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REPORTS OF CASES

DECIDED BETWEEN

APRIL 6, 1984 and JULY 19, 1984

IN THE

Supreme Court of Nebraska

VOLUME CCXVII

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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DURING THE PERIOD OF THESE REPORTS

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Number of District	Counties in District	Judges in District	City
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Second	Sarpy, Cass, and Otoe	Ronald E. Reagan	Papillion
		Raymond J. Case	Plattsmouth
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Third	Lancaster	Robert R. Camp	Lincoln
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		Jerry M. Gitnick	Omaha
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		Keith Howard	Omaha
		Robert V. Burkhard	Omaha
		Stephen A. Davis	Omaha
		Lawrence Corrigan	Omaha
		Theodore Carlson	Omaha
Fifth	Hamilton, Polk, York, Butler, Seward, and Saunders	William H. Norton	Osceola
		Bryce Bartu	Seward
Sixth	Burt, Thurston, Dodge, and Washington	Mark J. Fuhrman	Fremont
		Darvid D. Quist	Blair
Seventh	Fillmore, Saline, Thayer, and Nuckolls	Orville L. Coady	Hebron

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Tenth	Adams, Clay, Phelps, Kearney, Harlan, Franklin, and Webster	Bernard Sprague William G. Cambridge	Red Cloud Hastings
Eleventh	Hall and Howard	Joseph D. Martin Richard L. DeBacker	Grand Island Grand Island
Twelfth	Sherman and Buffalo	DeWayne Wolf	Kearney
Thirteenth	McPherson, Logan, Lincoln, Dawson, Keith, Arthur, Grant, Hooker, and Thomas	Hugh Stuart John P. Murphy	North Platte North Platte
Fourteenth	Chase, Hayes, Frontier, Furnas, Red Willow, Hitchcock, Perkins, Gosper, and Dundy	Jack H. Hendrix	McCook
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CUMULATIVE LIST OF CASES DISPOSED OF WITHOUT OPINION

No. 83-077: **State ex rel. NSBA v. Tomek.** Application for reinstatement to the NSBA is approved.

No. 83-134: **Roger Ackerman Investment v. Rainwood Financial Corp.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 83-211: **Hatfield v. Bishop Clarkson Memorial Hospital.** Stipulation allowed; appeal dismissed.

Nos. 83-402, 83-403: **State v. Ellis.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 83-435: **Schnell v. Schnell.** Stipulation allowed; appeal dismissed.

No. 83-454: **Petsick v. Starr Homes, Inc.** By order of the court, appellant's motion for an extension of brief date is overruled; judgment affirmed; see Rule 7A.

No. 83-556: **Neeman v. Ginsburg et al.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 83-592: **Elms v. Johnson.** Motion of appellant to dismiss appeal sustained; appeal dismissed at costs of appellant.

No. 83-639: **State v. White.** Judgment affirmed; see Rule 7A.

No. 83-670: **State v. Lopez.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 83-672: **Makelin v. State Dept. of Roads.** Stipulation allowed; appeal dismissed.

No. 83-695: **Hochstein v. Hochstein.** Stipulation allowed; appeal dismissed.

No. 83-714: **Lenz v. Burr.** By order of the court,

appeal dismissed for failure to file briefs.

No. 83-719: **State v. Perry.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 83-738: **Aulrich v. St. John's Center.** Stipulation allowed; appeal dismissed.

No. 83-748: **Dana F. Cole & Company v. Byerly.** Stipulation allowed; judgment vacated and cause remanded.

No. 83-785: **Farmers and Merchants Bank v. Marsh.** Stipulation allowed; appeal dismissed.

No. 83-807: **Brown v. State, Beatrice State Developmental Center.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 83-875: **State v. Velder.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 83-884: **Lockwood v. Lockwood.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 83-896: **State v. Allen.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 83-900: **State v. Stolzenberg.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 83-918: **State v. Aden.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 83-931: **Ingwerson v. Baney.** By order of the court, appeal dismissed for failure to file briefs.

No. 83-932: **Foral v. Foral.** Stipulation allowed; appeal dismissed.

No. 83-935: **In re Interest of Murphy, State v. Murphy.** Stipulation allowed; appeal dismissed.

No. 83-944: **Foster v. Remington Arms Co., Inc.** Stipulation allowed; appeal dismissed.

Nos. 83-947, 83-948: **State v. Higer.** Judgment affirmed; see Rule 7A.

No. 83-950: **State v. Bentley.** Judgment affirmed; see Rule 7A.

No. 83-960: **Hammond v. Dady.** By order of the court, judgment vacated and cause remanded for further proceedings.

No. 83-964: **State v. Rhoden.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 83-973: **State v. Lonsdale.** Judgment affirmed; see Rule 7A.

No. 83-976: **State ex rel. Douglas v. Calvary Academy.** By order of the court, motion for third extension of appellant's brief date is denied; appeal is dismissed for failure to file briefs.

No. 84-003: **State v. Robinson.** Judgment affirmed; see Rule 7A.

No. 84-004: **Warren v. Warren.** Affirmed as modified by order of the court.

No. 84-005: **Stungis v. City of Omaha.** Stipulation allowed; appeal dismissed.

No. 84-008: **Ott v. Karloff.** Stipulation allowed; appeal dismissed at costs of appellant.

No. 84-014: **Foral v. Foral.** Stipulation allowed; appeal dismissed.

No. 84-020: **State v. Roland.** Judgment affirmed; see Rule 7A.

No. 84-022: **Frizzell v. City of Omaha.** Stipulation allowed; appeal dismissed.

No. 84-023: **State v. Moore.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-025: **Union Pacific Railroad Co. v. Hupp.** Stipulation allowed; appeal dismissed.

Nos. 84-032, 84-033: **State v. Cooks.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-035: **State v. James.** By order of the court, appeal dismissed for failure to file briefs.

No. 84-038: **State v. Brick.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-040: **Toussaint v. Toussaint.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 84-043: **Nichols v. State.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 84-045: **State v. Johnson.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-047: **Kraner v. Kraner.** Stipulation allowed; appeal dismissed.

No. 84-048: **In re Estate of Matthews, Freed v. Stephens.** On court's motion, appeal dismissed as frivolous; judgment affirmed; appeal dismissed.

No. 84-051: **State v. Crawford.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-058: **State v. Ricky Jones.** Stipulation allowed; appeal dismissed.

No. 84-059: **State v. Paul Jones.** Stipulation allowed; appeal dismissed.

No. 84-060: **Wearin v. Wearin.** Motion of appellant to dismiss appeal sustained; appeal dismissed pursuant to stipulated settlement.

Nos. 84-062, 84-063: **State v. Shaddy.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-064: **State v. Dean.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-068: **Woodworth v. Woodworth.** Affirmed as modified by order of the court.

No. 84-070: **The Golden Five, Inc. v. Nebraska Dept. of Health.** Stipulation allowed; appeal dismissed.

No. 84-076: **Fenwick v. Hahn.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 84-084: **State ex rel. Douglas v. Schroeder.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 84-090: **State v. Day.** Judgment affirmed; see Rule 7A.

No. 84-091: **State v. McCoy.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-094: **State v. Melvin.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-095: **State v. Hawk.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-099: **State ex rel. Stahmer v. Boyle.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 84-101: **State v. Hardin.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-102: **State v. Andrews.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-103: **State v. Fisher.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

Nos. 84-104 through 84-112: **State ex rel. Douglas v. Faith Baptist Church.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

Nos. 84-115, 84-116: **State v. Thornburg.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-118: **Smith v. Root.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 84-119: **State v. Benson.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-120: **State v. Norris.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-121: **State v. Henderson.** Motion of court-appointed counsel for leave to withdraw appearance

sustained; judgment affirmed; see Rule 3B.

No. 84-123: **State v. Stull.** Judgment affirmed; see Rule 7A.

No. 84-124: **Fisher v. Fisher.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

Nos. 84-125, 84-126: **State v. Rodriguez.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-129: **State v. McCoy.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-133: **State v. Hollman.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-143: **State v. Brown.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-146: **Claussen v. The Vit-E-Men Co., Inc.** Stipulation allowed; appeal dismissed at costs of appellant.

No. 84-153: **State v. Uribe.** Motion of appellant to amend the record is denied; judgment affirmed; see Rule 7A.

No. 84-157: **State v. Bessent.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-160: **Five Points Bank v. Boucher Rural Products, Inc.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 84-161: **Schwisow Enterprises, Inc. v. Menke Constr. Co., Inc.** Stipulation allowed; appeal dismissed at costs of appellant.

No. 84-162: **State v. Brown.** By order of the court, appeal dismissed for failure to file briefs.

No. 84-163: **Village of Trumbull v. City of Hastings.** By order of the court, appeal summarily dismissed; see Rule 7.

No. 84-169: **Mid-State Sales Co. v. Carlton.** Stipulation allowed; appeal dismissed at costs of appel-

lant.

No. 84-170: **Lamb v. Lamb.** By order of the court, appeal dismissed for failure to file briefs.

No. 84-171: **Dahn v. Gibbs.** Affirmed as modified by order of the court.

No. 84-176: **State v. Buller.** Stipulation allowed; appeal dismissed at costs of appellant.

No. 84-181: **State v. Robbins.** Judgment affirmed; see Rule 7A.

No. 84-182: **In re Interest of Requena, State v. Tuder.** Stipulation allowed; appeal dismissed.

No. 84-183: **State v. Adkins.** Judgment affirmed; see Rule 7A.

Nos. 84-184, 84-185: **State v. Pratt.** Motion of appellant, pro se, to dismiss appeal sustained; appeal dismissed.

No. 84-197: **State v. Kiger.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-203: **Vetro v. Vetro.** Stipulation allowed; appeal dismissed.

No. 84-204: **State v. Rogers.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 84-212: **City of North Platte v. North Platte Police Union.** Stipulation allowed; appeal dismissed.

No. 84-215: **State v. Russell.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-216: **State v. Shook.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-220: **Hanway v. Hanway.** Stipulation allowed; appeal dismissed.

No. 84-221: **State v. Markus.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-222: **State v. Johnson.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-225: **Maresh v. Tobler.** Stipulation allowed; appeal dismissed at costs of appellant.

No. 84-227: **State v. Neemann.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-228: **Foreman v. Foreman.** Affirmed as modified by order of the court.

No. 84-230: **Cillessen v. Cillessen.** Stipulation allowed; appeal dismissed.

No. 84-232: **State v. Thomas.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-234: **State v. Kelly.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-235: **State v. Barnes.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-237: **Centerre Bank v. Reitz.** Stipulation allowed; appeal dismissed.

No. 84-242: **Robley v. Robley.** Stipulation allowed; appeal dismissed with prejudice to the appellant.

No. 84-247: **State v. Hairston.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-256: **State v. Grant.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-257: **State v. Harrod.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-258: **Marmon v. Marmon.** Stipulation allowed; appeal dismissed.

No. 84-264: **State v. Kellerman.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-273: **Hurley v. State.** Affirmed as modified by order of the court.

No. 84-276: **Omaha Police Union v. City of**

Omaha. Stipulation allowed; appeal dismissed.

No. 84-281: **State v. Moneyhun.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-298: **Haug v. Krivosha et al.** Upon recommendation of prehearing conference officer and upon the court's own motion, case is summarily dismissed for the reason that the appeal is frivolous; affirmed; see Rule 7A.

No. 84-312: **Crane v. Crane.** Affirmed as modified by order of the court.

No. 84-315: **Sivadge v. Sivadge.** Stipulation allowed; appeal dismissed.

No. 84-327: **State v. Santos.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 84-338: **Smith v. Smith.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 84-339: **State v. Timm.** Motion of appellant to proceed pro se denied; motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-379: **State v. Parker.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 84-401: **Commercial Nat. Bank & Trust Co. v. Jones.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 84-417: **Liebl v. Vacca.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 84-443: **Neuharth v. School District of Hershey.** Stipulation allowed; appeal dismissed.

IN MEMORIAM

JOHN EDWARD NEWTON

And now, on this twenty-ninth day of May 1984, at the hour of nine a.m., the Supreme Court of the State of Nebraska convened for its June term of court, which term started on this day. Prior to hearing the regular business of the court, resolutions were received in memory of John Edward Newton, a former Justice of this court who departed this life on the twenty-sixth day of March 1984.

CHIEF JUSTICE NORMAN KRIVOSHA.

On behalf of the court, I should like to publicly thank Mr. Robert G. Scoville, a member of this bar residing in South Sioux City, Nebraska, for his service as chairman of the committee selected to present such resolutions. The members of the committee will be presented to the court by the chairman as their resolutions are offered to the court.

HONORABLE ROBERT G. SCOVILLE.

MAY IT PLEASE THE COURT, CHIEF JUSTICE KRIVOSHA, HONORABLE JUSTICES, MR. AND MRS. TUNNICLIFF, AND FAMILY OF JUDGE NEWTON:

It is trite but true that it is a distinct honor to be chairman of the memorial committee to honor Judge John E. Newton here today. It is all the more so for the fact that I have had the privilege of serving with two prominent members of the Nebraska bar and bench—former Chief Justice Paul White, and past chairman of the Nebraska House of Delegates, Tom Brogan from Norfolk.

John Edward Newton was a child of the hills of the Missouri River valley of northeast Nebraska. He was born of pioneer stock on April 4, 1904, in Ponca, Dixon County, Nebraska, the son of Oliver I. Newton and Mary Stough

Newton. His paternal grandparents were among the first settlers of the area, homesteading the farm on the Missouri River where it first turns south to form the eastern boundary of Dixon County in the State of Nebraska.

John Newton was always proud of his heritage. He left his roots only twice—both times he came to Lincoln and both times in the furtherance of the law—once to study the law at the University of Nebraska and the second time to serve as Justice of the highest court in Nebraska. Each time he returned to his home, to Ponca and Dixon County.

His first return was in 1926, after his college education at Nebraska, to commence what we remember him for today, his long and honorable career in the law. John Newton began his public service in our profession in 1928 when he was elected Dixon County attorney, a post he held without interruption until 1956.

In 1956 he donned the robes of District Judge of the Eighth Judicial District, then comprised of Cedar, Dakota, Dixon, and Thurston Counties. Judge Newton sat on the trial bench in that district until 1967, when he was appointed by Governor Norbert Tiemann as a Justice of this court following the retirement of Justice Robert C. Brower. John Newton was a member of this judicial body for over 10 years, relinquishing his position on the bench here in 1977 to the Honorable C. Thomas White, who still serves.

John was conservative, looking first to find a reason for deciding a case in what law existed rather than creating new law. He believed in the Constitution, both of the United States and the State of Nebraska, and the right of every citizen to be free from fear of unprovoked transgression. His many years as county attorney formed his thinking in criminal matters. His opinions were often written in such cases. Yet, in all, John Newton tried always to be fair in his judgments, and I for one, as a citizen, as a lawyer, and as an officer of this court, can pay him no higher accolade. One can only reflect on what was written years ago by Calamandrei in his *Eulogy of Judges*: "To say of a judge that his decisions are fine in the sense that they are exquisite essays, exposing a dazzling erudition, is not to

my way of thinking a way to compliment him. Decisions should simply be just, within the limits of human possibility."

John's beloved wife, Bonnie May, whom he married in 1940, is not here today, nor did she live to see John sworn in as a member of this court. But their two children—their daughter, Merrily, now Mrs. J. R. Tunnicliff of Clarinda, Iowa, and their son, John Richard, who now practices medicine in the State of Washington—as well as five grandchildren, are all proudly aware of John Newton's contributions to the bar and bench of Nebraska, and of our high esteem of him for his service to same. Merrily; her husband, Bob; their son, Joseph; and their daughters, Bonnie and Rebecca—who really want me to call them Joe, Buffy, and Becky—are all here today, together with friends and guests.

John Edward Newton died March 26, 1984, in his 80th year. He died in his home in Ponca, Dixon County, Nebraska, among those who knew him best and who were proud to have him serve them and Nebraska as a Justice of this honorable court. His name will not soon be forgotten in those Dixon County hills and valleys along the Missouri that John Newton called home.

It has been said that any court, as an institution, is a lengthened shadow of many men. It is no less true of this court and of the man we remember today. John Newton was tall in stature and cast a long shadow, both upon the northeast Nebraska fields and upon the bench of the Supreme Court of Nebraska.

Few men have as fine an epitaph.

HONORABLE THOMAS E. BROGAN.

MAY IT PLEASE THE COURT, HONORABLE SIRS:

I am privileged to participate in the memorial service for Judge John E. Newton.

My first acquaintance with him was when he was engaged in private practice, and later I appeared before him when he was a District Judge of the Eighth Judicial District and a Justice of this honorable court.

When he first assumed the bench as a District Judge, it

was then necessary to win the seat in an election. He won the election by an overwhelming majority, but, more importantly, he preserved the approval of the electorate throughout his distinguished career to the bench and bar.

As a lawyer, he was a zealous partisan for his client's interests, and he was always fair and honorable in his dealings with other lawyers. His courtroom demeanor as a practicing attorney set an excellent example for the rest of us.

His service as a Judge of the Eighth Judicial District began in January of 1957 and continued through 1966. His dockets were closely supervised so that cases would proceed expeditiously, and the administration of justice was well served.

His rulings during trial were fairly and promptly made. When jury trials were involved—recognizing the fact that most of the jurors were serving for the first time—he always properly oriented them on the conduct of the trial, their duties, and the duties of the attorneys, the court reporter, and the Judge. This demonstrated his consideration of others, as well as his commitment to justice for all.

Judge Newton's career as a practicing lawyer, and as a District Judge, and as a Judge of the Supreme Court were in the highest standards of the profession.

HONORABLE PAUL W. WHITE.
MAY IT PLEASE THE COURT:

I deeply appreciate the privilege of appearing before this court in honor of our past brother, Justice John Newton.

Continuously, for over 35 years, John Newton served the people of the State of Nebraska as a county attorney, then as a District Judge, and for 10 years further as a Justice of this court. The length of time that he served, the qualities of character and intellect that he demonstrated, and his dedication to the ideals of a government under law created in John Newton an imposing stature that symbolized all our ideals and traditions of a great Judge.

I knew Justice John Newton very well personally, and I may say with pride, as one of his close friends. And so, like

many of those that are present here this morning, I carry with me the fondest of recollections of the richness, the stimulation, and the warmth of John Newton's personality. But there is something further. The breadth and the rock solid strength of his character far transcended the scope of his able professional performance and competence. It can truly be said that in memorializing John Newton here this morning we also serve to strengthen the traditions and the ideals of the legal profession and the administration of justice.

These words, although they are true, leave me with a sense of unfulfillment when it comes to John. I had the fortunate experience of being able to observe Justice Newton while a colleague of his on this court. Now, of course, because of the fact that the court speaks as a unit in issuing opinions and in making decisions, it is unfortunate that the individual contribution of a Justice of the Supreme Court is obscured somewhat by the necessity for the secrecy of its operations in the decisional process. It was in the consultation room, and in the give-and-take of the decisional conversations, that Justice John Newton left a particularly strong imprint. Either by way of summary or in clarifying a confused issue, John Newton had a special quality of calm articulation that was of constant help in furthering the deliberative process. There were times, as I well remember, when John Newton, by way of summary, could articulate his conclusions on the issues and the reasons therefor that might have easily been issued as the court's opinion.

Now, John Newton was not only personally of the highest integrity, he was an intellectually honest man. In private discussion, as well as in consultation, you always knew where John Newton stood, and you could rely upon it.

These are some of the ways that John Newton left, in a personal sense, an imprint on and a contribution to the law and to justice in the State of Nebraska. That is not enough. Judges of an appellate court, and, I think, of all courts, are philosophers to a certain extent.

John Newton was a man who stood for something. Ever

mindful of the necessity to balance the equities in a proper case, there were certain basic principles about his philosophy of the law that could not be compromised. I will repeat just a few of them, with which some of the judges here are familiar.

He was fiercely protective of the independence and the equality of the judiciary as one of the three departments of the government. At the same time, he was always respectful of the authority and the independence of the legislative and executive departments of the government. Above all, he understood, and understood how important it was, that since as between departments of government the action of the judiciary is final, this very survival of an independent judiciary requires the exercise of an effective judicial restraint. For this reason, John thought, the very foundations of our system of checks and balances in our government, and the maintenance of the respect of the judiciary, would be lost if we permit the power of the judiciary to usurp the legislative or executive power, or be a vehicle for social reform and to redress all transitory perceived wrongs. To borrow the language and the wisdom of Justice Louis Brandeis, known as a great liberal, Justice Newton was convinced, as Justice Brandeis was, and I quote, "That many times the most important thing we do is not doing."

To John Newton the keystone of our government was the state and federal Constitutions, and these should only be amended by the people. He thought that Constitutions were to be applied in accordance with the intent manifested at the time of their adoption. The idea that a court could operate as a permanent, sitting, constitutional convention was foreign to John Newton's convictions. He believed very strongly in the dual sovereignty of our system of government, and opposed the destruction or invasion of state rights by erosion of the tenth amendment and an undue expansion of the fourteenth amendment.

Turning back to John Newton personally, John Newton was the latest descendant of a pioneer heritage in northeastern Nebraska. Last September, John spent the better part of a day showing me some 1,200 beautiful acres of rich bottomland bordering the Missouri River in Dixon

County; this land being, as he pointed out, a culmination and an accumulation of a heritage of some 100 years. It can truly be said that John Newton arose from the soil and the pioneer spirit of the people of the State of Nebraska.

These words from the past, in closing: We are thankful for the strength of his life, for the influence he had in the home and in the community, for the warmth and the honesty which drew friends to him, and the integrity and the strength of spirit which made us trust and admire him. We are thankful for his long and able dedication to his work in the interests of the people of the State of Nebraska. We are thankful to his family, for his able mind and strong spirit, and for his joy in living in this world.

ASSOCIATE JUSTICE LESLIE BOSLAUGH.

John E. Newton was appointed to the Supreme Court of Nebraska in 1967 to fill the vacancy created by the retirement of the Honorable Robert C. Brower. He served as a member of this court until his retirement on January 31, 1977. It was my pleasure to serve with Judge Newton as a member of the court during his years in office.

Judge Newton served the court and the State of Nebraska well. He approached the questions and issues which come before us with an open mind. But he was a man of firm conviction, and once he had reached a decision, he was resolute. He was never behind in his work, and set a pace which the rest of us found difficult to match.

He had served as District Judge in the Eighth Judicial District for some 10 years. During those years, he had compiled a notebook to which he resorted whenever we came to a standstill on a legal problem. More often than not, Judge Newton could produce, without delay, a Nebraska authority directly in point from that notebook. It was an exercise that seemed to surpass all of the best efforts of the West Publishing Company and its many editors.

John was a man of great loyalty. He was loyal to his family, to his friends, and to his district. Although the Constitution required that he live in Lincoln while serving as a member of the court, he considered Ponca and

Dixon County his home. I recall an occasion when a redistricting proposal was made in the Legislature. Under this proposal 60 percent of the population in the district would have been in Omaha and Douglas County. The remainder of the district would have been a narrow band of counties along the Missouri River, stretching up to Dixon County. Although the proposal was of little personal importance to him, Judge Newton became concerned and considered the proposal to be an affront to the citizens of northeastern Nebraska. Fortunately, the proposal met with no success in the Legislature.

It is with fond memories that I recall my association with Judge Newton. All of his other colleagues on the court have since retired. The state has lost a fine citizen who devoted many years to service of the public with the dignity and integrity that only a man of high character could possess.

We shall miss him greatly.

CHIEF JUSTICE NORMAN KRIVOSHA.

The court is indebted to the members of the committee for the resolutions presented this morning. The resolutions offered this morning are received by the court, and adopted. It shall be the order of this court that all the resolutions offered this morning be extended at length in the journal of this court and printed in the official reports of this court, so that all may see them.

To the family of Justice John E. Newton, we extend our expressions of sympathy and our resolutions of respect. We further direct that copies of these proceedings shall be made available to them.

We are adjourned until 9:45 this morning.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

BENJAMIN L. DOUPNIK, JR., ET AL., APPELLANTS, V. USHER PEST CONTROL CO., A CORPORATION, APPELLEE.

346 N.W.2d 699

Filed April 6, 1984. No. 83-069.

1. **Negligence.** Unless he represents that he has greater or less skill or knowledge, one who undertakes to render services in the practice of a trade is required to exercise the skill and knowledge normally possessed by members of that trade in good standing in similar communities.
2. **Breach of Contract: Proof.** In order to prove a breach of a service contract, the plaintiff must show that the defendant failed to exercise the skill and knowledge normally possessed by members of that trade in good standing in similar communities.

Appeal from the District Court for Clay County: WILLIAM G. CAMBRIDGE, Judge. Affirmed.

Stephen A. Scherr of Whelan, Foote & Scherr, P.C., for appellants.

Baylor, Evnen, Curtiss, Grimit & Witt, for appellee.

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

WHITE, J.

This is an appeal from the decision of the trial court in a law action wherein the jury was waived. The court, finding generally for the defendant, held that the plaintiffs were not entitled to recover for the breach of an alleged contract to provide termite inspection services.

Benjamin L. Doupnik, Jr., and Kay F. Doupnik, the appellants in this case, are husband and wife

who entered into a real estate contract for purchase of a residence in Clay Center, Nebraska. The appellants applied for a home mortgage loan at the Aurora office of the First Federal Savings and Loan Association of York, Nebraska. Included in the terms of the mortgage loan commitment was a condition that the termite inspection be made and substantiated by a written report. The termite inspection was made by the appellee, Usher Pest Control Co., and a report rendered to First Federal, the lender, indicating that the inspector discovered no evidence of termite activity or termite damage on the premises. At the closing of the real estate purchase, the appellants were presented a statement which reflected an item of $15 for the inspection, for which appellants were charged at the settlement. Shortly after the premises were occupied by the appellants, Mrs. Doupnik discovered evidence of termite damage at a baseboard in the living room of the home. Subsequent inspection by an entomologist from the University of Nebraska and another termite inspection company confirmed extensive termite damage throughout the house. Appellants commenced the action in the district court on the theory that appellants were third-party beneficiaries to a contract between Usher and First Federal Savings and Loan Association of York, Nebraska. At the conclusion of the trial the district court, in a general finding, held for the appellee and against the appellants. A number of errors are assigned in the brief; however, we find it unnecessary to discuss these assignments of error in view of our consideration and disposition of this case.

While the record is clear that the appellee, Usher Pest Control Co., a corporation, by its agent did in fact complete an inspection of the home and in its report indicated no evidence of termite activity or damage, it is also clear that approximately 3 months after the inspection, evidence of termite activity was manifested and discovered. Although the appellants

did present testimony that another pest control company might have conducted the inspection differently from that of Usher's, we have searched the record in vain for any evidence to suggest that the failure to discover the termite infestation, if such was present at the time the original inspection was made, was a breach of the agreement, i.e., that the appellee's inspector failed to exercise the skill and knowledge normally possessed by members of that trade in good standing in similar communities. Restatement (Second) of Torts § 299 A (1965). Since more than 3 months had elapsed between defendant's inspection and the discovery by plaintiffs of termite activity, there is not presented the situation where the termite activity was so obvious, on the date of appellee's inspection, that it would have been apparent to a person untrained in the trade. If the termite activity were latent, its discovery depends on the degree of the search made. The degree of the search necessary to comply with the contract must necessarily be determined by measuring the search as made by defendant's agent against the search which would have been made by members of defendant's trade in good standing in similar communities. There was no such evidence presented. The appellants and appellee's agent never met prior to the closing. There was no evidence that the agent represented to anyone that he or the appellee had any greater or less skill than the ordinary termite inspector. The rule of the Restatement has been applied in professional malpractice cases, and has also been applied to skilled trades. See, *Brown v. Kaar*, 178 Neb. 524, 134 N.W.2d 60 (1965) (tow-truck operator); *O'Connor v. Burns, Potter & Co.*, 151 Neb. 9, 36 N.W.2d 507 (1949) (stockbroker). There is no allegation that the contract required the appellee to discover the presence of termites or termite damage at its peril, and therefore the law implies only that the appellee would exercise the skill and knowledge

normally possessed by persons who practice the trade or profession.

It is elementary that appellants, plaintiffs below, had the obligation to offer proof of the contract and a breach of the contract, i.e., the failure of the appellee to exercise such skill and knowledge. Absent such proof, the appellants failed to make a prima facie case. The decision of the trial court dismissing the appellants' petition is correct, and the judgment of the court is affirmed.

AFFIRMED.

KRIVOSHA, C.J., concurring.

I concur in the result reached by the majority because of the absence of any evidence in the record that would establish that Usher's inspection of the premises was negligent or that Usher failed to discover termites which were there at the time of inspection. I do not agree that there was any requirement that the petition allege that Usher's contract required it to discover the presence of termites or termite damage at its peril. It occurs to me that when one hires a termite inspector, it is implied that a termite inspector will find termites if they are present.

STATE OF NEBRASKA, APPELLEE, V. BERNARD R. SCHAEFFER, APPELLANT.

346 N.W.2d 701

Filed April 6, 1984. No. 83-401.

1. **Criminal Law: Evidence: Sentences.** Unless there is specific material in a document necessary to the presentation of a defense or helpful to a defendant in mitigating his sentence, such a document need not be disclosed to a defendant personally, if harm to others is a possible result.
2. **Sentences: Appeal and Error.** In the absence of an abuse of discretion, a sentence imposed within statutory limits will not be disturbed on appeal.

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

Dennis R. Keefe, Lancaster County Public Defender, and Gerald L. Soucie, for appellant.

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

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

WHITE, J.

Appellant, Bernard R. Schaeffer, defendant below, appeals from his convictions of assault in the first degree, Neb. Rev. Stat. § 28-308(1) (Reissue 1979), and use of a knife or other deadly weapon in the commission of a felony, Neb. Rev. Stat. § 28-1205(1) (Reissue 1979). The appellant was sentenced to consecutive terms of 6 to 20 years on each count.

The incident which gave rise to the convictions and sentencing arose out of the stabbing by appellant of a supervisor of the upholstery shop at the Nebraska Penal and Correctional Complex, where appellant was an inmate. Appellant does not dispute that the evidence is sufficient to sustain the convictions. Indeed, it is overwhelming.

He, rather, assigns as error (1) that he was denied effective assistance of counsel by the trial court's order allowing inspection of a certain state ombudsman's report by defense counsel, but prohibiting counsel from disclosing the contents to appellant, and (2) that the sentences are excessive.

Although the report, entitled "The Assault of an Inmate and the Near-Fatal Stabbing of Four Prison Guards on June 25, 1981, Could Have Been Prevented," is not contained in the bill of exceptions, its contents have been before this court in previous cases. See, *State v. Clark*, 216 Neb. 49, 342 N.W.2d 366 (1983); *State v. Zalme*, 216 Neb. 61, 342 N.W.2d 373 (1983). As found in *Clark* and *Zalme*, and conceded by the parties in their briefs, the ombuds-

man's report revealed nothing of evidentiary value as to the facts in this case. The report merely contained statements in which "named inmates told of threats on their lives and sexual pressures by other inmates planning on taking over a cell block by killing guards." *State v. Clark, supra* at 60, 342 N.W.2d at 372.

The alleged prejudice to the appellant's sixth amendment right to the effective assistance of counsel is the inability of counsel to discuss with appellant all aspects of the case and a deprivation "of counsel's guiding hand during a critical stage of the proceedings." *Jackson v. United States*, 420 A.2d 1202, 1204 (D.C. App. 1979).

The appellant's brief cites cases relating to a defendant's denial of access to counsel during a 17-hour overnight recess of trial, *Geders v. United States*, 425 U.S. 80, 96 S. Ct. 1330, 47 L. Ed. 2d 592 (1976), and during a luncheon recess, while defendant was still on the stand, *Jackson v. United States, supra*. It is difficult to equate denial of the right to speak to a client with a prohibition against disclosure of the contents of a nonrelevant document, the contents of which would neither tend to prove nor disprove any element of the crimes charged. We hold there was no showing of a denial of effective assistance of counsel.

In connection with the nondisclosure of information to a defendant, we said in *State v. Rice*, 214 Neb. 518, 527, 335 N.W.2d 269, 275 (1983): " 'This means that the omission [of undisclosed information] must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. . . .' " To hold that the compelled withholding of nonmaterial and irrelevant information from a criminal defendant is prejudicial error would simply exalt form over substance. Defense counsel performed in a professional manner throughout. The verdict resulted because the evi-

dence of his client's guilt was overwhelming. The first assignment is without merit.

The second assignment of error is also meritless. Appellant, at the time of the unprovoked, brutal, and life-threatening assault, was serving a life term for the offense of first degree murder and another 2-year term for assault with intent to do great bodily injury for the stabbing of a fellow inmate. To suggest that any lawful sentence, even the maximum, is excessive is frivolous.

There was no abuse of discretion by the trial court; consequently, the sentence will not be disturbed on appeal. *State v. Hellbusch*, 213 Neb. 894, 331 N.W.2d 815 (1983).

The judgment and sentence of the trial court are affirmed.

AFFIRMED.

KRIVOSHA, C.J., concurring.

I concur in the result reached by the majority in this case. I do so on the basis that the evidence does not establish any showing of ineffective assistance of counsel. I do not agree, however, with the majority's suggestion that a court may ever instruct counsel to withhold documents or information from a client. If the client does not have the benefit of all of the information available to counsel, then the relationship between attorney and client cannot be fulfilled. I believe that a rule which permits a trial court to instruct a lawyer to withhold information from his client imposes upon counsel a burden which a court should not be permitted to impose upon counsel. If the client should not see the information, and that may be the case, neither should his counsel. I would not wish this case to be read as standing for the proposition that a trial court may impose such a requirement upon counsel.

CYRIL KLUCK ET AL., APPELLANTS, V. JAMES ROBERT MENTZER ET AL., APPELLEES.
CYRIL KLUCK ET AL., APPELLANTS, V. ESTHER M. ARPS ET AL., APPELLEES.

347 N.W.2d 306

Filed April 13, 1984. Nos. 83-223, 83-224.

1. **Equity: Appeal and Error.** While matters in equity are reviewed de novo on appeal, this court must, where the credibility of the evidence is in conflict, give weight to the fact that the trial court saw and heard the witnesses while testifying.
2. _____: _____. In a review de novo this court will also give weight to an inspection of the premises by the trial court, where such inspection was given consideration by the trial court in its decision and judgment.

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

James A. Cada of Bailey, Polsky, Cada & Todd, for appellants.

George E. McNally, for appellees.

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

RIST, D.J.

Plaintiffs, Cyril and Goldie Kluck, commenced two actions in the district court for Colfax County, Nebraska, seeking injunctive relief against defendants in each case for removal of embankments on defendants' properties, which plaintiffs alleged interfered with the natural drainage of surface and flood waters, thereby causing plaintiffs' damages, and additionally, in one action, seeking restoration of claimed loss of lateral support of plaintiffs' land. Said actions were consolidated for trial, following which both were dismissed. Plaintiffs appeal both judgments of dismissal, which appeals were consolidated for hearing in this court.

Plaintiffs are the owners of the west half of Section 27, Township 17 North, Range 3 East, of the 6th P.M., Colfax County, Nebraska. The Platte River

abuts this property on the south side. Defendants James and Don Mentzer own a tract of land in the east half of said section, bounded on the south by the Platte River and the west line of which is common with a portion of the east line of plaintiffs' property. Defendants Vern and Aaron Arps are the owners of a tract of land in the east half of said section, the south line of which is common with the north line of the Mentzer property and the west line of which is common with a portion of the east line of plaintiffs' property. The land of all parties concerned is in the flood plain of the Platte River. There is what is variously described as a watercourse or drainageway through plaintiffs' land, generally draining to the east onto defendants' lands and thence into the Platte River.

Defendants Mentzer acquired their property in 1970. Their predecessors in title in 1969 constructed a roadway along the west line of the property, which is elevated above plaintiffs' land. The roadway begins 40 to 50 feet north of the river and runs to the northwest corner of said defendants' property. No change has been made in the road since its construction.

Defendants Arps, in the early 1970s, probably 1971, removed topsoil from an area of their property near the west line for the purpose of pumping gravel, and placed such topsoil along the west line to form a roadway. The roadway was above the elevation of plaintiffs' land and begins at a point some distance north of the drainageway from plaintiffs' land into the defendants' property, thence north an undetermined distance along the property line, but not the full length thereof. Said defendants did not complete the construction of said road, at plaintiffs' request. Nothing further was done with respect to the same.

Defendants Arps did, in the early 1970s, pump gravel from their land, the pit coming within 20 to 30 feet of their west property line.

We are faced at the outset with the state of the record on appeal. The bill of exceptions is replete with instances of testimony concerning photographs apparently received in evidence but which are not sufficiently identified during the testimony to permit this court to know which exhibits are being considered. There are also numerous instances of witnesses pointing out aspects of many such photographs to the trial court, but in a manner that could not be preserved in a bill of exceptions so that this court can know what was being presented. Clearly, the trial court could see and consider such matters as they occurred in its presence; but for purposes of appellate review, much of the record is incomplete and unintelligible. It is a case of counsel not preserving and protecting the record. We are therefore in the position that such evidence not being adequately and properly presented and preserved, it must be treated as not effectively included in the record and hence not considered in this court. *Elm Creek State Bank v. Johnson*, 195 Neb. 131, 236 N.W.2d 838 (1975). While both counsel offered evidence in this manner, the same weighs most heavily upon plaintiffs'.

Plaintiffs' claim is essentially that the roadways constructed on defendants' lands restricted floodwaters and surface waters upon such lands for a longer period than would normally occur, blocked the natural course through which such waters would normally flow, and thereby caused pooling and erosion upon plaintiffs' land, which would otherwise not occur. Plaintiffs claim that the pumping of gravel by defendants Arps near the boundary line of the parties deprives plaintiffs of lateral support for their lands.

The flood plain of a stream is considered a part of the channel of such stream, and no one may obstruct the flow of floodwaters in the natural drainage to the detriment of another. *Bahm v. Raikes*, 160 Neb. 503, 70 N.W.2d 507 (1955). The issue in this case is

whether plaintiffs have proved the defendants obstructed such waters to plaintiffs' damage.

While there is some dispute, we find there is convincing evidence that no change occurred in the channel for surface and floodwaters and that plaintiffs' problems of additional floodwaters are the result of actions taken by governmental entities upstream for the protection of other lands and highways. We find no credible evidence to sustain plaintiffs' claim of a loss of lateral support.

We also note that at the conclusion of all the evidence the trial court viewed the premises here involved at the request of the parties. While we review these cases de novo, the rule is that where there are issues of credibility of witnesses, weight must be given to the fact that the trial court saw and heard them, and also of the trial court's inspection of the premises, where, as here, the court gave consideration to such inspection in reaching its decision. *Hardt v. Short-Line Irr. Dist.*, 214 Neb. 612, 335 N.W.2d 292 (1983). This is particularly true in this case, given the state of the record previously noted.

We affirm the judgments of the trial court.

AFFIRMED.

IN RE BOUNDARIES OF McCOOK PUBLIC POWER DISTRICT.

STANLEY NEEL ET AL., APPELLEES, V. McCOOK PUBLIC POWER DISTRICT, APPELLANT.

347 N.W.2d 554

Filed April 20, 1984. No. 83-052.

1. **Statutes: Legislative Intent.** Where, because a statute is ambiguous, it is necessary to construe it, the principal objective is to determine the legislative intention. The legislative intention is to be determined from the general consideration of the whole act with reference to the subject matter to which it applies and the particular topic under which the language in question is found, and the intent deduced from the whole will prevail over that of a particular part considered separately.

2. **Statutes.** It is a fundamental rule of statutory construction that, if possible, a court will try to avoid a construction which leads to absurd, unjust, or unconscionable results. A statute should be construed in the context of the mischief sought to be remedied and the purpose to be served.
3. **Public Utilities.** The right to vote in an election of successors to the board of directors of a public power district is purely statutory.
4. _____. A public power district which does not provide at least 50 percent of the retail or wholesale power requirements of a municipality cannot include that municipality within its charter area.

Appeal from the Nebraska Power Review Board. Affirmed.

Stanley C. Goodwin of Colfer, Lyons, Wood, Malcom & Goodwin, for appellant.

Vernon Tweedie, for appellees.

Gene D. Watson and John C. McClure, for amicus curiae Nebraska Public Power District.

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

WHITE, J.

This is an appeal from an order of the Nebraska Power Review Board (PRB) which held McCook Public Power District (MPPD) in noncompliance with Chapter 70, article 6, of the Nebraska Revised Statutes for the reason that the city of McCook, Nebraska, is included within the charter area of MPPD. We affirm.

The parties stipulated to the following facts. MPPD is a lawfully constituted public power district which sells retail electricity. A portion of this sale of power is retail sales to six businesses and one residence located within the boundaries of the city of McCook. MPPD sells no wholesale power to McCook. MPPD owns business offices, storage facilities, inventory, and other assets with a value of over $2 million within the boundaries of McCook.

Since the inception of MPPD, the city of McCook has been within the charter area of MPPD; conse-

quently, all 5,134 resident registered voters of McCook are eligible to vote for MPPD's board of directors. There are 26,474 eligible voters in MPPD's entire charter area. Currently three of the nine members of the MPPD board of directors are residents of the city of McCook.

Pursuant to Neb. Rev. Stat. § 70-604.05 (Reissue 1981), the appellees, Stanley Neel and Lloyd Potthoff, filed a complaint with the PRB, alleging that because MPPD has ceased to sell at least 50 percent of the retail or wholesale power requirements of the city of McCook, that city cannot be included in MPPD's charter area. Appellees contend that the unlawful inclusion of the city of McCook in MPPD's charter area dilutes their votes and other votes of individuals similarly situated who are justly and lawfully qualified to vote for the board of directors of MPPD.

In its reply MPPD admitted to the status of the complainants, generally denied that it is in noncompliance, and further alleged that because MPPD does sell some retail electricity within the boundaries of McCook, that city is lawfully included in MPPD's charter.

After a hearing on the issue the PRB found MPPD in noncompliance with respect to the inclusion of the city of McCook for the purpose of the election of successors to the board of directors of MPPD. MPPD's motion for rehearing was denied, and they took timely appeal to this court.

The sole issue on appeal is whether the city of McCook is lawfully included in MPPD's charter area. Stated broadly, the issue becomes one of determining who has the right to vote in an election of the board of directors of a public power district. The Constitution of the State of Nebraska is silent on the issue; consequently, if such a privilege exists, it must of necessity be statutorily granted. A review of applicable provisions of Chapter 70, article 6, of

the Nebraska Revised Statutes provides us with the answer.

We begin by setting forth some of the well-established rules of statutory construction.

> "Where, because a statute is ambiguous, it is necessary to construe it, the principal objective is to determine the legislative intention. . . . The legislative intention is to be determined from the general consideration of the whole act with reference to the subject matter to which it applies and the particular topic under which the language in question is found, and the intent deduced from the whole will prevail over that of a particular part considered separately."

In re Guardianship of Sain, 211 Neb. 508, 511-12, 319 N.W.2d 100, 103 (1982).

It is a fundamental rule of statutory construction that, if possible, a court will try to avoid a construction which leads to absurd, unjust, or unconscionable results. A statute should be construed in the context of the mischief sought to be remedied and the purpose to be served. *State v. Farr*, 209 Neb. 163, 306 N.W.2d 854 (1981).

With these rules of construction in mind, we explore the relevant provisions of Chapter 70, article 6, of the Nebraska Revised Statutes in the order in which they appear.

Neb. Rev. Stat. § 70-601 (Reissue 1981) is the definitional section and will be referred to as needed.

Neb. Rev. Stat. § 70-602 (Reissue 1981) states in part:

> A public power district may be composed of the territory of one or more municipalities as defined in subsection (2) of section 70-601, whether contiguous or otherwise, but no city, village, or voting precinct shall be divided in the formation of a public power district. Nothing in Chapter 70, article 6 shall be construed to prevent the organization of a district within, or partly within, the territorial boundaries of another district

> organized hereunder, so long as the plants, systems, and works, the operation of the same, the exercise of powers, and the assumption of duties and responsibilities, of or on the part of one district, do not nullify, conflict with, or materially affect those of, or on the part of, another district.

Subsection (2) of § 70-601 defines municipality as follows:

> Municipality, when used in relation to the organization of a public power district, shall mean any county, city, incorporated village, or voting precinct in this state; but when used in relation to the election of successors to the board of directors of a public power district, as provided in sections 70-610 to 70-618, municipality or municipalities, comprising such public power district, shall be deemed automatically to be extended so as to include each incorporated city or village to which the public power district shall furnish or sell electrical energy either at retail to the inhabitants of such city or village or at wholesale to the city or village to be resold by it if the sale at wholesale is for more than fifty per cent of the power requirements of the city or village. When the public power district ceases to sell electrical energy at retail to the inhabitants of the city or village, or at wholesale to the city or village, for more than fifty per cent of the power requirements, such city or village shall cease to be a part of the public power district.

Appellant contends that the 50-percent requirement of § 70-601(2) applies only to wholesale sales of electrical energy, and because MPPD sells retail electricity, even though admittedly a minute amount, within the city of McCook, that city is lawfully included in its charter area. Appellees contend that the 50-percent requirement applies to both retail and wholesale sales of electricity, and because MPPD does not supply McCook with at least 50 per-

cent of the city's retail or wholesale electrical energy requirements, MPPD cannot include the entire city of McCook within its charter area.

The first and second sentences of § 70-601(2) seem to be in conflict. A search of legislative history concerning the provision is not helpful in resolving the conflict. By taking into consideration the entire statutory scheme, however, it becomes evident that the 50-percent requirement applies to both retail and wholesale sales of electricity, and, as such, the entire city of McCook cannot lawfully be included in MPPD's charter area.

Neb. Rev. Stat. § 70-604.01 (Reissue 1981) further sets out the mandatory and permissible charter areas of a public power district. It states as follows:

> Except as the same may be further limited or expanded by requirements in Chapter 70, article 6, the chartered territory of each public power district or public power and irrigation district, organized pursuant to and existing by virtue of, or subject to the provisions of, Chapter 70, article 6, after creation of a district, must include the area in this state within which each district renders electric service of the nature defined in section 70-604.02 and termed its operating area. There may be included within the chartered area of each district areas which are outside the operating area as defined in this act, but which inclusion is nevertheless authorized by other sections of Chapter 70, article 6.

Operating area is defined in Neb. Rev. Stat. § 70-604.02 (Reissue 1981) as:

> [T]he geographical area in this state comprising:
>
> (1) The district's retail distribution area, which is that area within which the district delivers electricity by distribution lines directly to those of its customers who consume the electricity; and

(2) The district's wholesale distribution area, which is the aggregate of those retail distribution areas of the public electric utilities which purchase electricity from the district for resale either directly or indirectly to their retail customers if the selling district has the responsibility, in whole or in part, of charging for, and delivery of, the electricity, by transmission lines, to the retail public electric utility distribution lines at one or more points of delivery pursuant to a power contract to deliver firm power and energy and having a term of five years or more. To the extent that a selling district leases its plant or systems to another district to be operated by such other district, or produces electricity which other districts may purchase, and such other districts provide or operate the transmission lines to carry such electricity from the producer to such other districts, the retail and wholesale distribution areas of such other districts are not a part of the operating area of the selling district by reason alone of such leasing or production.

Recently, 1982 Neb. Laws, L.B. 198, amended § 70-604.03 to read in pertinent part as follows:

(1) To establish boundary lines of an operating area coincident with voting precinct or county boundary lines, it shall be permissible to eliminate from, or add to, the operating area relatively minor areas containing a limited number of retail customers served, so that retail distribution areas are identified by reference to whole voting precincts and wholesale distribution areas are identified by reference to whole counties.

(2) After the formation of a district, voting or election precincts may be divided, for the purposes of district elections, by amending the charter as prescribed in sections 70-662 to 70-665. A district may divide a voting or election pre-

cinct whenever either (a) an excessive number of ratepayers are excluded from voting, or (b) an excessive number of nonratepayers are allowed to vote. The description of such divided precincts may be given by township and range and section number and shall be subject to the approval of the Secretary of State.

(3)(a) Any retail customer whose principal residence is being served by a public power district and whose principal residence is not in the chartered territory of such district may request the district in writing prior to the certification date for such district, as such date is provided in section 70-611, for the right for each registered voter residing at such residence to vote for, and be eligible to hold office as a member of, the board of directors of such district. The secretary of the district shall cause notice to be given to each such retail customer which reasonably prescribes the manner in which the retail customer may request such right to vote. The notice shall be given by first-class mail and may be included as part of the regular billing statement mailed to a customer, if such billing statement is sent by first-class mail to such retail customer, which mail shall be conspicuously marked as to its importance. Such notice shall be given at least sixty days prior to the time the election certification and publication information is transmitted to the Secretary of State pursuant to section 70-611. The district shall certify to the Secretary of State the names of all such retail customers for whom such request to vote has been made along with identification of the voting or election precincts wherein such retail customers reside, and each such retail customer shall be a qualified elector and qualified to hold office as a member of the board of directors, if otherwise qualified to vote.

Neb. Rev. Stat. § 70-604.03 (Cum. Supp. 1982).

The legislative history of L.B. 198 provides the following:

> The intent of LB 198 is to provide proportional and accurate representation of ratepayers of public power districts. The current version of section 70-604.03 is inadequate for assuring proper representation.
>
> As the Public Works Committee's 1980 interim studies on LRs 307 and 308 revealed, there are occasional instances of significant divergence between who pays rates and who is allowed to vote for a public power district's board of directors. LB 198 introduced by the Government, Military and Veterans Affairs Committee, is permissive and will allow public power district boards of directors to split voting precincts in order to extend the right to vote to ratepayers and to exclude nonratepayers.
>
> In order to avoid placing undue burdens on the counties, the public power districts will bear any additional election costs occasioned by the splitting of precincts.

Introducer's Statement of Purpose, Public Works Committee, L.B. 198, 87th Leg., 2d Sess. (Feb. 3, 1981).

In further reading the legislative history of L.B. 198, it is obvious that the Public Works Committee was acutely aware that some ratepayers of a public power district were not entitled to vote for the board of directors of the public power district which served them, while there were other people who did not receive service from that power district, yet voted for that district's board of directors. The situation of MPPD's including the city of McCook within its charter area was specifically mentioned.

The legislative intent is clearly to put control of a public power district in the ratepayers who receive their electricity from that district. Allowing MPPD to include the entire city of McCook within its charter area when MPPD services only two regis-

tered voters of McCook would and does indeed lead to an absurd result not intended by the Legislature.

As noted earlier, § 70-601(2) does not allow MPPD to include the entire city of McCook in its charter area. By dividing a voting or election precinct under the provisions of § 70-604.03, MPPD could, however, include those ratepayers receiving retail electricity from MPPD within the charter area. If MPPD chooses not to include those retail customers whose principal residences are being served by MPPD but whose residences are outside the charter area, those ratepayers may still vote and hold office as provided in § 70-604.03(3)(a).

Appellant next contends that because a significant amount of MPPD assets are located in McCook and because some of McCook's residents own oil wells powered by electricity, located outside the city of McCook but serviced by MPPD, the residents of McCook have a significant interest in the affairs of MPPD and should be allowed to vote for the board of directors. Again, we reiterate that the right to vote for a power district's board of directors is purely statutory. There being no statutory provision which allows a power district to include an area in its charter because the district owns assets in the area or because the residents have an "economic interest," the appellant's contentions must fail.

The Nebraska Power Review Board's order being correct, it is affirmed.

AFFIRMED.

HYDROFLO CORPORATION, A PENNSYLVANIA CORPORATION, APPELLANT, V. FIRST NATIONAL BANK OF OMAHA, APPELLEE.

349 N.W.2d 615

Filed April 20, 1984. No. 83-123.

1. **Uniform Commercial Code: Banks and Banking: Words and Phrases.** The language of Neb. U.C.C. § 3-419(3) (Reissue 1980),

"a representative, including a depositary or collecting bank," does include depositary and collecting banks when engaged in the normal business of paying or collecting ordinary checks.

2. **Uniform Commercial Code: Banks and Banking: Conversion: Negotiable Instruments.** In an action brought under Neb. U.C.C. § 3-419 (Reissue 1980) by a payee to recover in conversion for payment on a forged endorsement, it is incumbent on a depositary bank seeking immunity under subsection (3) to plead and prove as affirmative defenses that it acted in good faith and in accordance with reasonable commercial standards.
3. **Uniform Commercial Code: Banks and Banking.** Whether a bank has acted in a commercially reasonable manner is a question of fact.
4. **Evidence.** Where reasonable minds may differ as to the conclusions or inferences to be drawn from the evidence, such issues must be submitted to the jury or the trier of facts.
5. **Evidence: Negligence.** The failure to abide by custom or ordinary practice is competent evidence of negligence.
6. **Evidence: Proximate Cause.** Where evidence is conflicting on the question of proximate cause, the question is ordinarily one for the trier of facts.
7. **Negligence: Proximate Cause.** Generally, the question of whether there has been an intervening cause eliminating negligence of a defendant as a proximate cause is for the trier of facts.
8. **Uniform Commercial Code: Banks and Banking: Actions: Claims.** A claim for money had and received has not been eliminated by the Uniform Commercial Code. However, it is subject to the defenses of "good faith" and "reasonable commercial standards" as provided for by Neb. U.C.C. § 3-419(3) (Reissue 1980).
9. **Banks and Banking: Consumer Protection Act: Words and Phrases.** Because Neb. Rev. Stat. § 8-103 (Reissue 1977) of the Banking Act requires the director of the Department of Banking and Finance to "constructively aid banks in maintaining proper banking standards and efficiency," a bank is exempt from suit under the Nebraska Consumer Protection Act, Neb. Rev. Stat. §§ 59-1601 et seq. (Reissue 1978), by reason of its failure to follow customary and standard banking practices.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

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

Thomas J. Culhane of Erickson, Sederstrom,

Leigh, Eisenstatt, Johnson, Kinnamon, Koukol & Fortune, P.C., for appellee.

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

HASTINGS, J.

Hydroflo Corporation, named as payee on a number of checks, brought this action against the First National Bank of Omaha as a collecting or depositary bank, to recover the amounts paid on those checks to a bank customer who had wrongfully endorsed the checks and had the proceeds deposited to his account.

The district court sustained the bank's demurrer to the third cause of action, money had and received, and directed verdicts in favor of the bank, at the close of plaintiff's case, upon the first (conversion), second (negligence), and fourth (Consumer Protection Act) causes of action, and dismissed the petition in its entirety. We affirm as to the Consumer Protection action, and reverse and remand for trial as to the other three causes of action.

Hydroflo, a small Pennsylvania corporation, in the fall of 1978 hired John L. Hearn as a sales manager to sell specialized pumps and feed systems which it manufactured. Hearn was allowed to obtain a telephone listing and a post office box in Omaha in the name of the company. His job was to solicit orders for pumps throughout the Midwest and forward the orders to Pennsylvania for acceptance. Later, he had control of an inventory of up to approximately 180 pumps, which he kept in his garage.

In September of 1979 Hearn opened a corporate checking account in the name of Hydroflo but without its knowledge, and furnished the bank with a signature card containing his signature. Although the bank requested a corporate resolution authorizing the account, none was ever received. According to bank procedure, a corporate resolution is not required in an instance such as this, although it is the

bank's practice to request the resolution. During the next 11 months, a total of $23,773.37 in checks payable to Hydroflo was deposited by Hearn into and withdrawn from this account before it was closed on August 22, 1980.

Hydroflo first learned of the secret account when a bank statement was forwarded to the corporation after Hearn terminated employment in July of 1980. In the meantime, Hearn had incorporated Hydroflo Corporation of Nebraska on April 15, 1980, and furnished the bank a copy of those articles of incorporation after the plaintiff requested a freeze on the corporate account on August 13, 1980.

Hydroflo assigns as error the dismissal of each cause of action. We will address each cause in the order presented by the plaintiff's petition.

At the outset, the bank insists that there is no competent proof that Hearn was not the intended payee and that Hydroflo did not have the necessary possession of the forged instruments to authorize it to bring this action. On the basis of the record and the inferences to be drawn from it, there is no merit to either contention.

The first cause of action alleged in the second amended petition was conversion. The bank in its amended answer alleged as its only defense that it had acted in good faith and in accordance with reasonable commercial standards. The bank's defense of reasonable commercial standards is essentially Neb. U.C.C. § 3-419(3) (Reissue 1980), a statutory defense which the code apparently recognized to limit the conversion liability of depositary and collecting banks.

Hydroflo argues at length in its brief that that particular subsection was never intended to and did not apply to collecting and depositary banks when cashing checks in the normal course of business. Section 3-419(3) provides as follows:

> Subject to the provisions of this act concerning restrictive indorsements a representative, in-

> cluding a depositary or collecting bank, who has in good faith and in accordance with the reasonable commercial standards applicable to the business of such representative dealt with an instrument or its proceeds on behalf of one who was not the true owner is not liable in conversion or otherwise to the true owner beyond the amount of any proceeds remaining in his hands.

Following is a portion of the language of the Comment to the above section:

> Subsection (3), which is new, is intended to adopt the rule of decisions which has held that a representative, such as a broker or depositary bank, who deals with a negotiable instrument for his principal in good faith is not liable to the true owner for conversion of the instrument or otherwise, except that he may be compelled to turn over to the true owner the instrument itself or any proceeds of the instrument remaining in his hands.

The bank does not address this issue in its brief.

This question has generated substantial controversy among the courts and commentators who have addressed it and who are often in agreement in their conclusions that there is neither commercial nor rational justification for construing § 3-419(3) as being applicable to depositary and collecting banks engaged in the normal check collection business. As a result, this subsection of § 3-419 has been simply ignored at times, applied reluctantly in a few cases, and most often evaded on a variety of theories.

In *Tubin v. Rabin*, 389 F. Supp. 787, 789-90 (N.D. Tex. 1974), we find this language:

> In my opinion Section 3-419(3), when it refers to the representative having "dealt with an instrument or its proceeds on behalf of one not the true owner," is concerned with an entirely different transaction than the typical "honoring a check" transaction. *See*, Ervin v. Dauphin Deposit Trust Co., 3 UCC Rept. Serv. 31 (Penn.

> Common Pleas Court, 1965). As one case reasoned, the U.C.C. comments to this section refer to a line of cases primarily involving defendants that had acted as investment brokers and had marketed negotiable securities, remitting the consideration to their customers. The relationship in those cases between the representative and their customers typified the true agency type, and therefore differed substantially from the impersonal debtor-creditor relationship established in the banking world. . . . Thus, it is this true agency situation rather than the typical bank transaction involved in this case that 3-419(3) appears to be addressed.

In *Ervin v. Dauphin Deposit Trust Co.*, 38 Pa. D. & C.2d 473, 482-83 (1965), 3 U.C.C. Rep. Serv. 311, 318-19 (Callaghan 1967), this ingenious argument is used:

> It is true that it is provided that "representative" shall include a depository or collecting bank, but the clear meaning is to include them when acting as "representatives". The code, at section 1-201(35) defines "representative" as follows:
>
> " 'Representative' includes an agent, an officer of a corporation or an association, and a trustee, executor or administrator of an estate, or any other person empowered to act for another".
>
> The entire subsection speaks of something other than the negotiating or the honoring of a check when it refers to the representative having "*dealt* with an instrument or its proceeds on behalf of one who was not the true owner". (Italics supplied).
>
> In determining the intent of the legislative [sic] in adopting this subsection, we must assume that the legislature intended a reasonable result, and it would seem to be unreasonable to construe this subsection, as defendant would have us do, and limit the liability of the collect-

> ing bank in the face of other sections of the code which place the absolute liability ultimately on the check cashing bank when the payee's name is forged; this, because of the check cashing bank's warranties on the indorsements.

Knesz v. Central Jersey Bank & Trust Co., 188 N.J. Super. 391, 457 A.2d 1162 (1982), *cert. granted* 93 N.J. 293, 460 A.2d 690 (1983), in a rather long opinion citing *Ervin v. Dauphin*, *supra*, and *Cooper v. Union Bank*, 9 Cal. 3d 371, 507 P.2d 609, 107 Cal. Rptr. 1 (1973), as well as various policy considerations, also held that a depositary or collecting bank, when engaged in the customary business of accepting checks for payment or ordinary collection, is not immunized from conversion action by the payee whose endorsement has been forged.

The holdings in the foregoing cases can perhaps best be summed up by this language from J. White & R. Summers, Handbook of the Law Under the Uniform Commercial Code § 15-4 at 593-94 (2d ed. 1980):

> Perhaps those bankers whose hands were doubtless at work in the drafting of 3-419(3) got what they deserved. If the section be not dead it certainly is mortally wounded; one can only mourn that *Ervin* and *Cooper* inflicted fatal wounds with such little grace and that legislatures will doubtless not give it a decent burial for years to come, especially now that those cases have been followed in other jurisdictions. Although we deplore that mentality which leads a court to think it is completely free to disregard legislative language, we appreciate the strength of the policy arguments against the restrictions that the bankers presumably wrote into 3-419(3), and if we were in the legislature we would urge its modification.

We choose to be more faithful to the plain meaning of the language of the subsection, and hold that it does include depositary and collecting banks when engaged in the normal business of paying or collect-

ing ordinary checks. However, the immunity which they are to enjoy is limited to those cases where they act "in good faith and in accordance with the reasonable commercial standards." It is incumbent on a depositary bank seeking immunity to plead and prove those requirements as matters of affirmative defense. *Nat'l Surety Corp. v. Citizens State Bank*, 41 Colo. App. 580, 593 P.2d 362 (1978), *aff'd* 199 Colo. 497, 612 P.2d 70 (1980).

Whether or not a bank acted in a commercially reasonable manner is a question of fact. *Aetna Casualty and Surety Co. v. Hepler State Bank*, 6 Kan. App. 2d 543, 630 P.2d 721 (1981); *Continental Bank v. Wa-Ho Truck Brokerage*, 122 Ariz. 414, 595 P.2d 206 (1979); *Travelers Ins. Co. v. Jefferson Nat. Bank*, 404 So. 2d 1131 (Fla. App. 1981); *Holland America Cruises, N.V. v. Carver Federal Savings and Loan Association*, 60 A.D.2d 545, 400 N.Y.S.2d 64 (1977); *Thornton & Co. v. Gwinnett Bank &c. Co.*, 151 Ga. App. 641, 260 S.E.2d 765 (1979); *Casarez v. Garcia*, 99 N.M. 508, 660 P.2d 598 (1983).

The ordinary practice of the bank was to request a corporate resolution when opening a corporate account. Thomas Haller, second vice president, agreed there was no written requirement, for instance, that a corporate resolution be obtained, nevertheless it was the bank's practice to request it for its files. He stated the purpose of the corporate resolution was to check personal account signatures, and it was a formal authorization of the company itself as to who was authorized to sign checks, make deposits, draw loans, et cetera.

In a publication for commercial bankers, it is stated:

> In the case of the ordinary checking or commercial account, the bank is authorized to pay upon the order of the person whose signature is recorded on the signature cards kept for that purpose. The signature card constitutes the bank's contract with its depositor and contains

> the terms that give the persons named on the card authority to act on behalf of the depositor in making deposits and withdrawals and signing instruments. . . . Having a corporation's authorization to let its agent draw checks within certain limits can shield the bank from liability, if the agent converts sums for his own account.

F. Beutel & M. Schroeder, Bank Officer's Handbook of Commercial Banking Law § 19-40 at 319 (5th ed. 1982). This publication, in referring to the duties of the bank in opening corporation accounts, states:

> Corporation accounts can be opened in the name of the corporation only by properly constituted officers of the corporation. Although a corporation may be estopped from denying his authority, when it allows a person to carry on a continuous course of dealing, the safest way to open a corporation account is to receive a resolution of the board or a written authorization by a responsible officer under such a resolution for the opening of the account.

Id. § 19-35 at 318.

Although commercial reasonableness is usually a question of fact, several courts have held as a matter of law that it is commercially unreasonable for a bank to accept for deposit in an *individual* account a check made payable to a corporation, without first ascertaining, or at least inquiring, as to the authority of the depositor/endorser. *Aetna Casualty and Surety Co. v. Hepler State Bank, supra*; *Sherriff-Goslin Co v Cawood*, 91 Mich. App. 204, 283 N.W.2d 691 (1979); *Pargas, Inc. v. Estate of Taylor*, 416 So. 2d 1358 (La. App. 1982); *Belmar Trucking Corp. v. American Trust Co.*, 65 Misc. 2d 31, 316 N.Y.S.2d 247 (1970).

Also, in *National Bank v. Refrigerated & Co.*, 147 Ga. App. 240, 248 S.E.2d 496 (1978), a Georgia court determined a bank to be not in accordance with reasonable commercial standards when it failed to inquire to ascertain authority of a second corporation

(collection agency) to endorse and deposit the payee corporation's checks.

Thus, where reasonable minds may differ as to the conclusions or inferences to be drawn from the evidence, such issues must be submitted to the jury. *Prudential Ins. Co. v. Greco*, 211 Neb. 342, 318 N.W.2d 724 (1982). We hold that genuine questions of material fact exist on the issue of whether the bank acted in a commercially reasonable manner when it paid Hearn the money and that the bank has not established, as a matter of law, its defense.

The trial court directed a verdict in favor of the bank for the negligence cause of action because the court found as a matter of law the negligence of the defendant was not the proximate cause of the damage suffered by the plaintiff.

This court has held that the failure to abide by custom or ordinary practice is competent evidence of negligence. *McHenry v. First Nat. Bank*, 216 Neb. 581, 344 N.W.2d 652 (1984); *Wilbur v. Schweitzer Excavating Co.*, 181 Neb. 317, 148 N.W.2d 192 (1967); *O'Dell v. Goodsell*, 152 Neb. 290, 41 N.W.2d 123 (1950).

The bank contends it is not bound to anticipate criminal conduct; that the actual cause of Hydroflo's loss was the dishonesty of John L. Hearn, its employee; and that such action was an efficient intervening cause as a matter of law. The bank cites the recent case of *Travelers Indemnity Co. v. Center Bank*, 202 Neb. 294, 275 N.W.2d 73 (1979), as authority for its claim that an intervening cause is present. Hydroflo contends the question of whether Hearn's dishonesty was an intervening cause is a jury question.

In *Travelers Indemnity Co. v. Center Bank, supra*, this court held that (1) the claim that the bank failed to make reasonable and proper inquiry as to the authority of the maker's agent to deposit certain checks, without more, did not allege the violation of any duty owed by the bank to a maker, and, there-

fore, did not state a claim for negligence, and (2) it was clear from the facts as alleged in the petition that the bank's failure to make inquiry, even assuming that it had a duty to do so, did not proximately cause the maker's injury.

In *Travelers* the court relied on Neb. U.C.C. § 3-405 (Reissue 1971), the padded payroll rule, to make its decision. In the present case the checks were incoming checks rather than outgoing checks, and here § 3-405 is not applicable. According to J. White & R. Summers, Handbook of the Law Under the Uniform Commercial Code § 16-8 (2d ed. 1980), § 3-405 covers the imposter case, the padded payroll case, and the fictitious payee case, so that an employer should bear losses which result from employment of a cheating payroll clerk and that employers should carefully choose and supervise persons in such sensitive positions. Such is not the case here.

Also, in the *Travelers* decision, in the discussion of proximate cause, this court concluded that the mere claim that the bank failed to make reasonable inquiry was not sufficient to permit a conclusion that the *maker's* loss was a probable result of such failure. We went on to state, as dicta: "[W]ithout passing upon the matter, it may be said that the payee could have made such claim. Certainly that claim is not available to the maker." *Id.* at 300, 275 N.W.2d at 77. The present situation is one where the payee is making the claim.

Where evidence is conflicting on the question of proximate cause, the question is ordinarily one for the trier of facts. *Brown v. State*, 205 Neb. 332, 287 N.W.2d 676 (1980).

> "If the original negligence is of a character which, according to the usual experience of mankind, is liable to invite or induce the intervention of some subsequent cause, the intervening cause will not excuse it, and the subsequent mischief will be held to be the result of the original negligence."

Driekosen v. Black, Sivalls & Bryson, 158 Neb. 531, 537, 64 N.W.2d 88, 92 (1954). Generally, the question of whether there has been an intervening cause eliminating negligence of a defendant as a proximate cause is for the jury. *Libbey-Owens Ford Glass Co. v. L & M Paper Co.*, 189 Neb. 792, 205 N.W.2d 523 (1973).

It is our judgment that the issues of negligence, contributory negligence, and proximate cause should have been submitted to the jury, with appropriate instructions.

The third cause of action pleaded was money had and received. Before adoption of the Uniform Commercial Code, this claim would seem to be applicable to the alleged facts. In *Estate of Devries v. Hawkins*, 70 Neb. 656, 97 N.W. 792 (1903), this court held that whenever one person has money to which in equity and good conscience another is entitled, the law creates a promise by the former to pay it to the latter, and the obligation may be enforced by assumpsit. Neb. U.C.C. § 1-103 (Reissue 1980) states, unless displaced by the particular provisions of this act, the principles of law and equity shall supplement its provisions.

Following this reasoning, the Colorado court in *Nat'l Surety Corp. v. Citizens State Bank*, 41 Colo. App. 580, 583, 593 P.2d 362, 364-65 (1978), *aff'd* 199 Colo. 497, 612 P.2d 70 (1980), concluded that "[a]s no mention of this claim for recovery is made in the U.C.C., we conclude that the claim for money had and received is still viable."

However, the bank argues that in order to recover for money had and received it must be shown that to fail to permit recovery would allow it, the bank, to be unjustly enriched. *Soderlin v. Marquette National Bank*, 214 Minn. 408, 8 N.W.2d 331 (1943). The bank had paid out the entire proceeds of the checks by cash and credit, and therefore, it argues, when it received from the drawee banks only the amounts which it had disbursed, it was not unjustly enriched.

However, it seems that that argument misses the point. What the bank has done here, if Hydroflo's position is correct, is to wrongfully pay out its own money on the fraudulently endorsed instruments, and then has restored its position with the proceeds of the checks when finally collected. In *Cooper v. Union Bank*, 9 Cal. 3d 371, 378, 507 P.2d 609, 614, 107 Cal. Rptr. 1, 6 (1973), the court said:

> Again resorting to general banking theory, we find that the amounts a collecting bank remits to a person who transfers to the bank a check bearing a forged indorsement do not constitute the proceeds of the instrument. This result is quite clear in the case of an instrument cashed over the counter. At the time the bank takes such an instrument it has obviously not made any prior collection and, thus, has nothing that could be considered proceeds. The money paid over the counter is, consequently, the bank's own money. Upon collection of the instrument, the proceeds become merged with the bank's general funds and are therefore retained by the bank.

Hydroflo did state a cause of action against the bank, and the demurrer should not have been sustained. On trial, however, the bank is entitled to interpose the defenses of "good faith" and "reasonable commercial standards."

Hydroflo contends in its fourth cause of action that the bank's committing a conversion and acting in a commercially unreasonable manner constituted unfair or deceptive acts or practices in violation of the Nebraska Consumer Protection Act, Neb. Rev. Stat. §§ 59-1601 et seq. (Reissue 1978). However, § 59-1617 provides in part that "[n]othing in sections 59-1601 to 59-1622 shall apply to actions or transactions . . . regulated under . . . any other regulatory body or officer acting under statutory authority of this state . . . ."

In *McCaul v. American Savings Co.*, 213 Neb. 841, 331 N.W.2d 795 (1983), this court held that an install-

ment loan by an industrial loan and investment company, regulated by the Nebraska Department of Banking and Finance, is exempt from the Consumer Protection Act.

The specific issue in this case is the alleged failure of the bank to require a corporate resolution in opening a corporate account even though the bank's customary and standard practice was to request a resolution.

Under the provisions of the Banking Act, Neb. Rev. Stat. §§ 8-101 et seq. (Reissue 1977), the Department of Banking and Finance has general supervision and control over banks and other financial institutions. In particular, "The director shall have charge of and full supervision over the examination of banks . . . *and shall constructively aid banks in maintaining proper banking standards and efficiency.*" (Emphasis supplied.) § 8-103.

Under the provisions of §§ 8-102 and 8-103 the Department of Banking and Finance is given broad authority over proper banking standards, and since the requirements for opening corporate accounts are governed by banking standards indirectly approved by the Department of Banking and Finance, the practice of opening accounts is excluded from the terms of the Consumer Protection Act, §§ 59-1601 et seq. The dismissal of this cause of action was correct.

The judgment of the district court is affirmed in part and in part reversed and remanded for further proceedings consistent with this opinion.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

DEANNA NIELSEN, NOW KNOWN AS DEANNA TUTTLE, APPELLEE, V. WILFRED WALTER NIELSEN, APPELLANT.

348 N.W.2d 416

Filed April 20, 1984. No. 83-130.

Divorce: Appeal and Error. On appeal of domestic relations cases we review the record de novo in making our independent findings of fact, without reference to the conclusion reached by the trial court.

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

Martin R. Gardner, and Michael J. Lehan of Kelley, Kelley & Lehan, for appellant.

John W. Wynkoop, for appellee.

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

PER CURIAM.

Wilfred Walter Nielsen murdered the grandparents of his children, the parents of his former wife, Deanna Tuttle, formerly Deanna Nielsen. Wilfred is serving two concurrent life sentences in the Nebraska Penal and Correctional Complex for those murders, which occurred in 1977.

On October 20, 1978, the district court entered a decree dissolving the marriage of Deanna and Wilfred. The decree of dissolution placed custody of the Nielsen children with Deanna, subject to Wilfred's right of reasonable visitation. The children are a daughter, born on May 1, 1977, and a son, born on April 23, 1978.

On June 2, 1982, Deanna filed an application to modify the 1978 decree regarding Wilfred's visitation. At the hearing on Deanna's application, the evidence established that the children know that Wilfred murdered their grandparents. Evidence also included reports describing the psychological effect of the children's visiting Wilfred at the penitentiary. Dr. Paul M. Fine, associate professor and

director of the Child and Family Psychiatry Services at the Creighton University School of Medicine, informed the court that the main psychological need for the Nielsen children is a secure home and positive self-image and that "[v]isits with [Wilfred] at the penitentiary . . . will become more confusing and conflictual as they become older and more able to conceptualize the social implications of his crime. . . . I can see no constructive purpose for mandatory visits by these children at the penitentiary." Dr. Fine's report did allow that, when the Nielsen children are older, the children might desire to visit Wilfred, but "regular visits at this time are not in the children's best interests." The court received in evidence a report of Dr. Gary B. Melton, a clinical psychologist in the department of psychology at the University of Nebraska-Lincoln, which contained: "Dr. Fine's prediction that visits to the Penitentiary will become the precipitants of conflict for the children as they grow older is plausible." After hearing Deanna's application the district court found that the Nielsen children's visiting Wilfred at the penitentiary was not in the best interests of the children.

As his assignment of error, Wilfred contends that he should be allowed visitation of his children at the penitentiary.

In a question about visitation, as in the case of child custody, a parent's rights are not absolute but must yield to the best interests of the child. *Gorsuch v. Gorsuch*, 148 Neb. 122, 26 N.W.2d 598 (1947); cf. *Prince v. Massachusetts*, 321 U.S. 158, 64 S. Ct. 438, 88 L. Ed. 645 (1944). A child's best interests are a court's touchstone and primary consideration or concern in resolving a question about parental visitation. See, *Kaufmann v. Kaufmann*, 140 Neb. 299, 299 N.W. 617 (1941); *Caynor v. Caynor*, 213 Neb. 143, 327 N.W.2d 633 (1982); 27B C.J.S. *Divorce* § 317(2) (1959).

In determining reasonable visitation rights, the best interests and welfare of the child are

> the primary consideration, considering age, health, welfare, educational and social needs, the need for a stable home environment free of unsettling influences, the fitness of the noncustodial parent for such visitation, and the relationship of the child to that parent.

Heyne v. Kucirek, 203 Neb. 59, 63, 277 N.W.2d 439, 441 (1979). See, also, *Casper v. Casper*, 198 Neb. 615, 254 N.W.2d 407 (1977); *Brisby v. Whitted*, 190 Neb. 309, 207 N.W.2d 696 (1973). Determination of a child's best interests is a finding of fact made by the court. See *Caynor v. Caynor*, *supra*. On appeal of domestic relations cases we review the record de novo in making our independent findings of fact, without reference to the conclusion reached by the trial court. *Hinz v. Hinz*, 215 Neb. 335, 338 N.W.2d 442 (1983).

This case bears a striking similarity to *Casper v. Casper*, *supra*, wherein we held that the mere fact of incarceration is not sufficient justification to deny a prisoner's right to visit his children, even though the right of visitation may be effectively exercised only at the institution where the noncustodial parent is incarcerated. See, also, *McCurdy v. McCurdy*, 173 Ind. App. 437, 363 N.E.2d 1298 (1977).

Wilfred calls to our attention cases in which courts have struck down as unconstitutional procedures adopted by authorities or jail policies barring a prisoner from visiting his children at the place of incarceration. See, *In re Smith*, 112 Cal. App. 3d 956, 169 Cal. Rptr. 564 (1980); *Valentine v. Englehardt*, 474 F. Supp. 294 (D.C.N.J. 1979). In this case there is no procedure used by authorities or jail policy questioned by Wilfred. The order modifying Wilfred's visitation is not based solely on the fact of Wilfred's incarceration. When the decree of dissolution was entered in 1978, one of the Nielsen children was approximately 1½ years old and the other's age was just under 6 months. At the time the district court modified Wilfred's right of visitation, the children were nearly 6 years and 5 years of age. In view of

the ages of the children when the decree of dissolution was entered, the children could not have understood the reason for Wilfred's imprisonment. The evidence shows that with the passage of time the Nielsen children became aware of the circumstances surrounding Wilfred's incarceration. According to professional opinion in evidence, there will be an adverse psychological impact on the Nielsen children as a result of visitation at the penitentiary. Visitation at the penitentiary will disturb and unsettle the children during their current, formative years, when security and stability are essential to the normality of the Nielsen children.

We find that the best interests of the Nielsen children presently require that there be no visitation with Wilfred at the penitentiary.

No attorney fee is taxed as a part of the costs on appeal, and each party shall pay his or her own attorney fee.

The judgment of the district court is affirmed.

AFFIRMED.

GRANT, J., not participating.

BURTON E. NIXON, APPELLEE, V. MADISON COUNTY AGRICULTURAL SOCIETY, A POLITICAL SUBDIVISION, APPELLANT.

348 N.W.2d 119

Filed April 20, 1984. No. 83-179.

Public Meetings. A county agricultural society is a public body subject to the provisions of the public meetings law.

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

Michael T. Brogan of Brogan & Stafford, P.C., for appellant.

David A. Domina of Domina Law Firm, for appellee.

Alan M. Wood, for amicus curiae Nebraska Association of Fair Managers.

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

BOSLAUGH, J.

The issue upon this appeal is whether the Nebraska public meetings law is applicable to a county agricultural society such as the defendant in this case.

The plaintiff commenced this action to obtain a declaration that a contract for the construction of a livestock exposition building at a cost of approximately $140,000 was void because the meeting of the directors of the society at which the execution of the contract was authorized was held in violation of Neb. Rev. Stat. §§ 84-1408 et seq. (Reissue 1981). The defendant claims that it is a private corporation and not subject to the requirements of the public meetings law.

Both parties filed motions for summary judgment. The trial court found that the defendant was a body created by statute and authorized to cause the levy of, receive and procure, or expend public money, and as such was required to comply with the Nebraska public meetings law; that the defendant had failed to comply with the statutes and the construction contract was void. The plaintiff's motion was sustained and the defendant's motion overruled. The defendant has appealed.

The defendant is a county agricultural society organized under Neb. Rev. Stat. §§ 2-201 to 2-237 (Reissue 1977 and Cum. Supp. 1982). Such a society may be formed by the voluntary association of 20 or more residents of the county. After a society has been organized it can obtain the proceeds of a tax to be levied by the county board. §§ 2-201 et seq. (Cum. Supp. 1982). An additional capital construction tax is authorized under § 2-203.06 (Cum. Supp. 1982).

Although a county agricultural society resembles a private corporation in some respects, the statutory provisions which grant such a society the right to receive support from the public revenue give it a public character.

The Nebraska public meetings law is applicable to "public bodies," which are defined to include "all independent boards, commissions, bureaus, committees, councils, subunits, or any other bodies, now or hereafter created by Constitution, statute, or otherwise pursuant to law." § 84-1409(1)(c).

We think the better view is that a county agricultural society is a public body subject to the provisions of the public meetings law. The judgment of the district court is affirmed.

AFFIRMED.

CILLESSEN CONSTRUCTION COMPANY, APPELLANT, V. SCOTTS BLUFF COUNTY HOUSING AUTHORITY, APPELLEE.

348 N.W.2d 418

Filed April 20, 1984. No. 83-236.

1. **Contracts.** Where contract language is plain and unambiguous, the court will not read an ambiguity into the language of a contract in order to construe it against the one who prepared the contract.
2. **Estoppel.** The essential elements of equitable estoppel are: As to the party estopped, (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts. As to the other party, (4) lack of knowledge and of means of knowledge of the truth as to the facts in question; (5) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice.
3. **Summary Judgment.** Summary judgment may be properly granted where there exists no genuine issue as to any material fact

in the case, the ultimate inferences to be drawn from those facts are clear, and the moving party is entitled to judgment as a matter of law.

4. **Summary Judgment: Affidavits.** To be effective evidence opposing rendition of a summary judgment, an affidavit must be made on personal knowledge and show affirmatively that affiant is competent to testify to the matters stated therein.

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

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

Paul E. Hofmeister of Van Steenberg, Brower, Chaloupka, Mullin & Holyoke, for appellee.

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

PER CURIAM.

Plaintiff has appealed an order of the district court granting the defendant's motion for summary judgment.

This dispute centers upon whether Cillessen Construction Company (Cillessen) could seed the grass areas in a housing project or whether the contract required sod. Cillessen completed the project with sod and brought suit for the cost difference.

On September 9, 1980, Cillessen executed a contract with the defendant, Scotts Bluff County Housing Authority (Authority), to build 54 low-cost housing units for the price of $1,623,500.

On October 20, 1980, approximately 1 month after signing the contract, Cillessen submitted a schedule of amounts for contract payments. The schedule, which consisted of a cost breakdown for the $1,623,500 bid, included a seeding cost of $14,500 under the subcategory of site work. There was no provision for sodding in the schedule provided by Cillessen. On October 24, 1980, this schedule was signed and accepted by Ronald C. Young, the project's architect, and Pat Berzina, the executive director for the Authority.

In March of 1981 A. M. Cillessen attended a meeting of the board of directors of the Authority and stated his belief that the contract provided for an option to seed rather than sod. The Authority stated it wanted sod to be installed and requested Mr. Young and Mr. Cillessen to work out the final alternative for the installation of the lawn. Both parties have stood firm in their respective interpretations of the contract, and this dispute was brought to the courts.

Cillessen's assignments of error, stated generally, are that (1) the trial court erred in not determining the contract to be ambiguous, which would have given Cillessen the option to seed the project; (2) the trial court erred in not granting summary judgment in favor of the plaintiff, because the estoppel theory presented in the pleadings and supported by affidavits of fact in the motion for summary judgment was not contradicted by the evidence of the defendant; and (3) the trial court erred by receiving into evidence facts that were inadmissible because the affiant was not competent to testify in the specific matter.

The contract between the parties consisted of five components: the instrument, general conditions, special conditions, technical specifications, and drawings. Article 3 within the instrument states that in the event any provision in any component part of the contract conflicts with any provision of any other component part, the provisions of the component part first enumerated in article 3 shall govern, except as otherwise specifically stated.

The next relevant provision is paragraph 13a of the general conditions, which provides as follows:

> Anything mentioned in the Technical Specifications and not shown on the Drawings, or shown on the Drawings and not mentioned in the Technical Specifications, shall be of like effect as if shown on or mentioned in both. In case of difference between Drawings and Technical Specifications, the Technical Specifications shall gov-

> ern. In case of any discrepancy in Drawings, or Technical Specifications, the matter shall be immediately submitted to the Architect, without whose decision said discrepancy shall not be adjusted by the Contractor, save only at his own risk and expense. In case of differences between small and large scale drawings, the larger scale drawings shall take precedence.

In § 2D of the technical specifications, subsections 2A(7) and 3N include the instructions for both sodding and seeding, respectively. Cillessen relies on these two sections to contend the contractor has the option to seed or sod lawn areas because the contract is ambiguous.

The last relevant section is the architect's drawings. The drawings specifically provide: "ALL AREAS, NOT PAVED, INSIDE CONTRACT LIMIT TO BE SOD."

In reviewing the contract we have determined that the provisions were not ambiguous. The specifications for seeding and sodding set out in the special conditions merely contain instructions for compliance with the plans and drawings. It is here noted that the general conditions, the special conditions, and the technical specifications are all included in a specifications manual (part of this contract) applicable to all U.S. Department of Housing and Urban Development projects.

Furthermore, the controlling provision to this dispute is the before mentioned paragraph 13a of the general conditions. This is a situation where the drawing unambiguously requires sod to be installed; the technical specifications providing a guideline for the type of sod and how it should be maintained, and the kind of seed and how it shall be cared for, as the case may be.

Where contract language is plain and unambiguous, the court will not read an ambiguity into the language of a contract in order to construe it against the one who prepared the contract. *Rodriguez v.*

Government Employees Ins. Co., 210 Neb. 195, 313 N.W.2d 642 (1981).

Cillessen contends in the second assignment of error that its affidavit of facts established a right of recovery on the theory of equitable estoppel and that the authority failed to introduce evidence to contradict that contention. We disagree.

By affidavit A. M. Cillessen, Cillessen's president, contends that he relied upon the representation of the Authority in the special conditions of the contract because, 1 month after the contract was agreed upon, the project architect, Young, and the executive director, Berzina, accepted a schedule of payment for the total project, which included seeding rather than sodding. We find that the affidavits are inadequate to prove the equitable estoppel theory.

The essential elements of equitable estoppel are: As to the party estopped, (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts. As to the other party, (4) lack of knowledge and of means of knowledge of the truth as to the facts in question; (5) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice. *Kohlbeck v. City of Omaha*, 211 Neb. 372, 318 N.W.2d 742 (1982).

The first element Cillessen must show is that the Authority's conduct amounted to a false representation or concealment, or conduct which was calculated to give the impression that seeding would be

adequate. The contract on September 9, 1980, is clear that sodding is required.

The acts which are alleged to be inconsistent with the Authority's position are the signing of the payment schedule on October 24, 1980, and a periodic estimate for partial payment in October 1980. Both of these documents were submitted after the original contract was signed, and both were prepared by Cillessen, not the Authority.

Cillessen has produced no evidence of misleading conduct which occurred prior to the signing of the contract. Furthermore, the first mention of the sod or seed issue by Cillessen is in the March 17, 1981, board of directors meeting for the Authority, where the Authority requested sod. The Authority has consistently demanded sod whenever the issue has been raised.

Another element required to be shown by Cillessen is that it relied upon the contract or statements of the Authority. No facts are present in the affidavits to support the allegation that reliance existed. Because there is no conduct by the Authority to evidence an intent to allow seeding rather than sodding, nor is there evidence to show reliance by Cillessen when the contract was signed, the district court was correct in not granting a summary judgment in favor of Cillessen.

In effect, the facts offered by the affidavit of A. M. Cillessen were of no consequence and need not have been contradicted, because the documents referred to were not part of the contract and because the facts alleged were not sufficient to raise an estoppel theory. Therefore, summary judgment in favor of the defendant Authority was correct.

Summary judgment may be properly granted where there exists no genuine issue as to any material fact in the case, the ultimate inferences to be drawn from those facts are clear, and the moving party is entitled to judgment as a matter of law. *Snyder v. Nelson*, 213 Neb. 605, 331 N.W.2d 252 (1983).

Cillessen also claims, in the third assigned error, that affiant Berzina was not competent to testify about a written opinion on the sod issue by the U.S. Department of Housing and Urban Development.

Evidence consisting of denials, general allegations, conclusions, arguments, and statements that would not be admissible in evidence is of no avail in opposition to a motion for summary judgment; and, to be effective, evidence opposing rendition of a summary judgment must be made on personal knowledge and show affirmatively that affiant is competent to testify to matters stated therein. *Partridge v. Younghein*, 202 Neb. 756, 277 N.W.2d 100 (1979).

Cillessen objected to paragraphs 11 and 12 of Berzina's affidavit and the attached exhibits L and M because the opinion of HUD is inadmissible hearsay evidence. We believe the court erred in receiving exhibit L in Berzina's affidavit, the opinion of HUD, into evidence. Nevertheless, the error is harmless and the remaining portion of Berzina's affidavit is sufficient evidence to show the moving party is entitled to judgment as a matter of law.

The judgment of the district court is affirmed.

AFFIRMED.

TIMOTHY J. OTTO, PERSONAL REPRESENTATIVE OF THE ESTATE OF MARVEL F. WOODSIDE, DECEASED, APPELLEE, V. HONGSERMEIER FARMS, INC., A NEBRASKA CORPORATION, APPELLANT.

348 N.W.2d 422

Filed April 20, 1984. Nos. 83-253, 83-331.

1. **Forcible Entry and Detainer.** A forcible entry and detainer action is a civil action subject to the normal rules of a civil proceeding, including the power of the court to sustain a motion for a directed verdict in favor of either party at the close of all the evidence.
2. **Directed Verdict.** In examining the propriety of an order sustain-

ing a motion for a directed verdict, all controverted facts and all inferences arising from the evidence shall be construed most strictly against the moving party and in favor of the party against whom the motion for directed verdict was granted.

3. **Landlord and Tenant: Leases: Presumptions.** If a tenant, without consent of the landlord, holds over after the term of the lease has expired, there is no presumption that the parties had agreed that the same relation of landlord and tenant should continue for another term.

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

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

James A. Beltzer of Luebs, Dowding, Beltzer, Leininger, Smith & Busick, for appellee.

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

WHITE, J.

This action started as one suit for forcible entry and detainer to recover the possession of approximately 320 acres of farmland. Plaintiff below and appellee here is Timothy J. Otto, the personal representative of the estate of Marvel F. Woodside. The defendant below and appellant here is the Hongsermeier Farms, Inc. Since the appellant has filed two notices of appeal in this court, the first after the district court's order on the merits and the second following the district court's order overruling appellant's motion for new trial, a single case has been twice docketed. In any event, the cases were consolidated for purposes of this appeal.

A jury trial was demanded in the county court, and at the conclusion of all the evidence the county court sustained appellee's motion for a directed verdict and ordered restitution of the premises. Hongsermeier Farms, Inc., appealed to the district court, which affirmed the county court's decision. Appellant here assigns numerous errors, but the same involve basically the following three questions: (1) Whether a county court in an action for forcible

entry and detainer has the authority to direct a verdict. (2) Presuming the county court had authority to direct a verdict in a forcible entry and detainer action, did the county court err in determining that the plaintiff-personal representative was entitled to judgment of restitution of the premises as a matter of law? (3) Whether or not the required bond furnished by the personal representative as a condition of levying of the order of restitution was executed and approved according to law. In view of our disposition of the case, we shall consider only the first two errors.

Actions in forcible entry and detainer in the county and municipal courts are controlled by Neb. Rev. Stat. §§ 24-568 et seq. (Reissue 1979). The present section with respect to a jury trial in a forcible entry and detainer case is § 24-577. It provides:

> If a jury is demanded by either party, the proceedings shall be in all respects as in other cases. If the jury shall find that the complaint is true, they shall render a general verdict of guilty against the defendant; if not true, then a general verdict of not guilty; if true in part, then a verdict setting forth the facts they find true.

The argument advanced by appellant is, essentially, that since the right of a jury trial existed in a forcible entry and detainer action in Nebraska prior to the adoption of the Nebraska Constitution, a constitutional right of trial by jury is preserved for forcible entry and detainer actions. Appellant further contends that the constitutional right to trial by jury necessarily excludes the power of a county court to direct a verdict in a jury trial. Whether this prohibition against a directed verdict extends beyond forcible entry and detainer actions to other civil cases is not detailed by the appellant. Rev. Stat. tit. 30, ch. X, § 1028 (1866), which was in effect at the time of the adoption of the Nebraska Constitution, provided:

> If a jury be demanded by either party, the pro-

> ceedings, until the empanneling thereof, shall be in all respects as in other cases. The jury shall be sworn or affirmed, to well and truly try and determine whether the complaint of (naming the plaintiff) about to be laid before them is true according to the evidence. If the jury shall find the complaint true, they shall render a general verdict of guilty against the defendant; if not true, then a general verdict of not guilty; if true in part, then a verdict setting forth the facts they find true.

We said in *Omaha Fire Ins. Co. v. Thompson*, 50 Neb. 580, 584, 70 N.W. 30, 32 (1897), that "[t]he constitutional guaranty of trial by jury (Constitution, art. 1, sec. 6) is that 'The right of trial by jury shall remain inviolate.' That is, the right was not extended by the constitution; it was merely preserved." The appellant seizes on the words, "general verdict of guilty . . . [or] not guilty," found in both the antecedent statute and the present statute, to suggest that the action of forcible entry and detainer is, in fact, a criminal action and not a civil action, and therefore a motion for a directed verdict in favor of a plaintiff could never be appropriate. Aside from the fact that this court has uniformly held that a motion for directed verdict in a forcible entry and detainer action is appropriate, see, *Cochran v. Philadelphia Mortgage & Trust Co.*, 70 Neb. 100, 96 N.W. 1051 (1903); *House v. Lewis*, 108 Neb. 257, 187 N.W. 784 (1922); *Lierman v. Vidra*, 103 Neb. 613, 173 N.W. 575 (1919), there is authority from the general text at 36A C.J.S. *Forcible Entry and Detainer* § 64 at 1035 (1961), which states: "If the evidence is clear and without conflict, the court may direct a verdict by instructing the jury peremptorily to find for the plaintiff or defendant . . . ."

