If an easement in favor of the defendants were found to exist, the Strickers would in all likelihood find it necessary to construct cement drives across the draw in which defendants' waste, unused irrigation water flows. On the other hand, enjoining defendants from discharging such waters onto the Strickers' land will likely make it necessary for defendants to construct a reuse pit to capture their excess irrigation water.

Our analysis must begin with the general observation that "we are bound by the rule that a prescriptive right is not looked upon with favor and, generally, must be proved by clear, convincing, and satisfactory evidence." *Biegert v. Dudgeon*, 213 Neb. 617, 620, 330 N.W.2d 897, 899 (1983). The party claiming a prescriptive easement must prove that his user was exclusive, adverse, under a claim of right, continuous and uninterrupted, and open and notorious for the full prescriptive period. Proof of the user must be such that the identity of the thing enjoyed may be determined. *Kuhlmann v. Platte Valley Irr. Dist.*, 166 Neb. 493, 89 N.W.2d 768 (1958). As stated in *Kuhlmann* at 513, 89 N.W.2d at 781: "A claimed easement must be viewed from both ends of the prescriptive period. The nature and extent or scope of the user must from the beginning be clearly established. At the end of the period it must appear in retrospect that there has been no material change

or variance from the limits or course adopted or established at the beginning. A lesser user prevents a right to an easement and a greater user is of no importance until the full prescriptive period has elapsed from the initiation of the greater use. The law requires that the easement must be clearly definable and precisely measured." See, also, *Hagadone v. Dawson County Irr. Co.*, 136 Neb. 258, 285 N.W. 600 (1939); *Dunn v. Thomas*, 69 Neb. 683, 96 N.W. 142 (1903). We conclude the evidence fails to clearly, convincingly, and satisfactorily show all of the elements required to establish a prescriptive easement such as sought by defendants.

As to the Schmunk 80, we are not convinced the excess irrigation waters took any particular path to the Stricker land until 1973. Thus, whatever was enjoyed by defendants cannot be considered to have been clearly defined and precisely measured for the 10-year period required by Neb. Rev. Stat. § 25-202 (Reissue 1979). That being the case, we need consider nothing further with respect to that 80.

As to the Knaub 80, the evidence conclusively establishes that the dates of commencement and termination of irrigation varied from year to year depending upon weather conditions, the types of crops grown, and the changes in defendants' farming technology and practices. The fact the last of two wells to supplement the water obtained from the irrigation district was drilled within the 6 or 7 years last preceding this litigation makes clear that the amount of waste water discharged upon the Stricker land has been increasing. The volume of waste water discharged has varied from year to year. Consequently, the nature and extent or scope of the user over any one 10-year period cannot be determined. Stated another way, the evidence fails to establish by the requisite quantum of evidence the lesser user enjoyed by defendants during any 10-year period. The rules articulated in *Kuhlmann, supra*, dictate the conclusion that no prescriptive easement to dis-

charge waste, unused irrigation waters onto the Stricker land has been proven with respect to the Knaub 80.

The permanent injunction granted by the trial court conforms in all respects with the applicable rules of law and to our view of the evidence.

AFFIRMED.

RICHMAN GORDMAN STORES, INC., ET AL., APPELLEES, V. BOARD OF EQUALIZATION OF HALL COUNTY, NEBRASKA, AND RAYMOND HESSEL, ASSESSOR, HALL COUNTY, NEBRASKA, APPELLANTS.

338 N.W.2d 761

Filed September 30, 1983. No. 82-562.

1. **Taxation: Appeal and Error.** In appeals from actions of the county board of equalization in determining the actual value of property, the burden is upon the taxpayer to show by clear and convincing evidence that the board's determination as to actual value is incorrect and invalid.
2. _____: _____. The trial of an appeal from a county board of equalization involving the valuation of real estate, both in District Court and the Supreme Court, is de novo as an equitable proceeding.
3. _____: _____. The presumption that a board of equalization has faithfully performed its official duties disappears when there is competent evidence on appeal to the contrary, and from that point on the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon evidence, unaided by presumption, with the burden of showing such value to be unreasonable resting upon the appellant on appeal from the action of the board.

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

Stephen L. Von Riesen, Hall County Attorney, and Kevin A. Brostrom, for appellants.

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

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

HASTINGS, J.

Richman Gordman Stores, Inc., filed protests with the Board of Equalization of Hall County (board), complaining that the value of the plaintiff's real estate, on which a retail department store was located, was in excess of the actual value of the property for the years 1979 and 1981. The protests were denied by the board and Richman Gordman appealed to the District Court.

After the cases were consolidated in the District Court and trial was held, the court determined the property had an actual value of $1,200,000 for each of the years 1979 and 1981. The board has appealed to this court, assigning as error the finding that Richman Gordman sustained its burden of proving that the values determined by the board were arbitrary, unlawful, and discriminatory.

The real estate involved here was approximately 13 acres of property in Grand Island, Hall County, Nebraska, on which a retail department store was located. According to the trial court record, in 1975 and 1976 Western Appraisals and Surveys reappraised all real property in Hall County, using the Nebraska cost valuation manual. This was a manual which the state Tax Commissioner's office mandated be used in 1975 or 1976 but which both an appraiser employed by Hall County and one retained by the plaintiff described as "very confusing," and "a very poor manual." Values used in this appraisal were first relied upon in the 1977 assessment. The plaintiff's property was valued at $1,723,110 for the year 1977, and for 1979 the initial actual value of the property was also $1,723,110.

However, the State Board of Equalization and Assessment ordered an increase of 23.14 percent for this type of property to increase the total actual value to $2,121,830 for assessment purposes in 1979.

In the year 1980 the board reduced the actual value of the property in question by $185,640, to $1,936,190, to adjust for an error in the establishment of the "finishing" cost. The 1980 tax protest is not part of this appeal.

For the year 1981 the total actual value assessed for tax purposes was $1,936,190. The assessor and the board of equalization relied upon the 1977 appraisal for the valuation and assessment of Richman Gordman's property for 1979.

This court is governed by consistent guidelines in legal matters such as this. In appeals from actions of the county board of equalization in determining the actual value of property, the burden is upon the taxpayer to show by clear and convincing evidence that the board's determination as to actual value is incorrect and invalid. *Spencer Holiday House v. County Bd. of Equal.*, *ante* p. 194, 337 N.W.2d 759 (1983).

The trial of an appeal from a county board of equalization involving the valuation of real estate, both in District Court and the Supreme Court, is de novo as an equitable proceeding. There is a presumption that a board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its action, which presumption remains until there is competent evidence to the contrary. Such presumption disappears when there is competent evidence on appeal to the contrary, and from that point on the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon the evidence, with the burden of showing such valuation to be unreasonable resting upon the appellant on appeal from the action of the board. *Hastings Building Co. v. Board of Equalization*, 212 Neb. 847, 326 N.W.2d 670 (1982).

In the present case there is more than ample evidence to rebut the presumption of correctness of the assessed valuation by the board. Besides testimony

concerning the 1980 adjustment for "finishing" costs, the record also contained the testimony of Michael J. Mullen, an expert who testified on behalf of both the board and Richman Gordman, that further errors in the identification of materials used in construction were found when the parking lot and structural steel were improperly classified. These errors were more than mere errors of judgment, and as such the reasonableness of the valuation fixed by the board becomes a question of fact based upon the evidence.

The record indicates the actual value of the plaintiff's property for 1979 was quite different than the value listed on the assessment record for Hall County. The highest valuation placed upon the property after adjusting for obvious errors in the identification of materials used in construction was $1,421,386. This valuation figure was offered by Mr. Mullen, who testified for both parties. The lowest valuation placed on the property was by Richman Gordman's expert, J. G. Strawn, who found it to be $1,100,000.

Mr. Strawn testified that he used a cost approach, an income approach, and a market approach, and that after considering all factors he determined the actual value of the property for 1979 and 1981 was $1,100,000. Strawn's testimony on direct examination established that he was quite knowledgeable about valuing retail stores in the Midwest. He utilized the Marshall-Swift manual in making his appraisal, which, according to his testimony, the State of Nebraska has required county assessors to use since either 1980 or 1981.

In view of the entire record it is clear that the 1977 appraisal by Western Appraisals and Surveys contained numerous errors. In comparison, the record created by Richman Gordman's expert contained detailed, competent evidence to support the determination of the actual value of the property. The record in this case clearly rebuts the presumption

of correctness of the assessed valuation, and establishes that the valuation of plaintiff's property for the years 1979 and 1981 was made arbitrarily and capriciously. From a de novo review of the record, we conclude that the actual value of the property in question for the years 1979 and 1981 was $1,200,000.

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

AFFIRMED.

IN RE INTEREST OF M., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. C.M., APPELLANT.

338 N.W.2d 764

Filed September 30, 1983. No. 82-787.

1. **Parental Rights.** An order terminating parental rights must be based upon clear and convincing evidence.
2. _____. The right of parents to maintain custody of their child is a natural right, subject only to the paramount interests which the public has in the protection of the rights of a child.
3. _____. Parental rights cannot be terminated simply because others may be in a position to be better providers for the children.
4. _____. Termination of parental rights should indeed be a last resort, and should be implemented only when no other reasonable alternative exists.
5. _____. When natural parents cannot rehabilitate themselves within a reasonable time, the best interests of the child or children require that a final disposition be made without delay.
6. _____. Where there are reasonable grounds to believe that the conditions giving rise to the parent's inability to care for her children will continue for a prolonged and indeterminate period, the parental rights may be terminated when such action is in the best interests of the children.
7. **Rules of Evidence: Witnesses: Hearsay.** Where the party against whom a statement is offered is present, hears the statement being made, and makes no objection, the trial court may consider such evidence as an exception to the hearsay rule.
8. **Motions for Continuance.** A motion for continuance is addressed to the sound discretion of the court, and in the absence of a showing of an abuse of discretion, a ruling on a motion for a continuance will not be disturbed on appeal.

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

Dennis R. Keefe, Lancaster County Public Defender, and Mariclare Thomas, for appellant.

Michael G. Heavican, Lancaster County Attorney, and Mary L. Thramer, for appellee.

Paul Conley, guardian ad litem.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

KRIVOSHA, C.J.

This is an appeal from a judgment entered by the separate juvenile court of Lancaster County, Nebraska, terminating parental rights to two children. In an effort to protect the children we will refer to the parties by their initials rather than their names. The appellant in this case, the mother, will be referred to as "C.M." C.M. and her estranged spouse, F.M., are the parents of two minor children. The older child, J.A.M., was born August 19, 1980, and the younger child, B.L.A.M., was born August 31, 1981. The record in this case discloses a continuous struggle by the separate juvenile court to effect a reasonable solution, short of termination of parental rights. However, that effort, unfortunately, was without success. From the record, we are left with no other choice than to affirm.

On October 24, 1980, a petition was filed by the State of Nebraska in the interest of J.A.M. The petition alleged that J.A.M. was a child as defined by Neb. Rev. Stat. § 43-202(1) and (2) (Reissue 1978). Hearings on the petition were held on November 18 and December 3, 1980. On December 3, 1980, C.M. and her husband, in open court, admitted the allegations of the petition. The court found the allegations of the petition to be true and set forth its specific findings in a court order entered December 3, 1980. The court specifically found that J.A.M. was a child

as defined by § 43-202, and committed the temporary legal custody of the child to the Lancaster County Division of Public Welfare, with physical placement in the parents' home subject to certain conditions imposed by the court.

A further dispositional hearing on the petition was held by the separate juvenile court on December 18, 1980. As a result of that hearing, the court continued the legal custody of J.A.M. with the Lancaster County Division of Public Welfare and physical custody with the parents. On December 24, 1980, the Lancaster County Division of Public Welfare petitioned the court for a review of its order entered on December 18, 1980. The court specifically found that the child had been removed from the parental home with the consent of C.M. and her spouse and was placed in foster care. Further, the court specifically found that C.M. had subsequently reversed her position and requested that the child be returned to her care. The court held that J.A.M. should remain in foster care until a further hearing could be held on the disposition in the case.

On December 30, 1980, the separate juvenile court made specific findings as to the continued neglect of J.A.M. by C.M. and her spouse. The child was found to have sustained a burn on her left ankle, a burn on her right ankle, a burn on her cheek, and a bruise on her abdomen. The court also found that the parents of the child were experiencing severe marital problems and that the unstable home caused the child to be neglected. The court therefore entered an order placing legal and physical custody of J.A.M. with the Lancaster County Division of Public Welfare. The court further directed the parents to correct the conditions of neglect and to submit to the court a plan which was to include involvement in parental counseling and parent training.

On January 13, 1981, the court reviewed its prior order. The court directed that the legal custody of the minor child continue with the Lancaster County

Division of Public Welfare, and authorized child placement with the parents when conditions of neglect were remedied. The court further directed that the parents be involved in therapy counseling sessions with a child psychologist and to continue to maintain the marriage stability.

On April 17, 1981, the court held a further review of its earlier dispositional order. The court found that the conditions of neglect had not been corrected and that the child should remain in the legal and physical custody of the Lancaster County Division of Public Welfare. The court specifically set out a plan and conditions that had to be met by the parents prior to the child being returned to their care.

Following a hearing on May 21, 1981, the trial court found that conditions had sufficiently improved so that the minor child could be returned, subject to supervision, to her parents' home. However, on July 6, 1981, the State filed a notification of emergency removal of the child from the parental placement, and requested a review hearing to be held on whether the child should be returned to the parental home. On July 13, 1981, the court held such a hearing. The court directed that the legal custody of the child remain with the Lancaster County Division of Public Welfare but that the physical care of the child should be returned immediately to the parents, subject to conditions set forth in its order dated May 21, 1981. Further, the court ordered that the parents not argue in front of the child and that the child be enrolled in a day care program.

On September 24, 1981, the State advised the court that J.A.M. had again been taken into protective custody after being hospitalized with severe diaper rash. A supplemental petition was filed the next day alleging that both J.A.M. and her younger sister, B.L.A.M., were children as defined by § 43-202(2) and requesting the court hold a hearing and enter an appropriate order. On September 30, 1981, C.M. entered a denial to the supplemental peti-

tion. The trial court found that B.L.A.M. was not in immediate danger if she should remain with her parents, provided her parents would permit personnel from Child Protective Services, the homemaker and parent aide, as well as the public health nurse, to visit the child at any time. The parents were agreeable to that condition and B.L.A.M. was returned to the parents. The older child, J.A.M., however, continued in foster care placement.

On October 12, 1981, a hearing was held on the supplemental petition. The juvenile court found that the allegations of the supplemental petition were true, and directed that both children be placed in foster care because C.M.'s husband was incarcerated in the city jail and that on the night preceding the October 12 hearing C.M. had stayed out all night in her car with B.L.A.M. The court specifically determined that the lack of care by C.M. and her spouse showed that it would be unsafe for the children to remain with their mother. A further dispositional hearing was held on the supplemental petition on October 20, 1981. The court continued the temporary legal and physical custody of both children with the Lancaster County Division of Public Welfare for care and placement in a foster home. The court further directed that the parents correct the conditions of neglect, obtain mental status evaluations, participate in the Parent and Children Together program, and demonstrate the ability to budget their money and provide for the necessaries of life for their children and for themselves.

Between November 6, 1981, and January 15, 1982, the court granted several opportunities to C.M. to have one or both of the children with her upon meeting certain conditions, including having adequate food on hand. These conditions were not met and the visitations did not occur. Further hearings were held, and each time the court made every reasonable effort to grant the parents rights of visitation,

subject to their meeting reasonable conditions. Few, if any, of the conditions were met.

On May 13, 1982, the State filed a second supplemental petition. Trial was held on the second supplemental petition on September 20 and 21, and October 12 and 14, 1982. On September 20, 1982, the father voluntarily relinquished his parental rights and did not participate any further in the court proceedings. On November 2, 1982, the separate juvenile court of Lancaster County, Nebraska, entered an order adjudicating the children as being neglected children as defined by § 43-202(2), and terminated the parental rights of C.M. The children were committed to the legal custody of the state Department of Public Welfare for adoption.

C.M. has now appealed, maintaining that the trial court erred in terminating her parental rights, because (1) the evidence did not clearly and convincingly support the termination of parental rights; (2) it was not in the best interests of the children that the parental rights be terminated; (3) the trial court considered hearsay evidence in terminating C.M.'s parental rights; and (4) the trial court erred in not granting a continuance to permit C.M. to produce a witness in surrebuttal.

As always, the law in cases of this nature is clear; only the application of the facts is in dispute. With regard to the law, we have said that an order terminating parental rights must be based upon clear and convincing evidence. See *In re Interest of Hill*, 207 Neb. 233, 298 N.W.2d 143 (1980). Further, we have said that the right of parents to maintain custody of their child is a natural right, subject only to the paramount interests which the public has in the protection of the rights of a child. See *In re Interest of Hitt*, 209 Neb. 900, 312 N.W.2d 297 (1981). Parental rights cannot be terminated simply because others may be in a position to be better providers for the children. *In re Interest of D.*, 209 Neb. 529, 308 N.W.2d 729 (1981). And, finally, we have observed

that termination of parental rights should indeed be a last resort, and should be implemented only when no other reasonable alternative exists. *In re Interest of Brungardt*, 211 Neb. 519, 319 N.W.2d 109 (1982). However, we further observed in *In re Interest of Brungardt, supra* at 527, 319 N.W.2d at 114, that " 'when natural parents cannot rehabilitate themselves within a reasonable time . . . the best interests of the child or children require that a final disposition be made without delay.' "

Little purpose would be served in detailing all of the evidence in this case. Suffice it to say that the trial court was more than patient and afforded C.M. every reasonable opportunity to rehabilitate herself and to provide her children with a minimal home. She simply was unable to accomplish that objective. The evidence is replete with instances of child abuse, both physically and emotionally. C.M. simply failed to display any understanding of the role of a mother and what was required of her in raising these children. She did not provide them with adequate food; she could not keep them clean; she could not generally care for them. In short, the record overwhelmingly establishes by clear and convincing evidence that the best interests of the children demanded the action taken by the trial court. We have observed before that where there are reasonable grounds to believe that the conditions giving rise to the parent's inability to care for her children will continue for a prolonged and indeterminate period, the parental rights may be terminated when such action is in the best interests of the children. See *In re Interest of Wanek*, 212 Neb. 394, 322 N.W.2d 803 (1982). Termination in this case was the last resort and the only alternative available to the court. C.M.'s contention that that determination was not based on clear and convincing evidence is simply without merit and must be overruled.

Likewise, C.M.'s claim that the trial court erred in admitting hearsay evidence is without merit. Spe-

cifically, the evidence objected to by C.M. was testimony given by a rebuttal witness. The witness attributed a statement to C.M.'s husband to the effect that he and C.M. were back together again. C.M. had claimed that all of her problems with the children stemmed from her relationship with her husband and that now that they were no longer together she could take care of the children. The statement in question was made on October 5, 1982, after the husband had supposedly filed for a divorce. The statement was made to the witness in the presence of C.M., who agreed, at the time, stating, "Everything is going perfect." The witness further observed that the husband had his arm around C.M., and the witness described C.M. as "snuggled up" against him. On surrebuttal C.M. denied that her husband had made such a statement and that she had agreed to it. Nevertheless, the testimony was proper for the trial court to consider. Specifically, Neb. Rev. Stat. § 27-801(4) (Reissue 1979) provides in part: "A statement is not hearsay if: . . . (b) The statement is offered against a party and is . . . (ii) a statement of which he has manifested his adoption or belief in its truth." Where the party against whom a statement is offered is present, hears the statement being made, and makes no objection, the trial court may consider such evidence as an exception to the hearsay rule. See, *Naples v. United States*, 344 F.2d 508 (D.C. Cir. 1964); *United States v. Fortes*, 619 F.2d 108 (1st Cir. 1980). This assignment is likewise without merit.

The last error raised by C.M. requiring our attention is that the trial court erred in not granting a continuance so as to permit her to call a surrebuttal witness. That assignment is likewise without merit. A motion for continuance is addressed to the sound discretion of the court, and in the absence of a showing of an abuse of discretion, a ruling on a motion for a continuance will not be disturbed on appeal. See *Vlcek v. Sutton*, 201 Neb. 555, 270 N.W.2d

906 (1978). C.M. wished to call her husband to deny that he had made the statement in the presence of the earlier witness. There is no showing in the record that if the spouse had been called he would in fact have denied the statement. There is simply no showing of an abuse of discretion in this case which would justify our reversing the action of the trial court.

For these reasons, therefore, the judgment of the trial court terminating the parental rights is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MARY J. JOHNSON, APPELLANT.
338 N.W.2d 769

Filed September 30, 1983. No. 82-793.

1. **Expert Witnesses.** Expert testimony should not be received if it appears the witness is not in possession of such facts as will enable him to express a reasonably accurate conclusion as distinguished from a mere guess or conjecture. The witness should not be allowed to express an opinion on an inadequate basis or in respect to facts not disclosed to the jury.
2. _____. Where the opinion testimony of an expert witness does not have a sound and reasonable basis, it should be stricken.

Appeal from the District Court for Lancaster County: SAMUEL VAN PELT, Judge. Reversed and remanded with directions to dismiss.

Dennis R. Keefe, Lancaster County Public Defender, and Dorothy A. Walker, for appellant.

Norman Langemach, Jr., City Prosecutor, and Patrick A. Campbell, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, and SHANAHAN, JJ., and GRANT, D.J.

PER CURIAM.

On May 20, 1982, the appellant, Mary J. Johnson,

was found guilty in the municipal court of the city of Lincoln, Nebraska, on two counts. The first count was operating a motor vehicle while under the influence of alcoholic liquors, contrary to Lincoln Municipal Code § 10.52.020. The second count was refusing to submit to a chemical test for the determination of alcoholic content of her body fluid, contrary to the provisions of Lincoln Municipal Code § 10.52.025. Johnson was fined $100 on each of the counts and ordered not to drive a motor vehicle for a period of 6 months. On appeal to the District Court for Lancaster County, Nebraska, the conviction on count II was reversed and dismissed, because of a crack in the tube used for taking the breath sample, and is not before us for consideration. The conviction on count I was, however, affirmed, and Johnson appealed to this court. She maintains, in essence, that her conviction of operating a motor vehicle while under the influence of alcohol should be reversed and dismissed because the evidence was insufficient to support a conviction. She further argues that the municipal court abused its discretion in sentencing her to pay a fine of $100 and suspending her driving privileges for a period of 6 months rather than placing her on probation. We have reviewed the record and find that the decision of the District Court for Lancaster County, Nebraska, affirming the action of the municipal court of the city of Lincoln, Nebraska, on count I must be reversed and the cause dismissed.

The evidence discloses that on March 11, 1982, Johnson was observed by a member of the Lincoln Police Department operating a motor vehicle, apparently without proper registration. The car did not properly display either a license plate or an in-transit sticker. There was no evidence of any erratic or unusual driving, and but for the improper registration, the vehicle would not have been stopped. The officer stopped Johnson's vehicle and asked her for her operator's license and proof of car

ownership. She could produce neither. The officer testified that during this initial contact he observed her eyes to be watery, and detected the smell of alcohol on her breath. The officer then asked Johnson to walk back to the police car. He described her walk as "slow and deliberate." Johnson was placed in the rear seat of the police car and questioned concerning her identity. She accused the officers of picking on her and began yelling at the officers. The testifying officer stated that he continued to smell alcohol on her breath. She was arrested and charged with driving while intoxicated in violation of § 10.52.020 and transported to the county-city jail in the city of Lincoln, Nebraska.

At trial, over objection, the officer was permitted to express his opinion as to whether Johnson was intoxicated. Johnson objected on the grounds that the opinion lacked sufficient foundation and was not supported by the evidence. The State argues that there was sufficient evidence to establish that the officer had observed intoxicated persons on a number of occasions and, further, had had an opportunity to observe Johnson, thereby qualifying the officer to render an opinion concerning whether Johnson was intoxicated. Whether one considers the officer an expert or a lay witness does not change the result in this case. Clearly, if the officer qualified as an expert, as we believe he did in this case, he would have been entitled to render an opinion concerning Johnson's state of intoxication, and, unless otherwise ordered by the court, could render such opinion even without first giving the underlying basis for that opinion. See Neb. Rev. Stat. § 27-703 (Reissue 1979). Furthermore, if the officer was considered a nonexpert in this particular area, he could, nevertheless, render an opinion regarding Johnson's condition, provided he first detailed the facts upon which his opinion was based. See, Neb. Rev. Stat. § 27-701 (Reissue 1979); *State v. Lewis*, 177 Neb. 173, 128 N.W.2d 610 (1964); *Pierce v. State*, 173 Neb. 319, 113

N.W.2d 333 (1962). However, these rules do not permit either an expert or a lay witness to render an opinion based upon obvious speculation or conjecture. See *Northern Nat. Gas Co. v. Beech Aircraft Corp.*, 202 Neb. 300, 275 N.W.2d 77 (1979).

With regard to a lay witness, Neb. Rev. Stat. § 27-701 (Reissue 1979) specifically provides that the nonexpert's opinions or inferences must be limited to those opinions or inferences "which are (a) rationally based on the perception of the witness *and* (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." (Emphasis supplied.) And with regard to the expert witness, we have said: "Expert testimony should not be received if it appears the witness is not in possession of such facts as will enable him to express a reasonably accurate conclusion as distinguished from a mere guess or conjecture. The witness should not be allowed to express an opinion on an inadequate basis or in respect to facts not disclosed to the jury. [Citations omitted.] Where the opinion testimony of an expert witness does not have a sound and reasonable basis it should be stricken." *Clearwater Corp. v. City of Lincoln*, 202 Neb. 796, 804, 277 N.W.2d 236, 241 (1979).

An examination of the record in this case discloses that on either basis the trial court should not have accepted the opinion of the officer. There is no testimony to indicate that Johnson was under the influence of alcohol, if at all, to such an extent that she lost to an appreciable degree the normal control of her bodily and mental faculties, as we require for establishing that one is "intoxicated." See, *Hoffman v. State*, 162 Neb. 806, 77 N.W.2d 592 (1956); *Uldrich v. State*, 162 Neb. 746, 77 N.W.2d 305 (1956); *Shanahan v. State*, 162 Neb. 676, 77 N.W.2d 234 (1956). The officer simply testified that he smelled alcohol on Johnson's breath. The evidence shows that Johnson had been drinking some 5 hours earlier. He further testified that Johnson had watery eyes. She testi-

fied she had been crying. He further testified that she walked back to the police car in a slow and deliberate manner. There is no indication that this was unusual for Johnson or indicated any impaired ability. There is no testimony that the officer attempted to conduct any field sobriety tests or that Johnson failed to pass such tests. Moreover, the evidence discloses that it was Johnson who called the officer's attention to the fact that the device being used by the officers to give her a breath test was defective, resulting in count II being dismissed. The mere odor of alcohol, standing alone, is not sufficient to justify either a lay witness or an expert rendering an opinion as to whether one is intoxicated in violation of law. For those reasons we believe that the trial court should have struck the conclusion of the officer. When that is done, there is simply no evidence in the record to support the conviction. The judgment, therefore, is reversed and the cause remanded with directions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

STATE OF NEBRASKA, APPELLEE, V. FRED T. WENZEL, APPELLANT.

338 N.W.2d 772

Filed September 30, 1983. No. 82-820.

1. **Constitutional Law: Municipal Ordinances.** Courts will not pass on the constitutionality of a city ordinance unless it becomes necessary to do so.
2. **Appeal and Error.** Questions presented on appeal but not necessary to a decision need not be determined.

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

Herbert J. Friedman of Friedman Law Offices, for appellant.

Patrick A. Campbell, Assistant City Prosecutor, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, and SHANAHAN, JJ., and GRANT, D.J.

GRANT, D.J.

Defendant was charged in the municipal court of Lincoln, Nebraska, with violating an ordinance of that city, which, as printed on the uniform citation and complaint issued to defendant, required that drivers not "[o]perate or be in actual physical control of a motor vehicle while under the influence of alcoholic liquor or drugs or when he/she had ten hundredths of one per cent or more by weight of alcohol in his/her body fluid as shown by chemical analysis of his/her blood, breath, or urine."

Defendant pleaded not guilty. After trial defendant was found guilty and sentenced to pay a $100 fine, and had his operator's license suspended for 6 months. Defendant appealed to the District Court, where the judgment and sentence of the municipal court were affirmed.

Defendant then filed his notice of appeal to this court in the following manner: "COMES NOW the defendant, Fred T. Wenzel, by and through his attorney of record, and gives notice of his intention to appeal to the Supreme Court of the State of Nebraska, the sentence of $100 fine and revocation of his driver's license and suspension of all driving privileges for a period of 6 months, handed down and entered by the court on the 10th day of November, 1982 on a charge of first offense Driving While Under the Influence."

In his four assignments of error defendant alleges that the trial court erred, for various reasons, in receiving into evidence the results of a breath test administered to defendant, and alleges that the appropriate section of the Lincoln Municipal Code is unconstitutional in providing "that operating a motor vehicle with more than 0.10 of 1% blood alcohol

content is a criminal offense." Brief for Appellant at 2.

Interesting briefs were submitted dealing with those issues. The court notes, however, that defendant was charged under an ordinance setting out different responsibilities for drivers: one must not operate a motor vehicle while "under the influence of alcoholic liquor, or of any drug" or while having "ten-hundredths of one percent . . . or more by weight of alcohol" in one's body fluid. The ordinance seems to be modeled after Neb. Rev. Stat. § 39-669.07 (Reissue 1978). In *State v. Hilker*, 210 Neb. 810, 812, 317 N.W.2d 82, 83-84 (1982), we stated that § 39-669.07 "defines one offense which can be proved by any of three ways: (1) By proof that the defendant was in physical control of a motor vehicle while under the influence of alcoholic liquor; (2) By proof that the defendant was in physical control of a motor vehicle while under the influence of any drug; or (3) By proof that the defendant was in physical control of a motor vehicle while having ten-hundredths of one percent or more by weight of alcohol in his or her body fluid."

The municipal court made a general finding of guilt. The District Court generally affirmed that finding. Defendant appealed to this court from his conviction and sentence "on a charge of first offense Driving While Under the Influence."

Without any regard to the breath test results, or the constitutionality of Lincoln Municipal Code § 10.52.020, insofar as that ordinance provides that operating a motor vehicle with more than ten-hundredths of one percent blood alcohol content is an offense, there is ample uncontradicted evidence in the record as to defendant's driving his automobile, at the time and place charged, while under the influence of intoxicating liquor. Defendant does not challenge the sufficiency of that evidence.

In that situation it would be inappropriate for this court to decide the matters presented in defend-

ant's assignments of error. Courts will not pass on questions of constitutionality unless it becomes necessary to do so. *State v. Austin*, 209 Neb. 174, 306 N.W.2d 861 (1981). Questions presented on appeal but not necessary to a decision need not be determined. *Laverty v. Cochran*, 132 Neb. 118, 271 N.W. 354 (1936).

The judgment of the District Court, affirming the judgment and sentence of the municipal court, was correct.

AFFIRMED.

KANSAS-NEBRASKA NATURAL GAS COMPANY, INC., APPELLANT, V. SWANSON BROTHERS, APPELLEE.

338 N.W.2d 774

Filed September 30, 1983. No. 83-149.

1. **Contracts.** A written contract expressed in unambiguous language is not subject to interpretation or construction, and the intention of the parties must be determined from its contents alone.
2. _____. A trial court is not free to rewrite a contract for the parties or speculate as to the terms of a contract which the parties have not seen fit to set out or are contrary to the express terms of the contract.

