REPORTS OF CASES

DECIDED BETWEEN

JULY 20, 1984 and JANUARY 3, 1985

IN THE

Supreme Court of Nebraska

VOLUME CCXVIII

DONALD C. PATTON

OFFICIAL REPORTER

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1985

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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JUDICIAL DISTRICTS AND DISTRICT JUDGES

Number of District	Counties in District	Judges in District	City
First	Johnson, Pawnee, Nemaha, and Richardson	Robert T. Finn	Tecumseh
Second	Sarpy, Cass, and Otoe	Ronald E. Reagan	Papillion
		Raymond J. Case	Plattsmouth
		George A. Thompson	Papillion
Third	Lancaster	Robert R. Camp	Lincoln
		William D. Blue	Lincoln
		Dale E. Fahrnbruch	Lincoln
		Donald E. Endacott	Lincoln
		Bernard J. McGinn	Lincoln
		Jeffre Cheuvront	Lincoln
Fourth	Douglas	Donald J. Hamilton	Omaha
		James A. Buckley	Omaha
		Samuel P. Caniglia	Omaha
		John E. Clark	Omaha
		James M. Murphy	Omaha
		Jerry M. Gitnick	Omaha
		Paul J. Hickman	Omaha
		Keith Howard	Omaha
		Robert V. Burkhard	Omaha
		Stephen A. Davis	Omaha
		Lawrence Corrigan	Omaha
		Theodore L. 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

JUDICIAL DISTRICTS AND DISTRICT JUDGES

Eighth	Dakota, Dixon, and Cedar		Dakota City
Ninth	Knox, Antelope, Cuming, Pierce, Madison, Stanton, and Wayne	Merritt C. Warren Richard P. Garden	Creighton Norfolk
Tenth	Adams, Clay, Phelps, Kearney, Harlan, Franklin, and Webster	Bernard Sprague William G. Cambridge	Red Cloud Hastings
Eleventh	Hall and Howard	Joseph D. Martin William H. Riley	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
Fifteenth	Brown, Keya Paha, Boyd, Rock, Holt, and Cherry	Edward E. Hannon	O'Neill
Sixteenth	Sheridan, Dawes, Box Butte, and Sioux	Robert R. Moran Paul D. Empson	Alliance Chadron
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Eighteenth	Jefferson and Gage	William B. Rist	Beatrice
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TABLE OF CASES REPORTED

CUMULATIVE LIST OF CASES DISPOSED OF WITHOUT OPINION

No. 83-434: **J & B Enterprises v. City of Lincoln.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. 83-516: **O'Connor v. Thomas.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 83-517: **Wright v. Thomas.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 83-548: **Adams v. Thomas.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

Nos. 83-602, 84-765: **Charipar v. County of Platte.** Stipulation allowed; appeal dismissed.

No. 83-635: **Smith v. Morton.** Affirmed as modified by order of the court.

No. 83-751: **Nolte v. Duerfeldt.** Stipulation allowed; appeal dismissed.

No. 83-877: **Professional Real Estate Consultants, Inc. v. Real Estate Professional Group, Ltd.** Stipulation allowed; appeal dismissed.

No. 83-915: **State v. Lofquest.** Judgment affirmed; see Rule 7A.

No. 84-001: **Briley v. Gast.** Affirmed as modified by order of the court.

No. 84-017: **State v. Stewart.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 84-066: **Hawaiian Village, Inc. v. Holland.** Stipulation allowed; appeal dismissed.

No. 84-067: **Frazier v. Bakody Homes and Development, Inc.** Stipulation allowed; appeal dismissed.

No. 84-086: **State v. Umphenour.** Judgment affirmed; see Rule 7A.

No. 84-098: **Kester v. Zink.** Affirmed as modified by order of the court.

No. 84-130: **State v. Philmon.** By order of the court, appeal dismissed for failure to file briefs.

No. 84-159: **McMahon v. McMahon.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 84-167: **State v. Schnieber.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 84-179: **Milder Oil, Co. v. Jet-O-Space Inc.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 84-187: **State v. Duester.** Judgment affirmed; see Rule 7A.

No. 84-188: **State v. Tucker.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-191: **In re Conservatorship of Lindauer.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 84-192: **State v. Amen.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

Nos. 84-194, 84-195: **State v. Engelkemeier.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 84-206: **State v. Johnson.** Judgment affirmed; see Rule 7A.

No. 84-209: **State v. Seagle.** Judgment affirmed; see Rule 7A.

No. 84-213: **Schomp v. Schomp.** Affirmed as modified by order of the court.

No. 84-214: **State v. Minzghor.** Judgment affirmed; see Rule 7A.

No. 84-231: **Betts v. Great Plains Insurance Co.** Stipulation allowed; appeal dismissed.

No. 84-244: **State v. Garza.** Judgment affirmed; see Rule 7A.

No. 84-246: **State v. Rassman.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-249: **State v. Ziems.** Judgment affirmed; see Rule 7A.

No. 84-251: **Boyer v. Christensen.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 84-252: **State v. Brown.** Judgment affirmed; see Rule 7A.

No. 84-255: **State v. Puckett.** Judgment affirmed; see Rule 7A.

No. 84-259: **Bach v. Bach.** Affirmed as modified by order of the court.

No. 84-286: **Helberg v. Helberg.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 84-288: **Hill v. City of Lincoln.** By order of the court, appeal dismissed as premature.

No. 84-289: **In re Interest of M.R. and A.R.** Motion of appellee for summary dismissal sustained; appeal dismissed as premature.

No. 84-293: **Charles Vrana & Son Construction Co. v. Bahr Vermeer & Haecker Architects, Ltd.** Motion of appellant for summary disposition sustained; appeal dismissed; judgment affirmed.

Nos. 84-294, 84-295: **State v. Boetger.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-299: **State v. Barry.** Judgment affirmed; see Rule 7A.

No. 84-303: **State v. Lautenschlager.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-305: **Huss Platte Valley Auction, Inc. v. Pruden.** Stipulation allowed; appeal dismissed.

No. 84-310: **Stratton v. Stratton.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 84-314: **State v. Eisenman.** By order of the court, appeal dismissed for failure to file briefs.

No. 84-316: **Stoner v. Stoner.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 84-317: **Maddox v. Mathews.** Stipulation allowed; appeal dismissed.

No. 84-321: **State v. Love.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-323: **State v. Taylor.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment

affirmed; see Rule 3B.

No. 84-324: **State v. Stinnett.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-326: **State v. Schmidt.** By order of the court, appeal dismissed for failure to file briefs.

No. 84-331: **State v. Sondag.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-332: **State v. Fowler.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 84-336: **State v. Schweiger.** Judgment affirmed; see Rule 7A.

No. 84-344: **State v. Wolf.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 84-347: **State v. Baxter.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-348: **State v. Honeycutt.** Judgment affirmed; see Rule 7A.

No. 84-349: **State v. Crabtree.** Judgment affirmed; see Rule 7A.

No. 84-350: **State v. Schneider.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-353: **Housing Authority of the City of Omaha v. Bishop.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 84-354: **State v. York.** Judgment affirmed; see Rule 7A.

No. 84-360: **Alonso v. Alonso.** By order of the court and upon recommendation of prehearing conference officer, case is summarily dismissed; see Rule 7A.

No. 84-364: **Edwards v. Smith.** Stipulation allowed; appeal dismissed.

No. 84-366: **Powers v. Mental Health Board.** By order of the court, appeal is dismissed as moot.

No. 84-367: **State v. Gardner.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-381: **Guest v. Farmers Irrigation District.** By order of the court, case is remanded to the Nebraska Workmen's Compensation Court and the district court for Scotts Bluff County for the purpose of considering a lump sum settlement.

No. 84-384: **Sykora v. Cortese.** Affirmed as modified by order of the court.

No. 84-385: **Greenberg v. Blue Cross & Blue Shield.** Stipulation allowed; appeal dismissed.

No. 84-386: **Sexton v. Metro Area Transit.** Stipulation allowed; appeal dismissed.

No. 84-388: **Feighner v. Kiewit-Western Co.** Stipulation allowed; appeal dismissed.

No. 84-393: **State v. Main.** Judgment affirmed; see Rule 7A.

No. 84-394: **State v. Jones.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-395: **Tyler v. Tyler.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 84-397: **Holland v. Holland.** Stipulation allowed; appeal dismissed.

No. 84-400: **State v. Henderson.** Judgment affirmed; see Rule 7A.

No. 84-403: **State v. Iron Teeth.** Judgment affirmed; see Rule 7A.

No. 84-404: **Evans v. Shamrock Packing Co.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 84-405: **Nebraska Department of Public Institutions v. Watmore.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 84-406: **State v. Rhodes.** Judgment affirmed; see Rule 7A.

No. 84-407: **State v. Romay.** Judgment affirmed; see Rule 7A.

No. 84-416: **Welch v. Welch.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 84-418: **Pandorff v. Young.** Stipulation allowed; appeal dismissed.

No. 84-420: **Dunlap v. Krivosha.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 84-421: **State v. Barnes.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-423: **Goehring v. Kiolbasa.** Motion of appellant to dismiss appeal with prejudice sustained; appeal dismissed; each party to pay costs.

No. 84-425: **State v. Pascoe.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 84-426: **Wilson v. School District No. 1-C.** Stipulation allowed; appeal dismissed.

No. 84-428: **Bishop v. Bishop.** Affirmed as modified by order of the court.

No. 84-430: **NC+ Hybrids v. Growers Seed Assoc.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 84-431: **Omaha Manor, Inc. v. Dept. of Public Welfare.** Stipulation allowed; appeal dismissed.

No. 84-438: **School District 82 v. Stewart.** Motion of appellant to dismiss appeal sustained; appeal dismissed; each party to pay own costs.

No. 84-444: **Valmont-Sandhills, Inc. v. Galyen.** Stipulation allowed; appeal dismissed.

No. 84-446: **State v. Moeller.** Judgment affirmed; see Rule 7A.

No. 84-449: **DeRusse v. DeRusse.** Motion of appellee for summary affirmance sustained; appeal dismissed as premature.

No. 84-451: **State v. Rolling.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 84-452: **State v. Harlan.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-453: **State v. Ryan.** Judgment affirmed; see Rule 7A.

No. 84-455: **Bruner v. Bruner.** Appeal dismissed.

No. 84-460: **State v. Mitchell.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-461: **State v. Burdick.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-465: **Colson v. State Security Savings Co.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 84-466: **State v. Delgado.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-467: **State v. Yardley.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-469: **State v. Cole.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-479: **State v. Jones.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-480: **State v. Conley.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-481: **State v. Thomas.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-485: **State v. Dougherty.** Judgment affirmed; see Rule 7A.

No. 84-492: **Hurst v. Hurst.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. 84-495: **State v. Lindgarde.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-500: **Howard v. I.B.P., Inc.** Affirmed as modified by order of the court.

No. 84-502: **In re Interest of Gardner.** By order of the court, appeal dismissed for failure to file briefs.

No. 84-509: **State v. Zollars.** Judgment affirmed; see Rule 7A.

No. 84-515: **State v. Starks.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-516: **State v. Wright.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-521: **Farmers Union Cooperative v. Beekman.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 84-523: **Curley v. Curley.** Stipulation allowed; appeal dismissed.

No. 84-525: **State v. Brooks.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-527: **State v. Jacox.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 84-529: **State v. Delgado.** Judgment affirmed; see Rule 7A.

No. 84-533: **Country v. Benson.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 84-534: **Alford v. Neal.** Motion of appellee to dismiss sustained; appeal dismissed as premature.

No. 84-543: **Kroenke v. County of Dodge.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 84-548: **Robinson v. Robinson.** Stipulation allowed; appeal dismissed.

No. 84-555: **State v. Canaday.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 84-559: **State v. Goit.** Judgment affirmed; see Rule 7A.

No. 84-564: **In re Prescription of Ratee for Motor Carriers Etc.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 84-565: **Phillips v. Phillips.** By order of the court, appeal dismissed for failure to file briefs.

No. 84-570: **City of Kearney v. Tye.** Stipulation allowed; appeal dismissed.

No. 84-571: **State v. Kay.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-576: **State v. Stutzman.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-577: **State v. Bettelyoun.** Judgment affirmed; see

Rule 7A.

No. 84-582: **State v. Waters.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-586: **Blair Bank, Inc. v. Foley.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 84-591: **Jennie M. Melham Memorial Medical Center, Inc. v. County of Custer.** Affirmed as modified by order of the court.

No. 84-593: **Lahman v. Richardson.** Stipulation allowed; appeal dismissed.

No. 84-596: **Warren v. Hagen.** Appeal dismissed as premature.

No. 84-599: **Hansen v. Matisons.** Stipulation allowed; appeal dismissed at costs of appellant.

No. 84-601: **State v. Grant.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-602: **State v. Denbeck.** Stipulation allowed; appeal dismissed.

No. 84-603: **State v. Zemunski.** Judgment affirmed; see Rule 7A.

No. 84-604: **State v. Brunner.** Judgment affirmed; see Rule 7A.

No. 84-612: **York v. York.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 84-613: **State v. Feller.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 84-616: **State v. Alcorta.** Stipulation allowed; appeal dismissed.

No. 84-617: **State v. Stutzman.** Judgment affirmed; see Rule 7A.

No. 84-619: **Security State Bank v. Massey-Ferguson Credit Corp.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. 84-625: **Casselman v. Hippe.** Appeal dismissed.

No. 84-627: **Sluiter v. Board of Education.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 84-628: **State v. Robinson.** Motion of court-appointed

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

No. 84-629: **Aluminum Distributors, Inc. v. Daehling.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

Nos. 84-631, 84-632: **State v. Hallman.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-633: **Devine v. Devine.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 84-634: **State v. Burson.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 84-640: **Herskind v. Herskind.** Stipulation allowed; appeal dismissed at costs of appellant.

No. 84-648: **State v. Hudson.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-649: **Smith v. Smith.** Affirmed as modified by order of the court.

No. 84-650: **Cox v. Sarpy County.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 84-654: **State v. Voskamp.** Judgment affirmed; see Rule 7A.

No. 84-655: **Leibhart v. Vitek.** Stipulation allowed; appeal dismissed.

Nos. 84-658, 84-669: **State v. Arthaloney.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

Nos. 84-664, 84-665: **State v. Lame.** Judgment affirmed; see Rule 7A.

Nos. 84-671, 84-672: **State v. Galvin.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-673: **State v. Forbes.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-674: **DeLay First Nat'l Bank & Trust Co. v. Farmers Elevator Co.** Stipulation allowed; appeal dismissed.

No. 84-678: **State v. Gordon.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-681: **State v. Stewart.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-682: **Kentfield v. Kentfield.** Affirmed as modified by order of the court.

No. 84-686: **State v. Arbogast.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-693: **Sapp v. Early.** By order of the court, appeal dismissed as premature.

No. 84-695: **City of Genoa v. Cumming.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 84-699: **Sigler v. Dept. of Roads.** Affirmed as modified by order of the court.

No. 84-701: **John v. Metropolitan Utilities District.** Stipulation allowed; appeal dismissed.

No. 84-718: **State v. Cole.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-719: **Hall v. Dunning.** By order of the court, appeal dismissed.

No. 84-720: **Tyler v. Aetna Life Insurance Co.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 84-722: **State v. Carter.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 84-734: **Buchanan v. Thierstein.** Stipulation allowed; appeal dismissed.

No. 84-744: **Mathias v. Seachord.** Stipulation allowed; appeal dismissed.

No. 84-754: **Buoy v. Buoy.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 84-756: **State v. Burroughs.** Stipulation allowed; appeal dismissed.

No. 84-759: **Menco Corp. v. Gleason.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 84-768: **Poore v. Poore.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 84-776: **State v. McClain.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-780: **Gunny's, Ltd. v. Walkorp, Inc.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 84-784: **Vaughan-Jacklin Corp. v. The Yard Co.** Stipulation allowed; appeal dismissed.

No. 84-787: **Agrex, Inc. v. Brandt.** Stipulation allowed; appeal dismissed.

No. 84-790: **Graham v. Graham.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 84-798: **Goeres v. Rosberg.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 84-803: **Shatto v. Burlington Northern Railroad Co.** Stipulation allowed; appeal dismissed.

No. 84-819: **Brown v. City of Omaha.** Stipulation allowed; appeal dismissed.

No. 84-824: **Benyo v. Wormington.** Stipulation allowed; appeal dismissed.

No. 84-830: **State ex rel. Timm v. Timm.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 84-837: **Zeller v. Zeller.** Stipulation allowed; appeal dismissed.

No. 84-874: **Agrex, Inc. v. Gall.** Stipulation allowed; appeal dismissed at cost of appellant.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

STATE OF NEBRASKA, APPELLEE, V. FRANKIE L. COLE, APPELLANT.

352 N.W.2d 154

Filed July 20, 1984. Nos. 83-387, 83-388.

1. **Criminal Law: Double Jeopardy: Burglary.** Neither an acquittal nor a conviction of a larceny committed in the course of a burglary bars a prosecution for the crime of burglary.
2. **Criminal Law: Double Jeopardy.** The rule that a person cannot twice be 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. **Indictments and Informations.** Two or more offenses may be charged in the same information if the offenses charged are of the same or similar character.
4. **Indictments and Informations: Joinder.** The court may order two or more informations to be tried together if the offenses could have been joined in a single information.

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

Thomas M. Kenney, Douglas County Public Defender, and Victor Gutman, for appellant.

Frankie L. Cole, pro se.

Paul L. Douglas, Attorney General, and Michaela M. White, for appellee.

KRIVOSHA, C.J., BOSLAUGH, HASTINGS, SHANAHAN, and GRANT, JJ., and BRODKEY, J., Retired.

BOSLAUGH, J.

The defendant, Frankie L. Cole, was charged in case No. 83-387 with burglary of the Kardell Service Station in Omaha, Nebraska, on October 16, 1982. In case No. 83-388 he was charged with burglary of the H & V Auto Repair in Omaha, Nebraska, on October 15, 1982, and with theft of an MGB automobile from H & V Auto Repair.

Upon the motion of the State the cases were consolidated for trial and were tried together to a jury. At the close of the State's evidence the trial court dismissed the burglary count in case No. 83-388. The jury returned a verdict of guilty in both cases. The defendant was sentenced to imprisonment for 10 years on each count, the sentences to run consecutively.

The defendant appealed to this court, where the cases were consolidated for argument. The defendant contends that it was error for the trial court to deny the defendant's motion to dismiss one of the counts in case No. 83-388 and to consolidate the cases for trial.

The evidence shows that the Kardell Service Station was burglarized on the night of October 15, 1982. Three tires were stolen and a large number of cigarettes and approximately $50 in change were taken from the cigarette machine. The H & V Auto Repair was burglarized the same night and an MGB automobile was taken from the shop. The defendant was apprehended at about 5 a.m. on October 16, 1982, while driving the stolen MGB automobile. A large quantity of cigarettes was found in the automobile, and the defendant had a large amount of change on his person when arrested. His thumbprint was found on the door panel which had been removed to gain entry into the Kardell Service Station. The evidence was clearly sufficient to permit the jury to find the defendant guilty beyond a reasonable doubt on both counts.

The defendant moved to dismiss one of the counts in case No. 83-388 on the theory that he was being placed in double jeopardy by being charged with both burglary and larceny arising out of the same incident.

In *State v. Carter*, 205 Neb. 407, 410-11, 288 N.W.2d 35, 37 (1980), we said:

> Neither an acquittal nor a conviction of a larceny committed in the course of a burglary bars a prosecution for the crime of burglary. The People v. Woolsey, 399 Ill. 617, 78 N.E.2d 237; Cambron v. State, 191 Ind. 431, 133 N.E. 498; Williams v. State, 205 Md. 470, 109 A.2d 89; State v. Wiley, 173 Md. 119, 194 A. 629; People v. Snyder, 241 N.Y. 81, 148 N.E. 796; People v. Mignogna, 54 N.Y. Supp. 2d 233; People v. Mangano, 269 App. Div. 954, 57 N.Y.

Supp. 2d 891, affirmed 296 N.Y. 1011, 73 N.E.2d 583; Cooper v. State, 154 Tex. Crim. 182, 226 S.W.2d 122; Alarcon v. The State, 92 Tex. Crim. 288, 242 S.W. 1056; State v. Beaman, 143 Wash. 281, 255 P. 91; State v. Louden, 21 N.J. Super. 497, 91 A.2d 428. The rule that a person cannot twice be put in jeopardy for the same offense has no application where two separate and distinct crimes are committed by one and the same act because the constitutional inhibition is directed to the identity of the offense and not to the act. State v. Goodloe, 197 Neb. 632, 250 N.W.2d 606.

The defendant's argument is similar to that made in State v. Eagle Deer, *supra*, where the defendant was charged with burglary and the stealing of an automobile. The factual situation was similar to that involved in this case. The jury found the defendant guilty of wrongful use of an automobile (a lesser-included offense of auto theft), as well as guilty of the burglary charge. It was argued that the verdicts on the two charges were inconsistent. We said: "The evidence was also legally sufficient for the jury to have found the defendant guilty of stealing the automobile, but the fact that he was found guilty of only the lesser-included offense of wrongful use of the automobile on count II does not make the guilty verdict on count I inconsistent or invalid." Neither double jeopardy nor collateral estoppel is applicable under the circumstances which the defendant asserts exist here.

With respect to consolidation of the cases for trial, Neb. Rev. Stat. § 29-2002(1) and (3) (Reissue 1979) provides:

> (1) Two or more offenses may be charged in the same indictment, information, or complaint in a separate count for each offense if the offenses charged, whether felonies or misdemeanors, or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.
>
> . . . .
>
> (3) The court may order two or more indictments, informations, or complaints, or any combination thereof,

> to be tried together if the offense, and the defendants, if there are more than one, could have been joined in a single indictment, information or complaint. The procedure shall be the same as if the prosecution were under such single indictment, information, or complaint.

Offenses of the same or similar character may be joined in one information. *State v. Walker*, 200 Neb. 273, 263 N.W.2d 454 (1978); *State v. Nance*, 197 Neb. 95, 246 N.W.2d 868 (1976); *State v. Rodgers*, 186 Neb. 633, 185 N.W.2d 448 (1971).

The offenses involved in these cases were of the same or similar character and could have been joined in one information. Under those circumstances the trial court could order that they be tried together. The assignment of error is without merit.

We have examined the assignments of error in the defendant's pro se brief and they are without merit.

The judgment of the district court is affirmed.

AFFIRMED.

JOSE SUAREZ, A MINOR, BY AND THROUGH HIS FATHER AND NEXT FRIEND, JOSE SUAREZ, APPELLEE, V. OMAHA PUBLIC POWER DISTRICT, A POLITICAL SUBDIVISION, APPELLANT.

352 N.W.2d 157

Filed July 20, 1984. No. 83-396.

1. **Political Subdivisions Tort Claims Act: Appeal and Error.** Findings of fact made by the district court in cases brought under the Political Subdivisions Tort Claims Act will not be disturbed on appeal unless clearly wrong.
2. **Minors: Negligence.** If the actor is a child, the standard of care to which he must conform to avoid being contributorily negligent is that of a reasonable person of like age, intelligence, and experience under the same circumstances.
3. **Negligence.** One who is capable of understanding and discretion and who fails to exercise ordinary care and prudence to avoid defects and dangers which are open and obvious is negligent or contributorily negligent.
4. **Public Utilities: Electricity: Negligence.** Power companies engaged in the transmission of electricity, especially electricity of high voltage, are charged with the duty of exercising a very high degree of care to safeguard those whose lawful activities expose them to the risk of inadvertent contact with the electric lines,

but they are not insurers and not liable for damages in the absence of negligence.

5. _____: _____: _____. Power companies which are engaged in the transmission of electricity cannot be totally oblivious to the fact that children have a propensity to climb trees. It is ordinarily a question of fact, to be resolved by the trier of fact, whether or not a power company was negligent in the stringing, inspection, and maintenance of its transmission lines located in proximity to trees.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Reversed and remanded with directions to dismiss.

Joseph E. Jones of Fraser, Stryker, Veach, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellant.

Michael G. Goodman of Matthews & Cannon, P.C., for appellee.

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

WHITE, J.

This is an action under the Nebraska Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1983), against Omaha Public Power District (OPPD) for the personal injuries sustained by Jose Suarez, a minor, when he came in contact with an electrical transmission line owned and maintained by OPPD. Mr. and Mrs. Eugene Hubenka, owners of the tree in which plaintiff was climbing when he came in contact with the wire, were dismissed from the lawsuit when the trial court sustained their motion for summary judgment. No issue was raised concerning this dismissal, and the Hubenkas are not a party to this suit.

The trial court, as trier of fact, found generally in favor of the plaintiff, Jose Suarez, and against the defendant, OPPD. Specifically, the court found that OPPD was negligent in maintaining the wires and in trimming the tree in question. The court also found that the plaintiff was negligent but that his negligence was slight when compared with the gross negligence of the defendant. The trial court entered judgment in favor of the plaintiff for $25,500.90, and the defendant properly perfected this appeal.

On the morning of April 13, 1981, plaintiff, a 12-year-old boy, along with a friend, Mike Wright, decided to climb a tree located in the Hubenkas' yard. The tree was a 27-foot pine tree. It was easily climbable, and both boys had climbed it numerous times before. A telephone wire and neutral ground wire ran through the tree. The tree had been trimmed in March 1980 at the direction of OPPD. The trimming left a stump with a horizontal base approximately 8 inches in diameter. Three uninsulated, high voltage wires were strung above the tree. The middle wire, which carried 4,160 volts of alternating current, was directly above the stump, with a vertical clearance between the stump and the wire of 6 feet. The parties stipulated that the wire with which the plaintiff came in contact was strung 33 feet above ground. The plaintiff climbed to the top of the tree, and Mike Wright was below him in the tree. Mike became frightened and wanted to get down. The plaintiff testified that his feet were on a branch about 1 foot below the top stump. He stated that he was bent at the knees and waist and that as he was climbing down he lost his balance. The next thing plaintiff remembers is waking up in the tree. Although the plaintiff admitted that just before he was shocked, he yelled, "I think I could almost touch the wires," the plaintiff testified he did not intentionally try to grab the wires, nor does he remember whether he reached up toward the wires. Plaintiff was 5 feet 5 inches tall on the day of the accident. He received electrical burns from contacting the wire, including an entry wound on the left hand and an exit wound on the lower portion of his right leg.

Plaintiff's claim against defendant was one sounding in negligence. In his petition the plaintiff alleged that OPPD was negligent in (1) maintaining a tree near a power pole in which uninsulated, high voltage wires were strung, (2) failing to trim the top of the tree back to increase the clearance between the top of the tree and the wires, (3) failing to warn of the dangers of climbing a tree and touching or coming in close proximity to the overhead wires, and (4) failing to take measures to insure that the plaintiff and other children would not climb the tree. In its answer OPPD denied being negligent, and added the defense that plaintiff was contributorily negligent.

The trial court held that plaintiff's negligence was slight in

comparison to defendant's negligence which was gross. OPPD appeals, and although it assigns numerous errors, we discuss only two, the negligence, if any, of the plaintiff and the defendant.

Findings of fact made by the district court in cases brought under the Nebraska Political Subdivisions Tort Claims Act will not be disturbed on appeal unless clearly wrong. *McGinn v. City of Omaha,* 217 Neb. 579, 352 N.W.2d 545 (1984); *Garreans v. City of Omaha,* 216 Neb. 487, 345 N.W.2d 309 (1984).

Although there are no Nebraska cases directly on point, there is no shortage of authority from other jurisdictions. See Annot., Liability for Injury to or Death of Child from Electric Wire Encountered while Climbing Tree, 91 A.L.R.3d 616 (1979).

The general rule as to the standard of care to which a child must conform to avoid being contributorily negligent is that of a reasonable person of like age, intelligence, and experience under the same circumstances. *Cullinane v. Interstate Iron & Metal,* 216 Neb. 245, 343 N.W.2d 725 (1984); *Camerlinck v. Thomas,* 209 Neb. 843, 312 N.W.2d 260 (1981).

At the time of the accident Jose Suarez was about 3 weeks shy of his 13th birthday and possessed average intelligence. He testified that he knew before he climbed the tree that there were powerlines running above the tree and that he could be shocked if he touched the lines. The record is unclear as to whether he knew the extent of the dangers of electricity.

As far back as 1907, and still applicable today, is our finding in *Johnston v. New Omaha Thomson-Houston Electric Light Co., on rehearing* 78 Neb. 27, 113 N.W. 526 (1907), that a 12-year-old child should possess sufficient knowledge that a wire which carries a current of electricity is capable of causing shock or injury should one come in contact with it. " 'One who is capable of understanding and discretion and who fails to exercise ordinary care and prudence to avoid defects and dangers which are open and obvious is negligent or contributorily negligent.' " *Disney v. Butler County Rural P. P. Dist.*, 183 Neb. 420, 423, 160 N.W.2d 757, 759 (1968).

Plaintiff was of sufficient age, intelligence, and experience to understand the risk of climbing to the top of the tree in proxim-

ity to overhead powerlines. We are in accord with the trial court judge, and we find that the plaintiff was guilty of contributory negligence.

If plaintiff's conduct was slightly negligent, it then became incumbent on him, in order to recover a judgment, to prove that defendant's conduct was gross in comparison. See, Neb. Rev. Stat. § 25-1151 (Reissue 1979); NJI 3.21.

Power companies which engage in the transmission of electricity, especially electricity of high voltage, are charged with the duty of exercising a very high degree of care to safeguard those whose lawful activities expose them to the risk of inadvertent contact with electrical lines, but they are not insurers and are not liable for damages in the absence of negligence. Power companies must anticipate and guard against events which may reasonably be expected to occur, and the failure to do so is negligence. See, *Lorence v. Omaha P. P. Dist.*, 191 Neb. 68, 214 N.W.2d 238 (1974); *Roos v. Consumers Public Power Dist.*, 171 Neb. 563, 106 N.W.2d 871 (1961). Included in this general duty of care is a more specific obligation. It has often been held that power companies which are engaged in the transmission of electricity cannot be totally oblivious to the fact that children have a natural and sometimes insatiable inclination to ascend even the highest of trees. It is ordinarily a question of fact, to be resolved by the trier of fact, whether or not a power company was negligent in the stringing, inspection, and maintenance of its transmission lines located in proximity to trees. See, *Blackwell v. Alabama Power Company*, 275 Ala. 123, 152 So. 2d 670 (1963); *Alabama Power Company v. Taylor*, 293 Ala. 484, 306 So. 2d 236 (1975); *Dolata v. Ohio Edison Co.*, 2 Ohio App. 3d 293, 441 N.E.2d 837 (1981); *Petroski v. NIPSCO*, 171 Ind. App. 14, 354 N.E.2d 736 (1976).

Judging the conduct of the defendant under this standard of care, it is difficult to understand how OPPD could anticipate that a child, nearly 13 years of age with knowledge of the overhead electrical wires and with at least a minimum amount of knowledge concerning their danger, would climb a tree to a point at least 26 feet above ground and come in contact with lines 33 feet above ground. There is no evidence that the defendant had knowledge that children climbed this particular tree or

that the wires were hidden from view. No claim is made that defendant, by its easement, did not have a legal right to string the wires where they were located. There was no evidence that the wires were strung in a defective fashion or that the minimum safety standards applicable to electrical transmission companies were violated. This is not a case in which the high voltage lines were strung through a tree which was easily climbable. In fact, the undisputed evidence shows a vertical clearance of 6 feet from the very top of the tree to the wires, with a full 7 feet of clearance from a point in the tree where there is even a remote possibility that anyone would stand.

Even if we consider the evidence in a light most favorable to the successful party and resolve every controverted fact in plaintiff's favor, we are unable to conclude that defendant's conduct was grossly negligent when compared with plaintiff's conduct. Because the trial court's finding that defendant's conduct was grossly negligent is clearly wrong, we are compelled to reverse the court's order.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

ERIN RANCHO MOTELS, INC., APPELLEE, V. UNITED STATES FIDELITY AND GUARANTY COMPANY, APPELLANT.

352 N.W.2d 561

Filed July 20, 1984. No. 83-398.

1. **Trial: Juries: Appeal and Error.** A finding of fact made by a jury will not be set aside on appeal if it is supported by credible evidence.
2. **Insurance: Words and Phrases.** The term "actual cash value," as used in a policy of property insurance, means market value, i.e., that amount for which property may be sold by a willing seller who is not compelled to sell it to a buyer who is willing but not compelled to buy it. In deciding market value of property one should consider the situation and condition of the property as it was at the time, and all the other facts and circumstances shown by the evidence that affected or had a tendency to establish its value.
3. **Claims: Prejudgment Interest.** Where the amount of a loss, the subject of litiga-

tion, cannot be computed without opinion or discretion, as a general rule the claim is unliquidated and prejudgment interest is not recoverable.

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

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

Lawrence H. Yost of Yost, Schafersman, Yost, Lamme & Hillis, for appellee.

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

HASTINGS, J.

This was an action on an insurance policy to recover a loss sustained by fire. Following trial to a jury, a verdict was returned in favor of the plaintiff, upon which a judgment was entered by the court in the amount of $183,000. The court also awarded the plaintiff attorney fees and prejudgment interest at 12 percent per annum on $140,211 from and after July 1, 1981.

In its appeal to this court the defendant assigns as error: (1) The court failed to submit to the jury the issue of whether the plaintiff has complied with the terms of its insurance policy; (2) The court erroneously chose to define "actual cash value" in its instructions to the jury; (3) The definition of "actual cash value" given by the court was an incorrect definition; and (4) The court was in error in awarding prejudgment interest.

On August 17, 1980, a fire did considerable damage to the motel owned by the plaintiff and which was located in Grand Island, Nebraska. At the time of the loss this complex of buildings was insured against loss by fire by a policy of insurance issued by the defendant, United States Fidelity and Guaranty Company. The morning after the fire, the plaintiff's general manager notified the agent who sold the policy.

The building involved in this litigation was insured for a value of $247,000. Larry Murphy, the plaintiff's general manager, testified that the valuations placed on the various buildings had been recommended by agents of the defendant following an appraisal which they had obtained. After the fire Murphy said that he was unable to agree with the defendant on a

settlement figure. Therefore, in September of 1981 an oral agreement was made between the plaintiff and John Claussen Sons construction company to do the repair work on a cost-plus basis. A short time later, this action was filed.

The evidence presented at the trial, upon which the verdict and judgment apparently were rendered, included a three-page invoice for repairs in the amount of $117,234.06, checks for various light fixtures totaling in excess of $2,800, and the testimony of Murphy that it would cost an additional $103,000 to complete the necessary repairs.

In arguing its first assignment of error the defendant contends the court should have charged the jury to determine whether the plaintiff had complied with the conditions of its policy by furnishing a detailed inventory of the damaged property as well as a sworn proof of loss statement. The particular policy provision to which the defendant refers is found under CONDITIONS APPLICABLE TO SECTION I, which provides in part at paragraph 9 as follows:

> In case of loss the named insured shall: . . .
>
> (e) submit to the Company within 60 days *after requested* a signed, sworn statement of loss that sets forth to the best of the named insured's knowledge and belief:
>
> . . .
>
> (5) specifications of any damaged building and detailed estimates for repair of the damage.

(Emphasis supplied.)

The emphasized portion of the requirements is a simple enough answer to the defendant's claim. There is no evidence in the record that a request for such sworn statement of loss was ever made. The record does disclose, through the testimony of Larry Murphy, that an estimate of the fire damage was prepared on September 11, 1980, by John Claussen Sons construction company, which was submitted to a representative of the defendant. George Claussen also testified that he furnished to the defendant a complete set of the original set of plans of the motel, presumably to aid the defendant in obtaining an independent estimate of the damage. The defendant did in fact obtain independent estimates from two other sources.

From our review of the record we see no factual issue whatso-

ever as to the alleged failure of the plaintiff to comply with paragraph 9(e) of the policy provisions.

The next two assignments of error refer to the definition of "actual cash value" as it pertains to the coinsurance clause of the policy. Again, referring to the portion of the policy headed CONDITIONS APPLICABLE TO SECTION I, we find the following:

> 3. Coinsurance Clause. The Company shall not be liable for a greater proportion of any loss to property covered than the limit of liability under this policy for such property bears to the amount produced by multiplying the actual cash value of such property at the time of the loss by the coinsurance percentage stated in the Declarations.

It is argued by the defendant that the actual cash value of the property exceeded the declared "actual cash value" so as to require under the coinsurance clause a reduction of any amount found to be the amount of loss.

In this case there was expert opinion offered by both parties as to the "actual cash value." Plaintiff's expert fixed that value of the particular buildings at $253,700. Based on that valuation, there would be no requirement that the amount of loss be reduced. However, the defendant's expert calculated "actual cash value" at $376,000, which would have required a reduction in the amount of actual loss to approximately 82 percent.

However, the "actual cash value" as found by the jury was $300,700, which would require no change in the amount found to constitute the actual loss. Such a finding constitutes a decision as to a question of fact which will not be disturbed on appeal if supported by credible evidence. There was sufficient credible evidence in support of that finding.

Although the defendant alleges that the court erred in choosing to define "actual cash value" at all in its instructions, as well as utilizing an incorrect definition, it seems apparent from its argument that the defendant is not really complaining that the attempt to define was made but, rather, that it was an incorrect definition.

The definition of which complaint has been made is found in instruction No. 6. That instruction reads as follows:

> The term "actual cash value" as used in these instruc-

> tions and in the insurance policy in question herein means that amount which would be paid for the property in question by a willing purchaser, who is not compelled to buy it when purchasing such property from a willing seller who is not compelled to sell it. *In determining the actual cash value of the property in question, you shall consider all of the facts and circumstances shown by the evidence to affect or having a tendency to establish its value.*

(Emphasis supplied.)

The record discloses that the plaintiff's expert on value used, in arriving at his opinion of such value, the cost less depreciation basis, comparable sales method, and income approach. Defendant's expert insisted that the replacement cost less depreciation was the only method suitable for use in arriving at "actual cash value" for coinsurance purposes.

The term "actual cash value" is utilized in another portion of the policy. In VI. VALUATION it is stated as follows:

> The following bases are established for valuation of property:
>
> . . . .
>
> D. All other property at actual cash value at the time of loss, but not exceeding the amount which it would cost to repair or replace the property with material of like kind and quality within a reasonable time after such loss, nor in any event for more than the interest of the named insured.

In neither instance, in the section just quoted or in the coinsurance section previously cited, is the term "actual cash value" defined within the policy language. However, this court has defined "actual cash value" when used in the connotation of the amount of the loss. In *Borden v. General Insurance Co.*, 157 Neb. 98, 113-14, 59 N.W.2d 141, 149-50 (1953), we said:

> The jury should have been instructed, in the condition of the record, that actual cash value of property, as the words are used in this case, means the market value of it; that market value is the amount for which property may be sold by a willing seller who is not compelled to sell it to a buyer who is willing but not compelled to buy it . . . and that the jury in deciding the market value of the property should consider the situation and condition of the prop-

> erty as it was at the time and all the other facts and circumstances shown by the evidence that affected or had a tendency to establish its value.

This remains the law of Nebraska to this date.

However, the defendant urges us to adopt the "broad evidence rule" as set forth in *Messing v. Reliance Ins. Co.*, 77 N.J. Super. 531, 187 A.2d 49 (1962), for determining "actual cash value" as used in the coinsurance clause. The court, after detailing the shortcomings of both market value and replacement cost less depreciation as methods of determining actual cash value, ordered as follows:

> The appraisers and umpire are instructed that in determining the actual cash value of the property involved they may consider every fact and circumstance which would logically tend to the formation of a correct estimate of the building's value, including the original cost, the economic value of the building, the income derived from the building's use, the age and condition of the building, its obsolescence, both structural and functional, its market value, and the depreciation and deterioration to which it has been subjected.

Id. at 535, 187 A.2d at 51-52.

We have no particular quarrel with that definition. However, we believe that actual cash value must still be measured as an economic unit, i.e., related to what, in terms of value, one could receive for his or her property. Fair market value is a term which has been used and is generally understood by experts and lay people alike, and which may be found by employing, if you will, the broad evidence rule. The definition employed by the trial court was taken almost verbatim from *Borden*, and, by it, the jury was instructed to consider all facts and circumstances shown by the evidence to affect or establish such value. We continue to approve that definition for "actual cash value" wherever it is used in a policy of property damage insurance.

Finally, the defendant insists that it should not have been required to pay prejudgment interest because the amount of recovery was not a liquidated amount. We agree. The amount of the loss was the subject of diverse opinion testimony. Where the amount of loss cannot be computed without opinion or dis-

cretion, the claim is unliquidated and prejudgment interest is not recoverable. *Holt County Co-op Assn. v. Corkle's, Inc.*, 214 Neb. 762, 336 N.W.2d 312 (1983). This is still true even though the party who is required to pay has made an offer of settlement in a specific amount.

The judgment of the trial court is affirmed except for the award of prejudgment interest. The defendant is ordered to pay $2,000 toward the fees of the plaintiff's attorney in this court.

AFFIRMED AS MODIFIED.

SHANAHAN, J., concurring in part, and in part dissenting.

I agree with the majority that judgment on the jury's verdict should be affirmed, but I disagree on the disallowance of prejudgment interest.

The motel burned on August 17, 1980. On August 18 United States Fidelity and Guaranty Company (U.S.F. & G.) learned about the fire, and on the same day a supervisor-adjuster of U.S.F. & G. inspected the devastation. There was no question that the loss was covered by insurance. As expressed by U.S.F. & G., the insurance company embarked on a determination of repairs to restore its insured to a "preloss condition."

On October 22, 2 months after the fire, a contractor hired by U.S.F. & G. surveyed the fire damage to the motel and then prepared an extensive written itemization of damages and repairs. U.S.F. & G.'s contractor meticulously classified and listed damages in 10 separate categories and estimated repairs at $111,310. U.S.F. & G. received its contractor's estimate on November 24, 3 months after the fire.

After a series of collaborated adjustments by the insurance company and its contractor concerning the November 24 itemization, on February 26, 1981, U.S.F. & G. recognized the extent of the loss and repairs at the figure of $141,643, now 6 months after the fire. However, U.S.F. & G. quietly restrained its welling magnanimity until June 25, when U.S.F. & G. succumbed in a burst of its own largess by a letter to the motel owner and proposed a settlement, 10 months after the fire, 7 months after the exact nature and extent of the damage had been determined, and after 4 months of the insurance company's self-imposed and inexplicable reclusion following determination of the monetary amount of necessary repairs in the esti-

mation of U.S.F. & G.

Therefore, as early as October 22, 1980, not only was the fire loss determinable, but at February 26, 1981, the monetary amount of the loss in fact had been determined as far as U.S.F. & G. was concerned. The criterion for recoverable interest should not be whether the claim is liquidated or unliquidated; rather, the test should be determinability of the amount of damages claimed. See Note, *Recovery of Prejudgment Interest on an Unliquidated State Claim Arising Within the Sixth Circuit*, U. Cin. L. Rev. 151 (1977).

Today numerous courts award prejudgment interest as a basic element of damages, even in contract cases. See *Cree Coach Co. v. Wolverine Ins. Co.*, 366 Mich. 449, 115 N.W.2d 400 (1962); cf. *State v. Phillips*, 470 P.2d 266 (Alaska 1970) (tort). Prejudgment interest has been recoverable for an insured fire loss, although an insured's claim was unliquidated in the sense that the exact monetary amount of the loss was disputed and required resolution by litigation. See, *Northwestern States Portland Cem. Co. v. Hartford F. I. Co.*, 360 F.2d 531 (8th Cir. 1966) (applying the law of Iowa); *Aetna Insurance Company v. Barnett Brothers, Inc.*, 289 F.2d 30 (8th Cir. 1961); *J. P. Cope Hotels Co. et al. v. Ins. Co.*, 126 Pa. Super. 260, 191 A. 636 (1937); *Bernhard v. Rochester German Ins. Co.*, 79 Conn. 388, 65 A. 134 (1906); *The Peoria Marine and Fire Insurance Co. v. Lewis et al.*, 18 Ill. 553 (1857).

Underlying recoverability of prejudgment interest is a fundamental aspect of our jurisprudence, namely, to provide full and adequate compensation to a claimant and to award damages for delay in payment of money otherwise due a claimant. In cases such as the one before us, interest should be recoverable and awarded as a judicial measure originating in basic fairness—the right to full and fair compensation on a just claim. Therefore, I believe that prejudgment interest should have been allowed in this case because there was never a question that the loss occurred, no question that the insurance company owed the loss, and no doubt that the extent of damages was indeed determinable, and the monetary amount of the loss had in fact been determined by the insurance company well in advance of any offer of settlement or ensuing litigation.

GRANT, J., joins in this concurrence and dissent.

EMERY L. BASHUS, APPELLANT, V. MARGIE A. TURNER AND ROBERT I. TURNER, APPELLEES.

352 N.W.2d 161

Filed July 20, 1984. No. 83-420.

1. **Jury Instructions.** Jury instructions should be considered as a whole, and the meaning of an instruction or instructions, when taken as a whole, must be considered, and not just the phraseology of a particular part.
2. **Pleadings.** The purpose of pleadings is to frame the issues upon which a cause is to be tried and advise the adversary as to what he must meet.
3. **Verdicts.** A verdict will not be set aside as inadequate unless so clearly against the weight and reasonableness of the evidence and so disproportionate to the injury proved as to indicate that it was the result of passion, prejudice, mistake, or some other means not apparent in the record, or that the jury disregarded the evidence or rules of law.

Appeal from the District Court for Lancaster County: SAMUEL VAN PELT, Judge. Affirmed.

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

Alan L. Plessman, for appellees.

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

COLWELL, D.J., Retired.

In this appeal from a $458 judgment entered in his favor pursuant to a jury verdict, plaintiff-appellant, Emery L. Bashus, claims the trial court erred in its jury instructions and in failing to grant a new trial because of the insufficiency of the verdict. We affirm.

On March 6, 1980, in daylight hours, Emery Bashus was walking north on the west side of 9th Street in Lincoln, Nebraska. As he crossed G Street at its intersection with 9th Street, he was struck while in the crosswalk by an automobile operated by defendant-appellee Margie A. Turner, who was turning south from G Street into 9th Street. Bashus testified that when he was about 30 feet from the intersection, he noticed Turner's vehicle slowly approaching the intersection from the west on G Street. Assuming she would stop for the stop sign that protected the intersection, he proceeded across the intersection. Bashus

testified:

> Q And did you continue on northbound along 9th?
>
> A Yes, I did.
>
> Q Would you relate what occurred from that point on?
>
> A As I left the curb and had started across, I had already — I was already off the curb and had started across. The car wasn't going to stop, that was coming.
>
> Q Did you — When did you know or decide that it wasn't going to stop?
>
> A When it was coming at me.
>
> Q Okay. How far away, if you recall, was it at that time?
>
> A I can't — At that time, it was just — coming at me, it couldn't have been more than three feet, or so.
>
> Q Okay. Did you think, prior to that time, that it was going to stop?
>
> A Yes, I did.
>
> Q Did it appear that it was slowing down for a stop?
>
> A It was slowing down.

John Rallis, the investigating officer, testified:

> A I asked him [Bashus] how the accident had occurred and what he had been doing prior to the accident, and he stated that he was walking north on the sidewalk; as he approached G Street he stepped off the curb and he observed a vehicle that was eastbound on G Street and he observed the vehicle wasn't going to stop, so he began to run and he jumped prior to being struck by the vehicle.

When Bashus saw that he would be struck by the car, he leaped onto the hood of Turner's vehicle to avoid being run over. Bashus was taken to the hospital, where he was diagnosed as having an abrasion of the right leg and a sprained right ankle. He did not work that day but returned to work the next.

Turner said she did not see Bashus until she was upon him. Her view to her right was obstructed by cars parked along the south side of G Street; further, her attention was directed to the southbound traffic on 9th Street. She admitted that she drove her car slowly onto the crosswalk without stopping. The impact was 11 feet from the G Street south curb.

In September of 1980 Bashus contacted a psychiatrist, complaining of a lack of self-confidence, which included indecisive-

ness, problems with sleep, constant reliving of the accident, and fear of crossing intersections. The psychiatrist testified that Bashus suffered from post-traumatic stress disorder which had eased in its severity by the time of trial, but which was likely to last throughout the rest of Bashus' life.

Bashus incurred medical expenses of $637.13, $182.40 for his physical injuries and $454.73 for his psychiatric treatment, including drugs. He also claims a $1,079.53 wage loss. There was conflict in the evidence as to whether all of these items resulted from the accident.

> [T]he law in this state is well established that a pedestrian crossing at a regular crosswalk with the right-of-way has a right, until he has notice or knowledge to the contrary, to assume that others will respect his right-of-way. . . .
>
> However, the law is also well settled that even though a statute grants the right-of-way to a pedestrian crossing a street in the crosswalk, it does not excuse contributory negligence on his part.

Holly v. Mitchell, 213 Neb. 203, 210, 328 N.W.2d 750, 754 (1982). See, also, *Farag v. Weldon*, 163 Neb. 544, 80 N.W.2d 568 (1957).

In connection with the jury instructions, Bashus urges that the trial court erred in (1) giving instruction No. 11, (2) refusing to give Bashus' proposed instruction No. 2, rather than its instructions Nos. 7 and 10, and (3) instructing the jury concerning comparative negligence.

Instruction No. 11 reads: "It is the duty of a pedestrian who is in a place of safety, and who sees or could have seen the approach of a moving vehicle in close proximity to him, not to move suddenly from his place of safety into the path of such vehicle."

The authority for this instruction has a long history in our law. See, *Cuevas v. Yellow Cab & Baggage Co.*, 141 Neb. 662, 4 N.W.2d 790 (1942); *Corbitt v. Omaha Transit Co.*, 162 Neb. 598, 77 N.W.2d 144 (1956); *Farag v. Weldon, supra; Gerhardt v. McChesney*, 210 Neb. 351, 314 N.W.2d 258 (1982).

Bashus takes issue with this instruction on two grounds: (1) There is no evidence of sudden movement and (2) he never moved from a place of safety, since a crosswalk is such per se.

Bashus argues that *Dunlap v. Coleman*, 201 Neb. 148, 266 N.W.2d 527 (1978), is dispositive. It was a pedestrian-intersection accident where an instruction similar to No. 11 was held as error. That case is distinguishable on the facts—the pedestrian was struck from the rear, and the court said that the pedestrian had no duty to maintain a lookout to the rear to avoid a charge of negligence.

Travinsky v. Omaha & C. B. Street R. Co., 137 Neb. 168, 288 N.W. 512 (1939), involved a pedestrian who had stopped in an intersection close to the path of a moving streetcar. He "made a sudden dash" in front of the streetcar. The court said that when the pedestrian was stopped, he was in a place of safety, and, "The negligence does not arise from the single circumstance of whether the pedestrian looks or does not look. The determining element in this type of case is the sudden movement into the path of the vehicle followed by almost instantaneous collision." *Id.* at 173, 288 N.W. at 514-15.

While an official designation of a crosswalk contributes to the safety of pedestrians, the place of safety contemplated by instruction No. 11 is any place established by the evidence that is occupied by the pedestrian just prior to sudden movement where he is then safe from injury, considering the facts and circumstances in each case then existing. It is a jury question. There was evidence presented to the jury on all issues covered by instruction No. 11. Bashus' assignment with respect to instruction No. 11 fails.

Bashus next contends that his requested instruction No. 2 should have been given instead of the court's instructions Nos. 7 and 10. His proposed instruction No. 2 reads: "A pedestrian crossing at a regular crosswalk and having the right-of-way has a right to assume that his right-of-way will be respected until he has notice or knowledge to the contrary."

The trial court's instructions Nos. 7 and 10 were as follows:

> [7] A person may assume that every other person will use reasonable care and will obey the law until the contrary reasonably appears.
>
> [10] The right of a pedestrian to the lawful use of a street or highway is in all respects equal to that of a person driving an automobile, but each person or vehicle on the

> street or highway must so exercise his right to use it as not to injure others and must exercise such caution as an ordinarily prudent person would exercise under like circumstances. In other words, the rights of pedestrians and motor vehicles on a public street or highway are equal and each is obliged to act as a reasonably prudent person would with respect to the movements of the other. A person having the right of way is nevertheless obligated to exercise ordinary care for his own safety and to avoid an accident.

Bashus' sole problem with instruction No. 7 is that he believes it is not specific enough. Jury instructions should be considered as a whole, and the meaning of an instruction or instructions, when taken as a whole, must be considered, and not just the phraseology of a particular part. *Keating v. Klemish*, 214 Neb. 458, 334 N.W.2d 440 (1983). From a full review of all instructions, we conclude there is no merit in this claimed error.

Concerning instruction No. 10, this court, in *Holly v. Mitchell*, 213 Neb. 203, 328 N.W.2d 750 (1982), an automobile-pedestrian accident occurring in a crosswalk protected by a traffic signal, specifically approved an instruction identical to the trial court's instruction No. 10.

There was no error in instructions Nos. 7, 10, and 11 as given.

Next, Bashus contends that the trial court erred in instructing on comparative negligence, Neb. Rev. Stat. § 25-1151 (Reissue 1979), claiming that Turner did not specifically plead that Bashus' slight negligence was sufficient to reduce or mitigate damages.

Turner's answer alleges that "the subject accident and any injuries or damages sustained by plaintiff . . . are the direct and proximate result of his own negligence in failing to maintain a proper lookout and in failing to yield the right-of-way . . . sufficient . . . to bar his recovery."

The purpose of pleadings is to frame the issues upon which a cause is to be tried and advise the adversary as to what he must meet. *Moore v. Puget Sound Plywood*, 214 Neb. 14, 332 N.W.2d 212 (1983). Pleading Bashus' contributory negligence in the fashion employed by Turner advised Bashus that his contributory negligence was at issue, and the comparative negli-

gence instruction was proper.

In his final assignment Bashus contends it was error for the trial court to deny his motion for new trial, because the damage award was clearly inadequate. The jury returned a verdict of $458. Bashus contends that the undisputed evidence shows that he incurred $607.13, which the record shows to be $637.13, in reasonable and necessary medical expenses. As pointed out earlier, of these medical expenses only $182.40 was incurred as a result of treating Bashus' physical injuries. The rest were related to his psychiatric treatment. Bashus also contends that he lost wages in the amount of $1,079.53. The evidence at trial shows he returned to work on the day following the accident, after missing the previous 8-hour workday because of the accident. He was paid at the hourly rate of $8.27. The majority of the other workdays lost were more than 9 months later.

A verdict will not be set aside as inadequate unless so clearly against the weight and reasonableness of the evidence and so disproportionate to the injury proved as to indicate that it was the result of passion, prejudice, mistake, or some other means not apparent in the record, or that the jury disregarded the evidence or rules of law. *K & R, Inc. v. Crete Storage Corp.*, 194 Neb. 138, 231 N.W.2d 110 (1975); *Cooper v. Hastert*, 175 Neb. 836, 124 N.W.2d 387 (1963). This is not such a case.

AFFIRMED.

KRIVOSHA, C.J., dissenting.

I regret that I must respectfully dissent from the majority opinion in this case. While it may very well be that the injuries are not as serious as Mr. Bashus would have us believe and, therefore, the verdict of the jury is correct, nevertheless, I have difficulty agreeing with a proposition of law to the effect that when the driver of an automobile, who admittedly does not see a pedestrian, strikes the pedestrian while the pedestrian is in a marked crosswalk, the pedestrian is somehow guilty of negligence because he went from a place of safety to a place of danger. It would appear that this case may be misunderstood for the proposition that every pedestrian leaves the sidewalk at his own risk. I do not believe that to be the law in this jurisdiction. See *Dunlap v. Coleman*, 201 Neb. 148, 266 N.W.2d 527 (1978).

The majority relies upon testimony to the effect that Mr.

Bashus, after he observed that the Turner vehicle was not going to stop, began to run, and jumped prior to being struck by the vehicle. I do not read the testimony to mean that Bashus ran in front of the vehicle; rather, I read that to mean that when he realized the Turner vehicle was not going to stop, he ran to what he hoped would be a place of safety, but was not able to get away from the Turner vehicle. I do not believe that such action on the part of a pedestrian constitutes an act which would have justified the trial court in giving instruction No. 11. For that reason I would have reversed and remanded.

WHITE, J., joins in this dissent.

IN RE INTEREST OF D., A CHILD UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. L.J.D. ET AL., APPELLANTS.
352 N.W.2d 566

Filed July 20, 1984. No. 83-583.

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 any disputed facts make our own findings independent of any conclusion reached by the trial court.

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

Richard C. Anderson, for appellants.

Gerald R. Jorgensen, Deputy Buffalo County Attorney, for appellee.

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

SHANAHAN, J.

The county court for Buffalo County, sitting as a juvenile court, terminated the parental rights of the father and mother to their minor child, and the parents appealed to the district court, which affirmed. This appeal followed, and we affirm.

The father and mother were married on November 17, 1979. They first arrived in Kearney, Nebraska, in late August 1980. Approximately 1 month later, on September 21, 1980, the child was born and the family moved in with friends. That living arrangement continued until December 11, 1980, when the parents in these proceedings and their child moved. Because the parents were unable to provide immediate housing for themselves and their child, the parents voluntarily placed the child with the Buffalo County Department of Social Services for temporary foster care. On December 19, 1980, a juvenile petition was filed, alleging that the child was as described in subsections (1) and (2) of Neb. Rev. Stat. § 43-202 (Reissue 1978).

On January 7, 1981, a hearing was held at which the parents admitted that their child was a child as described in § 43-202(1), namely, that the child was "homeless or destitute, or without proper support through no fault of his parent . . . ." Cf. Neb. Rev. Stat. § 43-247 (Cum. Supp. 1982) (substantially similar language). Upon the evidence the county court made an adjudication determining the child to be as described in § 43-202(1), and ordered a plan of parental rehabilitation, namely, the child could be returned to the parents' home on condition that the parents (1) showed employment stability, (2) provided a suitable and stable home environment, (3) demonstrated financial and physical abilities to care for the child, and (4) cooperated in all programs required by the county department of social services.

Physical custody of the child was transferred from the county department of social services to the parents on February 14, 1981. The department of social services continued supervision of the child and his parents. The parents were required to keep doctors' appointments, receive psychological evaluations, cooperate with a homemaker from the welfare department in order to improve their home environment, and maintain an adequate living environment for the child. By mid-March 1981 the father had no steady employment, and failed to cooperate in the programs offered and required by the welfare department. The child developed a severe diaper rash which was brought to the attention of a physician only after intervention by the welfare department's homemaker. Although medicine for the child's diaper rash was obtained once, the parents did not refill

the required prescription to alleviate the child's rash, notwithstanding that the parents found money to purchase approximately two packs of cigarettes each day.

Before any further intervention by the court, and in violation of a January 7, 1981, court order forbidding removal of the child from the court's jurisdiction, the parents took their child to Florida. Felony charges of an unspecified nature were filed against the parents for removing their child from Nebraska. The parents were returned to Nebraska from Florida through extradition proceedings in the late summer or early fall of 1981. In September 1981 the child was returned to Nebraska and placed in renewed foster care. In Nebraska the parents' efforts to take advantage of rehabilitative services afforded by the welfare department were sporadic. The rehabilitation program had little or no success. The mother visited the child twice from the fall of 1981 to February 1982, while the father visited the child only once during that period.

On February 2, 1982, a review hearing was held, and the court ordered a definite rehabilitation program for the parents. This program required the parents to (1) secure and maintain full-time employment; (2) locate suitable housing; (3) participate in and complete the following specific programs: (a) classes designed to improve skills for the care and management of children, (b) alcohol treatment, and (c) marital counseling; (4) follow terms and directions of their felony probations; and (5) cooperate with the department of welfare and the services of its homemaker. The parents were allowed reasonable visitation of their child during such proposed program.

The father had a severe alcohol problem. However, because he believed he could control his alcoholism without outside help, the father exhibited limited participation in the county's counseling services and discontinued Antabuse prescribed as part of the father's treatment for alcoholism and rehabilitation. The only requirement regarding parenting classes was the physical presence of the parents at 7 of 10 class sessions. The mother completed the parenting classes, but the father did not. Marital counseling at the South Central Community Mental Health Services was terminated when the parents failed to pay a $1 per session fee for eight sessions. According to the father,

there were several months that he could have paid the total back fees of $8, but the father acknowledged nonpayment because he did not care to continue counseling. Throughout this time, the father's employment was still sporadic, and the mother forgot several appointments with the county's homemaker. The family fell in arrears in rent and were forced to move again.

In December 1982 the Buffalo County attorney's office requested a dispositional hearing for the termination of parental rights. The dispositional hearing was held on January 21 and February 2, 1983. After receiving evidence the county court entered an order terminating the parental rights of the appellant parents. That order was affirmed on appeal to the district court.

The parents contend the evidence before the court was insufficient to support termination of parental rights.

"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." *In re Interest of W.*, 217 Neb. 325, 329, 348 N.W.2d 861, 864 (1984); 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).

The county's homemaker informed the parents of hygiene, nutrition, meal planning, and general child care. According to the homemaker, the goal of her efforts is "to help people to learn how to take care of their home so they can take care of their children and have their children." The child was in the physical custody of his parents from February 14 through August 5, 1981, when the family moved to Florida. Despite her efforts over this 6-month period, the county's homemaker saw no improvement in parental skills. During that same 6-month period, the homemaker on occasions observed the following: unavailability of clean diapers for the child; four bags of trash simultaneously in the kitchen, and bags of soiled clothing; "a chicken bone"; "dirt, baby food jar lids, cigarette butts"; potentially dangerous tools accessible on the floor; and rotting fish bait (dead minnows) in the kitchen sink. In July and August

of 1981, notwithstanding 6 months' contact with the county's homemaker, and when the 11-month-old child was in a walker, the homemaker observed that the child could come in contact with "wet newspapers on the floor from the dogs going to the bathroom," and feces of dogs and cats. In addition, the house was beset with an infestation of flies due to large holes in the screens admitting cats from out of doors. Cats ate on the kitchen table in the family's house.

The mother obtained employment at a local motel on August 8, 1982, and retained that employment through the termination hearing in February 1983. However, the father's employment remained inconsistent, in the form of three jobs separated by varying lengths of unemployment, with full-time employment just 5 weeks before the termination hearing.

From October 1982 to January 1983 both parents were available for appointments and consultation with the caseworker until approximately 3 p.m. on weekdays. Before the parents commenced visitation of their child, the welfare department's caseworker frequently requested that the parents visit her office in the courthouse for familiarization about the visitation conditions in the court-ordered rehabilitation. Despite these repeated requests, the parents never made an appointment with the caseworker. The mother explained that she had attempted to make an appointment but was either working or did not have transportation to the courthouse office of the caseworker. When transportation was not available, the mother walked to the courthouse, where the department of welfare office was located, and picked up her food stamps and welfare checks. Neither parent missed any weekday appointment with their probation officer, whose office was also located in the county courthouse.

From the record we conclude that the parents were not interested in maintaining contact with their minor child and were not interested in taking advantage of the rehabilitation programs offered by the welfare department. The assignment of error that there is insufficient evidence to sustain termination of parental rights is without merit.

The parents next maintain that the county court, sitting as a juvenile court, erred in finding that the best interests of the

minor child would be served by terminating their parental rights.

The primary consideration in any case involving termination of parental rights is the best interests of the child. See *In re Interest of Levey*, 211 Neb. 66, 317 N.W.2d 760 (1982).

During two visitations, one in October and one in December of 1982, the caseworker had difficulties in separating the child from his foster parents. The child, when asked to leave the home of the foster parents with the caseworker, would cry, scream, and cling to the foster parents. According to the caseworker, in December 1982 "it took us probably 15 or 20 minutes to try to work him through it and could not and finally kind of just bodily carried him out to the car with me." The child had developed a sound, affectionate relationship with his foster parents and exhibited only minimal emotional attachment to his natural parents. When he was asked to return to his foster parents after parental visitation, the child "immediately put on his coat and left" with the caseworker without any problem.

As all too frequently occurs in cases such as the one before us, the enthusiasm or receptivity of a parent toward a rehabilitation program seems to intensify as the time for a dispositional hearing approaches. A practical program of parental rehabilitation should not be viewed as our system's indulgent toleration of an otherwise intolerable situation. A parent afforded a program of rehabilitation must realize that the courts will examine a pattern of parental conduct in determining an appropriate disposition for the best interests of a child. In cases such as this the past is an indication of the future. Failure of a parent's good faith effort toward rehabilitation to correct a situation injurious to the life and normal development of a child may cause a court to conclude that a parent's past offers no future for the child.

The child is currently almost 4 years old. With the exception of 9 months with his parents, the child has spent his entire life in foster care. During this time, the parents have failed to take advantage of the efforts of the court and support services to restore the child to the family home. It weighs heavily in our minds that the parents have generally failed and neglected to take advantage of opportunities to visit their child. To now

leave the child in foster care for an indefinite period would be patently unfair to him, and would only continue the emotional problems attendant to a "temporary" custody situation. A child cannot be left suspended in foster care, and should not be required to exist in a wholly inadequate home. Further, a child cannot be made to await uncertain parental maturity. As we said in *In re Interest of R.D.J. and K.S.J.*, 215 Neb. 724, 728, 340 N.W.2d 415, 418 (1983): " ' "[W]e will not gamble with the child's future." ' " In our system of law directed toward the best interests of a juvenile, termination of parental rights is not a penalty imposed on account of poverty. Parental inability to reach heights of economic success is no basis to sever the precious relationship which normally exists between parent and child. However, that same system of laws pertaining to juveniles cannot reward parental bankruptcy evidenced by indifference or inexcusable lethargy adversely affecting the life and living conditions demanded by a child's personal dignity. The assignment of error that termination of parental rights is not in the best interests of the child is without merit.

The judgment of the district court is affirmed.

AFFIRMED.

KRIVOSHA, C.J., dissenting.

For reasons more particularly set out in my recent dissent in *In re Interest of D.R. and S.B.*, 217 Neb. 883, 351 N.W.2d 424 (1984), I find that I must likewise dissent in this case. I again believe that the record simply does not establish "by clear and convincing evidence" that the parental rights of the parties here should be terminated. It is ironic, because the record would seem to imply that if the parents had not voluntarily placed the child with the Buffalo County Department of Social Services for temporary foster care in December of 1980, the State might not have taken any action with regard to this case. Obviously, the child is not comfortable with the natural parents, having been away for so long. That is a matter, however, which I believe time would correct. I believe that we should not have terminated the parental rights in this case.

ANTHONY A. FINK ET AL., APPELLANTS, V. O'NEILL COUNTRY CLUB, APPELLEE.

352 N.W.2d 166

Filed July 20, 1984. No. 83-782.

1. **Waters.** The flow of surface water may be increased and diverted upon the land of another if it is done through an existing natural watercourse and is done in a careful manner without negligence.
2. _____. Water velocities which increase as a result of proper maintenance or construction of drainage tubes or ditches, done without negligence, are a burden which must be accepted by the servient estate.
3. _____. Surface waters resulting from rainfall or melted snow which collect and flow into a natural drainage channel or depression may not be dammed, diverted, or otherwise repelled by the owner of the land upon which they flow. In other words, it is the continuing duty of a lower landowner who builds a structure across a natural drainageway to provide for the natural passage through such obstruction of all the water which may be reasonably anticipated to drain therein.
4. **Equity: Motions to Dismiss: New Trial.** The general rule in an equity case where a motion to dismiss at the close of plaintiff's case is erroneously sustained requires that the cause be remanded to the trial court for a new trial.

Appeal from the District Court for Holt County: HENRY F. REIMER, Judge. Reversed and remanded for a new trial.

John C. Schraufnagel of Cronin, Symonds & Schraufnagel, for appellants.

No appearance for appellee.

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

PER CURIAM.

The plaintiffs appeal from an order entered by the district court dismissing this action at the close of the plaintiffs' case. The assignments of error allege that the action of the trial court was contrary to the evidence and contrary to law. This is an equity action and is reviewed de novo on the record.

The plaintiffs own residences located immediately north of Hynes Street in O'Neill, Nebraska. The defendant operates a golf country club immediately south of this same street. There is a concrete drainageway which runs north and south between the residences of the plaintiffs, and which carries surface runoff

water through a culvert, under the street, and onto the property of the defendant. In the summer of 1982 the defendant built an earthen structure, or berm, to try to prevent the claimed increased runoff waters from flooding its golf course. As a result, the plaintiffs allege that this caused the water to back up and flood their properties. This action was brought seeking a mandatory injunction to require the defendant to remove the earthen structure.

The evidence would tend to establish that there was a natural drainage course which carried surface water runoff from the north to the south, generally in the area where the concrete drainageway is now located. Before 1981, the drainageway was not lined with concrete and only a single 27- by 42-inch corrugated pipe culvert drained the water under Hynes Street and onto the property of the defendant.

Prior to 1981, according to the testimony of Douglas Trowbridge, a former employee of the defendant, there was no problem with standing water on the golf course. However, in 1981 the concrete drainageway was constructed and the single corrugated pipe culvert was replaced with three 30-inch concrete arch pipes. After that, according to Trowbridge, water might remain on the fairways, following a rain, for as long as 2 to 3 weeks. In an effort to correct this situation, the earthen structure was built.

There appears to be no contradiction of the testimony of one of the plaintiffs, Anthony Fink, that before the earthen structure was installed, rainwater would back up on the plaintiffs' property and remain for no longer than half a day. However, following that time, the waters would pond up as deep as 15 inches or more and remain for as long as a week.

The testimony of Thomas Schaub, a certified land surveyor, revealed that in 1967, the date on which an aerial photograph map was made showing the natural drainage in this area, there were no houses and, of course, no lawn irrigation systems and no center pivot irrigation units. All of these items have been added to the area, together with the concrete drainageway and three drain pipes. Schaub also said that the change from a single pipe culvert to the three-pipe installation would increase the volume of water discharged onto the defendant's land in pro-

portion to the increase in square footage of the culvert system of from 7.07 square feet to 15 square feet.

We believe that the foregoing facts and conclusions drawn from them are amply supported by the record. It remains for us to apply the applicable law to those facts.

In concluding to deny the relief sought by the plaintiffs, the trial court reasoned that the burden imposed on the defendant to take waters draining from the plaintiffs' property was the "impoundment of water that would be carried by a 24-inch tube" (actually a 27- by 42-inch tube); the installation of the three 30-inch tubes caused a substantial increase in the burden cast upon the defendant; and the "country club . . . has some right to protect themselves against the excess burden, and . . . this plaintiff has failed to show that the country club exceeded its right to protect itself . . . ."

However, the law in this state does not permit such a conclusion. In *Barry v. Wittmersehouse*, 212 Neb. 909, 327 N.W.2d 33 (1982), this court said the flow of surface water may be increased and diverted upon the land of another, if it is done through an existing natural watercourse and is done in a careful manner without negligence.

In a similar vein, in *Nickman v. Kirschner*, 202 Neb. 78, 273 N.W.2d 675 (1979), we declared that water velocities which increase as a result of proper maintenance or construction of drainage tubes or ditches, done without negligence, are also a burden which must be accepted by the servient estate.

Finally, we have stated without equivocation that surface waters resulting from rainfall or melted snow which collect and flow into a natural drainage channel or depression may not be dammed, diverted, or otherwise repelled by the owner of the land upon which they flow. *Schmidt v. Chimney Rock Irrigation Dist.*, 209 Neb. 1, 305 N.W.2d 888 (1981).

In other words, it is the continuing duty of a lower landowner who builds a structure across a natural drainageway to provide for the natural passage through such obstruction of all the water which may be reasonably anticipated to drain therein. *Nichol v. Yocum*, 173 Neb. 298, 113 N.W.2d 195 (1962).

The record demonstrates that the defendant repelled and diverted water flowing in a natural drainageway onto the lands of

the plaintiffs, to their damage. The plaintiffs had sustained their burden of proof in making out a prima facie case, and the district court was in error in dismissing the plaintiffs' case at the stage of the proceedings that it did.

The general rule in an equity case where a motion to dismiss at the close of plaintiff's case is erroneously sustained requires that the cause be remanded to the trial court for a new trial. *Botsch v. Leigh Land Co.*, 205 Neb. 401, 288 N.W.2d 31 (1980). Accordingly, the judgment of the district court is reversed, and the cause is remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

STATE OF NEBRASKA, APPELLEE, V. LORINDA J. BEYER, APPELLANT.

352 N.W.2d 168

Filed July 20, 1984. No. 83-809.

1. **Criminal Law: Statutes.** It is a fundamental principle of statutory construction that a penal statute is to be strictly construed.
2. **Criminal Law: Legislature: Statutes.** No act is criminal unless the Legislature in express terms has declared it to be so, and no person can be punished for any act or omission which is not made penal by the plain import of the written law.
3. **Criminal Law: Penalties.** Where no penalty is provided in a penal statute for certain described activities, no penalty may be applied.

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

James H. Truell of Ahlschwede & Truell, for appellant.

Paul L. Douglas, Attorney General, and Timothy E. Divis, for appellee.

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

GRANT, J.

The appellant, Lorinda J. Beyer, appeals from a judgment entered by the district court for Hall County, Nebraska, affirming her conviction for theft of lost or mislaid property of a value less than $100, in violation of Neb. Rev. Stat. § 28-514 (Reissue 1979). She had earlier been convicted by the county court for Hall County, Nebraska, following a trial to a jury. Beyer was sentenced to 90 days in county jail. Beyer maintains that the action of the district court in affirming the trial court was in error in two respects. First, the trial court erred in presenting to the jury prior to the submission of evidence certain instructions and in not complying with what Beyer alleges are the requirements of Neb. Rev. Stat. § 25-1107 (Reissue 1979), and, second, the trial court erred in overruling Beyer's objections to the submission of subsequent jury instructions requested by the State. The record, however, does not support those contentions, and we would find that the county court acted properly in the manner of its handling of the trial. We have always reserved the right to note plain error, however. Neb. Rev. Stat. § 25-1919 (Reissue 1979); *State v. Christiansen,* 217 Neb. 740, 351 N.W.2d 67 (1984). For the reasons hereinafter set out we reverse and remand with directions to dismiss.

On October 9, 1982, a Grand Island police officer stopped Beyer at Conestoga Mall in Grand Island, Nebraska, to inquire as to the ownership of a purse in her possession. A driver's license and a library card found inside the purse identified the owner of the purse as Karleen Knuth. Beyer was arrested, taken into custody, and charged with theft by unlawful taking. At her trial she explained that when she was leaving Northwest High School campus on the morning of September 13, 1982, on an illness pass, she found the purse on the ground outside the school and that she attempted to identify the owner but was unable to do so. The purse had been reported as missing, and when Beyer was seen carrying it at the mall, the police were notified and she was arrested.

Beyer was charged in a two-count complaint, the Knuth incident and another theft. At the conclusion of the trial the other theft charge was dismissed and the case was submitted to the jury on one count of theft by taking the purse of Karleen Knuth

(a violation of Neb. Rev. Stat. § 28-511(1) (Cum. Supp. 1982)) and the lesser-included charge of theft of Knuth's property lost or mislaid (a violation of § 28-514 (Reissue 1979)). The jury acquitted defendant of the charge of theft by taking and convicted defendant of the lesser-included charge of theft of property lost or mislaid. Assuming, without deciding, that the charge of theft of property lost or mislaid was a lesser-included offense, examination of the applicable statutes shows that the Legislature has not provided a penalty for such a crime as to property lost or mislaid where the value of the item which was the subject of the theft is less than $100. We must reverse and dismiss.

In 1977 the Legislature consolidated all theft offenses in Neb. Rev. Stat. §§ 28-509 to 28-518 (Reissue 1979). 1977 Neb. Laws, L.B. 38. The consolidation was generally described in part in § 28-510 (Cum. Supp. 1982) as, "Conduct denominated theft in sections 28-509 to 28-511, 28-511.01, and 28-512 to 28-518 constitutes a single offense embracing the separated [sic] offenses heretofore known as larceny, embezzlement, false pretense, extortion, blackmail, fraudulent conversion, receiving stolen property, and the like." Except for two specific penalties set out in § 28-515(3) (Cum. Supp. 1982) (making or possessing devices to obtain telecommunications services fraudulently is a Class II misdemeanor) and in § 28-516(4) (Reissue 1979) (unauthorized use of a propelled vehicle is a Class III misdemeanor), the severity of the punishment for all theft offenses is dependent solely on the value of the item which was the subject of the theft and not on the precise form of theft employed. Section 28-518 (Cum. Supp. 1982) rates the theft offenses in four categories based on "the value of the thing involved": (1) over $1000 - Class III felony; (2) $300 but not more than $1000 - Class IV felony; (3) more than $100 but less than $300 - Class I misdemeanor; and (4) $100 or less - Class II misdemeanor.

With regard to the crime of which defendant was convicted, however, a different penalty structure is set out in § 28-514 (Reissue 1979), theft of property lost, mislaid, or delivered by mistake. That section provides in part, "Any person violating the provisions of this section shall, upon conviction thereof, be punished by the penalty prescribed in the next lower classifica-

tion *below the value of the item* lost, mislaid, or delivered under a mistake pursuant to section 28-518." (Emphasis supplied.) Section 28-514 (Reissue 1979) thus has reduced the four classifications set out in § 28-518 (Cum. Supp. 1982) to three classifications: (1) "value of the thing involved" over $1000 - Class IV felony; (2) $300 but not more than $1000 - Class I misdemeanor; and (3) more than $100 but less than $300 - Class II misdemeanor. There is no classification set out in § 28-518 (Cum. Supp. 1982) below the lowest classification for general theft of a thing of the value of $0 to $100, and thus, in § 28-514 (Reissue 1979), the Legislature has provided no penalty for theft of property lost, mislaid, or stolen where the value of the thing lost, mislaid, or stolen is less than $100.