We have further held in *Post v. Bohner*, 23 Neb. 257, 259, 36 N.W. 508, 509 (1888):

> "The action of forcible entry and detainer, under the statute, being a civil remedy to recover

> the possession of premises unlawfully, and with force, withheld from the plaintiff, it will be sufficient to sustain the charge of forcible detainer, that the party unlawfully in possession refuses to vacate the premises on lawful notice to do so."

See, also, *Board of Educational Lands & Funds v. Gillett*, 158 Neb. 558, 64 N.W.2d 105 (1954).

Black's Law Dictionary 336 (5th ed. 1979) defines criminal action as a "Proceeding by which person charged with a crime is brought to trial and either found not guilty or guilty and sentenced. An action, suit, or cause instituted to punish an infraction of the criminal laws." We have no hesitancy, therefore, in holding that an action for forcible entry and detainer is a civil action subject to the normal rules of a civil proceeding, including the power of the court to sustain a motion for a directed verdict in favor of either party at the close of all the evidence.

We next pass to a discussion of the second assignment of error, i.e., whether the evidence, as a matter of law, was sufficient to hold that the plaintiff is entitled to judgment. In considering the second assignment of error we keep in mind that in examining the propriety of an order sustaining a motion for a directed verdict, all controverted facts and all inferences arising from the evidence shall be construed most strictly against the moving party and in favor of the party against whom the verdict was granted. *Kresha v. Kresha*, 216 Neb. 377, 344 N.W.2d 906 (1984). Under the version of the facts most favorable to the appellant, the following appears. The appellant was in possession of the farm real estate under a written lease dated February 28, 1981, and by its terms due to expire on February 28, 1982. The owner of the real estate, one Marvel F. Woodside, passed away on December 27, 1981. Shortly thereafter, the appellant's president was contacted by Timothy J. Otto, an attorney who had drawn the lease and who was named in the will as personal representative of the deceased owner. In that con-

versation appellant urges that the discussion was simply to the effect that the personal representative was directed by the will to sell the farm real estate, that he intended to make successive offers commencing at the highest price, and that the first of said offers would be conveyed to appellant. Appellant acknowledges that some 10 to 12 separate offers were conveyed to him as the price gradually was reduced lacking willing bidders at the higher proffered prices. The appellant did not vacate the premises but held over. On the 23d day of April 1982 the personal representative caused to be served on the appellant a 3-day notice to quit. The appellant testified that he had performed some farmwork after the notification, but did not allege, nor was there proof offered to suggest, that Timothy J. Otto, the personal representative, either knew of the continued preparatory farmwork or consented to it. After the notice was served the appellant disregarded the notice, proceeded to fertilize, held over, and was ousted from the premises during the summer of 1982. Although no authority for the point is cited by appellant in its brief, its argument is obviously directed to the proposition that " '[w]hen a tenant with the consent of his landlord, express or implied, holds over his term, the law presumes a continuation of the original tenancy for another like term and upon the same conditions.' " *Wright v. Barclay*, 151 Neb. 94, 98, 36 N.W.2d 645, 648 (1949). Of what does this consent consist is not shown by the appellant, except to assert, incorrectly, that the mere holdover of days is sufficient to grant such consent. To the contrary is *Krull v. Rose*, 88 Neb. 655, 130 N.W. 272 (1911). Syllabus 1 of that case holds:

> If a tenant under a written lease for the term of three years holds over 45 days after the expiration of his term without the consent of the landlord, he will not become a tenant from year to

> year, unless the landlord has recognized him as tenant while so holding over.

The court in *Krull* at 656, 130 N.W. at 272, also held:

> [W]hen a term stipulated in a written lease for a year has ended, and the landlord recognizes him as tenant thereafter by receiving rent or in any other way, showing that both parties regard the relation of landlord and tenant as still continuing, and there is no further agreement as to the terms of the tenancy, defendant is to be considered as holding for another term upon the same conditions as specified in the original lease.

In this case the landlord did not recognize appellant as a tenant in any way after the lease term expired, and there is, of course, no presumption that the parties had agreed that the same relation of landlord and tenant should continue for another year. The appellant cites no authority nor have we discovered any that suggests that somehow the continued recognition of the tenancy was accomplished through the offer of sale of the farm premises or by the unauthorized farmwork done after the expiration date of the lease.

There being no basis on which appellant could deny the appellee restitution of the premises under a version of the facts most favorable to the appellant, the appellee-personal representative was entitled to a judgment as a matter of law, and the court correctly directed the jury to so find.

As to the third assignment of error, since the appellee was clearly entitled to possession of the premises, there can be no liability on the bond, and the formality or lack of it concerning the execution and approval of the bond need not be discussed.

The judgment of the trial court is affirmed.

AFFIRMED.

DAVID R. GARRETT, APPELLEE, V. BARBARA J. GARRETT, APPELLANT.

348 N.W.2d 120

Filed April 20, 1984. No. 83-305.

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

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

Steven M. Curry of Sampson, Curry & Hummel, for appellee.

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

PER CURIAM.

The instant appeal involves a domestic relations matter.

The court, having reviewed the record in this case de novo, agrees with the result reached by the trial court. The judgment is affirmed.

AFFIRMED.

PAUL E. COX, APPELLANT, V. COUNTY OF SARPY ET AL., APPELLEES.

348 N.W.2d 120

Filed April 20, 1984. No. 83-307.

1. **Administrative Agencies: Actions: Appeal and Error.** A petition in error is designed to review the decision of the inferior tribunal to determine that it is in accordance with law and is supported by sufficient competent evidence. The reviewing court is not to act as a super administrative agency and come to an independent conclusion.
2. **Termination of Employment.** Generally, discharge of an employee protected by civil service or classified service may only occur for reasons stated in the enabling legislation or agreement.

Appeal from the District Court for Sarpy County:

GEORGE H. STANLEY, Judge. Reversed and remanded with directions.

Donald J. Loftus, P.C., for appellant.

William P. MacKenzie, Deputy Sarpy County Attorney, for appellees.

KRIVOSHA, C.J., HASTINGS, CAPORALE, and SHANAHAN, JJ., and BRODKEY, J., Retired.

HASTINGS, J.

The employment of Paul E. Cox as a deputy sheriff was terminated by order of the sheriff. That action was affirmed by the Sarpy County Sheriff's Merit Commission. The district court rejected Cox's petition in error, thereby approving the action of termination.

In his appeal Cox claims that the commission was without authority to amend the sheriff's order of termination, the termination was not supported by a showing of good cause, and the findings of the commission were never certified to the sheriff as required by statute. We find it necessary to deal only with the issue of good cause.

On March 27, 1981, Paul Cox sustained certain injuries arising out of and during the course of his employment as a deputy sheriff. For a period of time following that he was totally disabled. As a result, he received weekly compensation checks, which he turned back to the county and in turn received his regular paychecks. This was in accordance with the labor agreement between the county and the police union. That contract provided in part that workmen's compensation benefits paid to an employee to replace lost salary are to be turned over to the county, which in turn will pay the regular salary to the employee as long as the employee remains eligible for compensation benefits.

Following a surgical operation in March of 1982, Cox was given to understand that he had a 15-percent permanent disability. According to Cox, he under-

stood that his physician released him for light work. However, the sheriff's office informed him that he could not return to work as long as he had the disability rating and was under the physician's care. He was told that he would be off on temporary disability. Cox began receiving workmen's compensation checks, which he said he understood were for his disability rating rather than for loss of wages. He also received normal paychecks during this period of time.

After having received and cashed two of those paychecks, Cox was told by the sheriff's department that any further paychecks would be held unless he turned back the workmen's compensation checks. Although the record is rather sketchy in this regard, Cox failed to turn back the checks and his employment was terminated.

Termination was accomplished by a letter from the sheriff dated May 17, 1982, advising Cox that he had been suspended from employment as of May 15 and would be terminated as of May 31. The reason given for such action was that Cox had failed to comply with the rules regarding workmen's compensation benefits. According to a memo sent from the sheriff's department to Cox, dated May 21, 1982, he was to be sent a final check covering the balance due him for vacation and holiday pay less the amount of the previously mentioned two paychecks.

Following a June 22, 1982, hearing, the Sarpy County Sheriff's Merit Commission denied Cox's grievance, declaring that the sheriff did have just cause for the action which he had taken. It did, however, amend the termination order so as to be effective on June 30, 1982, because the sheriff's letter was not received by Cox until May 31.

The bylaws of the sheriff's merit commission, by article III, provide for a classified service. Section XII of that article directs that any violation of the provisions of § XI shall be punishable by reprimand, suspension, demotion, or termination. That section

goes on to relate that any of those sanctions may be applied for "cause." Section XI states in part:

> Any action which reflects discredit upon the service or is a direct hindrance to the effective performance of the county government functions shall beconsidered [sic] good cause for disciplinary action. The following are declared to be good cause for disciplinary action against any employee, though charges may be based upon caused [sic] and complaints other than those listed.

There follow 14 specific acts, such as habitual use of alcohol or narcotics, criminal offenses, negligence, solicitation of gifts, failure to pay debts, and other activities which would not cover the situation here.

The appellee argues that justifiable "cause" is not limited to the specific activities enumerated. We agree. However, the appellee cites us to no authority which would permit a finding that an unspecified activity that does not reflect "discredit upon the service or is [not] a direct hindrance to the effective performance of the county government functions" furnishes good cause for disciplinary action. We find no such authority ourselves.

A petition in error is designed to review the decision of the inferior tribunal to determine that it is in accordance with law and is supported by sufficient competent evidence. The reviewing court is not to act as a super administrative agency and come to an independent conclusion. *Andrews v. City of Fremont*, 213 Neb. 148, 328 N.W.2d 194 (1982); *Hollingsworth v. Board of Education*, 208 Neb. 350, 303 N.W.2d 506 (1981).

Generally, discharge of an employee protected by civil service or classified service may only occur for reasons stated in the enabling legislation or agreement. *Sailors v. City of Falls City*, 190 Neb. 103, 206 N.W.2d 566 (1973).

In order to support the action of the sheriff, it was necessary that the commission find that the action

of Cox in cashing the two payroll checks while retaining the workmen's compensation benefits either reflected discredit on the service or was a direct hindrance to the effective performance of the county government functions. Such a finding was not supported by sufficient competent evidence.

If such activities are intended to be good cause for discipline, the bylaws should be amended to so provide.

The judgment of the district court is reversed, and the cause is remanded with directions to order the reinstatement of Paul Cox to his position in the classified service, with restoration of backpay and benefits, mitigated by any wages or salary earned by him in the interim, and further reduced by the amount of any workmen's compensation benefits paid to the plaintiff on account of temporary total disability.

REVERSED AND REMANDED WITH DIRECTIONS.

EUGENE STOCK, APPELLEE, V. LOUIS A. MEISSNER, APPELLEE, AND UNIVERSAL SURETY COMPANY, APPELLANT.

348 N.W.2d 426

Filed April 20, 1984. No. 83-417.

1. **Bonds: Principal and Surety.** A grain dealer's bond is an official bond, sometimes called a statutory bond, creating a new obligation; the liability of both principal and surety is original and primary.
2. **Limitations of Actions.** Statutes of limitation are statutes of repose, and generally they do not impair existing substantive rights, but merely affect the procedure by which such rights may be enforced.
3. **Collateral Estoppel.** 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.

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

James W. Hewitt, for appellant.

Edward F. Carter, Jr., and Dana Baker of Barney, Carter & Johnson, P.C., and Cleo Robak, for appellee Stock.

BOSLAUGH, WHITE, and GRANT, JJ., and CHEUVRONT, D.J., and COLWELL, D.J., Retired.

COLWELL, D.J., Retired.

Defendant Universal Surety Company (Universal) appeals the entry of a money judgment against it as surety on a grain dealer's bond, claiming that the summary judgment in favor of the codefendant principal, Louis A. Meissner, discharged the liability of the surety.

There is no dispute as to the facts, which are fully set out in *Stock v. Meissner*, 209 Neb. 636, 309 N.W.2d 86 (1981), wherein Western Surety Company was the surety party defendant. The suit is based on an oral contract under which the plaintiff, Eugene Stock, and his assignors sold 4,072.32 bushels of corn to Meissner, a grain dealer, in February 1974 at $2 a bushel. No payment was made, and in 1979 Stock filed suit against Meissner and Western Surety Company, which was the surety for Meissner at the time that suit was filed. Summary judgment was entered in favor of Western, for the reason that it was not the surety at the time of the alleged oral contract, and in favor of Meissner, on the basis of the 4-year statute of limitations applicable to suits on oral contracts. Stock demanded payment from Universal in 1981, but no payment was ever made. Meissner and Universal, as surety, had executed and filed a surety bond on January 12, 1973, that was canceled September 21, 1975.

The bond is required by Neb. Rev. Stat. § 88-518 (Reissue 1981) for Meissner's grain dealer license from the Public Service Commission "conditioned

that the applicant will pay the purchase price of such grain upon demand of the owner or seller . . . ." The statute of limitations applicable to suits on such a bond is 10 years. Neb. Rev. Stat. § 25-209 (Reissue 1979).

Following the 1981 case, Stock refiled his claim alleging one cause of action on Universal's surety bond, joining Meissner and Universal as defendants.

Meissner and Universal filed separate motions for summary judgment. Meissner's motion was granted upon general findings. Stock's motion for new trial was denied, and he did not appeal; that judgment is final. Universal's motion was denied, and a trial was held on stipulated facts. Judgment was entered against Universal for $8,144.64, plus interest, costs, and attorney fees. Neb. Rev. Stat. § 44-359 (Reissue 1978).

On appeal Universal claims that the summary judgment in favor of the principal, Meissner, discharged the liability of Universal as surety, citing *Niklaus v. Phoenix Indemnity Co.*, 166 Neb. 438, 89 N.W.2d 258 (1958), which held that a surety's obligation is not an original or direct one but, rather, is collateral to the principal's obligation.

Niklaus is not applicable to the facts here. The grain dealer's bond is an official bond, sometimes called a statutory bond, creating a new obligation; the liability of both principal and surety is original and primary. *Neisius v. Henry*, 143 Neb. 273, 9 N.W.2d 163 (1943).

The terms of the surety bond here provided that Meissner and Universal were jointly and severally liable. We have held in other similar cases that on official bonds the principal and surety are jointly and severally liable. See, *State Surety Co. v. Peters*, 197 Neb. 472, 249 N.W.2d 740 (1977) (fuel dealers bond); *Suns Ins. Co. v. Aetna Ins. Co.*, 169 Neb. 94, 98 N.W.2d 692 (1959) (motor vehicle dealers bond). "In a joint obligation, as well as in a joint and several obligation, each obligor who is bound at

all is legally liable for the whole undertaking . . . ." 12 Am. Jur. 2d *Bonds* § 29 at 499 (1964). The record here does not show the reasoning or basis for granting Meissner's summary judgment, and whether or not it was correct was not preserved in this appeal. The record does show that Meissner's application alleged defenses of (1) the bar of the statute of limitations, (2) issue preclusion, and (3) the laws of the case, which were not substantive issues. The execution of the bond was admitted in the pleadings, and the summary judgment did not litigate the merits of Universal's liability on the bond.

Universal also contends that since in the 1981 case the 4-year statute of limitations was applied, collateral estoppel, or issue preclusion, bars Stock from now asserting that the 10-year statute of limitations is applicable here.

Statutes of limitations are statutes of repose, *Colton v. Dewey*, 212 Neb. 126, 321 N.W.2d 913 (1982), and generally they do not impair existing substantive rights, but merely affect the procedure by which such rights may be enforced, *Cedars Corp. v. Swoboda*, 210 Neb. 180, 313 N.W.2d 276 (1981). See 51 Am. Jur. 2d *Limitation of Actions* § 3 at 593 (1970).

> 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.) *Borland v. Gillespie*, 206 Neb. 191, 198, 292 N.W.2d 26, 31 (1980).

In the 1981 case the 4-year statute of limitations was applied in favor of Meissner as a defense to the action on the oral contract; however, the summary judgment in that case did not litigate or impair Stock's rights and separate cause of action against Universal on the statutory bond. The issue of the

applicability of the 10-year statute of limitations to a suit on the bond executed by Meissner and Universal had never been resolved; therefore, the original summary judgment in favor of Meissner does not operate to bar the cause of action against Universal.

Stock is allowed $750 for the services of his attorneys in this court.

AFFIRMED.

SUSAN K. CONDON, PLAINTIFF, V. A. H. ROBINS COMPANY, INC., DEFENDANT.

349 N.W.2d 622

Filed April 20, 1984. No. 83-471.

Products Liability: Limitations of Actions. The 4-year statute of limitations set forth in Neb. Rev. Stat. § 25-224(1) (Cum. Supp. 1982) begins to run on the date on which the party holding the cause of action discovers, or in the exercise of reasonable diligence should have discovered, the existence of the injury or damage.

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

Jerold V. Fennell of Robert E. O'Connor & Associates, for plaintiff.

Ronald F. Krause of Cassem, Tierney, Adams, Gotch & Douglas, for defendant.

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

KRIVOSHA, C.J.

This matter is presented to the court on a certification of a question of law from the U.S. District Court for the District of Nebraska, pursuant to the provisions of Neb. Rev. Stat. § 24-219 (Cum. Supp. 1982). The specific question certified to us by the federal court is as follows: Does the 4-year statute of limitations set forth in Neb. Rev. Stat. § 25-224(1) (Cum. Supp. 1982) begin to run on the date on which

injury or damage complained of occurs or when the person injured discovers the facts constituting the basis of the cause of action or the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery?

If the question presented to us is whether the statute of limitations begins to run on the date on which the injury or damage "happens," whether known to the injured party or not, or when the injured party knows whom to sue, we believe the answer is neither time. We reach this conclusion because we believe, for reasons which we will detail hereafter, that a cause of action under the provisions of § 25-224(1) begins to run from the time the party entitled to bring the cause of action discovers, or in the exercise of reasonable diligence should have discovered, the existence of death, injury, or damage. While the date on which death occurs should usually be easy to determine, the date on which the injury or damage is discovered, or in the exercise of reasonable diligence could be discovered, may be more difficult. Furthermore, the date on which the statute of limitations under § 25-224(1) begins to run in regard to one particular injury or damage may not be the same as it is with respect to a further or different injury or damage occasioned by the use of or contact with the defective product.

Because evidence has not as yet been presented in the trial court and because this matter comes to the court as a certified question, the particular facts are neither available to us nor relevant in our determination of the legal question. We do, however, set out the statement of facts presented to us by the request for formal certification, solely for the reason that the statement may be helpful in discussing the legal principles.

On February 1, 1974, the plaintiff, Susan K. Condon, was professionally fitted with a "Dalkon Shield" intrauterine device manufactured by the de-

fendant, A. H. Robins Company. On or about August 27, 1976, after experiencing abdominal pain, Condon received medical care, and the Dalkon Shield was removed. In January of 1982, following an examination and the administration of diagnostic tests, a physician advised Condon that she had pelvic adhesions, which were probably caused by her use of the Dalkon Shield. While not set out in the statement of facts presented to us, the complaint filed by Condon alleges that by reason of Robins' negligence, Condon was required to be hospitalized and, in addition to other damages, has become permanently sterile.

The statute in question, § 25-224(1), provides: "All product liability actions, except one governed by subsection (5) of this section, shall be commenced within four years next after the date on which the death, injury, or damage complained of occurs." Subsection (5) is not material to our question as presented. Robins argues that the statute should be interpreted to mean that the statute of limitations begins to run when the injury or damage in fact first happens, even though the individual who has been injured or damaged may be totally unaware of the fact. In support of its position Robins argues that the Legislature was mindful of our decision in *Spath v. Morrow*, 174 Neb. 38, 115 N.W.2d 581 (1962), when it adopted § 25-224(1), and by omitting a specific reference to "discovery" in the subsection, the Legislature obviously intended that a discovery rule should not be applied. We do not believe, however, that an examination of either the legislative history surrounding the adoption of § 25-224(1) or the general applicable rules of law leads to the conclusion urged by Robins.

The purpose of permitting a discovery rule to be applied to a statute of limitations is founded upon what this court perceives as the logic of the matter. In *Spath* we examined the history underlying a stat-

ute of limitations, and noted at 41, 115 N.W.2d at 583-84:

> The statute of limitations is a statute of repose; it prevents recovery on stale demands. In re Estate of Anderson, 148 Neb. 436, 27 N.W.2d 632. The statute is enacted upon the presumption that one having a well-founded claim will not delay enforcing it beyond a reasonable time if he has the right to proceed. The basis of the presumption is gone whenever the ability to resort to the courts is taken away. Lincoln Joint Stock Land Bank v. Barnes, 143 Neb. 58, 8 N.W.2d 545. The mischief which statutes of limitations are intended to remedy is the general inconvenience resulting from delay in the assertion of a legal right which it is practicable to assert. 34 Am. Jur., Limitation of Actions, § 10, p. 20. If an injured party is wholly unaware of the nature of his injury or the cause of it, it is difficult to see how he may be charged with a lack of diligence or sleeping on his rights.

Additionally, if an individual is wholly unaware that he has in fact suffered injury or damage, it is difficult to see how he can file suit under a legal system which requires a party to allege and prove not only that another has breached a duty owed to the plaintiff but also that such breach has produced injury or damage. May one bring a cause of action if one neither knows nor, with the exercise of reasonable diligence, could know that he has been injured or damaged? We think not. The elements of actionable negligence are set out in 57 Am. Jur. 2d *Negligence* § 32 at 378 (1971). The author there notes:

> The primary wrong upon which a cause of action for negligence is based consists in the breach of a duty on the part of one person to protect another against injury, the proximate result of which is an injury to the person to whom the duty is owed. These elements of duty, breach,

> and injury are essentials of actionable negligence. In the absence of any one of them, no cause of action for negligence will lie.

And at 57 Am. Jur. 2d, *supra* § 64 at 415, the author further notes:

> A cause of action for negligence depends not only upon the defendant's breach of duty to exercise care to avoid injury to the plaintiff, but also upon damage or injury suffered by the plaintiff as a consequence of the violation of duty. Liability for negligence, of course, depends upon a showing that the injury suffered by the plaintiff was caused by the alleged wrongful act or omission of the defendant.

In *Widemshek v. Fale*, 17 Wis. 2d 337, 340, 117 N.W.2d 275, 276 (1962), the Wisconsin Supreme Court observed: "Actual damage is an essential element in the cause of action based on negligence or on fraud."

It seems to us that it would be a Hobson's choice to suggest, on the one hand, that one could not maintain a cause of action unless and until one could show not only a breach of duty but an injury or damage resulting from that breach and, on the other hand, to suggest that the time for bringing that action could begin and terminate before the individual could either reasonably be aware of the injury or damage or be able in any manner to establish its existence.

These rules are consistent with our own rules in such matters. It has long been recognized in this jurisdiction that a cause of action accrues and the statute of limitations begins to run when the aggrieved party has the right to institute and maintain a suit. See *Weiss v. Weiss*, 179 Neb. 714, 140 N.W.2d 15 (1966). Nebraska has a statute specifically declaring that concept to be the law of this jurisdiction. Neb. Rev. Stat. § 25-201 (Reissue 1979) provides: "Civil actions can only be commenced within the time prescribed in this chapter, after the cause of

action shall have accrued." The provisions of § 25-201 are applicable to § 25-224(1).

One may maintain that such an argument may have merit, but the Legislature, having spoken with clarity, cannot be disregarded. We believe, however, that we are not disregarding either the Legislature or the statutory language.

By simply turning to the dictionary and obtaining the plain meaning of "occur," one is inclined to adopt a discovery rule for § 25-224(1). While it is true that the word "occur" is often thought to mean "to happen," in fact its preferred meaning is otherwise. According to Webster's New Universal Unabridged Dictionary 1237 (2d ed. 1983), the word "occur" means "to come to mind; to be presented to the mind, imagination, or memory; to present itself." And the preferred meaning in Webster's Third New International Dictionary, Unabridged 1561 (1968), is "to be found or met with." To therefore suggest that the use of the word "occur" rather than "accrue," in § 25-224, somehow precludes the presence of a discovery rule or requires us to abandon the rule adopted by us in *Spath* is without support.

The word "occur" has previously been the source of litigation in insurance policies and generally has been held to imply a meaning of "being made known" rather than "happening." In *Wilkins v. Grays Harbor Com. Hosp.*, 71 Wash. 2d 178, 182, 427 P.2d 716, 719 (1967), the Washington Supreme Court, in defining the word "occur" within the meaning of a health insurance policy, said:

> Under the law, an illness or disease is deemed to "occur" when it first becomes manifest or active or when there is a distinct symptom or condition from which one learned in medicine can, with reasonable accuracy, diagnose the disease. The presence of germs in a body does not cause a disease to occur so long as they are only latent, inactive, and not discoverable.

And in the case of *Dependable Motors, Inc. v. Smith*, 433 S.W.2d 933, 935-36 (Tex. Civ. App. 1968), the Texas Court of Civil Appeals, in defining the word "occurring," said: "Webster's New International Dictionary (2 Ed.), p. 1684, defines the ordinary and reasonable meaning of 'occur' as: 'To meet one's eye; to be found or met with; to present itself; to appear; hence, to befall in due course; to happen. * * *' "

Most courts which have been asked to answer the specific question presented to us here have adopted a "discovery rule," whether for the reasons given by us herein or simply because to hold otherwise would deny a litigant the right to sue before the litigant, even in the exercise of due diligence, could sue. In *Hansen v. A. H. Robins, Inc.*, 113 Wis. 2d 550, 554, 335 N.W.2d 578, 580 (1983), the Wisconsin Supreme Court, responding to a certification of a question of law from the U.S. Court of Appeals for the Seventh Circuit, said:

> Basically, there are three points in time when a tort claim may be said to accrue: (1) when negligence occurs, (2) when a resulting injury is sustained, and (3) when the injury is discovered. [Citations omitted.] We have held that the time of the negligent act alone is not the key to accrual of tort claims. Traditionally, under Wisconsin law " '[a] cause of action accrues where there exists a claim capable of present enforcement, a suable party against whom it may be enforced, and a party who has a present right to enforce it.' " [Citation omitted.] A tort claim is not capable of enforcement until both a negligent act and an accompanying injury have occurred. [Citation omitted.] Although the negligence and resulting injury are often simultaneous, occasionally an injury will not be sustained until a subsequent date. Therefore, we have held that tort claims accrue on the date of injury. [Citations omitted.]

The Wisconsin court went on further in *Hansen* to note at 559, 335 N.W.2d 582:

> In any event the problems caused by the lapse of time must be balanced against the policy in favor of allowing diligent claimants to bring meritorious claims. It is manifestly unjust for the statute of limitations to begin to run before a claimant could reasonably become aware of the injury. Although theoretically a claim is capable of enforcement as soon as the injury occurs, as a practical matter a claim cannot be enforced until the claimant discovers the injury and the accompanying right of action. In some cases the claim will be time barred before the harm is or could be discovered, making it impossible for the injured party to seek redress. Under these circumstances the statute of limitations works to punish victims who are blameless for the delay and to benefit wrongdoers by barring meritorious claims. In short, we conclude that the injustice of barring meritorious claims before the claimant knows of the injury outweighs the threat of stale or fraudulent actions.

The Wisconsin court therefore determined that the discovery rule should be applicable in such cases.

Another reason to apply a discovery rule to a statute similar to § 25-224(1) is a recognition by courts that there is often a difference between a physical "injury" and a legal "injury" and that the time in which each may take place can be different.

In the case of *Dortch v. A. H. Robins Co., Inc.*, 59 Or. App. 310, 650 P.2d 1046 (1982), the Oregon Court of Appeals was asked to pass upon a statute identical to that which is presented to us by § 25-224(1), except as to number of years. In imposing a discovery rule on the statute, the Oregon court noted at ____, 650 P.2d at 1051:

> It is thus clear that the term "injury" has both a common and a legal meaning and that our cases and those of the Supreme Court have es-

> sentially settled the issue that, when used in construing a statute of limitations, the term "injury" is to be given its legal meaning. "Injury" in the legal sense means a physical injury which the plaintiff knows or as a reasonable person should know was caused by the defendant. That is when the legal injury occurs. [Citations omitted]; that is when the tort is committed, [citation omitted]; that is when the cause of action accrues and when the statute of limitations commences to run. [Citations omitted.]

One might therefore argue, from a medical standpoint, that some type of injury or damage, in the physical sense, first "happened" when the device was inserted; yet, in a legal sense, injury or damage does not "occur" until it has sufficiently manifested itself so that a reasonable person knows, or with the exercise of due diligence should have discovered, the injury or damage.

Therefore, we hold that the 4-year statute of limitations set forth in § 25-224(1) begins to run on the date on which the party holding the cause of action discovers, or in the exercise of reasonable diligence should have discovered, the existence of the injury or damage.

Because of the manner in which the question certified was presented, we believe one further comment may be necessary. By applying a discovery rule to § 25-224(1), we are not providing that the statute of limitations does not begin to run until someone advises an individual either that the injury or damage which they already know they have sustained is actionable or advises them who it is that should be sued. Discovery, as we apply it to § 25-224(1), refers to the fact that one knows of the existence of an injury or damage and not that one knows he or she has a legal right to seek redress in the courts.

In the case of *Sidney-Vinstein v. A. H. Robins Co.*, 697 F.2d 880 (9th Cir. 1983), the U.S. Court of Appeals for the Ninth Circuit was presented with such a case.

In affirming the action of the trial court in dismissing the plaintiff's petition, the ninth circuit observed at 883:

> The plaintiff does not dispute the applicability of a one-year statute of limitations to her claims. She contends, however, that under the "discovery rule", the statute begins to run not upon discovery of the physical cause of the injury but upon the discovery that tortious conduct may have been involved.

In rejecting that argument the ninth circuit observed at 884:

> In the absence of fraudulent concealment it is plaintiff's burden, within the statutory period, to determine whether and whom to sue. Once a plaintiff knows that harm has been done to him he must, . . . determine within the period of limitations whether to sue or not, which is precisely the decision that other tort plaintiffs must make.
>
> . . .

See, also, *Davis v. United States*, 642 F.2d 328 (9th Cir. 1981), *cert. denied* 455 U.S. 919, 102 S. Ct. 1273, 71 L. Ed. 2d 459 (1982).

As we indicated at the outset, we do not by this opinion attempt to decide the issues in this case nor attempt to determine on what date the statute of limitations began to run as to the plaintiff's various claims of injury or damage. We observe only that by applying a discovery rule to § 25-224(1), as we do, there may be different times at which the statute of limitations begins to run on various injuries or damages. The effect on this particular case must of necessity be determined by the U.S. District Court for the District of Nebraska wherein the action is pending.

Question answered and cause remanded to the U.S. District Court for the District of Nebraska for further proceedings.

JUDGMENT ENTERED.

STATE OF NEBRASKA, APPELLEE, V. DONALD L. GREEN, JR., APPELLANT.

348 N.W.2d 429

Filed April 20, 1984. No. 83-525.

1. **Drunk Driving: Evidence: Proof.** Testimony by a witness as to acts done and words spoken by a defendant as the basis for an opinion that defendant was intoxicated is direct evidence which, if believed by the trier of fact, is sufficient to support a conviction for driving while under the influence of intoxicating liquor.
2. **Criminal Law: Appeal and Error.** In determining the sufficiency of evidence to sustain a criminal conviction, this court does not resolve conflicts in the evidence, pass upon the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence, and a verdict rendered thereon must be sustained if, taking the view of such evidence most favorable to the State, there is sufficient evidence to support it.
3. **Trial: Evidence: Appeal and Error.** In a case tried to the court without a jury, there is a presumption that the court considers only such evidence as is competent and relevant, and a reviewing court will not reverse such a case because evidence was erroneously admitted, where there is other material, competent, and relevant evidence sufficient to sustain the judgment.

Appeal from the District Court for Lancaster County: DALE E. FAHRNBRUCH, Judge. Affirmed.

Roy A. Sheaff and John F. Sheaff of Sheaff Law Offices, for appellant.

Paul L. Douglas, Attorney General, and Henry M. Grether III, for appellee.

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

GRANT, J.

Defendant was convicted, after trial, in the municipal court of the city of Lincoln of operating his motor vehicle while under the influence of intoxicating liquor and of speeding. He was sentenced to 7 days in the city jail and fined $200 on the intoxication charge and $41 on the speeding charge. Defendant appealed to the district court for Lancaster County, where his convictions and sentences were

affirmed. He then appealed to this court, assigning seven errors, which may be consolidated into four: (1) In the trial court's receiving in evidence results of a preliminary breath test, both initially and as corroboration; (2) In the trial court's receiving in evidence the opinion of the arresting officer as to defendant's intoxication; (3) In the trial court's receiving in evidence radar results with regard to the speeding violation; and (4) In the error of the trial court's failing to dismiss both counts because of failure of proof. For the reasons set out below we affirm.

The evidence shows that on November 12, 1982, at 1:30 a.m., Nebraska State Patrol Trooper Keith Rodaway observed the defendant traveling westbound on Highway 2 in Lancaster County where the speed limit was 55 m.p.h. The trooper testified he obtained a radar reading of 75 m.p.h. and stopped the defendant's vehicle after a 40-block chase. The defendant experienced difficulty in producing a driver's license, spoke in a slurred and incomplete manner, and a strong odor of alcohol was detected coming from the defendant's vehicle. The trooper, Rodaway, observed defendant's walk back to the trooper's car, balancing himself all the way on first his own car and then the trooper's. The night was rainy and windy, and for that reason the officer did not conduct any walking, balancing, or coin tests at the stop.

After defendant was in his vehicle the trooper continued to smell the odor of alcohol coming from defendant and conducted the following speech and dexterity tests: (1) Reciting the alphabet; (2) Counting backward by ones from 100 and changing at a point to fives; and (3) Touching fingers to thumb in a specific sequence while counting aloud. The defendant passed the first test but had difficulty on the other two. The trooper then administered a preliminary breath test, using an Alco-Sensor II digital readout device, obtaining a readout of .21. Defendant was

placed under arrest and transported to the County-City Building in Lincoln for further chemical analysis. At the County-City Building the defendant was unable or unwilling to blow continuously into the machine and an adequate sample could not be obtained for further testing.

At the trial in the municipal court, the officer testified as to the results of the preliminary breath test and also, at length, as to his observance of the defendant at the time of the arrest and thereafter.

The first general assignment of error is the admission in evidence of the preliminary breath test. Neb. Rev. Stat. § 39-669.08(3) (Cum. Supp. 1982) provides that a law enforcement officer may require a driver to submit to a preliminary test if the officer has reasonable grounds to believe that person "has alcohol in his or her body, or has committed a moving traffic violation . . . . Any person . . . whose preliminary breath test results indicate an alcohol content of ten-hundredths of one per cent or more shall be placed under arrest . . . ."

The evidence regarding the preliminary test was offered and received at the trial to show the circumstances leading to the arrest and the eventual transporting of Green to the police station where Green would be required to take a further chemical test to determine his blood alcohol level. The administering of the preliminary breath test was proper under § 39-669.08(3) and *State v. Gerber*, 206 Neb. 75, 291 N.W.2d 403 (1980).

Before the results of a preliminary test can be received, foundation evidence must be established following the requirements of Neb. Rev. Stat. § 39-669.11 (Reissue 1978), including the requirements that the method of performing the preliminary test has been approved by the Nebraska Department of Health and that the testing officer possess a valid permit issued by the Department of Health for such purpose. *State v. Gerber*, *supra*.

The record contains a copy of a class C permit

issued to the trooper on December 8, 1981, for direct breath testing on an Alco-Sensor II device following the fuel cell analysis method. This permit was in effect at all times pertinent to this case. The trooper also followed a checklist technique as designated in the rules and regulations relating to analysis for the determination of alcoholic content of body fluids and of breath as adopted by the Department of Health (commonly referred to as Rule 3). There was ample foundation testimony by the trooper to warrant the admission of the test for limited purposes.

In this connection it should be noted that the "preliminary test" of § 39-669.08(3) need not be a "chemical test" necessary for conviction under Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1982), which states, "It shall be unlawful for any person to operate . . . any motor vehicle . . . when that person has ten-hundredths of one per cent or more by weight of alcohol in his or her body fluid *as shown by chemical analysis* of his or her blood, breath, or urine." (Emphasis supplied.) Rule 3 of the "Rules and Regulations Relating to Analyses for the Determination of Alcohol Content of Body Fluids and of the Breath Under the Driving While Intoxicated Law," as adopted by the Department of Health, sets out three categories of permits issued by the health department: (1) A class A permit, which is a permit to perform chemical tests "by an approved chemical laboratory method(s)"; (2) A class B permit, which is a permit to perform chemical tests by "approved method(s) with a specifically designed testing device(s)"; and (3) A class C permit, which is a permit "to operate an approved direct breath testing device to perform preliminary breath tests." Only tests taken pursuant to class A and B permits are such a "chemical test" as to comport with the requirement of § 39-669.08(1) and a "chemical analysis" as to comport with § 39-669.07. The "preliminary test" referred to in § 39-669.08(3) is a different procedure and not such a "chemical test" or

"chemical analysis" as to satisfy requirements for a conviction under § 39-669.07. The preliminary test does, however, serve the specific functions set out, and the result of that test was properly received in evidence for the limited purpose of showing the basis for the arrest of defendant.

The procedural problem arises in this case from the fact that at the station defendant was unable or unwilling to blow enough of his breath into the chemical testing instrument to permit that instrument to operate properly. At one point this testing instrument did print out a reading, but the trial court properly sustained defendant's foundational objection to that printout when it was determined that the printout was obtained only after a second breathing effort by defendant, without an intervening recalibration of the testing instrument as required by Rule 3 procedures. Once this ruling was made, and if defendant did not challenge the validity of his arrest, it would have been proper to strike the result of the preliminary breath test, but defendant made no such motion to strike and there was no necessity for the court to intervene on its own motion.

The fact that the preliminary test remained before the court, however, does not constitute error requiring reversal of this case. In matters tried to a court without a jury, it is settled law that if irrelevant evidence, even if prejudicial, is received and not stricken from the record, it is presumed that the trial court did not consider such evidence. As stated in *Barber v. Barber*, 207 Neb. 101, 115, 296 N.W.2d 463, 472 (1980),

> We have often stated that a presumption arises that the trial court, in trying a case without a jury, will consider only such evidence as is competent and relevant and this court will not reverse a case so tried because evidence was erroneously admitted where there is other material, competent, and relevant evidence sufficient to sustain the trial court's judgment.

See, also, *Sinclair v. United States*, 279 U.S. 749, 49 S. Ct. 471, 73 L. Ed. 938 (1929).

In this case the evidence adduced at the trial, other than the preliminary breath test, was clearly sufficient to sustain defendant's conviction for driving while under the influence of intoxicating liquor. The precise nature of the conviction should be noted —defendant was *not* convicted of operating a motor vehicle when he had "ten-hundredths of one per cent or more by weight of alcohol in his or her body fluid," as forbidden by § 39-669.07, but of driving under the influence. See *State v. Jablonski*, 199 Neb. 341, 258 N.W.2d 918 (1977).

The record in this case shows that the defendant was stopped for speeding by the trooper, who then observed impaired finger dexterity and coordination while the defendant was obtaining his license and registration. A strong odor of alcohol came from defendant's vehicle and was later detected from defendant's person, along with slurred, incomplete speech and the necessity of defendant to balance himself by touching his vehicle when walking back to the trooper's cruiser. The defendant was unable to communicate the route he had just traveled, gave two different addresses to the trooper, and performed poorly on two of the field tests. The trooper also saw defendant walk in an uncoordinated and swaying fashion at the County-City Building. There was ample evidence to support the arresting officer's conclusion that defendant was driving while under the influence of alcohol.

The defense presented evidence contrary to the trooper's testimony, and explanations were given by the defendant and his girl friend. Those factual questions were resolved by the trial court against the defendant. In determining the sufficiency of the evidence to sustain a criminal conviction, this court does not resolve conflicts in the evidence, pass upon the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence, and a

verdict rendered thereon must be sustained if, taking the view of such evidence most favorable to the State, there is sufficient evidence to support it. *State v. Miner*, 216 Neb. 309, 343 N.W.2d 899 (1984).

The evidence previously discussed also shows that defendant's contention that the trial court erred in receiving the trooper's opinion as to whether the defendant was under the influence of alcohol is without any merit. The arresting officer testified that he had attended patrol schools on the identification of persons under the influence of alcohol; that he had observed people in a social situation drinking alcohol, and has observed their reactions, on many occasions; and that in the preceding 3 years he had made more than 90 drunk driving arrests. Testimony by such a witness based on personal observation as to acts done and words spoken by a defendant is a sufficient basis for an opinion that the defendant was under the influence of intoxicating liquor. *State v. Betts*, 210 Neb. 348, 314 N.W.2d 257 (1982); *State v. Jablonski, supra*. Even without the opinion of the arresting officer, the facts as presented were clearly sufficient to allow the fact finder to conclude that defendant was operating his vehicle while under the influence of intoxicating liquor. *State v. Hilker*, 210 Neb. 810, 317 N.W.2d 82 (1982).

Finally, the defendant challenges the sufficiency of evidence for the speeding conviction. Evidence of the readings of radar equipment designed to determine the speed of moving vehicles is admissible as evidence of speed if a sufficient foundation is laid as to the accuracy of the equipment in operation. *Peterson v. State*, 163 Neb. 669, 80 N.W.2d 688 (1957); *State v. Snyder*, 184 Neb. 465, 168 N.W.2d 530 (1969). The uncontroverted evidence is that the trooper was qualified to operate the radar equipment, which was working properly and accurately on the date in question. Defendant argues other points not covered in his assignments of error. Under our rules we do not consider such arguments.

There is no merit in any of the contentions advanced by defendant. The judgments and convictions are affirmed in their entirety.

AFFIRMED.

CAROL WORLEY, APPELLANT, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, ET AL., APPELLEES.

348 N.W.2d 123

Filed April 20, 1984. No. 83-599.

1. **Statutes: Legislative Intent.** When a statute is ambiguous and must be construed, recourse may be had to the legislative history for the purpose of discovering the intent of lawmakers. This court will, if possible, try to avoid a construction which leads to absurd, unjust, or unconscionable results.
2. _____: _____. A sensible construction will be placed upon a statute to effectuate the object of legislation, rather than a literal meaning that would have the effect of defeating the legislative intent.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Affirmed.

James E. McBride and Jon B. Abbott, for appellant.

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

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

PER CURIAM.

This is an appeal from the judgment of the district court for Douglas County, Nebraska, upholding the decision of the board of trustees of the City of Omaha Employees Retirement System denying to appellant, Carol Worley, a certain lump sum death benefit claimed under the city's employees' retirement system.

Appellant's husband, James Worley, passed away on June 11, 1981. The appellant, his wife of approxi-

mately 4 months, and his minor son survived him. It is conceded by all parties that the minor son is entitled to pension benefits until he reaches his 18th birth date and that appellant, as beneficiary, is entitled to a $5,000 lump sum death benefit, but, as a surviving spouse, is not entitled to pension benefits, since the marriage at death was of a shorter duration than 1 year.

At issue is the construction of § 22-37(a) and (b) of the city code of the City of Omaha, which is set out as follows:

> Sec. 22-37. Lump sum death benefit.
>
> (a) Upon the death of a member not receiving a retirement pension whose spouse or children qualify for pension benefits under section 22-36, his beneficiary shall be entitled to receive a death benefit, in a lump sum in the amount of five thousand dollars ($5,000.00).
>
> (b) Upon the death of a member not receiving a retirement pension whose spouse or children do not qualify for pension benefits under section 22-36, such member's beneficiary shall be entitled to receive an amount payable in a lump sum, equal to member's total contributions including interest thereon, plus a death benefit in the sum of five thousand dollars ($5,000.00).

As can be seen, § 22-37(a) is a comparatively straightforward example of legislative draftsmanship. It seems clear that if either the spouse *or* children of the deceased employee are eligible to receive a pension, the beneficiary (a person or the estate of the deceased employee named in writing by the employee) is entitled to receive a $5,000 death benefit only.

However, in the drafting of § 22-37(b) the scrivener accomplished that most difficult of tasks in declarative writing, that of attaining the precise opposite of that which was intended.

If the intent of § 22-37(a) was to allow the bene-

ficiary the sum of $5,000 only, when the spouse or child was eligible to receive a pension, then, logically, § 22-37(b) must have been intended to allow an additional amount (i.e., the employee's contributions), plus $5,000, where *neither* the spouse *nor* the child or children are eligible to receive a pension.

The lower court was correct in following the obvious intent of the ordinance rather than a technical interpretation, stemming from poor draftsmanship, which would lead to an incongruous result. We have frequently held that when a statute is ambiguous and must be construed, recourse should be had to the legislative history for the purpose of discovering the intent of lawmakers. See, *Adkisson v. City of Columbus*, 214 Neb. 129, 333 N.W.2d 661 (1983); *North Star Lodge #227 v. City of Lincoln*, 212 Neb. 236, 322 N.W.2d 419 (1982). Furthermore, we have said that "this court will, if possible, try to avoid a construction which leads to absurd, unjust, or unconscionable results." *Adkisson v. City of Columbus*, *supra* at 134, 333 N.W.2d at 665. See, also, *State v. Coffman*, 213 Neb. 560, 330 N.W.2d 727 (1983).

Recently, in the case of *Hill v. City of Lincoln*, 213 Neb. 517, 521-22, 330 N.W.2d 471, 474 (1983), we said, "A sensible construction will be placed upon a statute to effectuate the object of legislation, rather than a literal meaning that would have the effect of defeating the legislative intent. . . .

. . . .

". . . 'It is axiomatic that there is no such thing as "free money." ' "

The district court's order is correct and it is affirmed.

AFFIRMED.

WHITE, J., dissenting.

Under the guise of statutory construction the majority has successfully found ambiguity where none exists, supplied terms to a document that the drafter did not see fit to set forth, and interpreted an ordinance to mean the exact opposite of what it says.

The wording of § 22-37(b) of the city code of the City of Omaha is clear. I would not have discovered a different meaning.

SHANAHAN, J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V. ROBERT L. ROTH, APPELLANT.

348 N.W.2d 125

Filed April 20, 1984. No. 83-648.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Affirmed.

Hal W. Anderson of Berry, Anderson, Creager & Wittstruck, for appellant.

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

KRIVOSHA, C.J., WHITE, and CAPORALE, JJ., and MCCOWN and BRODKEY, JJ., Retired.

PER CURIAM.

The defendant-appellant, Robert L. Roth, appeals from his conviction on a charge of possessing cocaine with intent to deliver.

The relevant facts are set forth in *State v. Roth*, 213 Neb. 900, 331 N.W.2d 819 (1983), *Roth I*, a single-judge opinion which determined that the district court erred in suppressing certain physical evidence. Thereafter, defendant proceeded to trial on stipulated facts, preserving the question as to whether the physical evidence admitted by the district court into evidence pursuant to *Roth I* should in fact have been suppressed.

We adopt the reasoning and rationale set forth in *Roth I*, hold that the physical evidence should not have been suppressed, and affirm.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. KENNETH KABA, APPELLANT.

349 N.W.2d 627

Filed April 20, 1984. Nos. 83-665, 83-666.

1. **Identification Procedures: Proof.** Identification of the accused is an essential element in establishment of guilt beyond a reasonable doubt; however, identification can be inferred from all facts and circumstances that are in evidence.
2. _____: _____. While specific in-court identification is the preferred method of discharging the State's burden of proving the identity of an accused as the perpetrator of the crime charged, absent such identification, where no witness during trial noted that the defendant was not the same individual charged with the crime, both the prosecution and defense counsel referred to the defendant as the individual involved in the crime, and at no time did defense counsel object to the prosecution's references to the defendant, there is sufficient evidence to establish the defendant's identity in connection with the crime for which he stood accused.
3. **Jury Trials: Waiver.** The right of trial by jury having been voluntarily waived by the accused, he thereafter has no right or power at his mere will to withdraw or revoke his waiver and demand a jury trial.
4. _____: _____. Whether one accused of a crime who has voluntarily waived a jury trial will be permitted to withdraw the waiver and have his case tried before a jury is ordinarily within the discretion of the trial court.
5. **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 Holt County: HENRY F. REIMER, Judge. Affirmed.

Forrest F. Peetz of Peetz and Peetz, for appellant.

Paul L. Douglas, Attorney General, and G. Roderic Anderson, for appellee.

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

WHITE, J.

These are appeals from convictions and sentences in the district court for Holt County, Nebraska. In each case the defendant-appellant, Kenneth Kaba, was charged with issuing a check knowing he did not

have sufficient funds and/or credit with the drawee bank for payment of the check, in violation of Neb. Rev. Stat. § 28-611(1) (Reissue 1979). The cases were consolidated for trial and for purposes of appeal in this court. The district court, sitting without a jury, found the defendant guilty of both charges, and the defendant was sentenced to concurrent terms of imprisonment in the Nebraska Penal and Correctional Complex for not more than 7 nor less than 3 years. We affirm.

These cases were previously before this court in *State v. Kaba*, 210 Neb. 503, 315 N.W.2d 456 (1982), at which time we determined the appeals were premature as no final sentences had been imposed, and in *Kaba v. Fox*, 213 Neb. 656, 330 N.W.2d 749 (1983), wherein Kaba brought a habeas corpus action against the sheriff to whom the district court had remanded him for the purpose of carrying out the court's previous commitment order. In the latter opinion we held that Neb. Rev. Stat. § 83-1,105(3) (Reissue 1981) (commitment for evaluation purposes) was constitutional and that the delay in sentencing the defendant did not deny him his right to a speedy trial as provided by the sixth amendment to the U.S. Constitution and article I, § 11, of the Nebraska Constitution. In the instant case we deal with the propriety of the defendant's convictions and sentences.

The facts are simple. On February 12, 1980, Kenneth Kaba contacted Dean Rowse, a farmer and rancher in Holt County, Nebraska, concerning the sale of cattle which Dean Rowse had advertised. After additional discussions concerning the transaction, the first load of cattle was shipped out February 20, 1980, and the second load, February 21, 1980. On that day, after the cattle had been loaded, Kaba issued and personally handed two checks, one in the amount of $41,400 and the other in the amount of $17,280, to Dean Rowse. Both checks were subsequently returned marked "insufficient funds," and

the Holt County attorney initiated these proceedings. After waiving a trial by jury Kaba was found guilty on both charges and was sentenced to 3 to 7 years in the Nebraska Penal and Correctional Complex on each count, said sentences to run concurrently.

Kaba appeals, basically assigning three errors: (1) There is insufficient evidence to support a finding of defendant's guilt beyond a reasonable doubt; (2) The district court erred and abused its discretion in denying defendant's motions to withdraw his waiver of a jury trial; and (3) The sentences imposed are excessive.

Concerning the first assignment of error, Kaba contends that the identity of the accused as the person who committed the crimes was not established by the State beyond a reasonable doubt. More specifically, he asserts that because none of the State's witnesses identified Kaba by actually pointing him out in the courtroom, his convictions must be reversed and the charges dismissed. We agree with the defendant that the State must establish beyond a reasonable doubt the identity of the accused at trial. When the State fails in meeting its responsibility, jeopardy attaches and acquittal is the proper remedy. *Burks v. United States*, 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978); *Greene v. Massey*, 437 U.S. 19, 98 S. Ct. 2151, 57 L. Ed. 2d 15 (1978). We also agree that, unfortunately, the county attorney failed to ask any State's witness two basic questions: (1) Is the defendant, Kenneth Kaba, in the courtroom today? (2) Would you point out the defendant, Kenneth Kaba? Contrary to the defendant's position, however, under the facts of this case the omission of an in-court identification does not require acquittal.

In many cases identification of the defendant is not litigated, and so remains as only an implicit issue. In other instances identification is a very real and hotly contested issue, as, for example, where the opportunity of the witnesses to observe the perpetrator at the time of the commission of the crime

or their ability to recall accurately at trial is the subject of substantial exploration. This case is clearly of the former type and not of the latter; it is not a case of possible misidentification, of suggestive pretrial procedures, or of uncertain, equivocal, or indecisive in-court identification. Rather, the defendant has interposed a highly technical and narrow objection concerning the sufficiency of the State's proof.

The parties, disregarding their assertions promoting their respective positions, are of little assistance in resolving this question, and although this court has never passed on the exact issue, other jurisdictions have. In *State v. Hutchinson*, 99 N.M. 616, 623, 661 P.2d 1315, 1322 (1983), the court stated:

> Hutchinson asserts that at no time during the trial did Hart or High, the only eye witnesses to the crime, identify Hutchinson as he sat in the courtroom, as the person responsible for the crimes charged. Nor did any other witness identify Hutchinson as the same individual whom Hart and High had testified about. Nor was there other evidence admitted, such as fingerprints, blood stains, hair samples, or articles belonging to Platt that would link Hutchinson to the crimes charged, other than Hart's and High's testimony.
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> After the State's case in chief, Hutchinson asked for a directed verdict for failure of the witnesses to identify Hutchinson as the defendant in this case. The trial court denied the motion stating that there was "sufficient evidence to establish a prima facie case, evidence from which reasonable inference could be drawn as to the elements of the crime charged."
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> In the present case, during Hart's and High's testimony, Hutchinson was referred to as "the Defendant, Terry Wayne Hutchinson", "Terry Hutchinson", "Terry", "The Defendant" or "Wolf" (Hutchinson's nickname).

The New Mexico Supreme Court went on to rule that there were sufficient inferences identifying Hutchinson to permit the jury to draw the inference that the person on trial was the one who committed the crimes.

The Oklahoma Court of Criminal Appeals has passed on this issue in at least three cases. See, *Workman v. State*, 491 P.2d 308 (Okla. Crim. App. 1971); *Holt v. State*, 489 P.2d 504 (Okla. Crim. App. 1971); *Dillon v. State*, 508 P.2d 652 (Okla. Crim. App. 1973). These cases stand for the general proposition that although it is better practice for a prosecuting attorney to specifically ask a witness to make an in-court identification of a defendant, there is no failure of identification when references were made by the witnesses throughout the trial implying that the person to whom the witnesses were referring was the same person who was on trial and present in the courtroom.

In *State v. Hill*, 83 Wash. 2d 558, 560, 520 P.2d 618, 619 (1974), the court stated:

> In the case at bench, the defendant was present in the courtroom at all pertinent times throughout the course of the trial, during which there were numerous references in the testimony to "the defendant" and to "Jimmy Hill." The arresting officer testified that it was "the defendant" whom he observed at the scene of the arrest, that he had ordered "the defendant" to halt, and that it was "the location where the defendant was finally stopped that the Kleenex was found." The jury verdict was in the form: "We, the Jury . . . , find the defendant [Jimmy Hill] GUILTY . . ."
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> Although we do not recommend the omission of specific in-court identification where feasible, we are satisfied that the evidence as it developed in the instant case was adequate to establish the defendant's identity in connection with the offense for which he stood accused.

Perhaps the best-reasoned cases concerning the issue are *United States v. Fenster*, 449 F. Supp. 435 (E.D. Mich. 1978), and *United States v. Weed*, 689 F.2d 752 (7th Cir. 1982). In *Fenster*, *supra*, the prosecutor failed to have any of the government witnesses make an in-court identification of the accused. The court held that the failure of any of the witnesses to point out that the wrong man had been brought to trial was eloquent and sufficient proof of identity. To maintain absolute certainty, the district court permitted the government to reopen its case.

In *United States v. Weed*, *supra*, the court stated at 755-56:

> In this case, three Customs agents testified regarding the events of the evening of December 22, 1977 and the statements made by Weed. None of these witnesses during the bench trial noted that the defendant was not the same John Weed stopped in 1977. Both the prosecution and defense counsel referred to the defendant at trial as the John Weed involved in the December, 1977 events. At no time did defense counsel object to the prosecution's references to "the defendant." Appellate counsel, who was also defense counsel, admitted at oral argument to this Court that he realized no identification had been made during the testimony of the third witness, yet he still did not object to references to the defendant.

The court went on to hold that there was sufficient evidence for the trial court to find the defendant guilty beyond a reasonable doubt.

We find the above authorities persuasive, and by applying that rationale to the evidence before us in the instant case, we find, beyond a reasonable doubt, that the Kenneth Kaba who appeared in the courtroom during the trial was the Kenneth Kaba whose behavior was reported by the witnesses. The record

is replete with evidence sufficient to furnish the link. A few examples are as follows:

> Q. [By Mr. Strope] And did Mr. Kaba pay you for the checks (sic) at that time? Pay you for the cattle, excuse me, at that time? A. [By Dean Rowse] Yes, he gave me two checks; one check for $41,400 and one for $17,280. . . . Q. And are those the original checks that you received from Mr. Kaba? A. Yes, I'm sure they are. . . . Q. And would you indicate to the Court what portions on that check you saw filled in and who filled them in? A. Ken, he completed the check with my name and the amount, what it was for, and signed his name. . . . Q. What did you state to the operator in placing that call? What information did you give to the operator? A. I asked to talk personally with Ken Kaba at Hoxie, Kansas, and I gave her his number. Q. And did the operator then place that call? A. Yes.

The following colloquy took place on cross-examination of the State's principal witness, Dean Rowse:

> Q. [By Mr. Peetz] Okay. So on your testimony, this 4th day of March you called Mr. Kaba to tell him that his check had not cleared the bank, is that correct? A. Yes. Q. And it is true that he asked you for some time to get the money in the bank to clear it, and you told him that would be all right? A. I said two or three days. . . . Q. Now, Mr. Rowse, are you aware that on the 5th day of March, the day after that phone call, that a criminal complaint was filed against Mr. Kaba? A. I didn't remember the date, no, but it was filed. Q. Well, would it be fair to say that prior to the time that you were telling Mr. Kaba on the telephone that he can have additional time to cover this check, that you had already gone to the authorities and asked them to press charges? A. I don't know

the exact date when I called. It was about the 4th of March.

The defendant admits that he was present in court at all stages of the proceedings. The State's primary witness, Dean Rowse, testified in detail concerning the transaction by which Kenneth Kaba purchased and took delivery of the cattle, how Kenneth Kaba sat in Mr. Rowse's kitchen on February 21, 1980, and drafted and signed the two checks, and how he contacted the defendant in Hoxie, Kansas, after the checks had been returned. Apparent from the defendant's cross-examination of Dean Rowse is the fact that Dean Rowse was intensely aware of the criminal proceedings against the defendant, Kenneth Kaba. At no time did Dean Rowse give the slightest indication that the defendant, who was sitting at the defendant's table, was not the Kenneth Kaba who had issued him the bad checks. It is inconceivable that Dean Rowse would sit silently by, knowing the wrong man had been brought to trial. Dean Rowse's silence is eloquent and sufficient to support a finding of identity in this case.

The defendant next contends that the district court erred and abused its discretion in overruling his motion to withdraw the waiver of a trial by jury. We are not persuaded that such is the case. Once a trial by jury is voluntarily waived, which the defendant concedes, the defendant has no absolute right to withdraw or revoke his waiver and demand a jury trial. Whether one accused of a crime who has previously waived his right to trial by jury will be permitted to withdraw the waiver is within the discretion of the trial court. There is no error absent a clear abuse of discretion. *Sutton v. State*, 163 Neb. 524, 80 N.W.2d 475 (1957).

The defendant did not file his motion until May 15, 1981, the date set for trial. In light of the present availability of the State's chief witness, who would be subsequently unavailable because of heart surgery the next week, the court denied the motion and

ordered that the testimony of Dean Rowse be taken that day. The court, after the testimony was taken, allowed a continuance and set further proceedings for May 28, 1981, at which time the trial was concluded and the defendant ultimately found guilty. In view of the facts and circumstances known to the court when the motion was denied, it cannot be said that the court abused its discretion in not allowing the defendant to withdraw his waiver of a trial by jury.

In the defendant's final assignment of error, he asserts that, although the sentences imposed are within the statutory limits, under the facts and circumstances his sentences are excessive.

The defendant was twice convicted of violating § 28-611(1)(a). The maximum penalty on each charge, a Class III felony, is 20 years' imprisonment, or a $25,000 fine, or both, with a minimum of 1 year's imprisonment. Kaba was sentenced to a term of from 3 to 7 years on each charge, said sentences to run concurrently. The district court was cognizant of all the facts and circumstances surrounding the crimes, including the defendant's medical condition, past criminal history, and the investigation and evaluation by the Nebraska Department of Correctional Services. Considering the substantial sum of money involved in the crimes and the fact that the defendant's sentences are at the low end of the scale, it cannot be said that the district court abused its discretion in sentencing the defendant.

Finding no errors which merit reversal, the convictions and sentences of Kenneth Kaba are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROGER COOLEY, APPELLANT.

348 N.W.2d 433

Filed April 20, 1984. No. 83-689.

Judgments: Sentences: Appeal and Error. A judgment denying probation and imposing a sentence which is within statutory limits will not be modified absent an abuse of discretion by the sentencing judge.

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

Kirk E. Naylor, Jr., for appellant.

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

KRIVOSHA, C.J., and CAPORALE, J., and MCCOWN and BRODKEY, JJ., Retired, and RONIN, D.J., Retired.

CAPORALE, J.

The defendant-appellant, Roger Cooley, entered a plea of guilty to a charge of attempted subornation of perjury and was sentenced to a term of imprisonment of 1 year. We affirm the judgment of the district court.

In his sole assignment of error Cooley claims that the district court abused its discretion by imposing the 1-year sentence. While we are given the statutory authority to modify sentences which are excessive, Neb. Rev. Stat. § 29-2308 (Cum. Supp. 1982), a judgment denying probation and imposing a sentence which is within statutory limits will not be modified absent an abuse of discretion by the sentencing judge. *State v. Miner*, 216 Neb. 309, 343 N.W.2d 899 (1984); *State v. Nix*, 215 Neb. 410, 338 N.W.2d 782 (1983). Attempted subornation of perjury is a Class IV felony. Neb. Rev. Stat. §§ 28-915 and 28-201(4)(c) (Reissue 1979). That classification of crime is punishable by a maximum penalty of imprisonment for 5 years, a $10,000 fine, or both such imprisonment and fine. There is no prescribed

minimum penalty. Neb. Rev. Stat. § 28-105(1) (Reissue 1979). The 1-year term of imprisonment being well within statutory limitations, the sole remaining question is whether the sentencing judge abused his discretion.

Cooley contends that there was an abuse of discretion rooted in the fact that while he was charged with a felony and sentenced to a year's imprisonment, his two companions were less harshly treated. In order to assess this claim it is necessary to review the factual situation which resulted in Cooley's conviction.

In the late afternoon of December 1, 1982, Cooley, Tim Kayl, and Tim Fehncke, all Columbus, Nebraska, police officers at the time, were off duty and sitting at Fehncke's house drinking beer and discussing ongoing narcotics investigations. The conversation turned to the efforts which had been made to obtain the cooperation of one Eddie Johansen in an investigation. Around 5:30 p.m., Kayl, armed with Cooley's handgun, left the Fehncke residence to find Johansen and talk with him. Unknown to Kayl, Cooley and Fehncke decided to "back up" Kayl. Fehncke armed himself, and then he and Cooley drove to the police station, where Cooley obtained another handgun. Unable to locate Kayl, they again went to Fehncke's residence, where Kayl had returned. Kayl then called Johansen's father, who informed him that Johansen was at a local school where he and other individuals were working. Kayl set off for the school, and, again unknown to Kayl, Cooley and Fehncke decided to back him up.

When Kayl reached the school, he saw two work partners of Johansen. Kayl approached the two, stepping into freshly poured cement in the process, and repeatedly asked, "Where is Eddie?" Kayl then moved away from the two. At that time Fehncke appeared, pointed his handgun at the two men, and ordered them against the wall. Fehncke grabbed one of the workmen and repeatedly slammed

his head against a windowsill. Kayl and Fehncke also searched the men. Meanwhile, Cooley noticed Johansen's arrival, and grabbed him and threw him against a fence. Cooley, claiming Johansen had made a furtive gesture, took his revolver, placed it against Johansen's head, and led him to a pickup truck. Cooley then threw Johansen onto the hood of the truck and kept the gun at Johansen's head. Cooley, Fehncke, and Kayl continued their harassment until other police officers arrived, at which time Cooley and Fehncke departed, leaving Kayl to speak with the newly arrived police officers.

Cooley, realizing that he and his friends had acted improperly, decided to fabricate a story to explain their actions. He drove to the police station and retrieved from his locker a bag of marijuana which had been seized in an unrelated incident. Cooley, Fehncke, and Kayl again met at Fehncke's house, where Cooley explained that they would make up the story that the marijuana had been seized from Johansen and his two companions. Cooley, Fehncke, and Kayl told this falsehood to their superiors. Kayl later changed his mind about continuing with the lie and informed his superiors of the true circumstances.

Although Kayl was apparently suspended for a period of time, he was retained on the Columbus police force. Both Cooley and Fehncke were fired. After Cooley pled guilty and was sentenced, Fehncke was charged with a false reporting misdemeanor and found guilty. His sentence is not part of the record before us in this case, but we were informed during oral argument that Fehncke was sentenced to 7 months in the county jail.

Cooley contends that his actions were not substantially different than those of Kayl or Fehncke and, thus, he is entitled to have their penalties considered by the sentencing judge. Cooley points out that while Fehncke will be able to serve his sentence in the county jail in his home community, near his

family, with a good opportunity for work release, he (Cooley) will have to serve his time in the harsher environment of a prison, away from his family, and with less opportunity for work release, thereby destroying his present desirable employment.

Cooley additionally claims that the court abused its discretion by not placing him on probation. Although the conduct of each of the three participants is base, vile, totally reprehensible, and criminal, there are distinctions to be made. It was Cooley who instigated the lie; it was he who took unlawful possession of contraband; it was he who conceived the plan to trump up charges against innocent men; and it was he who held a gun to Johansen's head.

There is probably no greater danger to the security of a society based upon the rule of law than for a police officer to willfully and maliciously violate the law and then attempt to frame innocent persons in order to escape the consequences of his own unlawful acts. Such conduct on the part of someone who seeks and accepts the responsibility and trust inherent in the role of a policeman threatens the very foundation of our social structure.

Neb. Rev. Stat. § 29-2260(2)(c) (Cum. Supp. 1982) provides that probation should not be granted if such a sentence will depreciate the seriousness of the offender's crime or promote disrespect for the law. Cooley disgraced the law in such a manner that a significant sanction must be imposed.

Without in any way commenting upon the adequacy of the sanctions imposed upon Cooley's companions, the nature and quality of Cooley's acts justify different treatment for him. We note that no fine was assessed against Cooley and that he received but 20 percent of the maximum prison sentence prescribed. Under the circumstances it cannot be said there was any abuse of discretion which worked to Cooley's prejudice.

AFFIRMED.

IN RE INTEREST OF B.F.R., A CHILD UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. J.A.R., APPELLANT.

348 N.W.2d 125

Filed April 20, 1984. No. 83-711.

Parental Rights. The natural rights of a parent to the custody of a child cannot be terminated absent clear and convincing evidence.

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

William A. Lynch of Monaghan, Tiedeman & Lynch, for appellant.

Donald L. Knowles, Douglas County Attorney, and Christopher E. Kelly, for appellee.

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

WHITE, J.

This is an appeal from the order of the separate juvenile court of Douglas County, Nebraska, directing that the parental rights of J.A.R. to B.F.R., a male child of 5 years of age, be terminated. We affirm.

The action for termination was filed in July 1983. B.F.R. was removed from the home in which he was living with his mother, J.A.R., in June 1982 for temporary placement with a foster care family. J.A.R. was alleged to be suffering from a mental and emotional disorder which prevented her from providing necessary protection, supervision, and parental control. Neb. Rev. Stat. § 43-292(5) (Cum. Supp. 1982).

B.F.R. has lived in a foster home since that time, with periodic visitation with his mother every 2 to 3 weeks. At the time the child was placed in the foster home, the child, then 3 years old, had extremely limited language capabilities and displayed behavior best characterized in layman's terms as extreme insecurity and fear. Except for reactions

to the periodic visits with his mother, the learning disability and insecurity symptoms are lessening.

In June 1982 J.A.R. was admitted to the psychiatric unit of an Omaha hospital, where she remained until December 1982, as an involuntary patient. The diagnosis was a "schizophrenic disorder, paranoid type," manifested by assertions of persecution, disinterest in personal hygiene and grooming, and a marked decline in language skills.

After her release J.A.R. voluntarily lived in a structured residential home and continued her treatment with her psychiatrist. Her activity was limited to some limited personal grooming, light household duties, and sedentary activities such as watching television. She continues to take, on a regular basis, substantial quantities of antipsychotic medication. The diagnosis of the psychiatrist at the disposition hearing was "schizophrenic disorder, chronic paranoid type, which carries a somewhat guarded diagnosis." He testified that if J.A.R. discontinued taking the medication, a return to the offensive housekeeping and unhygienic practices was inevitable. In the opinion of the psychiatrist it was questionable whether or not J.A.R. would ever be able to provide a "very stable, consistent and nurturing environment for another human being."

J.A.R. testified at the disposition hearing that she took the medication because her doctor told her to, but that she did not need it. She still was of the impression that her "nervous breakdown" was precipitated by people in "the church" and that she was now well. The psychiatrist testified that the inability to discharge her parental responsibilities was due to a combination of the illness and a mild mental retardation.

Counsel assigns as error the finding by clear and convincing evidence that the appellant was unable to discharge her parental responsibilities because of mental illness or mental deficiency which will continue for a prolonged, indeterminate period of time.

We agree that the natural rights of a parent to the custody of a child cannot be terminated absent clear and convincing evidence. *In re Interest of J. and R.*, 216 Neb. 183, 342 N.W.2d 660 (1984).

The argument that the evidence does not support the findings of the juvenile court is not meritorious. This court, along with appellant's counsel (and J.A.R.'s psychiatrist), may indeed hope that by some quantum leap serious mental illnesses may be found to have resulted from chemical imbalances in the brain. However stated, that faint hope cannot stand in the face of the reality that J.A.R. is a chronically ill person, unable to face her own illness, and able to maintain herself in a minimal sense in a supervised setting only with relatively large doses of medication. The psychiatrist holds little or no hope for her recovery. B.F.R., now 5 years old, cannot be made to face this uncertainty. His best interests and his future stability require that parental rights be terminated.

AFFIRMED.

IN RE GUARDIANSHIP OF RICHARD ANDREW SAIN. PATRICIA L. ZERBS, APPELLANT, V. RICHARD H. SAIN, APPELLEE.

348 N.W.2d 435

Filed April 20, 1984. No. 83-793.

1. **Adoption: Proof.** Abandonment for purposes of permitting substitute consent pursuant to Neb. Rev. Stat. §§ 43-104 and 43-105 (Reissue 1978) must be established by clear and convincing evidence.
2. **Evidence: Words and Phrases.** Clear and convincing evidence means evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.
3. **Adoption: Intent: Proof.** The question of abandonment is largely one of intent to be determined in each case from all the facts and circumstances.
4. **Adoption.** To prove abandonment in adoption proceedings, the evidence must clearly and convincingly show that the parent has acted toward the child in a manner evidencing a settled purpose to

be rid of parental obligations and to forego parental rights, together with a repudiation of parenthood and an abandonment of parental rights and responsibilities.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Affirmed.

Charles R. H. Kluver of Taylor, Hornstein, Peters & Kluver, for appellant.

John B. Ashford of Dowd, Fahey & Ashford, for appellee.

KRIVOSHA, C.J., WHITE, and CAPORALE, JJ., and MCCOWN and BRODKEY, JJ., Retired.

KRIVOSHA, C.J.

The appellant, Patricia Zerbs, appeals from a judgment entered by the county court for Sarpy County, Nebraska, and on appeal affirmed by the district court for Sarpy County, Nebraska, finding that the appellee, Richard H. Sain, had not abandoned his minor child. We affirm.

This is the second time this matter has been before this court, and much of the background leading up to the adoption is set out in that earlier opinion. See *In re Guardianship of Sain*, 211 Neb. 508, 319 N.W.2d 100 (1982) (*Sain I*). By reason of our holding in *Sain I* the sole issue presented to the county court was whether Richard H. Sain abandoned his minor child for at least 6 months next preceding the filing of the adoption petition as provided in Neb. Rev. Stat. § 43-104 (Reissue 1978), so that his consent was not required as provided by § 43-104(3). In *Sain I* we declared that abandonment for purposes of permitting substitute consent pursuant to Neb. Rev. Stat. §§ 43-104 and 43-105 (Reissue 1978) must be established by clear and convincing evidence. Clear and convincing evidence means evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved. See *Castellano v. Bitkower*, 216 Neb. 806, 346 N.W.2d 249 (1984). We do not believe that the evidence

in this case establishes abandonment by clear and convincing evidence.

The record discloses that Patricia Zerbs and Richard Sain were married in 1970. In December of 1973, and shortly after the birth of the minor child involved in this matter, the parties separated. A decree dissolving the marriage of the parties was entered by the district court for Douglas County, Nebraska, on July 12, 1974, and custody of the minor child, who was then 6 months old, was awarded to Mrs. Zerbs. Mr. Sain was ordered to pay $30 a week child support and was granted visitation rights on Sunday afternoons. It appears from the record that during all of 1974 and 1975, and until the summer of 1976, Mr. Sain had no difficulty exercising his visitation rights and, in fact, did regularly exercise them. However, following Mrs. Zerbs' marriage to Stephen Zerbs on March 28, 1976, difficulty with regard to visitation began. In August of 1976 the minor child began to act negatively toward visits with his natural father. While the record is not as clear as it might be, it appears that the difficulty in part occurred by reason of the fact that the child was instructed to begin to recognize Mr. Zerbs as his father and to refer to him as such. The record further discloses that in August of 1976 the child abruptly and for an unknown reason threw "a tantrum" and said he did not love his father any more nor did he want to see him. Sain testified that he had asked Mrs. Zerbs to help with the problem, that he had offered to pay for professional help to solve the problem, but that Mrs. Zerbs was not cooperative. Sain last visited with his son on November 7, 1976, but continued during November to call the Zerbs' residence in an effort to talk to his son. He asked if his son wanted to visit with him, and each time the child refused. Moreover, Sain testified that he tried to make other contacts with his son but each time was obstructed. When he called, Mrs. Zerbs would tell him that the child did not want to see him; she also

told him that he would be unable to see the child at Christmas in 1976 because the Zerbs had made plans for the holidays. When he telephoned at Christmas 1976, the child said that he did not want to see his father. On January 2, 1977, Sain again attempted to visit the child, and the child screamed at the sight of Sain.

The record further discloses that but for one brief period, later explained, Sain paid child support regularly during the years 1974, 1975, and through December of 1976. Sain testified that he told Mrs. Zerbs that he was going to stop paying until such a time as his visitation was reinstated on the same basis as it was prior to the problem. Mrs. Zerbs made no effort to bring any action to require Sain to pay child support after that time. The record further discloses that Sain had earlier had a problem with Mrs. Zerbs concerning visitation, in 1974, and had discontinued paying child support for a brief period. At that time, when he stopped support payments, Mrs. Zerbs brought an action to require him to pay, and in those proceedings he was able to adjust his visitation rights. Sain testified that he stopped paying child support the second time because he expected Mrs. Zerbs to again take action to require him to pay and he would then attempt to adjust his visitation rights. While this procedure by either party was inappropriate, see *Eliker v. Eliker*, 206 Neb. 764, 295 N.W.2d 268 (1980), it does nevertheless lend credence to Sain's explanation as to why he discontinued making child support payments in 1976. Additionally, the record discloses that the child was enrolled in preschool in September of 1978 under the name of Zerbs.

While it is true, as argued by Mrs. Zerbs, that the statute in question, § 43-104, refers to abandonment "for at least six months next preceding the filing of the adoption petition," we pointed out in *In re Adoption of Simonton*, 211 Neb. 777, 783, 320 N.W.2d 449, 453 (1982):

> There can be no serious dispute but that the critical period of time during which abandonment must be shown is the 6 months immediately preceding the filing of the adoption petition. § 43-104(3)(b). *In re Cardo, supra*; *Matter of Adoption of Baby Girl Doe*, 621 S.W.2d 87 (Mo. App. 1981). However, the various definitions of abandonment do not require us to view this statutory period in a vacuum. One may consider the evidence of a parent's conduct, either before or after the statutory period, for this evidence is relevant to a determination of whether the purpose and intent of that parent was to abandon his child or children. *Young v. Young, supra.*

It appears to us that if one considers the relationship which existed between Mr. Sain and his child prior to Mrs. Zerbs' marriage and the difficulties which developed following the marriage, including the apparent lack of interest and support by Mrs. Zerbs in helping Sain maintain a relationship with his child, one cannot say that Sain abandoned his child within the meaning of the act. It may be for that reason that courts in the various jurisdictions which have considered the question of abandonment generally have agreed that abandonment must be absolute, complete, and intentional. See Annot., 35 A.L.R.2d 690 (1954). In the case of *D'Augustine v. Bush*, 269 S.C. 342, 345-46, 237 S.E.2d 384, 386 (1977), the court said:

> Recognizing that the question of abandonment is largely one of intent to be determined in each case from all the facts and circumstances, we have held that, 'abandonment imports any conduct on the part of the parent which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child,' 2 Am. Jur. (2d), Adoption, Section 32; but 'does not include an act or course of conduct by a parent which is done through force of circum-

> stances or dire necessity,' 2 Am. Jur. (2d), Adoption, Section 33.

And in the case of *In re Cardo*, 41 N.C. App. 503, 507-08, 255 S.E.2d 440, 443 (1979), the court said:

> "Abandonment has also been defined as wilful neglect and refusal to perform the natural and legal obligations of parental care and support.
>
> . . .
>
> "Certainly a continued wilful failure to perform the parental duty to support and maintain a child would be evidence that a parent had relinquished his claim to the child. However, a mere failure of the parent of a minor child in the custody of a third person to contribute to its support does not in and of itself constitute abandonment. Explanations could be made which would be inconsistent with a wilful intent to abandon."

This view was generally adopted by this court in the *Simonton* case, where we said, in the syllabus of the court:

> To prove abandonment in adoption proceedings, the evidence must clearly and convincingly show that the parent has acted toward the child in a manner evidencing a settled purpose to be rid of all parental obligations and to forego all parental rights, together with a complete repudiation of parenthood and an abandonment of parental rights and responsibilities.

We believe that where, as here, the record discloses that the parent exercised every right afforded him until the ability to exercise that right became nearly impossible or, at the very least, extremely painful for both the parent and the child, it cannot be said that the parent has voluntarily abandoned the child within the meaning of the law. While hindsight might reflect that Sain should have taken the initiative, we cannot say that his actions under the circumstances evidenced an intent to abandon his child. Were we to support Mrs. Zerbs' position in this case, we would be encouraging the custodial

parent to create disharmony between a child and a noncustodial parent in hopes that by doing so abandonment could be established and the parental rights of the noncustodial parent could be terminated by an adoption without the noncustodial parent's consent. We cannot believe that this was the intent of the law which requires that consent of both parents be obtained unless there has been an abandonment.

As we review the evidence in this case, we do not develop a firm belief or conviction that the noncustodial parent made a choice not to see his child any longer. Rather, we believe the record establishes for us, as it did for the county court in the first instance and the district court on appeal, that Mrs. Zerbs played an active role in preventing Mr. Sain from exercising his rights of visitation.

While Sain's failure to continue paying child support cannot be condoned or excused, it does not constitute abandonment. In *D'Augustine v. Bush*, *supra* at 347-48, 237 S.E.2d at 387, the South Carolina court noted:

> The preponderance of the testimony sustains the conclusion that appellant did not wilfully fail to visit and support his child but was prevented from doing so by the remarriage of the mother and her removal of the child . . . for several years where the antagonistic attitude of respondents made visitation inadvisable, if not impossible.

It is clearly inferable that those respondents did not want appellant to contribute to the support of the child or have any contact with him. Under this record, the failure to contribute to the support of the child is of little weight in establishing abandonment. We likewise believe that the testimony in this case makes it clearly inferable that Mrs. Zerbs did not want Mr. Sain to contribute to the support or welfare of the child so long as he did not attempt to see the child, and she was content to have him not do so as

long as he did not attempt to exercise his rights of visitation.

We are urged to permit this adoption absent the natural father's consent because of the desire on the part of the natural mother and her present husband to make a home for the child. We are likewise told that the present husband has in effect been the father to the child, and we, of course, applaud such action. Too often children of a second marriage are not afforded that benefit. But we would further point out, as we did in *Goodman v. Goodman*, 180 Neb. 83, 89, 141 N.W.2d 445, 449 (1966), that "[c]hildren are not chattels," and title to children is not necessary in order for one to provide a child with a good home. All that the Zerbs are doing for the child is commendable, and we would be hopeful that they would continue to do so. But they do not need either absolute title or the removal of the natural father in order to do so. The natural father continues to have rights which ought not to be severed unless required by law. As we noted in *In re Adoption of Simonton*, 211 Neb. 777, 320 N.W.2d 449 (1982), the ties of a natural parent are not to be treated lightly. Hopefully, the parties to this action can now set aside their feelings for each other and put the best interests of the child ahead of their own desires. Through proper encouragement by the Zerbs, this child can have the best of all worlds.

For these reasons, therefore, we believe that the judgment of the county court in finding that the natural father had not abandoned the child was correct, and the judgment of the district court approving the action of the county court is affirmed.

AFFIRMED.

IN RE ESTATE OF WILLIAM J. GLASER, ALSO KNOWN AS WILLIAM GLASER, DECEASED.
ALOIS A. MICEK AND FLORENCE M. MICEK, APPELLANTS, V. FIRST NATIONAL BANK & TRUST CO. OF COLUMBUS, NEBRASKA, PERSONAL REPRESENTATIVE, APPELLEE.

348 N.W.2d 127

Filed April 27, 1984. No. 83-285.

1. **Decedents' Estates.** Where one holds a life estate for the duration of his own life, such estate is terminated by his death, and, while it may be a property right when held by the life tenant, it does not pass on account of anyone's death, including the life tenant's.
2. **Appeal and Error.** This court will not for the first time on appeal consider a question not presented to or passed upon by the trial court, though in limited cases we will correct plain error in furtherance of the interest of substantial justice.

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

Edward F. Carter, Jr., and Mark D. Petersen of Barney, Carter & Johnson, P.C., and Cleo Robak, for appellants.

Wilbur L. Johnson and Frank J. Skorupa of Johnson & Skorupa, for appellee.

KRIVOSHA, C.J., WHITE, and CAPORALE, JJ., and MCCOWN and BRODKEY, JJ., Retired.

KRIVOSHA, C.J.

This case involves the question of whether certain estate and inheritance taxes due by reason of the death of William J. Glaser should be paid by the estate of William J. Glaser or by the appellants, Alois and Florence Micek, who acquired, in part by contract and in part by gift, certain real estate included in the federal estate tax return of William J. Glaser, deceased. The county court determined that the tax should be paid by the Miceks. On appeal the district court affirmed. We also affirm.

William J. Glaser died on March 13, 1980, leaving neither a wife nor children surviving. His last will

and testament dated November 27, 1979, was admitted to probate in the county court for Platte County, Nebraska, on April 9, 1980. The will provided that nine U.S. series H bonds and $500 in cash be delivered to the First United Methodist Church of Columbus, Nebraska. The remainder of Glaser's property was divided among various relatives.

The undisputed facts disclose that on December 7, 1979, Glaser sold certain real estate which he owned to the Miceks by a land contract. The total price for the land to be paid by the Miceks to Glaser was $79,000, payable $7,900 upon execution of the contract and the balance in nine annual installments with interest at the rate of 6 percent per annum. Glaser reserved a right to live in the residence located upon the land during his lifetime. The sale price for the land was fixed at approximately $500 an acre for 154.87 acres. A gift tax return was prepared and filed for the difference between the purchase price and the value of the land, which was shown on the gift tax return at $1,000 per acre. Because of the size of the gift, however, no tax was due. The land was considered as part of Glaser's estate for estate tax purposes because the conveyance was made within 3 years of Glaser's death for insufficient consideration. I.R.C. § 2035 (1976). At that time the Internal Revenue Service maintained that in fact the land was worth $3,000 an acre. After conferences and negotiations with the Internal Revenue Service, the personal representative of the estate and the Internal Revenue Service agreed that for estate tax purposes the land should have a value of $2,000 per acre and a gift tax value of $1,000 per acre. As a result of these negotiations, there was an additional tax due and owing. The question presented by this case is whether the Miceks are obligated for a portion of both the federal estate and the Nebraska inheritance taxes due by reason of Glaser's death.

Under the provisions of Neb. Rev. Stat. § 77-2108 (Reissue 1981):

> Whenever it appears upon any accounting, or in any appropriate action or proceeding, that an executor, administrator, trustee, or other person acting in a fiduciary capacity, has paid or may be required to pay any estate tax levied or assessed under Chapter 77, article 21, or under the provisions of any estate tax law of the United States heretofore or hereafter enacted, upon or with respect to any property required to be included in the gross estate of a decedent under the provisions of any such law, the amount of the tax so paid or payable, *except as otherwise directed in the decedent's will*, . . . shall be equitably apportioned and prorated among the persons interested in the estate.

(Emphasis supplied.) The parties each agree that the provisions of § 77-2108 apply and require that the tax due and owing upon the property conveyed to Miceks but included in Glaser's estate for tax purposes should be paid by the Miceks unless the payment is "otherwise directed in the decedent's will." The personal representative maintains that no such directions may be found in the will, while the Miceks contend to the contrary.

The specific language which gives rise to the dispute is paragraph FIRST of the last will and testament of William Glaser. Paragraph FIRST provides as follows:

> FIRST. I direct that all my just debts, funeral expenses, the costs and expenses of administering my estate and all inheritance, succession and estate taxes which may be levied or assessed upon or *with respect to any property passing on account of my death*, be first paid out of the property belonging to my estate.

(Emphasis supplied.) The parties again concede that the critical language is "with respect to any property passing on account of my death." The personal representative argues that the specific property in question was acquired by the Miceks under

contract and therefore did not pass on account of Glaser's death. The Miceks, on the other hand, maintain that Glaser reserved a life estate in a portion of the property conveyed by contract, which passed to the Miceks and merged with the remainder interest on Glaser's death. The Miceks further argue that because the life estate was property which passed on account of Glaser's death, *all* of the tax assessed on the transfer of the real estate from Glaser to the Miceks should be paid by the estate in accordance with Glaser's directive contained in paragraph FIRST of his will. We believe that the difficulty with the Miceks' position is the mistaken belief that the termination of a life estate by reason of the death of the life tenant transfers any property interest to the remainderman. Where one holds a life estate for the duration of his own life, such estate is terminated by his death, and, while it may be a property right when held by the life tenant, it does not pass on account of anyone's death, including the life tenant's.

In the case of *In re Estate of Mischke*, 136 Neb. 875, 878, 287 N.W. 760, 761 (1939), we said: "The interest of the life tenant in the real estate was extinguished by her death. Her title did not pass to the remainderman. It ceased to exist." Glaser's death did not result in the "transfer" of any property interest. The language of paragraph FIRST is clear and unambiguous and requires no interpretation, contrary to the urgings of the Miceks. As we noted in *Nielsen v. Sidner*, 191 Neb. 324, 329, 215 N.W.2d 86, 89 (1974), "[U]nder section 77-2108, R.R.S. 1943, estate taxes will be equitably apportioned in accordance with statutory rules unless there is a clear and unambiguous direction to the contrary. Ambiguities are to be resolved in favor of apportionment."

The Miceks cite to us the case of *Gretchen Swanson Family Foundation, Inc. v. Johnson*, 193 Neb. 641, 228 N.W.2d 608 (1975), as authority for their position. We believe, however, that the *Gretchen Swan-*

son decision makes it clear how an appropriate intent should be evidenced and that paragraph FIRST of William J. Glaser's will does not reflect this intention. The *Gretchen Swanson* case at 642, 228 N.W.2d at 609, sets out that the will provided " 'that all estate, inheritance, transfer, succession, legacy, or other death taxes which may become payable upon or with respect to any property included as a part of my gross taxable estate shall be paid out of the corpus of my residuary estate.' " Obviously, a direction to the effect that taxes on property included as part of the gross taxable estate, *whether passing or not by reason of death*, should be paid is completely different than a requirement that the taxes be paid only with regard to property passing by reason of death. The ideal language may be found in *Rasmussen v. Wedge*, 190 Neb. 818, 819, 212 N.W.2d 637, 638 (1973), wherein the will provided:

> "I direct my Executors to pay all Federal and State estate, inheritance, succession, transfer or other death taxes which are assessed against my estate or any beneficiary including any such tax which may be so assessed by reason of property which may be included in my estate for such tax purposes whether or not so included for probate purposes, out of my residuary estate."

When one looks at the language of either the *Gretchen Swanson* will or the will involved in the *Rasmussen* case, it is clear that paragraph FIRST of the Glaser will does not apply to property acquired by contract, even though the property was included in the federal estate tax return because a federal statute requires that all property conveyed within 3 years for less than adequate consideration be included in the decedent's estate tax return. The simple fact of the matter is that no property interest passed to the Miceks upon Glaser's death, and therefore paragraph FIRST of his will is not applicable. Because no contrary direction is contained in

Glaser's will, the provisions of § 77-2108, requiring apportionment, must be applied.

The Miceks raise a second assignment to the effect that the district court erred in ordering the appellants to pay inheritance and estate taxes which were based upon incorrect computations and valuations. The Miceks agree, however, that this claim was never raised either before the county court or the district court and is raised in this court for the first time on appeal. We have frequently held that this court will not for the first time on appeal consider a question not presented to or passed upon by the trial court, though in limited cases we will correct plain error in furtherance of the interest of substantial justice. See, *Guynan v. Guynan*, 208 Neb. 775, 305 N.W.2d 882 (1981); *Nielsen v. SID No. 229*, 208 Neb. 542, 304 N.W.2d 385 (1981); *Linn v. Linn*, 205 Neb. 218, 286 N.W.2d 765 (1980). Were this simply a matter of making a mathematical recomputation, perhaps what is requested of us by the Miceks would not be impossible. However, what we are requested to do is to redetermine the value of the property for gift tax purposes. The record is simply inadequate for us to attempt to determine what the value of the gift should be, and we should not attempt to do so for the first time on appeal. The judgment of the district court upholding the order of the county court is affirmed.

AFFIRMED.

EDWARD H. KENDALL, APPELLEE, v. DALE W. HONGSERMEIER, APPELLANT.

347 N.W.2d 855

Filed April 27, 1984. No. 83-399.

Motor Vehicles: Rules of the Road: Right-of-Way. Two vehicles approach an intersection at approximately the same time whenever they are in such relative positions that it would appear to one

of ordinary prudence approaching from the left that there is danger of collision if he fails to yield.

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

Luebs, Dowding, Beltzer, Leininger, Smith & Busick, for appellant.

Cunningham, Blackburn, VonSeggern, Livingston, Francis & Riley, for appellee.

KRIVOSHA, C.J., and CAPORALE, J., and MCCOWN and BRODKEY, JJ., Retired, and RONIN, D.J., Retired.

CAPORALE, J.

As the result of an automobile accident at an uncontrolled intersection, plaintiff-appellee, Edward H. Kendall, obtained a county court judgment in a trial without a jury against defendant-appellant, Dale W. Hongsermeier. That judgment was affirmed by the district court. We reverse and remand to the district court with directions to remand to the county court for dismissal.

On April 2, 1981, at approximately 8:45 in the morning, the vehicles operated by the parties collided at West Third and Myrtle Streets in Alda, Nebraska.

Kendall testified that he was traveling eastward at a little under 20 miles per hour. As he approached the intersection he first looked to his left and, when 40 to 50 feet from the intersection, looked to the right and saw the Hongsermeier station wagon traveling north. At that time the Hongsermeier vehicle was approximately 140 to 150 feet away. It did not appear to Kendall that Hongsermeier was speeding. Kendall looked left again and then proceeded into the intersection without again looking to the right before entering it. Kendall next saw the Hongsermeier vehicle while Kendall was in the intersection, at which time he noted that Hongsermeier was looking not in the direction of his travel but to the east at

an empty lot. Kendall swerved to his left but could not avoid the collision.

Hongsermeier testified that he was traveling northward and approached the intersection while traveling in the 20-mile-per-hour range. He did not see the Kendall vehicle until impact.

The parties made essentially the same statements to the investigating State Patrol trooper. The trooper testified that there were no obstructions to either party's view, and also testified, without objection, that the point of impact was 27 feet from the southwest corner and 17 feet from the "opposite corner," in the northbound lane of Myrtle Street.

Among other assignments Hongsermeier claims the district court erred in affirming the county court's judgment, which erred in failing to find that Kendall was contributorily negligent in a degree sufficient to bar his recovery as a matter of law.

Hongsermeier contends that the two vehicles were approaching the intersection at "approximately the same time," and, as he was on the right, he was in the favored position under Neb. Rev. Stat. § 39-635(1) (Reissue 1978), which provides: "When two vehicles approach or enter an intersection from different roadways at approximately the same time, the driver of the vehicle on the left shall yield the right-of-way to the vehicle on the right." Therefore, he argues, Kendall was more than slightly negligent as a matter of law in failing to yield the right-of-way, and consequently is barred from recovery, irrespective of Hongsermeier's negligence.