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

M. J. Bruckner and W. Scott Davis of Marti, Dalton, Bruckner, O'Gara & Keating, P.C., for appellant.

Swanson Brothers, pro se.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

This appeal began as an action in the small claims court for Rock County, Nebraska, by the Kansas-

Nebraska Natural Gas Company, Inc., against Swanson Brothers, a partnership, for the balance due pursuant to a written gas sales agreement. In July 1974 the appellee, Swanson Brothers, by one of the partners, B. Duane Swanson, entered into a written agreement with the appellant, Kansas-Nebraska Natural Gas Company, in which the appellee agreed to pay Kansas-Nebraska a minimum payment of $500 per year for natural gas service for grain drying. The contract was to continue in force for 5 years and from year to year thereafter until canceled. Under the written contract, cancellation could be effected by either party by giving the other party 30 days' written notice. The written contract states: "7. This contract shall be effective as of July 31, 1974, and shall continue in force and effect for a period of five (5) years from the above date and thereafter from year to year until canceled. Such cancellation may be given by either party by giving the other party thirty (30) days written notice."

The small claims court for Rock County entered judgment for the appellee and against the appellant. The Kansas-Nebraska Natural Gas Company, Inc., perfected its appeal to the District Court.

At trial in the District Court Swanson Brothers admitted the execution of the contract but asserted that in the early spring of 1981, at the time sale of the property was made to another, oral notice of cancellation was given to a representative of the Kansas-Nebraska Natural Gas Company. The trial court, without assigning reasons therefor, found that the oral notice was effective and denied recovery. The amount alleged to be due for 1981 was $458.90, and for 1982 the amount was $94.52. The sum of $458.90 represented the difference between the actual billings to the premises in 1981 of $41.10 subtracted from the guaranteed minimum of $500, and the $94.52 was the amount of the guarantee prorated to February 8, 1982, on which date actual written no-

tice of the termination was received by the natural gas company from one of the partners. It is uncontradicted in the evidence that the cancellation notice in accordance with the contract was not received until February 8, 1982, and we are unable to conclude on what basis the trial court felt free in suggesting that a notice not conforming with the express requirement of the contract was sufficient to afford cancellation. We have previously said on a number of occasions that a written contract expressed in unambiguous language is not subject to interpretation or construction, and the intention of the parties must be determined from its contents alone, *Clemens Mobile Homes, Inc. v. Anderson*, 206 Neb. 58, 291 N.W.2d 238 (1980), and that a trial court is not free to rewrite a contract for the parties or speculate as to the terms of a contract which the parties have not seen fit to set out or are contrary to the express terms of the contract, *W. Wright, Inc. v. Korshoj Corp.*, 197 Neb. 692, 250 N.W.2d 894 (1977).

The brief of appellee addresses itself to a theory of equitable estoppel, a theory that the appellant is equitably estopped from denying the effectiveness of the oral cancellation notice. The brief does not assert, nor do the facts in the bill of exceptions reveal, what detrimental reliance was placed on the so-called acceptance of the oral cancellation by Swanson Brothers, nor is the evidence very conclusive as to whom precisely the alleged oral notice of cancellation was given. It is sufficient to say we find no basis whatever to apply any doctrine of equitable estoppel.

Since we are bound by the findings of fact which find support in the evidence, we therefore accept the fact that an oral cancellation was given. However, the trial court was not free to substitute its version of the contract for the express terms of the contract as written by the parties, nor do we find any reason why the express terms of the contract should not be enforced against the appellee herein. The trial

court was in error in so doing, and the judgment is reversed and the cause remanded to the trial court with directions to enter judgment as prayed for in the appellant's petition.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. JERRY G. OHLER, APPELLANT.

338 N.W.2d 776

Filed September 30, 1983. No. 83-150.

1. **Post Conviction: Appeal and Error.** A motion for post conviction relief can not be used as a substitute for an appeal or to secure a further review of issues already litigated.
2. _____: _____. Once a motion for post conviction relief has been judicially determined, any subsequent motion for such relief from the same conviction and sentence may be dismissed unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time of the filing of the prior motion.

Appeal from the District Court for York County: WILLIAM H. NORTON, Judge. Reversed and remanded with directions.

Robert B. Creager of Berry, Anderson, Creager & Wittstruck, for appellant.

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

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, and SHANAHAN, JJ., and GRANT, D.J.

BOSLAUGH, J.

This is an appeal in a post conviction proceeding.

At the original trial the defendant was convicted of possession of burglary tools and possession of stolen property. He was found to be an habitual criminal, was fined $500, and was sentenced to imprisonment for a term of 15 years. On his direct appeal to this court the defendant contended that the overruling

of his motion to suppress was error. We held that the defendant had consented to the warrantless search, and affirmed the judgment. *State v. Ohler*, 208 Neb. 742, 305 N.W.2d 637 (1981), *cert. denied* 454 U.S. 967, 102 S. Ct. 510, 70 L. Ed. 2d 383.

The defendant then commenced a proceeding for post conviction relief under Neb. Rev. Stat. § 29-3001 (Reissue 1979), alleging that the search had violated his constitutional rights, that his right to procedural due process was denied when the State was permitted to amend the information without a hearing, and that his right to a fair trial was prejudiced by violations of the court's order to sequester the witnesses. Following a review of all the records and bill of exceptions, the trial court found that the defendant was not entitled to relief.

The defendant was represented by Anthony Troia at trial, on the direct appeal, and in the trial court in the first post conviction proceeding. Shortly after the defendant had filed a notice of appeal, pro se, in the first post conviction proceeding, Troia's motion for leave to withdraw was granted by this court and George Brugh was appointed as counsel. The defendant then filed a motion to dismiss the pending appeal, pro se, and the appeal was dismissed.

On January 20, 1983, the defendant commenced the present proceeding, in which he alleged: "2. That during the course of the defendant's trial, the defendant's attorney failed to provide the defendant with effective assistance of counsel in the following particulars:

"a. The defendant's counsel refused to allow the defendant to testify in his own behalf, when under the circumstances, an attorney reasonably competent in such matters, would have, or in the exercise of reasonable care should have, advised and allowed the defendant to testify in his own behalf.

"b. The defendant's counsel failed to object, and failed to make and [sic] adequate and proper record of the fact that during the course of the trial, wit-

nesses for the state discussed their trial testimony in violation of the sequestration order made by the court prior to trial.

"c. The defendant's counsel failed to produce a witness for the defendant who was familiar with the implements alleged to be burglary tools, to testify that said tools would not or could not be used for burglary tools, despite the fact that counsel indicated such a witness would be produced for trial.

"d. The defendant's counsel failed to effectively and properly cross examine the state's witnesses with respect to the defendant's motion to suppress evidence seized from a cardboard box, when such cross examination would have revealed material facts, relevant to the court's decision on the motion to suppress, which would have resulted in the suppression of critical evidence.

"e. That defendant's counsel failed to properly and timely object to the amendment of the information to allege that the defendant was a habitual criminal.

"f. The defendant's counsel failed to properly investigate the validity of prior convictions used by the state to enhance the defendant's sentence under the Habitual Criminal Act, when such investigation would have revealed that the prior convictions were invalid.

"g. That with respect to each of the above, the defendant was denied due process of law and effective assistance of counsel as guaranteed by the Fifth, Sixth and Fourteenth Amendment to the United States Constitution, which prejudiced the defendant's right to a fair trial, in that each, any or all of such omissions withheld from the jurys [sic] or courts [sic] consideration, relevant evidence which would have created a reasonable doubt where no such doubt may have existed without the benefit of such evidence.

"3. That during the course of the appeal of defendant's conviction, defendant's attorney failed to

provide the defendant with effective assistance of counsel in the following particulars:

"a. The defendant's counsel failed to raise as an issue on appeal, the sufficiency of the evidence to sustain the conviction when reasonable counsel, competent in such matters, would have, or in the exercise of reasonable care should have, presented the issue of the sufficiency of the evidence for review by the Supreme Court.

"4. That during the course of the defendant's previous motion for post-conviction relief, the defendant's attorney failed to provide the defendant with effective assistance of counsel, including, but not limited to the following:

"a. That counsel failed to properly draft and prepare the motion to set aside and vacate the conviction, consistent with the requests of the defendant, by failing to include in said motion, all grounds reasonably available to the defendant for potential post-conviction relief, including all the allegations contained in this petition.

"b. Failed to attend the defendant's post-conviction hearing, and properly prepare and present to the Court all matters that should have been considered on the motion.

"5. That with respect to each of the above deprivations of constitutional rights, such deprivations prejudiced the substantial rights of the defendant, and entitle the defendant to a hearing thereon, and for a determination of the issues with findings of fact and conclusions of law."

On January 26, 1983, the defendant moved to have Creager appointed as his counsel. That motion was overruled, the appointment of Brugh was reconfirmed, and the trial court denied post conviction relief without receiving any evidence and without a hearing on the motions. From that order the defendant has appealed.

The defendant contends the District Court erred in failing to grant him a hearing or an opportunity to

present evidence in support of his request for post conviction relief. He argues that it was error for the trial court to fail to make findings of fact and conclusions of law with respect to his request for post conviction relief.

A motion for post conviction relief can not be used as a substitute for an appeal or to secure a further review of issues already litigated. *State v. Freeman*, 212 Neb. 278, 322 N.W.2d 437 (1982); *State v. Meredith*, 212 Neb. 109, 321 N.W.2d 456 (1982). Once a motion for post conviction relief has been judicially determined, any subsequent motion for such relief from the same conviction and sentence may be dismissed unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time of the filing of the prior motion. *State v. Newton*, 202 Neb. 361, 275 N.W.2d 297 (1979); *State v. Haskett*, 194 Neb. 523, 233 N.W.2d 782 (1975).

Under the standards set forth above, a defendant is entitled to bring a second proceeding for post conviction relief only if the grounds relied upon did not exist at the time of the filing of the first motion. A review of the motion filed in the present case reveals that the only ground which was not capable of being raised at the time of the first hearing is the claim defendant's counsel failed to provide effective assistance during the course of the first motion for post conviction relief. All other grounds can not be raised in a second post conviction motion. See *Sims v. State*, 295 N.W.2d 420 (Iowa 1980).

The order overruling the defendant's second motion for post conviction relief filed January 20, 1983, is reversed and the cause remanded for further proceedings in conformity with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

LAND PAVING CO., A NEBRASKA CORPORATION, APPELLANT, V. D. A. CONSTRUCTION COMPANY, INC., A NEBRASKA CORPORATION, APPELLEE.

338 N.W.2d 779

Filed September 30, 1983. No. 83-170.

1. **Prejudgment Interest.** Prejudgment interest may be recovered on claims that are liquidated.
2. _____. A claim is liquidated if the evidence furnishes data which, if believed, make it possible to compute the amount with exactness, without reliance upon opinion or discretion.
3. _____. Where a reasonable controversy exists as to the plaintiff's right to recover or as to the amount of such recovery, the claim is generally considered to be unliquidated and prejudgment interest is not allowed.
4. _____. Where the claim is otherwise liquidated, prejudgment interest should be denied only when the evidence shows there is a reasonable controversy as to the plaintiff's right to recover or as to the amount of such recovery.

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

C. Robert Vote of Young & White, for appellant.

Dennis E. Martin of Dwyer, O'Leary & Martin, P.C., for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

The issue upon this appeal is whether the plaintiff was entitled to prejudgment interest.

The action was brought to recover $8,329.68, the balance due the plaintiff on an express contract for paving a parking lot. There was no dispute about the amount due the plaintiff if the work was performed satisfactorily.

The defendant's answer alleged the work had not been substantially performed in a good and workmanlike manner. The defendant counterclaimed for damages in the amount of $25,749.50, an amount

alleged to be required to bring the work into compliance with the plans and specifications.

After trial to the court, the court found that the plaintiff had substantially performed the contract and that the complaints of the defendant were minute when viewed with the overall performance of the plaintiff. The plaintiff recovered judgment in the amount of $8,329.68, together with costs and interest at the statutory rate from July 19, 1979. The defendant's motion for new trial was overruled on February 3, 1983, but the trial court modified its judgment by deleting the award of prejudgment interest. The order recites that the modification was made to comply with *Langel Chevrolet-Cadillac v. Midwest Bridge*, 213 Neb. 283, 329 N.W.2d 97 (1983).

We recently restated the applicable rules in *Classen v. Becton, Dickinson & Co.*, 214 Neb. 543, 545, 334 N.W.2d 644, 645 (1983), as follows: "The general rule is that prejudgment interest may be recovered on claims that are liquidated. A claim is liquidated if the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance upon opinion or discretion. *First Data Resources, Inc. v. Omaha Steaks Int., Inc.*, 209 Neb. 327, 307 N.W.2d 790 (1981). Where a reasonable controversy exists as to the plaintiff's right to recover or as to the amount of such recovery, the claim is generally considered to be unliquidated and prejudgment interest is not allowed. *Langel Chevrolet-Cadillac v. Midwest Bridge*, 213 Neb. 283, 329 N.W.2d 97 (1983)."

In the present case the findings of fact by the trial court are not challenged, and no bill of exceptions has been filed in this court. The effect of the trial court's findings were to determine that no reasonable controversy existed as to the plaintiff's right to recover, or the amount of the recovery. The claim was liquidated and the plaintiff was entitled to prejudgment interest as originally determined by the trial court in its judgment of December 22, 1982.

The order of February 3, 1983, did not vacate or set aside any of the findings made on December 22, 1982, and was based upon an interpretation of the opinion in *Langel Chevrolet-Cadillac v. Midwest Bridge, supra.*

In the *Langel* case, as distinguished from this case, the evidence showed that Langel was entitled to damages, which proof defeated Midwest's claim for prejudgment interest. Where the claim is otherwise liquidated, prejudgment interest should be denied only when the evidence shows there is a reasonable controversy as to the plaintiff's right to recover or as to the amount of such recovery.

The judgment of the District Court is reversed and the cause remanded with directions to reinstate the judgment of December 22, 1982.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. SHARON L. KRUSE, APPELLANT.

338 N.W.2d 781

Filed September 30, 1983. No. 83-222.

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

Daniel A. Fullner of Moyer, Moyer, Egley & Fullner, for appellant.

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

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

PER CURIAM.

The defendant appeals as excessive a sentence of not less than 3 nor more than 5 years for what was described in the amended information as the May 6, 1982, Class III felony offense of aiding and abetting

the delivery of marijuana. Included in the record in support of her claim that there exists a disparity in her sentence with that received by her coconspirator is the presentence investigation of her brother, Robert Kruse.

The defendant took the phone call in which a cooperating individual asked to buy some marijuana. She arranged with her brother to fill the order, and the two of them made the delivery, with the brother receiving and taking all of the purchase price. The brother was also charged with two additional counts of delivery of a controlled substance which did not involve the defendant.

The defendant is 38 years of age; the brother, 37 years of age. The defendant has a record of approximately 19 misdemeanors involving intoxication, traffic, and larceny, and one felony conviction of second degree assault for which she was sentenced to a term of from 1 to 2 years in the Nebraska Center for Women at York. She was paroled, which parole was revoked, and she served the entire maximum sentence.

The brother's record includes approximately 30 misdemeanors for traffic and alcohol offenses, and larceny. He has no felony convictions.

Although the records of the two individuals support some disparity in sentences, when consideration is given to the degree of involvement of the defendant and her coconspirator, the additional offense of which the coconspirator was convicted, and the prior records of the two, we believe that the sentence imposed upon the defendant was excessive as resulting from an abuse of discretion on the part of the trial court. *State v. Komor*, 213 Neb. 376, 329 N.W.2d 120 (1983).

The sentence of the District Court is modified to one of imprisonment of not less than 18 months nor

more than 3 years to the Department of Correctional Services.

AFFIRMED AS MODIFIED.

McCOWN, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL NIX, APPELLANT.

338 N.W.2d 782

Filed September 30, 1983. Nos. 83-371, 83-372.

1. **Sentences: Appeal and Error.** Sentences within statutory limits will not be disturbed on appeal absent an abuse of discretion on the part of the sentencing judge.
2. _____: _____. Where two or more defendants are convicted for the same offense and different penalties are inflicted, and it appears from the evidence that the defendant receiving the least punishment is at least equally guilty, it may be necessary for this court to examine the evidence to determine whether there were justifiable reasons for the distinctions and whether the higher sentence should be reduced.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Affirmed as modified.

Peter K. Blakeslee, for appellant.

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

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

CAPORALE, J.

The only assignment of error for us to consider in this appeal is whether the sentence imposed upon the defendant, Michael Nix, was excessive. We find the sentence excessive, modify it, and affirm as modified.

On February 4, 1983, Nix entered a plea of no contest to three property-related offenses. Those offenses were two felony counts of theft by receiving

stolen property and one misdemeanor count of theft by receiving stolen property. Nix was sentenced to consecutive terms of not less than 1 nor more than 2 years on each of the felony convictions, and to a term of 1 year on the misdemeanor conviction, to be served concurrently with the two other sentences.

All of the convictions stem from a "sting" operation conducted by Lincoln police and the Nebraska State Patrol. The law enforcement officers had set themselves up in a secondhand store in Lincoln and let the word be circulated throughout the community that they were interested in buying property of all types. Word reached Nix and his partner in crime, James Knaff. Knaff and Nix on numerous occasions, prior to their eventual arrest, sold stolen property to the undercover officers. Knaff pled no contest to two counts of theft by receiving stolen property and was placed on probation for 2 years.

The rule of this court is that sentences within statutory limits will not be disturbed on appeal absent an abuse of discretion on the part of the sentencing judge. *State v. Beach*, *ante* p. 213, 337 N.W.2d 772 (1983). Nix concedes that the sentence he was given is within statutory limits, but argues that an abuse of discretion took place when he was not placed on probation as was his partner.

In *State v. Shonkwiler*, 187 Neb. 747, 751, 194 N.W.2d 172, 174 (1972), we stated: "At least as early as 1905, this court expressed its view that where two or more defendants are convicted for the same offense and different penalties are inflicted, and it appears from the evidence that the defendant receiving the least punishment is at least equally guilty, it may be necessary for this court to examine the evidence to determine whether there were justifiable reasons for the distinctions and whether the higher sentence should be reduced." See, also, *State v. Kruse*, *ante* p. 408, 338 N.W.2d 781 (1983); *State v. Komor*, 213 Neb. 376, 329 N.W.2d 120 (1983); *State v. Javins*, 199 Neb. 38, 255 N.W.2d 872 (1977);

State v. Burkhardt, 194 Neb. 265, 231 N.W.2d 354 (1975).

Here, it is clear from the factual recitation in the District Court upon Nix's no contest pleas that Knaff and Nix were equally involved in these crimes. The fact that Knaff was allowed to plead to two charges and Nix to three is of no importance. Both were originally charged by information with at least twice as many crimes as they eventually pled to.

A review of the reports of the presentence investigation indicates that both of these men have lengthy juvenile and adult records but no prior felony convictions. The only significant difference in their past records indicates that Nix is somewhat less docile in his confrontations with police officers and has been convicted twice for assaults on police officers. Knaff has been convicted once for hindering arrest. Both still live with a parent, and Nix contributes to the support of his mother from wages he earns from employment he has held since November of 1982. Knaff, at the time of being placed on probation, was unemployed.

Under the circumstances of this case we conclude that the disparity of sentences accorded these two men for the involvement in identical offenses is impermissible and embodies an abuse of discretion.

Accordingly, the sentence imposed by the Nebraska Third Judicial District Court, Lancaster County, upon the defendant is modified to one of probation for a period of 2 years under the same conditions as those imposed upon the coperpetrator Knaff.

AFFIRMED AS MODIFIED.

ELDEN E. FRIEDEMAN, WIDOWER OF BETTY E. FRIEDEMAN, INDIVIDUALLY AND AS NEXT FRIEND OF DAVID EARL FRIEDEMAN AND DOREEN RAE FRIEDEMAN, APPELLEE, V. STATE OF NEBRASKA, BEATRICE DEVELOPMENTAL CENTER, APPELLANT. ELDEN E. FRIEDEMAN, PERSONAL REPRESENTATIVE OF THE ESTATE OF BETTY E. FRIEDEMAN, DECEASED, APPELLEE, V. STATE OF NEBRASKA, BEATRICE DEVELOPMENTAL CENTER, APPELLANT.

339 N.W.2d 67

Filed October 7, 1983. Nos. 82-416, 82-417.

1. **Workmen's Compensation: Appeal and Error.** Findings of the Workmen's Compensation Court on rehearing have the same force and effect as a jury verdict and, if supported by sufficient evidence, will not be disturbed on appeal unless clearly wrong.
2. **Workmen's Compensation.** The Workmen's Compensation Act is to be construed liberally so that its beneficent purposes may not be thwarted by technical refinement of interpretation. Neb. Rev. Stat. §§ 48-101 et seq. (Reissue 1978).
3. _____. The fact that an employee knew that he was inflicting upon himself a mortal wound will not, in all cases, constitute willful negligence within the meaning of Neb. Rev. Stat. § 48-151(7) (Reissue 1978).
4. **Workmen's Compensation: Evidence.** Scientific testimony of factors that can override a person's will, to the extent that even the knowledge of the consequences of the act of suicide do not prevent the act from taking place, are admissible to demonstrate that the act was not willful.
5. _____: _____. While the act of suicide may be an independent intervening cause in some cases, it is certainly not so in those cases where the incontrovertible evidence shows that, without the injury, there would have been no suicide; that the suicide was merely an act intervening between the injury and the death and part of an unbroken chain of events from the injury to the death and not a cause intervening between the injury and death.
6. _____: _____. A suicide note written by the decedent within 24 hours of death is admissible as a declaration of present state-of-mind exception to the hearsay rule.
7. _____: _____. The Workmen's Compensation Court may receive in evidence matters not properly admissible in other courts bound by the rules of evidence.

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

Paul L. Douglas, Attorney General, and John R. Thompson, for appellant.

Herbert J. Friedman of Friedman Law Offices, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, and SHANAHAN, JJ., and GRANT, D.J.

WHITE, J.

This is an appeal by the State of Nebraska from the decision of the three-judge Workmen's Compensation Court which reversed a judgment of the single-judge court. The three-judge court determined that the employee suffered a compensable injury and was totally disabled until her death by her own hand. In the companion case, submitted together, the State appeals from the judgment of the compensation court, holding that the widower and next of kin were entitled to death benefits on account of decedent's death, which the court held arose out of and in the course of her employment at the Beatrice State Developmental Center, and that decedent was not "willfully negligent" in procuring her own death.

The State assigns as error: (1) That the evidence does not support the finding that the decedent was temporarily totally disabled for a period of 154 1/7 weeks; (2) In failing to find that the decedent's suicide was "willful negligence," thus barring any recovery for death-related benefits; (3) In finding that the death of the decedent arose out of and in the course of her employment; and (4) In admitting into evidence a suicide note. We affirm.

A detailed recitation of the facts is necessary. Betty E. Friedeman (hereafter decedent) was, on September 1, 1977, a married woman of 44 years of age and the mother of four children. On that day, while employed as an attendant at the Beatrice State Developmental Center, an institution for the housing, care, and training of the mentally retarded,

she suffered an injury to her lower back while attempting to restrain a patient. Decedent was treated by an orthopedic surgeon, undergoing two myelograms and a laminectomy. She was examined by neurologists and ultimately two psychiatrists. All treatment was apparently unavailing.

Decedent's husband and two of her children testified. According to their testimony, the decedent was a healthy, vigorous, active, friendly, and industrious woman prior to the accident of September 1, 1977; she did chores around the farm; she was always on the go; she enjoyed her children and had an active, normal relationship with her husband. After the accident she was a completely changed person. Her husband, daughter, and son each testified that she chronically complained of pain and had a difficult time moving around. She had trouble climbing stairs, walking, and sleeping. She would walk the floor at night because of the pain in her back. During the day, she spent most of her time lounging on a couch, because it hurt her to walk, to stand, and to sit. She stopped doing the housework and, for the most part, was a mere shadow of her former self.

The decedent worked from the time of the injury up to September 12, 1977, and was off work until October 30, 1977. She again started working in October 1977 and worked up till May 15, 1978, when she had her operation.

In the early morning of March 9, 1981, decedent took an overdose of drugs and a half bottle of vodka, left a poignant suicide note, and died. The note stated as follows: "Dear Family: Please forgive me. I just cannot stand the pain any longer. I have been thinking about doing this for the last year or more.

"Please do not feel bad because I hope I will have no more pain.

"I love you all very much.

"But you have your lives and I cannot live mine day after day in pain.

"Always remember I loved you all with all my heart." Signed: "Mom & Betty."

The autopsy reports by Dr. Harlan Papenfuss indicate death by suicide.

Dr. Bruce Miller and Dr. Eli Chesen both testified in person. Dr. Miller testified that decedent was consistently in pain and appeared to be depressed. He had referred her to Dr. Fisher, a psychologist, and Drs. Robert Osborne and Eli Chesen, psychiatrists, because of her psychological depression. Dr. Miller testified that decedent was totally disabled from returning to her employment at the Beatrice State Developmental Center from May 15, 1978, the time of the second operation, up until the time of her death, March 9, 1981.

Dr. Chesen, who saw decedent approximately 4 weeks before her death, testified that in his opinion the cause of death was the pain, caused by the back injury, which drove her to commit suicide. Dr. Chesen stated that she was not psychotic but that she did make a conscious decision to end her life. He stated both on direct and cross-examination that, although she was lucid, the suicide was beyond her control and was not voluntary.

On direct examination Dr. Chesen testified as follows: "THE WITNESS: It was my opinion after reviewing the autopsy, suicide note, and my own previous notes, that she had taken her own life or suicided in response to the pain from which she was suffering. Q. (By Mr. Friedman) And do you, again, have an opinion based upon a reasonable degree of medical certainty as to what was the cause of her suicide? A. Yes. . . . THE WITNESS: It was my opinion that the suicide was caused or was a response to the pain. . . . In this situation, I felt that while there certainly were depressive elements here that depression, at least in my opinion, was not the primary cause of this tragic event but rather the pain from which this woman was suffering. Again, people suicide for a large variety of reasons, depres-

sion being only one, one of them, and possibly explaining only a minority of them even. Q. Based on the history that you took from her, do you have an opinion as to what caused the pain? A. Yes. Q. And what's that? . . . A. After reviewing the medical records and just given all the data that I had to go on, and inclusive of my interview, I feel that with a reasonable degree of medical certainty that the pain was caused by the injury that Mrs. Friedeman had suffered previously. Q. And was this then, the suicide, in your opinion, a direct result of that? A. Yes. Q. Doctor, in your opinion, was Mrs. Friedeman really able to control herself in the sense of a decision to take her life? . . . THE WITNESS: I think based on, again, based on all of the information, including the information subsequent to my own examination, that this was beyond her control."

In discussing the assignments of error we apply the standard that findings of the Workmen's Compensation Court on rehearing have the same force and effect as a jury verdict and, if supported by sufficient evidence, will not be disturbed on appeal unless clearly wrong. *Caradori v. Frontier Airlines*, 213 Neb. 513, 329 N.W.2d 865 (1983).

The first assignment of error is clearly without merit. There is evidence that the decedent suffered an accident arising out of and in the course of her employment; that she incurred an injury; that, except for a short period of reemployment, she was totally disabled to the date of her death; and that the pain and depression were causally connected to the accident and injury, based on a reasonable medical certainty. The State's arguments are directed to the weight of the evidence and to the credibility of witnesses, something that was within the province of the compensation court to weigh and consider. We will not again reweigh the facts.

We will discuss the next two assignments together.

The threshold question underlying consideration of the assigned errors is whether employee suicide ab-

solutely disqualifies a survivor from receiving benefits under the Nebraska workmen's compensation law. We previously have said that it does.

In *Hannon v. J. L. Brandeis & Sons, Inc.*, 186 Neb. 122, 181 N.W.2d 253 (1970), at issue was whether the decedent leaped from a parking structure, thereby committing suicide, or whether in the absence of proof to the contrary the presumption against suicide applied and the survivors were entitled to benefits. The court, in determining that the burden was on the survivors to prove a natural death, observed almost in passing that "[a]n employee who is willfully negligent cannot recover under the workmen's compensation law. § 48-101, R. R. S. 1943. An employee who commits suicide is willfully negligent within the meaning of the act." *Hannon, supra* at 126, 181 N.W.2d at 256.

Since this appears to be a distinct minority view in the United States, prudence requires that we reexamine that issue to determine if we should continue to adhere to it. The State and the survivors have furnished us with comprehensive briefs on this subject.

The status of suicide as a work-related death has been the subject of considerable litigation. An extensive discussion of the subject is had in 1A A. Larson, The Law of Workmen's Compensation § 36.10 et seq. (1979).

Although not cited in *Hannon v. J. L. Brandeis & Sons, Inc., supra*, the decision by the *Hannon* court would seem to be in agreement with the rule set forth in *Sponatski's Case*, 220 Mass. 526, 530, 108 N.E. 466, 467-68 (1915): "This decision rests upon the rule established in *Daniels v. New York, New Haven, & Hartford Railroad, supra* [183 Mass. 393, 67 N.E. 424 (1903)]. That rule applies to cases arising under the workmen's compensation act. It is that where there follows as the direct result of a physical injury an insanity of such violence as to cause the victim to take his own life through an un-

controllable impulse or in a delirium of frenzy 'without conscious volition to produce death, [without] having knowledge of the physical nature and consequences of the act,' then there is a direct and unbroken causal connection between the physical injury and the death. But where the resulting insanity is such as to cause suicide through a voluntary wilful choice determined by a moderately intelligent mental power which knows the purpose and the physical effect of the suicidal act even though choice is dominated and ruled by a disordered mind, then there is a new and independent agency which breaks the chain of causation arising from the injury."

As Larson observes at § 36.21 at 6-121: "Armed with this formula, courts plunged into the murky depths of every conceivable kind of broken and anguished mind, and tried to come up with the cases classified as compensable or not, according to whether the employee killed himself through a voluntary (though insane) choice or through a delirious impulse."

Sponatski then is a two-part test, whether the suicide was the result of an uncontrollable impulse and was accomplished without conscious knowledge of the physical consequences. Under this doctrine the State argues, and the survivors seem to agree, that recovery for decedent's death would be barred, as the evidence was quite clear that the decedent was lucid, thus knowing the physical consequences that would result.

Larson at § 36.22 at 6-123 attacks the inclusion of the second prong in a determination of causation: "It is abundantly evident that the second element is traceable to the criminal law test of insanity in *M'Naghten's Case*. But there is a decisive difference between the role of 'insanity' in criminal law murder cases and in workmen's compensation suicide cases. It can well be argued in a criminal case that the accused's *understanding* is a crucial element, since it is necessary to the establishment of

mens rea or criminal intent. But in the compensation suicide defense, the only legal issue is causation, and that in turn depends on the *will*, not on the understanding. If the injury so acts upon the will that it is not operating independently at the time of the suicide, then the chain of causation is clear, since there is no independent intervening cause. Whether the decedent knew the physical consequences of his act is utterly irrelevant to this question of causation. Using *Sponatski's* own words, if the injury produced a literally uncontrollable impulse to suicide, how can causation theory demand more? Postulate that the decedent as a result if [sic] his injury was driven by an uncontrollable impulse to produce what he understood perfectly well was his own physical death. To say that such an act was causally independent of the injury is to defy the plain meaning of words."

As discussed by Larson at § 36.22, it appears that, since *Sponatski*, only one case in the last 25 years has used the knowledge of the physical consequences test to defeat recovery. *Zimmiski v. Lehigh Val. Coal Co. et al.*, 200 Pa. Super. 524, 189 A.2d 897 (1963). The *Sponatski* rule has itself been reversed legislatively. 1937 Mass. Acts ch. 370, § 2.

A second test was set forth by the New York courts in *Matter of Delinousha v. Nat. Biscuit Co.*, 248 N.Y. 93, 94, 161 N.E. 431 (1928): "[I]f an injury causes insanity which in turn causes suicide, death benefits may be awarded . . . ."