In the Legislative hearings on this consolidated theft bill, Senator Luedtke explained what is now § 28-514 (Reissue 1979) as follows:

> [Y]ou see that this is the section dealing with lost, where you know that something is lost and you keep it. Nevertheless, the penalty would be the same as just stealing something and it was felt by the group that reviewed and came up with these proposed consent amendments that the penalty where you keep it under that kind of mistaken notion, under lost property, that it ought to be a lesser penalty, that there ought to be some distinction between just merely stealing something under those circumstances or just keeping it, even if you do know that it is lost because you are, after all, holding on to it for somebody or have held on to it and maybe you know the person won't reward you anyway, although I wouldn't want to read that motive into it but there is that possibility. There should be a distinction is the argument, lesser penalty than would be prescribed in this amendment. *So it says that it would be the next lower classification below the value of the item lost, mislaid, or delivered under a mistake* pursuant to section 120, and 120, if you will refer to 120, you see that is the theft classification. *So it would go down one classification for the category in which it is placed.*

(Emphasis supplied.) Floor Debate, L.B. 38, Judiciary Committee, 85th Leg., 1st Sess. 1801 (Mar. 23, 1977).

The general law is settled. First of all, as set out in *State v. Suhr*, 207 Neb. 553, 560, 300 N.W.2d 25, 29 (1980): "It is a fundamental principle of statutory construction that a penal statute is to be strictly construed." Secondly, as set out in the same case at 558, 300 N.W.2d at 28:

> In this state, all public offenses are statutory. "No act is criminal unless the Legislature has in express terms declared it to be so, and no person can be punished for any act or omission which is not made penal by the plain import of written law." *State v. Ewert*, 194 Neb. 203, 204, 230 N.W.2d 609, 610 (1975).

Where the situation exists that the Legislature has not provided a penalty, our duty is clear. As set forth in *Lane v. State*, 120 Neb. 302, 309, 232 N.W. 96, 99 (1930):

> In view of the canons of construction heretofore set out, we may not by judicial construction ignore specific limitations or extend the scope of the penalty provided in the barbers' act beyond the express words in which they are prescribed. The conclusion is that there are no penalties provided in chapter 163, Laws 1927, as amended, for the violation of any of the provision [sic] of section 3 of the barbers' act. Therefore none can be applied or enforced by the state.

There is no penalty provided in this case, and defendant's conviction must be reversed.

It should be indicated, in passing, in view of the value classification orientation of all theft offenses, that note should be taken of the provisions of Neb. Rev. Stat. § 29-2026.01 (Reissue 1979). While that statute refers to "larceny, embezzlement or obtaining under false pretenses," it is obviously necessary that the jury determine "the value of the thing involved" in order that the court may determine the applicable sentence. There was no prejudicial error in this case, because the value of the thing involved was alleged to be the minimum—$0 to $100—and the State did prove some value of the lost purse.

The judgment appealed from is reversed and the cause remanded with directions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

CAPORALE, J., participating on briefs.

KRIVOSHA, C.J., dissenting.

I regret that I must respectfully dissent from the majority opinion in this case. While I concede that the language of Neb. Rev. Stat. § 28-514 (Reissue 1979) is not a model of legislative draftsmanship, nevertheless, I believe that it is sufficiently clear and that the Legislature has, indeed, provided a penalty for a violation of § 28-514. Theft other than of property lost, mislaid, or delivered by mistake, having a value of $100 or less, is, under the provisions of Neb. Rev. Stat. § 28-518(4) (Cum. Supp. 1982), a Class II misdemeanor. Section 28-514 provides in part: "Any person violating the provisions of this section shall, upon conviction thereof, be punished by the penalty prescribed in the next lower classification below the value of the item lost, mislaid, or delivered under a mistake pursuant to section 28-518." It seems fairly clear to me that § 28-514 provides that if you steal lost, mislaid, or mistakenly delivered property having a value of $100 or less and would be guilty of a Class II misdemeanor but for the fact that you stole property which was lost, mislaid, or delivered by mistake, you are guilty of a Class III misdemeanor, pursuant to the provisions of Neb. Rev. Stat. § 28-106(1) (Cum. Supp. 1982), which defines the various penalties for the classes of misdemeanors. Obviously, one cannot ever steal property having a value of less than zero. It occurs to me that the legislative history, as expressed by the majority, simply supports that view. It also occurs to me that the reason we have had to rely upon plain error is because the statute was not nearly as confusing to counsel, who did not argue the point, as it is to the court. I would have affirmed the conviction and the sentence imposed.

JAMES E. ISKE, APPELLEE, V. PAPIO NATURAL RESOURCES DISTRICT, APPELLANT.

352 N.W.2d 172

Filed July 20, 1984. No. 83-815.

1. **Statutes.** A statute is open to construction where the language used requires interpretation or may reasonably be considered ambiguous.
2. **Statutes: Legislature.** The court will, if possible, give effect to every word, clause, and sentence of a statute, since the Legislature is presumed to have intended every provision of a statute to have a meaning.
3. **Statutes: Words and Phrases.** Referential and qualifying words in a statute, where no contrary intention appears, refer solely to the last antecedent.
4. **Eminent Domain: Interest.** In an appeal by a condemnee, if the condemnee obtains a greater amount than that allowed by the appraisers, the condemnee shall not be entitled to interest on the amount deposited in the county court which the condemner had offered to stipulate for withdrawal. The 1982 amendment to Neb. Rev. Stat. § 76-711 (Cum. Supp. 1982), which requires that the condemnee agree to the stipulation, is applicable only where the appeal is taken by the condemner.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Reversed and remanded with directions.

Paul F. Peters, for appellant.

Dixon G. Adams, for appellee.

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

WHITE, J.

In 1979 a permanent easement was taken by appellant, Papio Natural Resources District (NRD), over 9.54 acres of the appellee Iske's farm.

On November 13, 1979, the Sarpy County Court appraisers' report was filed, which awarded damages to Iske in the amount of $29,700. NRD deposited $29,700 with the Sarpy County Court on November 20, 1979, and offered to stipulate that Iske could withdraw all or any part thereof. Iske thereafter filed an appeal to the district court from the award of the appraisers.

On December 10, 1979, Iske not having accepted NRD's offer to stipulate, NRD moved for and obtained an order which directed the Sarpy County Court to place the $29,700 deposit in an interest-bearing investment.

Iske's appeal was tried to a jury, and on July 28, 1982, a verdict was rendered awarding Iske $33,000. No appeal was taken from the amount of the award, though Iske did appeal the district court's refusal to pay the judgment in U.S. gold coin at face value. That appeal was summarily affirmed. The district court thereafter entered judgment on the mandate and determined the amount of interest due to Iske under Neb. Rev. Stat. § 76-711 (Cum. Supp. 1978 and Cum. Supp. 1982). The district court awarded $12,501.22 interest, plus $14.29 per day thereafter. Any balance remaining in the county court was to be paid to NRD.

It is the determination of the amount of interest due which is the subject of this appeal.

The issue which must be decided is whether Iske, as condemnee, is entitled to interest on the money which was deposited in the county court by the condemner NRD, where NRD offered to stipulate that the funds could be withdrawn.

The resolution of the issue requires the interpretation of § 76-711 as amended by the Legislature by 1982 Neb. Laws, L.B. 705, § 1. The relevant portions of the statutory section are the fifth and sixth sentences, which read as follows before and after the amendments were made:

> If an appeal is taken from the award of the appraisers by the condemnee and the condemnee obtains a greater amount than that allowed by the appraisers, the condemnee shall be entitled to interest from the date of the deposit with the county judge at the rate ~~of nine per cent per annum~~ provided in section 45-104.01, as such rate may from time to time be adjusted by the Legislature, compounded annually, on the amount finally allowed, less interest at the same rate on the amount withdrawn, or on the amount which the condemner offers to stipulate for withdrawal, as provided by the provisions of section 76-719.01.
>
> If an appeal is taken from the award of the appraisers by the condemner, the condemnee shall be entitled to interest from the date of deposit with the county judge at the rate ~~of nine per cent per annum~~ provided in section 45-104.01, as such rate may from time to time be adjusted by the Legislature, compounded annually, on the amount

finally allowed, less interest at the same rate on the amount withdrawn, or on the amount which the condemner offers to stipulate for withdrawal as agreed to by the condemnee, as provided by section 76-719.01, which provision shall apply to all appeals by the condemner or condemnee pending on June 6, 1961.

Neb. Rev. Stat. § 45-104.01 (Cum. Supp. 1982), referred to in the amendment as the rate of interest to be applied, provides for a 14-percent interest rate to be assessed on delinquent payment of taxes.

We first note that the district court properly determined that the increased interest rate was to be applied as of the effective date of the amendment, see *Colburn v. Ley*, 191 Neb. 427, 215 N.W.2d 869 (1974); however, the incorrect date was applied. L.B. 705 was passed with the emergency clause and took effect on March 25, 1982. See Cum. Supp. 1982 app. at 2164. While neither party has raised that issue, we reserve the right to note and correct plain error. Neb. Ct. R. 9D(1)d (Rev. 1983); *Wittwer v. Dorland,* 198 Neb. 361, 253 N.W.2d 26 (1977).

The more difficult question involves the interpretation of the final phrase of the sixth sentence, "which provision shall apply to all appeals by the condemner or condemnee pending on June 6, 1961."

Specifically, we must determine *what* provision is referred to by the language quoted.

A statute is open to construction where the language used requires interpretation or may reasonably be considered ambiguous. *Omaha P.P. Dist. v. Nebraska State Tax Commissioner*, 210 Neb. 309, 314 N.W.2d 246 (1982).

Legislative intent is the cardinal rule in statutory construction. *Northwest High School Dist. No. 82 v. Hessel*, 210 Neb. 219, 313 N.W.2d 656 (1981).

This court will, if possible, give effect to every word, clause, and sentence of a statute, *State v. Glover*, 212 Neb. 713, 325 N.W.2d 155 (1982), since the Legislature is presumed to have intended every provision of a statute to have a meaning, *Richardson v. Board of Education*, 206 Neb. 18, 290 N.W.2d 803 (1980).

Referential and qualifying words in a statute, where no con-

trary intention appears, refer solely to the last antecedent. *Haiar v. Kessler*, 188 Neb. 312, 196 N.W.2d 380 (1972).

In order to give effect to each sentence and phrase in § 76-711, the language, "which provision shall apply to all appeals by the condemner or condemnee pending on June 6, 1961," must be interpreted as referring to Neb. Rev. Stat. § 76-719.01 (Reissue 1981), the provision immediately preceding it.

Section 76-719.01 provides for funds to be withdrawn from county court after deposit by condemner.

Section 76-711 was originally enacted in 1951. At that time the language involving appeals merely provided that if an appeal was taken and the condemnee obtained a greater amount than the award of the appraisers, he would receive interest on the amount finally allowed. No distinction was made with regard to who filed the appeal. 1951 Neb. Laws, ch. 101, § 11, p. 454.

In 1959 the Legislature passed § 76-719.01, which at that time allowed the parties to stipulate that up to 80 percent of the county court deposit could be withdrawn. In conjunction with the passage of § 76-719.01, the Legislature added to § 76-711 the provision for the subtraction of interest on the amount withdrawn under § 76-719.01. 1959 Neb. Laws, ch. 351, § 1, p. 1240.

In 1961, § 76-711 was amended to provide separate provisions for appeals taken by a condemnee or a condemner. The language, "which provision shall apply . . . ," was also added in 1961. 1961 Neb. Laws, ch. 369, § 1, p. 1141.

A strict reading of § 76-711 prior to the 1982 amendments could have led to an interpretation that § 76-719.01 applied only to appeals by a condemner pending on the effective date of the legislation and thereafter. The addition of the language "or condemnee" in 1982 now precludes that interpretation.

The appellee has argued that the additional language requires that the condemnee agree to the offer to stipulate. To adopt that construction would force us to ignore the plain language of the fifth sentence.

We must give effect to the plain language of the statute. Had the Legislature intended to require agreement to the stipulation in appeals by the condemnee, the change could have been made.

As written, § 76-711 clearly provides for interest calculations in two different contexts. The first is in the context of a successful appeal by a condemnee, which does not require agreement to the offer to stipulate. The second context is that of an appeal by a condemner, which, as amended in 1982, requires the condemnee to agree to a stipulation for withdrawal before interest is deducted on that amount.

The calculation of interest by the district court in this case was based on the entire amount of the award. No deduction was made for the amount on deposit which the condemner offered to stipulate for withdrawal, and therefore the calculation was in error. The interest should be calculated on the amount finally awarded, less interest on the $29,700 which NRD offered to stipulate for withdrawal, as provided by the fifth sentence of § 76-711.

We therefore reverse the order of the district court and remand the cause for proceedings consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. CATARINO GONZALES, JR., APPELLANT.

352 N.W.2d 571

Filed July 20, 1984. No. 83-831.

1. **Confessions: Appeal and Error.** A trial court's admission into evidence of a confession constitutes an independent determination by the trial court that the confession was voluntarily made, and such determination will not be set aside unless clearly erroneous.
2. **Confessions: Probable Cause: Warrants.** A statement from a person involved in a crime with the defendant may provide enough trustworthy information to permit the issuance of an arrest warrant.
3. **Habitual Criminals: Prior Convictions.** Contentions that prior criminal convictions, relied on to enhance a penalty under the habitual criminal statute, are constitutionally invalid may be raised at the habitual criminal hearing.
4. **Pleas.** The requirements of *State v. Tweedy*, 209 Neb. 649, 309 N.W.2d 94 (1981), as to guilty pleas are applied prospectively only after August 7, 1981.

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

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

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

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

GRANT, J.

Defendant was convicted, after jury trial, of the crime of burglary and sentenced, after determination that he was a habitual criminal, to 10 to 12 years in the Nebraska Penal and Correctional Complex. He appeals, assigning seven errors. Those assignments may be summarized as error by the court (1) in failing to suppress defendant's confession and certain physical evidence seized pursuant to a search warrant; (2) in failing to dismiss the case because of insufficient evidence; (3) in the court's instructions to the jury, in that the court refused to instruct on criminal trespass as a lesser-included offense of burglary; and (4) in determining defendant to be a habitual criminal.

With regard to defendant's confession the evidence shows that defendant was arrested at 5:15 p.m. on June 1, 1983, in connection with a burglary that had occurred at the Don Reichert home in Scottsbluff, Nebraska, on April 15, 1983. Defendant was kept in jail, and at 9:20 a.m. the next morning he was informed of his *Miranda* rights. The interview between defendant and a Scottsbluff police officer was taped in its entirety, and the tape was introduced in evidence at the hearing on defendant's motion to suppress before the trial judge and, in an edited form, before the jury (deleting, by agreement with defendant's counsel, all mention of another crime allegedly committed by defendant). Defendant signed a *Miranda* rights form in two places, indicating that each of his rights had been read to him, that he understood those rights, and that he was willing to waive those rights and give a statement.

Defendant contends that the statement is not admissible be-

cause (1) it was not freely and voluntarily given; (2) there was no intelligent and knowing waiver of his constitutional rights; and (3) the statement was obtained as a result of an illegal arrest.

With regard to the first two points, defendant presents no facts in support of his contentions sufficient to overcome the admitted facts set out above. In *State v. Hunt*, 212 Neb. 214, 217, 322 N.W.2d 621, 623 (1982), this court stated:

> It is the law in Nebraska that in order for a confession to be admissible, it must have been freely and voluntarily given and must not have been obtained by threat or promise. *State v. Hunsberger*, 211 Neb. 667, 319 N.W.2d 757 (1982); *State v. McDonald*, 195 Neb. 625, 240 N.W.2d 8 (1976). It is also the law that the admission into evidence of a confession constitutes an independent determination by the trial court that the confession was voluntarily made. Such determination will not be set aside on appeal unless such finding is "clearly erroneous." *State v. Hunsberger, supra; State v. Williams*, 205 Neb. 56, 287 N.W.2d 18 (1979).

In this case the determination of the trial court that the statement was admissible is not only not "clearly erroneous" but is supported by overwhelming evidence. The form of the submission of the issue to the jury is not challenged, and the issue of voluntariness was also found against defendant by the jury.

The contention that the confession was the result of an illegal arrest is based on defendant's claim that the arrest warrant was based on information obtained from his accomplice, Cathy Cushing, who was not a reliable witness. The fact that the underlying information was obtained from a person allegedly involved in the same crime does not invalidate the arrest warrant. That argument was rejected in *State v. Lytle*, 194 Neb. 353, 360, 231 N.W.2d 681, 686 (1975), where this court stated:

> Actually, probable cause did exist. It is undisputed that defendant was arrested somewhere around 1:30 a.m., on December 28, 1973. Between 5 p.m. on December 27, 1973, and 1:30 a.m. on December 28, 1973, police officers had interviewed Joseph Harris and had taken a statement from him regarding his involvement, along with the defendant, in the purse snatching on October 28, 1973. It

> was this statement of Harris, implicating the defendant, which gave the officers probable cause to arrest the defendant. This statement provided reasonably trustworthy information which would warrant a man of reasonable caution in the belief that defendant was involved in the commission of the crime. The officers could reasonably believe the information was trustworthy because it came from a statement which implicated the maker as well as the defendant.

Defendant further argues that the affidavit supporting the request for an arrest warrant shows that the accomplice agreed to disclose the facts about the burglary in question only after obtaining a promise that no charges would be filed against her for the burglary. Such a fact should be considered by the issuing magistrate in the decision as to whether there is sufficient verified information to warrant the issuance of the warrant, whether for a search or, as in this case, for an arrest. The fact of the accomplice's bargain was before the magistrate, along with the other information. As this court held with regard to a search warrant in *State v. Gilreath*, 215 Neb. 466, 469, 339 N.W.2d 288, 291 (1983):

> [A]n issuing magistrate is required only to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. The duty of the reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed.

In this case the magistrate's decision was practical and based on common sense, given all the facts, and the trial court was correct in determining that the magistrate had a substantial basis for concluding that probable cause existed for the arrest of the defendant. Defendant's confession was properly admitted before the jury.

Once it is established the defendant's confession was properly admitted, there is no real basis for defendant's contention that the evidence was insufficient to support his conviction. The

evidence was undisputed that a break-in occurred at the Don Reichert home and that items of value were removed from the home. Defendant's girl friend, with whom he was living, testified, in detail, how she and defendant entered the home. Defendant's statement corroborated her testimony. Defendant did not testify during the trial, but would have us hold that because his girl friend was the one who initiated the burglary plan and because, in his statement, defendant denied that he intended to steal anything from the home, this court should hold as a matter of law that defendant was not guilty of burglary. The argument does not warrant a response. The evidence was sufficient to support defendant's conviction.

Defendant next contends the physical evidence seized pursuant to a search warrant should have been suppressed. The search warrant was based on an affidavit which appears to be identical with the affidavit described generally above with regard to the arrest. For the reasons stated above, the search warrant was also valid and the motion to suppress physical evidence seized under the search warrant was properly denied.

Defendant next asserts that criminal trespass, in violation of Neb. Rev. Stat. § 28-520(1) (Reissue 1979), is a lesser-included offense of burglary, as defined in Neb. Rev. Stat. § 28-507(1) (Reissue 1979), and that defendant was entitled to an instruction permitting the jury to acquit defendant of burglary and find him guilty of criminal trespass. Defendant, in his brief, "recognizes that this court, in State v. Miller, 215 Neb. 145, [337] N.W.2d [424] (1983), ruled that criminal trespass was not a lesser-included offense to the charge of burglary," but urges us to overrule *Miller*. We decline to do so.

Defendant's last contention is that his prior convictions used to support the habitual criminal count were not constitutionally sound. At the hearing to determine defendant's status as a habitual criminal, the State introduced evidence of defendant's pleas of guilty to each of two counts of burglary alleged to have been committed on January 8, 1973, at different locations in the city of Scottsbluff, and evidence of defendant's plea of guilty to a charge that on or about April 12, 1975, also in Scottsbluff, defendant had failed to appear before the court after being released on bond on a burglary charge, different

from the two charges just referred to. (Defendant apparently was also convicted and sentenced on this additional burglary charge, but this burglary conviction is not relied on by the State on the habitual criminal charge.)

Each of the transcripts of the earlier convictions showed, on the face of the transcript, that defendant had counsel at the time of his plea. The State has, therefore, proved the earlier convictions *prima facie*, and without any further evidence has complied with the requirements of *Baldasar v. Illinois*, 446 U.S. 222, 100 S. Ct. 1585, 65 L. Ed. 2d 169 (1980). The proceedings in the habitual criminal proceeding to this point would support a finding of the trial court that defendant was a habitual criminal. That was not the end of the proceedings in this case, however.

Defendant then introduced the verbatim transcript of the arraignment at each of the earlier two pleas relied on by the State, and the trial court considered that additional evidence. This was an appropriate procedure. As set out in *State v. McGhee*, 184 Neb. 352, 358, 167 N.W.2d 765, 769 (1969):

> Such cases as Burgett v. Texas, 389 U.S. 109, 88 S. Ct. 258, 19 L. Ed. 2d 319, indicate quite clearly that in a habitual criminal proceeding a prior conviction is subject to attack on constitutional grounds, but that case implicitly recognizes that the attack must be made initially in the trial court, not on appeal.

In *State v. Smith*, 213 Neb. 446, 449, 329 N.W.2d 564, 566 (1983), we said:

> We agree that in an enhancement proceeding, a defendant should not be able to relitigate the former conviction, and to that extent such conviction cannot be collaterally attacked. However, under the present circumstances, the burden remains with the State to prove the prior convictions. This cannot be done by proving a judgment which would have been invalid to support a sentence of imprisonment in the first instance. . . . A defendant's objection to the introduction of a transcript of conviction which fails to show on its face that counsel was afforded or the right waived does not constitute a collateral attack on the former judgment.

See, also, *State v. Cole*, 207 Neb. 318, 320, 298 N.W.2d 776, 778 (1980): "We have consistently held that the validity of a prior conviction offered to enhance punishment under the habitual criminal statute must be challenged at the habitual criminal hearing." In this habitual criminal hearing, defendant had raised the constitutional invalidity of two of his prior convictions, and we hold he may raise these issues in this manner.

The transcript of the arraignments at the time defendant pled guilty to the two burglary counts in 1973, as offered by defendant, was received in evidence, as was the transcript of the arraignment in 1975 when defendant pled guilty to the charge of failure to appear. The arraignments on the charges were all similar, in that defendant appeared with counsel, that defendant was advised that the charges were felonies and told the penalty in each case, and that defendant was advised he had a right to trial by jury. In all the arraignments the court, by further questioning directed to the defendant, determined that the pleas were voluntary and that there was a factual basis for each of the pleas.

The record does not show in any of the arraignments that defendant was advised of each and all of the constitutional rights set out in *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), and *State v. Tweedy*, 209 Neb. 649, 309 N.W.2d 94 (1981). For example, specific mention was not made of defendant's privilege against self-incrimination nor of his right to confront the witnesses against him.

Insofar as defendant relies on *Boykin v. Alabama, supra*, this court's position was clearly set out in *State v. Turner*, 186 Neb. 424, 425, 183 N.W.2d 763, 765 (1971), where we stated:

> If we understand defendant's argument, in his reliance on Boykin, as well as on McCarthy v. United States, 394 U.S. 459, 89 S. Ct. 1166, 22 L. Ed. 2d 418, which deals with Rule 11 of the Federal Rules of Criminal Procedure, it is his contention that the trial court must direct a defendant's attention to each and every constitutional right and then obtain a separate expressed verbal waiver of each of them before it can find an intelligent and voluntary waiver. This requirement of an item-by-item review of constitutional rights on a guilty plea is a strained and a too

extreme construction of those cases.

We hold in this case, as in *Turner, supra*, that there was substantial compliance with the ABA Standards Relating to Pleas of Guilty and that the convictions based on defendant's pleas of guilty in earlier cases were properly considered by the trial court in determining whether defendant was a habitual criminal within the intendment of Neb. Rev. Stat. § 29-2221 (Reissue 1979).

While the arraignments above referred to do not strictly comply with the requirements in *State v. Tweedy, supra*, that case was decided on August 7, 1981, and, by its own terms, was not to be applied to cases decided before that date. As to this case, the law of *State v. Turner, supra*, applies, and, as stated above, the arraignments and resulting pleas relied on by the State do fully comply with *State v. Turner, supra*.

If the habitual criminal statute is held to be properly applicable to defendant in this case, his claim that this sentence of 10 to 12 years is excessive is frivolous.

The judgment and sentence are affirmed.

AFFIRMED.

BOSLAUGH, J., concurring.

I concur in the judgment of the court. I disagree with the dicta which permits a defendant to collaterally attack a prior judgment in an enhancement proceeding.

In *State v. Smith*, 213 Neb. 446, 449, 329 N.W.2d 564, 566 (1983), we said: "We agree that in an enhancement proceeding, a defendant should not be able to relitigate the former conviction, and to that extent such conviction cannot be collaterally attacked." In the *Smith* case we held that a transcript of a conviction which does not show on its face that counsel was afforded or the right waived cannot be used as proof of the prior conviction in accordance with the rule set forth in *Baldasar v. Illinois*, 446 U.S. 222, 100 S. Ct. 1585, 64 L. Ed. 2d 169 (1980). *Baldasar* requires only that a prior conviction be shown to have been a counseled one. In the present case the dicta in the majority opinion exceeds the scope of the holding in *Baldasar* and permits a defendant to collaterally attack a former conviction on other grounds.

This permits a defendant to relitigate the former conviction

by raising issues which should be raised only upon direct appeal or in a proceeding to set aside the judgment filed in the court where the prior judgment originated. This result places a great burden on the State in proving earlier convictions, particularly when the challenged conviction was rendered in a distant county or in another jurisdiction and witnesses have died, moved away, or otherwise have become unavailable.

HASTINGS and CAPORALE, JJ., join in this concurrence.

STATE OF NEBRASKA, APPELLEE, V. WALTER W. ROLLING, APPELLANT.

352 N.W.2d 175

Filed July 20, 1984. No. 83-843.

1. **Habitual Criminals: Sentences.** The Nebraska habitual criminal statute, Neb. Rev. Stat. § 29-2221 (Reissue 1979), is not a separate offense but, rather, provides an enhancement of the penalty for the crime committed, with a minimum sentence of 10 years and a maximum sentence of 60 years for each conviction of one found to be a habitual criminal, even though, absent a conviction as a habitual criminal, the minimum or maximum sentence might be less.
2. **Post Conviction: Sentences.** Matters relating to sentences imposed within statutory limits are not a basis for post conviction relief.
3. **Post Conviction.** Once post conviction relief has been denied, subsequent petitions will not be entertained unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time of filing the prior motion for post conviction relief.
4. **Sentences.** Whenever a judge imposes a more severe sentence upon a defendant after a new trial or upon resentencing, the reasons for doing so must affirmatively appear in the record. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant.

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

Walter W. Rolling, pro se.

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

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

KRIVOSHA, C.J.

The appellant, Walter W. Rolling, apparently committed to the adage, "If at first you don't succeed, try, try again," has once more sought relief in this court. In view of the action we are required to take, perhaps Rolling should better have adopted the adage, "Let sleeping dogs lie."

On April 29, 1980, Rolling was charged in a five-count information. Count I charged him with a violation of a Class I misdemeanor. Count II charged him with a violation of a Class IV felony, while counts III and IV charged him with a violation of a Class III felony, including using a knife to commit a felony, in violation of Neb. Rev. Stat. § 28-1205 (Reissue 1979). Upon conviction under this section the sentence imposed must, by statutory mandate, run consecutive to any other sentences imposed. Count V alleged facts which, if true, made Rolling a habitual criminal and subject to the provisions of Neb. Rev. Stat. § 29-2221 (Reissue 1979).

Following trial, Rolling was found guilty by a jury on all four substantive counts, and after a proper hearing he was sentenced by the trial court as follows: count I, misdemeanor theft, 161 days in jail; count II, felony theft, 1 year in the Nebraska state penitentiary; count III, attempted robbery, felony, 5 years in the Nebraska state penitentiary; count IV, use of a firearm to commit a felony, not less than 4 nor more than 7 years in the Nebraska state penitentiary; and count V, being a habitual criminal, not less than 4 nor more than 7 years in the Nebraska state penitentiary. The trial court ordered that the sentences imposed on counts I, II, and III shall be served concurrently, and the sentences for counts IV and V shall also be served concurrently but consecutive to the sentences in counts I, II, and III. Rolling then appealed to this court, maintaining that the evidence was insufficient for the jury to find him guilty beyond all reasonable doubt and that the sentences imposed were harsh and an abuse of discretion. We overruled both of the assignments and affirmed the conviction. See *State v. Rolling*, 209 Neb. 243, 307 N.W.2d 123 (1981) (*Rolling I*). We did, however, note plain er-

ror in *Rolling I* in that the sentences imposed by the trial court were in violation of the statutes. Specifically, we said:

> Rolling was found by the court to be an habitual criminal. Nevertheless, he was sentenced by the trial court on the first four counts to terms of imprisonment of less than 10 years. In addition, he was specifically sentenced to a term of imprisonment as an habitual criminal. The sentencing is in all respects improper and must be corrected. Under the provisions of § 29-2221, one is not sentenced as an habitual criminal. This is due to the fact that the habitual criminal statute is not a separate offense but, rather, provides an enhancement of the penalty with a minimum sentence of 10 years and a maximum sentence of 60 years *for each conviction [of] one found to be an habitual criminal* even though, absent a conviction as an habitual criminal, the minimum or maximum sentence might be less. See *State v. Journey,* 201 Neb. 607, 271 N.W.2d 320 (1978).

(Emphasis supplied.) *Id.* at 245, 307 N.W.2d at 125.

We therefore set aside the sentences and remanded the case to the trial court for proper sentencing. See *State v. Gaston*, 191 Neb. 121, 214 N.W.2d 376 (1974). Upon remand the trial court, for reasons not at all clear from the record, resentenced Rolling as follows: count I, misdemeanor theft, 161 days in jail; count II, felony theft, *1* year in the Nebraska state penitentiary; count III, attempted robbery, felony, *5* years in the Nebraska state penitentiary; count IV, use of a firearm to commit a felony, not less than 10 nor more than 60 years in the Nebraska state penitentiary. Counts I, II, and III were to be served concurrently with each other, and count IV was to be served consecutive to the sentences imposed on counts I, II, and III. The records before this court indicate that Rolling took no direct appeal of that sentence to this court but, instead, on December 14, 1982, filed a petition seeking post conviction relief pursuant to the provisions of Neb. Rev. Stat. § 29-3001 (Reissue 1979). The trial court denied Rolling's petition, and on appeal to this court the denial of relief was affirmed under our Neb. Ct. R. 7B(2) (Rev. 1983).

Rolling, dissatisfied with that result, filed a second petition

on September 12, 1983, seeking post conviction relief, and once again the trial court dismissed his petition. It is from this denial that he now appeals to this court.

Normally, we would not grant any relief in this case on the basis that matters relating to sentences imposed within statutory limits are not a basis for post conviction relief. See *State v. DeLoa*, 194 Neb. 270, 231 N.W.2d 357 (1975). Further, once post conviction relief has been denied, subsequent petitions will not be entertained unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time of the filing of the prior motion for post conviction relief. See, *State v. Newton*, 202 Neb. 361, 275 N.W.2d 297 (1979); *State v. Ohler*, 215 Neb. 401, 338 N.W.2d 776 (1983). We are, however, compelled to accept jurisdiction in this case because the sentences imposed by the trial court still do not conform to the requirements of law and, therefore, are invalid on their face.

Section 29-2221 clearly and specifically provides as follows:

> (1) Whoever has been twice convicted of crime, sentenced and committed to prison, in this or any other state, or by the United States, or once in this state and once at least in any other state, or by the United States, for terms of not less than one year each, *shall*, upon conviction of *a felony* committed in this state, be deemed to be an habitual criminal, and *shall* be punished by imprisonment in the Nebraska Penal and Correctional Complex for a term of *not less than ten* nor more than sixty years . . . .

(Emphasis supplied.)

The information in this case alleges facts pursuant to the provisions of § 29-2221(2), and the record in this case clearly and unequivocally discloses, that before Rolling was convicted of any of the felonies set out in the information in this case, he had twice before been convicted of a crime, sentenced, and committed to prison for terms of not less than 1 year. Therefore, upon conviction of each of the felonies in this case, the trial court was required to impose minimum sentences on *each* felony count of not less than 10 years. In *Kennedy v. State*, 171 Neb. 160, 105 N.W.2d 710 (1960), we discussed in some detail the effect of being found to be a habitual criminal, saying at 163-65, 105

N.W.2d at 715:

> "The charge that one accused of crime is an habitual criminal is not the charge of a distinct offense or crime. It is a direction of attention to facts which under the statute and the crime charged in the information are determinative of the penalty to be imposed.
>
> "The habitual criminal law does not set out a distinct crime, but provides that the repetition of criminal conduct aggravates the offense and justifies heavier penalties. . . ."
>
> . . . .
>
> . . . "When a proper record of a previous conviction has been produced, it becomes a matter of law for the court to determine whether or not that record establishes a previous conviction for the violation of a statute."
>
> Thus, whether or not defendant was an habitual criminal was not an issue upon defendant's trial of the felonies charged in counts I and II, but was one required to be heard by the trial court alone after the trial was held and defendant was found guilty.

In *Berning v. Commonwealth*, 550 S.W.2d 561 (Ky. 1977), the defendant was charged with breaking into a store, malicious shooting with intent to kill, and with being a habitual criminal. Because he was a habitual criminal, upon conviction his sentence was enhanced to two life sentences. Berning argued that the "charge" of being a habitual criminal only applied to one of the substantive counts. In rejecting his argument the Kentucky Supreme Court said at 564:

> "The fallacy in the opinion of the Lyon Circuit Court lies in its conclusion that only as to *one* subsequent felony can the punishment be enhanced by reason of previous felony convictions. Our cases make it clear that the enhancement validly is applicable to *every* subsequent felony. * * *"
>
> Suffice it to say, therefore, that it is not necessary in an indictment to charge facts constituting a basis for the imposition of the habitual criminal penalty for each primary offense constituting separate counts of an indictment. One properly pleaded charge of being a habitual criminal is sufficient for an indictment containing multiple charges.

In the instant case count V simply called the court's attention to the fact that before committing any of the felonies set out in the information, Rolling had twice before been convicted of felonies and sentenced to a term of 1 year or more in prison. While count V makes reference to count IV, the allegations to the effect that Rolling was a habitual criminal before he committed any of the crimes set out in counts II, III, and IV subjected Rolling to the consequences of the habitual criminal act on all counts. Therefore, upon conviction of counts II, III, and IV, the court was required to impose minimum sentences on each count of not less than 10 years.

Because this is a post conviction proceeding brought pursuant to the provisions of §§ 29-3001 et seq., we are required to remand this case to the trial court for further sentencing. In doing so, we believe that the trial court should consider certain relevant factors.

Following the trial, the court sentenced Rolling to imprisonment as follows: count I, misdemeanor theft, 161 days in jail; count II, felony theft, 1 year in the Nebraska state penitentiary; count III, attempted robbery, felony, 5 years in the Nebraska state penitentiary; count IV, use of a firearm to commit a felony, not less than 4 nor more than 7 years in the Nebraska state penitentiary; and count V, being a habitual criminal, not less than 4 nor more than 7 years in the Nebraska state penitentiary. No sentence imposed upon Rolling was more than 7 years. Following our direction to the trial court that Rolling be resentenced, the trial court imposed the exact same sentences on counts I, II, and III, but sentenced Rolling on count IV to imprisonment in the Nebraska state penitentiary for a term of not less than 10 nor more than 60 years. Nothing in the record indicates the reason why an increased sentence of 60 years was imposed. While it is true that § 29-2221 provides that the minimum sentence shall be not less than 10 nor the maximum more than 60 years, nothing contained in the act requires the trial court to impose the maximum sentence. The only requirement is the imposition of the minimum sentence. In view of the fact that the trial court initially sentenced Rolling to imprisonment of not more than 7 years on count IV, and, further, in view of the fact that the provisions of § 29-2221 require the trial court to

impose a minimum sentence but do not make such requirement with regard to a maximum sentence, we are simply at a loss to understand why the trial court, on resentencing, would impose a maximum sentence of 60 years on Rolling. Rolling argues that in some manner the imposition of the maximum sentence is due solely to the fact that he appealed. While we have no evidence to support that claim, if true, such sentence would be directly in violation of the pronouncements of the U.S. Supreme Court in *North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), and thus invalid.

It would therefore appear to us that unless some evidence is presented at the third sentencing to indicate that a more severe sentence than the minimum required by law should be imposed, a sentence of 10 years on each of the felony counts, with the serving of such time on counts II and III to be concurrent and on count IV to be consecutive to counts II and III, would seem to be the most that could be imposed by the trial court. For these reasons, therefore, the sentences of the trial court are vacated and set aside and the matter remanded to the trial court with directions to impose proper sentences in this case.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. TIMOTHY R. WILLIAMS, APPELLANT.

352 N.W.2d 576

Filed July 20, 1984. No. 83-860.

1. **Criminal Law: Weapons: Words and Phrases.** In order to be a "deadly weapon" per se under Neb. Rev. Stat. § 28-1202(1) (Reissue 1979), the weapon in question must be one specifically enumerated in that statute.
2. _____: _____: _____. Under Neb. Rev. Stat. § 28-1202(1) (Reissue 1979), whether an object or weapon not specifically named in the statute is a "deadly weapon" is a question of fact to be determined by the trier of fact, and the resolution of that fact question will depend on the evidence adduced as to the use or intended use of the object or weapon.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Reversed and remanded for a new trial.

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

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

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

GRANT, J.

Defendant, Timothy R. Williams, was charged with receiving stolen property (a 1983 Lincoln Continental automobile) and with carrying a weapon "concealed on or about his person." After jury trial Williams was acquitted of the receiving stolen property charge and convicted of the charge of carrying a concealed weapon. He appeals his conviction, alleging that the court failed to properly instruct the jury and that his sentence of 1 to 2 years in the penal complex was excessive. For the reasons hereinafter stated we reverse and remand for a new trial.

The evidence shows that on July 31, 1983, at approximately 3 a.m., Williams and his codefendant, Cedric Johnson, were arrested in Omaha, Nebraska, while in a 1983 Lincoln Continental automobile of a value of approximately $20,000. This car had been reported stolen from a Lincoln, Nebraska, new car dealer on July 25, 1983. After a report of gasoline stolen from a filling station in Carter Lake, Iowa, by two men in a 1983 Lincoln Continental had been broadcast over the police radio, the car was seen, followed, and ultimately stopped at 24th and Bristol Streets in Omaha. Williams was driving the car, and Johnson was the passenger. The police searched the car for contraband, and discovered a pellet gun, which looked like a .357-magnum firearm, in the glove compartment and an 8 1/2-inch-long "serrated steak knife," with a blade 4 3/4 inches long, beneath the driver's seat. This knife was eleven-sixteenths of an inch wide at its widest point, tapering to a point, and had a wooden handle. It was, in short, a table steak knife as used in dining.

Johnson and Williams were tried together. Johnson did not testify, but Williams did. Williams testified he was 19 years old

and had known Johnson for some years; that on the evening of July 30, 1983, Williams had walked to his brother's house; that at about 10 p.m. Johnson drove up to the house in the new Lincoln Continental; and that Johnson told Williams the car belonged to a friend and asked Williams if he wanted to go riding. Williams further testified that he got into the car on the passenger's side; that at the time he had the pellet gun in his hand that he had earlier taken away from his young nephew who had been playing with it; that the pellet gun was owned by Williams' brother; and that he placed the pellet gun in the glove compartment.

Williams further testified that later in the evening he took over driving the car because Johnson was not driving well and Williams was a more experienced driver. Williams testified that he had no knowledge of the knife underneath the seat and that he had never seen it before.

With regard to defendant's allegation that the jury was improperly instructed, he takes the position that the jury should have been specifically instructed that concealment of a weapon may be innocent as opposed to culpable. The State responds that, in effect, the jury was so instructed; that, in any event, the knife in question was a deadly weapon as specifically enumerated in Neb. Rev. Stat. § 28-1202(1) (Reissue 1979); that the use or intended use of such a weapon is immaterial; and that, therefore, there could not be any innocent concealment. Section 28-1202(1) provides:

> Except as provided in subsection (2) of this section, any person who carries a weapon or weapons concealed on or about his person such as a revolver, pistol, bowie knife, dirk or knife with a dirk blade attachment, brass or iron knuckles, or any other deadly weapon, commits the offense of carrying concealed weapons.

This court discussed the per se deadly weapon question in *State v. Valencia*, 205 Neb. 719, 290 N.W.2d 181 (1980), where we held that the Legislature, by enacting § 28-1202(1), had designated certain enumerated weapons as deadly weapons per se, and the carrying of such enumerated weapons concealed on or about the person constituted a Class IV felony without any regard to the manner of the actual or intended use of the weapon;

subject, of course, to the affirmative defenses set out in § 28-1202(2). *Valencia* further held that with reference to other weapons, they could be determined to be deadly weapons only if the manner in which they were used, or intended to be used, was capable of producing death or serious bodily injury.

The State, in this case, would have us expand the list of weapons specifically enumerated in § 28-1202(1) to include all knives with a blade in excess of 3 1/2 inches in length. The State asks us to expand the specific list of per se deadly weapons to include the table steak knife in this case by considering the definition of "deadly weapon" in Neb. Rev. Stat. § 28-109(7) (Reissue 1979), which includes the word "knife," and the definition of "knife" in Neb. Rev. Stat. § 28-1201(2) (Reissue 1979) as a "knife with a blade over three and one half inches in length." Brief for Appellee at 5.

We refuse to expand the *Valencia* holding or to construe § 28-1202(1) in that fashion. The context of Chapter 28, article 12, requires that the concept of per se deadly weapon be limited to the specific weapons enumerated in § 28-1202(1). To hold otherwise would mean that every citizen carrying a kitchen paring knife with a 4-inch blade in a picnic basket containing other appropriate picnic items would be concealing a per se deadly weapon and would be guilty of a Class IV felony without being able to explain his innocent intent. In the specific context of this case, the State would have us hold that an ordinary tool for personal dining is a per se deadly weapon. Such a result was not contemplated by the Legislature in enacting § 28-1202(1).

Section 28-1202(1), of course, must be examined to determine if the weapons in this case—the pellet gun and the steak knife—are weapons specifically enumerated in the statute. With regard to the knife, the specifically named weapons in the statute are "bowie knife, dirk or knife with a dirk blade attachment." A "bowie knife" is "a large hunting knife adapted esp. for knife-fighting . . . and having a guarded handle and a strong single-edge blade typically 10 to 15 inches long . . . ." A "dirk" is "a long straight-bladed dagger formerly carried esp. by Scottish Highlanders," or "a short sword formerly worn by British junior naval officers." Webster's Third New International Dictionary 262, 642 (1968). A "knife with a dirk blade attachment" must mean a knife with a long straight blade. The steak knife in

this case is, as a matter of law, none of those and therefore is not a deadly weapon per se.

With regard to the pellet gun it is clear that it does not fall within the weapons specifically enumerated in § 28-1202(1) as a "revolver" or "pistol." Both a revolver and pistol are firearms—a revolver being a handgun having a cylinder of several chambers that are brought successively into line with one barrel, and a pistol being a handgun whose chamber is integral with the barrel. Webster's Third New International Dictionary (1968). A "firearm" is an instrument used in the propulsion of shot, shell, or bullets by the action of gunpowder exploded therein. Black's Law Dictionary (5th ed. 1979). A pellet gun which discharges a BB shot by means of compressed gas or a spring is not a firearm.

Having so held, we do not say that the steak knife and the pellet gun in this case could not be found to be "deadly weapons" within the meaning of § 28-1202(1). As set out in *State v. Valencia*, 205 Neb. 719, 725, 290 N.W.2d 181, 184 (1980),

> the question of whether an object or weapon not specifically mentioned in the statute is a "deadly weapon" is clearly a question of fact to be decided by the trier of fact in prosecutions under this statute, and the resolution of this question will depend upon the evidence adduced as to the use or intended use of the object in question.

For the jury to make a proper finding of fact in this regard, of course, it is necessary that the jury be properly instructed. In this case the jury was not instructed, as it should have been, that neither the knife nor the pellet gun were per se deadly weapons. Nor was the jury instructed that before Williams could be convicted of the crime charged, the jury would have to determine that one or both of the weapons was a "deadly weapon," as the court defined that term, and that the jury must also find that the defendant carried that weapon with the intention to use it to produce death or a serious bodily injury.

The court's "burden of proof" instruction, instruction No. 10, states in part that, in order to convict, the State must prove that defendant (1) "did carry a weapon concealed on or about [his] person," and (2) "did carry said weapon knowingly and intentionally." An instruction as to "knowingly and intention-

ally" carrying a weapon is not the same as "knowingly and intentionally carrying a weapon with the intention to use it to produce death or serious bodily injury." The instructions were incomplete and misleading.

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

REVERSED AND REMANDED FOR A NEW TRIAL.

CAPORALE, J., participating on briefs.

KRIVOSHA, C.J., concurring in the result.

While I concur in the result reached by the majority in this case, I nevertheless believe that there is one further aspect of the case which may very well occur again on retrial, and for that reason I write separately.

In my opinion, if the evidence on the second trial concerning the steak knife is no different than it was at the first trial, it would be error for the court to submit the issue of the steak knife to the jury. The undisputed evidence at the first trial was that Williams did not own the car, did not own the knife, nor was aware that the knife was under the seat. Under such a fact situation the evidence, in my view, is insufficient to submit the issue to the jury.

Today, in *State v. Harris, post* p. 75, 77, 352 N.W.2d 581, 582-83 (1984), a case involving a minor in possession of alcohol, we said: "As a general rule, the mere presence of the minor passenger in a vehicle where alcohol is found is not sufficient by itself to convict the minor of possession. *State v. Eberhardt, supra; State v. Faircloth,* 181 Neb. 333, 148 N.W.2d 187 (1967)." I believe a similar rule should prevail with regard to a charge of being in possession of a deadly weapon.

Other jurisdictions which have addressed this question have reached similar conclusions. In the case of *Commonwealth v. Almeida*, 381 Mass. 420, 422-23, 409 N.E.2d 776, 778 (1980), the Supreme Judicial Court of Massachusetts said:

> At the close of the Commonwealth's case, there was no evidence that the defendant saw the gun or knew of its presence in the automobile. . . . The jury would have had to speculate that the defendant knew the gun was in the covered console of a car he borrowed that evening, merely

> from his presence in that car. We believe the evidence was insufficient "to warrant a reasonable inference of personal knowledge of the presence of the gun."

And in *State v. Krana*, 246 N.W.2d 293, 295 (Iowa 1976), the Iowa Supreme Court said: "As to the principal issue, the law of Iowa is clear that while specific intent is not an element of this crime, the accused must be aware of the presence of the gun." See, also, *Commonwealth, Appellant v. Gladden*, 226 Pa. Super. 13, 311 A.2d 711 (1973).

If there had been any evidence to create a fact question, it would have, of course, been proper for the trial court to submit that matter to the jury. But, here, the evidence did not raise a fact question. The uncontroverted evidence was that Williams did not know of the presence of the knife, that it did not belong to him, and that the car was obviously not his. There was simply no evidence from which a jury could conclude that Williams was in possession or had custody of the knife. As a matter of fact, the evidence in this case would seem to support a contrary conclusion. There is no explanation why Williams would have placed the gun, which he admittedly owned, into the glove compartment and the knife, which he did not own, under the seat. It was only by coincidence that he was even driving the vehicle at the moment they were arrested. Absent more evidence creating an issue of fact, I believe the court should not have submitted the issue of the knife to the jury.

WHITE, J., joins in this concurrence.

LESA LEPPERT, APPELLEE, V. VERNON PARKER, APPELLANT.
352 N.W.2d 180

Filed July 20, 1984. No. 83-876.

1. **Workmen's Compensation.** Employers of farm or ranch laborers are generally exempt from the provisions of the Nebraska Workmen's Compensation Act, and farm or ranch laborers injured while employed by one operating a farm or ranch

are not entitled to receive any of the benefits of the Nebraska Workmen's Compensation Act.

2. _____. Under the provisions of Neb. Rev. Stat. § 48-106(2) (Reissue 1978), it is the nature of the employer's business which determines the exemption, and not the work performed by the employee.

Appeal from the Nebraska Workmen's Compensation Court. Reversed and dismissed.

McQuillan & Spady, P.C., for appellant.

Leonard P. Vyhnalek of McCarthy, McCarthy & Vyhnalek, for appellee.

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

KRIVOSHA, C.J.

This case presents to the court the question of whether one who hires an individual to train horses on the employer's farm or ranch is an employer of farm or ranch laborers within the meaning of Neb. Rev. Stat. § 48-106(2) (Reissue 1978), so as to be exempt from the provisions of the Nebraska Workmen's Compensation Act. The Nebraska Workmen's Compensation Court, first by a single judge and then by a three-judge panel, ruled that the employer in this case was not exempt under the act, pursuant to the provisions of § 48-106(2), and was therefore liable to the employee injured in the course of the employee's work on the ranch. We believe that the result was in error, and for that reason we are required to reverse and dismiss.

The record discloses that the appellant, Vernon Parker, was a farmer and rancher, owning some 22 quarter sections of land in and around Perkins County, Nebraska. Parker grows sugar beets, corn, pinto beans, and alfalfa, and also raises cattle and horses. At the time of the accident incurred by the appellee, Lesa Leppert, Parker owned about 750 head of cattle and 50 to 55 horses. He employed 12 persons on his farm and had a manager over each of the various areas. The entire farm, however, was operated as a single unit.

One of the divisions of the farm was Parker Paint Farm. This was not a separate operation but, as Parker testified, a name used to advertise the farm. In July of 1980 Parker employed

Bruce Martin as manager of Parker's horse operation. Leppert was contacted by Martin when Martin started work for Parker, and she secured a job with Parker as a general farm and ranch laborer. Although Leppert argues she was hired as "an assistant horse trainer," the record is in conflict as to who attached the title to the job. Martin's duties included managing the breeding operation and overseeing the entire horse operation, and Leppert's duties in connection with her employment included cleaning of the stalls and the barns, grooming the horses, hauling hay, and assisting in training the horses and in any other operation where she was needed in connection with the farm and ranch. The record does disclose that Leppert attended Findlay College in Findlay, Ohio, for 2 years and received an associate degree in equestrian studies, although it appears that Parker did not know this fact when Leppert was hired, nor was the degree a condition of employment.

Leppert maintains that she was not a farm and ranch employee but, rather, was a horse trainer at the time of her injury, and the Workmen's Compensation Court agreed with her claim. Assuming, as we must, that the Workmen's Compensation Court's finding that Leppert was in fact a horse trainer is correct, see, *Gregg v. Challburg*, 217 Neb. 143, 347 N.W.2d 559 (1984), and *Doggett v. Brunswick Corp.*, 217 Neb. 166, 347 N.W.2d 877 (1984), a fact upon which we believe the evidence is extremely thin, we nevertheless must conclude that the exemption of § 48-106(2) applies and that Leppert is not covered by the act.

Section 48-106(2), in clear and unequivocal terms, provides in part as follows: "The following are declared not to be hazardous occupations and not within the provisions of this act: Employers of household domestic servants and employers of farm or ranch laborers, except as hereinafter provided . . . ." The exceptions are not relevant or material to this case.

Apparently, it was the view of the Workmen's Compensation Court that because Leppert "trained horses" she was not a ranch laborer within the meaning of § 48-106(2). It is difficult for us to conceive who could be more like a ranch laborer than one who works on a ranch and performs the duties performed by Leppert. If Leppert is not a ranch laborer, we have difficulty

imagining who would be. While it may be true that Leppert rode the horses on occasion and assisted in getting them ready for the various shows, her principal duties seem to be that of grooming the animals, feeding the animals, helping in breeding the animals, and cleaning the stalls. A rose by any other name is a rose, and a ranch laborer by any other name is a ranch laborer. Leppert has cited us to no authority, nor are we able to find any authority, to the effect that a "horse trainer" working exclusively on a ranch is not within the exemption of § 48-106(2).

One of the first cases where this court addressed the farm and ranch laborer exception is *Keefover v. Vasey*, 112 Neb. 424, 427, 199 N.W. 799, 800 (1924), wherein we said:

> Our problem requires us to discover the intention of the legislature in the use of the four words "employers of farm laborers." Our attention has not been called to any statute making use of these precise terms. In Iowa the excluding words are, "farm or other laborer engaged in agricultural pursuits;" Minnesota, "farm laborers;" Utah, "agricultural laborers;" Idaho, "agricultural pursuits;" Michigan, "farm laborers;" Indiana, "farm or agricultural laborers," and "employers of such persons;" and New York, "farm laborers." It is worthy of note that in these other states the emphasis seems to be placed upon the exclusion of the laborer, while in this state it rests upon the exclusion of the employer of such labor. It would seem, therefore, that the legislature (composed to a large extent of farmers) by these words have pointed out a class which it intended to exclude from the law, which class consists exclusively, or nearly so, of farmers; and while the classification, as remarked by Schneider, Workmen's Compensation Law, sec. 31, quoted by plaintiff's counsel, "was perhaps based more on legislative expedience than on sound reason," still it is the law, and if there is any question as to the propriety of the classification, that question is not now before us.

In the recent case of *Brown v. Leavitt Lane Farm*, 215 Neb. 522, 340 N.W.2d 4 (1983), we recognized that one may be engaged in both a farm operation exempted under the act and in a nonfarm operation covered by the act; however, the evidence in

this case does not support that distinction.

In *Campos v. Tomoi*, 175 Neb. 555, 557, 122 N.W.2d 473, 474 (1963), we said: "There is considerable confusion and diversity of opinion in the cases construing factual situations arising under the applicable provisions of the Workmen's Compensation Act and the principles applicable thereto." A review of the cases decided in Nebraska fails to indicate any singular overriding approach used by this court in determining the applicability of the farm and ranch laborer exception. Instead, there really is an examination on a case-by-case basis of the facts in each particular instance. Within that examination, the court will review "[t]he place where the work is being performed, the nature of the task the employee is performing at the time, the purposes for which he was hired, and the nature of the employer's occupation . . . ." *Id.* at 557, 122 N.W.2d at 474-75. It is clear from both the statute and the cases that it is the nature of the employer's business which determines the exemption, and not the work performed by the employee.

Parker was first, last, and always the operator of a farm and ranch. If 22 *quarter sections* of land devoted to growing sugar beets, corn, pinto beans, and alfalfa, and raising 750 head of cattle and 50 horses, do not qualify as a "farm or ranch," nothing, it would seem, could fall within the definition. Parker was clearly the operator of a farm and ranch, and Leppert, as his employee, was an employee of one operating a farm or ranch. There is simply no way to suggest that Parker was not a farmer and rancher or that Leppert was not an employee of one engaged in the farming and ranching operation. Had the animals involved all been cattle instead of horses, perhaps the matter would have been obvious. One may be a carpenter doing work on a farm and, because of the nature of the employer's business, be covered under the act; while one employed by the owner of a farm or ranch who repairs sheds, buildings, or fences on a full-time basis on the farm or ranch is exempted under the provisions of § 48-106(2). See, *Guse v. Wessels*, 132 Neb. 41, 270 N.W. 665 (1937); *Oliver v. Ernst*, 148 Neb. 465, 27 N.W.2d 622 (1947); *Keith v. Wilson*, 165 Neb. 58, 84 N.W.2d 192 (1957); *Keefover v. Vasey*, 112 Neb. 424, 199 N.W. 799 (1924). The same thing applies, we believe, to Leppert's employment, re-

gardless of what title may be given to it.

While we would be inclined to agree with arguments made to this court that the statement contained in § 48-106(2) to the effect that farm or ranch labor is not a hazardous occupation is patently silly, and while we would agree that subjecting someone to the likelihood of being kicked in the knee by a horse or being pulled into a combine is as hazardous as any office work covered by the act, nevertheless, the Legislature, which has absolute control in this matter, has made such a classification, and absent a determination by this court that the classification violates the Nebraska Constitution, we are compelled to apply the law as written.

We therefore believe that the evidence overwhelmingly establishes that Vernon Parker was an employer of farm and ranch laborers, and Leppert was, at the time of her accident, a farm and ranch employee of Parker and not covered by the Workmen's Compensation Act. For this reason the decision of the compensation court must be reversed and the petition dismissed. Having thus disposed of this matter, we need not consider any of the other issues raised by this appeal.

REVERSED AND DISMISSED.

IN RE INTEREST OF P.L.F., A CHILD UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. P.L.F., APPELLEE.
CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLANT.
352 N.W.2d 183

Filed July 20, 1984. Nos. 83-879, 83-880.

Juvenile Courts: Jurisdiction: Records. The separate juvenile court does not have statutory authority to order expungement of a juvenile record.

Appeal from the Separate Juvenile Court of Douglas County. Affirmed in part, and in part reversed and remanded with directions.

Herbert M. Fitle, Omaha City Attorney, James E. Fellows,

and Timothy K. Kelso, for appellant.

Anthony S. Troia, for appellee P.L.F.

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

WHITE, J.

P.L.F., appellee in this court, petitioned the separate juvenile court of Douglas County, Nebraska, pursuant to Neb. Rev. Stat. §§ 43-2,102 et seq. (Cum. Supp. 1982), for an order of the court to set aside the adjudication of the juvenile court and "that all records relevant to said child's adjudication(s) be sealed and shall not be available to any person except upon the order of this Court for good cause shown."

Service was had on, among others, the police division of the City of Omaha, Nebraska, pursuant to § 43-2,105. The police division, through the City of Omaha, responded. The response did not oppose the setting aside of the adjudication as a delinquent child, but sought clarification of the "sealing" process and the establishment of a method of handling its own records as would cause minimal interference or obstruction in the investigative work of the police division. The City of Omaha specifically objected to an agreement relating to the process of record retrieval that had been in effect in Douglas County.

The juvenile court, after hearing, entered an order which in pertinent part provided:

> 2. That the Motion objecting to the sealing of the record by the City of Omaha is overruled;
>
> 3. That all records relevant to the adjudication are hereby sealed, pursuant to Section 43-2,102 et., seq., R.R.S. Nebraska 1943, Cum., Supp., 1982, and such reports shall not be available to any person except upon order of the Court for good cause shown;
>
> 4. That any and all computer bank records and police divisional records be sealed and expunged without exception.

Appellant assigns as its single error that "[t]he Juvenile Court erred in . . . ordering the Police Division records sealed and expunged."

Section 43-2,105 provides in part:

> When the court issues an order setting aside the adjudication, the order shall also require that all records relevant to the adjudication be sealed. Thereafter, such records shall not be available to any person except upon the order of the court for good cause shown. The court order may include all records of the court, law enforcement officers, county attorneys, or any institution, person, or agency which may have such records.

A number of questions are necessarily involved in the resolution of this case, the first of which is whether the juvenile court possesses the power to "expunge" the adjudication and related records of law enforcement authorities.

Black's Law Dictionary 522 (5th ed. 1979) defines "Expunge" as follows: "To destroy; blot out; obliterate; erase; efface designedly; strike out wholly. The act of physically destroying information—including criminal records—in files, computers, or other depositories."

The same source defines "Seal" in part at 1210: "As regards sealing of records, means to close by any kind of fastening that must be broken before access can be obtained."

It is obvious that the statute authorizes the court to limit access to juvenile records and is silent on the subject of destruction of such records. Appellee concedes that the statute does not so provide, but asserts that the separate juvenile court has inherent equitable authority to order such records expunged.

The question is a novel one. A number of courts have held that the juvenile court has such authority, but have restricted its exercise to situations " 'when [there was] serious governmental misbehavior leading to the arrest, or unusually substantial harm to the defendant not in any way attributable to him, outweighs the government's need for a record of arrest.' " *United States v. Doe*, 496 F. Supp. 650, 653 (D.R.I. 1980).

Illustrative of that point is *Police Comm'r of Boston v. Municipal Court of the Dorchester District*, 374 Mass. 640, 661-62, 374 N.E.2d 272, 284 (1978):

> The power properly may be exercised where the utility of the records for law enforcement purposes is likely to be minimal or nonexistent. Thus, where a juvenile proceeding has been terminated due to the absence of any evidence

> of delinquency, expungement would seem justified. On the other hand, if there is a disposition of the case favorable to the juvenile due to matters not necessarily supportive of a finding of noninvolvement in delinquent behavior, the need for the remedy, in terms of the injury sought to be avoided, becomes correspondingly less. In such latter instance, no order of expungement may be indicated, or a less drastic measure, such as ordering the records sealed or placing other limitations on dissemination and access, may be sufficient.

Similarly, in *Doe v. Comdr., Wheaton Police Dep't*, 273 Md. 262, 329 A.2d 35 (1974), the petitioner requested expungement of police records relating to an arrest for commission of unnatural sexual acts, which charges were dismissed. The court of appeals held, in reversing the order of the district court sustaining the police department demurrer, that the court had jurisdiction to determine whether the facts warranted granting the expungement of the arrest records.

In all the cases cited which uphold the theory of "inherent equitable power to expunge," the expunging of such records is a process of weighing the interests of society and of the individuals involved.

Here, the appellee was adjudicated and found to have committed acts tantamount to burglary and sexual assault against two male minors. Under none of the cases discussed or cited by appellee would expungement be justified. Assuming the authority of the juvenile court to expunge records independent of statute exists (which we specifically do not decide), the appellee has not shown a basis on which such authority should be exercised. The order expunging records is in error and must be reversed.

Having determined that the records, including arrest records, may only appropriately be sealed and not expunged, the remaining question as to how the sealing should be accomplished must be remanded to the separate juvenile court for an initial answer. We note that several proposals, including physical removal of the records to a secure storage area and removal of detailed arrest and adjudication records from the police division computer, with the notation in the computer that a juvenile

record exists, sufficient to trigger a request to the juvenile court, are in the evidence and argued in the brief. However, the juvenile court has neither approved nor disapproved of any such method.

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

CAPORALE, J., participating on briefs.

KRIVOSHA, C.J., concurring.

I concur in the result reached by the majority in this opinion. I do not, however, believe that the majority was required to "assum[e] the authority of the juvenile court to expunge records independent of statute," and I believe that any discussion by the majority regarding whether the juvenile court has such independent authority is mere dictum. The statute in this case clearly provided that the juvenile court did not have authority to expunge the record. That was the issue presented to us and the only one which we need decide. Whether the separate juvenile court has inherent authority to expunge a record is a matter which should best be left for another day when the question is properly and directly presented to us.

IN RE INTEREST OF J.M.S., A CHILD UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. J.M.S., APPELLEE.
M.R.S. AND M.S., PARENTS OF J.M.S., APPELLANTS.
IN RE INTEREST OF C.B., A CHILD UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. C.B., APPELLEE.
L.B. AND D.B., PARENTS OF C.B., APPELLANTS.
352 N.W.2d 186

Filed July 20, 1984. Nos. 83-887, 83-888.

Juvenile Courts: Final Orders: Appeal and Error. An order placing a juvenile in the Youth Development Center for evaluation is predispositional, interlocutory in nature, and not a final order for the purposes of appeal.

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

Richard L. Kuhlman, for appellants.

Larry J. Karel, Colfax County Attorney, and Richard T. Seckman, for appellee State of Nebraska.

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

BOSLAUGH, J.

These cases were commenced by the filing of complaints in the county court charging each of the juveniles with procuring alcoholic liquor for a minor. Upon the motion of each juvenile the cases were transferred to the juvenile court.

At the adjudication hearings held on July 22, 1983, each juvenile admitted the facts stated in the complaints and was adjudicated to be a child as described in Neb. Rev. Stat. § 43-247(1) (Cum. Supp. 1982). Disposition hearings were set for September 2, 1983.

At the disposition hearings the county court determined that each juvenile should be placed in the Youth Development Center at Geneva, Nebraska, for not to exceed 30 days for the purposes of study and evaluation as provided in Neb. Rev. Stat. § 43-281 (Cum. Supp. 1982). Each of the juveniles then filed a notice of appeal to the district court.

The district court found that the orders of the juvenile court placing the juveniles in the Youth Development Center were not final orders and remanded each case to the county court. The district court, however, stayed the orders of the county court pending the appeals to this court and ordered the juveniles be returned to their parents.

The cases were consolidated for argument in this court. The issue involved in each case is whether an order of the county court, placing a juvenile in the Youth Development Center for evaluation, is a final order from which an appeal can be taken to the district court.

Section 43-281 provides: "Following an adjudication of jurisdiction and prior to final disposition, the court may place the juvenile in any facility or institution for evaluation under the control of the State of Nebraska, except an adult penal institution as provided in section 43-258."

The same issue was involved in *In re Interest of Aufenkamp*, 214 Neb. 297, 300, 333 N.W.2d 681, 684 (1983). There we said:

> The appellant's last assignment of error is directed at the predisposition order of June 22, 1982. *Such orders are interlocutory in nature and not appealable.* See *Kaba v. Fox*, 213 Neb. 656, 330 N.W.2d 749 (1983).
>
> The juvenile court has broad discretion as to the disposition of a child found to be delinquent. Neb. Rev. Stat. § 43-210(2) (Reissue 1978) authorizes the court to commit the child described in § 43-202(3) to the Youth Development Center. It is within the jurisdiction and discretion of the juvenile court to order a juvenile who is eligible for commitment to the Youth Development Center to be placed in the Youth Development Center temporarily for the purpose of evaluation preliminary to a dispositional hearing.

(Emphasis supplied.)

The appellants rely upon the rule, originally stated in *State v. Belding*, 190 Neb. 646, 211 N.W.2d 715 (1973), that every dispositive order that rests upon an adjudication of delinquency is a final order for the purposes of appeal. The rule has no application here because the order placing the juveniles in the Youth Development Center for evaluation was predispositional, interlocutory in nature, and not a final order for the purposes of appeal.

As we stated in the *Aufenkamp* case, it is important that an appropriate order be made in a juvenile proceeding, and an evaluation by trained and experienced personnel may well be of benefit to the court in determining what dispositional orders should be made.

The offenses involved in the cases now before us consisted of supplying a case of beer to four other juveniles, 12 to 13 years of age. This was accomplished by arranging for a third person to purchase the beer with money supplied by the four younger persons. The two juveniles now before the court, who were then 16 and 17 years of age, delivered the beer to the younger children. They have refused to disclose the name of the person who made the purchase at their request.

The finding of the district court that the orders were not ap-

pealable was correct. The proper order should have been a dismissal of the appeals. The judgments are so modified and, as modified, are affirmed.

AFFIRMED AS MODIFIED.

KRIVOSHA, C.J., concurs in the result.

STATE OF NEBRASKA, APPELLEE, V. BEVERLY J. HARRIS, APPELLANT.

352 N.W.2d 581

Filed July 20, 1984. No. 83-909.

1. **Convictions: Minors: Alcoholic Liquors: Proof.** As a general rule, knowledge and consciousness of possession of alcoholic liquor are essential elements of proof to support a conviction for a minor being in possession of alcoholic liquor.
2. **Criminal Law: Circumstantial Evidence: Proof.** Where circumstantial evidence is relied upon to prove the elements of a crime, the circumstances must relate directly to the guilt of the accused beyond all reasonable doubt.
3. **Controlled Substances: Alcoholic Liquors: Evidence: Convictions.** Ordinarily, when liquor, narcotics, or contraband materials are found on a defendant's premises or in an automobile possessed and operated by him, the evidence of unlawful possession is deemed sufficient to sustain a conviction, in the absence of any other reasonable explanation for its presence.
4. **Convictions: Minors: Alcoholic Liquors.** As a general rule, the mere presence of the minor passenger in a vehicle where alcohol is found, without more, is not sufficient to convict the minor of possession.

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

Bruce Dalluge of Morrissey & Morrissey, for appellant.

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

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

HASTINGS, J.

Defendant appeals from a conviction for being a minor in

possession of alcoholic liquor. The assignments of error set forth by the defendant can be summarized into the single issue of whether the evidence is sufficient to support the conviction.

The facts of the case are not disputed. While on routine patrol at night, the deputy sheriff spotted two stationary vehicles parallel to each other, 4 to 5 feet apart. The officer, who was approximately one block west of the vehicles, observed four to five individuals between the vehicles, but could not determine whether the individuals were drinking. Upon seeing the sheriff's vehicle all of the individuals hurriedly entered one of the vehicles and drove away. The deputy sheriff, being suspicious, followed the moving vehicle, and while doing so spotted beer cans on the ground where the remaining car was parked.

After stopping the moving vehicle approximately 10 to 12 blocks from the parked vehicle, the officer surveyed the vehicle with his flashlight and found a Budweiser cooler containing four cans of cold beer underneath the legs of one of the back seat passengers. At trial the officer testified that the driver of the car had a strong odor of alcohol on his breath and the eyes of the two back seat passengers "looked very glassy." The officer also testified that the passenger in the front seat next to the defendant was unruly and drunk.

The defendant was seated between the driver and another passenger in the front seat of the vehicle which was stopped. There is no testimony in the record of how the defendant arrived at the scene. There is no testimony that the defendant had been drinking or had appeared to have been drinking. Furthermore, the testimony of the officer makes it apparent that alcohol was not within the defendant's view or reach from the front seat. The defendant contends that the evidence is insufficient to establish knowledge or consciousness of actual or constructive possession.

It has consistently been the rule that knowledge and consciousness of possession of alcoholic liquor are essential elements of proof to support a conviction for a minor being in possession of alcoholic liquor. *State v. Embrey*, 188 Neb. 649, 198 N.W.2d 322 (1972); *State v. Reeder*, 183 Neb. 425, 160 N.W.2d 753 (1968); *State v. Eberhardt*, 176 Neb. 18, 125 N.W.2d 1 (1963). In *State v. Reeder, supra* at 427, 160 N.W.2d at

755, with regard to these elements, we said: "There is often, as here, very little direct evidence of knowledge and 'conscious possession.' Like intent, these elements remain hidden in the recesses of the human mind and must be proved by means of circumstantial evidence." The applicable rule which follows is that where circumstantial evidence is relied upon, the circumstances proven must relate directly to the guilt of the accused beyond all reasonable doubt. *State v. Evans*, 215 Neb. 433, 338 N.W.2d 788 (1983).

Ordinarily, when liquor, narcotics, or contraband materials are found on a defendant's premises or in an automobile possessed and operated by him, the evidence of unlawful possession is deemed sufficient to sustain a conviction, in the absence of any other reasonable explanation for its presence. *State v. Britt*, 200 Neb. 601, 264 N.W.2d 670 (1978); *State v. Torrence*, 192 Neb. 720, 224 N.W.2d 177 (1974); *State v. Rys*, 186 Neb. 341, 183 N.W.2d 253 (1971).

However, in this case the defendant was not the owner of the vehicle but a passenger riding in it. As a general rule, the mere presence of the minor passenger in a vehicle where alcohol is found is not sufficient by itself to convict the minor of possession. *State v. Eberhardt, supra; State v. Faircloth*, 181 Neb. 333, 148 N.W.2d 187 (1967).

In the case before us there is insufficient circumstantial evidence present to infer knowledge and conscious possession. The alcohol was not within the reach or view of the defendant, and no evidence is present to indicate the defendant had been drinking. In no way did the circumstances proven relate directly to the guilt of the accused beyond a reasonable doubt.

The motion of the defendant for a directed verdict should have been granted. Accordingly, we reverse the judgment and remand the cause with directions to dismiss the information.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

STATE OF NEBRASKA, APPELLANT, V. ROBIN K. BURCHETT, APPELLEE.

352 N.W.2d 188

Filed July 20, 1984. No. 84-415.

1. **Search and Seizure: Evidence.** Objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence.
2. **Search and Seizure: Rules of Evidence.** Where it is shown by a preponderance of the evidence that information or evidence obtained by an illegal search would ultimately or inevitably have been discovered by lawful means, the evidence is admissible under the inevitable discovery exception to the exclusionary rule.
3. _____: _____. The inevitable discovery exception to the exclusionary rule allows illegally obtained evidence to be admitted if the illegal act merely contributed to the discovery of the allegedly tainted information and it would have been acquired lawfully even if the illegal act had not occurred.

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

Michael G. Heavican, Lancaster County Attorney, Alan L. Everett, and Bruce W. Gillan, for appellant.

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

BOSLAUGH, J.

The State has appealed under Neb. Rev. Stat. § 29-824 (Cum. Supp. 1982) from an order of the district court for Lancaster County, Nebraska, suppressing two bicycle owner's manuals seized from the residence of the defendant, Robin K. Burchett.

Burchett is charged with first degree murder. Juana Lea Rolenc was found dead in Lancaster County on May 11, 1983. On May 16, 1983, Clement Rolenc told an investigating officer that he had hired Robin Burchett and another man to kill his wife, Juana Lea, and had paid them $1,000, mostly in $100 bills.

Burchett was arrested in Grand Island, Nebraska, on May 17, 1983. On that date a search warrant was issued by the district court for Lancaster County for a search of Burchett's residence in Grand Island. Officers from Lancaster County went to Grand Island to conduct the search. Shortly before the search commenced, Burchett's wife informed an investigating officer

that Burchett had purchased two new bicycles on May 11, 1983, with $100 bills. She told the investigator that she had noticed in the bicycle owner's manuals that the price of each bicycle was $90. This information was relayed to the officers who were to conduct the search.

During the course of the search, the officers found and seized the owner's manuals which were in a box in the dining room. The box contained various other papers. The search warrant did not specifically authorize seizure of the manuals.

Burchett filed a motion to suppress, arguing that the manuals were illegally seized. The district court sustained the motion, stating that the manuals were outside the scope of items authorized to be seized by the search warrant issued May 17, 1983. The State brought this appeal.

The State contends that the manuals were in "plain view" of the officers, who had a right to be in the position to have that view, and therefore should not be suppressed. Moreover, the State contends that there is a reasonable probability that the evidence would have been discovered in a lawful manner had any illegality not occurred. Burchett maintains that the officers were aware of the existence of the owner's manuals before conducting the search and therefore were required to get a search warrant specifically naming those items. Burchett argues that the "plain view" exception to the warrant requirement is applicable only where the discovery is "inadvertent."

Burchett admits for purposes of this appeal that the officers were present at his residence pursuant to a valid search warrant. Burchett relies upon *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971), for his contention that the discovery must be inadvertent. In *Texas v. Brown*, 460 U.S. 730, 743, 103 S. Ct. 1535, 75 L. Ed. 2d 502 (1983), the U.S. Supreme Court discussed the *Coolidge* case, and stated: "[T]he *Coolidge* plurality also stated that the police must discover incriminating evidence 'inadvertently,' which is to say, they may not 'know in advance the location of [certain] evidence and intend to seize it,' relying on the plain-view doctrine only as a pretense." The court went on to state that a roadblock set up by police in a known area of drug trafficking did not constitute anything more than a generalized expectation

on the part of the police that some of the vehicles halted would contain narcotics. The court held that the "inadvertence" requirement did not bar the application of the "plain view" exception.

The record in this case does not indicate that the officers used a valid warrant as a pretense for seizing the manuals. Mrs. Burchett merely informed the investigating officer that Burchett had purchased the bicycles and that the price was indicated on the manuals. The information from Mrs. Burchett only furnished the basis for the officers to know that the manuals were relevant as evidence. She did not tell the officers where the manuals were. Thus, the officers had only a generalized expectation that they might find the manuals in the house. In such a case an officer who has a right to be where he is, is authorized to seize evidence which he knows to be incriminating in nature when that evidence comes into plain view. *State v. Holloman*, 197 Neb. 139, 248 N.W.2d 15 (1976).

Moreover, it is reasonably probable that the manuals seized by the officers would have been obtained in the course of an investigation based upon evidence or leads already in possession of the authorities. In *Nix v. Williams*, ____ U.S. ____, 104 S. Ct. 2501, 2511, 81 L. Ed. 2d 377 (1984), the U.S. Supreme Court said: "[I]f the government can prove that the evidence would have been obtained inevitably and, therefore, would have been admitted regardless of any overreaching by police, there is no rational basis to keep that evidence from the jury in order to ensure the fairness of the trial proceedings." See, also, *State v. Poit*, 216 Neb. 635, 344 N.W.2d 914 (1984).

The record clearly shows that Mrs. Burchett had informed the investigating officer that her husband had purchased the bicycles with $100 bills. In investigating this lead it is inevitable that the officers would have discovered and seized corroborative evidence of the purchase of the bicycles.

The order of the district court suppressing the bicycle owner's manuals is reversed.

REVERSED.

ELIZABETH M. HARDT ET AL., APPELLEES AND CROSS-APPELLANTS, V. ERNEST ESKAM ET AL., APPELLANTS AND CROSS-APPELLEES.

352 N.W.2d 583

Filed July 27, 1984. No. 83-012.

1. **Adverse Possession.** Title to real estate by adverse possession cannot be acquired without the simultaneous and continuous existence of each element of adverse possession for a period of 10 years.
2. **Words and Phrases.** Continuous means uninterrupted, or stretching on without break or interruption.
3. **Adverse Possession.** Generally, seasonal and recreational use and, therefore, occasional use, even if occurring annually, cannot ripen into title for the real estate on which such recreation takes place.
4. _____. Intermittent use by the adverse claimant, not inconsistent with and excluding the predominant and most suitable use of a disputed tract, cannot be the foundation for ownership by adverse possession.