We agree. The statute is intended to avoid collisions between vehicles at intersections. The right-of-way is therefore not to be determined by the single test of which vehicle actually entered the intersection first. The driver who does not have the right-of-way is not justified in taking close chances, but has the duty to yield if there is a reasonable risk of collision should both vehicles continue on their course. *Weber v. Southwest Nebraska Dairy Sup-*

pliers, Inc., 187 Neb. 606, 193 N.W.2d 274 (1971), *appeal after remand* 190 Neb. 389, 208 N.W.2d 667 (1973). The same thought was expressed earlier in *Gernandt v. Beckwith*, 160 Neb. 719, 721, 71 N.W.2d 303, 304 (1955):

> [The right-of-way statute] does not mean that drivers of motor vehicles are permitted to race or to gamble on which vehicle may enter the intersection a few feet ahead of the other. When a collision occurs in the ordinary city or country intersection, unless there is evidence that one of the vehicles was traveling at a very much greater rate of speed than the other, it is self-evident that the vehicles were reaching the intersection "at approximately the same time."

Malcom v. Dox, 169 Neb. 539, 100 N.W.2d 538 (1960), makes the point that two vehicles approach an intersection at approximately the same time whenever they are in such relative positions that it would appear to one of ordinary prudence approaching from the left that there is danger of collision if he fails to yield.

Kendall places heavy reliance on the language in *Costanzo v. Trustin Manuf. Corp.*, 176 Neb. 136, 125 N.W.2d 556 (1963), that where one sees an approaching vehicle but misjudges its speed or distance, or for some other reason assumes he can proceed and avoid a collision, the question is for the jury. This reliance is misplaced. In *Costanzo* there was no evidence which established the relative position of the two vehicles with respect to the intersection at any given instant. The language of the *Costanzo* court made the significance of that circumstance clear at 141, 125 N.W.2d at 559: "It may not be said that it is conclusively established that the defendants' vehicle was within the limit of danger."

Kendall's own testimony is that when he was 40 to 50 feet from the intersection, Hongsermeier was 140 to 150 feet away, a difference of but 100 feet between the distances of the two vehicles from the intersec-

tion. The Hongsermeier vehicle was within the limit of danger when Kendall first saw it. Having observed that condition, Kendall was negligent in a degree more than slight as a matter of law in entering the intersection without again determining the position of the vehicle on his right and yielding to it. He is therefore barred from recovery as a matter of law. Neb. Rev. Stat. § 25-1151 (Reissue 1979).

REVERSED AND REMANDED WITH DIRECTIONS.

VERNON D. SYNOVEC, APPELLANT, V. MARTIN K. EBY CONSTRUCTION CO., INC., A KANSAS CORPORATION, ET AL., APPELLEES.

JANE RUTH SYNOVEC, APPELLANT, V. MARTIN K. EBY CONSTRUCTION CO., INC., A KANSAS CORPORATION, ET AL., APPELLEES.

347 N.W.2d 117

Filed April 27, 1984. No. 83-432.

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

John J. Hanley, for appellants.

Richard E. O'Toole of Walsh, Walentine, Miles, Fullenkamp & O'Toole, for appellees.

KRIVOSHA, C.J., and CAPORALE, J., and MCCOWN and BRODKEY, JJ., Retired, and RONIN, D.J., Retired.

PER CURIAM.

Having reviewed the record in this case, we have concluded that the judgment of the district court was correct and should be affirmed.

AFFIRMED.

SCHMUECKER BROTHERS IMPLEMENT COMPANY, APPELLANT, V. EUGENE SOBOTKA, APPELLEE.

348 N.W.2d 130

Filed April 27, 1984. No. 83-440.

1. **Summary Judgment: Final Orders: Appeal and Error.** The denial of a motion for summary judgment is not a final order and therefore is not appealable.
2. **Judgments.** Failing a notation on the trial docket, a judgment is rendered when some written notation of it is made and filed in the records of the court.
3. _____. An irregularity in a judgment which has no prejudicial effect is to be ignored.
4. **Garnishment.** Neb. Rev. Stat. § 25-1056 (Cum. Supp. 1982) allows garnishment in aid of execution when the garnishee is indebted to the judgment debtor.
5. **Pleadings: Judgments.** While Neb. Rev. Stat. § 25-852 (Reissue 1979) allows pleadings to be amended after judgment in furtherance of justice, such may not be allowed when the amendment changes the issues or expands the relief the original judgment affords by the addition of another judgment debtor.
6. **Pleadings: Demurrer.** While leave to amend should ordinarily be granted when a demurrer has been sustained, such is not necessary if there is no reasonable possibility that the plaintiff can state a cause of action.

Appeal from the District Court for Holt County: HENRY F. REIMER, Judge. Affirmed in part, and in part reversed and remanded with directions.

James Widtfeldt, for appellant.

John C. Schraufnagel of Cronin, Hannon & Symonds, for appellee.

KRIVOSHA, C.J., WHITE, and CAPORALE, JJ., and MCCOWN and BRODKEY, JJ., Retired.

CAPORALE, J.

Plaintiff, Schmuecker Brothers Implement Company, a partnership, appeals from the orders of the trial court expunging from the court records a judgment in its favor against defendant-appellee Eugene Sobotka; sustaining, without leave to amend, the demurrer of Alice Sobotka, wife of Eugene; quashing certain summonses in garnishment; and denying

Schmuecker Brothers' motion for summary judgment on the petition to which the trial court sustained Alice's demurrer. We affirm in part and in part reverse and remand with directions.

In 1971 Schmuecker Brothers filed a petition seeking a judgment based upon allegations that Eugene had breached his contract for the purchase of a tractor and failed to pay promissory notes he had given in connection with that purchase. Eugene failed to answer the petition, and on May 31, 1972, a document labeled "Judgment" was signed by a judge of the district court and filed with the court's clerk. That document reads, in relevant part:

> The Court further finds that the allegations set forth in plaintiff's petition are true and that there is due from said defendant to the plaintiff the sum of Four Thousand Four Hundred Sixty-three Thirty-three ($4,463.33) dollars plus interest at Six (6%) per cent from September 10, 1971 in the sum of $30.50 dollars together with costs herein expended.
>
> IT IS THEREFOR [sic] CONSIDERED BY THE COURT that the plaintiff have and recover from the defendant the sum of _____ dollars together with his [sic] costs herein expended at the sum of 30.50 dollars together with a reasonable attorney's fee in the sum of $110.00 dollars.

The foregoing language is also contained in the court journal.

Executions on the judgment were returned unsatisfied in 1972 and 1973.

In 1981 Schmuecker Brothers revived the judgment, which had become dormant. On September 10, 1981, an execution was again issued and returned unsatisfied when no property belonging to Eugene could be found.

Subsequently, Schmuecker Brothers attempted to garnish an interest held by Alice in the estate of Lloyd A. Whaley, deceased. In the affidavit supporting the issuance of garnishment summonses,

which were served upon Alice and upon the personal representatives and attorneys for the estate, Schmuecker Brothers alleged not that Alice was indebted to Eugene but, rather, contended that, pursuant to Neb. Rev. Stat. § 42-201 (Reissue 1978), she was liable for her husband's debt on the tractor. At the same time, Schmuecker Brothers filed a petition seeking to add Alice as a defendant in the original lawsuit against her husband and praying for a judgment against her for the amount which remained unpaid on the judgment previously obtained against her husband. Schmuecker Brothers later moved for a summary judgment thereon. Meanwhile, both Alice and Eugene filed motions to quash the garnishments. Eugene additionally sought an order directing the clerk of the district court to expunge the 1972 judgment from the court records. An order was entered quashing the garnishment summonses and directing the clerk to expunge the 1972 judgment. Alice demurred to the petition of Schmuecker Brothers seeking to add her as a defendant. The district court sustained the demurrer, without leave to amend, and overruled Schmuecker Brothers' motion for summary judgment. Schmuecker Brothers filed timely motions for new trial on each order adverse to it. These motions for new trial were duly overruled; whereupon this appeal followed.

Given the posture of the case, Schmuecker Brothers' seven assignments of error raise four issues. Did the trial court err in (1) ordering the 1972 judgment expunged, (2) quashing the garnishments upon Alice's interest in an estate, (3) sustaining Alice's demurrer without leave to amend, and (4) denying Schmuecker Brothers' motion for summary judgment?

We deal with the fourth assignment first because it takes the least discussion. We have repeatedly and recently held that the denial of a motion for summary judgment is not a final order and therefore is not appealable. *Bryant Heating v. United*

States Nat. Bank, 216 Neb. 107, 342 N.W.2d 191 (1983). That assignment is devoid of any merit.

However, we sustain Schmuecker Brothers' first assignment of error. Even if Eugene did not waive some or all of the claimed defects in the judgment by failing to answer the revivor action, a determination we do not make, no one having briefed the issue, the original judgment was not void and should not have been expunged. Neb. Rev. Stat. § 25-1301 (Reissue 1979) provides:

> (1) A judgment is the final determination of the rights of the parties in an action.
>
> (2) 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.
>
> (3) Entry of a judgment is the act of the clerk of the court in spreading the proceedings had and the relief granted or denied on the journal of the court.

In support of his theory that the judgment in this case is void, Eugene cites us to two cases supporting the proposition that no judgment is rendered until a notation is made upon the trial docket. In *Valentine Production Credit Assn. v. Spencer Foods, Inc.*, 196 Neb. 119, 241 N.W.2d 541 (1976), the issue was whether a new trial motion was timely filed. The court held that since the record did not show that a notation had been made on the trial docket when the judge issued his memorandum sustaining plaintiff's motion for summary judgment, the judgment was not rendered until the formal judgment document had been signed by the trial judge and filed. Because the motion for new trial was filed within 10 days of that date, it was held to have been timely. In *Fritch v. Fritch*, 191 Neb. 29, 213 N.W.2d 445 (1973), the question was when an order became final. This court held that an oral pronouncement

which had not been accompanied by a notation on the trial docket did not constitute the rendition of a judgment and therefore no final order had been entered from which one could appeal. Thus, *Fritch* stands for the proposition that an oral pronouncement accompanied by nothing constitutes nothing. *Valentine Production Credit Assn.*, on the other hand, stands for the proposition that, failing a notation on the trial docket, a judgment is rendered when some written notation of it is made and filed in the records of the court. That written notation accompanied by its filing becomes the equivalent of a notation on the trial docket. That is the situation here.

Eugene further complains of the blank space in the final paragraph of the judgment document. That blank space does not cast any doubt about the amount Schmuecker Brothers was to recover from Eugene. It is an irregularity which has no prejudicial effect and therefore is to be ignored. The trial court erred when it ordered the 1972 judgment expunged. That order is therefore reversed and the cause remanded. The trial court is directed to reinstate that judgment.

The trial court did not err, as claimed in the second assignment of error, by quashing the garnishments sought against Alice's interest in the estate of Lloyd A. Whaley, deceased. In an affidavit supporting the request for garnishment orders, Edward Schmuecker stated that Schmuecker Brothers' executions against Eugene had been returned unsatisfied, the goods supplied which caused the judgment were necessaries of life, and that Alice possessed an interest in the estate of her deceased father, Lloyd A. Whaley. These attempted garnishments have their roots in Schmuecker Brothers' misguided notion that such a remedy is authorized by § 42-201. Neb. Rev. Stat. § 25-1056 (Cum. Supp. 1982) allows garnishment in aid of execution when the garnishee is indebted to the judgment debtor. There is no alle-

gation in Schmuecker Brothers' affidavit that the estate of Lloyd A. Whaley is indebted to Eugene. While the estate may be indebted to Alice, she is not a judgment debtor of Schmuecker Brothers. Section 42-201 provides in part:

> [A]ll property of a married woman, except ninety per cent of her wages, not exempt by statute from sale on execution or attachment, regardless of when or how said property has been or may hereafter be acquired, shall be liable for the payment of all debts contracted for necessaries furnished the family of said married woman after execution against the husband for such indebtedness has been returned unsatisfied for want of goods and chattels, lands and tenements whereon to levy and make the same.

By the terms of this statute, when a judgment has been returned against a husband for the payment of debts upon contracts for necessaries and execution has been returned unsatisfied against the husband, the wife then becomes liable for those debts. Assuming, but not deciding, that the tractor supplied to Eugene was a necessity, the most that can be said for the effect of § 42-201 is that it creates a debt owing from Alice to Schmuecker Brothers. Since there was no allegation of a debt owing to Eugene from the estate of Lloyd A. Whaley or its personal representatives or attorneys, the quashing of the garnishment summonses was proper.

By the remaining, or third, assignment of error, Schmuecker Brothers complains of the district court's order sustaining, without leave to amend, the demurrer to its pleading labeled "Petition and Praecipe for Summons to Add Alice Sobotka as Defendant," and thereby effectively dismissing the petition. In essence, this pleading constitutes an attempt in 1982 to amend the original petition filed in this case, even though the case proceeded to judgment more than 10 years earlier. While Neb. Rev. Stat. § 25-852 (Reissue 1979) allows pleadings to be

amended after judgment in furtherance of justice, such may not be allowed when the amendment changes the issues. *Collection Associates, Inc. v. Eckel*, 212 Neb. 607, 324 N.W.2d 808 (1982). Not only does this pleading introduce a new issue, namely, whether a tractor is a necessity within the meaning of § 42-201, but it also attempts to expand the relief the original judgment affords by the addition of another judgment debtor.

Neb. Rev. Stat. § 25-854 (Reissue 1979) provides that if a demurrer be sustained, the adverse party may amend if the defect can be remedied. While leave to amend should ordinarily be granted, such is not necessary if there is no reasonable possibility that the plaintiff can state a cause of action. See *Fowler v. Nat. Bank of Commerce*, 209 Neb. 861, 312 N.W.2d 269 (1981). Schmuecker Brothers cannot amend its petition so as to state a cause of action against Alice in this case which long ago went to judgment. The trial court was correct in sustaining the demurrer and refusing leave to amend.

Whether Schmuecker Brothers has a cause of action against Alice which can be asserted in a separate action and whether any such cause is time barred are matters not presently before us.

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

THEODORE N. REEDER AND ROSALIE M. REEDER, APPELLANTS, V. DANA REEDER, APPELLEE.

348 N.W.2d 832

Filed April 27, 1984. No. 83-453.

1. **Insurance: Subrogation.** No right of subrogation can arise in favor of an insurer against its own insured, since, by definition, subrogation exists only with respect to rights of the insurer against third persons to whom the insurer owes no duty.
2. _____: _____. Absent an express agreement to the contrary be-

tween a host and a guest, the host's fire insurance carrier does not have a right of subrogation against the guest for the negligent destruction of the property which the carrier insured and for which the host paid a premium.

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

Rodney S. Sederstrom of Erickson, Sederstrom, Leigh, Eisenstatt, Johnson, Kinnamon, Koukol & Fortune, P.C., for appellants.

Dennis R. Riekenberg of Cassem, Tierney, Adams, Gotch & Douglas, for appellee.

KRIVOSHA, C.J., WHITE, and CAPORALE, JJ., and MCCOWN and BRODKEY, JJ., Retired.

PER CURIAM.

This appears to be a case of first impression in this jurisdiction and presents the question of whether one who occupies the home of another with the owner's permission, and who negligently causes damage to the home, may be sued by the owner's insurance carrier under a right of subrogation after the insurance carrier has paid the owner for the damages. The trial court concluded that the cause of action did not lie. We believe that the trial court was correct, and, accordingly, we affirm.

Theodore N. Reeder and Rosalie M. Reeder, husband and wife, were the owners of a residence located in Omaha, Nebraska. In August of 1979 they moved to Arlington, Texas, still owning the home in Omaha. Reeder's brother, Bernard Reeder, who lived in Omaha, was in the process of constructing a new home for himself and his family. The brothers agreed that Bernard Reeder and his family could occupy the Theodore Reeder home in Omaha while the Bernard Reeders were awaiting the completion of their new home. As one would anticipate in arrangements of this type, there was no formal agreement and little discussion regarding the informal agreement. Theodore Reeder testified:

> We didn't have a lease, he did not lease it from me, he was only living in it. He was building a house of his own in the neighborhood, and he wanted to get his children in Christ the King School as soon as possible, and my house was sitting there vacant and he asked me if he could move in while he was completing his house and be closer to it, and get his kids in the school district right away. And I said that is fine, because it is sitting there vacant, and I can sell it with furniture in it just as easy as I can without; and you move in, and that is fine.

Further, Theodore Reeder testified that "there was no rent paid and no agreement. He was to just take care of it and shovel the snow, live in it. Pay the utility bills, which I wouldn't have to pay." The brothers understood that Theodore Reeder, the owner, would pay the taxes, but no rent was to be paid by Bernard to Theodore. Additionally, Theodore Reeder testified that he specifically told his brother "that I would leave my insurance policy that I had on it on it while he was in there, and I didn't really discuss any part of his homeowner's or anything else. I just assumed he would take care of that. But we did discuss that I would leave my policy on it."

On March 4, 1980, while occupying the house, Dana Reeder, Bernard's daughter, ignited the gas fireplace in the family room of the house. Allegedly, she failed to open the damper, which caused a fire resulting in substantial destruction to the home.

Cornhusker Casualty Company, Theodore Reeder's carrier, paid the sum of $139,760 to Theodore Reeder and obtained in return a subrogation receipt. Cornhusker then filed suit against Bernard Reeder and Patricia Reeder, parents of Dana Reeder, as well as against Dana Reeder herself. The parents were dismissed from the action, and no appeal has been taken from that order. It is therefore final and binding and not at issue in this appeal. Following the

order dismissing the parents, Dana Reeder filed a motion for summary judgment. On May 11, 1983, the trial court sustained the motion for summary judgment and dismissed the action as against the remaining defendant, Dana Reeder.

It is from that order, dismissing the petition against Dana Reeder, that Cornhusker appeals, assigning as error, in essence, the following claims: (1) That the granting of the summary judgment was inappropriate under the facts of the case; (2) That the trial court erred in finding that the relationship between the parties was that of landlord/tenant; (3) That the trial court erred in finding the majority rule prohibits a landlord's insurer from subrogating against a negligent tenant.

While we believe that the order of the trial court was correct, we should at this point note that nothing in either the motion for summary judgment or in the trial court's order sustaining the motion for summary judgment indicates the basis upon which the trial court rendered its judgment. There are no findings in the trial court's order that the relationship between the parties was that of landlord/tenant, nor any finding that the trial court was adhering to any particular rule, majority or minority. The motion for summary judgment simply asks that judgment be granted "for the reason that the pleadings, including all discovery pleadings filed herein, and the depositions filed herein establish that there is no genuine issue as to any material fact, and defendant is entitled to a judgment as a matter of law." And the order of the trial court sustaining the motion for summary judgment simply recites: "Motion of defendant Dana Reeder for summary judgment is sustained."

The issue whether the relationship between Theodore Reeder and his brother, Bernard Reeder, was that of landlord/tenant, as urged by appellee, or that of licensor/licensee, as urged by appellant, is raised in part by Dana Reeder's amended answer and by

the briefs of the parties to this court. It is not, however, a part of either the motion for summary judgment or the court's order. Nor do we believe that attempting to categorize this relationship is either material or helpful. One of the difficulties we too often encounter in the law is our effort to attempt to force every situation into a known and recognized relationship, hoping that by doing so the answer to our question may of necessity automatically follow.

In the instant case, we believe the facts would disclose that the relationship created between Theodore Reeder and his brother, Bernard Reeder, was neither landlord/tenant nor licensor/licensee in the full legal sense. To be sure, the relationship has characteristics of both landlord/tenant and licensor/licensee, but of a separate and unique kind, and in this instance meriting a different treatment. In *Friend v. Gem International, Inc.*, 476 S.W.2d 134, 137-38 (Mo. App. 1971), it was noted:

> The status of landlord and tenant is defined, generally, to arise from contract, express or implied, under the terms of which a person designated as "tenant" enters into possession of land of another, known as "landlord", with the rights of the tenant subordinate to the landlord. "The essentials of that relationship are said to be (1) a reversion in the landlord, (2) the creation of an estate in the tenant, either at will or for a term less than that for which the landlord holds, (3) *the transfer of exclusive possession and control of the premises to the tenant*, and (4) a contract, either express or implied, between the parties." Johnson v. Simpson Oil Company, Mo.App., 394 S.W.2d 91, 96 [4]. On the other hand, the condition of licensor and licensee has also been defined, generally, to arise when one who owns or possesses land known as the "licensor" grants to another known as "licensee" the privilege of going onto land for a certain purpose without passing an estate in the land.

(Emphasis supplied.) See, also, *Bentley v. Palmer House Company*, 332 F.2d 107 (7th Cir. 1964); *Gage v. City of Topeka*, 205 Kan. 143, 468 P.2d 232 (1970). As noted in 49 Am. Jur. 2d *Landlord and Tenant* § 6 at 47 (1970), the legal status of parties in their relationships one to the other "is a question of which direction the general effect of the various tests that have been applied, after weighing opposing ones against each other, can be said to take."

An express agreement to create a landlord/tenant relationship is not necessary; nevertheless, the evidence must indicate that the parties intended to impliedly create such an arrangement, including the fact that by entering into this arrangement the tenant acquired certain rights and the landlord assumed certain obligations. See *Bodie v. Epler*, 132 Neb. 442, 272 N.W. 249 (1937). We believe that when one examines the relationship and discussion between the parties, it is clear that Theodore Reeder did not intend to assume any obligations, nor did Bernard Reeder obtain any "rights" other than the opportunity to occupy his brother's home for such time and under such conditions as Theodore Reeder might impose arbitrarily from day to day. It is clear, for instance, that there was no intention of any payment of rent by Bernard to Theodore, nor was Theodore precluded from occupying the house any time he might return to Omaha.

Additionally, the relationship of licensor/licensee has been thought to exist with regard to the use of land and not the occupancy of a house. See, *Matter of Daben Corp.*, 469 F. Supp. 135 (D. Puerto Rico 1979); *Moore v. Chesapeake & O. Ry. Co.*, 493 F. Supp. 1252 (S.D. W. Va. 1980), *aff'd* 649 F.2d 1004 (4th Cir. 1981); *Wenner v. Dayton-Hudson Corp.*, 123 Ariz. 203, 598 P.2d 1022 (1979); *Ulan v. Vend-A-Coin, Inc.*, 27 Ariz. App. 713, 558 P.2d 741 (1976); *Union Travel Assoc. v. International Assoc.*, 401 A.2d 105 (D.C. App. 1979).

The arrangement, for whatever difference placing

titles on it may be, was really that of a host and guest.

> The word [guest] is descriptive of a relationship known to the common understanding. Besides its somewhat narrow technical significance in statutes, it has a broad, general meaning, implying both a social relationship and the existence of a host; and has been defined in general, as meaning a person entertained in one's house or at one's table, a visitor entertained without pay; a person received and entertained at the house of another, a visitor; . . . hence a person to whom the hospitality of a home, club, etc., is extended.

39 C.J.S. *Guest* at 447 (1976). In *Stadelmann v. Glen Falls Ins. Co.*, 5 Mich. App. 536, 147 N.W.2d 460 (1967), the Michigan court said a guest is a person who is received at one's home.

The reason that we make this distinction is not to simply find our own "pigeonhole" in which to force the answer. Rather, it is to clarify the question presented by this case. This question is not whether the relationship between the brothers was that of landlord/tenant or licensor/licensee, but whether the carrier, by seeking to recover from Theodore Reeder's "guest," is, in effect, seeking to recover from the insured himself for the very risk that the carrier insured and for which it received premiums.

We should note that the question presented to us is not whether a landlord may sue his tenant for negligent destruction to the landlord's property or whether a licensor may sue a licensee for negligent destruction of the licensor's property, absent agreements to the contrary. Rather, the question is whether the relationship between the host and the guest, under the facts in this case, is such that if the carrier is permitted to sue the guest under a claim of right of subrogation, in effect the carrier is recovering from the insured himself on the very risk which the insurer agreed to take upon payment of

the premium. Therefore, in this case, the issue is not whether, absent insurance, Theodore Reeder could sue his brother or his niece, but whether the relationship between the insured and his brother was such, however characterized, that by permitting the carrier to sue the brother, in effect the carrier is suing the insured. This we believe the carrier may not do.

In *Cagle, Inc. v. Sammons*, 198 Neb. 595, 602, 254 N.W.2d 398, 403 (1977), we noted:

> The doctrine of subrogation is not administered by courts of equity as a legal right, but the principle is applied to subserve the ends of justice and to do equity in the particular case under consideration. . . . The facts and circumstances of each case determine whether the doctrine is applicable.

While it is true that the right of an insurance company to recover against a wrongdoer whose negligence has subjected the insurance company to a liability, whether the company's right be based on an equitable subrogation or an express assignment is traced through the insured, see *Omaha & R. V. R. Co. v. Granite State Fire Ins. Co.*, 53 Neb. 514, 73 N.W. 950 (1898), it is also true that an insurer cannot recover against its own insured, see *Midwest Lumber Co. v. Dwight E. Nelson Constr. Co.*, 188 Neb. 308, 196 N.W.2d 377 (1972).

In *Stetina v. State Farm Mut. Auto. Ins. Co.*, 196 Neb. 441, 451, 243 N.W.2d 341, 346 (1976), we said:

> "No right of subrogation can arise in favor of an insurer against its own insured since, by definition, subrogation exists only with respect to rights of the insurer against third persons *to whom the insurer owes no duty.* 16 Couch on Insurance 2d, § 61:133; see also 46 C.J.S. Insurance § 1209(b); 16 Couch on Insurance 2d, § 61:136. This principle is succinctly stated in *Chenoweth Motor Co. v. Cotton*, 2 Ohio Misc. 123, 207 N.E.2d 412, 413:

> " '* * * it is axiomatic that [an insurance company] has no subrogation rights against the negligence of its own insured.' (Bracketed material paraphrased.)
>
> "To allow subrogation under such circumstances would permit an insurer, in effect, to pass the incidence of the loss, either partially or totally, from itself to its own insured and thus avoid the coverage which its insured purchased. . . ."

(Emphasis supplied.) In *Alaska Ins. Co. v. RCA Alaska Commun.*, 623 P.2d 1216, 1218 (Alaska 1981), the court said:

> Absent an express provision in the lease establishing the tenant's liability for loss from negligently started fires, the trend has been to find that the insurance obtained was for the mutual benefit of both parties, and that the tenant "stands in the shoes of the insured landlord for the limited purpose of defeating a subrogation claim." *Rizzuto v. Morris*, 22 Wash.App. 951, 592 P.2d 688, 690 (1979), *citing Rock Springs Realty, Inc. v. Waid*, 392 S.W.2d 270, 278 (Mo.1965); *Monterey Corp. v. Hart*, 216 Va. 843, 224 S.E.2d 142, 146 (1976).

See, also, *West American Ins Co v Pic Way*, 110 Mich. App. 684, 313 N.W.2d 187 (1981); *Gift Box v. Scott*, 272 Ark. 256, 613 S.W.2d 395 (1981); *Liberty Mut. Fire Ins. Co. v. Auto Spring Supply Co.*, 59 Cal. App. 3d 860, 131 Cal. Rptr. 211 (1976). The undisputed evidence is that Theodore Reeder testified that he told his brother, Bernard, that he would "leave my insurance policy that I had on it on it while he was in there." It is difficult to see how the insurance was not for the benefit of the Bernard Reeders to the same extent as it was for the Theodore Reeders.

In the case of *Rizzuto v. Morris*, 22 Wash. App. 951, 955-56, 592 P.2d 688, 690 (1979), the Washington Court of Appeals reasoned:

> [I]nsurance companies expect to pay their insureds for negligently caused fire, and they adjust their rates accordingly. In this context, an insurer should not be allowed to treat a tenant, who is in privity with the insured landlord, as a negligent third party when it could not collect against its own insured had the insured negligently caused the fire. In effect, a tenant stands in the shoes of the insured landlord for the limited purpose of defeating a subrogation claim.

It occurs to us that if the reasoning underlying the denial of a subrogation claim applies between a landlord and a tenant, then we conclude that this reason is even more compelling when the relationship is that of host and guest, particularly when the host has assured the guest that there is insurance coverage. It may be presumed that the insured bought this policy so that he would not have to look to his guest for payment in the event of damage caused by the negligent act of the guest. We are persuaded that the relationship which existed between the brothers in this case was such that, regardless of how their relationship is characterized, a right of subrogation in the insurer against the insured's niece should not lie as a matter of law.

Having therefore concluded as a matter of law that the carrier was not entitled to maintain the right of subrogation, and, further, in view of the fact that there is no dispute as to the facts, this was a case in which there existed no genuine issue as to any material fact, the ultimate inferences to be drawn from those facts were clear, and the moving party was entitled to judgment as a matter of law. Under such circumstances the court was obligated to enter summary judgment. See *Interholzinger v. Estate of Dent*, 214 Neb. 264, 333 N.W.2d 895 (1983). The judgment of the trial court granting summary judgment in favor of the appellee and against the appellant was correct, and the judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GARY K. OLSON, APPELLANT.

347 N.W.2d 862

Filed April 27, 1984. No. 83-621.

1. **Constitutional Law: Appeal and Error.** For a question of constitutionality to be considered on appeal, it must have been properly raised in the trial court. Except in the most unusual of cases, if it has not been raised in the trial court, it will be considered to have been waived.
2. **Criminal Law: Appeal and Error.** The standard of review in criminal cases on appeal to the district court from the county court is limited to an examination of the record presented for error or abuse of discretion.
3. **Sentences.** A sentence imposed within the statutory limits will not be disturbed on appeal absent an abuse of discretion.

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

John M. Gerrard of Domina Law Firm, P.C., for appellant.

Paul L. Douglas, Attorney General, and Linda L. Willard, for appellee.

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

CAPORALE, J.

Defendant-appellant, Gary K. Olson, pled guilty to third offense drunk driving before the county court for Madison County. He was found guilty and sentenced to serve 3 months in the county jail, to pay a $500 fine, to never drive again in this state for any purpose, to have his driver's license permanently revoked, and to pay court costs. The finding of guilt and the sentence were affirmed on appeal to the district court for Madison County. We affirm the actions of the district court.

The complaint filed February 14, 1983, alleged, among other things, that on February 4 of that year Olson operated a motor vehicle on a public street or highway while under the influence of alcoholic liquor

and that this was the third such offense. On February 15, 1983, Olson appeared with an attorney before County Judge Philip R. Riley. Judge Riley carefully explained Olson's constitutional rights and advised Olson of the potential penalties should he be found guilty of third offense drunk driving. At this time Olson pled not guilty.

On May 3, 1983, Olson again appeared before Judge Riley with a second attorney who practiced in the same firm as the one who first appeared in the case. A charge of refusing to submit to a chemical test was dismissed. Olson withdrew his plea of not guilty to the third offense drunk driving charge and entered a plea of guilty. Judge Riley properly found that there was a factual basis for such plea and accepted it. The record on the issue of guilt reflects that Olson had been convicted of drunk driving under this state's statutes on two prior occasions, once on June 28, 1977, and again on February 5, 1980, for offenses occurring on March 19, 1977, and December 16, 1979, respectively. The record also affirmatively shows that he was represented by counsel on each of those occasions.

On appeal to the district court for Madison County, Olson's present attorney asserted for the first time that the penalties specified by Neb. Rev. Stat. § 39-669.08(4)(c) (Cum. Supp. 1982) are unconstitutional. Since that statute deals with persons who refuse to submit to chemical tests, a charge which was dismissed here, we assume that counsel refers to Neb. Rev. Stat. § 39-669.07(3) (Cum. Supp. 1982), which concerns itself with the penalties for persons operating or being in the actual physical control of any motor vehicle while under the influence of alcoholic liquor. Section 39-669.07(3) provides in pertinent part as follows:

> If such person (a) has had two or more convictions under this section since July 17, 1982, (b) has been convicted two or more times under this section as it existed prior to July 17, 1982,

(c) has been convicted two or more times under a city or village ordinance enacted pursuant to this section either prior or subsequent to July 17, 1982, or (d) has been convicted as described in subdivisions (3)(a) to (3)(c) of this section a total of two or more times, such person shall be guilty of a Class W misdemeanor and the court shall, as part of the judgment of conviction, order such person to never again drive any motor vehicle in the State of Nebraska for any purpose from the date of his or her conviction, and shall order that the operator's license of such person be permanently revoked.

If the court places such person on probation or suspends the sentence for any reason, the court shall, as one of the conditions of probation or sentence suspension, order such person not to drive any motor vehicle in the State of Nebraska for any purpose for a period of one year, and such order of probation shall include as one of its conditions confinement in the city or county jail for seven days.

In this appeal Olson assigns three errors to the actions of the district court: (1) The failure to consider the constitutionality of "the sentencing portion" of the subject statute; (2) The failure to find that portion of the statute unconstitutional; and (3) The imposition of an excessive sentence.

As to the first assignment of error, it is, and has long been, the rule that for a question of constitutionality to be considered on appeal, it must have been properly raised in the trial court. Except in the most unusual of cases, if it has not been raised in the trial court, it will be considered to have been waived. *State v. Hiross*, 211 Neb. 319, 318 N.W.2d 291 (1982); *State v. Schwade*, 177 Neb. 844, 131 N.W.2d 421 (1964).

Olson argues, however, that the rule does not apply because the sentencing proceeding in the district court is a thing separate and apart from that in

which it is determined that the conviction should be affirmed. Accordingly, he argues, the sentencing proceeding is "a fresh stage which provides the District Court wide latitude in affirming or modifying the lower Court's sentence." Moreover, he argues, the rule is particularly inapplicable where Olson has retained different counsel for the district court appeal. Brief for Appellant at 8.

Olson cites no authority for his assertion that on appeal from the county court the district court's sentencing power is something separate and apart from its authority to review the finding of guilt. In point of fact, the law is to the contrary. Neb. Rev. Stat. § 29-613 (Reissue 1979) provides: "The district court shall hear and determine any cause brought by appeal from a county or municipal court upon the record, and may affirm, modify, or vacate the judgment, or may remand the case to the county or municipal court for a new trial." See, also, Neb. Rev. Stat. § 24-541.06(1) (Cum. Supp. 1982).

We have held that the review by the district court of a county court criminal judgment is limited to an examination of the record presented for error or abuse of discretion. *State v. Smith*, 199 Neb. 368, 259 N.W.2d 16 (1977). Therefore, the district court may modify a sentence imposed by the county court only where the county court has so abused its discretion as to render its sentence an error upon the record presented. The fact that the district court elected in this case to make its analysis of the county court sentence in a proceeding separate and apart from that in which it first determined there was no other error "upon the record" is of no moment. Such a procedure did not present the district court with the "fresh stage" suggested by Olson. The district court was still functioning as an appellate court reviewing the record made in the county court. *State v. Smith, supra*. See, also, *State v. Ferris*, 216 Neb. 606, 344 N.W.2d 668 (1984).

The suggestion that the rule requiring constitu-

tional issues to be raised in the trial court may be circumvented by the simple expedient of changing one's attorney between the various levels of courts is supported neither by authority nor logic.

There are no reasons for departing from the ordinary rule in this case. Olson, by pleading guilty in the county court, was able to bargain away the charge of refusing to submit to a chemical test. If Olson had raised the constitutional question in the trial court, it is certainly questionable whether the plea bargain would have been accepted by the State. The State necessarily gave up some of its rights in relying on defendant's conduct at the plea hearing in the trial court. Olson should not be able to take advantage of the constitutional question at later stages of the proceedings against him.

The district court correctly concluded that it was not the trial court, and, therefore, constitutional issues could not be raised before it for the first time.

Having determined that Olson's first assignment of error is without merit, we do not reach the constitutional issues presented by his second assignment.

As to his third assignment, a sentence imposed within the statutory limits will not be disturbed on appeal absent an abuse of discretion. *State v. Pierce and Wells*, 215 Neb. 512, 340 N.W.2d 122 (1983). The presentence report shows that, in addition to a variety of other motor vehicle offenses, Olson has been convicted five times for drunk driving and has been on probation at least three times. In the face of such a record there is no merit in the argument that Olson's sentence is somehow excessive.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. HAROLD LEDINGHAM, APPELLANT.

347 N.W.2d 865

Filed April 27, 1984. No. 83-651.

1. **Constitutional Law: Appeal and Error.** It is, and has long been, the rule that for a question of constitutionality to be considered on appeal, it must have been properly raised in the trial court. Except in the most unusual of cases, if it has not been raised in the trial court, it will be considered to have been waived.
2. **Criminal Law: Appeal and Error.** In determining the sufficiency of evidence to sustain a criminal conviction, this court does not resolve conflicts in the evidence, pass upon the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence, and a verdict rendered thereon must be sustained if, taking the view of such evidence most favorable to the State, there is sufficient evidence to support it.

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

Donn C. Raymond of Raymond, Olsen, Ediger & Ballew, P.C., for appellant.

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

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

KRIVOSHA, C.J.

The appellant, Harold Ledingham, appeals from a judgment entered by the county court for Scotts Bluff County, Nebraska, and thereafter affirmed by the district court for Scotts Bluff County, finding Ledingham guilty of discharging sewage waste in violation of Scotts Bluff County health regulations. A violation of the regulation is a Class III misdemeanor. See Neb. Rev. Stat. § 71-1631.01 (Reissue 1981). The county court ordered Ledingham to pay a fine in the amount of $25, together with costs. On appeal to the district court the fine was affirmed. We have reviewed the record and find that the decision of the county court, affirmed by the district

court, was in all respects correct, and, accordingly, we affirm.

The record discloses that on July 8, 1982, a complaint was filed in the county court for Scotts Bluff County, charging Ledingham with violating § XIII(F)(1) of the Scotts Bluff County Board of Health rules and regulations. The pertinent section of the regulations adopted pursuant to authority granted the county board by Neb. Rev. Stat. § 71-1631(7) (Reissue 1981) provides: "No person shall drain sewage wastes into any stream, lake, ditch or canal, into any abandoned well, into any ground water table or upon any private or public lands of the county." Section 71-1631.01 provides that any person violating any rule or regulation authorized by § 71-1631(7) or (9) shall be guilty of a Class III misdemeanor.

On appeal to this court appellant raises three issues. Two of the issues purport to raise constitutional deficiencies not previously raised before either the county court or the district court. The third assignment maintains that the court erred in finding Ledingham in violation of § XIII(F)(1). A fourth assignment of error maintains that the district court erred in affirming the decision of the county court. This, of course, is just another way of stating the previous assignments.

With regard to the first two assignments of error, involving alleged constitutional violations, we are not in a position as the record is presented to us to pass upon those issues. Recently, in *State v. Olson*, *ante* p. 130, 132, 347 N.W.2d 862, 864 (1984), we said: "[I]t is, and has long been, the rule that for a question of constitutionality to be considered on appeal, it must have been properly raised in the trial court. Except in the most unusual of cases, if it has not been raised in the trial court, it will be considered to have been waived."

A situation somewhat similar to the instant case was presented to us in *State v. Hiross*, 211 Neb. 319,

318 N.W.2d 291 (1982). In *Hiross* the appellant was charged with the crime of contributing to the delinquency of a minor. She entered a plea of not guilty, and trial was had in the county court. Following conviction, she appealed to the district court, whereupon the judgment of the county court was affirmed. In rejecting the appellant's claim that the statute was unconstitutional, we said at 321, 318 N.W.2d at 292:

> Turning to her last and final assignment, that the act itself, § 28-709(1), is unconstitutional, we again note that the issue of the constitutionality of the statute was raised for the first time in the District Court on appeal. We have many times noted that in order for the constitutionality of a statute to be considered by this court, the issue must have been properly raised in the trial court.

In support of our position in *Hiross* we quoted from *State v. Irwin*, 208 Neb. 123, 127, 302 N.W.2d 386, 389 (1981), wherein we said:

> "Defendant did not raise the constitutional issue in the trial court. It is raised for the first time on appeal. For a question of constitutionality of a statute to be considered in this court it must be properly raised in the trial court. If it is not raised in the trial court, it will be considered as waived in this court."

The basis underlying the rule is clear, and the rule is not intended to be arbitrary or intended to put form over substance. In cases of this nature, first the district court and then this court act as appellate courts and not as trial courts. The standard of review in cases appealed from the county court to the district court, and from the district court to this court, is on the record made in the county court, and is not de novo. See Neb. Rev. Stat. § 29-613 (Reissue 1979). In *State v. Smith*, 199 Neb. 368, 371, 259 N.W.2d 16, 17 (1977), we said: "The review of criminal cases in the District Court is limited to an examination of the

record presented for error or abuse of discretion." And in *State v. Clark*, 194 Neb. 487, 490, 233 N.W.2d 898, 900 (1975), we said: "Criminal misdemeanor appeals from the county court are specifically covered by section 29-613, R.S. Supp., 1974, and are restricted to the record made in the lower court."

If, then, the district court is to be able to properly review the question of whether the trial court abused its discretion, and if this court, on further appeal, is to be able to determine whether the district court in reviewing the action of the county court properly exercised its authority, it occurs to us that the trial court must be given the first opportunity to pass upon the question. To hold otherwise would require us to totally ignore the rules with regard to appellate review and make matters on appeal to the district court or on appeal to this court, in effect, de novo. To simply make a general claim on appeal that a statute in question is unconstitutional because it fails to afford due process, without setting out whether the alleged violation is in conflict with either the federal Constitution or the state Constitution, or both, and which section thereof, and to deny the trial court the opportunity to pass upon the matter, is not an appropriate way to conduct either trial courts or appellate courts. Only in the most unusual of cases, and where the error is plain, should courts disregard such rules and consider constitutional issues raised for the first time on appeal to this court.

Having thus determined that we cannot consider the constitutional issues raised in this court, we turn to the question of whether the evidence was sufficient to justify a conviction.

A review of the record discloses that at a minimum there was a conflict in the evidence, though there was sufficient evidence produced by the State to establish a prima facie case. We do not resolve conflicts in the evidence. As we said in *State v. Miner*, 216 Neb. 309, 313, 343 N.W.2d 899, 902 (1984):

In determining the sufficiency of evidence to

> sustain a criminal conviction, this court does not resolve conflicts in the evidence, pass upon the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence, and a verdict rendered thereon must be sustained if, taking the view of such evidence most favorable to the State, there is sufficient evidence to support it.

Ledingham's main complaint in this regard is to the effect that no tests were ever performed upon the waste that was discharged from his septic tanks to determine whether or not in fact the waste constituted a nuisance. Under the provisions of the regulation the State is not required to prove a nuisance. It is merely required to prove the emission of sewage waste. That it did. Under the express language of the regulations the observations made by the State's witnesses were sufficient, if believed by the court, to sustain a conviction. For these reasons, therefore, the decision of the district court affirming the conviction entered by the county court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. THOMAS P. ROEPKA, APPELLANT.

347 N.W.2d 857

Filed April 27, 1984. No. 83-669.

Search and Seizure: Constitutional Law. The warrantless search of a third party's home by police officers for a person named in an arrest warrant, absent consent or exigent circumstances, violates the fourth amendment rights of the third party.

Appeal from the District Court for Holt County: HENRY F. REIMER, Judge. Reversed and remanded for further proceedings.

John C. Schraufnagel of Cronin, Symonds & Schraufnagel, for appellant.

Paul L. Douglas, Attorney General, and Mark D. Starr, for appellee.

KRIVOSHA, C.J., WHITE, and CAPORALE, JJ., and MCCOWN and BRODKEY, JJ., Retired.

CAPORALE, J.

Thomas P. Roepka was adjudged guilty, pursuant to a jury verdict, of two counts of possession of a controlled substance, to wit, cocaine and lysergic acid diethylamide. He was placed on 5 years' probation, the terms of which include a 90-day jail term. While Roepka assigns no error to the trial court in his brief, we address one issue on the basis of plain error as we are permitted, at our option, to do. Neb. Rev. Stat. § 25-1919 (Reissue 1979); *State v. Ellis*, 216 Neb. 699, 345 N.W.2d 323 (1984); Neb. Ct. R. 9D(1)d (1983). For the reason detailed hereinafter we vacate the judgment of conviction and remand for further proceedings consistent with this opinion.

The relevant facts begin with the circumstance that one Lyle Ruzicka failed to appear as scheduled on September 22, 1980, in the county court for Buffalo County in connection with a prosecution for petit larceny. By virtue of that failure a warrant for his arrest was issued on January 29, 1981. During that month, the State Patrol kept a trailer house located at Reimers Trailer Court in O'Neill, Nebraska, under surveillance because of suspected drug-related activity. At that time they believed that Ruzicka lived at the trailer house.

Early on the morning of May 18, 1981, law enforcement officers served a number of arrest warrants on various individuals as a result of a drug investigation. After serving the drug-related arrest warrants the Holt County sheriff suggested that they all go to the trailer and serve the arrest warrant issued January 29 on Ruzicka.

At approximately 8:45 a.m. on May 18 the Holt County sheriff, the O'Neill police chief and assistant police chief, and two troopers of the Nebraska State

Patrol working in the drug enforcement division of that agency arrived at Reimers. Upon their arrival at the trailer court the officers surrounded the trailer house they had previously kept under surveillance. Their knock on the door and acts of identification were answered when Roepka opened the door. The agents asked if Ruzicka was there. Roepka stated that Ruzicka was not there. The officers claim to have asked Roepka if they could come inside and look. One of the troopers testified that no verbal consent was given to enter but that after the door was opened Roepka backed up, indicating his consent to their entry. This same trooper testified that they intended to enter no matter what the response. The sheriff testified that Roepka stated in response to their request for entry, "Come on in and look, he ain't here." Roepka claims to have given no consent to the entry.

The trailer house was a rental unit. Ruzicka, Allan M. Mitchell, and one other roommate began renting the trailer in January of 1980. Ruzicka moved from the trailer to his parents' home in O'Neill on February 18, 1981. At the time of this incident only Mitchell and Roepka were residing at the trailer.

After the officers gained entry to the trailer, they observed marijuana plants and drug paraphernalia, and, not finding Ruzicka, asked consent of Mitchell and Roepka to further search the trailer. This request was refused. Based upon the officers' observations, a warrant was later issued to search the trailer. The search turned up a quantity of cocaine and lysergic acid diethylamide, and resulted in Roepka being charged as stated previously.

The evidence adduced by Roepka on his motion to suppress the evidence seized during the later search included a copy of the testimony offered in support of a similar motion made by Mitchell in connection with Mitchell's prosecution on a similar charge. Both motions were heard by the same district judge.

In ruling upon the motion at Mitchell's trial, the judge stated:

> The Court finds that the motion to suppress the evidence is overruled and denied because the officers were then executing a lawful warrant for the arrest of Lyle Ruzicka, and the information in their possession indicated that that trailer house probably was his residence, and their execution of or attempt to execute that warrant was lawful, and their presence in the trailer house was lawful, and they were entitled to make any observations which they could make in the process of such attempted execution.

While, in overruling Roepka's motion to suppress, the district judge did not state the reason supporting his decision, we think the basis for it is adequately reflected by his earlier ruling on the identical matter in Mitchell's case.

Payton v. New York, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980), presented the question of whether an individual's home can be entered by police, without an arrest warrant, in order to make a routine felony arrest. The Court held that such a practice was not constitutionally permissible, and further stated at 603: "Thus, for Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which a suspect lives when there is reason to believe the suspect is within."

In *Steagald v. United States*, 451 U.S. 204, 101 S. Ct. 1642, 68 L. Ed. 2d 38 (1981), the question presented was whether an arrest warrant carried with it the authority to enter the home of a third party in order to secure the arrest of the person named in the warrant. The Court concluded that the warrantless search of a third party's home by police officers for a person named in an arrest warrant, absent consent or exigent circumstances, violated the fourth amendment rights of the third party.

The State urges us, and we agree, that there is no need to address the issue of whether *Steagald* allows the search of a third party's home which police officers reasonably believe is the residence of a person named in an arrest warrant, when in fact such is not the case. The State concedes in its brief at page 2, and we agree, that the officers in this case had no reason to believe that Ruzicka was within the trailer house occupied by Roepka at the time of their search. Even if the trailer house were Ruzicka's residence, the officers' nonconsensual entry without reason to believe Ruzicka was presently therein was not constitutionally permissible, and, thus, the district court's ruling was based upon a faulty premise.

However, the requirement for a search warrant at the time of the initial entry would be waived if that entry were to have been made with consent. *Steagald, supra.* Since there was no finding by the district court as to whether Roepka consented to the officers' entry to search for Ruzicka, this case must be remanded to the district court for such a finding, because upon such consent is premised the admissibility of the evidence seized in the later search. *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

JUDITH E. GREGG, APPELLANT, V. DONALD CHALLBURG AND JOANN CHALLBURG, APPELLEES.

347 N.W.2d 559

Filed April 27, 1984. No. 83-683.

1. **Workmen's Compensation: Employer and Employee: Independent Contractor.** There is no single test by which determination of whether a workman is an employee, as distinguished from an independent contractor, may be made. The determination must be made by consideration of all the facts in the case. The burden is

on the plaintiff to prove that he was an employee at the time of the accident.

2. **Workmen's Compensation: Appeal and Error.** Findings of fact made by the Nebraska Workmen's Compensation Court on rehearing have the same force and effect as a jury verdict and will not be set aside unless clearly wrong.

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

Jack R. Knicely, for appellant.

Robert L. Bals of Nelson & Harding, for appellees.

KRIVOSHA, C.J., WHITE, and CAPORALE, JJ., and MCCOWN and BRODKEY, JJ., Retired.

MCCOWN, J., Retired.

In this workmen's compensation case a single judge of the Workmen's Compensation Court found that plaintiff was an employee of the defendants and was injured in the course of her employment, and entered an award for temporary total disability and permanent partial disability of her right arm and for medical expenses. On rehearing the three-judge Workmen's Compensation Court found that plaintiff was an independent contractor rather than an employee at the time of the accident and injury, and reversed and set aside the award and dismissed plaintiff's petition.

In April 1980 the plaintiff began a cleaning and janitorial service in Sidney, Nebraska, under the name of Judy's House Service, and thereafter performed cleaning and janitorial services for various customers and employers.

In April 1981 plaintiff was employed by defendants through the employment office to help clean up their restaurant prior to its initial opening. She worked 2 or 3 days for $4.50 per hour. She was paid and the employment concluded. Defendants opened their restaurant shortly thereafter.

Sometime in June 1981, plaintiff was in the restaurant as a customer and told the defendant Donald

Challburg that she had a janitorial service and that if he needed any janitorial work she would be glad to help out. Challburg had been washing windows and doing extra kitchen cleaning by himself after hours, and told her he needed somebody to clean the kitchen and wash the windows every other week.

The parties orally agreed that plaintiff would come in once a week and wash the windows one week and clean the kitchen the next week, a total of 4 times a month. She could wash the windows any time after the noon hour, but the kitchen was to be cleaned after the restaurant closed. Defendant Challburg testified, "She bid the job at $100 per month." Plaintiff said, "I verbally made an agreement at that time to do it at $100 a month." There was no discussion as to how many hours the work would take, or who would do the work, or for what period the agreement would continue. The personal service of plaintiff was not required. It was understood that plaintiff was to pay for any extra help she used. Plaintiff could and ordinarily did use defendants' cleaning supplies and equipment.

Plaintiff began the work in June 1981 and continued until November 29, 1981. During that period, plaintiff's mother and nephew helped with the work from time to time, but were not paid. An unrelated individual also worked with plaintiff occasionally, and was paid by plaintiff from her own funds.

Defendants paid plaintiff monthly by check payable either to Judy's Cleaning Service or Judy's Janitorial Service. No social security or income tax was withheld. Plaintiff told defendant that she had an employer's identification number, but it was not furnished. Challburg testified that he knew at the time of the agreement that plaintiff worked for other businesses.

Plaintiff testified that defendant gave her instructions about cleaning walls and grease filters in the kitchen. Defendant Challburg testified that he occasionally told plaintiff about some specific area of

the kitchen that needed attention but that he did not supervise or control how she cleaned, but only looked afterward to see that it had been done.

The evidence also showed that between April 1980 and November 29, 1981, Judy's House Service had provided cleaning and janitorial services to 27 individuals, 5 businesses, and a school district. Plaintiff was the sole proprietor of the business and had obtained a federal tax identification number for the business. She also drove an automobile which advertised the business.

None of the businesses for which plaintiff cleaned withheld social security or federal or state income taxes. Most of the checks in payment for plaintiff's services were made payable to Judy's House Service and were deposited in a bank account which was in the name of Judy's House Service.

The three-judge Workmen's Compensation Court on rehearing found that plaintiff was an independent contractor at the time of her accident and injury, and dismissed her petition, and this appeal followed. The only critical issue on this appeal is whether the plaintiff was an employee of the defendants or an independent contractor at the time of her accident and injury.

The Workmen's Compensation Court on rehearing specifically found that the defendants did not exercise control over plaintiff, and the record shows that the court weighed the various factors to be considered in determining whether an individual is an employee or an independent contractor within the ambit of previous decisions of this court.

There is no single test by which determination of whether a workman is an employee, as distinguished from an independent contractor, may be made. The determination must be made by consideration of all the facts in the case. The burden is on the plaintiff to prove that she was an employee at the time of the accident. See, *Voycheske v. Osborn*, 196 Neb. 510, 244 N.W.2d 74 (1976); *Sortino v. Miller*,

214 Neb. 592, 335 N.W.2d 284 (1983); *Franklin v. Pawley*, 215 Neb. 624, 340 N.W.2d 156 (1983).

There is ample evidence in the record to support the finding of the Workmen's Compensation Court that the plaintiff was an independent contractor rather than an employee at the time of her accident and injury.

Findings of fact made by the Nebraska Workmen's Compensation Court on rehearing have the same force and effect as a jury verdict and will not be set aside unless clearly wrong. Neb. Rev. Stat. § 48-185 (Reissue 1978); *Sortino v. Miller, supra.*

The record supports the judgment of the Workmen's Compensation Court.

AFFIRMED.

NANCY KAY DENNIS, APPELLANT, V. KENNETH EUGENE SMITH, APPELLEE.

347 N.W.2d 873

Filed April 27, 1984. No. 83-692.

1. **Child Custody: Appeal and Error.** On appeal of the trial court's determinations as to whether such a change in circumstances has occurred which justifies the modification of a prior child custody order in a dissolution of marriage case, this court must review the determinations de novo and make independent conclusions of fact without reference to the conclusion reached by the trial court, recognizing, however, that this court will give weight to the fact that the trial court observed the witnesses and has accepted one version of the facts rather than the opposite.
2. **Pleadings: Parties.** Neb. Rev. Stat. § 43-1210 (Cum. Supp. 1982) does not provide a basis for complaint to one not prejudiced by the failure to implead others as parties.
3. **Child Custody.** Orders fixing custody of minor children will not be modified unless there has been a change of circumstances indicating that the person who has custody is unfit for that purpose or that the best interests of the child require such action.
4. _____. The provisions of Neb. Rev. Stat. § 42-364(1)(b) (Cum. Supp. 1982) do not empower this nor any other court to abdicate its responsibility to decide custody on the basis of what it deems to be

in a child's best interests based on the totality of the circumstances.

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

Avis R. Andrews, for appellant.

No appearance for appellee.

KRIVOSHA, C.J., WHITE, and CAPORALE, JJ., and MCCOWN and BRODKEY, JJ., Retired.

CAPORALE, J.

The petitioner mother, Nancy Kay Dennis, appeals from the denial of her application for custody of the younger of the two minor daughters of the parties. Both daughters are presently in the custody of the respondent father, Kenneth E. Smith, and live with the paternal grandparents. We affirm.

Dennis and Smith were divorced in October of 1978. Custody of their two daughters (the elder having been born in 1965 and the younger in 1968) was awarded to Dennis. In March of 1980 the court decreed, pursuant to a stipulation and agreement made by Dennis and Smith, that custody of the two daughters be placed with Smith. Dennis remarried in April of 1982. In February of 1983 she filed the application at bar, alleging a change in circumstances and asking that she be given custody of both children and that Smith be required to pay appropriate child support. At trial she abandoned her effort for custody of the older child and sought custody only of the younger child, then 15 years of age. This change in Dennis' position was apparently prompted by the older child's desire to continue her present living arrangement.

The scope and nature of our review is set forth in *Haake v. Haake*, 215 Neb. 889, 891, 341 N.W.2d 911, 912-13 (1983):

> In actions such as this, seeking modification of the trial court's order as to custody of children in a dissolution of marriage case, on appeal this

> court must review de novo the determinations of the trial court with regard to whether a change in circumstances has occurred which justifies the modification of the earlier custody order. We are required to make independent conclusions of fact without reference to the conclusion reached by the trial court, recognizing, however, that we will give weight to the fact that the trial court observed the witnesses and has accepted one version of the facts rather than the opposite.

The record establishes that Dennis attributed the 1980 agreed-upon change in the custody arrangement to the fact that she was then receiving Aid to Families with Dependent Children and Smith was more financially able to provide for the children. It is further the fact, however, that she was involved with a man who was sexually abusing one of the children.

Upon receiving custody of the children pursuant to the 1980 decree, Smith, with Dennis' knowledge, entrusted them to the care of his parents in Fremont, Nebraska, with whom the children continue to live. Smith testified he made those arrangements because he was at that time driving a truck and worked long hours. He has since opened a body shop, where he nets $300 per month. He lives with a woman who does not wish to have the children live with them. Smith makes small contributions to his parents for the support of his daughters.

The children's paternal grandparents have done an admirable job of caring for and nurturing the children. They assure both children's attendance at school and take an interest and participate in the girls' school activities. The children are happy, attend church, and have friends.

Neither Dennis nor her present husband is employed, and they live on a monthly income of $80 in a one-bedroom, rent-subsidized apartment in Lincoln, Nebraska. At the time of trial they were in the

process of applying for vocational rehabilitation training and were willing to rent an apartment with two bedrooms. Dennis relies upon the fact that she would be eligible for Aid to Families with Dependent Children payments to supplement her and her husband's present $80-a-month income.

Dennis' mother, although she has not been in contact with her daughter for the last 4 years, states that her daughter is slovenly.

The trial court found that the change in Dennis' circumstances did not warrant a change in custody and that the best interests of the younger child required that the application be denied.

Dennis' 10 assignments of error present the following issues: (1) Was the trial court required to join the grandparents as parties? (2) Did the court err by granting, in Dennis' language, "constructive, if not actual, custody" to the grandparents when Dennis was not proven to be unfit? (3) Were there sufficient changes in circumstances to warrant modification of the previous custody order? (4) Did the trial court fail to give proper weight to the wishes of the younger child?

In support of her contention that there was a defect of parties by failing to join the grandparents, Dennis directs our attention to *Tautfest v. Tautfest*, 215 Neb. 233, 338 N.W.2d 49 (1983). In that case the original custody order awarded custody of a child to her mother. Shortly thereafter, the mother delivered the child to her parents, who thereafter cared for the child. The father then petitioned for custody. The trial court, on the father's application that custody be awarded to him, awarded custody to the grandparents. We reversed that award, finding that there was no notice given to the father that custody was sought in the grandparents. We further retained custody in the mother, recognizing that the living arrangements the mother had made served the best interests of the child.

We do not understand what support Dennis draws

from *Tautfest*. In the present case the paternal grandparents did not seek, and the court did not award them, custody of the child in question. It simply refused to take custody of the younger child from her father, who had arranged for her to reside with his parents.

Dennis further argues that Neb. Rev. Stat. § 43-1210 (Cum. Supp. 1982) requires joinder of the grandparents. That statute provides:

> If the court learns from information furnished by the parties pursuant to section 43-1209 or from other sources that a person not a party to the custody proceeding has physical custody of the child or claims to have custody or visitation rights with respect to the child, it shall order that person to be joined as a party and to be duly notified of the pendency of the proceeding and of his joinder as a party. If the person joined as a party is outside this state he shall be served with process or otherwise notified in accordance with section 43-1205.

That statute may, although we do not decide the issue, have provided the paternal grandparents with a basis for complaint had they been deprived of physical possession of the younger child, but it provides no basis upon which Dennis may complain. It was Dennis who, knowing of her daughter's living arrangement, instituted the action; under the circumstances she was not prejudiced by the failure to implead the grandparents if they were required as parties.

Dennis next contends that the trial court erred in failing to modify the 1980 custody order, because there was no showing she was unfit. In support of this proposition she cites us to *Nielsen v. Nielsen*, 207 Neb. 141, 149, 296 N.W.2d 483, 488 (1980), wherein it is stated: "The courts may not properly deprive a parent of the custody of a minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship, or has

forfeited that right." That case balanced the right of a parent to have custody as against the right of the grandparents. Here, no such dispute is involved; as pointed out previously, the grandparents do not seek custody. The rule to be applied is found in *Haake v. Haake*, 215 Neb. 889, 896, 341 N.W.2d 911, 915 (1983): " '[O]rders fixing custody of minor children will not be modified unless there has been a change of circumstances indicating that the person who has custody is unfit for that purpose or that the best interests of the child require such action.' " Accordingly, it was Dennis' burden to prove Smith unfit to be the custodial parent or that the best interests of the child required a change. Although one who prefers to live with his paramour rather than with his children cannot be considered a model parent, and such is a factor to be considered in determining fitness, under the circumstances of this case Dennis failed in her burden to prove Smith unfit.

The significant changes in circumstances are that Dennis is now married and no longer involved with a man who sexually abuses one of the children. The former paramour has been replaced by an untrained and unemployed husband. However, the circumstances in which the younger child was placed immediately after her removal from her mother's custody have not changed. She has lived, without complaint and in good style, with her paternal grandparents ever since 1980. The change in the mother's circumstances is not such as to warrant upsetting the custody and living arrangements of the daughter.

Lastly, Dennis argues that the younger daughter's express wish to live with her natural mother must be respected. Neb. Rev. Stat. § 42-364(1)(b) (Cum. Supp. 1982) provides that the desires and wishes of a child if of an age of comprehension regardless of chronological age, when the desires are based on sound reasoning, are to be considered in determining the best interests of a child. There are, how-

ever, no facts which justify the 15-year-old's express desire to live with her mother. The reasons she states for wanting a change in custody are that she believes a child should live with her regular parent and that she could be helped and also help her mother. We do not find that reasoning sound or persuasive when the present living arrangements provide excellent care and nurturing. Although § 42-364(1)(b) requires that when of an age of comprehension a child's desires are to be considered, neither this nor any other court may abdicate its responsibility to decide custody on the basis of what it deems to be in a child's best interests based upon the totality of the circumstances. See *Deacon v. Deacon*, 207 Neb. 193, 297 N.W.2d 757 (1980). A child's statement of preference may be considered, but it is not controlling. *State ex rel. Speal v. Eggers*, 181 Neb. 558, 149 N.W.2d 522 (1967).

We conclude from our de novo review that custody of the younger daughter should remain in Smith and physical possession remain with her paternal grandparents.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DANIEL R. SMYTH, APPELLANT.

347 N.W.2d 859

Filed April 27, 1984. No. 83-733.

1. **Constitutional Law: Appeal and Error.** It is and has long been the rule that for a question of constitutionality to be considered on appeal, it must have been properly raised in the trial court. Except in the most unusual of cases, if it has not been raised in the trial court, it will be considered to have been waived.
2. **Prior Convictions: Proof: Waiver.** There is no requirement that the State prove a prior conviction by a transcript of the judgment if the defendant admits that he was in fact convicted as alleged in the complaint. However, in accepting such a waiver the trial court must address the defendant and ascertain that he was represented

by counsel at the time of the prior conviction or waived his right to counsel.

Appeal from the District Court for Lincoln County: JOHN P. MURPHY, Judge. Reversed and remanded with directions.

George E. Clough and R. Bradley Dawson, for appellant.

Paul L. Douglas, Attorney General, and Linda L. Willard, for appellee.

KRIVOSHA, C.J., WHITE, and CAPORALE, JJ., and MCCOWN and BRODKEY, JJ., Retired.

KRIVOSHA, C.J.

The appellant, Daniel R. Smyth, was convicted of operating a motor vehicle while under the influence of alcoholic liquor, third offense, in violation of Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1982). The county court for Lincoln County, Nebraska, sentenced Smyth to confinement in the Lincoln County jail for a period of 3 months, imposed a fine of $500 and costs, and ordered Smyth never again to operate or drive a motor vehicle in the State of Nebraska for any purpose, thereby permanently revoking Smyth's operator's license as provided for in § 39-669.07(3). Smyth appealed his conviction to the district court for Lincoln County, Nebraska, where the judgment and sentence were affirmed. For reasons hereinafter set out the sentence is reversed and the cause remanded for further sentencing according to law.

One of Smyth's assignments of error is that § 39-669.07 violates the provisions of Neb. Const. art. I, § 16, and U.S. Const. art. I, § 10. However, an examination of the files and records in this case makes it clear that Smyth has never before raised that constitutional issue and now attempts to raise it for the first time on appeal in this court. It is and has long been the rule that for a question of constitutionality to be considered on appeal, it must have been properly raised in the trial court. Except in the most

unusual of cases, if it has not been raised in the trial court, it will be considered to have been waived. *State v. Olson*, *ante* p. 130, 347 N.W.2d 862 (1984); *State v. Hiross*, 211 Neb. 319, 318 N.W.2d 291 (1982); *State v. Mayes*, 183 Neb. 165, 159 N.W.2d 203 (1968).

Smyth has further assigned as error that the county court did not follow the requirements set forth in *State v. Smith*, 213 Neb. 446, 329 N.W.2d 564 (1983), and *State v. Prichard*, 215 Neb. 488, 339 N.W.2d 748 (1983). While the assignment is somewhat vague as to what specifically it is that the county court did not do, counsel conceded at oral argument that our recent decision in *State v. Ziemba*, 216 Neb. 612, 346 N.W.2d 208 (1984), has made moot whatever defects Smyth alleged existed and we need not consider this assignment of error.

We turn, then, to the assignment which does require our examination. To paraphrase the assignment, Did the county court err in finding that the evidence of Smyth's two previous convictions was sufficient for the court to sentence Smyth to the penalty for third offense drunk driving? We believe Smyth is correct in this regard. We have on several previous occasions set out what the rules are regarding the use of previous convictions for enhancement purposes such as those found in § 39-669.07(3). In *State v. Smith*, *supra* at 449, 329 N.W.2d at 566, we said:

> However, under the present circumstances, the burden remains with the State to prove the prior convictions. This cannot be done by proving a judgment which would have been invalid to support a sentence of imprisonment in the first instance. *Baldasar v. Illinois*, *supra*. Where a record is silent as to a defendant's opportunity for counsel, we may not presume that such rights were respected.

And in *State v. Ziemba*, *supra* at 620, 346 N.W.2d at 214, we said:

> There is no requirement that the State prove a

> prior conviction by a transcript of the judgment if the defendant admits that he was in fact convicted as alleged in the complaint. However, in accepting such a waiver the trial court must address the defendant and ascertain that he was represented by counsel at the time of the prior conviction or waived his right to counsel.

We believe that with these rules in mind an examination of the present record discloses that these requirements were not met. The complaint originally charged Smyth with having been convicted of two previous offenses, once on *October 7, 1972*, and again on *December 5, 1975*. At the arraignment held on May 13, 1983, the trial court suggested to the state prosecutor that she should obtain certified copies of these previous convictions before Smyth was sentenced. When the court reconvened on June 22, 1983, for the purpose of imposing the sentence, the State still had not acquired certified copies of the prior convictions. A recess was taken in order to permit the State to obtain copies. The record reflects that 30 minutes later the hearing was reconvened and the State asked permission to amend the complaint to charge some dates other than those previously charged: "MS. McBRIDE: Yes, Your Honor, I would like to amend both prior offenses listed, one was in *1972* and one was in *1975*. I'm going to amend them to the *1981* conviction and the *1977* conviction. Both indicating that defendant was represented by counsel at that time." (Emphasis supplied.) The trial court then explained to Smyth that he had the right to contest the prior two convictions, and further explained to Smyth the effect of the court's receiving evidence as to the prior convictions. Smyth indicated that he did not desire a hearing on the prior convictions. Had this been the end of the matter, our rule announced in *State v. Ziemba*, *supra*, might have sufficed. However, the State still was not content with the confusion which it had already created, and sought to add more.

The following discussion occurred between the various parties:

> THE COURT: As soon as the state is done, I will ask you — the State is alleging that you were previously convicted of drunk driving, *January 9th, 1981* in Lincoln County. Were you so convicted - - -
>
> MR. SMYTH: Yes, sir.
>
> THE COURT: - - - of drunk driving in Lincoln County, 1981 — January, 1981. Is that right?
>
> MR. SMYTH: Yes, sir.
>
> THE COURT: And were you also convicted of drunk driving in *December of 1977* in Lincoln County?
>
> MR. SMYTH: Yes, sir.
>
> THE COURT: Is that the evidence, then, that the state would be presenting?
>
> MS. McBRIDE: Your Honor, I can't find a Journal Entry for the '76 one — or, '77 one (indiscernible). Now this one would be the *23rd of June, 1976* — I'm going to list that one, I can't seem to find - - -
>
> . . . .
>
> THE COURT: Now let's ask. *June 23rd, 1976*, drunk driving in Lincoln County Court.
>
> MR. FLOROM: Were you convicted then?
>
> MR. SMYTH: (Indisernible) [sic] sir.

(Emphasis supplied.) It is upon this record that we are asked to affirm a conviction of third offense drunk driving, based upon two previous offenses charged to have occurred on June 23, 1976, and January 9, 1981, and we are asked to further assume that at each of those hearings Smyth was either represented by counsel or advised of his right and intelligently, voluntarily, and knowingly waived that right. This we cannot do. The record is simply silent as to whether Smyth was ever convicted of drunk driving on June 23, 1976, and whether he was represented by counsel.

Because neither transcript of the previous convic-

tions was offered in evidence, and because the record fails to disclose whether Smyth admitted to pleading guilty to the charge on June 23, 1976, either with counsel or after knowingly and intelligently waiving counsel, we cannot examine the record even in light of our holding in *State v. Ziemba, supra.*

The record in this case consists of the very silent record which in *State v. Smith,* 213 Neb. 446, 329 N.W.2d 564 (1983), we said was insufficient. For that reason we are left with no alternative other than to reverse and remand this case to the trial court for proper sentencing in accordance with law. The record as presented to this court will not support the sentence imposed.

REVERSED AND REMANDED WITH DIRECTIONS.

BARBARA L. KROHN, APPELLEE, V. FRANK J. KROHN, APPELLANT.

347 N.W.2d 869

Filed April 27, 1984. No. 83-754.

1. **Child Custody: Appeal and Error.** On appeal of the trial court's determination as to whether such a change in circumstances has occurred which justifies the modification of a prior child custody order in a dissolution of marriage case, this court must review the record de novo and make independent conclusions of fact without reference to the conclusion reached by the trial court, recognizing, however, that where evidence is in conflict, this court will give weight to the fact that the trial court observed the witnesses and has accepted one version of the facts rather than the opposite.
2. **Child Custody.** One who seeks modification of a prior custody determination has the burden of showing that there has been a change of circumstances such as to show that the person who has custody is unfit for that purpose or that the best interests of the child require such action.
3. _____. Sexual conduct is a factor which may be considered, among others, in deciding the issue of custody, and may support a finding of a change of circumstances sufficient to conclude that the one who had custody is no longer fit for that purpose or that the best interests of the child require such change.

4. **Evidence: Proof.** Ordinarily, unless the substance of the evidence is apparent, an offer of proof is required to predicate error for the exclusion of evidence.
5. **Child Custody.** The provisions of Neb. Rev. Stat. § 42-364(1)(b) (Cum. Supp. 1982) do not empower this nor any other court to abdicate its responsibility to decide custody on the basis of what it deems to be in a child's best interests, based on the totality of the circumstances.

Appeal from the District Court for Adams County: WILLIAM G. CAMBRIDGE, Judge. Affirmed.

Kent E. Person of Person, Dier, Person & Osborn, for appellant.

Gene C. Foote II and Dale A. Norris of Whelan, Foote & Scherr, P.C., for appellee.

KRIVOSHA, C.J., WHITE, and CAPORALE, JJ., and MCCOWN and BRODKEY, JJ., Retired.

CAPORALE, J.

The respondent father, Frank J. Krohn, appeals from the denial of his application for custody of the two minor sons of the parties, who are presently in the custody of and living with the petitioner mother, Barbara L. Krohn. We affirm.

The marriage of the parties was dissolved on October 30, 1981. Custody of Nick Ryan, born December 1, 1975, and Joseph Max, born May 21, 1978, the two sons of the parties, was awarded to the mother. On September 21, 1982, the father commenced these proceedings, alleging a change in circumstances and seeking custody of the two children and a termination of his child support obligation. Although the mother counterclaimed for an increase in child support payments, she lodges no complaint to the trial court's denial of that request.

Our obligation in this appeal is to review the record de novo to determine whether a change in circumstances has occurred which justifies modification of the earlier custody decree. In making that review we are required to make independent conclusions of fact without reference to the conclusions

reached by the trial court, recognizing, however, that where there is a conflict in the evidence, we will give weight to the fact that the trial court observed the witnesses and accepted one version of the facts rather than the opposite. *Dennis v. Smith*, *ante* p. 147, 347 N.W.2d 873 (1984); *Haake v. Haake*, 215 Neb. 889, 341 N.W.2d 911 (1983).

As the applicant, the father's burden is to establish that there has been a change of circumstances such as to indicate that the mother is no longer fit to have custody or that the best interests of the children require the change he requests. *Dennis v. Smith*, *supra*; *Hinz v. Hinz*, 215 Neb. 335, 338 N.W.2d 442 (1983); *Dunne v. Dunne*, 211 Neb. 636, 319 N.W.2d 741 (1982).

At all times since the dissolution decree the father has continued to farm and live at the house which the parties occupied as the family dwelling during their marriage. The house is owned by his parents' farm corporation and is located near Holdrege, Nebraska. He remarried on August 8, 1982.

The mother is employed and lives at Hastings, Nebraska, and supports herself and the children on her monthly earnings of approximately $600 and the $250 child support paid by the father. While she is at work, the children stay at a child care center.

The children have a comfortable, loving relationship with their mother and are neat, properly fed, and properly clothed. The mother is a concerned parent who takes an active interest in the children and in Nick's schoolwork. The father is also a concerned parent who likewise takes an interest in his children and in the older boy's schoolwork.

The older son has a learning disability which predates the dissolution. He is enrolled in a special education program and is making progress. Both children have been receiving counseling to help them deal with the trauma of the dissolution of their parents' marriage.

Although both children swear, there is no showing

they learned to do so from their mother or her associates. There is evidence the father has sworn in the past.

During a 200-day period in which a private investigator retained by the paternal grandmother observed the mother and the children, there were instances when the children were seen playing on, around, and in the mother's car while it was parked in the driveway to her house. There were also instances when the children were observed playing near, around, and in a relatively well-traveled street. The mother exerts efforts to teach the boys not to play in the street, but they have not yet fully responded to that teaching. On one occasion the mother was photographed helping the younger boy urinate behind a tree or bush alongside the house. The mother explained that the need was urgent, and rather than have the child soil his clothes, she elected to have him relieve himself on the spot.

For a period of time after the dissolution through approximately April of 1983, the mother dated and kept company with one Shaw. Shaw would spend time with the mother and the children at the mother's home. He, the mother, Nick, Joseph, and Shaw's two children took a vacation together and were out together on other occasions. Shaw would occasionally babysit and discipline the children. Shaw and the mother engaged in sexual activity at the mother's home at times when the two boys were in, around, and about the house. There is no showing, however, that the boys were exposed to the activity or that they were damaged in any way by the sexual conduct of their mother and Shaw.

A clinical psychologist engaged by the father to evaluate the boys concluded that the children need more structure in their lives than they presently receive, that they express confusion over the situation between their parents and the variation in the rule systems from one house to the next, and that they exhibit some anger toward their mother. The evi-

dence also is that the father bemoans, in the presence of the children, the fact that they must live with their mother. The psychologist concluded that the home the father is presently maintaining could provide the needed stability. He testified further, however, that he could not evaluate the present situation and had no opinion as to whether the mother could provide a good home for the children.

The trial judge rejected the father's invitation to interview the children in chambers. No offer of proof was made as to what the children were expected to say.

The father's four assignments of error merge to claim that the district court erred in failing to (1) consider the mother's sexual conduct, (2) find that the father could provide a more stable environment, and (3) interview the children in chambers.

It is true, as the father argues, that in *Hinz v. Hinz*, 215 Neb. 335, 338 N.W.2d 442 (1983), we stated that sexual misconduct is a factor which may be considered in deciding the issue of custody, and may support a finding of a change of circumstances sufficient to conclude that the one who had custody is no longer fit for that purpose or that the best interests of the child require such change. That is all such conduct is, however, "a factor to be considered," among others. *Ritchey v. Ritchey*, 208 Neb. 100, 302 N.W.2d 372 (1981). The other factors considered in *Hinz* were that the mother used vile, obscene language around the children, that the children were also using similar language, that there was an indication of physical abuse by the mother, and some suggestion that the children were not as neat and clean as they should be and, at one period of time at least, were not being adequately fed. Those are not the circumstances here. We find the father's first assignment of error to be without merit.

The father next contends the evidence shows he was better able to provide a stable environment for the children, and on that basis it was error not to

change the prior custody order. We do not agree.

The record convinces us that part of the children's anxiety and confusion over the dissolution arises from the tension between the parties as to the custody arrangement and the comments which are made in the presence of the children as to that situation. Part of the confusion and anxiety rests with the fact that the mother's home and the father's home are operated somewhat differently. As each parent has the right to visit the children, that will continue no matter who has custody. The clinical psychologist did not say that the mother was not providing or could not provide a stable home, only that the father could, and that more stability was needed. It seems that a first step toward achieving that end would be to continue the present custody arrangement and not subject the children to further confusion as to where they are to make their home.

As to the last assignment of error, the trial judge wisely exercised his discretion by declining the father's invitation to interview the children in chambers. Given our de novo review, such a practice is of questionable value unless an adequate record is made. Moreover, the young and impressionable age of the children would entitle any expression as to their preferred living arrangements to little, if any, weight. In the final analysis, no court can abdicate its obligation to determine what it deems to be in the best interests of the children, based upon the totality of the circumstances. Neb. Rev. Stat. § 42-364(1)(b) (Cum. Supp. 1982); *Dennis v. Smith*, *ante* p. 147, 347 N.W.2d 873 (1984).

In any event, no offer of proof having been made as to what the children were expected to tell the trial judge, any error in that regard was waived. See, Neb. Rev. Stat. § 27-103 (Reissue 1979); *Sherman County Bank v. Kallhoff*, 205 Neb. 392, 288 N.W.2d 24 (1980).

We conclude the father has failed to sustain his burden of proving a change of circumstances such

as to establish that the mother is unfit to have custody or that the best interests of the children would be served by ordering a change in their custody.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMES A. MERCER, APPELLANT.

347 N.W.2d 868

Filed April 27, 1984. No. 83-756.

Constitutional Law: Appeal and Error. For a question of constitionality to be considered on appeal, it must have been properly raised in the trial court. Except in the most unusual of cases, if it has not been raised in the trial court, it will be considered to have been waived.

Appeal from the District Court for Douglas County: PAUL J. HICKMAN, Judge. Affirmed.

Anthony S. Troia of Troia Law Offices, P.C., for appellant.

Paul L. Douglas, Attorney General, and Linda L. Willard, for appellee.

KRIVOSHA, C.J., WHITE, and CAPORALE, JJ., and MCCOWN, and BRODKEY, JJ., Retired.

KRIVOSHA, C.J.

The appellant, James A. Mercer, was convicted in the municipal court of Omaha, Douglas County, Nebraska, of the crime of operating a motor vehicle under the influence of intoxicating liquor in violation of Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1982). The complaint alleged that this was Mercer's fourth offense for operating a motor vehicle under the influence of intoxicating liquor. On March 14, 1983, upon being arraigned in the municipal court of Omaha, Douglas County, Nebraska, a plea of not guilty was entered. Thereafter, Mercer reappeared in court with his counsel and, with the court's permission,

withdrew his plea of not guilty and entered a plea of nolo contendere. After reviewing the record and advising Mercer of all of his constitutional rights, the court accepted Mercer's plea and found that there was a factual basis to find Mercer guilty as charged. The court further accepted and received into evidence certified copies of prior convictions of driving while intoxicated, for the purpose of sentencing. The court then sentenced Mercer to a term of 90 days in the county jail, a fine of $500, and ordered his driver's license permanently revoked. Mercer appealed his conviction to the district court for Douglas County, Nebraska, whereupon the judgment and sentence were affirmed. After the district court announced the affirmance of the judgment of the municipal court, counsel for Mercer, on the record, in an informal discussion with the court, said, "Your Honor, we plan to take this matter up to the Supreme Court of the State of Nebraska to test the constitutionality of the statute, the section of the statute specifically with regard to cruel and unusual punishment as to the nature of lifetime suspension. . . ." This was the first indication anyone had given, in either the municipal court or the district court, that any constitutional issue was being raised.

Now, on appeal to this court, the defendant formally assigns, for the first time, a single error to the effect that the trial court erred in imposing a sentence upon the defendant which amounts to cruel and unusual punishment within the ambit of the eighth and fourteenth amendments to the U.S. Constitution.

We believe that in light of our recent decisions in *State v. Olson*, *ante* p. 130, 347 N.W.2d 862 (1984), and *State v. Ledingham*, *ante* p. 135, 347 N.W.2d 865 (1984), both of which merely repeated rules earlier adopted and followed by this court, see *State v. Hiross*, 211 Neb. 319, 318 N.W.2d 291 (1982), the assignment is made too late. For a question of constitutionality to be considered on appeal, it must have

been properly raised in the trial court. If it has not been raised in the trial court, it will be considered to have been waived. *State v. Hiross, supra*; *State v. Schwade*, 177 Neb. 844, 131 N.W.2d 421 (1964). Having therefore waived the constitutional issue, there is no assignment before us for consideration. The judgment of the district court, affirming the sentence of the municipal court, is affirmed.

AFFIRMED.

KARLENE DOGGETT, APPELLANT AND CROSS-APPELLEE, V. BRUNSWICK CORPORATION, APPELLEE AND CROSS-APPELLANT.

347 N.W.2d 877

Filed April 27, 1984. No. 83-759.

1. **Expert Witnesses.** Where the testimony of the same expert witness given at different times is conflicting, for other than bad faith motives, it rests with the trier of fact to resolve the conflict.
2. **Workmen's Compensation: Evidence.** Questions of causation in workmen's compensation cases are for the fact finder.
3. **Workmen's Compensation: Appeal and Error.** Our standard of review accords to the findings of the compensation court the same force and effect as a jury verdict in a civil case, and they will not be set aside unless clearly wrong.
4. **Workmen's Compensation.** The scheduled allowance for the loss of an eye is exclusive, and includes all consequences which naturally follow from the loss of an eye or its loss of use, total or partial.
5. _____. There is no disability to an eye in the absence of a loss or diminution of vision.
6. _____. There can be no disability benefits payable in the absence of disability being suffered.

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

Jay L. Grytdahl of Robert E. O'Connor & Associates, for appellant.

Richard D. Sievers of Marti, Dalton, Bruckner, O'Gara & Keating, P.C., for appellee.

KRIVOSHA, C.J., WHITE, and CAPORALE, JJ., and MCCOWN and BRODKEY, JJ., Retired.

CAPORALE, J.

The plaintiff employee, Karlene Doggett, appeals from the award on rehearing of the Nebraska Workmen's Compensation Court, which reimbursed her for certain expenses, ordered payment for future treatment, but denied other benefits. The defendant employer, Brunswick Corporation, cross-appeals, claiming Doggett's action should have been dismissed. We affirm the award and dismiss the cross-appeal.

On August 25, 1982, Doggett was injured when, while cleaning equipment in the employer's chemical room, acetone splashed into her left eye. She immediately flushed her eye at an emergency eye wash supplied on the premises by the employer. On September 13, 1982, again while cleaning machinery, Doggett splashed acetone into her right eye. As previously, she immediately proceeded to the emergency eye wash and flushed her eye with water. It is not disputed that both accidents arose out of and in the course of Doggett's employment with Brunswick.

On October 1, 1982, Doggett consulted Dr. Frederick Mausolf, an ophthalmologist, because of a burning and irritation of her eyes. The doctor concluded that she had blepharitis with keratitis sicca in both eyes; that is to say, an inflammation of the margin where the eyelashes come out, and of the glands which give secretion to the lashes, together with a dryness of the cornea, the part of the eye through which one looks, and the conjunctiva, which covers the white of the eye and the back surface of the eyelid. Doggett was placed on a treatment program which requires her to apply liquid teardrops and warm compresses to her eyes frequently during the day. She was also treated with antibiotics and is to apply an ointment to lubricate her eyeballs and

eyelids while sleeping. Doggett suffered no impairment of vision in either eye.

She apparently lost no worktime due to the injury. After October 18, 1982, she was transferred from the chemical room to another job because of her concern for her eyes. On April 29, 1983, she was laid off because of economic conditions. Doggett's eyes have remained subject to dryness, aching, and feelings of scratchiness. She claims that she would return to work at Brunswick if called back, but not in the chemical room.

Doggett presented a rehabilitation consultant who, based upon the recommendation of Doggett's physician that she should avoid employment in areas which exposed her to chemicals, dust, and dryness, testified that Doggett's access to employment has decreased. The consultant testified that prior to Doggett's eye problems, she would have been qualified for 39 percent of the jobs available in the labor market, while if she had to avoid jobs which would subject her to chemical-laden, dusty, or dry environments, she would be eligible for only 23 percent of those jobs. This is labeled by Doggett as a 41-percent decrease in her employability.

The three-judge panel of the compensation court, on rehearing, found that Dr. Mausolf's testimony supplied the necessary causal link between the accidents and the condition of Doggett's eyes. It awarded Doggett reimbursement of the medical and pharmaceutical expenses she had incurred, and ordered Brunswick to pay the cost of such future medical care and treatment as may be reasonably necessary as a result of the accidents. The compensation court further concluded Doggett was entitled to no other benefits.

Doggett assigns as error the compensation court's failure to find a loss of earning capacity, while Brunswick, in its cross-appeal, claims error in the finding of a causal connection between the present condition of Doggett's eyes and the accidents.

We deal first with Brunswick's assignment of error. Dr. Mausolf initially wrote in a report that, with reasonable medical certainty, the accidents either caused the present permanent condition of Doggett's eyes or aggravated a preexisting condition. It is true, as argued by Brunswick, that thereafter Dr. Mausolf expressed his opinion with less certainty, to the point where he spoke in terms that the accidents "could have" or "possibly caused" the condition. This situation is not, however, like that presented in *Riha v. St. Mary's Church & School, Inc.*, 209 Neb. 539, 308 N.W.2d 734 (1981), wherein the physician superseded his preoperative opinion that a causal relationship existed between the accident and the disability with a postoperative opinion that such causal connection did not exist. In *Riha* the physician found from the surgery he performed that the facts on which his preoperative opinion was based were not as he had thought them to be, and therefore recanted his preoperative opinion. Here, Dr. Mausolf did not change his opinion; he simply did not consistently state it as positively as when he first wrote it. There was no showing, however, that the facts were not as he originally perceived them to be or that he had for some other reason changed his mind. Where the testimony of the same expert witness given at different times is conflicting, it rests with the trier of fact to resolve the conflict, at least where the conflict does not arise out of bad faith motives. *Dickinson v. Mailliard*, 175 N.W.2d 588 (Iowa 1970); *American General Insurance Company v. Barrett*, 300 S.W.2d 358 (Tex. Civ. App. 1957); 32 C.J.S. *Evidence* § 572(1) (1964).

We have previously committed ourselves to the proposition that questions of causation are for the fact finder. *Heironymus v. Jacobsen Transfer*, 215 Neb. 209, 337 N.W.2d 769 (1983). We are also committed to the proposition that our standard of review accords to the findings of the compensation court the same force and effect as a jury verdict in a civil

case, and they will not be set aside unless clearly wrong. *Moore v. The Sisk Co.*, 216 Neb. 451, 343 N.W.2d 767 (1984). In view of Dr. Mausolf's opinion, weak as it is, it cannot be said the compensation court was clearly wrong in finding a causal link between the accidents and Doggett's present condition. Accordingly, we reject Brunswick's assignment of error and dismiss its cross-appeal.

In arguing her assignment of error Doggett assumes that the impairments to her eyes translate into a disability of the body as a whole and that she is therefore to be compensated on the basis of her claimed loss of earning power. Neb. Rev. Stat. § 48-121 (Cum. Supp. 1982); *Nordby v. Gould, Inc.*, 213 Neb. 372, 329 N.W.2d 118 (1983). Her assumption that the injuries and resultant condition of her eyes constitute an impairment to the body as a whole is incorrect.

Brewer v. Hilberg, 173 Neb. 863, 115 N.W.2d 437 (1962), applying the rule announced in *Carlson v. Condon-Kiewit Co.*, 135 Neb. 587, 283 N.W. 220 (1939), holds that the scheduled allowance for the loss of an eye is exclusive, and includes the loss of binocular vision which results from the loss of a single eye. In other words, the scheduled allowance includes all consequences which naturally follow from the loss of an eye or its loss of use, total or partial.

The most analogous case revealed by our research, though from another jurisdiction, is *Thomas Concrete Products v. Robinson*, 485 P.2d 1054 (Okla. 1971). Therein, the claimant was struck in the eye as a result of which the tear ducts became stopped. As a consequence, it became necessary for the claimant to frequently wipe tears from his eye to prevent infection and, on some occasions, to quit work because of impairment of vision when tears accumulated in the eye. Since the disability was confined solely to the eye and no other portion of the body was affected, the court held that the award

must be limited to a percentage of the scheduled loss of the eye as a member.

Since Doggett's impairments are limited to the structures of the eyes, we are here presented with impairments of two scheduled members.

The next question to be answered is whether the evidence supports a finding that she suffers any disability as a consequence of the accidents.

It has been said that the word "eye" in common usage means the organ of sight. *Gentry v. Bano, Inc.*, 91 Idaho 790, 430 P.2d 681 (1967); Webster's Third New International Dictionary, Unabridged (1968); Dorland's Illustrated Medical Dictionary (24th ed. 1965). So far as we have been able to determine, in each instance that compensation benefits have been awarded under our workmen's compensation law for the loss or loss of use of an eye, there has been a loss or diminution of vision. *Brewer v. Hilberg*, *supra*; *Gruber v. Stickelman*, 149 Neb. 627, 31 N.W.2d 753 (1948); *Bolen v. Buller*, 143 Neb. 237, 9 N.W.2d 204 (1943); *Ames v. Sanitary District*, 140 Neb. 879, 2 N.W.2d 530 (1942); *Carlson v. Condon-Kiewit Co.*, *supra*. In this case the accidents produced no loss or diminution of vision in either eye. Therefore, there has been no loss of use of, or disability to, either eye.

Since there can be no disability benefits payable in the absence of disability being suffered, the issues as to whether evidence of loss of earning power is relevant under the provisions of § 48-121(3), dealing with multiple-member disability, and whether the evidence offered in this case proves such are not before us.

The award of the compensation court being correct, it is affirmed.

AFFIRMED.

GARY L. HEADY, APPELLANT AND CROSS-APPELLEE, V. FARMERS MUTUAL INSURANCE COMPANY, APPELLEE AND CROSS-APPELLANT.

349 N.W.2d 366

Filed May 4, 1984. No. 83-197.

1. **Judgments: Evidence.** A judgment will be reversed for the reception of irrelevant evidence where it is probable such evidence influenced the jury.
2. **Statutes: Insurance.** Neb. Rev. Stat. § 44-501 (Reissue 1978) applies to policies of fire insurance.
3. **Insurance: Fraud: Evidence: Arson.** Although Neb. Rev. Stat. § 44-501 (Reissue 1978) precludes evidence of the actual value of the insured premises for the purpose of voiding a fire insurance policy on the basis it was procured fraudulently or for the purpose of showing that a proof of loss statement was executed with fraudulent intent, evidence of actual value may nonetheless be admitted as bearing on the insured's motive to commit arson.
4. **Directed Verdict.** Upon a motion for directed verdict or for judgment notwithstanding the verdict, the party against whom a verdict is directed is entitled to have all controverted facts resolved in his favor and to have the benefit of every reasonable inference deducible from the evidence.

Appeal from the District Court for Douglas County: THEODORE L. RICHLING, Judge. Reversed and remanded for a new trial.

H. Daniel Smith of Stehlik, Smith & Trustin, for appellant.

Thomas A. Grennan of Gross, Welch, Vinardi, Kauffman & Day, P.C., for appellee.

KRIVOSHA, C.J., WHITE, and CAPORALE, JJ., and MCCOWN and BRODKEY, JJ., Retired.

CAPORALE, J.

Gary L. Heady, plaintiff below, appeals from the trial court's judgment which, pursuant to the jury's verdict in favor of defendant-appellee, Farmers Mutual Insurance Company, denied him recovery on a fire insurance binder. Farmers Mutual has filed a cross-appeal. We reverse and remand for a new trial.

In June of 1981 Gary Heady contacted Patricia Hohman of Insurance Agents, Inc., an independent insurance agency located in Omaha, Nebraska, in order to obtain a fire insurance policy on a house located in Omaha. After Hohman asked Heady questions pertinent to the property, she issued, without prior inspection, a 1-month binder commencing on July 2, 1981, for Farmers Mutual, extending $60,000 of fire and extended coverage insurance on the property. The $60,000 figure represented the reproduction cost of the house, which was in a rundown condition and for which Heady paid a total of $5,000.

Heady was engaged in the business of buying older homes and refurbishing them for resale or rental. He began to remodel the house in question 2 days prior to completing the purchase on July 2, 1981. The work was primarily confined to scraping the exterior paint and doing other work on the outside of the house until July 8, 1981. On that day Heady directed his workmen to remove damaged plaster from the inside walls and ceiling. In the early morning hours of July 9, 1981, the house was destroyed beyond repair by fire.