The presence or absence of a brain derangement, however that term is interpreted, is critical to recovery under this theory. While there is evidence of depression and possibly melancholy at the time of decedent's suicide, no claim of brain derangement or psychosis is made. We agree with the State that recovery could not be had under the evidence in this case if we were to apply the theory of the *Delinousha* case.

The third test, known as the chain of causation

test, would allow recovery if the injury and its consequences directly caused the employee to lose normal judgment and to be dominated by a mental disturbance. Larson, *supra* at § 36.30.

Our Neb. Rev. Stat. § 48-101 (Reissue 1978) bars recovery if the employee was "willfully negligent." Was the act of the decedent willfully negligent? In *Delaware Tire Center v. Fox*, 411 A.2d 606, 607 (Del. 1980), the court commented on "willful intention." "Common experience demonstrates the effect of serious injury, pain, depression and despair, and the medications prescribed for them, can influence one's thinking and override one's will, to the end that suicide, though undertaken with knowledge of its nature and consequences, is not an act of the free will but rather a direct product of the incapacity. This influential effect should be recognized in our Workmen's Compensation law, a remedial statute with a benevolent purpose long subject to liberal construction."

Florida also has a statutory provision which bars recovery if the injury was a result of the employee's willful intention to injure or kill himself. In construing the meaning of "willful intention" the Supreme Court of Florida stated: "The difficulty inherent in proving that one who kills himself by his own hand does so because of injuries sustained in an accident, and as a direct and proximate result thereof, undoubtedly accounts for the diversity of opinion on this question among the courts of this country. And, clearly, in a proper case, the provisions of Section 440.09(3), supra, should be given full force and effect so that industry should not have to carry the burden of compensating for a death for which it was in no wise responsible. But we are not persuaded that the fact that a workman *knew* that he was inflicting upon himself a mortal wound will, in all cases, amount to a 'wilful intention' to kill himself, within the meaning of the statute. We believe that in those cases where the injuries suffered by the

deceased result in his becoming devoid of normal judgment and dominated by a disturbance of mind directly caused by his injury and its consequences, his suicide cannot be considered 'wilful' within the meaning and intent of the Act.

"There is no force to the argument, propounded by some courts, that the act of suicide is an independent intervening cause of the death of the workman, thus breaking the chain of causation from the injury to the death of the deceased. While it may be an independent intervening cause in some cases, it is certainly not so in those cases where the incontrovertible evidence shows that, without the injury, there would have been no suicide; that the suicide was merely an *act* intervening between the injury and the death, and part of an unbroken chain of events from the injury to the death, and not a *cause* intervening between the injury and death." *Whitehead v. Keene Roofing Co.*, 43 So. 2d 464, 465 (Fla. 1949).

We are of the opinion that scientific testimony of factors that can override a person's will, to the extent that even the knowledge of the consequences of the act of suicide do not prevent the act from taking place, are admissible to demonstrate that the act was not willful. Such was the direct testimony of Dr. Chesen. It is elementary that an act which is not voluntary is also not willful. We are further persuaded that to the extent that *Hannon* holds that a nonvoluntary act of suicide constitutes willful negligence, it should be overruled.

The last assignment deals with the reception of the suicide note in evidence. The evidence was admissible. The note was found at the time the body was discovered and was written by the decedent within 24 hours of her death. Dr. Chesen testified that the declaration was relevant in forming his opinion concerning decedent's state of mind at the time it was written and as to the cause of death.

The Supreme Court of Illinois, when faced with a

similar question, also held that a suicide note was admissible as a declaration of present state-of-mind exception to the hearsay rule. *City of Streator v. Industrial Com.*, 92 Ill. 2d 353, 444 N.E.2d 164 (1982).

The statement is not unlike the declaration of present state of mind and intent we found to be admissible in *Fite v. Ammco Tools, Inc.*, 199 Neb. 353, 258 N.W.2d 922 (1977). Further, we held in *Fite* that the compensation court may receive in evidence matters not properly admissible in other courts bound by the rules of evidence.

The judgment of the Workmen's Compensation Court is affirmed. Counsel is allowed a $1,250 attorney fee for services in this court.

AFFIRMED.

BOSLAUGH, J., dissents.

CAPORALE, J., dissenting.

I must respectfully dissent from that portion of the opinion which overrules *Hannon v. J. L. Brandeis & Sons, Inc.*, 186 Neb. 122, 181 N.W.2d 253 (1970), and affirms the compensation court's award of benefits to the widower and next of kin on account of the decedent's death by her own hand. In doing so I acknowledge that the majority's rationale is well reasoned and is supported by respectable authority. My problem arises from the fact that the question presented is not one of first impression.

Neb. Rev. Stat. § 48-101 (Reissue 1978) provides, as it did at the time of *Hannon*, that one who is "willfully negligent" may not recover benefits under the Workmen's Compensation Act. Whether observed "almost in passing" or otherwise, the fact remains that this court ruled, with three members dissenting on the question of what presumptions should arise from an unexplained death, that an employee who commits suicide is "willfully negligent." With that ruling, suicide became a bar to the recovery of workmen's compensation benefits. During the intervening dozen years, our Legislature has elected to let its language remain unchanged and has

thereby acquiesced in this court's determination of its intent. *Erspamer Advertising Co. v. Dept. of Labor*, 214 Neb. 68, 333 N.W.2d 646 (1983).

With all due respect to the learned Professor Larson, he is not the Legislature of Nebraska. Nor, no matter how sound and persuasive their reasoning, are the courts of our sister states empowered to construe Nebraska's legislative enactments.

The nature of suicide has not changed in the past 12 years and, at least so far as the majority demonstrates, mankind's understanding of the phenomenon has not markedly improved. The only thing that has changed is the composition of this court. That circumstance alone, I respectfully submit, does not justify the abandonment of precedent.

HASTINGS, J., joins in this dissent.

LUDWIG THOS, APPELLEE, V. EMPLOYERS MUTUAL CASUALTY COMPANY, APPELLANT.

338 N.W.2d 784

Filed October 7, 1983. No. 82-551.

1. **Insurance: Contracts.** A separate exclusionary clause in an insurance contract should be construed in light of the provisions of the whole contract and harmonized therewith if reasonably possible.
2. _____: _____. An exclusion in a liability policy excluding from coverage injury to or destruction of any goods sold by the named insured, or work completed by the named insured out of which the accident arises, eliminates any coverage for injury to or destruction of the product furnished or work completed by the named insured.
3. _____: _____. Under an exclusion in a liability policy excluding from coverage injury to goods sold or work completed by the named insured, if a defect in the product furnished or work completed by the named insured causes damage to other property, there is coverage for such damage to other property.

Appeal from the District Court for Wayne County: MERRITT C. WARREN, Judge. Reversed and remanded with directions to dismiss.

Larry E. Welch and Earl G. Greene III of Gross, Welch, Vinardi, Kauffman & Day, P.C., for appellant.

Thomas E. Brogan of Brogan & Stafford, P.C., for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

WHITE, J.

This is an appeal from the judgment of the District Court for Wayne County, Nebraska, in favor of appellee, Ludwig Thos, against appellant, Employers Mutual Casualty Company, for breach of an agreement, contained in a comprehensive liability policy, to defend the insured (Thos) against actions by third persons. The insurer (Employers) refused coverage and declined to defend the action. The insured procured a private defense counsel and prevailed in the original action and on appeal to this court. See *Kniesche v. Thos*, 203 Neb. 852, 280 N.W.2d 907 (1979). The trial court in the instant case found that the insurer had a duty to defend, and entered judgment for the costs of such defense and a fee for the successful prosecution of this action in the District Court. Employers appeals, essentially assigning only one error, that the trial court was wrong in its determination that the policy provided coverage and that there was a duty to provide a defense. We reverse with directions to dismiss the petition.

A complete statement of the facts is contained in *Kniesche v. Thos*, *supra*, and is not important to the disposition of this case. Only pertinent facts will be set forth. Thos erected a hog confinement structure for Kniesche which was damaged in a subsequent high wind. At issue was whether the structure was erected in a workmanlike manner and conformed to a rather general warranty.

The insurance policy in effect at the time of the

construction and damage to the building contained the following clauses which are central to the resolution of this case.

"COVERAGE A—BODILY INJURY LIABILITY
"COVERAGE B—PROPERTY DAMAGE LIABILITY

"The company will pay on behalf of the *insured* all sums which the insured shall become legally obligated to pay as damages because of

Coverage A. *bodily injury* or

Coverage B. *property damage*

to which this insurance applies, caused by an *occurrence*, and the company shall have the right and duty to defend any suit against the *insured* seeking damages on account of such *bodily injury* or *property damage*, even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient, but the company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the company's liability has been exhausted by payment of judgments or settlements.

"*Exclusions*

"This insurance does not apply:

"(a) to liability assumed by the *insured* under any contract or agreement except an *incidental contract*; but this exclusion does not apply to a warranty of fitness or *quality of the named insured's products* or a warranty that work performed by or on *behalf of the named insured* will be done in a workmanlike manner;

. . . .

"(n) to *property damage* to the *named insured's products* arising out of such products or any part of such products;

"(o) to *property damage* to work performed by or on behalf of the *named insured* arising out of the work or any portion thereof, or out of materials, parts or equipment furnished in connection therewith . . . ."

In a clause known in the insurance trade as a "completed operations" clause, coverage is expressly provided for "*bodily injury* and *property damage* arising out of operations or reliance upon a representation or warranty made at any time with respect thereto, but only if the *bodily injury* or *property damage* occurs after such operations have been completed or abandoned and occurs away from premises owned by or rented to the *named insured.*"

In the determination of the controversy two separate questions must be considered: (1) Is the loss suffered by Kniesche such that, if proved, it is covered by the risks assumed by the insurer in the policy of insurance? (2) Did the insurer have knowledge, or should it have had knowledge, of facts which would give rise to "the potential of liability," thus requiring the insurer to provide a defense to the insured?

With respect to the first question, two bases of liability were advanced by the insured. First, that the "completed operations" clause extended coverage. Here, it is clear from the petition at the first trial and the record of that trial that the property owner was seeking recovery for the damage to the product itself. Indeed, if other property had in fact been damaged, that property belonged to another.

A second basis is the language of exclusion (a) which excepts from the exclusion certain warranties of fitness, quality, and workmanlike performance.

The first basis cannot be sustained. In *Hartford Acc. & Ind. Co. v. Olson Bros., Inc.*, 187 Neb. 179, 188 N.W.2d 699 (1971), this court construed the completed operations clause and concluded that the clause did not afford coverage for damage to the product itself, but only for damage to other property or for bodily injury. See, also, Henderson, *Insurance Protection for Products Liability and Completed Operations — What Every Lawyer Should Know*, 50 Neb. L. Rev. 415, 441 (1971): "The coverage is for tort liability for physical damages to

others and not for contractual liability of the insured for economic loss because the product or completed work is not that for which the damaged person bargained," citing *Aetna Insurance Co. v. State Motors*, 109 N.H. 120, 244 A.2d 64 (1968).

Similarly, the second basis urged by the insured is not tenable. We said in *Townley v. Whetstone*, 190 Neb. 541, 209 N.W.2d 350 (1973): "A separate exclusionary clause in an insurance contract should be construed in light of the provisions of the whole contract and harmonized therewith if reasonably possible . . . ." (Syllabus of the court.)

Exclusions (n) and (o) specifically exclude any coverage to the insured's product, i.e., the hog building. The only possible, and it seems to us the most logical, manner to construe (a) in harmony with (n) and (o) is to conclude that (a) extends coverage to tort claims by third parties for personal injury or property damage, not including the insured's product. It appears to us that this is in harmony also with the nature of the policy itself. It is a liability policy, not a contract in the nature of a performance bond or guarantee of satisfactory construction.

On the premise that the loss to the product itself was not covered, the petition does not disclose damage to other than the product itself, nor does the record disclose damage to other property of Kniesche. Thus, the insurer was correct in determining no potential liability to Kniesche under the policy, and was not obligated to extend a defense. Cf. *Allstate Ins. Co. v. Novak*, 210 Neb. 184, 313 N.W.2d 636 (1981).

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

Cite as 215 Neb. 429

CHARLES V. SEDERSTROM, JR., TRUSTEE, APPELLEE, V. DONALD E. WREHE ET AL., APPELLANTS, LARRY BAHENSKY, DOING BUSINESS AS BAHENSKY WELL DRILLING, ET AL., APPELLEES, JAMES S. CLINTON, INTERVENOR-APPELLEE.

339 N.W.2d 74

Filed October 7, 1983. No. 82-572.

1. **Motions for New Trial: Time.** Application for a new trial must be made within 10 days after a judgment is rendered.
2. **Motions for New Trial: Appeal and Error: Time.** In the absence of a timely motion for new trial, a notice of appeal must be filed within 1 month after rendition of the judgment or decree or the making of the final order.

Appeal from the District Court for Howard County: JOSEPH D. MARTIN, Judge. Appeal dismissed.

Joseph Polack of Polack & Woolley, P.C., and Chesley S. Baker of Lauritsen, Baker & Brownell, for appellants.

C. Patrick Shaughnessy, Jr., of Shaughnessy, Shaughnessy & Shaughnessy, for intervenor-appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, and SHANAHAN, JJ., and GRANT, D.J.

GRANT, D.J.

Defendants, Donald E. Wrehe, an individual, and Harold E. and Mary Lou Wrehe, husband and wife, appeal from an order granting a motion for summary judgment filed by intervenor-appellee, James S. Clinton.

The motion for summary judgment was filed on January 5, 1982. The motion was submitted on February 4, 1982, on the entire court file. On March 26, 1982, the trial court, in the judge's minutes, made the following entry, "Intervenor's Mot. for S.J. Sustained."

On April 13, 1982, an order granting intervenor's motion for summary judgment was filed with the clerk of the District Court. The last sentence of this

order states, "This Order was entered on the Trial Docket this 26th day of March, 1982."

The record further shows that appellants, on April 13, 1982, filed a motion for new trial, seeking "that a new trial be had in the matter of the summary judgment motion filed by the intervenor, James S. Clinton." The certificate of service on this motion indicates that it was mailed to opposing counsel on April 12, 1982. This is noted only because it indicates that appellants were aware of the order filed on April 13 before the date of the filing.

The motion for new trial was overruled on July 12, 1982. Notice of appeal to this court was filed on August 11, 1982.

Neb. Rev. Stat. § 25-1143 (Reissue 1979) states: "The application for a new trial must be made, within ten days, either within or without the term, after the verdict, report or decision was rendered, except . . . ." The stated exceptions are not involved here.

Neb. Rev. Stat. § 25-1301(2) (Reissue 1979) states: "Rendition of a judgment is the act of the court, or a judge thereof, in pronouncing judgment, accompanied by the making of a notation on the trial docket, or one made at the direction of the court or judge thereof, of the relief granted or denied in an action."

We have held that the docket pronouncement "must include a notation 'of the *relief granted or denied* in an action.' " *Carter v. State*, 198 Neb. 519, 525, 254 N.W.2d 390, 393 (1977), citing *Valentine Production Credit Assn. v. Spencer Foods, Inc.*, 196 Neb. 119, 241 N.W.2d 541 (1976). The docket notation in this case does set out the relief granted and was entered on March 26, 1982. The order of the trial court setting out in detail the sustaining of the motion merely confirms the docket entry, and concludes with the words, "This Order was entered on the Trial Docket *this* 26th day of March, 1982." (Emphasis supplied.)

Appellants' motion for new trial was not filed

within 10 days after judgment was rendered, as required by § 25-1143.

Appellants' notice of appeal was not filed within 1 month after the judgment was rendered, as required by Neb. Rev. Stat. § 25-1912 (Reissue 1979).

Although this dispositive point is not raised by appellee, it is obvious this court cannot act without jurisdiction, and it is clear, on the record presented to us by appellants, that this court is without jurisdiction to hear this appeal. See, *Sloan v. Gibson*, 156 Neb. 625, 57 N.W.2d 167 (1953); *Ricketts v. Continental Nat. Bank*, 169 Neb. 809, 101 N.W.2d 153 (1960).

APPEAL DISMISSED.

WESLEY BROWN AND PRINCIE BROWN, APPELLANTS, V. METROPOLITAN UTILITIES DISTRICT, APPELLEE.

338 N.W.2d 787

Filed October 7, 1983. No. 82-835.

Court Rules. A trial court may adopt rules and procedures designed to move cases from filing to disposition, whether disposition is to be by dismissal, trial, or other method.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Affirmed.

Wadie Thomas, Jr., for appellants.

Randall W. Owens of W. L. Strong, Thomas A. Wurtz, Randall W. Owens, Daniel G. Crouchley, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

The plaintiffs appeal from the order of the District Court sustaining the defendant's motion to dismiss made at the close of the plaintiffs' evidence. The ac-

tion had been filed on March 3, 1980, to recover damages resulting from a break in a water main on March 4, 1978, and again on March 16, 1978, alleged to have been caused by the negligence of the defendant.

The case was placed on the dismissal docket on January 22, 1982, because there had been no activity in the case for more than 1 year. On February 24, 1982, the trial court ordered that the case be removed from the dismissal list on condition that the plaintiffs file a certificate of readiness for trial within 1 week.

On March 3, 1982, the plaintiffs filed interrogatories which were mailed to the defendant on that date. On March 4, 1982, the eighth day after the conditional order of February 24, 1982, the plaintiffs filed a certificate of readiness for trial which, among other things, recited that "all discovery proceedings including depositions and other necessary preparation has [sic] been completed."

The case went to trial on October 20, 1982. The plaintiffs introduced no evidence in support of their allegations that the negligence of the defendant had caused damage to their property. The plaintiffs do not contend that it was error for the trial court to dismiss the action at the close of their evidence.

The plaintiffs contend that it was error for the trial court to strike their interrogatories. No such order appears in the transcript filed in this court. In any event, the certificate of readiness for trial, filed by the plaintiffs on March 4, 1982, waived any right to further discovery.

The case had been pending for 2 years when the certificate of readiness for trial was filed. The plaintiffs' present counsel is the third lawyer to appear of record for the plaintiffs. The record indicates that a fourth lawyer had represented them in 1979. The damage was alleged to have occurred in 1978. There is nothing in the record to justify the delay in preparation for trial which occurred.

A trial court may adopt rules and procedures de-

signed to move cases from filing to disposition, whether disposition is to be by dismissal, trial, or other method. *Fanning v. Richards*, 193 Neb. 431, 227 N.W.2d 595 (1975).

It is quite apparent in this case that the plaintiffs made no preparation for trial until after the case had been placed on the dismissal list, 2 years after the filing of the petition. The trial itself did not commence until more than 7 months after the certificate of readiness for trial was filed. At that time, more than 4½ years after the damage was alleged to have occurred, the plaintiffs were unable to produce any evidence in support of their allegations that the cause of the damage was the negligence of the defendant.

The record shows no abuse of discretion. The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JERRY L. EVANS, APPELLANT.

338 N.W.2d 788

Filed October 7, 1983. No. 83-016.

1. **Constitutional Law: Statutes.** Where a statute is susceptible of two constructions, under one of which the statute is valid, while under the other it is unconstitutional or of doubtful validity, that construction which gives it validity should be adopted.
2. **Criminal Law: Affidavits: Identification Procedures.** The provisions of Neb. Rev. Stat. § 29-3303 (Reissue 1979) require a showing of probable cause that a crime has been committed and that the person compelled to produce the nontestimonial evidence has committed that crime.
3. **Convictions: Proof.** One accused of a crime may be convicted on the basis of circumstantial evidence if, taken as a whole, the evidence establishes guilt beyond a reasonable doubt.
4. **Criminal Law: Verdicts: Appeal and Error.** After a jury has considered all the evidence and returned a verdict of guilty, that verdict may not, as a matter of law, be set aside on appeal for insufficiency of evidence, if the evidence sustains some rational theory of guilt.

5. **Convictions: Appeal and Error.** In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact, and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
6. **Appeal and Error.** Consideration of assignments of error is limited to those discussed in the brief.
7. **Jury Instructions: Appeal and Error.** Error cannot be predicated on the failure to give tendered jury instructions absent prejudice to the rights of the defendant.
8. **Sentences: Appeal and Error.** An order denying probation and a sentence imposed within statutorily prescribed limits will not be disturbed on appeal unless there has been an abuse of discretion on the part of the sentencing judge.

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

James R. Wefso, for appellant.

Paul L. Douglas, Attorney General, and Frank J. Hutfless, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, and SHANAHAN, JJ., and GRANT, D.J.

CAPORALE, J.

Following trial by jury, the defendant, Jerry L. Evans, was adjudged guilty of burglary and sentenced to the Nebraska Penal and Correctional Complex for a period of not less than 18 nor more than 30 months. He was given credit for the 3 months and 16 days he spent in jail awaiting disposition of the case. We affirm.

The issues, as defined by defendant's assignments of error, are whether (1) Nebraska's identifying physical characteristics act is constitutional, (2) the evidence is sufficient to sustain the conviction, (3) the trial court erred in refusing to charge the jury in the language of certain of defendant's tendered instructions, and (4) the sentence imposed is excessive.

The trial testimony was that at approximately 8

a.m. on July 2, 1982, Paul Osborn entered his Hay Springs, Nebraska, grocery store and discovered that it had been burglarized since its closing the previous day. Over $700 in food stamps and cash was missing, along with merchandise. A window located some 10 feet off the ground above a rear door had been broken such as to admit a small person. In the opinion of a state highway patrolman, two persons were responsible for the break-in, one being needed to lift the other to the window. Bloodstains were found on the broken glass. Fingerprints and palm prints, less than 24 hours old, were found on various articles throughout the store, including a tag or wrapper used in the display of a pair of gloves. Defendant had not been seen in the grocery store during regular working hours prior to July 2, 1982.

At 6 a.m. on the morning of July 2, 1982, Robert McCarter, as he was out walking, saw defendant and a small, young boy speaking with each other. He overheard defendant say to the boy, "It is over there." The boy then walked to a steel shed. At this time McCarter knew nothing of the burglary. After he heard of the burglary he informed his mother, another Hay Springs merchant, about the incident. She informed Osborn. Osborn, after hearing of the conversation, searched the sheds located in the area which had been indicated by McCarter. On July 10, 1982, in the shed which had been the subject of the conversation between defendant and the boy, Osborn found merchandise which he believed to have been stolen from his store. While making a purchase at Mrs. McCarter's store on July 2, 1982, defendant displayed a thick stack of currency.

Defendant testified that his print was on the glove wrapper as a result of his having looked at a pair of gloves while shopping in Osborn's store. He denied any recollection of a conversation with a boy. Defendant was unemployed at the time of the burglary, needed gloves for prospective employment, and his

testimony as to how much, if any, money he had at the relevant time is in conflict.

On July 30, 1982, an affidavit prepared by a Nebraska state patrolman was submitted to the District Court, seeking an order pursuant to the identifying physical characteristics act, Neb. Rev. Stat. §§ 29-3301 et seq. (Reissue 1979), to compel defendant to submit to fingerprinting and palm printing.

Section 29-3302 of that act empowers certain judicial officers to issue orders authorizing identification procedures for the purpose of obtaining identifying physical characteristics. Section 29-3303 thereof provides: "The order may issue upon a showing by affidavit of a peace officer that (1) there is probable cause to believe that an offense has been committed; (2) that procurement of evidence of identifying physical characteristics through nontestimonial identification procedures from an identified or particularly described individual may contribute to the identification of the individual who committed such offense; and (3) that the identified or described individual has refused, or there is reason to believe he will refuse, to voluntarily provide the desired evidence of identifying physical characteristics. The contents of the affidavit may be supplemented or augmented by the affidavits of other persons or by sworn testimony given to the issuing judge or magistrate."

The affidavit recited the fact of the burglary; the finding of prints believed, because of their location, to have been left by the person or persons committing the burglary; that defendant was overheard saying to an unknown person, "the stuff is over there," referring to a shed; and that merchandise taken from the grocery during the burglary was found in the shed. The affidavit also recited that on July 6, 1982, defendant was asked to voluntarily give a sample of his fingerprints and palm prints and that defendant refused. An order requiring the defendant to so submit was entered on August 2, 1982.

On August 3, 1982, pursuant to the order, a palm print was taken from the defendant which matched the one on the glove wrapper found on the floor of the store during the burglary investigation.

As to the first issue, defendant argues that his motion to suppress the palm print exemplar, taken from him pursuant to the order issued under the identifying physical characteristics act, was erroneously denied. Defendant argues more specifically that § 29-3303 is constitutionally infirm in that it authorized him to be unreasonably seized by police authorities in violation of the fourth amendment of the U.S. Constitution and article I, § 7, of the Nebraska Constitution. He urges that our opinion in *State v. Swayze*, 197 Neb. 149, 247 N.W.2d 440 (1976), is wrong and should therefore be reconsidered and overruled. We disagree.

In *Swayze* a recently born child was found abandoned in a restroom at a state wayside area. A large amount of blood was found on bedding in the room where the child was believed to have been born. Police had four suspects and received orders pursuant to §§ 29-3301 et seq. to obtain blood samples from each. Swayze's blood sample matched that found at the scene, and she was convicted of assault with intent to commit murder. On appeal she questioned the constitutionality of the statute on fourth and fifth amendment grounds. This court upheld the statute, finding specifically that *Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966), was controlling. In *Schmerber* a man who had been arrested for drunk driving was compelled to give a blood sample over his objection. The U.S. Supreme Court found that his arrest was supported by probable cause and that since the exigency of the circumstances required present action to obtain evidence of Schmerber's blood alcohol level, it was a proper search incident to arrest.

It appears that the progenitor of statutes such as our identifying physical characteristics act is cer-

tain dictum found in *Davis v. Mississippi*, 394 U.S. 721, 89 S. Ct. 1394, 22 L. Ed. 2d 676 (1969). In *Davis*, police conducted a mass roundup of young men in order to fingerprint them for the purpose of seeking the individual who had raped a woman. The Court reversed Davis' conviction, holding that the fingerprint exemplar taken during the roundup was the result of an unreasonable seizure and should have been suppressed. The Court did not decide what quantum of suspicion would justify a seizure for fingerprinting, but stated: "Detentions for the sole purpose of obtaining fingerprints are no less subject to the constraints of the Fourth Amendment. It is arguable, however, that, because of the unique nature of the fingerprinting process, such detentions might, under narrowly defined circumstances, be found to comply with the Fourth Amendment even though there is no probable cause in the traditional sense." 394 U.S. at 727.

Responding to this language, several states adopted statutes allowing judicial officers to issue orders empowering police authorities to seize persons in order to obtain nontestimonial identification evidence. See, Ariz. Rev. Stat. Ann. § 13-3905 (1978); 7B Colo. Rev. Stat. Rule 41.1 (1973); Idaho Code § 19-625 (1979); Iowa Code Ann. §§ 810.2 et seq. (West 1979 & Supp. 1983); N.C. Gen. Stat. §§ 15A-271 et seq. (Repl. 1978); Utah Code Ann. § 77-8-1 (Repl. 1982). See, also, Model Code of Pre-Arraignment Procedure app. VIII at 669 et seq. (1975). In most instances the orders issue upon an affidavit of a police officer showing that there is probable cause to believe that an offense has been committed; that there are reasonable grounds, not amounting to probable cause to arrest, to suspect that the person named or described in the affidavit committed the offense; and that the results of specific nontestimonial identification procedures will be of material aid in determining whether the person named in the affidavit committed the offense. In the only re-

ported case we have found involving a direct constitutional attack on this type of statute, the statute was upheld. *People v. Madson*, 638 P.2d 18 (Colo. 1981).

Defendant argues that unlike the above-cited statutes the one at hand requires no nexus between the crime and the individual seized. In this respect he is mistaken. We must bear in mind that where a statute is susceptible of two constructions, under one of which the statute is valid, while under the other it is unconstitutional or of doubtful validity, that construction which gives it validity should be adopted. *Nebraska P.P. Dist. v. City of York*, 212 Neb. 747, 326 N.W.2d 22 (1982).

A similar process of interpretation was employed by the Arizona Supreme Court under their § 13-3905, which provides that an order to compel the submission of an individual to nontestimonial identification procedures can issue on the showing by affidavit of a peace officer that "1. Reasonable cause for belief that a specifically described criminal offense punishable by at least one year in the state prison has been committed. 2. Procurement of the evidence of identifying physical characteristics from an identified or particularly described individual may contribute to the identification of the individual who committed such offense. 3. Such evidence cannot otherwise be obtained by the investigating officer from either the law enforcement agency employing the affiant or the criminal identification division of the Arizona department of public safety." Arizona interpreted that language to require a showing that reasonable grounds exist to connect the person detained with the crime being investigated. *State v. Grijalva*, 111 Ariz. 476, 533 P.2d 533 (1975), *cert. denied* 423 U.S. 873, 96 S. Ct. 141, 46 L. Ed. 2d 104; *Long v. Garrett*, 22 Ariz. App. 397, 527 P.2d 1240 (1974).

Unlike the Arizona Supreme Court, though, we are not willing to follow the suggestion of the *Davis*

dictum that seizures for the purpose of compelling nontestimonial identification evidence under § 29-3303 are permissible, under either the fourth amendment to the U.S. Constitution or article I, § 7, of the Nebraska Constitution, on a showing of less than probable cause to believe the person to be seized and compelled to submit to identification procedures committed the crime under investigation. We are led to this conclusion by a reading of the U.S. Supreme Court cases decided after *Davis v. Mississippi*, 394 U.S. 721, 89 S. Ct. 1394, 22 L. Ed. 2d 676 (1969), which effectively dispel any speculation created by the above-quoted dictum.

In *Dunaway v. New York*, 442 U.S. 200, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979), a suspect was not told that he was under arrest but was picked up by police officers and held for questioning. Dunaway was convicted after information supplied during his interrogation incriminated him. Dunaway's motion to suppress evidence obtained by the seizure was denied by the state courts. The U.S. Supreme Court reversed, rejecting the State's contention that Dunaway's seizure was permissible because it was based upon reasonable suspicion and did not amount to an arrest. The Court stated: "The application of the Fourth Amendment's requirement of probable cause does not depend on whether an intrusion of this magnitude is termed an 'arrest' under state law. The mere facts that petitioner was not told he was under arrest, was not 'booked,' and would not have had an arrest record if the interrogation had proved fruitless, while not insignificant for all purposes, [citation omitted], obviously do not make petitioner's seizure even roughly analogous to the narrowly defined intrusions involved in *Terry* and its progeny. Indeed, any 'exception' that could cover a seizure as intrusive as that in this case would threaten to swallow the general rule that Fourth Amendment seizures are 'reasonable' only if based on probable cause." 442 U.S. at 212-13.

In *Florida v. Royer*, ____ U.S. ____, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983), the Court reversed a conviction of a man convicted of transporting narcotics. The defendant had initially been apprehended as he walked through an airport after it was determined by police that he fit the profile of a drug courier. He was held in a small room at the airport until his luggage could be brought to him. The suitcases were then opened, revealing a quantity of marijuana. At trial Royer's motion to suppress was denied, but that denial was reversed by the Florida District Court of Appeal. In the U.S. Supreme Court it was argued that the reasonable suspicion standard for police investigatory stops enunciated in *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), should apply to Royer's airport seizure by police officers. The Court disagreed, and concluded "that at the time Royer produced the key to his suitcase, the detention to which he was then subjected was a more serious intrusion on his personal liberty than is allowable on mere suspicion of criminal activity." 103 S. Ct. at 1326.