Appeal from the District Court for Scotts Bluff County: ALFRED J. KORTUM, Judge. Reversed and remanded with directions to dismiss.

Holtorf, Kovarik, Nuttleman, Ellison, Mathis & Javoronok, P.C., for appellants.

Brenner and Meister Law Office, for appellees.

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

PER CURIAM.

Elizabeth and Donald Hardt filed suit to quiet title to river land. Hardts also sought damages for trespass by Eskams on the disputed tract. Eskams answered and counterclaimed for quiet title to the disputed tract. The district court found in favor of the Hardts. Eskams appeal and Hardts cross-appeal. We reverse and remand for dismissal.

As background, the parties by their pleadings have referred to the disputed tract as "Blackacre," and for brevity we shall adopt that usage rather than the lengthy legal description for the disputed tract. Also, although the trial court decided adversely to Eskams on their counterclaim, Eskams have not appealed that judgment. As assigned error, Eskams contend only

that the district court was incorrect in finding for Hardts on the issue of adverse possession.

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 without reference to the findings of the district court. *Pettis v. Lozier*, 217 Neb. 191, 349 N.W.2d 372 (1984); *Weiss v. Meyer*, 208 Neb. 429, 303 N.W.2d 765 (1981).

Blackacre, the disputed tract, contains 14.99 acres of alluvion in the North Platte River within Scotts Bluff County. Blackacre is suitable for hunting, fishing, and livestock pasture the year around. Hardt personally hunted on the tract from 1940 until the early 1970s and eventually leased hunting rights on the tract to hunters, who built duckblinds on Blackacre. Hardt, as a youngster, had herded his family's sheep on Blackacre. However, Hardt made no use of Blackacre for livestock purposes from 1949 until 1965, when Hardt's cattle grazed on the tract.

Hardt did not recall the specific years his cattle grazed Blackacre, and he admitted that grazing was intermittent until 1978. Hardt testified he tried to conserve grass on Blackacre for use as winter pasture and last had calving operations on the tract in 1976. Hardt also acknowledged there were years when he did not have livestock on the tract. Hardt had no records regarding the presence or absence of his cattle in the use of the disputed tract.

The burden is on one who claims title by adverse possession to prove by a preponderance of the evidence that he has been in actual, continuous, exclusive, notorious, and adverse possession under claim of ownership for the statutory period, namely, 10 years. See, *Hutson v. The Rush Creek Land and Livestock Co.*, 206 Neb. 658, 294 N.W.2d 374 (1980); *Weiss v. Meyer, supra*. Title to real estate by adverse possession cannot be acquired without the simultaneous and continuous existence of each element of adverse possession for a period of 10 years. Continuous means "uninterrupted . . . stretching on without break or interruption." Webster's Third New International Dictionary, Unabridged 493-94 (1968). The law does not require the possession shall be evidenced by persons remaining continu-

ously upon the land and constantly from day to day performing acts of ownership thereon. It is sufficient if the land is used continuously for the purposes to which it may be naturally adapted. See *Weiss v. Meyer, supra;* accord *Walker v. Bell,* 154 Neb. 221, 47 N.W.2d 504 (1951). Hardt's alleged possession of Blackacre through his livestock operations does not fulfill the requirement of continuous use for the statutory period of 10 years.

Turning to hunting on Blackacre as a factor in determining whether Hardts' adverse possession exists, the evidence shows that the primary hunting activity related to waterfowl, especially duck hunting, although there was some hunting of upland birds and deer on the tract. Hunting being seasonal, the recreational use of Blackacre was, at best, occasional and limited to a few weeks or months of each year.

In *Knight v. Denman*, 64 Neb. 814, 819, 90 N.W. 863, 865 (1902):

> "Every disseisin is a trespass. But every trespass is not a disseisin. A wrongful intention to oust the real owner must clearly appear in order to raise an act, which may be only a trespass, to the bad eminence of a disseisin." 4 Kent, Commentaries (12th ed.), 535. There must be adverse possession, and, where the acts relied on by the claimant are equally consistent with mere trespasses, it is obvious that adverse possession has not been shown. Where there is color of title or a claim of right, pasturing cattle upon the land in season, when the only use to which the land is well adapted, is undoubtedly sufficient possession. But where there is a claim of right, except as it may be inferred from such occasional use of the land, it is obvious that such use may co-exist with an intention of a different nature from that of asserting ownership. *Murray v. Romine,* 60 Nebr., 94, 97 [82 N.W. 318 (1902)].

There is no evidence that the hunting-related activity was such as would give notice to anyone that title to real estate was being claimed by adverse possession. The record does not reflect that any of the hunters, either Hardt or those hunting with Hardt's permission, performed acts or displayed conduct upon which anyone could reasonably infer that Hardts were claiming

ownership of Blackacre. Generally, seasonal and recreational use and, therefore, occasional use, even if occurring annually, cannot ripen into title for the real estate on which such recreation takes place. See *W. T. Carter & Brother v. Ruth*, 275 S.W.2d 126 (Tex. Civ. App. 1955). In the present case the disputed tract was susceptible of multiple uses, but pasture for cattle and livestock operations was the predominant use. Hardts' intermittent use was not inconsistent with and did not exclude the predominant and most suitable use of the disputed tract and cannot be the foundation for ownership by adverse possession. Under the circumstances seasonal and recreational use does not supply the continuous possession for the required 10-year period. Further, Hardts have failed to prove that such hunting activity was notorious or so conspicuous as would be known by the public at large and construed as a claim of ownership by adverse possession. Hardts have failed to prove continuous and notorious possession of Blackacre for a period of 10 years.

Hardts have failed to present a preponderance of evidence demonstrating a continuous use of the disputed tract for a period of 10 years. The judgment of the district court in favor of Hardts on the question of adverse possession is reversed and set aside. Because Hardts have failed to prove the elements of adverse possession, Hardts' suit must be dismissed.

Hardts, in their cross-appeal, claim they should have been permitted to amend their petition to inject an issue of Eskams' mutual acquiescence in a boundary line. Reception of evidence in this case was concluded and the case submitted on November 10, 1982. Hardts' motion to amend their petition was filed on December 1, 1982. We are unable to find any reference in the record to the trial court's denying the amendment requested by Hardts. Assuming counsel's statements to this court are correct, that the district court did deny Hardts' request for amendment of the pleadings, under the circumstances the matter of an amendment of pleadings is addressed to the sound discretion of the trial court. See *State Securities Co. v. Corkle*, 191 Neb. 578, 216 N.W.2d 879 (1974). We find no abuse of discretion.

Hardts claimed damages as a result of Eskams' trespass on Blackacre, namely, deprivation of use of Blackacre and destruction of a fence located on Blackacre. The trial court awarded

Hardts $750 as damages for the fence and refused to award any other damages to Hardts. Because any recovery on the theories advanced by Hardts necessarily depends on title to Blackacre, which we have held Hardts do not have, Hardts are not entitled to any damages alleged to have been sustained as a result of trespass by Eskams. The judgment of the district court awarding damages to Hardts is reversed and set aside.

Eskams claim additional error on the part of the trial court, failure to read the deposition of a witness for Eskams. In view of the disposition we make in this appeal, it is unnecessary to decide that question.

For the reasons given, the judgment of the district court is reversed and set aside. We remand these proceedings to the district court with directions that the proceedings shall be dismissed.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

BOSLAUGH, J., concurs in the result.

PATRICK J. BOLAN ET AL., APPELLANTS, V. MICHAEL BOYLE ET AL., APPELLEES.

352 N.W.2d 586

Filed July 27, 1984. No. 83-102.

Employer and Employee: Wages. Where an employer retains a hold on employees during their lunch period so that the employees are not actually at liberty, the lunch period constitutes compensable time.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Reversed and remanded for further proceedings.

Jerold V. Fennell and Jay L. Grytdahl of Robert E. O'Connor & Associates, for appellants.

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

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

GRANT, J.

Plaintiffs, Patrick J. Bolan and Marcellus Deats, bring this action on behalf of themselves and as a class action on behalf of certain current and former civilian employees of the defendant City of Omaha, a municipal corporation.

Plaintiffs' petition alleged that plaintiffs, and those similarly situated, were entitled to one-half hour of overtime per day pursuant to a proper interpretation of the collective bargaining agreement with defendant City from and after February 27, 1977. Defendants named were officials of the City of Omaha and the City, and will be collectively referred to herein as "City." The City, in its answer, generally denied the allegations in the petition and relied on the terms of the same collective bargaining agreement in seeking dismissal of the petition.

The issue of the City's liability under the contract was the only issue submitted to the trial court. Evidence was submitted on that issue, and the court, after trial, rendered judgment for the City on the plaintiffs' petition. Plaintiffs timely filed a motion for new trial and have appealed from the denial of that motion. For the reasons hereinafter set out we reverse and remand the cause for further proceedings.

The evidence showed that plaintiffs are civilian employees of the City and work for the police division in the criminalistics section, as a part of the public safety department. As described by Marcellus Deats, one of the plaintiffs, the jobs of plaintiffs are:

> Our section has the responsibility for—our main mission would be crime scene investigation. In other words, we go to a crime scene whether it be a burglary, homicide, whatever, to dust the latent fingerprints, photograph, collect, and preserve physical evidence; if warranted, making drawings of the crime scene. We also have in-house services which would include running the gas chromatograph, the intoxometer [sic] for suspected drunk drivers, mugging, fingerprinting and photographing persons booked in the detention area for certain crimes, the identification

> of latent prints that have been picked up and in some instances we have specialties, in my particular case, it would be firearms and tool mark examination.

Plaintiffs are members of the Omaha city employees union, Local No. 251, American Federation of State, County and Municipal Employees, and were members from 1976 through 1982. In each of the years 1976 through 1982, the agreement between the union and the City contained an identical paragraph, to wit:

> Employees of the Public Safety Department shall receive a one-half (1/2) hour meal period without pay, and such meal period shall not be considered as time worked, *except for those employees who by the nature of their work are required to be on duty for eight (8) consecutive hours, in which case they shall receive a one-half (1/2) hour meal period with pay and such time shall be considered as time worked.*

(Emphasis supplied.)

Before February 27, 1977, and while the foregoing clause was in effect, plaintiffs worked an 8-hour shift and were paid for a full 8 hours of work even though they were permitted a 1/2-hour lunch period during the shift. After February 27, 1977, plaintiffs were scheduled for 8 1/2-hour shifts, but were paid for 8 hours and provided a 1/2-hour lunch period.

Testimony adduced by plaintiffs further indicated that the technicians are called to the scenes of various crimes, such as burglaries, homicides, and robberies, and that when they are called, they report to the scene at once. The manner of the taking of employees' meals during those shifts did not change after February 27, 1977. As testified to by plaintiff Deats, his practice was to carry a lunch 90 or 95 percent of the time and to "take my lunch hour when the time is available." Plaintiffs would inform the senior person on the shift when they were going to eat; and if they left the premises to get a sandwich, the plaintiffs would check out with their superiors and inform them of their destination. They would remain in touch with headquarters on those occasions by portable radio or by being available at the destination to which they had informed their superiors they were heading.

Plaintiffs testified that sometimes they were unable to take

any lunch period during their 8½ hours of work and that at other times their lunch period was interrupted by calls for their services.

The City introduced six exhibits reflecting the daily activities of six City employees, including Deats, for 20 working days during the time from November 11 to December 8, 1979. These exhibits were completed by the employees at the time the City was doing a job analysis or job review. The daily worksheets were not kept for the purpose of determining whether lunch periods were taken or not taken, but for the City's personnel department in determining job skills, training needs, etc. However, such exhibits did contain information relevant to this dispute.

These exhibits disclose facts that are persuasive in determining this case. As stated, each of the six employees kept a record for 20 working days.

As to plaintiff Deats, whose work hours were 3:30 p.m. to 12 midnight, in those 20 days he was unable to take any lunch break on 3 days, and the time of taking his lunch breaks ranged from 6:30 p.m. to 10:30 p.m.

As to employee Beverly Mazur, whose work hours were also 3:30 p.m. to 12 midnight, on 2 days she took no lunch period; on 1 day her lunch was shortened when she was called out to check for fingerprints at the scene of a robbery; and the taking of her lunch period ranged from 5:25 p.m. to 10:05 p.m.

As to employee Micheal Stone, whose shift was 7:30 a.m. to 4 p.m., on 1 day he had no lunch period; on 1 day his lunch was curtailed to 10 minutes due to a call for his services at a death scene; on 2 other days his lunch period was shortened for unstated reasons; and the taking of his lunch period ranged from 11 a.m. to 1:45 p.m.

With regard to employee Donald Veys, whose shift was 7:30 a.m. to 4 p.m., he did not miss lunch entirely during the 20 days, but his lunch period was shortened on 6 days (including 1 day when he had 5 minutes for lunch at 11 a.m., interrupted by a call to a shooting, and 15 minutes at 12:25 p.m.) and interrupted on two other occasions—once for a line-up photo and once on a call to a burglary.

Another employee, Cleve Albaugh, whose shift was 7:30

a.m. to 4 p.m., missed no lunch periods, but took his meals at times ranging from 11 a.m. to 1:30 p.m.

The last of the six employees, Laura Beal, whose shift was 3:30 p.m. to midnight, missed her lunch period once; had her lunch time shortened on three occasions (once to 10 minutes) and took her meal beginning at times from 6:30 p.m. to 9:30 p.m.

The only conclusion that can be drawn from all the evidence is that plaintiffs' lunchtime belonged to the City. There was no set time at which plaintiffs could, as a matter of right, demand to sit down and enjoy one-half hour of privacy and not be subject to the employer's call. There were days, as demonstrated by the City's own evidence, when no lunch period was taken; and while those times were not regular, in the six instances presented, the lunchless days ranged from zero to three. Every employee as to whom evidence was submitted, except one, had lunch periods shortened due to duty calls. In that situation, as stated in *North v. City of Omaha*, 215 Neb. 107, 110, 337 N.W.2d 409, 411 (1983):

> Substantial authority exists for the proposition . . . that when an employer retains a hold on employees during lunchtime so that employees are not actually at liberty to leave, the lunchtime constitutes compensable time. *Glenn L. Martin Nebraska Co. v. Culkin*, 197 F.2d 981 (8th Cir. 1952); *F. W. Stock & Sons v. Thompson*, 194 F.2d 493 (6th Cir. 1952); *Thompson v. Iowa Beef Packers, Inc.*, 185 N.W.2d 738 (Iowa 1971).

These plaintiffs fell in the group defined in the City's contract, "except for those employees who by the nature of their work are required to be on duty for eight (8) consecutive hours, in which case they shall receive a one-half (1/2) hour meal period with pay and such time shall be considered as time worked."

The evidence is clear that plaintiffs are in the group "required to be on duty for eight (8) consecutive hours" and are on duty and working during their entire 8 1/2-half hour shifts, and they are entitled to be compensated for the entire time they are at work.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

KERMIT L. WHITAKER AND AMERICAN COLLOID CARRIER CORPORATION, APPELLANTS, V. BURLINGTON NORTHERN, INC., AND JOEL D. SCHAFFER, APPELLEES.

352 N.W.2d 589

Filed July 27, 1984. No. 83-151.

1. **Railroads: Motor Vehicles: Negligence.** A traveler on a highway, when approaching and while crossing a railroad crossing, has a duty to look and listen for the approach of trains. He must look, where by looking he could see, and listen, where by listening he could hear, and if he fails without a reasonable excuse to exercise such precautions, then he is guilty of contributory negligence more than slight as a matter of law and no recovery can be had for damages resulting from a collision with a passing train.
2. **Negligence.** A person who is himself negligent may not recover under the doctrine of the last clear chance where his negligence is active and continuing to the very time of the accident. Such a situation involves questions of contributory and comparative negligence and not those of the last clear chance doctrine.

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

Winner, Nichols, Douglas and Kelly, for appellants.

Holtorf, Kovarik, Nuttleman, Ellison, Mathis & Javoronok, P.C., and William C. Beyers, for appellees.

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

GRANT, J.

Plaintiff Kermit L. Whitaker was the owner of a truck tractor and plaintiff American Colloid Carrier Corporation owned a trailer and the cargo loaded on that trailer. On March 8, 1981, Whitaker's tractor, being driven by Whitaker's employee, was pulling the corporation's trailer and cargo. The tractor-trailer rig was in collision with a train owned by defendant Burlington Northern, Inc., and being operated by BN's employee, defendant Joel D. Schaffer. Since the interests of the two named plaintiffs are treated by the parties as identical for the purposes of this lawsuit, they will be referred to collectively as plaintiff. Similarly, the two named defendants will be referred to as defendant.

Plaintiff sued defendant for damages resulting from the col-

lision, alleging that defendant was negligent in not keeping a proper lookout; in not keeping its locomotive under proper control; in exceeding a safe speed; in failing to stop or attempting to stop the train; and in failing to slow down the train after the train operators saw plaintiff's rig stopped on the railroad tracks. In its answer defendant generally denied any negligence on its part, and alleged that plaintiff was contributorily negligent. At the conclusion of plaintiff's evidence at the jury trial of the issues, the trial court, on defendant's motion, directed a verdict in favor of defendant and dismissed the case. This appeal followed. Plaintiff assigns five errors, which may be consolidated into one, namely, that the court erred in granting defendant's motion for directed verdict because a jury question was presented either under general negligence theories or under the doctrine of last clear chance. For the reasons hereinafter set out we affirm.

In reviewing the case in the posture presented, we are bound by the rule, as set out in *Morris v. Laaker*, 213 Neb. 868, 331 N.W.2d 807 (1983), that the party against whom a verdict is directed is entitled to have every controverted fact resolved in favor of that party and to have the benefit of every inference that can reasonably be deduced from the evidence.

The record shows that the collision took place at the intersection of 21st Avenue and defendant's two main line railroad tracks east of Scottsbluff, Nebraska. Twenty-first Avenue is a two-lane road running north and south. The railroad tracks run slightly northwest to southeast and cross 21st Avenue at an angle of approximately 67°. The crossing was protected, as to traffic coming from the north, by a standard railroad crossbuck sign and a standard red, octagonal stop sign located a short distance north of the tracks. A paved highway known as the South Beltline Highway runs parallel to, and approximately 100 feet south of, the railroad tracks. The Beltline Highway intersects 21st Avenue at approximately the same angle of 67°. A standard red, octagonal stop sign to control southbound traffic on 21st Avenue at its intersection with the South Beltline Highway is located approximately 55 feet south of the southernmost tracks and approximately 45 feet north of the north edge of the Beltline Highway. At the northwest corner of 21st

Avenue and the Beltline Highway, construction work was going on and an excavation had been dug. The construction work was not on either highway, but was sufficiently close so as to make a right turn onto the Beltline Highway difficult for a rig such as plaintiff's. Barricades had been erected on 21st Avenue a substantial distance to the north of the tracks to give notice of the construction work.

From the crossing at 21st Avenue the tracks run east in a straight line, with unlimited visibility. To the west of the crossing the tracks run straight for approximately eight-tenths of a mile and then curve to the north.

Defendant's train consisted of 110 coal cars, 5 locomotives, and 1 caboose. The train was 5,982 feet long and weighed 14,467 tons. Plaintiff's rig was 59 feet in overall length, consisting of a tractor approximately 18 feet long pulling a trailer approximately 42 feet long. The trailer was loaded with 25 tons of cargo.

Plaintiff's driver, Larry Kuhlman, testified that he was proceeding south on 21st Avenue and stopped at the stop sign to the north of the tracks. At this stop he turned his tractor to the west at an angle in order to observe up the tracks as far as possible. This maneuver let Kuhlman see the eight-tenths of a mile west to the curve in the tracks, and the maneuver was necessary because of the angle at which the road and tracks intersected. Kuhlman saw there was no train approaching, and heard no train, and then continued south. The tractor and all but the last 10 feet of the trailer were across the track when Kuhlman noticed the excavation and construction at the northwest corner of 21st Avenue and the Beltline Highway. When Kuhlman noticed the excavation, he knew he "couldn't make that turn where my tractor was because I was right on the right-hand side of the road there." He stopped his rig at this point, which was approximately at the stop sign for the Beltline Highway, and some 45 feet north of the highway itself. Kuhlman then backed his rig up "approximately seven, eight feet, to twist my tractor around again so I could start my tractor to get on the left-hand side of the road so that the trailer would miss the hole . . . ." Kuhlman further testified that after backing up he again went forward and was struck by the train at the halfway point of the

42-foot trailer. Kuhlman estimated he was actually on the tracks "a couple minutes."

Kuhlman never saw the train, nor did he hear the whistle until a second before the collision. It was undisputed that the train's whistle was blowing the last one-quarter of a mile before the collision. With regard to seeing the train, or looking for a train before backing up, Kuhlman testified there were no back windows in the tractor, and with regard to rear vision, "Well, just the mirrors on the side of the truck but, you know, you just see straight back, that is all you can see." When later asked by plaintiff's attorney as to what visibility he had to his right, or west, Kuhlman stated, "Well, there isn't any, you just — All you can see is just a little bit behind you, you know, you couldn't see the railroad tracks where I was at all, from the truck where I was at."

According to plaintiff's expert witness, the train was going 31 miles per hour just west of the crossing. This witness also testified that at that speed it would take 1,630 feet for the train to stop if the emergency brakes were applied. The evidence is undisputed that the emergency brakes were applied and that the train came to rest 985 feet east of the point of collision. Plaintiff's expert also testified that this meant the emergency brakes were applied 644.6 feet west of the collision point, if the train was going 31 miles per hour. Defendant's conductor testified that as the train neared the "whistle post," which was one-quarter of a mile west of the crossing, the truck began to back up onto the tracks and the defendant's engineer applied the emergency brakes while blowing the train's whistle.

Monica Betancur was driving her automobile down the South Beltline Highway parallel to the train just before the collision. She estimated the train as proceeding at 30 to 35 miles per hour and saw plaintiff's rig "rocking back and forth" on the tracks. Her husband, Robert, testified that as they proceeded east on the highway and catching up on the train, he saw plaintiff's rig on the tracks, with the train about three-quarters of a mile away. He testified that the train's speed was between 30 and 35 and that when the train was one-half to one-quarter of a mile from the crossing, he believed there was going to be a collision. He also testified that the rig was always on the tracks "like this

rocking motion, like going back and forth on the tracks." After the collision this witness talked to the driver Kuhlman and testified that Kuhlman kept repeating, "I didn't see it" and "I didn't hear it." Kuhlman escaped any serious injury in the accident.

Plaintiff also adduced the testimony of Mitchell Endsley, the conductor on defendant's train. Endsley testified the speedometer in the engine indicated the train was going 30 miles per hour and that the rig was on the tracks about a minute and a half. Endsley then testified:

> Okay. I observed the truck. I can't really say if he stopped at the stop sign on the other side or not, but when I first saw him he was pulling over the tracks, pulled on over the tracks, stopped it there at the stop sign, and I would assume he stopped, stayed there a few seconds and, then, he backed up, started backing up on to the tracks. And the time he started back on the tracks that's when we put the train in emergency.

Endsley also testified that the defendant's engineer applied the train's emergency brakes approximately just east of the "whistle post," one quarter of a mile west of the crossing.

As can be seen from an examination of the facts just set out, it is clear that the legal question presented is nothing more than an exaggerated form of the usual grade crossing accident involving a vehicle approaching a crossing and failing to stop for an oncoming train in plain view.

As stated in *Wyatt v. Burlington Northern, Inc.*, 209 Neb. 212, 215-17, 306 N.W.2d 902, 905-06 (1981):

> The rules which are applicable to motorists approaching railroad grade crossings in this state are well settled. In *Thomas v. Burlington Northern R.R., Inc.*, 203 Neb. 507, 510-11, 279 N.W.2d 369, 372 (1979), we said: "It is a well-established rule in Nebraska that a traveler on a highway, when approaching a railroad crossing, has a duty to look and listen for the approach of trains. He must look, where by looking he could see, and listen, where by listening he could hear, and if he fails without a reasonable excuse to exercise such precautions, then he is guilty of contributory negligence more than slight, as a matter of law, and no recovery can be had for damages resulting from a collision

with a passing train . . . .

. . . .

> The ordinary rules of the road which are applicable to motor vehicles crossing at highway intersections have no application to railroad trains approaching grade crossings. Although railroad trains may not have an absolute right-of-way at grade crossings under all conditions, there is no duty on the part of the engineer operating the train to yield the right-of-way until the situation is such as to indicate to a reasonably prudent person that to proceed would probably result in a collision. At that time it becomes the duty of the engineer to exercise ordinary care to avoid an accident, even to the extent of yielding the right-of-way. *Carter v. Chicago, B. & Q.R.R. Co.*, 175 Neb. 188, 121 N.W.2d 44 (1963). The defendants in this case complied fully with these rules and did everything possible in an effort to stop the train when it became reasonably apparent that Wyatt might not stop before reaching the crossing.

In the case at bar plaintiff's driver had complied with his duties as a driver approaching a grade crossing and had safely negotiated the crossing, except for the last 10 feet of his trailer, when he stopped his rig and began to back up, thus recrossing the tracks from the other direction, without being able to see at all in the direction from which the train was approaching. As to this recrossing, it is undisputed that plaintiff's driver did not look at all. It is established that this maneuvering was done in an area where plaintiff's driver had approximately 100 feet to turn his 59-foot rig between the tracks and the Beltline Highway, although admittedly that 100 feet included some 45 feet past the stop sign. To recross the tracks in that position and not looking in the only direction of possible danger constitutes contributory negligence more than slight as a matter of law, which negligence is sufficient to deny recovery to plaintiff.

With regard to plaintiff's contention that the case should have been submitted to the jury under the theory of last clear chance, we determine that the trial court was correct in holding that the doctrine of last clear chance did not apply to the facts presented in this case. It is established in our case law, and

stated in the last clear chance instruction, NJI 3.23, that one of the propositions which plaintiff must prove in order to be entitled to that doctrine of the law is "that the active negligence of the plaintiff had ceased and was not a contributing factor to the accident." Both parties cite *Maricle v. Spiegel*, 213 Neb. 223, 329 N.W.2d 80 (1983), in this connection. While the holding of that case is premised on the determination that the last clear chance doctrine is not available to a defendant, the case, in generally discussing the subject, does refer to the fact that "[f]urthermore, the doctrine of last clear chance is factually inapplicable, as the negligence of the party seeking to invoke it was active and continuing as a contributing factor up to the time of injury." *Id.* at 227, 329 N.W.2d at 84.

In this case plaintiff's negligence continued up to the instant of the collision in that his driver did not look for danger and did not hear the warning whistle, which admittedly was blowing, until a second before the collision. Even a late awareness of the obvious danger approaching might have enabled plaintiff's driver to escape. As stated in *Bush v. James*, 152 Neb. 189, 196, 40 N.W.2d 667, 672 (1950), " 'A person who is himself negligent may not recover under the doctrine of the last clear chance where his negligence is active and continuing to the very time of the accident. Such a situation involves questions of comparative negligence and not those of the last clear chance doctrine.' "

The action of the trial court in dismissing plaintiff's case at the conclusion of plaintiff's evidence was correct and is affirmed.

AFFIRMED.

GEORGE P. ROSE, JR., AND GEORGE P. ROSE, SR., APPELLANTS, V. U.S. NATIONAL BANK OF OMAHA, APPELLEE.

352 N.W.2d 594

Filed July 27, 1984. No. 83-293.

1. **Uniform Commercial Code: Banks and Banking: Secured Transactions.** Under Neb. U.C.C. § 3-802 (Reissue 1980), unless otherwise agreed, where a personal check is taken for an underlying obligation, the obligation is suspended pro tanto until the presentment of the check. If the check is dishonored, an action may be maintained on either the check or the obligation.
2. **Uniform Commercial Code: Banks and Banking.** When a check is sent for collection to be held by the payor bank for a reasonable period until sufficient funds become available in the account, it is not a presentment within the meaning of Neb. U.C.C. § 3-504 (Reissue 1980).

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Reversed and remanded for a new trial.

Quintin S. Hughes, for appellants.

Thomas M. Locher of Hansen, Engles & Locher, P.C., for appellee.

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

CHEUVRONT, D.J.

This replevin action was brought by the plaintiffs, George P. Rose, Jr., and George P. Rose, Sr., against the U.S. National Bank of Omaha, defendant. The plaintiff George P. Rose, Jr., prayed for possession of the object of the action, namely, a certain 1979 Ford Styleside pickup truck. The plaintiff George P. Rose, Sr., prayed that the court find that he had a "special interest" in the said vehicle and for damages resulting from the need to rent a replacement vehicle. Prior to trial, the pickup truck was returned to the plaintiffs and the case proceeded to trial on the question of damages. George P. Rose, Sr., was the only plaintiff seeking this relief.

Following trial to a jury, both the plaintiffs and the defendant moved for a directed verdict; the defendant's motion for a directed verdict was sustained. In reviewing the directed verdict the plaintiff is entitled to have all competent evidence adduced on his behalf treated as true, to have every controverted fact

resolved in his favor, and to have the benefit of every inference that can reasonably be drawn from the evidence. *Bank of Valley v. Mattson*, 215 Neb. 596, 339 N.W.2d 923 (1983).

On July 17, 1979, George P. Rose, Jr., purchased a 1979 Ford Styleside pickup truck from Sapp Bros. Ford Center, Inc., on an installment sales contract providing for monthly payments of $137.53 due on the 30th of each month, the first being payable on August 30, 1979. This contract was assigned to the defendant, and a lien notation in favor of the defendant was noted on the title to the vehicle on July 31, 1979.

Numerous payments due under the installment sales contract were not paid until delinquent; most of the payments received by the defendant were checks written by George P. Rose, Sr., on the account of George P. Rose Sodding & Grading Co. On April 1, 1981, an employee of the defendant went to the home of George P. Rose, Jr., to either collect a delinquency of $205.14 or take possession of the truck. Although unable to contact George P. Rose, Jr., the employee did discuss the delinquency with his mother, Mrs. George P. Rose, Sr. Mrs. Rose gave the defendant's employee a check drawn on the account of George P. Rose Sodding & Grading Co. at the Ashland State Bank in the amount of $205.14, stating that the check was good. Later that day, the check was delivered to Janet Connelly, a loan counselor employed by the defendant. On April 2, 1981, Mrs. Connelly telephoned the Ashland State Bank and was informed that there were insufficient funds in this account to pay the $205.14 check. In fact, the account had a negative balance of $783.01 on April 1, 1981. Mrs. Connelly sent the check to the Ashland State Bank for collection on April 8, 1981. There is no evidence as to the exact date the check was received by the Ashland State Bank, although it is conceded that the check was in the possession of the bank on April 17, 1981, a Friday.

The check was paid on April 21, 1981; late that afternoon, a cashier's check payable to the defendant was placed in a receptacle which was to be delivered to the defendant that evening. These funds were credited to the account of George P. Rose, Jr., by the defendant on April 23, 1981. There were sufficient funds in this account to pay this check on two occasions prior to April 21, 1981, but, by inadvertence, the Ashland State Bank failed to

pay it. On April 22, 1981, the truck was repossessed by the defendant, at which time it was found to have extensive damage to the grille, front bumper, hood, windshield, and right fender. Following the temporary replevin hearing, the truck was returned to the plaintiffs.

It is not clear from the record what the exact nature of the "special interest" of George P. Rose, Sr., was in the truck. The evidence shows that George P. Rose, Sr., made all of the installment payments to the defendant, other than the original downpayment; that George P. Rose, Sr., used the truck in the business of George P. Rose Sodding & Grading Co.; and that he paid for the maintenance, insurance, and fuel for the truck. The evidence would support a finding that the use of the truck by George P. Rose, Sr., was with the permission and consent of George P. Rose, Jr., and that George P. Rose, Sr., was in the position of a bailee.

Although the plaintiffs' theory of recovery is not entirely clear, it appears that the principal issues raised in this appeal are as follows: (1) The telephone call by the defendant to the Ashland State Bank did not constitute presentment for payment under Neb. U.C.C. § 3-504 (Reissue 1980); (2) The acceptance of the check by the defendant bank constituted a suspension of the obligation under Neb. U.C.C. § 3-802 (Reissue 1980); and (3) The defendant bank was equitably estopped from repossessing the security because it had accepted the $205.14 check on April 1, 1981, and did not give the plaintiffs further warning prior to repossessing the vehicle. We will address the second issue only. The doctrine of equitable estoppel has no application to this case. See *Chappelear v. Grange & Farmers Ins. Co.*, 190 Neb. 589, 210 N.W.2d 921 (1973). Further, the defendant concedes that the telephone call did not constitute presentment under the rule in *Kirby v. Bergfield*, 186 Neb. 242, 182 N.W.2d 205 (1970).

Under the provisions of Neb. U.C.C. § 3-802(1) (Reissue 1980), the acceptance of the check on April 1, 1981, by the defendant suspended pro tanto the underlying obligation until its presentment. The defendant was precluded from enforcing any right under the security agreement until the check was dishonored. *Westland Homes Corp. v. Hall*, 193 Neb. 237, 226

N.W.2d 622 (1975). Although the check in question here bore no special notations, both the Ashland State Bank and the defendant concede that it was sent to the Ashland State Bank "for collection" and that there were no specific instructions attached to or included with the check.

When a check is forwarded to the payor bank for collection and is to be held for a reasonable period of time until sufficient funds become available in the account to pay the check, such delivery is not a presentment within the meaning of Neb. U.C.C. § 3-504 (Reissue 1980). *Idaho Forest Industries, Inc. v. Minden Exch. Bank & Trust Co.*, 212 Neb. 820, 326 N.W.2d 176 (1982). Since there was no presentment, the check could not be dishonored and the defendant had no enforcement rights under its security agreement. We conclude, therefore, that the seizure of the truck by the defendant was unlawful, since the plaintiffs were not in default.

The defendant argues that even if there was no default in payment, it was entitled to seize the truck under the terms of the agreement in order to protect its security by reason of the extensive damages. However, this argument ignores the testimony of the employees that the sole reason for repossessing the truck was the delinquent payment.

The plaintiffs attempted to introduce copies of rental agreements with an auto leasing business in order to show the amount of damages sustained by George P. Rose, Sr. These agreements described the rental vehicle and listed the monthly rental and mileage fees. Objections to these exhibits were sustained by the trial court on the basis of foundation. In *Husebo v. Ambrosia, Ltd.*, 204 Neb. 499, 283 N.W.2d 45 (1979), we held that the measure of damages for the loss of use of a vehicle is an amount which does not exceed either the fair rental value of a vehicle of similar nature for a reasonable length of time or the amount actually paid, whichever is the least. We stated: "There is no evidence indicating that the charges actually paid by the plaintiff for the use of the leased vehicles were not fair and reasonable, or that they exceeded the fair rental value of such vehicles in the locality involved." *Id.* at 502, 283 N.W.2d at 47. Under this rule these rental agreements would be admissible to show the amount paid by the plaintiffs for the rental of the

vehicle.

The judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

GRANT, J., dissenting.

I respectfully dissent. I do not feel that George P. Rose, Sr., has any standing in this case and that the action of the trial court in dismissing the case was proper and should be affirmed.

Plaintiffs, George P. Rose, Jr., and George P. Rose, Sr., brought this action in replevin and for damages on May 29, 1981. The petition alleged that George junior had purchased a pickup truck in July 1979; that George junior was the certificate of title holder as to the truck but that George senior had made all the payments on the truck; and that the defendant bank had a recorded lien on the certificate of title to the truck. Defendant bank had used self-help to recover the vehicle, without replevin action, on April 22, 1981. After the initial hearing, the district court on June 11, 1981, ordered this truck returned to plaintiffs. The truck was returned apparently to its owner of record, George P. Rose, Jr., who took no further part in the case.

The case proceeded to trial on February 7, 1983, with plaintiff George P. Rose, Sr., seeking damages for the loss of use of the truck during the time the truck was wrongfully taken by the defendant bank—apparently from April 22 to June 11, 1981. George junior did not appear at the trial, nor was any evidence submitted on his behalf. The evidence at the trial showed that the monthly payments on the truck had been made by checks written on check blanks entitled "George P. Rose Sodding & Grading Co." and drawn on Ashland State Bank. The title of the account at the Ashland State Bank was "George Rose Sod Grading Co." There was no evidence as to whether these entities were corporations, partnerships, sole proprietorships, or otherwise, or what George senior's connections with those entities were.

George senior testified the truck was used in the sodding company business, but did not specify what the terms of that use were. No contract, oral or written, was testified to. George

junior also worked in the business. This evidence was apparently the basis for George senior's allegation that he had a "special interest" in the truck. The "special interest" allegedly entitled George senior to seek damages.

I am unable to discover the meaning of the term "special interest" in Black's Law Dictionary (5th ed. 1979), in 1 Nebraska Digest, Descriptive-Word Index (1939, Cum. Supp. 1980, and Supp. 1983), or in 12 Nebraska Digest, *Words and Phrases* (1940, Cum. Supp. 1971, and Supp. 1983). The term is vaguely pled in the petition and haphazardly attacked in the answer, and, in my judgment, is incapable of conveying enough meaning to give George senior standing to seek damages.

The majority indicates recognition of this difficulty, but says the evidence would support a finding that George senior was in the position of a bailee. Bailments are all based on contracts, express or implied. See, e.g., *Simpkins v. Ritter*, 189 Neb. 644, 204 N.W.2d 383 (1973), and *Peck v. Masonic Manor Apartment Hotel*, 203 Neb. 308, 278 N.W.2d 589 (1979). The testimony does not disclose any contract between George junior and George senior, and I fail to see how we can determine there was any bailment between those parties.

There is the further problem that we are here dealing with a motor vehicle. Neb. Rev. Stat. § 60-105(1) (Reissue 1978) provides in part: "No court in any case at law or in equity shall recognize the right, title, claim, or interest of any person in or to any motor vehicle . . . sold or disposed of, or mortgaged or encumbered, unless there is compliance with this section." George senior is trying to establish an "interest" in this motor vehicle by some sort of an encumbrance on that vehicle arising out of some alleged transaction with the owner of the vehicle. This transaction is not noted on the certificate of title. As stated in *The Cornhusker Bank of Omaha v. McNamara*, 205 Neb. 504, 508, 288 N.W.2d 287, 290 (1980):

> The Legislature has mandated that no court shall recognize the right, title, claim, or any interest of any person in or to any motor vehicle unless there is compliance with section 60-105, R.R.S. 1943. It is clear to this court that the plaintiff has made no good faith effort

to comply with the statutory requirements. This court, therefore, refuses to recognize any claim of lien or any claim of legal title by the plaintiff and holds that the plaintiff may not be successful against the defendant upon an action in replevin.

In my judgment, George senior has failed to prove that he has any interest in the truck in question. He is in no privity of contract with the defendant bank, and whatever duty was owed by the bank was owed to its debtor, George junior, owner of the truck, and not to George junior's father.

I would affirm.

IN RE ESTATE OF MYRTLE MASSIE, DECEASED. JOSEPH F. MASSIE, PERSONAL REPRESENTATIVE OF THE ESTATE OF MYRTLE MASSIE, APPELLANT, V. GIFFORD E. MASSIE, APPELLEE.

353 N.W.2d 735

Filed July 27, 1984. No. 83-438.

1. **Decedents' Estates: Jurisdiction: Equity.** County courts, in exercising exclusive original jurisdiction over estates, may apply equitable principles to matters within probate jurisdiction.
2. **Actions: Trial.** A litigant has no vested right in a mode of procedure, and an action commenced before an enactment changing the procedure in the court where the action is pending is properly triable under the changed procedure after the enactment becomes effective, unless the procedure is specifically retained by a saving clause.
3. **Decedents' Estates: Trial: Appeal and Error.** There is no absolute right to trial by jury on appeal to the district court in probate matters unless such right is expressly conferred by statute.
4. **Constitutional Law: Decedents' Estates: Trial: Appeal and Error.** There is no constitutional right to trial by jury in appeals to the district court from the county court in probate matters.
5. **Undue Influence: Proof.** In order to establish a case of undue influence, the party asserting the claim must show clearly and convincingly (1) that the party who executed the instrument was subject to undue influence; (2) that there was an opportunity to exercise undue influence; (3) that there was a disposition to exercise undue influence for an improper purpose; and (4) that the result was

clearly the effect of such undue influence.

6. **Undue Influence: Proof: Appeal and Error.** The lower court's findings concerning products of undue influence are determinations of fact. As such, the standard of review is whether the findings are supported by sufficient evidence, which are not to be disturbed unless clearly wrong.
7. **Decedents' Estates: Recoupment: Claims.** When a counterclaim is filed by an estate, the defendant may plead the defense of recoupment to reduce the amount of the counterclaim even though the defendant did not file a claim against the estate.
8. _____: _____: _____. The defense of recoupment is not barred by Neb. Rev. Stat. § 30-2485 (Reissue 1979).
9. _____: _____: _____. The defense of recoupment, by its nature, can only be used in a defensive character relating to the same transaction.

Appeal from the District Court for Custer County: JAMES R. KELLY, Judge. Affirmed as modified.

Steven O. Stumpff of Stumpff & Washburn, for appellant.

John O. Sennett of Black & Sennett, for appellee.

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

PER CURIAM.

This is an appeal in a probate action from the district court for Custer County, Nebraska. On appeal from the county court the district court affirmed the county court's order, with the exception that the "claim" of the appellee, Gifford E. Massie, was reduced from $43,106.50 to $40,142.80. Joseph F. Massie, as personal representative of the estate of Myrtle Massie, appeals.

We review the case, as did the district court, for error appearing on the record. See, Neb. Rev. Stat. § 30-1601 (Cum. Supp. 1982); Neb. Rev. Stat. § 24-541.06 (Cum. Supp. 1982).

Myrtle Massie died intestate on July 8, 1980. On May 29, 1981, Gifford Massie filed a timely claim against the estate in the amount of $40,142.80. Subsequently, the estate filed a notice of disallowance of the claim and a counterclaim against Gifford for over $175,000. In response to the disallowance and counterclaim, Gifford filed a protest of disallowance, an answer, and a setoff. After a hearing the county court held, among other things, that the estate owed Gifford $129,549.37 and that

Gifford owed the estate $86,442.52, for a net balance in favor of Gifford in the amount of $43,106.50. On appeal the district court affirmed the county court but reduced the net balance due to Gifford to $40,142.80, ostensibly on the fact that Gifford could not receive more money from the estate than was specified in his original claim.

In one of its six assignments of error, the estate contends that because a portion of its counterclaim was based on a constructive trust theory and/or conversion, the county court was without jurisdiction to try the counterclaim. In its counterclaim the estate alleged that Gifford, who had been tending to his mother's affairs while she was residing at a rest home, had converted proceeds of the estate from various sales of cattle and grain, and proceeds of the estate from various other sources, to his own. In essence, the estate asked that these proceeds be returned.

In *In re Estate of Layton*, 207 Neb. 646, 300 N.W.2d 802 (1981), we stated that "[c]ounty courts, in exercising exclusive original jurisdiction over estates, may apply equitable principles to matters within probate jurisdiction." (Syllabus of the court.) See, also, *In re Estate of Jurgensmeier*, 142 Neb. 188, 5 N.W.2d 233 (1942).

One cannot doubt that whether or not Gifford Massie converted proceeds of the estate related to the "decedent's estate" within the meaning of Neb. Rev. Stat. § 24-517(1) (Reissue 1979), the estate chose to file its counterclaim in county court; consequently, we need not decide the issue of whether the district court would have had concurrent jurisdiction in that portion of the counterclaim dealing with equitable remedies.

The estate contends that upon appeal to the district court it should have been afforded a trial by jury. We believe not.

At the time the probate proceedings were commenced, Neb. Rev. Stat. § 30-1606 (Reissue 1979) provided that a personal representative of an estate could obtain a jury trial on the allowance of a claim in an appeal to the district court. In 1981 Neb. Laws, L.B. 42, § 30-1606 was repealed and Neb. Rev. Stat. § 30-2488 (Reissue 1979) was amended. L.B. 42, codified in part in Neb. Rev. Stat. § 30-2488 (Cum. Supp. 1982), provides that a personal representative has 14 days after a claimant files his petition for allowance in which to transfer the claim to dis-

trict court. The district court would then adjudicate the claim in the manner provided in Neb. Rev. Stat. § 25-1104 (Reissue 1979) as to actions for the recovery of money or of specific real or personal property. A jury trial is allowed. If not transferred to the district court, the claim would be heard in county court without a jury and then, if appealed, heard upon the record by the district court. L.B. 42 was passed without a saving clause and became effective August 30, 1981. Gifford Massie's protest of the disallowance of his claim was filed September 18, 1981, 19 days after the effective date of L.B. 42.

In *Lindgren v. School Dist. of Bridgeport*, 170 Neb. 279, 283-84, 102 N.W.2d 599, 604 (1960), we stated:

> "A litigant has no vested right in the mode of procedure, and an action commenced before an enactment changing the procedure in the court where the action is pending, after the enactment becomes effective, is properly triable under the changed method." See, also, Norris v. Tower, 102 Neb. 434, 167 N.W. 728; Department of Banking v. Hedges, 136 Neb. 382, 286 N.W. 277; Krepcik v. Interstate Transit Lines, 151 Neb. 663, 38 N.W.2d 533.

There is no constitutional right to a trial by jury in appeals from the county court to the district court in probate proceedings. By necessity, then, the right to a trial by jury in probate proceedings must be conferred by statute. See *In re Estate of Hagan*, 143 Neb. 459, 9 N.W.2d 794 (1943). Section 30-2488 (Cum. Supp. 1982), which was in effect when Gifford filed his protest of disallowance, gave the estate 14 days in which to transfer the case to the district court for a jury trial. The estate, not having complied with requisite steps for obtaining a jury trial, cannot now be heard to complain of the procedural changes.

We next decide the issues surrounding Gifford's claim against the estate. On May 29, 1981, Gifford filed a claim for $40,142.80. Following the estate's motion and the county court's order, Gifford filed the following itemization specifying the details of his claim: (1) Drug and doctor bills - $1,261.05; (2) Insurance - $951.49; (3) Taxes - $2,181.28; (4) Rest home care - $21,022.76; (5) Landlord's share of expenses - $3,600.75; (6) Income tax work - $1,722; (7) Co-op fertilizer bill - $1,503.86;

(8) Funeral home - $2,505.11; (9) Real estate taxes - $7,433.83. The total of this itemized claim was $42,182.13.

Pursuant to a pretrial stipulation, the parties agreed that all items and their corresponding amounts were proper, with the exception of No. 3, the personal property tax on the cattle, which "should be adjusted to reflect actual ownership of the cattle"; No. 9, real estate taxes, which were "subject to the possible reduction . . . by any penalty and interest, which the Estate claims must be paid by Gifford E. Massie"; and No. 6, income tax work, which was reduced to $1,402. During the hearing, the parties agreed that the real estate taxes would be allowed to the full amount of $7,433.83. Although discussed later in the opinion, the lower courts found, and we agree, that Gifford owned an undivided one-half interest in the cattle. Consequently, No. 3, personal property tax on the cattle, must be reduced, per stipulation, by one-half, to $1,090.64. Based on the stipulations of the parties, Gifford's claim amounted to $40,771.49, which is $628.69 over his original claim of $40,142.80. Generally, a party cannot recover for any amount exceeding his original claim. See *Storm v. Cluck*, 168 Neb. 13, 95 N.W.2d 161 (1959). However, parties to a suit are bound by their stipulations. See *Havelock Bank v. Western Surety Co.*, 217 Neb. 560, 352 N.W.2d 855 (1984). The claim of Gifford Massie is allowed in the amount of $40,771.49.

The estate next contends that "[t]he District Court erred in ruling that the decedent was competent in October of 1977 to transfer her livestock brand to the claimant, and in ruling that the Claimant owned one-half of the cattle." Brief for Appellant at 2-3.

Regarding the issue of the one-half ownership of the cattle, Gifford presented unrebutted testimony that as early as 1975, Myrtle Massie had given him an undivided one-half interest in all the cattle. The records of Gifford and Myrtle confirm Gifford's interest. Gifford also testified that after a "shake-up" with Joseph Massie, the personal representative of the estate, Gifford claimed an interest in all the cattle, since he was the owner of the livestock brand. Both lower courts held, and rightfully so, that Gifford presented sufficient evidence to sustain his contention of an undivided one-half ownership of the cattle.

Both courts also correctly decided that the estate rebutted Gifford's prima facie evidence, via the brand transfer, that he owned all the cattle. See *Bendfeldt v. Lewis*, 149 Neb. 107, 30 N.W.2d 293 (1948).

Concerning Myrtle Massie's competency to transfer the livestock brand to Gifford in October 1977, the estate, in order to prove undue influence, had the burden of proving (1) that the person who executed the instrument was subject to undue influence; (2) that there was opportunity to exercise undue influence; (3) that there was a disposition to exercise undue influence for an improper purpose; and (4) that the result was clearly the effect of such undue influence. See *McDonald v. McDonald*, 207 Neb. 217, 298 N.W.2d 136 (1980). The trial court's findings concerning products of undue influence are determinations of fact. As such, the standard of review is whether the findings are supported by sufficient evidence, which are not to be disturbed unless clearly wrong. *In re Estate of Marsh*, 216 Neb. 129, 342 N.W.2d 373 (1984).

Myrtle's physician and several of her children testified that, in their opinion, Myrtle was not competent in October 1977 to transfer the livestock brand to Gifford. The notes compiled by the staff at the rest home in which Myrtle resided in 1977 showed that Myrtle was confused and disoriented much of the time. Gifford Massie and his wife, Ruth, both of whom visited Myrtle almost daily, testified that Myrtle was competent when she transferred the brand. The director of activities at the rest home also testified that, in her opinion, Myrtle was competent to transfer the livestock brand in 1977.

Although the question of Myrtle's competency and the broader issue of undue influence are extremely close, we hold that the district court's finding is not clearly wrong and, thus, will not be disturbed.

The final issue presented in this case is whether a claim which was barred by the nonclaim statute, Neb. Rev. Stat. § 30-2485 (Reissue 1979), may be pled as a setoff or recoupment to a counterclaim filed by the estate. We have not directly ruled on this issue, and there is a conflict of authority in other jurisdictions. See Annot., 36 A.L.R.3d 693 (1971).

We are of the opinion that when a counterclaim is filed by an

estate, the defendant may plead the defense of recoupment to reduce the amount of the counterclaim even though the defendant did not file a claim against the estate. Black's Law Dictionary 1439-40 (4th ed. 1957) defines recoupment as follows:

> Defalcation or discount from a demand. A keeping back something which is due, because there is an equitable reason to withhold it. . . .
>
> . . . .
>
> "Recoupment" differs from "set-off" in this respect: that any claim or demand the defendant may have against the plaintiff may be used as a set-off, while it is not a subject for recoupment unless it grows out of the very same transaction which furnishes the plaintiff's cause of action.
>
> . . .

In *Nathan v. McKernan*, 170 Neb. 1, 16, 101 N.W.2d 756, 766 (1960), we stated:

> In that connection, defendants' answers were in effect a defense of recoupment. In Oft v. Dornacker, 131 Neb. 644, 269 N.W. 418, and again in Mettlen v. Sandoz, 131 Neb. 625, 269 N.W. 98, *this court concluded that the defense of recoupment or reduction of plaintiff's claim must arise out of the same transaction as plaintiff's claim, and survives as long as plaintiff's cause of action exists, even if affirmative legal action upon the subject of recoupment is barred by the statute of limitations.* Therefore, plaintiff's contention with regard to the statute of limitations barring defendants' claim has no merit.

(Emphasis supplied.) Similarly, the defense of recoupment is not barred by § 30-2485.

In the instant case the estate's counterclaim alleged that Gifford had converted $97,189 in proceeds from the sale of cattle belonging to the estate. Gifford's response was that he had expended $51,632 for care and management of the cattle and $24,404.57 for feed for the cattle. Neither of these expenses was specified in Gifford's initial claim. The estate contends that these "claims" are barred, as they were not filed in accordance with § 30-2485. In the alternative, the estate contends that the amount expended for care and management of the cattle is unreasonable.

As noted previously, the defense of recoupment is not barred by § 30-2485. The expenses incurred in maintaining the cattle for sale and the subsequent sale of the cattle are, in effect, relating to the same transaction. It would result in unjust enrichment to allow the estate to recover the gross proceeds from the sale of the cattle without having to pay for any of the necessary expenses incurred.

Concerning the reasonableness of the expenses for care and management of the cattle, Gifford presented sufficient evidence that this fee for labor, mileage, and management of the cattle over the 4-year period in question was reasonable. Even under the estate's version of a reasonable fee of $1,000 a month, *for labor only*, the expense would be $48,000.

The parties stipulated that an expense of $21,733 was reasonable for cattle feed.

The parties also stipulated that Gifford had deposited in his checking account a total of $39,017.02 from the proceeds of grain sales and other sources which belonged to the estate. The parties later agreed that this sum should be reduced by $1,169, leaving a balance of $37,848.02. Of this $37,848.02, a $1,665 check, payable to Myrtle Massie from the Commodity Credit Corporation, remained in dispute. Gifford admitted the receipt and deposit of the check in his account but maintained that the proceeds were a partial reimbursement for labor, materials, and tax for the water pipeline which he installed on his mother's farm. Gifford maintained, and the record proves, that he expended a total of $3,500.88 for the pipeline expenses, leaving an unpaid balance of $1,835.88.

The $1,665 check was for partial reimbursement for the installation of a water pipeline. The pipeline was installed and paid for by Gifford. Reimbursement for installation and the installation itself concern the same transaction; consequently, the estate is not entitled to a credit for these funds.

As to the unpaid balance of $1,835.88, Gifford did not include this item in his original claim. The defense of recoupment, by its nature, can be used only in a defensive character relating to the same transaction. See *Mettlen v. Sandoz*, 131 Neb. 625, 269 N.W. 98 (1936). Because Gifford was not in possession of the unpaid balance of $1,835.88, this item represents an affirm-

ative claim against the estate which was not filed in compliance with § 30-2485. Any claim such as this not filed within the time limits provided by statute and after due notice is forever barred. See *Supp v. Allard*, 162 Neb. 563, 76 N.W.2d 459 (1956).

In conclusion, we hold the district court was correct in finding that the transfer of the livestock brand from Myrtle Massie to Gifford Massie was not a product of undue influence. The court was also correct in determining that Gifford owned an undivided one-half interest in the cattle. The following computations are dispositive of the remainder of this case, keeping in mind, as the appellant correctly points out but the lower courts apparently failed to consider, that the disputed proceeds of the counterclaim were in Gifford's possession and not in the possession of the estate.

CREDITS OF CLAIMANT		
Claim allowed in the amount of		$ 40,771.49
CREDITS TO THE ESTATE		
One-half proceeds from sale of cattle	$48,594.50	
Less one-half for cattle feed	10,866.50	
Less one-half for care of cattle	25,816.00	
Net proceeds from sale of cattle		$ 11,912.00
Proceeds from other sources	$37,848.02	
Less pipeline reimbursement	1,665.00	
Net balance of proceeds from other sources		$ 36,183.02
Total to be credited to claimant	$40,771.89	
Total to be credited to estate	48,095.02	
Net balance in favor of estate		$ 7,323.13

The district court's order is affirmed as modified.

AFFIRMED AS MODIFIED.

WHITE, J., participating on briefs.

KRIVOSHA, C.J., concurs in the result.

HELEN O. RUSSELL, APPELLANT, V. FIRST YORK SAVINGS COMPANY, A CORPORATION, ET AL., APPELLEES.

352 N.W.2d 871

Filed July 27, 1984. No. 83-466.

1. **Limitations of Actions: Pleadings.** If a petition alleges a cause of action ostensively barred by the statute of limitations, such petition, in order to state a cause of action, must show some excuse tolling the operation and bar of the statute.
2. **Pleadings.** Proper pleading requires a petition to state in logical and legal form the facts which constitute the plaintiff's cause of action, define the issues to which the defendant must respond at trial, and inform the court of the real matter in dispute. The character of the facts alleged, not necessarily the prayer for relief, determines the nature of the action.
3. **Declaratory Judgments.** A declaratory judgment is a statutory remedy for the determination of a justiciable controversy where the plaintiff is in doubt as to his legal rights.

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

Richard L. Spangler, Jr., of Woods, Aitken, Smith, Greer, Overcash & Spangler, for appellant.

Robert T. Grimit of Baylor, Evnen, Curtiss, Grimit & Witt, for appellees.

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

PER CURIAM.

Helen O. Russell, plaintiff and a former shareholder of The York Investment Company, appeals the judgment of the district court for York County which sustained the defendants' demurrer. Russell requested a part of the assets of The York Investment Company upon dissolution. The district court held that Russell's action was barred by Neb. Rev. Stat. § 21-20,104 (Reissue 1983). We affirm.

A demurrer tests the substantive legal rights of the parties upon admitted facts, including proper and reasonable inferences of law and fact which may be drawn from the facts which are well pleaded. *Philp v. First Nat. Bank & Trust Co.*, 212 Neb. 791, 326 N.W.2d 48 (1982). In testing whether a petition states a cause of action, we must accept as true all facts well

pleaded, but we do not accept as true conclusions of law or of the pleader. *Harmon Care Centers v. Knight*, 215 Neb. 779, 340 N.W.2d 872 (1983). For the purpose of this appeal such facts and inferences will be deemed to be true.

On May 23, 1980, Helen O. Russell, a shareholder of The York Investment Company (York Investment), received written notice of a special meeting of shareholders of York Investment to be held on June 5. The stated purpose of the special meeting was "[t]o consider and take action for the adoption of a Plan for the Complete Liquidation of the corporation and for a distribution of all of the assets of the corporation in complete liquidation . . . ." On June 5 the shareholders of York Investment were the First York Savings Company, 462 shares; Helen O. Russell, 20 shares; and Ann LeMay, 1 share. The main asset of York Investment was a commercial building which formerly was occupied by the J. M. McDonald Company but is now occupied by the York State Bank and Trust Company.

On June 5, Dean Sack, one of the defendants, was an officer and director of York State Company, York State Bank and Trust Company (Bank), First York Savings Company, and York Investment. York State Company owned 100 percent of the stock of both First York Savings Company and the Bank. As a result of such stock owned, York State Company was a holding company for both First York Savings Company and the Bank. Since he was the majority shareholder in York State Company, Sack controlled York State Company, First York Savings Company, the Bank, and York Investment.

Russell did not attend the shareholders' special meeting. At the special shareholders' meeting on June 5, York State Company, controlled by Sack, unanimously voted to adopt a plan of liquidation of York Investment pursuant to I.R.C. § 334(b)(2) (1976), namely, York Investment would distribute all its assets, except those retained for corporate obligations, to the shareholders and complete the liquidation in the ratio of a shareholder's holdings to the total issued and outstanding stock of the corporation.

Shareholders present at the special meeting determined that the value of corporate stock in liquidation of the corporate assets was $282.23 for each of the 483 outstanding shares of York

Investment. A corporate resolution was adopted by York Investment, namely, the dissolved corporation's real estate would "be distributed and conveyed pursuant to a Plan of Liquidation, in lieu of cash, to First York Savings Company in liquidation of its stock interest . . . ." The resolution also provided that Russell would be paid $5,644.60 in cash for her shares in York Investment. On June 5 tender was made to Russell in accordance with the corporate resolution, but Russell refused the tender of $5,644.60. In her letter of June 23, 1980, Russell demanded her undivided percentage interest of 4.14 percent in the real estate owned by York Investment, that is, a percentage equal to her percentage interest of outstanding stock she owned in York Investment.

Russell does not object to the dissolution of York Investment. Russell's only objection is directed to the distribution of assets (real estate) of York Investment to First York Savings Company and the cash payment to minority shareholders of York Investment in lieu of their proportional interest in the assets of the dissolved corporation.

On June 23 York Investment conveyed its real estate by warranty deed to First York Savings Company. A statement of intent to dissolve York Investment was signed by Sack on August 25, 1980, and was filed with the Secretary of State of Nebraska on November 30.

On September 11 First York Savings Company conveyed the real estate formerly owned by York Investment to the present titleholder, the Bank. The Bank had common officers, directors, and shareholders with other defendants in this action and with York Investment. Also, the Bank knew about the Russell claims at the time the real estate was transferred to the Bank on September 11.

Articles of dissolution of York Investment were signed by its president, Sack, on October 28. The articles of dissolution were then filed in the office of the Secretary of State of Nebraska on November 4.

In her amended petition Russell claims that the transfer of York Investment's real estate to First York Savings Company and the subsequent conveyance to the Bank were appropriations of corporate opportunity belonging to the shareholders of

York Investment. Russell further claims that Sack owed a fiduciary duty to her as a mutual shareholder of York Investment and that there was a breach of Sack's fiduciary duty, causing a constructive trust to be imposed on the assets (real estate) of York Investment. Russell's share or part of the trust would then be 4.14 percent, that is, a percentage equal to her stock ownership in York Investment. Russell also claims there was a plan or scheme to deprive her of the full value of her proportional interest in the assets of York Investment and that the determination of value set by the majority shareholders of York Investment was self-dealing and not an arm's-length transaction.

Dissolution of York Investment was complete on November 5, 1980. Russell filed suit on December 2, 1982. The sole issue before this court is whether the district court was correct in sustaining defendants' demurrer on the basis of the special statute of limitations contained in § 21-20,104.

Section 21-20,104 provides that dissolution of a corporation "shall not take away or impair any remedy available to or against such corporation, its directors, officers, or shareholders, for any right or claim existing . . . prior to such dissolution if action . . . is commenced within two years after the date of such dissolution." Since the petition in this case was filed more than 2 years after the date of dissolution of York Investment and such situation appears on the face of the petition, Russell's petition is subject to a demurrer unless the petition contains proper allegations about an excuse tolling the operation and bar of the statute of limitations. See *S.I.D. No. 145 v. Nye*, 216 Neb. 354, 343 N.W.2d 753 (1984).

Proper pleading requires a petition to state in logical and legal form the facts which constitute the plaintiff's cause of action, define the issues to which the defendant must respond at trial, and inform the court of the real matter in dispute. See 71 C.J.S. *Pleading* § 1 (1951); cf., *B. C. Christopher & Co. v. Danker*, 196 Neb. 518, 244 N.W.2d 79 (1976); *Moore v. Puget Sound Plywood*, 214 Neb. 14, 332 N.W.2d 212 (1983). The character of the facts alleged, not necessarily the prayer for relief, determines the nature of the action. See, 71 C.J.S., *supra* § 92 b.; *Mills v. Heckendorn*, 135 Neb. 294, 281 N.W. 49 (1938).

The facts alleged in Russell's petition and amended petition clearly disclose that Russell was a shareholder of York Investment, that dissolution of York Investment occurred on November 5, 1980, and that Russell's petition was initially filed on December 2, 1982—more than 2 years after dissolution of York Investment. Absent her status as a shareholder of York Investment, Russell would have no cause of action against any of the defendants regarding the dissolved corporation. In addition, there is no dispute that Russell's cause of action arose before dissolution of York Investment, since the suit was directed to the distribution of the assets of the corporation upon dissolution and the cash payment to be made in lieu of a distributive share of the assets of the corporation. Such distribution took place before dissolution of York Investment on November 5, 1980.

Russell attempts to evade the plain wording of the 2-year statute of limitations (§ 21-20,104), which bars any remedy available to a shareholder for a claim existing before corporate dissolution, in her argument that (1) an action for declaratory judgment is not a remedy and (2) she is not asserting any right of the corporation, but only her individual rights as a shareholder.

We have no quarrel with Russell's contention that she is asserting her personal rights resulting from her status as a shareholder of York Investment, or with her contention that Sack is in a fiduciary relationship to her. Shareholders in a close corporation owe one another the same fiduciary duty as that owed by one partner to another in a partnership. *Donahue v. Rodd Electrotype Co. of New England, Inc.*, 367 Mass. 578, 328 N.E.2d 505 (1975). Furthermore, we have held that a shareholder of a close corporation may sue in his own name and such action is not derivative in nature.

> Although the general rule is that a shareholder suing on behalf of a corporation for wrongs done to it must first seek to persuade the officers and directors to bring the action, *Kowalski v. Nebraska-Iowa Packing Co.*, 160 Neb. 609, 71 N.W.2d 147 (1955), he is not required to make such an effort if it would have been unavailing. See *Fisher v. National Mtg. Loan Co.*, 132 Neb. 185, 271 N.W. 433 (1937), *modified in other respects* 133 Neb. 280,

274 N.W. 568 (so holding with respect to the need for a demand upon other shareholders).

Anderson v. Clemens Mobile Homes, 214 Neb. 283, 287, 333 N.W.2d 900, 904 (1983).

Nevertheless, we find that any right asserted by Russell in the present case is dependent solely upon and arises from Russell's status as a shareholder of York Investment. Asserting her right as a shareholder or her individual nonshareholder right is the same, when each such right is entirely dependent upon and existing solely as an outgrowth of Russell's status as a shareholder. Russell's claim must fail and is barred by the statute of limitations, unless we conclude that an action for declaratory judgment is not a remedy within § 21-20,104.

An action for declaratory judgment (Neb. Rev. Stat. §§ 25-21,149 et seq. (Reissue 1979)) determines the rights of the parties in a justiciable controversy and is binding on any further adjudication between the parties as to the rights so declared. This court has never had occasion to pass on the question of whether declaratory judgment is a remedy within the meaning of § 21-20,104. Black's Law Dictionary 368 (5th ed. 1979) defines a declaratory judgment in part as a "[s]tatutory . . . *remedy* for the determination of a justiciable controversy where the plaintiff is in doubt as to his legal rights." (Emphasis supplied.) Because Russell's claim and concomitant right to a remedy arose before dissolution of York Investment, that is, Russell's right arose from her status as a shareholder of the corporation, and because suit was not instituted within 2 years of the dissolution, Russell's causes of action, as alleged in her petition, are barred as a matter of law by the specific statute of limitations contained in § 21-20,104.

The judgment of the district court is affirmed.

AFFIRMED.

ELIZABETH TRIMBLE, APPELLEE AND CROSS-APPELLANT, V. JOHN TRIMBLE, APPELLANT AND CROSS-APPELLEE.

352 N.W.2d 599

Filed July 27, 1984. No. 83-573.

1. **Child Custody.** Custody of minor children is determined on the basis of their best interests.
2. _____. An award of joint custody of minor children is not favored. Such an award must be reserved for the most rare of cases.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Affirmed.

Annette E. Mason of Ross, Mason, Mason, Fennell & Smith, for appellant.

Larry R. Forman of Schmid, Ford, Mooney & Frederick, for appellee.

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

WHITE, J.

In December 1982 the appellee, Elizabeth Trimble, filed her petition in the district court for Douglas County, Nebraska, seeking dissolution of her marriage to appellant, John Trimble. The parties were married January 29, 1967. Two children were born of the marriage, Theodora, June 13, 1973, and Athena, March 23, 1979. The parties' marriage was dissolved by order of the district court on May 20, 1983. Various issues were presented to the district court and decided by it. Several of the decisions displease each of the parties and this appeal and cross-appeal follow.

At the time of the trial the appellant was a medical resident at the University of Nebraska Medical Center. He was due to complete this training as an ear, nose, and throat specialist in July 1984. In addition to his degree in medicine, he also is the holder of a Ph. D. from the Colorado State University and was, prior to his medical training as well as during his training, a full-time professor at the Creighton University School of Medicine. Elizabeth Trimble, except for a period immediately before and after the birth of her first child, worked outside the home during the

marriage.

The trial court, in the decree of dissolution, awarded custody of the minor children to Elizabeth, ordered child support of $200 per month per child, alimony of $200 per month for 2 years, and $400 per month for the next 3 years. The court further directed that it would review the alimony award in January 1988 (the award by its terms would otherwise expire with the April 1988 payment) or sooner if requested by the parties. The court, before dividing the real and personal property of the parties, ordered John to maintain two life insurance policies which have a combined face value of $150,000, to be held as security for all future alimony and child support payments.

John assigns as error: (1) The court's award of custody to Elizabeth after finding that both parents were fit and proper persons to have custody of the minor children; (2) The court's order directing the two life insurance policies be held as security for alimony and child support; and (3) The court's order directing review of the alimony award as to amount and continuance in January 1988.

We will discuss the appellant's contentions before we consider those of the appellee.

Each party agrees that the other is a fit and proper person to have the custody of the minor children, and each agrees that the standard to be followed by the trial court in awarding custody of children is that of the best interests of the children. *Elsasser v. Elsasser*, 206 Neb. 128, 291 N.W.2d 260 (1980).

The evidence is strongly supportive of the trial court's judgment. The record reveals that Elizabeth spent a great deal more of her time with the children, has the more predictable work and leisure schedule, and was more concerned with the children's education. Appellant strongly urges that a concept, which he contends is employed by some of the district courts in this state, be utilized in this case. The concept is that of joint custody of the minor children by each of the two now separated and divorced parents.

It occurs to us that in a given case joint custody might very well act to preserve the parent-child bond for both parents and thus avoid the severance of either of the attachments. See, Folberg, *Joint Custody of Children Following Divorce*, 12

U.C.D. L. Rev. 523 (1979); Bratt, *Joint Custody*, 67 Ky. L.J. 271 (1979). We believe, however, that such arrangements must be reserved for the most rare of cases, i.e., where in the judgment of the trial court the parents are of such maturity that the arrangement will not operate to allow the child to manipulate the parents or confuse the child's sense of direction. A collateral question exists as to why those most ideal of parents, who would satisfactorily cope with the conflicts inherent in a joint child custody arrangement, came to be divorced in the first instance. After a de novo review of the record, we agree with the trial court that the award of custody was properly placed in the appellee. The visitation arrangements to appellant appear to be most generous, and, indeed, no complaint is made of them. We are not prepared to reject the concept of joint custody, but are not prepared to state that it should be a regular tool in the remedies of the district courts. The first assignment is without merit.

At issue in the second assignment of error is that part of the decree of dissolution which reads as follows: "If not reviewed sooner, the Court will consider in January, 1988, if requested by either party, whether or not alimony shall continue beyond the time set forth herein, and if it should, the amount of alimony and the additional length of time that it should continue." Appellant contends that the above provision violates Neb. Rev. Stat. § 42-365 (Cum. Supp. 1982), which provides in part that "orders for alimony may be modified or revoked for good cause shown . . . ."

We do not interpret the provision in the decree in the fashion appellant urges. Read literally, it simply means that the court will review the alimony award if asked. It does not suggest that the award can be changed except for good cause shown. We have previously interpreted good cause as a material change of circumstances. *Anderson v. Anderson*, 206 Neb. 655, 294 N.W.2d 372 (1980). It is obvious that the core of the court's consideration is the possible dramatic rise in appellant's earnings when his residency is completed and he begins his active professional life. Whether such an eventuality would constitute "good cause," we leave to an appropriate forum at an appropriate day. The second assignment is without merit.

As to the third assignment, the appellant contends that the

amount of security for the required payments is excessive. Section 42-365 provides in part that "[r]easonable security for payment may be required by the court." We are unable to say that the amount of security in this case is unreasonable, although we acknowledge that the combined face value of the life insurance policies is more than sufficient to discharge the required payments at least twice over. We are not furnished with any evidence of the cost of the policies, nor any evidence of the policies' cash or loan values. It would accomplish little to review in detail the evidence that convinced the trial court that security was justified. We have also reviewed the evidence, and it also convinces us that the order was justified. The assignment is without merit.

Though labeled "Brief of Petitioner-Appellee & Cross Appellant Elizabeth Trimble," the absence of compliance with our rules makes it a very questionable activity to attempt to discern of what appellee complains on cross-appeal. We will not undertake the uncertain journey.

Appellee is awarded $1,000 for her attorney's services in this court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. FORREST W. HURLBURT, APPELLANT.
352 N.W.2d 602

Filed July 27, 1984. No. 83-581.

Judges: Sentences. Remarks of a sentencing court judge about possible adverse verdicts which might have been returned against a defendant do not demonstrate per se an abuse of discretion on the part of the sentencing court.

Appeal from the District Court for Cass County: RAYMOND J. CASE, Judge. Affirmed.

J. William Gallup, for appellant.

Paul L. Douglas, Attorney General, and Linda L. Willard, for appellee.

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

PER CURIAM.

Forrest W. Hurlburt was charged with two counts of second degree murder—the murder of Allan Thingstad and the murder of Matthew Meisinger. Hurlburt entered his not guilty plea to each count and claimed the killings were done in self-defense. A jury found Hurlburt not guilty of the Thingstad murder but guilty of manslaughter regarding Meisinger's death. The district court for Cass County, Nebraska, sentenced Hurlburt to an indeterminate term of 6 years and 8 months to 20 years in the Nebraska Penal and Correctional Complex. We affirm.

Hurlburt and a group of coworkers got off work early in the morning of September 11, 1982, and proceeded to a bar in Louisville, Nebraska, where Hurlburt met Lisa Owen and several other friends. Thingstad and Meisinger were also in the bar. While Hurlburt and others were playing pool in the bar, Thingstad approached the pool table and made rude comments to Lisa Owen. Thingstad also challenged the male members of Hurlburt's party to a fight, an offer which was declined. Thingstad then went to a table occupied by two girls, Cathy and Becky, where he dropped his pants. Owen, Hurlburt, and friends left the bar, and the bar owner escorted Thingstad outside. Shortly after he left the bar, Hurlburt obtained a .25-caliber automatic pistol from one of his group. Lynn Kellogg, a member of the Hurlburt group, heard Hurlburt say that the "big guy" (Thingstad) was not going to jump on his back.

As they were leaving the bar, Thingstad and Meisinger approached Hurlburt's group, and Thingstad said, "Which one of you guys would like to go in this vacant lot with us and get it on?" Although the Hurlburt group started to leave, Hurlburt returned downtown to locate one of his friends, Roger Hassebroek. Hurlburt had explained to Lisa Owen that the gun was for her protection; he did not want to shoot anyone; he did not want to go to the penitentiary; but he was not leaving until Hassebroek was out of downtown safely.

Hurlburt and Lisa Owen got out of the car, and, shortly afterward, Thingstad, also known as "Animal," began chasing Lisa Owen around Hurlburt's car. After Thingstad failed to catch Lisa Owen, Hurlburt attempted to get into his car and leave. However, Hurlburt was restrained by Meisinger, who

said, "You ain't going nowhere. The big one [Thingstad] wants to talk to you." In the conversation that followed between Hurlburt and Thingstad, Hurlburt told Thingstad he could get an after-hours drink down the street. Thingstad replied, "If you're lying to me, you're a dead man."

Hurlburt was again attempting to get into his car when someone struck him from behind and caused him to spin around. Hurlburt believed he saw somebody holding a knife over his head. Hurlburt, who had been carrying the gun in plain view, fired one shot, fatally striking Meisinger in the heart. Someone yelled, "Kill that mother fucker," and Hurlburt saw Thingstad advancing toward him in a menacing manner. Hurlburt backpedaled as fast as he could as Thingstad ran toward him with his left arm extended, his fingers spread apart, and his right arm at his side with his fist clinched. At Thingstad's contact, Hurlburt fired, striking Thingstad in the heart and causing his death. Hurlburt immediately left the scene of the shooting, but returned soon to turn himself in to the police.

Hurlburt claims the court erred in overruling his motion to dismiss at the close of the State's evidence, and argues that the evidence is insufficient to support the jury's findings.

Since the jury has acquitted Hurlburt regarding Thingstad's death, there is no prejudice and, therefore, no error in the trial court's failure to sustain Hurlburt's motion to dismiss the murder charge involving Thingstad.

The only question is whether the trial court erred in overruling the motion to dismiss the murder charge arising out of Meisinger's death.

> 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.

State v. Miner, 216 Neb. 309, 313, 343 N.W.2d 899, 902 (1984). Cf., *State v. Cano*, 191 Neb. 709, 217 N.W.2d 480 (1974); *State v. Hiatt*, 190 Neb. 315, 207 N.W.2d 678 (1973); *State v. Harig*, 192 Neb. 49, 218 N.W.2d 884 (1974). See, also, *State v. Isley*,

195 Neb. 539, 239 N.W.2d 262 (1976). We recognize that the jury was free to reject the testimony of Hurlburt when he said that he believed it was Meisinger with the knife. In other words, the jury could reject Hurlburt's contention that the shooting was in self-defense. There is sufficient evidence to support the jury's verdict that Hurlburt was guilty of manslaughter in the death of Meisinger.

Concerning Hurlburt's motion to dismiss, such assignment is without error. At the time the motion was made the State had introduced competent evidence which, if believed by the jury, was sufficient to establish all the elements of the crimes charged against the defendant. Cf. *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984).

Hurlburt next asserts that the trial court erred in not sustaining his motion for new trial. The motion for new trial is not contained in the record. Therefore, there is no error preserved for review in this court. Further, although the action of the trial court in overruling Hurlburt's motion for new trial is assigned as error, Hurlburt's assignment of error in this regard is not argued in his brief. Errors not discussed or argued in the appellant's brief will not be considered by the court. See Neb. Ct. R. 9D(1)d (Rev. 1983).

The last assignment of error is that the district court imposed an excessive sentence under the circumstances.