The chief arson investigator for the Omaha Fire Division testified, without contradiction, that the fire was of incendiary origin and the result of arson. He also stated that removal of the plaster from a load-bearing wall on the main floor caused that wall to burn and weaken the structure nearly twice as fast as would have been the case had the plaster not been removed. Firefighters also found the back door to the house unsecured and, during their efforts to douse the fire, smelled the odor of gasoline. A 1-gallon can was found on the premises. The can had contained gasoline which had been used to repel wasps.

On the evening of July 8, 1981, Heady was at the home of a friend until about 10:30 p.m. He testified that he then returned to his own home, where he was living alone, and remained there until 7:30 a.m. on

July 9, 1981, when he was notified of the fire. After Heady viewed his burned house he called the police and accused a teenage neighbor of setting the fire, even though he had not yet been informed by the fire department of their suspicions as to the origin of the fire. On that same day Heady placed calls to an agent of Farmers Mutual and, during his conversations, was alleged to have stated, "It's an obvious total loss. With the valued policy loss of the State of Nebraska you owe me the full amount." Heady later filed a proof of loss statement swearing that the actual cash value of the property at the time of loss was $60,000.

Farmers Mutual refused to honor Heady's claim, and Heady instituted this suit to recover the $60,000 face value of the insurance binder. Farmers Mutual did not contest the issuance of the binder, but defended on the grounds that the binder was void due to misrepresentations made by Heady to Insurance Agents, and also that Heady had deliberately caused or procured another to cause the fire.

Heady assigns as one error of the district court the admission into evidence, over his objection, of a memorandum from Farmers Mutual to Insurance Agents. That memorandum, dated the same day as the fire but prepared before Farmers Mutual had knowledge of the fire, rejected Heady's application for insurance on the subject dwelling because it was vacant. It also rejected applications for insurance made by Heady on one other dwelling because it was vacant, and further rejected his request to increase coverage from $13,600 to $49,000 on a third dwelling for the same reason. We agree with Heady that the exhibit was not relevant to any fact at issue in the case. Farmers Mutual makes no claim that the memorandum was effective to revoke the binder. It contends, rather, that the memorandum was relevant to show Heady's pattern of overinsuring property. The problem with that contention, from Farmers Mutual's point of view, is that the memo-

randum does not show that fact. The insurance coverage sought by Heady was denied, according to the memorandum, not because the insurance coverage sought was in excess of the actual value of the dwellings, but because the dwellings were vacant. Receipt of the memorandum into evidence improperly permitted the jury to speculate about Heady's motives in attempting to increase coverage on vacant dwellings, and also raised questions as to the reasons those dwellings were vacant. Its receipt was prejudicial error and grounds for reversal and the granting of a new trial. *Exchange Bank v. Gifford*, 102 Neb. 324, 167 N.W. 69 (1918); *Odell v. Story, on rehearing* 81 Neb. 442, 118 N.W. 1103 (1908).

Since the judgment must be reversed and a new trial granted, we address the additional issues raised by both the appeal and cross-appeal in order to answer questions of law which will likely be present again in such new trial. Those issues are: (1) Is Neb. Rev. Stat. § 44-380 (Reissue 1978), the valued policy statute, a viable statute with respect to fire insurance? (2) Does the valued policy statute preclude evidence of the actual value of the premises to establish that the coverage was procured fraudulently? (3) If so, does it preclude evidence of the actual value of the premises to establish a motive for arson? (4) Does the filing of a fraudulent proof of loss statement render void a policy of insurance governed by the provisions of § 44-380?

Turning to the first of these issues, § 44-380 provides:

> Whenever any policy of insurance shall be written to insure any real property in this state against loss by fire, tornado, windstorm, lightning, or explosion and the property insured shall be wholly destroyed, without criminal fault on the part of the insured or his assignee, the amount of the insurance written in such policy shall be taken conclusively to be the true value

of the property insured and the true amount of loss and measure of damages.

In *Insurance Co. of North America v. County of Hall*, 188 Neb. 609, 198 N.W.2d 490 (1972), this court held that § 44-380 was not applicable to recovery on a fire insurance policy because a 1951 enactment of the Legislature, codified at then Neb. Rev. Stat. § 44-501 (Reissue 1952), required that all policies of fire insurance conform to the 1943 Standard Fire Insurance Policy of the State of New York, which allows recovery only up to the actual value of the loss. In 1972 the Legislature amended § 44-501 to add subsection (10) of the present statute, which reads: "The policy shall provide that claims involving total loss situations shall be paid in accordance with section 44-380." 1973 Neb. Laws, L.B. 51; § 44-501 (Reissue 1978). Farmers Mutual contends that our opinion in *Insurance Co. of North America* held that § 44-380 was repealed by implication by the 1951 legislative enactment. No language suggesting an implied repeal is found in that opinion. Clearly, that opinion had no effect on the other subjects in § 44-380, namely, policies of insurance covering windstorm, tornado, lightning, or explosion; it therefore cannot be said that the statute had been repealed. We merely resolved the partial conflict between §§ 44-380 and 44-501 in favor of § 44-501. By legislative enactment in 1972 that conflict was removed. As we said in *Insurance Co. of North America v. County of Hall, supra* at 612, 198 N.W.2d at 492, "The fundamental principle of statutory construction is to determine the intent of the Legislature." The clear intent of § 44-501(10) is that the written value provisions of § 44-380 apply to fire insurance policies. We are bound by that intention.

The remaining issues are all concerned with the effect of the valued policy statute on certain fraud defenses asserted by Farmers Mutual.

By its answer to Heady's petition Farmers Mutual claims that Heady should not be allowed to recover

on the insurance binder and the binder should be declared void because Heady fraudulently obtained the coverage by misrepresenting the value of the subject dwelling. Farmers Mutual presented evidence that, if believed, would establish that the actual value of the property was $5,000, while the insured value was $60,000. Farmers Mutual claims the trial court erred in failing to instruct the jury on this defense, while Heady claims that the valued policy statute precludes the introduction of such evidence.

In *Aetna Ins. Co. v. Simmons*, 49 Neb. 811, 69 N.W. 125 (1896), the elements of the fraudulent overinsurance defense are illuminated by language quoted with approval from *Franklin Fire Ins. Co. v. Vaughan*, 92 U.S. 516, 23 L. Ed. 740 (1875):

> "The law exacts the utmost good faith in contracts of insurance, both on the part of the insured and the insurer, and a knowing and willful overvaluation of property by the insured, with a view and purpose of obtaining insurance thereon for a greater sum than could otherwise be obtained, is a fraud upon the insurance company that avoids the policy. It is a question of good faith and honest intention on the part of the insured, and though he may have put a value on his property greatly in excess of its cash value in the market, yet if he did so in the honest belief that the property was worth the valuation put upon it, and the excessive valuation was made in good faith, and not intended to mislead or defraud the insurance company, then such overvaluation is not a fraudulent overvaluation that will defeat a recovery."

49 Neb. at 838-39, 69 N.W. at 134.

Farmers Mutual asserts that *Aetna* supports its position that the valued policy statute does not preclude a fraudulent overvaluation defense. We cannot read the case in that manner. While it is true that a form of the valued policy statute was in effect at that time, the *Aetna* court did not resolve the

exact issue we confront here, because the matter was resolved on the basis that the insurer failed to plead or prove that the insured intentionally overvalued the property, that the representations were material to the risk, and that the insurer had relied upon them. *Aetna* therefore does no more than say that if there were such a defense, it was neither pled nor proved.

On the other hand, in *United States Fire Ins. Co. v. Sullivan*, 25 F.2d 40 (8th Cir. 1928), *cert. denied* 278 U.S. 608, 49 S. Ct. 12, 73 L. Ed. 534, the insured sought recovery against his insurance company for $5,000 after a dwelling valued at $2,500 was destroyed by fire. The insurance company defended on the grounds the policy was void, first, because the insured breached an affirmative duty to disclose the actual value was no more than $2,500 and, second, because the insured stated in the application that the dwelling was worth $5,000. The eighth circuit held that, under Nebraska law, these fraud defenses were unavailable to the insurance company to defeat its insured's recovery. It based its decision on Nebraska's then valued policy statute, which was identical to our present statute except that it did not cover insurance policies covering windstorm or explosion. Comp. Stat. § 7809 (1922). We find the reasoning and analysis of the eighth circuit persuasive, and adopt it as our own.

> It is a well-known fact that it has been the practice of some fire insurance companies to insure property at any value the insured cared to put thereon without any investigation as to such value. The natural impulse of the insured was toward amply sufficient or even over valuation. The higher the valuation, the greater the premium. If there were no loss, the insurance company profited through the high valuation. If loss occurred, the insurer would contest the value or amount of recovery and the insured might recover less than the value stipulated in the policy,

although he had honestly estimated the value at the time the insurance was taken and had paid premiums on the basis of such estimated value. This situation produced dissatisfaction and litigation. It was to correct this condition, that this section was enacted. Lancashire Ins. Co. v. Bush, 60 Neb. 116, 120, 82 N.W. 313; Calnon v. Ins. Co., 114 Neb. 194, 199, 206 N.W. 765. Also, overvaluation was a temptation to commit arson, which might endanger lives or other property. The statute is not merely for the protection of the insured but "rests on considerations of public policy, and it is probable that the insured could not, even by express contract, relinquish the benefit of its provisions." Lancashire Ins. Co. v. Bush, 60 Neb. 116, 122, 82 N.W. 313, 314; also see Reilly v. Franklin Ins. Co., 43 Wis. 449, 28 Am. Rep. 552; Emery v. Piscataqua Ins. Co., 52 Me. 322; Queen Ins. Co. v. Leslie, 47 Ohio St. 409, 24 N.E. 1072, 9 L.R.A. 45; 14 R.C.L. p. 1306.

The method of the section is to have the value liquidated in the policy by the parties to the contract and removed from dispute and determination "by evidence, agreement or arbitration." Lancashire Ins. Co. v. Bush, 60 Neb. 116, 121, 82 N.W. 313. The statute is confined to real property because values thereof are relatively fixed and certain. Calnon v. Ins. Co., 114 Neb. 194, 198, 206 N.W. 765. The result of this method of making the policy valuation binding was to place on the insurer the duty to make its own investigation and binding determination of value before such is agreed upon and placed in the contract. Insurance Co. v. Barron, 91 Miss. 722, 727, 45 So. 875; Queen Ins. Co. v. Leslie, 47 Ohio St. 409, 24 N.E. 1072, 9 L.R.A. 45. Neither party can evade the statute by avoiding this duty. If the insurer performs its full duty, in this respect, it is bound by its estimate of value based

> thereon unless conditions (reducing value), not ascertainable by a reasonably careful inspection and known to the insured, are withheld by the insured. But the insurer cannot close its eyes, make no reasonable investigation, take the bare word of the insured as to value and thereafter challenge such value. To permit this would be to nullify the good effect intended by the statute. It would reinstate the very situation and condition which the statute sought to destroy and prevent. It would encourage conscious overvaluation and, possibly, resulting arson.

25 F.2d at 41-42.

We recognize that at least one jurisdiction has reached the opposite conclusion. *Zuraff v. Empire Fire & Marine Ins. Co.*, 252 N.W.2d 302 (N.D. 1977). We do not find that case persuasive except for its dissenting opinion. We hold, therefore, as the eighth circuit in this instance correctly foreshadowed in 1928, that the valued policy statute precludes Farmers Mutual from asserting as a defense to liability on its fire insurance contract the fact that its insured either affirmatively misrepresented or failed to disclose the actual value of the subject property.

The next issue is raised by Heady's assertion that the valued policy statute forecloses evidence of the actual value of the destroyed premises in order to show that the insured had a motive to commit arson. Heady argues that *United States Fire Ins. Co. v. Sullivan*, 25 F.2d 40 (8th Cir. 1928), *cert. denied* 278 U.S. 608, 49 S. Ct. 12, 73 L. Ed. 534, supports that assertion. We do not agree. *Sullivan* concerned itself with whether the insured's misrepresentation voided the policy ab initio without reference to showing a motive for arson, for there was no arson in *Sullivan*. Consequently, *Sullivan* does not address the motive issue.

In *Weiner v. Aetna Ins. Co.*, 127 Neb. 572, 587, 256 N.W. 71, 77 (1934), we stated with respect to arson cases:

> [I]t is firmly established that in cases of this kind circumstantial evidence is not only admissible, but is usually the only evidence obtainable, since it is very evident that in almost no instance can direct testimony of eyewitnesses be obtained. Persons desiring to burn their property for the purpose of collecting the insurance, or for any other illegal purpose, do not discuss their intentions with others, nor do they carry out such intentions in the light of day.

In light of the facts of this case it was proper for the district court to allow evidence of the actual value of the property to supply a motive to Heady, if the jury wished to so believe, for the commission of the unquestioned act of arson. Failure to allow such evidence would deprive the insurer of one of its vehicles to connect the arson to Heady and not to some other person. We think the proper rule to be that when the loss complained of is shown to be the result of an intentional act of destruction, § 44-380 does not preclude admission of the actual value of the property into evidence for the jury to consider in assessing whether the insured had a motive for committing arson.

This conclusion disposes of Heady's argument that his motion for a directed verdict after the presentation of evidence should have been granted, as well as his motion for judgment notwithstanding the verdict. Upon a motion for directed verdict the party against whom a verdict is directed is entitled to have all controverted facts resolved in his favor and to have the benefit of every reasonable inference deducible from the evidence. *Otto v. Hongsermeier Farms*, *ante* p. 45, 348 N.W.2d 422 (1984); *May v. Hall Co. L'stock Improvement Assn.*, 216 Neb. 476, 344 N.W.2d 629 (1984). One of the reasonable inferences the jury was entitled to draw from the evidence was that Heady caused the fire which resulted in the destruction of the insured premises. Accordingly,

he was entitled neither to a directed verdict nor to a judgment notwithstanding the verdict.

The final issue involving the effect of § 44-380 concerns the proof of loss statement filed by Heady after the fire, in which he swore that the actual cash value of the insured property was $60,000. At trial Heady's testimony and that of a real estate appraiser placed that value, at the most, at $10,000. Farmers Mutual contends that the false sworn proof of loss statement served to void the insurance binder. In support of this contention Farmers Mutual cites *Home Ins. Co. v. Winn*, 42 Neb. 331, 60 N.W. 575 (1894). That case involved insurance on merchandise and not on real property under a valued policy. The valued policy statute was not involved.

Several relatively old cases from other jurisdictions lend support to the proposition that the overvaluation of totally destroyed property in a proof of loss statement filed in connection with recovery on a valued insurance policy is immaterial and no defense to recovery on the policy, even when a provision in the policy would void the policy for such statements. *Walker v. Phoenix Ins. Co.*, 62 Mo. App. 209 (1895); *Cayon vs. The Dwelling House Ins. Co. of Boston, Mass.*, 68 Wis. 510, 32 N.W. 540 (1887); *Bammessel vs. The Brewers' Fire Ins. Co. of America*, 43 Wis. 463 (1877). We think the rationale expressed in *Cayon* is sound and adopt it.

> It is not perceived how the company could have been influenced by any such over-estimate to settle or compromise, or not to settle or compromise, the claim for the insurance so fixed *conclusively* by the statute; for in no case could the company be compelled to pay more, or could the insured be induced thereby to receive less, than the amount so fixed by law.

68 Wis. at 516, 32 N.W. at 541.

For the reasons hereinabove stated the judgment

is reversed and the cause remanded for a new trial conducted in accordance with this opinion.

REVERSED AND REMANDED FOR A NEW TRIAL.

BELLEVUE COLLEGE, APPELLEE, V. GREATER OMAHA REALTY COMPANY, APPELLANT.

348 N.W.2d 837

Filed May 4, 1984. No. 83-319.

1. **Breach of Contract: Contracts.** As a general rule, a condition is excused if the occurrence of the condition is prevented by the party whose performance is dependent upon the condition. That person must put forth a good faith effort to obtain the condition.
2. _____: _____. If a promisor prevents or hinders the occurrence of a condition precedent, the condition is excused.
3. **Contracts: Property: Sales: Statute of Frauds.** It is a general rule that the description of land in a memorandum of a contract for the sale thereof must be sufficiently definite to identify the land by its own terms or by reference to external standards in existence at the time of the making of the contract, and capable of being determined beyond dispute.

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

Kenneth D. Gaskins and James L. Koley of McGill, Koley, Parsonage & Lanphier, P.C., for appellant.

Dean J. Jungers of Hascall, Jungers & Garvey, for appellee.

KRIVOSHA, C.J., WHITE, and CAPORALE, JJ., and MCCOWN and BRODKEY, JJ., Retired.

KRIVOSHA, C.J.

The appellant, Greater Omaha Realty Company (Greater Omaha), a Nebraska partnership with its principal place of business in Omaha, Douglas County, Nebraska, appeals from a judgment entered by the district court for Sarpy County, Nebraska, directing Greater Omaha to convey to the appellee,

Bellevue College, a certain 2-acre tract of land owned by Greater Omaha, as well as to pay Bellevue College damages for failing to deliver fill dirt. We affirm.

The record discloses that Greater Omaha owned a 58-acre farm in Bellevue, Nebraska. The land was bordered by Bellevue College on the east, U.S. Highway 73-75 on the west, and by a residential development on the south. In early 1970 Herman Cohen, one of the partners of Greater Omaha, unsuccessfully attempted to rezone the tract for a Woolco shopping center development. The proposal received heavy opposition from the adjacent area residents. On August 11, 1977, Cohen, again seeking to obtain the platting and rezoning of the land in question, filed a request on behalf of Greater Omaha with the Bellevue Planning Commission. Two preliminary hearings were held by the Bellevue Planning Commission on the proposal, one on September 8, 1977, and the other on November 10, 1977. After the application was filed Doyle Wineland, a design engineer who had been hired by Cohen to do the engineering and design work for the project, advised Cohen that it would be helpful if Cohen could obtain the support of Bellevue College for the application. As a result thereof, Cohen sought the support of Bellevue College, and on November 10, 1977, a letter agreement was signed by Cohen, presumably on behalf of Greater Omaha, and Richard D. Winchell, president of Bellevue College. The agreement, in essence, provided that Bellevue College would join with Greater Omaha in the request for platting and rezoning on the condition that Greater Omaha would convey certain land to Bellevue College and would provide Bellevue College with "a minimum of 150,000 cubic yards of dirt and a maximum of 250,000 cubic yards of dirt" to be used by the college to elevate the college property as a means of preventing damage from flooding.

The Bellevue Planning Commission held three

public hearings in connection with the request. They were held on December 8, 1977, and January 19 and February 9, 1978. Again, opposition was voiced by the adjacent residents. As a result, the commission, at the December meeting, required the developer to abandon plans for the construction of high rise apartments on a large lot between the existing homes and the college. Greater Omaha agreed with the request and revised the plat. On February 9, 1978, the planning commission approved the preliminary plat and initial request for rezoning, on the condition, however, that a portion of one of the streets designated as Cohen Drive be redesigned and approved by the city engineer and the city planner.

On February 20, 1978, the Bellevue City Council considered the planning commission's recommendations at a public hearing. The council voted to continue the hearing until February 27, 1978, to permit the applicant an opportunity to change certain of the street designs. At the meeting held on February 27, 1978, the city council considered the revised preliminary plat with the street changes. In addition to the changes shown on the plat, the city council added three more conditions which Greater Omaha had to meet, and with those changes the city council approved the preliminary plat and rezoning.

The record establishes that while Cohen was dissatisfied with the changes and conditions imposed by the city council, he nevertheless accepted them. The record discloses, however, that no further action was taken by Cohen to complete the plat and zonings following the approval by the Bellevue City Council of the preliminary plat, and on November 6, 1978, Cohen died. His interest in the partnership passed to his wife.

Greater Omaha maintains that the decision of the trial court was in error in two respects. First, Greater Omaha maintains that the trial court erred in finding that the conditions precedent to Greater Omaha's obligations to perform had, in fact, oc-

curred, and, second, Greater Omaha maintains that the trial court erred in enforcing a contract that was unenforceable under the Nebraska statute of frauds because the real property to be conveyed was not adequately described in the document.

Turning first to the matter of the conditions precedent, we believe the trial court was correct. The specific, pertinent language of the letter agreement entered into between Bellevue College and Greater Omaha, and for which Bellevue College agreed to support the zoning request, provided as follows:

> 3) You [Greater Omaha] would arrange for the conveyance to us of approximately two acres of your property adjacent to Betz Road without cost to us so that the vacated portion of Betz Road would ultimately be the property of Bellevue College.
>
> 4) You would agree to provide us with a minimum of 150,000 cubic yards of dirt and a maximum of 250,000 cubic yards of dirt, as determined by your engineer in the preparation of a grading plan, to be moved at our expense and used to raise the elevation of College property as a means of preventing damage from flooding.
>
> . . . .
>
> I agree to the above conditions this 10th day of November, 1977, subject to the requested zoning and all of the above being accomplished within twelve months of the above date.

The last paragraph, making the obligations subject to completion of platting and zoning within 12 months, was signed by Herman Cohen.

Greater Omaha maintains that by reason of the letter agreement it was not obligated to convey the land or provide the dirt unless "the requested zoning and all of the above" were accomplished within 12 months from November 10, 1977. Everyone agrees that neither the requested zoning nor the final plat was, in fact, approved within 12 months from November 10, 1977, and, therefore, unless the time limit for accomplishing the final platting and rezoning

was waived, Greater Omaha is under no obligation to either convey the land or deliver the dirt.

We believe, however, the evidence in this case establishes that the failure to accomplish the desired ends was due solely to the fault of Greater Omaha and that Greater Omaha is not excused from either conveying the property or delivering the dirt. The record is clear that the reason that neither the zoning nor final platting was accomplished was due solely to the inaction of Greater Omaha and that, had Greater Omaha taken any further steps, both the zoning and the final platting would have been received. John E. Rice, the city attorney for the city of Bellevue, testified at trial that, in his opinion, the city council had no choice about approving the final plat and the zoning ordinance after approval of the preliminary plat. However, as disclosed by the evidence, Greater Omaha never produced a final plat, nor ever requested approval for it. Cohen's daughter and partner, Florence Davis, testified that she did not proceed with the final platting process because her father had died and she was in the process of obtaining a divorce, and because she was not satisfied with the street layouts. Her dissatisfaction, however, following the acceptance of the preliminary plat by the city council, came too late, and it does not entitle Greater Omaha to refuse to perform the obligations owed to Bellevue College. As a general rule, a condition is excused if the occurrence of the condition is prevented by the party whose performance is dependent upon the condition. That person must put forth a good faith effort to obtain the condition. See *Hahn v. International Management Services, Inc.*, 207 Neb. 229, 298 N.W.2d 140 (1980). Additionally, if a promisor prevents or hinders the occurrence of a condition precedent, the condition is excused. See *Keystone Bus Lines v. ARA Services*, 214 Neb. 813, 336 N.W.2d 555 (1983). In the present case, the record seems clear beyond question that the only reason that the final plat and

zoning were not obtained within the required 12-month period was the failure on the part of Greater Omaha to proceed to seek such approval. We believe that under the facts presented in this case, Greater Omaha cannot be relieved of its obligations by reason of the fact that it failed to follow through on its own request.

Having thus disposed of the first assignment, we turn to the second, which is to the effect that the description contained in the letter agreement is not adequate to permit specific performance as requested, and, in fact, the description violates the statute of frauds. The trial court correctly held to the contrary.

The rule with regard to the sufficiency of a description is of longstanding origin in this jurisdiction. In *Holliday v. McWilliams*, 76 Neb. 324, 328-29, 107 N.W. 578, 580 (1906), this court said:

> In actions brought for the specific performance of contracts to convey real estate, the land must be described in the contract with such clearness and accuracy that it can be identified and its boundaries determined beyond the possibility of future controversy; and yet there are many cases in which no specific description of the land has been given, where it has been referred to in general terms, in which it has been held that the action could be maintained. The rule undoubtedly is that that is definite and certain which can be made certain by parol proof which does not contradict what appears in writing.

Further, in *McCarn v. London*, 83 Neb. 201, 202, 119 N.W. 251 (1909), we said:

> It is a general rule that the description of land in a memorandum of a contract for the sale thereof must be sufficiently definite to identify the land by its own terms *or* by reference to external standards in existence at the time of the making of the contract, and capable of being determined beyond dispute.

(Emphasis supplied.) That is, while ideally the description should be specific in the writing, if there is sufficient writing so that with the use of reliable external standards the description can be made certain, it will satisfy the requirements of law. As an example, in *Wisnieski v. Coufal*, 188 Neb. 200, 195 N.W.2d 750 (1972), the contract described the land to be conveyed simply as "120 acres." This court held that there was a sufficient writing, when viewed in light of parol evidence, that established that the party, at all times relevant to the case, owned only one farm and the farm contained 120 acres. Similarly, in *Schneider v. Patterson*, 38 Neb. 680, 684, 57 N.W. 398, 399-400 (1894), the land was described as " 'Four acres out of lot four in S.E. ¼ of the N.W. ¼ of sec. 5, T. 12, R. 11, in Cass county, Neb., lying on the north side of the railroad track.' " The person in question owned more than 4 acres lying on the north side of the railroad track. However, the plaintiffs were permitted to show that the parties had gone upon the land and plowed a furrow along the portion that they intended to be one of the tracts and that they had stepped off the rest of the tract, thereby agreeing to the boundaries.

We believe that an examination of the language of the contract, together with other reliable evidence, shows what was intended by the language contained in paragraph "3)" of the letter agreement dated November 10, 1977. It is clear from the language of the letter that the college wished to acquire land adjacent to Betz Road so that when Betz Road was vacated under the proposed plat, the college thought it would acquire title to the vacated street. The reason for Bellevue College's believing that is relatively simple. Generally, under the law of Nebraska, absent a reservation of title, when a city street is vacated, the title to the vacated street reverts one-half each to the owners of the property abutting the vacated street. *Dell v. City of Lincoln*, 170 Neb. 176, 102 N.W.2d 62 (1960). Unfortunately, this may not

be the case in a city of the first class. See Neb. Rev. Stat. § 16-611 (Reissue 1983). This, however, does not change the situation. There is, we believe, sufficient evidence to permit the court to order specific performance. The location of Betz Road is known and is definite and ascertainable. Likewise, the amount of ground to be conveyed to Bellevue College is ascertainable. Furthermore, it appears from an examination of certain of the preliminary plats that the property ordered by the trial court to be conveyed by Greater Omaha to Bellevue College is exactly the land which was designated by Greater Omaha as a specific lot in exhibits 15 and 16, first as Lot 40 and then as Lot 41. While the record is unclear as to whether the location of the lot to be conveyed was in existence at the time the letter agreement was entered into, it is clear that the land ordered conveyed by the trial court coincides exactly with a lot designed by Greater Omaha abutting Betz Road and containing approximately 2 acres. The evidence leaves no doubt that, at least in the minds of the developers, what ultimately became Lot 41 was intended to be, at some point, conveyed to Bellevue College in satisfaction of paragraph "3)" of the letter agreement. We therefore believe that the description, under the circumstances, is sufficient and that the contention by Greater Omaha that it is insufficient to satisfy the statute of frauds is without merit.

For these reasons, therefore, the decision of the trial court is in all respects affirmed.

AFFIRMED.

GLENN A. PETTIS, APPELLANT, v. CORLEE A. LOZIER, APPELLEE.

349 N.W.2d 372

Filed May 4, 1984. No. 83-482.

1. **Adverse Possession.** One who claims title by adverse possession must prove by a preponderance of the evidence that he has been in actual, open, continuous, exclusive, notorious, and adverse possession under a claim of ownership for a full period of 10 years.
2. _____. When a claimant occupies the land of another by actual, open, exclusive, and continuous possession, the owner is placed on notice that his ownership is in danger and that unless he takes proper action within 10 years to protect himself, he may lose his title to the claimant. It is the nature of the hostile possession that constitutes the warning, not the intent of the claimant when he takes possession.
3. **Quiet Title: Appeal and Error.** An action to quiet title is an equitable action, and it is the duty of this court to try the issues of fact de novo on the record and to reach an independent conclusion thereon without reference to the findings of the district court.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Affirmed.

Richard L. Swenson, for appellant.

John E. Hubbard of Kutak Rock & Huie, for appellee.

KRIVOSHA, C.J., WHITE, and CAPORALE, JJ., and McCOWN and BRODKEY, JJ., Retired.

McCOWN, J., Retired.

Plaintiff brought this action to quiet title to a tract of suburban land located in Douglas County, Nebraska. The land was owned of record by defendant. Plaintiff's action is based upon a claim of adverse possession. The district court found that plaintiff had failed to prove actual, open, continuous, exclusive, and notorious possession under a claim of ownership for the statutory period of 10 years. The district court quieted title in the defendant, and the plaintiff has appealed.

This is the second appearance of this case in this court. In the first case the district court sustained

a motion for summary judgment for the defendant on the ground that as a matter of law plaintiff could not acquire title to the property by adverse possession "because he knew the property was not his." On appeal this court held that "claim of right" or "claim of ownership" means "hostile," and these terms describe the same element of adverse possession, and that it was the nature of the possession rather than the intent of the possessor which constituted the warning.

This court held that the moving party is not entitled to summary judgment except where there exists no genuine issue as to any material fact and where, under the facts, the moving party is entitled to judgment as a matter of law. Since there were material disputed facts, the case was reversed and remanded for trial, and the present appeal reflects that trial.

The land involved here is a wooded, suburban tract of approximately 8 acres located a short distance from Omaha, Douglas County, Nebraska. It was purchased by the defendant and her husband in 1963 as a future building site for their home. They changed their plans to build on the tract, but kept the lot as an investment and as a possible future building site. Plaintiff purchased his tract of approximately 5 acres, located immediately to the east of defendant's land, in 1966. The grantor of both plaintiff's and defendant's lands is the same individual, and the grantor retained the tract immediately east of the plaintiff's tract. The north and south boundaries of plaintiff's and defendant's lands are on the same line, and the division line between plaintiff's land on the east and defendant's land to the west is approximately 650 feet from north to south. A highway designated "Calhoun Road" runs north and south along the west side of the defendant's tract. There was a fence along Calhoun Road and a fence along the north and south bounda-

ries of the tracts, but there was no fence on the boundary line between the two tracts.

At the time plaintiff purchased his tract of land in 1966, his grantor showed him the rough boundaries between plaintiff's land and defendant's land and told him that a person named Lozier owned the tract involved here. Plaintiff made no investigation as to the ownership of the land until 1973 or 1974 when he checked the tax records of the county and learned that the defendant owned the property and the taxes were paid. The taxes were paid by the defendant throughout the entire period involved here.

At the time plaintiff purchased his tract in 1966, there was a house, a shed, and a barn on the south portion of plaintiff's tract. Plaintiff has occupied the tract as his residence ever since his purchase. There was also a house and outbuildings on the tract immediately to the east which was occupied. There were no buildings on defendant's tract, and the defendant lived elsewhere.

Plaintiff's residence and the residence to the east had access to a north-south road farther east, known as Old Post Road, by means of a road running along the south boundary of plaintiff's tract of land and the tract to the east. The only direct access to defendant's tract of land was by way of Calhoun Road on the west.

The plaintiff testified that on August 14, 1967, he set out to acquire title to defendant's tract of land by adverse possession, and announced his intention to his then wife.

Plaintiff testified that he began grazing six or eight goats on defendant's property in 1966. He continued to keep the goats and grazed them on both properties until 1976, although he testified that they were kept on the disputed property most of the time. Plaintiff testified also that eight sheep were kept exclusively on the disputed property during the year 1975; a few geese were kept on the defendant's property from spring to fall of 1976; and two ponies were

kept a majority of the time on the disputed land from approximately 1972 to 1978, although they were housed in plaintiff's barn.

Plaintiff testified that he planted some bromegrass twice between 1966 and 1972 on some area of pastureland, although he admitted that bromegrass grew wild in the area and generally reseeded itself. He planted 25 pine trees in the early 1970s, all of which died. He also testified that for at least 2 or 3 years watermelon, squash, and/or rhubarb patches were planted in inconspicuous areas to avoid theft by trespassers.

The only "improvement" which plaintiff testified he placed on the disputed land consisted of three, large, movable packing crates which were kept on the disputed land for approximately 3 years, and used some of the time as sheds for animals. They were hauled on and off with a tractor. A watering tank was put out in 1975, and a beehive was set out for 3 or 4 years during the 1970s.

Plaintiff also testified that junk cars were placed in inconspicuous areas on the property. Sometimes they were on the plaintiff's land and sometimes on the disputed land. Generally, they were located near the boundary line between the tracts and concealed in wooded areas. Plaintiff also testified that he put trash and junk in a gully on the west side of the disputed land near Calhoun Road in the early 1970s for the purpose of stopping erosion.

Plaintiff testified that at some unspecified time he posted and later maintained "No Hunting" and "No Trespassing" signs on the disputed tract. He testified that on two occasions he removed "For Sale" signs from the land, and once told an inquiring prospective purchaser that the land was his.

Plaintiff testified that he kept the border fences in repair around the disputed land from 1967 on, apparently to keep his livestock from getting out. He installed a section of barbed wire fence in a wooded area at the northeast corner of the property in 1971,

and testified that he also installed some other fence somewhere in the interior of the disputed tract in 1975. Plaintiff also testified that he and his family used the land for recreational purposes from time to time, including sledding, target practice, and riding ponies.

The defendant's husband testified that the tract was purchased as a homesite and that although they changed their plans, they kept the land and wished to maintain it in a wild state as a good house site for the future. He testified that he inspected the defendant's land approximately every 2 to 3 years after it had been purchased. His visits of inspection were always in the wintertime when there was no snow on the ground and it was easier to walk through the underbrush. He testified that he never saw any animals grazing on the land and that the fences, which were not in very good condition, always looked the same. He testified that beginning in the early 1970s, he noticed junk cars near the southeast corner of defendant's property in an area near the boundary line between plaintiff's and defendant's properties, although he was not certain the cars were on defendant's land or plaintiff's land. He decided that if they were on defendant's property, it would be easy enough to bulldoze them off in the event they decided to build on the property. He testified that he had the impression that plaintiff had horses and was occasionally using the disputed land for one purpose or another, but felt there had been no damage or devaluation of the land, and he never had any idea that plaintiff was claiming ownership.

Defendant's husband testified that he either did not see the "No Hunting" and "No Trespassing" signs or, if he did, assumed they had been there before, and agreed with the idea. He also testified that the defendant had twice listed the property for sale in the early 1970s and that the realtor reported that he had showed the property at least once but had not sold it. The realtor did not report to de-

fendant any difficulty getting on the property or any difficulty with signs.

The district court found that the actions of the plaintiff did not meet the requirements of adverse possession nor constitute a warning to the titleholder that plaintiff was claiming ownership, and held that the plaintiff had failed to prove an open, hostile, notorious, exclusive, and continuous possession of the property for the statutory period of time.

The district court quieted title in the defendant, and this appeal followed.

In essence, the plaintiff argues on appeal that because he intended to acquire title by adverse possession against a known owner, therefore all of his acts of possession should be deemed to have been an unequivocal warning of his intention to claim title and that anyone should have realized the purpose because of the intention.

When a claimant occupies the land of another by actual, open, exclusive, and continuous possession, the owner is placed on notice that his ownership is in danger and that unless he takes proper action within 10 years to protect himself, he may lose his title to the claimant. It is well settled in this state that one who claims title by adverse possession must prove by a preponderance of the evidence that he has been in actual, open, continuous, exclusive, notorious, and adverse possession under a claim of ownership for a full period of 10 years. *Berglund v. Sisler*, 210 Neb. 258, 313 N.W.2d 679 (1981); *Wiedeman v. James E. Simon Co., Inc.*, 209 Neb. 189, 307 N.W.2d 105 (1981).

It has been stated repeatedly by this court that the real purpose of prescribing the manner in which adverse holding will be manifested is to give notice to the real owner that his title or ownership is in danger so that he may within the period of limitations take action to protect his interest. As this court has said, "It is the nature of the hostile possession that constitutes the warning, not the intent of the claimant when he takes possession." *Purdum v.*

Sherman, 163 Neb. 889, 895, 81 N.W.2d 331, 335 (1957).

The fact that a claimant testifies that he intended to acquire his neighbor's land by adverse possession does not transform every minor trespass into proof of hostile possession under a claim of ownership. Neither does it alter the essential requirements of adverse possession nor lessen the burden of proof resting on the claimant.

The plaintiff argues that the grazing of a few head of livestock on various unspecified portions of the disputed tract was an open and obvious warning to defendant that plaintiff was claiming ownership of all of defendant's land, even though most of the tract was wooded and not grazing land. In addition, the grazing land on the disputed tract was completely surrounded by woods except on the unfenced boundary between defendant's and plaintiff's lands. Except from plaintiff's land to the east, it would have been difficult for anyone to see animals on the disputed tract without going onto the tract itself.

Even if grazing had been open and obvious to anyone, there is no evidence to support the conclusion that a landowner who permits his livestock to graze on the unused land of his neighbor across an unfenced boundary line is giving a clear and unequivocal warning to the neighbor that the owner of the livestock is claiming ownership of all the neighbor's land. By the same sort of reasoning plaintiff asks us to assume that a person who occasionally repairs his neighbor's fence is giving notice that he is claiming ownership of all the land inside the fence rather than preventing his own livestock from escaping or performing a neighborly favor.

Plaintiff also wishes to treat his dumping of junk and trash in a gully near the highway for the stated purpose of stopping erosion as an act constituting notice of a claim of ownership of all the real estate. It would be much more reasonable to assume that it showed an intent to abandon personal property rather than an intent to claim ownership of the real

estate on which the personal property was abandoned.

Although the plaintiff testified that he often ordered kids off the land over the 10-year period, there is nevertheless the evidence that defendant's agents or invitees were also on the premises on various occasions, but apparently the parties or their agents or representatives did not meet on the premises at any time prior to 1978. In 1978 the defendant sent surveyors onto the land to survey the boundary line between defendant's and plaintiff's lands when her son-in-law was planning to build a house on the disputed tract. The plaintiff ejected them and filed this suit on September 1, 1978.

The district court specifically found that the planting of melons and garden and placing of personal property on the disputed tract were done in inconspicuous areas or were not on the property for the required time. Evidence of cutting and stacking of dead timber was without evidence of extent, duration, or exact location. The court found that plaintiff had failed to prove actual, open, continuous, exclusive, and notorious possession for the full period of 10 years and quieted title in the defendant.

An action to quiet title is an equitable action, and it is the duty of this court to try the issues of fact de novo on the record and to reach an independent conclusion thereon without reference to the findings of the district court. *Weiss v. Meyer*, 208 Neb. 429, 303 N.W.2d 765 (1981).

A review of the entire record establishes that plaintiff failed to meet his burden of proving actual, open, continuous, exclusive, notorious, and adverse possession under claim of ownership for the full period of 10 years.

The decree of the district court was correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, PLAINTIFF, V. PAUL L. DOUGLAS, ATTORNEY GENERAL OF THE STATE OF NEBRASKA, DEFENDANT.

349 N.W.2d 870

Filed May 4, 1984. No. 84-199.

1. **Constitutional Law: Impeachment.** The concurrence of five or more judges is required to convict in an impeachment proceeding.
2. **Impeachment: Rules of Evidence.** An impeachment proceeding is a judicial proceeding in the nature of a criminal proceeding in which the rules of evidence apply.
3. **Impeachment.** An omission for which an officer may be impeached and removed from office must relate to the duties of the office.
4. **Impeachment: Misdemeanors.** A misdemeanor in office may consist of a violation of some provision in the Constitution or a statute, willful neglect of duty done with a corrupt intention, or negligence so gross and disregard of duty so flagrant as to warrant an inference that it was willful and corrupt.
5. **Impeachment: Attorneys at Law.** A violation of the Code of Professional Responsibility which is applicable to members of the bar is not, as such, an impeachable offense.
6. **Criminal Law: Evidence.** When the State introduces statements of a defendant, the State is not bound by exculpatory statements contained therein, but such statements are to be considered by the finder of fact in the light of the surrounding facts and circumstances.

Impeachment trial before the Supreme Court under the provisions of Neb. Const. art. III, § 14. Judgment of not guilty.

Jerome Warner and Vard R. Johnson, managers.

Richard G. Kopf, and Wesley C. Mues and Graten Beavers, special assistant attorneys general, for plaintiff.

William E. Morrow, Jr., Thomas J. Culhane, and Tamra Lin Wilson of Erickson & Sederstrom, P.C., and Judy K. Hoffman, and Murray Ogborn of Nelson & Harding, for defendant.

BOSLAUGH, C.J. Pro Tem., HASTINGS, SHANAHAN, and GRANT, JJ., and MORAN and HOWARD, D. JJ., and COLWELL, D.J., Retired.

PER CURIAM.

On March 14, 1984, the Eighty-eighth Legislature, Second Session, adopted articles of impeachment against Paul L. Douglas, the Attorney General of Nebraska, by Legislative Resolution 277. A copy of the resolution was delivered to the Chief Justice of this court on March 15, 1984.

Pursuant to Neb. Const. art. III, § 17, a special session of this court was called to try the articles of impeachment. A pretrial conference was held in chambers on March 21, 1984. Douglas entered a plea of not guilty on March 26, 1984, and trial commenced on that day. Trial was concluded on March 29, 1984, and the matter taken under advisement. The parties were given 7 days to submit briefs.

The articles of impeachment against Paul L. Douglas consist of some 30 paragraphs of general allegations, followed by 6 specifications, or counts, each of which charges a specific offense.

Neb. Const. art. III, § 17, provides in part, "No person shall be convicted without the concurrence of two-thirds of the members of the Court of impeachment . . . ." The effect of this provision is to require the concurrence of five or more judges to convict on any specification.

The court is divided on specifications Nos. 1 and 2. On specification No. 1, Judge Hastings, Judge Shanahan, Judge Grant, and Judge Moran vote to find the defendant guilty. Judge Boslaugh, Judge Howard, and Judge Colwell vote to find the defendant not guilty.

On specification No. 2, Judge Shanahan, Judge Grant, and Judge Moran vote to find the defendant guilty. Judge Boslaugh, Judge Hastings, Judge Howard, and Judge Colwell vote to find the defendant not guilty.

On specifications Nos. 3, 4, 5, and 6, the court is unanimous in finding the defendant not guilty.

Since there was not a concurrence of five or more judges to find the defendant guilty on any specifi-

cation, it is the judgment of the court that the defendant is not guilty. The defendant, however, is subject to "prosecution and punishment according to law," and, as a member of the bar, may be subjected to sanctions which may be imposed in a disciplinary proceeding.

Under the Constitution of 1866 an impeachment was tried by the Senate in a political proceeding. Neb. Const. art. II, § 28. The Constitution of 1875 changed this procedure by providing that an impeachment should be tried by the Supreme Court. Neb. Const. art. III, § 14. This provision of the Constitution remains in force today. Neb. Const. art. III, § 17. See, also, Neb. Rev. Stat. § 24-101 (Reissue 1979).

In *State v. Hastings*, 37 Neb. 96, 55 N.W. 774 (1893), it was held that an impeachment proceeding is to be classed as a criminal prosecution in which the State is required to establish the essential elements of the charge beyond a reasonable doubt. While an impeachment proceeding is not a criminal prosecution in the strict sense of the word, it is a judicial proceeding in the nature of a criminal proceeding in which the rules of evidence apply. Before Douglas can be found guilty and removed from office, the State must have proved beyond a reasonable doubt one or more of the specifications. The purpose of the present constitutional provision is to ensure a strictly judicial investigation of the charge according to judicial methods. *State v. Hastings*, *supra*.

An important issue in this case is what constitutes an impeachable offense. The Constitution provides that all civil officers of this State shall be liable to impeachment "for any misdemeanor in office." Neb. Const. art. IV, § 5. We think this provision of the Constitution means that the act or omission for which an officer may be impeached and removed from office must relate to the duties of the office. In *State v. Hastings*, *supra*, it was said that

> where the act of official delinquency consists in

> the violation of some provision of the constitution or statute which is denounced as a crime or misdemeanor, or where it is a mere neglect of duty willfully done, with a corrupt intention, or where the negligence is so gross and the disregard of duty so flagrant as to warrant the inference that it was willful and corrupt, it is within the definition of a misdemeanor in office.

Id. at 116, 55 N.W. at 780.

In *Hastings* the court recognized certain principles that are equally applicable today:

> [T]he provision for the trial of impeachments before the supreme court was to insure a strictly judicial investigation according to judicial methods. . . . [W]e have endeavored to adopt the rule best sanctioned by authority and which is just, alike to the state and its servants. . . . "[A]n impeachable high crime or misdemeanor is one in its nature or consequences subversive of some fundamental or essential principle of government or highly prejudicial to the public interest, and this may consist of a violation of the constitution, of law, of an official oath, or of duty by an act committed or omitted, or, without violating a positive law, by the abuse of discretionary powers from improper motives or for an improper purpose."

Id. at 114-15, 55 N.W. at 780.

> It is better that the state should be confined to the remedy afforded by the Criminal Code and civil action on the bonds of its officers, than an alternative so dangerous and so liable to abuse as impeachment for technical violations of law, errors of judgment, mistake of fact, or even neglect of duty . . . .

Id. at 128, 55 N.W. at 785.

Four of the specifications contain references to disciplinary rules of the Code of Professional Responsibility, which has been adopted by this court as the standard relating to persons admitted to the

practice of law. While the provisions of the Code of Professional Responsibility are applicable to the defendant in his capacity as a lawyer, and he may be held accountable in a disciplinary proceeding for any violation of the provisions of the code, it is our opinion that a violation of a disciplinary rule as such is not an impeachable offense. Further comments regarding the code are found in our discussion of specifications Nos. 3 and 6.

The defendant, Paul L. Douglas, was admitted to the practice of law in Nebraska in 1953. His public service began in 1956, when he was appointed deputy county attorney of Lancaster County, Nebraska. Later, he was elected and served as Lancaster County attorney from 1961 to 1974. He has been the elected Attorney General of the State of Nebraska since January 1975.

The articles of impeachment relate generally to a series of transactions between the defendant Douglas and Marvin Copple, a real estate developer and director of Commonwealth Savings Company. Paul Galter, a lawyer practicing in Lincoln, Nebraska, was associated with Douglas in these transactions. Douglas and Galter were partners in a partnership known as "P.P.S.S."

The following is a brief chronology of some events and transactions involving Douglas that are relevant to this proceeding.

1. December 29, 1973. Douglas buys a car from Marvin Copple; payment is made by his $6,500 note to Copple, who the same day assigns it to Commonwealth (paid in full with interest August 30, 1979).
2. December 3, 1976. Douglas borrows $25,000 from Commonwealth for home improvements (paid in full with interest September 7, 1982).
3. January 12, 1977. Douglas and Galter contract with Marvin Copple to buy 26 unimproved lots for $241,774 (first contract).
4. April 20, 1977. Douglas borrows $241,774

from Commonwealth (guaranteed by Galter); the loan proceeds check is endorsed and delivered to Copple for the 26 lots (Commonwealth loan paid in full August 30, 1979).

5. September 8, 1977. Douglas and Galter contract with Marvin Copple to buy 40 unimproved lots for $320,755 (second contract).

6. December 27, 1977. Douglas and Galter convey the 40 lots to Judith Driscoll; consideration, $371,814.

Driscoll borrows $371,814 from Commonwealth.

Driscoll endorses the $371,814 loan proceeds check from Commonwealth and delivers it to P.P.S.S.

Douglas and Galter pay Copple $320,775 with P.P.S.S. check (payment of second contract).

7. June 1, 1979. Douglas and Galter contract with Marvin Copple to buy 12 unimproved lots for $105,600 (third contract).

8. July 20, 1979. Douglas and Galter sell 12 lots to Driscoll for $120,000.

Driscoll borrows $132,600.96 from Commonwealth.

Driscoll pays $120,000 by her personal check to Douglas and Galter for 12 lots; she pays Copple $12,600.96.

P.P.S.S. pays Copple $105,600 as full payment for the 12 lots purchased.

9. August 28, 1979. Driscoll borrows $100,500 from Commonwealth to buy 8 lots remaining of the 26-lot sale of April 20, 1977, from Douglas and Galter.

10. August 30, 1979. Driscoll pays Douglas and Galter $100,500 for the 8 lots.

P.P.S.S. pays Commonwealth $119,273 by check, representing the balance due, including accrued interest, on Douglas' $241,774 loan (April 20, 1977, first contract).

Douglas pays Commonwealth $1,345.08 as bal-

ance due, including accrued interest, on car loan.

11. September 7, 1982. Douglas pays Commonwealth balance due on his home improvement loan.

The general allegations of the articles of impeachment alleged that Douglas, a lawyer, was Attorney General of Nebraska from 1974 to the present; that as a result of transactions with Marvin Copple while Douglas was Attorney General, he received fees or commissions in excess of $77,000; that on or about March 14, 1983, Douglas received a copy of a letter from an agent of the Federal Bureau of Investigation, which was then discussed with Paul Amen, the Nebraska Director of Banking and Finance; and that at this discussion Amen requested Douglas to investigate, examine, or prosecute alleged financial irregularities at Commonwealth.

It was further alleged that during the spring of 1983, Barry Lake, legal counsel to the Department of Banking and Finance, informed Douglas of possible crimes committed by Marvin Copple involving Commonwealth.

It was further alleged that on or about May 4, 1983, Ruth Anne Galter, an assistant attorney general and the estranged wife of Paul Galter, was assigned to the Department of Banking and Finance to represent the department in regard to investigations, examinations, and prosecutions concerning matters within the jurisdiction of the department; that Ms. Galter was indebted to Commonwealth at this time; and that beyond speaking with certain officers of the Federal Bureau of Investigation, the U.S. attorney, employees of the Nebraska Department of Banking and Finance, and examining an examination report, nothing of substance was done by Douglas or Ms. Galter from March 14 to October 25, 1983, concerning alleged criminal activity concerning Commonwealth or Marvin Copple.

It was further alleged that Commonwealth was de-

clared insolvent on November 1, 1983; that on November 18, 1983, Douglas disqualified himself as to all matters relating to Commonwealth; and that prior to November 1, 1983, Douglas did not disclose to anyone in the office of the Attorney General, or in the Department of Banking and Finance, the specific nature of his financial involvement with Commonwealth, Marvin Copple, or Judith Driscoll, an employee of Copple and a participant in some of the transactions.

Although the general allegations recited that certain documents were attached to the articles and incorporated therein, no documents were attached to the copy of the resolution delivered to this court.

We emphasize again that the foregoing recitation of events taken from the articles of impeachment are simply allegations which were made by the State, some of which are not supported by the record. As a matter of fact, the evidence in this case leaves many questions unanswered. Perhaps the case is characterized more by evidence which is not in the record than by the evidence presented.

The evidence hints at a conspiracy to defraud Commonwealth by mortgaging real estate to it for amounts far in excess of the value of the land. Such a charge was not made and, of course, not proved. The State was content to make peripheral charges, some of which were not impeachable offenses.

The State presented 21 witnesses in support of its case, and some 103 exhibits, 7 of which were not received, and 4 of which were not offered. On March 20, 1984, subpoenas were issued by the State for the attendance and testimony of S. E. Copple, Marvin Copple, Judith Driscoll, and Joan Copple. The subpoenas were not served at the State's request made on March 22, 1984. This court heard no evidence from any of these witnesses.

In addition, four members of the Lincoln Police Department were subpoenaed, together with a certain Lincoln Police Department investigative file,

but these witnesses were not called. W. N. Stevenson and other Commonwealth loan officers who handled the Copple-Douglas-Driscoll transactions were not called.

We are not permitted to speculate as to what the testimony of these persons might have been.

Defendant was served a subpoena commanding his appearance to testify, along with the production of certain documents. Defendant filed a motion to quash the subpoena

> for the reason that such subpoena violates the Attorney General's rights under the Fifth Amendment to the United States Constitution and under Article I, Section 12 of the Nebraska Constitution because in this proceeding, the Attorney General has a right to remain silent and may not be compelled to testify against himself either by words or by production of his own documents.

This motion was sustained by the court, and defendant did not testify in the trial.

Since the State offered in evidence two sworn statements of defendant, a 36-page letter written by defendant to the special counsel of the Legislature's Special Commonwealth Committee, and the statement and testimony of defendant before the legislative committee, the court was faced with a situation where, although defendant had not testified in the case, many statements made by defendant, exculpatory in nature, were before the court. In *Truman v. State*, 153 Neb. 247, 251, 44 N.W.2d 317, 319-20 (1950), this court stated:

> And in *State v. Harris*, 324 Mo. 223, 22 S.W.2d 802: "The general rule is that, while the jury may believe any statement made by a defendant which is against his interest, it is not obliged to believe statements in his own interest merely because such statements appear in a statement shown by the State to have been made by said defendant."

> While the jury may or may not believe any part or all of a statement made by a defendant, it is not obligated to believe statements in his interest merely because they appear in a statement proved by the State.
>
> When the State introduces a written statement of the defendant it is not bound by exculpatory statements contained therein but such statements are to be considered by the jury in the light of the surrounding facts and circumstances.

The differing conclusions reached by the court may well have resulted from the different weight each member of the court felt should be given to defendant's statements as a whole.

The opinion of the court as to each of the six specifications follows, together with the dissenting and concurring opinions as indicated.

SPECIFICATION NUMBER ONE -
DUTY NOT TO MISREPRESENT

1. The general allegations hereinabove recited are incorporated herein as if set forth verbatim;

2. Paul L. Douglas did knowingly misrepresent his knowledge of his receipt of $32,500.00 from Marvin Copple to David Domina in a sworn statement;

3. As a consequence of such knowing misrepresentation, Paul L. Douglas did violate:

A. The Code of Professional Responsibility adopted by the Nebraska Supreme Court, specifically including, but not limited to, DR 1-102 (A); or,

B. Neb. Rev. Stat. § 28-901 relating to obstructing governmental operations; or,

C. Neb. Rev. Stat. § 28-924 relating to official misconduct; or,

D. Neb. Rev. Stat. § 7-105 relating to the duties of an attorney; or,

E. Neb. Rev. Stat. § 7-106 relating to deceit or collusion by an attorney.

The first specification charges that Douglas "did knowingly misrepresent his knowledge of his receipt of $32,500.00 from Marvin Copple to David Domina in a sworn statement."

Some background is appropriately discussed at this point. According to the evidence, in March 1976 Marvin Copple, a director of Commonwealth Savings Company, asked Paul Galter, an attorney, to assist him in the development of 80 acres of land Copple had purchased. Because Galter's work would not be part of the regular legal practice of his law firm, he suggested the participation of Douglas. Copple agreed, and Galter then approached Douglas. For the purpose of this development work, Douglas and Galter used the partnership known as P.P.S.S. The development resulted in the subdivision known as Fox Hollow. Douglas also did some work for Copple on his own account on an unsuccessful development called Timber Ridge, some property near Southwest 21st and A Streets, and other relatively minor matters. It is the compensation which Douglas received which is in question.

On November 30, 1983, Mr. David Domina, a special assistant attorney general, questioned Douglas under oath in the presence of a shorthand reporter, who transcribed the questions and answers. The transcription is in evidence. As related by Douglas, he and Galter would enter into an agreement with Copple to purchase lots at a set price. Copple would find a purchaser for the lots, at a higher price, give Douglas a deed, and Douglas would give the purchaser a deed. The profit was the means of compensation of Douglas and Galter. According to testimony at the trial, the net profit to Galter and Douglas, over a period of 3 years and 5 months in such transactions, was $44,700 each, after deduction of some $29,000 in interest paid by them to Commonwealth Savings Company, which financed the first

transaction involving 26 lots in early 1977 to the extent of $241,774. That amount, plus interest, was fully paid to Commonwealth. Forty lots were purchased and sold later in 1977, and 12 in 1979. Douglas and Galter were not required to obligate themselves as to these 52 lots, Douglas having complained that the interest charges incurred on the $241,774 loan before resales could be accomplished made the venture too risky. Details of the 40-lot and 12-lot transactions are reserved for other specifications.

The involvement of Douglas in the Fox Hollow development does not appear to have been concealed in any way. His services, as detailed in the evidence introduced by the State, show him to have been in contact with many members of the public and public officials. One witness states that "it was very common knowledge around Lincoln during those years."

In an extended letter dated February 6, 1984, to the special counsel of the Special Commonwealth Committee of the Legislature, Douglas revealed that in addition to profits received from the lot sales above described, he was paid $32,500 by Marvin Copple in three separate checks during 1978, 1979, and 1980 "[b]ecause of the extensive additional work which I did and in which Paul Galter had little participation relating to the noise problems, alternative construction methods, the flowage easement and miscellaneous other matters." If Douglas "did knowingly misrepresent his knowledge of his receipt of $32,500.00 from Marvin Copple" in answering Mr. Domina's questions on November 30, 1983, he did so in the execution of his duties, as he was bound to assist in the investigation; and, accordingly, if the offense be deemed sufficiently serious, he could be removed upon the trial of an impeachment for a "misdemeanor in office" as that constitutional term is judicially construed. We must turn, then, to the actual questions and answers, without paraphrase:

Q. Have you served as counsel, whether that means as a lawyer or not, for Marvin Copple for compensation at any time since 1975, January 1?
A. As a lawyer?
Q. All right. You qualified the question. Let's take that part of it first. Have you served as Marvin Copple's lawyer since January 1 of 1975?
A. I have not. I have never served as Marv Copple's lawyer.
Q. Have you counseled Marvin Copple in some non-legal way for pay?
A. Yes.

What immediately follows is not strictly pertinent. Later in the questioning, the following appears:

Q. Okay. What was your financial involvement, then, in Timber Ridge?
A. When you say financial involvement, I did not invest any money in it.
Q. Did you serve as counsel in connection with that development and receive compensation?
A. Yes.
Q. Were there other developments in addition to the Fox Hollow and Timber Ridge in which you served as counsel for Marv Copple or any of the Copple family?
A. First of all, I did no other business with anybody else in the Copple family except Marv.
Q. All right. Were there other developments, then, besides Fox Hollow and Timber Ridge for which you were paid for services as counsel?
A. There was always something coming up, and as it was requiring my time and my counsel — and I would remind him of it and periodically — he would pay me for it. There was a motel. He had a couple of motels.
Q. Was one of those the Town and Country Motel at 27th and "O"?
A. He owned that one.
Q. And then the Clayton House?
A. Well, I — the Clayton House, but I had hard-

ly anything to do with the Clayton House. He had another one on Cornhusker Highway. He wanted to build some property up at 14th and Superior. We talked about a horse breeding farm in Elkhorn. We had — we talked about some property out on West "A", about 120th. Periodically - periodically Marv would have an idea, he would call and say, hey, we've got a chance to buy this and do something with it, do you have any thoughts? We would go out and look at it and talk about it. But for all practical purposes — for all practical purposes the large bulk of the time, and what I would really consider my involvement with Marv, would be Fox Hollow and Timber Ridge.

Q. Did you ever specifically bill Mr. Copple for your counsel on these other projects other than Fox Hollow and Timber Ridge?

A. No.

Q. Did you ever give him orally, you know, a figure or ask for a specific amount of compensation on those other projects?

A. No.

Q. How did he pay you for your services on the projects other than Fox Hollow and Timber Ridge or did he?

A. He never did pay me.

Q. With respect to Fox Hollow, then, what was the arrangement that you had with Mr. Copple for compensation for your services as counsel, then?

A. We were going to — Paul Galter and I would make a contract with Marvin, he would sell us some lots under contract. He would then go out and find a purchaser for those lots. He then would negotiate with that purchaser for the price of the lots. Then we would sign a standard contract that somebody drew up — I suppose Paul Galter did — I don't know who drew the standard contract up — to sell these lots under contract to the purchasers that he would find.

Q. That would be some third person who Mr. Copple would locate, he would agree to buy a lot or a couple lots, whatever the case may be?
A. Yes. He — some were to individual purchasers, some were to contractors.
Q. Then how were you to be paid as a result of that arrangement?
A. The way the contract was originally drawn up he would — he would sell us the lots at a hundred dollars — the original contract that I had with him — that we had with him, that Paul Galter and I had with him listed 26 lots.
Q. All in Fox Hollow?
A. All in Fox Hollow. And there was a set total purchase price of $241,774 for the 26 lots. That was computed on the basis of a hundred dollars per frontal foot for that real estate. And that's in the contract, and I'll give you a copy of the contract. That as he would find a buyer he would give me a deed. I would give the buyer a deed. The buyer would pay me for the purchase of the lot and I would pay Marv Copple for — for that lot. In the contract each lot is not broken down individually, but he did give me a price on every one of the lots so I would know what I paid for each lot for tax purposes, and what the lot was sold for and the difference would be money that Paul Galter and I would jointly get for the sale of the lots which would compensate us for the work that we had done helping Marvin develop those lots.
Q. Was your compensation calculated on a per hour basis or a per transaction basis or how did you know how much you would be paid?
A. I didn't know how much — I had no idea how much I was going to end up making on this except, as I indicated to you, Marvin Copple had led Paul Galter and I to believe — and I'm not saying deceivingly, I'm saying he led us to believe that there was a lot of money to be made

and always left us with the assurance that we were going to be well compensated for it, and I remember that if he told me once he told us several times along the way as things were — were progressing very well, that our financial worries were over. He had anticipated that the whole transaction would take about two years.

Q. That is to develop Fox Hollow?

A. He thought in a two year period of time originally we would be, as he said and said, as I say, was told numerous times to both of us, that our financial worries would all be over within a two year period of time. I knew how much money he had invested in it. I knew about what each lot was costing him and I knew what kind of a tax problem he had. I knew because of what I just earlier stated to you and I know — I knew that he wanted to sell 600 lots. I knew he wanted to keep back about a hundred of them, and he was going to hold back a hundred and sell those off much later on.

Asked whether he counseled Marvin Copple in some nonlegal way for pay, Douglas answered in the affirmative. Later asked if he served as counsel in connection with Timber Ridge (a Copple development), Douglas answered in the affirmative, also pointing out that he did not invest any money in Timber Ridge. Finally, asked whether there were other developments besides Fox Hollow and Timber Ridge for which he was paid for services as counsel, Douglas answered, "There was always something coming up, and as it was requiring my time and my counsel — and I would remind him of it and periodically — he would pay me for it." If the purpose of the inquiry was to learn the nature of Douglas' association with Copple and the nature of or reason for payments to Douglas by Copple, it must be conceded that Douglas made a disclosure commensurate with the inquiry. At no time was Douglas asked the amount of compensation received, nor in another

lengthy question and answer session 12 days later was the question raised. It had been made clear to the questioner that Douglas had been compensated not only by profit on the sale of lots but otherwise, by payments. "I would remind him of it and periodically — he would pay me for it." It only remained for the questioner to ask the amount and any other details.

Complaint is made that Douglas never provided access to his tax returns. Yet, during the second (December 12, 1983) questioning of Douglas, copies of Douglas' federal income tax returns were at hand. He was asked, "Could I have copies of those returns, please?" and he answered, "I think you indicated that you wanted to see it and I have no problem in showing you this." The questioner replied, "All right. That's fine." And according to the trial testimony of Mr. John Miller:

> A. Mr. Douglas never let go of the tax returns, and in — the questions were asked and the answers were given but what happened is Mr. Douglas held the tax returns, one page, and he would — he would — he came around his desk and in front of David and he would point to the tax returns, and he did not — when David asked for the tax returns, he said well you said you wanted to see them, and he showed them.
>
> In fairness to Paul, I'm sure he showed more than one page with respect to the specific questions that were asked, but he never released those tax returns from his possession, neither I nor David ever had physical possession of those returns. They never left the possession of Paul Douglas.

We cannot conclude from this that Douglas withheld pertinent information on his tax returns in a procedure agreed to by his questioner. Finally, according to Douglas in his statement to the legislative committee, introduced into evidence by the State, he had by that time turned over his "entire income tax

returns from '75 through '82'' to the committee's special counsel.

There is a discrepancy in Douglas' answers to questions in the November 30 session. Asked whether he was paid for services as counsel other than for Fox Hollow and Timber Ridge, Douglas answered affirmatively. Later in the statement, however, asked how he was paid for services on projects other than Fox Hollow and Timber Ridge, Douglas answered, ''He never did pay me,'' meaning, according to Douglas in his statement to the legislative committee, that he was not paid for projects other than Fox Hollow and Timber Ridge. We are unable to resolve the discrepancy with the evidence at hand, but Douglas is not charged with it in the specification, nor would we be at liberty, even if requested, to permit amendment of the specification, impeachment being in the nature of an indictment by a grand jury. *State v. Leese*, 37 Neb. 92, 55 N.W. 798 (1893).

The defendant having disclosed receipt of payments from Marvin Copple, he cannot be said knowingly to have misrepresented their amount when he was never asked. Nor can it reasonably be maintained that the failure to volunteer the information offends Neb. Rev. Stat. § 28-901 (Reissue 1979) (obstructing government operations) even if, which is not fairly inferable from the record, the investigation was thereby deflected, for the offense must consist of physical interference or some unlawful act. Even words deliberately calculated to frustrate law enforcement have been held insufficient to support a claimed violation of a virtually identical statute. *People v. Case*, 42 N.Y.2d 98, 365 N.E.2d 872, 396 N.Y.S.2d 841 (1977), and cases cited. As for the alleged violations of other statutes, it is enough to say that they are clearly inapplicable.

Much of what we have heard in the evidence is disturbing, but as stated in the impeachment case of *State v. Hastings*, 37 Neb. 96, 123, 55 N.W. 774, 783

(1893), "It should be remembered in the first place that this is a criminal prosecution and we are not to enter upon the field of conjecture in search of a theory upon which the respondents may be pronounced guilty."

The State failed to prove specification No. 1 beyond a reasonable doubt.

SPECIFICATION NUMBER TWO - DUTY NOT TO LIE

1. The general allegations hereinabove recited are incorporated herein as if set forth verbatim;

2. Paul L. Douglas did knowingly misrepresent or knowingly lie to David Domina in a sworn statement, or, to the Counsel on Discipline of the Nebraska State Bar Association in a letter dated on or about December 13, 1983, or, to the Special Commonwealth Committee of the Legislature in a letter response dated on or about February 6, 1984, regarding the issue of whether Paul L. Douglas had knowledge that certain lots purchased from Paul L. Douglas and Paul Galter by one Judy Driscoll were financed by Commonwealth Savings Company;

3. As a consequence of such knowing misrepresentation or knowing lie, Paul L. Douglas did violate:

A. The Code of Professional Responsibility adopted by the Nebraska Supreme Court, specifically including, but not limited to, DR 1-102(A); or,

B. Neb. Rev. Stat. § 28-901 relating to obstructing governmental operations; or,

C. Neb. Rev. Stat. § 28-924 relating to official misconduct; or,

D. Neb. Rev. Stat. § 7-105 relating to the duties of an attorney; or,

E. Neb. Rev. Stat. § 7-106 relating to deceit or collusion by attorneys.

The letter from Douglas to the Counsel for Disci-

pline referred to in the specification was not received in evidence.

This specification charges that Douglas did knowingly misrepresent or knowingly lie when he denied knowledge that Judith Driscoll had obtained loan funds from Commonwealth Savings Company to pay Douglas and Galter for eight lots that they sold to her. It fails for these reasons: (1) Douglas believed that he was speaking the truth at the time; (2) The alleged offense, if proven, was only a technical violation; (3) The alleged offense, if proven, was not an impeachable misdemeanor in office; and (4) The State failed to meet its burden of proof.

In effect, this specification accused Douglas of perjury: lying under oath in his sworn statement to Domina. Thus, the basis for the charge of "knowingly misrepresent or knowingly lie" appears to be grounded in Neb. Rev. Stat. § 28-915 (Reissue 1979):

> Perjury . . . (1) A person commits perjury if, having given his oath or affirmation in any judicial proceeding or to any affidavit on undertakings, bonds, or recognizances or in any other matter where an oath or affirmation is required by law, he deposes, affirms or declares any matter to be fact, knowing the same to be false, or denies any matter to be fact, knowing the same to be true.

Technically, the perjury statute may not have been applicable, because an oath may not have been required by law. For the purposes of our discussion here that distinction is not important.

"Precise questioning is imperative as a predicate for the offense of perjury." *Bronston v. United States*, 409 U.S. 352, 362, 93 S. Ct. 595, 34 L. Ed. 2d 568 (1973). In the *Bronston* case the U.S. Supreme Court, in a unanimous opinion, held that an unresponsive answer if literally true does not constitute perjury, even if it is intentionally misleading and by negative implication false. See, also, *United States v. Esposito*, 358 F. Supp. 1032 (N.D. Ill. 1973). If the

answer is literally true, the failure to *volunteer* more explicit information is not perjury even though the answer may create a misleading impression. *In re Rosoto*, 10 Cal. 3d 939, 519 P.2d 1065, 112 Cal. Rptr. 641 (1974). See, also, *State v. White*, 31 Wash. App. 655, 644 P.2d 693 (1982); *State v. Workman*, 635 P.2d 49 (Utah 1981).

"To lie is to make an untrue statement with intent to deceive. . . . Even though a statement as to the truth of a fact is mistaken, the statement is not a lie if the sayer himself honestly believes it to be true." *State ex rel. Nebraska State Bar Assn. v. Cook*, 194 Neb. 364, 380, 232 N.W.2d 120, 128 (1975).

Whether an answer is false depends upon how the witness understands the question. If the answer given is true when the question is interpreted in accordance with the understanding of the witness, then the answer is not false and his statement is not a lie. It may be a question for the trier of fact whether the witness so understood the question that the answer was true. *Seymour v. United States*, 77 F.2d 577 (8th Cir. 1935).

The essence of perjury is the belief of the witness concerning the veracity of his statement, not his knowledge of the interrogator's intent. *State v. Olson*, 92 Wash. 2d 134, 594 P.2d 1337 (1979).

> In a case where the question propounded admits of several plausible meanings, the defendant's belief cannot be adequately tested and it is necessary to determine what the question meant to him when he gave the disputed answer. United States v. Lattimore, 127 F.Supp. 405 (D.C.D.C.1955), aff'd, 98 U.S.App.D.C. 77, 232 F.2d 334 (1955).

United States v. Wall, 371 F.2d 398, 400 (6th Cir. 1967).

A witness who does not understand the question and gives a nonresponsive answer does not commit perjury. *United States v. Paolicelli*, 505 F.2d 971 (4th Cir. 1974).

"The meaning of the word 'know,' when used in a penal statute, varies with the context in which it is used." (Syllabus of the court.) *Hancock v. State ex rel. Real Estate Comm.*, 213 Neb. 807, 331 N.W.2d 526 (1983).

To determine whether the statement of Douglas that he was unaware of the fact that Driscoll was financing the purchase through Commonwealth was a lie—a conscious, deliberate untruth—it is necessary to determine what Douglas understood the question to mean. His testimony indicates that he was interpreting the word "know" to mean actual or direct knowledge, as distinguished from notice of substantial probability. His explanation that he thought the lots had been sold to third parties is consistent with a theory that Driscoll was only a conduit.

The State itself has introduced into evidence the testimony of Douglas that he was told the ultimate purchaser or purchasers had been found and that the "transaction had all been put together, that when we got there, it was just a matter of paperwork, and we got the check." Defendant stated that, at the closing, "Mr. Marvin Copple said that he would give to me a deed. I would give Judy Driscoll a deed, and Judy Driscoll would give it to the ultimate purchaser. I had no reason in the world to think that she was going to go upstairs and finance those lots." The defendant, according to evidence introduced by the State, told the Counsel for Discipline, "At no time were we advised that Mrs. Driscoll was financing them with Commonwealth Savings Company." At the legislative hearing, the point the State attempts to make is found in the question, "Despite the fact you had the check in your hand, you didn't know that she was financing it through Commonwealth Savings Company?" In the December 12 statement are the following questions and answers:

> Q. Now, in any event later on Judy Driscoll then borrowed some money from Commonwealth to buy lots from you, didn't she?

A. You told me that.
Q. Did you know that?
A. I did not know that.
Q. Did Marvin Copple ever tell you that he was going to use Judy Driscoll to borrow money from Commonwealth because he couldn't?
A. No, never.
Q. You suspected that, didn't you?
A. I did not.

There is no evidence that defendant knew Judith Driscoll had signed a note in favor of Commonwealth Savings Company. The statements of Douglas were corroborated by the testimony of Paul Galter.

What must not be overlooked is that the defendant was not questioned as to Commonwealth's obvious involvement, but rather that of Judith Driscoll—whether she in fact had borrowed money from Commonwealth and, more to the point, whether she was acting not on her account but as a strawwoman for Marvin Copple. Defendant denied such knowledge. What the specification amounts to is that Douglas should have drawn an inference from the $371,814 check, and the earlier transactions, that Judith Driscoll had in fact borrowed money from Commonwealth. Perhaps that is so, but the failure to draw that inference and recall the transaction 4 years later is not a lie. Douglas did not knowingly lie or misrepresent.

The situation presented here, as shown by the evidence, was a business transaction to close a land sale. Douglas and Galter were required to deliver deeds of conveyance in return for payment of the agreed selling price. This occurred without complication or suggestion of irregularity. Douglas had no "in fact" notice, and he had no reason or duty to inquire concerning the "in fact" source of financing funds provided Driscoll. Subsequent to this transaction, there were no circumstances either requiring

or suggesting to Douglas that he should inform himself as to the source of the loan funds.

The assumption urged by the State fails to overcome the belief of Douglas that he was telling the truth. At most, it displays the wisdom employed 100 years ago of removing impeachment proceedings from the political atmosphere of the Legislature to the judicial forum.

It is conceivable that if this allegation had been an element of conspiracy or of aiding and abetting a felony, and proven, there would be some substance to the charge. However, the only offense alleged here is that Douglas did not say what the State already knew and what it wanted him to admit. The State possessed the information sought from Douglas, and any of the answers given by Douglas on this subject neither hindered nor delayed any inquiry the State was making. Further, even if the evidence is accepted as proof of the specification, it is not an impeachable offense, because it was only a technical violation as referred to in *State v. Hastings*, 37 Neb. 96, 55 N.W. 774 (1893).

> "[A]n impeachable high crime or misdemeanor is one in its nature or consequences *subversive of some fundamental or essential principle of government or highly prejudicial to the public interest* . . . ."
>
> . . . .
>
> It is better that the state should be confined to the remedy afforded by the Criminal Code and civil action on the bonds of its officers, than an alternative so dangerous and so liable to abuse as impeachment for *technical violations of law, errors of judgment, mistake of fact, or even neglect of duty* . . . .

(Emphasis supplied.) *State v. Hastings*, *supra* at 115, 128, 55 N.W. at 780, 785.

And lastly, the acts alleged in this specification do not meet the test of a misdemeanor in office that warrants impeachment, since it is not "one in its

nature or consequences subversive of some fundamental or essential principle of government or highly prejudicial to the public interest." *State v. Hastings*, *supra* at 115, 55 N.W. at 780.

The State failed to prove specification No. 2 beyond a reasonable doubt.

SPECIFICATION NUMBER THREE - DUTY TO DISQUALIFY

1. The general allegations hereinabove recited are incorporated herein as if set forth verbatim;

2. On or about March 14, 1983, Paul L. Douglas in his capacity as Attorney General was notified by virtue of a letter received from the Federal Bureau of Investigation of certain transactions, which were possibly criminal in nature, occurring at Commonwealth Savings Company, and which were similar in nature to certain transactions in which he had engaged in at Commonwealth Savings Company;

3. In the spring of 1983, Paul L. Douglas was informed that Marvin Copple may be guilty of crimes involving Commonwealth Savings Company;

4. In July of 1983, Paul L. Douglas was informed that Marvin Copple may be guilty of crimes involving Commonwealth Savings Company;

5. That at all pertinent times, Paul L. Douglas was acting in his capacity as Attorney General of the State of Nebraska;

6. That notwithstanding Paul L. Douglas' previous business relationships with Marvin Copple and Commonwealth Savings Company, Paul L. Douglas acting in his capacity as Attorney General of the State of Nebraska, accepted employment from the State of Nebraska regarding possible criminal activities involving Marvin Copple or Commonwealth Savings Company without obtaining the consent of his client,

the State of Nebraska, after full disclosure at a time when the exercise of his professional judgment on behalf of his client, the State of Nebraska, would be or reasonably might be affected by his financial, business, property, or personal interests;

7. Notwithstanding Paul L. Douglas' previous financial and business dealings with Marvin Copple or Commonwealth Savings Company, Paul L. Douglas failed to decline proffered employment from the State of Nebraska respecting the possible criminal activities regarding Marvin Copple or Commonwealth Savings Company at a time when the exercise of his independent professional judgment, in behalf of his client, the State of Nebraska, was or might likely be, adversely affected by the acceptance of the proffered employment;

8. As a consequence of such actions, Paul L. Douglas did violate:

A. The Code of Professional Responsibility adopted by the Nebraska Supreme Court, specifically including, but not limited to, DR 5-101 (A); or,

B. The Code of Professional Responsibility adopted by the Nebraska Supreme Court, specifically including, but not limited to, DR 5-105 (A).

To attempt to prove this charge, the State does not point to any constitutional provision or statute, but rather relies solely on the claimed infractions of Canon 5, DR 5-101(A) and DR 5-105(A), of the Code of Professional Responsibility.

DR 5-101(A) provides:

> Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.

The language of DR 5-105(A) is as follows:

> A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of his client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interest, except to the extent permitted under DR 5-105 (C) [not applicable].

As we have pointed out earlier in this opinion, the violation of the Code of Professional Responsibility may form the basis for a disciplinary proceeding, but such violation does not, per se, constitute an impeachable offense. However, the same conduct which may constitute a violation of the disciplinary regulations may amount to such a breach of the defendant's official responsibilities as to constitute negligent conduct.

We believe that the Attorney General had the duty of serving the public with undivided loyalty, uninfluenced in his official actions by any private interest or motive whatsoever. As stated by Chief Justice Vanderbilt of the Supreme Court of New Jersey, in *Driscoll v. Burlington-Bristol Bridge Co.*, 8 N.J. 433, 474-76, 86 A.2d 201, 221-22 (1952):

> They [public officers] stand in a fiduciary relationship to the people whom they have been elected or appointed to serve. . . . As fiduciaries and trustees of the public weal they are under an inescapable obligation to serve the public with the highest fidelity. In discharging the duties of their office they are required to display such intelligence and skill as they are capable of, to be diligent and conscientious, to exercise their discretion not arbitrarily but reasonably, and above all to display good faith, honesty and integrity. . . . They must be impervious to corrupting influences and they must transact their business frankly and openly in the light of public scrutiny so that the public may

> know and be able to judge them and their work fairly. . . .
>
> These obligations are not mere theoretical concepts or idealistic abstractions of no practical force and effect; they are obligations imposed by the common law on public officers and assumed by them as a matter of law upon their entering public office.

In *Copple v. City of Lincoln*, 202 Neb. 152, 167, 274 N.W.2d 520, 528 (1979), this court cited the following language from another New Jersey case: " 'The decision as to whether a particular interest is sufficient to disqualify is necessarily a factual one and depends on the circumstances of the particular case.' "

The substance of the third specification is that notwithstanding that the defendant had been advised in March of 1983 that certain transactions of a possible criminal nature had occurred in the operations of Commonwealth, "similar in nature to [those] in which he [the defendant] had engaged," and notwithstanding that in July of 1983 the defendant had been advised of possible criminal actions of Marvin Copple, with whom the defendant had become involved in some rather bizarre business dealings, he nevertheless "accepted employment from the State of Nebraska" regarding those various activities without disclosing the nature of his previous relationship with Copple and Commonwealth, and he "failed to decline proffered employment from the State of Nebraska." We feel compelled to state at this point that we were furnished with no details as to the time of occurrence or nature of the "transactions, which were possibly criminal in nature," which prevents us from fully exploring the scope of the defendant's alleged conflict of interest.

However, one of the problems with the charge as specified is that it really does not fit this situation. The defendant in this case was employed by the State of Nebraska before, during, and after his

extracurricular dealings. There were no statutory provisions precluding outside employment on the part of the Attorney General in effect at the time. By case law, a public officer is not necessarily required to give every instant of his time to the public service in such a sense that he cannot, if wholly consistent with public duties, perform any other service or earn money from any other source. *State v. Hinshaw*, 197 Iowa 1265, 198 N.W. 634 (1924). Nevertheless, we believe that Douglas had a duty to avoid entanglements which potentially could cause a division of his loyalties. Because he did not choose to do so, we must examine his personal situation as of the spring of 1983.

The defendant had engaged in a series of intricate real estate dealings with Marvin Copple, commencing in about 1977. These are set forth in considerable detail in other portions of this opinion. The conclusion of those transactions occurred on July 20, 1979, when Marvin Copple was paid for the last of the lots purchased by Douglas and Galter.

In addition, the defendant did certain other work for Marvin Copple, during the years 1978, 1979, and 1980, for which he was paid the sum of $32,500. Altogether, Douglas devoted approximately 1,500 hours to his dealings with Copple.

During this same period of time, the defendant had made several loans with Commonwealth. With the payoff of the final loan in the amount of $54,048.51 on September 7, 1982, his business relations with that institution apparently ceased. However, the source of funds used to repay that loan was a $55,000 loan from First Security Bank & Trust Co. of Beatrice, Nebraska, an institution with a management familial relationship with Commonwealth. That loan was paid in full on November 25, 1983.

As nearly as can be determined from the record, no business relationship existed between Douglas on the one hand and Copple and Commonwealth on the other hand as of March 14, 1983. Therefore, it can-

not be said that Douglas was at that point actively representing interests which conflicted with those of the State.

The State would seem to argue, however, that the defendant's enthusiasm for investigation of, and judgment as to possible prosecution for, insider loans to Marvin Copple might very well be dimmed by the fact that the defendant's own personal interests and conduct *may* have been a link in the chain of alleged illegal activities. Certainly, such thoughts have occurred to a number of people.

However, there is no evidence that Douglas acted in the discharge of the responsibilities of his office any differently than he would have, had the unfortunate prior dealings never occurred. According to the practices and procedures of that office, the Department of Banking and Finance would have remained primarily obligated to investigate the condition of Commonwealth and other financial institutions. An assistant attorney general would have been assigned full time for the general investigative and legal work required by the Department of Banking and Finance. That assistant attorney general would have been directed by the Department of Banking and Finance and would have been directly responsible to Deputy Attorney General Gerald Vitamvas. That is exactly how this case was handled; and the work performed by the assistant attorney general assigned to the Department of Banking and Finance to investigate many financial institutions, including Commonwealth, was done in a professional manner and was thoroughly acceptable to the department.

The Attorney General did have the appearance of possessing a conflict of interest, and normally should have made a full public disclosure. However, when one considers that the Department of Banking and Finance was interested in avoiding prosecution, if possible, and even in avoiding adverse publicity so as not to cause the "house of

cards" to come tumbling down, the defendant's reticence to "rock the boat" is understandable. These facts are set forth in great detail in our discussion of specification No. 5.

In order to warrant a finding of guilty, we must conclude beyond a reasonable doubt that the defendant's conduct rose to the level of willful neglect with a corrupt intention or that it amounted to gross negligence accompanied by such a flagrant disregard of his duty as to warrant an inference that it was done willfully and corruptly. On the basis of the record before us, we cannot do so.

SPECIFICATION NUMBER FOUR -
DUTY TO AVOID INSIDER BORROWING

1. The general allegations hereinabove recited are incorporated herein as if set forth verbatim;

2. During 1979, Marvin Copple was an officer or Director of Commonwealth Savings Company;

3. On or about August 28, 1979, Marvin Copple borrowed from Commonwealth Savings Company, directly or indirectly, without first having secured the approval of the Board of Directors of such industrial loan and investment company, the sum of $100,500.00, and Paul L. Douglas aided, abetted or assisted in such borrowing;

4. As a consequence of the foregoing, Paul L. Douglas violated the provisions of Neb. Rev. Stat. § 8-409.06.

Although there may be some doubt whether this specification as phrased would support a criminal charge, it is sufficient in this impeachment proceeding considering the full impeachment resolution. Douglas is informed that he was charged with aiding and abetting Marvin Copple to borrow funds from Commonwealth Savings Company in violation of Nebraska statutes, Neb. Rev. Stat. §§ 8-409.01 and 8-409.06 (Reissue 1983), and that such conduct was

a misdemeanor in office, Neb. Const. art. IV, § 5.

The following is a summary of the evidence relevant to this specification. In 1977 Paul Douglas and Paul Galter, as partners, purchased 26 residential lots from Marvin Copple for $241,774; the deeds of conveyance were executed in favor of Douglas as grantee; Douglas borrowed all of the purchase price, $241,774, from Commonwealth Savings Company, and immediately paid this sum to Marvin Copple. This paid Copple in full for the 26 lots. The Douglas loan was paid in full with accrued interest on August 30, 1979.

On or about August 28, 1979, Douglas sold eight of these lots to Judith Driscoll for $100,500, which sum she borrowed from Commonwealth, represented by its check dated August 30, 1979. On August 30, 1979, Driscoll paid Douglas $100,500 by her check, which he deposited in the P.P.S.S. partnership account; those funds, with some additional partnership money, were paid that date to Commonwealth to pay the balance of the $241,774 loan with all accrued interest. The evidence before us, including records of Commonwealth, is silent as to any fact that Marvin Copple either (1) originated, approved, or benefited from this Driscoll loan, or (2) directly or indirectly obtained any proceeds from this loan, or (3) directly or indirectly borrowed all or any part of this Driscoll loan. Marvin Copple had been paid in full for any interest he had in these eight lots on April 20, 1977.

The State argues that this loan transaction must be viewed in the light of all of the previous real estate transactions wherein Douglas was involved with either Marvin Copple, Driscoll, or Commonwealth, claiming that from these it is clear that both Douglas and Copple benefited from this Driscoll loan and that the "borrowing" statutes were violated.

The "insider borrowing" statutes involved here became law on August 24, 1979. They provide:

> 8-409.01. Industrial loan and investment company; loan to director, officer, or employee; re-

quirements. No director, officer, or employee of an industrial loan and investment company, no corporation in which an officer of the industrial loan and investment company is the owner of a controlling interest, and no partnership in which an officer of the industrial loan and investment company is a member, shall borrow any of the funds of the industrial loan and investment company, directly or indirectly, without first having secured the approval of the board of directors of such industrial loan and investment company. The approval shall be made at a meeting of the board and a record of such approval shall be made and kept as part of the records of such company. The amount of any loan shall be limited as provided in sections 8-409 and 8-409.02.

8-409.06. Violations; penalty. Any officer, director, or employee of an industrial loan and investment company, or any other person who shall violate sections 8-409.01 to 8-409.05, or who shall aid, abet, or assist in such violation shall be guilty of a Class IV felony.

The terms "borrow" and "indirectly" are not defined in the statutes; however, they have been considered in our prior decisions involving similar banking situations:

(1) Lending by the bank involved to the borrowing official, either directly or indirectly. (2) On the part of the delinquent officer, it implies making himself indebted for; to appropriate; to take, receive or derive, funds of the bank lending to him, either directly or indirectly. (3) It involves the diminishment of the "funds of the loaning bank" to the extent of the loan made. It must, in other words, amount to a debtor and creditor transaction in which the delinquent officer is the ultimate debtor, and the bank involved the ultimate and real creditor.

Hinds v. State, 121 Neb. 508, 512, 237 N.W. 617, 619 (1931).

> "Indirectly" signifies the doing by an obscure circuitous method something which is prohibited from being done directly, and includes all methods of doing the thing prohibited except the direct one.

State v. Pielsticker, 118 Neb. 419, 423, 225 N.W. 51, 52 (1929).

Since the statutes do not define a "person who shall . . . aid, abet, or assist," we look to the applicable statutes, enacted in 1977.

> 28-205. Aiding consummation of felony; penalty. (1) A person is guilty of aiding consummation of felony if he intentionally aids another to secrete, disguise, or convert the proceeds of a felony or otherwise profit from a felony.
>
> (2) If the crime involved is a felony of any class, aiding consummation of crime is a Class IV felony.
>
> 28-206. Prosecuting for aiding and abetting. A person who aids, abets, procures, or causes another to commit any offense may be prosecuted and punished as if he were the principal offender.
>
> "Aiding and abetting involves some participation in the criminal act or involves some conscious sharing in the criminal act, as in something that accused wishes to bring about, in furtherance of the common design, either before or at the time that the criminal act is committed, and it is necessary that he seeks by his action to make it succeed. . . ."

State v. Alvarez, 189 Neb. 276, 280, 202 N.W.2d 600, 603 (1972).

> "Where a crime requires the existence of a particular intent, an alleged aider or abettor cannot be held as a principal unless it is established that the aider knew that the perpetrator of the

act had the required intent, or that the aider himself possessed the required felonious intent."

State v. Dittrich, 191 Neb. 475, 480, 215 N.W.2d 637, 640 (1974).

Where in an impeachment proceeding the act of official delinquency consists in the violation of some positive provision of the constitution or statute which is denounced as a crime or misdemeanor . . . it is a misdemeanor in office within the meaning of section 5, article 5, of the constitution.

(Syllabus of the court.) *State v. Hastings*, 37 Neb. 96, 55 N.W. 774 (1893).

The State had the burden to prove beyond a reasonable doubt each of these elements: That on or about August 28, 1979, (1) Marvin Copple was a director, officer, or employee of Commonwealth Savings Company; (2) Marvin Copple did directly or indirectly borrow funds from Commonwealth Savings Company; (3) such borrowing was done without his first having secured the approval of the board of directors of Commonwealth Savings Company at a meeting of that board wherein a record of the approval was made and kept; (4) Paul Douglas did intentionally aid and abet Marvin Copple to violate § 8-409.01 in that he did secrete, disguise, or convert the proceeds of a felony or otherwise profit from a felony; and (5) such acts or omissions of Paul Douglas constituted a misdemeanor in office warranting his impeachment.

We review the record as to these elements. The evidence lacks depth on the issue of Copple's official business association with Commonwealth; however, the reports filed by Commonwealth with the Nebraska Department of Banking and Finance show that in 1978 and 1979 Marvin Copple was a member of the board of directors of Commonwealth. The State met its burden in this impeachment proceeding as to element (1).

On the element of "borrowing" there is no direct

evidence in the record before us that Marvin Copple was the ultimate debtor and that he either directly or indirectly had any legal obligation as a debtor to pay the $100,500 Driscoll loan to Commonwealth. The circumstantial evidence previously suggested by the State includes the personal and business relationships between Copple and Douglas, Douglas' loans with Commonwealth, and the sale of the lots to Judith Driscoll, Copple's private secretary, who borrowed all of the purchase price of the lots from Commonwealth. Such circumstantial evidence is entirely speculative; it falls far short of the required proof. See *State v. Buchanan*, 210 Neb. 20, 312 N.W.2d 684 (1981). The State failed to prove element (2) beyond a reasonable doubt, and therefore we need not discuss the remaining elements. Specification No. 4 must fail.

SPECIFICATION NUMBER FIVE -
DUTY TO INVESTIGATE

1. The general allegations hereinabove recited are incorporated herein as if set forth verbatim;

2. On or about March 14, 1983, Paul L. Douglas received a copy of a letter from the Federal Bureau of Investigation generally describing financial irregularities occurring at Commonwealth Savings Company;

3. Sometime in March, 1983, Paul L. Douglas met with Barry Lake and Paul Amen, and possibly others, to discuss the F.B.I. letter and financial irregularities;

4. In the spring of 1983, on a date unknown, Barry Lake advised Paul L. Douglas of possible criminal activity involving Marvin Copple and Commonwealth Savings Company;

5. On or about May 4, 1983, Paul L. Douglas assigned, or consented to the assignment of, Ruth Anne Galter, an Assistant Attorney General, to the Nebraska Department of Banking and Finance for the purpose of assisting said

Department in prosecuting "white collar" crime;

6. At all material times, Paul L. Douglas was aware of the fact that Ruth Anne Galter was personally indebted to Commonwealth Savings Company for large sums of money and that she was the estranged wife of Paul Galter;

7. In July of 1983, on a date not known, Ruth Anne Galter advised Paul L. Douglas of the possibility of criminal activity involving Marvin Copple and Commonwealth Savings Company;

8. The Nebraska Department of Banking and Finance made available or would have made available to Paul L. Douglas or Ruth Anne Galter all information it had in its possession regarding alleged criminal activity involving Marvin Copple or Commonwealth Savings Company from and after March 14, 1983;

9. Substantially nothing was done to prosecute or investigate Marvin Copple or Commonwealth Savings Company, from March 14, 1983, until Commonwealth Savings Company was declared insolvent on November 1, 1983, by Paul L. Douglas or any of his subordinates;

10. By virtue of the foregoing, Paul L. Douglas violated the provisions of Neb. Rev. Stat. § 84-205 (4) and other laws of the State of Nebraska generally.

Paragraphs 2 to 8 of the specification are general statements of information, knowledge, and evidence that Douglas is alleged to either have possessed or had available to him as Attorney General; they all concern financial irregularities at Commonwealth and the possible criminal activity of Marvin Copple. The charge in paragraph 9, "Substantially nothing was done to prosecute or investigate . . .," falls far short of being specific. From this charge we conclude that the State admits that Douglas did in some way respond to the information he either possessed or had available to him; however, it then alleges his judgment and response did not meet the standard

imposed by the Constitution, statutes, and his inherent common-law duties, and implies that his acts or omissions were " 'subversive of some fundamental or essential principle of government or highly prejudicial to the public interest . . . .' " *State v. Hastings*, 37 Neb. 96, 115, 55 N.W. 774, 780 (1893).

The principal facts upon which the specification is based relate to the March 10, 1983, FBI letter, a carbon copy of which was received by the defendant, and a conversation between the defendant and Barry Lake which took place sometime during the spring of 1983.

The gravamen of the charge is that substantially nothing was done to prosecute or investigate Marvin Copple or Commonwealth Savings Company from March 14, 1983, until after November 1, 1983, the date on which Commonwealth was declared insolvent by the Department of Banking and Finance. The evidence shows that some investigation was made but no prosecution was commenced during this period. Thus, the charge is that the defendant failed to do sufficient investigation during this time, and failed to prosecute Copple.