We find these cases persuasive in reaching the conclusion that the compulsion of a person by police officers to accompany them to a police station or hospital, or wherever, and the forced submission to nontestimonial identification procedures, is a seizure of such a magnitude that more than mere suspicion is required. We read the identifying physical characteristics act to require a showing of probable cause to believe the person to be so seized has engaged in an articulable criminal offense prior to the judicial officer issuing an order pursuant to § 29-3303. As so interpreted, the act is constitutional. It would be anomalous and indeed bizarre to require such probable cause prior to the seizure of papers, books, and other objects, but not for the seizure of persons. See, also, *Matter of Abe A.*, 56 N.Y.2d 288, 437 N.E.2d 265, 452 N.Y.S.2d 6 (1982), for a case reaching the same conclusion.

The next inquiry is whether the order requiring Evans to submit to fingerprinting was based upon a showing of probable cause that a crime was committed and that the defendant was the person committing it. We are guided in this inquiry by the recent case of *Illinois v. Gates*, ____ U.S. ____, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). *Gates* teaches that findings of probable cause necessary for fourth amendment seizures pursuant to a warrant are to be interpreted in a commonsense manner with an eye to the totality of the circumstances. The same can be said for findings under § 29-3303.

The affidavit supporting the order in this case establishes the fact that a burglary occurred and that shortly after that burglary the defendant was seen and heard conversing with a small boy, and that the words "the stuff is over there" were uttered by the defendant in reference to a shed. The fruits of the burglary were later found in the same shed. The defendant was in Hay Springs, Nebraska, during the time the burglary occurred. We find that the affidavit was sufficient to establish probable cause to believe that the defendant was involved in the burglary.

As to the sufficiency of the evidence, the defendant argues principally that since the facts and circumstances are reasonably susceptible of two interpretations, they must be resolved in favor of the accused and therefore the evidence is insufficient to convict him.

In making that argument he relies principally upon *State v. Earlywine*, 191 Neb. 533, 215 N.W.2d 895 (1974). In so arguing he overlooks the clear import of the later case of *State v. Buchanan*, 210 Neb. 20, 312 N.W.2d 684 (1981), which acknowledges that while some decisions of this court may be found which create confusion as to the State's burden in such a case, the better reasoned decisions of other courts, and the reasoning adopted in *Buchanan*, are that one accused of a crime may be convicted on the

basis of circumstantial evidence if, taken as a whole, the evidence establishes guilt beyond a reasonable doubt. See, also, *State v. Rowe*, 214 Neb. 685, 335 N.W.2d 309 (1983); *State v. Evans*, 214 Neb. 432, 334 N.W.2d 5 (1983).

It is also the rule that after a jury has considered all the evidence and returned a verdict of guilty, that verdict may not, as a matter of law, be set aside on appeal for insufficiency of evidence, if the evidence sustains some rational theory of guilt. *State v. Mackey*, 200 Neb. 549, 264 N.W.2d 430 (1978); *State v. Harig*, 192 Neb. 49, 218 N.W.2d 884 (1974).

Here, the evidence, including that entry was obtained through a broken window which would allow the admission of a small person, the finding of defendant's palm print on a glove wrapper within the store, and the discovery of the stolen items as a result of a conversation between the defendant and the unknown child, together with the other circumstances, certainly sustains a rational theory of guilt. Not unlike in *State v. Pena*, 208 Neb. 250, 302 N.W.2d 735 (1981), the jury was not required to accept defendant's explanation as to how his print found its way onto the glove wrapper.

As recently observed in *State v. Rowe*, *supra*, it is not for this court to accept one version of the case over another; that was for the jury. In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact, and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.

Defendant's claim that the evidence is insufficient to support his conviction is without merit.

Next, the defendant argues that the trial court erred in refusing to charge the jury in the language of his tendered instruction Nos. 1 through 4. How-

ever, his argument deals only with tendered instruction Nos. 1 and 4. Since consideration of assignments of error is limited to those discussed in the brief, we do not address tendered instruction Nos. 2 and 3. See, Neb. Ct. R. 9D(1)d (Rev. 1982); Neb. Rev. Stat. § 25-1919 (Reissue 1979); *Flakus v. Schug*, 213 Neb. 491, 329 N.W.2d 859 (1983).

Defendant's tendered instruction No. 1 undertook to inform the jury that he had a right to testify on his own behalf; that the jury had no right to disregard his testimony merely because he was the defendant, nor was it to receive the testimony as true; but that it was required to consider whether the testimony was true. The defendant does not undertake to explain how the failure to so instruct the jury prejudiced his defense. The fact that he did testify would seem to convey to the jury the notion that he had a right to do so. As stated in *State v. Bartholomew*, 212 Neb. 270, 322 N.W.2d 432 (1982), error cannot be predicated based on instructions given to the jury in the absence of prejudice to the rights of the defendant. That is equally the case with respect to the failure to give tendered instructions. Moreover, there was no error; the court's standard credibility instruction properly advised the jury of the factors it was to consider in assessing the credibility of any witness.

Defendant's tendered instruction No. 4 simply misstated the law as to how the jury was to consider circumstantial evidence. The court's instructions properly informed the jury as to the law in that regard, which is as set forth in the preceding discussion concerning the sufficiency of the evidence.

Lastly, defendant argues that the trial court erred in not placing him on probation. The presentence investigation of the defendant is not a favorable one. He has a criminal history dating back to 1976, when he was 15 years old. It has long been the rule that an order denying probation and a sentence imposed within statutorily prescribed limits will not be dis-

turbed on appeal unless there has been an abuse of discretion on the part of the sentencing judge. *State v. Patterson*, 213 Neb. 686, 331 N.W.2d 500 (1983). The defendant was found guilty and convicted of violating Neb. Rev. Stat. § 28-507 (Reissue 1979). This is a Class III felony punishable by up to 20 years' imprisonment, a $25,000 fine, or both. Neb. Rev. Stat. § 28-105 (Reissue 1979). Under the circumstances it cannot be said that there was an abuse of discretion which worked to the prejudice of the defendant.

AFFIRMED.

KRIVOSHA, C.J., dissenting.

I regret that I must dissent in this case. While I concur completely with that portion of the majority opinion which provides that Neb. Rev. Stat. § 29-3303 (Reissue 1979) requires a showing of probable cause that a crime has been committed and that the person compelled to produce the nontestimonial evidence has committed that crime before an order requiring one to give fingerprints may issue, I cannot agree that the evidence in this case, even when considered as a whole, was sufficient to submit the case to the jury. The circumstantial evidence presented to the jury is to the effect that a glove wrapper contained a palm print of the accused; that he was overheard saying to a young boy, "It is over there"; and that he displayed a thick stack of currency while making a purchase on July 2, 1982. The palm print was on a wrapper that had been around a pair of gloves offered for sale and which the defendant had a right to touch. The fact that no one could remember that he was in the store was not sufficient, in my view, to create any inference of his having placed his palm print on the wrapper during the course of a robbery. Moreover, his pointing in a general direction and saying "It is over there" are not sufficient to connect him with the fact that certain goods from the store are later found in a shed a week after the burglary. No goods, including the gloves, were ever found in the possession of the defendant or on any

property owned or controlled by the defendant. While it is true that one accused of a crime may be convicted on the basis of circumstantial evidence if, taken as a whole, the evidence establishes guilt beyond a reasonable doubt, and the State is not required to disprove every hypothesis but that of guilt, see *State v. Buchanan*, 210 Neb. 20, 312 N.W.2d 684 (1981), it is likewise true that to sustain a conviction for a crime the corpus delicti must be proved beyond a reasonable doubt. *State v. Workman*, 213 Neb. 479, 329 N.W.2d 571 (1983). In order to convict one of burglary in violation of Neb. Rev. Stat. § 28-507 (Reissue 1979), the State must produce evidence to prove beyond a reasonable doubt that the accused willfully, maliciously, and forcibly broke and entered any real estate or any improvements thereon with intent to commit any felony or with intent to steal property of any value. The State was able to establish the elements of the crime only by requiring the jury to make substantial leaps of faith from one bit of circumstantial evidence to another. In my view, it was asking more than the jury should have been asked to do, and, like our decision in *State v. Workman*, *supra*, the action should have been dismissed.

WHITE, J., joins in this dissent.

MARVIN WILSON, APPELLANT, V. BRYAN MEMORIAL HOSPITAL, A NEBRASKA CORPORATION, ET AL., APPELLEES.
RUTH WILSON, APPELLANT, V. BRYAN MEMORIAL HOSPITAL, A NEBRASKA CORPORATION, ET AL., APPELLEES.
338 N.W.2d 796

Filed October 7, 1983. Nos. 83-070, 83-071.

Courts: Judgments. A District Court has both statutory and inherent power to dismiss an action for lack of prosecution.

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

Marjan R. Kmiec, and Richard J. Dinsmore, for appellants.

Kenneth C. Stephan of Knudsen, Berkheimer, Richardson & Endacott, for appellee Decker.

Joe P. Cashen and Neil B. Danberg, Jr., of Kennedy, Holland, DeLacy & Svoboda, for appellee Bryan Memorial Hospital.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

This is an appeal from an order of the District Court for Lancaster County, Nebraska, in each of two related cases, dismissing the petitions for failure to prosecute diligently. We affirm.

The petitions filed by Marvin Wilson and Ruth Wilson, husband and wife, on May 9, 1979, alleged a cause of action of medical negligence against appellees, Douglass A. Decker, M.D., and Bryan Memorial Hospital, a corporation.

Preliminary motions were made and promptly ruled on by the court. Answers were filed by Decker and Bryan Memorial on August 22, 1979, and August 31, 1979, respectively. The cases were at issue from those dates.

On September 12, 1980, Decker moved for dismissal of both cases. He moved for dismissal of the suit brought by Ruth Wilson for want of prosecution. Decker moved to dismiss the suit brought by Marvin Wilson on grounds that Marvin had failed to answer the interrogatories which had been served on him on August 13, 1979. Both motions to dismiss were withdrawn. The answers to the interrogatories were not filed, and a motion to compel answers was filed on January 9, 1981. Appellants' counsel did not appear at the hearing. The interrogatories were eventually answered.

At the hearing on the motion for dismissal, the trial court observed that except for pleadings filed

resisting the motions to dismiss, the court files disclosed no action by the appellants for 3 years. Affidavits offered at the hearing established that the only discovery in the cases was that by appellees. Some effort was made to arrange depositions of the appellees in April 1982 but was apparently abandoned. On the date of the hearing, counsel for appellants again resisted dismissal, confessed that the cause was not ready for trial, and indicated that 60 to 90 days would be necessary. The trial court, in effect, found that 3 years and 3 months after the cause is at issue, the failure to have discovery completed and be prepared for trial indicated a decided lack of diligence. In addition, both cases had previously been placed on the dismissal docket of the trial court for want of prosecution, and one case had previously been on the dismissal docket twice before, only to escape.

It is elementary that a District Court has inherent authority, even absent a statute, to dismiss cases not diligently prosecuted. *A. Hirsh, Inc. v. National Hair Co.*, 210 Neb. 397, 315 N.W.2d 236 (1982).

We find that the District Court did not abuse its discretion in dismissing the action.

We are aware from the record that lead counsel is not a member of the Nebraska bar and is associated with Nebraska counsel to allow lead counsel's appearance in the courts of this state. It fairly appears that the extensive delays were the result of inaction by the lead counsel. Appearances by counsel not licensed in this state are a matter of grace and not of right, and the same degree of diligence is required of them as counsel admitted to the Nebraska bar.

We further observe that in the suggested case progression rules for the District Courts the recommended time for disposition of this type of action is 18 months. To fail to affirm the decision of a trial court on the second and third motions to dismiss for want of diligent prosecution, involving a delay twice

as long as the total recommended disposition time, would be a travesty and an affront to courts and counsel who are in good faith attempting to support this court's determination to insure speedy resolution of cases in all the courts of Nebraska.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DARWIN JAY ROBINSON, APPELLANT.

339 N.W.2d 76

Filed October 7, 1983. No. 83-249.

1. **Post Conviction.** In order to state a cause of action for post conviction relief, the motion must allege facts which, if proved, constitute an infringement of the prisoner's constitutional rights; allegations which are mere conclusions are insufficient.
2. **Records: Appeal and Error.** An assignment of error which requires an examination of evidence cannot prevail on appeal in the absence of a bill of exceptions; the only question presented under such circumstances is the sufficiency of the pleadings to sustain the judgment of the trial court.

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

Darwin Jay Robinson, pro se.

Paul L. Douglas, Attorney General, and Mark D. Starr, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

CAPORALE, J.

In this appeal the defendant-appellant, Darwin Jay Robinson, seeks reversal of the District Court's order denying post conviction relief. We affirm.

Defendant's entire motion for post conviction relief reads as follows:

"COMES NOW the petitioner and in pro se, pursuant to Nebraska Revised Statue [sic] Section 29§3001-3004 (Revised Reissue 1979) of the Uniform

Post-Conviction Act, and shows that he is the petitioner in the above-entitled case herein, that he is a citizen of the State of Nebraska. That there was such a denial or infringement of the rights of the petitioner as to render the judgement void or voidable under the Constitution of this State or the Constitution of the United States. That he is in the custody of the Nebraska State Penitentiary in Lincoln, Nebraska, 68502-0500, from a judgement of conviction in the Douglas County District Court, and that said judgement of conviction is the subject of this cause of action.

"Wherefore, the petitioner moves this Court, pursuant to the Nebraska Statue [sic], 29§3001-3004 (Reissue 1979), and order that a hearing be held on the matter in this said Motion for Post-Conviction Relief and that it set aside the sentence and judgement rendered."

It is obvious that the motion does not meet the requirements of Neb. Rev. Stat. § 29-3001 (Reissue 1979) that a "verified motion . . . stating the grounds relied upon" be filed.

Not only is the motion not verified, it sets forth no facts which, if proved, would entitle defendant to relief. Defendant pleads only the conclusion that there was a denial of federal and state constitutional rights.

We have recently reiterated the rule that in order to state a cause of action for post conviction relief, the motion must allege facts which, if proved, constitute an infringement of the prisoner's constitutional rights; allegations which are mere conclusions are insufficient. *State v. Glasenapp*, 212 Neb. 99, 321 N.W.2d 450 (1982).

No hearing was required. However, it appears, from the lower court's order directing the sheriff to bring the defendant before the court, that a hearing was nonetheless had.

The transcript contains two praecipes, each directed to the clerk of the trial court. One praecipe

reads: "Request is made for direction to the official stenographic reporter, Lois Thompson, for a complete Bill of Exceptions in the above entitled cause, same to contain all evidence offered and received, for purpose of a reviw [sic] of the conviction and sentence and Post Conviction order in said cause by the Supreme Court of the State of Nebraska."

The other praecipe states: "Please make Transcript of record in above entitled case for Supreme Court, and include therein:

"1. Trial Bill of Exceptions of October 6, 1981, and November 2, 1981.

"2. Post Conviction records of March 24, 1983, (including all motions and docket entries, and Bill of Exception as well as exhibits).

"3. Docket entries of March 2, 1983, (including the findings of facts and law by the trial court).

"4. All exhibits offered and received on March 24th, 1983."

The record does not reflect whether defendant complied with the provisions of Neb. Ct. R. 5A(1) (Rev. 1982), which requires in part that the appellant "file a request to prepare a bill of exceptions in the office of the clerk of the District Court at the same time the notice of appeal is filed. At the same time, appellant shall deliver a copy of the request to the court reporter."

In any event, no bill of exceptions has been filed with this court concerning whatever evidentiary proceedings have been had on defendant's motion.

Defendant's assignments of error claim the trial court erred in refusing to suppress evidence which was allegedly illegally obtained, and erred in refusing to suppress both in- and out-of-court identification testimony. Even if we were to assume, but not decide, that such errors could not have been asserted in defendant's direct appeal (case No. 82-028, wherein said appeal was determined to be wholly frivolous and the judgment of the trial court af-

firmed), it is clear they cannot be reviewed in the absence of an evidentiary record.

It has long been the rule in this jurisdiction that any assignment of error which requires an examination of evidence cannot prevail on appeal in the absence of a bill of exceptions; the only question presented under such circumstances is the sufficiency of the pleadings to sustain the judgment of the trial court. *State v. Jacobsen*, 194 Neb. 105, 230 N.W.2d 219 (1975). See, also, *Snyder v. Nelson*, 213 Neb. 605, 331 N.W.2d 252 (1983); Neb. Ct. R. 5A(1) (Rev. 1982).

The trial court's ruling states only the following: "Motion of defendant for post conviction relief is denied. Mandate received from Supreme Court affirming conviction. Costs taxed to Douglas County."

If the trial court denied relief on the grounds the motion stated no facts upon which relief might be granted, it was correct.

If the court did in fact take evidence and conclude, as would be inherent in its ruling, that the evidence did not support defendant's conclusions, we are in no position to review the determination. In either event, the appeal must be dismissed.

APPEAL DISMISSED.

SHARON Y. COLSON, APPELLANT AND CROSS-APPELLEE, V. ROY H. COLSON, APPELLEE AND CROSS-APPELLANT.

339 N.W.2d 280

Filed October 21, 1983. No. 82-645.

1. **Divorce: Property Division: Fraud.** Where a party to a divorce action, represented by counsel, voluntarily executes a property settlement agreement which is approved by the court and incorporated into a divorce decree from which no appeal is taken, the decree will not thereafter be vacated or modified as to such property provisions. One of the exceptions to the rule, however, is that the decree may be vacated or modified where there is evidence of fraud.
2. **Property Division.** In every case involving the dissolution of a

marriage and the division of property, the trial court must examine how the property is being divided, even if by agreement of the parties; the court can only approve the agreement if the court finds the agreement is not unconscionable.

3. **Property Division: Fraud.** In reviewing a property settlement agreement entered into by the parties, the trial court is admonished not to regard the agreement lightly but, rather, is required to carefully scrutinize the agreement to be sure that neither party takes an unconscionable advantage over the other through fraud.
4. _____: _____. In order for the court to carry out its duty with regard to property settlement agreements, the parties must be honest and candid with the court so that the court may have all of the proper and necessary information before it in order to make its decision.
5. _____: _____. The fact that a decree is submitted and representations made to the court that the decree contains a description of matters previously disclosed to the court and agreed to by the parties, when, in fact, they were not, is not sufficient to overcome an objection of fraud.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Reversed and remanded with directions.

Betsy G. Berger, for appellant.

James L. Haszard of Zimmerman & Haszard, for appellee.

KRIVOSHA, C.J., WHITE, and HASTINGS, JJ., and BRODKEY, J., Retired, and MURPHY, JOHN, D.J.

KRIVOSHA, C.J.

The appellant, Sharon Y. Colson, appeals from a judgment entered by the District Court for Lancaster County, Nebraska, dismissing her petition seeking to modify and reform a decree of divorce previously entered by the District Court. The decree, entered by the court on January 4, 1980, approved an oral property settlement agreement between the parties. Mrs. Colson maintains as her basis for such relief the fact that Mr. Colson failed to fully and honestly disclose to the trial court the extent of his assets prior to the entry of the decree, i.e., while he represented to the court that the estate of the par-

ties was in the amount of approximately $216,000, in fact it was well in excess of $650,000. While the record in this case is anything but a model of clarity, one fact does stand out. Specifically, Mr. Colson knowingly withheld information about the value of his estate from the trial court prior to the time the court entered the decree.

Mr. Colson argues that the District Court has jurisdiction to modify a property settlement contained in the divorce decree only during the 6-month period after the decree has been entered by the court. It is true that we have held previously that where a party to a divorce action, represented by counsel, voluntarily executes a property settlement agreement which is approved by the court and incorporated into a divorce decree from which no appeal is taken, the decree will not thereafter be vacated or modified as to such property provisions. See *Klabunde v. Klabunde*, 194 Neb. 681, 234 N.W.2d 837 (1975). One of the exceptions to the rule, however, is that the decree may be vacated or modified where there is evidence of fraud. See *Shinn v. Shinn*, 148 Neb. 832, 29 N.W.2d 629 (1947).

In the instant case, the decree entered on January 4, 1980, recites that the parties have entered into an oral property settlement agreement, the terms of which were acknowledged in open court, and thereafter approved by the court as fair and equitable and not unconscionable. In every case involving the dissolution of a marriage and the division of property, the trial court must examine how the property is being divided, even if by agreement of the parties; the court can only approve the agreement if the court finds the agreement is not unconscionable. See Neb. Rev. Stat. § 42-366 (Reissue 1978). The trial court, in reviewing the property agreement, is admonished not to regard the agreement lightly but, rather, is required to carefully scrutinize the agreement in order to be sure that neither party takes an unconscionable advantage over the other through

fraud. See, *Clatterbaugh v. Clatterbaugh*, 182 Neb. 160, 153 N.W.2d 749 (1967); *Diers v. Diers*, 185 Neb. 552, 177 N.W.2d 503 (1970). Whether the agreement is unconscionable or not is not subject to mathematical certainty and must be determined by the facts in each case. See *Van Pelt v. Van Pelt*, 206 Neb. 350, 292 N.W.2d 917 (1980).

Although the manner by which the court reaches its conclusion may vary from case to case, one fact is unquestionably clear—unless the trial court has *all* of the honest facts, it cannot possibly carry out its duty to first examine the agreement and then approve or reject the agreement. In order for the court to carry out its duty with regard to property settlement agreements, it seems clear, beyond question, that the parties must be honest and candid with the court so that the court may have all of the proper and necessary information before it in order to make its decision.

The evidence is without dispute that perhaps there were as many as 11 pieces of real estate, the existence of which was withheld from the court's knowledge prior to the time the agreement was approved and the decree was signed. Examples of the omitted property include a residence located at 14200 Pioneers Boulevard. Mrs. Colson testified that this property was sold for around $60,000. Mr. Colson responds, in his brief, that there is no indication where this information was obtained; however, no objection was made when Mrs. Colson testified regarding the property or its value. Likewise, Mrs. Colson testified about property described as Lot 5, Block 5, Briarhurst, Lincoln, which she maintains was sold for $15,000 or $16,000. Again, Mr. Colson questions the source of Mrs. Colson's information, but he made no objection to her testimony at the time of trial. Mrs. Colson further testified that a residence at 5621 Tipperary Trail in Lincoln was sold for $70,000 and the sale was not reported to the court. Mr. Colson's answer regarding this omitted prop-

erty is that the payment check, exhibit 20, was issued jointly to him and Mrs. Colson and therefore she is somehow precluded from objecting to this omission. Finally, Mr. Colson admits that he omitted a house being built upon a parcel of ground described as Lot 13, Taylor Meadows, an addition to the City of Lincoln, Lancaster County, Nebraska. These are but a few examples of the 11 tracts not disclosed to the court prior to the entry of the decree.

Mr. Colson argues that while these lots were not described in answers to interrogatories or in an exhibit required to be prepared by court rule, they were attached to the decree when the decree was signed, thereby putting everyone on notice. The fact that a decree is submitted and representations made to the court that the decree contains a description of matters previously disclosed to the court and agreed to by the parties, when, in fact, they were not, is not sufficient to overcome an objection of fraud.

There are a number of bank accounts, some of which appear to be in Mr. Colson's name. He maintains that, while they are in his name, he has no control over them nor any rights to them. That may or may not be true. Clearly, the information was never conveyed to the court.

Here, we are not just concerned with the fact that Mr. Colson withheld information from Mrs. Colson; we are further concerned with the fact that Mr. Colson clearly withheld information from the court which the court needed in order to carry out its function of approving or disapproving the property settlement agreement. While we do not mean to imply that the omission of any item of property will justify setting aside a previously approved property settlement agreement, where, as here, the omissions are gross and significant so as to interfere with the court's duty to scrutinize the agreement, the agreement must be set aside. It is to prevent exactly

what appears to have transpired in the instant case that courts must determine that property settlement agreements are not unconscionable. There may be explanations for all of these matters. We are not at this time passing upon that fact. What we are passing upon is the fact that the trial court was not able to sort out the truth of the matter, and therefore not able to determine whether an equitable division was agreed to by the parties. The courts cannot tolerate persons intentionally withholding information required to be furnished to the court. Where one attempts to take advantage of the court in that fashion, one must suffer the consequences if caught. For these reasons we reverse the decision of the trial court and on remand order that a hearing be held as to all of the properties in which the parties appear to have had any interest at the time of the divorce, so that the court might make a fair and equitable division, taking into account any and all properties previously acquired by either party as separate property. In so doing we do not in any manner modify or affect that portion of the decree entered on January 4, 1980, which dissolved the marriage of the parties, but only that portion which approved the property settlement agreement of the parties.

One other matter requires our attention. Mr. Colson has cross-appealed from that portion of the District Court's order which required Mr. Colson to pay Mrs. Colson $1,000 to apply toward her attorney fees on appeal. We need not consider that assignment, however, because we specifically award an attorney fee to Mrs. Colson in the amount of $1,500 to apply toward her attorney fees in this court. The sum is assessed as costs against Mr. Colson. This fee is to be in lieu of any fee awarded by the trial court on appeal, and to the extent Mr. Colson has paid any portion of the $1,000 previously ordered by the trial court, he is to receive credit against the $1,500 ordered paid herein.

The judgment is reversed and the cause remanded with directions.

REVERSED AND REMANDED WITH DIRECTIONS.

RYDER TRUCK RENTAL, INC., A CORPORATION, APPELLEE, V. TRANSPORTATION EQUIPMENT CO., INC., A NEBRASKA CORPORATION, DEFENDANT AND THIRD-PARTY PLAINTIFF, APPELLANT,
PAUL A. HEIFNER, THIRD-PARTY DEFENDANT AND APPELLEE.

339 N.W.2d 283

Filed October 21, 1983. No. 82-652.

1. **Assignments.** Generally, an assignor retains only those rights which have not passed to the assignee by the assignment, and the assignor loses all right to control or enforce an assigned right against the obligor.
2. **Pleadings.** An allegation in a pleading upon which an action is tried is a judicial admission and a limitation of the issues which is binding upon the party making the allegation.
3. **Agency.** A party who has knowingly permitted others to treat one as his agent is estopped to deny the agency.

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

John R. Hall of Anderson, Vipperman, Hinman, Hall & Kovanda, for appellant.

Stephen A. Scherr of Whelan, Foote & Scherr, P.C., for appellee Ryder Truck.

BOSLAUGH, WHITE, and SHANAHAN, JJ., and NORTON, D.J., and COLWELL, D.J., Retired.

BOSLAUGH, J.

Ryder Truck Rental, Inc., commenced this action to recover the balance due it on a truck rental agreement entered into with the defendant Transportation Equipment Co., Inc., on October 10, 1977.

The agreement was for the lease of a tractor unit,

No. 66058K, to the defendant in accordance with the terms of the written agreement and attached schedules. On May 22, 1978, with the approval of Ryder, the defendant assigned the agreement to Williams Transfer, Inc. The assignment provided that the defendant was not released from its obligations and liabilities under the lease.

Williams Transfer was not a party to the action, and the record is not clear as to whether further assignments were made by Williams. The record does show that Ryder understood that Transportation Equipment Co. and Williams Transfer were under the same management. The president of Transportation Equipment Co., Robert Gartner, testified that both entities operated to an extent out of the same building and that he served "in an advisory capacity" at Williams Transfer.

Trip records maintained by Ryder show that Williams Transfer was listed as "lessee" beginning in January 1978. "Paul A. Heifner, dba H & K Trucking Co. (and Transportation Equip. Co.)" are listed as "lessee" beginning in April 1978. These records indicate that a number of drivers operated the vehicle, including one named "Svoboda."

Gartner testified he was aware that Heifner was operating the vehicle during this time. However, he testified that Transportation Equipment Co. did not have a written agreement with Heifner for use of the vehicle. The district manager for Ryder testified he was under the impression that an agreement existed whereby Transportation Equipment Co. allowed Heifner use of the vehicle and whereby Heifner did remit payments to Ryder.

On November 15, 1978, vehicle No. 66058K was taken out of service due to an accident. On that trip Svoboda was the driver and "Paul A. Heifner, dba H & K Trucking Co. (and Transportation Equipment Co.)" were listed as the "lessee." The record shows that a substitute vehicle was requested by Heifner.

Ryder then provided vehicle No. 23528, which was signed for by Svoboda.

Transportation Equipment Co. refused to pay the charges against the substituted vehicle in the amount of $7,901.17. Ryder then brought this suit against Transportation Equipment Co. for the balance due.

The transcript does not contain an answer filed by the defendant Transportation Equipment Co. The defendant filed a third-party petition against Heifner in which it alleged that it had assigned the rental agreement for the substituted vehicle to Heifner and that he was liable to the defendant for any judgment against the defendant for payments due under the agreements.

The trial court found generally for the plaintiff and awarded judgment in the amount of $7,901.17. The third-party petition was dismissed. The defendant has appealed and has assigned as error the finding that the defendant was liable for rental charges for the substituted vehicle, No. 23528.

The agreement contained the following provision: "Ryder will, at the request of Customer, rent Customer a replacement vehicle, if available from Ryder's rental fleet, at a rental rate equal to the charges applicable to the inoperable Vehicle."

The defendant contends that it is not liable because it did not request the substitute vehicle, was not notified that a substitute vehicle had been requested by Heifner, and Heifner was not empowered to request a substitute. None of these arguments has merit.

The assignment of the agreement to Williams Transfer provided: "Assignor does hereby assign to Assignee all of its right, title and interest in and to the above described Lease Agreement and the use of the vehicles covered thereby."

By this assignment, the assignee Williams acquired all of the rights and interests of the assignor, Transportation Equipment Co. *State Securities Co.*

v. Daringer, 206 Neb. 427, 293 N.W.2d 102 (1980); *United States Nat. Bank v. Alexander*, 140 Neb. 784, 1 N.W.2d 920 (1942). Generally, an assignor retains only those rights which have not passed to the assignee by the assignment. The assignor loses all right to control or enforce an assigned right against the obligor. 6A C.J.S. *Assignments* § 96 (1975). In this case the defendant transferred its right to request a substitute vehicle to Williams Transfer, and it cannot now claim that its failure to request a substitute vehicle or Ryder's failure to notify it of Heifner's request precludes its liability.

In its third-party petition the defendant alleged that it had entered into a lease agreement with Heifner for the use of the substituted vehicle. This allegation was a judicial admission and a limitation of the issues, which was binding upon it. *City of Omaha v. Rubin*, 177 Neb. 314, 128 N.W.2d 814 (1964).

At the trial the defendant attempted to prove that it had no agreement with Heifner and that he was, in essence, a stranger to the transaction. A party may not subsequently take a position contradictory of, or inconsistent with, his pleadings. 71 C.J.S. *Pleading* § 59 (1951); *Kuhlman v. Farmers Union Co-Operative Assn.*, 152 Neb. 597, 42 N.W.2d 182 (1950). The defendant is deemed to have admitted that Heifner acted pursuant to a lease agreement with it, and thus had authority to request a substitute.

There are other grounds upon which a judgment for the plaintiff may be supported. There is sufficient evidence to support a finding that Heifner had apparent authority to request a substitute vehicle. Apparent authority is the power which enables a person to affect the legal relations of another with third persons, professedly as agent for the other, from and in accordance with the other's manifestation to such third persons. A party who has knowingly permitted others to treat one as his agent is estopped to deny the agency. *Abel Constr. Co. v. School Dist. of Seward*, 188 Neb. 166, 195 N.W.2d 744 (1972).

The record shows that it was Ryder's understanding that Heifner had authority to control and possess the vehicles leased; that Heifner made remittances directly to Ryder; and that Transportation Equipment Co. was aware that Heifner had been using the vehicle even before it assigned the lease. Thus, it may be inferred that Heifner had authority to request a substitute vehicle, and the defendant is estopped from denying this authority.

The record supports the judgment for the plaintiff and the judgment is affirmed.

AFFIRMED.

NEBRASKA PUBLIC POWER DISTRICT, A PUBLIC CORPORATION AND POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLANT, V. KATHIE LACY, APPELLEE.