Manslaughter is a Class III felony, punishable by imprisonment of not less than 1 year nor more than 20 years, a $25,000 fine, or any combination of such fine and imprisonment. See Neb. Rev. Stat. § 28-105 (Reissue 1979). Neb. Rev. Stat. § 83-1,105(1) (Reissue 1981) provides in part that "the minimum limit fixed by the court shall not be less than the minimum provided by law nor more than one-third of the maximum term, and the maximum limit shall not be greater than the maximum provided by law." "It is a well-settled rule that the court on appeal will not disturb a sentence imposed within the limits prescribed by statutes unless there has been an abuse of discretion on the part of the trial court imposing the sentence." *State v. Neal,* 216 Neb. 709, 713, 346 N.W.2d 218, 221 (1984). See, also, *State v. Parks,* 212 Neb. 635, 324 N.W.2d 673 (1982).

The sentence imposed, although the maximum allowed, was

within the statutory limits. This court will not disturb the sentence of the trial court unless there is an abuse of discretion apparent on the record. Hurlburt argues that the district court abused its discretion, and supports that allegation in comments by the trial court, namely, "[I]n looking at this evidence, I feel that it would have supported either one of the more serious offenses [first or second degree murder]." The trial court, before pronouncing sentence on Hurlburt, mentioned three considerations regarding the sentence to be imposed, namely, the risk of the offender engaging in criminal conduct, need for correctional treatment, and a lesser sentence depreciating the seriousness of the crime for promoting disrespect for the law. See Neb. Rev. Stat. § 29-2260(2) (Cum. Supp. 1982). Remarks of a sentencing court judge about possible adverse verdicts which might have been returned against a defendant do not demonstrate per se an abuse of discretion on the part of the sentencing court. There has been no abuse of discretion on the part of the trial court regarding the sentence imposed on Hurlburt.

The judgment of the district court is in all respects affirmed.

AFFIRMED.

CAPORALE, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. CURTIS E. TURNER, APPELLANT.

354 N.W.2d 617

Filed July 27, 1984. No. 83-757.

1. **Pleas.** Regarding a guilty plea, a defendant is informed of the nature of the charge against him if the defendant had fair notice of what he was being asked to admit.
2. **Attorney and Client: Conflict of Interest: Words and Phrases.** The phrase "conflict of interest" denotes a situation in which regard for one duty tends to lead to disregard of another, where a lawyer's representation of one client is rendered less effective by reason of his representation of another client, or where it becomes a lawyer's duty on behalf of one client to contend for that which his duty to another client would require him to oppose.

3. _____: _____: _____. A conflict of interest exists whenever one defendant stands to gain significantly by counsel adducing probative evidence or advancing plausible arguments that are damaging to the cause of a codefendant whom counsel is also representing.
4. **Constitutional Law: Attorney and Client: Conflict of Interest: Effectiveness of Counsel.** A sole attorney's multiple representation of codefendants is not per se a violation of the constitutional guarantee of effective assistance of counsel.
5. **Attorney and Client: Conflict of Interest: Effectiveness of Counsel.** Prejudice is presumed only if the defendant demonstrates that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer's performance.
6. _____: _____: _____. A conflict of interest must be actual rather than speculative or hypothetical before a conviction can be overturned on the ground of ineffective assistance of counsel.
7. **Attorney and Client: Conflict of Interest: Waiver.** A defendant can waive his right to assistance of an attorney unhindered by a conflict of interest, provided such waiver is voluntarily, knowingly, and intelligently done with sufficient awareness of relevant circumstances and likely consequences.
8. **Attorney and Client: Conflict of Interest: Trial.** Henceforth, unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel in situations of joint and multiple representation.

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

Daniel W. Ryberg, for appellant.

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

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

SHANAHAN, J.

Curtis E. Turner was charged with the commission of two felonies—robbery (Neb. Rev. Stat. § 28-324(1) (Reissue 1979)) and use of a knife to commit the robbery (Neb. Rev. Stat. § 28-1205(1) (Reissue 1979)). By a plea bargain the charge regarding use of a knife to commit the robbery was dismissed by the county attorney. In exchange for such dismissal and in accordance with the plea bargain, Turner entered a plea of guilty to the charge of robbery. After a presentence investigation the district court for Douglas County sentenced Turner to a term of 7 to 10 years in the Nebraska Penal and Correctional Complex. Turner appeals. We affirm.

Prosecution of Turner arose out of the robbery of Town and Country Market in Omaha on May 16, 1983. Four men were charged with the robbery, namely, Marcy Davis, Tranell Seals, Donald Davis, and Turner. The record does not reflect the identity of attorneys representing individuals of the quartet before any appearances in the district court, although Turner's brief indicates counsel for the various defendants. For the purpose of background we accept Turner's statements designating counsel. After representing the four defendants at their preliminary hearing, the Douglas County public defender's office remained as attorney for Seals but withdrew as counsel for the other three defendants. An attorney in private practice was appointed to represent Donald Davis, and another attorney engaged in private practice was appointed for Marcy Davis and Turner.

Although Marcy Davis and Turner had entered pleas of not guilty, a plea bargain was negotiated between the prosecutor and the attorney for Davis and Turner. The plea bargain required the State to dismiss the charge involving use of a knife to commit the robbery, provided Davis and Turner entered a plea of guilty to the robbery charge. Section 28-324 contains: "(1) A person commits robbery if, with the intent to steal, he forcibly and by violence, or by putting in fear, takes from the person of another any money or personal property of any value whatever. (2) Robbery is a Class II felony." As a Class II felony, conviction of robbery is punishable by incarceration for a term of 1 to 50 years. See Neb. Rev. Stat. § 28-105 (Reissue 1979).

At a joint hearing in the district court on July 27, Davis and Turner, through their mutual counsel, expressed their wish to withdraw the pleas of not guilty and to plead guilty to robbery, in accordance with the plea bargain. The judge proceeded to ask Davis and Turner about promises made beyond the plea bargain, threats, and indication of punishment on conviction. Having assured himself that the change of plea for each defendant was voluntary, the judge discussed the crime charged in the information:

> [The information] alleges that on or about May 16th of this year in Douglas County that you did then and there forcefully and by violence or by putting in fear take money

> from the personal protection of Gregory J. Lyons, that money being the property of the Town & Country Market, and with the intent to steal that money. Have you talked over the information and the words that I have just read to you with your attorney?

(Lyons was the clerk in the store at the time of the robbery.) Davis and Turner each acknowledged talking with their attorney about the charge and understanding the charge in the information. The court informed Davis and Turner about the penalty which could be imposed upon conviction of robbery. After the defendants told the court that the penalty for robbery was understood, the judge meticulously explained the pleas available concerning the charge of robbery, the right to stand mute, and the constitutional rights given up by a plea of guilty. Each defendant acknowledged he understood that his plea of guilty would be "giving up those constitutional rights." The court explained the necessity and function of a presentence investigation and report "to help me determine what sentence" should be imposed after conviction, and cautioned the defendants that the court was not bound by any recommendations on sentence. Each defendant then withdrew his plea of not guilty and entered a plea of guilty to robbery.

Next, the court sought the factual basis for the guilty pleas. Requested by his attorney to "tell the judge what happened," Davis recounted the robbery, and in particular told the court about the presence of a knife: "So I think he [Lyons, the clerk] saw Curtis with the knife. Curtis didn't have it out, just had it on the side. I never seen him pull it out or nothing, but . . . . So he handed us the money. . . ." After a colloquy between the court and defendants' counsel, the following conversation occurred as indicated, in response to the court's inquiry of the prosecutor:

> THE COURT: Do you have anything to add . . .?
>
> [PROSECUTOR]: Why don't you hear from Mr. Turner.
>
> THE COURT: Perhaps that is a good idea. You tell us also, Mr. Turner.
>
> MR. TURNER: It was pretty hot that night. Went to the Town & Country. We was shopping for things to get. I

> got what I wanted. I went over to the counter. I ordered a couple of packs of cigarettes. He rung everything up and I had a knife right here, setting right here. As I was going for the money he seen the knife and he knew something was happening. He got to backing up. He just kind of like froze and handed me the money in cash. I grabbed the money out of the cash register and he got some more money out of the back. That's when my man got the money out of the back. We went on and left.

Shortly after Turner described the robbery to the court, the prosecutor added:

> [PROSECUTOR]: Mr. Turner tells it pretty much as the victim remembers it, Judge. The victim, Mr. Lyons, who was the employee of the Town & Country does add that he received a few directives from the three people. There were a total of three people in the store . . . . These parties were apprehended in a car in just a matter of minutes after it happened approximately a mile away. . . .
>
> I am satisfied with Mr. Turner's statement.

On September 9, at separate but contemporaneous sentence hearings for Davis and Turner, the presentence investigation and report to the court disclosed that Turner was a "functional illiterate" and that Turner admitted having the knife during the robbery of Town and Country. In the course of the sentence hearings the defendants' attorney mentioned that Turner, not Davis, had the knife during the robbery. At the conclusion of the hearings, the court sentenced Turner to a term of 7 to 10 years and Davis to a term of 4 to 8 years.

Turner has appealed and assigned three errors: (1) Turner's guilty plea to robbery was not made intelligently, because the court did not inform Turner of the "nature" of the charge; (2) Turner did not have effective assistance of counsel due to his attorney's simultaneously representing Turner's codefendant, that is, a conflict of interest depriving Turner of effective assistance of counsel; and (3) Turner's sentence is excessive under the circumstances.

An accused is entitled to be informed of the nature of the charge against him. See *State v. Tweedy*, 209 Neb. 649, 309 N.W.2d 94 (1981). In criminal proceedings the complaint, in-

formation, or indictment is constitutionally sufficient (1) if there is a correct statement of the elements of the offense charged so that a defendant knows the charge against which he must defend, and (2) if the formal, written accusation (complaint, information, or indictment) enables the defendant to plead an acquittal or conviction in bar of any future prosecution for the same offense. See, *State v. Abraham*, 189 Neb. 728, 205 N.W.2d 342 (1973); *Hamling v. United States*, 418 U.S. 87, 94 S. Ct. 2887, 41 L. Ed. 2d 590 (1974). Generally, it is sufficient that the complaint, information, or indictment set forth the offense in the words of the statute itself, so long as the statutory language fully, directly, and expressly, without uncertainty or ambiguity, contains all the elements necessary to constitute the offense to be punished. See *Hamling v. United States, supra.*

Although he does not assert that the information filed is deficient in charging the crime of robbery, Turner does contend that the trial court's reference to the information was inadequate and prevented Turner from understanding the nature of the charge against him. In the context of this case *nature* means "the essential character of a thing; quality or qualities that make something what it is." Webster's New Universal Unabridged Dictionary 1197 (1983). There was nothing incorrect or deceptive in the court's reference to the charge contained in the information. The statutory language defining the crime of robbery and the trial court's use of words or phrases such as "forcefully," "putting in fear," "take money," and "steal" are not judicial jargon, technical terminology, or words with mysterious meaning which place recognition of the offense and comprehension of its elements beyond the grasp of ordinary intelligence. Informing a defendant about the nature of a charge levied does not require a court to provide a spontaneous or unsolicited explanation of the offense word by word in some geometric progression of definitions. If there is no quarrel about the clarity and sufficiency of a statute defining the crime, there can be no quarrel with a court's question-free explanation of a crime in terms of the statutory language pertaining to the offense. Moreover, the factual basis immediately supplied by Turner in response to the court's inquiry provides an insight into Turner's awareness and knowledge of the charge against

him; for example, "I had a knife" and, in reference to the store clerk, "He got to backing up. He just kind of like froze and handed me the money in cash." That graphic description by Turner demonstrates his clear realization of the conduct condemned in the crime of robbery, and an unquestionable understanding of the law in relation to his actions. The requirement that an accused be informed of the nature of the charge against him is satisfied if, as in this case, the record discloses that the defendant had fair notice of what he was being asked to admit. See, *State v. Williams*, 122 R.I. 32, 404 A.2d 814 (1979); *In re Ronald E.*, 19 Cal. 3d 315, 562 P.2d 684, 137 Cal. Rptr. 781 (1977); *State v. Ohta*, 114 Ariz. 489, 562 P.2d 369 (1977). Additionally, in response to the trial court's question about understanding the information filed, Turner assured the court that he had "talked it over" with his attorney. We are compelled to the conclusion that Turner understood the nature of the charge against him and that all other requirements imposed by *Tweedy* concerning a guilty plea have been satisfied.

Before addressing Turner's question regarding his counsel's alleged conflict of interest, we believe it advisable to examine the characteristics of a conflict of interest. A conflict of interest places a defense attorney in a situation inherently conducive to divided loyalties. See *Mitchell v. Maggio*, 679 F.2d 77 (5th Cir. 1982). The phrase "conflict of interest" denotes a situation in which regard for one duty tends to lead to disregard of another (*United States v. Miller*, 463 F.2d 600 (lst Cir. 1972)); where a lawyer's representation of one client is rendered less effective by reason of his representation of another client (*Spindle v. Chubb/Pacific Indem. Group*, 89 Cal. App. 3d 706, 152 Cal. Rptr. 776 (1979)); or where it becomes a lawyer's duty on behalf of one client to contend for that which his duty to another client would require him to oppose (*Zimmer v. Gudmundsen*, 142 Neb. 260, 5 N.W.2d 707 (1942), and *The Florida Bar v. Moore*, 194 So. 2d 264 (Fla. 1966)). A conflict of interest exists "whenever one defendant stands to gain significantly by counsel adducing probative evidence or advancing plausible arguments that are damaging to the cause of a codefendant whom counsel is also representing." *Foxworth v. Wainwright*, 516 F.2d 1072, 1076 (5th Cir. 1975).

In criminal proceedings a defendant's right to effective counsel includes a lawyer's representation free from conflicting interests. See *Glasser v. United States*, 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680 (1942). See, also, U.S. Const. amend. VI; Neb. Const. art. I, § 11; Moore, *Conflicts of Interest in the Simultaneous Representation of Multiple Clients: A Proposed Solution to the Current Confusion and Controversy*, 61 Tex. L. Rev. 211 (1982); Note, *The Right to Counsel of One's Choice: Joint Representation of Criminal Defendants*, 58 Notre Dame Law. 793 (1983); Note, *Conflicts of Interest in the Representation of Multiple Criminal Defendants: Clarifying Cuyler v. Sullivan*, 70 Geo. L.J. 1527 (1982).

However, a sole attorney's multiple representation of codefendants is not per se a violation of the constitutional guarantee of effective assistance of counsel. See *Holloway v. Arkansas*, 435 U.S. 475, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978). "An 'attorney representing two defendants . . . is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial.' " *Holloway v. Arkansas, supra* at 485.

> But nothing in our precedents suggests that the Sixth Amendment requires state courts themselves to initiate inquiries into the propriety of multiple representation in every case. Defense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the course of trial. Absent special circumstances, therefore, trial courts may assume either that multiple representation entails no conflict or that the lawyer and his clients knowingly accept such risk of conflict as may exist. . . . Unless the trial court knows or reasonably should know that a particular conflict exists, the court need not initiate an inquiry.
>
> . . . .
>
> In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance. . . .
>
> . . . Thus, a defendant who shows that a conflict of

> interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief. . . . But until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance. . . .
>
> . . . We hold that the possibility of conflict is insufficient to impugn a criminal conviction. In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance.

Cuyler v. Sullivan, 446 U.S. 335, 346-50, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980).

Further, as the U.S. Supreme Court expressed in *Strickland v. Washington,* 466 U.S. ____, 104 S. Ct. 2052, 2067, 80 L. Ed. 2d 674 (1984): "Prejudice is presumed only if the defendant demonstrates that counsel 'actively represented conflicting interests' and 'that an actual conflict of interest adversely affected his lawyer's performance.' " Citing *Cuyler v. Sullivan, supra.*

A conflict of interest must be actual rather than speculative or hypothetical before a conviction can be overturned on the ground of ineffective assistance of counsel. See *Johnson v. Hopper*, 639 F.2d 236 (5th Cir. 1981).

We have already determined that Turner's guilty plea was knowingly and intelligently made according to the standards of *State v. Tweedy*, 209 Neb. 649, 309 N.W.2d 94 (1981). There is no indication whatsoever, and Turner does not contend, that the guilty plea was the product of any conflict of interest on the part of Turner's lawyer. We note that Turner never objected to his counsel's representation of the codefendant, Davis. In response to the trial court's directive, "You tell us" what happened concerning the robbery, Turner, unprompted by counsel, acknowledged that he had a knife during the robbery. Turner's statement about the knife resulted from the court's effort to determine whether there was a factual basis for the guilty plea. Consequently, it was Turner himself who actively brought out the fact that he brandished a knife during the robbery. Rather than lying to the court or remaining silent, Turner, without any

instruction from counsel, opted to respond truthfully to the court's directive to provide facts as a basis for accepting the guilty plea. Turner's statement about the knife corroborated and repeated his codefendant's, Davis', description of the robbery. Where codefendants' statements are largely corroborative or repetitive, there is no conflict. See *United States v. Mers*, 701 F.2d 1321 (11th Cir. 1983). Furthermore, after acknowledging in open court that he had the knife, Turner reaffirmed such fact to the probation officer responsible for the presentence investigation and report. When the guilty plea was entered, the court told Turner that such report would be used to determine the appropriate sentence under the circumstances. Even if Turner's attorney had never mentioned the knife at the sentence hearing, Turner's acknowledgment about the knife when his guilty plea was accepted and the contents of the presentence report foreclosed any question about variable culpability which might otherwise attach to the one handling the knife during the robbery. Any remarks about the knife spoken by Turner's counsel at the sentencing hearing merely reiterated information already possessed by the trial court, that is, information previously elicited without instruction by counsel and also reported to the court by the probation officer. See *United States v. Mari*, 526 F.2d 117 (2d Cir. 1975). The real clash of interests and actual antagonism necessary for a conflict of interest does not exist in the case before us. Turner has failed to establish an actual conflict of interest which adversely affected his lawyer's performance. There is no merit to Turner's claim that he was deprived of effective assistance of counsel due to a conflict of interest on the part of his attorney.

In the absence of an abuse of discretion by the sentencing court, a sentence imposed within the statutory limits will not be disturbed on appeal. See *State v. Parks*, 212 Neb. 635, 324 N.W.2d 673 (1982). Turner has submitted the presentence investigations and reports for Marcy Davis and Tranell Seals, who were also convicted of robbing the Town and Country Market and were sentenced by the same judge who sentenced Turner. Davis received a sentence of 4 to 8 years for the robbery and Seals a sentence of 2 to 3 years. The report on Davis reflects no felony conviction, and Davis' most recent conviction was in

1980—possession of marijuana "less than 1 Oz." Seals' record indicates a 19-year-old with two prior convictions for misdemeanor theft. The report on Turner, 21 years old, reflects disorderly conduct (jail sentence) in 1981; third degree assault (jail sentence) in 1982; and on September 3, 1982, a conviction for carrying a concealed weapon. Therefore, Turner's last conviction was approximately 8 months before he robbed Town and Country at knife point. Turner's aggravating affinity for weapons undoubtedly weighed heavily as the trial court pondered an appropriate sentence for Turner. In view of the dissimilar histories displayed by Seals, Davis, and Turner, and in view of Turner's greater turpitude in handling the knife and menacing the clerk during the robbery, imposition of a more severe sentence on Turner was appropriate and justified under the circumstances. We find no abuse of discretion regarding the sentence imposed.

Although we hold in this case that there was no conflict of interest depriving the defendant of his constitutionally guaranteed right to counsel, we must comment further concerning a sole attorney representing multiple defendants, whether by court appointment or by retainer as private counsel.

We note the provisions of Fed. R. Crim. P. 44(c):

> Whenever two or more defendants have been jointly charged . . . or have been joined for trial . . . and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.

Nebraska criminal procedure has no counterpart to Fed. R. Crim. P. 44(c).

It is true that *Cuyler v. Sullivan*, 446 U.S. 335, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980), indicates that a state court may assume there is no conflict of interest relative to representation

of multiple codefendants, and unless the trial court knows or reasonably should know that a particular conflict of interest exists, a state court need not initiate an inquiry into the propriety of multiple representation.

We do not condemn multiple representations in criminal cases, for, as Justice Frankfurter (dissenting) observed in *Glasser v. United States,* 315 U.S. 60, 92, 62 S. Ct. 457, 86 L. Ed. 680 (1942): "Joint representation is a means of insuring against reciprocal recrimination. A common defense often gives strength against a common attack."

However, as also expressed in *Holloway v. Arkansas*, 435 U.S. 475, 490, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978): "But in a case of joint representation of conflicting interests the evil—it bears repeating—is in what the advocate finds himself compelled to *refrain* from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process." (Emphasis in original.)

> The potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one of several co-defendants except in unusual situations when, after careful investigation, it is clear that no conflict is likely to develop and when the several defendants give an informed consent to such multiple representation.

ABA Standards Relating to The Defense Function § 3.5 at 211 (Approved Draft 1971). See, also, Model Code of Professional Responsibility Canon 5, A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client, and DR 5-105, Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer (1984).

There are some illustrative possibilities of a conflict of interest arising out of joint and multiple representations: (1) In planning and executing trial strategy, counsel may make decisions favoring one defendant over another; (2) The fact that counsel appears on behalf of a group of defendants may make some defendants appear guilty by association; (3) At the plea bargaining stage counsel's recommendation to each defendant may be affected by an assessment of the plea's effect on other de-

fendants; (4) In offering defenses at trial, counsel may harm one or more defendants; or (5) At sentencing an argument may occur that one defendant's role was subordinate to that of another defendant. See, *United States v. Agosto*, 675 F.2d 965 (8th Cir. 1982); *United States v. Curcio*, 680 F.2d 881 (2d Cir. 1982); *Developments in the Law—Conflicts of Interest in the Legal Profession*, 94 Harv. L. Rev. 1244 (1981).

Nevertheless, a defendant can waive his right to assistance of an attorney unhindered by a conflict of interest. See *Holloway v. Arkansas, supra* at 483 n.5. The standard to determine whether a defendant has effectively waived a constitutional right requires that the waiver be voluntarily, knowingly, and intelligently done, with sufficient awareness of the relevant circumstances and likely consequences. See *Brady v. United States*, 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970). Such standard for measuring a defendant's waiver applies to a waiver of the right to conflict-free counsel. See, *United States v. Agosto, supra; United States v. Dolan*, 570 F.2d 1177 (3d Cir. 1978); *United States v. Garcia*, 517 F.2d 272 (5th Cir. 1975). Such waiver of the right to conflict-free counsel is permissible provided a defendant "knows what he is doing and his choice is made with eyes open." See *Adams v. U. S. ex rel. McCann*, 317 U.S. 269, 279, 63 S. Ct. 236, 87 L. Ed. 268 (1942).

We believe that safeguards such as those contained in Fed. R. Crim. P. 44(c) tend to promote and protect the effective administration of the criminal justice system. Consequently, and henceforth, unless it appears that there is good cause to believe no conflict is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel in cases involving joint and multiple representation of criminal defendants.

In carrying out such responsibility the court should elicit a narrative response from each defendant that he has been advised of his right to effective representation, that he understands the details of his attorney's possible conflict of interest and potential perils of such conflict, that he has discussed the matter with his attorney or, if he wishes, with outside counsel, and that he voluntarily waives his right to a conflict-free attorney required under the Constitutions, state and federal. See,

United States v. Dolan, supra; United States v. Curcio, supra. Judges should inquire with as much detail as the court's experience and knowledge of the case will permit, and should bear in mind that most defendants are rarely sophisticated enough to evaluate potential conflicts which may arise from joint and multiple representation. See *United States v. Carrigan*, 543 F.2d 1053 (2d Cir. 1976).

Such ounce of procedural prevention regarding conflict of interest may forestall the necessity of a pound of appellate cure in the criminal justice system.

The judgment of the district court is in all respects affirmed.

AFFIRMED.

STATE EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. CLAY B. STATMORE, RESPONDENT.

352 N.W.2d 875

Filed July 27, 1984. No. 83-844.

1. **Disciplinary Proceedings.** Implicit in the license to practice law is the requirement that the recipient of the license shall demean himself in a proper manner and shall refrain from practices which bring discredit upon the lawyer, the profession, and the courts.
2. _____. A lawyer's poor accounting procedures and sloppy office management are not excuses or mitigating circumstances in reference to commingled funds.
3. _____. A lawyer's restitution of a client's funds after being faced with legal accountability does not exonerate professional misconduct.

Original action. Judgment of suspension.

Dennis G. Carlson, Counsel for Discipline, and Alison L. Larson, for relator.

Paul E. Galter of Bauer, Galter, Geier & Flowers, for respondent, and, on brief, Dana M. London.

KRIVOSHA, C.J., BOSLAUGH, HASTINGS, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

PER CURIAM.

This is an original disciplinary proceeding by the State of Nebraska ex rel. Nebraska State Bar Association against Clay B. Statmore, an attorney admitted to practice in Nebraska. After a hearing before the Committee on Inquiry of the First Disciplinary District and a review by the Disciplinary Review Board, formal charges against Statmore have been filed in this court.

Statmore does not deny the charges. The charges allege violations of the following:

> CANON 1. A Lawyer Should Assist in Maintaining the Integrity and Competence of the Legal Profession.
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> . . . .
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> DR 1-102. Misconduct.
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> A. A lawyer shall not:
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> 1. Violate a Disciplinary Rule.
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> . . . .
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> 6. Engage in any other conduct that adversely reflects on his fitness to practice law.
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> . . . .
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> CANON 9. A Lawyer Should Avoid Even the Appearance of Professional Impropriety.
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> . . . .
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> DR 9-102. Preserving Identity of Funds and Property of a Client.
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> . . . .
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> B. A lawyer shall:
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> 1. Promptly notify a client of the receipt of his funds, securities, or other properties.
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> . . . .
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> 4. Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

We review the evidence de novo to determine if discipline should be be imposed and, if discipline is warranted, the nature of the discipline which is appropriate under the circumstances. See *State ex rel. Nebraska State Bar Assn. v. McArthur*, 212 Neb. 815, 326 N.W.2d 173 (1982).

On April 15, 1982, Statmore undertook representation of Deborah A. Kuzara regarding a charge of driving while intoxicated, second offense. Kuzara, on June 2, gave Statmore her check for $500—the agreed fee for the representation. Statmore deposited Kuzara's June 2 check, which was returned twice by the bank due to insufficiency of Kuzara's account. Statmore contacted Kuzara and her father in New Jersey about the insufficient fund check.

On June 22 Kuzara issued another check (check A) for $500, which Statmore deposited but which was returned to Statmore's Lincoln bank on account of Kuzara's insufficient funds. On June 30 Kuzara sent Statmore still another check (check B) in the amount of $540—$500 for Statmore's fee, plus $40 for the check service charges regarding the other Kuzara checks. Check B was returned on account of insufficient funds. Unbeknown to Statmore, his bank had held check A and collected that check on July 9, 1982, with credit to Statmore's business account in the sum of $495 ($500 less a $5 service charge). Statmore again contacted Kuzara about the insufficient fund checks. At this time Statmore was still unaware that the bank had credited his account $495 for check A on July 9.

Statmore took check B to the Lancaster County attorney and requested criminal prosecution. Notified by the county attorney regarding prosecution on check B, Kuzara hired attorney George Thompson of Bellevue, Nebraska. Kuzara later delivered $540 to the county attorney for check B. On November 12 the county attorney sent $540 to Statmore regarding check B.

Kuzara contacted Statmore about the possibility of a double payment, that is, check A credited to Statmore on July 9 and the funds from the county attorney on November 12 regarding check B. Statmore asked for verification from Kuzara that there was in fact a double payment, and felt he was getting a "runaround" about the checks.

Attorney Thompson wrote Statmore on January 5, 1983, pointed out the double payment, and requested a reply. Statmore did not respond to Thompson's letter. Early in February, Statmore checked his deposit slips and saw that there indeed had been the "$495 deposit" (check A) to his account on July 9. This was apparently Statmore's first verification of payment on

check A. Thompson again wrote to Statmore on March 2 and demanded Kuzara's $495 by return mail. Statmore never responded to that letter. By March 14 Statmore conclusively realized that he had received double payment from Kuzara. On March 16 Thompson telephoned Statmore, who then acknowledged the double payment and told Thompson he did not have the funds to reimburse Kuzara.

On May 23 Kuzara filed a complaint with the Counsel for Discipline of the Nebraska State Bar Association. Counsel for Discipline wrote Statmore as soon as Kuzara filed her complaint. Statmore paid Kuzara $250 on June 28 and the same day wrote the Counsel for Discipline that he had "recently" paid Kuzara $250. In his June 28 letter to the Counsel for Discipline, Statmore also mentioned that the "remaining $245 should be repaid within the next fourteen days." Statmore paid nothing further until the day of the hearing before the Committee on Inquiry.

On the day of the hearing before the Committee on Inquiry, September 20, Statmore brought the Counsel for Discipline a check for $245 to pay Kuzara, and stated he "didn't know who to send it to."

Statmore says he never reconciles his monthly bank statement and, therefore, had no knowledge that check A had cleared and been credited to his account on July 9. Such ignorance regarding check A existed at the time Statmore received the money from the Lancaster County attorney regarding check B.

Throughout all the time in question, Statmore was having financial problems: failed to pay utilities (some of which were disconnected) and did not pay office rent (moved his office after delinquency in rent). Statmore implies that the somewhat chaotic office situation explains, if not excuses, the sorry state of affairs during his representation of Kuzara.

Implicit in the license to practice law is the requirement that the recipient of the license shall demean himself in a proper manner and shall refrain from practices which bring discredit upon the lawyer, the profession, and the courts. See, *State ex rel. Nebraska State Bar Assn. v. Hungerford*, 159 Neb. 468, 67 N.W.2d 759 (1954); *State ex rel. Nebraska State Bar Assn. v.*

Conover, 166 Neb. 132, 88 N.W.2d 135 (1958).

Any violation of the ethical standards relating to the practice of law, or any conduct of an attorney which tends to bring reproach upon the courts or the legal profession, constitutes grounds for suspension or disbarment. See, *State ex rel. Nebraska State Bar Assn. v. Bremers*, 200 Neb. 481, 264 N.W.2d 194 (1978); *State ex rel. Nebraska State Bar Assn. v. Strom*, 189 Neb. 146, 201 N.W.2d 391 (1972).

When the double payment occurred, Statmore held Kuzara's money, which he was not authorized to retain. Kuzara's conduct or mistake concerning payment of her checks did not relieve Statmore of his professional duty regarding his client's funds. Accurate accountability of a client's funds is the responsibility of the lawyer, not the client. Statmore's slipshod office management and careless bookkeeping prevented any semblance of the accurate accounting lawyers must maintain with respect to a client's funds. As a result of Statmore's poor management and failure to keep track of payment from Kuzara, there was a commingling of a client's money—an area of gravest concern of this court in reviewing claimed lawyer misconduct. The prohibition against commingling of funds is a salutary rule adopted

> "to provide against the probability in some cases, the possibility in many cases, and the danger in all cases that such commingling will result in the loss of clients' money. Moral turpitude is not necessarily involved in the commingling of a client's money with an attorney's own money if the client's money is not endangered by such procedure and is always available to him. However, inherently there is danger in such practice for frequently unforeseen circumstances arise jeopardizing the safety of the client's funds, and as far as the client is concerned the result is the same whether his money is deliberately misappropriated by an attorney or is unintentionally lost by circumstances beyond the control of the attorney."

In re Moore, 110 Ariz. 312, 314-15, 518 P.2d 562, 564-65 (1974), citing and quoting from *Peck v. The State Bar*, 217 Cal. 47, 17 P.2d 112 (1932).

A lawyer's poor accounting procedures and sloppy office management are not excuses or mitigating circumstances in ref-

erence to commingled funds. See, *Attorney Griev. Comm'n v. Boehm*, 293 Md. 476, 446 A.2d 52 (1982); *Inniss v. State Bar*, 20 Cal. 3d 552, 573 P.2d 852, 143 Cal. Rptr. 408 (1978).

We realize that Statmore has repaid Kuzara the overpayment. However, a lawyer's restitution of a client's funds after being faced with legal accountability does not exonerate professional misconduct. See, *State ex rel. Nebraska State Bar Assn. v. Bremers, supra; State, ex rel., Okl. Bar Ass'n v. Raskin*, 642 P.2d 262 (Okla. 1982).

Among the major considerations in determining whether a lawyer should be disciplined is maintenance of the highest trust and confidence essential to the attorney-client relationship. As a profession, the bar continuously strives to build and safeguard such trust and confidence, but conduct such as before us in the present case weakens the efforts of the overwhelming majority of lawyers in Nebraska whose conduct meets, if not exceeds, the Code of Professional Responsibility.

> To determine whether and to what extent discipline should be imposed, it is necessary that we consider the nature of the offense, the need for deterring others, the maintenance of the reputation of the bar as a whole, the protection of the public, the attitude of the offender generally, and his present or future fitness to continue in the practice of law.

State ex rel. Nebraska State Bar Assn. v. McArthur, 212 Neb. 815, 819, 326 N.W.2d 173, 175-76 (1982).

Therefore, under the circumstances we find that a suspension is appropriate discipline for Statmore and that Statmore should be suspended from the practice of law for a period of 6 months. During such suspension, we sincerely suggest that Statmore reappraise the candor, fairness, and responsibility a lawyer owes to his client. We recommend that Statmore revise his accounting procedures and office management to prevent recurrence of any misconduct. Suspension of Statmore shall be effective September 1, 1984, and shall last for 6 months. Statmore shall make suitable arrangements that his clients' matters pending at and during his suspension shall be suitably protected.

JUDGMENT OF SUSPENSION.

STATE OF NEBRASKA, APPELLEE, V. DENNIS L. COBURN, APPELLANT.
352 N.W.2d 605

Filed July 27, 1984. No. 83-878.

1. **Criminal Law: Burglary: Intent: Proof.** Intent sufficient to support a conviction for burglary may be inferred from the facts and circumstances surrounding an illegal entry, if those facts and circumstances are of such a nature as to present a jury question as to defendant's intent.
2. **Lesser-Included Offenses.** Criminal trespass is not a lesser-included offense of burglary.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Affirmed.

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, SHANAHAN, and GRANT, JJ., and BRODKEY, J., Retired.

GRANT, J.

The defendant appeals his conviction of burglary in the Douglas County District Court. The defendant was charged in two dockets with three separate burglaries. The burglaries all involved churches located within 2 miles of one another in the South Omaha area of Omaha, Nebraska. Two burglaries in the one docket happened on or about March 25, 1983, and the other occurred on or about April 5, 1983. On the State's motion the three charges were consolidated for jury trial. The defendant was also charged as being a habitual criminal as described in Neb. Rev. Stat. § 29-2221 (Reissue 1979). Following his trial, defendant was acquitted on one charge and a mistrial was declared on a second charge, the jury stating they were deadlocked on an 11-to-1 vote. These two charges involved the March 25 burglaries. The defendant was convicted on the third burglary of April 5, 1983, and after later determination that he was a habitual criminal, sentenced to 10 years in the penitentiary.

Defendant assigns two errors: (1) That the trial court erred in overruling defendant's motion to dismiss or for a directed verdict of not guilty; and (2) That the trial court erred in refusing defendant's request for a jury instruction on trespass as a lesser-included offense of burglary.

With regard to the first alleged error, we recognize the proposition advanced by the State, that by adducing evidence after his motion to dismiss was overruled, defendant has waived any error in the trial court's overruling of that motion. As set out in *State v. Hilpert*, 213 Neb. 564, 569, 330 N.W.2d 729, 733 (1983),

> following a motion for a directed verdict at the close of the evidence of the State, the introduction of evidence thereafter by the defendant waives any error in the ruling or failure of ruling on the motion, although the defendant is not prevented from questioning the sufficiency of the evidence in the entire record to sustain a conviction.

Nonetheless, we will consider the assignment of error as one attacking the sufficiency of the evidence to sustain defendant's conviction. Upon consideration of the errors alleged, for the reasons hereinafter stated we affirm.

The evidence adduced at trial on behalf of the State clearly established that the defendant entered the Assumption Ukrainian Catholic Church of Byzantine Rite, 2301 South 16th Street, Omaha, Nebraska, at approximately 5:20 a.m. on April 5, 1983. Michael and Stephanie Worobec testified that they live across the street from the church. They generally rise for work about 4 a.m. and leave for work about 5:15 a.m. On April 5, 1983, they were leaving their house when they saw a person in dark clothes "gesture" around the ground floor church window, open it, and climb into the church. The police were called and arrived within minutes. The first officer on the scene testified he was only two blocks away when notified of a possible break-in, and arrived at the church in 30 seconds.

After securing all possible exits the police entered the church, and the defendant was found slouched in a chair in the basement, which is used as a cafeteria. A sack was in defendant's possession containing a pair of pliers, a small knife, a candle, and some toy dishes. Nothing in the church was missing or dis-

turbed except the window that had been broken for entry.

At the trial defendant testified that he had entered the church through the window, but he denied any intent to steal anything, and stated he entered the structure to get warm and to sleep. The defendant also testified that he had purchased the pliers, knife, and dishes for relatives earlier in the evening. He denied any knowledge of a candle.

The elements necessary to prove beyond a reasonable doubt that the defendant was guilty of the crime of burglary were properly submitted to the jury in appropriate instructions. Most of those elements were, in effect, admitted by defendant in his testimony at the trial: the willful, malicious, and forcible breaking into the building without the consent of the owner. The only dispute in the evidence is as to defendant's intent in so breaking into the building—defendant testifying that he did not intend to steal anything within the building, and the State alleging that defendant intended to steal property of value within the structure.

In opposition to defendant's self-serving testimony, the prosecution offered circumstantial evidence regarding intent. The defendant had made an illegal entry into the church about 5:20 a.m. The defendant was wearing dark pants, a dark, thigh-length coat, and stocking cap. He did not appear intoxicated. He was carrying a paper bag that contained a candle, a pair of pliers, and a small knife—all suggesting preparation for a burglary.

The appellant's explanation of his presence, that he had broken in to find a place to sleep out of the cold, was challenged on several points. He had numerous relatives in Omaha, some of whom were not too distant from the church. Friends also lived nearby. An officer testified that the defendant was wide awake when found. The defendant, on the other hand, said he had been sleeping. After his entry, on his way to the basement, defendant passed some pews where he could have slept. Defendant testified he had been in the church about one-half hour, but the testimony by the other witnesses showed defendant had been in the church only a few minutes. His credibility was further brought into question by his claim prior to trial that he had come in through the door instead of breaking in the window.

The defendant initially told the police that he had entered the church through the front door, which he said was unlocked. The pastor of the church testified all doors and windows were secured the night before. The defendant stood by his version of entry until he testified at trial after the Worobecs' testimony that they saw a man enter the window.

In determining the sufficiency of evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the jury. The verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Jones,* 217 Neb. 435, 350 N.W.2d 11 (1984).

Viewing the evidence in that fashion, it is clear that following the court's instruction as to intent—i.e., in part, "Intent is a mental process, and it therefore generally remains hidden within the mind where it is conceived. . . . It may, however, be inferred from the words and acts of the defendant and from the facts and circumstances surrounding his conduct"—the jury could determine that defendant had the required intent. The jury could have properly inferred that intent from the facts set out above. Defendant's evidence to the contrary on his intent might also have been believed by the jury, but that issue has been determined adversely to the defendant pursuant to appropriate instructions.

In so holding we are not deciding that burglarious intent can be reasonably and justifiably inferred from the unlawful and forcible entry alone—a proposition put forward in *State v. Cannon*, 185 Neb. 149, 174 N.W.2d 181 (1970). In this case, as set out above, there are facts and circumstances present beyond the mere fact of the illegal entry sufficient to justify the jury's determination of guilt.

The record contains sufficient evidence from which the jury could conclude that defendant did indeed intend to steal property when he broke into the church and was prevented from doing so only by the fortuitous, instant response to the scene by the police.

With regard to defendant's assigned error that the trial court

erred in refusing to instruct the jury on criminal trespass as a lesser-included offense of burglary, we have recently specifically held that criminal trespass is not a lesser-included offense of burglary. *State v. Miller*, 215 Neb. 145, 337 N.W.2d 424 (1983). Defendant recognizes this and asks us to change our holding in *Miller*. We decline to do so. As set out in *State v. Lovelace*, 212 Neb. 356, 360, 322 N.W.2d 673, 675 (1982), "To determine whether one statutory offense is a lesser-included offense of the greater, we look to the elements of the crime and not to the facts of the case."

That proposition is now the settled law of this state. There are obviously other ways of considering the difficult question of lesser-included offenses, but Nebraska has adopted the statutory elements test. As in *Miller, supra*, the *facts* of this present case might well qualify as a lesser-included trespass within burglary, but the test as to all the statutory elements of both crimes leads to the conclusion reached in *Miller*.

There being no error in the trial of this case, the judgment and sentence are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DONALD E. TOMES, APPELLANT.

352 N.W.2d 608

Filed July 27, 1984. No. 83-899.

Trial: Evidence: Presumptions: Appeal and Error. In a case tried to the court without a jury, there is a presumption that the trial court, in reaching its decision, considered only evidence that is competent and relevant. This court will not overturn such a decision where there is sufficient material, competent, and relevant evidence to sustain the judgment.

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

Kent F. Jacobs of Blevens, Blevens & Jacobs, for appellant.

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

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

BOSLAUGH, J.

The defendant, Donald E. Tomes, was convicted of driving while intoxicated and was sentenced to 7 days in the county jail, fined $200, and his driver's license revoked for 6 months. Upon appeal to the district court the judgment was affirmed.

The defendant has appealed to this court and contends that an error in a ruling on an evidentiary matter requires that the judgment be reversed.

The record shows that on January 21, 1983, at approximately 5:40 p.m., a state patrolman observed a pickup truck being operated by Tomes on U.S. Highway 34 near Waco, Nebraska. The truck crossed the centerline four times and forced an oncoming car onto the shoulder of the road when the defendant's vehicle crossed the centerline.

The patrolman stopped Tomes and detected a moderate odor of alcohol about him. Tomes was unsteady when he got out of the truck, had bloodshot eyes, and spoke "with a thick tongue." He was unable to touch the tip of his nose with his index finger, but, rather, touched the bridge of his nose and his cheek. When asked to pick up a set of keys from the ground, Tomes lost his balance twice. Tomes was placed under arrest and taken to the sheriff's office, where a breath test was conducted.

Trial was had to the county court without a jury. The results of the breath test were admitted over objection that there was insufficient foundation.

The rules of procedure adopted by the Department of Health, following the decision in *State v. Gerber*, 206 Neb. 75, 291 N.W.2d 403 (1980), provide that the certification as to preparation of the simulator test solution may be made by affidavit. The defendant's objection was directed to the affidavit of the person who had prepared and tested the simulator solution used in preparing the machine for the test made in this case.

After the defendant rested, the court determined that there was a foundational defect in the State's evidence, reversed its

earlier ruling, and sustained the defendant's objection. However, the court found the defendant guilty of driving while under the influence, and stated that the conviction was based upon evidence which had been properly admitted.

Tomes contends that he was prejudiced by the admission of the breath test results despite the fact that his objections were later sustained. We conclude that even if we were to assume that the results of the breath test were properly held inadmissible, there is no merit to this assignment of error.

In a case tried to the court without a jury, there is a presumption that the trial court, in reaching its decision, considered only evidence that is competent and relevant, and this court will not overturn such a decision where there is sufficient material, competent, and relevant evidence to sustain the judgment. *Barber v. Barber*, 207 Neb. 101, 296 N.W.2d 463 (1980); *Murdoch v. Murdoch*, 200 Neb. 429, 264 N.W.2d 183 (1978). In the present case the record shows clearly that the trial court did not base its finding on the results of the breath test, but, rather, based its decision upon other evidence. Moreover, we note that the trial court expressly sustained the objection, thereby withdrawing the evidence from its consideration as fact finder. This is analogous to curing error in the admission of evidence by sustaining an objection and instructing the jury to disregard the improper evidence. See *State v. Ebberson*, 209 Neb. 41, 305 N.W.2d 904 (1981).

The conviction is supported by other material, competent, and relevant evidence. Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1982) provides in part:

> It shall be unlawful for any person to operate or be in the actual physical control of any motor vehicle while under the influence of alcoholic liquor or of any drug 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.

In *State v. Hilker*, 210 Neb. 810, 812, 317 N.W.2d 82, 83-84 (1982), we said:

> Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1980) defines one offense which can be proved by any of three ways: (1) By proof that the defendant was in physical control of a

motor vehicle while under the influence of alcoholic liquor; (2) By proof that the defendant was in physical control of a motor vehicle while under the influence of any drug; or (3) By proof that the defendant was in physical control of a motor vehicle while having ten-hundredths of one percent or more by weight of alcohol in his or her body fluid. *State v. Jablonski*, 199 Neb. 341, 258 N.W.2d 918 (1977).

In the *Jablonski* case the defendant was stopped after a police officer observed the defendant's vehicle going through a red light. The defendant had an odor of alcohol about him and slurred his speech. The defendant also failed several field sobriety tests. We held this evidence sufficient to sustain a conviction for driving while intoxicated.

In the present case the evidence shows that defendant had been drinking and exhibited clear indications that he was intoxicated. This is sufficient to sustain the conviction.

The judgment of the district court is affirmed.

AFFIRMED.

PAMELA TRANMER, APPELLEE, V. MASS MERCHANDISERS, APPELLANT.
352 N.W.2d 610

Filed July 27, 1984. No. 84-009.

1. **Workmen's Compensation: Appeal and Error.** The findings of fact made by the Nebraska Workmen's Compensation Court on rehearing have the same force and effect as a jury verdict in a civil case and will not be reversed or set aside unless there is insufficient evidence in the record to warrant the award.
2. **Workmen's Compensation: Evidence.** In testing the sufficiency of the evidence, every controverted fact must be resolved in favor of the successful party, and the successful party is given the benefit of every inference that can be drawn from the evidence.

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

Jewell, Otte, Gatz & Collins, for appellant.

LeRoy J. Sturgeon of Smith & Smith, for appellee.

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

KRIVOSHA, C.J.

The appellant, Mass Merchandisers, appeals from a judgment entered by a three-judge panel of the Nebraska Workmen's Compensation Court, which entered an award in favor of the appellee, Pamela Tranmer, and against her employer, Mass Merchandisers. For reasons set out in this opinion, we believe that the three-judge panel was correct and, therefore, affirm the judgment.

In doing so we must keep in mind that the findings of fact made by the Nebraska Workmen's Compensation Court on rehearing have the same force and effect as a jury verdict in a civil case and will not be reversed or set aside unless there is insufficient evidence in the record to warrant the award. See, Neb. Rev. Stat. § 48-185 (Reissue 1978); *Heironymus v. Jacobsen Transfer*, 215 Neb. 209, 337 N.W.2d 769 (1983); *Halbert v. Champion International*, 215 Neb. 200, 337 N.W.2d 764 (1983). Furthermore, we must keep in mind that in testing the sufficiency of the evidence, every controverted fact must be resolved in favor of the successful party, and the successful party is given the benefit of every inference that can be drawn from the evidence. *Mack v. Dale Electronics, Inc.*, 209 Neb. 367, 307 N.W.2d 814 (1981); *McCann v. Holy Sepulchre Cemetery Assn.*, 205 Neb. 444, 288 N.W.2d 45 (1980). There is no real dispute as to the principles of law applicable in this case, but, rather, a dispute as to the meaning of the evidence, which the compensation court resolved in favor of Mrs. Tranmer.

Mrs. Tranmer was, at the time of the accident involved in this case, employed as a factory line person by Mass Merchandisers. She had initially been employed in March of 1979, and she worked until November 15, 1980, when she sustained an injury. Her work consisted of placing and securing lids on filled baskets of merchandise as the baskets moved along a conveyor belt, and then lifting these baskets onto another conveyor belt.

During the course of a workday, she processed four or five baskets a minute.

The record reflects that Mrs. Tranmer had no prior employment nor other positions at Mass Merchandisers which required the use of her hands or arms. Furthermore, she had no prior accidents or hand or wrist problems before the accident on November 15, 1980. On that date, while working, she suddenly felt pain in both wrists and her wrists began to swell simultaneously. After reporting her condition to her supervisor, she was sent to a doctor the following day.

Two weeks later, still experiencing difficulty, Mrs. Tranmer went to a family practitioner, who, after a physical examination and X-rays, referred her to an orthopedic surgeon.

Sometime in January or early February of 1981, the orthopedic surgeon, Dr. Wheeler, to whom she had been referred by the family practitioner, examined her. He performed various tests, including taking X-rays and an electrical nerve conductor test. Following a review of these tests, he diagnosed her condition as carpal tunnel syndrome, and in April 1981 he performed surgery on her left wrist. In June of 1981 he performed similar surgery on her right wrist. After postoperative examinations, Dr. Wheeler released Mrs. Tranmer to return to work in August of 1981. However, by that time the factory operation had been closed down. Mrs. Tranmer continued to suffer discomfort in her hands. She has not worked since November 15, 1980, when she suffered her initial accident.

In February of 1982 she returned to Dr. Wheeler, with continued complaints of pain, weakness, and swelling. The evidence is clear that she suffered no injury between the surgery performed by Dr. Wheeler in 1981 and when she returned to see Dr. Wheeler in February of 1982. Dr. Wheeler performed another electrical nerve test and injected cortisone; and when, in the spring of 1983, the treatments given by Dr. Wheeler were ineffective to eliminate the discomfort, he sent her to Dr. Linscheid at the Mayo Clinic in Rochester, Minnesota. Dr. Linscheid examined Mrs. Tranmer and advised her that she probably had what he described as bilateral pronator syndrome, and might have a double crush syndrome. He recommended surgery in both forearms. On June 10, 1983, he performed surgery on her

left arm at the Mayo Clinic.

Mrs. Tranmer testified that since the surgery in June of 1983, there has been no improvement and that she was scheduled to return to the Mayo Clinic in October of 1983 for followup consultation. She testified that she was taking no medication and that she was suffering from pain and swelling which made it difficult to perform normal housework without discomfort. Furthermore, she testified that she was unable to sleep through the night without being awakened by tingling in her hands, that her hands fell asleep during the day, and that while she was able to drive, the pain increased when she did so.

In April of 1983 Mass Merchandisers sent Mrs. Tranmer to a Dr. Isgreen for examination. He reviewed her medical history, performed a clinical neurological examination, and ordered an electrical conductor test—an EMG—and other laboratory tests.

It was stipulated by the parties that Mass Merchandisers has paid all the expenses of medical care and treatment and temporary disability compensation benefits from the date of the accident on November 15, 1980, until August of 1981. It was further agreed, however, that since August of 1981, no expenses or benefits have been paid, including the expenses of the trips to Rochester and the surgery performed there.

In essence, Mass Merchandisers maintains that the award entered by the three-judge panel was in error because there is not sufficient reliable evidence to connect the injury of November 15, 1980, with Mrs. Tranmer's current condition, nor is there sufficient evidence to establish that the treatment received by Mrs. Tranmer and the expenses incurred in connection therewith after August of 1981 are related to the injury of November 15, 1980.

We believe that while the evidence is not as abundant as one would hope, it is, nevertheless, sufficient to support the judgment of the compensation court. Mass Merchandisers' doctor provided the only medical testimony offered at the hearing before the three-judge panel. Dr. Isgreen, by deposition, testified with respect to his objective clinical findings and indicated that as of April 1983 Mrs. Tranmer continued to suffer from carpal tunnel syndrome. He further testified that his history and phys-

ical examination of Mrs. Tranmer revealed that she was still bothered significantly by swelling, numbness, and weakness in her hands, wrists, and forearms, which would become worse with any sort of prolonged activity, and, therefore, she was virtually able to do very little. Dr. Isgreen testified specifically that a review of the electrical tests of the nerves and muscles of Mrs. Tranmer's hand indicated that "indeed both carpal tunnels — or both median nerves are affected. The left side is worse than the right side, and the electromyographer felt that this was due to compression or irritation or inflammation of the median nerve at the wrist." His diagnosis was bilateral carpal tunnel syndrome. Thus, the EMG confirmed the objective finding that carpal tunnel syndrome continued to exist after the surgery performed by Dr. Wheeler. When asked if the Mayo Clinic's diagnosis of pronator syndrome was the same as the earlier diagnosis rendered by Dr. Wheeler, Dr. Isgreen said, "[I]t's kind of the same thing." Dr. Isgreen testified that while one normally would expect that the condition experienced by Mrs. Tranmer on November 15, 1980, would not result in permanent disability, in her case the electrical nerve conductor test seemed to support her contention that she was experiencing continued abnormality.

There is no evidence to indicate any break in the chain of events. The parties stipulated and agreed that Mrs. Tranmer suffered a compensable injury in November of 1980, and Mass Merchandisers' expert witness conceded that when he examined Mrs. Tranmer, she in fact did continue to have difficulty of the type similar to that resulting from the injury in November of 1980. Moreover, he testified that one of the alternatives for the condition experienced by Mrs. Tranmer was surgery of the type ultimately performed at the Mayo Clinic, but for which Mass Merchandisers refused to make payment. Apparently, it is the view of Mass Merchandisers that an employee must regularly, frequently, and periodically continue to be examined by a physician so as to establish that each continued week of disability is related to the initial injury. We do not believe this to be the law. Nor do we believe that we can say as a matter of law that the three-judge panel was in error when it concluded that because Mrs. Tranmer admittedly suffered a compensable injury in No-

vember of 1980 and appeared to continue to suffer from that injury without any other intervening cause, she was still entitled to medical treatment and compensation. While Dr. Isgreen testified that Mrs. Tranmer's condition was unusual, he did not at any time indicate that it was nonexistent or that she was not in fact experiencing the pain or disability which she claimed.

In view of the limitations imposed upon this court regarding the review of the actions taken by a three-judge panel of the Nebraska Workmen's Compensation Court, we believe that the evidence was sufficient to support the award made by the court on December 5, 1983, and, therefore, we are compelled to affirm the award in all respects.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DARWIN JAY ROBINSON, SR., APPELLANT.

352 N.W.2d 879

Filed July 27, 1984. No. 84-010.

1. **Effectiveness of Counsel.** Where one maintains that counsel was inadequate, one must likewise show how or in what manner the alleged inadequacy prejudiced the defendant.
2. _____. The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.
3. **Criminal Law: Effectiveness of Counsel: Appeal and Error.** An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.
4. _____: _____: _____. The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.
5. **Criminal Law: Confessions: Miranda Rights.** Voluntary statements made to third persons who were not then acting as police officers or their equivalent are not inadmissible, even though the individual did not receive his *Miranda* warnings.

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

Darwin Jay Robinson, Sr., pro se.

Paul L. Douglas, Attorney General, and Calvin D. Hansen, for appellee.

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

KRIVOSHA, C.J.

The appellant, Darwin Jay Robinson, Sr., appeals from a judgment entered by the district court for Douglas County, Nebraska, denying to Robinson relief pursuant to the Nebraska Post Conviction Act, Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1979). Robinson maintains that the trial court erred in failing to find he had ineffective assistance of counsel at a pretrial suppression hearing and again on appeal to this court. We believe that both contentions are wholly without merit, and for that reason the judgment of the trial court is affirmed.

The facts which give rise to all of this litigation disclose that in the early morning hours of January 31, 1981, a convenience store attendant, Marvin Pfeifer, was robbed at knife point. Just as the robber was leaving, another attendant, Michael Klaumann, came on duty and passed by the robber. As Klaumann entered the store, Pfeifer told him that he had been robbed. Klaumann returned to the street, got into his automobile, and followed a white Buick, as it was the only other car on the street at that time. The driver resembled the individual who passed by Klaumann when Klaumann was entering the store. Klaumann obtained the license number, followed the car to an apartment building, and gave this information to the police.

The authorities then went to the location provided by Klaumann and towed the automobile away. Shortly thereafter, a woman representing herself to be Robinson's wife reported to the police that their car had been stolen or towed away. Investigating officers arrived at Robinson's apartment and spoke with the woman who said she called the police and who held herself out to be Robinson's wife. It later developed that, in fact, the individual was not Robinson's wife but, rather, a Miss Edna Lyncook, who had been instructed by Robinson to represent

herself to the police as Robinson's wife. The real Mrs. Robinson was hiding in a bedroom of the apartment when the police arrived.

One of the investigating officers asked Miss Lyncook, who was then representing herself to be Mrs. Robinson, whether he could have a photograph of Mr. Robinson. There is a dispute as to whether Miss Lyncook consented, but at the suppression hearing the trial court resolved that fact in favor of the State. The officer then left the location and returned to the convenience store, where he showed a photograph of Robinson to the attendants. Klaumann immediately identified the photograph as being a picture of the robber.

In the meantime, and while the officer was at the convenience store, Miss Lyncook admitted to the officers that in fact she was not Mrs. Robinson and that Robinson was upstairs in her apartment. The officers went upstairs to the Lyncook apartment and arrested Robinson.

After his arrest Robinson was taken downstairs to his apartment to get a coat. At this point the real Mrs. Robinson was located and advised of her husband's arrest, and was requested by the officers to grant them consent to search the apartment for certain items believed to have been worn by Robinson at the time of the robbery. She consented to the search, and a blue jacket similar to the type described by Klaumann was found.

While awaiting trial on the charges, Robinson was housed at the Douglas County Correction Center. A regularly paid informant of the State Patrol, a Mr. Koppock, was also being held there after being arrested on charges of assault and receiving stolen property. During the time Robinson and Koppock were incarcerated together, Robinson admitted to Koppock that he had robbed Pfeifer at the convenience store, using a butcher knife. The sometime informant testified at the trial. Furthermore, at the trial both Klaumann and Pfeifer identified Robinson as the robber. The jury returned a verdict of guilty on both the robbery and use of a knife charges, and the court found that Robinson was a habitual criminal.

Robinson's first assignment of error is to the effect that he received ineffective assistance of counsel because his trial counsel did not call Edna Lyncook at the suppression hearing to

testify that she was not in fact Robinson's wife, had lied to the police when she told them she was his wife, and did not give consent to the officers for the photograph. Miss Lyncook was in fact called later at the actual trial by the State and testified to all that had occurred, including her false statements to the police. Following his conviction, an appeal was lodged with this court, and court-appointed counsel, pursuant to court rule, filed a motion to withdraw. That motion was considered in detail by this court and an order entered sustaining the motion to withdraw and affirming the conviction and sentence. Robinson maintains that by filing a motion to withdraw he again received ineffective assistance of counsel because there were two valid errors which should have been raised and argued to this court. The first error which Robinson maintains would have entitled him to a reversal was the inadmissibility of the photograph allegedly illegally obtained from Miss Lyncook and which was in plain sight, and, second, the testimony of Koppock to the effect that Robinson admitted committing the robbery.

Before addressing each of these matters individually, we believe it to be of some value to note the rules generally with regard to a claim of ineffective assistance of counsel. In *State v. Holtan*, 205 Neb. 314, 319, 287 N.W.2d 671, 675 (1980), we said: "[W]here one maintains that counsel was inadequate one must likewise show how or in what manner the alleged inadequacy prejudiced the defendant." We further said in *Holtan* at 320, 287 N.W.2d at 675:

> "[I]f competent counsel, after investigation, considers a point worthless, the fact that he is court-appointed does not require him to pursue it. * * * the right to counsel * * * does not include the right to counsel, whether at counsel's expense or government expense, to advance a totally frivolous claim merely because some layman thinks it has merit. . . ."

This view has since been wholly adopted by the U.S. Supreme Court in its recent decision in *Strickland v. Washington,* 466 U.S. ____, 104 S. Ct. 2052, 2064-67, 80 L. Ed. 2d 674 (1984), wherein the Court there said:

> The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the

> proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.
>
> . . . .
>
> Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.
>
> . . . .
>
> An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. Cf. *United States v. Morrison*, 449 U.S. 361, 364-365, 101 S. Ct. 665, 667-668, 66 L. Ed. 2d 564 (1981). The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.

The U.S. Supreme Court then went on to say in 104 S. Ct. at 2068-69:

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to under-

mine confidence in the outcome.

. . . .

The governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's errors. When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. . . .

In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

While we do not for a moment accept Robinson's argument that the photograph was illegally obtained or should have been suppressed or that it was error to permit the photograph to have been offered in evidence, nevertheless, even assuming the argument to have validity, Robinson has not met his burden in cases of this nature. The evidence of guilt in this case was overwhelming. There were two eyewitnesses to the robbery, both of whom the evidence discloses had more than adequate time to observe Robinson and were therefore clearly able to identify him in court. Furthermore, once Miss Lyncook conceded to officers, as she did, that she was attempting to pervert justice and assist in hiding the commission of a crime, Robinson would have been arrested, even without the photograph. The photograph played no material role in convicting Robinson. That the investigating

officer obtained an identification from the convenience store attendants regarding Robinson at the very moment that Miss Lyncook was admitting to her actions seeking to give false information to the police is of no material significance. The trial court was absolutely correct in disregarding this as evidence of ineffective assistance of counsel.

Likewise, Robinson's claim that he received ineffective assistance of counsel in this court on appeal because a brief was not filed and, instead, counsel filed a motion to withdraw is wholly without merit. Upon the filing of the motion to withdraw, the court made a careful study of both the record and the legal arguments which would have been raised had briefs been filed. It was clear that neither the contention regarding the photograph nor the testimony of Koppock had any merit. Voluntary statements made to third persons who were not then acting as police officers or their equivalent are not inadmissible, even though the individual did not receive his *Miranda* warnings. See *State v. Crouch*, 205 Neb. 781, 290 N.W.2d 207 (1980). Koppock was in jail because of his own misconduct and not at the direction of the police. Robinson freely and voluntarily made his confession to Koppock, and that was clearly admissible.

There is simply no basis to Robinson's contention that he received ineffective assistance of counsel, and the trial court was correct in denying the requested relief. The judgment is affirmed.

AFFIRMED.

BENJAMIN F. AND KATHLEEN C. ALLEN, APPELLANTS, V. COUNTY OF LANCASTER, STATE OF NEBRASKA, APPELLEE.

352 N.W.2d 883

Filed August 3, 1984. No. 83-126.

1. **Demurrer.** In ruling on a demurrer the district court and this court are obligated to accept the plaintiff's well-pleaded facts, as distinguished from conclusions, as true.
2. **Political Subdivisions Tort Claims Act: Public Officers and Employees.** Where a county legislative body delegates duties to a county official, and gives that official discretion in performing those duties within broad overall guidelines, actions of that county official in issuing permits are discretionary functions within the meaning of Neb. Rev. Stat. § 23-2409(2) (Reissue 1977).

Appeal from the District Court for Lancaster County: SAMUEL VAN PELT, Judge. Affirmed.

A. Loy Todd, Jr., of Bailey, Polsky, Cada & Todd, for appellants.

John R. Baylor of Baylor, Evnen, Curtiss, Grimit & Witt, for appellee.

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

GRANT, J.

Allens sued Lancaster County under the provisions of the Political Subdivisions Tort Claims Act (Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1977)). Allens' amended petition alleged that they purchased a residence from the builders thereof by agreement dated October 5, 1977; that at the time of the building of the residence and Allens' purchase thereof, the county's resolution No. 2832 was in effect; that the county issued a permit, pursuant to resolution No. 2832, for the construction of an individual sewage system on the property in question; and that such permit was "in non-conformity with the provisions of Resolution No. 2832." The amended petition goes on to allege that as a result of the county's negligence in issuing the nonconforming permit, in the county's approval of the nonconforming individual sewer system construction, and in the county's failure to properly inspect the system, "the individual sewage system failed to operate satisfactorily and

raw sewage backed up from the system and stood in Plaintiffs' basement," causing Allens damage.

The county demurred; the demurrer was sustained, and the Allens elected to stand on their pleadings. This appeal timely followed. The county's demurrer was based on four grounds. Without considering the merits of three of those grounds, we affirm the trial court's order of dismissal for the reason hereinafter stated.

With regard to the pleadings herein, and particularly the county's demurrer, the law in Nebraska was set out in *Almarez v. Hartmann*, 211 Neb. 243, 245, 318 N.W.2d 98, 99 (1982), where we stated: "For the purpose of determining respondent's demurrer, the District Court and this court are obligated to accept the petitioner's well-pleaded facts, as distinguished from conclusions, as true." By its demurrer, Lancaster County is not admitting that the system, as licensed and installed, is in nonconformity with its own regulation. The allegation that the system is in nonconformity with specified subdivisions of the resolution in question is simply a conclusion of the pleaders, since no facts are alleged in that regard.

Without considering the inadequacies of Allens' petition in failing to set out facts which allegedly show nonconformity with the regulation, the case turns on the terms of the regulation itself. In that connection, resolution No. 2832 provides in pertinent part as follows: "Section 9. REQUIREMENTS. All individual sewage disposal systems shall be constructed, altered, or extended in conformance with the requirements of the health Officer who shall be guided by the following criteria: . . . ."

Approximately five pages of "criteria" follow. Allens allege, as conclusions, that the county violated seven of the listed criteria, including nonconformity with § 9a(2), (3), and (4), which provides as follows:

a. General

. . . .

(2) Design

The design of the individual sewage disposal system shall take into consideration location with respect to wells or other sources of water supply,

topography, water table, soil characteristics, area available, and maximum occupancy of the building.

(3) Type of System
The type of system to be installed shall be determined on the basis of location, soil permeability, and ground water conditions, including depth to the water table.

(4) Sewage
The system shall be designed to receive and treat all sewage, including wastes from garbage grinders and automatic washing machines, from the building. Drainage from basement footings or from roofs shall not enter the system. In addition, industrial wastes shall not be discharged into the system when their introduction would interfere with proper operation of the system.

The petition also alleges violations of § 9b(1), which sets out specified minimum distances between components of a system; § 9e, which sets out required square footage of absorption areas; § 9f, which sets out a procedure to be followed in determining a percolation rate; and § 9g, which sets out minimum standards for absorption system construction.

Examination of the general requirements for such individual sewage disposal systems shows that such systems are *not* required to be constructed according to the regulation, but are required to be constructed in conformance "with the requirements of the health Officer who shall be *guided*" by the listed criteria. (Emphasis supplied.)

Additionally, as can be seen from an examination of the criteria listed as § 9a(2) and (3) above, there are no specifications set out therein—one section referring to taking certain factors "into consideration," and the other to making determinations "on the basis of location, soil permeability, and ground water conditions."

It is clear that the regulation in question calls for the exercise of the discretion of the health officer, who is defined in the regulation as "the Director of Health of the Lincoln-Lancaster County Health Department or his authorized representative." That officer's "requirements," which are not spelled out in the regulation nor in the pleadings, determine the standards.

Section 23-2409 sets out the exclusions from the Political Subdivisions Tort Claims Act. Section 23-2409(2) provides that the act shall not apply to:

> (2) Any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the political subdivision or an employee of the political subdivision, whether or not the discretion be abused.

There is no definition of the term "discretionary function" in our statute. Courts have labored for many years to provide a definition, with limited success. The only approach which sheds any light on the problem seems to be a review of the guidelines of previous decisions and an application of those guidelines to the particular case. See *Payton v. United States*, 679 F.2d 475 (5th Cir. 1982).

This court has considered the matter, and in *Koepf v. County of York*, 198 Neb. 67, 73, 251 N.W.2d 866, 870 (1977), stated:

> It seems to us that the better rule and one that should be adopted in this state is one that suggests that the discretionary-function exemption extends only to the basic policy decisions and not to ministerial acts arising therefrom.

We reaffirm that statement, and turn to an examination of this case. Allens argue, at page 19 of their brief, that "[i]t cannot be argued that the acts complained of involved a basis [sic] policy decision, as these acts affected only an individual property owner. The acts complained of were ministerial in nature and cannot be excluded under subsection two (2) of § 23-2409."

With regard to the first statement it is not correct. The purpose of resolution No. 2832 is to regulate "individual sewage-disposal systems within the unincorporated areas in Lancaster County outside of the incorporated cities and villages . . . ." For whatever reason, the board of commissioners of Lancaster County has given to the health officer of the county the duty to oversee all such installations, and has given to that officer broad discretion in determining the "requirements" for individual systems. Such a grant of power constitutes the delegation of the right to make policy in that regard. The health

officer of Lancaster County is to set the policy by his granting of individual permits to install systems in the way he determines, subject, of course, to overall guidelines.

The "discretionary function" exemption from tort claims acts generally is best described in one of the early cases interpreting the Federal Tort Claims Act. In *Dalehite v. United States*, 346 U.S. 15, 35-36, 73 S. Ct. 956, 97 L. Ed. 1427 (1953), the Court stated:

> It is unnecessary to define, apart from this case, precisely where discretion ends. It is enough to hold, as we do, that the "discretionary function or duty" that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable. If it were not so, the protection of § 2680(a) would fail at the time it would be needed, that is, when a subordinate performs or fails to perform a causal step, each action or nonaction being directed by the superior, exercising, perhaps abusing, discretion.

Dalehite, insofar as it interprets the discretionary function exception, was recently reaffirmed by the U.S. Supreme Court in *United States v. Varig Airlines,* 467 U.S. ____, 104 S. Ct. 2755, 81 L. Ed. 2d 660 (1984), where the Court stated at 104 S. Ct. 2764, "While the Court's reading of the Act admittedly has not followed a straight line, we do not accept the supposition that *Dalehite* no longer represents a valid interpretation of the discretionary function exception." *United States v. Varig Airlines, supra,* denied recovery against the United States in a situation analogous to the present case. In the *Varig Airlines* case respondent airlines sought to recover damages resulting from fires occurring in aircraft while in flight. The aircraft had been inspected and certified as safe by the Federal Aviation Administration. Pursuant to statute, the FAA delegated certain

inspection and certification responsibilities to qualified private individuals. In holding that the activities of the FAA and any individual person delegated inspection and certification authority were discretionary functions and not subject to the Federal Tort Claims Act, the Supreme Court stated at 104 S. Ct. 2765:

> Second, whatever else the discretionary function exception may include, it plainly was intended to encompass the discretionary acts of the Government acting in its role as a regulator of the conduct of private individuals. Time and again the legislative history refers to the acts of regulatory agencies as examples of those covered by the exception, and it is significant that the early tort claims bills considered by Congress specifically exempted two major regulatory agencies by name. See *supra*, at ____. This emphasis upon protection for regulatory activities suggests an underlying basis for the inclusion of an exception for discretionary functions in the Act: Congress wished to prevent judicial "second-guessing" of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort. By fashioning an exception for discretionary governmental functions, including regulatory activities, Congress took "steps to protect the Government from liability that would seriously handicap efficient government operations." *United States v. Muniz*, 374 U.S. 150, 163, 83 S.Ct. 1850, 1858, 10 L.Ed.2d 805 (1963).

In this case the health officer had a great deal of "room for policy judgment and decision," and as stated in *Dalehite* at 36, where there is such room "there is discretion." The health officer is clearly required to exercise his discretion. He is not given standards that he must follow, but instead he and the public are informed that individual sewage systems must be installed "in conformance with [his] requirements" and that, in connection with those requirements, he is to be guided by certain criteria, many of which require the exercise of further discretion.

Consideration of the second of Allens' statements set out above—that the acts complained of were

ministerial—reinforces our holding herein. In *State of Nebraska ex rel. Line v. Kuhlman*, 167 Neb. 674, 682-83, 94 N.W.2d 373, 380 (1959), we stated:

> "A ministerial act has been defined as one performed in response to a duty which has been positively imposed by law and its performance required at a time and in a manner or upon conditions which are specifically designated, the duty to perform under the conditions specified not being dependent upon the officer's judgment or discretion."
>
> In Mekota v. State Board of Equalization & Assessment, 146 Neb. 370, 19 N.W.2d 633, we quoted with approval this definition: " 'A ministerial act may * * * be defined to be one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to, or the exercise of, his own judgment upon the propriety of the act being done.' "

Examination of the regulation herein, delegating authority to the health officer of Lancaster County, shows clearly that that officer is to exercise a great deal of his own judgment and that his acts are clearly not ministerial.

It should be noted that this case presents a different factual picture than that in *Wickersham v. State, post* p. 175, 354 N.W.2d 134 (1984). In *Wickersham* as we do here, we held that the discretionary function exemption extends only to policy decisions and not to ministerial activities, but in *Wickersham* we held that the state, in its ministerial activities, violated its own regulations. The regulations were specific, and the state's alleged negligence was in not following the specific regulations. Such a factual situation is not present here.

We hold, under the specific language of the resolution in this case, that the act of the county health officer in issuing the permit in question was a discretionary act and, as such, exempt from the requirements of §§ 23-240l et seq.

With regard to the allegations of negligence in the approval of the sewer system in question and in negligence in inspection, there is no allegation that such actions did not fully conform to the discretionary permit issued, and therefore no cause of

action is stated in those allegations. The order of the trial court in sustaining the county's demurrer was correct and is affirmed.

AFFIRMED.

KRIVOSHA, C.J., concurring in the result.

While I concur in the result reached by the majority in this case, I write separately due to a concern that someone may misread the majority opinion and conclude that we approve the format of resolution No. 2832. In fact, we do not pass upon the propriety of such a resolution, which delegates to an administrative officer such broad authority without specific guidelines, said issue not having been raised by the parties to this case. On its face it would appear to be in violation of the longstanding rule in this jurisdiction that the Legislature must prescribe specific guidelines when delegating authority to an administrative officer. See *Lincoln Dairy Co. v. Finigan*, 170 Neb. 777, 104 N.W.2d 227 (1960). The majority opinion should only be understood to stand for the simple proposition that where such a resolution is enacted and no one attacks the validity of the ordinance, the ordinance does not give rise to a cause of action under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1977).

CRANE RENTAL, INC., APPELLANT, V. HUNNICUTT LAND CO., APPELLEE.

352 N.W.2d 888

Filed August 3, 1984. No. 83-316.

1. **Mechanics' Liens: Appeal and Error.** In cases arising before January 1, 1982, a mechanic's lien foreclosure is to be considered by the Supreme Court on appeal de novo on the record, giving weight to the fact that the trial court has observed the witnesses and their manner of testifying.
2. **Mechanics' Liens: Leases: Construction Contracts.** Agreed prices between a lessor of equipment and a general contractor are not binding on the owner of land where the leased equipment is used, but such prices may be taken as prima facie correct.

3. _____: _____: _____. Where leased equipment is used by a general contractor on more than one jobsite, the lessor of the equipment has the burden of proving both the rental price of the leased equipment and the length of time it was used on the land as to which a lien is claimed.

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

Adams, Carstenson, Owens & Jones, for appellant.

Gerald D. Warren of Whitney, Newman, Mersch & Otto, for appellee.

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

GRANT, J.

Plaintiff, Crane Rental, Inc., brought this action to enforce a mechanic's lien for the rental value of equipment rented to a general contractor and used in performing work on a farm owned by defendant, Hunnicutt Land Co. (Hunnicutt), and at other locations. After trial the court found in favor of Hunnicutt and dismissed plaintiff's petition. Plaintiff timely appealed from the trial court's denial of plaintiff's motion for new trial. On appeal plaintiff assigns two errors, that the trial court erred (1) in finding that the plaintiff must prove the reasonable rental for the period of actual use, and (2) in finding that plaintiff had failed to prove the reasonable rental value of the rented equipment. For the reasons hereinafter set out we affirm.

In this case plaintiff's lien was filed January 25, 1980, for work allegedly done on Hunnicutt's farm from August 25 to October 4, 1979. The case, therefore, is controlled by the provisions of Neb. Rev. Stat. §§ 52-101 et seq. (Reissue 1978), as those statutes existed prior to January 1, 1982, when the current Nebraska Construction Lien Act (Neb. Rev. Stat. §§ 52-125 to 52-159 (Cum. Supp. 1982)) became effective.

The scope of our review in such mechanic's lien cases was set out in *Senften v. Church of the Nazarene*, 214 Neb. 708, 710, 335 N.W.2d 753, 756 (1983), as follows: "A mechanic's lien foreclosure is to be considered by the Supreme Court on appeal de novo on the record, giving credit to the fact that the trial

court observed the witnesses and their manner of testifying."

Uncontradicted evidence shows plaintiff was a corporation engaged in renting cranes for various heavy lifting jobs, primarily for building and modifying grain elevators and related equipment for farmers and commercial elevators. In early 1979, in the Grand Island, Nebraska, area, plaintiff entered into three rental contracts with Construction Enterprises, Inc., hereinafter called the general contractor. In 1979 the general contractor basically had four contracts. One of the "basic contracts" was with Hunnicutt to do certain modification work on Hunnicutt's grain handling equipment at the Hunnicutt farm. This work was set out in two written contracts, one dated April 10 and one May 31, 1979. On June 25, 1979, the general contractor rented a crane and jib from plaintiff for 1 month. The monthly rental and expenses were $2,157.85, and the rental ended on July 25, 1979. The rental for this month was paid in advance by the general contractor to plaintiff. On July 25, 1979, a new rental agreement was signed for a period ending on August 25, at a price of $2,305.85. This amount was also paid by the general contractor to plaintiff. During this period of time, the rented crane was apparently used on the Hunnicutt job and on other jobs that the general contractor had.

The general contractor testified that between August 25 and October 4, when the crane was returned to the plaintiff, the rented crane was at the Hunnicutt farm every day, except 1 day when it was used by the contractor at another of his "basic contracts"—the Hansen farm. During this same period of time, Hunnicutt's president, Gerald Hunnicutt, testified that after August 25 and up to approximately September 19, 1979, or later, the rented crane was only on the premises for about 1 week and that during that time the general contractor had taken the rented crane elsewhere.