The last paragraph of the specification refers to Neb. Rev. Stat. § 84-205(4) (Reissue 1981), and alleges that the defendant violated this statute and "other laws of the State of Nebraska generally." The statute cited provides that the duties of the Attorney General shall be:

> (4) At the request of the Governor, the head of any executive department, the Secretary of State, State Treasurer, Auditor of Public Accounts, Board of Educational Lands and Funds, State Department of Education or Public Service Commission, to prosecute any official bond or any contract in which the state is interested, deposited with any of them, and to prosecute or defend for the state all actions and proceedings, civil or criminal, relating to any matter connected with any of their departments; *Provided*,

> that, after investigation, he is convinced there is sufficient legal merit to justify the proceeding; and none of the above-named officers shall pay, or contract to pay, from the funds of the state any money for special attorneys or counselors at law, unless the employment of such special counsel shall be made upon the written authorization of the Governor or the Attorney General.

This statute requires the Attorney General, when requested by the Governor, the head of any executive department, or certain other named officers, (1) to prosecute any official bond or any contract in which the State is interested; and (2) to prosecute or defend for the State all actions and proceedings for the named departments.

Under this statute there is no duty to investigate until the Attorney General *has been requested* to prosecute or defend. The investigation which is to be made is for the purpose of determining if there is sufficient legal merit to justify the proceeding.

We recognize that the Attorney General has some duties which are not purely statutory and are sometimes referred to as the common-law duties of the office. In *State v. State Board of Equalization and Assessment*, 123 Neb. 259, 242 N.W. 609 (1932), we stated that the Attorney General is clothed and charged with all such common-law powers and duties except insofar as they have been limited by statute; and in the absence of some express legislative restriction to the contrary, he may exercise all such power and authority as the public interests may require from time to time. See 7 Am. Jur. 2d *Attorney General* § 9 (1980).

"It is generally acknowledged that the attorney general is the proper party to determine the necessity and advisability of undertaking or prosecuting actions on the part of the state." 7 Am. Jur. 2d, *supra* § 16 at 20; *State v. Pacific Express Co.*, 80 Neb. 823, 115 N.W. 619 (1908). This discretion is

obvious when exercising inherent powers; and it is also recited in § 84-205(4), "*Provided*, that, after investigation, *he is convinced* there is sufficient legal merit to justify the proceeding . . . ." (Emphasis supplied.)

" '[I]nvestigation' means the process of inquiring into or tracking down through inquiry . . . 'investigate' means to follow up by patient inquiry or observation; to inquire and examine with systematic attention to detail and relation." *Mason v. Peaslee*, 173 Cal. App. 2d 587, 592 n.2, 343 P.2d 805, 808 n.2 (1959).

Although § 84-205 provides that the Attorney General shall have the same powers and prerogatives in each of the several counties of the state as the county attorneys have in their respective counties, the affirmative duty to prosecute all criminal matters is specifically placed upon the county attorney. Neb. Rev. Stat. § 23-1201 (Cum. Supp. 1982). This is a common arrangement throughout the United States. See 7 Am. Jur. 2d, *supra* § 13.

The evidence shows that with regard to criminal prosecutions the usual and customary practice, and the procedure which had been followed by the office of the Attorney General, was to refer them to the proper county attorney after an investigation by the interested department had developed sufficient information to establish that a criminal prosecution was justified. This policy had been one of necessity because the office of the Attorney General did not have sufficient personnel or resources to carry on investigations, except in a few limited areas, and the other departments had skilled employees who were trained and experienced in their particular fields of operation. This was especially true with respect to financial institutions which were supervised and examined routinely by personnel of the Department of Banking and Finance.

The evidence further shows that this procedure was followed in 1982 in connection with a prosecution

in Douglas County, Nebraska, for the violation of banking laws and regulations. The Department of Banking and Finance, through Barry Lake, delivered a complete report of investigation, together with a suggested form of complaint, to the office of the Attorney General. The matter was referred to the county attorney of Douglas County, Nebraska, and prosecutions instituted and completed in 1983.

The FBI letter of March 10, 1983, was addressed to the Director of Banking and Finance, and stated that during an investigation at Beatrice, Nebraska, information was obtained concerning similar transactions at Commonwealth, including a $1,250,000 transaction in which S. E. Copple received $750,000 of the proceeds. The letter advised the director that the FBI could provide further details concerning the matter. The letter, which did not mention Marvin Copple, was not a surprise to the banking department because it had been advised in 1982 about the investigation being made in Beatrice.

On March 14, 1983, after the copy of the FBI letter had been received by the Attorney General, there was a conference at the office of the Attorney General with Paul Amen, the Director of Banking and Finance, and Barry Lake, an assistant director of the banking department and counsel to the department, concerning the letter. The evidence is in conflict as to other personnel present at this meeting.

The substance of the conversation was that the Director of Banking and Finance was very concerned about the financial condition of Commonwealth and a number of other industrial loan and investment companies. The director testified that he related his "deep concern about the industrials"; that any type of prosecution "would blow the lid"; and that it would mean "a number of these industrials would come tumbling down." He further testified that he felt the failure of one institution, or perhaps even some adverse publicity, could cause a run and eventually topple the entire industry.

Lake admitted that at this conference they did not disclose to the defendant in any extensive detail the information in the reports of examination or information the department had on insider transactions. As early as March 31, 1982, the department knew of "numerous insider transactions" at Commonwealth, including a loan to Dana Saylor in which the proceeds were endorsed to Newt Copple.

Although the director did not specifically ask the Attorney General *not* to investigate Commonwealth, there was *no request* to investigate and *no request* to prosecute anyone connected with Commonwealth at that time. The director testified that "our position was simply to point out the seriousness of our problem and what we thought would happen if there were an investigation and possible prosecution." It was concluded at the meeting that someone should talk to the FBI about the letter. Barry Lake testified that "it was resolved that I would go to the Federal Bureau of Investigation and discuss that letter with them."

It was the aim and purpose of the Department of Banking and Finance to save the institution for the depositors, if possible, by obtaining an infusion of capital and finding a purchaser. In accordance with banking department policy, criminal prosecution was the last step in the process, and was not to be commenced until the institution had been saved or all efforts to save the institution had been attempted.

The effort to save Commonwealth was successful only in part, in that S. E. Copple contributed additional property and capital to the institution. The department was unable to find a buyer, and on November 1, 1983, Commonwealth was declared insolvent and was closed by the Department of Banking and Finance. After the institution was closed there was some delay in commencing the receivership proceeding because the director was still trying to find a purchaser and did not want the Attorney

General to file a petition in the district court immediately.

During 1983 and earlier, the Department of Banking and Finance had been trying to obtain the services of a full-time assistant attorney general to assist the department with the large number of matters that were then pending in the department. Most of these matters involved security law violations, but there were also banking law violations. Lake estimated that the department had about a 2-year backlog of securities cases and an increasing number of criminal cases involving banks and other depository institutions like industrial loan and investment companies. On October 1, 1982, an assistant attorney general was hired and assigned to the banking department full time, but this employee left for a better paying job on October 11, 1982. There was a delay in finding another employee, partly due to transitional problems resulting from a change in the office of the Governor. During the interim, an assistant attorney general was assigned to the department, but not on a full-time basis.

On July 1, 1983, upon the recommendation of Gerald Vitamvas, the deputy attorney general, Ruth Anne Galter, an assistant attorney general of some 5 years' experience, was assigned to the Department of Banking and Finance full time. The assignment was actually made on May 4, 1983, but her duties with the banking department did not commence until June 1, and she was not full time until July 1, 1983.

On May 10, 1983, Ms. Galter met with Barry Lake and Patricia Herstein, also an assistant director and legal counsel to the department. Ms. Herstein had prepared two memorandums, one of which was a detailed list of matters which were under investigation and of concern to the department. The list contained 25 to 35 items, but Commonwealth was not on the list.

On or about May 4, 1983, Barry Lake mentioned to

the defendant that a report of examination of Commonwealth disclosed that Marvin Copple had received two $250,000 fees or commissions as part of a real estate transaction, which Lake thought amounted to theft. He did not testify to, and the record does not show, the date the fees or commissions were received. At this conversation the defendant stated that he had had "a personal and prior business relationship with Marvin Copple but he said that would not make any difference with respect to any criminal prosecution" and that "if Marv Copple was guilty of any crimes, that he would prosecute Marv Copple."

According to Lake, he advised Ms. Galter at a meeting with her on June 24, 1983, that she was to "review and supervise" any potential criminal activity in regard to Commonwealth and its principals. A typewritten status report of department investigations prepared by Lake and dated June 23, 1983, listed seven matters under investigation. Two items were added to this list in handwriting, one of which was "Commonwealth Sav Co. - Copples." The list included cases involving two industrial loan and investment companies other than Commonwealth, a cooperative credit association, and four banks. Lake testified that each of the nine items was discussed with Ms. Galter on June 24, 1983.

Lake testified that he met with Ms. Galter "every other two weeks" to discuss matters that she was working on and that he was satisfied with the progress which she made. Lake further testified that in his discussions with Ms. Galter he told her that, because of the large volume of cases that had been referred to her, "we should try to be as efficient as we could and that we should try to piggyback off of the FBI's investigation as much as possible." He further testified, "I mentioned to her my meeting with the FBI, the general substance of it and said I thought it would be a good idea for her to meet with the FBI and possibly the U. S. Attorney's

office to try to get as much of the — of evidence from their investigation as she could so that she wouldn't have to duplicate interviewing the people they had already interviewed."

On June 30, 1983, Ms. Galter met with Ronald Lahners, the U.S. attorney, concerning the Commonwealth matter. She was referred to Agent Campbell of the FBI, and she had several telephone conversations with Campbell. Campbell mentioned the names of several people, but stated that the information she wanted could be found in the records of the Department of Banking and Finance. She requested information concerning Commonwealth from both Lahners and Campbell, but it was not made available to her.

According to Ms. Galter, when she looked over a report of examination of Commonwealth in July, she requested a copy of the report, but it was not furnished to her. She requested a copy of the report again in October, but it was not given to her.

Both Lake and Ms. Galter testified that from time to time Lake would advise her as to which cases had priority and should be worked on first. Lake testified that the department did not set any specific priority on the Commonwealth matter. There is no evidence that Commonwealth was ever given a high priority by the banking department or that Ms. Galter was instructed to give it preference over the many other cases which had been assigned to her.

It is important to recognize the number of cases which had been assigned to Ms. Galter between July 1 and November 1, 1983, by the Department of Banking and Finance through Lake. During this time, Ms. Galter assisted the county attorney of Buffalo County in two cases. One, *State v. Giese*, involved a complicated fraud and theft charge. The other, *State v. Doolittle*, involved investigation in numerous counties. She was involved in *State v. Soukup* and *State v. Adams*, both of which were filed in Sarpy County but involved transactions in both

Douglas and Sarpy Counties. There were two criminal matters in Knox County which required her time. When the Bank of Niobrara failed, that matter required a week of her time. The financial crisis involving the Bank of Blair took a week of her time.

When Ruth Anne Galter reported to the defendant that she was investigating the matter of the $500,000 in commissions received by Marvin Copple, she was directed by the defendant to "keep on it" and "keep him advised." There is no evidence that Ruth Anne Galter failed to pursue the investigation or did anything which hampered or prejudiced the investigation of the commissions received by Marvin Copple from Commonwealth.

It is true that Ruth Anne Galter was indebted to Commonwealth at the time she was assigned to the Department of Banking and Finance and that she was the estranged wife of Paul Galter, who was a participant in the real estate transactions with the defendant. She was concerned about the possibility of a conflict of interest, and discussed the matter with the defendant and obtained legal advice from private counsel. She was advised by her counsel that there was no conflict of interest at that time. When Commonwealth was declared insolvent, Ruth Anne Galter requested that she be relieved of any further duties in regard to Commonwealth because of the conflict of interest arising out of her indebtedness to Commonwealth, which was then about to be placed in receivership.

From our consideration of the evidence we find that the allegations contained in specification No. 5 were not proved beyond a reasonable doubt and that the specification forms no basis upon which to remove the defendant from office. There is no evidence of gross neglect of any duty of the office, and no evidence of corrupt conduct or other malfeasance.

We believe it is appropriate to point out that whatever delay there may have occurred in regard to a

prosecution of Marvin Copple was consistent with the policy of the Department of Banking and Finance and its efforts to save the institution. There is no evidence of any prejudice to the State whatever in regard to a prosecution of Marvin Copple because of a failure to commence a prosecution at any time prior to November 1, 1983. Insofar as an investigation of Commonwealth is concerned, from the evidence presented in this case it would appear that most of the essential information was already in the possession of the banking department at the time of the conference with the Director of Banking and Finance at the office of the Attorney General on March 14, 1983. There is no evidence whatever of any prejudice to the State from a failure to conduct a more extensive investigation during the 7½-month period prior to November 1, 1983, alleged in the specification.

Under the evidence in this case the Attorney General had no duty to refuse to cooperate with the Director of Banking and Finance in his efforts to save the institution. While these efforts may have been futile because of the condition of the institution, there is no evidence that the Attorney General was aware of the true financial condition of Commonwealth, and no evidence that he should have questioned the judgment of the Director of Banking and Finance in the matter.

SPECIFICATION NUMBER SIX - DUTY TO AVOID EVEN THE APPEARANCE OF IMPROPRIETY

1. The general allegations hereinabove recited are incorporated herein as if set forth verbatim;

2. From approximately 1973 until approximately 1982, Paul L. Douglas engaged in various business transactions with Marvin Copple, Judy Driscoll, or Commonwealth Savings Company which were not in the ordinary course of business, all as more specifically described in the

report of Officer Lowe of the Lincoln Police Department, dated February 21, 1984, and the report of David Domina and John Miller, dated January 20, 1984;

3. Paul L. Douglas did not fully and openly and honestly cooperate with Special Assistant Attorney General David Domina in Mr. Domina's investigation into possible acts of official wrongdoing;

4. As a result of the foregoing, Paul L. Douglas violated:

A. The Code of Professional Responsibility adopted by the Nebraska Supreme Court including, but not limited to, DR 1-102, or,

B. The Code of Professional Responsibility adopted by the Nebraska Supreme Court, including, but not limited to, the ethical considerations related [to] DR 8; or,

C. The Code of Professional Responsibility adopted by the Nebraska Supreme Court, including, but not limited to, the ethical considerations related to DR 9; or,

D. Neb. Rev. Stat. § 7-105 relating to the duties of attorneys; or,

E. Neb. Rev. Stat. § 7-106 relating to deceit or collusion by attorneys; or,

F. Neb. Rev. Stat. § 28-901 relating to obstructing governmental operations; or,

G. Neb. Rev. Stat. § 28-924 relating to official misconduct.

Paragraph 2 of the specification refers to reports which were not received in evidence. The allegation that various transactions "were not in the ordinary course of business" did not allege an impeachable offense, because it does not describe an official delinquency.

The allegation in paragraph 3 that Douglas did not fully, openly, and honestly cooperate was discussed in part in connection with specifications Nos. 1 and 2. To the extent that the allegations are intended to

expand upon those in specifications Nos. 1 and 2, they do not contain any specific statements of fact sufficient to constitute an impeachable offense. The Miller-Domina report was not received in evidence and the police report was not offered.

The State's theory is that (1) Douglas was engaged in financial transactions outside of the ordinary course of business, (2) Douglas was neither candid, open, nor honest when interviewed by John Miller and David Domina, and (3) such acts and omissions violated his duty to avoid the appearance of impropriety.

Specification No. 6 alleges that Douglas violated Canon 9 of the Nebraska Code of Professional Responsibility. This code in its present form was proposed in 1969 by the American Bar Association (ABA); it was later adopted, with few exceptions not applicable here, by the Supreme Court of the State of Nebraska.

The general purpose of the code is to encourage and develop the conscience and ethics of lawyers in their professional and private lives, to the end that the institution of the law merits and receives the trust and respect of the public. These excerpts are taken from the Preliminary Statement of the ABA draft of the code to further explain the code.

> The Code is designed to be adopted by appropriate agencies both as an inspirational guide to the members of the profession and as *a basis for disciplinary action* when the conduct of a lawyer falls below the required minimum standards stated in the Disciplinary Rules.
>
> . . . .
>
> The Canons are statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers in their relationships with the public, with the legal system, and with the legal profession. . . .
>
> . . . .
>
> . . . . The Code makes no attempt to prescribe

> either disciplinary procedures or *penalties for violation* of a Disciplinary Rule, nor does it undertake to define *standards for civil liability* of lawyers for professional conduct.

(Emphasis supplied.) ABA Code of Professional Responsibility 2 (Final Draft 1969).

The following from Canon 9 of the code, referred to in the specification, lends further explanation of the lawyer's duty to avoid the appearance of professional impropriety.

> EC 9-1. Continuation of the American concept that we are to be governed by rules of law requires that the people have faith that justice can be obtained through our legal system. A lawyer should promote public confidence in our system and in the legal profession.
>
> . . . .
>
> EC 9-6. Every lawyer owes a solemn duty to uphold the integrity and honor of his profession; to encourage respect for the law and for the courts and the judges thereof; to observe the Code of Professional Responsibility; to act as a member of a learned profession, one dedicated to public service; to cooperate with his brother lawyers in supporting the organized bar through the devoting of his time, efforts, and financial support as his professional standing and ability reasonably permit; to conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of his clients and of the public; and to strive to avoid not only professional impropriety but also the appearance of impropriety.

The present Nebraska State Bar Association (NSBA) was formed as an integrated bar in 1937. *In re Integration of Nebraska State Bar Ass'n*, 133 Neb. 283, 275 N.W. 265 (1937). The Supreme Court of the State of Nebraska governs the admission of lawyers to practice law and their professional conduct; it is vested with the singular power and authority to dis-

cipline lawyers, including power to disbar, suspend, and/or censure, as the nature and circumstances of the case warrant. Complaints concerning alleged violations of the code are processed through disciplinary committees and the Counsel for Discipline of the NSBA.

We do not intend to say that violations of a code disciplinary rule do not have substance. On the contrary, the code is viable, but it concerns only standards of conduct, discipline, and penalties relating to a lawyer's professional life. Whether the defendant has violated the Code of Professional Responsibility is a matter to be determined in a disciplinary proceeding commenced for that purpose.

Although an act or omission by a lawyer may be both a violation of a disciplinary rule and an impeachable offense, it does not follow that a violation of a disciplinary rule, as such, is an impeachable offense.

It is further noted that in addition to possible disciplinary measures under the Code of Professional Responsibility, and dependent upon the nature and the circumstances of an alleged violation, a lawyer may be held liable in the civil courts and prosecuted in the criminal courts.

Insofar as specification No. 6 alleged a duty to avoid even the appearance of impropriety, it did not allege an impeachable offense.

For the reasons stated the defendant is adjudged not guilty of all specifications.

JUDGMENT OF NOT GUILTY.

HASTINGS, SHANAHAN, and GRANT, JJ., and MORAN, D.J., dissenting.

For the reasons hereinafter stated we dissent from the acquittal on specification No. 1—duty not to misrepresent.

Paul L. Douglas, before being elected Attorney General of the State of Nebraska, invested in the commodities market with a friend, Paul E. Galter, a Lincoln attorney. That venture into commodities

was unsuccessful, for Douglas and Galter lost $40,000 —a $20,000 loss sustained by each in the market endeavors.

After Douglas' election as Attorney General, Galter told Douglas about a real estate investment, namely, real estate development projects by Marvin Copple, a friend and client of Galter's. Regarding the prospective developments and the roles of each participant, initial capital or financing was supplied by Copple; Galter provided any "purely legal services"; and "many other services" would be provided by the three—Copple, Galter, and Douglas. Douglas, who had no experience in land development, acted as a consultant to Copple in the projects.

The real estate projects involving Douglas centered around developments known as Fox Hollow and Timber Ridge. From January 1, 1977, to June 1, 1979, Galter and Douglas bought 78 Fox Hollow lots from Copple at an aggregate price of $668,129. Throughout this time, Copple was a director of Commonwealth Savings Company, a fact known to Douglas. Copple sold Galter and Douglas lots at a "discount" or reduced purchase price. When Galter and Douglas resold the lots, profit on the resale would constitute their compensation for services rendered to Copple for the real estate projects. It was contemplated that the entire "transaction would take about two years." Copple told Galter and Douglas that their "financial worries were over."

Among his consulting services to Copple, Douglas visited members of Lincoln's city council about zoning Timber Ridge, conferred with the Lincoln city attorney and with the U.S. Corps of Engineers about a water easement in Fox Hollow, met with paving contractors concerning Fox Hollow, and studied methods of installing utilities in Fox Hollow. The bulk of Douglas' time in consulting was directed to Fox Hollow.

Apart from any profit realized on resale of lots

acquired from Copple, Douglas also received payments from Copple, namely, $5,000 on December 20, 1978; $5,000 on April 13, 1979; $7,500 on September 6, 1979; and $15,000 on December 5, 1980. Those payments by personal check of Copple had a total of $32,500. Galter did not share any part of the $32,500 paid by Copple.

On March 14, 1983, Paul Amen, director of the Department of Banking and Finance of the State of Nebraska, received a letter from the Federal Bureau of Investigation implying that there might be irregularities in loans at Commonwealth. Copple's name was not mentioned in the FBI letter to Amen. Douglas received a copy of the FBI letter.

On May 4, 1983, Barry Lake, assistant director of the Department of Banking and Finance, personally met with Douglas at the Attorney General's office to inform Douglas of "evidence of possible crimes that were not mentioned" in the FBI letter. Lake told Douglas about an examination report reflecting Copple's receipt of $500,000 in what appeared to Lake to be an "insider-type transaction" which Lake characterized as "theft."

Lake later pointed out to Ruth Anne Galter, an assistant attorney general assigned by the Attorney General to the Department of Banking and Finance, the two Copple transactions reflected in an examination report on Commonwealth. Ms. Galter "could not characterize them as insider loans," but in July 1983 reported to Douglas the $500,000 Copple "commissions."

On November 1, 1983, Commonwealth was declared insolvent and its doors closed by receivership. Around November 12, 1983, Amen resigned as director of the Department of Banking and Finance, and on November 16, 1983, John P. Miller was appointed interim director of the department.

In his letter of November 18, 1983, Douglas designated David A. Domina as "special counsel to handle

all legal matters relating to Commonwealth Savings Company."

Domina, by his letter of November 25, 1983, to Douglas, requested information regarding "any payment received by you as compensation for any service(s) from [Marvin Copple]." There was no reply to Domina's letter before Domina personally interviewed Douglas.

Within a few days after Douglas' receipt of Domina's letter, Douglas, Domina, and Miller met at Douglas' office to "set the ground rules for the taking of Paul's testimony." At that time Douglas stated "he wanted the opportunity of making full disclosure of all his involvement in the matters relating to Commonwealth."

In a transcribed interview with Douglas on November 30, 1983, Domina asked about compensation which Douglas had received from Copple.

> Q. . . . Were there other developments, then, besides Fox Hollow and Timber Ridge for which you were paid for services as counsel?
>
> A. There was always something coming up, and as it was requiring my time and my counsel — and I would remind him of it and periodically — he would pay me for it. . . .
>
> . . . .
>
> Q. Did you ever specifically bill Mr. Copple for your counsel on these other projects other than Fox Hollow and Timber Ridge?
>
> A. No.
>
> Q. Did you ever give him orally, you know, a figure or ask for a specific amount of compensation on those other projects?
>
> A. No.
>
> Q. How did he pay you for your services on the projects other than Fox Hollow and Timber Ridge or did he?
>
> A. He never did pay me.

During a second transcribed interview by Domina on December 12, 1983, Douglas again discussed his

compensation for services to Copple, and informed Domina and Miller that Copple was going to convey a 10-percent interest in Timber Ridge to Galter and Douglas. Such acquisition of the 10-percent interest was not part of the lot-resale plan involving Fox Hollow. In this second interview there was no specific inquiry by Domina regarding compensation other than compensation resulting from the acquisition of real estate interests—Fox Hollow and Timber Ridge—and there was no mention of Copple's payment of $32,500 to Douglas.

Upon completion of his investigation Domina, with Miller, prepared a report, the "Miller-Domina report," which was submitted to the Legislature.

After the Miller-Domina report and in his letter of February 6, 1984, to Richard G. Kopf, special counsel for the Special Commonwealth Committee of the Legislature, Douglas stated that Copple was "willing to compensate us for our services by allowing us to participate in the profits of future lot sales." Later, in this letter to Kopf, Douglas stated:

> For all those services, I received compensation in the form of reduced price purchases of Fox Hollow lots, *money*, and a, to date unconveyed, 10% interest in Timber Ridge. . . . That compensation was paid to me in accordance with the general agreement and understanding between Paul Galter, myself and Marvin Copple. . . . As indicated, the transaction [resale of lots] was designed to provide compensation to us for our services.

(Emphasis supplied.) Douglas then disputed a profit of $118,288.67 on resale of the lots as alleged by the State, that is, the allegation that Galter and Douglas each received a profit of $59,144.34. Douglas indicated the net profit on resale of the lots was $89,544.22, or a profit of $44,772.11 each for Galter and Douglas. Douglas' letter to Kopf continued:

> Although I advised Mr. Domina that Marvin Copple made payments to me from time to time,

> no one has ever asked me whether or not the only payments I received for my services in connection with all the real estate developments . . . were received as profits from the lot sales. Because of the extensive additional work which I did . . . I was paid a total of $32,500 during 1978, 1979 and 1980. For more than 1,500 hours of work over a period of five years, I received a total of $77,272.11.

Douglas' letter of February 6 was the first public disclosure of the $32,500 paid by Copple.

At the hearing before the Special Commonwealth Committee of the Legislature on February 24 or 25, 1984, Douglas commented upon the Copple payments of $32,500:

> I wish I would have told them about the extra 32 five. I didn't, but that hardly puts me in the role that he [Domina] says that I belong in, but interestingly enough, on his examination of me, he asked me this question: "All right. Were there other developments, then, besides Fox Hollow and Timber Ridge for which you were paid for services as counsel"? That was the question. "Were there other developments besides Fox Hollow and Timber Ridge for which you were paid for services as counsel", and I responded, "There was always something coming up, and it required my time and counsel. I would remind him of it periodically; he would pay me for it". Now, he didn't pursue that. It is quite obvious that I didn't volunteer it, and I should have.
>
> On the next — Later on on that page, he asks the question slightly different, and I played the part of the lawyer and answered his question. Again, I say, I should have told him. "Did you especially bill Mr. Copple for your counsel on these other projects other than Fox Hollow and Timber Ridge"? And the answer was, "No", and that is a correct answer, but I knew what he wanted. "Did you ever give him orally, you

> know, a figure or ask for a specific amount for compensation on these other projects"? The answer was, "No". "How did he pay you for your services on the project other than Fox Hollow? How did he pay you for your services on the projects other than Fox Hollow and Timber Ridge, or did he"? I answered the first part of the question by saying, "He never did pay me", meaning he never did pay me for projects other than Fox Hollow and Timber Ridge, and I realize that when I got my statement, and one of the first things we talked about, and one of the things that I did in the two-week period of time was to put it in the report, not only put it in that I had gotten paid, but tell you the exact amount of money that I made.

The profit from the resale of lots was produced over a period of almost 3½ years. Galter knew Douglas "had received money from Marvin Copple in connection with other transactions," namely, Timber Ridge. However, Douglas' letter to Kopf was Domina's first knowledge about Copple's payment of $32,500 to Douglas.

"Misrepresentation. Any manifestation by words or other conduct by one person to another that, under the circumstances, amounts to an assertion not in accordance with the facts. . . . That which, if accepted, leads the mind to an apprehension of a condition other and different from that which exists." Black's Law Dictionary 903 (5th ed. 1979).

Misrepresentation is any manifestation by words or other conduct by one person to another that, under the circumstances, amounts to an assertion not in accordance with the facts. See, *Pasko v. Trela*, 153 Neb. 759, 46 N.W.2d 139 (1951); *Caruso v. Moy*, 164 Neb. 68, 81 N.W.2d 826 (1957).

Before we determine whether Douglas had a duty to refrain from misrepresentation during Domina's investigation concerning Commonwealth, we must first examine Douglas' status during that investiga-

tion. Douglas was the elected Attorney General of the State of Nebraska during the interviews. As Attorney General, Douglas was a public officer holding a position of public trust. Throughout the United States, public officers have been characterized as fiduciaries and trustees charged with honesty and fidelity in administration of their office and execution of their duties. See, *Driscoll v. Burlington-Bristol Bridge Co.*, 8 N.J. 433, 86 A.2d 201 (1952); *Marshall Impeachment Case*, 363 Pa. 326, 69 A.2d 619 (1949); *Fuchs v. Bidwill*, 31 Ill. App. 3d 567, 334 N.E.2d 117 (1975); *Williams v. State*, 83 Ariz. 34, 315 P.2d 981 (1957); *Jersey City v. Hague*, 18 N.J. 584, 115 A.2d 8 (1955); *In re Removal of Mesenbrink as Sheriff*, 211 Minn. 114, 300 N.W. 398 (1941); *Matter of Parsons v. Steingut*, 185 Misc. 323, 57 N.Y.S.2d 663 (1945); 67 C.J.S. *Officers* §§ 11, 201 (1978); 63 Am. Jur. 2d *Public Officers and Employees* § 7 (1972).

"Although the general rule is that 'one party to a transaction has no duty to disclose material facts to the other,' an exception to this rule is made when the parties are in a fiduciary relationship with each other." *Midland Nat. Bank, etc. v. Perranoski*, 299 N.W.2d 404, 413 (Minn. 1980). When a relationship of trust and confidence exists, the fiduciary has the duty to disclose to the beneficiary of that trust all material facts, and failure to do so constitutes fraud. See 37 C.J.S. *Fraud* § 16 d. (1943).

" 'It is the duty of a trustee to fully inform the cestui que trust [beneficiary] of all facts relating to the subject matter of the trust which come to the knowledge of the trustee and which are material to the cestui que trust to know for the protection of his interests.' " *Johnson v. Richards*, 155 Neb. 552, 566-67, 52 N.W.2d 737, 746 (1952). See, also, *First Trust Co. v. Carlsen*, 129 Neb. 118, 261 N.W. 333 (1935); *Rettinger v. Pierpont*, 145 Neb. 161, 15 N.W.2d 393 (1944).

Where one has a duty to speak but deliberately remains silent, his silence is equivalent to a false rep-

resentation. See *Anderson v. Anderson*, 620 S.W.2d 815 (Tex. Civ. App. 1981). One standing in the relationship of a trustee to another owes to that other the duty of making a full disclosure of all matters appertaining to the trust, and neglect to do so, when the trustee knows or has good reason to believe that silence will result, is a "fraudulent act." *Kauffman v. McLaughlin*, 189 Okla. 194, 114 P.2d 929 (1941).

"The failure on the part of one occupying a fiduciary relation to disclose fully and fairly all of the facts to those to whom such duty of disclosure is owed may be regarded as evidence of fraud." *Grigg v. Hanna*, 283 Mich. 443, 459, 278 N.W. 125, 131 (1938).

Fraud can exist in the absence of a positive false statement. See *Krueger v. St. Joseph's Hospital*, 305 N.W.2d 18 (N.D. 1981).

> [S]uppression of a material fact, which a party is bound in good faith to disclose, is equivalent to a false representation. . . . Fraud may arise not only from misrepresentation but from concealment as well. For concealment to constitute fraud, there must be suppression of facts which one party has a legal or equitable obligation to communicate to another. One who stands in a confidential or fiduciary relationship to another party must disclose material facts and must reveal enough information to prevent misleading the other party.

Id. at 25. In reference to misrepresentation and fraud, *concealment* means nondisclosure when a party has a duty to disclose. See *Reed v. King*, 145 Cal. App. 3d 261, 193 Cal. Rptr. 130 (1983). " 'Where persons sustain toward [another] a relation of trust and confidence, their silence when they ought to speak . . . is as much a fraud in law as an actual affirmative false representation.' " *Wade v. Thomasville Orthopedic Clinic*, 167 Ga. App. 278, 281, 306 S.E.2d 366, 368 (1983). "The concealment of a fact which one is bound to disclose is an indirect representation that such fact does not exist, and consti-

tutes fraud." 37 C.J.S. *Fraud* § 16 a. at 245 (1943).

Douglas had appointed Domina to "handle legal matters" relating to Commonwealth. Domina's investigation of the Commonwealth catastrophe necessarily and legitimately included inquiry about the activities of officers and directors of the insolvent company. Because Douglas had a business association with Copple, a director of Commonwealth, the line of inquiry logically led to Douglas. In order to determine and evaluate the precise relationship between Copple and Douglas, Copple's payments to Douglas demanded explanation.

There is no room for doubt that Domina's letter of November 25, 1983, to Douglas and the subsequent interviews of Douglas sought the nature and reason for all compensation which Copple had paid to Douglas. It is true Domina did not ask Douglas the precise question, Were the profits on resale of the lots the *only* compensation received from Copple regarding real estate developments? Yet, in his testimony before the legislative committee on February 24 (February 25), Douglas said, "[A]nd I played the part of the lawyer and answered his question . . . but I knew what he wanted." What was "wanted" was the truth about compensation paid by Copple to Douglas.

As Attorney General, Douglas was responsible to the State of Nebraska and owed loyalty to the people of Nebraska as a trustee of the public interest. Cf. *Gardner v. Broderick*, 392 U.S. 273, 88 S. Ct. 1913, 20 L. Ed. 2d 1082 (1968) (a law enforcement officer's relationship and loyalty to a city or state as an employer).

Douglas' comments before the legislative committee are a positive and unambiguous expression of his mental state during the interviews by Domina, that is, he knew the subject of the inquiry—compensation paid by Copple—and recognized that "I should have told" Domina about the $32,500. There could hardly be a more clear-cut acknowledgment of the duty to

disclose the information and breach of that duty to speak in response to the public's inquiry. At the time of Domina's inquiry in December 1983, information about payments from Copple was particularly within Douglas' knowledge. As a fiduciary and upon inquiry, Douglas was required to disclose his compensation from Copple. Public trust is not a field on which a public officer can display gamesmanship by playing "the part of the lawyer."

> Though one may be under no duty to speak, if he undertakes to do so, he must tell the truth and not suppress facts within his knowledge or materially qualify them. Fraudulent representations may consist of half-truths calculated to deceive, and a representation literally true is fraudulent if used to create an impression substantially false.

Johnson v. Richards, 155 Neb. 552, 563, 52 N.W.2d 737, 744 (1952). See, also, *State ex rel. Nebraska State Bar Assn. v. Richards*, 165 Neb. 80, 84 N.W.2d 136 (1957). "To reveal some information on a subject triggers the duty to reveal all known material facts." *Wirth v. Commercial Resources, Inc.*, 96 N.M. 340, 345, 630 P.2d 292, 297 (1981). "[W]hen a party undertakes to disclose anything, it has the duty to speak the full truth." *Issen v. GSC Enterprises, Inc.*, 538 F. Supp. 745, 751 (N.D. Ill. 1982). Even if a party has no duty originally, partial disclosure creates a duty for full disclosure. *Ingaharro v. Blanchette*, 122 N.H. 54, 440 A.2d 445 (1982). Although a party is under no duty to speak, once the party does speak, that party is required to make a full and fair disclosure concerning the matters discussed. *Shaver v. N.C. Monroe Const. Co.*, 63 N.C. App. 605, 306 S.E.2d 519 (1983).

> Thus where one person seeks information from another and expressly states that he will place reliance on the latter's statements, or the circumstances are such that the person approached must know that what he says will be relied on,

> he may either refuse to give any information or he must make a full and truthful disclosure which shall have no tendency to deceive or mislead.
>
> A duty to speak may arise from partial disclosure, the speaker being under a duty to tell the whole truth although he might have said nothing.

37 C.J.S. *Fraud* § 16 c. at 247 (1943).

"Although a party may keep absolute silence and violate no rule of law or equity, yet, if he volunteers to speak and to convey information which may influence the conduct of the other party, he is bound to discover [disclose] the whole truth. A partial statement, then, becomes a fraudulent concealment, and even amounts to a false and fraudulent misrepresentation." *Gidney v. Chapple et al.*, 26 Okla. 737, 753, 110 P. 1099, 1105-06 (1910).

When Douglas gave a rather lengthy, sometimes detailed, but frequently confusing account of the acquisition and disposition of Fox Hollow lots and the prospective 10 percent interest in Timber Ridge as compensation for services to Copple, Douglas was required to reveal *all* information about his compensation and to make a truthful disclosure regarding his compensation from Copple. During the November 30 interview by Domina, Douglas was questioned: "Q. . . . Were there other developments, then, besides Fox Hollow and Timber Ridge for which you were paid for services as counsel? A. There was always something coming up . . . he would pay me for it. . . ." And several questions later: "Q. How did he pay you for your services on the projects other than Fox Hollow and Timber Ridge or did he? A. He never did pay me." Douglas' answers about his compensation from Copple were inconsistent and created a substantially false impression during the interviews. Douglas' office as a public trust required correction and elimination of the false impression resulting from the inconsist-

ent answers. We note that the provisions of the Model Penal Code § 241.1(5) at 93 (1980) provide:

> Where the defendant made inconsistent statements under oath or equivalent affirmation, both having been made within the period of the statute of limitations, the prosecution may proceed by setting forth the inconsistent statements in a single count alleging in the alternative that one or the other was false and not believed by the defendant. In such case it shall not be necessary for the prosecution to prove which statement was false but only that one or the other was false and not believed by the defendant to be true.

From his comments before the legislative committee, Douglas knew that he had created a false impression during his interviews by Domina. Such conduct by Douglas was a misrepresentation under the circumstances.

Pecuniary loss by the State of Nebraska is not a necessary element of misrepresentation in this case. Cf. *Chicago ex rel. Cohen v. Keane*, 64 Ill. 2d 559, 357 N.E.2d 452 (1976) (monetary damage to a governmental entity to which an officer has been elected or appointed is not necessary for a violation of a rule forbidding conflict of interest). Direct financial gain does not have to result from misrepresentation by a public officer. Cf. *Miller v. City of Martinez*, 28 Cal. App. 2d 364, 82 P.2d 519 (1938) (in a conflict of interest, the interest does not have to involve a direct financial gain on the part of a public official; the interest can be anything which would prevent the public official from exercising absolute loyalty and undivided allegiance to the best interest of the government he serves, that is, absolute freedom from any influence other than that which may grow out of the obligation he owes to the public).

We will not speculate on the investigative avenues which might have opened, had the payments of $32,500 been disclosed during the Domina interviews

of Douglas. The benefit to Douglas by his misrepresentation was the advantage of time gained outside the focus of public inquiry.

If there is no misrepresentation in the case before us, references to public trust are reduced to political platitudes or rhetoric.

The circumstances in this case raise many unanswered questions about the entire situation involving Copple and Douglas. Nevertheless, based on the evidence before us, we find beyond a reasonable doubt that the misrepresentation by Douglas was willfully done with a corrupt intention. Specifically, we find that Douglas is guilty of specification No. 1 of the articles of impeachment and resolution submitted by the Eighty-eighth Legislature, Second Session, of the State of Nebraska. Therefore, we would find that Paul L. Douglas has committed a misdemeanor in his office as Attorney General of the State of Nebraska.

SHANAHAN and GRANT, JJ., and MORAN, D.J., dissenting.

For the reasons hereinafter stated we dissent from the acquittal on specification No. 2—duty not to lie.

The following appear to be the defendant's statements on this specification. The questions are asked by Mr. Domina and the answers are defendant's.

> Q. So, the proceeds of the July 20, 1979 sale to Driscoll enabled you to pay off that 1973 note, correct?
> A. Yes, that's correct.
> Q. Who arranged the sale to Judy Driscoll?
> A. Marvin Copple arranged for all the sales.
> Q. Did you ever talk to Judy Driscoll about that sale?
> A. No.
> Q. Do you know where she got the money to pay you off?
> A. No. I was led to believe and I think I said earlier to you that Marvin had had a buyer that

wanted to buy the lots. And that he would sell it to me, we would make some profit, we would sell it to Judy — he would sell it to me, we would sell it to Judy, Judy would make some profit and then Judy had a buyer and she would make a profit.

. . . .

Q. I want to ask you one other thing relating to the Judy Driscoll purchases. You were fully aware, were you not, that Judy Driscoll had no money with which to buy any property?
A. No, I was not.
Q. Did you ever ask her?
A. No.
Q. Did you negotiate with her?
A. No.
Q. Did you find it unusual that the secretary of a guy who bought your lots, sold you your lots, would buy yours?
A. No, I did not.
Q. Did you ask any questions about that at all?
A. I told you why he explained to me they were going to be sold from me to Judy.
Q. Why would Marvin Copple, who you described as a well-respected, ethical businessman, sell you 12 lots for $105,000 on June 1 and permit you to buy them from his secretary for at least 15 and maybe —
A. Sell them to his secretary.
Q. Sell them to his secretary for somewhere between 15 to $30,000 more 50 days later?

This question was never answered.

Q. Now, in any event later on Judy Driscoll then borrowed some money from Commonwealth to buy lots from you, didn't she?
A. You told me that.
Q. Did you know that?
A. I did not know that.
Q. Did Marvin Copple ever tell you that he was going to use Judy Driscoll to borrow money

from Commonwealth because he couldn't?

A. No, never.

In his letter response to the Miller-Domina report on February 6, 1984, the defendant stated:

> The [Miller-Domina] report indicates that a number of the lots transferred to Judy Driscoll remain unsold and that a substantial balance is due to Commonwealth from Judy Driscoll. We had no knowledge that Commonwealth financed her acquisition of those lots.

The question is clear, Did defendant lie when he said he did not know that Judith Driscoll was being financed by Commonwealth Savings Company when she bought lots from defendant and Paul Galter?

Defendant's connection with Marvin Copple began, so far as this case shows, on December 29, 1973. Defendant borrowed $6,500 from Marvin Copple personally, apparently to buy a car. Marvin Copple assigned defendant's note to Commonwealth on December 29, 1973, "without recourse." Defendant paid some interest on the note, but finally began having the interest added to the note and signing extension notes ranging from 30 days to 1 year, until the Commonwealth note was finally paid off by defendant on August 30, 1979, when defendant paid Commonwealth two checks totaling $8,556.

During the time that this note was unpaid, defendant borrowed $25,000 on December 3, 1976, to repair his home. Defendant's certificate given to Commonwealth on that date stated the money was "for business and commercial purposes; and not for personal, family, household, or agricultural purposes." Defendant stated, however, that this loan was taken out to repair his residence. This note was a signature note and was extended some 15 times. Interest was seldom paid, but was added to the principal at the times of renewal. This note was paid off by defendant by a check in the amount of $54,048.51 on September 7, 1982. This payment was apparently financed by an August 31, 1982, loan of $55,000 from

First Security Bank & Trust Co. of Beatrice, Nebraska, an institution owned by Copple family members. The First Security note was then paid by a loan from an outside bank on November 23, 1983.

Aside from these troublesome financial problems, defendant and Paul Galter, prior to 1975, engaged in the commodities market and lost the sum of $40,000, or $20,000 each. Defendant told Paul Galter that he, Douglas, would have to make that money up. Galter told defendant that Marvin Copple was going to start a new development and needed help. The three met, and Copple agreed to take Douglas into the Copple-Galter venture. Galter was to do the legal work, and defendant was to counsel Copple on other details of the development. The arrangement for compensation was described by defendant, in answer to Mr. Domina's questions, as follows:

> Q. Then how were you to be paid as a result of that arrangement?
>
> A. The way the contract was originally drawn up he would — he would sell us the lots at a hundred dollars — the original contract that I had with him — that we had with him, that Paul Galter and I had with him listed 26 lots.
>
> Q. All in Fox Hollow?
>
> A. All in Fox Hollow. And there was a set total purchase price of $241,774 for the 26 lots. That was computed on the basis of a hundred dollars per frontal foot for that real estate. And that's in the contract, and I'll give you a copy of the contract. That as he would find a buyer he would give me a deed. I would give the buyer a deed. The buyer would pay me for the purchase of the lot and I would pay Marv Copple for — for that lot. In the contract each lot is not broken down individually, but he did give me a price on every one of the lots so I would know what I paid for each lot for tax purposes, and what the lot was sold for and the difference would be money that Paul Galter and I would jointly get for the

sale of the lots which would compensate us for the work that we had done helping Marvin develop those lots.

Q. Was your compensation calculated on a per hour basis or a per transaction basis or how did you know how much you would be paid?

A. I didn't know how much — I had no idea how much I was going to end up making on this except, as I indicated to you, Marvin Copple had led Paul Galter and I to believe — and I'm not saying deceivingly, I'm saying he led us to believe that there was a lot of money to be made and always left us with the assurance that we were going to be well compensated for it, and I remember that if he told me once he told us several times along the way as things were — were progressing very well, that our financial worries were over. He had anticipated that the whole transaction would take about two years.

The arrangement for compensation to defendant and Galter began with a purchase agreement executed January 12, 1977, between defendant and Galter, as buyers, and Marvin Copple, as seller. This agreement covered 26 lots for the price of $241,774. The next agreement between the same parties was for 40 lots for $320,755 and was executed on September 8, 1977, and the last agreement was executed on June 1, 1979, for 12 lots for $105,600. Exhibit 45 was received in evidence. It is a partial abstract of the title to the 78 lots involved in the three Copple-Douglas transactions during the period relevant to this case.

In the original 26-lot agreement the buyers were to have 120 days interest free, but on April 20, 1977, Copple called defendant and Paul Galter to Copple's office and told them that the purchase agreement had been assigned to Commonwealth and that defendant and Galter should borrow the necessary funds from Commonwealth to pay Copple off. Without objection and pursuant to Copple's direction, on

April 20, 1977, defendant signed a 6-month, $241,774 note to Commonwealth (with the rate changed from the printed rate of 11 percent to 8¾ percent). Paul Galter guaranteed this note. A Commonwealth check in that amount was issued to defendant, Galter, and Copple. Defendant and Galter endorsed the check, and Marvin Copple deposited it in his personal account on April 21, 1977. This arrangement was not satisfactory to defendant and Galter because of the interest which would accrue on the Commonwealth note, and defendant stated that he did not want to transact business again with Marvin Copple in this fashion. The relevance of this transaction to later dealings with Judith Driscoll is that defendant certainly knew that in connection with the beginnings of the convoluted compensation plan between Copple and Douglas, money did flow from Commonwealth to Marvin Copple. Defendant executed a mortgage to Commonwealth, but that mortgage was never filed on these 26 lots.

Pursuant to the agreement between Copple, Galter, and Douglas, Copple was to arrange for sales to third parties at a price that would result in a gain to defendant and Galter. Examination of exhibit 45 indicates that 18 of these lots were sold to third persons (i.e., to someone other than Judith Driscoll) at some time.

One lot, although a part of the purchase agreement between Copple and defendant, was sold in September of 1978 directly by Copple to a third party. No explanation is furnished concerning this sale.

Four lots were conveyed by Marvin Copple and his wife to defendant on April 20, 1977 (deed recorded on May 16, 1980), at a total price of $38,500. No evidence is furnished as to defendant's selling of these four lots, but passing reference is made to the lots in the abstract (exhibit 45), and three of the lots ended up titled in Commonwealth Savings Company in 1981.

The other lot is shown mortgaged to Commonwealth in 1977.

As to two other lots, exhibit 45 shows nothing, except that those two lots apparently were conveyed from Swails Construction Company to Commonwealth Savings Company by warranty deed in February 1981.

As to the remaining 11 lots of the 18 allegedly sold to third parties, 5 were sold by defendant to third parties by 5 deeds dated in May, August, and October 1977. The five deeds to those lots to defendant from Marvin Copple and his wife were dated a few days before the sale. Judith A. Driscoll was the notary public on all of these deeds to and from defendant. On four of these transactions, according to the revenue stamps, defendant was a mere conduit and made no profit. On one transaction defendant made $2,500. On May 16, 1978, defendant sold three lots on one deed to a third party after getting title from Copple the day before. There was no profit on this transaction. On May 15, 1978, defendant sold three more lots to another purchaser after getting title to these lots 3 days before. There was a $3,000 profit on these lots.

In this connection, defendant stated in his December 12, 1983, statement that he and Galter had bought and sold 10 lots of the original 26 lots in 1977 and that each had a net gain of $5,808. No evidence was furnished in explanation of this difference.

After the disposition of 18 of the 26 lots, 8 lots were left. With regard to these eight lots, all subject to Commonwealth's unrecorded mortgage, on August 28, 1979, defendant sold each of these lots by separate warranty deed to J. A. Driscoll. An individual deed to each lot, dated April 20, 1977, from Marvin Copple and his wife to defendant, was recorded on May 16, 1980. (Each of these 16 deeds was acknowledged before W. N. Stevenson, an assistant vice president of Commonwealth.) Ms. Driscoll borrowed $100,500 from Commonwealth on August 28,

1979, deposited this sum in her personal account, and paid Douglas by check on August 30, 1979. Douglas paid Commonwealth the same day, finally closing out defendant's 1977 $241,774 debt to Commonwealth. Each of these eight lots remained titled in J. A. Driscoll's name as of the time of trial, subject to a mortgage, acknowledged before W. N. Stevenson, to Commonwealth in the amount of $100,500.

Next, defendant and Paul Galter entered into a purchase agreement with Marvin Copple on September 8, 1977, to purchase 40 described lots in Fox Hollow Second Addition for a price of $320,755, payable not later than September 8, 1978. Judith Driscoll acknowledged the parties' execution of this agreement.

At the time of this purchase agreement, Marvin E. Copple and his wife had executed (on September 1, 1976) a mortgage covering the entire 40 lots (and probably much more land) to the National Bank of Commerce Trust & Savings Association in the amount of $841,500. So far as the evidence presented to the court shows, this mortgage had not been released as of March 26, 1984, as to the lots in this 40-lot transaction. Paul E. Galter was the notary public who acknowledged this mortgage.

On December 27, 1977, J. A. Driscoll signed a note in the amount of $371,814 to Commonwealth and received from Commonwealth a check in that amount. On the same date, J. A. Driscoll executed a mortgage to Commonwealth in the same amount. This mortgage was never recorded.

The $371,814 Commonwealth check was endorsed by Ms. Driscoll "Pay to the order of P.P.S.S. A Partnership" and deposited by defendant in the P.P.S.S. account on the same day, December 27, 1977. On the same day, defendant signed a P.P.S.S. check in the amount of $320,755 to Marvin E. Copple. This check to Copple was also deposited in his account the same day. At this point, defendant and Paul

Galter have made a profit of $51,059 on this 40-lot transaction.

The later history of the 40 lots is interesting. As to 10 of the lots, defendant does not appear in the chain of title. On January 17, 1978, Marvin Copple and his wife conveyed these 10 lots directly to J. A. Driscoll for an indicated price of $70,000. On January 18, 1978, J. A. Driscoll conveyed the same 10 lots to Dwaine and Phyllis E. Andringa for an indicated price of $87,500. Both of these deeds were recorded on January 19, 1978.

The Andringas gave a mortgage to Commonwealth on January 17, 1978, covering these 10 lots plus an additional 20 lots (all in Fox Hollow First or Second Addition, but none involving defendant) in the amount of $290,412. The last indication of activity on these 10 lots is the filing of a notice of lis pendens on November 22, 1982, by Commonwealth Savings Company indicating that the mortgage on the 10 lots (and an additional 15 of the original 20 additional lots) was being foreclosed in the district court for Lancaster County.

With regard to the other 30 of the 40 lots in this grouping, title typically went from Marvin E. Copple and wife to defendant by warranty deeds (there were 10 such deeds) dated December 27, 1977, and recorded May 16, 1980. These deeds would each convey three lots and showed an indicated price of $24,500 for the three lots. Then on December 29, 1977, defendant conveyed the same three lots by warranty deed to J. A. Driscoll at an indicated price of $28,000 (there were 10 of these deeds). W. N. Stevenson, assistant vice president of Commonwealth, was the notary public on these 20 deeds. The deeds to Ms. Driscoll were all recorded on May 30, 1980.

Also typically, in connection with 25 of these 30 lots, J. A. Driscoll, on January 25, 1979, conveyed 2 of the 3 lots as to which she had received a deed from defendant to Lakeshore Marina, Inc. These

deeds were all recorded on June 10, 1980. In other words, for each two deeds Ms. Driscoll would get from defendant, she would give three deeds to convey the same six lots. The rationale for this is beyond us to fathom, and we were not favored with any explanatory testimony or evidence from any person connected with the events.

As to these 25 lots, Lakeshore Marina then gave a mortgage to Commonwealth on January 25, 1979, in the amount of $312,000. This mortgage was recorded on January 31, 1979, and was payable on July 25, 1979. On September 7, 1979, Lakeshore Marina gave another mortgage to Commonwealth in the amount of $357,940.98, apparently renewing the earlier mortgage. By deed dated October 21, 1983, Lakeshore Marina, Inc., conveyed the 25 lots to Fox Hollow, Inc. On the same date of October 21, 1982, Fox Hollow gave a deed of trust in the amount of $1,205,565.24 to "S. E. Copple, Real Estate Broker, Trustee and Commonwealth Savings Company Beneficiary" for the 25 lots plus an additional 24 lots in Fox Hollow Second Addition. The additional 24 lots have no connection with defendant.

As to the remaining 5 lots (40 lots minus 10 directly to Driscoll and minus the 25 lots discussed above), those lots were conveyed on the same dates and in the same manner as the other deeds described above, from the Copples to Douglas to Driscoll. Ms. Driscoll then conveyed the five lots by two separate deeds to a third party. The five lots were mortgaged to Commonwealth in recorded mortgages in the amount of $68,302.52. These mortgages remain of record.

It is reasonably clear, then, that all the 40 lots sold from the Copples to defendant to Driscoll during late 1977 ended up mortgaged in one form or another to Commonwealth. It also appears, in the absence of further explanation, from the number of lots involved and the value of the mortgages on them that

apparently no building was ever begun on any lot between 1977 and 1983.

The 12-lot transaction began with the execution of a purchase agreement on June 1, 1979, between the same parties—defendant and Galter, as buyers, and Marvin Copple, as seller. On July 20, 1979, Marvin Copple and his wife, in 4 separate warranty deeds each covering 3 lots, conveyed the 12 lots to defendant. Each deed was acknowledged before Judith A. Driscoll on July 20, 1979. The check to Marvin Copple for these 12 lots was dated July 20, 1979, and was written on the account of P.P.S.S., a partnership, and signed by Paul L. Douglas, in the amount of $105,600.

Also on July 20, 1979 (recorded October 24, 1979), defendant by 1 warranty deed conveyed the 12 lots to J. A. Driscoll for an indicated price of $120,000, showing a gross profit to defendant of $14,400. W. N. Stevenson, an assistant vice president of Commonwealth Savings, was the notary public on this deed.

Also on July 20, 1979, J. A. Driscoll mortgaged the same 12 lots to Commonwealth Savings Company for $132,600.96. This mortgage was also recorded on October 24, 1979. She deposited the Commonwealth money in her personal account, and wrote a check to defendant for $120,000. This check was deposited in this P.P.S.S. account the same day. On the same day, Judith Driscoll wrote a check for $12,600.96 to Marvin Copple—thus disposing of the remainder of the $132,600.96 borrowing from Commonwealth. This check indicated it was for "Storm Sewer." There is no evidence showing that defendant had any knowledge of this $12,600.96 payment to Copple. We note, only as an example of bizarre Commonwealth financing, that for lots first sold for $105,600 and resold for $120,000 Judith Driscoll was able to borrow $132,600.96 from Commonwealth on the lots—all on the same date.

These 12 lots, at the time of trial, remained titled

in J. A. Driscoll, subject to a mortgage of $132,600.96 to Commonwealth.

The summary, then, of the lot purchase-sale arrangement between Marvin Copple on the one hand and defendant and Paul Galter on the other shows that defendant purchased 78 lots from Copple for the sum of $668,129, and sold those 78 lots for $786,417.67, or a gross profit of $118,288.67. Interest paid to Commonwealth, according to defendant and Paul Galter, reduced the profit to $89,544.22. Defendant sold a total of 78 lots for $786,417.67. Sixty of the 78 lots were sold to Judith Driscoll for $592,314.

From our examination of the evidence presented, there is no direct evidence that defendant knew that Judith Driscoll had borrowed money from Commonwealth to purchase lots from defendant and Paul Galter. There is substantial circumstantial evidence on the question.

The law concerning the manner in which a trier of fact may consider circumstantial evidence is settled in this state. In *State v. Buchanan*, 210 Neb. 20, 28, 312 N.W.2d 684, 689 (1981), we said: "One accused of a crime may be convicted on the basis of circumstantial evidence if, taken as a whole, the evidence establishes guilt beyond a reasonable doubt. The State is not required to disprove every hypothesis but that of guilt."

The defendant's guilt on this specification depends on circumstantial evidence. Direct evidence from which an inference of guilt may be drawn must be considered. It is undisputed that defendant knew Ms. Driscoll was Marvin Copple's secretary; that "Judy answered the telephone, she had a typewriter out there . . . that she worked with Marv . . ."; and that Ms. Driscoll often acted as notary public taking acknowledgments on deeds from Marvin Copple and his wife to defendant and from defendant to third parties. Defendant did not know if she had a real estate license or "what skills she had" or "what responsibility she had."

It is also shown by documentary evidence, discussed above, that in connection with the 26-lot transaction, defendant himself was required by Marvin Copple to borrow $241,744 from Commonwealth and endorse the very check directly to Marvin Copple. It is also undisputed, from defendant's own statements, that he did not like that arrangement and did not intend to do future business with Marvin Copple in that manner.

Additionally, the documentary evidence shows that on December 27, 1977, Commonwealth issued its check to J. A. Driscoll (admittedly, Judith Driscoll) in the sum of $371,814. This check was endorsed to P.P.S.S., a partnership consisting of defendant and Paul Galter, and deposited by defendant, acting for the partnership, in the partnership account on the same day.

The documentary evidence is conclusive that on the same day defendant deposited the Commonwealth check, defendant himself signed a partnership check to Marvin Copple for $320,755 and a partnership check to State Bank of Colon for $9,691.35. On that same day Paul Galter signed a partnership check to Citibank for $10,487.55, to Union Bank & Trust Company for $11,698.49, and to National Bank of Commerce Trust & Savings for $10,437.85. It is difficult for us to believe that defendant could deposit a check for $371,814, and that immediately defendant and his partner could write checks totaling over $363,000 without knowing the source of the funds on which those checks were issued and that the deposit was good so as to enable large amounts to clear the P.P.S.S. account.

As fact finders, we conclude that defendant knew the $371,814 check was from Commonwealth and that defendant knew Commonwealth was, *at least*, furnishing interim financing to Judith Driscoll in December of 1977. Defendant had to note and remember a single deposit of more than 10 times his annual income from his position as Attorney General.

Again, from the circumstances presented, when we consider the 40-lot, $371,814 transaction, we note that while defendant sold 30 of the 40 lots to Ms. Driscoll on December 27, 1977, not one of these lots was sold again until January 25, 1979—13 months later.

Keeping in mind that defendant was constantly furnishing general counseling to Marvin Copple during this time, it is simply unbelievable that defendant was so uncaring of the interests of the developer he was serving that he did not notice that, so far as the lots he sold were concerned, the development was, in fact, not developing.

In his letter to Mr. Kopf the defendant stated that he furnished at least 1,500 hours of nonlegal consultation during a 5-year period. We then note the first of the 1979 transactions. The 12 lots which defendant purchased from Marvin Copple on July 20, 1979, for $105,600 were sold that same day to Ms. Driscoll for $120,000. (This is essentially a 1-day transaction, although the purchase agreement for the lots was signed by defendant on June 1, 1979.) Those 12 lots remained unsold by Judith Driscoll up to the date of trial, and there had been a recorded mortgage to Commonwealth in the amount of $132,600.96 since October 24, 1979. Again, it must be noted that no construction was ever started on any one of these lots, so far as the evidence discloses. It is impossible to believe that a well-paid consultant ($50 per hour is good compensation when one has no overhead) did not notice that no building was taking place on the lots he had sold and wonder how the lot purchaser was servicing the debt incurred in buying and holding undeveloped lots.

The second 1979 transaction must have been of even greater concern to the defendant, as Copple's adviser. Eight lots had been held since April 20, 1977, in defendant's name. As stated above, these 8 lots were part of the original 26-lot transaction. Suddenly, on August 29, 1979—1 month and 9 days

after a $120,000 transaction with Judith Driscoll—defendant is afforded an opportunity to dispose of another eight lots to Ms. Driscoll. Defendant received $105,600 from Ms. Driscoll and finally cleared up his 1977 note with Commonwealth.

From the circumstances presented, we find it inconceivable that a well-paid consultant, spending an average 300 hours per year counseling a developer, did not know the nature of the financing that was keeping this venture afloat. It is obvious that financing is the foundation of any property development—indeed, keeping the lending agency satisfied is, in all probability, the most difficult job the developer has.

In summary, the following evidence is particularly significant in our consideration of this specification:

1. Douglas' rolling over of his unsecured indebtedness and accrued interest to Commonwealth over an extended period of time. While there is evidence that this was not uncommon at Commonwealth, there is no evidence that Douglas knew that.

2. In return for their services Galter and Douglas sold lots in Fox Hollow by contract. They made no downpayments and paid no interest to Copple on the contracts. Copple was to find a purchaser for those lots and negotiate the price. When a purchaser was located by Copple, Douglas would convey the lot to the purchaser, receive the purchase price, pay Copple for the lots, and the profit would be compensation to Douglas and Galter for their services.

3. There were three contracts. The lots in the first contract were mortgaged by Douglas to Commonwealth to pay Copple. Douglas did not want to continue this arrangement. Douglas thereafter sold some of the lots to purchasers located by Copple. Other sales were made by Douglas to Judith Driscoll, Copple's secretary, whom Copple arranged to be the purchaser. She would in turn resell some of the lots. We believe it is significant that Douglas

agreed that Ms. Driscoll could be interjected into the sale arrangement as an intermediate purchaser. This decreased his profits to an extent which he did not know, and left him without control over Copple's desires.

4. The first Driscoll purchase from which defendant's knowledge of Driscoll financing may be inferred was by her endorsement of a check from Commonwealth to defendant's partnership. Douglas deposited the check. Other lot purchases by Driscoll from Douglas were by Driscoll's personal check. The sums involved in these transactions were substantial and Driscoll's personal checks were treated as the equivalent of cash.

5. Douglas paid his 1976 Commonwealth house loan on September 7, 1982, with the proceeds of a loan from First Security Bank & Trust Co. of Beatrice (a Copple-related financial institution).

6. Douglas paid the First Security Bank loan on November 25, 1983, after Commonwealth was in receivership.

7. Douglas was the elected Attorney General of the State of Nebraska. He was described by Roger Beverage, a legal acquaintance and the director of the Department of Banking and Finance at the time of trial, as a good lawyer with an ability to "perceive and grasp."

Douglas did not testify. As the triers of fact, we are not bound to accept as true any testimony relating to his out-of-court statements. In particular we are free to reject those exculpatory statements made by Douglas purporting to explain or justify his conduct. See *Truman v. State*, 153 Neb. 247, 44 N.W.2d 317 (1950).

The issue is what did Douglas mean when he said he did not "know" or had no "knowledge." We were not favored with his testimony in that respect. In *Hancock v. State ex rel. Real Estate Comm.*, 213 Neb. 807, 811-12, 331 N.W.2d 526, 529-30 (1983), the court, in a proceeding dealing with revocation of a

real estate broker's license, discussed the words "know" or "knowingly" in a penal statute:

> In light of these rules of construction, we turn to the meaning of the word "know" as used in the statute under consideration. The meaning of the word "know" or "knowingly" in a penal statute varies in the context in which it is used. *R. D. Lowrance, Inc. v. Peterson*, 185 Neb. 679, 178 N.W.2d 277 (1970). We have considered a number of penal statutes in which the word is used with respect to the actions of others or of facts not in the actual knowledge of the person to whom the statute is applied. A statute making it an offense to leave the scene of an accident "knowing" that injury has resulted to another had been held to mean actual, not constructive, knowledge, or such notice as would put one on inquiry, and more than mere negligence in failing to know, or the mere presence of facts which might have induced belief in the mind of a reasonable person. *State v. Dougherty*, 358 Mo. 734, 216 S.W.2d 467 (1949). A statute making it a crime to "knowingly" receive stolen goods has been held to require a person to have such information from facts which should convince him that the property was stolen, or which should lead a reasonable man to believe they have been stolen, before, in a legal sense, he knew they were stolen. *Pettus v. State*, 200 Miss. 397, 27 So. 2d 536 (1946). See, also, *Bennett v. State*, 211 So. 2d 520 (Miss. 1968). A statute making it unlawful for a person to "knowingly" deliver liquor intended for sale in a dry territory has been held to require such person to have such information as would cause a person of ordinary prudence to believe the liquor was to be so sold, before being liable under the statute. *American Express Co. v. Commonwealth*, 171 Ky. 1, 186 S.W. 887 (1916). In *Leary v. United States*, 395 U.S. 6, 89 S. Ct. 1532, 23 L. Ed. 2d 57 (1969), the

> Supreme Court was considering offenses involving the "knowing" transportation of marijuana, and in footnote 93 of the opinion it accepted the Model Penal Code definition of knowledge: "When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist." *Id.* at 46.

Comment 9 to § 2.02 of the Model Penal Code referred to in *Leary v. United States*, 395 U.S. 6, 89 S. Ct. 1532, 23 L. Ed. 2d 57 (1969), states:

> Paragraph (7) deals with the situation British commentators have denominated "wilful blindness" or "connivance," the case of the actor who is aware of the probable existence of a material fact but does not satisfy himself that it does not in fact exist. See Edwards, *The Criminal Degrees of Knowledge* 17 Modern L. Rev. 294 (1954); Williams, Criminal Law § 41. Whether such cases should be viewed as instances of acting recklessly or knowingly presents a subtle but important question.
>
> The draft proposes that the case be viewed as one of acting knowingly when what is involved is a matter of existing fact, but not when what is involved is the result of the defendant's conduct, necessarily a matter of the future at the time of acting. The position reflects what we believe to be the normal policy of criminal enactments which rest liability on acting "knowingly," as is so commonly done. The inference of "knowledge" of an existing fact is usually drawn from proof of notice of substantial probability of its existence, unless the defendant establishes an honest, contrary belief. The draft solidifies this usual result and clarifies the term in which the issue is submitted to the jury.

Model Penal Code § 202, Comment 9 at 129-30 (Tent. Draft No. 4, 1975).

Douglas seems to contend that the words "know" or "knowledge" mean actual or direct knowledge in the sense of actual perception, and concludes that there is insufficient evidence that he had actual or direct knowledge that Driscoll was financing the purchase of lots through Commonwealth.

Even if we accept that meaning and attribute it to Douglas' state of mind, there is sufficient evidence to find beyond a reasonable doubt that Douglas did know that Driscoll was financing her purchase of the lots through Commonwealth. But we adopt the broader meaning of "know" or "knowledge" and conclude that the evidence is almost overwhelming that Douglas was willfully blind or willfully abstained from ascertaining the facts, and thus "knew" or had "knowledge" of the financing arrangement.

Douglas had a number of inducements not to disclose the facts. These have been discussed above. Domina had asked Douglas and other state officials in a letter dated November 18, 1983, to disclose in detail, by letter to him, all financial transactions they had had with Marvin Copple and others. He did not disclose that information in the manner requested. Douglas never wrote such a letter. Had he disclosed all that Domina requested, the very things the record shows he was so reluctant to disclose would have come to light, to his embarrassment.

If Douglas did lie as charged, he did so while in office. If, under *State v. Hastings*, 37 Neb. 96, 55 N.W. 774 (1893), gross negligence in office done corruptly is an impeachable offense, a lie is certainly a corrupt act and is more than negligence.

As noted in the dissenting opinion on specification No. 1, we determine that defendant's conduct in so lying is a clear breach of his fiduciary duty to the people of the State of Nebraska requiring him, as Attorney General, to be honest in his official actions.

We further find that defendant has violated the

provisions of Neb. Rev. Stat. § 28-901 (Reissue 1979), which provides in pertinent part:

> (1) A person commits the offense of obstructing government operations if he intentionally obstructs, impairs, or perverts the administration of law or other governmental functions by force, violence, physical interference or obstacle, breach of official duty, or any other unlawful act . . . .

Defendant would have us believe that the "obstruction" to be actionable must be "by force, violence, physical interference or obstacle." Defendant thus raises the picture that the Attorney General of our state may criminally obstruct government operations only if he seizes a rifle and keeps duly appointed officials from discovering relevant information. We refuse to construe that statute in so narrow a fashion. We determine the matter on a much more fundamental basis—that the elected Attorney General of this state breached his official duty to be truthful during an official investigation and that he thus obstructed government operations.

We would find defendant guilty of specification No. 2.

HASTINGS, J., concurring.

I concur in the opinion of the court as to specification No. 2 which finds that the State failed to prove beyond a reasonable doubt that the defendant lied concerning his knowledge of the loan to Judith Driscoll. I do not agree that the alleged charge amounted to only a technical violation. I also believe that at no point during this investigation was Douglas entitled to respond to questions with less than the whole truth.

CAESAR DE LOS SANTOS, APPELLANT, V. THE GREAT WESTERN SUGAR COMPANY, A CORPORATION, APPELLEE.

348 N.W.2d 842

Filed May 11, 1984. No. 82-594.

1. **Summary Judgment.** A summary judgment is properly 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. _____. For summary judgment purposes the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the party against whom it is directed, and any reasonable doubt touching the existence of a genuine issue of material fact must be resolved against the moving party.
3. _____. When the allegations of the pleadings have been pierced by a movant for summary judgment and resistance to the motion fails to show that a genuine issue of fact exists, summary judgment should be granted.
4. **Contracts.** An agreement which depends upon the wish, will, or pleasure of one of the parties is unenforceable.
5. _____. Speaking generally, mutuality of obligation is an essential element of every enforceable agreement; mutuality of contract consists in the obligation on each party to do, or to permit something to be done, in consideration of the act or promise of the other; mutuality is absent when one only of the contracting parties is bound to perform, and the rights of the parties exist at the option of one only.
6. **Contracts: Summary Judgment.** When the provisions of a contract, together with the facts and circumstances that aid in ascertaining the intent of the parties thereto, are not in dispute, the proper construction of such contract is a question of law and determinable upon a motion for summary judgment.

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

Robert G. Pahlke of Van Steenberg, Brower, Chaloupka, Mullin & Holyoke, for appellant.

John F. Simmons of Wright, Simmons & Selzer, for appellee.

BOSLAUGH, HASTINGS, SHANAHAN, and GRANT, JJ., and CAMBRIDGE, D.J.

CAMBRIDGE, D.J.

This is an appeal by the plaintiff of a summary

judgment entered by the trial court in favor of the defendant in an action for breach of contract.

A summary judgment is properly 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. *Swanson v. First Fidelity Life Ins. Co.*, 214 Neb. 654, 335 N.W.2d 538 (1983). For summary judgment purposes we are required, as was the trial court, to view the evidence and all reasonable inferences therefrom in the light most favorable to the party against whom it is directed, and any reasonable doubt touching the existence of a genuine issue of material fact must be resolved against the moving party. *Piper v. Hill*, 185 Neb. 568, 177 N.W.2d 509 (1970).

This appeal centers around the following provision contained in the "Hauling Contract" executed by the plaintiff and the defendant in October 1980:

> The Contractor [i.e., plaintiff] shall transport in the Contractor's trucks *such tonnage of beets as may be loaded by the Company* [i.e., defendant] from piles at the beet receiving stations of the Company, and unload said beets at such factory or factories as may be designated by the Company. The term of this contract shall be from October 1, 1980, until February 15, 1981.

(Emphasis supplied.) The plaintiff, as an independent contractor, was obligated under the "Hauling Contract" to furnish certain insurance, suitable trucks and equipment, and all necessary labor, maintenance, fuel, and licenses required for his operations thereunder, and the compensation which he was to receive for his services was based solely upon the amount of beets which he transported, the rate per ton varying with the length of the haul.

It is undisputed that upon executing the hauling contract the plaintiff knew that the defendant had executed identical such contracts with other independent truckers who would also be hauling the

defendant's beets and that the plaintiff would therefore transport on his trucks only "such tonnage of beets as may be loaded by" the defendant upon the plaintiff's trucks, not all of the beets "as may be loaded by" the defendant from piles at the defendant's beet receiving stations. The plaintiff had been transporting beets under the contract for approximately 2 months when, in early December 1980, the defendant informed the plaintiff that his services would no longer be needed. The plaintiff does not claim that he was entitled to transport all of the beets, but he does contend that he was entitled to continue to haul until all of the beets had been transported to the factory, that the defendant did not allow him to do so, and that the defendant thereby wrongfully terminated the hauling contract, causing the plaintiff loss of profits, forced sale of his trucks at a loss, and other damages to be proved on trial. In his petition the plaintiff predicated his action against the defendant upon the hauling contract. The defendant in its amended answer thereto alleged, among other defenses not relevant to the disposition of this appeal, that the defendant was not obligated under the contract to allow the plaintiff to haul any particular amount of tonnage and that its determination that it would no longer require the plaintiff's services was a determination which was within the defendant's discretion under the terms of the contract. In his reply to the defendant's amended answer, the plaintiff in effect contended that the defendant nevertheless was still liable under the principles of law set out in the Restatement (Second) of Contracts §§ 223, 90, and 205 (1981). The plaintiff was paid in full for all beets which were in fact hauled by him, and there is no issue in this case in that regard.

Considering the words contained therein together with the aforesaid undisputed facts known to both the plaintiff and the defendant when they executed the hauling contract, it is clear that neither the

plaintiff nor the defendant intended to or did, either in fact or law, promise to transport a specific quantity of beets or promise to transport beets during a specific period of time. The term of the contract set forth therein, i.e., October 1, 1980, until February 15, 1981, did not constitute a promise, but merely established the period of time during which the promises which were contained in the contract would be in effect. Although the plaintiff made a number of promises in the hauling contract, all centered around the plaintiff's promise to transport beets as loaded by the defendant on the plaintiff's trucks during the period of October 1, 1980, through February 15, 1981, the defendant made no promises at all other than the promise to pay for the transportation of those beets which were in fact loaded by the defendant onto the trucks of the plaintiff during that period. An agreement which depends upon the wish, will, or pleasure of one of the parties is unenforceable. See 56 C.J.S. *Master and Servant* § 6 (1948). In *Garsick v. Dehner*, 145 Neb. 73, 79, 15 N.W.2d 235, 238 (1944), this court stated:

> Speaking generally, mutuality of obligation is an essential element of every enforceable agreement. However, "Mutuality of contract consists in the obligation on each party to do, or to permit something to be done, in consideration of the act or promise of the other. * * * Mutuality is absent when one only of the contracting parties is bound to perform, and the rights of the parties exist at the option of one only."

Where a promisor agrees to purchase services from the promisee on a per unit basis, but the agreement specifies no quantity and the parties did not intend that the promisor should take all of his needs from the promisee, there is no enforceable agreement, and the promisor is not obligated to accept any services from the promisee and may terminate the relationship at any time without liability other than to pay for the services accepted. The fact that the

promisor has accepted services from the promisee in the past under such an agreement does not furnish the consideration necessary to require the promisor to accept such services in the future under the agreement. Nor does the specification in such an agreement of the period of time during which it will be operative impose an obligation that is not already present under the agreement. *Waco Fire &c. Ins. Co. v. Plant*, 150 Ga. App. 888, 259 S.E.2d 95 (1979); *Louisville Tobacco Warehouse Co. v. Zeigler*, 196 Ky. 414, 244 S.W. 899 (1922); *M.J.S. Resources, Inc. v. Circle G. Coal Co.*, 506 F. Supp. 341 (E.D. Mo. 1980); *Wright v. Fuel Oil Co.*, 342 Mo. 173, 114 S.W.2d 959 (1938); *Foley v. Euless*, 214 Cal. 506, 6 P.2d 956 (1931); *St. Joseph Data Serv. v. Thomas Jefferson Life*, 73 Ill. App. 3d 935, 393 N.E.2d 611 (1979); *Solace v. T. J. Moss Tie Co.*, 142 S.W.2d 1079 (Mo. App. 1940); *Mason v. United States*, 615 F.2d 1343 (Ct. Cl. 1980). Applying the foregoing to this case, it is apparent that the right of the defendant to control the amount of beets loaded onto the plaintiff's trucks was in effect a right to terminate the contract at any time, and this rendered the contract as to its unexecuted portions void for want of mutuality. In the absence of a specification of quantity, the defendant had no obligation to use any of the plaintiff's services, and the defendant's decision to cease using those services after a certain point is not actionable.

The plaintiff contends that prior actions of the defendant constituted a course of conduct which caused the plaintiff to justifiably believe that the defendant would permit the plaintiff to haul beets until all of the same had been transported from the receiving stations to the factory. The Restatement (Second) of Contracts § 223 at 157-58 (1981) provides:

> (1) A course of dealing is a sequence of previous conduct between the parties to an agreement which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.

> (2) Unless otherwise agreed, a course of dealing between the parties gives meaning to or supplements or qualifies their agreement.

That principle of law is of no avail to the plaintiff in this case. The evidence is undisputed that prior to the plaintiff's execution of the hauling contract of October 1980, there had been no similar course of dealing between the plaintiff and the defendant and that the course of dealing had between the defendant and other parties in preceding years, as well as for the year 1980, clearly established that independent truckers such as the plaintiff who had less seniority than others with hauling contracts were let go prior to completion of the beet haul.

No promise having been made by the defendant to the plaintiff other than the promise to pay for the transportation of those beets loaded on the plaintiff's trucks, there is no merit in the plaintiff's contention that the Restatement, *supra* § 90 applies in this case, that section often being referred to in terms of "promissory estoppel."

The same is true with respect to the applicability of the Restatement, *supra* § 205. Under that section every contract imposes upon each party a duty of good faith and fair dealing in its performance. The plaintiff alleges that the defendant breached that duty by terminating the contract; but the defendant having the right to do so under the contract, the exercise of that right did not constitute bad faith on its part.

When the allegations of the pleadings have been pierced by a movant for summary judgment and resistance to the motion fails to show that a genuine issue of fact exists, summary judgment should be granted. See *Page v. Andreasen*, 200 Neb. 641, 264 N.W.2d 682 (1978).

When the provisions of a contract, together with the facts and circumstances that aid in ascertaining the intent of the parties thereto, are not in dispute, the proper construction of such contract is a ques-

tion of law and determinable upon a motion for summary judgment. See, *Bishop Cafeteria Co. v. Ford*, 177 Neb. 600, 129 N.W.2d 581 (1964); *Grantham v. General Tel. Co.*, 191 Neb. 21, 213 N.W.2d 439 (1973); *Oehlrich v. Gateway Realty of Columbus, Inc.*, 209 Neb. 417, 308 N.W.2d 327 (1981).

AFFIRMED.

FARMERS CO-OP GRAIN COMPANY, APPELLANT, V. DONALD S. LEUENBERGER, STATE TAX COMMISSIONER, STATE OF NEBRASKA, DEPARTMENT OF REVENUE, APPELLEE.

348 N.W.2d 135

Filed May 11, 1984. No. 83-024.

Appeal from the District Court for Lancaster County: DALE E. FAHRNBRUCH, Judge. Affirmed.

Robert C. Guenzel of Crosby, Guenzel, Davis, Kessner & Kuester, for appellant.

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

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

PER CURIAM.

Farmers Co-op Grain Company appeals a judgment of the district court for Lancaster County, Nebraska. The brief filed by Farmers Co-op in this court does not contain any assignment of error regarding the decision or judgment of the district court, as required by Neb. Ct. R. 9D(1)d (Rev. 1983). After argument before this court, Farmers Co-op Grain Company filed a motion for amendment of its brief to include an assignment of error. The appellee in his brief and argument has relied on Farmers Co-op's brief as filed, and has responded to an issue different from the question proposed in the appel-

lant's motion to amend its brief. The record does not disclose any plain error prejudicial to Farmers Co-op. In the absence of any assigned error, the judgment of the district court will be and is affirmed. Cf., *Packard v. De Voe*, 94 Neb. 740, 144 N.W. 813 (1913); *Wielinga v. Beatrice Creamery Co.*, 95 Neb. 406, 145 N.W. 987 (1914); *Cole v. Swigert*, 121 Neb. 255, 236 N.W. 739 (1931); *Parkhurst v. Parkhurst*, 184 Neb. 687, 171 N.W.2d 243 (1969); *Scudder v. Haug*, 201 Neb. 107, 266 N.W.2d 232 (1978).

AFFIRMED.

ZALKINS PEERLESS WIPING COMPANY, A NEBRASKA CORPORATION, APPELLANT, V. THE NEBRASKA EQUAL OPPORTUNITY COMMISSION ET AL., APPELLEES.

348 N.W.2d 846

Filed May 11, 1984. No. 83-106.

1. **Equal Opportunity Commission: Appeal and Error.** Upon appeal to the district court from an order of the Nebraska Equal Opportunity Commission, the review is by trial de novo upon the record.
2. _____: _____. On appeal of review by the district court of an order of the Nebraska Equal Opportunity Commission, this court will not disturb the district court's findings if they are supported by substantial evidence.
3. **Fair Employment Practice Act: Discrimination: Proof.** An individual case of discrimination based on the disparate treatment theory will usually be divided into three phases. First, the plaintiff has the burden of proving by a preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the employee's rejection. Third, should the defendant carry the burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.
4. **Fair Employment Practice Act: Discrimination.** Employment decisions based on subjective standards carry little weight in rebutting charges of discrimination.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Affirmed.

Duane M. Katz, for appellant.

Paul L. Douglas, Attorney General, and Dale D. Brodkey, for appellee Nebraska Equal Opportunity Commission.

Clyde A. Christian, for appellee Landers.

KRIVOSHA, C.J., WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

WHITE, J.

This is an appeal from an order of the district court for Douglas County, Nebraska, affirming the decision of the Nebraska Equal Opportunity Commission (Commission). The Commission, which refused to follow the recommendations of the hearing examiner, held that the appellant, Zalkins Peerless Wiping Company (Zalkins), a corporation, had discriminated against the appellee Paul Landers on the basis of his sex in refusing to hire Landers in appellant's used clothing and rag business.

Neb. Rev. Stat. § 48-1104 (Reissue 1978) provides that "[i]t shall be an unlawful employment practice for an employer: (1) To fail or refuse to hire . . . any individual . . . because of such individual's . . . sex . . . ."

The parties do not dispute that appellant is an employer within the meaning of the Nebraska Fair Employment Practice Act, Neb. Rev. Stat. §§ 48-1101 to 48-1125 (Reissue 1978), nor that appellee Landers is entitled to invoke the provisions of the act.

The method and scope of review in an appeal to the district court from an order of the Commission is governed by Neb. Rev. Stat. § 48-1120(3) (Reissue 1978), which provides in part that "[t]he commission's orders shall not be vacated, modified, or set aside unless: . . . (b) The findings of the commission in support of such order are unreasonable

or arbitrary or are not supported by a preponderance of the evidence."

The standard of review in the district court was therefore one of a de novo review of the record, with an independent determination by the district court. *Farmer v. Richman Gordman Stores, Inc.*, 203 Neb. 222, 278 N.W.2d 332 (1979); *Duffy v. Physicians Mut. Ins. Co.*, 191 Neb. 233, 214 N.W.2d 471 (1974).

In this court, however, since no different statutory standard of review is provided for in the Nebraska Fair Employment Practice Act, we are bound by the provisions of Neb. Rev. Stat. § 84-918 (Reissue 1981), which provides that this court will not disturb the district court's findings if they are supported by substantial evidence. See, *Ranger Division v. Bayne*, 214 Neb. 251, 333 N.W.2d 891 (1983); *Farmer v. Richman Gordman Stores, Inc.*, *supra*.

The text of the Nebraska Fair Employment Practice Act in most respects is identical to that part of the Civil Rights Act of 1964 contained in 42 U.S.C. §§ 2000e et seq. (1976). In application of the Nebraska act, this court has been guided by the decisions of the federal courts in construing similar and parent federal legislation. See *Richards v. Omaha Public Schools*, 194 Neb. 463, 232 N.W.2d 29 (1975).

The record in the instant case reveals, subject to the parties' extenuating explanations, that Landers applied for employment with Zalkins in early September 1979. Zalkins is in the rag/used clothing business in Omaha, Nebraska. It regularly employs 27 or 28 persons in various positions. There are no standards or qualifications for employment at Zalkins and substantially all of the employees are paid minimum wages, with no benefits. Landers was told, after a personnel interview with one of the owners, "that if a job opening came up, that we would get back to him." Within a week Zalkins hired a female "cutter," a person who removes buttons and other unwanted material from the clothing. Shortly after Landers learned of this, he again con-

tacted Zalkins and applied specifically for work as a cutter. Landers was told that if anything came up that he could "fit into," Zalkins would hire him. Within 1 month from Landers' second application, Zalkins hired three more female cutters. Based on these facts, both the Commission and the district court on appeal held that Landers had been discriminated against on the basis of sex.

Throughout the proceedings Landers relied on both the "disparate impact" theory, as outlined in *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971), and the "disparate treatment" theory, as outlined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), to prove his case of sex discrimination. Although the disparate impact and the disparate treatment theories are, in a proper case, alternative grounds for relief, *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 98 S. Ct. 2943, 57 L. Ed. 2d 957 (1978), and both the Commission and the district court held that Landers had proven his case under both theories, we analyze and find substantial evidence, on the record, to affirm the district court's order under the disparate treatment theory, thereby making any discussion of the disparate impact theory unnecessary.

The *McDonnell Douglas Corp. v. Green*, *supra*, methodology consists of dividing a Title VII discrimination case into three phases. First, the plaintiff has the burden of proving by a preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Id.* at 802. Third, should the defendant carry the burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

The evidence shows, and Zalkins does not seriously dispute, that Landers did, in fact, prove a prima facie case of discrimination. Landers initially applied for any job at Zalkins in early September 1979. After becoming aware that Zalkins hired a female cutter, Landers reapplied for a job as cutter. As there are no qualifications for this position, it is undisputed that Landers was qualified. Landers was not hired by Zalkins. Within 1 month subsequent to Landers' second application, Zalkins hired several female cutters.

Zalkins seeks to rebut the inference of discrimination by claiming Landers was denied the job not because of his sex but because (1) Landers had not worked for several months prior to his applying at Zalkins, (2) Linda Collins, an employee at Zalkins and the person who had recommended Landers for employment, had a poor work record, (3) prior to his applying at Zalkins, Landers had been observed on the business premises without permission, which was against corporate policy, (4) Landers would, on occasion, take Linda Collins to lunch and Linda would sometimes come back late or not at all, and (5) Zalkins was not in an aggressive hiring position at the time Landers applied.

The U.S. Supreme Court, in the recent case of *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981), clarified the nature of the burden that shifts to the defendant after the plaintiff has proved a prima facie case of discriminatory treatment. The court stated at 254-56:

> The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reasons. . . . It is sufficient if the defendant's evidence raises

> a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. The explanation provided must be legally sufficient to justify a judgment for the defendant. If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity. Placing this burden of production on the defendant thus serves simultaneously to meet the plaintiff's prima facie case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext. The sufficiency of the defendant's evidence should be evaluated by the extent to which it fulfills these functions.

We agree with the district court that Zalkins' proffered reasons for not hiring Landers must be "charitably described as pretextual." As to Landers' previous unemployment, Thomas J. Clark, a co-owner and the individual with whom Landers met during his first interview, stated that when an applicant is referred to them for employment, very little emphasis is put on his or her past employment history. Zalkins never verified previous work records of any potential employee, including Landers. At least one employee of Zalkins who testified stated that she was previously unemployed before being hired by Zalkins. Many employees of Zalkins would be hired "on the spot." Clark, on cross-examination by Landers' attorney, conceded that he did not recall any discussion concerning Landers' past employment history, but he was sure that he had asked about it. Clearly, this proffered reason is pretextual.

Concerning Zalkins' second reason for not hiring Landers, we agree that "Linda Collins did not have

that good of a work record." The evidence reveals, however, that on at least one occasion Linda Collins quit her job, only to be subsequently rehired by Zalkins. Even if some nexus could logically be drawn between Linda Collins' work record and the probable work record of Landers, which it cannot, we strain to comprehend why, if Linda Collins was such an unreliable employee, Zalkins would rehire her.

As its third reason for not hiring Landers, Zalkins contends that Landers had been seen on the business premises without permission, which was against corporate policy. When questioned by Landers' attorney concerning this reason for not hiring Landers, John Houlihan, a coowner of Zalkins, recalled this happening only "once or twice," and further conceded that this was not one of the reasons Zalkins did not hire Landers. Clark testified he could not remember seeing Landers on the premises other than during the job interview.

Zalkins next contends that because Landers would, on occasion, take Linda Collins to lunch and Linda would sometimes come back late or not at all, this had a bearing on not hiring Landers. Houlihan admitted at the hearing that Linda Collins' being late could not be attributed to Landers and that he did not hold it against him.

Finally, Zalkins contends that it was not in an aggressive hiring position when Landers applied for a job. The evidence does not support this contention. One female cutter was hired between the time of Landers' first and second applications. Three other female cutters were hired within a month subsequent to Landers' second application.

Zalkins seems to contend that because it hires employees based on "gut reaction," this subjective hiring practice somehow shields it from scrutiny under the Nebraska Fair Employment Practice Act. Such is not the case. In *United States v. Hazelwood School Dist.*, 534 F.2d 805, 813 (8th Cir. 1976), the

court stated: "Vague and subjective criteria may disguise discriminatory practices, whether or not that was the original intent. . . . [T]he law in this Circuit is clear that employment decisions based on subjective standards carry little weight in rebutting charges of discrimination." The same is true in this jurisdiction.

We hold that there is substantial evidence in the record to support Landers' prima facie case of discrimination, which was not rebutted by Zalkins. Any error in the Commission's use of the Nebraska Department of Labor statistics, which were not admitted into evidence by the hearing examiner, was harmless. It is clear that both the Commission and the district court did not rely on these statistics when they made their findings and orders. We likewise did not utilize the statistics.

One final issue needs to be addressed concerning whether or not the district court erred in sustaining the special appearance filed by the Commission. Upon the filing of an individual complaint of discrimination with the Commission, the Commission is required by § 48-1118(1) to

> furnish such employer, employment agency, or labor organization with a copy of such charge within ten days . . . make an investigation of such charge . . . [and] [i]f the commission shall determine, after such investigation, that there is reasonable cause to believe that the charge is true, [it] shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.

Section 48-1119(1) further provides in part that in the event of a

> failure to eliminate any unlawful employment practice by informal methods of conference, conciliation, and persuasion, the commission may order a public hearing. If such hearing is ordered, the commission shall cause to be issued

> and served a written notice, together with a copy of the complaint, requiring the person, employer, labor organization or employment agency named in the complaint, hereinafter referred to as respondent, to answer such charges at a hearing before the commission at a time and place which shall be specified in such notice. Such hearing shall be within the county where the alleged unfair practice occurred. The complainant shall be a party to the proceeding, and in the discretion of the commission any other person whose testimony has a bearing on the matter may be allowed to intervene therein.

In this setting the Commission is a neutral fact-finding administrative body. It is neither an adversary nor advocate of either party. We therefore hold that when, as here, a private individual brings a discrimination action against an employer covered by the Nebraska Fair Employment Practice Act, the Commission is not a proper party to any subsequent appeal, and the district court did not err in sustaining the Commission's special appearance.

Appellee Landers is awarded $750 for an attorney fee in this court. *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 100 S. Ct. 2024, 64 L. Ed. 2d 723 (1980); *Farmer v. Richman Gordman Stores, Inc.*, 203 Neb. 222, 278 N.W.2d 332 (1979).

AFFIRMED.

BOSLAUGH, J., participating on briefs.

AETNA CASUALTY & SURETY COMPANY, A CORPORATION, APPELLEE AND CROSS-APPELLANT, V. DON NIELSEN AND VELMA NIELSEN, APPELLANTS AND CROSS-APPELLEES.

348 N.W.2d 851

Filed May 11, 1984. No. 83-220.

1. **Guaranty: Presumptions.** There is no presumption as to the genuineness of signatures upon a guaranty of a contract or promis-

sory note. The presumption of genuineness of a signature under Neb. U.C.C. § 3-307 (Reissue 1980) has application only to negotiable instruments, and a guaranty is not such an instrument.

2. **Pretrial Motions: Evidence.** A failure to appropriately respond to properly served requests for admissions within the time prescribed constitutes an admission of the facts sought to be elicited.
3. **Trial: Courts: Pleadings.** Courts will take appropriate action to prevent unnecessary delays and dilatory proceedings, and such action may involve a refusal to permit amendment of pleadings where request therefor is both untimely and violates a prior order limiting such pleading by virtue of a failure to answer requests for admissions.
4. **Court Rules: Judicial Notice.** This court will judicially notice trial court rules filed with the clerk of this court.
5. **Pleadings.** Formal judicial admissions which waive any evidence by the adverse party on the admitted matter are conclusive on the pleader.
6. **Prejudgment Interests: Claims.** Prejudgment interest is allowable where the amount of the claim is liquidated. A claim is liquidated where no reasonable controversy exists as to the plaintiff's right to recover or as to the amount of such recovery. If either of the requirements of the rule is not met, the claim is unliquidated and prejudgment interest is not allowed.

Appeal from the District Court for Lancaster County: SAMUEL VAN PELT, Judge. Reversed and remanded for a new trial.