339 N.W.2d 286

Filed October 21, 1983. No. 82-709.

Equal Opportunity Commission: Civil Rights: Discrimination. In order to sustain a charge of discrimination where there is no charge of a universal discriminatory practice or system, the complainant must establish that the employer intentionally engaged in acts that discriminated against the complainant in violation of the statutory prohibition.

Appeal from the District Court for Platte County: JOHN C. WHITEHEAD, Judge. Reversed and dismissed.

John R. McPhail, and Barlow, Johnson, DeMars & Flodman, for appellant.

Paul E. Hofmeister of Van Steenberg, Brower, Chaloupka, Mullin & Holyoke, for appellee.

KRIVOSHA, C.J., HASTINGS, CAPORALE, and GRANT, JJ., and BRODKEY, J., Retired.

KRIVOSHA, C.J.

The appellant, Nebraska Public Power District

(NPPD), appeals from a judgment entered by the District Court for Platte County, Nebraska, affirming an order earlier entered by the Nebraska Equal Opportunity Commission. The commission had found that NPPD had violated § 48-1104(1) and (2) of the Nebraska Fair Employment Practice Act, Neb. Rev. Stat. §§ 48-1101 to 48-1125 (Reissue 1978), when it failed to hire the appellee, Kathie Lacy. We believe that the District Court was in error, and we therefore reverse and dismiss the complaint.

Before turning to the facts of the case, we believe it helpful to consider the standard of review to be applied by both the District Court and this court. Under the provisions of § 48-1120 an appeal may be taken from an order entered by the Equal Opportunity Commission to the appropriate District Court. The District Court, after considering the evidence presented before the commission, is to affirm the action of the commission unless "[t]he findings of the commission in support of such order are unreasonable or arbitrary or are not supported by a preponderance of the evidence." § 48-1120(3)(b). See, also, *Snygg v. City of Scottsbluff Police Dept.*, 201 Neb. 16, 266 N.W.2d 76 (1978). On appeal to the Supreme Court the judgment of the District Court is to be affirmed if it is supported by substantial evidence. See *Snygg v. City of Scottsbluff Police Dept.*, *supra*.

Lacy initiated this action by filing a complaint with the Equal Opportunity Commission, alleging that NPPD had violated § 48-1104(1) and (2) of the Nebraska Fair Employment Practice Act by refusing to hire her because of her sex. Section 48-1104 makes it unlawful for an employer "(1) To fail or refuse to hire . . . any individual . . . because of such individual's . . . sex . . . ." Therefore, in order for Lacy to recover in this action, based upon the claim as she presented it, she must prove by a preponderance of the evidence that NPPD refused to hire her because of her sex. Moreover, we have

held previously that in order to sustain a charge of discrimination where there is no charge of a universal discriminatory practice or system, the complainant must establish that the employer intentionally engaged in acts that discriminated against the complainant in violation of the statutory prohibition. See, *American Stores v. Jordan*, 213 Neb. 213, 328 N.W.2d 756 (1982); *Duffy v. Physicians Mut. Ins. Co.*, 191 Neb. 233, 214 N.W.2d 471 (1974).

The facts in this case disclose that on June 18, 1979, Lacy filed an employment application with NPPD at its Scottsbluff plant in connection with Lacy's desire to obtain employment with NPPD as a "utility maintenance man." NPPD maintains that at the time the application was filed there was then in effect a hiring freeze which was shortly thereafter lifted. The record further discloses that NPPD did not interview Lacy but, instead, transferred an existing NPPD employee into the job. Lacy was interviewed subsequently for a second opening as utility maintenance person but, again, was not hired for that position.

The commission limited its findings with respect to the first job opening and specifically disregarded Lacy's complaint with regard to the second opening. Lacy did not appeal from that decision, and the parties at oral argument conceded that the matter was not relevant to the review either by the District Court, in the first instance, or by this court on appeal in this case. Our review of the evidence is limited to those matters relating to the first job opening for which Lacy was not hired, which she claims constituted a violation of § 48-1104(1) and (2).

The only evidence in the record is that Lacy was not interviewed for a job for which she had applied and which was instead given to an individual already employed by NPPD. Lacy argues that this shows an intent to discriminate. Otherwise, she claims, she would have been interviewed. We know of no rule of law, nor has any been cited to us, which

provides that an employer must interview all persons who file applications with the employer. Furthermore, there is no evidence in the record that, prior to transferring an existing employee of NPPD to the position, Lacy's application was not in fact reviewed. Lacy claims it was not, but NPPD denies it.

In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), the U.S. Supreme Court, in reviewing the federal act which is similar to the Nebraska act involved in this appeal, held that a complainant had the initial burden of proof in showing a prima facie case of employment discrimination before the employer was required to go forward with its proof. There is simply insufficient evidence in this record from which one may conclude that Lacy has sustained her burden by a preponderance of the evidence. All that she has established is that she was not hired for the job she sought. No one argues that the employee transferred was less qualified for the job or otherwise improperly selected.

While the purpose of the act, as stated in § 48-1101, is to establish a policy by the state to foster the employment of all employable persons, regardless of race, color, religion, sex, disability, or national origin, a purpose which is laudable, the act further provides in § 48-1101: "The policy of this state does not require any person to employ an applicant for employment because of his race, color, religion, sex, disability, or national origin; and the policy of this state does not require any employer, employment agency, labor organization, or joint labor-management committee to grant preferential treatment to any individual or to any group because of race, color, religion, sex, disability, or national origin." The most that can be said from the record in this case is that Lacy was not employed for the job she sought and that she is a woman. This is not sufficient to establish by a preponderance of the evi-

dence a violation of the Nebraska Fair Employment Practice Act as set forth in § 48-1104, and certainly does not establish by a preponderance of the evidence an intentional act on the part of NPPD to discriminate. For this reason the court is required to reverse the action of the District Court affirming the commission's order, and to dismiss the complaint.

REVERSED AND DISMISSED.

STATE OF NEBRASKA, APPELLEE, V. LARRY D. GILREATH, APPELLANT.

339 N.W.2d 288

Filed October 21, 1983. No. 82-721.

1. **Search Warrants: Affidavits.** A "totality of the circumstances" test is to be used to determine the sufficiency of an affidavit used to obtain a search warrant.
2. _____: _____. If the circumstances set forth in the affidavit, including the veracity and basis of knowledge of persons supplying hearsay information, indicate that there is a fair probability that evidence of a crime may be found at the place described, the affidavit is sufficient.
3. _____: _____. An issuing magistrate is required only to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.
4. **Search Warrants: Probable Cause: Appeal and Error.** The duty of the reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed.
5. **Search Warrants: Probable Cause.** The report of a citizen eyewitness supplies its own indicia of reliability and may be self-corroborating.
6. _____: _____. Doubtful or marginal cases should be determined largely by the preference to be accorded to warrants.
7. **Criminal Law: Judgments: Appeal and Error.** A judgment will not be reversed for error in admitting evidence which is cumulative in nature if evidence which was properly admitted clearly established the guilt of the defendant beyond a reasonable doubt.

Appeal from the District Court for Douglas County: PAUL J. HICKMAN, Judge. Affirmed.

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

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

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

The defendant was convicted of theft by deception of property having a value in excess of $1,000 and of being an habitual criminal. He was sentenced to imprisonment for 12 to 20 years. He has appealed and assigned as error the admission into evidence of items seized pursuant to a search warrant allegedly issued without probable cause.

The offense consisted of passing a certified check that had been "raised" from $85 to $85,000.

The defendant had organized a corporation known as Gilreath Food Services Management. In January 1982 the corporation entered into a contract to purchase a building near 60th and Ames in Omaha, Nebraska, for $89,000. One thousand dollars was paid at the time the contract was signed, and an additional $4,000 was paid on February 12.

On March 1, 1982, a corporation check in the amount of $85 was presented to the First National Bank of Omaha for certification. This check was signed by the defendant as president of the corporation and by M. Denise Conley, an administrative assistant for the corporation. After the check had been certified it was returned to Conley. Conley delivered the check, which was still in the amount of $85, to the defendant's wife. On March 4, 1982, the defendant delivered the check which was now in the amount of $85,000 to the real estate broker in payment for the property. The check was deposited in another bank and was paid by the First National Bank before the bank discovered that the check had

been "raised" from $85 to $85,000. The loss to the bank on the check was $84,915.

On March 24, 1982, an affidavit and application for a search warrant was filed in the Omaha Muncipal Court. The affidavit was made by an officer of the Omaha Police Department assigned to the criminal investigation bureau. The application requested that a warrant be issued authorizing a search of the defendant's home, where the office of the corporation was maintained, and his automobile. The affidavit alleged the facts concerning the certified check and the purchase of the property, and was based in part upon information obtained from M. Denise Conley.

Among the items seized pursuant to the warrant and received in evidence were checks drawn by the defendant on an Amarillo, Texas, bank and a letter from the Small Business Administration, dated February 24, 1982, refusing a loan in the amount of $100,000. The defendant argues that this evidence was highly prejudicial because the checks were part of a "kiting" scheme which the defendant had used to obtain credit at the Omaha bank and the letter tended to show the motive for raising the certified check.

The defendant contends that the affidavit was defective in that it did not indicate sufficient underlying circumstances or the source of the information on which the affiant's belief was based. The State contends that the affidavit was based on information the officer had obtained through his investigation of the offense and did not constitute hearsay which would require a detailed statement of underlying circumstances to establish the reliability of the information.

The rules relating to affidavits used to obtain search warrants have been relaxed somewhat by recent decisions of the U.S. Supreme Court and this court.

In *Illinois v. Gates*, ____ U.S. ____, 103 S. Ct. 2317,

76 L. Ed. 2d 527 (1983), the Supreme Court of the United States held that the "two-pronged" test established in *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964), and *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969), should be abandoned and a "totality of the circumstances" test used to determine the sufficiency of an affidavit used to obtain a search warrant. The Court stated that if the circumstances set forth in the affidavit, including the veracity and basis of knowledge of persons supplying hearsay information, indicate that there is a fair probability that evidence of a crime may be found at the place described, the affidavit is sufficient.

In *State v. Arnold*, 214 Neb. 769, 336 N.W.2d 97 (1983), after citing *Illinois v. Gates*, we noted that an issuing magistrate is required only to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. The duty of the reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed.

The information upon which the affidavit filed in this case was based was not "hearsay" obtained from tipsters or unknown informants. The police had been investigating the offense by interviewing persons who had been involved in the transaction. M. Denise Conley, referred to in the affidavit, had signed the check, obtained its certification when it was in the amount of $85, and then delivered it to the defendant's wife. The report of a citizen eyewitness supplies its own indicia of reliability and may be self-corroborating. *State v. Payne*, 201 Neb. 665, 271 N.W.2d 350 (1978).

While the affidavit used in this case is subject to criticism for failure to disclose in detail the source

of the information upon which the officer relied, it is aided somewhat by the constitutional policy that doubtful or marginal cases should be determined largely by the preference to be accorded to warrants. *State v. Payne*, *supra*.

The State points out that the facts relative to the "kiting" scheme and the refusal of the SBA loan were established through the testimony of witnesses called by the State and that the evidence seized pursuant to the warrant was cumulative. Thus, any error in receiving the exhibits seized pursuant to the warrant was harmless beyond a reasonable doubt. A judgment will not be reversed for error in admitting evidence which is cumulative in nature if evidence which was properly admitted clearly established the guilt of the defendant beyond a reasonable doubt. See, *Ricehill v. Brewer*, 459 F.2d 537 (8th Cir. 1972); *State v. Weible*, 211 Neb. 174, 317 N.W.2d 920 (1982).

From our review of the record we are satisfied that the defendant received a fair trial and there was no substantial prejudice to any of his rights as a result of the exhibits in question being received in evidence.

The judgment of the District Court is affirmed.

AFFIRMED.

WHITE, J., concurs in the result.

LARRY J. KOKES, APPELLANT, V. LUDY SHAFER, DOING BUSINESS AS LINCOLN MAYTAG HOME APPLIANCE CENTER, APPELLEE.

339 N.W.2d 292

Filed October 21, 1983. No. 82-811.

1. **Workmen's Compensation: Witnesses.** Generally, the matter of a claimant's credibility is for the trier of fact to determine.
2. **Witnesses: Evidence.** A litigant may not recite upon oath one statement of fact in one judicial proceeding and thereafter, to meet

the exigencies of the case in trial of a different cause, recite an entirely different and inconsistent set of facts. In such a situation the evidence is discredited as a matter of law and will be disregarded.

3. **Workmen's Compensation: Evidence.** Issues of causation are ones of fact to be determined by the fact finder.
4. **Workmen's Compensation: Appeal and Error.** Findings of the Workmen's Compensation Court on rehearing have the same force and effect as a jury verdict and, if supported by sufficient evidence, will not be disturbed on appeal unless clearly wrong.

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

Herbert J. Friedman of Friedman Law Offices, for appellant.

Barlow, Johnson, DeMars & Flodman, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

CAPORALE, J.

In this frivolous workmen's compensation appeal the employee, Larry J. Kokes, challenges the Nebraska Workmen's Compensation Court's dismissal of his petition for benefits from his employer, Ludy Shafer, doing business as Lincoln Maytag Home Appliance Center. For the reasons discussed hereinafter, we affirm.

On March 4, 1980, Kokes was injured when he was involved in a nonwork-related automobile accident. After a period of convalescence he returned to his employment. On that very day, April 2, 1980, he was involved in an accident arising out of and in the course of his employment when he fell while delivering an appliance to one of his employer's customers.. He has not worked since the April occurrence.

Kokes filed suit on March 13, 1981, to recover damages resulting from the automobile accident. In the petition he alleged that as a result of that accident

he received permanent injuries to his neck and lower back. That suit was eventually settled.

Thereafter, on January 13, 1982, Kokes filed a claim against his employer, seeking benefits under the Workmen's Compensation Act. At the rehearing before a three-judge panel of the compensation court, Kokes claimed that the only injuries he received in the automobile accident were to his neck and shoulders and that the first time he experienced low back pain was after the fall at work, during which he struck his back on some steps.

On cross-examination Kokes acknowledged that in his automobile accident petition he claimed low back pain as a result of that accident. In his deposition taken in connection with the automobile accident, he characterized the work incident as one in which his legs collapsed or his back went out, rather than his description to the compensation court that the fall was caused when his helper unexpectedly pulled on the appliance while the two of them were maneuvering down a flight of steps. Kokes also stated in that deposition that he had felt the same pain prior to the work accident as he did afterwards.

Furthermore, the billing statements for medical expenses claimed in connection with the automobile accident were in almost all instances the identical ones entered into evidence in the workmen's compensation case.

Dr. Styner, an orthopedic surgeon, testified by deposition it was his understanding that Kokes had experienced low back pain prior to the fall at work and that the pain was created by the automobile collision, but he also allowed that the fall at work had some contributory influence on Kokes' present back problems. He was unable to state the extent of that influence. Dr. Styner also acknowledged that, in a deposition taken in connection with the automobile collision, he stated that Kokes' back pain was caused by the automobile accident and not the lifting incident. Dr. Spencer, a chiropractor, stated it was

his opinion that the low back pain is caused in equal degree by both occurrences.

Kokes states his assignment of error as follows: "The court erred in finding that plaintiff-appellant suffered no compensable injury from the accident he sustained arising out of and in the course of his employment on April 2, 1982 [sic]." The actual language of the compensation court's operative finding is: "Having considered all the evidence, the court finds that the plaintiff has failed to sustain his burden of proving by a preponderance of the evidence that said disability is due to or was aggravated by his alleged accident of April 2, 1980."

Generally, the matter of a claimant's credibility is for the trier of fact to determine. *Chism v. Convair Mobile Homes, Inc.*, 173 Neb. 86, 112 N.W.2d 393 (1961). However, a litigant may not recite upon oath one statement of fact in one judicial proceeding and thereafter, to meet the exigencies of the case in trial of a different cause, recite an entirely different and inconsistent set of facts. In such a situation the evidence is discredited as a matter of law and will be disregarded. *Momsen v. Nebraska Methodist Hospital*, 210 Neb. 45, 313 N.W.2d 208 (1981); *Nichols v. McArdle*, 170 Neb. 382, 102 N.W.2d 848 (1960).

The shifts in Kokes' positions and statements to meet the exigencies of the matter then at issue discredit him as a matter of law and require that his testimony be disregarded. Stated more directly, Kokes is simply not to be believed.

The question of what caused Kokes' present alleged disability must therefore be resolved solely on the basis of the expert medical evidence.

We have recently reiterated the rule that issues of causation are ones of fact to be determined by the fact finder. *Heironymus v. Jacobsen Transfer, ante* p. 209, 337 N.W.2d 769 (1983). In the opinion of a chiropractor the low back pain is caused in equal degree by both the automobile and work-related accidents. In the ambivalent opinion of the orthopedic

surgeon, the pain was created by the automobile accident but the work incident had some unknown influence on it. In view of the status of the medical evidence on the issue of causation and the incredibility of Kokes' testimony, the oft-stated rule which controls this case is that the findings of the Workmen's Compensation Court on rehearing have the same force and effect as a jury verdict and, if supported by sufficient evidence, will not be disturbed on appeal unless clearly wrong. *Friedeman v. State*, *ante* p. 413, 339 N.W.2d 67 (1983).

The findings of the compensation court are not clearly wrong.

AFFIRMED.

H. RICHARD MCCORISON, APPELLANT, V. CITY OF LINCOLN, NEBRASKA, AND STATE OF NEBRASKA, COMMISSIONER OF LABOR, APPELLEES.

339 N.W.2d 294

Filed October 21, 1983. No. 82-819.

1. **Employment Security Law: Words and Phrases.** While the term "misconduct" is not specifically defined in Neb. Rev. Stat. § 48-628(b) (Reissue 1978), it has generally been defined to include behavior which evidences (1) wanton and willful disregard of the employer's interests, (2) deliberate violation of rules, (3) disregard of standards of behavior which the employer can rightfully expect from the employee, or (4) negligence which manifests culpability, wrongful intent, evil design, or intentional and substantial disregard of the employer's interests or of the employee's duties and obligations.
2. **Employment Contracts.** No aspect of a contract of employment is more basic than the right of the employer to expect employees will appear for work on the day and at the hour agreed upon. Persistent failure to honor that obligation evinces a substantial disregard for the employer's interest, and may justify a finding of misconduct connected with the employment.

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

H. Richard McCorison, pro se.

Paul D. Kratz, for appellee Commissioner of Labor.

William F. Austin, City Attorney, and James D. Faimon, for appellee City of Lincoln.

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

KRIVOSHA, C.J.

This case involves the right of a former employee to receive full unemployment compensation benefits pursuant to the Nebraska Employment Security Law, Neb. Rev. Stat. §§ 48-601 to 48-671 (Reissue 1978). The appellant, H. Richard McCorison, a former employee of the City of Lincoln, Nebraska (City), has appealed from a judgment entered by the District Court for Lancaster County, Nebraska, which affirmed findings made by the Nebraska Appeal Tribunal. The tribunal found that McCorison had been discharged for misconduct connected with his work, as provided for by § 48-628(b), and, accordingly, was not entitled to receive benefits for the week in which he was discharged and for an additional 9 weeks.

The record discloses that on March 19, 1981, the City sent McCorison a letter in which the City terminated his employment, and gave as the reasons for the termination deficiencies in 10 areas. We have carefully examined the record. While we find that most of the claims made by the City upon which the discharge was based are unsupported in the record by sufficient evidence, though they may be true, we do believe that one of the charges is fully supported by the record, and for that reason the judgment of the District Court must be affirmed.

We have previously defined misconduct as referred to in § 48-628(b). Specifically, in *Stuart v. Omaha Porkers*, 213 Neb. 838, 840, 331 N.W.2d 544, 546 (1983), we recently said: "While the term 'misconduct' is not specifically defined in the statute, it

has generally been defined to include behavior which evidences (1) wanton and willful disregard of the employer's interests, (2) deliberate violation of rules, (3) disregard of standards of behavior which the employer can rightfully expect from the employee, or (4) negligence which manifests culpability, wrongful intent, evil design, or intentional and substantial disregard of the employer's interests or of the employee's duties and obligations." See, also, *Snyder Industries, Inc. v. Otto*, 212 Neb. 40, 321 N.W.2d 77 (1982); *Bristol v. Hanlon*, 210 Neb. 37, 312 N.W.2d 694 (1981).

The first deficiency constituting misconduct set out in the City's letter of March 19, 1981, is, "cannot be depended upon to report to work on a regular basis." The City introduced evidence which established that McCorison was absent 531.5 hours from October 27, 1978, to September 18, 1980. On the basis of a normal 40-hour week, this amounts to more than 13 weeks of absences, or nearly 12 percent of the time of his employment. McCorison knew that his frequent and unexcused absences from work were a serious problem. His periodic employee service ratings prepared on April 17, 1979, and May 19 and October 10, 1980, all recite that McCorison's immediate supervisor was recommending that he not be given a merit increase because of his questionable use of sick leave. McCorison acknowledged that he had read each of these documents and affixed his signature to them.

McCorison argues that the leaves were occasioned principally by illness caused by his work. However, the record does not support such a finding; we have only McCorison's unsubstantiated statements to that effect.

An employer has a right to expect an employee to be on the job except when otherwise excused and as authorized by the employment rules. The City, through its personnel code, provided for certain authorized times to be absent from work, including

sick leave with pay, funeral leave with pay, and injury leave with pay. However, the absences, as reflected by the record, were neither explained nor justified by McCorison.

In an extensive annotation found at 41 A.L.R.2d 1158, 1160 (1955), the author notes: "Under statutes providing that unemployment benefits are to be denied or delayed to one whose unemployment results from discharge for wilful misconduct, it has been held or recognized that persistent or chronic absenteeism, at least where the absences are without notice or excuse, and are continued in the face of warnings by the employer, constitutes wilful misconduct within the statute." In *Keefer v. Com., Unemployment Comp. Bd. of Rev.*, 47 Pa. Commw. 281, 407 A.2d 934, 935 (1979), the Pennsylvania Commonwealth Court said: "However, excessive unjustified absenteeism can constitute willful misconduct because it may evidence a wanton and willful disregard of the employer's interest or a disregard of the standards of behavior which an employer can rightfully expect from his employee."

And in *Wallace v. Stewart*, 559 S.W.2d 647, 648 (Tenn. 1977), the Tennessee Supreme Court said: "In our opinion, excessive absenteeism may be the basis of a finding of misconduct by the commissioner. What constitutes absenteeism must be left to be determined case by case, at least until the Legislative [sic] provides a definition of misconduct.

"No aspect of contract of employment is more basic than the right of the employer to expect employees will appear for work on the day and at the hour agreed upon. Persistent failure to honor that obligation evinces a substantial disregard for the employer's interest and may justify a finding of misconduct connected with the employment.

"Ample authority may be found in other jurisdictions to the effect that persistent or chronic absenteeism without notice or excuse in the face of warnings from the employer constitutes such mis-

conduct as requires a denial of unemployment compensation. See *Broadway & Fourth Ave. Realty Co. v. Crabtree*, 365 S.W.2d 313 (Ky.196[2]); *Krawczyk v. Unemployment Compensation Board of Review*, 175 Pa.Super. 361, 104 A.2d 338 (1963); *Chapman v. Division of Unemployment Security*, 104 So.2d 201 (La.App.1958)."

Applying our definition of misconduct as most recently set out in *Stuart v. Omaha Porkers*, 213 Neb. 838, 331 N.W.2d 544 (1983), and the decisions regarding unjustified absenteeism to the facts in the present case, it is clear that McCorison's absence from work without explanation evidenced wanton and willful disregard of the employer's interests, and appears to have been in clear, deliberate violation of the City's personnel rules regarding absences. An employer has a right to expect an employee to be present and at work. By absenting himself from work for a total of some 13 weeks, McCorison clearly disregarded standards of behavior which the City could rightfully expect from him. The Nebraska Appeal Tribunal was correct in concluding that his absence from work constituted misconduct. For these reasons, therefore, the judgment of the District Court must be affirmed.

AFFIRMED.

McCOWN, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. DEARLE ALEXANDER, JR., APPELLANT.

339 N.W.2d 297

Filed October 21, 1983. No. 82-826.

1. **Criminal Law: Minors.** Neb. Rev. Stat. § 43-202.01 (Reissue 1978) and Neb. Rev. Stat. § 29-1816 (Reissue 1979) involve a balancing test, namely, public protection and societal security weighed against practical and not problematical rehabilitation, in determining whether there should be a waiver of jurisdiction in criminal proceedings with a transfer to the juvenile court.

2. _____: _____. The probability of success and the duration of rehabilitative treatment must be considered in determining the manner and location of detention.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Scott P. Helvie, for appellant.

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

KRIVOSHA, C.J., BOSLAUGH, WHITE, CAPORALE, and SHANAHAN, JJ., and GRANT, D.J.

SHANAHAN, J.

Dearle Alexander, Jr., was charged with three felonies—first degree murder, robbery by violence, and terroristic threats. Alexander's motion that the District Court waive jurisdiction of the criminal proceedings and transfer the case to the juvenile court was denied. Pursuant to a plea bargain, Alexander entered a plea of guilty to an amended information charging Alexander with manslaughter and robbery by violence. Alexander appeals from the District Court's retention of the proceedings as a criminal case and from the sentences imposed. We affirm.

Born on November 8, 1966, Dearle Alexander, Jr., had his first contact with a court in May 1980 when a petition was filed in the county court of Richardson County, Nebraska, as a juvenile court, concerning Alexander's shoplifting. After an adjudication involving that offense, the court placed Alexander on 6 months' probation.

Alexander's family later moved from Falls City, Nebraska (Richardson County), to Lincoln, Nebraska. A petition was filed in the juvenile court of Lancaster County in August 1980 due to Alexander's unauthorized absences from his parents' home. Alexander was placed on probation. In September 1980 Alexander was again placed on probation by the juvenile court and ordered to seek psychological

evaluation and counseling, after Alexander had assaulted his mother. Alexander was examined and evaluated by Dr. Burton Zung at the Lancaster County Child Guidance Center in September 1980. Dr. Zung's evaluation concluded that Alexander "presents no immediate danger to himself or to other persons."

As a result of Alexander's stealing property from a woman's apartment in November 1980, the juvenile court adjudicated Alexander to be a juvenile who had violated state law, and again placed Alexander on probation—this time in January 1981.

In March 1981 Alexander, a seventh grader, was expelled from junior high school because he was truant and had intimidated or harassed his fellow students.

On or about March 1, 1981, Alexander accosted a 9-year-old girl in a Lincoln public park. Alexander's brother had been defacing property in the park, and the girl objected to such conduct. At this encounter Alexander produced a switchblade knife and pressed the blade against the girl's chest, while saying, "I'm going to kill you." The girl, frightened but uninjured, escaped to her grandfather's house. This incident was later reported to the Lincoln police.

At 9:25 a.m. on March 3, 1981, Dorothy Blessing, age 65, was walking to work at the Lancaster Child Care Center. As the lady walked along a public street, Alexander approached from behind and struck Mrs. Blessing with a club 3 feet long and 2 inches in diameter. Mrs. Blessing fell unconscious on the sidewalk, and upon regaining her senses Mrs. Blessing found her purse missing. She was taken to Lincoln General Hospital and treated for lacerations.

On March 12, 1981, at approximately 9:30 p.m., Eugene Warren, age 80, was walking on a public sidewalk in Lincoln. Alexander, riding a bicycle, nearly collided with Warren. An altercation occurred, and after an exchange of words Alexander

left the scene, located a pile of junk in a nearby yard, and picked up a metal pipe approximately 2 feet long, 3 inches around, and weighing 10 pounds. Ten minutes later Alexander found Warren still walking on the sidewalk. Approaching Warren from behind, Alexander struck Warren in the head with the pipe. The first blow dazed Warren, and approximately 30 seconds later Alexander, gripping the pipe with both hands, struck Warren again. After Warren had collapsed on the sidewalk, Alexander "just turned around and walked off."

Warren was discovered lying on the roadway and taken for emergency care at Lincoln General Hospital around 10 p.m. Extensive efforts to revive Warren failed, and he died at 4:45 a.m. on March 13, 1981. The cause of death was "extensive skull fracture . . . shock and hemorrhage resulting from the cerebral contusion and laceration . . . multiple fractures . . . severe head trauma including a depressed skull fracture." The pathologist concluded that there were at least four blows to Warren's head.

Alexander was apprehended and placed in the Jennie B. Harrel Attention Center for Youth, pending proceedings. While in such confinement, Alexander suggested to two other inmates that they carry out a violent plan for escape from detention.

The county attorney of Lancaster County, Nebraska, filed an information charging Alexander with first degree murder regarding the death of Warren, robbery by violence regarding Blessing, and terroristic threats concerning the girl. At his arraignment, and pursuant to Neb. Rev. Stat. § 29-1816 (Reissue 1979), Alexander requested the District Court to waive jurisdiction over the matter as a criminal case and to transfer proceedings to the juvenile court.

At an evidentiary hearing on Alexander's motion for waiver and transfer to the juvenile court, William Janike, chief juvenile probation officer for Lancaster County, Nebraska, and Jeff Clausen, parole

officer of the Juvenile Parole Administration of the Department of Corrections of the State of Nebraska, described Alexander's possible confinement in the Youth Development Center in Kearney, Nebraska. At Kearney the average duration of confinement is 8 months, and there are no guards to "watch over" those confined. (Neb. Rev. Stat. § 83-472 (Reissue 1981) provides that anyone committed to the Youth Development Center-Kearney shall remain until 19 years of age unless sooner paroled or legally discharged, and further provides: "The assistant director of the Division of Juvenile Services shall adopt bylaws for the promotion, paroling and final discharge of inmates such as shall be considered mutually beneficial for the institution and the inmates. The discharge of any boy pursuant to the bylaws, or upon his arrival at the age of nineteen, shall be a complete release from all penalties incurred by conviction of the offense for which he was committed.")

Dr. Burton Zung, the clinical psychologist who had previously examined and evaluated Alexander in September 1980, testified that Alexander had "significant areas of immaturity," "average intellect," and intellectual functioning within average range. In a May 1981 evaluation, Zung diagnosed Alexander's condition as "conduct disorder, socialized aggressive." Zung further testified that Alexander had a "sustained pattern of rule breaking which included aggressive behavior . . . an ongoing way of life," and that use of violence in a robbery was "more characteristic of the crime committing adult than a child." Zung had "no detailed knowledge" of the crimes charged against Alexander.

Dr. Nora Quiason, a psychiatrist, evaluated Alexander in March 1981. Based upon Alexander's repeated violations of rules, rebellious attitude, poor impulse control, and aggressive behavior, Dr. Quiason diagnosed Alexander's condition as "conduct disorder, socialized aggressive." Dr. Quiason

described Alexander as "impulsive," that is, he tends to act before he thinks of consequences, and "has a very short fuse." Dr. Quiason further testified that Alexander had average intelligence and suffered no psychosis. When asked about the likelihood that treatment would be successful for Alexander, Dr. Quiason responded, "I don't know, I hope so." The prognosis of Dr. Quiason was that, "without intervention," there is a likelihood of repeated violence by Alexander. In forming her diagnosis, Dr. Quiason did not consider the circumstances surrounding the criminal charges against Alexander.

James K. Cole, a clinical psychologist, diagnosed Alexander's condition as "conduct disorder, socialized aggressive." "Conduct disorder" means there is a "high probability of acting aggressively." Cole testified that Alexander was preoccupied with physical violence and strongly values aggressive behavior as a way of handling other people. When Alexander is angered, there is a "high probability, relative to other people, that he will act on the basis of that anger and he will act in an aggressive way." Alexander's condition was not permanent, and Cole recommended treatment in a "highly controlled and structured environment," and acknowledged that any therapeutic efforts or treatments for Alexander would have to be "long term," that is, for a "number of years, quite a few years in this particular case." For an evaluation of Alexander, Cole admitted that elements or details of crimes or any other "moments of physical aggression" could be relevant and that evidence of premeditation could affect any evaluation. Cole did not have such information for his evaluation of Alexander, and acknowledged he was aware that previous counseling in the psychological treatment of Alexander "did not take."