Gerald Hunnicutt's son, Ronald, lived on the site where the modification work was being done by the general contractor. He testified that both the general contractor and the rented crane were gone for 10 days to 2 weeks during the same period of time. Both Ronald and Gerald Hunnicutt testified that from the beginning of the job the general contractor had been offered

the free use of Hunnicutt's tractor and loader. All parties agreed that another crane, larger than the rented crane in question and hereinafter called the Lacey crane, was present at times at the jobsite. The general contractor testified he had rented the Lacey crane also, but that both cranes were needed. The Hunnicutts testified that only the larger, Lacey crane was necessary because the rented crane was too small to do all the necessary work that could be done by the larger Lacey crane, and the tractor-loader could do all the work needed to be done by the rented, smaller crane.

On October 4, 1979, the general contractor returned the rented crane to plaintiff. At the time of the return the general contractor wrote on the invoice "Gereld [sic] Hunnicutt Giltner Nebr." The next day, plaintiff calculated that the crane had been rented for 1 7/20 months (between August 25 and October 4, 1979), and billed out this rental at $3,038.24. This amount was never paid to plaintiff.

Based on these facts, plaintiff contends that when the contract between plaintiff and the general contractor is received in evidence, the plaintiff has established a prima facie case. That is indeed the law. As stated in *Rosebud Lumber and Coal Company v. Holms*, 155 Neb. 688, 689, 53 N.W.2d 82, 83 (1952), "an owner may not be compelled to pay more than the reasonable value of labor or materials furnished, and is not bound by the agreed prices between the contractor and the lien claimant, but such agreed prices may be taken as prima facie correct." See, also, *Senften v. Church of the Nazarene*, 214 Neb. 708, 335 N.W.2d 753 (1983).

In the instant case we may assume that plaintiff established a prima facie case. The disagreement between the parties, however, goes beyond the rental price agreed to between the plaintiff and the general contractor. By plaintiff's own evidence the equipment was originally rented for more than the job at Hunnicutt's, and was used at three other jobs, none of which was ever completed by the general contractor. Plaintiff also admits that the equipment was used for at least 1 day at another jobsite during the period which plaintiff claims its equipment was rented for use at Hunnicutt's farm. Hunnicutt presents evidence that the crane and the general contractor were gone

from the Hunnicutt jobsite for 10 days to 3 weeks during the contract time period of August 25 to October 4, 1979. The trial court found generally in favor of defendant, and therefore determined this issue against plaintiff.

The trial court was correct in holding that, in the particular circumstances of this case, the plaintiff had the burden of proving both the rental price and the time of actual use of the equipment at the Hunnicutt farm. The equipment was originally rented by the general contractor for use on four jobsites. Three of those jobs were never completed by the contractor and, by plaintiff's own evidence, the equipment was used at one job other than defendant's during the time in question. Hunnicutt presented evidence that the equipment was gone from the Hunnicutt farm up to 3 weeks during the time from August 25 to October 4, 1979. In those circumstances it becomes part of the plaintiff's burden of proof to show the time actually used at the job in question.

With regard to "standby time," in the same circumstances, another difficult question is presented. If the rented equipment is being used on different jobs, the evidence must show on whose behalf the equipment is standing by. The trial court was correct in determining that plaintiff did not prove the reasonable rental value of the equipment at the Hunnicutt farm. Plaintiff was unfortunate in that the records of the general contractor were lost in the Grand Island tornado of 1980, but, for whatever reasons, plaintiff did not prove its case. The facts were determined against plaintiff, and in our de novo review, when we give appropriate weight to the fact that the trial court observed the witnesses, we cannot say that that determination is not correct. The trial court was not in error, and the judgment is affirmed.

AFFIRMED.

JAMES L. WICKERSHAM, APPELLANT, V. STATE OF NEBRASKA AND NEBRASKA DEPARTMENT OF AGRICULTURE, APPELLEES.

354 N.W.2d 134

Filed August 3, 1984. No. 83-322.

1. **Tort Claims Act: Words and Phrases.** The "discretionary function or duty" exemption under the State Tort Claims Act includes determinations or judgments made by the State in establishing plans, specifications, or schedules of operations as policy judgments.
2. **Tort Claims Act: Words and Phrases: Negligence.** The discretionary function or duty exemption in the State Tort Claims Act extends only to the basic policy decisions made in governmental activity and not to ministerial activities implementing such policy decisions. The State is liable for negligence of its employees at the operational level.
3. **Tort Claims Act: Negligence.** The State, as in the case of an individual, must act with reasonable care in reference to action undertaken without obligation to act.
4. _____: _____. Where the gravamen of the complaint is negligent performance of operational tasks rather than misrepresentation, the State cannot rely upon the misrepresentation exclusion found in the State Tort Claims Act.
5. **Tort Claims Act: Venue: Words and Phrases.** As used in the State Tort Claims Act, the phrase "the county in which the act or omission occurred" means the site where the wrongful conduct actually takes place, not where the results of the wrongful conduct take place or occur.

Appeal from the District Court for Lancaster County: SAMUEL VAN PELT, Judge. Reversed and remanded for further proceedings.

Robert F. Bartle of Nelson & Harding, and Steven C. Smith of Van Steenberg, Brower, Chaloupka, Mullin & Holyoke, for appellant.

Paul L. Douglas, Attorney General, and John R. Thompson, for appellees.

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

SHANAHAN, J.

James L. Wickersham filed suit in the district court for Lancaster County against the State of Nebraska and the Nebraska Department of Agriculture (State) under the State Tort Claims Act, Neb. Rev. Stat. §§ 81-8,209 et seq. (Reissue 1981). The district court granted summary judgment to the

State. Wickersham appeals. We reverse and remand.

Wickersham's claim against the State relates to a loss of livestock on account of a highly contagious disease, *Brucella abortus*, otherwise known as brucellosis or Bang's disease. Brucellosis causes cattle to abort or have procreational problems. As a part of federal efforts to eradicate brucellosis, the U.S. Department of Agriculture has promulgated regulations known as the Uniform Methods and Rules for Brucellosis Eradication. Those federal regulations supply guidelines for federal-state cooperation, and direct state officials in a program to eradicate brucellosis.

Periodically, the Veterinary Service of the U.S. Department of Agriculture checks the State's eradication program and certifies whether the State's program complies with federal regulation. On occasion, and upon notice from the federal government, the State changed its brucellosis program to comply with federal standards.

The Uniform Methods and Rules for Brucellosis Eradication in part provide:

> B. REPORTING—Activities conducted privately or as part of the official brucellosis eradication program, such as results of agglutination tests or vaccination, shall be reported immediately to cooperating agencies and to the herd owner.
>
> . . . .
>
> G. ADJACENT HERD AND EPIDEMIOLOGICALLY TRACED HERD TESTING—Adjacent herds, or herds sharing common pasture or having other contact with the affected herd, and herds containing previous purchases from or exchanges with the affected herd shall be tested within 30 days of disclosure of the affected herd or be placed under quarantine until blood tested. (See Part III, C)
>
> When the quarantine is released on the brucellosis affected herd, the owners of the potentially exposed herds, as described above, shall be notified of the desirability of a second negative herd blood test. If the owner decides not to have a second test, the representative of the animal health agencies will prepare a statement indicating that the

> value of a second test was discussed with the owner and listing the reasons the herd was not further tested. A copy of this statement will be given the herd owner.

Among the statutes pertaining to the state Department of Agriculture is Neb. Rev. Stat. § 54-701 (Reissue 1978), which provides in part:

> The Department of Agriculture shall be vested with the power and charged with the duties of protecting the health of livestock in Nebraska, of determining and employing the most efficient and practical means for the prevention, suppression, control and eradication of dangerous, infectious, contagious or otherwise transmissible diseases among domestic animals . . . ; *Provided,* that as far as practicable the regulations approved by the United States Department of Agriculture shall be adopted.

Wickersham lived and ranched in Sioux County in the northwestern corner of Nebraska, bordering South Dakota and Wyoming. State offices are located in Lancaster County, but the State contracts with local veterinarians for inspection and tests at sale barns and livestock commission companies in Nebraska. Thomas Peddicord is a rancher with operations in Nebraska and South Dakota. As early as January 19, 1980, State authorities discovered the possibility of brucellosis in Peddicord's herd. Later, some of Peddicord's heifers were shipped to Nebraska for sale. In accordance with a State contract, a local veterinarian administered tests to cattle sold at the sale barn in Gordon. Before sale of the livestock to Wickersham, the local veterinarian tested the Peddicord heifers for brucellosis, but the tests were negative.

On January 30, 1980, Wickersham bought 17 head of Peddicord heifers at the Gordon sale barn. The local veterinarian drew blood samples from the heifers and sent those samples to the State laboratory at Lincoln. Upon the samples' arrival at Lincoln it was discovered that the blood samples had hemolyzed, that is, the blood cells in the samples had been destroyed as a result of freezing or other contamination which caused a breakdown of the cells. Although the hemolyzed samples were useless for a brucellosis test, the State did not order retesting of the heifers purchased by Wickersham. The

decision not to retest the heifers was made by State personnel in Lincoln. Meanwhile, back at the ranch, and in keeping with generally recommended practice, Wickersham quarantined the heifers bought at the Gordon sale barn.

On February 19 the director of the state Department of Agriculture issued a brucellosis quarantine order addressed to Peddicord. Peddicord's cattle were quarantined because his cattle had been "determined to be affected with or exposed to brucellosis." The State retested Peddicord's cattle around February 20 and decided it was necessary to identify all purchasers of Peddicord's cattle. On February 25 a State field investigator sent information to Lincoln identifying and locating purchasers of Peddicord cattle, including Wickersham.

Around March 1 Wickersham removed the Peddicord heifers from quarantine and incorporated the heifers into his herd. Approximately 2 weeks later, Wickersham bought an additional 40 head of pregnant cows. After removing those additional cows from quarantine, sometime about April 23, Wickersham placed the pregnant cows in his herd.

On May 2 the State notified Wickersham for the first time that his herd had been exposed to brucellosis. Wickersham again quarantined his cattle. Brucellosis testing by the State around September 12 disclosed that Wickersham's cattle were infected with brucellosis to such a degree that the herd had to be liquidated. Wickersham sold the infected cattle for slaughter and sustained monetary loss due to the decreased sale price and liquidation of the herd on account of brucellosis. A federal epidemiologist expressed the opinion that the Peddicord herd was the source of the brucellosis infecting the Wickersham cattle.

After the State Claims Board disapproved his claim, Wickersham filed suit in the district court for Lancaster County. Wickersham's petition alleged three causes of action: (1) The proximate cause of Wickersham's damage was the State's "negligence, undue delay, and omission in failing to promptly notify" Wickersham about the brucellosis situation; (2) Notwithstanding the State's knowledge of the brucellosis problem in Peddicord's cattle, the State did not promptly

inspect or test the cattle purchased from Peddicord and incorporated into Wickersham's herd; and (3) The State failed to retest Wickersham's cattle, after blood samples from the heifers purchased by Wickersham "were not handled properly" and were hemolyzed before arrival at the State's laboratory, so that such samples were useless for brucellosis testing. (Such "causes of action" may be more correctly characterized as specifications of the State's alleged negligent conduct.)

The State's answer alleged: (1) The conduct of the State was a discretionary function or duty of the State (see § 81-8,219(1)(a)); (2) All acts of the State are alleged as misrepresentations, which are excluded from coverage under the State Tort Claims Act (see § 81-8,219(1)(d)); and (3) All acts of which Wickersham complains occurred outside Lancaster County (see § 81-8,214).

The State moved for summary judgment on the basis of the three specifications contained in its answer. Although the judge mentioned only the venue issue in the body of his order, the trial court nevertheless granted summary judgment to the State without designating a specific reason for sustaining the State's motion.

In general Wickersham questions the trial court's action in sustaining the State's motion for summary judgment. In particular Wickersham assigns as error any determination by the trial court that Lancaster County was not the proper venue for the proceedings.

> " 'The issue on a motion for summary judgment is whether or not there is a genuine issue as to any material fact, and not how that issue should be determined. In considering such a motion, the trial court must take that view of the evidence most favorable to the party against whom summary judgment is directed, giving to that party the benefit of all favorable inferences that may be reasonably drawn from the evidence.' "

Scheideler v. Elias, 209 Neb. 601, 605, 309 N.W.2d 67, 70 (1981).

In view of the action taken by the district court, we shall discuss each of the three specifications assigned by the State in its motion for summary judgment.

The first question is whether the State's conduct is a discretionary function or duty for which the State cannot be liable due to the exclusion found in § 81-8,219(1)(a):

> (1) The provisions of this act shall not apply to:
>
> (a) Any claim based upon an act or omission of an employee of the state . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state agency or an employee of the state, whether or not the discretion be abused.

Performance of or failure to perform a discretionary function or duty cannot be the basis for liability under the State Tort Claims Act. See *Fletcher v. State*, 216 Neb. 342, 344 N.W.2d 899 (1984); cf. *Dalehite v. United States*, 346 U.S. 15, 73 S. Ct. 956, 97 L. Ed. 1427 (1953) (Federal Tort Claims Act, 28 U.S.C. § 1346(b) and §§ 2671 et seq. (1948)).

That which is protected under the State Tort Claims Act, § 81-8,219(1)(a), is the discretion of a governmental executive or administrator to act according to one's judgment of the best course to be taken. Such discretion includes more than the initiation of programs and activities. Discretion includes determinations or judgments made in establishing plans, specifications, or schedules of operations. Where policy judgment exists, there also exists discretion exempted from liability under the State Tort Claims Act. Cf. *Dalehite v. United States, supra*.

However, the discretionary function or duty exemption in the State Tort Claims Act extends only to the basic policy decisions made in governmental activity, and not to ministerial activities implementing such policy decisions. See *Koepf v. County of York*, 198 Neb. 67, 251 N.W.2d 866 (1977); cf. *Indian Towing Co. v. United States*, 350 U.S. 61, 76 S. Ct. 122, 100 L. Ed. 48 (1955) (Federal Tort Claims Act). In other words, the State is liable for negligence of its employees at the operational level, where there is no room for policy judgment. See *Eastern Air Lines v. Union Trust Company*, 221 F.2d 62 (D.C. Cir. 1955).

In Wickersham's case there is no attempt to impose liability on the State for a policy judgment. The State's acquisition and

accumulation of specific information about the dangerous and contagious disease brucellosis are activities conducted as part of the official brucellosis program in Nebraska. The duty of immediate notification to a Nebraska herd owner is imposed by the regulations under which the State was operating. On the one hand, the duty to notify may be imposed on the State as a result of federal regulation of the State's activities to eradicate brucellosis. On the other hand, the duty of notification may have become self-imposed by the State, if the State has adopted the regulations approved by the U.S. Department of Agriculture. In this latter case the State may have adopted the federal regulations and incorporated those regulations into the State's brucellosis eradication program as appropriate standards for conduct. The State may discover its conduct is contrary to federal regulation, its own regulations, or both state and federal regulations. Ironically, the regulator may have become the regulated. The government, having found itself in a regulatory mesh, can empathize with the governed beset by reams of regulations. In any event, the State's conduct in response to the discovery of brucellosis cannot be characterized as formulation of policy, planning, or discretionary action. The activity of the State moved from the province of planning into the realm of reality by the State's executing a duty imposed by the regulations. It may be that the State's conduct will eventually be evaluated in terms of the specific standards and regulations for the brucellosis eradication program. The State's action or inaction in response to detected brucellosis involved a State operational task governed by recognized regulations. At that point policy had long since passed from the picture.

Moreover, once the State did in fact act, namely, inspect the suspected Peddicord cattle and make tests which provided confirmation of brucellosis, the State was obligated to use due care in protective measures against the confirmed brucellosis. When one under no obligation to act does undertake action, one must act with reasonable care. See *Indian Towing Co. v. United States, supra.* The government, here the State, as well as an individual, must act with reasonable care in reference to action undertaken without an obligation to act. See *Barnum v. Rural Fire Protection Company*, 24 Ariz. App. 233, 537 P.2d

618 (1975); accord *Wolf v. City of New York*, 39 N.Y.2d 568, 349 N.E.2d 858, 384 N.Y.S.2d 758 (1976). See, also, *Wulf v. Rebbun*, 25 Wis. 2d 499, 131 N.W.2d 303 (1964). Having acted in this case, the State's conduct must be evaluated by the standard of reasonable care. Whether the State is entitled to the exemption for "discretionary function or duty" under the State Tort Claims Act at this stage of the proceedings is a question of fact. However, upon the same evidence presented at trial as has been presented in this appeal, the State will more than likely find the exemption of discretionary function or duty unavailable in any respect.

The next aspect of the summary judgment granted to the State relates to § 81-8,219(1)(d) of the State Tort Claims Act, which excludes: "Any claim arising out of . . . misrepresentation . . . ." In support of its assertion that Wickersham seeks recovery for misrepresentation, the State relies on cases such as *Rey v. United States*, 484 F.2d 45 (5th Cir. 1973), and *Saxton v. United States*, 456 F.2d 1105 (8th Cir. 1972). Those federal cases involve situations in which claimants relied on a government veterinarian's misrepresentation about the condition of animals, that is, the veterinarian stated either that the animals were infected with a contagious disease or that the animals were disease-free. The cases suggested by the State have a common thread in a government employee's misrepresentation of the health of animals. In this case Wickersham's petition does not allege any misrepresentation by the State. Wickersham does not allege that any State employee or representative has misrepresented the condition of livestock owned either by Peddicord or Wickersham and does not allege that the State misrepresented its knowledge concerning any cattle in question. Any allegation that the State failed to take proper action, namely, failure to disseminate information to Wickersham or to conduct proper tests, is not a reference to any misrepresentation by the State. Where the gravamen of the complaint is the negligent performance of operational tasks rather than misrepresentation, the State cannot rely upon the misrepresentation exclusion found in § 81-8,219(1)(d) of the State Tort Claims Act. See *Ingham v. Eastern Air Lines, Inc.*, 373 F.2d 227 (2d Cir. 1967). Wickersham's allegation

concerning lack of notification from the State and lack of proper testing relates to the State's negligent inaction and nonperformance of a duty imposed on the State. Summary judgment based on the misrepresentation exclusion found in the Nebraska State Tort Claims Act was error on the part of the trial court.

Finally, there is the question of the proper venue of Wickersham's lawsuit. Section 81-8,214 in pertinent part provides: "The district court . . . shall have exclusive jurisdiction to hear, determine, and render judgment on any suit or tort claim . . . . Suits shall be brought in the district court of the county in which the act or omission complained of occurred . . . ."

"Jurisdiction is the inherent power or authority to decide a case; venue is the place of trial of an action—the site where the power to adjudicate is to be exercised." *State ex rel. Bauersachs v. Williams*, 215 Neb. 757, 759, 340 N.W.2d 431, 433 (1983). Clearly, under § 81-8,214 the district court has subject matter jurisdiction to hear, determine, and render judgment concerning any tort claim defined in the State Tort Claims Act. Because the State has given only conditional consent to be sued and there is no absolute waiver of immunity by the State, requirements of the State Tort Claims Act must be followed strictly. The petition, based on the State Tort Claims Act, must be filed in the district court for the county in which the alleged wrongful act or omission took place. See *Catania v. The University of Nebraska*, 204 Neb. 304, 282 N.W.2d 27 (1979).

The State contends that venue of Wickersham's suit is somewhere outside Lancaster County, because any harm "could only manifest itself in Sioux County." Brief for Appellees at 7. As support for such position, the State relies on *Miller v. State*, 208 Neb. 170, 302 N.W.2d 692 (1981). *Miller* involved a claim for wrongful death as a result of an automobile accident alleged to have been caused by faulty highway construction and maintenance. The road was planned in Lincoln but was located in Wheeler County, Nebraska. The *Miller* lawsuit was filed in Lancaster County. At page 7 of its brief the State suggests: "The essence of *Miller* is that an act or omission occurs in that county in which the alleged results of the

act or omission manifest themselves." *Miller* neither contains such expression nor permits such inference. In *Miller* we stated at 172, 302 N.W.2d at 693: "[T]he action would have to be brought in the county where the act or omission occurred — the county where the accident happened." Therefore, *Miller* does not undermine Wickersham's position.

The question presented in Wickersham's case is, Where did the act or omission occur? More simply, Where's the venue? The answer to the question lies in the definition of the word *occur*. In *Mills v. Aetna Ins. Co.*, 168 Neb. 612, 619, 96 N.W.2d 721, 725 (1959), we recognized the following definition: " 'A word said to be an ordinary one and without technical import. It carries to the mind a sense of origin . . . and in its generally accepted and most popular sense the word "occur" means to happen. . . .' " Black's Law Dictionary 974 (5th ed. 1979) contains the following: "Occur. To happen . . . to take place . . . ." Other definitions of "occur" are "to happen, to take place," Webster's New Universal Unabridged Dictionary 1237 (1983), and "[t]o take place . . . . To be found to exist," The American Heritage Dictionary of the English Language 908 (1981). From the foregoing we conclude that "occur" is a plain and unambiguous word. In reference to the State Tort Claims Act, § 81-8,214, "the county in which the act or omission occurred" means the site where the wrongful conduct actually takes place, not where the results of the wrongful conduct take place or occur. Occur does not include the results of the act or omission, but only the taking place, happening, or coming to pass. See *Leonard v. Abbott*, 366 S.W.2d 925 (Tex. 1963); cf. *Richards v. United States*, 369 U.S. 1, 82 S. Ct. 585, 7 L. Ed. 2d 492 (1962) (Federal Tort Claims Act; "occur" does not mean where the act or omission has an operative effect but where the conduct took place). See, also, *Eastern Air Lines v. Union Trust Company*, 221 F.2d 62 (D.C. Cir. 1955); *Buchheit v. United Air Lines, Inc.*, 202 F. Supp. 811 (S.D.N.Y. 1962).

In the present case information about the Peddicord cattle and the purchase by Wickersham was accumulated and contained at the State's principal office in Lincoln, Lancaster County, Nebraska. There is no indication that the state Department of Agriculture had an office at any place but

Lancaster County. In view of the information possessed by the State, any notification to Wickersham based on such information would have to emanate from Lincoln. Also, those having authority to initiate and direct field activities of the state Department of Agriculture had their headquarters in Lincoln. Tests on bovine blood samples were made at the State laboratories at Lincoln. The recorded results of bovine blood tests were maintained in Lincoln in the office of the state Department of Agriculture. Any decision to retest Wickersham's cattle had to be made in Lincoln by State personnel, because apparently only the State's employees in Lincoln were aware the bovine blood samples had hemolyzed and, therefore, were useless for brucellosis tests. In the final analysis, all people responsible for decisions and action regarding Wickersham's problem were in Lancaster County. Consequently, the correct venue of Wickersham's action is Lancaster County. If the Legislature had intended venue to be the site where the State's wrongful conduct resulted in damage to a claimant, simple language to express such intention and situation was available. By the same token, the Legislature has used uncomplicated language in words of ordinary meaning to declare an unambiguous provision in the State Tort Claims Act: Venue is the place where the state's wrongful act or omission occurred, not where the wrongful conduct has its harmful effect. The venue provision of the State Tort Claims Act is an instance where statutory language and practicality fortunately coincide, leaving little room for debate. We debate the issue of venue no further. The trial court committed error in granting summary judgment based upon improper venue.

For the reasons given, the judgment of the district court is reversed and the summary judgment granted to the State is set aside. This matter is remanded to the district court for Lancaster County, Nebraska, for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

JOSEPH F. CHMELKA, JR., APPELLANT AND CROSS-APPELLEE, V. CONTINENTAL WESTERN INSURANCE COMPANY, A CORPORATION, APPELLEE AND CROSS-APPELLANT.

352 N.W.2d 613

Filed August 3, 1984. No. 83-444.

1. **Motions for New Trial: Appeal and Error.** The standard of review of an order granting a new trial is whether the trial court abused its discretion. This court will not disturb an order granting a new trial unless it clearly appears that there are no tenable grounds existing therefor.
2. **Motor Vehicles: Negligence.** The driver of a motor vehicle is under a continuing duty to exercise reasonable care for the safety of others.
3. **Jury Instructions: Negligence.** When appropriate, it is the better practice for the trial court to instruct the jury as to specific acts of negligence rather than general allegations of negligence.
4. _____: _____. Proper practice is to instruct the jury as to specific acts of negligence charged and supported by the evidence.
5. **Trial: Evidence: Appeal and Error.** The admission or exclusion of evidence is a matter left largely to the sound discretion of the trial court, and its ruling will be upheld absent an abuse of discretion.
6. **Trial: Evidence: Circumstantial Evidence.** A plaintiff may establish his case by direct or circumstantial evidence.
7. **Trial: Circumstantial Evidence: Proof.** The burden of establishing a cause of action by circumstantial evidence requires that the evidence be of such character and the circumstances so related to each other that a conclusion fairly and reasonably arises that the cause of action has been proved.
8. **Trial: Negligence.** Where reasonable minds might draw different conclusions from the evidence, the question as to negligence or contributory negligence under the circumstances is a matter for determination by the jury.
9. **Verdicts: Appeal and Error.** A jury verdict will not be disturbed on appeal unless it is clearly erroneous, against the preponderance of the evidence, and so clearly contrary to the findings that it is the duty of the reviewing court to correct it.

Appeal from the District Court for Saunders County: WILLIAM H. NORTON, Judge. Reversed and remanded with directions.

Gary J. Nedved of Marti, Dalton, Bruckner, O'Gara & Keating, P.C., for appellant.

Alan L. Plessman, for appellee.

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

WHITE, J.

This is a personal injury action in which the plaintiff, Joseph F. Chmelka, Jr., seeks to recover uninsured motorist coverage benefits provided by an insurance policy issued by the defendant, Continental Western Insurance Company. No previous determination had been made as to the alleged negligence of the uninsured driver, and he is not a party to this action. The case proceeded to trial on the issues of the negligence of the uninsured motorist and the contributory negligence and assumption of risk of the plaintiff. The jury returned a verdict for the plaintiff in the amount of $140,000. The trial court sustained the defendant's motion for a new trial because of a faulty jury instruction. The plaintiff appealed, contending that the trial court erred in sustaining the motion for a new trial. We agree, and therefore reverse with instructions to reinstate the jury's verdict.

At approximately 9 p.m. on August 5, 1979, the plaintiff and his friend decided to attend an open wedding dance at the Starlite Ballroom in Saunders County, Nebraska. About 11:30 p.m. the plaintiff and several other friends went outside to one of their cars to drink beer. Just as the plaintiff was ready to leave to go home, John F. Vasa and his girl friend, Maggie Sullivan, walked out of the ballroom. Chmelka engaged in a short conversation with Vasa and Sullivan, and then the couple got in Vasa's car. The car was parked in the most northern row of cars in the ballroom parking lot. The parking lot is located between the ballroom and Highway 92 and is elevated from the highway. After Vasa and Sullivan had gotten in his car, Vasa discovered that the car was stuck in first gear and could not be shifted into reverse. Consequently, he got out of the car, examined the ditch, and determined that he could drive down through the ditch and onto the highway. He instructed Sullivan to get out of the car, and he then proceeded to drive down into the ditch; however, the car's front end got stuck on the bottom of the ditch. At that point the Vasa vehicle was pointed downhill at a slight angle toward the northwest.

Chmelka's four friends went down into the ditch to help free Vasa's car. The plaintiff and Sullivan remained in the parking

lot. They were standing southeast of Vasa's car, 10 to 15 feet to the right and 20 feet behind the car. As the four boys were pushing and rocking the car, Vasa would accelerate rapidly, causing the rear wheels to "spin" and "smoke." After several unsuccessful attempts the car finally broke free. Robert T. Shanahon, Jr., one of the boys who helped push the car, testified as follows:

> Q. [Nedved] And could you describe for the ladies and gentlemen of the jury what happened as the car came free? A. Well, I was still lifting up on the front of the car when the car came free, and when it come free, it just took off. We were sitting there, lifting on the front end of the car, and when it took off, I fell down on the ground and he just kept it floored when he took off and when he took off, he just took off flying because he sprayed dirt and everything all over me and whoever else was behind the car got dusty too. He just took off and went fishtailing down the highway. Q. Did it sound like he still had the car floored? A. Yes, he still had the car floored, wide open. Q. When you say that he was wrapping it as tight as he could, what do you mean by that? A. It means that the motor won't run no faster when it gets wrapped up as tight as it will go, it won't run no faster. It's wound up, it can't go no faster.

Shanahon further testified that there were numerous rocks and chunks of cement in the ditch in the vicinity where Vasa's car was stuck.

Immediately after freeing the car, the boys went back to the parking lot, where they found the plaintiff lying on the ground, his face covered with blood. The plaintiff suffered severe, permanent injuries, including the loss of his right eye. No one actually witnessed how the plaintiff was injured, and he does not remember.

In his amended petition the plaintiff alleged that his injuries were sustained by the negligent conduct of Vasa while trying to free his car. The amended petition further alleged that the coverage for each of the three vehicles insured under the defendant's policy could be aggregated, resulting in a total of $45,000 in uninsured motorist coverage. The plaintiff prayed for damages up to the limits of liability set out in the defendant's policy.

In its answer the defendant admitted that it issued to the plaintiff's parents a family combination automobile policy and that the policy provided for uninsured motorist coverage for the three vehicles described therein. The defendant also admitted that the plaintiff sustained personal injuries at the Starlite Ballroom parking lot, but generally denied the remaining allegations of the plaintiff's petition. The defendant affirmatively alleged that the plaintiff was contributorily negligent and assumed the risk of injury.

The jury returned a general verdict in favor of the plaintiff for $140,000. On March 16, 1983, the trial court sustained the defendant's motion for a new trial based on an allegedly faulty jury instruction, and this appeal followed.

The standard of review of an order granting a new trial is whether the trial court abused its discretion. This court will not disturb an order granting a new trial unless it clearly appears that there are no tenable grounds existing therefor. *Juniata Feedyards v. Nuss*, 216 Neb. 29, 342 N.W.2d 1 (1983).

The jury instruction in question was structured after NJI 2.02. Included in this instruction was the following allegation of negligence: "Plaintiff claims in said petition that the said John Vasa was negligent in accelerating his vehicle thereby causing the tires to spin in a rapid fashion."

During the instruction conference, the defendant objected to this instruction on the grounds that "it is an improper allegation or act of negligence, and there is insufficient evidence to warrant giving it." At the prehearing conference the defendant, in an apparent change of position, contended that the instruction was erroneous because "further information was necessary, such as, faster than was reasonable under the conditions then and there existing."

The plaintiff's theory of the case, from the outset, was that a rock, bottle, or other object was thrown by the spinning rear wheels of Vasa's car while Vasa was trying to extricate his car from the ditch and that the spinning rear wheels were the proximate cause of plaintiff's injuries. The defendant contends that Vasa was under no duty to refrain from spinning his wheels in a rapid fashion and therefore the trial court's instruction does not constitute an allegation of negligence. We are not convinced by such an interpretation.

The driver of a motor vehicle is under a continuing duty to exercise reasonable care for the safety of others. *Bear v. Auguy*, 164 Neb. 756, 83 N.W.2d 559 (1957); *Simpson v. John J. Meier Co.*, 158 Neb. 264, 63 N.W.2d 158 (1954). This duty, as the defendant concedes, encompasses the use of reasonable care in freeing one's vehicle when it has become stuck. The concept of reasonable care and the broader concept of negligence cannot be measured in a vacuum. Whether or not Vasa exercised reasonable care in freeing his car depends upon the facts and circumstances of the case, as reflected by the evidence presented. See *McClelland v. Interstate Transit Lines*, 142 Neb. 439, 6 N.W.2d 384 (1942).

In his amended petition the plaintiff alleged that Vasa was negligent "[i]n accelerating his vehicle and causing his tires to spin on the parking lot." The plaintiff presented evidence that Vasa was accelerating his car in such a fashion as to cause his rear wheels to "smoke." This high acceleration continued even after Vasa's car was unstuck and while he was driving onto the highway. There was evidence that large rocks or pieces of cement were located in the area where the car was stuck.

The defendant contends that "[p]erhaps, the operator [of a motor vehicle] has a duty to exercise reasonable care in freeing his vehicle, but the duty can't be properly stated any more specifically than that; certainly not as specific as in the court's instruction." Brief for Appellee at 19. When appropriate, it is the better practice for the trial court to instruct the jury as to specific acts of negligence rather than general allegations of negligence. *Graham v. Simplex Motor Rebuilders, Inc.*, 189 Neb. 507, 203 N.W.2d 494 (1973). Proper practice is to instruct as to specific acts of negligence charged and supported by the evidence. *Ripp v. Riesland*, 176 Neb. 233, 125 N.W.2d 699 (1964).

Had the plaintiff merely stated in his petition that Vasa was negligent in freeing his vehicle from the ditch, such a petition would surely be subject to a motion to make more definite and certain. Chmelka pled and presented evidence that Vasa was spinning his tires rapidly. Whether or not this conduct constituted negligence was a question of fact properly submitted to the jury under the instruction in question.

Although we believe it is the better practice to incorporate the specific act of negligence in the instruction, such as adding "causing the tires to spin in a more rapid fashion *than was reasonable and prudent under the circumstances*," such an omission is not reversible error when combined with the general definition of negligence instruction NJI 3.02, as was done in this case.

The defendant next contends that a new trial was in order for the further reason that the trial court erred in receiving into evidence the medical bills incurred by the plaintiff as a result of his injuries. The defendant contends that because the plaintiff was a minor and the medical bills constitute a claim of a third party (plaintiff's parents), the probative value of the evidence was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. See Neb. Rev. Stat. § 27-403 (Reissue 1979).

It cannot be contended that the medical bills were not relevant to the issue of damages, even though the plaintiff did not submit a claim for their amount. The bills were fairly detailed concerning the extent of the plaintiff's injury and the subsequent medical attention incurred. The trial court gave the following cautionary instruction concerning the use for which the medical bills were offered:

> Certain exhibits have been offered and received in evidence generally described as hospital and medical bills incurred as a result of hospital and medical care given the plaintiff. They were received in evidence for the limited purpose of reflecting the nature and extent of such hospital and medical care, not to prove the amount charged therefor.
>
> If you find for the plaintiff on the issue of liability, and commence to fix the amount of money which will fairly and reaonsably [sic] compensate him, you are not permitted to allow any damages for the charges incurred as a result of hospital and medical care given the plaintiff inasmuch as they are claims of a third party.

The admission or exclusion of evidence is a matter left largely to the sound discretion of the trial court, and its ruling will be upheld absent an abuse of discretion. *Lincoln Grain v. Coopers*

& Lybrand, 216 Neb. 433, 345 N.W.2d 300 (1984). In light of the fact that the evidence was relevant concerning the issue of damages and the trial court's cautionary instruction, we are unable to determine that the trial court abused its discretion in admitting the medical bills into evidence. Perhaps the better practice would have been to eliminate the money amounts.

In the cross-appeal the defendant contends that the district court "erred in overruling defendant's motions for directed verdict or in the alternative to dismiss plaintiff's case, and for judgment notwithstanding the verdict." Brief for Appellee at 26. The defendant seems to base its cross-appeal on the fact that because there were no eyewitnesses to the accident, the plaintiff did not prove his case. We find this submission untenable.

A plaintiff may establish its case by direct or circumstantial evidence. *Barkalow Bros. Co. v. Floor-Brite, Inc.*, 188 Neb. 568, 198 N.W.2d 329 (1972); *Dunbier v. Stanton*, 170 Neb. 541, 103 N.W.2d 797 (1960).

The burden of establishing a cause of action by circumstantial evidence requires that the evidence be of such character and the circumstances so related to each other that a conclusion fairly and reasonably arises that the cause of action has been proved. *Mustion v. Ealy*, 201 Neb. 139, 266 N.W.2d 730 (1978); *Howell v. Robinson Iron & Metal Co.*, 173 Neb. 445, 113 N.W.2d 584 (1962).

Where reasonable minds might draw different conclusions from the evidence, the question as to negligence or contributory negligence under the circumstances is a matter for determination by the jury. *Cullinane v. Interstate Iron & Metal*, 216 Neb. 245, 343 N.W.2d 725 (1984).

The issues involved in this case were properly submitted to the jury for its consideration. Even a cursory review of the record reveals that the evidence, along with the inferences to be drawn therefrom, could support the jury's verdict. A jury verdict will not be disturbed on appeal unless it is clearly erroneous, against the preponderance of the evidence, and so clearly contrary to the findings that it is the duty of the reviewing court to correct it. *Maricle v. Spiegel*, 213 Neb. 223, 329 N.W.2d 80 (1983).

In conclusion, we find that the defendant's motion for a new

trial was improvidently granted; consequently, we reverse and remand with directions to reinstate the verdict of the jury. We do not pass on the issue of "stacking" the uninsured motorist coverage benefits as that issue was not passed upon by the lower court.

The plaintiff is allowed $1,500 for attorney fees in this court. Neb. Rev. Stat. § 44-359 (Reissue 1978).

REVERSED AND REMANDED WITH DIRECTIONS.

KRIVOSHA, C.J., participating on briefs.

CAROLYN CONATY, FORMERLY CAROLYN BOELHOWER, APPELLEE, V. CONRAD BOELHOWER, APPELLANT.

352 N.W.2d 619

Filed August 3, 1984. No. 83-446.

Appeal from the District Court for Dakota County: FRANCIS J. KNEIFL, Judge. Reversed and remanded with directions to dismiss.

Paul W. Deck of Deck & Deck, for appellant.

William L. Binkard, for appellee.

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

HASTINGS, J.

The defendant appeals from an order entered by the district court refusing to set aside the registration of a foreign default judgment in the amount of $20,904.70 from the State of Wisconsin.

Four errors are assigned, but we need deal only with the one claiming no personal jurisdiction over the defendant on the part of the Wisconsin court.

Plaintiff's original petition alleged and sought to register a decree of divorce entered by the circuit court of Milwaukee County, Wisconsin, in which the defendant had been ordered to

pay child support of $200 per month. It was further alleged, as reflected by the certificate of the clerk of the court, that the defendant was some $20,000 in arrears on his payments.

After various motions and arguments the plaintiff abandoned the attempted registration of the divorce decree, and instead caused a new action in the form of a complaint to be filed in Wisconsin, seeking to ascertain and declare the amount of back child support due and owing in the divorce case. Substituted service was had on the defendant within the State of Nebraska. A default judgment was then entered by the Wisconsin court against the defendant in the amount of $20,904.70. It is this judgment which plaintiff sought to register by her amended petition.

The plaintiff, although recognizing that a personal money judgment could not be supported on the basis of the service obtained in this case, insists that the rule of *State v. Wedige*, 205 Neb. 687, 289 N.W.2d 538 (1980), applies; i.e., it is unnecessary for additional service of summons each time a new hearing has been set in a case where a court has already acquired personal jurisdiction over the parties.

This was not an additional hearing in the same case. Why the plaintiff abandoned her effort to register the divorce decree, or, for that matter, failed to seek relief through the provisions of the Revised Uniform Reciprocal Enforcement of Support Act (Neb. Rev. Stat. §§ 42-762 et seq. (Reissue 1978)), we do not know. The fact remains that the judgment sought to be registered emanated from an entirely new, albeit a related, action. As such, it required personal service of summons on the defendant, particularly in the state of the record which fails to disclose a sufficient quantum of contacts in Wisconsin for personal jurisdiction to attach.

The judgment of the district court is reversed, and the cause is remanded with directions to dismiss the petition for registration.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

KENNETH C. SCOTT, APPELLANT, V. STATE OF NEBRASKA, BEATRICE STATE HOME, APPELLEE.

352 N.W.2d 890

Filed August 3, 1984. No. 83-544.

1. **Workmen's Compensation: Appeal and Error.** On appeal the findings of fact made by the Workmen's Compensation Court on rehearing have the same force and effect as the findings of a jury in a civil case and will not be set aside unless clearly wrong.
2. _____: _____. On appeal the findings and decision of the Workmen's Compensation Court must be considered in the light most favorable to the successful party, and every controverted fact must be decided in its favor.
3. **Expert Witnesses.** Opinions of an expert witness are not binding on the trier of fact.

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

Stephen A. Brunette of Brunette & Otley, for appellant.

Paul L. Douglas, Attorney General, and John R. Thompson, for appellee.

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

GRANT, J.

This is a workmen's compensation action in which the claimant, Kenneth C. Scott, seeks to recover benefits for a psychiatric injury arising out of and in the course of his employment by the State of Nebraska at the Beatrice State Home (now Beatrice State Developmental Center) in Beatrice, Nebraska. On rehearing, a three-judge Workmen's Compensation Court panel affirmed the single judge's dismissal of claimant's petition, finding that Scott's disability was the result of a normal progression of a preexisting condition. Scott appeals, assigning two errors: (1) That the panel erred in that its findings of fact and order are not supported by the evidence; and (2) That the panel erred in the application of workmen's compensation law pertaining to psychiatric disability. For the reasons hereinafter set out we affirm.

The case, as decided by the compensation court panel, and as

appealed to this court, presents a narrow issue, to wit, Did the evidence support the panel's finding that plaintiff's injury was the normal progression of a preexisting condition, or did that evidence require that the panel find that plaintiff had suffered an occupational disease arising out of and in the course of his employment? For the purposes of its decision the panel, in its order dismissing Scott's petition, stated:

> We will assume for the purposes of this decision that the plaintiff has been under a disability so as to toll the Statute of Limitations. We will also assume that plaintiff's medical proof, even though there is no proof of physical trauma, is adequate to make a fact question as to whether the plaintiff suffered an injury or occupational disease (48-151 (3) (4)).

We observe the same limitations, and specifically do not determine whether the statute of limitations has been tolled, nor do we determine whether Scott has stated a cause of action under our workmen's compensation statutes, where he alleges that he suffered a mental injury without suffering any physical trauma. We will not, therefore, address the second of Scott's assigned errors.

The record shows that Scott was employed by the State of Nebraska as a laundry handler at the Beatrice State Home from August 1969 to January 1973. His duties were to pick up laundry from all the buildings on the grounds in a laundry wagon, deliver it, and return it after cleaning. He supervised other employees and some residents who helped perform this work. His performance reports, compiled by his supervisors, during the time from August 1969 through February 1973 indicated generally superior performance of his job.

In a letter dated December 20, 1972, Scott wrote to his immediate supervisor, complaining that a laundry coworker was verbally abusing and exhibiting "aggressive behavior" toward residents who were assisting with the laundry duties. When he felt nothing was being done about the alleged abuses of the residents, Scott complained to the business manager in charge of the laundry. He next complained of physical abuse to residents by writing the director of the Department of Public Institutions on December 31, 1972. Scott met with the director

in January and May of 1973.

In January 1973 Scott was transferred by the business manager to the warehouse. Scott maintains the move was a result of his complaints to the director. Scott testified that fellow workers were angry and harassed him because he had gone to the persons in charge of the Beatrice State Home with his complaints. He requested a transfer out of the warehouse due to the stress of the harassment he was receiving. In September of 1973 he became a security guard at the home and worked as such until May 3, 1974. Scott testified that on that date he was in the basement garage of the administration building cleaning out automobiles when he began "hearing voices." The voices were making derogatory remarks, and stated that the superintendent was going to fire Scott for being a "stool pigeon." Scott testified he continued to hear the voices for approximately 5 hours at work and later on when he was at home. He then saw a physician in Beatrice, who advised Scott to seek psychiatric care. He has not worked since.

The record further shows that Scott had had some indications of mental illness since 1968. Scott testified he had some mental problems while in the service, which he described as anxiety and a "nerve problem." He was discharged from the armed services in 1968 and given a 100-percent, nonservice-connected disability. On June 26, 1969, Scott had a 1-day admission at the VA medical center in Lincoln, Nebraska, and was diagnosed as a schizoid personality with systematic alcoholism. He continued to receive disability benefits until 1971, when he was reevaluated and the disability rating was removed. On May 23, 1974, Scott entered the VA hospital in Lincoln and has since been under the psychiatric care of Dr. Fay Whitla. In July of 1974 Scott's 100-percent disability rating was restored, and he has continued to receive it to the date of the hearing herein. Dr. Whitla diagnosed Scott as a paranoid personality, and treated him for anxiety and depression. He was discharged July 12, 1974, and has been seeing Dr. Whitla on an outpatient basis since.

Scott has not worked since May 3, 1974, and resigned from the home in a letter dated April 14, 1975. Since June 1976 to the present, Dr. Whitla has diagnosed Scott's condition as

"schizophrenia, paranoid type."

In reviewing the decision we must keep in mind that the findings of fact by the compensation court after rehearing have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong. The decision after rehearing must be considered in the light most favorable to the successful party, and every controverted fact must be decided in its favor. *Moore v. The Sisk Co.*, 216 Neb. 451, 343 N.W.2d 767 (1984); *Hamer v. Henry*, 215 Neb. 805, 341 N.W.2d 322 (1983).

The record shows that the claimant saw a Dr. Wilson in 1969, when he was diagnosed a schizoid personality with systematic alcoholism. Dr. Wilson died many years before the hearings. Dr. Whitla provided the only medical testimony. His initial contact with Scott was in 1974. Dr. Whitla was questioned regarding causation of claimant's mental illness in May 1974, and the following exchanges occurred during Dr. Whitla's testimony:

> Q. At the time of his 1974 hospitalization, Doctor, do you have have any opinion as to whether the diagnosis made of him in 1969 had carried over to some extent; or do you have any opinion as to whether Mr. Scott had any psychiatric disability or psychiatric condition at the time that he came into the facility or while he was working at the Beatrice State Developmental Center based on what you have available in the records and your own personal and professional knowledge of Mr. Scott?
>
> A. Do I feel that he had — that — if the diagnosis in '69 was correct, you're saying, could it carry over. Yes, it could because Dr. Wilson's a very competent person. However, he only saw him for one day or less than a day. And he — personality disorder is a lifelong problem. It's a mental adapted pattern of behavior, so that would carry over.
>
> Q. There may have been — I'm wondering whether you have an opinion as whether there was a preexisting condition in Mr. Scott?
>
> A. It appears that there was, yes.

This testimony, when considered with Scott's own statements and other evidence, seems to establish, without dispute, that

Scott did have a preexisting psychiatric condition before his employment with defendant.

With regard to the question of the aggravation of that preexisting condition:

> MR. BUNDY: Do you have any personal knowledge of whether, in fact, it did aggravate his condition?
>
> THE WITNESS [Dr. Whitla]: I don't know if anybody can prove it, but he continued to mention that it did. It was a stressful area that we discussed frequently. And I have to go by what he brings up and what things he shows more anxiety about when he's discussing.
>
> MR. BUNDY: You didn't see Mr. Scott previous to 1974, though, did you?
>
> THE WITNESS: Not to my knowledge.
>
> MR. BUNDY: So you really have no knowledge of what happened to him between 1969 and 1974, do you?
>
> THE WITNESS: No, sir.

At other times in his testimony Dr. Whitla stated that the events at the Beatrice State Home "would aggravate" Scott's condition, or "could aggravate" Scott's condition. Dr. Whitla further testified that Scott's condition in 1983 was generally the same as in 1974 but that Scott in 1983 was "a bit more aggravated, upset, under more stress now." The testimony could mean only that plaintiff's psychiatric condition has continued to deteriorate and that plaintiff's condition continues to be a normal progression of his preexisting condition.

The burden of proof is on the plaintiff to show an occupational disease arising out of and in the course of his employment and the disability resulting therefrom. The plaintiff must show a causal connection between his employment and the alleged disability. *Caradori v. Frontier Airlines*, 213 Neb. 513, 329 N.W.2d 865 (1983). It is true that Scott never returned to work after May 1974, when he was diagnosed for the second time as suffering a mental illness. However, the doctor's testimony upon the issue of causation and the presence of a preexisting condition was such as to allow the three-judge panel to determine the claimant had not met his burden of proof. In a case such as this the burden of proof is upon the plaintiff to show by a preponderance of the evidence

that the disability sustained is the result of an occupational disease arising out of and in the course of his employment, and was not the result of the normal progression of a preexisting condition. *Negrete v. Western Electric Co., Inc.*, 212 Neb. 876, 326 N.W.2d 681 (1982). Moreover, the presence of a preexisting disease or condition enhances the degree of proof required to establish that the occupational disease or injury arose out of the employment. *Riha v. St. Mary's Church & School, Inc.*, 209 Neb. 539, 308 N.W.2d 734 (1981). The testimony with regard to causation must be definite and certain to warrant a compensation award. *Randall v. Safeway Stores*, 215 Neb. 877, 341 N.W.2d 345 (1983).

We recognize, as stated in *Halbert v. Champion International*, 215 Neb. 200, 204, 337 N.W.2d 764, 766 (1983), quoting from the syllabus of the court in *Lane v. State Farm Mut. Automobile Ins. Co.*, 209 Neb. 396, 308 N.W.2d 503 (1981), " 'Although it is frequently stated that medical testimony must be given with "reasonable medical certainty" it is sufficient when such testimony is stated in terms of "probability." In this connection, "reasonable certainty" and "reasonable probability" are one and the same thing.' "

The three-judge panel assumed "that plaintiff's medical proof . . . is adequate to make a fact question as to whether the plaintiff suffered an injury or occupational disease . . . ." The three-judge panel simply held that plaintiff, while he presented a fact question, did not sustain his burden of proof. We agree. The testimony of Scott's doctor was equivocal and, when considered together with the undisputed evidence as to plaintiff's psychiatric background, did not require that the fact finder determine the question of causation in plaintiff's favor. We have long held that the opinion of an expert witness is not binding on the trier of fact. *Hamer v. Henry*, 215 Neb. 805, 341 N.W.2d 322 (1983).

There was no error in the panel's determination, and the order dismissing plaintiff's petition should be affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. KENNETH L. SMITH, APPELLANT.

352 N.W.2d 620

Filed August 3, 1984. No. 83-594.

Criminal Law: Appeal and Error. No judgment shall be set aside, or new trial granted, or judgment rendered in any criminal case, on the grounds of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, if the Supreme Court, after an examination of the entire cause, shall consider that no substantial miscarriage of justice has actually occurred.

Appeal from the District Court for Dawson County: JOHN P. MURPHY, Judge. Affirmed.

P. Stephen Potter of Bacon and Potter, for appellant.

Paul L. Douglas, Attorney General, and Michaela M. White, for appellee.

KRIVOSHA, C.J., BOSLAUGH, HASTINGS, SHANAHAN, and GRANT, JJ., and BRODKEY, J., Retired.

SHANAHAN, J.

A county court jury found Kenneth L. Smith guilty of the charge that Smith operated a motor vehicle while he was under the influence of alcoholic liquor or while he had .10 of 1 percent or more by weight of alcohol in his body fluid. See Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1982). After determining that such offense was Smith's second conviction of driving while under the influence of alcoholic liquor, the county court for Dawson County, Nebraska, sentenced Smith to pay a fine of $500, confinement in the county jail for 48 hours, and 2 years' probation. On appeal the district court affirmed the judgment of the county court, and Smith appeals to this court. We affirm.

During the late hours of November 12, 1982, Smith spent about 1 1/2 hours in Bob's Reload Lounge in Cozad, Nebraska, where, according to Smith, he drank four cans of beer. Smith drank his last beer around 1:15 a.m. on November 13, although one of Smith's friends testified Smith left the lounge at 1 a.m. Alone, Smith drove his pickup east on U.S. Highway 30 toward the Darr road. The Darr road is approximately 4 miles from

Bob's Reload Lounge.

Trooper Gregory L. Vandenberg of the Nebraska State Patrol was on routine patrol westbound on Highway 30 as Smith's pickup approached from the west. By the mobile radar unit in the patrol car, Trooper Vandenberg determined that Smith's pickup was traveling at 69 miles per hour. After Smith's oncoming pickup passed the trooper's unit, Vandenberg turned his vehicle and pursued Smith. Smith made a right turn from Highway 30 and proceeded south on the Darr road for approximately one-fourth of a mile, where the trooper stopped Smith at 1:45 a.m. to issue a speeding citation. Before he was stopped, Smith had not driven erratically and had violated no traffic law except the speeding infraction.

At the driver's side of the stopped pickup, Trooper Vandenberg asked for Smith's driver's license and vehicle registration. At that time Vandenberg smelled the odor of alcoholic beverage coming from within the pickup. Trooper Vandenberg asked Smith to come to the patrol car, observed Smith's conduct, and noted that Smith was walking unsteadily. In the patrol unit Vandenberg again smelled the odor of alcoholic beverage on Smith's breath, and Smith admitted that he had been drinking at the Reload Lounge.

During the stop at the Darr road, Trooper Vandenberg used an "Alco-Sensor," an instrument used by law enforcement officers in connection with field sobriety tests. The Alco-Sensor was used for the preliminary breath test of Smith pursuant to Neb. Rev. Stat. § 39-669.08(3) (Cum. Supp. 1982), which in pertinent part provides that a law enforcement officer can require an individual "to submit to a preliminary test of his or her breath for alcohol content if the officer has reasonable grounds to believe that such person has alcohol in his or her body, or has committed a moving traffic violation, or has been involved in a traffic accident." That preliminary test was administered to Smith at 2:07 a.m. The Alco-Sensor was a "pass-warn-fail" model which indicates any presence of alcohol on the breath of the person tested. As described by Vandenberg, the Alco-Sensor is a means for an officer to confirm a "suspicion" that "the subject has consumed alcoholic beverage or is under the influence," or "to determine

whether or not the subject does have alcohol on his breath." According to Vandenberg, the Alco-Sensor cannot measure the blood alcohol content of an individual, but is used as a test "to build probable cause" to arrest an individual and require an additional test of blood, breath, or urine in accordance with § 39-669.08(4). Over Smith's objection, Vandenberg testified the Alco-Sensor, when applied to Smith's breath, registered "fail." Vandenberg arrested Smith and transported him to the city police department in Lexington, Nebraska.

Smith and Vandenberg arrived at the Lexington Police Department at 2:18 a.m., where Smith stated he had his last drink of alcohol at Bob's Reload Lounge at 1 a.m. Trooper Vandenberg then administered a breath test on Smith with an "Intoxilyzer 4011AS" at 2:35 a.m. (Smith stipulated foundation for the test equipment and correctness of all procedures used for the Intoxilyzer breath test.) The digital "readout" of Smith's test on the Intoxilyzer was .12 percent. Smith acknowledged such measurement by the Intoxilyzer.

At the police station Trooper Vandenberg also administered four separate sobriety tests, including the balance test, in which Smith "wobbled back and forth"; the heel-to-toe test; and two types of the finger-to-nose test, during which Smith touched the bridge of his nose with his index finger during one test and touched his upper lip during another test. Vandenberg also observed Smith staggering and having difficulty getting through the door to use the restroom at the police station.

Trooper Vandenberg, based on his observations but over Smith's objection, testified that Smith was "under the influence of alcohol to such an extent that it impaired his physical and mental faculties to an appreciable extent" while operating the pickup. Later, without objection, Vandenberg again expressed his opinion that Smith was "under the influence." On cross-examination Vandenberg reaffirmed his opinion given on direct examination, namely, that Smith was "under the influence of alcohol."

On cross-examination Trooper Vandenberg acknowledged that generally an individual reaches a "peak" or the maximum level of absorption for alcohol anywhere from 45 minutes to an hour after the last ingestion of alcohol and that an individual's

level of alcohol thereafter decreases at the rate of .015 percent per hour. Also, Vandenberg acknowledged the Intoxilyzer 4011AS had a margin of error of .01 percent, so that the reading of .12 percent regarding Smith could actually have been .11 percent or .13 percent instead of the .12 percent "readout" on Smith's breath test.

The jury found Smith guilty as charged.

Smith contends there is no sufficient evidence to sustain his conviction and that it was prejudicial error to admit the testimony of Trooper Vandenberg regarding the Alco-Sensor, the preliminary breath test.

In his question about the sufficiency of evidence to support the verdict, Smith has perhaps passed over the fact that § 39-669.07 defines an offense based on multiple situations involving alcohol, namely, operating or controlling a motor vehicle while (1) under the influence of alcoholic liquor or (2) having .10 of 1 percent or more by weight of alcohol in body fluid. See *State v. Weidner*, 192 Neb. 161, 219 N.W.2d 742 (1974). There was proper evidence before the jury regarding Smith's driving his pickup while he was under the influence of alcoholic liquor—conduct and a situation prohibited by § 39-669.07. Trooper Vandenberg testified about Smith's odor from alcoholic beverage and additional observations about Smith's difficulties in locomotion at the scene of the arrest as well as at the police station. On both direct examination and cross-examination, Trooper Vandenberg expressed his opinions that Smith was intoxicated and "under the influence." Such opinions were among the evidence from which a jury could reasonably infer that Smith was guilty of driving a motor vehicle while under the influence of alcoholic liquor.

No aspect of the Intoxilyzer 4011AS is questioned by Smith. In fact, during argument to this court, Smith's counsel emphasized the importance of the Intoxilyzer measurement relative to Smith's defense, which may be summarized in the following hypothesis: The Intoxilyzer's margin of error results in an accepted measurement of Smith's blood alcohol level of .11 percent at 2:35 a.m. during the 45-minute period of an ascending blood alcohol level; an ascending level of Smith's blood alcohol content prevented determination of the precise

blood alcohol level at the time Smith was stopped at 1:45 a.m., or indicated that Smith's blood alcohol level was less than .10 percent; hence, Smith cannot be convicted of driving with a blood alcohol content at a level more than .10 percent.

In probing the intricacies of machines and man's metabolism, Smith has overlooked a less complicated and more common item—the clock. Testimony concerning the time of Smith's last drink of alcohol ranges from 1 a.m. to 1:15 a.m. Crucial to Smith's hypothesis is a postingestion span of 45 minutes to 1 hour as the period during which the blood alcohol level rises toward a maximum level of absorption. However, the Intoxilyzer test was not administered during such initial 45-minute or 1-hour period following Smith's last consumption of alcohol. The Intoxilyzer test was administered at 2:35 a.m., at least 1 hour and 20 minutes after Smith's last consumption of alcohol. In view of the testimony and the suggested hypothesis, Smith's blood alcohol level was descending at the time the Intoxilyzer test was administered, not ascending. Concerning proof that Smith drove his pickup while his blood alcohol content was more than .10 percent, Trooper Vandenberg testified that, after the maximum level of absorption has been reached, the individual's blood alcohol level decreases at the rate of .015 percent per hour. Among various courses open to the jury in determining Smith's blood alcohol content at 1:45 a.m. were two paths. First, from the evidence the jury could have formulated a commonsense hypothesis of its own: whatever is descending is moving from a higher level. At 2:35 a.m. the uncontradicted Intoxilyzer measurement of Smith's blood alcohol content was at least .11 percent and descending from a greater or maximum level of absorption reached by the time the trooper stopped Smith at 1:45 a.m. Therefore, Smith's blood alcohol content was greater than .11 percent when he was stopped at 1:45 a.m. Second, based on the evidence, the jury could have satisfactorily computed Smith's blood alcohol content at 1:45 a.m. On the basis of an individual's blood alcohol level decreasing at the rate of .015 percent per hour, Smith's blood alcohol level decreased .01125 percent between 1:45 a.m. (when Smith was stopped) until 2:35 a.m. (when the Intoxilyzer test was administered). [Rate of decrease (.015

percent) multiplied by the elapsed time (three-fourths of an hour or 75 percent of the hourly rate of decrease) equals .01125 percent.] According to the evidence adduced by Smith in his questions about the Intoxilyzer, and allowing for the margin of error in the Intoxilyzer test, the lowest level of Smith's blood alcohol content was .11 percent. By adding .01125 percent (the amount of the decrease from 1:45 a.m to 2:35 a.m.) to the level of .11 percent, determined by the Intoxilyzer test at 2:35 a.m., a jury could find that at the time Smith was stopped on the Darr road, the level of Smith's blood alcohol content was at least .121 percent. A jury could have so interpolated the figures pertaining to the measurement by the Intoxilyzer at 2:35 a.m. and the hourly rate of decrease in Smith's blood alcohol content to determine Smith's blood alcohol level at 1:45 a.m. By either path, and by inference from the facts presented, the jury reached a permissible verdict.

Rule 401 of the Nebraska Evidence Rules provides: "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). Trooper Vandenberg described the function of the Alco-Sensor as a means for an officer to confirm a "suspicion" that a driver had been drinking alcohol. Vandenberg also acknowledged that the Alco-Sensor was not an instrument for measuring the blood alcohol content of a driver. Moreover, as testified by the trooper, the Alco-Sensor is used as an ingredient for probable cause to arrest and require a postarrest test of blood, breath, or urine as authorized under § 39-669.08(4). As a matter involving probable cause, any aspect of the breath test was a matter of law for judicial determination, not evidence for the jury. (In disposing of the question raised about the preliminary breath test in this case, we need not define the exact legal nature and role of the preliminary breath test.) The result of the preliminary breath test was irrelevant to prove any aspect of the charge against Smith. Under the circumstances it was error to place before the jury any evidence regarding the result from the Alco-Sensor. However, Neb. Rev. Stat. § 29-2308 (Cum. Supp. 1982)

provides in part:

> No judgment shall be set aside, or new trial granted, or judgment rendered in any criminal case, on the grounds of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, if the Supreme Court, after an examination of the entire cause, shall consider that no substantial miscarriage of justice has actually occurred.

Although it was error for the trial court to admit the result of the Alco-Sensor, testimony about the Alco-Sensor was cumulative. Other evidence against Smith, and properly before the jury, was overwhelming and of such stature that admission of evidence about the Alco-Sensor did not cause any miscarriage of justice in Smith's trial. Cf. *State v. Red Feather*, 205 Neb. 734, 289 N.W.2d 768 (1980) (cumulative evidence not requiring reversal). See, also, *State v. Heiser*, 183 Neb. 665, 163 N.W.2d 582 (1968).

The judgment of the district court affirming the judgment upon Smith's conviction in the county court is correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. EDGAR B. BAKER, JR., ALSO KNOWN AS "STUD," APPELLANT.

352 N.W.2d 894

Filed August 3, 1984. No. 83-634.

1. **Criminal Law: Evidence: Prior Acts: Proof.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.
2. **Criminal Law: Evidence: Prior Acts: Appeal and Error.** The admissibility of evidence of other crimes lies largely within the discretion of the trial court.

Appeal from the District Court for Douglas County: PAUL J. HICKMAN, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Victor Gutman, for appellant.

Edgar B. Baker, Jr., pro se.

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

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

WHITE, J.

Appellant, Edgar B. Baker, Jr., was convicted after a jury trial in the district court for Douglas County, Nebraska, of both counts of a two-count information: attempted first degree sexual assault and false imprisonment in the first degree. The trial judge sentenced the appellant to a term of from 3 to 5 years on count I and a concurrent term of 2 years on count II, with credit for 202 days served in the county jail.

Appellant assigns as the single error in this court that the district court erred in overruling defendant's objections to the testimony of Jacquie B., Desiree L., and Helen O. because the purpose of such testimony was to present evidence of other crimes, wrongs, or acts by the defendant, in violation of Neb. Rev. Stat. § 27-404(2) (Reissue 1979).

A recitation of the facts is necessary for a resolution of this case. At the time of the incident on January 20, 1983, the complaining witness, a 19-year-old female, was a student at the Capitol Beauty School located in downtown Omaha, Nebraska. Her schoolday generally started at 8:30 a.m. and ended in the late afternoon. As was her custom, the complainant was waiting for Metro Area Transit bus No. 3 at the corner of 45th and Wirt Streets, expecting to catch the 7:48 a.m. bus.

Shortly before the bus was due to arrive, the appellant, hereafter Baker, driving a 1973 blue Ford Thunderbird, stopped in the vicinity of the bus stop, spoke to the complainant, and asked her if she needed a ride. Baker was the sole occupant of

the car. Baker stated that he was planning to go to the Woodmen Tower in downtown Omaha and could give the complainant a ride. The complainant accepted. After proceeding a couple of blocks the complainant testified that she asked Baker what his name was, to which he replied, "All the ladies call me Stud." At that point the complainant looked over and noticed that the defendant had pulled his penis out and was masturbating. Baker then suggested that they stop the car for the purpose of having sexual relations. The victim refused, and repeatedly stated that she had to go to school. Baker appeared to be driving in a direct route downtown; however, he then drove past the downtown exit of the Interstate. Baker continued urging the complainant to engage in sexual relations with him, and she continued to refuse. Baker ultimately drove to Hanscom Park, where he stopped the car and attempted to force the victim to engage in fellatio. The victim resisted. Baker then took her hand and masturbated until he climaxed. He then drove the complainant to school.

Complainant testified that she did not try to leave the vehicle because she did not think she could successfully get away from Baker. Rather, she testified that she tried to talk him out of engaging in sexual relations by indicating that she had to get to school, but she would see him at a later time.

In contrast, Baker testified that at 7:40 a.m. on January 20, 1983, he was returning home after driving his wife to work at Mutual of Omaha. He decided to return downtown to run errands. A woman, the complainant, who was walking on the sidewalk gestured at him, so he asked her if she wanted a ride. She accepted, and then began fondling his genitals to stimulate him. Baker testified that he drove to Hanscom Park because the woman had expressed a desire to engage in sexual relations. At the park, according to Baker, she continued fondling him until he climaxed. He denied any attempt to force the victim to have oral sex. He testified that he then drove her to school.

The testimony of the three minor girls was offered and received over Baker's objection; it can be summarized as follows.

Jacquie B., a 14-year-old student at Monroe Junior High School, was walking to school at approximately 7 a.m. on the

morning of December 13, 1982, where she intended to meet a friend, Desiree L. As she approached the school, located at 52nd and Bedford Streets, a car, which she described as a blue LTD four-door, drove up to her. There was one black man in the car who told her that his name was "Stud." He then asked her if she wanted to come over to his house for about 20 minutes. She declined and said she was going to school. The car drove off, and Jacquie found her friend, Desiree L., to whom she explained the incident. Jacquie saw the car again that day and pointed it out to Desiree, who wrote down the license plate number. Jacquie identified Baker both in the courtroom and in a previous photo array as the man in the car who had called himself "Stud."

Desiree L., also a 14-year-old student at Monroe Junior High School, testified that she went to school at approximately 7 a.m. on December 13, 1982, to meet Jacquie B. Jacquie told her that some guy had tried to pick her up, and then pointed the car out to her when she saw it again. Desiree testified that the driver of the car was a black man with a mustache who was alone in the vehicle. She wrote down the license plate of the vehicle, which she testified was "1-ND870."

Desiree further testified that on January 19, 1983, she saw the same car with the same license number on approximately 48th and Maple Streets at about 3 p.m. as she was walking home from school. The same person as the one she saw on December 13, 1982, was driving the car. The man in the car said to her, "Hey, Baby, get in my car." She kept on walking.

Helen O. was a 16-year-old student at Benson High School. At approximately 3:30 p.m. on January 10, 1983, at 50th Avenue and Maple Street, as she was walking home from school, a car approached her, turned into a side street, and stopped. The driver asked her if she would like a ride home. She declined, and the driver said that his name was "Stud" and he was lonely so he would like to spend some time with her. She again declined and kept on walking. The man was black; he had a mustache and the car was a dark color. Two days later, while she was walking home, she saw the same car driven by a man who appeared to be the same. She wrote down the license number of the car, which was "1-ND870."

Defendant testified that he drives a dark blue, two-door Ford Thunderbird with license number Nebraska 1-ND870.

The incidents established by the testimony of Jacquie B., Desiree L., and Helen O. all took place within a few blocks from where Baker picked up the complainant. The incidents all took place shortly before the acts leading to Baker's conviction, in a time frame of from 5 weeks to 1 day before the crimes charged. All three girls were between 5 feet and 5 feet 4 inches in height, with a medium or slender build. The victim was approximately 5 feet 5 inches tall and weighed 105 pounds. She was wearing a parka and carrying a sack and a tote bag. There are three schools located within two blocks of the location where Baker offered her a ride. Baker told the victim that she looked younger than 20, and he spoke to her as though she were a child.

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

§ 27-404(2).

As we observed in *State v. Morosin*, 200 Neb. 62, 67, 262 N.W.2d 194, 196-97 (1978):

> Rule 404(2) is simply a restatement of previous Nebraska law. In State v. Casados, 188 Neb. 91, 195 N.W.2d 210, this court stated the general rule that evidence of other crimes than that with which the accused is charged is not admissible in a criminal prosecution. We said: "One basic reason for the rule is that such evidence is apt to be given too much weight, rather than too little, by the jury, thus resulting in the conviction of a defendant because he is a bad man and not because of his specific guilt of the offense with which he is charged." In that case we also reaffirmed the rule that evidence of other crimes, similar to that charged, is relevant and admissible when it tends to prove a particular criminal intent which is necessary to constitute the crime charged.

In *State v. Plymate*, 216 Neb. 722, 725, 345 N.W.2d 327, 329

(1984), this court quoted with approval from *State v. Hitt*, 207 Neb. 746, 301 N.W.2d 96 (1981):

> "[S]exual crimes have consistently been classified as those in which evidence of other similar sexual conduct has been recognized as having independent relevancy, and courts generally hold that evidence of other sex offenses by the defendant may be admissible, whether the other offense involves the complaining witness or third parties."

In *Plymate* we approved the reception of a description of an interview wherein the defendant admitted some 300 or more sexual assaults on children and described in detail the seduction of the children. The details closely corresponded with the evidence in the principal crime.

In *Hitt, supra*, we held as admissible proof of previous and continuing sexual contacts with a brother of the complainant.

For recent nonsexual crimes where we have held admission of other criminal acts admissible, see *State v. Harper*, 208 Neb. 568, 304 N.W.2d 663 (1981) (admission of previous assault of a victim by shotgun in prosecution for murder and assault by poison); *State v. Ellis*, 208 Neb. 379, 303 N.W.2d 741 (1981) (admission of attempted sexual assault of another at or near the scene where the victim of the crime—manslaughter—was found); and *State v. Morosin, supra* (admission of photographs and testimony of social worker of injuries to 3½-year-old son in custody of defendant charged with child abuse of 7-month-old child).

Though the trial court limited the evidence received to the jury's consideration for the purpose of determining the motive and intent only, the evidence was clearly admissible to establish preparation, plan, and identity as well as motive and intent.

Generally, the admissibility of evidence of other crimes lies within the sound discretion of the trial court. *State v. Ellis, supra*. We find that the reception of the relevant evidence was not prejudicial to Baker when compared with its probative effect. We therefore affirm.

AFFIRMED.

KRIVOSHA, C.J., dissenting.

I regret that I must respectfully dissent from the majority opinion in this case. In my view there was no basis upon which

the testimony of the three students could have been admissible in evidence under the provisions of Neb. Rev. Stat. § 27-404(2) (Reissue 1979).

As noted by the majority, evidence of other crimes for the purpose of proving the defendant's propensity to commit such crime is inadmissible. Section 27-404(2) specifically provides in part: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." Only if the evidence is offered as an exception to the general rule is it admissible. Section 27-404(2) goes on to provide: "It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." In view of the nature of the crimes charged, issues such as motive, opportunity, intent, preparation, plan, knowledge, or absence of mistake or accident were not at issue, and the evidence of the three students would have been totally irrelevant if offered to establish any of those elements.

The State argues, however, that it had the burden of establishing identity and, therefore, the evidence of the three girls was admissible to establish identity. I agree that the burden was upon the State to establish and prove identity; I do not believe that the testimony of the three girls was either necessary, relevant, or admissible to prove identity. It could only prove propensity to commit a crime.

In the first instance, counsel for Baker admitted to the jury in his opening statement that there was no dispute about the act having taken place, the dispute simply being over whether it was consensual. Additionally, the victim herself testified for the State in its case in chief, identifying Baker as the individual with whom the alleged act was committed. That testimony was more than sufficient to make a prima facie case.

Courts which have considered the matter of evidence of other crimes to prove identity have recognized that more than a mere similarity in the classification of the acts and attendant circumstances must be shown or the evidence is simply not relevant within the meaning of the act. In the case of *People v. Guerrero*, 16 Cal. 3d 719, 548 P.2d 366, 129 Cal. Rptr. 166

(1976), the California Supreme Court had before it for review a judgment of conviction for first degree murder. In determining that evidence of a prior uncharged rape involving a different victim was inadmissible, the California court said at 725, 548 P.2d at 369, 129 Cal. Rptr. at 169:

> On the issue of identity the evidence of the Lopez crime is not only cumulative, it is also irrelevant. Few of the asserted similarities between the Lopez and Santana offenses aid in placing defendant at the scene of the alleged murder. . . . If the victim had been attacked in a distinctive manner that was identical to a previous crime defendant had committed, then the evidence of the other crime might have probative value. But the only claimed connection that has any logical relevance is evidence of "sexual activity" in both cases and the possible use of a wrench. Even if both facts were established . . . it could not reasonably be claimed that the two offenses were committed in a particularly distinct manner that tends to inculpate defendant.

There was simply nothing unique about the manner in which the crime charged was committed to bring it within the "identity" exception to § 27-404(2).

Federal courts which have reviewed the question of identity under the federal act similar to § 27-404(2) have generally held that mere similarity does not establish identity so as to permit the introduction of other crimes, acts, or wrongs for the purpose of establishing identity. Rather, the act must bear such a high degree of similarity as to mark it as the handiwork of the accused, much like a fingerprint. See, *United States v. Silva*, 580 F.2d 144 (5th Cir. 1978); *United States v. Myers*, 550 F.2d 1036 (5th Cir. 1977); *United States v. Solomon*, 490 F. Supp. 373 (S.D. Ga. 1980). It is generally held that unless the crime is so distinctive in nature that there is a reasonable likelihood that it could not have been committed by anyone else, the admission of such evidence only establishes the accused's propensity or disposition to commit a crime and is, under the clear language of the rule or state statutes, irrelevant and inadmissible. Anything less would seem to totally eliminate the prohibition of § 27-404(2). For a full discussion on the matter, see Krivosha,

Lansworth, Pirsch, *Relevancy: The Necessary Element in Using Evidence of Other Crimes, Wrongs, or Bad Acts to Convict*, 60 Neb. L. Rev. 657 (1981).

This general view is consistent with the decisions of our court, although admittedly there have occasionally been decisions to the contrary. In *State v. Casados*, 188 Neb. 91, 195 N.W.2d 210 (1972), we examined the purpose of the rule prohibiting the introduction of other crimes, wrongs, or acts, and said at 95, 195 N.W.2d at 213:

> "One basic reason for the rule is that such evidence is apt to be given too much weight, rather than too little, by the jury, thus resulting in the conviction of a defendant because he is a bad man and not because of his specific guilt of the offense with which he is charged."

And in *State v. Franklin*, 194 Neb. 630, 642-43, 234 N.W.2d 610, 617-18 (1975), we said:

> The defendant's third assignment relates to the admission of the park caretaker's testimony that the defendant had committed another act of sodomy with a different person 3 weeks prior to the act charged. It is the usual rule that in a criminal prosecution evidence of crimes committed by the accused, other than that with which he is charged, is not admissible. State v. Brown, 190 Neb. 96, 206 N.W.2d 331. An exception to the above rule is that evidence of similar offenses is admissible where an element of the crime charged is motive, a particular criminal intent, or guilty knowledge. State v. Ray, 191 Neb. 702, 217 N.W.2d 176; State v. Young, 190 Neb. 325, 208 N.W.2d 267; State v. Rich, 183 Neb. 128, 158 N.W.2d 533. The State concedes that no such motive, criminal intent, or guilty knowledge is an element of the crime here charged. Another exception to the general rule is that in prosecutions for rape, incest, and sodomy, testimony that the defendant committed the same or similar acts against the prosecutrix is admissible for its corroborative value. Smith v. State, 127 Neb. 776, 257 N.W. 59. Evidence of similar crimes with third persons is not admissible. Henry v. State, 136 Neb. 454, 286 N.W. 338; Nickolizack v. State, 75 Neb. 27, 105 N.W. 895.

The evidence of alleged other crimes, if indeed the testimony established a crime or bad act, offered in this case does not fall within the generally recognized exception for establishing identity. None of the witnesses could do more than testify that a black man with a mustache, driving an automobile having a license plate identical with the automobile owned by Baker, asked each of the witnesses whether she wanted to go for a ride. Such evidence does not identify the defendant as one charged with the crime of attempted first degree sexual assault or false imprisonment in the first degree. We have simply permitted the introduction of evidence tending to show Baker's propensity to potentially commit a crime, in order to show he is a "bad man."

While the evidence, absent that offered by the three witnesses, was more than sufficient to establish Baker's guilt, it cannot be said to have been harmless error. As we noted in *State v. Atwater*, 193 Neb. 563, 565-66, 228 N.W.2d 274, 275 (1975):

> The evidence against the defendant was more than adequate. Possibly in the past we have been too lenient in excusing these transgressions under the guise of harmless error, and the prosecution has concluded that anything goes. Defendants must be given fair trials, and it is the responsibility of the prosecution to see that each defendant receives one. Harmless error is intended to cover those inadvertent slips, which occasionally creep into a hotly contested trial, which do not severely prejudice the rights of the defendant. Harmless error should never be applied in those instances where the prosecution deliberately, or because of very careless procedures, injects prejudicial error into the proceedings.

By affirming this conviction we have advised the prosecution that it may introduce evidence of any other crime, wrong, or act if it can in any manner be suggested that it has some relevance, even with regard to facts not in issue. I believe that we have effectively repealed the provisions of § 27-404(2) and that we should not do so. For that reason I would have found that the introduction of the testimony objected to by Baker was prejudicial error.

GRANT, J., joins in this dissent.

THE CONSERVATIVE SAVINGS AND LOAN ASSOCIATION OF OMAHA, NEBRASKA, A CORPORATION, APPELLANT, V. HAROLD H. KARP AND MAURINE E. KARP, HUSBAND AND WIFE, ET AL., APPELLEES, ARLO HANSON, INTERVENOR-APPELLEE.