James P. Fitzgerald of McGrath, North, O'Malley & Kratz, P.C., for appellants.

Knudsen, Berkheimer, Richardson & Endacott, for appellee.

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

RIST, D.J.

This is an action by appellee, Aetna Casualty & Surety Company (Aetna), against appellants, Don and Velma Nielsen (Nielsens), upon a guaranty allegedly given by appellants to guarantee a sale contract and promissory note from Lincoln Skyrise, Inc. (Skyrise), to International Hotel Supply Corporation (IHSC). Aetna's action is based upon an assignment from IHSC. Following trial, a jury returned

verdicts against both appellants in the amount of $64,671.66. Judgment was entered thereon with prejudgment interest. Appellants appeal from the verdicts and judgment, and appellee cross-appeals.

Skyrise was a corporation which built a motel near Lincoln, Nebraska. It purchased furnishings and equipment for the motel from IHSC, for which it executed a purchase contract and promissory note. Appellant Don Nielsen was president and a stockholder of Skyrise. He and his wife, Velma, are alleged to have executed a guaranty of the contract and note.

Skyrise defaulted on the note and, after application of proceeds from the sale of property pledged to secure the note, IHSC assigned to Aetna its rights against all persons liable for the balance. Aetna had paid $64,671.66 to IHSC under its policy obligation with respect to the default, and sought to recover $143,840.04 plus interest, being the total amount claimed due on the note.

One assignment of error by appellants is dispositive of the case and requires reversal of the judgment below, although we will consider several other assignments, since this cause is subject to retrial.

One of the issues at trial was whether appellants had executed the guaranty. In instruction No. 2 the trial court properly instructed that appellee had the burden to prove such execution by appellants. The court, however, also gave instruction No. 6, which provided in part that "[w]hen the effectiveness of a signature is put in issue, the burden of establishing it is on the party claiming under the signature, *but the signature is presumed to be genuine or authorized.*" (Emphasis supplied.) Appellants assign as error the giving of this instruction, having sufficiently objected to the same at the trial court's instruction conference.

Appellants are correct that the instruction was improper. The record is clear that the trial court considered Neb. U.C.C. § 3-307 (Reissue 1980) as appli-

cable, the language emphasized above being a literal statement of a portion of that statute. The problem is that the statutory rule contained in this instruction is applicable only to negotiable instruments as such instruments are defined in Neb. U.C.C. § 3-104 (Reissue 1980).

The guaranty in issue is not a negotiable instrument. It does not meet the criteria of the statute last cited, in that it does not contain an unconditional promise to pay a sum certain and is not payable on demand or at a time certain. Two courts have specifically held guaranty agreements are not negotiable instruments. *Associates Discount Corporation v. Elgin Organ Center, Inc.*, 375 F.2d 97 (7th Cir. 1967); *Crown Life Ins. Co. v. LaBonte*, 111 Wis. 2d 26, 330 N.W.2d 201 (1983).

A guaranty of a promissory note cannot be construed together with the note so that the guaranty partakes of the status of a negotiable instrument of the note. This court has held that a guaranty is an undertaking independent of the note, the responsibilities of which differ from those of the note to which the guaranty is collateral. *National Bank of Commerce Trust & Sav. Assn. v. Katleman*, 201 Neb. 165, 266 N.W.2d 736 (1978). See, also, *Crown Life Ins. Co. v. LaBonte*, *supra*.

We find no law providing any presumption of genuineness with respect to signatures on a guaranty.

Appellee argues that even though the instruction may be wrong, it is harmless error, asserting that the instructions as a whole fairly submitted the case and that the jury was not misled as to appellee's burden of proof. We cannot agree. Instruction No. 6 as framed has the effect of making the presumption of genuineness evidence of that fact, regardless of what evidence appellants offered. At best, this type of presumption is rebuttable and would have no effect once there was evidence which disputed the signatures. Nowhere in the instructions is there a

statement to that effect, nor that if evidence had been offered by appellants denying the execution of the guaranty, the presumption no longer applies. Under instruction No. 6 the jury could well believe the presumption remained in full force and effect to appellee's benefit, no matter what evidence appellants produced, and was to be considered, in effect, as evidence to support appellee's burden of proof in all circumstances.

Even if § 3-307 were applicable, which it is not, the Comment following that section makes clear that if some evidence is produced by a defendant that the signature is not his, the statutory presumption disappears and the burden of proof is on the claimant without benefit of the presumption.

We find instruction No. 6 substantially misstates the law with respect to appellee's burden of proof and what may be considered in support of that burden. Such error is not harmless and is not cured by other instructions correctly setting forth the burden of proof. For this reason we must reverse the judgment of the trial court.

Since we remand this cause for retrial, several additional assignments of error require consideration.

One such assignment is that Nielsens were denied the right to amend their answer before trial. The record reflects that on October 15, 1979, Nielsens originally filed an answer by way of a general denial. Aetna, on February 27, 1980, filed requests for admissions from the Nielsens. On April 7, 1980, Aetna moved to have the requests deemed admitted, Nielsens having failed to answer them within the statutory time. The trial court heard this motion and, on September 18, 1980, entered its order that the parties having agreed that all admissions be deemed admitted except for the execution of the guaranty, the Nielsens were ordered to file an amended answer in accordance therewith.

On February 5, 1981, the Nielsens filed their an-

swer admitting all allegations of plaintiff's petition save for the execution of the guaranty, which was denied, and, as a further defense, alleged they had never agreed to execute a guaranty, that IHSC had delivered the furniture and supplies before any alleged guaranty was signed, and that Nielsens were never notified of the sale of the security for the note. On February 10, 1981, the trial court, after hearing, found this answer with respect to such further defenses was done in violation of the rules of the court and without leave of court, and struck such defenses from the answer.

On July 23, 1982, the Nielsens moved for leave to file an amended answer, which admitted all allegations of the petition except that, with respect to the guaranty, they admitted such guaranty guaranteed to IHSC that Skyrise would pay all obligations to IHSC, but denied the execution of such guaranty; and with respect to the amount due, defendants denied they owed plaintiff $143,840.04 plus interest because they denied the execution of the guaranty, but admitted that Skyrise was indebted to plaintiff in the amount of $143,840.04 plus interest thereon at the rate of 9 percent per annum from September 29, 1975. Said answer was filed August 6, 1982.

Up to this point, Nielsens had been represented by Mr. John Akin. On December 6, 1982, Mr. Akin asked leave to withdraw as Nielsens' counsel because of a conflict of interest, which leave was granted, and Mr. James Fitzgerald then entered his appearance for the Nielsens. On December 20, 1982, Mr. Fitzgerald moved for leave to file yet another amended answer in the form of a general denial, and further moved that the court's order deeming requests for admissions as admitted be set aside and Nielsens be given an opportunity to answer the same. These motions were denied.

Appellants claim the denial of the December 1982 motion to amend appellants' answer was an abuse of discretion by the trial court. We find it was not. It

is obvious from the record that, given Nielsens' failure to answer the requests for admissions within the statutory time, such requests were properly treated as admitted, except that the parties stipulated through counsel that the admission of the signing of the guaranty would be excluded therefrom. The court so ordered, directing that an answer be filed in accordance with that stipulation. The effort in December 1982 to reinstate additional defenses more than 2 years after the court's order must fail. The failure to answer the requests for admissions justified the court's action with respect to the appellants' answer. It is an appropriate result when parties fail without good cause to meet procedural standards. As this court noted in *Sargent Feed & Grain v. Anderson*, 216 Neb. 421, 344 N.W.2d 59 (1984), it will not reward unnecessary delays or dilatory proceedings. To have permitted the proposed amended answer of December 1982 would have been such a reward. A change in counsel does not alter the situation.

At trial Aetna sought to introduce an oral agreement between Mr. Akin and Aetna's counsel with respect to the issues to be tried. Objection to such testimony was sustained on the basis that it violated the rule of the trial court. Appellee argues such rule may not be considered on appeal, since it does not appear of record.

This court, in the case of *State v. Barrett*, 200 Neb. 553, 264 N.W.2d 434 (1978), ruled it would take judicial notice of all district court rules on file with the Clerk of the Supreme Court. Subsequent to that decision, the rules of the district court for Lancaster County were so filed. We judicially notice the same, and find that Rule VII(G), in effect at the time of trial, required all stipulations and private agreements or understandings of counsel or parties, unless made in open court, to be signed and in writing. The trial court properly excluded the evidence under this rule.

Aetna, in its cross-appeal, assigns as error the

submission to the jury of the question of the amount which Aetna might recover, asserting that under the pleadings there was only one amount to be considered, namely, $143,840.04 plus the interest set forth in the answer. We find Aetna's position to be correct as to the principal amount of $143,840.04. We note Nielsens' answer of August 6, 1982, which denied the amount due only because they denied the execution of the guaranty, also admitted that Skyrise was indebted to plaintiff in the above amount and that the second assignment to Aetna specifically covers all amounts due on the obligation to IHSC, not just the amount paid by Aetna under its policy. We further note in said answer that Nielsens admit the guaranty at issue guaranteed payment of all obligations due IHSC from Skyrise under the purchase contract, subject only to the issue of execution of the guaranty. Such pleading constitutes a judicial admission of the amount due if Nielsens are found to have executed the guaranty, and they are bound thereby. See *Barkalow Bros. Co. v. English*, 159 Neb. 407, 67 N.W.2d 336 (1954). Accordingly, the trial court should have instructed the jury as a matter of law that if it found Nielsens had executed the guaranty, then the amount of principal admitted in the answer would be its verdict.

Nielsens assign as error the allowance of any prejudgment interest, and Aetna assigns as error that prejudgment interest should have been allowed on the sum of $143,840.04.

The rule with respect to the allowance of prejudgment interest, as found in the most recent decisions of this court, is that such interest is allowable only if the amount of the claim is liquidated. A claim is liquidated where no reasonable controversy exists as to the plaintiff's right to recover or as to the amount of such recovery. *Langel Chevrolet-Cadillac v. Midwest Bridge*, 213 Neb. 283, 329 N.W.2d 97 (1983); *Philip G. Johnson & Co. v. Salmen*, 211 Neb. 123, 317 N.W.2d 900 (1982). The rule has two require-

ments. One is that there be no dispute as to the amount due. There is no such dispute in this case. The second requirement, that there be no reasonable controversy over plaintiff's right to recover, is, however, not met in this case. Such controversy did exist as to the guaranty, namely, whether appellants had executed it, and it is sufficient to prevent the allowance of any prejudgment interest.

Other assignments of error need not be considered.

The cause is remanded for retrial in accordance with this opinion.

REVERSED AND REMANDED FOR A NEW TRIAL.

IN RE ESTATE OF JACQUELINE WATSON, DECEASED. ROBERT WATSON, APPELLANT, V. DAU'N M. WATSON, PERSONAL REPRESENTATIVE, APPELLEE.

348 N.W.2d 856

Filed May 11, 1984. No. 83-248.

Decedents' Estates: Divorce. Under the provisions of the Nebraska Probate Code, if one of the parties to a decree of dissolution dies during the 6-month period, the decree is effectively made nonoperative and the other party is the surviving spouse within the meaning of the Nebraska Probate Code.

Appeal from the District Court for Adams County: WILLIAM G. CAMBRIDGE, Judge. Reversed and remanded with directions.

Jacobsen, Orr & Nelson, for appellant.

Gerald T. Whelan of Whelan, Foote & Scherr, P.C., for appellee.

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

KRIVOSHA, C.J.

The question presented to us by this appeal is

whether the death of one of the parties to a dissolution of marriage during the 6-month waiting period prescribed under the provisions of Neb. Rev. Stat. § 42-372 (Reissue 1978) results in the other party to the dissolution becoming the surviving spouse of the deceased under the provisions of the Nebraska Probate Code, and in particular Neb. Rev. Stat. § 30-2353 (Reissue 1979). Both the county court for Adams County, Nebraska, and, on appeal, the district court for Adams County, Nebraska, determined that Robert Watson was not the surviving spouse of Jacqueline Watson upon her death. We have now considered the arguments of the parties and determine that both the county court, in the first instance, and the district court, on appeal, were in error, and for that reason we reverse and remand.

The facts in the case are neither complicated nor in dispute. Robert and Jacqueline Watson were married on August 20, 1950. On July 29, 1981, Mrs. Watson filed in the district court for Adams County, Nebraska, a petition for dissolution of her marriage to Mr. Watson. No responsive pleading of any type was filed by Mr. Watson. On January 29, 1982, the district court took the matter under advisement, and on March 2, 1982, entered a decree dissolving the marriage of the parties and dividing the property. On July 7, 1982, less than 6 months after the entry of the decree by the district court and before the decree became final, Mrs. Watson, then a resident of Adams County, Nebraska, died. She was survived by her four children and Mr. Watson.

All of the parties agree that prior to the adoption of the Nebraska Probate Code, and in particular § 30-2353, the death of Mrs. Watson during the 6-month period following the entry of the decree of divorce would have resulted in the decree being considered a nullity and Mr. Watson being considered the surviving spouse of Mrs. Watson. In *Parker v. Comstock*, 177 Neb. 197, 200, 128 N.W.2d 696, 699 (1964), we examined just such a situation and said:

> Plaintiff is still the surviving husband of the deceased. Section 42-340, R.R.S. 1943, provides that a decree of divorce shall not become final or operative until 6 months after trial and decision, except for the purpose of review by appeal. The divorce herein had never become final because the deceased died within the 6-month period. As we said in Williams v. Williams, 146 Neb. 383, 19 N.W.2d 630: "When the marriage relation is extinguished by death prior to the time when the decree can go into effect, then the subject matter is gone, and the parties can never be divorced by operation of law."

We further said in *Parker* at 204, 128 N.W.2d at 700-01:

> "During the entire pendency of that decree, the marital relation continues. The decree cannot, under the law, take effect and dissolve the marriage until at the expiration of the six months' period. In order that a marriage status be dissolved by decree of divorce, such status obviously must exist at the time of the taking effect of the decree. When the marriage relation is extinguished by death prior to the time when the decree can go into effect, then the subject-matter, upon which the decree would otherwise have operated, is gone, and the parties to the suit manifestly can never be divorced by operation of law. . . ."

The children of Jacqueline Watson, however, argue that the adoption of Nebraska Probate Code § 30-2353 has changed the law in Nebraska with regard to the effect of death during the 6-month period. We do not agree. The Nebraska Probate Code is, to a large extent, modeled after the Uniform Probate Code (UPC) adopted by the National Conference of Commissioners on Uniform State Laws. Had the Legislature adopted the UPC as drafted by the commissioners, then the argument made by the

heirs of Jacqueline Watson might be correct. Section 2-802 of the UPC provides as follows:

> (a) A person who is divorced from the decedent or whose marriage to the decedent has been annulled is not a surviving spouse unless, by virtue of a subsequent marriage, he is married to the decedent at the time of death. A decree of separation which does not terminate the status of husband and wife is not a divorce for purposes of this section.

Unif. Probate Code § 2-802, 8 U.L.A. 170 (1983).

The Legislature, however, in adopting § 30-2353(a) chose not to adopt the language of the UPC and, instead, modified it:

> (a) An individual who is divorced from the decedent or whose marriage to the decedent has been dissolved or annulled by a decree *that has become final* is not a surviving spouse unless, by virtue of a subsequent marriage, he is married to the decedent at the time of death.

(Emphasis supplied.) Specifically, the Legislature sought to insert the words "that has become final" into the language proposed by the UPC. Both the Nebraska Comments to § 30-2353 and the working papers of the Judiciary Committee make it clear that the purpose of inserting the words "that has become final" is to bring about just the opposite result that would have existed but for the insertion of that phrase. The Nebraska Comment reads as follows: "A Nebraska decree dissolving a marriage becomes operative for succession and other testamentary purposes *only at the expiration of the six month waiting period* under section 42-372." The Comment also refers to paragraph (b), which we will discuss in a moment. In addition, the working papers explain the purpose of paragraph (a). They provide:

> Section 75(a) has been drafted so as to clearly conform with present Nebraska law. The term "dissolution" has been added in accordance with the no fault divorce language. Section

> 75(a) adds to the Official Text of the UPC "by a decree that has become final" to clarify that the decree becomes operative for succession and other testamentary purposes only at the expiration of the six month waiting period.

Working Papers and Preliminary Interim Study Report on a revised Nebraska Probate Code 117 (1973). It appears to us that the language of § 30-2353(a) is clear, and therefore it is unnecessary of interpretation. It provides that unless the 6-month period has expired, making the decree final, a divorce does not preclude the former spouse from being the surviving spouse under the Nebraska Probate Code.

The heirs of Jacqueline Watson argue, however, that § 30-2353(a) has no application to the instant case because, they allege, it applies only in those cases where the decree has already become final. Instead, they argue that § 30-2353(b)(3) is applicable. We believe that such is not the case. Section 30-2353(b) provides:

> (b) For purposes of parts 1, 2, 3, and 4 of this article and of section 30-2412, a surviving spouse does not include:
>
> (1) an individual who obtains or consents to a final decree or judgment of divorce from the decedent or an annulment or dissolution of their marriage, which decree or judgment is not recognized as valid in this state, unless they subsequently participate in a marriage ceremony purporting to marry each to the other, or subsequently live together as man and wife;
>
> (2) an individual who, following a decree or judgment of divorce or annulment or dissolution of marriage obtained by the decedent, participates in a marriage ceremony with a third individual; or
>
> (3) an individual who was a party to a valid proceeding concluded by an order purporting to terminate all marital property rights against the decedent.

The heirs of Jacqueline Watson concede that subsections (b)(1) and (2) can have no application, but they maintain that (b)(3) is intended to cover a situation where a decree of divorce is granted and death occurs during the 6-month period. In other words, the heirs of Jacqueline Watson argue that § 30-2353(a) applies only *after* the 6-month period, while § 30-2353(b)(3) applies only *during* the 6-month period. We are unable to accept that argument. If this were true and if it were the intention of the Legislature to provide that the death of one of the parties to a decree of dissolution during the 6-month period should not result in the other party being the surviving spouse, there would have been no need to modify the UPC as was done when adopting § 30-2353(a). This is precisely what § 30-2353(a) provided before the words "that has become final" were added. It is difficult to imagine why the Legislature would modify the UPC to bring about exactly the same result which would occur had the Legislature not modified or amended it. Furthermore, if the argument made by the heirs of Jacqueline Watson is correct, then the Nebraska Comment following § 30-2353, to the effect that a decree dissolving a marriage becomes operative for succession and other testamentary purposes only at the expiration of the 6-month waiting period, makes absolutely no sense at all.

We believe that an examination of both the Nebraska Comment and the working papers of the Judiciary Committee explains the purpose of subsection (b). The Nebraska Comment says: "Paragraph (b) changes previous decisional law," and then cites us to the cases of *Yost v. Yost*, 161 Neb. 164, 72 N.W.2d 689 (1955), *Lippincott v. Lippincott*, 141 Neb. 186, 3 N.W.2d 207 (1942), and *Bassett v. First Nat. Bank & Trust Co.*, 189 Neb. 206, 201 N.W.2d 848 (1972). Additionally, the working papers provide:

Section 75(b) should be taken to represent a sub-

> stantial departure from present Nebraska law. In the absence of a valid divorce decree entitled to be recognized in the State of Nebraska, Nebraska law would treat the parties as still married for purposes of intestate succession and testamentary dispositions. . . . Section 71(b) [sic] is an attempt to deal with attacks on foreign divorce decrees by creating an estoppel where the surviving spouse has (1) consented to the foreign decree, (2) married a third party after the entry of the foreign decree, or (3) been a party to a valid proceeding concluded by an order purporting to terminate all marital property rights.

Working Papers and Preliminary Interim Study Report, *supra* at 117-18. The comments contained in the working papers make it clear that the Legislature recognized that subsection (b) was addressed to the matter of collateral attack, and the cases cited support that concern.

The *Yost* case involved a situation where one of the parties had obtained a divorce in a foreign jurisdiction and the former spouse sought to bring an independent divorce action in Nebraska, attacking the foreign divorce on the grounds that at the time the foreign divorce was granted the party who had obtained the divorce was not a bona fide resident of Florida. In refusing to recognize the Florida decree, this court in *Yost*, *supra* at 169, 72 N.W.2d at 693, said: " 'A divorce from the bonds of matrimony obtained in another jurisdiction shall be of no force or effect in this state, if both parties to the marriage were domiciled in this state at the time the proceeding for the divorce was commenced.' " Subsection (b)(1) of § 30-2353 is intended to prevent by statute such an attack from being made and thereby permitting one of the parties to the decree to have a divorce set aside after a foreign decree has been entered, on the ground of its alleged invalidity.

In the *Lippincott* case we have a situation where more than 6 months had expired. While the *Bassett*

case involves a situation wherein one of the parties died within the 6-month period, it does not address that issue in that manner. The claim made in the *Bassett* case was that the surviving wife was *estopped* from claiming to be the surviving spouse because she had entered into a valid property settlement agreement. In rejecting the argument, this court simply recognized that if one of the parties dies during the 6-month period, the property settlement agreement has no viability independent of the finality of the decree of divorce. We must not lose sight of the fact that subsections (a) and (b) to § 30-2353 were drafted by the commissioners to take into account situations existing in the various jurisdictions and not just Nebraska. There may very well be jurisdictions in which some type of valid proceeding may be conducted solely to terminate marital property rights, and when this is done, the party may not *collaterally* attack it as being invalid. That situation simply does not exist in Nebraska, and § 30-2353(b)(3) has no apparent application to any procedure known in Nebraska not otherwise covered by § 30-2353(a).

The heirs of Jacqueline Watson further direct our attention to the case of *Prudential Ins. Co. of America v. Dulek*, 665 F.2d 217 (8th Cir. 1981), wherein the U.S. Court of Appeals for the Eighth Circuit purported to decide how this court would interpret § 30-2353 were we called upon to do so. Our review of the opinion simply leads us to the conclusion that the court of appeals was in error and that the opinion is not correct under Nebraska state law. The court of appeals relied, to a large extent, upon language to the effect that § 30-2353(b) was designed to change the prior case law of Nebraska. That prior case law, however, was with regard to the right to collaterally attack a divorce decree which, on its face, appears to be valid, and not the effect of death during the 6-month period. That is not the same situation as presented to us in this case.

We are convinced that the action of the Legislature in amending § 30-2353(a) by adding the phrase "that has become final" was an attempt by the Legislature to keep intact this court's previous decisions as expressed in *Parker v. Comstock*, 177 Neb. 197, 128 N.W.2d 696 (1964), and for that reason we believe the correct rule to be that under the provisions of the Nebraska Probate Code if one of the parties to a decree of dissolution dies during the 6-month period, the decree is effectively made nonoperative and the other party is the surviving spouse within the meaning of the Nebraska Probate Code. For that reason the judgment of the district court is reversed and the cause remanded with instructions to enter a decree in conformance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

BOSLAUGH, J., dissenting.

The clear and unambiguous language of Neb. Rev. Stat. § 30-2353(b)(3) (Reissue 1979) provides that where there has been a valid court proceeding concluded by an order purporting to terminate all marital property rights, a party governed by such an order cannot be deemed a "surviving spouse." A reading of this plain language leads to the inescapable conclusion that where, as in the present case, a husband has been a party to such an order, he cannot receive another share of his wife's estate as a "surviving spouse." The eighth circuit reached this conclusion in applying § 30-2353 in *Prudential Ins. Co. of America v. Dulek*, 665 F.2d 217 (8th Cir. 1981).

The majority relies heavily on the draftsman's comments to § 30-2353 in reaching its decision. When the language of a statute is plain and unambiguous, as it is in the statute involved herein, no resort may be had to legislative history to explain such terms. In *O'Neill Production Credit Assn. v. Schnoor*, 208 Neb. 105, 108, 302 N.W.2d 376, 378 (1981), we said: " '[A] statute should be construed so that an ordinary person reading it would get from it the usual

accepted meaning. Rules of interpretation are resorted to for the purpose of resolving an ambiguity, not of creating it.' "

In *County of Douglas v. Board of Regents*, 210 Neb. 573, 577-78, 316 N.W.2d 62, 65 (1982), we said:

> "A statute is not to be read as if open to construction as a matter of course. Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain the meaning. . . . It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language. Neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute."

We noted in *Norden Laboratories, Inc. v. County Board of Equalization*, 189 Neb. 437, 440, 203 N.W.2d 152, 154 (1973), that legislative history cannot serve to " ' "import an intent into legislation devoid of language fit to express it." ' " In the present case there is no language in the unambiguous exception listed in § 30-2353(b)(3) which would lead one to the conclusion that its application is as limited as concluded by the majority.

It is apparent from the plain language of the statute that the exception embodied in § 30-2353 was designed to prevent a spouse who had received a share of the marital estate through a court order from receiving another share of that estate due to the untimely death of a "soon to be" former spouse. This was mischief the statute was clearly designed to prevent, and it should be applied as it was written.

CHILES, HEIDER & CO., INC., APPELLEE, V. PAWNEE MEADOWS, INC., A NEBRASKA CORPORATION, APPELLANT, RICHARD WOZNIAK ET AL., APPELLEES.

350 N.W.2d 1

Filed May 11, 1984. No. 83-279.

1. **Contracts: Guaranty.** A guaranty is a collateral undertaking by one person to answer for the payment of a debt or the performance of some contract or duty in case of the default of another person who is liable for such payment or performance in the first instance.
2. **Contracts: Tender.** The law does not require a useless formality. A formal tender is not necessary where a party has shown by act or word that it would not be accepted if made.
3. **Contracts: Joinder.** A person with whom or in whose name a contract is made for the benefit of another may bring an action without joining with him the person for whose benefit it is prosecuted.

Appeal from the District Court for Saunders County: BRYCE BARTU, Judge. Affirmed as modified.

August P. Ross and Annette E. Mason of Ross & Mason, P.C., for appellant.

Michael G. Lessmann and Thomas E. Johnson of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, for appellee Chiles, Heider & Co., Inc.

KRIVOSHA, C.J., WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

KRIVOSHA, C.J.

The appellant, Pawnee Meadows, Inc. (Pawnee Meadows), appeals from a judgment entered by the district court for Saunders County, Nebraska, foreclosing a real estate mortgage given by Pawnee Meadows to appellee Chiles, Heider & Co., Inc. (Chiles, Heider), to secure performance of a contract entered into between Pawnee Meadows and Chiles, Heider. This being an equity case, we have examined the record de novo, *Tilden v. Beckmann*, 203 Neb. 293, 278 N.W.2d 581 (1979), and we have concluded that, except as modified herein, the judgment of the district court should be affirmed.

The record discloses that Pawnee Meadows, a

Nebraska corporation, was the owner of Lots 1 to 58, inclusive, in Pawnee Meadows, a subdivision in Saunders County, Nebraska. In connection with the development of the property, Sanitary and Improvement District No. 4 of Saunders County, Nebraska, was created pursuant to the provisions of Neb. Rev. Stat. §§ 31-701 et seq. (Reissue 1978). In August of 1974 Chiles, Heider and S.I.D. No. 4 entered into a letter agreement in which Chiles, Heider agreed to purchase certain construction fund warrants issued by S.I.D. No. 4. The agreement set out the terms of the purchase, including a requirement that the agreement between Chiles, Heider and S.I.D. No. 4 "shall not become effective until an agreement between Pawnee Meadows, Inc., the developer, and Chiles, Heider & Co., Inc. concerning the repurchasing of warrants has been signed." Simultaneous with the execution of the letter agreement, Pawnee Meadows and Chiles, Heider in fact entered into a repurchase agreement wherein Pawnee Meadows agreed that

> [a]t any time on or after a date four (4) years after the date of the first warrant issued by SID and purchased by Chiles, Heider, upon request of Chiles Heider, [Pawnee Meadows] will purchase from Chiles, Heider, *or any other holder of warrants issued by SID*, all unpaid warrants issued by SID requested by Chiles, Heider to be so purchased.

(Emphasis supplied.) The agreement further provided for how the purchase price was to be computed in the event of a repurchase, and when payment was to be made. By the agreement Chiles, Heider agreed that it would not request a repurchase if at least 45 houses in the S.I.D. had been completed or started, or if the total amount of outstanding warrants and bonds issued by S.I.D., plus accrued interest, reduced by the amount of any moneys in the bond fund of the S.I.D., did not exceed 30 percent of the assessed valuation of the S.I.D.

according to the last completed assessment thereof. There is no dispute that neither of the conditions existed and, therefore, Chiles, Heider was entitled to request the repurchase. The agreement between Chiles, Heider and Pawnee Meadows further provided that Pawnee Meadows would execute and deliver to Chiles, Heider a first mortgage covering Lots 1 to 58 in Pawnee Meadows to secure its obligation under the agreement.

In February of 1976 S.I.D. No. 4 executed a second letter agreement with Chiles, Heider. Both the letter agreement and the record reflect that the reason for the second letter agreement was because of certain questions which had been raised concerning the validity of the earlier agreement. This agreement, executed in February of 1976 between Chiles, Heider and S.I.D. No. 4, specifically provided in part: "This agreement replaces the agreement between us dated July 25, 1974, said agreement having been terminated because certain provisions thereof were deemed by our bond counsel to be unenforceable or illegal." While the earlier agreement was dated July 25, 1974, it was in fact accepted by S.I.D. No. 4 on August 15, 1974.

The agreement of February 1976 did not contain any condition similar to that contained in the August 1974 agreement to the effect that the agreement was conditioned upon Pawnee Meadows and Chiles, Heider entering into a repurchase agreement. We do not believe that the absence of this provision, however, is material to our resolution of this case.

Subsequently, the construction fund warrants were issued by S.I.D. No. 4 and were purchased by Chiles, Heider. The record reflects that at first Chiles, Heider sold most, if not all, of the warrants to various individuals, and later repurchased part of them. The record reflects that Chiles, Heider owns warrants in the total amount of $15,660.53 and that Chiles, Heider's parent company, Chiles, Heider Corporation, owns warrants in the amount of

$132,164.90. The remaining outstanding construction fund warrants in the amount of $270,234.78 are owned by various other persons.

More than a few years after the first warrants were issued, Chiles, Heider, by letter dated December 20, 1979, demanded that Pawnee Meadows repurchase all of the outstanding warrants held by it or others. Pawnee Meadows admittedly failed to do so, and Chiles, Heider commenced this action to enforce the terms of its repurchase agreement and to foreclose upon the mortgage given as security. The trial court found that the agreement was valid and binding on Pawnee Meadows and that Pawnee Meadows was obligated to purchase all of the outstanding warrants. It further found that the mortgage was valid and that Pawnee Meadows owed Chiles, Heider the total sum of $681,082.18, representing principal plus interest to date of trial. The court then ordered that in default of payment of this sum for a period of 20 days the mortgaged property should be sold to satisfy the obligation.

Pawnee Meadows has assigned six errors allegedly committed by the trial court, which reduce to four issues requiring our examination. The issues are: (1) Whether the agreement between Chiles, Heider and Pawnee Meadows, dated August 15, 1974, is a guaranty or an independent obligation, and, if a guaranty, whether Pawnee Meadows is discharged from its obligation because of various facts raised by Pawnee Meadows; (2) Whether the court erred in declaring foreclosure without formal tender of the warrants by Chiles, Heider to Pawnee Meadows; (3) Whether the court erred in decreeing foreclosure over and above the amounts of the warrants owned by Chiles, Heider itself; and (4) Whether the trial court erred in not providing for the release of individual lots.

Turning first to the issue of whether the agreement dated August 15, 1974, is a guaranty or an independent obligation, we determine that it is not a

guaranty but, rather, is an independent obligation, unaffected by any subsequent actions taken by and between S.I.D. No. 4 and Chiles, Heider. We reach our conclusion on the basis that the agreement signed by Chiles, Heider and Pawnee Meadows does not have either the characteristics or the obligations of a guaranty. In the case of *In re Estate of Williams*, 148 Neb. 208, 215-16, 26 N.W.2d 847, 851 (1947), we explained what a guaranty was, saying:

> "A guaranty is a collateral undertaking by one person to answer for the payment of a debt or the performance of some contract or duty in case of the default of another person who is liable for such payment or performance in the first instance." [Citation omitted.]
>
> "A guaranty * * * is collateral to, and made independently of, the principal contract which is guaranteed; and the guarantor's liability is secondary rather than primary or original." [Citation omitted.]

With that definition in mind, and upon examination of the document in question, it is clear that the contract obligation entered into between Chiles, Heider and Pawnee Meadows dated August 15, 1974, was not a collateral undertaking by Pawnee Meadows to answer for the payment of a debt or the performance of S.I.D. No. 4. S.I.D. No. 4 had no obligation to repurchase the warrants, and Pawnee Meadows had no obligation to pay the warrants if S.I.D. No. 4 did not. The agreement between Pawnee Meadows and Chiles, Heider was to the effect that at any time on or after a date 4 years after the date of the first warrant issued by S.I.D. No. 4, Pawnee Meadows would agree to purchase the warrants, some of which at that point in time might not be due. The agreement between Chiles, Heider and Pawnee Meadows, unusual as it may have been in a transaction of this nature, was freely and voluntarily entered into by Pawnee Meadows as an inducement to get Chiles, Heider to purchase the warrants from

S.I.D. No. 4. The duties and obligations of S.I.D. No. 4 were never involved and, in fact, are not affected by the repurchase. S.I.D. No. 4 is still obligated to pay the warrants when due and when presented by whomever may be the holders. Pawnee Meadows' obligation to repurchase under its agreement with Chiles, Heider was not dependent upon the failure of any performance by S.I.D. No. 4. The obligation of S.I.D. No. 4 is to pay the warrants when due. The obligation of Pawnee Meadows is to repurchase the warrants any time after 4 years from the date the first warrant was issued when requested by Chiles, Heider. The second obligation is simply not in law a guaranty of the first. We believe that the case of *Union Bank v. Winnebago Industries, Inc.*, 528 F.2d 95 (9th Cir. 1975), is similar to the instant case. In *Union Bank* the bank and Winnebago Industries were involved in a financial arrangement similar to the arrangement which existed in the instant case between Pawnee Meadows and Chiles, Heider. Winnebago contended that pursuant to a repurchase agreement it had executed, it was a guarantor or surety. In rejecting Winnebago's claim the U.S. Court of Appeals for the Ninth Circuit said at 98-99:

> The manifest purpose of the repurchase agreement was to induce additional extensions of credit to Winnebago's retail dealers, enabling them to increase their inventories of Winnebago recreational vehicles. Further, the agreement affords the lending institution a quick and relatively easy method for disposing of the floored inventory at a specified price. . . .
>
> . . . .
>
> The repurchase agreement does not purport to guarantee any debt the dealer may owe to Union Bank. In fact, it expressly disavows liability for any accrued interest on the principal amount of the loan and further discounts the invoice cost or loan principal originally paid to Winnebago in arriving at the specified repurchase price. In

effect, Winnebago guarantees the value and resale of only a portion of the bank's collateral; it does not guarantee the dealer's debt. While a guaranty relationship might conceivably include an obligation to repurchase collateral for the loan, nothing in the instant repurchase agreement, either by express language or implication, suggests such a relationship.

The trial court was correct in concluding that the repurchase agreement was an independent contract and not a guaranty and, therefore, the claims of Pawnee Meadows with regard to the document are without merit.

Having determined that the repurchase agreement is an independent obligation and not a guaranty, we may disregard all of the assignments raised by Pawnee Meadows which are dependent upon our first determining that the repurchase agreement is a guaranty.

Pawnee Meadows next argues that the trial court erred in declaring a foreclosure, when the evidence fails to disclose that Chiles, Heider tendered the warrants to Pawnee Meadows when demanding the repurchase. We believe that the trial court was correct, and Chiles, Heider's failure to actually tender the warrants when making its demands by letter on December 20, 1979, was not a defect. While, under certain circumstances, a tender may be a condition precedent to enforcement of an action, in the instant case the failure to tender the warrants does not relieve Pawnee Meadows of liability. It is clear that Pawnee Meadows would not have made payment if the warrants had in fact been tendered. Their position was that they were under no obligation until S.I.D. No. 4 defaulted. As we said in *Hogan v. Pelton*, 210 Neb. 530, 535-36, 315 N.W.2d 644, 647 (1982): "The law does not require a useless formality. A formal tender is not necessary where a party has shown by act or word that it would not be accepted if made." See, also, *Canaday v. Krueger*,

156 Neb. 287, 56 N.W.2d 123 (1952). We do believe, however, that because some or all of the warrants involved herein may be negotiable instruments, see *S.I.D. No. 32 v. Continental Western Corp.*, 215 Neb. 843, 343 N.W.2d 314 (1983), Chiles, Heider should deliver to Pawnee Meadows such warrants as are to be repurchased before Pawnee Meadows is required to make payment. For this reason we believe that the judgment of the trial court should be modified to require Chiles, Heider to deliver to the clerk of the district court for Saunders County, Nebraska, such of the warrants, properly endorsed if necessary, as are to be purchased by Pawnee Meadows; and, upon delivery of such warrants, Pawnee Meadows should have 20 days in which to make payment to the clerk of the district court for such warrants and, upon payment, receive physical possession of the warrants from the clerk of the district court. Upon failure of Pawnee Meadows to make payment to the clerk of the district court within 20 days after the warrants have been delivered by Chiles, Heider to the clerk, the real estate described in the mortgage is to be foreclosed in the manner previously ordered by the trial court in satisfaction of the debt. This modification does not, however, entitle Pawnee Meadows to a new trial.

The next issue is whether the trial court erred in decreeing foreclosure in an amount sufficient to satisfy a repurchase of all of the warrants, notwithstanding the fact that Chiles, Heider was not the owner of all of the warrants. The evidence discloses that of the total outstanding warrants in the amount of $418,060.21, Chiles, Heider owned only $15,660.53, and its parent corporation, Chiles, Heider Corporation, owned $132,164.90. The remaining $270,234.78 was owned by various other warrant holders. The difficulty with this argument is that it is simply contrary to the agreement which Pawnee Meadows made with Chiles, Heider. The agreement specifically provides that upon "*request of Chiles*

Heider" Pawnee Meadows will purchase either from Chiles, Heider, *or any other holder*, warrants issued by S.I.D. No. 4. Therefore, by the express terms of the agreement Chiles, Heider was given the authority by Pawnee Meadows to request the repurchase of all warrants, regardless of who held the warrants. This is not a question of whether Chiles, Heider may bring a class action but, rather, whether the suit brought by Chiles, Heider to enforce the terms of the repurchase contract was brought in the name of the real party in interest. Neb. Rev. Stat. § 25-304 (Reissue 1979) provides that "a person with whom or in whose name a contract is made for the benefit of another . . . may bring an action without joining with him the person for whose benefit it is prosecuted."

In *O'Shea v. North American Hotel Co.*, 109 Neb. 317, 191 N.W. 321 (1922), the plaintiff and two other friends were the owners of several lots in Scottsbluff, Nebraska. They believed that a hotel would make their lots more valuable, and entered into an agreement with North American Hotel Company. The contract, however, was entered into solely between O'Shea and North American Hotel Company, though the language of the contract made it clear that it was on behalf of all three owners. Default occurred, and O'Shea, in his own name, sued North American Hotel Company on behalf of himself and the other two owners. North American Hotel Company objected on the grounds that O'Shea was not the real party in interest with respect to anything more than his one-third interest in the real estate. In rejecting the claim this court cited the predecessor to § 25-304 as authority for bringing such an action pursuant to the contract of the parties, and it permitted O'Shea to bring suit on behalf of all the parties to the contract in his own name. See, also, *Ley v. Miller*, 28 Neb. 822, 45 N.W. 174 (1890). Nothing Chiles, Heider did in making demand or bringing this suit in any way affected the validity of the war-

rants. By making demand for repurchase under the terms of the agreement, Chiles, Heider was simply doing what the parties had earlier agreed to in the repurchase agreement. Under the terms of the repurchase agreement Chiles, Heider was the real party in interest for the purpose of making demand upon Pawnee Meadows to purchase all of the warrants, regardless of who held them, and was entitled to bring the suit in its own name to enforce performance of *its* contract with Pawnee Meadows without making all of the other warrant holders parties. The trial court was correct in requiring Pawnee Meadows to purchase all of the outstanding warrants and, upon failure thereof, to permit the land to be foreclosed to pay for the repurchase of all of the warrants, subject, of course, only to the condition as provided for in this opinion that in fact the warrants be physically delivered to Pawnee Meadows. This is what Pawnee Meadows agreed to in writing, and it should not now be surprised.

We have further examined the claim raised by Pawnee Meadows regarding the release of individual lots and found it to be without merit. No purpose would be served in detailing the claim to any greater extent. For these reasons the judgment of the trial court is affirmed, except as modified herein, and the cause is remanded to the district court with directions to modify the decree as provided for in this opinion.

AFFIRMED AS MODIFIED.

BOSLAUGH, J., participating on briefs.

IN RE INTEREST OF M.W., B.L.W., R.L.W., AND B.J.W., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. L.W., APPELLANT.

348 N.W.2d 861

Filed May 11, 1984. No. 83-345.

Parental Rights: Appeal and Error. In an appeal of a juvenile case, including termination of parental rights, we review the record de novo, and regarding disputed facts make our own findings independent of any conclusion reached by the trial court. If evidence is in conflict or dispute, we do consider and give great weight to the fact that the trial court has observed the parties and witnesses and has judged their credibility.

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

John R. Brownell of Lauritsen, Baker & Brownell, for appellant.

Cunningham, Blackburn, VonSeggern, Livingston, Francis & Riley, and Gary Schacht, Deputy Hall County Attorney, for appellee.

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

PER CURIAM.

The natural mother of the children under the age of 18 years, M.W., B.L.W., R.L.W., and B.J.W., appeals the Hall County District Court's judgment affirming a county court order terminating the mother's parental rights. We affirm.

Although the mother assigns five errors, the errors are summarized as follows: (1) There is insufficient evidence to terminate parental rights, and (2) The court should have required less restrictive alternatives before terminating parental rights.

On February 26, 1981, a petition was filed in the county court and alleged the children were abandoned by their parents and lacked parental care by reason of the fault or habits of their parents; were children whose parents neglected or refused to pro-

vide proper or necessary subsistence, education, or other care necessary for the health, morals, or well-being of the children; and were children whose parents neglected or refused to provide special care made necessary by the mental condition of the children. See Neb. Rev. Stat. § 43-202(2)(a), (b), (c), and (d) (Reissue 1978). On March 4, 1981, after a hearing on temporary custody, the county court placed legal and physical custody of the children with the Hall County Department of Public Welfare, subject to visitation by their parents.

On May 1, 1981, the parents of the children admitted the allegation that the children lacked proper parental care by reason of the faults and habits of the parents. The county court then adjudged that the children came within the purview of § 43-202(2)(a) and (b). After such adjudication by the county court, the parents entered into an agreement with the county welfare department, which required that the parents (1) obtain and maintain employment at least 35 hours per week, (2) obtain suitable housing, (3) refrain from using illegal drugs and intoxicating beverages, (4) continue with counseling at the mental health center, (5) continue involvement with the parenting group at the mental health center or with the nutrition aid group, (6) have visitation with the children from 5:30 p.m. on Fridays to 5:30 p.m. on Sundays, and (7) develop a written plan for babysitting services once the children are returned to their home. In the meantime, the county welfare department placed the children with foster parents.

As a result of a hearing on August 25, 1981, the county court found that the parents of the children had not substantially complied with their agreement with the county welfare department until approximately 3 weeks before the hearing. In its order of August 25, the county court specifically incorporated the provisions of the agreement between the parents and the county welfare department.

On November 3, 1981, a motion was filed for

termination of parental rights. At the May 6, 1982, hearing on the motion, the evidence showed the children's parents had not complied with the provisions of the agreement with the welfare department and the court's order incorporating that agreement between the parents and the welfare department. In particular, the evidence showed that the employment of the parents was sporadic, that alcohol abuse was still a problem with the children's father, who had been incarcerated for a parole violation, that the parents had to change residences at least three times due to evictions for nonpayment of rent, and that the parents failed to keep their appointments for counseling. Upon the evidence at the May 6 hearing, the county court indefinitely continued the termination hearing, revoked the parents' contract with the welfare department, and entered a supplemental order requiring the parents to obtain employment and to maintain regular counseling for parenting skills.

At a hearing on July 16 provisions were made for return of the children to the parental home, provided the parents continued and completed parenting classes, complied with the special educational needs of each child, continued medical treatment for the children, and provided adequate housing.

The parents left their home when they could not pay rent on their residence. On October 14, 1982, there was a hearing on the supplemental motion to terminate parental rights. Evidence showed that all four children have special needs not met while the children were in parental custody. A pediatrician testified the children were dirty when brought to his office, and the physician expressed concern that the children had not received prescriptions ordered by the doctor. When the pediatrician tried to treat the children with injectable medication, the parents did not come to the doctor's office for appropriate followup treatment of the children. Another physician testified that the children's hygiene was sub-

standard and that some of the children were unclean to the point of neglect.

A staff nurse for the home health care program periodically visited the parental home and observed the children's illnesses due to failure to administer medication obtained for the children. The nurse took the children to a physician because the parents had neglected to do so. On one occasion the nurse took one of the children to a physician because the mother failed to recognize a serious case of pneumonia in the child. Failure to treat a recurring ear infection in one of the children was a potential cause of loss of hearing. However, the home health care program ceased when the nurse could not locate the parents, who had moved without notifying the nurses about a new location for the parents and the children.

A social services worker testified that parenting classes, usually completed within 8 to 10 weeks, were never completed by the father of the children during the 20 months that the proceedings had been under submission in the county court. The mother completed the program some 18 months after the petition had been filed in 1981.

The children's mother admitted at the hearing that the parental home was not a good environment for the children and that she could not take care of the four children under the circumstances, especially in view of the father's alcohol problem and presence in the home.

As a result of the hearing on October 14, 1982, the county court terminated parental rights and placed legal and physical custody with the Nebraska Department of Public Welfare for permanent placement for adoption. The parents appealed to the district court. The district court, upon the evidence, found that the conditions described in § 43-292(2), (3), and (4) (Cum. Supp. 1982) existed, namely, that "the neglect of the minor children and failure to discharge the duties of parental care and protection

have been substantial, continuous and repeated." The district court also found that termination of parental rights was in the best interests of the children and that the order of the county court terminating parental rights was supported by clear and convincing evidence, and affirmed the county court's judgment.

Termination of parental rights must be based on clear and convincing evidence. *In re Interest of Hill*, 207 Neb. 233, 298 N.W.2d 143 (1980). In an appeal of a juvenile case, including termination of parental rights, we review the record de novo, and regarding disputed facts make our own findings independent of any conclusion reached by the trial court. If evidence is in conflict or dispute, we do consider and give great weight to the fact that the trial court has observed the parties and witnesses and has judged their credibility. Cf., *State v. Kinkner*, 191 Neb. 367, 216 N.W.2d 165 (1974); *State v. Rice*, 204 Neb. 732, 285 N.W.2d 223 (1979); *In re Interest of Brungardt*, 211 Neb. 519, 319 N.W.2d 109 (1982); *In re Interest of Roman*, 212 Neb. 919, 327 N.W.2d 36 (1982). Although the mother contends that there is no clear and convincing evidence to support termination of parental rights, there is clear and convincing evidence for terminating parental rights. In this case the evidence clearly and convincingly establishes that the mother has been unable to care for the children and that the mother has failed to take advantage of the resources and facilities offered to improve living conditions for the children. Such inability to care for the children and indifference to the well-being of the children has persisted over many months and indicates an impermissible inability to take care of the children.

Concerning the mother's contention that the court should have required less restrictive alternatives before terminating parental rights, it is not the law in Nebraska that parental rights may not be terminated unless a parent is given a reasonable oppor-

tunity for rehabilitation. The court may, within its discretion, order a parent to make reasonable efforts to rehabilitate, and a parent's failure in such rehabilitative efforts is another independent reason justifying termination of parental rights. See, *In re Interest of Brungardt, supra*, citing *In re Interest of Wood and Linden*, 209 Neb. 18, 306 N.W.2d 151 (1981); § 43-292(6) (Cum. Supp. 1982). Although the right of parents to maintain custody of their children is a natural right protected by the Constitution, such parental right is subject to the paramount interest which the public has in the protection of the rights of a child. See *In re Interest of M.*, 215 Neb. 383, 338 N.W.2d 764 (1983). Alternatives less restrictive than termination of parental rights were attempted over a period of approximately 20 months. The mother has failed to rehabilitate herself, notwithstanding the county court's order and programs directed to rehabilitation. When parents cannot rehabilitate themselves within a reasonable time, the best interests of a child require that a final disposition be made without delay. See, *In re Interest of M., supra*; *In re Interest of R.D.J. and K.S.J.*, 215 Neb. 724, 340 N.W.2d 415 (1983). " '[W]e will not gamble with the child's future; she cannot be made to await uncertain parental maturity.' " *State v. Souza-Spittler*, 204 Neb. 503, 511, 283 N.W.2d 48, 52 (1979). Upon the record before us we conclude there is clear and convincing evidence that the best interests of the minor children require termination of the mother's parental rights.

AFFIRMED.

KRIVOSHA, C.J., dissenting.

I must respectfully dissent from the majority opinion. In my view the evidence in this case is neither clear nor convincing that the parental rights of the mother should be terminated. Quite to the contrary, I believe the evidence discloses that if any movement, in fact, is occurring, it is in the direction of improvement on the part of the mother. While it is

true that we need not wait forever to " 'await uncertain parental maturity,' " see *State v. Souza-Spittler*, 204 Neb. 503, 511, 283 N.W.2d 48, 52 (1979), neither should we encourage the parent to improve her condition and, just at the moment that evidence of improvement appears, decide we have waited too long.

There is no evidence of physical abuse, though there is some evidence that by reason of the low mental condition of the mother, the children have experienced some medical problems. This, however, is balanced against the facts that for 5 months prior to the hearing the mother remained gainfully employed, that she finally completed the parenting classes that had been required of her, and that for 8 months prior to the hearing she had abstained from the use of alcoholic beverages. Neither unemployment nor one's inability to pay rent, thereby necessitating frequent moves, absent actual harm to a child, should be grounds for termination of parental rights.

What we really have in this case is a poor, uneducated parent who has, by reason of her place in society, had poor, uneducated children. But a court cannot deprive a parent of the custody of a child merely because the parent has limited resources or financial problems, or is not socially acceptable, or because the parent's lifestyle is not typically middle class. It seems almost self-evident that any child of poor, uneducated parents who is placed with wealthy, educated parents will be "better off." However, in determining the "best interests" of the child, we cannot close our eyes to the realities of life and assume that we should terminate parental rights to children because of the parents' financial station in life or inability to conduct themselves in accordance with middle class standards. Poor, illiterate people still have a right to have children.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL J. JACKSON, APPELLANT.

348 N.W.2d 866

Filed May 11, 1984. No. 83-375.

1. **Lesser-Included Offenses.** 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.
2. **Constitutional 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.
3. _____: _____. Multiple punishments can be imposed for the same act without violating the double jeopardy guarantee of the fifth amendment to the U.S. Constitution, where it is specifically authorized by state statute.
4. **Lesser-Included Offenses.** Use of a firearm or other deadly weapon in the commission of a felony is not a lesser-included offense of assault in the second degree.

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

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

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

KRIVOSHA, C.J., WHITE, and CAPORALE, JJ., and MCCOWN and BRODKEY, JJ., Retired.

WHITE, J.

Appellant, Michael J. Jackson, was found guilty by a jury in Douglas County, Nebraska, on a two-count information, assault in the second degree, Neb. Rev. Stat. § 28-309 (Reissue 1979), and use of a firearm in the commission of a felony, Neb. Rev. Stat. § 28-1205 (Reissue 1979). Second degree assault is a Class IV felony, punishable by a fine and/or confinement of up to 5 years. Use of a firearm to

commit a felony is a Class III felony, punishable by a fine and/or confinement of up to 20 years. Appellant was sentenced to a term of 20 months to 5 years' imprisonment on the second degree assault charge and to a consecutive term of 3 to 5 years' imprisonment for use of a firearm in the commission of a felony.

On December 21, 1982, at about 11:25 p.m., Jackson and a companion were observed from a window in the Old Settlers Bar located at 5250 South 21st Street, Omaha, Nebraska, crouched in the vicinity of two pickup trucks belonging to patrons of the bar. The victim, John Granger, and three others left the bar and ran across the street to the parking lot where the pickups were parked. Appellant was directed to stop and was subsequently tackled and held on the ground by Granger. Jackson struggled with Granger, and Granger struck Jackson across the face at least once. Jackson managed to free his right hand, remove a loaded .22-caliber revolver from his belt area, and shoot Granger once in the upper chest. Jackson escaped, as did his companion, who was concealed in one of the pickups. Police later apprehended both Jackson and his companion. The companion testified at the trial that the purpose of the late evening expedition was to steal something that could be sold in order to obtain a birthday present for the companion's sister, Jackson's girl friend.

Appellant does not maintain that the evidence is insufficient to sustain his conviction, nor does he contend of any errors in the admission of evidence or in the jury instructions. His sole assignment of error is directed at the sentences imposed, that being that the two sentences imposed were for essentially the same crime, thus violating the appellant's right not to be twice placed in jeopardy for the same crime, in accordance with the fifth amendment to the U.S. Constitution. The question for resolution is whether use of a firearm to commit a

felony is a lesser-included offense of second degree assault.

The State argues that the offenses are distinct, and, in any circumstance, even if the offenses were identical or lesser-included, no constitutional prohibition exists against multiple penalties where the Legislature clearly intended such penalties to be imposed.

The definition of what constitutes a lesser-included offense has been extensively litigated in this state. A majority of this court has adopted what may best be termed "The Statutory Elements Theory." In *State v. Lovelace*, 212 Neb. 356, 359, 322 N.W.2d 673, 675 (1982), we defined a lesser-included offense as

> "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. . . ."

For a general discussion of the various theories of lesser-included offenses, see Comment, *State v. Lovelace: The Procrustean State of the Lesser-Included Offense Doctrine in Nebraska*, 17 Creighton L. Rev. 417 (1984).

We should from the beginning indicate that the scope of our inquiry is not directed by the fact that the crimes charged arose out of a single act. As we repeated in *State v. Kuntzelman*, 215 Neb. 115, 119, 337 N.W.2d 414, 417 (1983):

> "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 . . . 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."

Citing *State v. Robinson*, 202 Neb. 210, 214, 274 N.W.2d 553, 555-56 (1979).

Reviewing the offenses involved herein, second degree assault is defined in § 28-309, which provides in pertinent 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 . . . . (2) Assault in the second degree shall be a Class IV felony."

The offense of using a firearm or other deadly weapon to commit a felony is defined in § 28-1205 as follows:

> (1) Any person who uses a firearm, knife, brass or iron knuckles, or any other deadly weapon to *commit any felony which may be prosecuted in a court of this state*, or any person who unlawfully possesses a firearm, knife, brass or iron knuckles, or any other deadly weapon during the commission of any felony which may be prosecuted in a court of this state commits the offense of using firearms to commit a felony.
>
> (2) Use of firearms to commit a felony is a Class III felony.
>
> (3) The crime defined in this section shall be treated as a separate and distinct offense from the felony being committed, and *sentences imposed under the provisions of this section shall be consecutive to any other sentence imposed.*

(Emphasis supplied.)

In order to convict appellant of second degree assault, the prosecutor was legally required to prove (1) intent or knowledge, (2) bodily injury to another, and (3) use of a dangerous instrument. Clearly, elements (1) and (2) are irrelevant to the offense of use of a firearm to commit a felony. On the other hand, in order to convict appellant of the offense of use of a firearm, the prosecution was legally required to prove (1) the carrying or possession of a firearm or other deadly weapon, and (2) that said firearm or

deadly weapon was carried or possessed during the commission of *any* felony which may be prosecuted in a court of this state. The second element is not part of the crime of second degree assault. Although factually in this case the prosecution relied on proof of second degree assault in order to secure the use of a firearm conviction, it was not legally required to do so. Proof of any felony which may be prosecuted in a court of this state would have been sufficient. While the evidence offered to prove the violation overlaps, the violation itself is distinctly different. *Legally*, each provision requires proof of a fact which the other does not.

This rationale was used by the eighth circuit in *Kowalski v. Parratt*, 533 F.2d 1071 (8th Cir. 1976), *cert. denied* 429 U.S. 844, 97 S. Ct. 125, 50 L. Ed. 2d 115, to uphold a defendant's multiple convictions and consecutive sentences for both robbery and use of a firearm in the commission of a felony. The court therein stated at 1073: "Although the appellant assumes that count II [use of a firearm in the commission of a felony] *required* proof of the robbery alleged in count I, that is not the case. The weapons statute is satisfied by proof that a weapon was possessed or used during *any* felony." (Emphasis supplied.)

Similarly, in *Wayne Pros v Recorder's Ct Judge*, 406 Mich. 374, 280 N.W.2d 793 (1979), wherein the appellant's convictions for the crimes of armed robbery and felony-firearm were upheld, the court analyzed the issue as follows:

> In order to convict the defendant of armed robbery, the prosecution was legally required to prove an assault, a taking and an intent to permanently deprive the owner of his or her property—none of which are legally required to convict the defendant of felony-firearm. On the other hand, in order to convict the defendant of felony-firearm, the prosecution was legally required to prove two things: first, that the de-

> fendant carried or possessed a firearm—a fact which is not necessary to secure a conviction for armed robbery (any "dangerous weapon" or "article" used or fashioned so as to lead the victim to believe it is a dangerous weapon will satisfy the "armed" requirement of the armed robbery statute); second, that the firearm was carried or possessed during the course of any felony or attempted felony. *The prosecution was not legally required to prove armed robbery. Any proper felony would have sufficed. Each of these statutes legally requires proof of a fact which the other does not.* Proof of felony-firearm does not necessarily prove armed robbery.

(Emphasis supplied.) *Id.* at 398-99, 280 N.W.2d at 799.

In the instant case appellant was charged with the crime of intentionally or knowingly causing bodily injury to the victim with a dangerous instrument, count I, and the crime of use of a firearm to commit a felony which may be prosecuted in a court of this state, count II. Employing the above-stated rationale, since the prosecution was not *legally* required to prove second degree assault as an element of the crime of use of a firearm, the elements of the two offenses are different. Thus, appellant was convicted of two separate offenses within the meaning of the constitutional prohibition against double jeopardy, and his contentions in that regard are without merit.

A separate and distinct reason presents itself requiring affirmance. As noted in *State v. Kuntzelman*, 215 Neb. 115, 119, 337 N.W.2d 414, 417 (1983):

> 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.

Section 28-1205 is plain and unambiguous. The statute requires the imposition of a consecutive sentence when a person uses a firearm or other deadly weapon to commit "any felony which may be prosecuted in a court of this state."

The legislative intent being manifest and the multiple sentences not constitutionally infirm, the assignment is without merit and the trial court's judgment is affirmed.

AFFIRMED.

McCOWN, J., Retired, dissents.

MAUREEN MACMILLEN, APPELLANT, V. A. H. ROBINS COMPANY, INC., APPELLEE.

348 N.W.2d 869

Filed May 11, 1984. No. 83-383.

1. **Demurrer.** A demurrer admits all well-pleaded facts.
2. **Limitations of Actions.** One who wrongfully conceals a material fact necessary to the accrual of a cause of action against him, and such concealment causes the opposite party to delay the filing of suit, cannot avail himself of the statute of limitations as a defense.
3. **Estoppel.** Estoppel may be applied to prevent a fraudulent or inequitable resort to a statute of limitations.

Appeal from the District Court for Lancaster County: DALE E. FAHRNBRUCH, Judge. Reversed and remanded.

Thomas J. Jenkins, and A. James McArthur of McArthur, Lamb, Lyford, Gilmore & Janssen, for appellant.

Ronald F. Krause of Cassem, Tierney, Adams, Gotch & Douglas, for appellee.

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

BOSLAUGH, J.

This is an appeal in a products liability action brought by Maureen MacMillen against A. H. Robins Company, Inc. (Robins), the manufacturer of an intrauterine contraceptive device known as a "Dalkon Shield." The trial court sustained the defendant's demurrer and dismissed the amended petition. The plaintiff appeals.

The amended petition alleged that the Dalkon Shield, which was designed for permanent implantation into the uterus by a physician to prevent conception, was unsafe for its intended use. The plaintiff alleged that in March of 1971 she was implanted with a Dalkon Shield and that in November of 1978 her physician found that she had an abscess and infection in her uterus and she underwent an abdominal hysterectomy with bilateral oophorectomy. The plaintiff further alleged that her injury was caused by the defects in the Dalkon Shield and that the defendant had concealed information regarding the dangers of use of the Dalkon Shield.

The defendant filed a demurrer alleging that the plaintiff did not have capacity to sue and that any cause of action was barred by the statute of limitations.

The applicable statute of limitations, Neb. Rev. Stat. § 25-224 (Cum. Supp. 1982), provides:

> (1) All product liability actions, except one governed by subsection (5) of this section, shall be commenced within four years next after the date on which the death, injury, or damage complained of occurs.
>
> (2) Notwithstanding subsection (1) of this section or any other statutory provision to the contrary, any product liability action, except one governed by section 2-725, Uniform Commercial Code or by subsection (5) of this section, shall be commenced within ten years after the date when the product which allegedly caused

the personal injury, death, or damage was first sold or leased for use or consumption.

(3) The limitations contained in subsection (1), (2), or (5) of this section shall not be applicable to indemnity or contribution actions brought by a manufacturer or seller of a product against a person who is or may be liable to such manufacturer or seller for all or any portion of any judgment rendered against a manufacturer or seller.

(4) Notwithstanding the provisions of subsections (1) and (2) of this section, any cause of action or claim which any person may have on July 22, 1978, may be brought not later than two years following such date.

(5) Any action to recover damages based on injury allegedly resulting from exposure to asbestos composed of chrysotile, amosite, crocidolite, tremolite, anthrophyllite, actinolite, or any combination thereof, shall be commenced within four years after the injured person has been informed of discovery of the injury by competent medical authority and that such injury was caused by exposure to asbestos as described herein, or within four years after the discovery of facts which would reasonably lead to such discovery, whichever is earlier. No action commenced under this subsection based on the doctrine of strict liability in tort shall be commenced or maintained against any seller of a product which is alleged to contain or possess a defective condition unreasonably dangerous to the buyer, user, or consumer unless such seller is also the manufacturer of such product or the manufacturer of the part thereof claimed to be defective. Nothing in this subsection shall be construed to permit an action to be brought based on an injury described in this subsection discovered more than two years prior to August 30, 1981.

The first petition in the present case was filed on October 29, 1982, within 4 years after the injury occurred, but more than 10 years after the date of the sale of the product. The trial court sustained a demurrer to the first petition because the petition had been filed more than 10 years after the date of sale.

The amended petition was then filed alleging that the defendant had intentionally withheld information from the public regarding the dangers inherent in the use of the Dalkon Shield. A demurrer to the amended petition was sustained and the amended petition dismissed.

The plaintiff has assigned as error the sustaining of the demurrer to the amended petition, and has made several arguments in support of this assignment. We discuss only the issue raised by the allegations that the defendant deliberately concealed information regarding danger from use of the Dalkon Shield.

A demurrer admits all well-pleaded facts. *Almarez v. Hartmann*, 211 Neb. 243, 318 N.W.2d 98 (1982).

The issue to be determined is whether the defendant is estopped from raising the statute of limitations as a defense because defendant fraudulently concealed its knowledge of the dangerousness of the Dalkon Shield. In *Rucker v. Ward*, 131 Neb. 25, 33, 267 N.W. 191, 195 (1936), we said, " 'One who wrongfully conceals a material fact necessary to the accrual of a cause of action against him, and such concealment causes the opposite party to delay the filing of suit, cannot avail himself of the statutes of limitation as a defense;'. . . ." In *Luther v. Sohl*, 186 Neb. 119, 121, 181 N.W.2d 268, 269 (1970), we stated that "estoppel may be applied to prevent a fraudulent or inequitable resort to a statute of limitations." We also stated that "if a plaintiff has ample time to institute his action, after the inducement for delay has ceased to operate, he cannot excuse his failure to act within the statutory time on the ground of estoppel." *Id.* at 122, 181 N.W.2d at 270.

Knaysi v. A. H. Robins Co., 679 F.2d 1366 (11th Cir. 1982), is similar to the present case. In that case Knaysi alleged that her spontaneous septic abortion was caused by the Dalkon Shield and that Robins had concealed its knowledge that septic abortions occurred in connection with the use of the Dalkon Shield. The eleventh circuit reversed the trial court's grant of summary judgment, which was made on the basis that the action was time barred. The eleventh circuit held that Knaysi had adequately pleaded facts which, if proven, could constitute an equitable estoppel to raising the statute of limitations as a defense. The court stated at 1370:

> Having determined that the facts alleged could, if proved, estop Robins from pleading the bar of the statute of limitations, we further conclude that the issue of equitable estoppel was one inappropriate for summary judgment as there exist genuine issues of material fact to be resolved at trial. First, there are obvious questions of fact regarding the alleged misrepresentations made by Robins. In *Dupuis v. Van Natten*, 61 A.D.2d 293, 402 N.Y.S.2d 242 (1978), the Appellate Division, affirming the trial court's holding that triable issues of fact precluded entry of summary judgment for defendant, noted the "bona fide issues of fact concerning the alleged misrepresentations which resulted in plaintiffs' failure to institute a timely action." *Id.* at 295, 402 N.Y.S.2d at 243.
>
> In addition, the highest state court in New York recently has endorsed the notion that the plaintiff's due diligence in bringing suit must "be demonstrated by the plaintiff when he seeks the shelter of the doctrine [of equitable estoppel]." *Simcuski v. Saeli*, 44 N.Y.2d at 450, 377 N.E.2d at 717, 406 N.Y.S.2d at 263. The Court of Appeals went on to state: "Whether in any particular instance the plaintiff will have discharged his responsibility of due diligence in

this regard must necessarily depend on all the relevant circumstances. . . . *It is not* possible or *appropriate*, however, on the present motion [to dismiss] addressed to the pleading, . . . to determine whether this plaintiff met her obligation of due diligence when she instituted the present action . . . ." *Id.* (emphasis added). Other cases in the New York courts echo the conclusion that the question of a plaintiff's due diligence is a question of fact unsuited for summary judgment. In *Renz v. Beeman*, a diversity action in which New York law governed, the Second Circuit opined "that the test for timely knowledge under the doctrine of equitable estoppel is similar to that set forth with regard to fraud in CPLR § 213(8)—'could with reasonable diligence have discovered it.' " 589 F.2d at 751-52. In *Erbe v. Lincoln Rochester Trust Co.*, 3 N.Y.2d 321, 144 N.E.2d 78, 165 N.Y.S.2d 107 (1957), a fraud action, the New York Court of Appeals elaborated on this reasonable diligence test and the inappropriateness of summary disposition: "[T]he plaintiffs will be held to have discovered the fraud when it is established that they were possessed of knowledge of facts from which it could be reasonably inferred, that is, inferred from facts which indicate the alleged fraud. Ordinarily such an inquiry presents a mixed question of law and fact . . . and, where it does not conclusively appear that the plaintiffs had knowledge of facts of that nature a complaint *should not be dismissed on motion.*" *Id.* at 326, 144 N.E.2d at 80-81, 165 N.Y.S.2d at 111 (citations omitted) (emphasis added). *See also Erbe v. Lincoln Rochester Trust Co.*, 13 A.D.2d 211, 214 N.Y.S.2d 849 (1961), *appeal dismissed*, 11 N.Y.2d 754, 181 N.E.2d 629, 226 N.Y.S.2d 692 (1962) (motion to dismiss should be denied and plaintiff permitted to litigate estoppel issue). In light of these cases we must conclude that the

> Knaysis' diligence in pursuing their claims against Robins is a triable issue of fact in this case.

(Emphasis in original.)

The defendant argues that our decision in *Colton v. Dewey*, 212 Neb. 126, 321 N.W.2d 913 (1982), prevents a plaintiff from separating her claims so that the products liability statute of limitations would apply to some of them while a more favorable fraud statute of limitations would apply to other claims. The plaintiff does not contend that the fraud statute applies. The plaintiff argues that the defendant's fraudulent conduct has estopped it from asserting the products liability statute of limitations.

Colton, supra, was based upon our decision in *Stacey v. Pantano*, 177 Neb. 694, 131 N.W.2d 163 (1964), in which we held that fraudulent representations by a physician as to previous negligence or as to the plaintiff's condition do not convert the cause of action from one of malpractice to one of deceit. This rule is not applicable where the action is not founded upon professional negligence. The rationale underlying the rule of *Stacey v. Pantano, supra*, is inapplicable to the facts in this case.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

KRIVOSHA, C.J., concurring.

For reasons more specifically set out in my separate concurrence in *Sacchi v. Blodig*, 215 Neb. 817, 341 N.W.2d 326 (1983), I concur in the result reached by the majority in this case. I continue to adhere to the view, however, that any effort by the Legislature to bar a cause of action, regardless of the period of time, prior to that time when an individual knew or with the exercise of reasonable diligence could know that he or she had suffered injury or damage, would be a denial of both state and federal constitutional rights.

WHITE, J., joins in this concurrence.

STATE OF NEBRASKA, APPELLEE, V. JANE M. ARCHBOLD, APPELLANT.

350 N.W.2d 500

Filed May 11, 1984. No. 83-394.

1. **Homicide: Jury Instructions.** As required by Neb. Rev. Stat. § 29-2027 (Reissue 1979), and when there is a proper, factual basis, a court is required to instruct on the degrees of criminal homicide even in the absence of a requested instruction regarding the lesser degrees of criminal homicide.
2. **Trial: Evidence: Motions for Mistrial.** In order to prevent defeat of justice or to further justice during a jury trial, a mistrial is generally granted at the occurrence of a fundamental failure preventing a fair trial in the adversarial process.
3. **Trial: Evidence: Motions to Strike.** A litigant may not speculate about the answer to a question and then, after answer has been given, for the first time lodge his objection. Failure to make a timely objection or motion to strike will ordinarily bar a party from later claiming error in the admission of testimony.
4. _____: _____: _____. In order to be timely an objection must ordinarily be made at the earliest opportunity after the ground for the objection becomes apparent. A motion to strike is not timely where testimony has been adduced without objection and the grounds for the motion to strike should have been apparent before the motion to strike is made.
5. _____: _____: _____. A motion to strike evidence to which there should have been an objection when offered is merely another term for an objection and is governed by the rules as to the time of an objection.
6. **Trial: Evidence: Motions for Mistrial.** When there occurs in the course of a trial a highly prejudicial event which is likely to materially affect the outcome of the trial, the party aggrieved must raise his objection then and move for mistrial. His failure to do so when he reasonably should have known of the prejudicial occurrence constitutes a waiver of the objection.
7. **Trial: Evidence.** Problematical prejudice is no justification for delay in making a required, proper objection to questioning and testimony believed to be improper.

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

Steven Lefler of Schrempp, Lefler, Hoagland & Gray, 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.

Jane M. Archbold appeals her conviction and sentence for manslaughter. Archbold complains that the trial court should not have given an unrequested instruction regarding manslaughter when the crime alleged in the information was second degree murder. As an additional complaint, Archbold claims a mistrial should have been declared as a result of evidence adduced on Archbold's cross-examination. We affirm.

About 7 p.m. on November 19, 1982, Jane Archbold, 19 years old, took her 2-year-old son to the home of her sister, Kathy Archbold, for babysitting. At approximately 10 p.m. a group unexpectedly visited Kathy's home, and a party developed. During the party, Kathy got into an argument with her boyfriend, Gregory (Greg) Middleton. Jane arrived at midnight, while Kathy and Middleton were arguing. Shortly after Jane's arrival, Kathy went into the kitchen of her house and returned to the front room brandishing a kitchen knife. Kathy asked Middleton to leave and threatened him with the knife. While quieting Kathy, Jane took the kitchen knife from Kathy and put it in her belt or sash. Jane remained at Kathy's house until 1 or 1:30 a.m. (November 20), when Kathy and Jane decided to take their children to Sue Waugh's house across the street.

At Sue Waugh's house Kathy and Jane visited around 1½ hours, when one of the male party-people from Kathy's house came across the street and talked to Jane. Because that man was "loaded," Jane walked him back across the street. About this time, Middleton came to Waugh's house and demanded to see Kathy, who was inside. When Kathy did not appear, Middleton broke a window and ripped the screen door of Waugh's house.

Waugh, carrying a baseball bat, came out the back door of her house and encountered Middleton at the side of the house. At this point Jane was returning to Waugh's house and saw Waugh and Middleton meet alongside the house. Waugh swung the baseball bat at Middleton, but missed. Middleton then tackled Waugh and grabbed the ball bat. As Jane came near the scene, Waugh broke away from Middleton, and Middleton threw the ball bat against the side of the house. The ball bat caromed off the house and struck Jane's head.

Middleton apologized to Jane for causing the ball bat to strike her. As Middleton and Jane walked from the scene of the Waugh-Middleton scuffle, Middleton continued to apologize for and Jane harangued about the "bat incident." After a 2-minute walk and argument, interspersed with profanities from Jane, Middleton and Jane reached the street in front of Waugh's house.

As observed by the party-people at Kathy's house, Kathy approached Middleton and Jane in the street. Kathy asked Middleton to leave. In the course of this meeting involving Kathy, Middleton, and Jane, Middleton—apparently realizing that Jane still carried the knife—said to Jane, "What are you going to do, stab me?" As Middleton began to move toward Kathy, Jane raised the kitchen knife and stabbed Middleton in his upper left chest. The knife severed Middleton's pulmonary artery and produced hemorrhage which caused his death.

An information was filed charging Archbold with second degree murder of Gregory Middleton (Neb. Rev. Stat. § 28-304(1) (Reissue 1979)), and the case was tried before a jury.

In her cross-examination Archbold testified:

> Q. There is no accident about this stabbing, is there, Miss Archbold? You are not telling the jury that in any way your taking that knife and stabbing him in the chest was an accident, you did it intentionally, didn't you? A. No. Q. You

didn't do it intentionally? A. It was a reflex. Q. I'm sorry? A. It was a reflex. Q. A reflex. I mean, is this reflexive action that happened that night, I mean is it something you have done before? A. What do you mean? Q. Stab somebody before? A. No. Q. You never have? Out in California? A. Yes.

After the foregoing interrogation the prosecutor questioned Archbold about other aspects of Middleton's homicide and never cross-examined Archbold further about the stabbing in California. Shortly after Archbold's redirect examination was commenced, Archbold's counsel interrupted his questioning and approached the bench. The court excused the jury, and outside the jury's presence Archbold's counsel moved for a mistrial due to the cross-examination about the California stabbing. The court and Archbold's counsel agreed that such questioning by the prosecutor was not in bad faith. The California stabbing had been unknown to Archbold's attorney until elicited on Archbold's cross-examination. Archbold's attorney then explained his reason for the delayed motion for mistrial, that is, the attorney's belief that a motion for mistrial during Archbold's cross-examination would have called "undue attention to that aspect of the case." The court overruled the motion for mistrial. Archbold's counsel then objected to the prosecutor's question regarding the California stabbing, moved to strike Archbold's testimony about such stabbing as irrelevant, and requested that the court admonish the jury to disregard Archbold's testimony about the stabbing in California. The objection and the motion to strike were overruled, and the jury was not admonished to disregard Archbold's testimony about the California stabbing. Upon resumption of redirect examination Archbold testified in detail concerning the California stabbing.

During the conference on instructions, Archbold's counsel objected to any instruction on the crime of

manslaughter. Without any request to do so, the court gave an instruction on the elements of manslaughter, and also gave an unrequested instruction which in substance informed the jury that the California incident could be considered only for the limited purpose of determining whether Archbold had the requisite criminal intent as proof for second degree murder. There was no objection to the instruction regarding testimony about the California incident.

The jury's verdict was "guilty of manslaughter." After a presentence report, the court sentenced Archbold to a period of 5 to 10 years in the Nebraska Center for Women at York, Nebraska.

Archbold does not claim that the instruction on manslaughter contained any incorrect statement of law. As assignments of error, Archbold contends: (1) The trial court should not have instructed on the crime of manslaughter and should not have submitted such issue to the jury; (2) A mistrial should have been declared; and (3) The sentence is excessive.

There was evidence of a disagreement between Jane and Middleton as a result of the "bat incident." The circumstances surrounding the bat incident and argument resulted in a question for the jury whether Middleton's death occurred "upon a sudden quarrel" involving Archbold. Also, Middleton, knowing Archbold was carrying a knife, asked whether she was going to stab him. In her testimony Archbold called her stabbing Middleton a "reflex." "Reflex," in common usage, means an involuntary response, that is, an unintentional act. Consequently, in view of the evidence there was a jury question whether Middleton's homicide might have been unintentional but during the commission of an unlawful act (assault). In short, there was evidence on the elements of manslaughter. See Neb. Rev. Stat. § 28-305(1) (Reissue 1979).

Neb. Rev. Stat. § 29-2027 (Reissue 1979) provides:

"In all trials for murder the jury before whom such trial is had, if they find the prisoner guilty thereof, shall ascertain in their verdict whether it be murder in the first or second degree, or manslaughter . . . ."

Notwithstanding an information charging murder, when evidence can support different and reasonable inferences regarding the degree or grade of criminal homicide, the jury must draw the inference determining the degree of criminal homicide. See, *Moore v. State*, 148 Neb. 747, 29 N.W.2d 366 (1947); *Jackson v. Olson*, 146 Neb. 885, 22 N.W.2d 124 (1946); *Denison v. State*, 117 Neb. 601, 221 N.W. 683 (1928).

In order that there be an instruction on manslaughter as a lesser degree of criminal homicide within the charge of murder, there must be evidence which tends to show that the crime was manslaughter rather than murder. See *State v. Beers*, 201 Neb. 714, 271 N.W.2d 842 (1978).

When a proper, factual basis is present, a court must instruct a jury on the degrees of criminal homicide, that is, the provisions of § 29-2027 are mandatory. See *Bourne v. State*, 116 Neb. 141, 216 N.W. 173 (1927). Where murder is charged, the court is required, even without request, to instruct the jury on the lesser degrees of criminal homicide for which there is proper evidence before the jury. See *State v. Hardin*, 212 Neb. 774, 326 N.W.2d 38 (1982).

In view of the evidence concerning Middleton's death, in compliance with § 29-2027 the court was required to instruct the jury on the crime of manslaughter. Under the circumstances the court had no choice whether to give a manslaughter instruction. The court's submitting the issue of manslaughter was correct.

Archbold next contends there should have been a mistrial due to the prosecutor's questions about the California stabbing.

Although a mistrial is recognized in Nebraska trial practice, it does not appear that we have pre-

viously discussed the function of a mistrial. A mistrial results in nullification of a pending jury trial. In order to prevent defeat of justice or to further justice during a jury trial, a mistrial is generally granted at the occurrence of a fundamental failure preventing a fair trial in the adversarial process. Some examples are an egregiously prejudicial statement by counsel, the improper admission of prejudicial evidence, or the introduction of incompetent matters to the jury, to the extent that any damaging effect cannot be removed by proper admonition or instruction to the jury. See, *Loveland v. Nieters*, 79 N.D. 1, 54 N.W.2d 533 (1952); *Lemberger v. Koehring Co.*, 63 Wis. 2d 210, 216 N.W.2d 542 (1974); *Hoffer v. Burd*, 78 N.D. 278, 49 N.W.2d 282 (1951); *Usborne v. Stephenson*, 36 Or. 328, 58 P. 1103 (1899).

Courts have considerable discretion in passing on the motions for mistrial, to the end that justice be more nearly effectuated. See *State v. Ware*, 205 N.W.2d 700 (Iowa 1973).

To support her claim for a mistrial, Archbold relies on *Sandomierski v. Fixemer*, 163 Neb. 716, 81 N.W.2d 142 (1957). *Sandomierski* involved misconduct by counsel during closing argument and, generally, stands for the proposition that a motion for mistrial is timely if made at the first reasonable opportunity. See *Motis v. Manning*, 200 Neb. 593, 264 N.W.2d 844 (1978).

The question before us does not relate to a mistrial on account of improper argument by counsel. Rather, the question before us concerns availability of a mistrial during adduction of evidence. To resolve Archbold's claim for a mistrial, the adduction of evidence, objection to evidence, and a motion to strike testimony must be placed in perspective.

"A defendant cannot predicate error on the admission of evidence to which no objection was made at the time the evidence was adduced." *State v. Tomrdle*, 214 Neb. 580, 586, 335 N.W.2d 279, 283 (1983).

A litigant may not speculate about the answer to a question and then, after answer has been given, for the first time lodge his objection. See *State v. Smith*, 248 Iowa 603, 81 N.W.2d 657 (1957). If a party does not make a timely objection to evidence, the party waives the right on appeal to assert prejudicial error. See, *State v. Hogan*, 194 Neb. 207, 231 N.W.2d 135 (1975); *McAllister v. State*, 74 Wis. 2d 246, 246 N.W.2d 511 (1976). Failure to make a timely objection or motion to strike will ordinarily bar a party from later claiming error in the admission of testimony. See *State v. Shimon*, 182 N.W.2d 113 (Iowa 1970).

In order to be timely an objection must ordinarily be made at the earliest opportunity after the ground for the objection becomes apparent. A motion to strike is not timely where testimony has been adduced without objection and the grounds for the motion to strike should have been apparent before the motion to strike is made. See *State v. Goff*, 182 N.W.2d 921 (Iowa 1971).

A motion to strike evidence to which there should have been an objection when offered is merely another term for an objection and is governed by the rules pertaining to a timely objection. See *State v. Bruno*, 204 N.W.2d 879 (Iowa 1973). If an objection or motion to strike is made and the jury is admonished to disregard the objectionable or stricken testimony, ordinarily error cannot be predicated on the allegedly tainted evidence and a mistrial should not be granted. See, *State v. Kirby*, 185 Neb. 240, 175 N.W.2d 87 (1970); *State v. Lee*, 216 Neb. 63, 341 N.W.2d 600 (1983).

When a party has knowledge during trial of irregularity or misconduct, he must timely assert his right to a mistrial. See, *Breiner v. Olson*, 195 Neb. 120, 237 N.W.2d 118 (1975); *State Highway Commission v. Carmel Estates, Inc.*, 15 Or. App. 41, 514 P.2d 1124 (1973); *State v. Cornelius*, 293 N.W.2d 267 (Iowa 1980); cf. *Motis v. Manning*, *supra*.

> [W]hen there occurs in the course of trial a highly prejudicial event which is likely to materially affect the outcome of the trial, the party aggrieved must raise his objection then and move for mistrial. His failure to do so when he reasonably should have known of the prejudicial occurrence constitutes a waiver of the objection.

Lemberger v. Koehring Co., 63 Wis. 2d 210, 226, 216 N.W.2d 542, 550 (1974). See, *Hoffer v. Burd*, 78 N.D. 278, 49 N.W.2d 282 (1951); *Hayward v. Richardson Const. Co.*, 136 Mont. 241, 347 P.2d 475 (1959).

There was no objection to the prosecutor's inquiry about any prior stabbing by Archbold. In his discussion with the court regarding a mistrial, Archbold's counsel acknowledged his awareness of the possible prejudicial effect when the testimony was given. Yet, there was neither an objection nor a motion to strike, with the request for an appropriate admonition to the jury. In substance, Archbold seeks to use a motion for mistrial as a substitute for a timely objection which should have been made when any offensive line of questioning was commenced and the allegedly prejudicial testimony elicited. In the absence of either a proper objection to the prosecutor's questions about the California incident or a timely motion to strike Archbold's testimony about the stabbing in California, we cannot pass upon the admissibility of the California incident, that is, relevancy under Rule 404 of the Nebraska Evidence Rules, Neb. Rev. Stat. § 27-404 (Reissue 1979). Archbold's failure to object to the testimony adduced is a waiver of any objection to that evidence and precludes appellate review concerning admissibility of the evidence. Under the circumstances the trial court was correct in overruling Archbold's request for a mistrial.

Archbold seeks to excuse or justify tardiness of the motion for mistrial, objection to testimony, and motion to strike by suggesting possible aggravation of what Archbold viewed as an already bad situation

resulting from disclosure of the California incident. The elections whether to object to the prosecutor's questions and whether to move to strike Archbold's testimony when given became matters of counsel's strategy, on which we will not speculate. Problematical prejudice is no justification for delay in making a required, proper objection to questioning and testimony believed to be improper. The reason for such a rule is the necessity that a trial court have the opportunity to correct any mistake in the adduction of testimony, that is, to prevent the testimony or to strike the testimony and give the jury the appropriate admonition to disregard improper evidence. This rule and practice avoids the drastic consequence of a mistrial—the costly discontinuation and nullification of a jury trial, especially problems arising from rearranging court calendars and preserving evidence, as well as availability of witnesses. See, *Apple v. State*, 190 Md. 661, 59 A.2d 509 (1948); *State v. McGee*, 52 Wis. 2d 736, 190 N.W.2d 893 (1971).

We consider another aspect of Archbold's request for a mistrial. Notwithstanding counsel's recognition of the prejudicial effect of testimony about the California incident, Archbold's motion for mistrial was made only after the prosecutor had asked many questions quite unrelated to the line of questioning found offensive by Archbold, that is, some 139 questions later, which consumed 14 pages of the bill of exceptions and 25 minutes of interrogation by the prosecutor. That span afforded ample opportunity for counsel to approach the judge and, out of the jury's presence, move to strike testimony admitted with an excusable absence of objection; for example, where counsel was prevented from making a timely objection. Archbold's motion for a mistrial was not timely, because the motion was not made at the earliest opportunity after the claimed prejudice became apparent. The untimely motion was an ad-

ditional basis for the trial court's proper refusal to grant a mistrial.

Our disposition of Archbold's claim for a mistrial should not be construed that there is no instance where a mistrial can be granted without an antecedent objection or motion to strike. A mistrial may be warranted where unfairness has been injected into a jury trial and so permeates the proceedings that no amount of admonition to the jury can remove the unfairness to a party. Cf., *Motis v. Manning*, 200 Neb. 593, 264 N.W.2d 844 (1978) (reference in plaintiff's case to liability insurance and the defendant moved for mistrial as soon as the plaintiff rested her case); *United States v. King*, 461 F.2d 53 (8th Cir. 1972) (government's attorney, being forewarned that witnesses would invoke the fifth amendment, nevertheless asked whether the witness was with the defendant when the crime occurred, thereby creating an atmosphere of prejudice; held, a precautionary instruction could not sufficiently cure prejudice to the defendant). See, also, *State v. Allen*, 224 N.W.2d 237 (Iowa 1974); *Stoskoff v. Wicklund*, 49 N.D. 708, 193 N.W. 312 (1923). Therefore, a mistrial may be the only recourse on those occasions when admonition to the jury cannot eradicate the unfair prejudice to a party, or, as expressed in *Dunn v. United States*, 307 F.2d 883, 886 (5th Cir. 1962), "Otherwise stated, one 'cannot unring a bell'; 'after the thrust of the saber it is difficult to say forget the wound'; and finally, 'if you throw a skunk into the jury box, you can't instruct the jury not to smell it'."

Finally, Archbold believes her sentence of 5 to 10 years for manslaughter is excessive. None can be oblivious to the fact that a human life has been lost under circumstances which preclude a sentence less than that imposed by the district court. Any sentence of a shorter term would depreciate the gravity of criminal homicide and would spawn disrespect for the criminal justice system. Cf. *State v. Alexander*, 215 Neb. 478, 339 N.W.2d 297 (1983). The sen-

tence imposed is within the statutory limits, and we find no abuse of discretion by the sentencing court. Consequently, we will not disturb the sentence imposed upon Jane M. Archbold. See *State v. Parks*, 212 Neb. 635, 324 N.W.2d 673 (1982).

The judgment of the district court is correct in all respects and is therefore affirmed.

AFFIRMED.

IN RE ESTATE OF RAYMOND K. SNYDER.
HARVEY A. NEUMEISTER, PERSONAL REPRESENTATIVE OF THE ESTATE OF RAYMOND SNYDER, ALSO KNOWN AS RAYMOND K. SNYDER, DECEASED, APPELLANT, V. KAREN BOTELHO ET AL., APPELLEES.

348 N.W.2d 136

Filed May 11, 1984. No. 83-441.

1. **Decedents' Estates: Appeal and Error.** The standard of review in both the district court and this court in cases arising from Neb. Rev. Stat. § 30-2482 (Cum. Supp. 1982) is for error appearing on the record.
2. **Constitutional Law: Appeal and Error.** For a question of constitutionality to be considered on appeal, it must have been properly raised in the trial court. Except in the most unusual of cases, if it has not been raised in the trial court, it will be considered to have been waived.

Appeal from the District Court for Otoe County: RAYMOND J. CASE, Judge. Affirmed.

Edwin A. Getscher, and Harvey A. Neumeister and Kent J. Neumeister, for appellant.

Lora L. Damme, and Jay W. Longinaker of Eaton & Longinaker, for appellees.

KRIVOSHA, C.J., WHITE, and CAPORALE, JJ., and MCCOWN and BRODKEY, JJ., Retired.

WHITE, J.

This is an appeal from an order on final accounting and settlement by Harvey A. Neumeister, per-

sonal representative and attorney for the estate of Raymond K. Snyder. In its order the district court affirmed the order of the county court setting the fee for the services of appellant Neumeister as personal representative and attorney at $9,000, including all expenses advanced by appellant. The district court further directed the refunding of $3,900 of the $12,900 which appellant had paid himself for services as personal representative and attorney. The district court did, as do we, review the case for error appearing on the record. See Neb. Rev. Stat. §§ 30-1601 and 24-541.06 (Cum. Supp. 1982).

Appellant assigns as error:

> The County Court of Otoe County violated both the vested contractual rights and the vested property rights of Mr. Harvey A. Neumeister as the personal representative, attorney, and farm manager in the estate of Raymond Snyder. Upon appeal, the District Court of Otoe County failed to vindicate those same two rights of Mr. Neumeister.

At the hearing on the final accounting, evidence was introduced by appellant of a fee and expense agreement between the three heirs of Raymond Snyder and appellant. The appellees, who are grandchildren of Snyder, did not deny the conversation took place, but maintained that the appellant did not perform certain services, e.g., completing a sale of an 80-acre farm in Iowa, and that the estate proceedings were needlessly prolonged and unnecessary expenses were incurred.

In passing we note that the recommended maximum time for the complete handling of a complicated estate in our proposed rules is 18 months.

Raymond Snyder died testate on September 18, 1978, and the estate proceedings were immediately opened. An inventory was not filed until September 17, 1979, nearly 1 year after death. Except for an 80-acre tract in Iowa, the assets consisted of tools and furniture valued at less than $1,500, cash assets

of $147,418.52, and a promissory note. From opening to closing, the proceedings took longer than 4 years. It would needlessly encumber this opinion, as well as to tax patience, to attempt to recite in detail the claimed services of the personal representative. The ancillary proceeding in Iowa was handled by another lawyer, yet the appellant claims that the time spent administering what appears to be an uncomplicated estate was in excess of 1,200 hours, or, stated in different terms, over 150 working days of 8 hours each. Appellant maintains much of the time expense was incurred in the management of the 80-acre farm, though his authority to do so is not readily apparent from the record. In view of the total farm receipts of less than $22,000 over the relevant time period, the farm was overmanaged.

We agree with the county court and the district court in their conclusions that the fee and expenses were excessive.

The review of the compensation was conducted by the county court under Neb. Rev. Stat. § 30-2482(1) (Cum. Supp. 1982), which provides in part:

> After notice to all interested persons or on petition of an interested person . . . the reasonableness of the compensation determined by the personal representative for his or her own services, may be reviewed by the court. Any person who has received excessive compensation from an estate for services rendered may be ordered to make appropriate refunds.

It is the appellant's contention that the ordered reduction, and the statute, insofar as it authorizes the reduction, is violative of his due process rights and purports to impair the obligation of a contract. As these issues were not directed to either the county court or to the district court, we will not consider the issues. A prerequisite to the consideration of the constitutionality of a statute on appeal is the proper raising of the issue in the trial court. *State v. Olson,*

ante p. 130, 347 N.W.2d 862 (1984); *State v. Smyth*, *ante* p. 153, 347 N.W.2d 859 (1984).

The judgment of the district court is affirmed.

AFFIRMED.

ELMER RICHARDSON ET AL., APPELLANTS, V. SCHOOL DISTRICT NO. 100 OF KEYA PAHA COUNTY, AND THE STATE BOARD OF EDUCATION OF THE STATE OF NEBRASKA, APPELLEES.

348 N.W.2d 873

Filed May 11, 1984. Nos. 83-461, 83-468.

1. **Administrative Agencies: Appeal and Error.** On appellate review of an order of the State Board of Education, this court may not reach an independent conclusion as to factual issues, but may determine only whether the findings of the board are supported by substantial evidence or are arbitrary or capricious.
2. **Appeal and Error.** On an appeal the appellant has the burden of establishing that there was error in the proceeding from which the appeal is taken.

Appeal from the District Court for Lancaster County: DALE E. FAHRNBRUCH, Judge. Affirmed.

John C. Schraufnagel of Cronin, Hannon & Symonds, for appellants.

William B. Cassel of Cassel & Cassel, for appellee School District No. 100.

KRIVOSHA, C.J., WHITE, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

HASTINGS, J.

The plaintiffs, Elmer Richardson, Havor Heyden, Curtis Hitchcock, and Larry McCarthy, appeal the judgments of the district court for Lancaster County, Nebraska, which affirmed the decisions of the State Board of Education denying the payment of tuition for the plaintiffs' children to attend high school in Burke, South Dakota, for the 1981-82 and 1982-83 school years.