At the conclusion of evidentiary hearings on May 23 and June 2, 1981, and as required by § 29-1816 regarding waiver of jurisdiction and transfer to the

juvenile court, the district judge considered the criteria set forth in Neb. Rev. Stat. § 43-202.01 (Reissue 1978). On June 16, 1981, the trial court found as follows: (1) Alexander "would most likely be amenable to an extended period of confinement and care in an institution where he will be closely supervised, and where he will receive treatment . . ."; (2) the offenses (alleged in the information) included "violence . . . committed in an aggressive manner and with premeditation"; (3) one of the offenses was committed for financial gain, while the other two offenses were attributable to the violent and aggressive tendencies of Alexander; (4) Alexander will be 15 years old in November 1981; the decedent, Warren, was 80 years old; the robbery victim, Blessing, was 65 years old; and the girl threatened was 9 years old; (5) there were previous adjudications in juvenile courts, including theft in May 1980; being a wayward and uncontrolled child, August 1980; assaulting his mother, August 1980; and Alexander has a "history of antisocial behavior with a pattern of physical violence"; (6) Alexander is somewhat immature, although he sees himself as sophisticated; is aggressive, impulsive, and easy to anger, with almost no insight or foresight; and has had considerable contact with law enforcement officials in Falls City and Lincoln; (7) the Youth Development Center at Kearney is the only facility available to the separate juvenile court for confinement of Alexander, but he could not be confined in that institution beyond his 19th birthday and could be administratively released at any time before age 19; (8) "it is in the best interests of [Alexander] and the public if [Alexander] continues in custody for a period extending beyond his minority"; and (9) there was evidence that persons such as Alexander are usually assigned to the Lincoln Correctional Center by the Department of Correctional Services, where there are programs that could be helpful to Alexander. The District Court concluded that there was a "sound basis"

for retaining jurisdiction of the criminal proceedings against Alexander, and declined to waive jurisdiction with a transfer of the proceedings to the juvenile court.

On August 26, 1982, pursuant to a plea bargain and an amended information, the charge against Alexander regarding the Warren homicide was reduced to manslaughter and the charge of terroristic threats to the little girl was dismissed. Alexander entered his plea of guilty to the charges in the amended information. In accordance with Neb. Rev. Stat. § 83-1,105(3) (Reissue 1981), the District Court committed Alexander to the Diagnostic and Evaluation Center of the Department of Correctional Services for an evaluation. The report from the Diagnostic and Evaluation Center contained the following: "For his age, [Alexander] shows strongly developing antisocial traits . . . . Our conclusions are consistent with the adolescent diagnosis of conduct disorder, socialized aggressive type. Significant outstanding traits are a history of vicious assaultiveness, lack of empathy for others, [and Alexander] when anger is provoked . . . can become hostile, vicious and homicidal. [Alexander] is also in need of confinement until he reaches enough maturity to control his impulsive, assaultive behavior. Typically, this does not occur until well in adulthood."

While confined in the Attention Center and awaiting sentence, Alexander, on January 16, 1982, assaulted an employee of the Attention Center because the employee attempted to change the TV channel while Alexander was watching a program. Alexander was convicted of assault and was sentenced to 60 days in jail.

After a presentence investigation and report, on November 17, 1982, the court imposed the following sentence on Alexander: For manslaughter, 6 years and 8 months to 20 years, and for robbery, 10 to 15 years, which sentences run consecutively.

In deciding whether to grant the requested waiver and to transfer the proceedings to juvenile court, the court having jurisdiction over a pending criminal prosecution must carefully consider the juvenile's request in the light of the criteria or factors set forth in § 43-202.01. There is no arithmetical computation or formula required in a court's consideration of the statutory criteria or factors. For retention of the proceedings as a prosecution of a criminal offense, the court need not resolve every factor against the juvenile. Also, there are no weighted factors, that is, no prescribed method by which more or less weight is assigned to each factor specified in the statute. *In Re Rodney Dean Stevenson*, 167 Mont. 220, 538 P.2d 5 (1975); *J. T. P. v. State*, 544 P.2d 1270 (Okla. Crim. 1975); *P. H. v. State*, 504 P.2d 837 (Alaska 1972).

The statutory criteria or factors of § 43-202.01 disclose a balancing test by which public protection and societal security are weighed against practical and not problematical rehabilitation of the juvenile. See, *Matter of Seven Minors*, ____ Nev. ____, 664 P.2d 947 (1983); *R_____ M_____ v. State*, 563 S.W.2d 853 (Tex. Civ. App. 1978); *State in the Interest of C. A. H. & B. A. R.*, 89 N.J. 326, 446 A.2d 93 (1982). "Rehabilitation has traditionally played a key role in the treatment of young offenders. . . . Nevertheless, the concept of deterrence and the need to balance individual justice with the needs of society—a balancing process that is basic and fundamental to the general scheme of the criminal law—also have a place in the juvenile justice system." *State in the Interest of C. A. H. & B. A. R.*, *supra* at 336, 446 A.2d at 98. As a result of such balancing, some youths will be held accountable through proceedings in the adult criminal justice system for effective deterrence of future antisocial misconduct.

Those testifying about Alexander's amenability to rehabilitation apparently gave little diagnostic weight to Alexander's assault upon his mother some

6 months before he killed Warren, his repeated contacts with authorities, expulsion from school due to intimidation of his fellow students, and several other incidents of Alexander's antisocial conduct. An evaluation by one who is oblivious of Alexander's history or disregards his past does result in some skepticism that Alexander is amenable to any rehabilitation. Alexander has displayed a propensity to brutalize those who are unable or unlikely to defend themselves. From vandalism to violence and from hooky to homicide, Alexander has demonstrated a definite pattern of malevolence and violence. A common denominator in any rehabilitation proposed for Alexander is a protracted program which will extend into adulthood and necessarily beyond the purview of the juvenile justice system. The probability of success and the duration of rehabilitative treatment must be considered in determining the manner and location of detention, that is, in the juvenile justice system or criminal justice system. See, *Jimmy H. v. Superior Court*, 3 Cal. 3d 709, 478 P.2d 32, 91 Cal. Rptr. 600 (1970); *In re Pima County, Juvenile Action No. J-218-1*, 22 Ariz. App. 327, 527 P.2d 104 (1974).

The findings recited by the trial court as a "sound basis" for retaining Alexander's case as a criminal prosecution for the felonies charged are supported by appropriate evidence. Applying the balancing test in the light of the several criteria or factors found in § 43-202.01, the trial court was correct in its judgment to retain Alexander's case for disposition in the general, criminal jurisdiction of the District Court.

In reviewing the sentences imposed by the trial court, we are acutely aware of Alexander's age. Age is a consideration in the imposition of any sentence, but not a controlling factor in determination of the punishment. We are obliged to consider protection for the public and deterrence—to Alexander and to those similarly inclined. As expressed in

State v. Davis, 199 Neb. 424, 427, 259 N.W.2d 33, 34 (1977): "Defendant's behavior reveals that he has become a serious threat to society and must be treated accordingly, regardless of age." See, also, *State v. Trusdale*, 199 Neb. 427, 259 N.W.2d 35 (1977); *State v. Selman*, 204 Neb. 833, 285 N.W.2d 832 (1979). The sentences were within the statutory limits as punishment for the crimes of which Alexander has been convicted. Under the circumstances of this case there is no abuse of discretion by the District Court regarding the sentences imposed. Therefore, the judgment regarding the sentences imposed must be affirmed. See, *State v. Sims*, 213 Neb. 708, 331 N.W.2d 255 (1983); *State v. Schmidt*, 213 Neb. 126, 327 N.W.2d 624 (1982).

Alexander's case involves a tragedy in every sense of the word—a youth, with his whole life ahead of him, snuffing out the remaining life of an elderly gentleman. The report from the Diagnostic and Evaluation Center of the Department of Corrections indicates that, depending on Alexander's attitude, there is rehabilitative treatment available to Alexander in facilities within the State's criminal justice system.

The judgments of the District Court are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMES PRICHARD, APPELLANT.

339 N.W.2d 748

Filed October 21, 1983. No. 83-073.

1. **Pleas.** A plea of guilty must not only be intelligent and voluntary to be valid but the record must affirmatively disclose that the defendant entered his plea understandingly and voluntarily.
2. **Prior Convictions.** For each conviction under Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1982), the court shall, as part of the judgment of conviction, make a finding on the record as to the number of the defendant's prior convictions, and shall give the defendant

an opportunity to review the record of his or her prior convictions, bring mitigating facts to the attention of the court prior to sentencing, and make objections on the record regarding the validity of such prior convictions.

3. **Prior Convictions: Proof.** In a proceeding to enhance the punishment because of prior convictions, the burden remains on the State to prove such convictions.
4. **Prior Convictions: Proof: Constitutional Law.** That defendant's constitutional rights were honored in a prior conviction may not be proved by a silent record.
5. **Appeal and Error.** The Supreme Court reserves the right to note and correct plain error which appears on the face of the record, in furtherance of the interests of substantial justice.

Appeal from the District Court for Lancaster County: SAMUEL VAN PELT, Judge. Reversed and remanded for further proceedings.

Dennis R. Keefe, Lancaster County Public Defender, and Coleen J. Sindelar, for appellant.

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

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, and SHANAHAN, JJ., and GRANT, D.J.

GRANT, D.J.

Defendant, James Prichard, was issued a "Uniform Citation and Complaint." The violation stamped or printed on the citation stated that the defendant did "[o]perate or be in the actual physical control of any motor vehicle while under the influence of alcoholic liquor or of any drug or while that person has .10 of one percent or more by weight of alcohol in his body fluid." After these words are added, in handwriting, the words, "Third Offense." There is no evidence as to when the additional words were placed on the citation. The citation, as amended, apparently serves as the complaint for these proceedings. Both the State and defendant assume that a violation of Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1982) is alleged, although defendant's brief erroneously refers to Neb. Rev. Stat. § 39-669.08 (Cum. Supp. 1982) as the pertinent statute.

Defendant was arraigned and pled not guilty. Later, defendant appeared before the court and signed a "Waiver of Rights." On the same document, defendant's attorney also signed her name and indicated she had explained defendant's rights to him and that defendant understood those rights.

The minutes of the municipal court then indicate: "Defendant pleads guilty. Defendant found guilty. Defendant fined $500 plus Defendant ordered not to drive any motor vehicle in Nebraska for any purpose for Life [then some six indecipherable lines on a stamped form] plus three months City Jail, plus costs." The clerk's record on this same document states: "No testimony taken. No bill of exceptions to be issued."

On the same day, the municipal court judge signed an order as follows: "After executing the attached Waiver of Rights Form, the Defendant entered a plea of (guilty) (no contest) to the charge contained in the complaint. The Court hereby finds that there is a factual basis for the entry of the plea, accepts the plea and finds the Defendant guilty of said charge. The Court further finds that the evidence presented to the Court reflects that the Defendant has had (two) previous conviction(s) under this subsection since the effective date of this act, and that the Defendant has had (two) previous conviction(s) under this subsection as it existed prior to the effective date of this act and/or under a city or village ordinance enacted pursuant to this subsection as authorized by section 39-669.07 either prior or subsequent to the effective date of this act. The Court therefore finds, as a part of the judgment of conviction, that the record presented at this time reflects said prior convictions."

The foregoing constitutes the entire record on this appeal. No presentence investigation was requested or made.

On appeal the District Court affirmed defendant's conviction and sentence. Defendant appeals, alleg-

ing that the sentence is excessive, and in particular alleging that the statute does not require a mandatory permanent revocation of defendant's operator's license. We do not reach those questions. We reverse and remand on other grounds hereinafter set out.

The record before this court does not disclose, in even the slightest way, that defendant's plea of guilty was made within the guidelines of *State v. Turner*, 186 Neb. 424, 183 N.W.2d 763 (1971); *State v. Tweedy*, 209 Neb. 649, 309 N.W.2d 94 (1981); and *State v. Kucera*, *ante* p. 337, 338 N.W.2d 443 (1983).

Nor does the record show any compliance with the provisions of § 39-669.07(3), which in part states: "For each conviction under this section, the court shall as part of the judgment of conviction make a finding on the record as to the number of the defendant's prior convictions . . . . The defendant shall be given the opportunity to review the record of his or her prior convictions, bring mitigating facts to the attention of the court prior to sentencing, and make objections on the record regarding the validity of such prior convictions." The record before us is silent on this matter. The only reference made in the entire record to the prior convictions is in the municipal court order. There are no certified records of the prior convictions or any evidence to show whether the defendant was represented by counsel or waived such representation in those prior proceedings, or, indeed, to show what defendant was charged with. There is no showing that defendant or his counsel had any opportunity to "review the record of his . . . prior convictions, bring mitigating facts to the attention of the court prior to sentencing, and make objections on the record regarding the validity of such prior convictions" as required by § 39-669.07(3). In *State v. Smith*, 213 Neb. 446, 329 N.W.2d 564 (1983), this court decided that in a proceeding to enhance the punishment because of prior convictions, the burden remains on the State to

prove such convictions. In the case before us such proof is not present in the record.

With regard to the questions arising from the nature of defendant's plea, in *State v. Turner*, *supra* at 425, 183 N.W.2d at 765, this court stated that "What Boykin [*Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969)] says is that the court cannot presume a waiver of federal constitutional rights from a silent record. That case requires that a plea of guilty must not only be intelligent and voluntary to be valid but the record must affirmatively disclose that the defendant entered his plea understandingly and voluntarily."

In *State v. Tweedy*, *supra*, the *Boykin-Turner* rule was extended to misdemeanors resulting in imprisonment. When such imprisonment is accompanied by a lifetime suspension of a defendant's driving privileges, the necessity of proper procedures is all the clearer.

When this record is examined with regard to defendant's plea, the reviewing court cannot make even the most fundamental finding that defendant was apprised of the precise charge against him. The handwritten words, "Third Offense," inserted in the citation cannot be said to inform defendant adequately of the fact that the State of Nebraska is attempting to place him in prison for 6 months *and* revoke his operator's license for his lifetime.

Nor is there in the record presented any factual basis shown for the entry of the plea, the statement in the order of the municipal court to the contrary notwithstanding. The record is simply silent.

In *State v. Turner*, *supra* at 426, 183 N.W.2d at 765, this court stated: "Without specifically detailing the exact procedure to be followed, we state that the Standards Relating to Pleas of Guilty promulgated by the American Bar Association outline what should be the minimum procedure in the taking of such pleas."

Standards Relating to Pleas of Guilty § 14-1.7

(2d ed. 1982) states at 38, "A verbatim record of the proceedings at which the defendant enters a plea of guilty or nolo contendere should be made and preserved. The record should include the court's advice to the defendant (as required in standard 14-1.4), the inquiry into the voluntariness of the plea (as required in standard 14-1.5), and the inquiry into the accuracy of the plea (as required in standard 14-1.6)."

Even insofar as the defendant was informed in this case of his various rights, as evidenced by the defendant's signature on the printed forms at arraignment and the printed forms as to "waiver of rights," that practice must be supplemented in some way by a verbatim record of the dialogue between the court and defendant—even in as minimal a degree as a question directed to defendant asking him if he can read. See, generally, *Blackledge v. Allison*, 431 U.S. 63, 97 S. Ct. 1621, 52 L. Ed. 2d 136 (1977).

Again we state that we recognize that additional mechanical burdens are being imposed both on the prosecutors and the trial courts by our holdings as to the responsibility resting on the trial judge—which responsibility can only be intelligently satisfied when the prosecutor files a complaint against a defendant which adequately sets forth the charge to which defendant is pleading. But, as stated in the concurring opinion of Justice Powell in *Blackledge v. Allison*, *supra* at 84: "The case before us today is not necessarily an example of abuse of the system. It *is* an example, however, of how finality can be frustrated by failure to adhere to proper procedures at the trial court level. I do not prejudge the ultimate result in this case by saying that respondent's guilty plea may well have been made knowingly and voluntarily. The case is here, five years after respondent's conviction, and following review by the North Carolina courts, the United States District Court, and the Court of Appeals for the Fourth Circuit, primarily because the record before us leaves

room for some doubt as to the reliability of the procedure followed with respect to the guilty plea. All that we have in the record, as a basis for testing the possible merit of respondent's petition, are answers to a printed form certified by the trial judge. We do not know whether anything was said by the judge, the prosecutor, or counsel for respondent, other than the questions read from the form and the monosyllabic answers by respondent. There was no transcript of the proceedings.

". . . If all participants in the process at the plea stage are mindful of the importance of adhering carefully to prescribed procedures and of preserving a full record thereof, the causes of justice and finality both will be served."

We recognize that defendant in this case did not assign as error the issues concerning defendant's plea, the absence of proof of the prior convictions, or the deprivation of the opportunity to review such convictions and make objections as provided for in § 39-669.07(3). This court, however, reserves the right to note and correct plain error which appears on the face of the record, in furtherance of the interests of substantial justice. *Wittwer v. Dorland*, 198 Neb. 361, 253 N.W.2d 26 (1977).

As stated above, we are mindful of the fact that effecting proper procedures may place additional burdens on municipal and county courts, and on prosecutors prosecuting defendants in such courts. It must be recognized, however, that imprisonment plus a lifetime suspension of driving privileges constitutes an extremely serious penalty. Such sanctions may well be necessary in particular cases, but the decision to impose the sanctions must be reached within the framework of constitutional procedures.

For the above reasons, the judgment of the District Court affirming the judgment of the municipal court is reversed, and the cause is remanded for

further proceedings, beginning with the arraignment of defendant.

REVERSED AND REMANDED
FOR FURTHER PROCEEDINGS.

IN RE ESTATE OF HARLAN H. FLICKER, DECEASED.
HELEN NEWILL ET AL., APPELLEES, V. MICHAEL H.
FLICKER ET AL., PERSONAL REPRESENTATIVES OF THE
ESTATE OF HARLAN H. FLICKER, DECEASED,
APPELLANTS.
339 N.W.2d 914

Filed November 4, 1983. No. 81-867.

Wills: Witnesses. Signing of a will by the witnesses prior to the testator's death is a formality of execution required by Neb. Rev. Stat. § 30-2327 (Reissue 1979).

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

Ronald J. Palagi, for appellants.

Clarence E. Mock of Johnson and Mock, for appellees.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

The personal representatives of the estate of Harlan H. Flicker appeal from a judgment entered upon a jury verdict in a will contest in which the will was declared valid. The dispositive issue in this court is whether the will was properly executed. We determine that it was not.

Harlan Flicker signed the will in the presence of two witnesses on August 15, 1979. He died on September 8, 1979. The witnesses signed the document in December 1979.

Neb. Rev. Stat. § 30-2327 (Reissue 1979) is part of the Nebraska Probate Code adopted in 1974. It states that, except for certain wills, "every will is required to be in writing signed by the testator or in the testator's name by some other individual in the testator's presence and by his direction, and is required to be signed by at least two individuals each of whom witnessed either the signing or the testator's acknowledgment of the signature or of the will."

Section 30-2327 changed prior Nebraska law requiring witnesses to sign in the presence of the testator. See, *In re Estate of Cagle*, 132 Neb. 47, 270 N.W. 664 (1937); Neb. Rev. Stat. § 30-204 (Reissue 1964). The comment to § 30-2327 states: "The formalities for execution of a witnessed will have been reduced to a minimum. . . . There is no requirement that . . . the witnesses sign in the presence of the testator . . . ." Further, § 30-2327 allows the witnesses to sign after the date of execution by the testator. See *In re Estate of Kavcic*, 341 So. 2d 278 (Fla. App. 1977), construing a similar statute. Thus, under § 30-2327, the witnesses could have signed the will out of the testator's presence and at a date after he signed the will.

The more difficult question is whether under § 30-2327 the witnesses must sign the will prior to the testator's death.

Section 30-2327 has its counterpart in U.P.C. § 2-502 (1983). We find no cases on point from any jurisdiction construing § 2-502 as applied to the facts here. In a Florida case not involving the Uniform Probate Code, *In re Leo's Will*, 12 Fla. Supp. 61 (Fla. Dade Co. Cir. Ct. 1958), a circuit judge reversed an order denying probate of a will which witnesses signed 24 hours after its execution, and after the testator's death. Like § 30-2327, the statute involved there did not require the witnesses to sign the will in the presence of the testator. The circuit judge reasoned that wills should be upheld unless some mandatory provi-

sion of the law has been violated. The Neb. Prob. Man. ch. II pt. 5(A)(2)(2.1) at 2-1 (1976), states that "in the extreme case, presumably each witness could sign the will as a witness after the testator had died," but cites no authority for that proposition.

The statute does not specifically require signing by witnesses prior to death, and a respectable argument can be made that since the requirement of attestation (witnessing) is purely statutory, *In re Estate of Aden*, 134 Neb. 810, 279 N.W. 794 (1938), a requirement of signing by witnesses prior to the testator's death should not be read into it. We also note that the legislative intent of § 30-2327 "is to validate wills which meet the minimal formalities of the statute." Comment to § 30-2327.

Notwithstanding these arguments, we construe § 30-2327 to require that the witnesses to a will must sign it before the testator's death. A line must be drawn, and we believe that it is unreasonable to follow the alternative of permitting witnesses to sign a will at any time after the testator's death and prior to the 3-year statute of limitations for probate or testacy proceedings in Neb. Rev. Stat. § 30-2408 (Reissue 1979). As a practical matter, we can think of no good reason for a delay in signing by witnesses until after the testator's death. Permitting witnesses to sign a will after the death of a testator would erode the efficacy of the witnessing requirement as a safeguard against fraud or mistake. We must bear in mind that we are dealing with an instrument allegedly signed or acknowledged by a man who is now dead. He is not present to confirm or reject it. Requiring completion of formalities of execution prior to death is likely to minimize miscarriages of justice.

Collaterally involved in this case is Neb. Rev. Stat. § 30-2430 (Reissue 1979), which reads in pertinent part: "(a) If evidence concerning execution of an attested will which is not self-proved is necessary in contested cases, the testimony of at least one of the

attesting witnesses, if within the state competent and able to testify, is required. *Due execution of an attested or unattested will may be proved by other evidence.*" (Emphasis supplied.)

The proponents argue that the highlighted phrase creates yet another class of will that may be proved and accepted for probate, an unattested will which is not a holographic will. The construction is strained, and is rejected. Section 30-2327 defines the formalities of a valid will, while § 30-2430 is obviously a procedural statute defining evidence that may be introduced to prove an otherwise valid will. We will not by fiat add another category of valid wills to those defined by the Legislature.

We reverse with instructions to enter judgment ordering that the will be denied probate.

REVERSED WITH DIRECTIONS.

GILBERT HORKY ET AL., APPELLANTS, V. WAYNE SCHRINER ET AL., APPELLEES.

340 N.W.2d 1

Filed November 4, 1983. No. 82-662.

1. **Quiet Title: Adverse Possession.** Actions to quiet title based upon adverse possession are equitable in nature.
2. **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.
3. **Adverse Possession.** To gain title by adverse possession, the acts of dominion over the land must be so open, notorious, and hostile as to put an ordinarily prudent person on notice of the fact that his lands are in the adverse possession of another.
4. _____. A claim of adverse possession must be proved by a preponderance of the evidence showing actual, open, exclusive, and continuous possession under a claim of ownership for a period of 10 years.

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

Donald W. Walters, for appellants.

James H. Spears, for appellees.

KRIVOSHA, C.J., HASTINGS, CAPORALE, and GRANT, JJ., and BRODKEY, J., Retired.

CAPORALE, J.

This is an appeal from a decree in equity quieting title by adverse possession and awarding damages for trespass. We affirm.

Plaintiffs-appellants Gilbert Horky and Bethel Horky are the owners of record of the southwest quarter of Section 3, Township 16 North, Range 12 West, of the 6th P.M., in Howard County, Nebraska. Plaintiff-appellant Roger Paulson is the purchaser of this southwest quarter under an executory land contract. Defendants-appellees, Wayne Schriner and Elaine Schriner, husband and wife, are the purchasers under an executory land contract of the southeast quarter of the above-described section.

Plaintiffs filed this action to quiet their title to the disputed land. The Schriners counterclaimed and prayed that title be quieted in them and that they be compensated for the damages caused by plaintiffs' trespass. The trial court dismissed plaintiffs' petition, quieted title to the disputed land in the Schriners, and awarded them a judgment in the sum of $150 against plaintiff Paulson for the damages caused by Paulson's placement of fenceposts upon the disputed land.

The issues framed by plaintiffs' assignments of error are (1) whether possession of the disputed land by the Schriners and their predecessors in title was adverse for more than 10 years and (2) whether the evidence supports an award of damages to the Schriners.

Actions to quiet title based upon adverse possession are equitable in nature and, as such, are reviewed under the usual rule pertaining to the scope

of review of actions in equity. *Bartlett v. Kloepping*, 195 Neb. 755, 240 N.W.2d 592 (1976).

In the 1800s a fence line was erected by plaintiffs' predecessor in title near the eastern boundary of the southwest quarter of Section 3 which abuts the Schriners' quarter section. The fence begins near the actual southeast corner of the southwest quarter and runs in a slightly northwesterly direction, ending at a point somewhat west of the northeast corner of the southwest quarter. The land in dispute is that area located within the southwest quarter but on the east side of the fence line.

The southeast quarter was held by Frank Tuma from 1907 until his death in 1976. His widow, Hilda Tuma, lived on the southeast quarter with her husband from 1921 until 1949. Mrs. Tuma testified that during the time she lived on the property with her husband, they grazed cattle up to the disputed fence line, planted crops on the disputed land, and kept the fence in repair. At all times she and her husband considered the land to be theirs. In 1978 Mrs. Tuma sold the land to Randall F. Thompson and Sharon K. Thompson, husband and wife, who entered into a contract for its sale to the Schriners in 1980.

The Horkys bought the southwest quarter in 1952 from Gilbert Horky's brother. Gilbert Horky expressed familiarity with that land and the fence line since the 1920s. He substantiates Mrs. Tuma's testimony that the disputed land was used by the Tumas to graze cattle and to farm as well. Gilbert Horky also testified that when he purchased the land, he considered the fence line to be his eastern border. He also testified that the Tumas were responsible for maintaining the fence. In 1977 the Horkys entered into a contract for the sale of the southwest quarter to the other plaintiff, Roger Paulson.

In 1980 Paulson had the southwest quarter surveyed and learned that the fence line was inside the eastern boundary. In November of 1980 Paulson

placed fenceposts on the survey line east of the old fence. Shortly thereafter, the Schriners removed them.

The plaintiffs' main contention is that the placement of a fence inside one's borders does not grant title to the lands outside the fence to neighboring landowners. In support of that proposition they cite *Elsasser v. Szymanski*, 163 Neb. 65, 77 N.W.2d 815 (1956), and *Linch v. Nichelson*, 178 Neb. 679, 134 N.W.2d 796 (1965).

In *Elsasser* a sidewalk was constructed some 5 to 6 inches from the true lot line dividing two residences. At a later time the sidewalk was widened to abut on the line. The adjoining lot owner claimed that the original sidewalk placement evidenced an acquiescence in his ownership of the 5 to 6 inches. This court held that the placement of the sidewalk was of no importance and that persons claiming lands of another by adverse possession must establish title by their own actions under a claim of ownership. The only evidence of the claimant neighbor's use of the 5- to 6-inch strip was that occasionally a wheel of a vehicle entering the claimant's driveway crossed onto the disputed land. We held such incidental use was not enough to establish adverse possession; the owner was not required to extend the sidewalk to the property line the first time he constructed it.

In the *Linch* case a farmer placed a fence line some 27 feet inside his northern section line in anticipation of a section road which was never built. His neighbor to the north brought suit to quiet title to the lands lying south of his section line up to the fence. No use of the land by the claimant could be shown other than as a turnaround area for farm machinery. This court reaffirmed the *Elsasser* rule and found that the placement of a fence by a landowner inside his boundary does not lead to a relinquishment of ownership of lands outside his fence

without an additional showing that the claimant of those lands used them under a claim of ownership.

The case at hand is not similar to either *Elsasser* or *Linch*. Here, the defendants' predecessor in title, Mrs. Tuma, testified that for the 28-year period she and her husband lived on the land, they considered the fence line to be the boundary. They grazed cattle up to the fence line and even placed some of the disputed land under tillage. She also testified that they kept the fence in repair. Gilbert Horky testified that he considered the fence line the border, saw the Tumas grazing cattle on the disputed land, and considered the repair of the fence line to be the responsibility of the Tumas.

The Schriners cite us to the case of *Wiedeman v. James E. Simon Co., Inc.*, 209 Neb. 189, 307 N.W.2d 105 (1981), and it is clearly analogous to the instant case. In *Wiedeman* the claimant used the disputed land for grazing livestock, posted it, closed it to dumping, and maintained the perimeter fence over the requisite 10 years. We stated therein: "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. [Citations omitted.]" *Id.* at 193, 307 N.W.2d at 108. See, also, *Petsch v. Widger*, 214 Neb. 390, 335 N.W.2d 254 (1983). We also stated in *Wiedeman* that to gain title by adverse possession, the acts of dominion over the land must be so open, notorious, and hostile as to put an ordinarily prudent person on notice of the fact that his lands are in the adverse possession of another.

Plaintiffs argue that the placement of the barbed wire on the side of the fence facing their land indicates, by custom and usage, that the fence is theirs. This fact, they argue, together with what they claim to be the irregularity of the fence line, shows that the fence was never intended to demarcate the

boundary line. One of the difficulties with this argument is that ownership of the fence is immaterial. Moreover, whatever inference might arise from the placement of the barbed wire, if any, is overcome by the testimony of Gilbert Horky and Hilda Tuma. Furthermore, the record fails to support plaintiffs' claim that the placement of the fence is so irregular that it obviously was not intended as a boundary line. The photograph to which they point shows almost nothing in that regard, and the survey shows the fence line to be straight and regular.

Plaintiffs also make much of Gilbert Horky's testimony that during the last few years of his ownership, prior to 1977, Mr. Tuma only occasionally ran cattle on the disputed land. This is clearly not a dispositive factor in this case. As was said in *Hendrickson v. Glaser*, 204 Neb. 492, 495, 283 N.W.2d 41, 43 (1979): "After the running of the statute, the adverse possessor has an indefeasible title which can only be divested by his conveyance of the land to another, or by a subsequent disseisin for the statutory limitation period."

A claim of adverse possession must be proved by a preponderance of the evidence showing actual, open, exclusive, and continuous possession under a claim of ownership for a period of 10 years. *Petsch v. Widger*, *supra*; *McCormick v. Terry*, 205 Neb. 650, 289 N.W.2d 516 (1980). We conclude that standard has been met here; indeed a clearer case of adverse possession can hardly be imagined.

As to the remaining issue, the uncontradicted evidence is that the cost of hiring someone to fill the postholes would be $200. The trial court awarded the Schriners damages in the sum of $150, and they have not appealed as to the amount of the judgment. Since the plaintiff Paulson installed fenceposts on the Schriners' land, it is obvious that Paulson must bear the cost involved in returning the land to its former condition. See, *Spilinek v. Spilinek*, *ante* p. 35, 337 N.W.2d 122 (1983); *Wiedeman v. James E.*

Simon Co., Inc., supra; *George Rose Sodding & Grading Co., Inc. v. City of Omaha*, 187 Neb. 683, 193 N.W.2d 556 (1972), *appeal on remand* 190 Neb. 12, 205 N.W.2d 655 (1973).