352 N.W.2d 900

Filed August 3, 1984. No. 83-644.

1. **Security Interests: Foreclosure: Words and Phrases.** The phrase "costs of management" includes all expenses necessary to perpetuate the actual commercial use of real estate, including the payment of real estate taxes.
2. **Judicial Sales: Security Interests: Foreclosure.** Where a successful bidder at a judicial sale pays only a small deposit or part of his bid at the sale and pays the balance of his bid later but does not pay interest on the balance of his bid, such bidder is not entitled to rents accruing from the date of sale until the balance of the bid is paid. To hold otherwise would bestow an undeserved windfall on the bidder: a bidder could, in good or bad faith, force a mortgagee in possession to finance the balance of the bid without any obligation to pay interest for the use of that money representing the balance of the bid.

Appeal from the District Court for Douglas County: JOHN T. GRANT, Judge. Affirmed as modified, and cause remanded with directions.

Michael G. Lessmann and Richard E. Putnam of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, for appellant.

Edward F. Pohren of Dwyer, Pohren & Wood, for intervenor-appellee.

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

PER CURIAM.

This appeal arises out of an action brought by The Conservative Savings and Loan Association of Omaha to foreclose a deed of trust. Arlo Hanson, the intervenor-appellee, was the successful bidder at the sheriff's foreclosure sale. Cross-motions for summary judgment were filed. Conservative appeals the judgment of the district court for Douglas County that Conservative was responsible for payment of accrued taxes on the real estate subject to foreclosure and that Conservative was not entitled to interest and rentals from the date the

foreclosure sale was confirmed through the date when the successful bidder paid the balance of his bid.

Conservative filed suit in September 1981 to foreclose a deed of trust given as security for a loan to Harold H. Karp, namely, two parcels which are leased commercial properties. On October 29, 1981, the district court entered an order allowing Conservative to take possession of the security real estate and to collect rents produced from the property.

On September 24, 1982, the district court entered a decree of foreclosure. In that decree the district court determined the amount due Conservative on the Karp note, $246,798.62, less the rent collected by Conservative from November 1, 1981, $22,275, and fixed interest at the rate of 19 percent per annum from the date of the foreclosure decree. The foreclosure decree specifically provided that the rents collected by Conservative

> shall apply in reduction of the amounts otherwise due [Conservative] under this Decree. From date hereof until the date of confirmation of any sheriff's sale held pursuant to this decree, [Conservative] shall be entitled to continue to receive all rents from such premises and, upon notice to all parties and hearing thereon at confirmation, such rentals sums received by [Conservative] subsequent to the date of this Decree shall be applied in further reduction of the amounts due it under its said lien.

The sheriff conducted the foreclosure sale on November 23, 1982. Hanson was the successful bidder at $229,600, and Hanson paid 10 percent of his bid at the sheriff's sale.

On December 7 the district court confirmed the foreclosure sale, but Conservative never requested to have the rentals collected after the foreclosure decree of September 24 applied to its judgment.

While in possession of the premises under the order of possession, Conservative paid the first half city and county real estate taxes. When Hanson purchased the properties at the sheriff's sale, the second half taxes for the county and city were unpaid and delinquent.

On December 21 Hanson paid the unpaid real estate taxes of $2,765.08 on the properties, paid the balance of his bid at the foreclosure sale, took possession of the real estate, and

demanded that Conservative pay $3,300, which was the amount of rent collected by Conservative for December 1982 and the prepaid rent collected for January 1983. In response, Conservative tendered Hanson $1,627.70, that is, the amount of the rents less interest which had accrued for 14 days at the rate of $119.45 per day from the date of confirmation (December 7) until Hanson paid the balance of his bid (December 21). Hanson refused Conservative's tender. On January 3, 1983, Hanson intervened in the foreclosure proceedings and sought to collect the real estate taxes he had paid and to recover the rentals collected by Conservative.

The trial court noted that, because the order of October 29, 1981, authorizing Conservative to take possession of the premises and to collect the rents did not specify how Conservative was to apply the rentals collected, Conservative was in effect a mortgagee in possession of the premises as a receiver appointed by the court. Such status of Conservative continued after the foreclosure decree on September 24, 1982. The district court further noted that, although no receiver's duties were specified in the court's order, Conservative had a contractual duty imposed by the deed of trust.

The deed of trust contained the following provisions:

> 3. Application of Payments. Unless applicable law provides otherwise, all payments received by Lender under the Note and paragraphs 1 and 2 hereof shall be applied by Lender first to the payment of interest payable on the Note and on Future Advances, if any, then to the payment of the principal of the Note and to the principal of Future Advances, if any, and then to the payment of amounts payable to Lender by Borrower under paragraph 2 hereof. [Paragraph 2 provided for an escrow fund to pay taxes, insurance premiums, and assessments.]
>
> . . . .
>
> 18. Assignment of Rents; Appointment of Receiver; Lender in Possession. As additional security hereunder, Borrower hereby assigns to Lender the rents and income of the Property, provided that Borrower shall, prior to acceleration under paragraph 16 hereof or abandonment of the Property, have the right to collect and retain such

> rents and income as they become due and payable.
>
> Upon acceleration under paragraph 16 hereof or abandonment of the Property, Lender, in person, by agent or by judicially appointed receiver shall be entitled to enter upon, take immediate possession of and manage the Property and to collect the rents of the Property, including those past due. All rents collected by Lender or the receiver shall be applied first to payment of the costs of management of the Property and collection of rents, including, but not limited to, receiver's fees, premiums on receiver's bonds and attorney's fees, and then to the sums secured by this Deed of Trust. Lender and the receiver shall be liable to account only for those rents actually received.

The trial court found that the "costs of management," as specifically applied to a court-appointed receiver in accordance with paragraph 18 of the deed of trust, imposes on the receiver a duty to apply rentals collected to pay real estate taxes that are due and owing. The district court held that Hanson, because he had discharged Conservative's duty to pay real estate taxes, was entitled to recover from Conservative the amount of taxes paid. The district court further found Conservative was entitled to interest on its debt to the date of confirmation (December 7, 1982), but Conservative was not entitled to rents from the premises after November 23, 1982, the date of the sheriff's sale. The district court then entered judgment in favor of Hanson in the amount of $2,765.08 for back taxes paid on the real estate, and $3,772.50 which was the amount of rents received by Conservative after the date of the sheriff's sale (November 23, 1982).

Conservative's first assignment of error is that the district court erroneously entered judgment for Hanson regarding the real estate taxes paid by him. Conservative contends that paragraph 3 of the deed of trust governs the priority of application of payments received by Conservative, that is, all payments received by Conservative must first be applied to the payment of interest and then to the payment of principal, and lastly to the payment of real estate taxes.

However, paragraph 3 of the deed of trust relates only to

payments made by the borrower pursuant to the borrower's promissory note, and does not apply to a mortgagee in possession of the premises on default of the borrower.

When the lender is placed in possession of the premises on default of the debtor, the provisions of paragraph 18 of the deed of trust govern the priority and application of rent received from the premises. The deed of trust is unambiguous. Because paragraph 18 of the deed of trust governs disposition of rent collected, the issue is whether payment of real estate taxes is a "cost of management" as the phrase is found and used in paragraph 18. Conservative contends the payment of taxes is not a cost of managing the real estate, because such expense is not specifically itemized in the express terms of paragraph 18. However, the clause "including, but not limited to," indicates that the costs or expenses mentioned are illustrative only. Payment of taxes is, therefore, not specifically excluded by the language of paragraph 18. We hold that the phrase "costs of management," as used in the deed of trust in this case, includes all expenses necessary to perpetuate the actual commercial use of real estate, including the payment of real estate taxes. See, *Real Est.-Ld T. & T. Co. v. B. & L. Assn.*, 124 Pa. Super. 17, 187 A. 824 (1936); *United States v. Thompson,* 272 F. Supp. 774 (E.D. Ark. 1967), *aff'd* 408 F.2d 1075 (8th Cir. 1969); *United States v. Frank*, 587 F.2d 924 (8th Cir. 1978).

Conservative next argues that the trial court erred by awarding Hanson the rents received after the foreclosure sale on November 23, 1982. Conservative contends that Hanson is entitled only to any rents after December 21, 1982, the date when Hanson paid the balance of his bid. Further, Conservative contends that it is error to deny Conservative interest on the unpaid balance of Hanson's bid, namely, interest from the date of confirmation (December 7) to the date Hanson paid the balance of his bid (December 21).

In *McCleneghan v. Powell,* 105 Neb. 306, 312, 180 N.W. 576, 579 (1920), we held:

> Equity will not permit a vendee to enjoy the rentals that are derived from land for which he has not paid and at the same time permit him to escape the payment of interest to the vendor on the unpaid purchase price unless a tender

has been made of such purchase price and kept good. Accord, *Kleeb v. Kleeb*, 213 Neb. 537, 330 N.W.2d 484 (1983); *Jordon v. Jackson, on motion for rehearing* 76 Neb. 15, 107 N.W. 1047 (1906); *Craig v. Greenwood*, 24 Neb. 557, 39 N.W. 599 (1888).

Where a successful bidder at a judicial sale pays only a small deposit or part of his bid at the sale and pays the balance of his bid later but does not pay interest on the balance of his bid, such bidder is not entitled to rents accruing from the date of sale until the balance of the bid is paid. To hold otherwise would bestow an undeserved windfall on the bidder: A bidder could, in good or bad faith, force a mortgagee in possession to finance the balance of the bid without any obligation to pay interest for the use of that money representing the balance of the bid.

We hold that Hanson is entitled to the rents collected for the period from December 21 to December 31, 1982, and to the prepaid rent for January 1983. Hanson, therefore, is entitled to rent in the amount of $718.56 for December 21 to December 31, 1982, and is entitled to the rent for January 1983 in the amount of $1,275. The total rent to which Hanson is entitled is $1,993.56, for which Hanson is entitled to judgment against Conservative. Also, Hanson had paid real estate taxes which we have determined to be the obligation of Conservative. The real estate taxes paid by Hanson are in the amount of $2,765.08. Consequently, Hanson is entitled to judgment against Conservative in the amount of $4,758.64. Because the trial court entered judgment in favor of Hanson against Conservative in the amount of $6,537.58, we affirm but modify the judgment granted to Hanson, namely, we find that Hanson is entitled to judgment against Conservative in the amount of $4,758.64. For this reason the judgment of the district court is affirmed as modified. These proceedings are remanded to the district court with directions to enter judgment in favor of Hanson against Conservative consistent with this opinion.

AFFIRMED AS MODIFIED, AND CAUSE REMANDED WITH DIRECTIONS.

KRIVOSHA, C.J., concurs in the result.

DANNY STARR, APPELLANT, V. SWIFT & COMPANY, APPELLEE.
353 N.W.2d 1

Filed August 3, 1984. No. 83-724.

Workmen's Compensation: Appeal and Error. As a general rule, where the record presents nothing more than conflicting medical testimony, this court will not substitute its judgment for that of the Workmen's Compensation Court.

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

Robert C. Wester of Schirber Law Offices, P.C., for appellant.

Richard M. Dustin of Gaines, Otis, Haggart, Mullen & Carta, for appellee.

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

GRANT, J.

This is an appeal from the Nebraska Workmen's Compensation Court. The claimant, Danny Starr, alleged in his petition that he sustained an injury in an accident on June 16, 1982, arising out of and in the course of his employment by Swift & Company (Swift). He further alleged the injury was an aggravation of a preexisting asymptomatic arthritic condition of his back.

Starr claimed the injury occurred when he bent over to pick up an unskinned ham and his back snapped. Swift answered, alleging that if claimant suffers from any condition, it was the result of a natural progression of a preexisting condition not resulting from an injury caused by an accident arising out of and in the course of his employment.

On rehearing, a three-judge panel vacated an earlier single-judge order and found the claimant had failed to sustain the burden of showing his alleged condition resulted from or was aggravated by an accident arising out of and in the course of his employment by Swift. The court dismissed the petition and set aside the award.

Starr appeals, asserting the court was clearly wrong in dismissing the petition, and assigning as error that the

three-judge panel's decision was contrary to the evidence presented. We find the court was correct and affirm its ruling.

Starr testified that he was a ham skinner for Swift and on June 16, 1982, felt a sharp pain in his back when he bent down to pick up a loose ham. The incident was reported to the production manager, and after a break, Starr completed his shift. On June 18, 1982, Starr sought permission from the plant nurse to visit his physician, Dr. John Monson, concerning his hand, for which he had been receiving treatment. Starr also told the nurse that he had felt a little pull in his back, but did not state it was a result of the June 16 incident.

Dr. Monson, a general surgeon, had been treating Starr for various ailments since May 1981. Dr. Monson had performed hernia surgery on Starr on June 2, 1981, had removed a cyst in November of 1981, had done surgery on his finger in December 1981, and had removed a foreign body in his left arm in May of 1982. Dr. Monson saw Starr again on June 18, 1982. Dr. Monson examined Starr's hand, which Monson had treated previously. X-rays of Starr's back were then taken. The film failed to disclose any injury to the back, and a diagnosis of a strain or spasm was made. A muscle relaxant and Tylenol were prescribed. Dr. Monson has not seen Starr since the June 1982 visit, and testified Starr did not appear to have severe back pain and was advised he could return to work.

On September 20, 1982, Starr saw Dr. Leroy Lee, a urologist, who testified Starr complained of pain he had endured for 4 days. Starr related a past history of severe kidney injury 28 years previous, from an automobile accident. Dr. Lee testified that Starr told him that his back pain had begun 3 or 4 days before, without any significant history of trauma or other initiating events. Starr denied this statement in his testimony.

Starr also testified that he had arthritis of the spine for many years. According to Dr. Lee, the June 18, 1982, incident was never mentioned by Starr at his September 20 visit. Dr. Lee hospitalized Starr, suspecting a kidney problem, but none was found. Instead, the problem was diagnosed as musculoskeletal pain, which usually abates on its own with aspirin treatment. Dr. Lee did not feel Starr was in severe pain, and required no followup visits.

Dr. Lee referred Starr to Dr. Richard Forsman, who specializes in internal medicine, and he saw the patient on September 28, 1982. Suspecting a herniated disk, he hospitalized Starr for a myelogram. A CAT scan was also conducted, and after consulting Dr. John Greene, a neurological surgeon, Dr. Forsman felt that a bulging herniated disk was causing the pain. When questioned as to the cause of Starr's injury, Dr. Forsman testified:

> Q Do you have an opinion based on a reasonable degree of medical certainty as to the cause of that particular injury?
> A No.
> Q Now when you treated Mr. Starr these various times, did you detect an arthritic condition of the back?
> A Yes.
> Q Have you formed an opinion based on a reasonable medical certainty as to whether the incident on January (sic) 16, that Mr. Starr described concerning lifting at work causing pain, aggravated the arthritic condition that you found?
> A It certainly could be very possible.
> Q Do you think it is probable?
> A That's a hard one to answer a yes or a no.
> Q Pardon me?
> A That's a hard one to answer a yes or a no. It's very possible. I'll leave it that way.
> Q Well, in your best opinion, based on a reasonable degree of medical certainty. I'm not asking for 100 percent, but just based on a reasonable degree of medical certainty, do you think that the incident on June 16 aggravated the arthritic condition that you found in Mr. Starr?
> A Yes.

On cross-examination he testified:

> Q Now can you tell us what other things might account for the same symptoms that he might have when he is seeing you several months later?
> A This could be any sort of trauma to the back, any straining situation, a jolt to the back. I've seen many — a variety of things that will cause these — the onset of the symptoms.

> Q And is that the reason why you said that there was a problem with answering the question "yes" or "no" in regard to that?
> A Yes.

Dr. Greene testified he saw Starr in January 1983. His opinion was that Starr had a herniated fourth lumbar disk, caused by "lifting something in May, if I'm correct, of 1982." He based his opinion on the history he received and on the results of the CAT scan. Dr. Greene did not testify as to causation with regard to any particular incident arising out of Starr's employment with defendant.

Dr. Werner Jensen, an orthopedic surgeon testifying on behalf of Swift, stated he saw Starr on January 19, 1983. Dr. Jensen, after reviewing the X-rays taken under Dr. Lee, was of the opinion Starr suffered from spurring between the 11th and 12th dorsal vertebrae, which is sometimes mistakenly referred to as arthritis. This spurring is a degenerative condition from "wear and tear." Jensen testified spurring is located in the kidney area, and not in the lower back where disk problems occur.

Jensen stated the degeneration occurs over a period of years and the pain felt by Starr would be back sprain or spasm. In Dr. Jensen's opinion the ham-lifting incident did not affect the spurring and Starr's back problems are not due to one lifting incident. Dr. Jensen stated that with rest and conservative treatment Starr should feel better.

Starr testified that after seeing Dr. Monson in June 1982 he returned to work the following Monday and worked through the month of August. In June 1982 he had a grievance hearing over not receiving workmen's compensation for a hand injury. He did not mention any back problems at this meeting.

On July 14, 1982, there was a compensation hearing on a hernia claim by Starr. He testified he made no complaint regarding his back because it was not bothering him at that time.

In reviewing workmen's compensation cases this court is not free to weigh 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. Every

controverted fact must be resolved in favor of the successful party, and such party should have the benefit of every inference that can be drawn therefrom. *Davis v. Western Electric*, 210 Neb. 771, 317 N.W.2d 68 (1982).

The burden of proof is on the claimant to show a causal connection between the accident suffered by him and the alleged disability. *Caradori v. Frontier Airlines*, 213 Neb. 513, 329 N.W.2d 865 (1983). The presence of a preexisting disease or condition enhances the degree of proof required to establish that the injury arose out of the employment. *Riha v. St. Mary's Church & School, Inc.*, 209 Neb. 539, 308 N.W.2d 734 (1981).

The evidence presented was sufficient for the compensation court to find that Starr had a history of arthritis which caused degeneration. In addition, Starr suffered from kidney and hernia injuries which the court could have found contributed to the degeneration and pain he was experiencing. None of the medical experts unequivocally attributed claimant's pain to the ham-lifting incident on June 16, 1982.

The conflicting medical testimony presented a question of fact to be resolved by the compensation court. That issue was resolved against the claimant. We state again that this court will not substitute its judgment for that of the compensation court where there is nothing more than conflicting medical testimony. *Ceco Corp. v. Crocker*, 216 Neb. 692, 345 N.W.2d 20 (1984); *Van Winkle v. Electric Hose & Rubber Co.*, 214 Neb. 8, 332 N.W.2d 209 (1983); *Riha v. St. Mary's Church & School, Inc., supra; Keith v. School Dist. No. 1*, 205 Neb. 631, 289 N.W.2d 196 (1980).

The three-judge panel was not clearly wrong in finding the claimant failed to prove that his back pain resulted from or was aggravated by the single incident on June 16, 1982. We affirm the order dismissing claimant's petition.

AFFIRMED.

SHERRI K. GERBER, APPELLEE, V. HELMUT GERBER, APPELLANT.
353 N.W.2d 4

Filed August 3, 1984. No. 83-749.

Divorce: Final Orders: Appeal and Error. Where any of the substantial rights of the parties to a dissolution case remain undetermined and the case is retained for further action by the trial court, any orders entered are interlocutory and not final.

Appeal from the District Court for Hall County: RICHARD L. DEBACKER, Judge. Appeal dismissed, and caused remanded with directions.

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

Gwyer Grimminger of Grimminger & Milner, for appellee.

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

PER CURIAM.

The legal problems in this dissolution of marriage case are a natural extension of the problems this court discussed in *Humphrey v. Humphrey*, 215 Neb. 664, 340 N.W.2d 381 (1983). In that case we stated at 666-67, 340 N.W.2d at 383, that

> the practice of bifurcating a dissolution of marriage case in any manner, and with any timelag, is expressly disapproved by this court. The essence of a dissolution case is the marriage between the parties. . . .
>
> . . . Whatever personal convenience a court may confer on parties by granting an immediate dissolution while retaining property jurisdiction cannot be worth the difficulties and problems to which the trial court is exposing the litigants.

We went on to state that it was fortunate that there was no question presented in that case, so far as we were informed, as to the effective date of the dissolution of marriage.

That question is now before us. In this case Sherri Gerber, wife and appellee, filed her petition for dissolution of her marriage to Helmut Gerber, husband and appellant, on May 17, 1982. The case was tried on November 16, 1982. The wife

adduced only her testimony, showing that the parties were married on August 7, 1972; that three children were born of the marriage; that the parties had acquired real and personal property during the marriage; that the marriage was irretrievably broken; and that the wife should have custody of the children. The husband then testified as to the marriage, and as to the parties' children and the property. The husband specifically testified that the marriage was not irretrievably broken and that he believed the marriage could be saved by counseling. The trial court then stated from the bench:

> BY THE COURT: The court finds that the marriage is irretrievably broken and it is hereby dissolved. The temporary orders concerning custody of the children, visitation with the noncustodial parent, support, and the injunction on each party against the disposition of property or acquisition of debts and disturbing the peace of the other will be continued in effect. The court will obtain a study of the home of each parent, from the respective welfare departments, and have those reports available. Copies of teh [sic] reports will be furnished to counsel, who will then be able to request the reopening of the evidentiary record on the issue of support, if you feel it appropriate in light of the reports.
>
> All other matters are reserved until that evidence is made available.
>
> You're excused.

Unsigned "court notes" in the transcript show the following on November 16, 1982:

> Now on this day this cause came on for hearing. Parties present w/counsel. Evidence presented. Birth of Elizabeth 1/14/75, David 6/28/77, and Helmut, Jr. 1/4/81. Court finds marriage is irretrievably broken and it is dissolved. Temporary orders re custody, visitation, support and injunctions continued in effect. Home studies to be obtained of home of each parent from respective county welfare departments. Copies will be furnished to counsel who may then request to reopen record re custody and support.

At an interim hearing on April 20, 1983, the court, as shown

by unsigned "court notes," found the husband to be in arrears on child support payments but not in contempt of court. The court ordered that legal custody of the children should be in the court with "physical custody" in the wife. The court also set out visitation rights and ended the notes, "Property division under advisement." The temporary restraining order and temporary support orders entered earlier were continued in effect.

On September 22, 1983, the court signed a journal entry reciting that on November 16, 1982, the matter came on to be heard, and stating in part: "The Court finds that the marriage is irretrievably broken and it is dissolved. That Temporary Orders concerning custody, visitation, support and injunctions to continue in effect."

This signed journal entry goes on to state: "NOW on this 20th day of April, 1983, this matter comes on to be heard before the Court upon the Motion for Temporary Custody . . . filed herein by the Respondent"; and later, "NOW on August 29, 1983, this matter comes on to be heard before the Court on the Motion to change custody . . . filed herein by the Respondent"; and still later, "NOW on September 6, 1983, this matter comes on to be heard further for decision by the Court."

The September 22, 1983, journal entry does dispose of the property (by ordering, with certain exceptions, all the real and personal property to be sold and the proceeds divided 60 percent to husband and 40 percent to wife), but it does not dispose of the custody issue (other than reciting the order entered as to temporary custody as of April 20, 1983) nor the support issue. The end result is total confusion, including the effective date of the dissolution of the marriage, if there ever was a dissolution. In oral argument we are informed that appellee has remarried at some time unknown to this court.

Appellant husband filed a notice of appeal on September 23, 1983, giving notice of "his intent to appeal the decision of the Court entered on August 29, 1983 denying Respondent's Motion for change of custody and contempt citation, and further order of the Court entered on September 6, 1983, ordering property division and child support." Appellant assigns seven errors, including the assignment, "The trial court erred and abused its discretion to the detriment of the parties by

taking under advisement and being dilatory in the resolution of the issues of the case, specifically property disposition, from November 16, 1982, to September 6, 1983." Brief for Appellant at 3. While we agree wholeheartedly with that statement, we cannot reach that issue and dispose of this case. As stated in appellee's brief at 5, "It is questionable that there is a final order of disposition of this matter sufficient to grant jurisdiction upon this court." We hold that in this welter of confusion, there is no final order that may be appealed from as to *any* of the issues between these parties, including the issue of dissolution of the marriage.

We note specifically that the wife's petition in this case and the responsive pleading of the husband put in issue the marriage relationship itself, custody and support issues concerning the children, and the parties' property rights. We are not faced with the situation where the pleadings present less than all issues between the marriage partners, such as might be the case in an action brought under Neb. Rev. Stat. § 43-512.04 (Reissue 1978), where a party might seek child support only. In this case, as presented, we adopt the statement set out in *Z & S Constr. Co., Inc. v. Collister*, 211 Neb. 348, 350, 318 N.W.2d 728, 729 (1982), "When, as in this case, substantial rights of the parties remain undetermined and the cause is retained for further action, the order is interlocutory and not final. . . . There being no final order in the District Court, the appeal is dismissed." We apply this holding to dissolution of marriage cases.

The appeal is ordered dismissed. The district court is ordered to, within 5 days of the entry of the mandate from this court, determine all issues between these parties and to make findings and orders as to *all* issues between these litigants.

APPEAL DISMISSED, AND CAUSE REMANDED WITH DIRECTIONS.

SHANAHAN, J., dissenting.

The majority promulgates a procedural precept: no bifurcation (disposition of issues in separate trials). We have moved from disapproval of bifurcation in *Humphrey v. Humphrey*, 215 Neb. 664, 340 N.W.2d 381 (1983), to prohibition in *Gerber*.

The majority requires that a trial court must have disposed of

every issue arising out of a dissolution proceeding before there is a final or appealable order. Consequently, whether a marriage is irretrievably broken, issues with respect to children (custody, visitation, and support) and issues involving alimony and marital property are absolutely inseparable and require collective disposition in order that a decree be subject to appellate review. However, we are overlooking the fact that those issues mentioned are distinct and essentially severable in a dissolution proceeding so that separate disposition is possible.

Bearing in mind that the Legislature has prescribed the statutory format for dissolution proceedings, there is no statutory prohibition of bifurcation in Nebraska's dissolution statutes. To the contrary, our statutes permit discretionary bifurcation; for example, "When dissolution of a marriage or legal separation is decreed, the court *may* include such orders in relation to any minor children and their maintenance as shall be justified" (emphasis supplied) (Neb. Rev. Stat. § 42-364 (Cum. Supp. 1982)); and "When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property as *may* be reasonable" (emphasis supplied) (Neb. Rev. Stat. § 42-365 (Cum. Supp. 1982)).

Other jurisdictions with dissolution statutes similar to Nebraska law have construed such statutes as discretionary permission for bifurcation. See, *Putnam v. Fanning*, 495 S.W.2d 175 (Ky. 1973); *Drew v. Drew*, 309 Minn. 577, 244 N.W.2d 491 (1976); *In re Marriage of Fink*, 54 Cal. App. 3d 357, 126 Cal. Rptr. 626 (1976); *Hyman v. Hyman*, 310 So. 2d 378 (Fla. App. 1975). One does not have to strain the imagination to envision situations where the best interests of the children or parties would be more suitably served through bifurcation, or where failure to bifurcate will work unnecessary hardship on those affected by a dissolution. Bifurcation should not occur merely for convenience of the litigants. Nevertheless, because there will be as many and varied situations as there are people involved in dissolutions, separate and final disposition of issues should be allowed in exceptional cases at the discretion and sound judgment of the district courts upon a showing of good cause. Prohibition of bifurcation presents a tidy and

ordered judicial package, but people affected by dissolutions do not always have lives in a tidy and ordered package. A monolithic judicial mandate against bifurcation may ultimately become a source of hardship and more hurt in already painful situations.

STATE OF NEBRASKA, APPELLEE, V. GREGORY D. HASELHORST, APPELLANT.

353 N.W.2d 7

Filed August 3, 1984. No. 83-779.

Criminal Law: Police Officers and Sheriffs: Search and Seizure: Evidence. If police officers, while lawfully engaged in an activity in a particular place, perceive a suspicious object, they may seize it immediately, provided that the initial intrusion is lawful, the discovery of the evidence is inadvertent, and it is apparent to the officer that the item seen might be contraband or evidence of a crime.

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

James Hatheway, for appellant.

Paul L. Douglas, Attorney General, and Linda L. Willard, for appellee.

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

GRANT, J.

Defendant, Gregory D. Haselhorst, was issued a citation for "Possession Less 1 oz Marijuana," in violation of Neb. Rev. Stat. § 28-416(6)(a) (Cum. Supp. 1982). Defendant filed a motion to suppress all evidence seized in a warrantless search of his car. The county court for Cedar County (hereinafter referred to as the trial court) denied the motion to suppress. Counsel then stipulated that the case be submitted for trial on

the evidence presented at the suppression hearing. The trial court then found defendant guilty and imposed a $100 fine. Defendant appealed to the district court, where, after a series of procedural misadventures (such as not offering the bill of exceptions in evidence—an omission corrected by the district court's granting of defendant's first motion for new trial), and after hearings on February 17, May 12, and September 8, 1983, the trial court's judgment and sentence were affirmed. Defendant then appealed to this court, assigning two errors: (1) "[I]n allowing plaintiff's witness to volunteer his answer to defendant's question over defendant's objection"; and (2) In "overruling the defendant's motion to suppress all evidence against defendant in a trial as a result of a search and seizure of defendant's automobile." We affirm.

The evidence before the trial court showed that defendant, a resident of Lancaster County, Nebraska, had returned to his hometown of Randolph, Nebraska, for his mother-in-law's birthday party on November 6, 1982. After the party defendant went to a dance in Randolph. After the dance defendant took a friend to the friend's home in the country to examine some remodeling work. Defendant and the friend then returned about 3 a.m. to Randolph in defendant's car with defendant driving. In Randolph defendant testified he "drove through the main street of Randolph probably a couple of times and also took maybe a couple of other side streets down a residential area. Probably was in town for 15 minutes." Defendant then parked next to his friend's pickup truck to let the friend out. At this point defendant was parked on the wrong side of the street next to the friend's truck.

In the meantime, defendant's conduct in driving slowly around Randolph, with out-of-county license plates, had been reported to the chief of police by a Randolph reserve officer. The chief of police, Gerald Greeley, drove to the area and observed defendant's car going 3 to 6 miles per hour while being driven by the downtown buildings. Greeley then observed defendant's car improperly parked next to a pickup truck. Greeley pulled up to defendant's car. As Greeley approached the car on foot, the passenger got out of defendant's car, looked back into the car, and said to the driver, "It's the cop." Greeley

told the passenger to get back into defendant's car, and the passenger did so.

During this time, Greeley saw defendant "shuffling something around on the floor." Greeley approached the driver's side of the car and asked the defendant for his driver's license. Greeley shined his flashlight into the car, and as he took another step forward, he "viewed a a [sic] bong pipe—it appeared to be a bong pipe—waterpipe they use for smoking marijuana, on the floor." Greeley then advised his companion (a policeman friend of Greeley's who was accompanying Greeley on his rounds as a volunteer) that he had seen drugs. Greeley then told defendant and the passenger to get out of the car and to go to the front of the car. They got out and went to the front of the car, where Greeley's friend kept them under observation.

Greeley then removed the water pipe from the car. He testified he "could smell an odor of it appeared to be marijuana from this pipe." Greeley then searched the car and found four packets of leafy material, which he later testified without objection contained marijuana, and another marijuana pipe. Greeley then placed defendant under arrest and issued a warning ticket for improper parking, and the citation for possession of marijuana.

On cross-examination Greeley was asked by defendant's counsel, "In fact you did not see any controlled substance in defendant's car from your position outside of defendant's car did you?" Greeley answered, "No sir, just except the glass pipe that had a black bowl the top of it—it was black and looked like residue."

Defendant's counsel objected to his answer and asked that it be stricken. His objection was overruled. It is this ruling that is the subject of defendant's first assignment of error. The assignment is frivolous and need not be discussed further. A dangerous question was asked on cross-examination and an answer that defendant's counsel did not want was elicited.

With regard to his second assigned error, defendant's position seems to be that since the glass water pipe could be used for legal purposes, Chief Greeley did not have probable cause to search the car. In support of this position defendant testified

that after his arrest in this incident, he bought, by mail, an identical water pipe, which he used for medical purposes of his own. Defendant testified he was troubled with hay fever and breathing problems, and he used the second water pipe to smoke "herbal remedies" such as "mullein and demania [sic]" to relieve his problems.

We consider this position no further, except to note, as a matter of fact, that Chief Greeley observed more than a glass water pipe—he viewed a glass water pipe with black residue on it. Greeley had received special training in the field of narcotics; he was familiar with the general type of water pipe he saw on the floor of the car; and he knew from his experience that such pipes were used for smoking marijuana. It is established that under certain circumstances a police officer may seize evidence in plain view without a warrant. *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971); *Texas v. Brown,* 460 U.S. 730, 103 S. Ct. 1535, 75 L. Ed. 2d 502 (1983).

Three requirements must be satisfied to uphold a warrantless search and seizure from an automobile under the plain view doctrine. First, the police officer must lawfully make an "initial intrusion" or otherwise properly be in a position from which he can view a particular area. Second, the officer must discover the incriminating evidence "inadvertently," i.e., he may not know in advance the location of the evidence and intend to seize it without obtaining a warrant, relying on the plain view exception only as a pretext. Finally, it must be "immediately apparent" to the police that the items they observe may be evidence of a crime, contraband, or otherwise subject to seizure. *Texas v. Brown, supra.*

The initial intrusion in the present case was based upon the suspicious nature of defendant's vehicle cruising a downtown section of a small town for 15 minutes at 3 a.m., coupled with the parking irregularity. The officer acted reasonably in approaching the driver. The second requirement is also satisfied, as there is no assertion made that Chief Greeley approached the vehicle on the pretext of seizing marijuana. The discovery of the water pipe was clearly inadvertent.

As to the final requirement for a seizure of this type, the

defendant, as alluded to above, argues that the officer must show he possessed knowledge the defendant intended to use the water pipe for illicit drugs as the officer viewed it on the floor from outside the vehicle. The defendant's interpretation of the "immediately apparent" requirement is mistaken.

In *Brown, supra,* the Court said at 741-42 that " '[t]he seizure of property in plain view involves no invasion of privacy and is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity' " (emphasis omitted), quoting from *Payton v. New York,* 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980). The *Brown* court continued by stating that

> probable cause is a flexible, common-sense standard. It merely requires that the facts available to the officer would "warrant a man of reasonable caution in the belief," [citation omitted] that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false. A "practical, nontechnical" probability that incriminating evidence is involved is all that is required.

Texas v. Brown, supra at 742.

Officer Greeley, having viewed the water pipe with black residue on it on the floorboard, acted reasonably in retrieving it for a closer inspection which revealed an odor of marijuana about the pipe. The officer's knowledge that this type of glass water pipe is commonly used for smoking marijuana, combined with the odor of marijuana, is sufficent to establish probable cause in the officer's mind that there was contraband or property useful as evidence of a crime in the car. It was reasonable for the officer to then conclude that marijuana may be located in the interior of the vehicle and that a search of the car was proper.

The order of the district court, affirming the trial court's judgment of conviction and the sentence, was correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. HENRY S. WEBB, APPELLANT.

352 N.W.2d 624

Filed August 3, 1984. No. 83-840.

1. **Post Conviction: Effectiveness of Counsel.** In the absence of allegations of fact specific enough to permit the trial court to make a preliminary determination of a question relating to an alleged violation of a defendant's constitutional rights, the court need not have an evidentiary hearing on the issue of ineffective counsel.
2. **Post Conviction: Sentences.** Matters relating to sentences imposed within statutory limits are not a basis for post conviction relief.
3. **Post Conviction.** Where the files and records of a case affirmatively show that the prisoner is entitled to no relief, an evidentiary hearing is not required.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Affirmed.

Henry S. Webb, pro se.

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

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

BRODKEY, J., Retired.

Henry S. Webb, defendant below, has appealed to this court from an order entered by the district court for Douglas County, Nebraska, denying his request for post conviction relief. The trial court, after reviewing the motion, the records, and the files of the case, concluded that Webb was entitled to no relief, and denied the motion for post conviction relief without an evidentiary hearing.

Webb was arrested on May 13, 1980, for a robbery which occurred at the Airport Inn on that same date. On June 5, 1980, Webb appeared in district court with private counsel and pled not guilty to the robbery charge.

On June 26, 1980, Webb again appeared in district court. His private counsel was permitted to withdraw, and a Douglas County public defender was appointed to represent him. After an explanation by the court of the rights which would be waived by a plea of guilty or nolo contendere, and Webb's recital of

facts constituting a factual basis for the crime with which he was charged, Webb pled guilty to the charge of robbery.

On September 5, 1980, Webb appeared for sentencing. When the court inquired whether he had any legal reason why the sentence should not be imposed at that time, Webb's counsel answered that he did not. The court then reviewed Webb's rather extensive criminal record and the facts of the crime. There was some dispute about the violence involved, and after the court once again reviewed the facts as shown in the police reports, Webb denied them and asked, "Is there any way possible I can change my plea?" The court replied that there was not, and then sentenced Webb to not less than 6 nor more than 10 years' imprisonment in the Nebraska Penal and Correctional Complex. No motion for new trial was filed. Webb's court-appointed counsel then perfected an appeal to this court and later also filed a motion to withdraw as counsel, which motion was granted. The judgment was affirmed without opinion.

Webb then filed a petition for post conviction relief, alleging (1) that he was denied effective assistance of counsel because of the failure of his attorney to make a motion for withdrawal of the guilty plea (in his brief on appeal he contends that a written motion should have been made); (2) that the facts used by the district court in considering the sentence were untrue and therefore cast a taint upon the consideration of the sentence; and (3) that his guilty plea was not freely and voluntarily entered because he was under *constant* abuse by the Omaha police. Attached and made a part of the petition, apparently in support of this last allegation, was a copy of an opinion written by the U.S. Court of Appeals for the Eighth Circuit in a civil rights action filed by the appellant. The opinion sustained one of his three claims, and found that Webb had been abused by the police during an incident following the lineup on the day of his arrest.

To determine whether or not Webb was entitled to an evidentiary hearing, it is necessary to consider each of the above claims.

Webb's first contention alleged ineffective assistance of counsel based upon counsel's alleged failure to file a motion to

withdraw the guilty plea. The record reveals that at no point before sentencing or in his petition did Webb set forth any reasons for the withdrawal of the plea. The district court was not required to speculate as to all of the possible grounds or reasons for the withdrawal of the plea. As we pointed out in *State v. Stranghoener*, 212 Neb. 203, 322 N.W.2d 407 (1982), lacking allegations of fact specific enough to permit the trial court to make a preliminary determination of the question relating to this alleged violation of Webb's constitutional rights, the district court correctly rejected an evidentiary hearing on the issue of ineffective counsel.

With regard to Webb's challenge as to the complete accuracy of the facts upon which his sentence was based, we have previously held that matters relating to sentences imposed within statutory limits are not a basis for post conviction relief. *State v. Walker*, 197 Neb. 381, 248 N.W.2d 784 (1977). Webb's sentence of not less than 6 nor more than 10 years is well within the statutory limits for the offense of robbery. Therefore, that issue is not a proper one for post conviction relief, and no evidentiary hearing was required.

Webb's final contention in his petition was that his plea of guilty was not voluntarily entered due to constant abuse by the Omaha police.

The rule is well established that where the files and records of a case affirmatively show that the prisoner is entitled to no relief, an evidentiary hearing is not required. *State v. Stranghoener, supra.* At the time the appellant entered his guilty plea, the following conversation took place between Webb and the judge:

> THE COURT: Has anyone made any promises, Henry, of any kind or threatened you in any way or used any force directly or indirectly to induce you to plead guilty to the charge?
>
> THE DEFENDANT: No.
>
> THE COURT: If you plead guilty, will it be of your own free will?
>
> THE DEFENDANT: Yes.

As we pointed out in *State v. Waterman*, 215 Neb. 768, 774, 340 N.W.2d 438, 442 (1983):

> A defendant who is mentally competent can no more assume one posture at the time of arraignment and then change positions afterwards to meet the exigencies of the situation than he can withhold facts from his attorney, and thereby experiment with one defense, and when that fails him, invoke the aid of the law to experiment with another which was fully known to him at the time.

The record affirmatively shows that the incident of abuse discussed in the petition is alleged to have occurred on May 13, 1980, over 6 weeks prior to the time Webb entered his guilty plea; that Webb pled not guilty on June 5, 1980; and that on June 26, 1980, with counsel present, Webb entered a plea of guilty, at which time he told the court that he had not been forced or threatened to plead guilty and that it was made of his own free will. There being an affirmative showing in the record that Webb is not entitled to relief, no evidentiary hearing was required, and we affirm the order of the district court overruling the motion for post conviction relief.

AFFIRMED.

WHITE, J., dissents.

BILL STRAUB, APPELLANT, V. AMERICAN BOWLING CONGRESS, AN ILLINOIS CORPORATION, ET AL., APPELLEES.

353 N.W.2d 11

Filed August 3, 1984. No. 83-885.

1. **Summary Judgment.** Summary judgment may be 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 moving party is entitled to judgment as a matter of law.
2. **Associations: Actions: Breach of Contract.** The management and internal affairs of a voluntary association are governed by its constitution and bylaws, which constitute a contract between the members of the association. While courts generally do not interfere with the internal affairs of a voluntary association, an action may be maintained for breach of contract if it can be

shown that defendants violated the contractual terms of membership.

3. **Associations: Actions.** Generally, courts will not interfere with the internal affairs of an association to settle disputes between members or with regard to discipline or internal government, provided that the government of the society is administered fairly and in conformity with its laws and other applicable law and no property or civil rights have been violated.
4. **Associations: Judgments: Collateral Attack.** A decision of the governing body of the association is binding and generally not subject to collateral attack in the courts.
5. **Associations: Judgments: Appeal and Error.** The power of the courts to review the quasi-judicial actions of voluntary associations is extremely limited. The court can only determine whether there are inconsistencies between an association's rules and the action taken; whether the member has been treated unfairly in the proceedings; whether the association's actions were prompted by fraud, malice, or collusion; and whether the association's rules contravene public policy or law.

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

John Tavlin, for appellant.

Thomas M. Haase of Perry, Perry, Witthoff, Guthery, Haase & Gessford, P.C., and K. Thor Lundgren of Michael, Best and Friedrich, for appellees.

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

PER CURIAM.

The plaintiff, Bill Straub, appeals from an order of the trial court granting summary judgment in favor of the defendants.

Straub brought this action against the American Bowling Congress (ABC), the Lincoln Bowling Association (LBA), and Rodger Florom, seeking equitable relief and special and general damages. Straub alleged that as a result of breach of contract and fraud and negligence on the part of the defendants, the defendants failed to recognize certain of Straub's bowling achievements.

The ABC is an Illinois corporation with its offices located in Milwaukee, Wisconsin. It is a nonprofit, nonstock, voluntary membership organization which establishes uniform rules and standards for competitive bowling. Membership is open to all male bowlers. The LBA is a local bowling association affiliated

with the ABC. Rodger Florom is the secretary-treasurer of the LBA.

Members of the ABC agree, upon becoming members, to be bound by the ABC rules and to grant jurisdiction over all bowling disputes to the ABC. A member bowling in an ABC-sanctioned league becomes eligible for ABC recognition of certain high scores if that score was achieved under conditions which are in conformity with ABC rules.

On November 16, 1979, Straub, an ABC member, was bowling in an ABC-sanctioned league at the Plaza Bowl in Lincoln, Nebraska. Straub bowled a three-game score of 836, including one 300 game, which scores entitled him to ABC recognition. ABC rules require an inspection of the lanes by the local affiliate before a high score will be recognized. This inspection was conducted on November 16, 1979, by Rodger Florom, the secretary-treasurer of the LBA.

The purpose of the inspection was to insure that if lane dressing had been applied to the lanes, its distribution on the surface of the lanes complied with the requirements specified in the constitution of the ABC. The inspection made involved visual observation of the lanes, a smear test, and a tactile test of the surface of the lanes. Florom also used a machine called a lane analyzer and recorded the readings from this machine on graphs. The report of the inspection by Florom, which was forwarded to the ABC, concluded that lane dressing had not been applied to the lanes used by Straub in conformity with article 7, § 3, of the ABC constitution.

Recognition of Straub's score was administratively denied by the ABC. Straub requested a review of that denial by the ABC's high score and awards review committee. That committee considered Florom's report and information submitted by Straub. The committee denied the request for high score recognition because the lane had not been dressed as required by the ABC constitution. Straub then brought this action.

Following a hearing on motions for summary judgment filed by Straub and each of the defendants, the trial court granted summary judgment in favor of the defendants and overruled Straub's motion. Straub has appealed.

Summary judgment may be 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 moving party is entitled to judgment as a matter of law. *Signor v. National Transp., Inc.*, 217 Neb. 667, 351 N.W.2d 58 (1984).

Straub alleges that the defendants breached the contract which they had with him as a member of the ABC. The management and internal affairs of a voluntary association are governed by its constitution and bylaws, which constitute a contract between the members of the association. While courts generally do not interfere with the internal affairs of a voluntary association, an action may be maintained for breach of contract if it can be shown that defendants violated the contractual terms of membership. *Attoe v. Madison Pro. Policemen's Asso.*, 79 Wis. 2d 199, 255 N.W.2d 489 (1977). The record shows that Straub agreed to submit to the rules of the ABC which govern high score recognition and to submit any appeal to the awards review committee. The record demonstrates that the ABC requirements governing lane inspection and appeal procedure were met. Summary judgment was properly granted in favor of the defendants as to the cause of action alleging breach of contract.

We likewise conclude that summary judgment was properly granted as to the other causes of action, as our review of the decision of the ABC tribunal, which tribunal was the proper forum by contract, is extremely limited.

Generally, courts will not interfere with the internal affairs of an association such as the ABC to settle disputes between members or with regard to discipline or internal government, provided that the government of the society is administered fairly and in conformity with its laws and other applicable law and no property or civil rights have been violated. *Charles O. Finley & Co. Inc. v. Kuhn*, 569 F.2d 527 (1978), *cert. denied* 439 U.S. 876, 99 S. Ct. 214, 58 L. Ed. 2d 190; *Adams v. American Quarter Horse Ass'n*, 583 S.W.2d 828 (Tex. Civ. App. 1979). A decision of the governing body of the association is binding and generally not subject to collateral attack in the courts. See, *James v MCAHS*, 107 Mich. App. 1, 308 N.W.2d 688 (1981); 7 C.J.S. *Associations* § 8 (1980). The power of the courts to

review the quasi-judicial actions of voluntary associations is extremely limited. The court can only determine whether there are inconsistencies between an association's rules and the action taken; whether the member has been treated unfairly in the proceedings; whether the association's actions were prompted by fraud, malice, or collusion; and whether the association's rules contravene public policy or law. *State ex rel. National Jr. Col. Ath. Ass'n v. Luten*, 492 S.W.2d 404 (Mo. App. 1973); *Barnhorst v. Mo. State High Sch. Activities Ass'n*, 504 F. Supp. 449 (W.D. Mo. 1980).

While the petition alludes only vaguely to the proper bases for judicial review, we have examined the record in the light of those particulars.

The record does not disclose any inconsistency between the action taken by the committee and the rules governing the ABC, nor does the record show that Straub was treated unfairly during the proceedings. The record shows that the lane was examined shortly after Straub bowled his scores and that that investigation was carried out using the ABC approved equipment and methods. The actions taken by the ABC were in conformity with the rules regarding lane dressing and those concerning internal review. Likewise, the record shows that Straub was given notice of all proceedings and was given the opportunity to provide information for review by the committee.

No claim was made that the ABC rules contravene public policy or the law, nor is there evidence to support such a claim.

The final basis for an action is whether there was fraud or malice on the part of the association in its actions. The only evidence on this point is a statement made by Rodger Florom to a Steve Hudson to the effect that Florom would use his position in the LBA to prevent any bowler from surpassing a recognized 813 score bowled by Florom. Florom claimed the statement was meant as a joke. This evidence was not sufficient to create a question of fact with regard to whether the ABC acted fraudulently with regard to its denial of recognition.

Straub's theory of liability under which he sued the LBA and Florom is unclear from the pleadings. However, we conclude that the ABC had no liability in this matter and that there was

no liability on the part of its affiliate, the LBA and its officer, Florom.

There was no genuine issue as to any material fact and the defendants were entitled to judgment as a matter of law. The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. JOE MCCARTHY, APPELLEE.
353 N.W.2d 14

Filed August 3, 1984. No. 84-422.

1. **Motions to Suppress: Appeal and Error.** Factfindings by the trial court on a motion to suppress will not be overturned on appeal unless clearly wrong.
2. **Confessions: Miranda Rights.** Statements made by a person not accused of a crime but in custody or otherwise deprived of his freedom of action in a significant way are not admissible in evidence unless the person has been advised of his *Miranda* rights.

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

Steven J. Moeller, Deputy Hall County Attorney, for appellant.

John R. Hall of Anderson, Vipperman, Hinman, Hall & Kovanda, for appellee.

GRANT, J.

Pursuant to Neb. Rev. Stat. § 29-824 (Cum. Supp. 1982), the State of Nebraska appeals the judgment of the Hall County District Court suppressing a statement made by defendant before *Miranda* warnings were read to him by police officers. The State admits the *Miranda* warnings were not given, but alleges warnings were unnecessary because the defendant was not in custody at the time of the statements and that, in any event, the warnings were unnecessary because there was an imminent danger to the public. For the reasons hereinafter set out, the order of the district court is affirmed.

On December 12, 1982, the Grand Island Police Department, with the help of officers from the Hall County Sheriff's Department and the Nebraska State Patrol, was investigating the possible homicide of Terry Atkinson. Jeff Benzel was a prime suspect. The authorities discovered that a car driven by Benzel had been seen at a residence occupied by Peggy McCarthy. The police suspected that Benzel was in the McCarthy residence, and they felt he was armed and dangerous. About 2:30 a.m. on December 13, 1983, the house was surrounded by various officers, including a S.W.A.T. team of the patrol. The officers surrounding the house were armed with shotguns, pistols, and "a high-powered rifle with scope." A spotlight was put in place, shining at the front door of the house. Peggy McCarthy was then called on the telephone, and she was told by the police to have all the people in the house come out, one at a time, with their hands in the air.

The people in the house did so. They were told to walk slowly toward the light and stop. They were patted down for weapons and told to enter a police van. Peggy McCarthy was the last to leave, and she informed the police that no other people were in the house. Five women, including Peggy's 9-year-old daughter, and two men (defendant and his brother Ed) left the house and entered the van. Guns were trained on those leaving the house.

The van was then driven to a police command post which had been established at the Al-Anon building, some three blocks from the residence. At the command post defendant was summoned from the van to go into the Al-Anon building. Two officers escorted him, one of whom was holding defendant's arm.

Inside the building, defendant was questioned by a captain of the police department. No guns were trained on him at the time. No *Miranda* warnings were given.

The police captain testified:

> A. I told Joe McCarthy that we were investigating a homicide; we had reason to believe that Jeff Benzel was involved. I needed to know if Jeff Benzel was hiding in the house at 1921 West Fifth. I says, officers are going to go in there, I need to know if they're going to be confronted by him in that house, and I need to know now.

To this interrogation defendant replied, according to the police captain, "I haven't seen Jeff Benzel all night."

After receiving the answer the police captain then testified:

> A. I told him not to lie to me. That I needed to know; for the safety of everybody involved in this investigation I needed to know if Jeff Benzel was in that house. If he wasn't in that house I needed to know where he went. I told him several times not to lie to me.
>
> Q. What was his response to your second, basically, question?
>
> A. I haven't seen Jeff Benzel all night.

Defendant testified the conversation between him and the police captain was as follows:

> Q. (By Mr. Moeller) The only questions he was asking was in relation to where Jeff Benzel was; is that correct?
>
> A. He asked me where he was and I said I didn't know.
>
> Q. Did he ask you again where he was? Did he explain why it was important to him?
>
> A. Then he asked me if I was with him. And I told him I don't want to get involved. He goes, were you with him, and I said no. He goes, you're lying.

Defendant was later charged with being an accessory to a felony. He then filed this motion to suppress his statements set out above.

The State states in its brief at 1 that "Miranda warnings need not be given to an individual who is not in custody who makes statements during an investigation." That is a sound statement of law, but does not address the issue in this case, which is, Was defendant in custody when he made his statement?

In *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), the Court stated:

> [T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of the procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in

any significant way.

In the present case the district court found: "1. That the Defendant was in custody or otherwise deprived of his freedom; 2. That he was under compulsion to answer police questions."

The evidence fully supports those findings, and, indeed, could not support any other finding. On an appeal in a case such as this, we have held, "Factfindings by the trial court on a motion to suppress will not be overturned on appeal unless clearly wrong. A totality of the circumstances test is used." *State v. Whitmore, White, and Henderson,* 215 Neb. 560, 572, 340 N.W.2d 134, 141 (1983). The factfindings in this case are clearly not wrong in any respect.

The State contends that the recent case of *New York v. Quarles,* 467 U.S. ____, 104 S. Ct. 2626, 81 L. Ed. 2d 550 (1984), authorizes the trial court to receive the defendant's statement. In *Quarles* the Court held that "overriding considerations of public safety justify the officer's failure to provide *Miranda* warnings before he asked questions devoted to locating the abandoned weapon." 104 S. Ct. at 2629. In *Quarles* the police apprehended the defendant in a supermarket immediately after a reported rape. The police had been told the defendant had a gun. After handcuffing defendant and discovering he was wearing an empty shoulder holster, the officer asked him where the gun was. Defendant responded, "the gun is over there." 104 S. Ct. at 2630. The Supreme Court held the statement admissible.

Whatever the merits of the *Quarles* holding, that case is simply not this case. There was obviously no immediate danger present in this case. The house in question was surrounded by armed men; defendant McCarthy was certainly "deprived of his freedom"; and there was no public danger present. As a matter of fact, before the questioning of McCarthy was completed, the house had been determined to be empty.

The order suppressing defendant's statement was correct and is affirmed.

AFFIRMED.

DONALD R. JOHNSON, APPELLANT, V. GAY STOVER ET AL., APPELLEES.

354 N.W.2d 142

Filed August 10, 1984. No. 83-329.

1. **Contracts: Deeds: Reformation: Proof.** In an action for reformation of a written contract or deed, the burden of proof rests on the moving party to overcome the strong presumption arising from the terms of the written instrument.
2. **Reformation: Evidence.** To warrant reformation of a written instrument, the evidence must be clear, convincing, and satisfactory.
3. **Pleadings.** It is the facts well pleaded that determine the nature of the action and the relief to be granted.
4. **Equity: Contracts: Reformation.** Equity will decree reformation of a contract for mutual mistake or where there is a mistake on one side and fraud or inequitable conduct on the other.
5. **Parol Evidence.** The parol evidence rule is ordinarily applied in the absence of fraud, mistake, or ambiguity.

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

Lieske and Kristensen, for appellant.

Mark L. Eurek, P.C., for appellees.

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

GRANT, J.

Plaintiff, Donald R. Johnson (hereinafter Johnson), brought this action against defendants Gay Stover, Robert Klimek, and Howard Shimon, seeking damages resulting from a trespass on Johnson's land caused when defendants' pivot irrigation system ran through Johnson's fence and onto Johnson's land.

The defendants' answer alleged generally that named defendants Stover and Klimek had no interest in the land or pivot irrigation system; that Shimon was an owner of the land; and that there had been no trespass because the land onto which the pivot irrigation system had gone had been sold to Shimon by Johnson but, through mistake, the land was described in error and Johnson's fence had been erected in the wrong place.

Shimon and his wife Marian then filed an "Amended

Cross-Petition; Counterclaim" against Johnson and his wife, and against other named defendants. The only reason for the presence of the other named defendants (all of whom entered a voluntary appearance in the case) was to bring in all other persons who were named in the chain of title to the property described in the case. The others named (Stover, Wagners, Collinses, and Dugans) were participants in a tax-related, property exchange transaction with the Shimons and have no real interest in the merits of this lawsuit. Therefore, we will approach the matter as did the trial court, treating Johnson as plaintiff, Shimon as defendant, and Howard and Marian Shimon (hereinafter Shimons) as counterclaimants against Johnson.

Shimons' counterclaim alleged that in 1978 Johnson owned all of Section 31, Township 14 North, Range 14 West, of the 6th P.M., in Sherman County, Nebraska (hereinafter called the section), with the exception of two tracts of land of a total area of approximately 11 acres which had previously been granted to the State of Nebraska for road purposes. The counterclaim further alleged that in the spring months of 1978 Johnson installed two center pivot irrigation systems on the western part of the section; that these systems were 10-tower Lockwood pivots, which irrigated almost all of the west half of the section and part of the east half of the section; and that Johnson or his tenant farmed the land irrigated by the pivot systems in 1978 and 1979. Shimons further alleged that in September of 1979 Johnson, through his agent, offered to sell to Shimons' agent the land that had been center-pivot irrigated during the years 1978 and 1979 and that Shimons agreed to purchase that land; and, further, that in the purchase agreement Johnson agreed to install and pay for two new Zimmatic pivots in the same location as the existing pivots, and to install a fence between the land retained by Johnson and that sold to Shimons. The Shimons' counterclaim further alleged that they had relied on the representations of Johnson's agent that Johnson was conveying all the land irrigated by the new pivot systems; that, through mutual mistake, the deed conveying such land referred to the west half of the section plus the west 110 feet of the east half of the section; and that the described 110 feet was not

sufficient land to permit the irrigation pivot system to operate. Shimons prayed that the deed from Johnson to Shimons' predecessors in title be reformed to reflect the correct description of the land intended to be conveyed.

Johnson generally denied the allegations of the counterclaim. The court then bifurcated the trial and heard the counterclaim first, since Johnson would have no right to damages for trespass if the deed from Johnson to Shimons' predecessors in title was reformed as prayed for in the counterclaim.

After trial on Shimons' counterclaim the trial court entered its decree reforming all the deeds involved to reflect that the west 172 feet of the southeast quarter was conveyed, rather than the west 110 feet as set out in the deeds. Johnson timely filed a motion for new trial, which motion was overruled, and has perfected his appeal to this court.

In his appeal Johnson assigns three errors, which may be consolidated into two: (1) That the trial court erred in overruling Johnson's motion in limine (which sought to exclude evidence of all prior negotiations between the parties to the contract as written) and in admitting parol evidence produced to modify the terms of a written contract and deed; and (2) That the trial court's decree is not sustained by a clear preponderance of the evidence necessary to reform a contract and deed. For the reasons hereinafter set out we affirm.

As the case is presented to us, it is an equitable action seeking the reformation of a deed to certain real estate. Such an action is tried de novo on appeal to this court, subject to the condition that when evidence on a material question of fact is in irreconciliable conflict, this court will give weight to the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite. *Waite v. Salestrom*, 201 Neb. 224, 266 N.W.2d 908 (1978).

The record shows that Johnson owned all of the section prior to 1977. Johnson desired to sell the whole section, or any part of it, and on August 13, 1979, listed the section for sale with Gene Boysen & Associates, Inc., a real estate firm in Grand Island. The listing included the two irrigation systems on the land,

described as "two Lockwood ten-tower" pivot systems. Gene Boysen showed the section to Gay Stover, Howard Shimon's brother-in-law and representative throughout the negotiations. Stover testified that he and Boysen looked at the land and that Stover told Boysen that Shimon would be interested in buying part of the section. In August of 1979 the Shimons viewed the land with Boysen and Stover, and while out on the section, Stover testified that he asked Boysen "if we got the pivots and all the land that it run on and he said, yes, that's the way it was represented to us." Stover also testified that he told Boysen "that we had to have enough land to run the pivots on" and that Boysen responded that there would be enough land.

At the time Stover was viewing the land, the pivots were operating and a corn crop was in. Stover also testified that at the time of his viewing of the section there were two posts which apparently marked a division between the two quarters. Stover described these as "corner posts," and testified that the posts were located east of the fence line that was later installed 110 feet east of the center of the section—one post being approximately 100 feet east of the fence line and the other "about in the fence line." The growing crops irrigated by the pivot system were, at this time, "[a]bout flush with that post on the west side as you sited [sic] over the posts."

Shimon testified that at the time he viewed the land in August of 1979, Boysen told him that the land "would be purchased with the room for the two ten-tower pivots." Shimon also remembered Stover's conversation with Boysen on the same subject.

Boysen testified, as to the same conversations with Stover and Shimon, that he could not remember the details of the conversations. In response to a question by Shimons' counsel to the effect "did you represent to them [Shimon and Stover] that you would be getting all the pivot property?" Boysen answered, "I don't remember that I specifically said that. I think knowing how I operate in such situations, I think it would be implied if not said." There is no contention raised by Johnson that Boysen was not his agent in all these transactions and conversations.

Johnson testified he reached the figure of 110 feet by his own calculations. He knew that the highway on the 11 acres granted

to the State of Nebraska on the east side of the section had narrowed the east-west width of the section by approximately 160 feet, so he "measured it off and tried to be fair on both half sections. I measured the width of it and I felt that by giving them 100 to 110 foot would give me enough room on the east half section to put two more pivots and it would still be approximately the same size as the west half section . . . ." There was no evidence that shows the Shimons were aware of the narrower east half section resulting from the road. Testimony adduced on behalf of the Shimons showed that the fence installed 110 feet into the east half of the section would have to be moved an additional 62 feet to the east to let the pivot operate.

After Johnson had made the 110-foot determination, a purchase agreement was entered into between Johnson and Stover, acting as Shimons' representative. This purchase agreement provided for the sale and purchase of the west half of the section, plus 110 feet into the west side of the east half of the section. The agreement also provided that Johnson would buy and install two new pivots for the land, and provided for the sale by Johnson to buyers of "2 irrigation engines, wells, and pumps, and allied equpiment [sic] in places." No price per acre was set out, but the buyers agreed to pay a "sum of $334,000.00 plus price of new pivots complete." Johnson was also required to install a fence at the line 110 feet east of the half-section line.

Closing was had, pursuant to the purchase agreement, in March 1980. Late in 1980, Johnson installed the two new pivots on the same pads on which the Lockwood pivots had been installed. The new Zimmatic pivots were 1,295 feet from the center to the end of the steel. The Lockwood pivots that were removed were 1,290 feet in length.

After hearing all the evidence the trial court found:

> The Cross-Petitioners have sought reformation on the basis of mutual mistake. This Court finds that the understanding of the parties prior to the execution of the offer to purchase was that as to the south west quarter, the seller would convey sufficient property to permit the operation of the existing pivot and that notwithstanding that mutual agreement, the seller caused the written

> description on the offer to purchase and subsequent deeds to be a lesser property which was inadequate for the operation of the pivot. This Court finds that by failure to disclose the intentional misstatement, the actions of the Plaintiff constituted actionable fraud by false representation and justifiable grounds for reformation of the instruments.

Much of the law in this area is well settled. Both parties recognize that in an action for reformation of a written contract, the burden of proof rests upon the moving party to overcome the strong presumption arising from the terms of the written instrument. *Farmers Coop. Assn. v. Klein*, 196 Neb. 180, 241 N.W.2d 686 (1976). It is established that to warrant reformation of a written instrument, the evidence must be clear, convincing, and satisfactory. A mere preponderance of the evidence is not sufficient. *Waite v. Salestrom*, 201 Neb. 224, 266 N.W.2d 908 (1978).

Applying those principles to the case at bar, we have no difficulty in reaching the same conclusion as did the trial court. The parties, acting through their representatives, agreed to sell the property irrigated by the pivot. The unilateral determination by Johnson that the dividing line should be 110 feet into the east half of the section is not controlling as to the intent of the parties. That intent is fully established by all the evidence except that of Johnson. The circumstances surrounding the transaction point to only one conclusion—if Johnson agreed to, and did, install a 10-tower pivot irrigation system, he must have logically intended to convey sufficient land to let that 10-tower pivot be used. The finding of the trial court that the agreement of the parties was to that effect is fully supported by the evidence, and we reach the same conclusion.

Johnson argues that the trial court found there was fraud in the transaction, rather than mutual mistake, and that since fraud was not pled, the trial court's judgment must be reversed. In *Lippire v. Eckel*, 178 Neb. 643, 650, 134 N.W.2d 802, 807 (1965), quoting from *United Services Automobile Assn. v. Hills*, 172 Neb. 128, 109 N.W.2d 174 (1961), we said, " 'It is the facts well pleaded that determine the nature of the action and the relief to be granted.' " Here, the facts were pleaded in the

petition as to mutual mistake. Johnson denied those facts in his answer, and in his testimony, in answer to the question, "Did you think at the time that you were giving of the 110 foot at the time that you asked that to be put in the contract that there would be sufficient ground for the purchasers to be able to operate their pivot as you had done?" Johnson replied, "To operate their pivot, was that the question? No."

Although the Shimons may have thought they were involved in a mutual-mistake situation, Johnson's general denial and Johnson's testimony above indicate that Johnson was willing to, and did, defraud Shimons. The pleadings as a whole presented enough facts to permit the court to reach the conclusion that it did.

The legal posture of the case does not change, in any event. As stated in *Waite v. Salestrom, supra* at 229, 266 N.W.2d at 912: "Equity will decree reformation of a contract for a mistake only if the mistake is mutual. . . . Equity may also grant reformation to conform to the antecedent agreement of the parties where there is mistake on one side and fraud or inequitable conduct on the other."

In this case there has been an antecedent agreement of the parties, as found by the trial court and this court, to sell the land irrigated by the pivot system; there has been a mistake on Shimons' part in accepting the 110-foot figure; and Johnson is at the least guilty of inequitable conduct in setting the 110-foot figure when he knew the pivot system would be useless if the 110-foot figure was used as the measurement of the land conveyed.

Johnson's reliance on the parol evidence rule is misplaced. As stated in *Olds v. Jamison*, 195 Neb. 388, 391-92, 238 N.W.2d 459, 462 (1976):

> Parol evidence is generally admissible when it is offered for the purpose of explaining and showing the true nature of the transaction between the parties. Central Constr. Co. v. Osbahr, 186 Neb. 1, 180 N.W.2d 139. In any event, this court has ordinarily applied the parol evidence rule only in the absence of fraud, mistake, or ambiguity. Securities Acceptance Corp. v. Blake, 157 Neb. 848, 62 N.W.2d 132.

Here, mistake and fraud were involved. Parol evidence was necessary in order that a determination could be made as to the terms of the antecedent agreement between the parties. As stated in 3 A. Corbin, Corbin on Contracts § 573 at 358-60 (1960) (a statement referred to with approval, or quoted in, *Central Constr. Co. v. Osbahr*, 186 Neb. 1, 180 N.W.2d 139 (1970), and *Olds v. Jamison, supra*):

> The use of such a name [the parol evidence rule] for this rule has had unfortunate consequences, principally by distracting the attention from the real issues that are involved. These issues may be any one or more of the following: (1) Have the parties made a contract? (2) Is that contract void or voidable because of illegality, fraud, mistake, or any other reason? (3) Did the parties assent to a particular writing as the complete and accurate "integration" of that contract?
>
> In determining these issues, or any one of them, there is no "parol evidence rule" to be applied. On these issues, no relevant evidence, whether parol or otherwise, is excluded. No written document is sufficient, standing alone, to determine any one of them, however long and detailed it may be, however formal, and however many may be the seals and signatures and assertions. No one of these issues can be determined by mere inspection of the written document.

Nebraska has consistently followed this rule. In *Story v. Gammell*, 68 Neb. 709, 712, 94 N.W. 982, 983 (1903), we said:

> An objection that the plaintiff can not have relief because he can not prove the allegations without varying the terms of a written contract by parol is scarcely deserving of mention. It is obvious that if this rule was applicable to cases like the one at bar the jurisdiction of the courts to reform instruments because of fraud or mutual mistake would be entirely defeated. The one purpose of such actions is to contradict or vary the terms of a written agreement, and the evidence, in most cases, is mainly or wholly oral.

See, also, *Cunningham v. Covalt*, 204 Neb. 512, 515, 283 N.W.2d 53, 55 (1979), where, although the parol evidence rule

was not discussed, this court affirmed the reformation of a deed conveying the south half of a section to reflect conveyance of land " 'south of the pasture fence extending east and west in the approximate middle' " of the section.

The judgment and order of the district court in this case are correct and are affirmed in all respects.

AFFIRMED.

BOSLAUGH, J., participating on briefs.

ROBERT PETERSON AND WILLIAM PETERSON, DOING BUSINESS AS PETERSON BROTHERS, APPELLEES AND CROSS-APPELLANTS, V. NORTH AMERICAN PLANT BREEDERS, DOING BUSINESS AS MIGRO SEED COMPANY, A CORPORATION, APPELLANT AND CROSS-APPELLEE.

354 N.W.2d 625

Filed August 10, 1984. No. 83-374.

1. **Uniform Commercial Code: Sales: Warranty.** Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
2. _____: _____: _____. The existence of an express warranty depends upon the particular circumstances in which the language is used and read. A catalog description or advertisement may create an express warranty in appropriate circumstances. The trier of fact must determine whether the circumstances necessary to create an express warranty are present in a given case. The test is whether the seller assumes to assert a fact of which the buyer is ignorant, or whether he merely states an opinion or expresses a judgment about a thing as to which they may each be expected to have an opinion and exercise a judgment.
3. _____: _____: _____. When a producer of seed places sealed bags of hybrid seed corn in its chain of distribution, it carries with it, unless effectively excluded or modified, an implied warranty of merchantability that protects the ultimate buyer-user in that chain.
4. **Pretrial Conferences: Appeal and Error.** The standard of review for denial of a motion to amend a pretrial order is whether there was an abuse of discretion.
5. **Crops: Damages.** The measure of damages where a crop is injured but not rendered entirely worthless as a result of the acts or omissions of another is the difference between the value at maturity of the probable crop if there had been

no injury and the value of the actual crop at the time injured less the expense of fitting for market that portion of the probable crop which was prevented from maturing.

6. **Damages: Proof.** Damages need not be proved with mathematical certainty, but the evidence must be sufficient to enable the trier of fact, in this case the jury, to estimate with a reasonable degree of certainty and exactness the actual damages.
7. **Claims: Prejudgment Interest.** Where the amount of a loss, the subject of litigation, cannot be computed without opinion or discretion, the claim is unliquidated, and prejudgment interest is not recoverable.

Appeal from the District Court for Rock County: HENRY F. REIMER, Judge. Affirmed.

Avery Gurnsey, and Charles L. House and Larry Norton of House, Norton & Mattix, for appellant.

David A. Domina and Jeffrey L. Hrouda of Domina Law Firm, P.C., for appellees.

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

COLWELL, D.J., Retired.

This is a suit for breach of express warranty and implied warranty of merchantability in the sale of seed corn. North American Plant Breeders, doing business as Migro Seed Company, defendant, appeals from an adverse $76,519.08 jury verdict and judgment in favor of plaintiffs, Robert Peterson and William Peterson, doing business as Peterson Brothers.

Plaintiffs are extensive farmers in the Rock County, Nebraska, area, where much of the land is sandy soil, sometimes called the Sandhills. The Peterson land here was irrigated from wells and four center pivots. The irrigation equipment revolved around each pivot, and all plantings were in circles.

Defendant's headquarters is in Mission, Kansas. It produces hybrid seeds, including the Migro SPX-8 variety. Hybrid seed corn is a product of scientific genetic cross-breeding of corn to produce a seed having desirable germination, growing, and production qualities intended by the producer.

In the spring of 1981 plaintiffs seeded four circles, alternating multiple rows of Migro SPX-8 with other seed varieties produced by four other companies. Plaintiffs

regularly kept and maintained records of the several plantings reflecting germination, cultivation, irrigation, fertilizer and herbicide applied, production, and expenses.

The corn crop progressed normally until July 23, 1981, when plaintiffs discovered that 65 to 70 percent of the Migro variety corn plants had broken off around the ear level. The rest of the corn crop of other varieties had minimal damage. The night before this discovery, there had been a thunderstorm which apparently was within the ordinary range of severity. The crop damage was promptly reported to the dealer, who notified defendant, according to his business custom. Plaintiffs continued to irrigate and otherwise uniformly nurture their total crop, including the Migro plants. The Migro variety corn plants continued to suffer stalk breakage, and by the time of harvest the Migro variety corn plants yielded only 19 1/2 bushels of corn per acre. The other varieties of corn on the same farmland yielded 113 3/4 bushels per acre.

Plaintiffs purchased the Migro seed corn from John Sandall (dealer), a neighboring farmer who acted as a Migro dealer and a dealer for other seed companies. Plaintiffs paid the dealer by offsetting the purchase price against an account Sandall owed to a fertilizer company owned by plaintiffs and their father. Prior to buying the seed, Robert Peterson studied advertising literature published by defendant, which, among other things, described Migro SPX-8 to have excellent stalk quality. Plaintiffs picked up the seed at Sandall's warehouse as they needed it for planting. Plaintiffs bought 102 bags, planted 77 bags on their farm, and the rest were planted on their father's farm. The bags came sealed with disclaimer tags attached, as follows: "LIMITED WARRANTY AND LIMITATION OF REMEDY. This product is sold by product description only. THERE ARE NO WARRANTIES, EXPRESSED OR IMPLIED, AND WARRANTIES OF MERCHANTABILITY AND FITNESS ARE EXPRESSLY DISCLAIMED AND EXCLUDED."

Plaintiffs' expert witness, an agronomist, testified that the cause of the breakage was the poor translocation of silica in the plant. Silica, being in heavy concentration in the Sandhills, is absorbed by the roots of the plant and distributed throughout

the plant; the damaged Migro plants had an overabundance of silica deposits at the ear level of the stalk in comparison to the silica level in the leaves. This gathering of silica in the stalk weakened the plants and contributed to their breakage. His opinion was that Migro SPX-8 was unsuitable for planting in the Sandhills.

Defendant's expert, a professor of plant breeding, said that corn plants reach a stage in their growth, about 8 weeks after planting, when, due to rapid growth, the plant stalks are brittle for a 3- to 4-day period. Different varieties of corn, even though planted on the same day, reach this stage at different times, thus explaining the confinement of the damage to one variety of hybrid and relating the damage to the storm.

Defendant assigns seven errors.

Error 1 - Express Warranties

Plaintiffs claimed that defendant had made and breached these express warranties that appeared in its sales literature furnished to them by Sandall:

a. A hybrid specially bred for superb performance and tested throughout the corn belt . . . under a broad range of growing conditions.
b. A hybrid with excellent stalk standability, outstanding heat and drought tolerance, good disease and insect resistance and a superior grain quality.
c. An attractive looking, top yielding single-cross with proven consistency in a maturity range of 105—108 days, and exhibiting excellent stalk and root quality.
d. A hybrid that would out-yield many longer season hybrids.
e. A hybrid with very good emergence, excellent root strength and stalk quality, very good dry-down rapidity and excellent ear retention.

At the end of plaintiffs' case in chief, defendant moved for a directed verdict on the ground, among others, that plaintiffs had not shown that the literature contained any warranties; rather, it was merely seller's talk, or puffing.

In considering whether a directed verdict motion should be granted, the party against whom such a motion is aimed is entitled to have all controverted facts resolved in his favor and

to have the benefit of every reasonable inference from the evidence. *May v. Hall Co. L'stock Improvement Assn.*, 216 Neb. 476, 344 N.W.2d 629 (1984). The problem with defendant's contention is that the question of the existence and scope of an express warranty is one of fact. Neb. U.C.C. § 2-313, comment 3 (Reissue 1980); *Lovington Cattle Feeders v. Abbott Lab.*, 97 N.M. 564, 642 P.2d 167 (1982); *Overstreet v. Norden Laboratories, Inc.*, 669 F.2d 1286 (6th Cir. 1982).

Section 2-313 provides in part:

> (1) Express warranties by the seller are created as follows:
>
> (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
>
> (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
>
> . . . .
>
> (2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

The question becomes whether the statements made by defendant are expressions of opinion or commendations of the goods or affirmations of fact.

The test adopted by many courts is well stated in *Overstreet v. Norden Laboratories, Inc., supra*:

> The existence of an express warranty depends upon the particular circumstances in which the language is used and read. . . . A catalog description or advertisement may create an express warranty in appropriate circumstances. . . . *The trier of fact must determine whether the circumstances necessary to create an express warranty are present in a given case. . . . The test is "whether the seller*

> *assumes to assert a fact of which the buyer is ignorant, or whether he merely states an opinion or expresses a judgment about a thing as to which they may each be expected to have an opinion and exercise a judgment.*"

(Emphasis supplied.) *Id.* at 1290-91.

In connection with the fact question here, the sale of hybrid seed corn is unusual in that it is delivered to the ultimate buyer-user in sealed bags, inspection of the seed by the buyer will generally not reveal any of its growing qualities, and the first notice of the seed's worth and performance is after planting and well into the growing season. Consequently, in the absence of a prior planting experience or other reliable information, the buyer may be justified to rely on the claims of the producers as more than puffing; it is a fact question. Here, plaintiffs had no prior knowledge of or planting experience with Migro SPX-8. The express warranty issue was properly submitted to the jury.

Error 2 - Implied Warranty of Merchantability and the Requirement of Privity of Contract

Error 6 - John Sandall Was an Independent Dealer

These two errors are discussed together.

Neb. U.C.C. § 2-314 (Reissue 1980) provides in part:

> (1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. . . .
>
> (2) Goods to be merchantable must be at least such as
>
> (a) pass without objection in the trade under the contract description; and
>
> (b) in the case of fungible goods, are of fair average quality within the description; and
>
> (c) are fit for the ordinary purposes for which such goods are used; and
>
> (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
>
> (e) are adequately contained, packaged, and labeled as the agreement may require; and
>
> (f) conform to the promises or affirmations of fact

made on the container or label if any.