These cases were commenced when the plaintiffs made application to the board of education of School District No. 100 of Keya Paha County, in accordance with Neb. Rev. Stat. § 79-1103.05 (Reissue 1981), which provides as follows:

> (1) When application is made in writing by the parent or guardian of a pupil subject to the provisions of this section, the board of education of any school district of the sixth class maintaining an accredited high school may pay the regular high school tuition for any pupil residing in such school district and attending an accredited or approved high school in this state outside such school district when such high school shall be located at least ten miles closer to the place of residence of such pupil than the school maintained by such school district and when, in the opinion of the board of education, the best interest of such pupil or such school district may so require. When the school attended is outside this state, the board of education may pay the regular high school tuition or such portion thereof as may be agreed upon by the respective governing bodies.
>
> (2) Any parent or guardian of such student who is aggrieved by a decision of the board of education may appeal such decision to the State Board of Education. If the State Board of Education determines that it would be in the best interest of such student to attend a school outside the State of Nebraska, fifty per cent of the high school tuition for such student shall be paid by the State Department of Education from funds budgeted and appropriated for such purpose. Such funds shall not exceed five thousand three hundred seventy-five dollars. In the event that appropriated funds are insufficient to provide fifty per cent of the high school tuition as required under the provisions of this section, the

appropriated funds shall be prorated among the students who qualify under this section.

The local school board denied the applications for tuition payments, and appeals were taken to the Nebraska State Board of Education. In both cases the State Board of Education affirmed the decision of the local school board. The district court affirmed the decisions of the State Board of Education, and, pursuant to a joint motion of the parties, these cases were consolidated for this appeal.

The plaintiffs assert as error: (1) That the trial court erred in finding it was in the best interests of the plaintiffs' children to attend school in Keya Paha County rather than Burke, South Dakota; (2) That the decision of the trial court was not supported by sufficient evidence; and (3) That the trial court erred by improperly considering any hardship that the local school district might suffer by reason of the plaintiffs' children attending school in Burke, South Dakota.

Verbatim transcripts of the testimony at the State Board of Education hearings, together with documentary evidence presented at the hearings, appear as exhibits in the bill of exceptions.

The school maintained by the defendant school district in Springview, Nebraska, is approximately 34 miles from the plaintiffs' homes, whereas the Burke, South Dakota, high school is 15 miles. Prior to the 1981-82 school year, 17.4 miles of the road to Springview consisted of a gravel and dirt road. This road, Highway 12, has now been hard-surfaced, resulting in a much improved roadway. Both schools have adequate facilities and each provides an assortment of extracurricular activities.

This is an appeal from an order of a state agency based upon certain findings of fact. Neither this court nor the district court is entitled to review the record de novo to make those enumerated findings itself. Rather, on appellate review, even if we do not agree with the decision of the State Board of

Education, we determine only whether the findings of the board are supported by substantial evidence or are arbitrary or capricious. Neb. Rev. Stat. § 84-917 (Reissue 1981).

Both the State Board of Education and the district court made the specific factfinding that it was in the best interests of the plaintiffs' children to attend the accredited high school in their resident district. Although the plaintiffs argue the record does not contain sufficient evidence to support the decision that it is in the best interests of the children to attend school in Springview, the finding of the State Board of Education and the district court is supported by the record before us.

Keya Paha County High School offers about 400 credit hours in academic areas and had plans to install computer usage into the school system in the 1982-83 school year. Students at Keya Paha performed in class plays and competed in the Chadron High School interscholastic academic contest, state speech contest, and state track meet. The music department has received awards in the district music contest, and the school presented a spring festival to the town, showcasing a number of works from the art department, an exhibit from the industrial arts department, a style review from the home economics department, and entertainment from the music department.

Keya Paha has a staff of 10 teachers, of whom 3 have master's degrees and have been on the staff from 2 to 7 years. Even the plaintiff Richardson admitted the roads are equal now that Highway 12 has been blacktopped.

Having made the determination that sufficient evidence existed, we now determine whether the State Board of Education's decisions were arbitrary or capricious. To support their position the plaintiffs rely solely on the shorter distance factor to argue: (1) The children are less likely to be stranded on a road in bad weather; (2) Extra time spent traveling to

Springview can be spent helping parents at home; (3) Students could take part in more activities at Burke; (4) Burke school system provides free bus service within 2 miles of each student; and (5) Parents can attend more school activities.

On an appeal the appellant has the burden of establishing that there was error in the proceeding from which the appeal is taken. *Elm Creek State Bank v. Department of Banking*, 191 Neb. 584, 216 N.W.2d 883 (1974). In citing only the distance factor we cannot say the plaintiffs have sustained the burden of proving the State Board of Education's decisions to be arbitrary and capricious.

The evidence in the record before us is sufficient, and the first two assignments of error have been disposed of, making the third unnecessary to discuss.

The decision of the trial court is affirmed.

AFFIRMED.

BOSLAUGH, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. NORMAN D. JACKSON, APPELLANT.

348 N.W.2d 876

Filed May 11, 1984. No. 83-498.

1. **Witnesses: Prior Inconsistent Statements: Impeachment.** A witness may be impeached by showing prior contrary statements as to a matter relative to the issue.
2. _____: _____: _____. The State may not use a prior inconsistent statement of a witness under the guise of impeachment for the primary purpose of placing before the jury substantive evidence which is not otherwise admissible.
3. _____: _____: _____. If a witness, not a party, admits making earlier statements contradictory of his testimony given at trial, then the earlier statements are not admissible for purpose of impeachment.
4. **Trial: Witnesses: Rules of Evidence.** Under the provisions of Neb. Rev. Stat. § 27-801(4)(a)(i) (Reissue 1979), testimony contrary to the testimony of a witness during the course of a trial, which contrary testimony was given under oath subject to the penalty of

perjury at a former trial, hearing, or other proceeding, is not hearsay and is therefore admissible as substantive evidence of the truth of the fact alleged.

5. **Jury Instructions.** A trial court is not required to give a cautionary instruction in the absence of a request.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Reversed and remanded for a new trial.

Thomas M. Kenney, Douglas County Public Defender, and Victor Gutman, for appellant.

Paul L. Douglas, Attorney General, and Mark D. Starr, for appellee.

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

HASTINGS, J.

Following a jury trial, Norman Jackson was convicted of the December 24, 1982, offenses of robbery and use of a firearm in the commission of a felony. On this appeal he has assigned as error that the trial court (1) improperly permitted the State to impeach the testimony of its own witnesses, and (2) failed to instruct the jury in a timely manner that the prior contradictory statements were not received as evidence of the facts declared, but only for the purpose of attacking the credibility of the witnesses.

At approximately 11:50 a.m. on the above-mentioned date, the North Side Bank in Omaha was robbed by three masked men, at least two of whom were armed. At about the same time, a man was seen walking back and forth beside an automobile which was parked approximately 1 block from the bank. Two men wearing masks were observed to jump a hedge, run toward that car, and get into it. The man walking nearby got into the driver's side and the car drove away. A witness noted the license number on the automobile, which identified it as belonging to the defendant.

Testimony, concerning which there was no objec-

tion, would tend to establish that sometime between 4 and 5 o'clock in the afternoon of December 24, a George Crumbley went to the apartment of Shirley Burnett, where he observed her nephew, the defendant, counting money into stacks of three, four, or five rows. This same witness testified, without objection, that on December 26, Shirley Burnett brought to Crumbley's apartment a shoebox containing two handguns which were connected to the robbery. These guns were kept in the possession of the witness until seized pursuant to a search warrant.

The complained-of errors center around the testimony of the State's witnesses, Shirley Burnett, an aunt of the defendant, and Thomas Coleman, her boyfriend.

Ms. Burnett testified that she had found two handguns in her closet, which she took over to her neighbor, George Crumbley, for safekeeping. When asked what she said to Crumbley, she answered that she asked him to keep the guns for her because she had found them in her closet and did not know to whom they belonged. The prosecuting attorney then asked her if she had not told Crumbley that she *thought* they belonged to the defendant. "I don't recall telling him anything like that. What I told you when you asked me would I say that: I said, 'No, I didn't say anything like that,' but you told me that George Crumbley said that I told him that." At this point the defendant objected to this line of questioning as improper impeachment. The objection was overruled. George Crumbley, who later testified, was never asked about that conversation.

The witness Burnett was then asked: "Did you, on that afternoon [December 24, 1982], go to the home of Thomas F. Coleman with Norman Jackson for the specific purpose of talking to Mr. Coleman about Norman Jackson?" She replied, "No. Never." She was then asked:

> All right, if Mr. Coleman testifies or if he has testified before in this case that, in fact, you and

> Norman Jackson did come over to his house . . . to talk to him about the concerns that you had about Norman Jackson being in trouble, then would he be lying?

Her answer was, "Yes, he would." No testimony of Thomas Coleman was ever offered in support of the last question by the prosecution.

Finally, Shirley Burnett was asked whether Norman Jackson was counting out money in her presence and in the presence of George Crumbley. She answered, "I've never seen him counting any money before." The prosecutor then followed with this question:

> If George Crumbley comes into court and testifies that on that day, December 24th, 1982, that when he went over to your apartment, that you were there, Fred Coleman was there, your children and Norman Jackson, and that while he was there, Norman Jackson was counting out denominations of money on the floor. . . .

She answered, "I would have to say he was telling a lie because I'd never seen that."

To the extent that the State would claim the statement of the witness that she did not see the defendant counting out money was impeached, that claim must fail. George Crumbley did testify that he saw Jackson counting out money in the living room, but he also said that at that time Ms. Burnett was in the kitchen.

There are several reasons why the questioning of Shirley Burnett was improper. In the first place, even assuming for the moment that this was a proper situation in which to bring forth impeachment testimony, the fact remains that it was not accomplished. An interrogator may not inquire of a witness, "Isn't it true that you told *X* that you saw *Y* shoot *Z*?" leaving the impression that such was the case, and then not call *X* to establish that fact. Yet, that is precisely what the prosecutor did in this instance.

As to the ownership of the gun, the most that can be said is that an attempt was made to get in evidence that the witness *thought* the gun was owned by the defendant. There was no foundation for such a statement and it certainly is not relevant as to what her opinion might be of such ownership. Similarly, whether the witness Burnett had a "concern" about her nephew that she related to Thomas Coleman was certainly not relevant to the issue of who robbed the bank.

Finally, and perhaps more to the point, the questioning of this witness flies right into the face of our holdings in *State v. Isley*, 195 Neb. 539, 239 N.W.2d 262 (1976), and *State v. Brehmer*, 211 Neb. 29, 317 N.W.2d 885 (1982).

In *Isley* we said that a witness may be impeached by showing prior contrary statements as to a matter *relative* to the issue. In *Brehmer* we held that the State may not use a prior inconsistent statement of a witness under the guise of impeachment for the primary purpose of placing before the jury substantive evidence which is not otherwise admissible. This is exactly what the State did in this instance.

Although evidence of possession of the guns by the defendant, and his counting of the money, was testified to by the witness Crumbley, the improper "impeachment" evidence offered through the witness Burnett was certainly corroborative of that testimony and we cannot say that its admission only amounted to harmless error.

The witness Thomas Coleman, also called by the prosecution, testified that Shirley Burnett had found some guns in her closet, and that was all he knew about it. He did not know who had had the guns in their possession. He was then asked outright if he did not know about the defendant ever being in possession of the handguns, or of being on the floor counting money, and he answered that he did not.

Coleman was further asked if he had not made contrary statements both to a police officer and in

sworn testimony at the defendant's preliminary hearing. He admitted that he had indeed made such statements in each instance, but that "it was false pretenses," not true. Normally, that should have ended the matter.

If a witness, not a party, admits making earlier statements contradictory of his testimony given at trial, then the earlier statements are not admissible for purpose of impeachment. *State v. Packett*, 206 Neb. 548, 294 N.W.2d 605 (1980).

However, we must take into account Neb. Rev. Stat. § 27-801(4)(a)(i) (Reissue 1979), which provides:

> (4) A statement is not hearsay if: (a) The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (i) inconsistent with his testimony and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition.

The result of this section is to declare what formerly constituted hearsay evidence and available for impeachment purposes only to become substantive evidence of the fact alleged.

Maine has a similar statute. In *State v. Creamer*, 379 A.2d 733 (Me. 1977), that court said at 734:

> Rule 801 states in the plainest terms that the first-trial testimony of Mrs. Eldridge, because ". . . given under oath subject to the penalty of perjury at a trial . . ." is a "statement . . . [which is] not hearsay." Hence, it is admissible as substantive evidence (absent other independent grounds to exclude it).

Although not necessary to a decision in this case, the defendant's last assignment of error is without merit. The court properly instructed as to the effect of impeachment evidence at the close of all of the case. If the defendant desired the instruction to be given immediately after hearing the specific evidence, he should have requested it. The trial court

is not required to give a cautionary instruction in the absence of a request. *Miller v. State*, 173 Neb. 268, 113 N.W.2d 118 (1962).

The judgment of the district court is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

IN RE INTEREST OF S.A.S., A CHILD UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. M.L.S., APPELLANT.
IN RE INTEREST OF J.S., A CHILD UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. M.L.S., APPELLANT.

348 N.W.2d 138

Filed May 11, 1984. Nos. 83-533, 83-534.

Parental Rights. An order terminating parental rights must be supported by clear and convincing evidence.

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

Clay B. Statmore of Statmore Law Offices, for appellant.

Michael G. Heavican, Lancaster County Attorney, and Mary L. Thramer, for appellees.

Roberta S. Stick, guardian ad litem.

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

WHITE, J.

These are appeals from the judgments of the separate juvenile court of Lancaster County, Nebraska, which terminated the parental rights of M.L.S., the mother of J.S., a male child born March 1, 1982, and S.A.S., a female child born January 25, 1980. The cases were consolidated for purposes of appeal in this court. The father of the two minor children is

unknown. We review the matter de novo, keeping in mind that an order terminating parental rights must be supported by clear and convincing evidence. *In re Interest of J. and R.*, 216 Neb. 183, 342 N.W.2d 660 (1984).

The appellant assigns only one error, that being that the separate juvenile court's orders terminating the parental rights were not supported by clear and convincing evidence.

S.A.S. was adjudicated a dependent child as defined by Neb. Rev. Stat. § 43-202(1) (Reissue 1978), now Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 1982), on May 30, 1980. By order, the court determined that M.L.S. was mentally deficient and that the mental deficiency affected her ability to provide adequate care for the child. With the assistance of the Lancaster County Division of Public Welfare, M. was directed to correct the conditions of neglect. Shortly after the birth of J.S., he was placed in foster care by M.L.S., and placement in foster care of both children on a court-ordered basis was made on July 16, 1982.

The record discloses that M.L.S. was the natural mother of two other children. The first, born in wedlock, was in the custody of the child's father. The parental rights to the other child were terminated at an earlier, unspecified time. M.L.S., at all times pertinent, resided in Lincoln, Nebraska, in rental housing with her father and mother. The mother was a disabled person, and M., through a combination of concern for her mother, whose health was suspect, and of her father, whom she recited to the welfare department as physically abusive to her mother, wished to continue living with her parents and steadfastly at all times in the proceedings refused to live elsewhere, even in the supervised home that the welfare department was in a position to provide her. The supervised home would involve living with one or two adults who would constantly monitor M. in her care for her chil-

dren. The evidence further discloses that M. is in the mild to moderately retarded intellectual range and is in the developmental stage of somewhere between the middle of the first and second grade.

Summarizing, the physical condition of the home from which the children were removed can honestly be described as atrocious. The visiting nurses, welfare workers, and caseworkers who testified established the fact that not only was the older child, S.A.S., habitually filthy and uncared for, she was frequently found lying in an uncovered crib, soaked and reeking of urine and feces. There was often a noted absence of clean diapers, formula, and clothing for the children. The house itself had literally thousands of roaches climbing over everything, including the child's crib, the child's bottle, on walls, cabinets, and on the refrigerator. Garbage was frequently stored in and about the house. There were repeated failures in keeping physician appointments and in administering the children's prescribed medicine. By reason of the refusal of M.'s father to submit to any kind of budget recommendation, heat was frequently shut off, although the evidence indicates the combined income of M. and her father exceeded $1,000 per month. In addition, M.'s father maintained that "no one was going to tell him what to do with his money."

An extended, almost heroic, effort on the part of the social workers to teach M.L.S. even the most rudimentary skills of cleanliness and personal hygiene proved futile.

It is overwhelmingly apparent from the record that the children cannot be returned to any home setting without live-in, active supervision of other responsible adults. The appellant has established that she is completely uninterested and probably incapable of taking even the barest precautions for the health and safety of her children.

The separate juvenile court was eminently correct in determining that the children could not be re-

placed in the home M. was sharing with her parents. M. steadfastly refuses to leave the family home, claiming that it is absolutely necessary for her to remain for the protection of her mother.

Again, as in *In re Interest of J. and R.*, 216 Neb. 183, 186, 342 N.W.2d 660, 662 (1984), "[a]s we view the matter, the juvenile court could not place the children with the natural mother, and indefinite foster care was unacceptable. The court clearly had no alternative but the termination. Ida clearly chose Fred over her children. She must live with that choice."

M.L.S. has chosen a lifestyle absolutely inconsistent with even the most rudimentary standards of child care. The best interests of the children require termination. M. has made her choice. She must live with it, her children must not.

AFFIRMED.

LOUIS WEINER, APPELLANT, V. STATE EX REL. STATE REAL ESTATE COMMISSION, APPELLEE.

348 N.W.2d 879

Filed May 11, 1984. No. 83-600.

Statutes: Brokers' Licenses: Words and Phrases. For the purpose of Neb. Rev. Stat. § 81-885.24(28) (Reissue 1981), regarding revocation or suspension of a real estate broker's license, *incompetence* means failure to meet requirements for a minimal level of acceptable conduct.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Affirmed.

Jean A. Mahon-Pettit and James T. Gleason of Swarr, May, Smith & Andersen, for appellant.

Robert H. Petersen, for appellee.

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

SHANAHAN, J.

Louis Weiner appeals the judgment of the district court for Douglas County affirming an order of the Nebraska State Real Estate Commission. The State Real Estate Commission had found that Louis Weiner violated Neb. Rev. Stat. § 81-885.24(28) (Reissue 1981), namely, that Weiner had demonstrated incompetence and unworthiness to act as a real estate broker, and had suspended Weiner's real estate license for 3 years, with the last year of such suspension stayed for probation conditioned upon no further misconduct by Weiner during that probationary period. We affirm.

In May 1981 John Treft, acting on behalf of his mother, Mary Treft, but without any legal authority to do so, contacted Louis Weiner, a licensed real estate broker. John Treft offered to sell to Weiner, Mary Treft's interest as a vendor in a land contract. The unpaid balance on Mary's land contract was approximately $17,000, which was being paid to an escrow for Mary's benefit. John left a copy of Mary's land contract at Weiner's office, and a few days later John and Weiner agreed to a sale of $7,000 for Mary's interest in the land contract. In the purchase agreement prepared by Weiner, Mary's interest in the land contract was sold to Weiner. Although the purchase agreement was signed by Weiner and John, a copy of that purchase agreement was never delivered to John. Weiner also agreed to make an advance payment of $2,000 to John, if a warranty deed signed by Mary was delivered to Weiner. John obtained Mary Treft's warranty deed, which was delivered to Weiner with the understanding that the deed would not be recorded until the balance of the Weiner-John agreement was paid. Weiner paid John $2,000, but required and received John's promissory note in favor of Weiner for $2,000. John subsequently made several demands that Weiner pay the balance required by their agreement. Requiring promissory notes in exchange for

John's payments, Weiner paid John $500 and $900. Weiner attempts to explain the bizarre aspect of the promissory notes by calling the payments to John Treft loans, rather than payments required by the purchase agreement.

Before the balance due on the Weiner-John agreement was paid, Weiner recorded the Mary Treft deed and notified the escrow that future payments on Mary's land contract must be paid directly to Weiner. John discovered that payments on Mary's land contract were being delivered to Weiner rather than to the escrow, and renewed demands for payment of the balance on the Weiner-John agreement. Weiner refused.

In February 1982 John filed a complaint with the State Real Estate Commission and alleged the foregoing facts. After a hearing and evidence establishing the facts alleged by John, the State Real Estate Commission ordered suspension of Weiner's real estate license and also imposed probation. The commission based its action and order on § 81-885.24, which provides for revocation or suspension of a real estate broker's license when a broker has been found guilty of violating any of the provisions ("unfair trade practices") of the designated statute. In particular, the commission found Weiner guilty of violating subsection (28) of the statute: "Demonstrating unworthiness or incompetency to act as a broker . . . whether of the same or of a different character as hereinbefore specified."

As his first assignment of error, Weiner contends that § 81-885.24(28) is unconstitutionally vague and overbroad, both in substance and in its application by the commission.

" '[B]efore a law can be determined unconstitutional, the express provision of our constitution which the law contravenes must be pointed out.' " *Metropolitan Utilities Dist. v. City of Omaha*, 171 Neb. 609, 613, 107 N.W.2d 397, 401 (1961). Statutes

are presumed to be constitutional, and unconstitutionality must be clearly established. *Id.*

> The due process command imposed by Amendment XIV to the Constitution of the United States, and Article I, section 3, Constitution of Nebraska, translates into two basic requirements. The statute's language must be sufficiently specific that persons of ordinary intelligence must not have to guess at its meaning. The statute must contain ascertainable standards by which it may be applied. This does not demand total absence of vagueness in a statute, but merely requires that a statute provide adequate notice of what conduct it requires or prescribes as well as guidelines by which a violation of the statute may be fairly and nonarbitrarily determined.

State v. A.H., 198 Neb. 444, 448-49, 253 N.W.2d 283, 286 (1977).

> Most decisions invoking the constitutional void for vagueness doctrine have dealt with statutes and ordinances imposing criminal sanctions. It is clear, however, that this doctrine applies equally to civil statutes. Yet even in criminal statutes the language adopted need not afford an interpretation approaching mathematical certainty. In determining the sufficiency of notice, a statute must of necessity be examined in light of the conduct with which a defendant is charged.

State v. A.H., *supra* at 449, 253 N.W.2d at 286, citing *Parker v. Levy*, 417 U.S. 733, 94 S. Ct. 2547, 41 L. Ed. 2d 439 (1974). Statutory notice governing behavior " 'must be unequivocal but this requirement does not preclude the use of ordinary terms to express ideas which find adequate interpretation in common usage and understanding.' " *Gold v. Lomenzo*, 29 N.Y.2d 468, 477, 280 N.E.2d 640, 645, 329 N.Y.S.2d 805, 812 (1972).

Section 81-885.24(28) is expressed in the disjunc-

tive, that is, "unworthiness or incompetency." Consequently, existence of either of the alternative situations mentioned in subsection (28) constitutes a violation of the questioned statute.

Weiner does not question any aspect of § 81-885.24 except subsection (28). Section 81-885.24 contains 27 other subsections which are not assailed by Weiner. Section 81-885.24(19) condemns and prohibits a real estate broker's "[f]ailing to deliver within a reasonable time a completed copy of any purchase agreement or offer to buy or sell real estate to the purchaser and to the seller." At the hearing before the State Real Estate Commission, there was no dispute that Weiner had never delivered a copy of the purchase agreement to John Treft.

Incompetence (the state of being incompetent) means failing to meet requirements. Webster's New Universal Unabridged Dictionary (2d ed. 1983). Incompetence means failure to meet requirements for a minimal level of accepted conduct. Cf. *Board of Dental Examiners v. Brown*, 448 A.2d 881 (Me. 1982); cf., also, *Hollingsworth v. Board of Education*, 208 Neb. 350, 303 N.W.2d 506 (1981) (teacher; incompetency must be measured against the standard required of others performing the same or similar duties).

Weiner cites nothing to support his contention that the term *incompetency* is unconstitutionally vague. Abundant authority acknowledges *incompetency* as a constitutionally permissible term in statutes pertaining to suspension or revocation of licenses. *Incompetency* is neither so general that persons of common intelligence must guess at the meaning of the word nor so indefinite as to defy evenhanded interpretation by the judiciary. *Maine Real Estate Commission v. Kelby*, 360 A.2d 528 (Me. 1976). Incompetency is not an unconstitutionally vague term. See, *Klein v. Real Estate Commissioner*, 19 Or. App. 646, 528 P.2d 1355 (1974); *Miller v. Iowa Real Estate Com'n*, 274 N.W.2d 288 (Iowa 1979).

Section 81-885.24 supplies sufficient notice to all real estate brokers about certain, minimal requirements for continued enjoyment of a license, namely, compliance with the statutory prescriptions and proscriptions concerning conduct of real estate brokers. Implicitly contained in the minimal standard for a state licensee's acceptable conduct is obedience to state law governing a licensee's practices and activities. Weiner failed to satisfy § 81-885.24(19) when he did not deliver a copy of the purchase agreement to John Treft. Such failure to meet the requirements of § 81-885.24 is conduct falling below the statutory standards, and demonstrates incompetence on the part of Weiner.

Weiner next contends that the order of the State Real Estate Commission was arbitrary, capricious, beyond the scope of its authority, and was not supported by competent and substantial evidence.

> The standard of review to be employed by both the District Court and this court is whether the order of the commission was supported by competent, material, and substantial evidence and whether the order is arbitrary or capricious. Neb. Rev. Stat. § 84-917(6) (Reissue 1981). " '[S]ubstantial evidence,' for purposes of administrative review, must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury, and this is something less than the weight of evidence; and the possibility of drawing two inconsistent conclusions from evidence does not prevent an administrative agency's finding from being supported by substantial evidence."

Weiner v. State ex rel. Real Estate Comm., 214 Neb. 404, 406, 333 N.W.2d 915, 917 (1983), citing *Wright v. State ex rel. State Real Estate Comm.*, 208 Neb. 467, 304 N.W.2d 39 (1981). The preceding standard of review is satisfied in this case.

If there is evidence satisfying the standard of re-

view adopted in *Weiner v. State ex rel. Real Estate Comm.*, *supra*, any question about arbitrary and capricious action of the commission seems to have been already answered. It is difficult to imagine how an order based on competent, material, and substantial evidence could simultaneously be arbitrary and capricious. Nevertheless, " 'Arbitrary and capricious action . . . is action taken, in disregard of the facts or circumstances of the case, without some basis which would lead a reasonable and honest person to the same conclusion.' " *In re Appeal of Levos*, 214 Neb. 507, 514, 335 N.W.2d 262, 267 (1983). "The question to be answered by a court is whether the agency or tribunal had before it *competent* evidence to support its findings and action in accordance with the appropriate law governing the subject matter within the jurisdiction of the agency or tribunal." (Emphasis supplied.) *In re Appeal of Levos*, *supra* at 514-15, 335 N.W.2d at 267. Competent evidence is that which tends to establish the fact in issue. *In re Appeal of Levos*, *supra*. In view of the evidence presented at the hearing before the commission, the order of the State Real Estate Commission concerning Weiner is not arbitrary or capricious.

Upon a review of the record in these proceedings, there is the requisite evidence to support the action taken by the State Real Estate Commission, and, consequently, the judgment of the district court is affirmed.

AFFIRMED.

STATE BANK, PALMER, NEBRASKA, A NEBRASKA BANKING CORPORATION, APPELLEE, V. SCOULAR-BISHOP GRAIN CO., A NEBRASKA CORPORATION, APPELLANT.

349 N.W.2d 912

Filed May 18, 1984. No. 83-034.

1. **Trial: Evidence: Appeal and Error.** The appropriate standard of review for an assignment of error directed at the exclusion of evidence is one of abuse of discretion.
2. **Security Interests.** A security interest continues in collateral notwithstanding sale, exchange, or other disposition thereof unless the disposition was authorized by the secured party in the security agreement or otherwise, and also continues in any identifiable proceeds, including collections received by the debtor.
3. **Waiver: Words and Phrases.** Waiver has been defined as a voluntary and intentional relinquishment or abandonment of a known existing legal right, advantage, benefit, claim, or privilege, which except for such waiver the party would have enjoyed; the voluntary abandonment or surrender, by a capable person, of a right known by him to exist, with the intent that such right shall be surrendered and such person forever deprived of its benefits; or such conduct as warrants an inference of the relinquishment of such right; or the intentional doing of an act inconsistent with claiming it.
4. **Security Interests: Uniform Commercial Code.** Where a buyer of farm products subject to a recorded security interest requiring "written consent" relies on the "or otherwise" provision, Neb. U.C.C. § 9-306(2) (Reissue 1980), and implied consent, waiver, or ratification by course of dealing, Neb. U.C.C. § 1-205 (Reissue 1980), the buyer must prove that the course of dealing was reasonably consistent with the express provisions in the security agreement, § 1-205(4), and that the course of dealing was a voluntary and intentional relinquishment by the secured party of a known and existing right amounting to waiver, consent, or ratification.
5. **Security Interests: Proof: Words and Phrases.** We hold that in cases involving a question of a waiver of a security interest, the standard of proof is by clear and convincing evidence, being that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.

Appeal from the District Court for Douglas County: THEODORE L. RICHLING, Judge. Reversed and remanded for a new trial.

Edward D. Hotz of Hotz, Kizer & Jahn, P.C., for appellant.

Steven M. Curry of Sampson, Curry & Hummel, for appellee.

KRIVOSHA, C.J., CAPORALE, and GRANT, JJ., and CAMP, D.J., and COLWELL, D.J., Retired.

COLWELL, D.J., Retired.

Plaintiff, State Bank, Palmer, Nebraska (Bank), brought this conversion suit against defendant, Scoular-Bishop Grain Co. (Scoular-Bishop), for grain which Scoular-Bishop bought that was subject to a recorded security interest in favor of the Bank. The security agreement required written permission to sell, which was not obtained. Scoular-Bishop claimed that the Bank had knowledge of the sales and that a course of dealing between the parties implied consent, waiver, ratification, and estoppel. At the close of the evidence a $28,941 verdict was directed for plaintiff. Defendant appeals.

A key issue, and the first assigned error discussed, is that the trial court excluded relevant evidence proffered by Scoular-Bishop in support of its defenses.

A right to introduce evidence depends upon there being an issue of fact as to which it is relevant. *Midland-Ross Corp. v. Swartz*, 185 Neb. 484, 176 N.W.2d 735 (1970).

"[A] person who wrongfully sells personal property in which another has an interest is liable for conversion." 18 Am. Jur. 2d *Conversion* § 35 at 179 (1965).

"Authority to sell the collateral might be inferred . . . from the facts and circumstances attending the particular transaction. Such authority depended upon the intent of the parties, and, where circumstances were relied on to show it, its existence was ordinarily a question of fact for the jury." 69 Am. Jur. 2d *Secured Transactions* § 462 at 317-18 (1973).

"Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected." Neb. Rev. Stat.

§ 27-103(1) (Reissue 1979). "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Neb. Rev. Stat. § 27-401 (Reissue 1979). "The appropriate standard of review for an assignment of error directed at the exclusion of evidence is one of abuse of discretion." *Lincoln Grain v. Coopers & Lybrand*, 216 Neb. 433, 438, 345 N.W.2d 300, 305 (1984).

During the trial, a part of Scoular-Bishop's evidence was excluded; generally, it included parts of David Rudolph's testimony of oral conversations with bank officers, bank records, checks, deposit slips (other than the five Scoular-Bishop sales), checking account summary, notes and renewal notes, other farm product sales, disability ledger cards, and livestock inspection reports. The judge rejected this evidence as not relevant to show notice, authorization, or waiver, relying on *Garden City Production Credit Assn. v. Lannan*, 186 Neb. 668, 186 N.W.2d 99 (1971), which case we later discuss. The judge patiently allowed and requested Scoular-Bishop to make a full offer of proof outside the hearing of the jury, § 27-103, and the same is included in the stated facts.

Between January 1975 and March 1980, David Rudolph, a farmer near Palmer, Nebraska, borrowed money from the Bank to finance a grain and livestock farm operation. During that time, the line of credit included 61 notes and renewal notes, representing a debt at one time amounting to $180,000. The loans were secured by recorded financing statements and security agreements to the Bank dated September 3, 1975, November 18, 1977, and October 9, 1979, granting a security interest in Rudolph's grain and farm products and proceeds of sale; their sale required the Bank's "prior written consent." During the 1975-80 period, Rudolph made 48 separate sales of secured products without either express oral

or written consent, including the five sales of corn to Scoular-Bishop which are the subject of this lawsuit: (1) April 19, 1979, $9,643.35; (2) August 13, 1979, $7,545.64; (3) October 19, 1979, $2,024.23; (4) October 26, 1979, $8,927.10; and (5) March 4, 1980, $800. In each instance, Rudolph deposited the Scoular-Bishop payment check in his personal account in the Bank; no payments were made on Rudolph's debt except for a part of two sales applied by the Bank as payment on his overdraft. Rudolph paid all of his farming expenses and living expenses out of the same account. At no time did the officials of the Bank request Rudolph to apply any funds to his debt, and the Bank never exercised its privilege of a setoff against the debt. In March 1980 Rudolph's loan was called by the Bank; at the time of trial Rudolph still owed the Bank $52,000.

The Bank had a policy discouraging officers and employees from monitoring the bank accounts of customers, regardless of the status of customer loans. Tellers usually reported large deposits and overdrafts to bank officers. The Bank averaged between 55 and 60 farm-type borrowers. During the prior 15 years, the Bank had never required any borrower to obtain written permission to sell secured farm products. Included in the evidence was the testimony of the Bank president, Roy Densdale, that he was not aware that the security agreement required written permission to sell, and "Q. Does the bank expect every farmer that has a loan with you to get written permission to sell collateral? A. No. Q. And why not? A. Because it isn't required."

During the 1975-80 period, Rudolph generally contacted James Thede, the bank cashier, when discussing his loan, refinancing, disposition of farm products, farm markets, and farm practices. No written permission was ever requested, discussed, or required. Rudolph testified:

Q. [By Mr. Curry] Isn't it true, Mr. Rudolph,

that at the time that the sales were made that no one at the bank knew that you were going to sell that corn to Scoular-Bishop? Isn't that true?
A. Probably not that day, no.

. . . .

Q. [By Mr. Hotz] Mr. Rudolph, you said in response to Mr. Curry's question about no one at the bank knew that you were going to sell grain to Scoular-Bishop, you said probably not that day. Would someone at the bank have known before you sold it?
A. Well, I had corn to sell. It was in the bin. I discussed it, discussed the sale of it. I guess a certain day wasn't really picked.

. . . .

Q. Now, did Mr. Thede discuss with you — did you ever tell Mr. Thede that you were selling either grain or livestock?
A. Yes, sir. It was brought up in conversations, yes.
Q. Did you inform him of sales of livestock and grain?
A. Orally.
Q. Did you report to him the sale prices of those farm products?
A. We may have discussed the price that I thought I might take, or something to that effect.
Q. Did he advise you with regard to a price that he thought you should take as your banker?
A. Not so much advice. He would say, "Well, it sounds good," or something like that. That's about the extent of the conversation, I guess.
Q. Well, I am a little unclear, when he said something like, "That sounds good," were you telling him about prices that you could get for either livestock or corn?
A. Yes.

. . . .

Q. Who normally would bring up the question

of the sale of either grain or livestock?

A. Probably me more than Jim.

Q. Well, did you use Mr. Thede as kind of an advisor?

A. Basically, yes. I thought he was in a position to do so.

Q. To advise you about what?

A. Sale of grain and livestock, because he — I felt he kept up on stuff like that.

Q. Well, before you sold any livestock or grain during this time period between 1978 and 1980, would you make it a point to discuss your thoughts on sales with Mr. Thede?

A. I would try to, yes.

Q. And did you sometimes report back to Mr. Thede as to what price you obtained?

A. Sometimes.

The defendant also sought to introduce the following deposition testimony of James Thede:

Q. Would this be an accurate description of your course of dealings with Mr. Rudolph with regard to the sale of his collateral? You never requested that he obtain your written permission prior to the sale of collateral; that you would counsel with him during such times as his notes were renewed with regard to sale of collateral, giving your banker's advice for the same, but that you would leave it up to his discretion whether or not to sell the collateral? Is that an accurate description?

A. Well, that sounds correct. We never requested him to sell or not to sell.

Applicable Uniform Commercial Code provisions include: "A buyer in ordinary course of business . . . *other than a person buying farm products from a person engaged in farming operations* takes free of a security interest . . . ." (Emphasis supplied.) Neb. U.C.C. § 9-307 (Reissue 1980).

Neb. U.C.C. § 1-205 (Reissue 1980):

Course of dealing and usage of trade.

> (1) A course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.
>
> . . . .
>
> (3) A course of dealing between parties and any usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement.
>
> (4) The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other; but when such construction is unreasonable express terms control both course of dealing and usage of trade and course of dealing controls usage of trade.

Neb. U.C.C. § 9-306(2) (Reissue 1980):

> Except where this article otherwise provides, a security interest continues in collateral notwithstanding sale, exchange or other disposition thereof unless the disposition was authorized by the secured party in the security agreement *or otherwise*, and also continues in any identifiable proceeds including collections received by the debtor.

(Emphasis supplied.)

The weight of authority holds that the term "or otherwise" codifies the common law. *Production Credit v. Sea-First*, 19 Wash. App. 397, 577 P.2d 589 (1978).

We have previously considered on a case-by-case basis the term "or otherwise" where there was a claim of waiver of written consent.

Overland Nat. Bank v. Aurora Coop. Elevator Co., 184 Neb. 843, 172 N.W.2d 786 (1969), was a conversion case holding that a bank without notice of a wrongful sale had no duty to apply a setoff and that the bank

records did not imply an authority to sell.

Garden City Production Credit Assn. v. Lannan, 186 Neb. 668, 186 N.W.2d 99 (1971), involved a replevin for cattle. About 90 days before the sale in question, the borrower discussed the sale of cattle. When sold, the sale proceeds were deposited in the borrower's account and credit given on the debt; and when the check did not clear, demand and suit followed. In a 4-to-3 decision the majority held at 675, 186 N.W.2d at 104: "As we have pointed out the mere failure to rebuke the seller, the reasonable acceptance of the proceeds of the sale when actually delivered to apply upon the debt, are not acts which indicate intention to waive a security interest . . . ." The majority discussed the general definition of waiver. That definition was originally set out in *Lipe v. World Ins. Co.*, 142 Neb. 22, 27, 5 N.W.2d 95, 98 (1942):

> " 'Waiver' has been defined as a voluntary and intentional relinquishment or abandonment of a known existing legal right, advantage, benefit, claim, or privilege, which except for such waiver the party would have enjoyed; the voluntary abandonment or surrender, by a capable person, of a right known by him to exist, with the intent that such right shall be surrendered and such person forever deprived of its benefits; *or such conduct as warrants an inference of the relinquishment of such right*; or the intentional doing of an act inconsistent with claiming it."

(Emphasis supplied.)

Farmers State Bank v. Edison Non-Stock Coop. Assn., 190 Neb. 789, 212 N.W.2d 625 (1973), is a conversion case having many facts similar to those presented here. The borrower discussed sales with the lender, and many sales of farm products were made prior to the sale in question. The court held that there had been no waiver, relying on the decision in *Lannan*, and determined that the lender's acts were

not an intelligent and voluntary waiver of its security rights.

These three cases do not turn on the question of relevancy, but, rather, that the weight of the evidence did not establish waiver. Those cases hold generally that where a buyer of farm products subject to a recorded security interest requiring "written consent" relies on the "or otherwise" provision, § 9-306(2), and implied consent, waiver, or ratification by course of dealing, § 1-205, the buyer must prove that the course of dealing was reasonably consistent with the express provisions in the security agreement, § 1-205(4), and that the course of dealing was a voluntary and intentional relinquishment by the secured party of a known and existing right, amounting to waiver, consent, or ratification. Here, Scoular-Bishop's proffered evidence was relevant to the issues presented by the pleadings, and its weight and credibility were for the trier of fact; its rejection was error affecting a substantial right of Scoular-Bishop.

Next, Scoular-Bishop objects to the directed verdict.

> A motion for directed verdict must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence.

(Syllabus of the court.) *Cullinane v. Interstate Iron & Metal*, 216 Neb. 245, 343 N.W.2d 725 (1984).

Our prior decisions provide no standard of proof in these cases when considering a motion for directed verdict or the submission of the case to a jury, other than the decisions in *Aurora Coop.*, *Lannan*, and *Edison*.

The California court, in *Central Cal. Equip. Co. v. Dolk Tractor Co.*, 78 Cal. App. 3d 855, 144 Cal. Rptr.

367 (1978), reviewed decisions of several jurisdictions and discussed this problem.

> [T]here must either be actual prior or subsequent consent in writing by the secured creditor manifesting a purpose to authorize the disposition free of the security interest. Mere acquiescence is insufficient. While we interpret "or otherwise" . . . to permit an implied agreement, we believe that such an implied agreement should be found with extreme hesitancy and should generally be limited to the situation of a prior course of dealing with the debtor permitting disposition. The issue is a question of fact, but the trial court should carefully consider the written prohibition against disposition found in the security agreement as an important factor in the factual determination and should determine the matter in favor of the written prohibition unless such conclusion is unreasonable under the circumstances.

Id. at 862, 144 Cal. Rptr. at 371.

We concur with California's statement of caution, and we hold that in these cases the standard of proof is by clear and convincing evidence, being that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved. See *Castellano v. Bitkower*, 216 Neb. 806, 346 N.W.2d 249 (1984).

Throughout the record, it is clear that Rudolph had an honorable, open relationship with the Bank. Unfortunately, Rudolph was not a successful farmer, which, combined with the Bank's lax banking practices, resulted in a loss. The Bank argues that Scoular-Bishop could have protected itself by either checking public lien records or making its check payable to Rudolph and the Bank; however, the question presented here is consent, waiver, and ratification.

There was a long-standing, close business relationship between Rudolph and the Bank officers. The

Bank was not concerned with its "written consent" provision in the security agreement, and it did not intend to either require or rely on that provision in the way Rudolph or any of its borrowers sold, consumed, and used farm products.

Considering the evidence as a whole and every reasonable inference as favorable to Scoular-Bishop, the jury could find, under proper instructions, that the course of dealing between the Bank and Rudolph was a waiver, that it implied consent and authority for the sale of grain to Scoular-Bishop free of the Bank's security interest, and that such was reasonably consistent with the express terms of the agreement. The rejection of the proffered evidence was an abuse of discretion, and the directed verdict was error.

REVERSED AND REMANDED FOR A NEW TRIAL.

STATE OF NEBRASKA, APPELLEE, V. JAMES M. WEST, APPELLANT.

350 N.W.2d 512

Filed May 18, 1984. No. 83-168.

1. **Implied Consent Law: Blood, Breath, and Urine Tests.** The regulations promulgated by the Nebraska Department of Health recognize that the holder of a Class B permit may test not only for alcohol content in breath but in blood and urine as well, and the tester to do so may use an Intoximeter Mark IV.
2. **Criminal Law: Verdicts.** Where one is charged with the commission of a crime which may be committed in a number of ways, a general verdict finding the defendant guilty of the crime charged is sufficient and is not ambiguous.
3. **Juror Misconduct: Verdicts.** In order for a verdict to be set aside because of the prejudicial effect of newspaper accounts on jurors, there must be evidence presented that the jurors read newspaper accounts and that the accounts were unfair or prejudicial to the defendant.
4. **Juror Misconduct.** The determination as to whether misconduct was prejudicial is to be resolved by the trial court on the basis of an independent evaluation of all the circumstances in the case.

5. **Motions for New Trial: Juror Misconduct: Appeal and Error.** A motion for a new trial upon the ground of jury misconduct is addressed to the sound discretion of the trial court, and a ruling made thereon will not be disturbed in the absence of an abuse of discretion.
6. **Courts: Trial: Evidence.** As a general rule, it is the province of the trial court in a jury case to determine the admissibility of the evidence offered by the parties at trial.
7. _____: _____: _____. Preliminary questions concerning the admissibility of evidence shall be determined by the judge. The court, and not the jury, is the arbitrator as to the admissibility of the evidence.
8. **Sentences: Appeal and Error.** In the absence of an abuse of discretion by the trial court, a sentence within the statutory limits will not be disturbed on appeal.

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

David E. Veath of Fisher & Veath, for appellant.

Paul L. Douglas, Attorney General, and Michaela M. White, for appellee.

KRIVOSHA, C.J., and CAPORALE, J., and MCCOWN and BRODKEY, JJ., Retired, and RONIN, D.J., Retired.

KRIVOSHA, C.J.

The appellant, James M. West, appeals from a judgment entered by the district court for Dawes County, Nebraska, following a jury verdict finding West guilty of unintentionally causing the death of Scott R. Smith while engaged in the unlawful operation of a motor vehicle. The trial court sentenced West to imprisonment in the Nebraska Penal and Correctional Complex for a period of 30 months, with credit given for time spent in custody. We affirm.

The record discloses that in the summer of 1982, West, then 19 years of age, was attending Chadron State College, Chadron, Nebraska. After attending two classes on the morning of August 27, 1982, West went to visit Scott Smith at Smith's trailer, which was located off-campus. The two later returned to the college, where they went to West's room in one of the dormitories. Once in the dormitory room,

Smith and West and West's roommate spoke with some friends and drank some beer. Smith and West left the dormitory room at approximately 5:30 p.m. to eat supper. During the period of time they spent in the dormitory room, West estimated that he drank two beers. However, Delores Peters, who testified at trial, stated she observed West consume three or four beers during the 45-minute period she was there. After eating supper West and Smith went to the weight room of the college for a light workout. They then went to a liquor store where Smith purchased some beer.

At approximately 7 p.m. that evening West and Smith went to the room of James Mackley, where they stayed approximately an hour. While at Mackley's room, they all drank some more beer. They then left Mackley's room and again stopped at Smith's trailer, where they remained for about 20 minutes. There is no evidence that anything was consumed while there. They then left Smith's trailer and went to the Favorite Bar, where they remained until approximately 11:30 p.m. Mackley testified that West had at least two beers at the Favorite Bar, but further admitted that West may have had more. While at the bar, West had an altercation with an individual who was acting as a bouncer at the bar. The bouncer testified at trial that, in his opinion, West was intoxicated while at the Favorite Bar. When West and Smith left the bar at 11:30 p.m., Elizabeth Oates observed them walking across the street. Oates testified that, from what she saw, West was under the influence of alcohol at that time.

At approximately 1 a.m. West and Smith met a friend, David Danner, in the college parking lot. Danner got in West's car and they then drove to Smith's trailer. At some point, traveling toward Smith's trailer, they saw Debra Boyer walking beside the road. She was crying, and the boys offered her a ride. They turned around and drove down

Maple Street. At approximately 1:40 a.m. West's motor vehicle violently struck a parked truck. As a result of the accident, Scott Smith was killed and Debra Boyer, David Danner, and West were injured. West was taken to the Chadron Community Hospital and placed under arrest.

At the hospital Officer Jeffery read West the implied consent form, and West elected to take a urine test. At approximately 4:40 a.m. Officer Jeffery obtained a urine sample from West and put it in a container obtained from a lab technician. Jeffery then took the sample to the sheriff's office, placed it in a box, labeled the containers, and put the box in a refrigerator. Officer Jeffery then went back to the scene to continue his investigation. He measured skid marks of 67 feet in length from the point of impact on the truck to the resting point of the car.

On August 30, 1982, West's urine sample was tested by Officer DaMoude. At trial Officer DaMoude detailed the procedures he followed in testing the sample. He further testified that the sample produced a value of alcohol of .299 percent. As a result of the test, West was charged with motor vehicle homicide in violation of Neb. Rev. Stat. § 28-306(1) (Reissue 1979). West entered a plea of not guilty, and the matter ultimately came on for trial. In addition to the testimony of Officer DaMoude as to the results of the urine sample, a number of witnesses were called to testify. All but one of them testified that, in their opinion, at the times they saw West, either before the accident or immediately following the accident, he appeared to be under the influence of alcohol.

West now claims error as follows: (1) The trial court erred in admitting the results of the urine test, on the ground that the test was not conducted under a method authorized by the state Department of Health, and further upon the ground that the person conducting the test did not have a valid permit at the time the test was conducted; (2) That the verdict

was unclear and ambiguous in that it did not indicate the specific grounds upon which West was found guilty; (3) That the defendant was denied a constitutionally fair trial on the ground that the jury read a newspaper account of the case during the trial; (4) That the court erred in not giving a jury instruction concerning the techniques used in conducting the urine test; and (5) That the sentence imposed was excessive.

West bases his first claim upon the argument that at the time Officer DaMoude performed the urine analysis, the Class B permit which he held did not authorize him to conduct tests pursuant to method 3-A5, the method in fact used to analyze the urine, but, instead, authorized him to conduct urine tests pursuant only to method 3-A2. While the permit first issued to Officer DaMoude did list method 3-A2 instead of 3-A5, the record is clear that this was a typographical error and that subsequent to the time the 3-A5 test was conducted, but before trial, the Department of Health issued a new permit to Officer DaMoude correcting the permit to list the 3-A5 method. The permit was reissued retroactively, so it became effective prior to the time that Officer DaMoude performed the test on the defendant's sample. Furthermore, it is clear that Officer DaMoude did, in fact, receive authorization from the state Department of Health to perform the 3-A5 test, though the permit issued to him was in error in that regard. The statute in question, Neb. Rev. Stat. § 39-669.11 (Reissue 1978), provides for the conditions under which such a test will be admissible in evidence. The statute provides in part:

> Tests to be considered valid shall have been performed according to methods approved by the Department of Health and by an individual possessing a valid permit issued by such department for such purpose. The department is authorized to approve satisfactory techniques or methods and to ascertain the qualifications and

> competence of individuals to perform such tests and to issue permits which shall be subject to termination or revocation at the discretion of the department.

It is clear that the state Department of Health ascertained the qualifications and competence of Officer DaMoude and determined that he was competent to conduct tests pursuant to the 3-A5 method. The error in the certificate did not change that fact. A certificate is merely one of the methods whereby the fact that a permit has been issued can be determined. At the time that the test was conducted, Officer DaMoude did in fact *hold* a valid permit issued by the Nebraska Department of Health, though the language of the permit, due to a typographical error, was incorrect. We do not believe that this made Officer DaMoude's authority invalid, nor did it invalidate the test. To so hold would be to carry form over substance to a ridiculous extreme. Typographical errors have been considered by other courts, and where it is clear that the document, through a scrivener's error, does not recite the truth of the matter, such errors have been ignored, and the truth instead considered. See, *Brunswick Corporation v. Haerter*, 182 N.W.2d 852 (N.D. 1971); *Pellegrino v. State Bd. of Elections*, 100 R.I. 71, 211 A.2d 655 (1965); *State v. Boushee*, 284 N.W.2d 423 (N.D. 1979); *Stinson v. Maxwell, Warden*, 2 Ohio St. 2d 228, 208 N.E.2d 132 (1965); *Schumm v. Nelson*, 659 P.2d 1389 (Colo. 1983). West's first assignment must therefore be overruled.

West's second claim of error in connection with the admissibility of the urine analysis is to the effect that a holder of a valid Class B permit is not authorized to perform a urine analysis, but is limited only to breath tests. Again, we believe West is in error. The evidence discloses that Officer DaMoude performed an analysis of West's urine with an Intoximeter Mark IV, using a technique enumerated in attachment 3-A5 to the rules promulgated by the state

Department of Health. While we are frank to concede that the rules, as promulgated, are not a paragon of clarity, we do believe that they authorize the holder of a valid Class B permit to perform a urine analysis. The following sections of the rules appear to be relevant in arriving at this conclusion:

(1) DEFINITIONS.

(a) Categories of permits issued by the Department of Health are:

. . . .

ii. CLASS B PERMIT, which means a permit to perform a chemical test to analyze a subject's blood, *urine*, or breath for alcohol content *by an approved method(s) with a specifically designed testing device(s).*

. . . .

(7) CLASS B PERMITS.

(a) QUALIFICATIONS FOR CLASS B PERMIT HOLDER. Class B permit holder qualifications for the chemical analyses of a subject's blood, *urine*, or breath for alcohol content by an approved method(s) with a specifically designed testing device(s) are:

. . . .

(d) LIST OF APPROVED DEVICES FOR CLASS B PERMITS.

i. Direct breath testing methods and devices, except preliminary breath testing devices, which are approved are listed below.

A. Gas chromatography analysis using the Intoximeter Mark II.

B. *Gas chromatography analysis using the Intoximeter Mark IV.*

C. Infrared absorption analysis using the Intoxilyzer Model 4011AS.

. . . .

(e) OPERATING RULES FOR CLASS B PERMIT. A Class B permit holder for the determination of alcohol content in blood, *urine* or

> breath with a specifically designed testing device(s) shall:
>
> i. Accept for test only the specimen types, i.e., blood, urine, or breath, which are listed on the permit;
>
> ii. Be responsible for maintaining the legal continuity of all blood or urine specimens received;
>
> . . . .
>
> iv. Conduct blood or urine test runs with an inclusion of a quality control sample. . . .
>
> . . . .
>
> v. Make periodic reports of standard deviation data to the Department of Health as requested for tests of blood or urine . . . .

(Emphasis supplied.)

While at first reading it may appear that the devices listed in § (7)(d) are intended to be used only for direct breath testing methods, it is clear that such is not the case. The regulations promulgated by the state Department of Health recognize that the holder of a Class B permit may test not only for alcohol content in breath but in blood and urine as well, and the tester to do so may use an Intoximeter Mark IV. As the evidence reflects, the Intoximeter Mark IV will obviously determine the amount of alcohol content in an individual's urine. We are simply unable to reach any other conclusion except that, under the rules promulgated by the state Department of Health, the holder of a Class B permit may analyze an individual's urine with the use of gas chromatography analysis using the Intoximeter Mark IV, as was done in the instant case.

West next contends that the verdict as returned by the jury was unclear and ambiguous, thereby entitling him to a new trial. West was specifically charged with motor vehicle homicide in violation of § 28-306(1). This section makes it a crime for one to cause "the death of another unintentionally while engaged in the operation of a motor vehicle in violation

of the law of the State of Nebraska." The laws which West was charged specifically with having violated, the violation of which unintentionally caused the death of another, were Neb. Rev. Stat. § 39-669.01 (Reissue 1978) and Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1982). To begin with, one may violate the provisions of § 39-669.07 in more than one way. This section may be violated if one operates or is in actual physical control of a motor vehicle "while under the influence of alcoholic liquor" or "when that person has ten-hundredths of one per cent or more by weight of alcohol in his or her body fluid as shown by chemical analysis of his or her blood, breath, or urine." Additionally, West could violate § 28-306(1) by violating § 39-669.01, which provides that "[a]ny person who drives any motor vehicle in such a manner as to indicate an indifferent or wanton disregard for the safety of persons or property shall be deemed to be guilty of reckless driving." The jury, therefore, could have found that West violated the provisions of § 28-306(1) in any one of three ways, either by operating a motor vehicle while under the influence of alcoholic liquor, or by operating a motor vehicle when he had ten-hundredths of one percent or more by weight of alcohol in his body fluid as shown by a urine analysis, or by operating his motor vehicle in a reckless manner. The commission of any one of those three acts, however, constituted but a single crime.

In the case of *Schluter v. State*, 153 Neb. 317, 44 N.W.2d 588 (1950), the defendant was charged with manslaughter in the operation of a motor vehicle. The information also set out the unlawful acts that the State claimed the defendant was guilty of at the time the death occurred. The defendant moved that the jury should, in the event of a verdict of guilty, specify the unlawful act upon which they relied. This court held that it was correct to overrule the request, on the ground that only a single offense was

charged. In *Schluter*, *supra* at 324, 44 N.W.2d at 593, we said:

> The claim of error and prejudice because of this is not well founded. It fails to distinguish between charging a person with separate offenses in one information, and rendering one general verdict on the separate offenses, and the situation in this case where only one offense is alleged in the information but there are several unlawful acts stated as one of the elements of that offense.

This is not a case in which a defendant is charged with multiple crimes in a single complaint but, rather, where the defendant is charged with a single crime which may be committed in a number of ways. Where one is charged with the commission of a crime which may be committed in a number of ways, a general verdict finding the defendant guilty of the crime charged is sufficient and is not ambiguous.

West next contends that he was denied his constitutional right to an impartial jury because members of the jury read a newspaper account, contained in the local newspaper, which was manifestly in error and prejudicial to him. It is, of course, unfortunate when newspapers fail to correctly and accurately report the facts. Nevertheless, we believe an examination of the record does not support the claim of prejudice. In order for jury misconduct to be the basis for a new trial, the misconduct must not only occur but it must be prejudicial to the defendant. *State v. Isley*, 195 Neb. 539, 239 N.W.2d 262 (1976). This rule applies to newspaper articles as well. In *State v. Bautista*, 193 Neb. 476, 478, 227 N.W.2d 835, 838 (1975), we said: "[I]n order for a verdict to be set aside because of prejudicial effect of newspaper accounts on jurors, there must be evidence presented that the jurors read newspaper accounts and that the accounts were unfair or prejudicial to the defendant." Therefore, not only must the defendant

in this case show that jurors in fact read the newspaper account but the defendant must also show that the accounts were unfair or prejudicial. Moreover, in any case, the determination as to whether misconduct was prejudicial is to be resolved by the trial court on the basis of an independent evaluation of all the circumstances in the case. *State v. Steinmark*, 201 Neb. 200, 266 N.W.2d 751 (1978). A motion for a new trial upon the grounds of jury misconduct is addressed to the sound discretion of the trial court, and a ruling made thereon will not be disturbed in the absence of an abuse of discretion. *State v. Robbins*, 207 Neb. 439, 299 N.W.2d 437 (1980).

The record discloses that the alleged misconduct occurred because of a newspaper article which appeared in the local paper the evening following the first day of trial. The article reported about evidence which had been introduced at the preliminary hearing but had not yet been introduced at the trial before the district court, and it informed the readers that the initial urine samples obtained from West showed "a 29.9 percent level of alcohol by weight, well above the 10 percent level considered proof of intoxication by law." Obviously, the decimal points in both numbers were in the wrong place. Although six jurors admitted to reading the article, the trial judge questioned the jurors on whether they could remain impartial. Following his examination, he concluded that they could be impartial. Further, the evidence which West maintains was prejudicial was in fact later introduced at trial, though the decimal points were put in the correct place. We do not believe that the evidence in this case shows that the newspaper article was prejudicial to the defendant nor denied him a fair and impartial trial. One would hope that such matters could be avoided and not be issues necessary to raise on appeal. Nevertheless, they do not entitle West to a new trial in this case.

West next contends that the trial court erred in

failing to give an instruction that he requested. The error concerns a requested addition to instruction No. 13 given by the trial court. The trial court gave instruction No. 13 as follows:

> Evidence has been received by the Court that Defendant had .299 per cent by weight of alcohol in his body fluids as shown by a chemical analysis of his urine.
>
> In determining the *weight* that this evidence is entitled to receive you should consider whether:
>
> 1. That the test was performed by an individual possessing a valid permit issued by the Department of Health for such purpose.
> 2. That the test was performed according to methods approved by the Department of Health.
> 3. That the testing device or equipment was in proper working order at the time the test was conducted.
> 4. That the test was conducted in compliance with all statutory requirements.

(Emphasis supplied.) This instruction, given by the trial court, was basically a verbatim instruction from, and at least tacitly approved by us in, the case of *State v. Brittain*, 212 Neb. 686, 325 N.W.2d 141 (1982). West contends, however, that the instruction did not go far enough; that the court should have given his requested instruction to the effect that there is a distinction to be made between methods used and techniques used and that failure to comply with the techniques also affects weight and credibility. See *State v. Miller*, 213 Neb. 274, 328 N.W.2d 769 (1983). On more careful analysis of this specific question, we now believe that the giving of the instruction of the type set out in *State v. Brittain*, *supra*, is not correct. The language contained in instruction No. 13 as given by the trial court states, in effect, the requirements of § 39-669.11. Such requirements for the admissibility of a urine specimen were first announced by us in *State v. Gerber*, 206 Neb. 75, 291 N.W.2d 403 (1980). That is, before it

may be determined that sufficient foundation has been laid for the admission into evidence of the results of the test, the requirements of *Gerber* must be met. Once the court, however, determines that the foundational requirements have been met and the evidence admitted, the jury has no function other than to determine the credibility and weight to be given the evidence. The jury is to consider the weight and credibility only of the test results, and not whether the foundational requirements necessary for admission of the tests were met. As a general rule, it is the province of the trial court in a jury case to determine the admissibility of the evidence offered by the parties at trial. See 75 Am. Jur. 2d *Trial* § 345 (1974). Neb. Rev. Stat. § 27-104(1) (Reissue 1979) specifically provides: "Preliminary questions concerning the . . . admissibility of evidence shall be determined by the judge . . . ." The court, and not the jury, is the arbitrator as to the admissibility of the evidence. See, *Garcia v. State*, 159 Neb. 571, 68 N.W.2d 151 (1955); *Northern Nat. Gas Co. v. Beech Aircraft Corp.*, 202 Neb. 300, 275 N.W.2d 77 (1979); *State v. Suggett*, 200 Neb. 693, 264 N.W.2d 876 (1978). The jurors are the judges of the credibility of the witnesses and of the weight to be given their testimony, once it is determined by the court that the evidence is admissible. *State v. Meadows*, 203 Neb. 197, 277 N.W.2d 707 (1979). Therefore, once the trial court determines that the *Gerber* tests have been met and that the evidence is admissible, it is not within the province of the jury to determine, as suggested by instruction No. 13, that the test was not performed by an individual possessing a valid permit issued by the state Department of Health for such purposes, or that the test was not performed according to methods approved by the state Department of Health, or that the testing device or equipment was not in proper working order at the time the test was conducted, or that the test was not conducted in compliance with all statutory require-

ments. The jury may only determine what weight to give the test in determining guilt or innocence. This is consistent with the general instruction given by the trial court to the jury that the jurors are the sole judges of the weight of the testimony and the credibility of the witnesses. In the instant case, West received an instruction far more favorable than he was entitled to receive, and the failure of the trial court to give the requested instruction was in no manner prejudicial, nor does it entitle West to a new trial. To the extent that our decisions in *State v. Brittain*, *supra*, and *State v. Miller*, *supra*, hold to the effect that an instruction such as that given here by the trial court in instruction No. 13 is either proper or required, they are modified.

The final error alleged by West is that the sentence imposed was excessive. Indeed, for a 19-year-old college student not previously guilty of any felony, a sentence of 30 months is a long and difficult sentence. Nevertheless, the crime here committed was of enormous proportion. One individual is dead and three others injured. And the saddest part of all is that all of it could have been avoided had West not been operating a motor vehicle in violation of the law. It was a senseless death, committed by a needless act. We have oftentimes said that in the absence of an abuse of discretion by the trial court, a sentence within the statutory limits will not be disturbed on appeal. See *State v. Foutch*, 196 Neb. 644, 244 N.W.2d 291 (1976). We cannot say, as a matter of law, that the trial court abused its discretion. For all of these reasons the conviction and sentence must be affirmed.

AFFIRMED.

ROSS WAITE, DOING BUSINESS AS WAITE CONSTRUCTION COMPANY, APPELLANT, V. SAMSON DEVELOPMENT COMPANY, INC., A CORPORATION, AND INLAND INSURANCE COMPANY, INC., A CORPORATION, APPELLEES.

348 N.W.2d 883

Filed May 18, 1984. No. 83-485.

1. **Pleadings: Causes of Action.** Under the code system of pleading it is not necessary to state a cause of action or a defense in any particular form. It is only necessary to plead the facts, not the theory of recovery.
2. **Pleadings: Demurrer.** A petition is sufficient [as against a general demurrer] if from the statement of facts set forth therein the law entitles the plaintiff to recover.
3. _____: _____. Pleadings are to be liberally construed, and if with such construction a petition states a cause of action against a defendant and in favor of the plaintiff, a demurrer thereto should be overruled.
4. **Pleadings: Causes of Action.** The prayer of a petition is not a part of the allegations of fact constituting the cause of action, and where the facts state a cause of action and are supported by the evidence, the court will grant proper relief, though it may not conform to the relief prayed for.
5. **Causes of Action.** The essential character of a cause of action or the remedy or relief it seeks, as shown by the allegations of the complaint, determines whether a particular action is one at law or in equity, unaffected by conclusions of the pleader or the prayer for relief.

Appeal from the District Court for Valley County: JAMES R. KELLY, Judge. Reversed and remanded for further proceedings.

Thomas A. Wagoner, for appellant.

James W. Hewitt, for appellee Inland Insurance Company, Inc.

KRIVOSHA, C.J., WHITE, and CAPORALE, JJ., and MCCOWN and BRODKEY, JJ., Retired.

MCCOWN, J., Retired.

Plaintiff filed suit in the district court for Valley County against Samson Development Company, Inc. (Samson), and Inland Insurance Company, Inc. (Inland), to recover for work done on a construction

project. He was unable to obtain service upon Samson, and the action proceeded against Inland only. The trial court entered summary judgment in favor of Inland, and the plaintiff has appealed.

The petition alleged (1) that Samson entered into a contract with Friesen Building Corporation in September 1973, whereby Friesen was to complete construction of a low-rent housing project on property owned by Samson in Ord, Nebraska; (2) that Friesen entered into a labor and material payment bond with Inland in October 1973 to cover the performance of the contract and that plaintiff was within the class of persons covered by that bond; (3) that Friesen engaged plaintiff to do certain work as a subcontractor on the project; (4) that plaintiff completed the work and that nothing remained to be done under his contract; (5) that he furnished labor to the property from July 22 to October 14, 1974; (6) that the defendant promised to pay the plaintiff for the labor but that there remained due $4,541.40; (7) that on January 14, 1975, plaintiff filed a mechanic's lien in the office of the register of deeds of Valley County, Nebraska; (8) that Samson and Friesen and the city housing authority were notified of the lien; (9) that an action by plaintiff against Friesen, filed March 20, 1975, resulted in a judgment against Friesen for $4,541.40, plus costs and interest from July 25, 1975, which judgment had not yet been satisfied; (10) that plaintiff had been notified by a June 30, 1975, letter that Samson had transferred the mechanic's lien to an undertaking filed with the clerk of the district court, as per Neb. Rev. Stat. § 52-121 (Reissue 1978) (since repealed); and (11) that the action fell under Neb. Rev. Stat. § 44-359 (Reissue 1978) as to Inland and that an attorney fee would therefore be proper. The prayer of the petition reads:

> WHEREFORE, Plaintiff prays for judgment against the Defendants, and each of them, in the amount of $4,541.40 plus interest from the 25th

> day of July, 1975, and the costs of this action, including the $73.00 costs taxed by the District County Court of Valley County, Nebraska, and for an attorney's fee to be taxed to the Defendant, Inland Insurance Company, as per Section 44-359, R.R.S., 1943, as amended; that the same be declared to be a statutory lien upon the fund presently on deposit with the office of the Clerk of the District Court of Valley County, Nebraska, as provided by Section 51-121 and 122, R.R.S., 1943, as amended, and for such other, further and different relief as to the Court may seem just and equitable in the premises.

Attached to the petition was a copy of the mechanic's lien and a copy of the labor and material bond.

Inland admitted (1) the existence of the contract between Friesen and Samson; (2) the execution of the labor and material bond; (3) the oral contract between Friesen and plaintiff; and (4) that plaintiff filed a mechanic's lien and that notice of the lien was given certain parties. Inland denied (1) that plaintiff was within the class of persons protected by the labor and material bond; (2) that the plaintiff's work was completed; (3) that plaintiff furnished labor between July 22 to October 14, 1974; (4) that defendant agreed to pay plaintiff for labor and that $4,541.40 remained to be paid; (5) that the mechanic's lien was a claim against the material bond; (6) that plaintiff had filed suit and obtained judgment against Friesen; (7) that plaintiff was notified of the transfer of the mechanic's lien by letter from Samson dated June 30, 1975; and (8) that the case was a proper case for an attorney fee.

Inland further alleged that, since Samson had not been served and the surety on the transfer bond had not been joined, no proper action had been brought on the transfer bond within the time period of § 52-121 (since repealed) and that the benefits of the lien had been forfeited.

Two particular sections of the labor and material bond are directly relevant.

> 1. A claimant is defined as one having a direct contract with the Principal or with a Subcontractor of the Principal for labor, material, or both, used or reasonably required for use in the performance of the Contract, labor and material being construed to include that part of water, gas, power, light, heat, oil, gasoline, telephone service or rental of equipment directly applicable to the Contract.
>
> 2. The above named Principal and Surety hereby jointly and severally agree with the Owner that every claimant as herein defined, who has not been paid in full before the expiration of a period of ninety (90) days after the date on which the last of such claimant's work or labor was done or performed, or materials were furnished by such claimant, may sue on this bond for the use of such claimant, prosecute the suit to final judgment for such sum or sums as may be justly due claimant, and have execution thereon. The Owner shall not be liable for the payment of any costs or expenses of any such suit.

Both parties moved for summary judgment. Inland argued as the bases for its motion that, according to the prayer of the petition, the plaintiff was suing on a mechanic's lien transfer bond and that since Samson was not served and the surety on that transfer bond was not a party here and Inland was not the surety on the transfer bond, plaintiff had lost all of his lien rights.

Inland also maintained that since plaintiff had secured a personal judgment against Friesen, he could not maintain an equitable action here, because he had an adequate remedy at law.

The district court sustained Inland's motion for summary judgment, and plaintiff has appealed.

Inland's position in support of the summary judg-

ment is that the plaintiff brought suit on the mechanic's lien transfer bond, failed to get service on Samson, sued the wrong surety, and lost his lien rights as a result.

Inland argues in its brief that the suit on a labor and material bond is a law action, triable to a jury, and that the instant case is in equity. Inland claims that pleading the lien, attaching it, and pleading the notice to sue, when coupled with the language of the prayer, established that this was a suit on the transfer bond.

Inland cites language from previous cases that a pleading should be construed with reference to the general theory upon which it proceeds and should not be uncertain as to which of two or more theories is relied on. *B. C. Christopher & Co. v. Danker*, 196 Neb. 518, 244 N.W.2d 79 (1976), citing *Fellers v. Howe*, 106 Neb. 495, 184 N.W. 122 (1921).

Inland further contends that the pleading is inconsistent and should be construed against the pleader.

The primary question is whether the petition must be treated as a suit on the mechanic's lien transfer bond or may be treated as an action at law on the labor and material bond.

The crucial issue is whether the petition states facts sufficient to constitute a cause of action at law against Inland on the labor and material bond.

Under the code system of pleading it is not necessary to state a cause of action or a defense in any particular form. It is only necessary to plead the facts, not the theory of recovery. *Blaha GMC-Jeep, Inc. v. Frerichs*, 211 Neb. 103, 317 N.W.2d 894 (1982), citing *Newman Grove Creamery Co. v. Deaver*, 208 Neb. 178, 302 N.W.2d 697 (1981).

In *Dixon v. Reconciliation, Inc.*, 206 Neb. 45, 49, 291 N.W.2d 230, 233 (1980), the court stated that " ' " [a] petition is sufficient [as against a general demurrer] if from the statement of facts set forth therein the law entitles the plaintiff to recover." ' " The *Dixon* court also stated at 49, 291 N.W.2d at 233:

"We have also held that pleadings are to be liberally construed, and if with such construction a petition states a cause of action against a defendant and in favor of the plaintiff, a demurrer thereto should be overruled."

Much of the defendant's argument is based on the fact that a portion of the prayer of the petition asked that any judgment be considered a lien against the funds on deposit in district court under the mechanic's lien transfer bond.

The prayer of a petition is not a part of the allegations of fact constituting the cause of action, and where the facts state a cause of action and are supported by the evidence, the court will grant proper relief, though it may not conform to the relief prayed for. *Standard Reliance Ins. Co. v. Schoenthal*, 171 Neb. 490, 106 N.W.2d 704 (1960).

In *Connor v. State*, 175 Neb. 140, 120 N.W.2d 916 (1963), we held that a prayer for relief is part of the petition but is no portion of a statement of fact required to constitute a cause of action, and the prayer may be in excess of what the court is empowered to grant in the action.

Under our system of code pleading the nature of an action is determined not by the prayer for relief but from the character of the facts alleged.

The essential character of a cause of action or the remedy or relief it seeks, as shown by the allegations of the complaint, determines whether a particular action is one at law or in equity, unaffected by conclusions of the pleader or what the pleader calls it, or the prayer for relief. *Brchan v. The Crete Mills*, 155 Neb. 505, 52 N.W.2d 333 (1952).

In our view the petition states facts sufficient to constitute a cause of action against Inland on the labor and material bond, and the allegations and prayer for equitable relief against others may be deemed surplusage.

As an action on the labor and material bond, the pleadings show a substantial conflict of material

facts which cannot be decided on a motion for summary judgment in the current state of the pleadings and record.

The judgment of the district court is therefore reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

LILLIAN E. TAYLOR, APPELLANT, V. MARSHALL TAYLOR, APPELLEE.

348 N.W.2d 887

Filed May 25, 1984. No. 83-173.

1. **Divorce: Pensions.** The effect of the Uniformed Services Former Spouses Protection Act, 10 U.S.C. §§ 1401 et seq. (1982), is that nondisability military pensions need no longer be treated differently than nonmilitary pensions.
2. **Alimony: Property Division.** While alimony and distribution of property rights have different purposes in marriage dissolution proceedings, in a proper case they may be considered together in reaching an award that is just and equitable.
3. **Divorce: Pensions.** The method of considering a husband's pension fund by awarding the wife a specified amount of alimony for her lifetime falls within the approved methods for dealing with pension funds.

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

Van A. Schroeder, for appellant.

John E. Rice, for appellee.

BOSLAUGH, WHITE, HASTINGS, and SHANAHAN, JJ., and BRODKEY, J., Retired.

BRODKEY, J., Retired.

Lillian E. Taylor (Lillian), petitioner-appellant, has appealed to this court from a decree entered by the district court for Sarpy County, Nebraska, dissolving the marriage of the appellant and Marshall Taylor (Marshall), respondent-appellee.

The trial court awarded Lillian custody of the three minor children, set child support at $150 per month per child, and awarded her alimony in the amount of $300 per month for 60 months, terminable upon her remarriage or death. Lillian was awarded the family home, two older model automobiles, one-half of the savings and checking accounts, and the household goods in her possession. Marshall was awarded the family business, including equipment, life insurance policies, a vacant lot, one-half of the savings and checking accounts, and the household items in his possession. The decree made no mention of the military retirement pay to which Marshall was entitled.

Lillian assigns as error (1) the amount and duration of alimony, (2) the division of property, particularly the failure to award her a share of the military pension, and (3) the failure of the trial court to award an attorney fee.

The record reveals that the parties were married for 23 years and had three minor children. At the time of trial Marshall was 45 years old. He was retired from the U.S. Air Force, with the rank of senior master sergeant, after 20 years of military service. He was receiving a military pension in the amount of $926 gross and $854 net per month and was employed in the family-owned business, Lilmar Beauty Services, Inc. He drew no salary until September 1981.

Lillian was 43 years of age at the time of trial. She had graduated from high school and then from beauty school and was a registered beautician in Nebraska and Illinois. Since graduation from beauty school, she worked as a self-employed beautician except for a 3-year period between 1960 and 1963 when she was employed by a beauty salon. She has worked full time at Lilmar since 1973. She did not draw a salary until September 1981, when she earned a net salary of $439.61 per month as ordered by the trial court.

The primary issue on appeal is whether Marshall's military retirement pay should have been considered by the trial court in determining the alimony and division of property.

The law applicable to the disposition of military pensions has undergone many changes over the past 4 years. Until 1980 the law in Nebraska was that pensions were to be considered as a source of alimony and maintenance.

In 1980 the Legislature amended Neb. Rev. Stat. § 42-366 (Reissue 1978) to provide as follows:

> (8) If the parties fail to agree upon a property settlement which the court finds to be conscionable, the court shall order an equitable division of the marital estate. The court shall include as part of the marital estate, for purposes of the division of property at the time of dissolution, any pension plans, retirement plans, annuities, and other deferred compensation benefits owned by either party, whether vested or not vested.

In *Kullbom v. Kullbom*, 209 Neb. 145, 306 N.W.2d 844 (1981), this court determined that by virtue of § 42-366(8) (Cum. Supp. 1982) "the law of this state now requires that pension plans and retirement plans shall be included as part of the marital estate for the purposes of the division of property . . . ." *Id.* at 151, 306 N.W.2d at 848.

In *McCarty v. McCarty*, 453 U.S. 210, 101 S. Ct. 2728, 69 L. Ed. 2d 589 (1981), the U.S. Supreme Court held that federal law precludes a state court from awarding a nonmilitary spouse a portion of the military spouse's government pension. The Court pointed out that "the plight of an ex-spouse of a retired service member is often a serious one," *id.* at 235, but that it was up to Congress to devise a remedy.

Subsequently, this court decided the case of *Pyke v. Pyke*, 212 Neb. 114, 321 N.W.2d 906 (1982), in which we pointed out that as a result of *McCarty*, military pensions were exempted from the provisions of

§ 42-366. We pointed out that the court could still consider the pension as a source of income for the military spouse's own maintenance and as a source of alimony for the nonmilitary spouse, even though the court could not award an interest in the military pension to the nonmilitary spouse.

Congress then passed the Uniformed Services Former Spouses Protection Act, Pub. L. No. 97-252, § 1002(a), 96 Stat. 730 (1982) (codified at 10 U.S.C. §§ 1401 et seq. (1982)) (USFSPA). The act provides, among other things:

> Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

10 U.S.C. § 1408(c)(1).

The legislative history reveals:

> The purpose of this provision is to place the courts in the same position that they were in on June 26, 1981, the date of the *McCarty* decision, with respect to treatment of non-disability military retired or retainer pay. The provision is intended to remove the federal pre-emption found to exist by the United States Supreme Court and permit State and other courts of competent jurisdiction to apply pertinent State or other laws in determining whether military retired or retainer pay should be divisable [sic]. Nothing in this provision requires any division; it leaves that issue up to the courts applying community property, equitable distribution or other principles of marital property determination and distribution. This power is returned to the courts retroactive to June 26, 1981. This retroactive application will at least afford individuals who were divorced (or had decrees modified) during the interim period between June 26, 1981 and the

> effective date of this legislation the opportunity to return to the courts to take advantage of this provision.

S. Rep. No. 502, 97th Cong., 2d Sess. 16, *reprinted in* 1982 U.S. Code Cong. & Ad. News 1596, 1611.

The effect of the USFSPA is that nondisability military pensions need no longer be treated differently than nonmilitary pensions.

The pension fund is clearly the most valuable asset of the parties. Since the trial court did not specifically award the interest in the retirement pay to the appellee, we do so at this time. Once we consider the pension, it is clear that equity requires that we make an adjustment in the award to the appellant.

This court has held on numerous occasions that alimony and distribution of property rights have different purposes in marriage dissolution proceedings, but in a proper case they may be considered together in reaching an award that is just and equitable. In *McBride v. McBride*, 211 Neb. 459, 319 N.W.2d 72 (1982), we held that the method of considering a husband's pension fund by awarding alimony to the wife in a specified amount for her lifetime falls within the approved methods for dealing with pension funds set forth in *Kullbom v. Kullbom*, 209 Neb. 145, 306 N.W.2d 844 (1981).

After a consideration of all the facts and circumstances, we are of the opinion that the decree should be modified to provide for an alimony payment of $300 per month to the appellant for her lifetime.

Appellant is awarded $750 for the services of her attorney in this court.

AFFIRMED AS MODIFIED.

IN RE CONTEMPT OF RALPH LILES, JESSIE LILES, LARRY NOLTE, AND JULIE NOLTE.
STATE OF NEBRASKA EX REL. PAUL L. DOUGLAS ET AL., APPELLEES, V. FAITH BAPTIST CHURCH OF LOUISVILLE, NEBRASKA, ET AL., APPELLANTS.

349 N.W.2d 377

Filed May 25, 1984. No. 83-237.

1. **Contempt.** One who is in privity with an enjoined party and also has knowledge of the injunction, or one who aids and abets the violation of the injunction, is subject to the contempt powers of the court.
2. **Contempt: Proof.** Guilt in a contempt action must be found beyond a reasonable doubt.
3. **Contempt: Appeal and Error.** Since there is no statutory provision for an appeal from a judgment of contempt, any such review of that judgment must be conducted in the Supreme Court on error in the same manner as a criminal case.
4. _____: _____. In an error proceeding the review is solely on the record, and the judgment of the lower court or tribunal will be affirmed, absent errors of law, if the findings are supported by the evidence.

Appeal from the District Court for Cass County: RAYMOND J. CASE, Judge. Reversed and remanded for a new trial.

George O. Rebensdorf and Craig F. Swoboda of Swoboda, Rebensdorf & Frazier, and Edward F. Fogarty of Fogarty, Lund & Gross, for appellants.

Ronald D. Moravec, Cass County Attorney, for appellees.

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

HASTINGS, J.

These are appeals by the Lileses and the Noltes from the March 22, 1983, order of the district court holding them in contempt of court. This action resulted from their alleged violation of an injunction entered in this same case on September 11, 1979, enjoining the operation of a school by the Faith Baptist Church and certain individuals. Our opinion affirm-

ing the issuance of that injunction may be found in *State ex rel. Douglas v. Faith Baptist Church*, 207 Neb. 802, 301 N.W.2d 571 (1981), *appeal dismissed* 454 U.S. 803, 102 S. Ct. 75, 70 L. Ed. 2d 72.

That injunction ran against Faith Baptist Church and certain individuals who were the pastor of the church, teachers, and members of the board of the church. These individuals did not include the contemners, however, who are parents who had been sending their children to the school operated by the Faith Baptist Church. This was during the time that injunction against operation of the school had become final. It is this action on their part which resulted in the contempt proceedings.

The contemners assign as error: (1) The trial court in these proceedings applied its original injunction to parents of children attending school rather than limiting it to teachers, administrators, and operators as specified in the original order; (2) The trial court erred in finding that the contemners were in privity with such teachers, administrators, and operators; (3) The trial court employed a standard of proof by a mere preponderance of the evidence rather than guilt beyond a reasonable doubt; and (4) The punishments imposed were constitutionally excessive.

We deal initially with the first two assignments. According to the affidavits found in the record, all of the contemners had stipulated in the case of *Arnold et al. v. Douglas et al.*, CV82-L-494 (D. Neb. filed Sept. 10, 1982), that each of them had personal knowledge of the existence of the injunction previously mentioned. Additionally, these same parties were involved in a declaratory judgment action filed in the district court for Cass County. In the petition filed in that case, the parties alleged that they had enrolled their children in the Faith Christian School and would continue to send them to that same school, which *will not be regulated by the State.* We reject those two assignments of error.

As stated by this court in the case of *In re Contempt of Liles*, 216 Neb. 531, 533, 344 N.W.2d 626, 628 (1984):

> It is clear, and has long been the rule, that one who is in privity with an enjoined party and also has knowledge of the injunction, or one who aids and abets the violation of the injunction, is subject to the contempt powers of the court.

The record leaves no doubt that the trial court in its findings determined that the evidence was sufficient to prove by a *preponderance of the evidence* that the contemners took an active part in the operation of the school and were in violation of the order of injunction. From our own review of the record, we are in agreement with those findings. However, in contempt proceedings it is necessary to establish guilt beyond a reasonable doubt. *Bahm v. Raikes*, 200 Neb. 195, 263 N.W.2d 437 (1978).

The State urges us to conduct our own review to determine the contemners' guilt under the proper standard. However, judgments of contempt are reviewable in the same manner as in criminal cases. *Gentle v. Pantel Realty Co.*, 120 Neb. 630, 234 N.W. 574 (1931). With the 1972 amendment of Neb. Const. art. I, § 23, thereby abolishing writs of error in this court, our review is by appeal. Therefore, we are not free to reach an independent conclusion, but must confine our review to errors appearing on the record. Neb. Rev. Stat. § 25-1911 (Reissue 1979).

We find this case in the same posture as would be a jury verdict of guilt based on an erroneous instruction setting forth an improper burden of proof. As we would do in such a case, we must also set this finding aside. The judgments are reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

STATE OF NEBRASKA, APPELLEE, V. ANDREW CLARK, APPELLANT.

350 N.W.2d 521

Filed May 25, 1984. No. 83-298.

1. **Pleas: Constitutional Rights: Waiver.** A defendant 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 where otherwise authorized, and the privilege against self-incrimination; a voluntary and intelligent waiver of these rights must affirmatively appear from the record.
2. **Criminal Law: Constitutional Law.** Retroactive application of a new rule of law is appropriate when it is aimed at enhancing the accuracy of criminal trials, when there has not been justifiable reliance on a prior rule of law, and when retroactive application will not have a disruptive effect on the administration of justice.
3. **Pleas.** The rule announced in *State v. Tweedy*, 209 Neb. 649, 309 N.W.2d 94 (1981), is not to be applied retroactively to guilty pleas accepted by any of the courts of this state before the date upon which the *Tweedy* mandate was issued, August 31, 1981.
4. _____. Misinforming a defendant of the possible penalty a conviction entails, coupled with a defendant's actual lack of knowledge of the actual penalty, vitiates an otherwise valid guilty plea.
5. _____. There is no requirement that the judge who accepts a guilty plea also sentence the defendant.
6. **Sentences.** A sentence imposed within statutory limits will not be set aside absent an abuse of discretion.

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 Michaela M. White, for appellee.

KRIVOSHA, C.J., BOSLAUGH, HASTINGS, CAPORALE, SHANAHAN, and GRANT, JJ.

CAPORALE, J.

Andrew Clark appeals from the sentence imprisoning him for a term of not less than 3 nor more than 4 years upon a plea of guilty to a robbery charge. We affirm.

On June 3, 1978, Clark, Ingreat Swift, and one

Kirby were driving around Omaha entertaining themselves by drinking a case and a half of beer and four or five fifths of wine. The trio pulled into a service station, where Swift left the car and helped the attendant service the car. While the car was being serviced, Kirby and Clark decided to rob the cashier. Clark accomplished the plan by pointing a toy pistol at the cashier and relieving her of $110, $40 of which he kept and $70 of which was given to Swift and Kirby. Clark and Swift were arrested a few days later. Swift was charged with and convicted of being an accessory after the fact and sentenced to 30 days in jail.

On September 14, 1978, Clark entered a plea of guilty to a charge of robbery in return for the dropping of an additional charge of using a firearm to commit a felony. Before accepting Clark's guilty plea, the district court judge informed Clark that he was charged with robbery and that a guilty plea entailed a waiver of his right to a jury trial, to subpoena witnesses, and to have a trial with assistance of counsel. The judge also informed Clark that the penalty upon conviction of armed robbery was a prison term of at least 3 years, up to a maximum term of 50 years. Neb. Rev. Stat. § 28-414 (Reissue 1975). After convincing himself that Clark's plea was a voluntary and intelligent one, the judge found Clark guilty. Clark failed to appear for his sentencing hearing.

Over 4 years later Clark was arrested and later convicted of third degree assault upon a female acquaintance. He received a 40-day jail term. At the time of his arrest he informed police that there was an outstanding warrant for his arrest as the result of his failure to appear at the sentencing hearing on the robbery charge.

On April 8, 1983, Clark appeared before another judge of the district court for his long-delayed sentencing on the robbery conviction. The penalty for robbery, a Class II felony, was changed, effective

January 1, 1979, to not less than 1 nor more than 50 years' imprisonment, Neb. Rev. Stat. §§ 28-324 and 28-105 (Reissue 1979), instead of the previous 3 to 50 years, which was in effect at the time of Clark's guilty plea in 1978.

Clark's first assignment of error, that his plea was not made intelligently and voluntarily, raises three distinct issues. The first issue is whether the rule of *State v. Tweedy*, 209 Neb. 649, 309 N.W.2d 94 (1981), should be given retroactive effect to the time when Clark entered his guilty plea in 1978. In *Tweedy* we stated:

> [N]o 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 realize that this holding may place some additional burdens on some of the municipal and county courts which have not heretofore followed this procedure. Therefore, the rule announced today is to be applied prospectively only, i.e., to guilty pleas taken after the date of the issuance of the mandate in this case.

209 Neb. at 654-55, 309 N.W.2d at 98.

In *Solem v. Stumes*, ____ U.S. ____, 104 S. Ct. 1338, 79 L. Ed. 2d 579 (1984), the issue was whether the rule of *Edwards v. Arizona*, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981), that once a criminal suspect has requested an attorney, any subsequent conversation between the suspect and interrogating police officers must be initiated by the suspect,

would be given retroactive effect. The U.S. Supreme Court refused to give retroactive application to the rule, recognizing that such application was not constitutionally compelled. Nonetheless, the Court indicated that retroactive application of a new rule of law is appropriate when it is aimed at enhancing the accuracy of criminal trials, when there has not been justifiable reliance on a prior rule of law, and when retroactive application will not have a disruptive effect on the administration of justice.

In the present case the specific waiver of rights required by *Tweedy* adds nothing to the factual determination of Clark's guilt. *Tweedy* was not aimed at the evil of mistaken determinations of guilt, but at the uninformed relinquishment of constitutional rights. It is also clear that the procedure used by the district court in accepting Clark's guilty plea was one based upon justifiable reliance. In *State v. Turner*, 186 Neb. 424, 183 N.W.2d 763 (1971), we specifically rejected the interpretation of *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), which we later adopted in *Tweedy*. As to whether the retroactive application of *Tweedy* would have a disruptive effect upon the administration of justice, there is no doubt that the answer must be an affirmative one. We can only guess at the number of persons incarcerated or otherwise under the control of the Department of Correctional Services upon their own plea of guilty who would need to be rearraigned. Clark argues that the retroactive application of the rule should be limited only to those few persons who were arraigned prior to *Tweedy* and sentenced afterwards. We see no rationale upon which such limited retroactive application could be based. Therefore, the *Tweedy* rule is not to be applied retroactively to guilty pleas accepted by any of the courts of this state before the date upon which the *Tweedy* mandate was issued, August 31, 1981.

The second issue raised by Clark's first assignment is whether his arraignment was conducted

within the procedural guidelines of *State v. Turner*, *supra*. In *Turner* we embraced the ABA Standards Relating to Pleas of Guilty (Approved Draft 1968) as the minimal procedure to be used in accepting guilty pleas. Those standards provide in relevant part:

> 1.4 Defendant to be advised by court.
>
> The court should not accept a plea of guilty or nolo contendere from a defendant without first addressing the defendant personally and
>
> (a) determining that he understands the nature of the charge;
>
> (b) informing him that by his plea of guilty or nolo contendere he waives his right to trial by jury; and
>
> (c) informing him:
>
> (i) of the maximum possible sentence on the charge, including that possible from consecutive sentences;
>
> (ii) of the mandatory minimum sentence, if any, on the charge; and
>
> (iii) when the offense charged is one for which a different or additional punishment is authorized by reason of the fact that the defendant has previously been convicted of an offense, that this fact may be established after his plea in the present action if he has been previously convicted, thereby subjecting him to such different or additional punishment.

In regard to these standards Clark contends that he was not adequately informed of the nature of the charges when the judge merely stated that he was charged with robbery. Clark contends that the very minimal procedure which would satisfy this requirement is a reading of the information. We do not think this case requires the announcement of such a rule. Clark was not facing numerous charges for conduct occurring on various occasions. As the record reflects, Clark was facing trial on one incident, and only one incident, and had discussed the matter with his attorney. We think the record fairly estab-

lishes that Clark was adequately informed of the nature of the charge to which he was pleading.

The third issue raised by Clark's first assignment concerns the effect, if any, the statutory penalty change for robbery had upon the voluntariness of Clark's plea.

On previous occasions we have held that misinforming the defendant of the possible penalty a conviction entails, coupled with a defendant's actual lack of knowledge of the actual penalty, vitiates an otherwise valid guilty plea. *State v. McMahon*, 213 Neb. 897, 33 N.W.2d 818 (1983); *State v. Curnyn*, 202 Neb. 135, 274 N.W.2d 157 (1979). The instant case does not fall within that rule. Clark was correctly informed of the robbery penalty at the time of his arraignment. While the penalty had decreased at the time of his sentencing 4 years later, that situation was brought about by Clark's own elusive behavior and not by any failure of the trial court. Moreover, Clark made no attempt to withdraw his plea at the time of his sentencing. Additionally, we find it hard to imagine any motivation for Clark to withdraw his prior plea because the penalty was decreased.

Clark's second assignment of error is that it was improper for him to be sentenced by a judge other than the one accepting his guilty plea. In support of his position Clark cites several California cases supporting the proposition that it is an implied condition of the plea bargain approved by a court, when it accepts a defendant's guilty plea, that the defendant be sentenced by the same judge who accepts the plea. *People v. Pedregon*, 115 Cal. App. 3d 723, 171 Cal. Rptr. 468 (1981); *People v. Arbuckle*, 22 Cal. 3d 749, 587 P.2d 220, 150 Cal. Rptr. 778 (1978). The problem with Clark's contention is that we are not writing upon a clean slate. In *State v. Hilderbrand*, 193 Neb. 233, 226 N.W.2d 353 (1975), we specifically held that there is no requirement that the judge who accepts a guilty plea also sentence the defendant.

Clark's second assignment of error is therefore without merit.

Clark's final attack upon the judgment of the district court is a claim that the sentence he received was excessive. We have often stated that a sentence imposed within statutory limits will not be set aside absent an abuse of discretion. *State v. Cooley*, *ante* p. 90, 348 N.W.2d 433 (1984). The 3- to 4-year sentence being well within the statutory limit, Clark contends an abuse of discretion comes to light when it is considered that a codefendant received only 30 days and that Clark's past history is free of what he labels as serious crime.

Clark's codefendant was convicted of being an accessory after the fact, and from the presentence report it appears that his only connection with the robbery came afterwards, when he accepted a share of the booty. Such conduct is easily distinguishable from Clark's, who put the cashier in fear by pointing a toy gun at her and relieving her of cash for which she was responsible. As such, this is not a case where equally culpable codefendants received different penalties. *State v. Nix*, 215 Neb. 410, 338 N.W.2d 782 (1983).