AFFIRMED.

CHARLES R. SINGLETON AND BETTY MAE SINGLETON, HUSBAND AND WIFE, APPELLEES AND CROSS-APPELLANTS, V. SOUTH PLATTE NATURAL RESOURCES DISTRICT, APPELLANT AND CROSS-APPELLEE.

339 N.W.2d 751

Filed November 4, 1983. No. 82-703.

1. **Good Cause: Appeal and Error.** Absent a showing of an abuse of discretion, the Supreme Court will not ordinarily set aside a determination by the District Court as to whether or not good cause has been shown.
2. _____: _____. The fact that counsel is misinformed or uninformed as to the requirements of filing a petition on appeal in the District Court is not a showing of good cause within the meaning of the statute.

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

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

Walter H. Radcliffe, for appellees.

KRIVOSHA, C.J., WHITE, and HASTINGS, JJ., and BRODKEY, J., Retired, and MURPHY, JOHN, D.J.

KRIVOSHA, C.J.

South Platte Natural Resources District (District) has appealed from a judgment entered in the District Court for Kimball County, Nebraska, awarding damages to the appellees, Charles R. and Betty Mae Singleton, for certain property condemned by the District, listing several assignments of error. The

Singletons have cross-appealed. Because we determine that the District's first assignment of error, to the effect that the trial court should have sustained the District's motion to dismiss, was correct, we need not consider any of the other assignments nor the cross-appeal.

Those facts necessary for our consideration of the instant appeal disclose that in February of 1978 the District proceeded to condemn certain real estate owned by the Singletons in Kimball County, Nebraska. As a result of that condemnation proceeding, the Singletons were awarded $80,000 in damages. On May 8, 1978, the Singletons filed a notice of appeal in the county court of Kimball County, Nebraska. On the same date, they filed their praecipe for transcript and their appeal bond. Thereafter, on July 3, 1978, *56* days after they filed their notice of appeal, the Singletons filed their petition on appeal in the District Court for Kimball County, Nebraska. On July 13, 1978, the District filed a motion to strike the petition of the Singletons and to dismiss their appeal on the grounds that the Singletons had failed to file their petition within 50 days after the filing of the notice of appeal in the county court, as required by statute. On August 29, 1978, the Singletons filed an application for permission to file a petition on appeal instanter. The District Court, without taking evidence, granted leave to file the petition on appeal instanter on August 31, 1978, and the appeal proceeded to trial.

In the case of *Estate of Tetherow v. State*, 193 Neb. 150, 226 N.W.2d 116 (1975), we held that even though 1972 Neb. Laws, L.B. 1032, repealed the provisions of Neb. Rev. Stat. §§ 27-1305 and 27-1306 (Reissue 1964), the requirements of those sections with regard to perfecting an appeal in a condemnation case still applied; therefore, the party first appealing to the District Court in an eminent domain proceeding must "within *50 days* from the date of the filing of the notice of appeal, file as plaintiff the petition in the dis-

trict court." (Emphasis supplied.) *Jensen v. Omaha Public Power Dist.*, 159 Neb. 277, 282, 66 N.W.2d 591, 595 (1954). There was no question that in 1978, when this appeal was perfected, the Singletons were required to file a petition on appeal within 50 days after the filing of the notice of appeal. See, also, *City of Seward v. Gruntorad*, 158 Neb. 143, 62 N.W.2d 537 (1954). The record clearly shows that the Singletons failed to file their petition within the 50-day period.

The Singletons argue that their failure to file the appeal within the 50-day period should be disregarded for two reasons. They argue that the court can always "on good cause shown" grant permission to file the petition on appeal out of time. See Neb. Rev. Stat. § 27-1307 (Reissue 1964). We agree with that statement as it applied under the law in effect in 1978. Furthermore, we agree that, absent a showing of an abuse of discretion, this court will not ordinarily set aside a determination by the District Court as to whether or not good cause has been shown. See *Neumeyer v. Omaha Public Power Dist.*, 188 Neb. 516, 198 N.W.2d 80 (1972). The difficulty, however, in the instant case is that the record fails to disclose *any* showing of good cause upon which the court could act, and therefore its action must, of necessity, have been an abuse of discretion. The only evidence of good cause is contained in the Singletons' application to the court. The application alleges that: "1. The plaintiffs duly filed their appeal bond herein and thereafter duly filed their transcript herein within the times required by law.

"2. That plaintiffs did not file their petition within 50 days required by Section R.S. 27-1306 for the following reasons, which constitute good cause:

"a) That said Section was repealed by L.B. 1030 [sic], Laws 1972;

"b) That as a result of such repeal the 50-day requirement no longer existed and plaintiff relied in good faith on the same.

"3. That notwithstanding *In re Estate of Charles S. Tetherow v State of Nebraska*, 226 N.W.2d 116, 193 Neb. 150 and other case law this application should be granted for the following reasons, which constitute good cause:

"a) That any and all case law does not impose a 50-day limit but merely aludes [sic] to the fact that a petition should be filed;

"b) That any and all case law gives the District Court discretion in permitting a petition to be filed with regard to time so long as the same is done.

"4. That the purpose of a petition is to give notice to the opposing party and that since this matter has not come on for trial the ends of justice and equity can best be served by permitting the filing of a petition in stanter [sic] if this Honorable Court deems a petition necessary and appropriate."

The difficulty with the statements is that they are simply not true. "L.B. 1030 [sic], Laws 1972," did not repeal the requirements of § 27-1306. We specifically held in *Tetherow* that L.B. 1032 left § 27-1306 intact insofar as appeals in condemnation cases were concerned; and, contrary to the claim made by the Singletons, *Tetherow* established that the requirement that a petition be filed within 50 days still exists. And in *Nelson v. State*, 211 Neb. 793, 794, 320 N.W.2d 444, 445 (1982), we said: "It is well settled that a petition on an appeal from the award of the appraisers in an eminent domain proceeding must be filed by the party first appealing within 50 days of the date of the filing of the notice of appeal." It therefore follows that the 50-day requirement was in effect when this appeal was perfected. The lack of information, or misinformation, about the law by the Singletons or their attorney is not a showing of good cause. In *Nelson*, *supra* at 794, 320 N.W.2d at 445, it was said: "[T]he fact that counsel is misinformed or uninformed as to the requirements of filing a petition on appeal in the District Court is not a showing of good cause within the meaning of the statute."

See, also, *Jensen v. Omaha Public Power Dist.*, *supra*.

It would appear that the only reason the petition was not filed within the 50 days was that the party responsible for filing failed to do so. This is not good cause, and the fact that no one has been prejudiced by reason of a party not filing a document within the time required in order to give the court jurisdiction does not constitute a showing of "good cause," nor does it justify the court's granting permission to file the petition out of time. The trial court should have sustained the motion of the District to dismiss the appeal.

In passing, and for the purpose of avoiding further confusion, we should note that Neb. Rev. Stat. § 76-717 (Reissue 1981) has been amended by 1983 Neb. Laws, L.B. 270, and therefore that amendment and not this decision should be referred to with regard to appeals filed after the effective date of L.B. 270. It does not, however, apply to the instant case. The judgment of the District Court is therefore reversed and the cause remanded with directions to dismiss the appeal, thereby causing the award of the appraisers in the county court to be reinstated.

REVERSED AND REMANDED WITH DIRECTIONS.

STELLA F. MARTIN, APPELLEE, V. JOHN F. MARTIN, APPELLANT.

339 N.W.2d 754

Filed November 4, 1983. No. 82-822.

1. **Divorce: Appeal and Error.** This court is required to review the record in a marriage dissolution proceeding de novo.
2. **Property Division.** Generally speaking, in marriage dissolution proceedings awards of property to a spouse from the marital estate vary from one-third to one-half of the value of the property involved, depending upon the facts and circumstances of the particular case.
3. **Property Division: Appeal and Error.** Although this court is hesi-

tant to disturb the division of property made by the trial court in a dissolution proceeding, we must do so when it is patently unfair on the record.

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

James D. Smith of Brock, Seiler and Smith, for appellant.

William M. Connolly of Conway and Connolly, P.C., for appellee.

KRIVOSHA, C.J., HASTINGS, CAPORALE, and GRANT, JJ., and BRODKEY, J., Retired.

PER CURIAM.

John F. Martin, the respondent, has appealed from the judgment of the District Court in a marriage dissolution proceeding, assigning as error generally the division of marital property and debts of the parties.

The respondent and Stella F. Martin, the petitioner and appellee, had been married for 22 years. Four children were born to the parties, two of whom were, at the time of trial, residing with Mrs. Martin. A decree of dissolution was entered by the court on November 2, 1982. We are required to review the record de novo. *Van Newkirk v. Van Newkirk*, 212 Neb. 730, 325 N.W.2d 832 (1982).

The record indicates the parties acquired most of their assets during the course of the marriage, and both made substantial contributions to the marriage and acquisition of property. The trial court awarded the husband a quarter section of farmland, farm machinery, livestock, grain in storage or to be harvested, and a 6-percent interest in his father's limited farm partnership. Also, the husband was required to pay the total marital indebtedness of $391,442, of which almost all related to debt for the quarter section of farmland, machinery, and livestock.

The wife received 19 parcels of Arizona property

acquired during marriage as an investment, and a 6-percent interest in the limited farm partnership of the respondent's father, which was gifted to her directly for estate tax savings purposes. Household furnishings were divided evenly between the parties, and the husband was ordered to pay $400 per month alimony until the death or remarriage of the petitioner, and $150 a month child support per child during the minority of each.

In evaluating the marital estate, only two items of property appear to be in substantial dispute. The valuation of the Arizona real estate ranges from $144,290, placed on it by Mr. Martin, to $64,940, assigned by Mrs. Martin. The petitioner also contends that because the respondent was awarded the unharvested crops, consisting of 156 acres of corn on the home place and 80 acres of milo on sharecrop land, the apparent disparity between the amounts awarded the two parties is greatly diminished.

Without considering the growing crops, taking Mr. Martin's valuation of the Arizona property, he received 4.2 percent of the net marital estate, compared to 95.8 percent received by Mrs. Martin. Utilizing the valuation assigned by Mrs. Martin, the respondent received 8.2 percent of the net estate, and she 91.8 percent. On the face of it, considering Mr. Martin's obligation to pay $4,800 per year alimony indefinitely, as well as child support for a short period of time in the future, the division of property appears disproportionate. " 'Generally speaking, awards in cases of this kind vary from one-third to one-half of the value of the property involved depending upon the facts and circumstances of the particular case.' " *Van Newkirk, supra* at 732-33, 325 N.W.2d at 833.

However, the petitioner argues that by allowing her former husband to retain all of the unharvested crops, the division of property is somehow equalized. The respondent insists that growing crops are but an expectancy of income out of which he must

pay the alimony and child support for the coming year. It is not necessary for us to decide this question because the record contains no evidence of market value, nor any evidence concerning the expenses of planting and harvesting the crops, quality, or type of corn connected with this crop. We believe that, after looking at the record in this case, to assign a value for the unharvested crops would be too speculative.

Although we have said that we are hesitant to disturb the division of property made by the trial court, we must do so when it is patently unfair on the record. *Johnson v. Johnson*, 209 Neb. 317, 307 N.W.2d 783 (1981). For the reasons discussed above, we conclude that the division of property in this case was unfair to the respondent.

The respondent suggests that we set over to him the 6-percent interest in his father's limited partnership farming interest which had been given to the petitioner, as well as a similar share to the respondent, as part of the elder Martin's estate plan. There is no solid evidence of its value. The trial court simply allowed each party to retain his or her separate estates, including these gifts. Due to the fact that this is a limited partnership which gives no control over the business operations to the petitioner, we do not believe it is necessary to alter that arrangement.

Rather, we conclude that the only practical way to adjust the property division is to make an arbitrary assignment of some of the Arizona land to the respondent. Accordingly, we modify the decree of the trial court and order that there be set over to respondent as his sole property the following: Lots 2976 and 2980, Arizona City, Unit Two-A, Pinal County, Arizona; Lot 573, Arizona City, Unit Ten, Pinal County; and Lots 52 and 53, Arizona City, Unit Fifteen, Pinal County. This real estate has a total value of $64,000 according to the respondent and $21,840 according to the petitioner, which now

amounts to an award of 56 percent to Mrs. Martin, using the respondent's valuations, or 64.9 percent using her valuations.

As modified herein, the judgment of the District Court is affirmed.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. DWIGHT PIERCE, APPELLANT.

STATE OF NEBRASKA, APPELLEE, V. KERRY C. WELLS, APPELLANT.

340 N.W.2d 122

Filed November 4, 1983. Nos. 82-827, 82-828.

1. **Police Officers and Sheriffs: Investigative Stops: Probable Cause.** A police officer may, in appropriate circumstances and in an appropriate manner, approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest.
2. _____: _____: _____. Police officers must have a particularized and objective basis for suspecting the person stopped of criminal activity. The assessment of the totality of the circumstances includes all of the objective observations and considerations, as well as the suspicion drawn by a trained and experienced police officer by inference and deduction that the individual stopped is, or has been, or is about to be engaged in criminal behavior.
3. **Police Officers and Sheriffs: Search and Seizure: Probable Cause.** Roadside encounters between police and suspects are especially hazardous, and danger may arise from the possible presence of weapons in the area surrounding a suspect. Thus, the search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant the officer to believe that the suspect is dangerous and the suspect may gain immediate control of weapons.
4. **Pretrial Motions: Appeal and Error.** The trial court is vested with broad discretion in considering requests of defense counsel for discovery, and error can be predicated only upon an abuse of such discretion.
5. **Motions for Continuance: Appeal and Error.** A motion for continuance is addressed to the sound discretion of the court, and in

the absence of a showing of an abuse of discretion, a ruling on a motion for a continuance will not be disturbed on appeal.

6. **Motions for New Trial.** In order to justify a new trial, newly discovered evidence must involve something other than the credibility of a witness who testified at trial.
7. **Convictions: Appeal and Error.** 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.
8. **Sentences: Appeal and Error.** In the absence of an abuse of discretion by the trial court, we will not disturb on appeal a sentence imposed within the statutory limits.

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

Marvin V. Miller, for appellants.

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

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, and SHANAHAN, JJ., and GRANT, D.J.

WHITE, J.

These two cases were consolidated for trial and for purposes of appeal before this court. Appellant Dwight Pierce was convicted by a Saunders County jury of robbery and aiding and abetting the use of a firearm to commit a felony. Appellant Kerry C. Wells was also convicted of robbery and use of a firearm to commit a felony. Both appellants were sentenced for a period of not less than 15 years nor more than 25 years for the robbery, and not less than 6 years nor more than 10 years for use of a firearm to commit a felony, said sentences to be served consecutively. We affirm.

Appellants appeal, and assign that the trial court erred in (1) failing to sustain appellants' motions to suppress evidence obtained by the Midwest City, Oklahoma, police department; (2) failing to sustain

appellants' motions for a continuance and subsequent motions for a new trial on the grounds that appellants were deprived of their right to present evidence by either compelling the attendance of or obtaining the deposition of Thomas J. Wilmoth; (3) failing to sustain appellants' motions for a new trial on grounds of newly discovered evidence; (4) failing to sustain appellants' motions for a new trial for the reasons that the verdicts of the jury were not supported by the evidence and were contrary to law; and that (5) the sentences imposed were excessive.

A statement of the facts is necessary. Both cases stem from an incident which occurred at the J. & M. Pitstop, in Mead, Nebraska, on February 23, 1982. At approximately 7 p.m. Marlene Vogt, one of the owners, was working alone as a clerk when two men dressed in dark jackets and blue jeans, with ski masks pulled over their heads, entered the store. One of the two men was armed with a revolver. The two men approached Mrs. Vogt and demanded her money. Mrs. Vogt was then struck across the hands with a yardstick which the robber without the gun picked up in the store. Mrs. Vogt removed money from the cash register and handed the money to the robbers. One of the robbers motioned to Mrs. Vogt's purse, which was behind the counter, and she gave the money from the purse to him. Before leaving, the robber without the gun struck Mrs. Vogt in such a manner across the back of the neck as to render her unconscious, and the robbers made good their escape. Approximately $350 was taken in the robbery.

The Saunders County sheriff's office and the Nebraska State Patrol responded to the call from Mrs. Vogt a short time later. A number of photographs were taken which variously showed the interior of the J. & M. Pitstop and a number of wet boot impressions which were found on the floor and outside the building. There were no arrests made or leads discovered by either of these two departments.

On February 28, 1982, an off-duty police lieutenant, Eddie Thomason, from Midwest City, Oklahoma, pulled into a Champlin service station in that city to obtain gasoline for his personal vehicle. While Thomason was putting gas in his vehicle, Wells approached and asked him to pay Wells cash for the gas and let Wells charge the gas on his credit card. Wells explained that he and some friends were traveling and they had run out of money and needed some cash to buy food. Thomason refused, after which Wells mumbled something and returned to a vehicle which was parked directly in front of the service station, just east of the front door. Thomason went into the station to pay for his gas. He noticed that the vehicle in question had an out-of-state license plate. He also noticed that the appellant Pierce had left the vehicle and was inside the station wandering around. He did not appear to be attempting to purchase anything, but, rather, he appeared to be looking the place over. Thomason left the station, parked some distance away, and observed appellants' behavior. Based upon these observations the officer radioed for a uniformed officer for assistance. Thomason observed the appellants from approximately 8:30 p.m. to 8:47 p.m.

Upon arrival of the uniformed police officer, Officer Anderson, both officers approached the vehicle, which was still occupied by appellant Wells and Randall Wilmoth. Thomason ordered the occupants out of the vehicle. Upon his exit Wells turned "as if he was trying to retrieve or place something under the right front seat." The officers moved Wells and Wilmoth to the front of the car and away from the door. While Officer Anderson was questioning Wilmoth, Officer Thomason went back and checked underneath the right front seat of the car. Under the seat was found a loaded .38-caliber revolver, a bag of marijuana, and a ski mask. Meanwhile, Pierce had joined his companions. The officers then advised the three men of their rights and placed them

under arrest for possession of a firearm and possession of marijuana. They were transported to police headquarters.

During custodial interrogation, Randall Wilmoth provided information to the police about various crimes the three men had perpetrated during their travels. Pursuant to this information and credit card receipts obtained in a subsequent search of the vehicle, the Midwest City Police Department sent a general teletype bulletin to the locations where the appellants had traveled. The Saunders County sheriff's office responded, and the appellants and Wilmoth were extradited.

In appellants' first assignment of error they contend that the weapon, marijuana, and ski mask obtained by Officer Thomason were illegally seized and as such should have been suppressed. They further contend that the "fruit of the poisonous tree" doctrine applies to other evidence obtained under the subsequent search warrant and as such that evidence was "tainted" and also should have been suppressed. We disagree. The appellants assert, and we agree, that at the time their vehicle was initially searched, the police officers did not have probable cause to arrest them. However, as the appellants later concede in their briefs, their detention and the search of their vehicle are more properly classified as a stop and search situation subject to the guidelines pronounced in *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). In *Terry* the U.S. Supreme Court said at 22: "[A] police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." See, also, *State v. Anderson*, 204 Neb. 186, 281 N.W.2d 743 (1979).

This lesser standard for investigative stops was recently articulated by this court in *State v. Longa*, 211 Neb. 356, 318 N.W.2d 733 (1982), and previously

stated in *State v. Nowicki*, 209 Neb. 640, 309 N.W.2d 89 (1981). Relying on *United States v. Cortez*, 449 U.S. 411, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981), we determined that " 'an investigatory stop must be justified by objective manifestation that the person stopped is, has been, or is about to be engaged in a criminal activity. In determining what cause is sufficient to authorize police to stop a person, the totality of the circumstances — the whole picture — must be taken into account.

" 'Police officers must have a particularized and objective basis for suspecting the person stopped of criminal activity. The assessment of the totality of circumstances includes all of the objective observations and considerations, *as well as the suspicion drawn by a trained and experienced police officer by inference and deduction that the individual stopped is or has been or is about to be engaged in criminal behavior.*' " *Nowicki* at 645, 309 N.W.2d at 92-93.

It is readily apparent, when one applies the facts of the present case, that the officers in question took reasonable action on the basis of particularized and objective facts. Officer Thomason, a 21-year veteran of law enforcement and supervisor for intelligence investigation in Midwest City, Oklahoma, testified that he first became suspicious of appellants' conduct when Wells approached him and asked whether Thomason would be willing to charge his gas to Wells' credit card and pay Wells the cash in return. Wells also stated they had no money. The officer also noted that the car was parked in such a position as to make an easy getaway, that the car had out-of-state license plates, and that appellant Pierce had entered the service station and was wandering around, but did not appear to be attempting to purchase anything. Thomason also testified that he observed appellants for approximately 15 minutes before making his initial investigation.

On the basis of these facts we conclude that the activities of the officers prior to the actual arrest of the

appellants were based upon a suspicion of criminal activity falling within the fourth amendment guidelines set forth above. Therefore, such action was permissible under Neb. Rev. Stat. § 29-829 (Reissue 1979).

A second issue which arises from the facts is the scope of a search in a *Terry*-type investigation. This issue was before the U.S. Supreme Court in the recent case of *Michigan v. Long*, 51 U.S.L.W. 5231 (U.S. July 6, 1983). In *Long* two officers on patrol stopped to investigate a speeding car that had swerved off into a ditch. Long, the occupant of the vehicle, met the officers at the rear of the car but turned to reenter it when asked to produce his vehicle registration. He had left the door on the driver's side open. The officers both followed Long, and both spotted a hunting knife on the floor of the driver's side. Long was then stopped and subjected to a protective *Terry* search. The car was subsequently searched for other weapons.

The Court held that a protective *Terry* search of the passenger compartment of an automobile is permissible, recognizing that "investigative detentions involving suspects in vehicles are especially fraught with danger to police officers." *Long*, *supra* at 5236. Furthermore, the Court concluded that "the officers did not act unreasonably in taking preventive measures to ensure that there were no other weapons within Long's immediate grasp before permitting him to reenter his automobile. Therefore, the balancing required by *Terry* clearly weighs in favor of allowing the police to conduct an area search of the passenger compartment to uncover weapons, as long as they possess an articulable and objectively reasonable belief that the suspect is potentially dangerous." *Id.* at 5236-37.

As previously noted, Officer Thomason had "reasonable suspicion" to believe that a robbery was about to take place. This fact, coupled with the testimony of Thomason that as Wells was exiting the

vehicle he turned "as if he was trying to retrieve or place something under the right front seat," certainly gave rise to an articulable and objectively reasonable belief that the suspects were armed and dangerous.

It should also be noted that the other items seized by the police were either in plain view or were seized pursuant to a valid search warrant. For the above reasons appellants' first assignment of error must fail. The District Court was correct in refusing to suppress the evidence.

Appellants contend in their second assignment of error that the District Court erred when it denied authorization to depose Thomas J. Wilmoth, father of the State's principal witness. Appellants further assert that this error became prejudicial when the District Court denied their motion for a continuance to obtain the elder Wilmoth's testimony at trial. This court has repeatedly held that the trial court is vested with broad discretion in considering requests of defense counsel for discovery and error can be predicated only upon an abuse of such discretion. *State v. Fuller*, 203 Neb. 233, 278 N.W.2d 756 (1979); *State v. Isley*, 195 Neb. 539, 239 N.W.2d 262 (1976). This court has further stated that a motion for continuance is addressed to the sound discretion of the court, and in the absence of a showing of an abuse of discretion, a ruling on a motion for a continuance will not be disturbed on appeal. There is no abuse of discretion by the court in denying a continuance unless it clearly appears that defendant suffered prejudice as a result thereof. *State v. Goodloe*, 197 Neb. 632, 250 N.W.2d 606 (1977); *State v. Ell*, 196 Neb. 800, 246 N.W.2d 594 (1976).

A review of the record indicates that Thomas Wilmoth had no knowledge, personal or otherwise, about the crimes in question. Wilmoth's testimony could only serve to impeach the general credibility of his son. Neb. Rev. Stat. § 27-608(1)(a) (Reissue 1979). Mr. Wilmoth admitted in a letter to defense

counsel that he had had little contact with his son since 1974. Randall Wilmoth testified that the last time he had seen his father was for 15 minutes some 2 years ago. He had not seen his father for 5 or 6 years prior to the stated meeting. In light of the foregoing it cannot be said that the trial court abused its discretion in not allowing the deposition of Thomas Wilmoth and in refusing to grant a continuance.

Appellants contend as their third assignment of error that the District Court erred in overruling their motion for new trial based on newly discovered evidence. This argument is without merit. Appellants' affidavits in support of their motion allege that Randall Wilmoth told a cellmate a story different than what the witness related at trial. As such, the evidence is relevant only on the issue of the credibility of a witness. In order to justify a new trial, newly discovered evidence must involve something other than the credibility of a witness who testified at trial. *State v. Mays*, 205 Neb. 730, 289 N.W.2d 545 (1980); *State v. French*, 200 Neb. 137, 262 N.W.2d 711 (1978).

The appellants contend in their fourth assignment of error that the trial court erred in overruling their motion for a new trial for the reason that the verdict of the jury was not supported by the evidence and was contrary to law.

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. Huffman*, 214 Neb. 429, 334 N.W.2d 3 (1983). An examination of the record reveals sufficient competent evidence to sustain the jury's verdicts.

Finally, appellants argue that their sentences are excessive. Robbery is a Class II felony which provides for a penalty of 1 to 50 years' imprisonment. Neb. Rev. Stat. §§ 28-105, 28-324 (Reissue 1979). Using a firearm to commit a felony is a Class III felony, as is aiding and abetting such a crime. Neb. Rev. Stat. §§ 28-206, 28-1205 (Reissue 1979). A Class III felony provides for a penalty of 1 to 20 years' imprisonment, a $25,000 fine, or both. § 28-105. The sentences imposed by the trial court are clearly within these statutory guidelines.

As we have said: " 'In the absence of an abuse of discretion by the trial court we will not disturb on appeal a sentence imposed within the statutory limits.' " *State v. Ellefson*, 214 Neb. 747, 754, 336 N.W.2d 88, 92 (1983). No abuse of discretion is evident in this case.

In light of the foregoing we affirm the convictions and sentences of appellants imposed by the District Court.

AFFIRMED.

KRIVOSHA, C.J., concurring.

While I am in complete agreement with the majority in this case, based upon the fact situation presented to us, I write separately to make it clear that the majority opinion should not be read to mean that any police officer may stop and search any individual based solely on the fact that one is parked in a filling station or without cash in one's pocket. In this particular case the officer, while unable to articulate the probable cause to make an arrest, did have sufficient circumstances to justify the action taken. The result in this case is reached based upon

the specific facts in this case, which are not likely to be repeated, thereby creating a general proposition of law.

MARTIN L. BROWN, APPELLEE, V. LEAVITT LANE FARM, APPELLANT.

340 N.W.2d 4

Filed November 4, 1983. No. 82-854.

1. **Workmen's Compensation: Appeal and Error.** Findings of the Workmen's Compensation Court on rehearing have the same force and effect as a jury verdict and, if supported by sufficient evidence, will not be disturbed on appeal unless clearly wrong.
2. **Workmen's Compensation.** An employer may engage in two separate businesses, one subject to the workmen's compensation law and one exempt from that law.

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

Ray C. Simmons of Simmons & Schneider, P.C., for appellant.

M. H. Weinberg of Weinberg & Weinberg, P.C., for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

GRANT, J.

This is an appeal by defendant employer from the decision of a three-judge panel of the Workmen's Compensation Court, which had reversed the judgment of a single-judge court. The three-judge panel held that plaintiff was entitled to workmen's compensation benefits as determined by the court.

Defendant appeals, alleging that the three-judge Workmen's Compensation Court erred in failing to hold that defendant was an employer of farm labor and plaintiff was a "farm laborer" within the exception of Neb. Rev. Stat. § 48-106(2) (Reissue 1978); in

holding that plaintiff's injuries arose out of his employment, when plaintiff was waiting for his paycheck and engaged only in nonauthorized helping of other employees; in holding that defendant had elected to be bound by the workmen's compensation law as to its entire farming operation by purchasing a policy of workmen's compensation insurance before October of 1979 on a separate nonfarm partnership operation with one employee; and in holding that defendant had not made an effective election to return to the status of not being covered by the workmen's compensation law by terminating the one employee in the nonfarm operation and terminating the compensation insurance, because defendant had failed to post a notice of its election as required by § 48-106(3).

For reasons hereinafter stated we reverse.

The three-judge panel found it was not necessary to determine whether defendant was an exempt employer of farm laborers for the reason that defendant had elected to be covered by the Workmen's Compensation Act. Appellee agrees with this approach, while appellant argues that it was an employer of farm laborers and that appellee was a farm laborer. We determine that the evidence is undisputed that appellant was primarily engaged in farming and was an employer of farm laborers.

As to appellee's status, when asked by his attorney as to what he did on the farm, appellee stated that he "cut weeds, fixed fence, and odds and ends, chased cows, a little painting, a little scraping paint, loaded sod." Appellee further testified that he ran a tractor in mowing sod and that the sod was cut and loaded as it was ordered by customers. At the time of the accident in question, appellee was helping other employees to build a corral to hold cattle. We determine that the evidence is undisputed that appellee was a farm laborer within the meaning of § 48-106(2).

The evidence further showed that on Saturday,

October 17, 1981, appellee reported for work. It was raining, and the ordinary procedure would have been for appellee to call to inquire if any work was available for him. Appellee's telephone was not working, however, and he actually went to the house of Paul Eveland, one of the partners in appellant partnership, to see if any work was available for him. Appellee was told there was no work. He then asked if he could get his paycheck, since wages were paid to the employees on Saturday, and Mr. Eveland agreed to make up appellee's check while appellee waited.

Appellee testified that he told Mr. Eveland he would "go over and help these guys until you get it done" and that Eveland said that would be "okay." The "guys" referred to were two other partnership employees who were digging postholes for a corral being built for the farm operation. Appellee did go to assist his coemployees and was injured almost immediately when his arm was caught in the auger of a posthole digger.

Appellant's testimony agreed fully with the facts concerning the accident itself. Mr. Eveland testified, however, that he had not ordered or authorized appellee to help the other employees. In this sort of a dispute in the evidence, the findings of the Workmen's Compensation Court on rehearing have the same force and effect as a jury verdict and, if supported by sufficient evidence, will not be disturbed on appeal unless clearly wrong. *Caradori v. Frontier Airlines*, 213 Neb. 513, 329 N.W.2d 865 (1983). We affirm the finding of the Workmen's Compensation Court that appellee was within the course of his employment because, although he was a volunteer, he was in the process of helping coemployees perform work for appellant, and the labor done by plaintiff in his good faith attempt to assist fellow employees was being done with the authorization of appellant. See, *Cook v. Bangor Hydro-Electric Co.*, 402 A.2d 64

(Maine 1979); *Aetna Cas & Surety v Duckham*, 89 Mich. App. 446, 280 N.W.2d 508 (1979).

For the purposes of this decision, then, we may assume that appellant is an employer of farm laborers and that appellee was injured while within the course of his employment as a farm laborer. The controlling error assigned by appellant is that the Workmen's Compensation Court erred in "[r]uling that defendant partnership had made an election to be bound by the Compensation Law as to defendant's farming operation employee because defendant had previous to October 1979 had in effect a policy of Workmen's Compensation insurance on a separate non-farm nutritional service with one employee." Brief for Appellant at 5.

Appellee meets this assignment of error head on by contending in his brief, "3. That the partnership known as Leavitt Lane Farm was a single business entity and was the employer under R. R. S. 48-114.

"4. That pursuant to R. R. S. 48-106 (2), the employer was a farm and as such was exempt but for its conclusive election to come under the Act by procuring insurance on some but not all of its employees." Brief for Appellee at 2.