(3) Unless excluded or modified (Section 2-316) other implied warranties may arise from course of dealing or usage of trade.

Sandall testified that he purchased the Migro seed from defendant, stored it in his warehouse in the original container bags, and then resold it to plaintiffs and other customers. The trial court denied defendant's proffered evidence that Sandall was an independent dealer and that disclaimers existed between them.

Defendant contends that privity of contract is an essential requirement between defendant seed producer and the ultimate buyer-user where a breach of warranty of merchantability is claimed and there is a claim of consequential damages for economic loss. We have not previously ruled on this issue.

We have held that an implied warranty that food products are wholesome may be asserted for personal injury against a remote manufacturer if the products are shown to have reached the consumer in the same condition in which they left the manufacturer. *Asher v. Coca Cola Bottling Co.*, 172 Neb. 855, 112 N.W.2d 252 (1961). Privity of contract has also been removed as a barrier to asserting an express warranty claim based upon statements made in advertising and other printed matters prepared by the manufacturer. *Koperski v. Husker Dodge, Inc.*, 208 Neb. 29, 302 N.W.2d 655 (1981); *Hawkins Constr. Co. v. Matthews Co., Inc.*, 190 Neb. 546, 209 N.W.2d 643 (1973).

There is a split of authority on the question here presented. *State ex rel Western Seed v. Campbell*, 250 Or. 262, 442 P.2d 215 (1968), follows the traditional rule requiring privity of contract. *Hiles Co. v. Johnston Pump Co.*, 93 Nev. 73, 79, 560 P.2d 154, 157 (1977), represents the contrary rule:

> We perceive no reason to distinguish between recovery for personal and property injury, on the one hand, and economic loss on the other. Cf. Santor v. A & M Karagheusian, Inc. [44 N.J. 52], 207 A.2d 305 (N.J. 1965); Randy Knitwear, Inc. v. American Cyanamid Company [11 N.Y.2d 5], 181 N.E.2d 399 [226 N.Y.S.2d 363] (N.Y. 1962). Instead, we believe that lack of privity

> between the buyer and manufacturer does not preclude an action against the manufacturer for the recovery of economic losses caused by breach of warranties. See: Cova v. Harley Davidson Motor Company [26 Mich. App. 602], 182 N.W.2d 800 (Mich.App. 1970); Kassab v. Central Soya [432 Pa. 217], 246 A.2d 848 (Pa. 1968); Lang v. General Motors Corporation, 136 N.W.2d 805 (N.D. 1965); Spence v. Three Rivers Builders & Masonry Supply [353 Mich. 120], 90 N.W.2d 873 (Mich. 1958); Hoskins v. Jackson Grain Co., 63 So.2d 514 (Fla. 1953); see also, Schwartz, The Demise of Vertical Privity: Economic Loss under the Uniform Commercial Code, 2 Hofstra L. Rev. 749 (1974); Zammit, Manufacturers' Responsibility for Economic Loss Damages in Products Liability Cases, 20 N.Y.L.F. 81 (1974).

See, also, *Cameo Curtains, Inc. v. Philip Carey Corp.*, 1981 Mass. Adv. Sh. 411, 416 N.E.2d 995; *Whitaker v. Farmhand, Inc.*, 173 Mont. 345, 567 P.2d 916 (1977); *Nobility Homes of Texas, Inc. v. Shivers*, 557 S.W.2d 77 (Tex. 1977); *Cova v. Harley Davidson Mtr. Co.*, 26 Mich. App. 602, 182 N.W.2d 800 (1970).

We are persuaded that the latter *Hiles Co.* rule applies to the facts here.

Our Legislature has already addressed the scope of warranty recovery for horizontal nonprivity plaintiffs, Neb. U.C.C. § 2-318 (Reissue 1980), but it has remained silent as to vertical nonprivity plaintiffs seeking recovery such as presented here.

Historically, the privity of contract requirement in suits by an injured ultimate purchaser of a product was seen as necessary to prevent "absurd and outrageous consequences" involving unlimited exposure of manufacturers to liability. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 Yale L.J. 1099 (1960). Such has not been the result in the history of strict liability for defective products litigation for which privity is not required.

The defendant argues that the privity requirement is necessary to prevent it from being exposed to unknown and excessive damages. Recovery for breach of implied warranty is limited to those damages reasonably contemplated by the

parties and proximately caused by the breach. Neb. U.C.C. § 2-715 (Reissue 1980). The defendant also argues that if its implied warranty of merchantability is extended to those it expects to ultimately use its seed, and not just to its dealers, then it will in effect be an insurer of its customers' crops. Nothing in this opinion is intended either to suggest such a result or to include buyers dissatisfied with the seed performance that was less or other than expected without regard for all Uniform Commercial Code requirements, § 2-314, and the standard of proof required, § 2-715. The liability arises and that warranty extends to reasonable damages proximately caused by its placing an unmerchantable product in the marketplace. Also, there is no reason that the defendant cannot disclaim its warranty liability by policing its dealers and making sure that its disclaimer reaches the ultimate user of its product during the negotiations for the product's sale. We therefore hold that when a producer of seed places sealed bags of hybrid seed corn in its chain of distribution, it carries with it, unless effectively excluded or modified, an implied warranty of merchantability that protects the ultimate buyer-user in that chain.

Error 3 - The Giving of Instruction No. 9

Instruction No. 9 states:

> Defendant, in its affirmative defense, claims as follows:
>
> An express limited warranty and limitation of remedy has been created with respect to the Migro SPX-8 seed corn as set out on tag attached to Exhibit No. 9.
>
> This limitation of warranty and limitation of remedy, if made on or after delivery of the goods is ineffectual unless the buyer assents or is charged with knowledge as to the transaction.
>
> The burden of proof is upon the Defendant to establish each of the above elements by a preponderance of the evidence then your verdict shall be for Defendant.

Defendant claims error on two grounds. First, the instruction should have quoted the language of the limited warranty and remedy. This was not necessary; exhibit 9 is the seed bag, and it is a part of the evidence considered by the jury. Second, the instruction is ambiguous and forces defendant to

prove that the tag was known to the plaintiffs at the time of the sale. This was not advanced by defendant at the jury instruction conference, and in the absence of plain error, it will not now be considered. *Enyeart v. Swartz*, 213 Neb. 732, 331 N.W.2d 513 (1983). We find no prejudicial error in instruction No. 9.

Error 4 - Discovery Sanctions Imposed

After the trial plaintiffs asked that discovery sanctions be imposed against defendant on two grounds. First, one of defendant's employees testified about the testing of Migro SPX-8, and during cross-examination a document containing test results came to light. A copy of this document had not been supplied to plaintiffs even though an order to produce all test results had been made by the court. The trial court struck the evidence as to those tests. The second ground was in connection with a deposition taken on the first day of trial. It appears that plaintiffs' expert witness was not available for a deposition at the time convenient to defendant, even though it was at a time when plaintiffs represented that the witness could be deposed. On the opening day of trial the trial court refused defendant's motion to exclude the witness and ordered his deposition taken during trial. It also appears that the deposition of one of defendant's experts was taken by the plaintiffs at the same time. At the sanction hearing, a $200 attorney fee was assessed against defendant for the costs in taking the deposition.

Neb. Ct. R. 37 (Rev. 1983) of the Nebraska Discovery Rules allows the assessment of attorney fees caused by failure to abide by a discovery order. There is confusion in the record concerning the basis for the sanction; however, the trial court based the sanction on the taking of depositions. It was within the trial court's discretion, and we cannot say that it was an abuse of discretion.

Error 5 - Amendment of Pretrial Order

On January 10, 1983, 2 months prior to trial, defendant filed a motion to amend the pretrial witness list to allow the testimony of certain employees of defendant, expert witnesses, and 11 Nebraska farmers who had planted Migro SPX-8. The trial court granted the order in part, allowing the employees and the expert witnesses to testify, but only one of the farmers. Defendant made an offer of proof at trial that the other farmers

would testify that they had success with Migro SPX-8 seed produced from the same lot as that sold to plaintiffs.

Defendant contends that such testimony was relevant to its defense of implied warranty to show Migro SPX-8 was "fit for the ordinary purposes for which such goods are used." § 2-314(2)(c). One farmer and the dealer, who was also a farmer, did so testify for defendant.

The admission of evidence is in the sound discretion of the trial court, and evidence may be denied even though it may be relevant. Neb. Rev. Stat. § 27-403 (Reissue 1979).

The standard of review for denial of a motion to amend a pretrial order is whether there was an abuse of discretion. *Mousel v. ten Bensel*, 195 Neb. 456, 238 N.W.2d 632 (1976). See, also, Pretrial Procedure, Neb. Ct. R. at 10.1 (Rev. 1983). The action of the trial court was neither an abuse of discretion nor prejudicial to defendant.

Error 7 - Proof of Damages—Crop Loss

Defendant claims that plaintiffs failed in their proof of crop loss damages, in that the evidence does not meet the established standard of *Hopper v. Elkhorn Valley Drainage District*, 108 Neb. 550, 188 N.W. 239 (1922), restated in *Gable v. Pathfinder Irr. Dist.*, 159 Neb. 778, 787, 68 N.W.2d 500, 506 (1955):

> The measure where a crop is injured but not rendered entirely worthless as a result of the acts or omissions of another is the difference between the value at maturity of the probable crop if there had been no injury and the value of the actual crop at the time injured less the expense of fitting for market that portion of the probable crop which was prevented from maturing.

Neb. U.C.C. § 2-714 (Reissue 1980) provides in part:

> (1) Where the buyer has accepted goods . . . he may recover as damages for any nonconformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.
>
> . . . .
>
> (3) In a proper case any incidental and consequential damages under the next section may also be recovered.

Section 2-715 provides in part:

(2) Consequential damages resulting from the seller's breach include

(a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and

(b) injury to person or property proximately resulting from any breach of warranty.

In *Shotkoski v. Standard Chemical Manuf. Co.*, 195 Neb. 22, 28-29, 237 N.W.2d 92, 97 (1975), we stated:

> Damages need not be proved with mathematical certainty, but the evidence must be sufficient to enable the trier of fact, in this case the jury, to estimate with a reasonable degree of certainty and exactness the actual damages. . . . It is the duty of the District Court to refrain from submitting to the jury the issue of damages where the evidence is such that it cannot determine that issue without indulging in speculation and conjecture.

See, also, *El Fredo Pizza, Inc. v. Roto-Flex Oven Co.*, 199 Neb. 697, 261 N.W.2d 358 (1978).

The record is uncontradicted that plaintiffs made continuous good faith efforts to mitigate any crop loss involving the Migro seed. See § 2-715(2).

Included in the evidence supporting plaintiffs' consequential damages were: All seed varieties were planted, cultivated, fertilized, irrigated, and harvested in the same manner. Two hundred twenty acres in the four circles were planted with Migro SPX-8 seed, and the remaining acres were planted with four other seed varieties. Plaintiffs maintained detailed farming records concerning all crops. Uncontroverted tests established the average yield of the Migro corn at 19½ bushels per acre and the other varieties at 113¾ bushels per acre. The probable crop was estimated at 22,000 bushels. A part of the harvested corn was sold for $3.42 per bushel, and the remainder was put into a U.S. reserve program at $2.83 per bushel, plus $0.265 per bushel storage. For convenience, all planted corn was harvested by plaintiffs together. Separate records of harvesting expenses for the probable crop were not maintained;

plaintiffs claim such proof was unreasonable.

Plaintiffs argue that the *Hopper* rule should not apply in warranty cases brought under the Uniform Commercial Code. We see no reason in this case to apply a different rule depending upon the method of injury, whether by external forces or improper seed; the economic loss is the same.

It was not necessary for plaintiffs to show the expense of harvesting the probable crop, since they harvested all the growing plants on the 220 Migro acres; that expense was about the same whether a good or poor crop. The question, then, is limited to the expense of handling and trucking the probable crop from the field to plaintiffs' storage facility or to market, or both, which is a normal farming procedure. Mathematical precision of that expense could require consideration of many factors, including hired labor costs, fuel costs, machinery use-depreciation costs, and repair expenses. Such would assist the jury; however, they are not absolutes. We conclude that the evidence proving damages was not speculative, and it was sufficient for the jury to estimate and assess plaintiffs' damages with a reasonable degree of certainty and exactness.

Cross-Appeal

In their cross-appeal plaintiffs claim error that prejudgment interest was not allowed. At trial plaintiffs were prevented from proving what rate of return they would have on their crop proceeds if they would have received such proceeds at the time the grain could have been sold, if produced. They contend that the loss of the use of the crop proceeds is a § 2-715(2)(a) proximate injury that was foreseeable and, thus, a recoverable element of their damage. They cite 4 R. Anderson, Anderson on the Uniform Commercial Code § 2-715:46 (3d ed. 1983). That section and the cases therein are aimed at establishing that the recovery of amounts by the buyer as interest paid in connection with the purchase of a product or amounts paid by the buyer as interest on amounts that needed to be borrowed as a result of a breach of warranty are recoverable. There is no persuasive reason to depart from our usual rule that where the amount of a loss, the subject of litigation, cannot be computed without opinion or discretion, the claim is unliquidated and prejudgment interest is not recoverable. *Erin Rancho Motels v.*

United States F. & G. Co., ante p. 9, 352 N.W.2d 561 (1984).

AFFIRMED.

CHRISTINE M. LITTLE, APPELLEE AND CROSS-APPELLANT, V. JAMES L. GILLETTE ET AL., APPELLANTS AND CROSS-APPELLEES.

354 N.W.2d 147

Filed August 10, 1984. Nos. 83-442, 83-686.

1. **Fraud.** It is a general rule that fraud must relate to a present or preexisting fact and cannot ordinarily be predicated on an unfulfilled promise or a statement as to future events. An exception to this rule is representations as to future acts that are falsely and fraudulently made with an intent to deceive.
2. **Consumer Protection.** Generally, institutions that are governed by the Nebraska Department of Banking and Finance or the Nebraska State Real Estate Commission are exempt from the provisions of the Nebraska Consumer Protection Act, Neb. Rev. Stat. §§ 59-1601 et seq. (Reissue 1978).
3. **Contracts: Fraud: Election of Remedies.** Where a party is induced to enter a contract by fraud, the party must, upon discovery of the fraud, elect a remedy and shall either affirm the contract and sue for damages or disaffirm and be reinstated to the position existing prior to the contract.
4. **Fraud: Damages.** The measure of general damages for fraud in inducing the purchase of property is the difference between the actual value of the property at the time of the purchase and the value it would have had if the seller's representation had been true.

Appeal from the District Court for Gage County: WILLIAM B. RIST, Judge. Affirmed in part, and in part reversed and remanded with directions.

Daniel E. Wherry of Johnston, Barber, Wherry & Knight, for appellant Gillette.

Thomas J. Culhane and Tamra L. Wilson of Erickson, Sederstrom, Leigh, Eisenstatt, Johnson, Kinnamon, Koukol & Fortune, P.C., for appellant Security Bank and Trust Company.

Thomas J. Fitchett of Pierson, Ackerman, Fitchett, Akin & Hunzeker, for appellants Edwards and Gateway.

Stephen Speicher, for appellee.

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

WHITE, J.

Appellee, Christine M. Little Koenig (Little), brought this action to recover damages for fraud. Her second amended petition was based on both common-law fraud and a violation of the Nebraska Consumer Protection Act, Neb. Rev. Stat. §§ 59-1601 et seq. (Reissue 1978), for damages sustained by her in the purchase and operation of a Mexican fast-food franchise restaurant in Beatrice, Nebraska. As defendants, she named Donald B. Edwards (Edwards), Gateway Realty of Beatrice, Inc. (Gateway), James L. Gillette (Gillette), First Security Bank and Trust Co. (Bank), Nancy Gillette, and First Security Savings of Beatrice, Nebraska (First Security Savings). The case was tried to a jury in the district court for Gage County, Nebraska. At the close of Little's evidence the court, on the parties' respective motions, dismissed Nancy Gillette and First Security Savings. At the close of all the evidence the court, on its own motion, consolidated the statutory and common-law causes of action. The jury was instructed on the elements of common-law fraud only. The jury returned a verdict for Little against all the remaining defendants in the amount of $43,220.30.

All the appellants filed timely motions for a new trial as well as motions for judgment notwithstanding the verdict. These motions were overruled on May 9, 1983, and the court requested Little to submit information relative to award of attorney fees under § 59-1609. Appellants, having orally suggested the possibility that § 59-1617 exempted them from liability under the Consumer Protection Act, then filed their motions for leave to amend their general denials and plead the effect of § 59-1617. In response, Little filed a motion for leave to amend her second amended petition, a motion she had made previously during the trial.

On August 19, 1983, the court overruled all the parties' motions for leave to file amended pleadings, denied Little's request for statutory damages under § 59-1609, entered

judgment on the verdict, and awarded Little costs and $10,900 in attorney fees pursuant to § 59-1609. Appellants, having previously appealed from the order overruling their motions for a new trial and for judgment notwithstanding the verdict, then filed a separate appeal from the order awarding attorney fees. Those appeals and the appellee's cross-appeal have been consolidated in this court.

The facts, taken in light most favorable to the prevailing party, reveal that in July or August 1979 Little, having previously had some success running a motel, sought to leave her job at a drugstore in Beatrice and reenter the motel field. Gateway, through one of its agents, Edwards, had sold her the home in which she then resided. She had been satisfied with this transaction and went to Gateway and Edwards for help in locating a motel.

Edwards informed her that he knew of no motels currently available, and he showed her a clothing store instead. After reviewing certain financial records, which showed gross sales of $20,000 per year and a net profit of $2,000, Little informed Edwards that she was not interested in the business as it had insufficient net profit.

On September 12, 1979, Gateway obtained a listing contract from Beatrice Taco Corporation on a piece of commercial real estate. Edwards showed the property to Little. Little informed Edwards that a restaurant business did not interest her. Two weeks later Edwards and Little revisited the site. On that occasion they went inside. Edwards told her the business had been closed but could be a good business if the right person got in there; that Little was the right person; and that he knew the business could make money. Subsequently, a third trip was made to the site. Frank Smith, Jr., Gateway's president, accompanied Little and Edwards. They discovered certain documents inside the building. All three examined them, but none was able to gain any useful information concerning the past operation's profit or loss. They also discovered a brochure from the Aunt Chilotta franchise which showed eight separate calculations of net income per year based on different levels of sales. Edwards, however, told Little that the figures shown would have to be checked out, since they appeared to depend on

local variables. He was to make that investigation but never did. Little further testified that Edwards quoted her a figure of $10,000 net profit per month as likely from the operation of the business. He made these statements to her at his office, in her home, and during two conversations at the offices of the Bank, where Little had gone with him to discuss financing possibilities. On these latter two occasions Edwards' statements were confirmed by Gillette; both Gillette and Edwards represented to the appellee that she could make a net profit of $10,000 per month. Little also testified that Nancy Gillette, Gillette's wife and a stockholder of the Bank and an officer, director, and stockholder of First Security Savings, discussed the business' potential and represented to the appellee that she could make a profit.

A purchase agreement for the restaurant was signed by Little on October 16, 1979, for $75,000. To raise the purchase price Little borrowed money from both the Bank and from First Security Savings. After a 2-week training course offered by the Aunt Chilotta franchise, the restaurant was opened by the appellee on January 7, 1980. Little managed the property until about May 1980 and then hired a Mr. Crosier as her assistant manager. Plaintiff fired Crosier after about 2 weeks, and the business was closed for about 2 weeks thereafter, until early June 1980. Crosier was then rehired. In December 1980 David Pethoud was hired to manage the property. Pethoud managed the property for 6 months, until June 1981. At that time Little resumed management of the property, and on September 28, 1981, the restaurant was closed. In December 1980 appellee listed the property for sale with Gateway, but a buyer was never found. Except for a short period of time, the business was operated at a loss.

The first question to be resolved on appeal is whether or not a cause of action for fraudulent misrepresentation exists under the facts of this case. We believe that it does.

It is a general rule that fraud must relate to a present or preexisting fact and cannot ordinarily be predicated on an unfulfilled promise or a statement as to future events. *Cook Livestock Co., Inc. v. Reisig*, 161 Neb. 640, 74 N.W.2d 370 (1956); *Boettcher v. Goethe*, 165 Neb. 363, 85 N.W.2d 884

(1957). This general rule has a well-recognized exception, the exception being when such representations as to future acts are falsely and fraudulently made with an intent to deceive. *Central Constr. Co. v. Osbahr*, 186 Neb. 1, 180 N.W.2d 139 (1970); *Transportation Equipment Rentals, Inc. v. Mauk*, 184 Neb. 309, 167 N.W.2d 183 (1969). In *Ames Bank v. Hahn*, 205 Neb. 353, 356, 287 N.W.2d 687, 689 (1980), this court had occasion to decide whether a party had adequately pleaded an intent to deceive, and held:

> The requirement of scienter is satisfied by alleging that the person making the statement knew the statement was false, or made it as a positive statement without knowledge as to whether it was true or false, and the false statement was made with intention that it should be acted upon.

In the instant case the jury was instructed that actionable fraud may not be based upon mere expression of opinion unless such an opinion is given with an intent to deceive. The instruction was proper and supported by Nebraska case law. See, *Central Constr. Co. v. Osbahr, supra; Ames Bank v. Hahn, supra*. The record contains evidence from which the jury could conclude that the statements of Edwards and Gillette were made with an intent to deceive.

The jury heard direct testimony that Edwards knew that the appellee was seeking to buy a business that generated at least a reasonable profit. In fact Edwards was told that the reason Little did not wish to buy the clothing business that Edwards had shown her was because the previous operation did not generate enough profit. It could be inferred from the evidence that Gillette also knew that the appellee was seeking to buy a business with a profit potential. The record discloses that prior to the time that the purchase was completed, Gillette had told Smith that the previous operation of the Beatrice Taco Corporation was a "financial disaster." Gillette's brother was the president of the previous operation, and the Bank held the mortgage on the property. This mortgage was 12 months in default. Even after Edwards, who had been an owner of a fast-food business in Beatrice for 15 years, reviewed the Aunt Chilotta brochure which detailed expected profit potentials

based on various degrees of volume, he continued to tell the appellee that she could make $10,000 a month net profit. Little testified that none of the appellants told her that the previous operation was a failure. She further testified that she relied on the representations of Edwards and Gillette that she could make a profit when she purchased the business. The motives for the false representation are clear: commission on the sale for Edwards and Gateway, and inducement for the sale of what was essentially property of the Bank for Gillette.

Against this background there was sufficient evidence in which the jury could find that the representations made by Edwards and Gillette came within the exception of opinions given with "intent to deceive." It is this finding of fraudulent intent that distinguishes the instant case from the cases of *Smith v. Wrehe*, 199 Neb. 753, 261 N.W.2d. 620 (1978), and *Boettcher v. Goethe, supra*.

In the instant case Edwards' and Gillette's representations, although in the form of opinions, could have reasonably been understood by the appellee to imply that there were facts that justified the opinion or at least that there were no facts that were incompatible with it. Such is not the case, as all of the appellants knew that the previous operation was a failure. Although some allowance must be made for "sales talk," the appellants' false representations amounted to a "con" to induce the appellee to purchase property she otherwise would not have purchased.

The appellants next contend that the appellee's recovery was barred because ordinary prudence would have prevented reliance on the statement. In *Foley v. Holtry*, 43 Neb. 133, 143, 61 N.W. 120, 123-24 (1894), we stated:

> We have little sympathy with the theory always advanced in such cases that the defendant should be protected from the consequences of false statements made by him for the purpose of inducing the plaintiff to act, because the plaintiff had sufficient confidence in the defendant to believe the statement and not proceed upon the assumption that he was dealing with a man unworthy of belief. There are some cases where the fact lies so open before the plaintiff that he is unwarranted in closing his

> eyes to its existence and depending upon a statement made to him by the other party. We do not think that this principle applies to any case where an absolute statement of fact is made and where an investigation elsewhere would be necessary to disclose its falsity. . . . In such case the plaintiff may, if he choose, rely upon the representation made to him, and if he do so, the defendant cannot complain.

The appellants shed little light as to what investigation Little could have undertaken to ascertain that the previous operation was operated at a loss. She had asked for previous financial records, to no avail. Her suspicions were somewhat assuaged by the representations that she could make a profit by Edwards and Gillette, both of whom were experienced in business. The question of reliance was properly submitted to the jury, and it determined the issue adversely to the appellants' position. As the jury's determination was not clearly wrong, it will not be reversed on appeal.

Case No. 83-686 presents the question of whether the appellee's attorney was properly awarded fees of $10,900 under the Nebraska Consumer Protection Act, § 59-1609. The appellee invites us to overrule the cases of *Kuntzelman v. Avco Financial Services of Nebraska, Inc.*, 206 Neb. 130, 291 N.W.2d 705 (1980), and *McCaul v. American Savings Co.*, 213 Neb. 841, 331 N.W.2d 795 (1983), in which we held that because the institutions were regulated by the Nebraska Department of Banking and Finance, they were exempt from the provisions of the Consumer Protection Act under § 59-1617. That section states in part:

> Exempted Transactions. Nothing in sections 59-1601 to 59-1622 shall apply to actions or transactions otherwise permitted, prohibited or regulated under laws administered by the Director of Insurance, the Public Service Commission, the federal power commission or *any other regulatory body or officer acting under statutory authority of this state or the United States* . . . .

(Emphasis supplied.)

The exemption provision of § 59-1617 is clearly stated and is applicable in the instant case. The Bank is regulated by the

Nebraska Department of Banking and Finance. Gateway is regulated by the Nebraska State Real Estate Commission. It is obvious that the appellee's invitation was directed to the wrong branch of government.

In her cross-appeal the appellee first contends that the district court erred in denying her motion for sanctions under Rule 37(d)(1) of the Nebraska Discovery Rules. She contends that because Nancy Gillette, Gillette, and First Security Savings did not appear for the scheduled depositions, her motion for sanctions should have been granted. Rule 37(d)(1) allows sanctions when a party fails "[t]o appear before the officer who is to take his or her deposition, *after being served with a proper notice*." (Emphasis supplied.)

Although the transcript reveals that notices to take the depositions of the parties were filed, they contain no certificate of service, and the record does not otherwise reveal that the parties were properly served with notice or subpoenaed to compel attendance. Absent compliance with the notice requirements of Rule 26 of the Nebraska Discovery Rules, any sanctions for nonappearance are inappropriate.

Little next contends that the trial court erred in dismissing Nancy Gillette and First Security Savings pursuant to the parties' motions for directed verdict at the close of the appellee's evidence. An essential element required to sustain an action for fraudulent misrepresentation is that a defendant's statement must induce the plaintiff to act to his injury or damage. See *Ames Bank v. Hahn*, 205 Neb. 353, 287 N.W.2d 687 (1980).

Although the appellee stated several times that the statements made by Gillette and Edwards induced her to buy the business, the record is absolutely silent of any inducement based on Nancy Gillette's statements. The appellee having failed to prove a prima facie case against Nancy Gillette and First Security Savings, they were properly dismissed from the litigation.

The remainder of the parties' assignments of error focuses on the issue of damages.

We have previously held that where a party is induced to enter a contract by fraud, the party must, upon discovery of the

fraud, elect a remedy and shall either affirm the contract and sue for damages or disaffirm and be reinstated to the position existing prior to the contract. *Russo v. Williams*, 160 Neb. 564, 71 N.W.2d 131 (1955). If the party chooses not to rescind the contract but, rather, to affirm it and seek damages for the fraudulent inducement, the party's recovery is based on the difference in value of the property as fraudulently represented and its value in actuality. *Camfield v. Olsen,* 183 Neb. 739, 164 N.W.2d 431 (1969).

> This jurisdiction adheres to what is known as the "benefit-of-the-bargain" rule, that is, that the measure of general damages for fraud in inducing the purchase of property is the difference between the actual value of the property at the time of the purchase and the value it would have had if the seller's representation had been true.

Rothery v. Pounds, 150 Neb. 25, 27, 33 N.W.2d 347, 348 (1948).

Although the parties agree that Little's action affirms the agreement to purchase the business, Little presented no proof to justify a benefit-of-the-bargain instruction. The maximum total damages testified to by the appellee is $22,560.54. The jury returned a verdict of $43,220.30. Rather than to speculate as to how the jury reached this verdict, we feel compelled to reverse the jury's verdict and remand the cause as to all the issues of damages raised by the pleadings.

In conclusion, we hold that the appellee had a viable cause of action for fraudulent misrepresentation against Gillette, Edwards, and their respective principals. Because the appellee failed to establish a prima facie case against Nancy Gillette and First Security Savings, those parties were properly dismissed from the lawsuit. Section 59-1617 exempts both Gateway and the Bank from the provisions of the Consumer Protection Act and therefore any award of attorney fees under that act was inappropriate. Because the notice requirements of Rule 26 of the Nebraska Discovery Rules were not complied with, any sanctions against the appellants were also inappropriate. We further conclude that the judgment must be reversed and the cause remanded for a new trial on the issue of damages.

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

SCOULAR-BISHOP GRAIN CO., A NEBRASKA CORPORATION, APPELLANT, V. BASSETT GRAIN, INC., A NEBRASKA CORPORATION, APPELLEE.

352 N.W.2d 904

Filed August 10, 1984. No. 83-481.

1. **Appeal and Error.** The rules of this court require that assignments of error be separately numbered and paragraphed, and consideration of the case will be limited to errors assigned and discussed.
2. **Trial: Proof.** In a civil case the burden of proof is on the plaintiff to prove, by a preponderance of the evidence, all facts essential to recovery.

Appeal from the District Court for Rock County: HENRY F. REIMER, Judge. Affirmed.

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

John P. Heitz, for appellee.

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

GRANT, J.

Plaintiff, Scoular-Bishop Grain Co., filed an action against defendant, Bassett Grain, Inc., seeking damages for amounts due under a lease agreement and a modification thereof. Bassett Grain, in its answer, admitted the execution of the agreements but denied it was indebted to Scoular-Bishop. Jury trial was waived and trial was had to the court. At the conclusion of all the evidence, the court found for Bassett Grain and dismissed the petition. Scoular-Bishop appeals, assigning as error the insufficiency of the evidence to support the court's decision in favor of Bassett Grain and alleging that the evidence required the court to find that Scoular-Bishop should recover on its amended petition. Appellant thus bases its appeal purely on an evidentiary basis. We believe the court disposes of the matter by its conclusions of law with regard to the construction of the contracts between the parties, and we affirm.

The terms of the lease and the modification thereof are not in dispute. On June 1, 1978, Bassett Grain, as lessor, leased a grain

elevator located at Long Pine, Nebraska, to Scoular-Bishop. Scoular-Bishop was to pay a basic, fixed amount of rent plus, as additional rent, an amount equal to 50 percent of the net operating income resulting from the operation of the leased elevator during each of Scoular-Bishop's fiscal years. The lease also provided that in the event there was a net operating loss for the fiscal year, that loss would be applied against any subsequent net income under the lease and that, at the termination of the lease, an adjustment would be made to reflect the total income and total losses; and if the losses exceeded the income, Bassett Grain would pay 50 percent of those losses to Scoular-Bishop.

When the June 1, 1978, lease was executed, Scoular-Bishop's fiscal year ended on April 30. During the first 2 fiscal years involving the lease (June 1, 1978, to April 30, 1979, and May 1, 1979, to April 30, 1980), there was operating income of approximately $28,000 and $190,000 yearly. Scoular-Bishop paid 50 percent of that income to Bassett Grain.

After the fiscal year ending April 30, 1980, Scoular-Bishop changed its fiscal year so that it would end on May 31. For the 13 months ending May 31, 1981, there was a net operating loss of over $164,000. The agreement between the parties ended on June 30, 1981.

On July 11, 1980, the parties executed another agreement. Bassett Grain was having financial difficulties and requested Scoular-Bishop to make certain payments to Bassett Grain's creditors rather than to Bassett Grain itself. Scoular-Bishop agreed to do so. Specifically, Scoular-Bishop agreed to pay three named creditors of Bassett Grain a total of over $171,000 in lieu of all rent due up to April 30, 1981, including both the basic monthly rent and the percentage rental based on net operating profits or losses. The July 11, 1980, agreement further provided, in paragraph 2 thereof,

> 2. Each of the foregoing payments [to the described creditors] by the Lessee [Scoular-Bishop] shall be deemed to be made by the Lessee on account of rent due and becoming due under the lease up to April 30, 1981 and shall be charged to and deducted from such rent. If the total amount of all of such payments shall be in excess of

> the aggregate amount of rent due and becoming due under the Lease up to April 30, 1981, the Lessor [Bassett Grain] *shall not be liable for such excess or any part thereof.*

(Emphasis supplied.)

This July 11, 1980, agreement also contained two other paragraphs which must be considered. Paragraph 5 states, "Except as modified by the provisions of this agreement, all of the terms and conditions of the Lease shall remain in full force and effect." Paragraph 8 provides, "This instrument constitutes the entire agreement and understanding of the parties with respect to the transactions contemplated hereby and supersedes any and all prior agreements and understandings relating to the subject matter hereof."

The two agreements described above were placed in evidence. Scoular-Bishop called two witnesses, the manager of the elevator and the secretary-treasurer of the company. Neither witness testified as to any matters concerning the relationship between the two agreements or the conflicting paragraphs 5 and 8 in the July 11, 1980, agreement. The secretary-treasurer did testify and gave proper foundation for two exhibits comprising the monthly computer runs showing, from Scoular-Bishop's books and records, the profit and loss for each month and year of the agreement between the parties. Bassett Grain did not present any evidence, and the matter was submitted to the trial court.

The trial court decided the matter by construing the July 11, 1980, agreement. At the conclusion of the trial, the court stated:

> THE COURT: This agreement that was signed the 11th day of July, 1980, seems to indicate that everything is square between the parties on that date, and at paragraph 8 it says that this agreement constitutes the entire agreement and understanding of the parties with respect to the transactions contemplated herein and supersedes any and all prior agreements and understandings related to the subject matter hereof, so it would seem to me by that agreement you are at point zero in your accountings. It does provide that these specific payments that were to be made to the — that are outlined in paragraph 1, and

> specifically to whom at (a), (b) and (c), and those payments are to be made through the month of April, and if the total amount of all such payments shall be in excess of the aggregate amount of rent due and becoming due under the lease up to April 30th, 1981, the lessor shall not be liable for such excess or any part thereof.

These observations were reflected in the court's journal entry, which stated that the court finds

> That, by reason of the agreement of the parties received into evidence as Exhibit No. 2 [the July 11, 1980, agreement], the obligation, if any, of the Defendant for any deficit operations under the percentage rental provisions of the lease as of April 30th, 1981 was zero (0) as between the parties.

The trial court properly construed the July 11, 1980, agreement as a matter of law. As stated in *Don J. McMurray Co. v. Wiesman*, 199 Neb. 494, 498, 260 N.W.2d 196, 199 (1977), "When the terms of a contract and the facts and circumstances that aid in ascertaining the intent of the parties are insufficient to raise an issue of fact, the interpretation of the contract is a matter of law." In this case no evidence as to any facts and circumstances that would aid in ascertaining the intent of the parties was adduced before the trial court, and the interpretation of the contract was purely a matter of law. The court determined that paragraph 8 of the July 11, 1980, agreement controlled and that the second agreement completely supplanted the earlier agreement, referring to it only to incorporate certain language.

There is no assignment of error challenging this dispositive contract construction by the trial court. Neb. Ct. R. 9D(1)d (Rev. 1983) provides in part, "Each assignment of error shall be separately numbered and paragraphed, bearing in mind that consideration of the case will be limited to errors assigned and discussed." Here, the assignments of error are directed to the nature and sufficiency of the evidence. There is no assignment or discussion of the crucial conclusion of law made by the trial court.

We recognize we may note plain error not assigned, but there is no such error in this case. Plaintiff's petition, insofar as it

seeks damages up to April 30, 1981, was properly dismissed as a matter of construction of the July 11, 1980, agreement.

With regard to the period from May 1 to June 30, 1981, a different question is presented. In connection with these 2 months the trial court found that Scoular-Bishop presented no evidence to enable the court to "determine the amount of loss occasioned by the operation of the facility during those months." Again we agree with the trial court, recognizing that, in this area, the findings of the trial court where a jury is waived have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. *White v. Medico Life Ins. Co.*, 212 Neb. 901, 327 N.W.2d 606 (1982). Noting just one fact on the computer run exhibit (exhibit 4) adduced by Scoular-Bishop points out the problem facing the court. As of June 30, 1981, the date of termination of the relationship between the parties, the exhibit shows an ending inventory of corn of $1,740,716.89, and of wheat, beans, milo, and others of much less amounts. There is no testimony as to whose grain constitutes this inventory, the nature of the inventory, or any other explanation. As the trial court found, there was simply not enough evidence before it to make any factual determination of the profit or loss with regard to the time from May 1 to June 30, 1981. In a civil case the burden of proof is on the plaintiff to prove, by a preponderance of the evidence, all facts essential to recovery. *Empire State Building Co. v. Bryde*, 211 Neb. 184, 318 N.W.2d 65 (1982). Scoular-Bishop has not met its burden on this point. The determination of the trial court is correct.

Scoular-Bishop also claims that it made certain advances to Bassett Grain and that damages should be awarded for Bassett Grain's failure to repay those advances, totaling about $20,000. First of all, we note that the amended petition on which this case was tried seeks damages arising only under the lease agreements between the parties. The only reference to "advances" is in a copy of an accounting summary letter exhibit attached to the amended petition, which states, "Advances from prior years $20,234.46." There is no evidence as to where, when, or if any repayment was agreed to by any authorized person employed by Bassett Grain. There is not enough evidence for the court to find liability for Bassett Grain in this connection. The amount

of the alleged advances can be gleaned from the record, but nothing else.

This action of the trial court in dismissing Scoular-Bishop's amended petition is correct and is affirmed.

AFFIRMED.

PAUL J. LAPUZZA ET AL., APPELLEES, V. HENRY F. SEDLACEK ET AL., APPELLANTS.
353 N.W.2d 17

Filed August 10, 1984. No. 83-507.

Waters. An upper landowner has the right to have surface waters that are naturally on his land flow freely off that land onto a lower landowner's adjoining property, so long as the surface waters flow under natural conditions.

Appeal from the District Court for Douglas County: THEODORE L. RICHLING, Judge. Reversed and remanded with directions.

Joseph E. Jones of Fraser, Stryker, Veach, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellants.

Thomas J. Young, for appellees.

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

GRANT, J.

Plaintiffs, Paul J. and Mary L. LaPuzza, filed this law action for damages against defendants, Henry F. and Marlene Sedlacek, in the municipal court of the city of Omaha. The municipal court, after trial, entered judgment in favor of Sedlaceks and dismissed the petition. LaPuzzas appealed to the district court for Douglas County, where that judgment was reversed and judgment in the amount of $1,460 was entered in favor of LaPuzzas against Sedlaceks. Sedlaceks appeal to this court. We reverse and order the judgment of the municipal court reinstated.

The parties are neighboring landowners whose backyards abut. Sedlaceks' home was built in 1955, and Sedlaceks have lived there since February of 1973. LaPuzzas' home was built in 1955, and LaPuzzas have lived there since 1976.

Sedlaceks' lot, located to the west of LaPuzzas' lot, is higher than LaPuzzas', and surface water drains to the east from Sedlaceks' lot onto the LaPuzzas' lot. The LaPuzzas' lot is basically flat. A single-tier retaining wall (built, so far as LaPuzzas knew, in 1955 when the home was built) was in place when LaPuzzas purchased the home in 1976. This wall was constructed of "river rock" and ranged from 1 foot to 7 feet in height. This wall ran parallel to the property line and some distance inside that line and on the LaPuzzas' lot. Mr. LaPuzza testifed that this wall collapsed in 1978 during a rainstorm while surface water was draining from Sedlaceks' lot over the wall and onto LaPuzzas' lot. Mr. Sedlacek testified that he did not know the wall ever collapsed but that he knew the wall was deteriorating. In 1978 the original wall was removed by the LaPuzzas and a new two-tier wall was constructed slightly to the west of the original wall and thus closer to the property line.

In June 1982 the two-tier wall collapsed. Expert testimony, adduced by the LaPuzzas, attributed the collapse to the flow of surface water from the Sedlaceks' lot. The municipal court found: "Plaintiff [LaPuzzas] alleges no diversion by defendant, and none has been shown. Plaintiff alleges defendant has a duty under the law to divert. No law exists to so require diversion. The evidence is conclusive that the water flow was normal in all respects." The municipal court thus determined as a matter of law that Sedlaceks owed no duty to LaPuzzas and dismissed LaPuzzas' petition.

On appeal the district court, without elaboration, found that the municipal court had "committed error which was prejudicial to the rights of the Plaintiffs, and the verdict and judgment of the Court below should be reversed." The district court thus determined as a matter of law that Sedlaceks did owe a duty to LaPuzzas and had violated such duty.

In Nebraska surface water is defined as water which appears upon the surface of the ground in a diffused state, with no permanent source of supply or regular course, which ordinarily

results from rainfall or melting snow. *Grint v. Hart*, 216 Neb. 406, 343 N.W.2d 921 (1984). In the present case it is undisputed that the source of the water involved is surface water.

LaPuzzas insist that the Sedlaceks have a duty to divert the surface water flowing down from their land and to arrange for the safe passage of the surface water over LaPuzzas' land. No such duty exists under Nebraska law. An owner may collect surface water, change its course, pond it, or cast it into a natural drain without liability. He may not, however, collect such waters and divert them onto the lands of another, except in depressions, draws, swales, or other drainageways through which such water is wont to flow in a state of nature. *Jameson v. Nelson*, 211 Neb. 259, 318 N.W.2d 259 (1982). Once a landowner diverts surface water and upsets the natural flow, he has a duty to do so reasonably and avoid damage to his neighbor. However, there is no affirmative duty to divert the natural flow away from one's neighbor even if it is causing damage in its natural state.

The uncontroverted testimony of Mr. Sedlacek was that he had never done anything to alter the natural flow of surface water from his lot to LaPuzzas' lot. There is no showing that Sedlaceks changed the configuration of their house in any way, such as adding or changing gutters or eaves. In short, Sedlaceks have done nothing affirmatively to affect the LaPuzzas in any way, and therefore Sedlaceks have done nothing to incur any liability to LaPuzzas.

Insofar as LaPuzzas contend that Sedlaceks must do something to change the natural flow of the surface waters, that proposition has been answered squarely in *Jorgenson v. Stephens*, 143 Neb. 528, 534-35, 10 N.W.2d 337, 340 (1943), where we stated:

> To require defendant, as plaintiff prays, to provide an unnatural and artificial outlet for his surface waters which would carry it away before reaching the land of plaintiff would be both an innovation in our law and a stumbling block in the path of progress and the development of urban real estate. If such a rule were adopted development of rolling or hilly urban real estate would entail the oppressive burden, for each upper parcel, of providing for

dispersion and disposal of surface waters through outlets other than over lower parcels within and without the area of the development. In other words urban development, except on level areas, would be arrested by the burden of overcoming the operation of the law of gravity.

We recognize that LaPuzzas have been injured. The remedy for that unfortunate situation has also been set out in *Jorgenson v. Stephens, supra* at 535, 10 N.W.2d at 340, where we said, "Under the record here the plaintiff must be left to her own resources to, reasonably and without negligence, protect her property from the surface water coming from the property of the defendant, if she would have protection therefrom."

The judgment of the district court is reversed and the cause remanded with directions to reinstate the judgment of the municipal court.

REVERSED AND REMANDED WITH DIRECTIONS.

CAPORALE, J., participating on briefs.

MARK BUHRMANN, APPELLANT, V. JERRY L. SELLENTIN ET AL., MEMBERS OF THE NEBRASKA STATE PERSONNEL BOARD; JAN PIEPER, DIRECTOR, STATE DEPARTMENT OF PERSONNEL, ET AL., APPELLEES.

352 N.W.2d 907

Filed August 10, 1984. No. 83-526.

1. **Administrative Law: Appeal and Error.** An appeal from a decision of the State Personnel Board is governed by the provisions of the State Administrative Procedure Act. In such an appeal the Supreme Court determines only whether the findings of the agency are supported by substantial evidence and whether the district court applied the proper statutory criteria.
2. **Administrative Law: Due Process: Termination of Employment.** A failure to provide due process at some point in a termination procedure does not invalidate the termination if that defect is later cured.
3. **Administrative Law: Words and Phrases.** Generally, the word "may" will be given its ordinary, permissive, and discretionary meaning unless it can be shown

that the intent of the drafters would be defeated by the application of such a meaning.

4. **Administrative Law: Constitutional Law.** The combination of investigative and adjudicative functions does not necessarily create an unconstitutional risk of bias in administrative adjudication.

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

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

Paul L. Douglas, Attorney General, and Sharon M. Lindgren, for appellees.

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

BOSLAUGH, J.

The plaintiff, Mark Buhrmann, appeals from the order of the district court which affirmed the action of the Nebraska State Personnel Board terminating Buhrmann's employment with the Nebraska Department of Correctional Services.

Buhrmann was employed as a correctional corporal at the state penitentiary. On May 6, 1982, Buhrmann was arrested and charged with pandering. The reports of the investigating officers state that Buhrmann procured the services of a prostitute for two undercover officers.

On May 7, 1982, Adelbert Knight, the major in charge of security at the penitentiary, telephoned Buhrmann and informed him that he was suspended from his employment. Buhrmann received an "Official Notice of Suspension" dated May 10, 1982, informing him that he was suspended without pay until further notice. In a letter dated May 18, 1982, which included a statement of charges, Major Knight advised Buhrmann that a meeting with Warden Charles Black and Knight had been scheduled for May 25, 1982, and at that time Buhrmann could present any information valuable to his defense. On May 24, 1982, Buhrmann was accepted in the pretrial diversion program and the charge was dismissed. Participation in the program involves an admission of guilt.

Buhrmann attended the May 25 meeting, with counsel.

Following that meeting, Warden Black recommended that Buhrmann's employment be terminated. Termination of his employment was approved by Charles Benson, director of the Department of Correctional Services, on May 26, 1982. After a hearing before the State Personnel Board, the action of the agency was affirmed.

Upon appeal to the district court, that court held the suspension of Buhrmann from May 7 to May 26 was invalid because Knight had failed to follow the procedure outlined in the rules and regulations of the Nebraska State Personnel System manual. The trial court ordered that Buhrmann be paid his salary and benefits for the period of suspension. As to termination, the court held that the proper procedure had been followed and that the evidence supported that action. Buhrmann has now appealed to this court.

An appeal from a decision of the State Personnel Board is governed by the provisions of the State Administrative Procedure Act. Neb. Rev. Stat. § 81-1319 (Reissue 1981). In such an appeal this court determines only whether the findings of the agency are supported by substantial evidence and whether the district court applied the proper statutory criteria. *The 20's, Inc. v. Nebraska Liquor Control Commission*, 190 Neb. 761, 212 N.W.2d 344 (1973); Neb. Rev. Stat. §§ 84-917 and 84-918 (Reissue 1981).

On this appeal Buhrmann contends that since the suspension was improper, it follows that the termination was also improper. This contention is without merit.

The suspension of Buhrmann was improper because he was not given an opportunity to refute the charges against him or to present mitigating evidence before the suspension was imposed as required by rule 13.11.2 of the Nebraska Personnel System Rules and Regulations.

Rule 13.11.2 provides:

> 13.11.2. The agency head, upon obtaining information which would indicate the possibility of administering corrective or disciplinary action, shall attempt to verify the information and give the employee an opportunity to refute the information or present mitigating evidence. The agency head shall notify the employee prior to any

meeting which occurs pursuant to this section.

However, as to the termination, Buhrmann was given an opportunity to present information vital to his defense at the May 25, 1982, meeting which he attended with his counsel.

In *Glenn v. Newman*, 614 F.2d 467 (5th Cir. 1980), the fifth circuit dealt with a similar situation and concluded that a failure to provide due process at some point in a termination procedure does not invalidate the termination if that defect was later cured. The court stated at 472:

> In seeking to minimize the risk of wrongful termination to an employee without burdening the government with elaborate pretermination proceedings, this Court has outlined a procedure to meet minimum due process requirements. *Thurston v. Dekle,* 531 F.2d at 1273. This includes, prior to termination, written notice of the reasons for termination and an effective opportunity to rebut those reasons. Effective rebuttal means giving the employee the right to respond in writing to the charges made and to respond orally before the official charged with the responsibility of making the termination decision. *Id.* We hold that the pretermination procedures afforded Glenn did not conform with *Thurston's* requirements.
>
> Nevertheless, we find that any error involved was cured in the subsequent public hearing before the Mayor and City Council. See *Blair v. Robstown Independent School District*, 556 F.2d 1331, 1334-35 (5th Cir. 1977); *Thurston v. Dekle*, 531 F.2d at 1269. In the post-termination proceedings, Glenn received written notice of the charges against him and was given sufficient time to prepare for the hearing. At the hearing, he was represented by an attorney who examined and cross-examined witnesses on his behalf, and he was allowed to present his case orally.

See, also, *Wilson v. Taylor*, 658 F.2d 1021 (5th Cir. 1981).

The procedural error was corrected by affording Buhrmann an opportunity to present a defense to charges of which he had been specifically notified before the termination took place. The termination did not violate any rules of the State Personnel System, nor did it otherwise violate the due process rights of

Buhrmann.

Buhrmann next contends that the State Personnel System rules require that he be reinstated because the charges against him were dropped. The section upon which Buhrmann relies does not require automatic reinstatement.

Rule 13.14.5 provides:

> 13.14.5. Suspension for Legal Charges or Investigation. Employees who are under investigation for or charged with criminal activity may, following a meeting as prescribed in paragraph 13.11.2 be indefinitely suspended pending outcome of a trial or investigation. Employees who are found guilty shall not be compensated for the suspension and *may* be dismissed. If they are not found guilty or if no judicial action is taken, they may be restored to their position and granted full pay and service credit for the period of their suspension, if circumstances justify such restoration.

(Emphasis supplied.)

Generally, the word "may" will be given its ordinary, permissive, and discretionary meaning unless it can be shown that the intent of the drafters would be defeated by the application of such a meaning. See, *State ex rel. Hubbard v. Northwall*, 150 Neb. 894, 36 N.W.2d 282 (1949); *Miller v. Schlereth*, 151 Neb. 33, 36 N.W.2d 497 (1949); *County of Keith v. Triska*, 168 Neb. 1, 95 N.W.2d 350 (1959); *State v. Noll*, 171 Neb. 831, 108 N.W.2d 108 (1961). In the present case the word "may" indicates that an employee who has been charged with criminal activity may be reinstated at the discretion of the board if the circumstances warrant. The determination made by the board in this case was that the circumstances warranted termination.

Buhrmann next argues that the pretermination hearing of May 25, 1982, violated his due process rights because Warden Black, the officer before whom the hearing was held, had made a determination of guilt prior to that hearing. A similar argument was advanced in *Nevels v. Hanlon*, 656 F.2d 372 (8th Cir. 1981). The court stated at 376-77:

> In his cross-appeal, Nevels alleges that the district court erred in holding that he was not denied his due process

right to have his case heard by an impartial decisionmaker. The crux of Nevels' claim is that, because the Merit System Rules require the Commissioner to make the initial determination to dismiss an employee and then to make the final decision of any appeal, the Commissioner is predisposed to uphold his original decision and is, therefore, not an impartial decisionmaker. *See In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 625, 99 L. Ed. 2d 942 (1955). In *Withrow v. Larkin*, 421 U.S. 35, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975), a doctor challenged the impartiality of the state medical examining board, which was to make the final determination of whether to warn and reprimand, to suspend or revoke his license to practice medicine, or to institute criminal action, on the grounds that the board also instituted the action and investigated the charges. The Court held that the due process clause did not prevent the board from deciding the issue of revoking the plaintiff's license. It said: "The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication . . . must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." 421 U.S. at 47, 95 S. Ct. at 1464.

Although the Commissioner is technically the party who initiated Nevels' discharge, in actuality, it was initiated by Nevels' immediate supervisor. Having the Commissioner review the actions of his subordinate runs a far less "risk of actual bias or prejudgment" than the practice in *Withrow* which was held to be valid. We, therefore, agree with the district court's rejection of Nevels' claim that the Commissioner was "constitutionally incapable of rendering an objective

judgment." *See also Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 492-94, 96 S. Ct. 2308, 2314-15, 49 L. Ed. 2d 1 (1976); *Norbeck v. Davenport Community School Dist.*, 545 F.2d 63, 68-69 (8th Cir. 1976), *cert. denied*, 431 U.S. 917, 97 S. Ct. 2179, 53 L. Ed. 2d 227 (1977); *Klinge v. Lutheran Charities Ass'n*, 523 F.2d 56, 63 (8th Cir. 1975).

We conclude that Buhrmann was not deprived of his due process rights. The hearing was held before Warden Black, and his recommendation to terminate Buhrmann was reviewed and approved by Director Benson. This is similar to the procedure found constitutional by the eighth circuit in *Nevels v. Hanlon, supra*. The record does not show that Benson was otherwise incapable of rendering an objective judgment in the present case.

Buhrmann's final contention is that the termination was arbitrary and capricious and not supported by the evidence. In particular, Buhrmann makes note of the facts that he had no prior criminal record, that he had a good employment record at the penitentiary, and that others with criminal records are employed at the penitentiary.

Rule 13.12 of the State Personnel System rules provides:

> 13.12 Reasons for Imposing Corrective or Disciplinary Action. An agency head may, if an employee commits one or more of the following offenses, take appropriate corrective or disciplinary action:
>
> . . . .
>
> 13.12.14. Other acts, based on competent evidence, which bring discredit upon the state, including but not limited to acts listed above.

The termination was based upon this rule.

The district court found as follows:

> 11. That the plaintiff admittedly and by the proof adduced, committed acts constituting a felony which involved moral turpitude; that because of the potential for harrassment [sic] by prisoners due to plaintiff's conduct that plaintiff's continued employment at the institution would compromise the security of the institution and that plaintiff's conduct brought discredit upon the state and

the institution by which plaintiff was employed.

12. That there is a substantial difference between the plaintiff's conduct which constitutes a felony and the conduct of some of the other guards who are ex-offenders. That in any event, that each of the ex-felony offenders have paid their debts to society and had demonstrated a useful life prior to being hired by the institution.

Upon a review of the record we conclude that the termination of Buhrmann was for reasonable cause and is supported by substantial evidence. There being evidence to support the termination, the action was not arbitrary or capricious. See, *Lewis v. City of Omaha*, 153 Neb. 11, 43 N.W.2d 419 (1950); *Beasley v. City of Omaha*, 212 Neb. 153, 322 N.W.2d 377 (1982).

The judgment of the district court is affirmed.

AFFIRMED.

KRIVOSHA, C.J., dissenting.

I find that I must respectfully dissent from the majority in this case. While I am in accord with all that the majority has said with regard to matters relating to due process and the manner in which various hearings were conducted, I cannot agree with the majority that the evidence establishes a violation of rule 13.12.14 of the Nebraska State Personnel System rules, which specifically provides that one of the grounds for discharge is "other acts, based on competent evidence, which bring discredit upon the state, including but not limited to acts listed above." While I am in complete accord with the majority that the actions of the appellant in this case were reprehensible and indeed brought discredit upon the appellant, I do not find any evidence to indicate that the state was somehow discredited. That is where I think the difficulty occurs. As noted by the majority, the termination in this case was based solely upon rule 13.12.14 of the State Personnel System rules, and was not based upon the finding made by the district court to the effect that the acts of the appellant constituted a felony which involved moral turpitude and which therefore would compromise the security of the institution. The pandering was conducted outside of the institution and while the appellant was off duty. I think it would be a relatively easy matter for the personnel code to succinctly

provide that one of the grounds for discharge is the commission of an act by a state employee which constitutes a felony, whether prosecuted or not. By making such provision employees would be adequately forewarned that their actions outside of their employment may nevertheless result in their being discharged. In this case I do not believe the evidence was sufficient to establish any discredit on the state that may result by permitting Buhrmann to remain employed, but that is a matter which should be resolved by amending the personnel rules and not by a leap of faith.

GLEN A. HEYD AND ROBIN L. HEYD, APPELLANTS, V. CHICAGO TITLE INSURANCE COMPANY, APPELLEE.

354 N.W.2d 154

Filed August 10, 1984. No. 83-547.

1. **Insurance.** A standard policy of title insurance is a contract of indemnity which only insures against defects, discrepancies, or other impediments of record affecting title to the real estate designated in the policy or interfering with the marketability of title to the land described in the policy. Such indemnification does not protect the insured from matters dependent upon a survey or critical inspection of the property unless the policy provides for extended coverage or the insured requests special endorsements.
2. _____. Unless agreed by a title insurance company or required by a provision of the policy of title insurance, an insurance company has no obligation to obtain a survey of the subject real estate before a policy of title insurance is issued.
3. _____. A title insurance company rendering a title report has the duty to use due care regarding inspection of public records.
4. _____. A title insurance company which renders a title report and also issues a policy of title insurance has assumed two distinct duties. In rendering a title report the title insurance company serves as an abstracter of title and must list all matters of public record adversely affecting title to the real estate which is the subject of the title report. By issuing a policy of title insurance, a title insurance company has the contractual duties which are imposed by its policy of insurance.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Michael Lehan, for appellants.

Joseph Polack of Polack & Woolley, P.C., for appellee.

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

SHANAHAN, J.

Glen and Robin Heyd sued Chicago Title Insurance Company (Chicago) in two causes of action. Heyds' first cause of action relates to a loss claimed to be covered under Chicago's policy of title insurance, while Heyds' second cause of action alleges negligence regarding a title report prepared by Chicago. The district court for Douglas County sustained Chicago's demurrer, held that the pleadings could not be amended to state a cause of action, and dismissed Heyds' lawsuit. We affirm in part and reverse in part.

In July 1978 Heyds contracted to purchase a home located on a lot designated as 5939 South 46th Street in Omaha, Nebraska. The seller was Gladys Smith. Heyds obtained a policy of title insurance from Chicago regarding the real estate being purchased from Smith. It was later discovered that the house being purchased was not entirely located within the boundaries of the tract described in the Smith-Heyd real estate contract. The house was in fact partially located on a public street of the city of Omaha.

The policy of title insurance issued by Chicago insures against any loss or damage by reason of "title to the [real] estate . . . being vested [in one other than Smith]; any defect in or lien or encumbrance on such title; lack of a right of access to and from the land; or unmarketability of such title." The policy continues: "The estate or interest in the land described herein and which is covered by this policy is: Fee Simple . . . in: GLADYS L. SMITH."

Chicago's policy was subject to certain stated and general exceptions specified in the policy, namely,

> This policy does not insure against loss or damage by reason of the following exceptions: (1) Rights or claims of parties in possession not shown by the public records. (2) Encroachments, overlaps, boundary line disputes, and

any other matters which would be disclosed by an accurate survey and inspection of the premises.

"CONDITIONS AND STIPULATIONS" in Chicago's policy contained the following:

1. Definition of Terms

The following terms when used in this policy mean:

. . . .

(d) "land": the land described, specifically or by reference in Schedule A, and improvements affixed thereto which by law constitute real property; provided, however, the term "land" does not include any property beyond the lines of the area specifically described or referred to in Schedule A, nor any right, title, interest, estate or easement in abutting streets, roads, avenues, alleys, lanes, ways or waterways . . . .

The policy issued by Chicago to Heyds also provided:

12. Liability Limited to this Policy

This instrument together with all endorsements and other instruments, if any, attached hereto by the Company is the entire policy and contract between the insured and the Company.

Any claim of loss or damage, whether or not based on negligence, and which arises out of the status of the title to the estate or interest covered hereby or any action asserting such claim, shall be restricted to the provisions and conditions and stipulations of this policy.

In their first cause of action Heyds allege a loss covered by Chicago's policy of title insurance, that is, a defect in title to the real estate being purchased from Smith and unmarketability of title to the tract, because the house is not totally situated within the boundaries of the real estate described in the Smith-Heyd contract and Chicago's policy.

Heyds' second cause of action contains the allegation "That [Chicago] was negligent in preparing its title report and title policy for [Heyds]" in failing to correctly examine the records of title and in failing to report defects of title to Heyds.

The demurrer by Chicago alleged that Heyds' amended petition "fails to set forth a cause of action . . . ." The district

court sustained Chicago's demurrer and held that

> there is no defect in title to the described property, nor is there any unmarketability of title in the face of the petition and therefore said petition does not state a cause of action . . . . The Court further determines that the pleadings cannot be amended to state a cause of action and therefore the action should be dismissed at this stage.

In their appeal Heyds maintain they should be allowed to prosecute their action based on contract, that is, the policy of title insurance, and based on Chicago's negligence regarding the title report.

Regarding policies such as that involved in the case before us, it is settled that a standard policy of title insurance is a contract of indemnity which only insures against defects, discrepancies, or other impediments of record affecting title to the real estate designated in the policy or interfering with the marketability of title to the land described in the policy. Such indemnification does not protect the insured from matters dependent upon a survey or critical inspection of the property unless the policy provides for extended coverage or the insured requests special endorsements. See *Contini v. Western Title Ins. Co.*, 40 Cal. App. 3d 536, 115 Cal. Rptr. 257 (1974). Unless agreed by a title insurance company or required by a provision of the policy of title insurance, an insurance company has no obligation to obtain a survey of the subject real estate before a policy of title insurance is issued. See *Kuhlman v. Title Insurance Company of Minnesota*, 177 F. Supp. 925 (W.D. Mo. 1959); cf. *Offenhartz v. Heinsohn*, 30 Misc. 2d 693, 150 N.Y.S.2d 78 (1956) (a title insurance company is not required to insure any title or interest to real estate beyond the boundaries of the property described in the policy of title insurance).

"[I]nsurance policies should be construed as any other contract and should be given effect according to the ordinary sense of the terms used; and if those terms are clear, they will be applied according to their plain and ordinary meaning." *Hemenway v. MFA Life Ins. Co.*, 211 Neb. 193, 199, 318 N.W.2d 70, 74 (1982).

However, as expressed in *MacBean v. St. Paul Title*

Insurance Corporation, 169 N.J. Super. 502, 508, 405 A.2d 405, 408-09 (1979):

> "When members of the public purchase policies of insurance they are entitled to the broad measure of protection necessary to fulfill their reasonable expectations. They should not be subjected to technical encumbrances or to hidden pitfalls and their policies should be construed liberally in their favor to the end that coverage is afforded 'to the full extent that any fair interpretation will allow.' . . ."
>
> This doctrine has been specifically applied to title insurance policies. *Sandler v. N. J. Title Ins. Co., 36 N.J. 471, 479* [178 A.2d 1, 5] *(1962).*

In *Paramount Properties Co. v. Transamerica Title Ins. Co.*, 1 Cal. 3d 562, 569, 463 P.2d 746, 750, 83 Cal. Rptr. 394, 398 (1970), the Supreme Court of California commented about a policy of title insurance: " 'If semantically permissible, the contract will be given such construction as will fairly achieve its object of securing indemnity to the insured for the losses to which the insurance relates.' " (Citing and quoting from *Continental Cas. Co. v. Phoenix Constr. Co.*, 46 Cal. 2d 423, 296 P.2d 801 (1956).)

The policy issued by Chicago insures against any loss or damage resulting from a defect or unmarketability of Smith's title to the real estate being purchased by Heyds. The risk covered by Chicago's policy relates to a deficiency of the vendor's, Smith's, rights to or ownership in the land under contract to Heyds and described in the insurance policy. Loss or damage covered by the insurance policy might occur, for example, if Smith did not have absolute ownership (fee simple) in the described real estate. However, the loss or damage alleged by Heyds has resulted from the location of the house, namely, the house not being located within the boundary lines of the land described in the sale to Heyds and the insurance policy. There is no allegation that Smith does not own fee simple title in the real estate. Likewise, Heyds do not allege any aspect of Smith's title which has caused some doubt about or flaw in the validity of Smith's ownership so that marketability of title is impaired.

By general exception (2) in its policy, Chicago removed from the insurance coverage any loss due to "[e]ncroachments, overlaps, boundary line disputes, and any other matters which would be disclosed by an accurate survey and inspection of the premises." That survey exception is expressed in language having plain and ordinary meaning. Therefore, correct location of any structure on the described premises is not a risk or loss covered by Chicago's policy of title insurance. The district court was correct in sustaining Chicago's demurrer to Heyds' first cause of action. Further, because there can be no question about the policy provisions or terminology concerning the stated survey exception, no amendment to the pleadings can improve Heyds' position in any contract action against Chicago, that is, any action based on the incorrect location of Heyds' house in reference to boundaries of the real estate described in the policy. The district court was correct in dismissing Heyds' contract action based on the policy of title insurance.

The demurrer to Heyds' second cause of action is a different matter. The allegations in that second cause of action describe a situation in which Chicago made some type of title search and issued a title report regarding the Smith-Heyd sale. Presumably, the title report to Heyds stated the name of the person in whom title was vested (Smith) and listed taxes, liens, encumbrances, easements, restrictions, conditions, outstanding interests, and defects to which the title is subject—all as reflected in public records. Undoubtedly that title report was the basis on which the policy of title insurance was issued.

Our research on questions of title insurance has disclosed *Ford v. Guarantee Abstract & Title Co.*, 220 Kan. 244, 553 P.2d 254 (1976). Interesting is the fact that one of the defendants in *Ford* was Chicago Title Insurance Company. In *Ford* there was a document entitled "CHICAGO TITLE INSURANCE COMPANY TITLE REPORT." The title report presented to the buyer failed to mention a break in the chain of title (a missing or unrecorded deed). The Supreme Court of Kansas in *Ford* described the "abstract method" for an approved title after an attorney's examination of the abstract of title for real estate. In contrast with the so-called abstract method, there was the title insurance

method where certain minimum information was required to complete the application for title insurance. After that initial information had been received, someone on behalf of the title insurance company examined public records and a title report was issued and sent to the parties involved in the real estate transaction. The Supreme Court of Kansas also noted that a title report indicates clouds on the title which must be cleared to the insurance company's satisfaction before any policy of title insurance is issued. The Supreme Court of Kansas concluded:

> [A] corporation organized for the purpose, among others, of examining and guaranteeing titles to real estate and which in all matters relating to conveyancing and searching titles holds itself out to the public, and assumes to discharge the same duties as an individual conveyancer or attorney, has the same responsibilities and its duty to its employer is governed by the principles applicable to attorney and client. [Citations omitted.] . . .
>
> . . . .
>
> Where a title insurer presents *a buyer* with both a preliminary title report and a policy of title insurance two distinct responsibilities are assumed; in rendering the first service, the insurer serves as an abstractor of title and must list all matters of public record regarding the subject property in its preliminary report. When a title insurer breaches its duty to abstract title accurately it may be liable in tort for all the damages proximately caused by such breach. [Citations omitted.]

Ford v. Guarantee Abstract & Title Co., supra at 256-58, 553 P.2d at 264, 266. See, also, *Jarchow v. Transamerica Title Ins. Co.*, 48 Cal. App. 3d 917, 122 Cal. Rptr. 470 (1975).

Courts of other jurisdictions have recognized the duty of a title insurance company to use due care regarding inspection of public records and title reports. See, *Sandler v. N. J. Realty Title Ins. Co.*, 66 N.J. Super. 597, 169 A.2d 735 (1961); *Udell v. City Title Ins. Co.*, 12 A.D.2d 78, 208 N.Y.S.2d 504 (1960); *Dorr v. Mass. Title Ins. Co.*, 238 Mass. 490, 131 N.E. 191 (1921); *Sunset Holding Corporation v. Home Title Ins. Co.*, 172 Misc. 759, 16 N.Y.S.2d 273 (1939).

The duty imposed upon an abstractor of title is a rigorous

> one: "An abstractor of title is hired because of his professional skill, and when searching the public records on behalf of a client he must use the degree of care commensurate with that professional skill . . . the abstractor must report all matters which could affect his client's interests and which are readily discoverable from those public records ordinarily examined when a reasonably diligent title search is made." [Citations omitted.]

Jarchow v. Transamerica Title Ins. Co., supra at 938-39, 122 Cal. Rptr. at 485. See, also, *Hawkins v. Oakland Title Ins. & Guar. Co.*, 165 Cal. App. 2d 116, 331 P.2d 742 (1958); *J. H. Trisdale, Inc. v. Shasta etc. Title Co.*, 146 Cal. App. 2d 831, 304 P.2d 832 (1956); cf. *Williams v Polgar*, 391 Mich. 6, 215 N.W.2d 149 (1974) (title insurance company's liability for tort apart from any liability arising out of contract).

We now hold that a title insurance company which renders a title report and also issues a policy of title insurance has assumed two distinct duties. In rendering the title report the title insurance company serves as an abstracter of title and must list all matters of public record adversely affecting title to the real estate which is the subject of the title report. When a title insurance company fails to perform its duty to abstract title accurately, the title insurance company may be liable in tort for all damages proximately caused by such breach of duty. A title insurance company's responsibility for its tortious conduct is distinct from the insurance company's responsibility existing on account of its policy of insurance. Different duties and responsibilities imposed on the title insurance company, therefore, can be the basis for separate causes of action—one cause of action in tort and another in contract.

Heyds should have been permitted to amend their petition regarding Chicago's inspection of public records and the ensuing title report. It was error to deny Heyds the opportunity to amend their second cause of action and to dismiss Heyds' action.

Chicago has suggested some form of contractual merger to preclude any action by Heyds for negligent conduct of the insurance company. Chicago's suggestion is predicated on the

language of paragraph 12 of its policy: "Any claim of loss or damage, whether or not based on negligence . . . shall be restricted to the provisions and conditions and stipulations of this policy."

In *Smirlock Realty v Title Guar*, 52 N.Y.2d 179, 190, 418 N.E.2d 650, 655, 437 N.Y.S.2d 57, 62 (1981), we find:

> Indeed, it is because title insurance companies combine their search and disclosure expertise with insurance protection that an implied duty arises out of the title insurance agreement that the insurer has conducted a reasonably diligent search. . . . This duty may not be abrogated through a standard policy clause which would, if given the effect urged by defendant, place the onus of the title company's failure adequately to search the records on the party who secured the insurance protection for that very purpose.

In any event, we believe that paragraph 12 of Chicago's policy and the suggested merger of any negligence action at best relate to a matter of defense, not to prohibition of a cause of action based on negligence. Whether the language of paragraph 12 is proper and permissible as a defense is another question and is not decided in the present appeal.

For the reasons given, the judgment of the district court dismissing Heyds' first cause of action is affirmed, but the district court's judgment that Heyds' pleading cannot be amended and dismissal of Heyds' second cause of action are reversed. This matter is remanded to the district court for further proceedings.

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

KRIVOSHA, C.J., concurring in the result.

I concur in the result reached by the majority in this case. I am fearful, however, that the majority opinion may be misread to imply that a title company may issue title reports and thereby perform the duties of an abstracter, though it has not complied with the laws of the State of Nebraska regulating abstracting. See Neb. Rev. Stat. §§ 76-501 et seq. (Reissue 1981). Under the facts of this particular case we are only

concerned with the allegations of the petition, and not whether the case can be proved to the extent that a title company has, in fact, issued a title report. It may very well render itself liable for damages realized by one to whom the report is issued and who relies thereon. Creating such liability, however, does not repeal the statutes of Nebraska regulating abstracting and abstracters, and does not in and of itself authorize title companies to engage in such endeavor without first complying with the requirements of our law. To that extent I believe that the majority is in error in stating that by merely rendering a title report the title insurance company serves as an abstracter of title. Nevertheless, it may still be liable in damages even though it violates the laws of the State of Nebraska pertaining to abstracters.

PATRICIA ROL, APPELLEE, V. LARRY ROL, APPELLANT.
353 N.W.2d 19

Filed August 10, 1984. No. 83-836.

Contempt. A coercive contempt sanction is not final and therefore not appealable; it is subject to collateral attack by habeas corpus.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Appeal dismissed.

Dennis R. Keefe, Lancaster County Public Defender, and Mariclare Thomas, for appellant.

Michael G. Heavican, Lancaster County Attorney, and Laurie Campbell, for appellee.

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

PER CURIAM.

Pursuant to an earlier decree of dissolution, appellant was required to pay child support. An order was served on appellant directing him to show cause why he should not be punished for

contempt of court for failure to make the court-ordered child support payments. A hearing was held, and, after hearing, the district court found the appellant was in willful and contumacious contempt of court for failure to pay child support. The court ordered the appellant confined in the county jail for 90 days, subject to further order of the court. The court later modified the earlier order to provide that the appellant should be discharged upon purging himself of all arrearages in child support.

The appellant assigns two errors: (1) There was insufficient evidence to support a finding by the court that the appellant had willfully failed to pay child support; and (2) The court abused its discretion by committing appellant to incarceration for 90 days unless he purges himself by paying his child support arrearages.

The sanction in this case is coercive in nature. This court has recently held that in a coercive sanction situation, as here, "the contemner holds the keys to his jail cell, in that the sentence is conditioned upon his continued noncompliance." *In re Contempt of Liles*, 216 Neb. 531, 534, 344 N.W.2d 626, 628 (1984). This situation is distinguished from a punitive sanction which is much like the sentence in a criminal case in that it is absolute and not subject to mitigation contingent on the contemner's future behavior. The latter (punitive) situation is an appealable, final order. The former (coercive) is always subject to modification by the contemner's conduct and is therefore not final in any sense and can only be attacked collaterally by habeas corpus. This appeal is hereby dismissed for lack of an appealable order.

APPEAL DISMISSED.

STATE OF NEBRASKA EX REL. PAUL L. DOUGLAS, ATTORNEY GENERAL, ET AL., APPELLEES, V. BIBLE BAPTIST CHURCH OF LINCOLN, NEBRASKA, A CORPORATION, ET AL., APPELLANTS, PAULA MILLER ET AL., INTERVENORS-APPELLANTS.

353 N.W.2d 20

Filed August 10, 1984. No. 83-886.

Motions for New Trial: Time. A motion for new trial must be filed within 10 days after the verdict or decision was rendered.

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

William Bentley Ball and Philip J. Murren of Ball & Skelly, and Lawrence W. Stunkel, for appellants.

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

Charles E. Rice, and Francis G. McKenna of Anderson & Pendleton, for amicus curiae Religious Liberty Foundation.

J. Marvin Weems, and Samuel E. Ericsson, for amicus curiae The Center for Law and Religious Freedom of the Christian Legal Society.

Steven F. McDowell and T. Patrick Monaghan, for amicus curiae Catholic League for Religious and Civil Rights.

William J. O'Connor, for amici curiae National Committee for Amish Religious Freedom and Mennonite Central Committee U.S.

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

GRANT, J.

The State of Nebraska, through relators Paul L. Douglas, Attorney General of the State of Nebraska, and Michael G. Heavican, county attorney of Lancaster County (hereinafter collectively called the State), brought this action in the district court for Lancaster County, Nebraska, against Bible Baptist Church, Park West Christian School, and named officials connected with those organizations (hereinafter collectively

called defendants), seeking a permanent injunction to prohibit the defendants from educating schoolchildren in grades kindergarten through 10th grade in violation of state education laws and regulations.

In their amended answer defendants alleged they were not subject to the state education laws because of their rights under the U.S. and State of Nebraska Constitutions.

After lengthy pleadings by both the State and defendants, the State filed a motion for summary judgment. The district court granted that motion and granted the injunctive relief prayed for. The district court's order enjoined defendants from operating Park West Christian School until that school was approved by the State Department of Education. This order was entered on May 27, 1983. On June 2, 1983, defendants filed a timely motion for new trial. This motion for new trial was overruled on September 6, 1983.

On September 19, 1983, defendants filed a pleading in the district court, entitled "Defendant's Motion to Vacate Order of Injunction and to Dismiss Action." This pleading moved the district court to vacate the injunction and either to dismiss the petition or to grant a new trial, because on September 9, 1983, the State Board of Education had taken certain action and that as a result of such action "no issue now remains in the case."

On October 3, 1983, the district court made a docket entry stating in part:

> The Court being advised that October 6, 1983 is the date by which defendants must perfect an appeal of this Courts [sic] order of September 6, 1983 and the defendants having requested time to brief the issues raised by motion #22, the Court now orders that enforcement of the order of injunction herein be stayed until November 3, 1983.

On November 3, 1983, the district court further stayed the enforcement of the injunction until November 10, 1983, and on November 9, 1983, the district court overruled defendants' motion filed September 19, 1983. On November 10, 1983, defendants filed their notice of appeal from, as stated in their notice of appeal,

> the order of this court granting summary judgment, May 27, 1983; the order of this court over-ruling its motion for

new trial dated September 6, 1983; and order of court denying motion to vacate judgment and grant new trial dated November 9, 1983.

The State then filed a motion for summary dismissal stating that "appellants did not file a notice of appeal within one (1) calendar month after their motion for new trial was overruled on September 6, 1983." Defendants filed objections to the motion for summary dismissal. Rather than dispose of the case on summary disposition, this court denied the motion in order that oral argument could be heard on the subject.