While Clark's past record is free of prior serious crime, the crime of robbery is one characterized by violence and terrorism and clearly warrants incarceration. We note that the 3- to 4-year term Clark received is nearly the minimum to which he could have been sentenced if he had appeared at the original sentencing. There is no abuse of discretion in his sentence.

AFFIRMED.

WHITE, J., not participating.

WHEELER CONSTRUCTION, INC., A CORPORATION, ET AL., APPELLEES, V. TOWN & COUNTRY REALTY OF GRAND ISLAND, INC., A CORPORATION, APPELLANT.

348 N.W.2d 890

Filed May 25, 1984. No. 83-310.

1. **Judgments: Appeal and Error.** Findings of a court in a law action in which a jury has been waived have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. In such a circumstance it is not within our province to resolve conflicts in or to weigh the evidence; if there is a conflict in the evidence, this court will review the judgment rendered and will presume that controverted facts were decided in favor of the successful party.
2. **Equity: Accounting.** Generally, in order to be entitled to the equitable remedy of accounting, it is necessary to show a fiduciary or a trust relationship between the parties, or a complicated series of accounts, making the remedy at law inadequate.
3. **Contracts: Real Estate.** Every contract for the sale of any lands shall be void unless the contract or some note or memorandum thereof be in writing and signed by the party by whom the sale is to be made.

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

Earl D. Ahlschwede of Ahlschwede & Truell, for appellant.

Cunningham, Blackburn, VonSeggern, Livingston, Francis & Riley, for appellees.

KRIVOSHA, C.J., and CAPORALE, J., and MCCOWN and BRODKEY, JJ., Retired, and RONIN, D.J., Retired.

PER CURIAM.

This is an appeal from a judgment of the district court for Hall County, Nebraska, in a law action in which a trial by jury was waived. The appellee, plaintiff below, Wheeler Construction, Inc. (Wheeler Construction), a corporation, sued the appellant, defendant below, Town & Country Realty of Grand Island, Inc. (Town & Country), a corporation, on a promissory note. The trial court found for Wheeler Construction and entered judgment in the amount of

$11,000, plus interest. Town & Country filed a cross-petition on two separate grounds. First, Town & Country sued Wheeler Construction for breach of contract, alleging that Wheeler Construction failed to perform the obligations of the contract in a workmanlike manner. The trial court held for Town & Country and entered judgment in the amount of $8,299.04. In its second cause of action Town & Country interpleaded Robert and Nancy Wheeler (Wheelers) and sought damages against them for an alleged breach of contract concerning a trade of real estate between the parties. The district court found for the Wheelers.

Town & Country appeals and assigns several errors which can be summarized as follows: The trial court erred in not allowing an accounting prior to entering judgment on the promissory note. The trial court erred in failing to find that the plaintiffs breached a contract for the exchange of real properties owned by the parties, and in failing to award damages to the appellant therefor. A related assignment is the action of the trial court in striking from the cross-petition allegations of damages relating to increased costs of financing certain improvements incurred by reason of the Wheelers' failure to carry out the exchange of real estate.

Town & Country, a real estate firm, owner of three unconnected buildings in Setag Subdivision in Grand Island, Nebraska, contracted with the appellee Wheeler Construction to construct certain improvements. As a result of the construction, the buildings would be connected and subsequently used as a shopping center. The total contract price was $350,000. The contract provided for a downpayment of 5 percent of the total amount, but it was not paid when the contract was signed. At a later time Town & Country paid $13,000 to Wheeler Construction. Wheeler Construction commenced work; however, no further payments were made to Wheeler Con-

struction prior to the stoppage of construction in December 1979.

Although Town & Country had obtained a loan commitment from First Federal Lincoln, a savings and loan association, and a commitment for interim or construction financing, Town & Country was unable to secure the interim financing because it failed to obtain guaranteed leases of the property. Wheeler Construction, aware of the financing difficulty, nevertheless continued construction of the improvements. Both Wheeler Construction and Town & Country were aware of and concerned about the failure to make timely payment to subcontractors. In view of Town & Country's contingency failure to obtain guaranteed leases and thereby to secure interim financing, during the summer of 1979 Fred Janisch, the president of Town & Country, and Robert Wheeler, the president of Wheeler Construction, began discussions concerning the exchange of Town & Country's property and certain real estate belonging to the Wheelers. As a result of these discussions, a draft agreement was prepared, keys were exchanged for the inspection of the various properties, and Town & Country collected rents in an unspecified amount from the Wheelers' tenants. The agreement was, however, never executed.

In June 1980, after the decision by the Wheelers not to consummate the exchange, a general meeting among Wheeler Construction, Town & Country, and various subcontractors was held. As a result of the meeting, a document entitled "Escrow Agreement" was executed by Town & Country in favor of Wheeler Construction and the subcontractors. The document recited in part that, contingent upon the execution of mechanic's lien releases, the sum of $26,067.53 was to be paid to Wheeler Construction and a note for $11,000 from Town & Country was to be delivered to Wheeler Construction. Wheeler Construction executed the releases, received the money, and accepted delivery of the note. At its due date,

payment on the note was refused by Town & Country, and this suit resulted. At trial the execution of the note was admitted, as was its nonpayment.

Our scope of review is limited.

> [T]he findings of a court in a law action in which a jury has been waived have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. In such a circumstance it is not within our province to resolve conflicts in or to weigh the evidence; if there is a conflict in the evidence, this court will review the judgment rendered and will presume that controverted facts were decided in favor of the successful party.

Nerud v. Haybuster Mfg., 215 Neb. 604, 609, 340 N.W.2d 369, 373 (1983).

The substance of appellant's first assignment of error is that a confidential relationship existed between Fred Janisch and Robert Wheeler and, therefore, an accounting should have been ordered. There is nothing in the record which suggests that either a fiduciary or a trust relationship existed between the parties; rather, the evidence discloses merely a friendly relationship of two parties to a contract, and thus an accounting is not appropriate. *Trump, Inc. v. Sapp Bros. Ford Center, Inc.*, 210 Neb. 824, 317 N.W.2d 372 (1982).

Concerning appellant's second assignment of error, all damages claimed arose from the alleged breach of the oral contract to exchange real estate.

Neb. Rev. Stat. § 36-105 (Reissue 1978) provides: "Every contract . . . for the sale of any lands, shall be void unless the contract or some note or memorandum thereof be in writing and signed by the party by whom the . . . sale is to be made." The evidence establishes that, after the exchange of keys to certain real estate, a letter was sent from Janisch to Robert Wheeler on September 13, 1979. In pertinent part, the letter (after listing certain documents which accompanied the letter) read: "Bob, should

for any reason this trade not be connsumated [sic], I will expect the return of all this documentation." The trade was never completed, and all documents were returned to Janisch. Janisch testified that he knew at the time the letter was written that no binding contract existed, that each party hoped and expected to complete the trade, but that no contract was ever executed. Therefore, this assignment, with respect to the breach of contract to convey real estate and the resulting damages, is without merit.

One further issue requires discussion. The appellees in their brief raise the propriety of the order of the trial court granting judgment to Town & Country on its cross-petition. Appellees assert that all matters were settled by the "Escrow Agreement" and that recovery was barred by the doctrine of accord and satisfaction. We merely point out that the trial court found otherwise and that the appellees did not cross-appeal. Thus, we do not consider the issue.

Finding no error, the judgment of the trial court is affirmed.

AFFIRMED.

WHITE, J., participating on briefs.

STEVEN EDWARD DOTY, APPELLEE, V. AETNA LIFE & CASUALTY, APPELLANT.

350 N.W.2d 7

Filed May 25, 1984. No. 83-487.

1. **Workmen's Compensation: Appeal and Error.** The findings of the compensation court on rehearing have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong.
2. _____: _____. In testing the sufficiency of evidence to support findings of the compensation court after rehearing, the evidence must be considered in the light most favorable to the successful party.
3. **Workmen's Compensation.** Where an employee has sustained an

injury compensable under the Workmen's Compensation Act, and suffers a later injury off the jobsite, his workmen's compensation benefits depend on whether his disability after the second accident was caused by the original injury or by an independent intervening cause.

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

Dennis R. Riekenberg of Cassem, Tierney, Adams, Gotch & Douglas, for appellant.

John B. Ashford of Dowd, Fahey & Ashford, and Radley Clemens, for appellee.

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

GRANT, J.

Appellant, Aetna Life & Casualty, the workmen's compensation insurance carrier for Mobile City Sales, appeals from the decision of a three-judge panel of the Workmen's Compensation Court affirming a single judge's finding that appellee, Steven Edward Doty, suffered a temporary total disability resulting from an accident on October 8, 1980. We affirm the judgment of the three-judge panel.

The evidence reveals that on October 8, 1980, Doty was employed by appellant's insured, Mobile City Sales, in Fremont, Nebraska. While Doty was unhooking a mobile home from a truck by cranking a tongue jack, something "popped" in his lower back. Doty had no prior history of back problems, and was treated with traction at Memorial Hospital in Fremont by Drs. Bridges and Smith.

In late October 1980 he returned to work, with the medical restrictions not to bend and not to lift anything heavy. In March 1981 Doty was referred to Dr. Frederick Hathaway. Doty's back pain persisted between October 1980 and July 28, 1981, when he was admitted to Lincoln General Hospital for additional conservative treatment of therapy and traction.

Office visits were conducted August 4 and September 1, 1981. Doty was given a release by Dr. Hathaway to return to work and resume his employment on September 8, 1981. At this time coworkers did his heavy lifting for him. On May 13, 1982, Doty was readmitted to Lincoln General due to continued back pain. A lumbar myelogram was conducted, and laminectomy surgery was performed May 20, 1982, at the L4-5 level. Following a period of convalescence, Doty was allowed to return to work August 2, 1982, with instructions not to lift over 20 to 40 pounds.

On September 2, 1982, at his residence, Doty experienced an episode of severe pain when he bent over to kiss his 2-year-old daughter. At the rehearing Doty testified he did not attempt to lift her off the ground at the time of this incident but that the child "was on the floor at first and I stood her up . . . and then I bent over to give her a kiss." Doty was sitting on the edge of a chair at this time. Earlier statements of Doty to his doctors indicated that he had lifted his 20- to 25-pound child at the time.

Dr. Hathaway hospitalized Doty for traction on September 3, 1982. Upon Dr. Hathaway's request Dr. Sposato, a neurologist, examined Doty on September 10. Drs. Hathaway and Sposato concluded that Doty "had a recurrent nerve injury, probably secondary to an irritation from scar tissue around the area of the previous injury [the October 1980 injury, followed by the laminectomy of May 20, 1982]." In answer to the question, "And would that be in the L-4, L-5 area?" Dr. Hathaway responded, "Yes." Dr. Hathaway further testified:

> Q. Prior to or during the time that he was hospitalized or prior thereto in September, had you theorized that there possibly could be injury to L-3, L-4 level as well?
>
> A. That was the impression we had when we put him in the hospital, but it subsequently wasn't borned [sic] out by further examination and tests.

Appellant's defense is based on the review of all of Doty's medical files made by Dr. Joseph Gross, a doctor called by appellant. Dr. Gross did not examine or see Doty. Dr. Gross concluded that in September of 1982 Doty had suffered a new injury at the L3-4 level and that Doty's problems in September of 1982 stemmed from that new injury. Appellant contends from this record examination that the child-lifting or child-kissing incident was an intervening cause between Doty's injury in October 1980 and his condition in late September 1982.

Appellant stopped paying workmen's compensation benefits on October 28, 1982. Between October 1982 and April 1983, Doty was seen on 10 occasions by Dr. Hathaway. Prompted by increasing financial difficulties, Doty sought a medical release to return to work, despite experiencing continued pain in his back. Dr. Hathaway signed the release April 18, 1983. Doty was required to wear a back brace while working. Doty had done "little odds and ends jobs," earning approximately $250 the month before the hearing. The parties stipulated Doty's average weekly wage before his back problems was $250.

In reviewing findings of fact in workmen's compensation cases, this court is not free to weigh the facts anew. The findings of the compensation court have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong. *Ceco Corp. v. Crocker*, 216 Neb. 692, 345 N.W.2d 20 (1984); *Osteen v. A. C. and S., Inc.*, 209 Neb. 282, 307 N.W.2d 514 (1981). In testing the sufficiency of evidence to support an award after rehearing, the evidence must be considered in the light most favorable to the successful party. *Ceco Corp. v. Crocker, supra*; *Hatting v. Farmers Co-op Assn.*, 212 Neb. 242, 322 N.W.2d 423 (1982).

This court has adopted the rule that where there have been two accidents to an employee, sustained while the employee was working for two different employers, the question of whether the disability

sustained by the employee should be attributed to the first accident or to the second accident depends on whether the disability sustained was caused by a recurrence of the original injury or by an independent intervening cause. *Snowardt v. City of Kimball*, 174 Neb. 294, 117 N.W.2d 543 (1962); *Breed v. Interstate Glass Co.*, 188 Neb. 284, 196 N.W.2d 169 (1972).

The burden of proof is upon the claimant to establish by a preponderance of the evidence that the injury was sustained in an accident arising out of and in the course of his employment. *Van Winkle v. Electric Hose & Rubber Co.*, 214 Neb. 8, 332 N.W.2d 209 (1983). In the present case there is no dispute in regard to the original injury of October 8, 1980, and appellee received compensation payments following that incident. The important question posed for consideration is whether the September 2, 1982, incident constituted a noncompensable independent intervening cause, or whether it was a natural consequence flowing from the compensable accident of October 8, 1980.

We find this issue has been addressed in 1 A. Larson, The Law of Workmen's Compensation § 13.00 (1982), where it is stated at 3-348:

> When the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributable to claimant's own intentional conduct.

Professor Larson continues further in § 13.11 at 3-352 to -353:

> Moreover, once the work-connected character of any injury, such as a back injury, has been established, the subsequent progression of that condition remains compensable so long as the worsening is not shown to have been produced by an independent nonindustrial cause. This may sound self-evident, but in close cases it is

> sometimes easy to overlook this essentially simple principle. In a Utah case, claimant had suffered a compensable accident in 1966, injuring his back. Several years later, this condition was triggered by a sneeze into a disc herniation, for which claimant required surgery. The medical testimony was that because of the back condition, it was probable that had claimant not had the sneezing episode, some other major or minor event would have eventually necessitated surgery. The finding that the sneezing episode was the independent cause of claimant's disability, and the resultant denial of compensation, were held to be error, and benefits were awarded on appeal. This result is clearly correct. The presence of the sneezing incident should not obscure the true nature of the case, which is nothing more than that of a further medical complication flowing from a compensable injury. If the herniation had occurred while claimant was asleep in bed, his characterization as a mere sequel to the compensable injury would have seemed obvious. This case should be no different if the triggering episode is some nonemployment exertion like raising a window or hanging up a suit, so long as it is clear that the real operative factor is the progression of the compensable injury, associated with an exertion that in itself would not be unreasonable in the circumstances. A different question is presented, of course, when the triggering activity is itself rash in the light of claimant's knowledge of his condition.

We find this analysis applicable in the present case. Doty was admittedly injured on the job in October of 1980. His life after that was one of pain resulting from this incident. Admittedly, there is a dispute in the medical testimony as to the result of the child incident, but that dispute has been resolved by the compensation court in Doty's favor.

The present case is factually similar to *Medart Div. of Jackes-Evans Mfg. v. Adams*, 344 So. 2d 141 (Miss. 1977). In that case a claimant injured her lower back while lifting at work. A few months later surgery was performed, and she continued to have soreness. Three and a half months after surgery she experienced severe pain while picking up clothes from a laundry basket at home. The Mississippi Supreme Court relied on Professor Larson's analysis in determining that the act of bending over to pick up clothes was simply a triggering episode and that claimant's act in performing this simple task was not unreasonable under the circumstances.

We find the same to be true in the present case. Following the 1980 injury, appellee experienced continuous pain and received an abundance of medical treatment, including surgery. There is sufficient evidence from which the compensation court could determine that the injury received while bending over to kiss the child was not an independent intervening cause but, in fact, a recurrence of the original injury.

Appellant also contends that Doty was fully recovered before the 1982 injury, as evidenced by his return to work in August of that year. Appellant cites *Oertel v. John D. Streett & Company*, 285 S.W.2d 87 (Mo. App. 1955), as controlling authority for such a situation. In *Oertel* the claimant injured his back in a lifting incident, received medical treatment, and returned to work wearing a belt prescribed by his physician. Approximately 2 months after the injury, claimant accepted a better paying job with a new employer. Claimant attended a family reunion 2 months later and sustained pain in his back while fielding a "grounder" during a softball game.

A denial of benefits by Oertel's former employer was sustained by the court on the basis that the softball injury was an independent and intervening cause. The court found claimant had returned to his normal work activities after the initial injury to his

back. Claimant testified he participated in heavy lifting and discarded his belt after gaining new employment. The medical evidence supported the court's finding in that case.

Appellee's situation is distinguishable from *Oertel* in that Doty did no heavy lifting after the initial injury. The evidence also clearly shows appellee never fully recovered, having continued to experience pain and receive medical treatment from the date of the admittedly compensable accident through September of 1982.

Where the record presents nothing more than conflicting medical testimony, this court will not substitute its judgment for that of the compensation court. *Ceco Corp. v. Crocker*, 216 Neb. 692, 345 N.W.2d 20 (1984). The record contains sufficient competent evidence to allow the compensation court to accept one opinion over another. The findings of the Workmen's Compensation Court on rehearing are not clearly wrong and are hereby affirmed.

Appellee is awarded an attorney fee of $750 for the services of his attorneys in this court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ELIJAH JONES, APPELLANT.

350 N.W.2d 11

Filed May 25, 1984. No. 83-497.

1. **Homicide: Intent.** No particular length of time for premeditation is required, provided that the intent to kill is formed before the act is committed and not merely simultaneously with the act which caused the death.
2. **Homicide: Photographs.** In a homicide case in particular, photographs of the victim are admissible, even if gruesome, if proper foundation is laid and they are received for purposes of identification, to show the condition of the body, the nature and extent of the wounds, and to establish malice or intent.

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 Lynne R. Fritz, for appellee.

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

KRIVOSHA, C.J.

The appellant, Elijah Jones, appeals from a judgment entered by the district court for Douglas County, Nebraska, which, following a trial to the jury, found Jones guilty of first degree murder and sentenced him to a term of life imprisonment in the Nebraska Penal and Correctional Complex. Jones appeals on two narrow grounds: (1) He maintains that the evidence was insufficient to find him guilty of premeditated first degree murder; and (2) He maintains that the introduction of two gruesome photographs constituted prejudicial error. We have reviewed the record and believe the assignments are without merit, and for this reason both the conviction and sentence are affirmed.

The record discloses that at approximately 11 p.m. on the evening of November 19, 1979, Jones shot and killed Elijah Kelly. There is no dispute in the evidence that Jones killed Kelly by firing a number of bullets from a .38-caliber handgun into Kelly. There were several eyewitnesses to the shooting. The only question is whether there was sufficient evidence from which the jury could determine, beyond a reasonable doubt, that the killing was done with premeditation, so as to permit the jury to find Jones guilty of first degree murder rather than of second degree murder or manslaughter. While there was indeed some conflict in the evidence, there was testimony from a number of eyewitnesses to the effect that the victim was playing cards when

Jones entered a room of a club located in Omaha, Nebraska, and approached the card table. Jones requested an apology from Kelly with respect to an altercation which had occurred some 3 days earlier when Kelly fired two shots through Jones' apartment door. Kelly responded that he, too, wanted an apology from Jones, and as he started to pull his money together and get up from the card table, Jones pulled the .38-caliber handgun from his jacket pocket and fired several shots. At the time of the shooting Kelly was clothed in only a shirt and blue jeans; therefore, one would have been able to detect any weapon on Kelly. Later investigation disclosed that Kelly had no weapon on him. Once Kelly was on the floor, apparently trying to crawl away from the table, Jones followed him around the table, leaned over him, and continued to fire the remaining bullets into Kelly. When officers at the scene approached Jones, he said, "I did it. I had to do it." He was therefore arrested and taken to police headquarters. For reasons which are silent in the record and which are beyond this court's comprehension, Jones was not charged with the crime at that time and was released.

In the early fall of 1982 while talking to an undercover agent who was investigating the sale of illegal weapons, Jones bragged that "he had to dust a dude several years prior to that on his birthday." Apparently, he was attempting to impress the undercover agent that he was a man with whom the undercover agent wanted to do business. A later conversation between the officer and Jones with respect to the details of the killing was video recorded, and Jones, still believing he was impressing a drug dealer, freely and voluntarily told the undercover agent all about what had transpired in November of 1979. At the trial Jones testified on his own behalf and admitted that he had fired the weapon but maintained that he believed that Kelly had a gun and, therefore, he shot him in self-defense.

As we have indicated, no question exists as to whether Jones fired the gun that killed Kelly, and the only possible question is whether the shooting was done with premeditation. In *State v. Bautista*, 193 Neb. 476, 227 N.W.2d 835 (1975), we noted that it was a jury question as to whether the elements of first degree murder existed in a particular case. And with regard to the conflict concerning the evidence, in *State v. Partee*, 199 Neb. 305, 313, 258 N.W.2d 634, 639 (1977), we said:

> In determining the sufficiency of evidence to sustain a conviction, however, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the jury. State v. Spidell, 194 Neb. 494, 233 N.W.2d 900 (1975); State v. Brown, 195 Neb. 321, 237 N.W.2d 861 (1976). The verdict of a jury must be sustained, if, taking the view most favorable to the State, there is sufficient evidence to support it. State v. Johnsen, 197 Neb. 216, 247 N.W.2d 638 (1976).

See, also, *State v. Miner*, 216 Neb. 309, 343 N.W.2d 899 (1984). Whether or not the elements of deliberation and premeditation existed in the instant case, in light of the evidence, was for the jury to determine. Jones makes some claim that he thought he was acting in self-defense and did not have sufficient time to think about the shooting, therefore rebutting any question of premeditation. No particular length of time for premeditation is required, however, provided that the intent to kill is formed before the act is committed and not merely simultaneously with the act which caused the death. See, *Savary v. State*, 62 Neb. 166, 87 N.W. 34 (1901); *State v. Nokes*, 192 Neb. 844, 224 N.W.2d 776 (1975).

In the instant case there was evidence which, if the jury had believed, would have proved that Jones obtained his handgun prior to the shooting and came

to the club at approximately 6 p.m. that evening looking for Kelly. He returned again later that evening, armed and still looking for Kelly. It is difficult to see how one is acting in self-defense when he goes looking for his supposed assailant.

When Jones returned to the club at approximately 11:15 p.m. the same evening, five men were in the backroom playing cards. The evidence further disclosed that Kelly did not have a gun, nor could a reasonable man believe that one was hidden either in Kelly's shirt or jeans. And, finally, after Kelly was first shot and fell to the ground, he attempted to crawl away. Yet, Jones pursued him, leaned over him, and continued to fire his gun into Kelly. The evidence shows that some of the bullets entered Kelly from his front, while others entered his body from his back while he was lying on the floor. It is difficult to envision what Jones was defending himself against when he shot Kelly in the back while Kelly was lying on the floor, attempting to crawl away. The jury could have determined, even absent Jones' own confession as to what he intended to do, that there was premeditation and deliberation involved in this killing.

In *State v. Lynch*, 215 Neb. 528, 534, 340 N.W.2d 128, 132 (1983), we said:

> 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. [Citations omitted.] The wounds were the windows of the mind through which the jury could see Lynch's subjectivity when he committed the act.

Based upon the testimony of eyewitnesses, the physical evidence at the scene, and the expert testimony by the pathologist, the jury could have concluded beyond a reasonable doubt that Jones killed Kelly purposely and with deliberate and premeditated malice, notwithstanding the conflict in the evidence. See *State v.*

Beers, 201 Neb. 714, 271 N.W.2d 842 (1978). The jury's finding was fully supported by the evidence.

Turning, then, to Jones' second assignment of error, that two photographs introduced in evidence were so gruesome as to be prejudicial, we believe such not to be the case. In the instant case the prosecution offered photographs marked as exhibits 1 to 21, inclusive. Thirteen photographs were admitted without objection, nine of which were photographs of the victim's body. Defense counsel objected to eight photographs, and the court sustained the objection to six of them and received in evidence photographs marked exhibits 6 and 8. Exhibit 6 depicts the area of the victim's body in which one bullet entered through the back shoulder and lodged just above the left nipple. Exhibit 8 illustrates the victim's left arm and shows the entry wounds. Dr. Jones, in his direct examination, testified with respect to each gunshot wound. He testified that Kelly's death was due to multiple gunshot wounds which involved the chest, the upper abdomen, the back, the left forearm, and the left upper arm. Exhibits 6 and 8 were introduced and used by the prosecution to illustrate and prove the position of the body and the wounds, the clothes worn by the victim, and the state of mind of Jones. The photographs support the version of the incident given by the eyewitnesses who testified that Jones kept shooting after the victim was down. We have frequently held that in a homicide case in particular, photographs of the victim are admissible, even if gruesome, if proper foundation is laid and they are received for purposes of identification, to show the condition of the body, the nature and extent of the wounds, and to establish malice or intent. See, *State v. Rowe*, 210 Neb. 419, 315 N.W.2d 250 (1982); *State v. Lamb*, 213 Neb. 498, 330 N.W.2d 462 (1983); *State v. Clermont*, 204 Neb. 611, 284 N.W.2d 412 (1979); *State v. Krimmel*, 216 Neb. 825, 346 N.W.2d 396 (1984). While Jones admits that he did the

shooting, he denies that the shooting was done with premeditation and malice, and therefore the photographs were relevant with regard to establishing that issue, and certainly to support the version of the incident given by eyewitnesses who testified that Jones kept shooting after the victim was down. See *State v. Record*, 198 Neb. 530, 253 N.W.2d 847 (1977). The second assignment is likewise without merit.

We believe that the evidence was sufficient for the jury to find Jones guilty of first degree murder and that the introduction of exhibits 6 and 8 was not prejudicial. For these reasons the judgment and sentence are affirmed.

AFFIRMED.

JAMES D. QUINN, TRUSTEE, APPELLEE, V. GODFATHER'S INVESTMENTS, INC., A NEBRASKA CORPORATION, ET AL., APPELLANTS.

348 N.W.2d 893

Filed May 25, 1984. No. 83-508.

1. **Attorney Fees.** Attorney fees may be recovered only in such cases as are provided by statute, or where the uniform course of procedure has been to allow such recovery.
2. ——. An allowance for attorney fees as costs is erroneous unless it is permitted by statute or uniform practice.
3. **Contracts: Costs: Attorney Fees.** A provision in a contract that in the event of any dispute or litigation involving the contract, the prevailing party shall be entitled to recover all costs of suit, including reasonable attorney fees, is contrary to public policy and void.

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

John W. Iliff, Eugene P. Welch, and Edward G. Warin of Gross, Welch, Vinardi, Kauffman & Day, P.C., for appellants.

Paul A. Rauth of Marks, Clare, Hopkins, Rauth & Cuddigan, for appellee.

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

BOSLAUGH, J.

This was an action for a declaratory judgment to determine whether the defendants, Godfather's Investments, Inc., as lessee, and William M. Theisen, as guarantor, were liable to the plaintiff, Quinn, under a lease agreement. The lease contained a provision that if the defendant lessee was unable to obtain "financing" for the construction of "contemplated improvements," the lessee could terminate the lease. The trial court found that the agreement was vague and ambiguous as to the term "financing"; that there was a failure of proof as to mutual assent among the parties; and that the defendants had made a good faith effort to obtain financing. Upon appeal the judgment was affirmed in 213 Neb. 665, 330 N.W.2d 921 (1983).

On April 14, 1983, the defendants filed a motion for an order granting them attorney fees under the following provision in the lease: "J. The Lessor and Lessee each agree that in the event of any dispute or litigation involving this lease, that the prevailing party shall be entitled to recover all costs of suit, including reasonable attorneys fees."

The trial court found that the previous litigation had determined that the contract was invalid and unenforceable, and denied the motion. The defendants have appealed.

In addition to the grounds mentioned in the order of the trial court, we believe that the provision for attorney fees is void and unenforceable under any circumstances.

The general rule in this jurisdiction is that attorney fees may be recovered only in such cases as are provided by statute, or where the uniform course of procedure has been to allow such recovery. *Gates v. Howell*, 211 Neb. 85, 317 N.W.2d 772 (1982). An allowance for attorney fees as costs is erroneous unless it is permitted by statute or uniform practice. *Warren v. Warren*, 181 Neb. 436, 149 N.W.2d 44 (1967).

In *Security Co. v. Eyer*, 36 Neb. 507, 510, 54 N.W. 838, 839 (1893), the plaintiff attempted to enforce a provision in a note and mortgage for the mortgagee to recover an attorney fee in the event of foreclosure. In holding the provision invalid this court stated:

> This court in repeated decisions has held, and it is now the settled law of this state, that stipulations of this character found in contracts executed since June 1, 1879, the date of the taking effect of the act repealing the attorneys' fees statutes, are invalid and will not be enforced. (*Dow v. Updike*, 11 Neb., 95; *Hardy v. Miller*, Id., 395; *Otoe Co. v. Brown*, 16 Id., 395; *Winkler v. Roeder*, 23 Id., 706.) The question being no longer an open one we shall not now attempt to examine the subject anew, or to review the authorities which hold a different view from the one enunciated by this court in the cases cited above. If the rule is changed in this state it should be by statute, and not by judicial decision.

In *City of Gering v. Smith Co.*, 215 Neb. 174, 180-81, 337 N.W.2d 747, 751-52 (1983), we said:

> 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 longstanding 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 exception relating to vexatious, unfounded, and dilatory conduct by counsel, amounting to bad faith, established in *Holt County Co-op Assn. v. Corkle's, Inc.*, 214 Neb. 762, 336 N.W.2d 312 (1983), has no application here.

The appellants rely upon *Haerry v. Hoffschneider*, 202 Neb. 534, 276 N.W.2d 196 (1979). The *Haerry* case involved a contract between a testator and her son, a donee of real estate, which contract contained a provision that the son would provide funds to the estate in the event the assets of the estate were insufficient to pay debts, taxes, and expenses of administration, and permits a devise of real estate to a daughter, subject only to a mortgage. We held that

it was plain error for the trial court to tax an attorney fee as costs in that case, and vacated that part of the judgment. The opinion further stated that the decision was without prejudice to a further action to determine whether the personal representative was entitled to recover attorney fees as a part of the expenses of administration from the son. There is nothing in the *Haerry* decision which supports the claim of the defendants in this case.

The judgment is affirmed.

AFFIRMED.

CAPORALE and GRANT, JJ., not participating.

STATE OF NEBRASKA, APPELLEE, V. TERRY L. CHRISTIANSON, APPELLANT.

348 N.W.2d 895

Filed May 25, 1984. Nos. 83-509, 83-510.

1. **Identification Procedures: Due Process.** Whether an identification procedure is violative of due process will be determined upon a consideration of the totality of the circumstances surrounding it.
2. **Search and Seizure.** The determination of whether a consent to search is voluntarily given is a question of fact. The voluntariness of the consent to search should be determined from the totality of the circumstances surrounding it.
3. _____. The mere fact that the individual is in police custody, standing alone, does not invalidate the consent to search if, in fact, it was voluntarily given.

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

Thomas M. Kenney, Douglas County Public Defender, and Victor Gutman, for appellant.

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

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

KRIVOSHA, C.J.

This appeal consists of two separate cases which

have been consolidated for purposes of appeal. In case No. 83-509 the appellant, Terry L. Christianson, was convicted of robbery, in violation of Neb. Rev. Stat. § 28-324 (Reissue 1979), and the use of a firearm to commit a felony, in violation of Neb. Rev. Stat. § 28-1205 (Reissue 1979). Robbery is a Class II felony and the use of a firearm is a Class III felony. This conviction grew out of a robbery committed on October 11, 1982, of the Payless shoestore in Omaha, Nebraska.

In case No. 83-510 Christianson was also convicted of robbery and the use of a firearm to commit a felony in connection with the robbery of the Radio Shack on September 29, 1982. In addition to robbing the Radio Shack, Christianson was also charged and convicted in No. 83-510 with robbing Robert H. Roose, Sister Timothy Marie O'Roark, and Georgianna Brown on September 29, 1982, while they were customers in the Radio Shack. Following a jury trial, which resulted in Christianson being convicted of all the charges in both cases, he was sentenced in case No. 83-509 to consecutive terms in the Nebraska Penal and Correctional Complex of 3 to 10 years for robbery and 2 to 3 years for the use of a firearm to commit a felony. In case No. 83-510 he was sentenced to consecutive terms in the Nebraska Penal and Correctional Complex of 3 to 10 years for the first count of robbery and 2 to 10 years for each of the remaining counts of robbery, and 2 to 3 years for each of the counts of use of a firearm to commit a felony. He now appeals to this court, raising but two errors. One is that the trial court committed reversible error by overruling his motion to suppress his identification by Cheryl Milroy in No. 83-509 and by Paul Rezich, Robert Roose, and Georgianna Brown in No. 83-510. The other alleged error is that the trial court committed reversible error by overruling his motion to suppress physical evidence obtained when the police searched his automobile. We have reviewed both of these alleged

errors and find neither of them to have merit. For this reason the judgments and sentences of the trial court are affirmed in both cases.

With regard to the first assignment of error, Christianson maintains that the trial court should have disallowed the in-court identification because the witnesses were permitted to congregate together following their identifying him in a police lineup. The evidence discloses that, with regard to each of the robberies, four witnesses at various times were brought to a properly conducted lineup and asked to identify the man who robbed them. In each instance, without hesitation, the witnesses identified Christianson as the man who committed the robbery. Following the identification, each witness was placed in a room with the other witnesses who had identified Christianson as being involved in the various robberies. While the witnesses were in the room, they discussed the identification they had already made at the lineup. Except for Christianson's claim that the witnesses were permitted to meet together after each of them had individually identified Christianson, no other claim of impropriety is made. Christianson does not maintain that the lineup itself was in any manner improper, nor that the in-court identification conducted at the trial was improper. Christianson's argument is simply that because the parties were able to meet together after they had initially identified Christianson in the lineup, both the lineup identification and the in-court identification were tainted and should have been disallowed. In support of this position, however, Christianson is unable to cite to us any authority, nor are we able on our own to find any such authority. We have frequently declared that whether an identification procedure is violative of due process will be determined upon a consideration of the totality of the circumstances surrounding it. See, *State v. Gingrich*, 211 Neb. 786, 320 N.W.2d 445 (1982); *State v. Banks*, 195 Neb. 340, 237 N.W.2d 875 (1976); *State v. Sanchell*,

191 Neb. 505, 216 N.W.2d 504 (1974). It is our conclusion that, when reviewing the totality of the circumstances surrounding the identifications in this case, we are unable to conclude that Christianson's due process rights were in any manner violated. Each of the witnesses had ample time to see Christianson during the course of the robbery, and to identify him both during the police lineup and in court. There is no evidence that their having been together affected the independence of their identifications. The first assignment is without merit.

Turning, then, to Christianson's second error, that the court should have suppressed physical evidence obtained when the police searched Christianson's automobile, we likewise conclude that it is without merit. The record discloses that Christianson was arrested during the early morning hours of October 13, 1982, for a matter unrelated to the facts of either case involved in this appeal. After he was arrested he was asked by a Sergeant Gutchewsky of the Omaha Police Department if he would consent to have his car searched. According to the police sergeant, Christianson said that he would give his consent if his car would not be towed. Later that morning, Officer Frank O'Connor was ordered to ask Christianson to sign a written release giving the police permission to search his car. There is a conflict in the evidence as to what transpired during the discussion between Officer O'Connor and Christianson. Officer O'Connor testified that Christianson signed the consent form without protest. O'Connor admitted that 1 to 2 hours after the consent form had been signed he had a confrontation with Christianson concerning two of Christianson's friends who were suspects in the Payless shoestore robbery. Christianson protested their innocence, and O'Connor threatened to get a "no-knock" search warrant for their home. Christianson now maintains that the threat of the "no-knock" search warrant was made at the same time that he was asked to give his con-

sent to search his automobile and that but for the threat of obtaining a "no-knock" search warrant he would not have signed the consent. The car was ultimately towed into the police station and searched. Payless-brand boots and an empty Payless shoebox were found in the car. The trial court concluded from all the evidence that the consent given by Christianson for the search of his automobile was voluntary and not a part of any threat made by the police department. Recently, in *State v. Garcia*, 216 Neb. 769, 773, 345 N.W.2d 826, 829 (1984), we said:

> The determination of whether a consent to search is voluntarily given is a question of fact. *State v. Skonberg*, 194 Neb. 550, 233 N.W.2d 919 (1975). The voluntariness of the consent to search should be determined from the totality of the circumstances surrounding it. *State v. Van Ackeren*, 194 Neb. 650, 235 N.W.2d 210 (1975). The findings of fact in this respect will not be set aside on appeal unless they are clearly erroneous. In making that determination this court will take into consideration the advantage of the district court in having heard the oral testimony. *State v. Billups*, 209 Neb. 737, 311 N.W.2d 512 (1981).

The mere fact that the individual is in police custody, standing alone, does not invalidate the consent if, in fact, it was voluntarily given. See *United States v. Green*, 525 F.2d 386 (8th Cir. 1975). Our review of the record discloses that there is simply a conflict in the evidence, which the trial court resolved against Christianson. We cannot say from the record that this was erroneous, and, therefore, the determination by the trial court as to the voluntariness of the consent must be upheld.

For these reasons, therefore, the assignments of error proposed by Christianson are found to be without merit and are overruled. The judgments and

sentences of the trial court in each of the cases involved herein are affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. PAUL L. DOUGLAS, ATTORNEY GENERAL, ET AL., APPELLEES, V. CALVARY ACADEMY ET AL., APPELLANTS.

348 N.W.2d 898

Filed May 25, 1984. No. 83-554.

Schools and School Districts. The contention that a person is not bound by the educational laws of this state because of his sincerely held religious beliefs is controlled by the decision in *State ex rel. Douglas v. Faith Baptist Church*, 207 Neb. 802, 301 N.W.2d 571 (1981), *appeal dismissed* 454 U.S. 803, 102 S. Ct. 75, 70 L. Ed. 2d 72.

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

David C. Gibbs, Jr., and Richard W. Moore of Gibbs & Craze, and Thomas A. Wagoner of Wagoner and Wagoner, for appellants.

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

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

PER CURIAM.

This was an action brought by the State of Nebraska to enjoin the defendants from operating the Calvary Academy in Grand Island, Nebraska, without complying with the school laws of the State of Nebraska. The defendants maintained that their religious convictions prevent them from complying with the school laws, and further argued that the school laws violate the free exercise clause of the first amendment to the Constitution of the United States and violate other provisions of the federal and state Constitutions. Defendants also maintain that

there was no showing that the state has a compelling interest justifying the school laws.

Following a lengthy trial, the trial court enjoined the defendants from operating the school until the school received approval in compliance with the applicable statutes and regulations. The defendants have appealed and argue that the trial court's determination that all constitutional issues raised had been resolved contrary to the position of the defendants in *State ex rel. Douglas v. Faith Baptist Church*, 207 Neb. 802, 301 N.W.2d 571 (1981), *appeal dismissed* 454 U.S. 803, 102 S. Ct. 75, 70 L. Ed. 2d 72, is erroneous.

The record discloses that Calvary Academy was being operated in violation of state law. The constitutional issues raised are controlled by our decisions in *State ex rel. Douglas v. Faith Baptist Church, supra*, and *State ex rel. Kandt v. No. Platte Baptist Ch.*, 216 Neb. 684, 345 N.W.2d 19 (1984). As we stated in *State ex rel. Douglas v. Morrow*, 216 Neb. 317, 319, 343 N.W.2d 903, 905 (1984):

> The arguments made in connection with Morrow's third and fourth assignments of error fuse into the contentions that he, because of his sincerely held religious beliefs, is not bound by the educational laws of this state and that, in any event, there was no showing the state has a compelling interest in the education of Morrow's children. Again, these issues have been addressed and resolved adversely to Morrow in *State ex rel. Douglas v. Bigelow, supra*, and *State ex rel. Douglas v. Faith Baptist Church*, 207 Neb. 802, 301 N.W.2d 571 (1981), *appeal dismissed* 454 U.S. 803, 102 S. Ct. 75, 70 L. Ed. 2d 72, and the authorities cited therein. We see no reason to further burden the legal literature of this state by restating these well-settled rules of law.

The order enjoining the defendants from operating Calvary Academy until such time as the school is

approved as in compliance with state law was proper and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RODERICK L. LEBRON, APPELLANT.

349 N.W.2d 918

Filed May 25, 1984. No. 83-567.

1. **Search Warrants: Evidence.** Absent a showing of pretext or bad faith on the part of the police or the prosecution, invalidity of part of a search warrant does not require the suppression of all the evidence seized pursuant to the valid portions of the warrant.
2. **Search Warrants: Affidavits.** In order to invalidate a warrant it must be shown that the affiant made a deliberate falsehood or acted with reckless disregard for the truth, and it must be demonstrated that the challenged material is "material" or necessary to a finding of probable cause. The defendant must then show that when the challenged matter is excised from the affidavit, the affidavit is left with insufficient content to establish probable cause.
3. **Search Warrants.** A search warrant may be issued for a location where it is probable that the property described would be found.
4. **Criminal Law: Jurors: Proof.** When an improper communication with a juror or jurors is shown to have taken place in a criminal case, a rebuttable presumption of prejudice arises and the burden is on the State to prove that the communication was not prejudicial.
5. _____: _____: _____. In cases where the contact with the witnesses is minimal or where the testimony of the witness involves only formal or uncontroverted issues, the presumption of prejudice is overcome.
6. **Jurors: Trial.** The retention or rejection of a juror is a matter of discretion for the trial court.
7. **Convictions: Appeal and Error.** A conviction will not be set aside unless the defendant meets his burden of showing that the error claimed created actual prejudice rather than merely the possibility of prejudice.
8. **Judgments: Evidence: Appeal and Error.** A judgment will not be reversed for error in the exclusion of evidence if there was no prejudice to a substantial right of the accused and the record as a whole shows the error was harmless beyond a reasonable doubt.
9. **Trial: Plea in Abatement: Evidence.** After trial and conviction in the district court, any error in the ruling of the district court on

the plea in abatement is cured if the evidence at trial is sufficient to permit the jury to find guilt beyond a reasonable doubt.

10. **Prosecuting Attorneys.** The remarks of a prosecutor in his closing argument which do not mislead and unduly influence the jury and thereby prejudice the rights of the defendant do not constitute misconduct.

11. **Trial: Evidence: Appeal and Error.** A proper objection to the receipt of evidence is required to preserve for review any error in the overruling of a motion in limine.

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

Timothy J. Cuddigan of Marks, Clare, Hopkins, Rauth & Cuddigan, and James Schaefer of Troia and Schaefer, for appellant.

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

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

BOSLAUGH, J.

After trial to a jury the defendant, Roderick L. LeBron, was convicted of theft by receiving stolen property valued at over $300 but less than $1,000. He was sentenced to a term of 5 years' probation, a fine of $10,000, and a 90-day term in the county jail. He is required to do 8 hours of volunteer work per week during the term of probation.

The evidence shows that on June 4, 1982, Jesse Chant brought a Sylvania video cassette recorder (VCR), serial No. 8300933, to LeBron's place of business in Omaha, Nebraska, for the purpose of selling it to LeBron. The VCR had been stolen from Benson High School, and it bore the markings "Omaha Public Schools." The meeting had been arranged by a former employee of LeBron's who was working as an undercover informant for the Federal Bureau of Alcohol, Tobacco, and Firearms. Chant told LeBron that he wished to sell the VCR but that he would not take it out of the pickup for inspection as the VCR was "a little warm." LeBron looked at the

VCR in the pickup, a price was agreed upon, and LeBron gave Chant a check in the amount of $250. The check bore the notation "refrigerator." Chant testified that LeBron made this notation because LeBron "owned a bunch of rental properties and stuff, in case someone got busted with it or something, they couldn't trace it."

A search of LeBron's home pursuant to a search warrant was made on June 9, 1982, by the Omaha Police Department and agents of the Federal Bureau of Alcohol, Tobacco, and Firearms. The VCR was seized by the Omaha police during the course of the 8-hour search. The present charge was then brought against the defendant.

Following his conviction and sentence, defendant brought this appeal. Defendant makes several assignments of error.

The defendant contends that because the search warrant stated that there was probable cause to believe that there was "stolen property and other property, description unknown" at the defendant's residence, the warrant was a general warrant and all evidence seized under the warrant must be suppressed. We note that the search warrant did contain the following description of the VCR involved in the present case: "(1) Sylvania Video Cassette Recorder, serial #8300933."

In *United States v. Fitzgerald*, 724 F.2d 633 (8th Cir. 1983), *cert. denied* ____ U.S. ____, 104 S. Ct. 2151, 80 L. Ed. 2d 538 (1984), the U.S. Court of Appeals for the Eighth Circuit held that a warrant may be severable and valid in part even though it may be in part invalid for lack of particularity. The court stated at 636-37:

> Accordingly, we follow the approach which the First, Third, Fifth, Sixth, and Ninth Circuits, and several states, have adopted, and hold that, absent a showing of pretext or bad faith on the part of the police or the prosecution, the invalidity of part of a search warrant does not require the suppression of all the evidence seized

> during its execution. More precisely, we hold that the infirmity of part of a warrant requires the suppression of evidence seized pursuant to that part of the warrant (assuming such evidence could not otherwise have been seized, as for example on plain-view grounds during the execution of the valid portions of the warrant), but does not require the suppression of anything described in the valid portions of the warrant (or lawfully seized—on plain view grounds, for example—during their execution). This approach, we think, complies with the requirements of the fourth amendment.

(Citations in footnotes omitted.)

In the present case the property which is the subject of the conviction was described with sufficient particularity. The record does not reflect pretext or that the police conducted themselves with bad faith. Thus, under the rule announced in *Fitzgerald*, *supra*, the VCR was properly seized pursuant to a valid portion of the warrant which was severable.

The defendant next contends that the affidavit supporting the warrant was insufficient because the affiant, Officer Tomsheck, was an uninformed officer selected to make an affidavit based upon deliberately untrue statements. In particular, the defendant argues that the affidavit contained an erroneous statement that Chant sold the stolen VCR to LeBron at 8008 Harney Street, LeBron's residence, rather than at LeBron's business address on 16th Street. Tomsheck testified that he received his information from an agent of the Federal Bureau of Alcohol, Tobacco, and Firearms and from the informant who arranged the meeting between LeBron and Chant. Defendant contends that excision of the erroneous material would result in a failure of the warrant to state with particularity the place to be searched, and the search would thus be without probable cause.

In *State v. Sims*, 216 Neb. 569, 572-73, 344 N.W.2d 645, 647-48 (1984), we said:

> In *State v. Stickelman*, 207 Neb. 429, 435, 299 N.W.2d 520, 524 (1980) (quoting *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978)), we stated that there is " 'a presumption of validity with respect to the affidavit supporting the search warrant. . . .' " In order to overcome this presumption the defendant bears the burden of demonstrating that the affidavit was false. *State v. Stickelman, supra. Franks v. Delaware, supra*, indicates that in order to invalidate a warrant it must be shown that the affiant made a deliberate falsehood or acted with reckless disregard for the truth, and it must be demonstrated that the challenged material is "material" or necessary to a finding of probable cause. *United States v. Young Buffalo*, 591 F.2d 506 (9th Cir. 1979), *cert. denied* 441 U.S. 950, 99 S. Ct. 2178, 60 L. Ed. 2d 1055. The defendant must then show that when the challenged matter is excised from the affidavit, the affidavit is left with insufficient content to establish probable cause. *Franks v. Delaware, supra*; *United States v. Young Buffalo, supra*.

If the statement that Chant sold the VCR to LeBron at his residence is excised from the affidavit, enough information remains in the affidavit to establish probable cause for the search. Defendant mistakenly argues that excision of this information results in a failure of the warrant to describe the place to be searched. The place to be searched is clearly described in the warrant as 8008 Harney Street, and the description does not fail because of the erroneous information contained in the affidavit. More importantly, there is sufficient information in the affidavit from which it can be concluded that Chant sold LeBron a stolen VCR.

A search warrant may be issued for a location where it is probable that the property described

would be found. *State v. Ernest*, 200 Neb. 615, 264 N.W.2d 677 (1978). It is probable that a VCR would be found at the residence of the purchaser. There was probable cause for the issuance of the warrant.

Defendant further argues that the warrant was invalid because the affidavit did not show any underlying facts from which it could be concluded that there was probable cause to believe that "additional stolen property" or the VCR could be found at 8008 Harney Street. As stated above, there was probable cause to believe that the VCR could be found at 8008 Harney Street, and the portion of the warrant dealing with "additional stolen property" may be severed from the valid portion of the warrant which is relevant to this case. The argument is without merit.

Defendant next assigns as error the failure of the court to declare a mistrial when it was learned that two jurors had overheard a brief conversation between a law clerk and the judge in which mention was made of an appeal of LeBron's conviction in federal court. The conversation occurred in an elevator in the courthouse shortly after closing arguments had been made. The trial court had sustained a motion in limine as to evidence regarding LeBron's federal conviction.

The jurors were examined by the trial court and defense counsel with respect to the conversation. The jurors involved indicated that the conversation would not influence their decision in the case. Defendant notes that one juror replied: "I have thought about it for quite a number of hours, since I heard the remark, and I am sure it won't."

In *Simants v. State*, 202 Neb. 828, 835, 277 N.W.2d 217, 221 (1979), we stated: "[W]hen an improper communication with a juror or jurors is shown to have taken place in a criminal case, a rebuttable presumption of prejudice arises and the burden is on the State to prove that the communication was not prejudicial." In cases where the contact with the

witnesses is minimal or where the testimony of the witness involves only formal or uncontroverted issues, the presumption is overcome.

In *State v. Robinson*, 198 Neb. 785, 255 N.W.2d 835 (1977), two jurors overheard statements regarding the truthfulness of one of the State's witnesses. The trial court questioned the jurors and determined that a fair and impartial verdict could be rendered by them. We concluded that the court did not abuse its discretion in refusing to grant a mistrial. We said at 791, 255 N.W.2d at 839: "The retention or rejection of a juror is a matter of discretion for the trial court."

In the present case the communication was not between a *witness* and a juror as in *Simants*, but rather was a conversation between the trial judge and a clerk overheard by two jurors. The situation is similar to that in *Robinson*. The only words the jurors heard were, "LeBron's federal appeal."

The State argues that "appeal" is "basically a neutral term." We note that the jury was made aware that hearings were held in federal court regarding the search of LeBron's home through questions asked of an investigating officer by the defendant's counsel. Moreover, we note that the trial court examined the jurors with respect to their ability to render a fair and impartial verdict and was satisfied with the jurors' answers that the remark did not affect them. We conclude that the State established that no prejudice was suffered by the defendant as a result of the unfortunate remark and that the court did not abuse its discretion in failing to grant a mistrial.

Defendant next contends it was error for the court to fail to grant a mistrial after testimony was elicited in violation of the court's grant of his motion in limine. The trial court had sustained the defendant's motion in limine to exclude testimony regarding his conviction in federal court for possession of firearms without proper registration on November 4,

1982. At trial the State asked a police witness: "Q. What were some of the items seized in this inventory? A. In addition to the two VCRs, the large-screen TV, there were a number of fur coats that were seized temporarily for purposes of examination, and also a large number of firearms." Defendant then made an objection, which was sustained. The court, out of the hearing of the jury, overruled the motion for a mistrial and instructed the prosecutor not to continue to question along this line.

A conviction will not be set aside unless the defendant meets his burden of showing that the error claimed created actual prejudice rather than merely the possibility of prejudice. *State v. Gore*, 212 Neb. 287, 322 N.W.2d 438 (1982); *State v. Lamb*, 213 Neb. 498, 330 N.W.2d 462 (1983).

In the present case the mere reference to firearms made by the witness did not directly inform the jury that LeBron had been convicted of possession of illegal firearms. The defendant has not shown that this information was prejudicial. The trial court did not abuse its discretion in overruling the motion for a mistrial.

Next, the defendant argues that it was an abuse of discretion to exclude the opinion of the purchasing manager of the Omaha public schools as to the value of the VCR. The opinion was properly excluded because of inadequate foundation.

The defendant made an offer of proof that if permitted to testify, the purchasing agent would have testified that the value of the VCR was less than $300. The defendant introduced the testimony of four other witnesses that the value of the VCR was less than $300.

A judgment will not be reversed for error in the exclusion of evidence if there was no prejudice to a substantial right of the accused and the record as a whole shows the error was harmless beyond a reasonable doubt. *State v. Sims*, 197 Neb. 1, 246 N.W.2d 645 (1976). The defendant was not prejudiced by the

exclusion of cumulative testimony from a fifth witness.

Defendant next argues that it was error for the court to fail to sustain his plea in abatement at a preliminary hearing. In *State v. Franklin*, 194 Neb. 630, 638, 234 N.W.2d 610, 615 (1975), we stated: "We further hold that after trial and conviction in the District Court any error in the ruling of the District Court on the plea in abatement is cured if the evidence at trial is sufficient to permit the jury to find guilt beyond a reasonable doubt." *State v. Schmidt*, 213 Neb. 126, 327 N.W.2d 624 (1982). The record discloses ample support for the jury verdict. This assignment of error is without merit.

Defendant contends that misconduct of the prosecutor warranted a mistrial. The defendant argues that the prosecutor's statement in closing argument that Chant, the seller of the VCR, "is as guilty as Mr. LeBron insofar as being a receiver" amounted to a statement of the prosecutor's personal belief based upon evidence not presented. The court overruled the defendant's objection and motion for mistrial, and stated that the determination of guilt or innocence was for the jury.

The comment made by the prosecutor did not embody a statement of personal belief in the defendant's guilt. The remarks of a prosecutor in his closing argument which do not mislead and unduly influence the jury and thereby prejudice the rights of the defendant do not constitute misconduct. *State v. Dandridge*, 209 Neb. 885, 312 N.W.2d 286 (1981).

Defendant's final assignment of error is that it was error for the court to overrule his motion in limine excluding evidence regarding a large-screen Panasonic TV which was not the basis of any charge against LeBron. No objection was made to the admission of this evidence at trial. "[A] proper objection to the receipt of evidence is required to preserve for review any error in the overruling of a motion in

limine." *Maricle v. Spiegel*, 213 Neb. 223, 227, 329 N.W.2d 80, 84-85 (1983).

There being no error, the judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ELAINE F. CANBY, APPELLANT.

348 N.W.2d 900

Filed May 25, 1984. No. 83-681.

1. **Jury Instructions.** It is the duty of the trial court upon request of the accused to instruct the jury upon the accused's theory of the case if there is sufficient evidence to support it.
2. **Assault: Words and Phrases.** An unintentional stabbing is not the use of "deadly force" as defined in Neb. Rev. Stat. § 28-1406(3) (Reissue 1979).

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

Dennis R. Keefe, Lancaster County Public Defender, and Michael D. Gooch, for appellant.

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

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

CAPORALE, J.

Elaine F. Canby appeals from her conviction, pursuant to a jury verdict, of third degree assault. We affirm.

Canby's two assignments of error present the single issue of whether the trial court erred in not instructing the jury on self-defense.

In the late evening of August 5, 1982, Canby and her uncle, Donald Grant, and other family members were in the backyard of a Lincoln residence inhabited by Canby and her parents. Canby, Grant, and other family members had been drinking vari-

ous alcoholic beverages since at least midafternoon and were highly intoxicated. Several members of the family passed out from consuming alcohol, only to, upon awakening from their stupor, once again resume their drinking.

While seated at a picnic table in the backyard, Donald Grant asked Canby to return to him some money he then believed he had given her for safekeeping. A few days later Grant discovered he had given his money to another of his relatives. Canby denied having the money, and the two, with other family members joining in, argued about the matter for some time. Canby arose from the table and went to a car parked next to the table in order to get another beer. Grant followed and grabbed her by the wrists, bent her hands, and caused Canby pain and fear that her wrist bones would be broken. Canby's cousin, Grant's nephew, pulled the two apart and Canby went into the house. Grant and his nephew continued to discuss the matter of Grant's money. During the discussion, both of them stood facing each other, the nephew with his back to the car. Suddenly, Grant fell to the ground. The nephew saw Canby standing behind Grant with a knife in her hand. The nephew transported Grant to the hospital, where it was found that he had been stabbed in the left side of his upper back. The wound was 1 inch wide and 4 inches deep. Grant recovered from the wound, but required surgery and 6 days' hospitalization.

Canby claims, by her testimony at trial, that after leaving the backyard she went into the house and grabbed a knife because she was frightened. She then went back outside and stood for a few minutes before going to where Grant and her cousin were standing. Her intent was to retrieve her mother, who Canby thought was also by the parked car discussing Grant's accusations of Canby. Her mother testified that she was in the house at the time. As Canby approached Grant and her cousin, she thought

she saw someone moving, so she threw her arms up to protect herself. In the process she unintentionally stabbed her uncle in the back, specifically denying that she had any intention to stab him. Canby and other witnesses testified that on at least two prior occasions when Grant was intoxicated, he had hit, pushed, or grabbed her.

Canby was charged with assault in the first degree, which is defined as the intentional or knowing causing of serious bodily harm. Neb. Rev. Stat. § 28-308 (Reissue 1979). The crime of which she was found guilty, assault in the third degree, is defined, among other things, as the intentional, knowing, or reckless causing of bodily injury. Neb. Rev. Stat. § 28-310 (Reissue 1979).

The prosecution's theory of the case is that Canby intentionally stabbed Grant in the back after having previously retreated from the backyard. Canby's theory is that her stabbing of Grant was an accident, the unintentional result of her being startled while standing next to Grant.

It is the duty of the trial court upon request of the accused to instruct the jury upon the accused's theory of the case if there is sufficient evidence to support it. *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984).

Neb. Rev. Stat. §§ 28-1406 et seq. (Reissue 1979) deal with the situations wherein the use of force is justified. Section 28-1409(4) allows, with certain exceptions, the use of deadly force once unlawful force has been used against the actor, if 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. Deadly force is defined at § 28-1406(3) to be "force which the actor uses *with the purpose* of causing or which he knows to create a substantial risk of causing death or serious bodily harm." (Emphasis supplied.)

The gist of Canby's requested instruction is that

the jury should acquit her if she reasonably believed she was in danger of suffering death or great bodily harm, in which events she would be justified in stabbing Grant. The evidence does not support such an instruction. Canby's testimony is not that she used justifiable force but, rather, that she accidentally and unintentionally, that is to say, without purpose, stabbed her uncle. Her action was thus outside the definition of deadly force.

In view of that circumstance the trial court was correct in refusing to give Canby's requested instruction.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. TONY I. LAYMON, APPELLANT.

348 N.W.2d 902

Filed May 25, 1984. No. 83-704.

1. **Evidence: Appeal and Error.** A defendant may not predicate error on the admission of evidence to which a timely objection was not made.
2. **Names.** The rule of idem sonans is applicable to both civil and criminal proceedings.
3. _____. Under the doctrine of idem sonans a mistake in the spelling of a name is immaterial if both modes of spelling have the same sound and appearance.

Appeal from the District Court for Gage County: WILLIAM B. RIST, Judge. Affirmed.

C. E. Danley, for appellant.

Paul L. Douglas, Attorney General, and Linda L. Willard, for appellee.

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

BOSLAUGH, J.

The defendant, Tony I. Laymon, appeals from his

conviction and sentence for third offense driving while under the influence of alcoholic liquor. No issue is raised as to the defendant's conviction and sentence for refusal to submit to a blood, breath, or urine test.

The defendant's only contention on this appeal is that the State failed to prove two prior convictions. The certified copies of prior convictions received in evidence at the enhancement proceeding show Tony I. Layman, not Tony I. Laymon, as the defendant.

The defendant made no objection to the offer of the certified copies at the enhancement proceeding. A defendant may not predicate error on the admission of evidence to which a timely objection was not made. *State v. Holland*, 213 Neb. 170, 328 N.W.2d 205 (1982).

The rule of idem sonans is applicable to both civil and criminal proceedings. *State v. Cardin*, 194 Neb. 231, 231 N.W.2d 328 (1975). Under the doctrine of idem sonans a mistake in the spelling of a name is immaterial if both modes of spelling have the same sound and appearance. *State v. Journey*, 201 Neb. 607, 271 N.W.2d 320 (1978). See, also, *Strasser v. Ress*, 165 Neb. 858, 87 N.W.2d 619 (1958); *State v. Paulson*, 176 Neb. 126, 125 N.W.2d 194 (1963); *Bunge v. State*, 87 Neb. 557, 127 N.W. 899 (1910); *Carrall v. State*, 53 Neb. 431, 73 N.W. 939 (1898).

The names Layman and Laymon are so similar in pronunciation and appearance and the variation is so slight that they must be regarded as idem sonans. Moreover, the defendant offered no evidence and has not claimed or demonstrated that he is not the Tony I. Laymon who was twice convicted of drunk driving. We conclude that the defendant was not misled or prejudiced by the admission into evidence of the certified copies.

The judgment is affirmed.

AFFIRMED.

III LOUNGE, INC., A NEBRASKA CORPORATION, APPELLANT, V. TYLER B. GAINES, TRUSTEE, APPELLEE.

348 N.W.2d 903

Filed May 25, 1984. No. 83-728.

1. **Specific Performance: Appeal and Error.** An action for specific performance is an equitable matter triable de novo on appeal to the Supreme Court.
2. **Contracts: Specific Performance.** As a general rule, where a valid, binding contract exists, which is definite and certain in its terms, mutual in obligation, and free from unfairness, fraud, or overreaching, a court will grant a decree of specific performance as a matter of course or right where the remedy at law is inadequate and specific performance will not be inequitable or unjust.
3. _____: _____. A party who seeks specific performance must show not only that he has a valid, legally enforceable contract but also that he has substantially complied with its terms by performing or offering to perform on his part the acts which formed the consideration of the undertaking on the part of the other party.
4. **Attorney and Client.** Ordinarily, the power of the attorney to act for his client in an action is to be considered valid and sufficient until disproved, not void or insufficient until proved.
5. **Contracts: Leases: Option to Purchase.** In the absence of words of express limitation, when a lease confers on the lessee an option to purchase the property at any time during the term of the lease, and the lease is thereafter extended upon the same terms and conditions, the option to purchase is also extended for the period of the extended term.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Reversed and remanded with directions.

Donald W. Kleine, for appellant.

David D. Ernst and John H. Cotton of Gaines, Otis, Haggart, Mullen & Carta, for appellee.

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

PER CURIAM.

The III Lounge, Inc., plaintiff lessee, appealed the judgment of the district court for Douglas County which denied specific performance of an option to purchase real estate.

The trial court held that the plaintiff had not completed conditions which must be fulfilled before the sale of the property may be effectuated. The trial court specifically referred to the failure of the plaintiff to draft a contract and tender a downpayment within the time specified in the lease as the unfulfilled conditions.

Plaintiff assigns as error the trial court's finding that (1) the downpayment and executed contract were conditions precedent to the exercise of the purchase option, and (2) the plaintiff did not properly attempt to exercise the purchase option in light of the manifest intention by the defendant not to perform.

On March 31, 1972, plaintiff entered into a lease agreement with the defendant for the premises at 1515 Dodge Street in Omaha, Nebraska. The lease was for an initial 5-year period from May 1, 1972, until April 30, 1977. The lease contained a renewal option in paragraph XIX that was exercised by the plaintiff, extending the lease into a second term and until April 30, 1982.

Paragraph XX of the lease contained a provision granting the plaintiff an option to purchase the leased premises. On December 7, 1981, James P. Costello, attorney for the plaintiff corporation, wrote to the defendant, stating that he was representing the plaintiff and was exercising the purchase option by this notice.

On December 10, 1981, Costello wrote a second letter to the defendant, asking for an explanation why the defendant was taking the position that the option to purchase did not exist. In this letter Costello also requested a meeting to agree on contract terms.

Once again, on December 29, 1981, Costello wrote to the defendant and informed him of the exercise of the purchase option. Then on April 29, 1982, the defendant delivered a notice to the plaintiff to quit the premises when the second term of the lease expired. Plaintiff refused to vacate the premises, became a

holdover tenant, and filed this action in September of 1982, requesting specific performance.

The defendant, by affidavit, acknowledged the receipt of the three letters in December 1981, and alleged he had not received (1) any instrument purporting to be a written contract for the real estate, nor (2) any other writing signed by any officer or director of the plaintiff corporation with respect to the purchase of the property, nor (3) any downpayment, other payment, or tender of payment on the purchase price of the real estate.

An action for specific performance is an equitable matter triable de novo on appeal to this court. *Cole v. Hickey*, 215 Neb. 728, 340 N.W.2d 418 (1983).

In reviewing the contract, paragraph XX, the purchase option, reads in part:

> Landlord grants to tenant the exclusive right and option to purchase the demised premises upon the following terms and conditions:
>
> Said option shall be exercised at any time J.D. ~~during the seventh month preceding the end of the initial term hereof~~ upon giving written notice to the landlord by certified mail, time being of the essence.
>
> The purchase price of the demised premises under this option shall be $87,500.00. The sum of $3,000.00 paid as rental under this lease agreement shall be credited against said purchase price making a net purchase price of $84,500.00. Upon exercise of said option, the party [sic] shall enter into a contract containing the customary provisions for sale of real estate in the city of Omaha, Nebraska. The tenant shall make a down payment of $1,000.00 upon execution of the contract which shall take place no later than thirty (30) days subsequent to the date upon which landlord shall be notified of the exercise of said option by tenant. The balance of said purchase price shall be paid in cash at closing.

We are first confronted by the issue of whether the downpayment provision and the provision to enter into a contract are conditions precedent to exercising the option contract or, instead, are acts required to be performed as part of the purchase contract.

> [W]here an option contract does not provide for payment of the purchase price at the time of, or coincident with, an optionee's exercise or attempted exercise of the option, or where such contract is silent as to the time of payment, the courts have usually adhered to the view, sometimes referred to as the general rule, that in such circumstances payment is not a necessary requisite to exercise but is instead simply one of the acts required of the optionee in performance of his part of the bilateral contract of purchase and sale which was formed when he communicated to the optionor his election or intention to exercise the option and thereby accepted the optionee's offer.

Annot., 71 A.L.R.3d 1201, 1205-06 (1976). See, also, 77 Am. Jur. 2d *Vendor and Purchaser* § 44 (1975).

In our review of this contract, payment is not a necessary requisite to the exercise of the option. Rather, it is an act required by the lessee (plaintiff) in performance of the contract of purchase which was formed when it communicated to the lessor (defendant) its election to exercise the option.

We reach this conclusion because the condition precedent for the option, simply requiring notice, is set apart in an indented paragraph from the following terms of payment. We are also persuaded by the provision for downpayment, which requires payment not at the time of notice but within 30 days subsequent to the date the landlord was notified of the exercise of the option. Under an option which requires merely that notice be given of the exercise and does not require the payment of the purchase money in order to exercise the option, tender of the

purchase price is generally regarded as something which the buyer is required to do in order to perform a contract to purchase which has previously been made, and not a condition precedent to the formation of a contract. *Horgan v. Russell*, 24 N.D. 490, 140 N.W. 99 (1913). See, also, *Gulf Oil Corporation v. Ferguson*, 509 S.W.2d 1 (Mo. 1974).

As a general rule, where a valid, binding contract exists, which is definite and certain in its terms, mutual in obligation, and free from unfairness, fraud, or overreaching, a court will grant a decree of specific performance as a matter of course or right where the remedy at law is inadequate and specific performance will not be inequitable or unjust. *Panhandle Rehabilitation Center, Inc. v. Larson*, 205 Neb. 605, 288 N.W.2d 743 (1980).

It is also the rule that a party who seeks specific performance must show not only that he has a valid, legally enforceable contract but also that he has substantially complied with its terms by performing or offering to perform on his part the acts which formed the consideration of the undertaking on the part of the defendant. *Panhandle Rehabilitation Center, Inc.*, *supra*.

The letters written by the plaintiff's attorney in December 1981 constitute an unequivocal acceptance of the purchase option and further request a meeting to work out the mechanics for drafting a real estate contract, one of the required acts in the bilateral contract of purchase and sale. We believe the evidence supports the contention of the plaintiff that the option to purchase was exercised and that it attempted to perform any other requirements due on the execution of the contract needed to obtain specific performance.

Defendant next contends a notice to exercise the option sent by the plaintiff's attorney is invalid, absent express authorization. Plaintiff's attorney, Costello, in the letter exercising the option, stated he was representing the plaintiff, and no evidence ex-

ists in the record to show that the defendant questioned the authority of Costello to act for the plaintiff when the option was exercised by notification. This matter was first brought up at the district court level.

Also, in the deposition of Richard D. Benak, Sr., the sole stockholder of the plaintiff corporation in 1981, Mr. Benak believed he had given Costello written power of attorney to act on behalf of the corporation in November 1981. Unfortunately, this document has not been produced. Nevertheless, it is the rule that, ordinarily, the power of the attorney to act for his client in an action is to be considered valid and sufficient until disproved, not void or insufficient until proved. *Curtice Co. v. Estate of Jones*, 111 Neb. 166, 195 N.W. 930 (1923). See, also, *Tau Delta Phi, Tau Eta Chapter v. Gutierrez*, 89 Ill. App. 2d 25, 232 N.E.2d 205 (1967).

The defendant also argues, in the alternative, that specific performance shall not be granted because the purchase option contained in the initial lease did not exist when the lease was renewed. Defendant relies on *Kraski v. Banwell*, 200 Neb. 279, 263 N.W.2d 458 (1978), as authority for this contention.

In *Kraski* we held where a lease confers on the lessee an option to purchase the property at any time during the term of the lease, and the lease is thereafter extended in accordance with its terms, the option to purchase is also extended for the period of the extended term.

Although there are differences as well, the facts in this case are somewhat similar to *Kraski* because the lease in *Kraski* contained specific provisions that the extension is to be on the same terms and conditions as those in the "current" lease.

Here, the renewal option, paragraph XIX, is simply drafted and reads in part: "The tenant shall have an option to renew this lease for a term of five (5) years upon the *same terms and conditions as are provided herein.*" (Emphasis supplied.) However,

paragraph XX, the purchase option, reads in part: "Said option shall be exercised at any time upon giving written notice to the landlord by certified mail, time being of the essence." In other words, the renewal provision does not contain any language to limit the purchase option to the "initial term" or the "original term," nor does the language specifically provide for the purchase option to exist in "the term of this lease, *or any extension hereof,*" as the renewal option was worded in the *Kraski* lease. (Emphasis supplied.)

We hold that absent words of express limitation, when a lease confers on the lessee an option to purchase the property at any time during the term of the lease, and the lease is thereafter extended upon the same terms and conditions, the option to purchase is also extended for the period of the extended term. The parties here had previously provided language in the purchase option section expressly limiting the purchase option to the initial term of the lease, but this language was specifically crossed out. This left a purchase option explicitly extended during the renewal period.

The judgment of the district court is reversed, and the cause is remanded with directions to enter judgment in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE COMPLAINT AGAINST FRANCIS J. KNEIFL, DISTRICT JUDGE IN AND FOR THE EIGHTH JUDICIAL DISTRICT OF THE STATE OF NEBRASKA. STATE OF NEBRASKA EX REL. COMMISSION ON JUDICIAL QUALIFICATIONS, RELATOR, V. FRANCIS J. KNEIFL, RESPONDENT.

351 N.W.2d 693

Filed June 1, 1984. No. JQ83-001.

1. **Judges: Disciplinary Proceedings.** Conduct which falls short of

reaffirming one's fitness for the high responsibilities of judicial office constitutes conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

2. _____: _____. Conduct prejudicial to the administration of justice that brings the judicial office into disrepute is less grave than willful misconduct in office.
3. **Judges: Disciplinary Proceedings: Appeal and Error.** The Nebraska Supreme Court's review in matters of judicial discipline is de novo; when no new evidence is received, our review is de novo on the record.
4. _____: _____: _____. This court must determine upon its own independent inquiry whether the evidence clearly and convincingly proves the alleged misconduct.
5. _____: _____: _____. Although the recommendations of the Commission on Judicial Qualifications are entitled to be given weight, this court has the obligation to make its own determination of what discipline is appropriate.
6. **Judges: Disciplinary Proceedings.** A judge's general performance as a jurist may be a relevant factor to consider in determining the appropriate discipline.
7. _____: _____. A judge may be disciplined for misconduct arising outside the performance of his judicial duties.
8. _____: _____. The purpose of sanctions in cases of judicial discipline is to preserve the integrity and independence of the judiciary and to restore and reaffirm public confidence in the administration of justice.
9. _____: _____. The discipline imposed must be designed to announce publicly this court's recognition that there has been misconduct; it must be sufficient to deter respondent from again engaging in such conduct; and it must discourage others from engaging in similar conduct in the future.
10. _____: _____. A judge is disciplined not for purposes of vengeance or retribution, but to instruct the public and all judges of the importance of the function performed by judges in a free society, to reassure the public that judicial misconduct is neither permitted nor condoned, and to reassure the citizens of Nebraska that the judiciary of their state is dedicated to the principle that ours is a government of laws and not of men.

Original action. Judgment of disciplinary sanctions.

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

Daniel D. Jewell, for respondent.

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

PER CURIAM.

This matter comes before this court pursuant to the provisions of Neb. Rev. Stat. §§ 24-715 et seq. (Cum. Supp. 1982) upon the December 13, 1983, complaint of the Nebraska Commission on Judicial Qualifications against respondent, Francis J. Kneifl, a district court judge in and for the Eighth Judicial District of the State of Nebraska, which complaint charged respondent with four counts of misconduct.

A formal hearing on the complaint was had on February 14, 1984, before the master, the Honorable Dale E. Fahrnbruch, a district court judge in and for the Third Judicial District of the State of Nebraska, a court of record. Both the commission and respondent accepted the findings of fact made and conclusions of law reached by the master. On April 2, 1984, the commission determined that two of its charges of misconduct against respondent had been proved but that two had not, and, accordingly, dismissed the latter. On April 20, 1984, respondent accepted the report of the commission, except as noted hereinafter. Oral arguments before this court were held on May 11, 1984.

Neb. Const. art. V, § 30(1), and § 24-721 provide that if the commission finds the charges are established by clear and convincing evidence, it shall recommend appropriate disciplinary sanctions to this court. We, therefore, may only concern ourselves with the two counts which the commission found were proved.

The first of these counts (hereinafter designated as Count I) is that on March 29, 1983, respondent conducted himself in a manner prejudicial to the administration of justice, thereby bringing the judicial office into disrepute, contrary to the provisions of § 24-722(6), by threatening reprisals against and

cursing certain police officers who were engaged in the lawful performance of their duties.

The second count with which we are concerned (hereinafter designated as Count II) is that on August 1 and 31, 1981, respondent conducted himself in a manner prejudicial to the administration of justice, thereby bringing the judicial office into disrepute by attempting to use the power of his office to influence a county attorney to either reduce or drop criminal charges against an acquaintance of respondent.

The relevant part of § 24-722, the statute on which the foregoing charges are founded, reads:

> A . . . judge of any court of this state may be reprimanded, disciplined, censured, suspended without pay for a definite period of time not to exceed six months, or removed from office for . . . (6) conduct prejudicial to the administration of justice that brings the judicial office into disrepute . . . .

Conduct which falls short of reaffirming one's fitness for the high responsibilities of judicial office constitutes conduct prejudicial to the administration of justice that brings the judicial office into disrepute. See *Geiler v. Commission on Judicial Qualifications*, 10 Cal. 3d 270, 515 P.2d 1, 110 Cal. Rptr. 201 (1973), *cert. denied* 417 U.S. 932, 94 S. Ct. 2643, 41 L. Ed. 2d 235 (1974). It includes conduct which would justify a reasonable man in believing that a result achieved by a judge was achieved because of his position and prestige, see *In re Foster*, 271 Md. 449, 318 A.2d 523 (1974), and conduct which would appear to an objective observer to be not only unjudicial but prejudicial to public esteem for the judicial office, *In re Edens*, 290 N.C. 299, 226 S.E.2d 5 (1976). It depends not so much on the judge's motives but more on the conduct itself, the results thereof, and the impact such conduct might reasonably have upon knowledgeable observers. *In re Stuhl*, 292 N.C. 379, 233 S.E.2d 562 (1977). The "judicial office" re-

fers not to the judge as an individual but, rather, to the judiciary. *Matter of Dalessandro*, 483 Pa. 431, 397 A.2d 743 (1979). Conduct prejudicial to the administration of justice that brings the judicial office into disrepute is less grave than willful misconduct in office. *McCartney v. Commission on Judicial Qualifications*, 12 Cal. 3d 512, 526 P.2d 268, 116 Cal. Rptr. 260 (1974); *Geiler v. Commission on Judicial Qualifications*, *supra*.

The commission's findings with respect to Count I are that on March 28, 1983, in the course of being booked for driving while under the influence of intoxicants in Iowa, respondent cursed a police officer while she was in the performance of her duties, and threatened other officers, also while in the course of their duties, with reprisals by saying that they "better never be" in his court and that if they ever came before him in his court, they would "be sorry."

With respect to Count II the salient facts are that in August of 1981 respondent advised a county attorney's partner that one with whom respondent was acquainted had been charged with driving while under the influence of intoxicants and refusal to submit to testing. Respondent asked the partner and county attorney to help or see what could be done for the acquaintance. There is no evidence that respondent directly asked the county attorney or his partner to reduce or dismiss the charges against the acquaintance, nor any evidence that respondent gained any financial or personal gain from the request he made. The commission found that respondent attempted to influence the county attorney to reduce the charges.

Our first task is to determine the nature and scope of our review. Neb. Const. art. V, § 30(2), reads:

> The Supreme Court shall review the record of the proceedings and in its discretion may permit the introduction of additional evidence. The Supreme Court shall make such determination as it finds just and proper, and may order the reprimand, discipline, censure, suspension, removal,

> or retirement of such Justice or Judge of the Supreme Court or other judge, or may wholly reject the recommendation[.] [U]pon an order for retirement, the Justice or Judge of the Supreme Court or other judge shall thereby be retired with the same rights and privileges as if he or she had retired pursuant to statute. Upon an order for removal, the Justice or Judge of the Supreme Court or other judge shall be removed from office, his or her salary shall cease from the date of such order, and he or she shall be ineligible for judicial office. Upon an order for suspension, the Justice or Judge of the Supreme Court or other judge shall draw no salary and shall perform no judicial functions during the period of suspension. Suspension shall not create a vacancy in the office of Justice or Judge of the Supreme Court or other judge.

Section 24-723 reiterates the same powers, although in slightly altered language. We note that respondent raises no issue with respect to the fact that although the charges involved allege a violation of § 24-722(6), the finding of the commission is that he violated Neb. Const. art. V, § 30(f) (sic), the relevant language of the two being identical.

From the power to permit the introduction of additional evidence, we conclude that our review is to be de novo. When no new evidence is received, our review must be de novo on the record. See *Matter of Cieminski*, 270 N.W.2d 321 (N.D. 1978). Our duty, then, is to determine upon our own independent inquiry, as to the charges of alleged misconduct referred to us, whether the evidence clearly and convincingly proves that respondent acted in such a manner as to prejudice the administration of justice and bring the judicial office into disrepute. See, *In re Conduct of Roth*, 293 Or. 179, 645 P.2d 1064 (1982); *Matter of Heuermann*, 90 S.D. 312, 240 N.W.2d 603 (1976).

Having conducted that inquiry, we hold that the

evidence does, clearly and convincingly, prove that respondent did so act, contrary to the provisions of Neb. Const. art. V, § 30(1)(f), and § 24-722(6), in the particulars found by the commission as set forth earlier in this opinion.

We must now address the discipline which is to be imposed. The commission recommended the following:

a. That Judge Francis J. Kneifl be suspended without pay for a period of three months, said suspension to begin on the 1st day of June, 1984, and terminate on the 31st day of August, 1984.

b. That immediately upon said suspension becoming effective, Judge Francis J. Kneifl should subject himself to alcohol evaluation by an institution able to perform such evaluations, which institution should first be approved by the Supreme Court of Nebraska.

c. That in the event such evaluation concludes that Judge Francis J. Kneifl is in need of alcohol treatment, that Judge Kneifl should, during said period of suspension, undertake such alcohol treatment. Both the evaluation and alcohol treatment are to be at the sole cost and expense of Judge Kneifl.

d. That upon completion of said period of suspension, Judge Francis J. Kneifl be reinstated as Judge of the Eighth Judicial District of the State of Nebraska.

e. That all the costs and expenses of this proceeding be taxed against Judge Francis J. Kneifl.

Respondent accepts that he should be disciplined, but takes exception to the recommendation he be suspended from office. He argues that the two isolated incidents of misconduct did not occur while he was performing his official duties and that he has executed his judicial duties expeditiously and competently. He also contends that his suspension from office would impose a burden on other judges who

will be called upon to handle the caseload in the Eighth Judicial District and would perhaps result in delays in the administration of justice. He suggests that his willingness to accept discipline, his recognition of the error of his ways, and his cooperation in the disciplining process, including entering into a stipulation of facts, mitigate against his suspension. Respondent suggests as alternatives that he be reprimanded or censured, fined, or required to serve his district at a reduced rate of pay. Respondent further argues that the assessment of costs is itself a quite severe form of discipline which tends to chill vigorous defense efforts. He argues, as we understand it, that the amount of costs for which he becomes liable should be limited or otherwise taken into account in considering the totality of the sanctions imposed. Although respondent states there is no evidence in the record that he is addicted to alcohol, except that which can be inferred from Count I, he wishes to submit to alcohol evaluation and undergo treatment if necessary.

While we recognize that the commission's recommendations are entitled to be given weight, see, *Disciplinary Proceeding Against Buchanan*, 100 Wash. 2d 396, 669 P.2d 1248 (1983), and *McCartney v. Commission on Judicial Qualifications*, 12 Cal. 3d 512, 526 P.2d 268, 116 Cal. Rptr. 260 (1974), it is clearly this court's obligation to make its own determination of what discipline is appropriate within the limits set by our Constitution and statute. Neb. Const. art. V, § 30(2), and § 24-723.

While respondent's general performance as a jurist may be a relevant factor to consider in determining the appropriate discipline, *In re Inquiry of Lee*, 336 So. 2d 1175 (Fla. 1976), we note that his technical competency and efficiency are not at issue. It is true, as respondent suggests, that misconduct of a judge in his official capacity is more culpable than extrajudicial misconduct. It does not follow, however, that extrajudicial misconduct should be ig-

nored, especially where, as in the instant matter, the misconduct is predicated upon the holding of judicial office. The threats made to the police officers were, in effect, that respondent would wreak judicial vengeance upon them should they ever appear in a court over which he presided. His effort to influence the county attorney depended, at least in part, on respondent's presiding over a court in which that attorney and his partner could be expected to appear. We have ruled that an attorney may be disciplined for misconduct outside the practice of law. *State ex rel. Nebraska State Bar Assn. v. Leonard*, 212 Neb. 379, 322 N.W.2d 794 (1982); *State ex rel. Nebraska State Bar Association v. Walsh*, 206 Neb. 737, 294 N.W.2d 873 (1980). A judge is even more responsible for the administration of justice than is an attorney; no one can seriously contend that we may exact a higher standard of conduct from members of the bar than from members of the bench. As said in *Matter of Killam*, 388 Mass. 619, ____, 447 N.E.2d 1233, 1236 (1983):

> Conduct by a judge resulting in his apprehension for operating a motor vehicle on a public way while under the influence of intoxicating liquor constitutes a clear violation of the Code's stricture that "[a] judge . . . should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved." S.J.C. Rule 3:09, Canon 1. Moreover, such conduct also constitutes a clear violation of the Code's admonition that "[a] judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." S.J.C. Rule 3:09, Canon 2(A).
>
> These rules may be applicable, in some circumstances, to the judge's conduct whether or not that conduct is directly related to judicial duties. In another case of a single incident of

> misconduct involving extrajudicial activity, we concluded that "the judge's misconduct brought undeserved discredit to the administration of justice in the Commonwealth." *Matter of Larkin*, 368 Mass. 87, 91-92, 333 N.E.2d 199 (1975).

Whether particular conduct warrants discipline is not dependent upon whether it occurs on or off the bench, as conduct inconsistent with judicial demeanor subjects the judiciary as a whole to disrespect and impairs the usefulness of an individual judge to carry out his duties. See *Mtr of Steinberg*, 51 N.Y.2d 74, 409 N.E.2d 1378, 431 N.Y.S.2d 704 (1980).

Respondent's observation that suspending him would impose a burden on the other district judges is obviously accurate. Such is the inevitable aftermath of removing or suspending a judge, just as it is upon a judge's retirement or resignation. In such instances those judges remaining in the system must take on and discharge additional duties in order that justice may be properly administered. That additional burden on the remaining judges cannot become a reason to forego suspension or removal, if such is the appropriate sanction.

Next, respondent calls our attention to a number of cases in which the sanction imposed was less severe than suspension. *Matter of Cieminski*, 270 N.W.2d 321 (N.D. 1978), described the censure of a judge who stated two misdemeanants would not be arraigned because they did not take the matter seriously, failed to keep a required verbatim record, displayed his judicial identification to various persons under circumstances detracting from the integrity and impartiality of the judiciary, and handled checking accounts for individuals having difficulty with finances, including the checking account of one named in a collection suit in the court over which the judge presided. *In re Dwyer*, 223 Kan. 72, 572 P.2d 898 (1977), presented a judge who was disrespectful to litigants and failed to afford them their

full rights. He was censured. *In re Crutchfield*, 289 N.C. 597, 223 S.E.2d 822 (1975), dealt with a judge who signed a judgment allowing a limited driving privilege without making any effort to ascertain whether the facts recited to him were true and whether he had the legal authority to act. The facts were not true and he had no authority to act. Moreover, he failed to file the judgment as required by law. He was censured. *In re Rome*, 218 Kan. 198, 542 P.2d 676 (1975), involved a judge who was held to have publicly ridiculed a defendant found guilty of prostitution by writing his memorandum in poetry, which made light of the situation and which used a number of street words. The court ruled the judge had violated the requirement that he act in a dignified and courteous manner, but concluded that the matter was not one of great magnitude, and censured the offending judge. *McCartney v. Commission on Judicial Qualifications*, 12 Cal. 3d 512, 526 P.2d 268, 116 Cal. Rptr. 260 (1974), declared that the judge's use of intemperate language, displays of uncontrolled temper, unreasonable verbal abuse and the bullying of defendants in criminal cases, and the use of similar conduct toward court personnel, other judges, and counsel constituted willful misconduct prejudicial to the administration of justice. Because inexperience and attempts to "do justice" were present, he was censured rather than, as the commission had recommended, removed from office.

On the other hand, cases may be found at various points of the leniency-severity spectrum, even where the misconduct arose off the bench. *Matter of Shilling*, 51 N.Y.2d 397, 415 N.E.2d 900, 434 N.Y.S.2d 909 (1980), *appeal dismissed* 451 U.S. 978, 101 S. Ct. 2301, 68 L. Ed. 2d 834 (1981), presented the removal of a judge who sat on the board of a nonprofit corporation which wished to obtain a permit to operate an animal shelter. Although he had an excellent reputation for honesty, integrity, and judicial demeanor

in the legal community, he had been privately admonished for having used profane, vulgar, and inappropriate language in open court. In connection with his service on the board of the nonprofit corporation, he, in intemperate tones and with the use of vulgarity in the presence of the public after identifying himself as a judge, threatened to use his influence with friends in high places to achieve the ends he sought, and attempted to interfere with the work of other agencies. In *Matter of Kuehnel*, 49 N.Y.2d 465, 403 N.E.2d 167, 426 N.Y.S.2d 461 (1980), a previously censured judge, upon leaving a tavern, detained and questioned four youths whom he suspected of breaking some glass and forced them to go with him to a store to call police. On the way he hit one of the youths behind the head, causing him to fall. When the policeman arrived, the judge accompanied the policeman and the youths to the police station, although no broken glass had been found. Upon entering the station the judge upbraided the youths in vulgar and derogatory language and in a taunting and hostile manner. He told one of the youths if he ever saw her before his court, he would send her to jail. Upon leaving the station the judge struck a 16-year-old youth in the face, causing a bloody nose. Some 2 or 3 weeks later the judge met with one boy and his father to discuss the incident and apologized to the youth and offered to permit the boy to strike him. He also paid for a release from liability. The New York Court of Appeals, in accepting the commission recommendation of removal from office, stated at 468-69, 403 N.E.2d at 168, 426 N.Y.S.2d at 462-63:

> Without question, petitioner's conduct was egregious and inexcusable. He does not and indeed could not justify his actions. Instead, he maintains that removal from office would be a Draconian sanction since such conduct was unrelated to his judicial duties. This argument, however, fails to comprehend the basic maxim

> that a Judge may not so facilely divorce behavior off the Bench from the judicial function. Standards of conduct on a plane much higher than for those of society as a whole, must be observed by judicial officers so that the integrity and independence of the judiciary will be preserved. A Judge must conduct his everyday affairs in a manner beyond reproach. Any conduct, on or off the Bench, inconsistent with proper judicial demeanor subjects the judiciary as a whole to disrespect and impairs the usefulness of the individual Judge to carry out his or her constitutionally mandated function (see *Matter of Spector v. State Comm. on Judicial Conduct*, *supra*, [47 N.Y.2d 462] at pp 468-469 [392 N.E.2d 552, 418 N.Y.S.2d 565 (1979)]; *Matter of Pfingst*, [N.Y. Ct. Jud.] 33 NY2d [(a)] [ii], [kk] [409 N.Y.S.2d 986 (1973)]). As the Referee aptly noted, throughout this entire incident petitioner, "although off the bench remained cloaked figuratively, with his black robe of office devolving upon him standards of conduct more stringent than those acceptable for others."

Instances of misconduct during the performance of official duties have also resulted in disciplinary sanctions of varying degrees. *In re McDonough*, 296 N.W.2d 648 (Minn. 1979), involved a judge who was addicted to alcohol and, among other things, threatened county and state officers, was absent from his duties, and abused those appearing before him. He was censured, ordered to forfeit his salary for 3 months, and placed on probation for the remainder of his service as a judge. The judge in *Matter of Inquiry Concerning a Judge No. 481*, 251 Ga. 524, 307 S.E.2d 505 (1983), was suspended without pay for 15 days for making flippant or derogatory remarks, both in the presence of and outside the hearing of the jury during the course of a trial, and directing the reporter to "take down nothing further." In *In re*

Romero, 100 N.M. 180, 668 P.2d 296 (1983), a judge was suspended for 30 days because he lacked patience, dignity, and courtesy in dealing with those who appeared before him, and otherwise neglected his duties. In *Gonzalez v. Com'n on Judicial Performance*, 33 Cal. 3d 359, 657 P.2d 372, 188 Cal. Rptr. 880 (1983), *appeal dismissed* ____ U.S. ____, 104 S. Ct. 690, 79 L. Ed. 2d 158 (1984), a judge who used his judicial office in efforts to intercede in criminal matters involving his friends and benefactors, who required attorneys to post their own funds as a condition of granting bail to their clients, who held court in the absence of counsel for one or both of the parties, who left the bench while evidence was being adduced, and who failed to make a record of proceedings was removed from office.

In the final analysis, however, any effort to design the appropriate discipline in this matter by comparing it with that imposed in any case by any other jurisdiction is of limited value. Although analyzing what other jurisdictions have done is instructive, the responsibility of defining and enforcing proper conduct for Nebraska judges falls upon this tribunal. Neb. Const. art. V, § 30(2), and § 24-723. See, also, Neb. Const. art. V, § 1, vesting in this court general administrative authority over all courts.

The purpose of sanctions in cases of judicial discipline is to preserve the integrity and independence of the judiciary and to restore and reaffirm public confidence in the administration of justice. The discipline we impose must be designed to announce publicly our recognition that there has been misconduct; it must be sufficient to deter respondent from again engaging in such conduct; and it must discourage others from engaging in similar conduct in the future. Thus, we discipline a judge not for purposes of vengeance or retribution, but to instruct the public and all judges, ourselves included, of the importance of the function performed by judges in a free society. We discipline a judge to reassure the

public that judicial misconduct is neither permitted nor condoned. We discipline a judge to reassure the citizens of Nebraska that the judiciary of their state is dedicated to the principle that ours is a government of laws and not of men. See, *Disciplinary Proceeding Against Buchanan*, 100 Wash. 2d 396, 669 P.2d 1248 (1983); *Matter of Ross*, 428 A.2d 858 (Me. 1981).

Neb. Const. art. V, § 30(1), and § 24-721 entrust to this court discretion to impose disciplinary sanctions ranging from a mere reprimand to removal from office. However, it may not suspend a judge for more than 6 months.

Weighing the nature of respondent's misconduct, the context in which it arose, and the purposes for which judicial discipline is imposed, we conclude that the commission's recommendations are sound and should be accepted by this court. Any lesser sanction would minimize the seriousness of respondent's misconduct; any greater sanction would be unjustly vindictive.

We therefore adopt the commission's recommendations "a" through "e" set forth earlier in this opinion, except, and except only, that we modify recommendation "a" to read as follows:

> That Judge Francis J. Kneifl be suspended without pay for a period of three months, said suspension to begin on the 1st day of July 1984 and terminate on the 30th day of September 1984. Respondent shall decide all matters taken under submission by him before June 30, 1984.

JUDGMENT OF DISCIPLINARY SANCTIONS.

KRIVOSHA, C.J., not participating.