The pertinent facts are undisputed on these questions, and are as follows. Appellant, Leavitt Lane Farm, is a partnership engaged primarily in raising row crops, alfalfa, cattle, and bluegrass. Appellant also operated a "little nutrition service which basically was selling nutrition products, feed, doing educational work in connection with selling these." The name of the business was EV Nutrition Service. The nutrition service had one employee who "drove a truck down the road selling and delivering the merchandise we were selling." This operation had nothing to do with the farm operation.

Appellant's partnership income tax returns for the years 1978 through 1981 showed gross farm income ranging from approximately $151,000 in 1979 to $342,000 in 1981. Its gross income is shown as com-

ing from the sale of cattle, soybeans, corn, other grains, alfalfa, and sod. This income is shown on the standard Schedule F ("Farm Income and Expenses") attached to the partnership returns for the same years.

Also shown as an attachment to the partnership return for each of the years is a Schedule C ("Profit or Loss From Business or Profession"). These schedules show that gross profits for this "business" ranged from $74,000 in 1978 to $16,439 in 1981. On the 1980 and 1981 Schedule C's, the "proprietor" is named as "EV Nutrition Service." On the 1978 Schedule C, the proprietor is "Leavitt Lane Farm" and the business name is "EV Nutrition Service," and on the 1979 Schedule C, the names cannot be read on the copies received in evidence.

Each Schedule C and Schedule F sets out separate deductions, and each showed a separate profit or loss. Each partnership return itself showed a "net farm profit or loss" reflecting the Schedule F, and "other income" reflecting the Schedule C.

Computerized accounting records received show monthly income and expense sheets for the farm operation, with separate summary sheets showing the income and expenses of EV Nutrition Service.

EV Nutrition Service had only one employee, who was terminated sometime before October 6, 1979. Appellant obtained workmen's compensation insurance on that employee at some indefinite time, and that compensation insurance expired on October 6, 1979. Since the employee had been terminated sometime before that date, the insurance was dropped. Paul Eveland, one of the partners, did all of the work thereafter.

The dispositive question, then, is whether one employer can operate two different businesses, one subject to the workmen's compensation law and one exempt, and obtain workmen's compensation insurance for the business which is subject to the law,

without by that act triggering the election of coverage provisions of § 48-106(3) as to both businesses.

We hold that an employer may do so. In *Kaplan v. Gaskill*, 108 Neb. 455, 460, 187 N.W. 943, 945 (1922), this court stated: "The act does not contemplate that a person can be engaged in only one regular business. . . . The compensation act was not intended to impose a charge upon the individual employer, but upon the industry or business or vocation in which he was engaged, on the theory that the industry could bear the loss resulting from personal injuries to its employees, and that the burden could be passed on to the patrons of that industry by charging up such losses to operating expense." In the statute in effect at that time, "employer" is defined essentially as that word is defined in § 48-106(1).

The converse of the situation presented in this case was present in *Campos v. Tomoi*, 175 Neb. 555, 122 N.W.2d 473 (1963). In *Campos* the court held that although the employers were generally farmers, when they operated as a partnership in a commercial-type hay grinding operation for other commercial cattle feeders in the area, for that operation the employers could not avail themselves of the farm labor exemption under the workmen's compensation law. In *Campos* the court cited 99 C.J.S. *Workmen's Compensation* § 33 at 193 (1958). It is there stated: "In accordance with the general rule . . . that an employer may be engaged in a number of separate businesses and occupations, some within the compensation act and some not, the fact that an employer is engaged in farming does not remove from the coverage of the statute another business or occupation carried on by the employer which is otherwise within the coverage of the statute, nor does it subject the farming business to the statute."

We hold that one employer may engage in two separate businesses, one subject to the workmen's compensation law and one exempt from that law,

and that the employer's actions with regard to the business which is subject to the workmen's compensation law do not affect the employer's business which is statutorily exempt from the compensation law. In the instant case appellant was engaged in a farming operation and in a separate business. Appellant's actions in obtaining workmen's compensation insurance coverage for the nutrition service and in letting that coverage lapse did not result in bringing appellant's farming business operation within the workmen's compensation law.

Appellee was injured in the course of employment with his employer in the farming business, which is exempt from the coverage of the workmen's compensation law, and the judgment in favor of appellee under the compensation law must be reversed.

In view of this determination we need not determine the other issues raised by appellant.

The judgment of the Workmen's Compensation Court is reversed and the cause remanded with directions to dismiss the petition.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. PATRICK BRIAN LYNCH, APPELLANT.

340 N.W.2d 128

Filed November 4, 1983. No. 83-032.

1. **Homicide: Evidence: Intent.** The location, nature, and number of wounds inflicted on a victim are circumstances from which a jury can infer the mental process of the one inflicting the wounds.
2. **Homicide: Photographs.** Although gruesome, photographs having probative value outweighing possible prejudice to the accused are admissible.
3. **Sentences.** Under Neb. Rev. Stat. § 83-1,106 (Reissue 1981), one sentenced to life imprisonment is not entitled to credit for time in custodial detention pending disposition of the proceedings on the charge levied.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Affirmed.

Douglas W. Thomson of Thomson & Hawkins, for appellant.

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

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

SHANAHAN, J.

Patrick B. Lynch was charged with first degree murder, namely, homicide with deliberate and premeditated malice or in the perpetration of a robbery. Neb. Rev. Stat. § 28-303 (Reissue 1979). In a jury trial Lynch was acquitted of homicide during the perpetration of a robbery but was convicted of homicide with deliberate and premeditated malice. After his conviction and sentence to life imprisonment in the Nebraska Penal and Correctional Complex, Lynch appeals to this court. We affirm.

The homicide victim, age 57, lived in West Omaha. The victim's daughter, age 20, attended university on the east coast and returned home on December 31, 1981, to stay with her father and share a two-bedroom apartment. In 1980 the victim had informed his daughter that he was a homosexual, and was quite open about his homosexuality.

In the early evening hours of January 2, 1982, the victim went to the home of one of his homosexual acquaintances, viewed pornographic films, and drank wine. Around 9:30 p.m., the victim returned to his apartment, and having informed his daughter that he was "going to go out and see what was going on," left the apartment at 10 o'clock. After her father had left the apartment, the daughter went to her bedroom, shut the door, and went to bed.

Lynch, who had ridden from downtown to West Omaha in the pickup of an "older gentleman," was hitchhiking for return to downtown Omaha. The victim, alone and driving toward downtown, offered Lynch a ride. Lynch accepted, and in the course of

the trip informed the victim that he was "down on his luck." The victim indicated that there might be some money for Lynch, if Lynch wanted to be the victim's "friend for a while." Lynch responded that this would be "fine," and the pair proceeded to the victim's apartment. Upon arrival at the victim's apartment complex, Lynch felt that the victim was acting "a little weird." After Lynch had opened a pocketknife which he carried with him, the two entered the building and went to the victim's apartment on the fourth floor.

During the absence of her father that evening, the victim's daughter had remained in her bedroom but had not fallen asleep. At approximately 10:40 p.m. the daughter heard the voices of two people entering the apartment. She recognized the voice of her father. After entering the apartment Lynch and the victim walked down a hallway to the living room, where the victim offered a drink to Lynch. The two then went to the victim's bedroom and the door was closed. In the bedroom the victim disrobed and invited Lynch to engage in sexual acts. When Lynch declined, the victim put his naked body against Lynch. From his pocket Lynch pulled the pocketknife and stabbed the victim once in the chest. When that wounding did not "stop" the victim, Lynch stabbed the victim in the neck. The victim fell bleeding to the floor. Lynch watched for a while, thought the victim was dead, and started to leave. As Lynch was leaving the bedroom, the victim reached up to grab Lynch. A struggle followed, during which Lynch stabbed the victim several additional times. According to Lynch, "I just slit his throat, man."

During this episode, the victim's daughter had remained behind the closed door of her bedroom. Approximately 10 minutes after Lynch and the victim had entered the bedroom, the daughter heard a "thump" on her father's bed and heard "someone groaning." The daughter surmised "they were hav-

ing sex." The groans stopped and were followed by about 5 minutes of silence, when the daughter heard her father's voice: "You're killing me, you sonofabitch." About "a minute later" a hall light came on. Someone was operating the shower in the bathroom adjacent to the victim's bedroom. Hearing someone go back into her father's bedroom, the daughter opened her bedroom door and saw her father lying "in the doorway of his bedroom." Her father's naked body was covered with blood, and was not moving. While someone was "rustling" in her father's bedroom, the girl left and ran to a neighbor's apartment to call the police.

Ten minutes after the daughter had left the apartment, four uniformed policemen responded to the call. As the police approached the victim's apartment, the door was slightly ajar. Upon entering the apartment the police found Lynch in the hallway leading to the victim's bedroom. In the doorway of the bedroom the police discovered the wounded victim, with his throat cut "wide open." There was blood on the bottom of the victim's feet. Shortly after handcuffs had been applied to him, Lynch volunteered to an officer, "It's in my back pocket." The officer removed the pocketknife from the back pocket of Lynch's jeans. Also, a $20 bill was removed from Lynch. Throughout this time, Lynch was "real calm" and cooperative. Lynch also informed the police about a sack in the bathroom—a sack containing miscellaneous jewelry of the victim.

In his interview by the police Lynch never mentioned defending himself or being afraid, and did not mention any attempt to ward off advances made by the victim. Lynch did acknowledge that he received $20 from the victim that night at the apartment.

A pathologist testified concerning the cause of the victim's death. According to the pathologist, the external examination of the victim revealed "multiple cutting and stabbing wounds" about the neck, left side of the chest, and right side of the back. The

pathologist described the difference between a "cutting wound" and a "stabbing wound." A cutting wound was "longer than it is deep," and is inflicted in a more horizontal plane. A stabbing wound, deeper than it is long, has more penetration. There were four separate cutting wounds to the neck, which severed arteries and veins, including the jugular veins—principal veins carrying blood from the head and the neck. Severed jugular veins produce extensive bleeding. A stab wound was located in the lower right side of the neck. In addition to the five wounds in the neck, there was a stab wound in the left side of the chest which penetrated the right ventricle of the victim's heart and resulted in bleeding into the heart sac. The pathologist further observed a stab wound in the thorax, that is, in the upper right part of the victim's back. There were seven separate stabbing and cutting wounds and two fractures of costal cartilage of the victim's chest. Cause of death was "hemorrhage or bleeding due to multiple stabbing and cutting wounds of the neck and chest." The pathologist stated that the wounds in the neck and throat of the victim caused the loss of much blood and were "lethal," and that the wounds in either the victim's heart or in his throat could have been fatal. As summarized by the pathologist after describing the victim's wounds, "certainly the aggregate of all of the wounds are, in my opinion, lethal injuries." The victim was 5 feet 8½ inches tall and weighed 140 pounds. According to the pathologist, the knife taken from Lynch could have inflicted the wounds on the victim.

During the course of trial, counsel for Lynch objected to five photographs of the victim which were taken at the time of the autopsy. The objection was based on irrelevancy and the inflammatory nature of the photographs. The pathologist referred to these photographs in the course of his testimony about the nature and location of the wounds and the cause of death.

Lynch did not testify, and rested his case immediately after the conclusion of the State's case. The jury returned a verdict of guilty to the charge of homicide with deliberate and premeditated malice. After considering evidence regarding the aggravating and mitigating circumstances of the crime, the trial court imposed a life sentence on Lynch.

Lynch alleges four errors in connection with his trial: (1) The trial court's failure to grant a continuance; (2) The insufficiency of evidence concerning premeditation in his conviction of murder in the first degree; (3) The abuse of discretion by the trial court in admitting photographs of the victim at the time of the autopsy; and (4) The trial court's failure to give credit for the time Lynch was in custody awaiting trial and sentence.

Because the elements of murder in the first degree include "deliberate and premeditated malice," there is a mental process, namely, the subjective state of the perpetrator, which can be proved by circumstantial evidence. See, *State v. Beers*, 201 Neb. 714, 271 N.W.2d 842 (1978); *State v. Payne*, 205 Neb. 522, 289 N.W.2d 173 (1980). Concerning the element of premeditation, "the time required may be of the shortest possible duration. The time may be so short that it is instantaneous, and the design or purpose to kill may be formed upon premeditation and deliberation at any moment before the homicide is committed . . . ." *Savary v. State*, 62 Neb. 166, 170, 87 N.W. 34, 36 (1901). See, also, *State v. Nokes*, 192 Neb. 844, 224 N.W.2d 776 (1975).

In this case the evidence showed that Lynch entered the apartment after he had opened the closed blade of the pocketknife he was carrying. With that knife Lynch was in his victim's bedroom for a period of approximately 15 minutes. During that time, Lynch inflicted seven separate wounds upon his victim, namely, one in the back, another in the chest and heart, and five more on the neck, including both the right and left sides of his victim's throat. Also,

after the wounded victim had collapsed on the bedroom floor, Lynch renewed the assault during his departure from the bedroom. The butchery culminated in Lynch's description: "I just slit his throat, man." The location, nature, and number of wounds inflicted are circumstances from which the jury could and did draw the inference that Lynch, with "deliberate and premeditated malice," killed his victim. See, *Com. v. Almon*, 387 Mass. 599, 441 N.E.2d 758 (1982); *State v. Snowden*, 79 Idaho 266, 313 P.2d 706 (1957); *Sireci v. State*, 399 So. 2d 964 (Fla. 1981); *People v. Johnson*, 93 Mich. App. 667, 287 N.W.2d 311 (1979). The wounds were the windows of the mind through which the jury could see Lynch's subjectivity when he committed the act.

The State was required to prove that Lynch killed his victim with deliberate and premeditated malice, that is, provide proof of the cause of death and the mental elements of premeditation and malice regarding the homicide. If the photographs of the victim at the autopsy are relevant, such photographs, although gruesome, are admissible. See, *State v. Rowe*, 210 Neb. 419, 315 N.W.2d 250 (1982); *State v. Blackwell*, 184 Neb. 121, 165 N.W.2d 730 (1969). The police found a knife in Lynch's pocket when they apprehended him in the apartment. According to the pathologist, that knife could have been the instrument used to inflict the fatal wounds. The photographs tended to correlate the victim's wounds with Lynch's knife. Such evidence depicted by the photographs was relevant. See, *State v. Wilbur*, 186 Neb. 306, 182 N.W.2d 906 (1971); *State v. Jones*, 213 Neb. 1, 328 N.W.2d 166 (1982); *State v. Partee*, 199 Neb. 305, 258 N.W.2d 634 (1977).

The photographs also showed a wound extending from below the victim's left ear and running forward to the "Adam's apple," another wound on the left neck parallel to but below the wound just mentioned, an additional, deep wound on the right side of the victim's throat, still other wounds on the vic-

tim's throat, and additional wounds on the victim's back and chest. These photographs show a series of systematic, sadistic, and savage slashes in the victim's throat—visual proof from which a jury could reasonably infer that the homicide was committed with "deliberate and premeditated malice." See, *State v. Lester*, 294 N.C. 220, 240 S.E.2d 391 (1978); *Commonwealth v. Sullivan*, 472 Pa. 129, 371 A.2d 468 (1977). According to the pathologist, the cause of death was "bleeding due to multiple stabbing and cutting wounds of the neck and chest." Illustration of the wounds in conjunction with the pathologist's testimony, that is, the location, number, and nature of such wounds, supplied evidence to prove the cause of death assigned by the pathologist. Establishing the cause of death is indispensable in criminal homicide cases. Generally, relevant evidence regarding causation of death in homicide cases is admissible, and the photographs in question were admissible under the circumstances. See, *State v. Wilbur*, *supra*; *State v. Partee*, *supra*; *State v. Jones*, *supra*.

Gruesome crimes produce gruesome photographs. Gruesomeness by itself is not a sufficient reason to keep photographs from the jury, if the probative value of the photographs outweighs the possible prejudice to one accused of a crime. See *State v. Rowe*, *supra*. The photographs in this case had probative value regarding the elements of the charge which the State was required to prove against Lynch. Consequently, such photographs were admissible in this case.

Near the first of July 1982, Lynch's case was set for trial on July 12. Subsequently, in communications with the trial court, Lynch's counsel, Thomson, assured the trial court that he would be ready for trial on July 13 and July 15, respectively, but finally informed the court that he would not be able to commence trial until the week of July 19. Around July 12, defense counsel told the court that he would not

be able to try the case during the 2-week jury panel summoned in July 1982. As a result of conference calls with Lynch's counsel in Minnesota, the court and counsel agreed that trial would commence on September 27. On September 27 Thomson was occupied in a trial in Minnesota, although an associate in Thomson's firm did appear on September 27 for jury selection and requested a 24-hour continuance. Hawkins, the associate attorney who appeared on behalf of Thomson the morning of trial, had been working on the Lynch case with Thomson since early in 1982 and had appeared with Thomson at pretrial hearings on motions to suppress some of the State's prospective evidence. The State objected to the continuance, because there were problems either with travel or availability of witnesses. In denying the continuance the trial court undoubtedly took into consideration the previous continuance granted to accommodate Lynch's counsel; an agreed trial date; the presence of Lynch's counsel, who had participated in pretrial proceedings; and difficulty in the orderly presentation of the State's case in the event that a continuance were granted. An application for a continuance is addressed to the sound discretion of the trial court and any ruling thereon will not be disturbed, unless it appears that the rights of the defendant were prejudiced by the denial of the continuance. See *Kennedy v. State*, 171 Neb. 160, 105 N.W.2d 710 (1960). In this case there has been no prejudice demonstrated as a result of the trial court's denying the continuance, and, consequently, there is no merit to Lynch's claim of error in denial of the continuance.

Lynch claims that he is entitled to credit for the time in custody pending trial and sentence. Lynch is incorrect. First, any credit for time spent in custody pending disposition of a charge is a matter within the discretion of the trial court. See, *Addison v. Parratt*, 208 Neb. 459, 303 N.W.2d 785 (1981); *State v. Prosser*, 209 Neb. 766, 311 N.W.2d 525 (1981). Sec-

ond, the purpose of credit under Neb. Rev. Stat. § 83-1,106 (Reissue 1981) is to avoid the situation where one convicted of a crime is incarcerated for a period greater than the maximum term of years prescribed as punishment for the particular offense. In Lynch's case the sentence was life imprisonment. By its very nature the sentence is indefinite. It is not possible to determine the number of years which Lynch may live serving his life sentence. Consequently, Lynch's life sentence has no term of years from which time in custody can be deducted. In the case of a life sentence, it is impossible to impose punishment exceeding the term prescribed by statute. See, *State v. Makal*, 106 Ariz. 591, 480 P.2d 347 (1971); *Baynor v. Warden, Maryland House of Correction*, 391 F. Supp. 1254 (D. Md. 1975). There has been no abuse of discretion by the trial court regarding Lynch's sentence of life imprisonment.

The judgment and sentence of the District Court are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL J. WYMAN, APPELLANT.

339 N.W.2d 756

Filed November 4, 1983. No. 83-085.

1. **Right to Counsel.** The right of counsel, accorded under the sixth amendment to the U.S. Constitution, cannot be manipulated so as to obstruct the orderly procedure in the courts or to interfere with the fair administration of justice.
2. _____. Defendant, by electing to act as his own counsel after the refusal of the court to permit lay counsel to appear for him, must be held responsible for his ineptness of counsel even though that counsel was himself.

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

Tessendorf, Milbourn & Fehringer, P.C., for appellant.

Paul L. Douglas, Attorney General, and Mark D. Starr, for appellee.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

WHITE, J.

This is an appeal from a judgment of conviction on two counts of operating a motor vehicle while the operator's license was suspended. Appellant, in his sole assignment of error, contends that his constitutional rights were violated in that the county court failed to appoint counsel at a critical stage of the criminal proceeding against him.

During appellant's arraignment in county court and after the court fully advised him of his constitutional rights, including the right to appointed counsel, appellant was asked if he desired counsel. His answer was "No." At a later stage in this almost mind-boggling proceeding, the appellant was again advised of his right to counsel. He refused, since the court would only appoint members of the bar, whom appellant did not trust, and not a lay adviser.

Three separate county judges spent countless hours patiently dealing with the bizarre pleadings and numerous motions filed by appellant. As far as it is discernible, appellant's principal point was that the county court lacked jurisdiction, since the State of Nebraska had not defined legal tender. Consequently, appellant argues the court could not impose a penalty in terms of nonlegal tender. Appellant, in support of the attack on jurisdiction, cited references to cases decided under the law merchant, early decisions of the U.S. Supreme Court, and from a majority of the highest state courts, none of which had the slightest application to the question at hand.

In order to bring the matter to some sort of conclusion, the court notified the appellant on April 15,

1982, that no motions would be considered after April 23, 1982. A jury was selected on April 15, 1982. A motion for continuance was set for hearing on April 26, 1982, and trial was due to commence on April 28, 1982.

Appellant's motion for continuance recited in part: "And since I am limited in my choosing to a member of the bar, (which I honestly can not trust) I am forced to try and defend myself . . . ." At the hearing on the motion for continuance 2 days before trial, the following dialogue took place. "THE COURT: . . . Are you asking for court appointed attorney at this time? MR. WYMAN: If that's what it's going to take, because I can't afford counsel, but yet I don't understand the law. I don't fully understand everything that I'm being charged with. THE COURT: You demand in your assistance of counsel, spokesman of your choice, who is not a member of the bar. That's not provided for in the state of Nebraska. Also this motion is out of time because you were told to have all but two motions in at — by last Friday. MR. WYMAN: I would object again." The appellant then waived jury trial, and on June 23, 1982, he was convicted of both counts.

Appellant's appointed counsel in this appeal urges us to conclude that at the April 26, 1982, hearing, appellant requested appointed counsel. In the entire context of this convoluted record, it is apparent that his demand was again for lay counsel, who would again assert the jurisdictional argument of the State's failure to specify legal tender.

The bar and courts of this state had a proud tradition of supplying appointed, free counsel to indigents long before the command of the U.S. Supreme Court required it. The appellant deliberately set out on a course to make a mockery of that proud tradition. It is well established that the right to counsel may be waived. *Case v. State*, 177 Neb. 404, 129 N.W.2d 107 (1964). Appointed counsel was waived on three occasions. The appellant's clear waiver will not be set

aside on the basis of a single ambiguous exchange. "[T]he right of counsel, accorded under the Sixth Amendment, cannot be manipulated as to obstruct the orderly procedure in the courts or to interfere with the fair administration of justice." *State v. Coleman*, 190 Neb. 441, 444, 208 N.W.2d 690, 692 (1973). See, also, *State v. Addison*, 197 Neb. 482, 249 N.W.2d 746 (1977).

"The defendant by electing to act as his own counsel after the refusal of the court to permit lay counsel to appear for him must be held responsible for his ineptness of counsel even though that counsel was himself." *State v. Brashear*, 201 Neb. 582, 584, 270 N.W.2d 924, 925 (1978).

The lower courts, with great restraint and professionalism, accorded appellant the fullest measure of his rights. His charade has now come to an end.

AFFIRMED.

DAVID E. NICHOLSON, JR., APPELLEE, V. CITY OF BELLEVUE, APPELLANT, COMMISSIONER OF LABOR, APPELLEE.

339 N.W.2d 758

Filed November 4, 1983. No. 83-169.

1. **Employment Security Law: Appeal and Error.** Appeals from a determination by a claims deputy to an appeal tribunal, under Neb. Rev. Stat. § 48-634 (Cum. Supp. 1982) of the Employment Security Law, must be filed within 20 days of the date of mailing of the notice of determination, except that for good cause shown the tribunal may take jurisdiction over appeals filed outside the prescribed appeal period.
2. _____: _____. Decisions of an appeal tribunal appealed to the District Court shall be heard de novo on the record, except that the court on its own motion may order additional evidence to be taken before it.
3. _____: _____. Appeals from the District Court involving the Employment Security Law are heard by this court de novo on the record.
4. **Appeal and Error: Time.** Generally, the right of appeal is statu-

tory, and the time requirements set forth in the statute are mandatory and must be complied with before the appellate tribunal acquires jurisdiction of the subject matter.

5. **Employment Security Law: Time: Appeal and Error.** A claim of newly discovered evidence will not sustain the appellant's burden of showing good cause for filing a late appeal under Neb. Rev. Stat. § 48-634 (Cum. Supp. 1982) of the Employment Security Law, unless it appears that such evidence, if offered and admitted in the former proceeding, probably would have produced a different result. In other words, the appellant must demonstrate that with the newly discovered evidence he or she is able to make out a valid claim or defense before an appeal tribunal may take jurisdiction over an appeal filed beyond the 20-day limitation.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Reversed and remanded with directions.

John E. Rice, for appellant.

David E. Nicholson, Jr., pro se.

Paul D. Kratz, for appellee Commissioner of Labor.

KRIVOSHA, C.J., BOSLAUGH, WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

PER CURIAM.

This is an appeal from an order of the District Court involving a claim for unemployment benefits under the provisions of Neb. Rev. Stat. §§ 48-601 et seq. (Reissue 1978). The order remanded the case to the Nebraska Appeal Tribunal, with directions to conduct a hearing on the merits of petitioner's appeal of the denial of his claim for unemployment compensation by a Department of Labor claims deputy.

The petitioner, David E. Nicholson, Jr., was separated from his employment with the respondent City of Bellevue on February 12, 1981. He filed a claim for unemployment compensation under the Employment Security Law cited above. Following a review of the records, his claim was denied by the deputy because of gross misconduct. A copy of the "Notice

of Deputy's Determination" was mailed to Nicholson on April 15, 1981. That notice also contained a provision entitled "APPEAL RIGHTS" which advised that the recipient had 20 days from the date of mailing in which to appeal the decision.

It was not until July 29, 1982, that Nicholson filed his appeal and request for hearing with the Nebraska Department of Labor, Division of Employment. Attached to that appeal was a statement signed by the petitioner as follows: "I am late in filing my appeal because: 1.) The FBI just recently completed their investigation regarding the incidents leading to my termination. Until this investigation was completed I felt I had no concrete evidence to present at a hearing in my behalf to the Tribunal for contradiction of gross misconduct. 2.) I have been waiting for the pending results from the complaint filed with the HUD Regional office of Fair Housing & Employment in Kansas City. Complaint filed 09-05-80."

An order was entered on July 30, 1982, by the chief administrative law judge of the Nebraska Appeal Tribunal, which provided in part as follows: "The claimant's appeal was not taken within the statutorily prescribed period. Good cause for said late filing has not been shown. As the appeal is untimely, the Tribunal has no jurisdiction to entertain it.

"The exhibits before the Tribunal revealing no patent defect in the Deputy's determination, it is ordered, therefore, that said appeal be and the same is hereby dismissed."

The petitioner filed a petition for judicial review in the District Court of Douglas County on August 30, 1982, alleging primarily "[n]ewly discovered evidence, material for the petitioner, which could not, with reasonable diligence, have been discovered, and produced at a hearing or trial." A hearing was had on that petition, at which time, without objection, the testimony of David Nicholson was offered,

together with a certified transcript of all documents appearing in the files of the Division of Employment of the Department of Labor relating to this matter.

Also received was a memorandum of the Federal Bureau of Investigation dated February 17, 1981, relating to an inquiry by Nicholson as to whether an investigation of him as to irregularities in his job performance for the City of Bellevue was in progress, and a copy of a letter from the FBI to the acting U.S. attorney in Omaha dated June 24, 1981, indicating that no violation by Nicholson had occurred within the jurisdiction of the FBI. Nicholson's testimony generally indicated that he knew he had but 20 days to appeal; that he immediately proceeded to attempt to get information to refute the charge of gross misconduct; and that he went to the FBI, received the documents set forth above, and filed his appeal in July of 1982.

On the basis of that record the District Court entered an order finding that the evidence offered before it was not considered by the chief administrative law judge; that such evidence constituted "good cause for jurisdiction by the Tribunal over this appeal, per Neb. Rev. Stat. § 48-634 (1982 Cum. Supp.)"; and ordered the matter "remanded to the Nebraska Appeal Tribunal for a hearing on the Petitioner's appeal of the deputy's determination of April 15, 1981."

Neb. Rev. Stat. § 48-634 (Cum. Supp. 1982) provides in part: "The claimant . . . may file an appeal from such determination [made by a claims deputy] with an appeal tribunal. Notice of appeal must be in writing and must be delivered and received within twenty days after the date of mailing of the notice of determination . . . . For good cause shown, the tribunal may also take jurisdiction over appeals filed outside the prescribed appeal period."

Section 48-631, cited by the petitioner, does not, as urged by him, support the proposition that when good cause is shown, the Nebraska Appeal Tribunal

must have a hearing on a denial of unemployment compensation within 2 years. That section merely permits the deputy to reconsider a determination when he finds an error in computation or identity, or that wages pertinent but not considered have been newly discovered, or that benefits have been allowed or denied or the amounts fixed on the basis of misrepresentations of fact, "but no such redetermination shall be made after two years from the date of the original determination."

Decisions of an appeal tribunal may be appealed within 30 days to the District Court, which shall consider the matter de novo on the record, except that the court on its own motion may order additional evidence to be taken before it. Neb. Rev. Stat. §§ 48-638 (Cum. Supp. 1982) and 48-639 (Reissue 1978).

An appeal to this court is heard de novo on the record. *Erspamer Advertising Co. v. Dept. of Labor*, 214 Neb. 68, 333 N.W.2d 646 (1983). We are required in this instance to search the record and determine whether the failure of the appeal tribunal to find good cause to take jurisdiction over an appeal filed 15 months after the statutory limitation was an abuse of discretion.

Generally, the right of appeal is statutory, and the time requirements set forth in the statute are mandatory and must be complied with before the appellate tribunal acquires jurisdiction of the subject matter. *Lydick v. Johns*, 185 Neb. 717, 178 N.W.2d 581 (1970). Without the "good cause" provision, the administrative appeal was clearly out of time and the appeal tribunal would have acquired no jurisdiction.

Section 48-634 does not define "good cause." It is Nicholson's contention that good cause existed because he suffered from unavoidable misfortune in not being able to secure his evidence on time and that he now has newly discovered evidence. These are some of the grounds for the granting of a motion for a new trial filed in the District Court out of time.

See Neb. Rev. Stat. §§ 25-1145 and 25-2001 (Reissue 1979). However, a new trial will not be granted for newly discovered evidence unless it appears that if offered and admitted in the former proceeding it would probably have produced a different result. *Morrill County v. Bliss*, 125 Neb. 573, 251 N.W. 106 (1933).

In other words, unless the newly discovered evidence, when considered together with that available to the claims deputy at the original hearing, makes out a valid claim or defense, as the case may be, the appeal tribunal should not take jurisdiction over an appeal filed beyond the 20-day limitation contained in § 48-634. See *Western Assurance Co. of Toronto v. Klein*, 48 Neb. 904, 67 N.W. 873 (1896).

There was evidence before the claims deputy that Nicholson had released bids submitted by building contractors to other contractors before the letting of contracts, thus allowing an unfair advantage to some contractors. The "newly discovered" evidence offered by the petitioner at the hearing in the District Court merely disclosed that he had violated no laws within the jurisdiction of the FBI. We do not believe that such evidence would have produced a different result in the original hearing.

Furthermore, the record discloses that Nicholson was aware of the 20-day filing rule, yet made no effort to perfect his appeal pending further investigation, and there was no apparent effort by him to inquire of the FBI until 10 months after receiving his notice of claim determination. He has not demonstrated unavoidable misfortune preventing him from filing a timely appeal. See *Nebraska State Bank v. Dudley*, 203 Neb. 226, 278 N.W.2d 334 (1979).

The judgment of the District Court is reversed and the cause is remanded with directions to dismiss the petitioner's appeal.

REVERSED AND REMANDED WITH DIRECTIONS.