It is now clear that this court does not have jurisdiction of this appeal. First of all, by its own terms, the defendants' pleading of September 19, 1983, seeking a new trial on the grounds of "newly discovered evidence" does not comply in any way with Nebraska statutes or practice. The September 19, 1983, pleading, insofar as newly discovered evidence is concerned, refers to action taken by the State Board of Education on September 9, 1983—some 3 1/2 months after the court's order of summary judgment entered on May 27, 1983. As stated in *Sullivan v. Hoffman*, 207 Neb. 166, 173, 296 N.W.2d 707, 712 (1980):

> "[E]vidence of facts happening after trial ordinarily cannot be considered as newly discovered evidence on which to justify the granting of a new trial." *Wagner v. Loup River Public Power District*, 150 Neb. 7, 12, 33 N.W.2d 300, 303 (1948). "A new trial will not be granted on the ground of newly discovered evidence where it appears that such evidence was not available at the time of the trial, but rather the result of changed conditions since." *Id.* at 11, 33 N.W.2d at 303. "In any but a very extraordinary case in which an utter failure of justice will unequivocally result, a verdict on the evidence at the trial will not be set aside and a new trial granted on the basis of evidence of facts occurring subsequent to such trial." *Id.* at 12, 33 N.W.2d at 304.

Secondly, defendants' motion for new trial filed on June 2 and denied on September 6, 1983, is the only motion for new trial relevant here. Neb. Rev. Stat. § 25-1143 (Reissue 1979) provides that a motion for new trial must be made "within ten

days . . . after the verdict, report or decision was rendered." No provision is made for a second motion for new trial, and it is clear that defendants' pleading of September 19 was addressed to a decision of May 27, 1983, and that defendants' September pleading was a nullity.

The notice of appeal in this case was filed on November 10, 1983. Defendants' motion for new trial was denied on September 6, 1983. The appeal is not timely and it is dismissed.

APPEAL DISMISSED.

STATE OF NEBRASKA, APPELLEE, V. CAROLYN A. JOY, APPELLANT.

353 N.W.2d 23

Filed August 10, 1984. No. 83-924.

1. **Criminal Law: Confessions.** In determining whether the State has shown the admissibility of custodial statements by the requisite degree of proof, this court will accept the factual determination and credibility choices made by the trial judge unless they are clearly erroneous, and in so doing we will look to the totality of the circumstances.
2. **Confessions: Right to Counsel: Waiver.** Once the right to counsel and the right to remain silent have been invoked by a defendant, the defendant cannot be persuaded to waive his rights, and there is a strong presumption against waiver. If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.
3. **Confessions: Right to Counsel.** An accused who has expressed his desire to deal with the police only through counsel is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

Appeal from the District Court for Douglas County: KEITH HOWARD, Judge. Reversed and remanded.

Donald W. Kleine, for appellant.

Paul L. Douglas, Attorney General, and Timothy E. Divis, for appellee.

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

WHITE, J.

The defendant, Carolyn A. Joy, was charged with first degree murder, convicted by a jury, and sentenced to imprisonment for the remainder of her life.

The sole assignment of error on appeal to this court is that the district court erred in refusing to suppress the statement or confession given by the defendant to Douglas County sheriff's officers. We agree with the defendant's position, and, as a consequence, we are compelled to reverse her conviction and sentence.

A recitation of the facts surrounding the confession is necessary. On June 8, 1983, members of the sheriff's department questioned Joy concerning the recent homicide of Laura J. LaPointe. Joy denied any involvement. On June 28, 1983, the defendant was in custody at the Douglas County Department of Corrections for a prostitution charge. On that day, at approximately 9 a.m., Joy was transported to the sheriff's office at 115th and Burt Streets to obtain a hair sample, undergo a polygraph test, and continue the June 8 interview. Joy told the deputy sheriffs that she had spoken with her attorney and that her attorney advised her not to say anything unless her attorney was present. After the hair sample was taken Joy was placed in an interrogation room "to continue the interview." The deputy sheriffs, on their own initiative and not at the defendant's request, attempted to contact the attorney whom the defendant said represented her. Around 11:15 that morning, the attorney returned the deputy sheriffs' telephone call and notified them that she was not Joy's attorney and did not intend to represent Joy. Joy was informed of this information, but she was not given an opportunity to talk to the attorney, nor was she allowed the option of calling the attorney or any other attorney. Joy was asked to continue the interview. Although Deputy Sheriff Robert J. Tramp testified that Joy agreed to talk to him at that time, it is undisputed that Joy refused to sign the standard rights advisory form. The questioning continued.

At 12:50 that afternoon Warden Charles Terry of the Douglas County Corrections Center arrived at the sheriff's office per Joy's request. Warden Terry informed Joy that she could trust the officers and "that if she knew anything it was best for her to cooperate and tell them what she knew and tell the truth . . . ." Terry went on to explain that no promises could be made. Shortly thereafter, and after signing the *Miranda* rights advisory form, Joy made incriminating statements as to how she and three other prostitutes had killed Laura J. LaPointe.

After a pretrial hearing on Joy's motion to suppress the statements, and after the trial court overruled her motion and subsequent objection at trial, the taped confession was heard by the jury.

In determining whether the State has shown the admissibility of custodial statements by the requisite degree of proof, this court will accept the factual determination and credibility choices made by the trial judge unless they are clearly erroneous, and in so doing we will look to the totality of the circumstances. *State v. Teater*, 209 Neb. 127, 306 N.W.2d 596 (1981); *State v. Strickland*, 209 Neb. 133, 306 N.W.2d 600 (1981).

The State agrees that the interrogation of the defendant was custodial and subject to the guidelines outlined in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), and its progeny. In *Edwards v. Arizona*, 451 U.S. 477, 484-85, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981), the U.S. Supreme Court held

> that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, *unless the accused himself initiates further communication, exchanges, or conversations with the police.*

(Emphasis supplied.) See, also, *State v. Pittman*, 210 Neb. 117, 313 N.W.2d 252 (1981).

There is no doubt that defendant unequivocally invoked her right to remain silent unless an attorney was present. Once the right to counsel and the right to remain silent have been invoked

by a defendant, the defendant cannot be persuaded to waive his rights, and there is a strong presumption against waiver. If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. *State v. Teater, supra.* The State has not met this burden. From the outset the deputy sheriffs' actions were aimed at soliciting incriminating statements from the defendant. The officers, on their own initiative, contacted the attorney whom the defendant contended represented her. The deputy sheriffs then told the defendant that the attorney did not nor would not represent her. Later questioning was then initiated by Tramp when he asked the defendant to continue the interview without the presence of counsel or without even allowing the defendant to contact an attorney. The defendant having invoked her constitutional rights to remain silent and to have an attorney present during questioning, it then became incumbent upon the authorities to refrain from initiating further conversation and to scrupulously honor the defendant's request. See, *State v. Pittman, supra; State v. Strickland, supra.* The officers, having violated these obligations, rendered any subsequent statements by the defendant inadmissible.

In view of the determination made it is unnecessary to discuss whether the defendant's statements were extracted through the use of improper influence. See, *State v. Teater, supra; State v. Hunsberger*, 211 Neb. 667, 319 N.W.2d 757 (1982).

The conviction and sentence of the defendant are vacated and the cause remanded to the district court.

REVERSED AND REMANDED.

DOUGLAS D. JASA ET AL., PLAINTIFFS, V. CITY OF OMAHA ET AL., DEFENDANTS.
352 N.W.2d 913

Filed August 10, 1984. No. 83-943.

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

Ephraim L. Marks, Timothy J. Cuddigan, and Steven M. Watson of Marks, Clare, Hopkins, Rauth & Cuddigan, for plaintiffs.

Herbert M. Fitle, Omaha City Attorney, James E. Fellows, and Timothy M. Kenny, for defendants.

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

HASTINGS, J.

This matter comes before us pursuant to Neb. Rev. Stat. § 24-219 (Cum. Supp. 1982) as three certified questions of law from the U.S. District Court for the District of Nebraska.

Plaintiffs are professional security guards employed by private businesses in Omaha, Nebraska. They claim that when they appear in Omaha Municipal Court as complaining witnesses on behalf of the state in criminal proceedings, they are denied statutory witness fees and costs. This, they allege, is pursuant to a decision of the municipal judges to exclude professional security personnel from the class of persons entitled to witness fees and costs under Neb. Rev. Stat. §§ 29-2207 (Reissue 1979), 33-139 (Cum. Supp. 1982), and 81-1848(5) (Reissue 1981).

The U.S. District Court certified the following questions to this court for decision:

(1) Whether or not the judges of the Omaha Municipal Court are required by law to assess or certify witness fees and costs for payment to professional security personnel who testify as complaining witnesses on behalf of the State of Nebraska in Omaha Municipal Court.

(2) Whether or not the City of Omaha is required to pay such fees and costs to professional security personnel, with or

without prior certification by the judges.

(3) Whether, if professional security personnel have unlawfully been denied such fees and costs, the City of Omaha would be liable for accounting and payment of previously earned but unpaid witness fees and costs.

Though class action certification has not yet been pursued, the plaintiffs make class action claims as representatives of all other professional security guards similarly situated.

At a formal meeting of the judges of the Omaha Municipal Court in August 1974, the judges adopted the policy that private security guards appearing as witnesses not be paid witness fees. During the time the policy was in effect, until January 1, 1983, the payment of witness fees was made from a separate account fund known as the Statutory Witness Fee Account. This fund was under the control, management, and administration of the municipal court. Since January 1, 1983, pursuant to the request of the municipal court, the fund was no longer in the municipal court budget, and the fees were and are now paid from and out of the general expense account of the finance department of the City of Omaha after certification by the municipal court.

When the policy of nonpayment was established, courtroom bailiffs, pursuant to the direct order of the court, were usually not allowed to permit the plaintiffs to sign the register, nor were other notations made indicating the attendance of the witness, which in effect precluded the receipt of a witness fee. In some cases the plaintiffs did register, but the bailiff would mark down that no payment would be received. One municipal judge estimated 90 percent of the security guards on private complaints were not allowed to sign the witness register. The practice continued, despite the advisement of the city legal department that nonpayment of the witness fees was contrary to law, until sometime after the filing of the complaint.

At present all subpoenaed witnesses are allowed to sign in when they make an appearance in the Omaha Municipal Court, and the court merely certifies the costs and leaves the matter of disbursement to the city finance department.

In addressing the first certified question of law, § 33-139 provides in part: "Witnesses before the district court and the

county court or municipal court . . . shall receive twenty dollars . . . for each day actually employed in attendance on the court . . . ." In *Nebraska Im-Pruv-All, Inc. v. Sass*, 197 Neb. 261, 266, 247 N.W.2d 924, 927 (1976), when interpreting this same statute, we stated: "The foregoing statute contains no exceptions to the allowance of witness fees. The language of the statute is plain and unambiguous." Although the present disputes in this case were criminal prosecutions rather than civil actions, the application of the statute is similar.

Section 29-2207 provides as follows: "In every case of conviction of any person for any felony or misdemeanor, it shall be the duty of the court or magistrate to render judgment for the costs of prosecution against the person convicted."

The language of the statutes is indeed unambiguous. The plaintiffs are not excepted, and witness fees should have been paid to them. However, the statutes do not specify whether the court or the city has the ultimate responsibility for payment of the witness fees.

Regardless of this responsibility, the system of payment was set up so that the municipal judges functioned as an integral part of the payment process. Therefore, we hold the judges are required by law to assess or certify witness fees and costs for payment to private security personnel who testify as complaining witnesses on behalf of the State of Nebraska in Omaha Municipal Court.

The second certified question asks the court to determine whether the city is required to pay such fees and costs to professional security personnel, with or without prior certification of the judges.

In criminal prosecutions in the municipal court, the suits are brought in the name of The State of Nebraska, pursuant to Neb. Const. art. V, § 24.

The specific statutory authority of a city of the metropolitan class with reference to criminal prosecution is specifically set out in Neb. Rev. Stat. § 14-102(25) (Reissue 1983), which provides:

> To make and enforce all police regulations for the good government, general welfare, health, safety, and security of the city and the citizens thereof, in addition to the police

> powers expressly granted herein; and in the exercise of the police power, they may pass all needful and proper ordinances, and shall have power to impose fines, forfeitures, penalties, and imprisonment at hard labor for the violation of any ordinance, and to provide for the recovery, collection, and enforcement thereof; and in default of payment to provide for confinement in the city or county prison, workhouse, or other place of confinement with or without hard labor as may be provided by ordinance.

The clerk of the Omaha Municipal Court is an employee of the City of Omaha and has the following duties pursuant to Neb. Rev. Stat. § 26-108 (Reissue 1979), which provides in part:

> The clerk shall have the same power in the municipal court, unless otherwise herein specifically provided, as the clerk of the district court in the county in which the municipal court exists, and shall keep and be custodian of the records of the court. He shall receipt and account for all fees and money received by him as such clerk . . . accompanied by a full and accurate statement of all such fees. All witness fees remaining unclaimed for ninety days after the same shall have been collected by the clerk, shall be forfeited to the city, and shall be paid to the city treasurer by the clerk, who shall report at the end of each month to the city treasurer all witness fees collected by him and in his possession.

All of the witness fees which are generated by the municipal court and collected by the clerk of the municipal court are to be paid to the city.

The payment of these fees to the city is governed by Neb. Rev. Stat. § 26-114 (Reissue 1979), which provides as follows: "All fees and charges received by the city treasurer from the clerk of the municipal court shall be placed to the credit of the general fund of the city."

There is further specific statutory authority for the City of Omaha to pay for judgments and costs. Neb. Rev. Stat. § 14-501 (Reissue 1983) provides in part:

> The city council shall annually and within the first week

> of January, if possible, appropriate money and credits of the city in such amounts as may be deemed necessary and proper and set the same aside to the following designated funds to be known as statutory funds: . . . (6) for the purpose of paying judgments and costs. The amounts so appropriated and set aside to such funds respectively shall be the maximum amounts that may be appropriated to or expended from such funds within the year for the purposes for which such funds respectively are created.

As mentioned before, § 33-139 stated the witnesses shall be paid for attendance in court. This section does not specifically state who must pay the witness fee. For this reason the city contends there is an absence of statutory authority to hold it liable for the unpaid witness fees. Nevertheless, § 33-139, in conjunction with the aforementioned statutes, is sufficient for us to hold that the city has the ultimate responsibility to pay for costs incurred in the prosecution of offenders for city ordinances.

Also, as mentioned before, the municipal court judge and his certification of costs is a necessary part of the payment process. Without certification, there is no payment. However, just because certification is withheld from recognizing certain names registered on the witness list, payment should not be withheld. In conclusion, we believe the city is required to pay such fees and costs to the security personnel, with or without prior certification of the judges, provided there is otherwise competent proof of the days a witness was "actually employed in attendance on the court."

The last question is whether the city is liable for an accounting and payment of previously earned, but unpaid, witness fees and costs. The city is liable for previously unpaid witness fees and costs, but it is not required to render an accounting under Nebraska law.

Generally, in order to be entitled to the equitable remedy of accounting, it is necessary to show a fiduciary or trust relationship between the parties, or a complicated series of accounts, making the remedy at law inadequate. *Trump, Inc. v. Sapp Bros. Ford Center, Inc.*, 210 Neb. 824, 317 N.W.2d 372 (1982). In this case, where there is no fiduciary or trust

relationship, this request for an accounting would seem to be a matter of evidence where proof of attendance is needed to establish the amount of damages, rather than the situation where there is a complicated series of accounts. It is not the city's responsibility to prove the plaintiffs' claims. The complexity of the situation requires the plaintiffs to prove their own damages.

Judgment is entered accordingly.

JUDGMENT ENTERED.

IN RE ADOPTION OF C.L.R. AND J.M.R., CHILDREN UNDER 18 YEARS OF AGE.

D.E.M., ADOPTIVE FATHER, APPELLANT, V. P.A.M., NATURAL MOTHER, APPELLEE.

352 N.W.2d 916

Filed August 10, 1984. Nos. 83-957, 83-958.

1. **Adoption: Appeal and Error.** Appeals in adoption proceedings are reviewed by the district court and this court for error appearing in the record.
2. **Adoption.** As a general rule, satisfactions and discharges of accrued child support obligations, or the termination of future responsibility for the same as to the natural father, do not constitute an unwarranted payment of consideration which will vitiate a child relinquishment and consent to adoption.
3. _____. In cases involving the vacation or annulment of adoption decrees, the welfare of the child is the paramount consideration of the court.

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

Edward F. Carter, Jr., of Barney, Carter & Johnson, P.C., and Cleo Robak, for appellant D.E.M.

Gary L. Erlewine, for natural father L.W.R.

Daniel A. Fullner of Moyer, Moyer, Egley & Fullner, for appellee.

Robert R. Steinke of Allphin & Steinke, guardian ad litem for C.L.R. and J.M.R.

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

HASTINGS, J.

These two cases were consolidated for trial in the courts below and for briefing and argument here. They involve appeals of proceedings in which it was sought to vacate and set aside decrees of adoption.

The natural mother (mother) and natural father (father) were husband and wife to whom the minor children involved were born in 1975 and 1977. Their marriage was dissolved by decree of the district court for Colfax County on October 7, 1977. Custody of the children was given to the mother, and the father was ordered to pay support.

The mother and adoptive father were married on July 12, 1980. On January 20, 1981, petitions were filed in the county court for Platte County, seeking the adoption of the children by the adoptive father. Decrees granting such request were entered on February 18, 1981.

A petition seeking dissolution of the marriage between the mother and adoptive father was filed by the mother in the district court for Platte County on October 5, 1981. The adoptive father was ordered to pay temporary child support. The record does not disclose any final decree.

On January 26, 1982, petitions were filed by the adoptive father in the county court for Platte County, seeking to vacate and set aside the adoptions. The petitions and amended petitions alleged fraud on the part of the mother in that she procured the adoptive father's consent to adoption for the sole purpose of obtaining a father who would support the children, inasmuch as the natural father refused to do so; the absence of a proper order from the district court for Colfax County consenting to such adoptions; and that consent to adoption was obtained from the natural father through fraud, duress, and the payment of an improper consideration.

The father voluntarily became a party to these proceedings. He joined in the request for relief advanced by the adoptive father, alleging that his consent to adoption was obtained by granting him improper consideration, to wit, the release of past

and future obligation to pay child support and the promise of the release of a bench warrant outstanding for his arrest for nonpayment of child support.

The county court denied the prayer of relief of the adoptive father. However, it did find that the father's consent to adoption was obtained by fraud and duress in that the mother and adoptive father represented to him at the time he signed the consent that they were married and that the outstanding bench warrant placed his employment in jeopardy and threatened his freedom. Accordingly, the court vacated the decrees of adoption and restored the rights and obligations of the father as a parent.

On appeal the district court affirmed the action in denying the adoptive father relief, but reversed the action of the county court in granting relief to the father and vacating the adoptions. The adoptive father appeals to this court. The father, although not having filed a notice of appeal, has filed a brief in these proceedings supporting the position of the appellant. The guardian ad litem has also filed a brief urging affirmance of the judgment of the district court.

Appeals in adoption proceedings are reviewed by the district court and this court for error appearing in the record. Neb. Rev. Stat. §§ 43-112 (Reissue 1978) and 30-1601 and 24-541.06 (Cum. Supp. 1982). Accordingly, we may dispose of the adoptive father's claim, that he was induced by fraud to enter into these adoptions, with a minimum of comment.

There is an abundance of evidence in the record to support the findings of both lower courts that the adoptive father entered into these adoptions freely and voluntarily, that he understood the nature of the relationship to be created, that he loved the children and wanted to be their parent, and that adoption was his idea more than it was that of the mother. He had no more right to deny the obligations of parenthood under these circumstances than would a natural father who claimed to have been defrauded into fathering a child by a wife who was more interested in becoming a mother than continuing as a wife.

The county court's finding of misrepresentation as to the marital status of the mother and adoptive father at the time the

father executed the consent and relinquishment was totally without substance. Although we are not prepared to say that we would condone adoptions by unmarried couples, we are not cited to any law prohibiting the same. More importantly, however, the relinquishment did not become effective until the adoption proceedings were commenced, which was some 7 months after the marriage of the parties.

Three assignments of error remain to be discussed: payment of improper consideration, coercion in the form of the bench warrant, and the absence of consent by the district court.

At the time the father signed the relinquishment and consent to adoption he was nearly $3,000 in arrears on the payment of child support. There is no question but that the mother and adoptive father executed a release of all child support obligations on the father's part, accrued or to accrue in the future, conditioned on the father's execution of the relinquishment. This document was filed in the dissolution proceedings in the district court for Colfax County. It is insisted that this is an impermissible payment of consideration sufficient to void the consent, as determined in *Gray v. Maxwell*, 206 Neb. 385, 293 N.W.2d 90 (1980).

We would be blind to reality if we did not acknowledge that in most adoptions of this nature the relinquishing father is "paid a consideration" in that he will, at the very least, be relieved of the obligation of future support. This is the very nature of adoption proceedings. "[A]fter a decree of adoption has been entered, the natural parents . . . shall be relieved of all parental duties toward and all responsibilities for such child . . . ." Neb. Rev. Stat. § 43-111 (Reissue 1978). Furthermore, it is a rare case indeed where a mother will attempt to obtain, or, more especially, that a father will willingly give, a relinquishment for adoption when he has faithfully and continually met his regular support obligations. We therefore hold that the satisfactions and discharges of accrued child support obligations, or the termination of future responsibility for the same, do not constitute an unwarranted payment of consideration which will vitiate a child relinquishment.

Similar reasoning obviates the father's claim of coercion. In support of his contention the father testified that at one time he

was nearly $3,000 in arrears on his child support payments; a deputy sheriff came to his place of employment and served some papers on him; he called Larry Karel, the attorney representing his former wife in the adoption proceedings, and expressed his concern that he might lose his job if he were arrested; Karel repeated what he had written the father, that he would be released from child support if he consented to the adoption; and the father told Karel that he knew the adoptive father, that he believed he would be a good father for his children, that he had no real objection to his adopting the children, and that he would sign the relinquishment if the bench warrant was recalled.

There is no evidence in the record that the mother took any steps to initiate the contempt proceedings against the father. As a matter of fact, she categorically denied that. The record in the district court transcript of the case involving the natural parents' dissolution proceedings discloses that J. H. Hoppe, who was appointed as a special attorney to prosecute contempt proceedings against the father for nonsupport, was responsible for having the bench warrant issued. It is true, and unfortunate, that he and the mother and adoptive father's attorney, Karel, held themselves out as being associated in the practice of law. However, there is no direct evidence that the two attorneys acted in concert to obtain the father's relinquishment and consent. Hoppe, in commencing contempt proceedings, apparently was discharging his duties imposed by statute and the court. Neb. Rev. Stat. § 42-358 (Reissue 1978) provides for the appointment of an attorney by the court to initiate contempt proceedings for the collection of delinquent child support payments.

There was no credible evidence that the contempt proceedings were instituted other than as required by law nor done in an effort to coerce the father's execution of the relinquishment. It was the father who deliberately placed himself in the position of being subject to contempt proceedings by not discharging his legal obligation for support, and it was he himself who proposed the dismissal of the contempt proceedings in return for his cooperation in the adoption proceedings.

After having enjoyed the "fruits of his bargain," we will not now permit a natural father, for all intents and purposes a total stranger to his children, who refused to live up to his parental obligations by way of either financial support or moral comfort and encouragement, to come forward some 31 months later and disrupt and upset an accomplished adoption.

Finally, it is suggested that the consent to the adoption was never obtained from the district court for Colfax County, thereby nullifying the adoption proceedings.

Neb. Rev. Stat. § 43-104 (Reissue 1978) provides in part that "[n]o adoption shall be decreed unless the petition . . . is accompanied by written consents . . . executed by . . . any district court . . . having jurisdiction of the custody of a minor child by virtue of divorce proceedings . . . ." The consent of the district court "shall be shown by a duly certified copy of order of the court required to grant such consent." Neb. Rev. Stat. § 43-106 (Reissue 1978).

For some unaccountable reason the original of a January 13, 1981, "Order for Court's Consent to Adoption," captioned "In the District Court for Colfax County, Nebraska," and signed by the district judge, was attached to and filed on January 20, 1981, with the petition for adoption in the county court for Platte County. The substance of the order is in all respects regular and complete, but appellant contends it does not conform to the requirements of law.

There is, as a part of the record, a transcript from the district court for Colfax County, in the dissolution proceedings involving the natural parents, in which is found an "Order for Court's Consent to Adoption," in substance similar to the previously mentioned order, dated January 13, 1981, but which was not filed until June 4, 1982. There is also the following entry on the trial docket, dated June 3, 1982: "Hearing previously had on 13 Jan. 1981 evidence produced showing consent to adoption and written relinquishment executed - order entered on said date - not apparently filed - order nunc pro tunc signed this date." There follow the initials of the same district judge who signed both orders.

The adoptive father cites us to the case of *Kellie v. Lutheran Family & Social Service*, 208 Neb. 767, 305 N.W.2d 874 (1981),

for the proposition that strict compliance with the statutory requirements for adoption is required. In that case the adoption agency had failed completely to execute a written acceptance of the child, as required by statute.

However, in *Hiatt v. Menendez*, 157 Neb. 914, 62 N.W.2d 123 (1954), this court held that the failure of the adoptive parents to sign and have verified their signatures to the petition for adoption was simply an irregularity which did not have the effect of rendering the decree void for want of jurisdiction. The court pointed out that the record did disclose positively the desire of the parents to complete the adoption.

In the cause before us the record also discloses positively that the district court consented to the adoption. Were there any doubts as to that court's intention, its previously declared action was ratified by the order nunc pro tunc entered sometime later, which related back to the January 13, 1981, order. The jurisdictional requirement is that the district court gives its consent. Section 43-106 merely provides the method by which proof of such consent may be unequivocally given.

Such an interpretation is in keeping with the principle that in cases involving the vacation or annulment of adoption decrees, the welfare of the child is the paramount consideration of the court. 2 C.J.S. *Adoption of Persons* § 119 (1972); 2 Am. Jur. 2d *Adoption* § 82 (1962). To judicially eradicate the only father these two children have ever known would definitely not be in furtherance of their welfare.

The judgment of the district court is correct and is affirmed.

AFFIRMED.

WHITE, J., dissenting.

I dissent from that part of the majority opinion which holds that strict compliance with the statutory requirements for adoption is *not* required. In *Kellie v. Lutheran Family & Social Service*, 208 Neb. 767, 771, 305 N.W.2d 874, 876 (1981), this court held that "[i]n this state we have followed the rule that strict compliance with the adoption statutes is required." See, also, *In re Petition of Ritchie*, 155 Neb. 824, 53 N.W.2d 753 (1952).

The majority opinion admits that the statutory requirements were not met. The strict compliance standard was simple and is

easily applied. I would not have substituted that standard for one more flexible.

KRIVOSHA, C.J., joins in this dissent.

TRAVELERS INDEMNITY COMPANY, A CORPORATION, APPELLEE, V. ARTHUR HEIM AND MELVA HEIM, HUSBAND AND WIFE, APPELLANTS, HIGH PLAINS AGRICULTURAL CREDIT CORPORATION, APPELLEE.

352 N.W.2d 921

Filed August 10, 1984. No. 84-077.

1. **Judicial Sales: Foreclosure: Appeal and Error.** An order confirming a judicial sale under a decree foreclosing a mortgage on real estate will not be reversed on appeal for inadequacy of price, when there was no fraud or shocking discrepancy between value and the sale price, and where there is no satisfactory evidence that a higher bid could be obtained in the event of another sale.
2. **Homesteads: Words and Phrases.** In order to qualify real estate as a homestead under Neb. Rev. Stat. § 40-101 (Cum. Supp. 1982), a homestead claimant and his family must reside in habitation on the premises. A person cannot have two homesteads, nor can he have two places either of which at his election he may claim as a homestead.

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

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

David C. Nuttleman of Holtorf, Kovarik, Nuttleman, Ellison, Mathis & Javoronok, P.C., for appellee Travelers Indemnity Company.

Mark L. Laughlin of Venteicher, Laughlin, Peterson & Lang, for appellee High Plains Agricultural Credit Corporation.

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

PER CURIAM.

Arthur and Melva Heim appeal the judgment of the district court for Kimball County confirming a sheriff's sale held in connection with foreclosure of a mortgage given by Heims to Travelers Indemnity Company (Travelers). We affirm.

On April 21, 1976, Heims gave their promissory note to Travelers in the amount of $400,000. As security for payment of their note, Heims also executed a real estate mortgage in favor of Travelers. Upon Heims' default in payment on the note, Travelers commenced suit on May 21, 1979, to foreclose the mortgage. A decree of foreclosure was entered on July 30, 1982. In that decree the district court found that Heims owed Travelers $580,647.30 and that Heims owed another mortgagee, High Plains Agricultural Credit Corporation, $346,712.56 on a second mortgage lien on the real estate. On April 11, 1983, the district court ordered a sale of the mortgaged real estate, and a sheriff's sale was held on June 17. At the June 17 sale three farmers bid an aggregate of $371,000, and High Plains was the high bidder for the entire tract at $455,000.

Heims objected to confirmation of the sheriff's sale. After a hearing on July 7 the district court sustained Heims' objections. On July 14 the district court set aside the sheriff's sale of June 17 and ordered the property resold.

After the district court's order to resell the mortgaged premises, Heims planted winter wheat on the mortgaged real estate. The district court amended its order for resale to provide that any purchaser at the foreclosure sale would become the owner of the crops unharvested at the date of such sale.

On September 23 a second sheriff's sale was held. Approximately 10 bidders attended this sale. One individual bid $10,000 on one of the parcels, Travelers bid $450,000 on the entire mortgaged tract, and High Plains made the high bid of $455,000 for all the mortgaged real estate.

Travelers moved for confirmation, and Heims objected. On October 12 the court confirmed the sale to High Plains for $455,000. In the order the district court found "that said real property was sold for a fair and reasonable value under the circumstances and conditions of sale, and that a subsequent sale would not realize a greater amount, the Court finds that the sale

should be confirmed."

Confirmation of foreclosure sales is governed by Neb. Rev. Stat. § 25-1531 (Supp. 1983), which provides in part:

> If the court . . . shall . . . be satisfied . . . that the said property was sold for fair value, under the circumstances and conditions of the sale, or, that a subsequent sale would not realize a greater amount, the court shall direct the clerk to make an entry on the journal that the court is satisfied of the legality of such sale, and an order that the officer make the purchaser a deed of such lands and tenements.

Heims contend the trial court erred in confirming the sheriff's sale. The principal evidence to support Heims' objection to confirmation was Mrs. Heim's testimony that a wheat crop on the subject real estate would increase the value of the land between $100 and $300 per acre. Mrs. Heim also testified that the value of mineral rights for the real estate had increased due to intensified mineral activity in the area of the mortgaged premises. However, on cross-examination Mrs. Heim admitted Heims did not own all the mineral rights for the mortgaged real estate and that, after the first sheriff's sale but before the second sale, Heims executed an oil and gas lease to themselves for 99 years. Heims recorded that mineral lease.

In support of its motion for confirmation, Travelers reoffered testimony of Robert Marland, an "accredited rural appraiser" who had testified at the first confirmation hearing held on July 7. Marland had appraised Heims' real estate at $383,490. Because his appraisal was completed before the winter wheat crop was planted, Marland's appraisal did not include any attributory value regarding the wheat crop and did not include any valuation for the mineral rights on the mortgaged real estate.

A real estate foreclosure action is an action in equity triable on appeal de novo. See *Tilden v. Beckmann*, 203 Neb. 293, 278 N.W.2d 581 (1979). However, when the evidence is in conflict, this court will consider that the trial court heard the witnesses and had an opportunity to observe their demeanor.

Other than Mrs. Heim's testimony that the property was worth more than the high bids at the two sheriff's sales, there is

no satisfactory evidence that the real estate has not been sold for its fair value under the circumstances and conditions of the sale, as required by § 25-1531. Further, there is no evidence that a subsequent sale would realize a greater amount. In this case the real estate has been sold twice at public sale for the same figure—$455,000. In *Lincoln Joint Stock Land Bank v. Fuller*, 132 Neb. 677, 273 N.W. 14 (1937), we said:

> We are convinced that the results obtained from three sales of this property furnish a fair and just criterion of the value of the property upon which the court might act. It is at least sufficient to present an issuable fact as against the opinion evidence contained in the affidavits offered in evidence by the appellants.

Id. at 681, 273 N.W. at 17.

> An order confirming a judicial sale under a decree foreclosing a mortgage on real estate will not be reversed on appeal for inadequacy of price, when there was no fraud or shocking discrepancy between value and the sale price, and where there is no satisfactory evidence that a higher bid could be obtained in the event of another sale.

Nebraska Federal Savings & Loan Assn. v. Patterson, 212 Neb. 29, 30, 321 N.W.2d 71, 72 (1982).

The court's reasoning in *Lincoln Joint Stock Land Bank, supra* at 682, 273 N.W. at 17, is equally applicable here.

> While opinion evidence is almost always necessary in fixing the market value of land, it is not always controlling. The trial court apparently gave it little weight in the case at bar when the results of [two] public auctions of the land were presented to it. In this we believe the trial court was justified. Opinion evidence must give way to facts, and, after [two] sales, [neither] of which brought over [$455,000], it would seem that the trial court was amply justified in finding that the market value did not exceed that amount.

The trial court was probably concerned, as are we, with preserving the solemnity and stability of judicial sales. To order the property to be sold yet again where it has twice brought the same price in previous sales would impermissibly "chill" bidding and nullify solemnity and stability of judicial sales. Cf.

Nebraska State Bank & Trust Co. v. Wright, 213 Neb. 822, 331 N.W.2d 535 (1983).

In this case there has been no evidence adduced by Heims that a higher bid would be obtained in the event of another sale. Therefore, the district court did not err in confirming the sheriff's sale to High Plains on September 23.

After the confirmation order of September 23, Heims, on October 18, filed an application to set aside the confirmed sale. Heims contend the district court should have granted their application to set aside the second sheriff's sale, because the real estate sold was Heims' homestead and Mrs. Heim's signature on the real estate mortgage was not acknowledged. Heims' application to set aside the confirmed sale was based on § 25-1531, which provides:

> Prior to the confirmation of sale pursuant to this section, the party seeking confirmation of sale shall, except in the circumstances described in section 40-103, provide notice to the debtor informing him or her of the homestead exemption procedure available pursuant to Chapter 40, article 1. The notice shall be given by certified mailing at least ten days prior to any hearing on confirmation of sale. . . . Upon application to the court by the judgment debtor within sixty days of the confirmation of any sale confirmed pursuant to this section, such sale shall be set aside if the court finds that the party seeking confirmation of sale failed to provide notice to the judgment debtor regarding homestead exemption procedures at least ten days prior to the confirmation of sale as required by this section.

In order to qualify real estate as a homestead under Neb. Rev. Stat. § 40-101 (Cum. Supp. 1982), a homestead claimant and his family must reside in habitation on the premises. See *Schroeder v. Ely*, 161 Neb. 262, 73 N.W.2d 172 (1955). A person cannot have two homesteads, nor can he have two places either of which at his election he may claim as a homestead. See *Berggren v. Bliss*, 122 Neb. 801, 241 N.W. 544 (1932).

Heims' contention that there can be no confirmation in view of § 25-1531 depends on whether the mortgaged premises was in fact Heims' homestead. In this case Heims' house was

located on the mortgaged premises. However, Heims had moved from their Nebraska house on April 30, 1983, almost 2 months before the first sheriff's sale on June 17, 1983. Heims currently reside in a mobile home in Colorado. When they moved from Nebraska to Colorado, Heims removed all the windows and doors in their Nebraska house. All that remains is the bare structure, a shell of a house, the telephone, and a mailbox. Mrs. Heim has testified she considers the Nebraska house as her home and residence, which she visits every day, but the facts belie any claim that the Nebraska house is Heims' homestead and residence. The objective evidence indicates Heims' abandonment of the Nebraska homestead and substitution or acquisition of a Colorado homestead. Because the Nebraska house is not used by the Heims as a family residence, the Nebraska real estate does not qualify as a homestead defined by § 40-101.

The judgment of the district court is affirmed.

AFFIRMED.

MICHAEL J. TRACY, APPELLANT, V. UNITED TELEPHONE COMPANY OF THE WEST, A CORPORATION, APPELLEE.

353 N.W.2d 273

Filed August 10, 1984. No. 84-082.

Jurisdiction: Appeal and Error. After an appeal has been perfected in this court, the trial court or any other lower tribunal is without jurisdiction to hear a case involving the same matter between the same parties.

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

John W. Herdzina of Abrahams, Kaslow & Cassman, for appellant.

John F. Wright of Wright, Simmons & Selzer, for appellee.

Darrel J. Huenergardt of O'Brien, Huenergardt & Cook, for

amicus curiae City of Kimball.

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

WHITE, J.

This is an appeal from the judgment of the district court for Scotts Bluff County, Nebraska, which sustained the special appearance of appellee, United Telephone Company of the West (United Telephone), and dismissed the petition of appellant, Michael J. Tracy. We affirm.

A recitation of the procedural history of this matter is necessary for a resolution of this case. The dispute between the parties arose in the Nebraska Public Service Commission (Commission). United Telephone filed an application with the Commission on December 27, 1982, to increase rates in its service area, which includes the city of Kimball, Nebraska. Michael J. Tracy and others filed protests with the Commission. After a hearing the Commission, on August 23, 1983, issued an order granting United Telephone permission to raise its rates. The Commission further directed United Telephone to file a revised schedule of rates that would reflect the rate increase. On September 6, 1983, the Commission approved the revised rate schedules. On September 12, 1983, appellant filed a motion for rehearing, which was overruled on October 25, 1983. Shortly thereafter, a praecipe for transcript and notice of appeal were filed. The notice of appeal was received by this court on December 5, 1983. On October 17, 1983, appellee filed a supersedeas bond with the Commission, which was approved on October 18, 1983.

On October 17, 1983, Tracy filed suit against United Telephone in the district court for Scotts Bluff County. It is the time frame from September 7, 1983, the date on which United Telephone implemented its rate increase, to October 18, 1983, the date on which United Telephone's supersedeas bond was approved, that is the subject of this lawsuit. In his petition Tracy alleged that the rate increase violated Neb. Rev. Stat. § 75-139 (Reissue 1981). That statute provides in pertinent part:

> Except as otherwise provided in this section, the effective date of a rate order that is appealed to the

> Supreme Court shall be the first Monday following the date of the court's mandate if the order is affirmed; . . . *and provided further*, that a common carrier may make effective a rate order increasing a fixed rate by filing a supersedeas bond with the commission sufficient in amount to insure refund of the difference between the rate finally approved and the rate appealed to shippers or subscribers entitled thereto if the order appealed is reversed. A supersedeas bond may be filed by any affected shipper or common carrier, including shippers or common carriers that were not parties to the rate proceeding, at any time prior to the issuance of the Supreme Court's mandate. Only the shipper or common carrier filing a supersedeas bond shall benefit from such filing. The commission shall approve a supersedeas bond which meets the requirements of this section within seven days after a written request therefor has been made, and failure to disapprove the bond within the time specified shall be deemed to be an approval.

In response the appellee filed a pleading on November 15, 1983, entitled "Special Appearance," with an attached certificate of the Commission reflecting the status of the rate application at that time.

On December 6, 1983, after the appeal had been docketed in this court, a hearing was held on the appellee's motion. Thereafter, on January 5, 1984, the court ordered dismissal of the appellant's petition, finding "that it has no jurisdiction to hear the matters involved between the parties hereto and that matter is still pending before the Nebraska Public Service Commission and on appeal to the Supreme Court of the State of Nebraska."

Although appellant argues that the power granted to the Commission by article IV, § 20, of the Constitution of the State of Nebraska does not deprive the district court of concurrent jurisdiction to exercise its general equitable powers, we will not discuss the matter. As noted by the trial court at the time of the entry of its order of dismissal, the jurisdiction to finally determine the cause was not in the Commission, but in this court. The parties do not assert that this court lacked jurisdiction to completely determine the cause before it, nor do

they assert that the issue of the propriety of the rate increase between September 7 and October 18, 1983, was not before this court.

It is an elementary principle of appellate jurisdiction that as soon as the jurisdiction of this court attaches, that of a lower court or tribunal ceases. *State v. Allen*, 195 Neb. 560, 239 N.W.2d 272 (1976). This principle is equally applicable to appeals from administrative agencies. Thus, the Commission had no jurisdiction to further act once the notice of appeal had been filed.

The novel question is, Does the acquisition of jurisdiction by this court deprive a separate, lower tribunal of jurisdiction to hear a case involving the same matter between the same interested parties? As a necessary corollary of this court's power to hear and finally determine causes within our jurisdiction, we believe it does.

In *Case v. Smith*, 215 Mo. App. 621, 257 S.W. 148 (1923), the appellate court noted that while a cause was on appeal, a separate division of the circuit court of Jackson County, Missouri, first entered a default judgment against one of the parties and then set aside the default as void. In approving the order vacating the default judgment, the court said, "As the record shows on its face that the [circuit] court had no jurisdiction or power to render the default judgment, it is absolutely void and of no effect. The court could, therefore, set it aside at the time it did . . . ." *Id.* at 629, 257 S.W. at 151. See, also, *Matter of M.L.Y.*, ____ Mont. ____, 655 P.2d 499 (1982).

At the time the order was entered dismissing appellant's petition, the district court clearly had no jurisdiction to take any action save the action it took. The judgment of the trial court was correct, and it is therefore affirmed.

AFFIRMED.

KRIVOSHA, C.J., concurring.

I agree with and join in the majority opinion. However, I feel it is necessary to emphasize what has been decided, and to point out that which has not been decided.

The majority simply holds that a district court may properly dismiss a petition when the identical question is before this court on appeal and the parties are identical.

We do not decide to what extent, in the exercise of its original

jurisdiction granted by Neb. Const. art. V, § 9, the district court may properly entertain a petition for relief from an alleged unlawful rate where the matter is also pending before the Nebraska Public Service Commission. Indeed, Neb. Rev. Stat. § 75-122.01 (Reissue 1981) appears to sanction the enjoining of rates imposed in violation of chapter 75. Nor does the majority opinion preclude the filing of an action of the type brought by appellant once the appeal is no longer before this court and the issue still unresolved.

CLARENCE KRAFKA, APPELLANT, V. IRENE BRASE, APPELLEE.
353 N.W.2d 276

Filed August 17, 1984. No. 83-603.

1. **Equity: Appeal and Error.** While matters in equity are reviewed de novo on appeal, the rule is that where there are issues of credibility of witnesses, this court must give weight to the fact that the trial court saw and heard them; the rule is also that this court will 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.
2. **Waters.** Surface waters are waters which appear upon the surface of the ground in a diffused state, which ordinarily result from rainfall or melting snow, and may be dammed, diverted, or otherwise repelled by an adjoining landowner without liability, if it is necessary and done without negligence.

Appeal from the District Court for Butler County: WILLIAM H. NORTON, Judge. Affirmed.

Robert G. Krafka of Krafka & Sixta, P.C., for appellant.

James M. Egr of Egr & Birkel, for appellee.

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

COLWELL, D.J., Retired.

Plaintiff, Clarence Krafka, appeals the dismissal of his suit to enjoin defendant, Irene Brase, from stopping the natural flow of surface water which caused ponding damage to

plaintiff. The trial judge personally inspected the lands. We affirm.

Krafka assigns as error that the injunction should have been granted on the evidence and as a matter of law. Further error is claimed on the basis that he had acquired a prescriptive right for drainage of water through an artificial culvert.

> 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.

Kluck v. Mentzer, 217 Neb. 8, 11, 347 N.W.2d 306, 308 (1984).

The farming area here is generally flat; water slowly drains toward the northeast and into the Platte River nearby. Krafka owns the north half of the northwest quarter of Section 24, and, to the north and east, Brase owns the south half of the southeast quarter of Section 13; both are in Township 16 North, Range 1 East, of the 6th P.M., Butler County, Nebraska. The northeast corner of the Krafka land and the southwest corner of the Brase land are common corners. There is a county road running east and west between Sections 13 and 24. The road surface is higher than the Krafka land. There is a grader ditch (ditch) running along the north (Brase's) side of the road. At the northeast corner of the Krafka land there is a 48-inch culvert underneath the road to convey water into the ditch. Some water usually stands in the ditch except during times of heavy rain, when it flows to the east. Prior to 1974, a heavy rainfall sometimes caused the water in the ditch to flow onto the Brase land. At those times some ponding resulted on Krafka's land, but it drained in 24 to 48 hours.

In 1974 Brase did some leveling on her land, and she also built up a dirt embankment along the ditch on the south side of her land for about a quarter of a mile east of the culvert. This embankment is the basis for this lawsuit. Krafka claims that the embankment causes retention of an additional volume of water in the ditch, which prevents water from draining from his land through the culvert and results in ponding of water on about 30 acres of his land, which takes 3 to 6 days to drain.

About 1962, Krafka did some leveling on his land to fill in some low spots and to change the water draining from his land to flow to the north rather than to the west.

> "Surface waters are waters which appear upon the surface of the ground in a diffused state . . . which ordinarily result from rainfall or melting snow" [and] "may be dammed, diverted, or otherwise repelled by an adjoining landowner without liability, if it is necessary and done without negligence."

Sullivan v. Hoffman, 207 Neb. 166, 172, 296 N.W.2d 707, 711 (1980); *Nichol v. Yocum*, 173 Neb. 298, 113 N.W.2d 195 (1962).

Krafka claims some of the water is not surface water; rather, it is spillover water from a drainage ditch in the area. However, that is not supported in the evidence. The evidence clearly shows that the water here is surface water in a diffused state.

"[W]hen diffused surface waters are concentrated in volume and velocity and *flow into a natural depression, draw, swale, or other drainway*, the rule as to diffused surface waters does not apply." (Emphasis supplied.) *Nichol v. Yocum, supra* at 306, 113 N.W.2d at 200.

The real question, then, is whether Krafka met his burden of proof to show that the Krafka water flowed in a natural depression, draw, swale, or other drainageway.

At most, Krafka's evidence shows that the water generally drained in a northeasterly direction and exits from his land through the culvert. There is evidence that at times of very heavy rainfall some water flows over the road. Krafka relies on a 1962 aerial map that shows ponding in the area of the culvert, which he claims is evidence of a depression. That, standing alone, is not convincing. Most of Krafka's evidence related to the acts of Brase in leveling and creating the earthen embankment which changed the waterflow. Brase's evidence was that the water did not flow from the Krafka land in any waterway or defined course, and this is supported by the findings of the trial court:

> The Court concludes that in a state of nature the water simply would not flow in the manner that the Plaintiff claims. The visual inspection of the Plaintiff's real estate indicated no particular source of drainage from the south.

> The Court is left with the conclusion that if there is water accumulating on the Plaintiff's land it is water that could be classified as surface water, which can be repelled by adjoining landowners . . . .

Plaintiff did not sustain his burden of proof, as required in *Yocum*.

Plaintiff relies on *Nickman v. Kirschner*, 202 Neb. 78, 273 N.W.2d 675 (1979), for his claim of a prescriptive right to discharge water upon Brase's land. That case is distinguished on the facts, since it involves the artificial drainage of ponded surface water into a natural water drain on the same land.

AFFIRMED.

RICHARD FREEMAN MCCORMICK AND JOAN MAXINE MCCORMICK, APPELLANTS, V. STATE OF NEBRASKA, DEPARTMENT OF PUBLIC WELFARE, ET AL., APPELLEES.

354 N.W.2d 160

Filed August 31, 1984. No. 84-100.

1. **Child Custody: Habeas Corpus: Appeal and Error.** A decision in a habeas corpus case involving the custody of a child is reviewed by this court de novo on the record. Where the evidence is in irreconcilable conflict, we consider the findings of the trial court.
2. **Parental Rights: Adoption.** In the absence of threats, coercion, fraud, or duress, a properly executed relinquishment of parental rights and consent to adoption form signed by a natural parent knowingly, intelligently, and voluntarily is valid.
3. _____: _____. A relinquishment conditioned upon the retention of some parental rights is invalid.

Appeal from the District Court for Douglas County: THEODORE L. CARLSON, Judge. Reversed and remanded with directions.

James H. Monahan, for appellants.

Paul L. Douglas, Attorney General, and Royce N. Harper, for appellees.

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

PER CURIAM.

Richard and Joan McCormick appeal from the order of the district court dismissing their petition for a writ of habeas corpus. The McCormicks brought the action to cancel their relinquishment and obtain custody of their son, Mark William McCormick. The McCormicks claim that the relinquishment of parental rights which they executed was not signed voluntarily and was therefore invalid.

The record shows that in 1981 the State commenced an action in the separate juvenile court to terminate the parental rights of Richard and Joan McCormick to their son Mark. A final hearing in that matter was set for March 23, 1982. Shortly before that hearing was to begin, there was a discussion in the courthouse hallway among the McCormicks; their pastor; their court-appointed counsel, James Pruss; the guardian ad litem, Kenneth Weiner; and Mary Lee Kenworthy, a caseworker from the Department of Welfare. During this discussion, it was explained to the McCormicks that if they signed a relinquishment of their parental rights, there was a possibility that an "open adoption" could be arranged, provided that cooperative adoptive parents could be found. An "open adoption" is described in the record as one where the natural parents continue to have contact with their child. The "open adoption" idea was first brought up in the discussion by the caseworker.

It appears that Mrs. McCormick understood "open adoption" meant that she and her husband would be able as a matter of right to see their son following an adoption. Mr. McCormick does not recall any of the events of March 23, 1982, apparently due to a combination of medication and the mental condition from which he suffers. Pruss told the McCormicks that it was likely that the juvenile judge would terminate their rights if the March 23, 1982, hearing was held, and he advised the McCormicks that the open adoption may be the "best route to go."

The McCormicks then signed a relinquishment. Immediately thereafter, the hearing commenced and the court was informed

that a relinquishment had been signed. The court granted the guardian ad litem's motion for a continuance until such time as an adoption was arranged or for 9 months.

Pruss testified that the attitude of those representing the State changed as soon as the relinquishment was signed, in that they moved quickly to obtain the child's possessions from the McCormicks. The McCormicks have not been permitted visitation with their son since the relinquishment was signed.

The McCormicks brought this action in August 1982 for a writ of habeas corpus. The district court dismissed the petition for a writ of habeas corpus but continued a restraining order preventing the arrangement of an adoption of Mark McCormick pending this appeal.

A decision in a habeas corpus case involving the custody of a child is reviewed by this court de novo on the record. Where the evidence is in irreconcilable conflict, we consider the findings of the trial court. *Gray v. Maxwell*, 206 Neb. 385, 293 N.W.2d 90 (1980); *Raymond v. Cotner*, 175 Neb. 158, 120 N.W.2d 892 (1963). Proceedings in habeas corpus to obtain custody of a child are governed by considerations of expediency and equity, and should not be bound by technical rules. *Gray v. Maxwell, supra*.

"In the absence of threats, coercion, fraud, or duress, a properly executed relinquishment of parental rights and consent to adoption form signed by a natural parent knowingly, intelligently, and voluntarily is valid." (Syllabus of the court.) *Lum v. Mattley*, 208 Neb. 789, 305 N.W.2d 878 (1981). The question before us on this appeal is whether the relinquishment was voluntarily executed.

The McCormicks contend that they were coerced into signing the relinquishment, as they were led to believe that they could continue to see their son following an adoption if they signed the relinquishment but would not be provided that opportunity if their rights were terminated as a result of the impending judicial proceeding. The State argues that the McCormicks were informed at the time the relinquishment was signed that an "open adoption" was not guaranteed, but was at the option of the adoptive parents.

Upon de novo review of the record we conclude that the

relinquishment was signed by the McCormicks as the result of coercion.

In *Duncan v. Harden*, 234 Ga. 204, 214 S.E.2d 890 (1975), the parents filed an action for a writ of habeas corpus in September 1974, claiming that they did not voluntarily sign relinquishments shortly following their child's birth in May 1974. The court held that family pressures on the mother and the fact that the mother was taking "mind-dulling" medication at the time the relinquishment was signed rendered her consent to adoption involuntary. The father's consent was also deemed involuntary, as it was given only after he received a "threatening" letter from the caseworker, stating:

> "I am requesting that you send these releases as soon as possible. If I do not receive them shortly, it will be necessary to approach the Juvenile Court regarding severing your parental rights. This is a complicated, drawn-out process which would require your and Dale's appearance in the Juvenile Court. . ."

Id. at 207, 214 S.E.2d at 892.

In *Matter of Danielson*, 104 Misc. 2d 33, 427 N.Y.S.2d 572, 574 (1980), the court stated:

> Mrs. Lewis did not sign the surrender freely and voluntarily and without outside influence. The record clearly indicates that Donald Lewis, Mrs. Lewis' husband at the time of the execution of the surrender, was instrumental in persuading Mrs. Lewis to sign the surrender. The court is satisfied that Mr. Lewis made it clear to his wife that he would leave her unless she permanently surrendered this child for adoption. In effect, Mrs. Lewis was forced to choose between her husband and her child. Under such circumstances the surrender can hardly be said to have been obtained without duress or coercion. Additionally, there may even be an element of fraud involved herein as the record indicates that Donald Lewis left his wife, despite his promise to remain, shortly after she had signed the surrender. There is nothing in Section 384 of the Social Services Law which indicates that the fraud, duress or coercion must be on the part of the Department of Social

Services.

In *Matter of Male M.*, 76 A.D.2d 839, 428 N.Y.S.2d 489 (1980), the court permitted a mother to revoke her consent to an adoption. The revocation was filed 4 months after the consent was signed. The court said at 839, 428 N.Y.S.2d at 490:

> Although the adoptive parents did not participate in any deception to induce the consent, the record establishes that the natural mother believed, at the time she executed the consent, and when her signature was later acknowledged, that a nun in whom she had trust and confidence had recommended the prospective adoptive parents and that the prospective parents resided in Westchester County. (The natural mother did not want the adoptive parents to live nearby.) She was given this information by a long standing friend. In fact, as that friend testified, and as the natural mother learned when she decided to revoke her consent, these were lies. The nun had made no recommendation about the couple, and the couple lived in the same borough as the natural mother. Although the friend had only been motivated by a desire to assist her, nonetheless, it is not at all certain that without the lies she would have given her consent.

In *Singer Adoption Case*, 457 Pa. 518, 326 A.2d 275 (1974), the court was faced with a situation somewhat similar to that presented in the present case. In that case the court determined that a conditional relinquishment does not amount to the requisite unequivocal consent to adoption.

> The record clearly indicates that from the time that he first agreed to an adoption in the amendment to the New Jersey divorce decree, Singer never intended to give up his parental rights. Although his signature did appear on the unconditional consent form, it was nevertheless conditioned upon the retention of these rights. Mr. Forbes' testimony regarding the conversations and understandings of the parties on September 3, 1972, at the signing of the unconditional consent form indicates that *but for* his assurance that he would continue Singer's rights on a goodwill basis, Singer would not have consented to the adoption. "Q. And is your answer to the

question, then [that you admit that] after May of 1972 he did not change his position with regard to preserving those rights [under the New Jersey divorce decree], is that correct? A. That is correct. Q. Even at the time on September 3rd, 1972, when you showed him [the new form of] consent, he brought up the matter of those rights not being incorporated in this consent, isn't that correct? A. That is correct. Q. And did you assure him at that time that the rights would be preserved privately, as between you and him, if he would sign the consent? . . . A. It was my intention at that time to consent, to follow the Court Order in New Jersey. . . . I told him we intended to follow those. Q. Did you assure him that he was not giving up those rights? A. No, I did not. In fact, I told him just to the contrary, there was no legal way to enforce this right, and that he would have to rely on our good will and our good relations we had until that time. Q. But you assured [him] that he would have those rights, however, relying upon your good will to obtain them? A. That is right."

The problem is that the preservation of these rights, even through an informal agreement, or on a goodwill basis, conflicts with the incident of complete control and custody of an adopted child by an adopting parent as contemplated by law. We cannot say that a consent conditioned upon the preservation of certain rights with respect to the child is sufficient to effectively establish the statutorily required consent. The severance of natural ties occasioned by adoption is of such obvious finality as to demand clear and unequivocal consent by a natural parent and we believe that Singer's consent here was insufficient.

Id. at 523-24, 326 A.2d at 278.

In the present case the parents were forced to make a quick decision in the courthouse hallway shortly before the hearing in the action to terminate their parental rights was to commence. The parents were told that the court would most likely terminate their rights. The chance that they would be able to see their son through an "open adoption" was an attractive inducement to sign the relinquishment and abandon their contest of the termination proceedings. Under the

circumstances in this case we conclude that the McCormicks were coerced into signing the relinquishment. A relinquishment conditioned upon the retention of some parental rights is invalid.

"[T]here remains the question that is present in every habeas corpus case involving child custody: the best interests of the child." *Gray v. Maxwell*, 206 Neb. 385, 394, 293 N.W.2d 90, 96 (1980). The juvenile court has retained jurisdiction to determine the best interests of the child. The plaintiffs' right to custody of their son is subject to further proceedings in the separate juvenile court.

The judgment is reversed and the cause remanded with directions to enter judgment in conformity with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

HASTINGS, J., dissenting.

As stated in the majority opinion, although we review a decision in a habeas corpus case involving custody of a child de novo on the record, we will give great weight to the findings of the trial court where the evidence is in irreconcilable conflict. *Gray v. Maxwell*, 206 Neb. 385, 293 N.W.2d 90 (1980). In my view, we have failed to accord that consideration to the district court in this instance.

The record fully supports the decision of the trial court. However, by this decision we have permitted the credibility and the integrity of the judicial process to become suspect by the second-thought, self-serving statements of parties to the action. I would affirm the judgment of the district court.

I am authorized to state that BOSLAUGH, J., and COLWELL, D.J., Retired, join in this dissent.

IN RE ESTATE OF HARRY W. CARMAN, DECEASED. EDWARD AXMANN ET AL., APPELLANTS, V. AMANDA CARMAN, APPELLEE.

354 N.W.2d 634

Filed September 7, 1984. No. 83-424.

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

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

Tye, Hopkins & Williams, for appellee.

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

COLWELL, D.J., Retired.

This is an appeal from the judgment entered by the district court upon the mandate of this court following the original appeal in a probate proceeding reported at 213 Neb. 98, 327 N.W.2d 611 (1982). The facts are not restated.

Appellants argue that the judgment does not carry out the terms of the mandate, particularly concerning the personal property. That judgment directs the computation of the augmented estate to include all property owned by the surviving spouse at the date of decedent's death to the extent that it is derived from the decedent; particular reference is made to a one-half interest in described real estate and a one-half interest in cattle, hogs, milo, corn, machinery, and household goods acquired during the marriage. Each item bears the notation "balance in probate estate."

With regard to the undivided one-half interest in the real estate owned by Amanda Carman as a tenant in common, the district court properly dealt with that property. The appellants seem to argue that the 1982 opinion indicated that Mrs. Carman had no interest in the property. The 1982 opinion addressed only the nature of the contribution made by the surviving spouse and whether the one-half interest could be excluded from the augmented estate. The title to that property was held as tenants in common, and the opinion did nothing to

change Mrs. Carman's ownership of an undivided one-half interest therein.

Concerning the treatment of the personal property in the first appeal, we addressed only the questions of whether Mrs. Carman's contribution in labor constituted a contribution in money's worth and whether the property was to be included in the augmented estate. We there affirmed the trial court's finding that Mrs. Carman had failed to establish ownership of one-half of the personal property and its order to the county court to include in the augmented estate "the full decedent's ownership of corn, milo, cattle, and machinery." Our opinion did not disturb that determination.

To the extent that the judgment entered on the mandate included the one-half interest in corn, milo, cattle, and machinery under the category "property owned by the surviving spouse . . . to the extent that it is derived from the decedent," the order was in error. The district court had previously found that she had no such interest.

We therefore affirm in part and in part reverse and remand with directions to enter judgment in accordance with this opinion.

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

THE COUNTY OF DODGE ON BEHALF OF MEMORIAL HOSPITAL OF DODGE COUNTY, NEBRASKA, APPELLEE, V. DEPARTMENT OF HEALTH OF THE STATE OF NEBRASKA, APPELLANT.

355 N.W.2d 775

Filed September 21, 1984. No. 83-133.

1. **Administrative Agencies: Statutes.** The Legislature can delegate to an administrative agency the power to make rules and regulations to implement the policy of a statute. However, the agency is limited in its rule-making authority to the powers delegated to it by the statute which it is to administer.
2. _____: _____. In order to be valid a rule or regulation must be consistent with the statute under which the rule or regulation is promulgated.

3. _____: _____. An administrative agency cannot use its rule-making power to modify, alter, or enlarge provisions of a statute which it is charged with administering.
4. _____: _____. An administrative agency cannot interpret its rules and regulations in such a manner so that self-interpreted rules and regulations contravene the statute which the agency is obliged to administer.

Appeal from the District Court for Lancaster County: SAMUEL VAN PELT, Judge. Affirmed.

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

Thomas B. Thomsen of Sidner, Svoboda, Schilke, Wiseman, Thomsen & Holtorf, for appellee.

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

SHANAHAN, J.

Regarding the Nebraska Health Care Certificate of Need Act, Neb. Rev. Stat. §§ 71-5801 to 71-5872 (Reissue 1981), the Department of Health of the State of Nebraska (department) appeals the judgment of the district court for Lancaster County which reversed the decision of the appeal board of the Nebraska Health Care Certificate of Need Appeal Panel (appeal panel). The appeal panel had held that Memorial Hospital of Dodge County (Memorial Hospital) could purchase nuclear medicine equipment but could not lease such equipment as requested by Memorial Hospital in its application to the department. We affirm.

In October 1981 Memorial Hospital applied to the department and sought approval to lease new nuclear medicine equipment, namely, a 5-year lease of a "new . . . stationary nuclear medicine gamma camera with a large field of view and appropriate collimators" and "additional periphery equipment" including an "EKG monitor and an image processor." Memorial Hospital applied to the department for a certificate of need because the expenditure for the nuclear medicine equipment exceeded $100,000. See § 71-5830. According to the application, "[a]cceptability and quality of the images produced by the [hospital's] present camera are not

up to medically desired standards."

The department ruled that Memorial Hospital could purchase, not lease, the new equipment. Memorial Hospital appealed to the appeal panel. See §§ 71-5860 et seq.

When Memorial Hospital applied, § 71-5830 authorized "the purchase, acquisition, or lease of clinical equipment" by a hospital. Section 71-5853 in pertinent part provided: "The department shall, by rules and regulations, provide criteria for: . . . (3) The immediate and long term financial feasibility of the proposal, as well as the probable impact of the proposal on the costs of and charges for providing health services by the person proposing the new institutional health service."

Also, when Memorial Hospital filed its application, the department had specific rules and regulations pertaining to a hospital's proposal, namely, rule 33, which provided in part as follows:

> The proposal must be the most effective alternative for satisfying the need, in terms of cost, efficiency, and appropriateness, and in terms of whether the development of alternatives is practicable. [(5)(b)iii.]
>
> The proposal must show that the financial requirements and involvements are such that the proposal can be developed and provided to the community on a continuous basis for the period of the life of the assets. . . . [A]vailability of the proposed means of financing . . . must be the least costly alternative available. [(5)(c)iv.]
>
> Any increase in costs of the service of the applicant and on the costs of related services in the community must be reasonable and justified by the severity of the problem or need and by the impact the proposed services will have on the need. [(5)(d).]

The purchase price for the nuclear medicine equipment sought by Memorial Hospital was $160,000. If Memorial Hospital were authorized to lease the equipment, the lease would be for a term of 5 years, with monthly payments of $3,536 and annual rental of $43,200, or total rental of approximately $216,000 for the entire term. The "current prime rate of interest" for any loan to the hospital was 16 percent in November 1981.

At the hearing before the appeal panel, Richard Kielman, vice president of support services for Memorial Hospital, advocated the hospital's leasing replacement equipment, described the proposed equipment, and recounted the basis of need for the new equipment. Kielman testified about the nuclear medicine camera and image processor. The image processor is basically a computer used with the gamma camera. Kielman described the repair costs for the hospital's present equipment and the "down time" when the equipment malfunctioned. Kielman's testimony about the hospital's need for the new equipment can be summarized as follows: nuclear medicine has changed "dramatically" over the last 10 years; there have been rapid changes in radiology due to technological innovations in the field of electronics; and, unless the present equipment is replaced by new equipment, the unreliability of the present equipment would necessitate termination of existing services to the hospital's patients, drawn from seven counties. Further, according to Kielman, through contact with various hospitals, the salvage value of any replacement equipment would be as low as $500 at the end of the 5 years, the anticipated useful life of replacement equipment. The proposed 5-year lease took into account such minimal salvage value of replacement equipment.

Kielman further testified that Memorial Hospital's reserve funds had already been earmarked for specified construction projects. Memorial Hospital was built in 1939, and there has been no significant renovation of the hospital since its construction. Reserve funds of the hospital were destined for renovation and remodeling of the older parts of the hospital, kitchen facilities, and roofing. Memorial Hospital planned to commence the designated remodeling and renovation within 2 years after application for the nuclear medicine equipment. The department did not dispute the necessity of the projects for remodeling or renovating the hospital and did not contest the hospital's reserve or the costs of the various projects to be paid from the reserve funds on hand.

Also testifying on behalf of Memorial Hospital before the appeal panel was Harvey Johnson, a certified public accountant specializing in hospital accounting and financing.

Johnson testified that, in comparing leasing and purchasing the equipment sought by Memorial Hospital, a lease was economically more advantageous to the hospital. In support of his conclusion favoring the lease, Johnson explained that under the proposed lease of equipment, Memorial Hospital would pay interest at 12.157 percent. Interest was implicit in the lease arrangement because the lessor paid interest on the equipment purchased and thereafter leased to the hospital. Presently, Memorial Hospital's reserve funds were earning interest at an investment rate of 15 percent. Under a lease situation and existing medicare and medicaid programs, the federal government would reimburse the hospital for 45 percent of the leasing costs, while under the purchase arrangement the federal government would reimburse the hospital only 45 percent of the depreciation for the equipment. The amount of federal reimbursement related to depreciation was less than the reimbursement anticipated from an equipment lease. According to Johnson, by taking the more favorable interest rate for investment of hospital funds and the greater reimbursement from medicare and medicaid as a result of an equipment lease, a lease produced a financial advantage to Memorial Hospital. To illustrate this point, Johnson demonstrated that $160,000 (cost of equipment if purchased) placed in a separate fund charged with payment of equipment rental but increased by interest income and federal reimbursements would contain $149,359 at the end of the 5-year lease. On the other hand, were the hospital to purchase the equipment by using reserve funds, the special fund would be reduced to zero on account of the purchase. In view of the lower federal reimbursement from medicare and medicaid in the purchase situation, there would be the sum of $63,540 attributable to the purchased equipment at the end of 5 years.

Johnson further testified that "[t]he issue is the lost interest." To recoup interest lost by the hospital's withdrawing its reserve funds from investment and interest-income production, Memorial Hospital would have to recover such loss from the "private-paying patient." If the hospital lost the revenue from investments, Memorial Hospital would "have to raise [its] charges more than what that loss is across the board . . . to get it

back through the private-paying side." Even without reimbursement due to medicare and medicaid, according to Johnson, a lease was more advantageous than purchase of the equipment. Johnson testified that in terms of a present value analysis, the cost of the lease was $151,940, while the cost of a purchase was $160,000, a difference of a little over $8,000. In Johnson's final analysis the "total charges and costs to the hospital to provide this service [new equipment] would be less" if the new equipment was leased rather than purchased.

A financial feasibility analyst testified for the department and acknowledged that she did not consider the loss of interest income which would be sustained by Memorial Hospital's withdrawing its reserve funds from investment. The department's analyst also testified that in considering "cost containment," that is, the least costly method of a hospital's acquiring new equipment, one has to consider how acquisition affects medicare and medicaid "[t]hat's paid for by all taxpayers."

After reviewing the evidence, the appeal panel found, on April 8, 1982:

> Leasing the said equipment is more favorable to the Hospital itself because the Hospital would receive more Medicare and Medicaid reimbursement if the equipment were leased, but the cost of this increased reimbursement would be placed on health care consumers and taxpayers. The increased cost to health care consumers and taxpayers is not offset by the advantage to the Hospital.

With this finding the panel concluded: "The Hospital has failed to establish that leasing the said equipment is the most effective and least costly alternative available, or that the increase in costs is reasonable and justified, as required by sections (5)(b)iii., (5)(c)iv., and (5)(d) of Rule 33 of the Department." The appeal panel granted Memorial Hospital a certificate of need for the new equipment "on the condition that the Hospital use its own funds to purchase the equipment rather than leasing it."

Memorial Hospital appealed to the district court for Lancaster County. See Neb. Rev. Stat. § 84-917 (Reissue 1981). Finding that the appeal panel's decision directing a purchase of

the equipment was contrary to law and not supported by substantial evidence, the district court ordered that Memorial Hospital be permitted to obtain the nuclear medicine equipment by lease rather than by purchase.

This court has stated that "[w]hen reviewing such appeals before this court . . . we need only determine if the proper rules of law have been applied and if the decision reached by the board or agency is supported by competent evidence in the record." *Lambert v. Nebraska Cr. Vict. Rep. Bd.*, 214 Neb. 817, 821, 336 N.W.2d 320, 323 (1983).

The language of § 71-5853 is clear that the costs of providing the service include the costs to the applicant proposing the health service. Because the statute is plain and unambiguous, the word "cost" will be given its ordinary meaning. See *Central Park Pharm. v. Nebraska Liq. Cont. Comm.*, 216 Neb. 676, 344 N.W.2d 918 (1984). Cost is defined as: "Expense; price. The sum or equivalent expended, paid or charged for something." Black's Law Dictionary 312 (5th ed. 1979). Thus, the term "costs" as used in § 71-5853 has a very broad meaning, and includes many factors besides the purchase price of proposed equipment. In this case Memorial Hospital has shown that varied interest rates and different reimbursements from medicare and medicaid are important factors affecting cost to the hospital in obtaining the nuclear equipment. Under the facts presented it was obvious to the appeal panel that the 5-year lease was the least costly arrangement for Memorial Hospital. Even the appeal panel recognized this fact, when it found that "[l]easing the said equipment is more favorable to the Hospital itself because the Hospital would receive more Medicare and Medicaid reimbursement if the equipment were leased."

Another compelling facet of cost to Memorial Hospital is the loss which occurs when the hospital's reserve funds are required to purchase the proposed equipment. As a consequence of the hospital's reduced reserve funds, lost interest revenue otherwise produced by investment is an expense incurred by the hospital. Also, if funds already earmarked for needed remodeling and renovation were diverted to purchase the nuclear medicine equipment, planned remodeling and renovation would undoubtedly be accomplished through loans bearing interest at

a "prime rate" of 16 percent, approximately 4 percent in excess of the interest rate attributable to the lease. Memorial Hospital would not only have to pay added and greater interest to replenish construction funds already committed but would be penalized for foresight in setting aside an appropriate reserve to cover necessary construction. Interest, either as lost revenue from investment or as the price paid for money to complete needed construction, affects the cost to Memorial Hospital in obtaining the proposed equipment. Restoration of the hospital's diminished reserve to defray remodeling and renovation costs will be a burden on the patient-consumer in the form of increased charges for using the proposed equipment, and perhaps by an increase in overall hospital charges apart from the use of the proposed equipment. Anything affecting costs to the hospital in turn affects hospital charges for the use of the equipment to be obtained. In this manner, "costs of and charges for" the services provided through the new equipment, as indicated in § 71-5853, are inextricably related.

The appeal panel determined that Memorial Hospital's leasing the proposed nuclear medicine equipment would increase cost to the "taxpayers." Whether the appeal panel was concerned about taxpayers statewide or nationwide is not clear from the decision of the panel. Nowhere in § 71-5853 is there any explicit reference or any statutory language susceptible to a reasonable inference that taxpayers' cost is a valid consideration for a certificate of need. Likewise, the derivative cost to taxpayers on account of the governmental programs of medicare and medicaid is not a criterion to be utilized in passing on a hospital's application for a certificate of need. Whether cost to taxpayers should be a factor in disposing of a hospital's application is a matter of policy with so far-reaching fiscal ramifications that such determination is more appropriately left to the people of Nebraska through their representatives in the Legislature, not to a governmental agency. In any event, neither § 71-5853 nor the rules and regulations of the department contain any indication that cost to taxpayers legitimately affects a hospital's application under the Nebraska Health Care Certificate of Need Act. Were the appeal panel's interpretation of the law accepted, no hospital could be

authorized to lease equipment under the circumstances presented in this case, because a lease would invariably result in greater reimbursement from medicare and medicaid and would derivatively increase the cost to taxpayers who ultimately bear the tax-supported programs. Thus, in the case before us the appeal panel's interpretation of its rules, regulations, and the Nebraska Health Care Certificate of Need Act frustrates prospective leasing notwithstanding statutory authority found in § 71-5830.

The Legislature can delegate to an administrative agency the power to make rules and regulations to implement the policy of a statute. *Rowe v. W. Va. Dept. of Corrections*, ____ W. Va. ____, 292 S.E.2d 650 (1982). However, the agency is limited in its rule-making authority to the powers delegated to it by the statute which it is to administer. *State ex rel. Marsh v. Nebraska St. Bd. of Agr.*, 217 Neb. 622, 350 N.W.2d 535 (1984); *Bond v. Nebraska Liquor Control Comm.*, 210 Neb. 663, 316 N.W.2d 600 (1982). In order to be valid a rule or regulation must be consistent with the statute under which the rule or regulation is promulgated. *United States v. Larionoff*, 431 U.S. 864, 97 S. Ct. 2150, 53 L. Ed. 2d 48 (1977). However, the Department of Health, by its interpretation of § 71-5853, has undertaken to incorporate into the Nebraska Health Care Certificate of Need Act a criterion not found in the statutory framework of the act itself. An administrative agency cannot use its rule-making power to modify, alter, or enlarge provisions of a statute which it is charged with administering. *Cray v. Kennedy*, 230 Kan. 663, 640 P.2d 1219 (1982). As a corollary to the foregoing, an administrative agency cannot interpret its rules and regulations in such a manner so that self-interpreted rules and regulations contravene the statute which the agency is obliged to administer.

An integral part of the department's and appeal panel's decision is application of an improper criterion for a certificate of need. The standard utilized by the department and the appeal panel is contrary to the Nebraska Health Care Certificate of Need Act. Once such improper criterion is removed as a consideration in this case, there is not substantial evidence to support the departmental decision on the application of

Memorial Hospital. In fact, the substantial evidence establishes that a lease of the proposed equipment is the most advantageous course of action to Memorial Hospital in terms of costs. Therefore, the judgment of the district court for Lancaster County is affirmed.

AFFIRMED.

ROBERT F. RUHNKE, APPELLEE, V. LORETTA L. RUHNKE, APPELLANT.
355 N.W.2d 339

Filed September 21, 1984. No. 83-703.

1. **Property Division.** There is no precise mathematical formula which can be employed to determine the equitable division of property in an action for dissolution of marriage.
2. **Property Division: Alimony.** The ultimate test for determining the correctness of the division of marital property and an award of alimony is one of reasonableness.
3. **Property Division.** In an action for dissolution of marriage, the courts may divide the property between the parties according to the equities, regardless of how legal title is held.

Appeal from the District Court for Gage County: WILLIAM B. RIST, Judge. Affirmed as modified.

Ronald Rosenberg of Rosenberg & Taute, for appellant.

Lyle Joseph Koenig of Germer, Koenig, Murray, Johnson & Daley, for appellee.

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

KRIVOSHA, C.J.

Loretta L. Ruhnke appeals from a judgment entered by the district court for Gage County, Nebraska, which dissolved the marriage of Mrs. Ruhnke and her former husband, the appellee, Robert F. Ruhnke, and which further divided the property belonging to the parties. Mr. Ruhnke was awarded

certain real estate and other personal property having a total value of $376,577. In addition, Mr. Ruhnke was to assume the operating debts of the farm business owned by the parties, including an obligation to the Production Credit Association in the amount of $53,588, plus accrued interest. Mrs. Ruhnke was awarded certain real estate and some personal property having a total value of $59,250. In addition, the trial court awarded to Mrs. Ruhnke what the court termed alimony in the sum of $1,400 per month for a period of 15 years. The alimony is not terminable upon the death of either party or upon the remarriage of Mrs. Ruhnke, and is an award of a specific sum of money. When this amount is added to the other property awarded to Mrs. Ruhnke, she received a total of $311,250. In addition, the household goods, furniture, furnishings, and articles of apparel and ornament were awarded to each party according to that which was in his or her possession, free and clear of any claims by the other party. The court specifically excluded from the marital estate certain real estate admittedly acquired by Mr. Ruhnke as a gift from his family, and also certain stock received by Mrs. Ruhnke from her family, directing, instead, that each party was to have such property as acquired by gift from their respective families as his or her own property free and clear of any claim of the other.

Mrs. Ruhnke concedes that the trial court was undoubtedly correct in providing Mr. Ruhnke with the farm real estate, but maintains that because of the significant imbalance in the value of the property, excluding alimony received by Mrs. Ruhnke, she should be awarded an additional lump sum of money; or, in the alternative, if the court considers that the money awarded to Mrs. Ruhnke was really intended for the purpose of equalizing the estate of the parties, then she should be awarded some further alimony in order to permit her to readjust to her new status. Finally, Mrs. Ruhnke argues that while the court was correct in excluding the property each of the parties acquired by gift, nevertheless, the real estate acquired by Mr. Ruhnke from his family has appreciably increased in value, due in part to an irrigation system placed upon the property with joint moneys of the parties. Mrs. Ruhnke therefore maintains that the trial court should have awarded to her some reasonable

value representing her interest in the irrigation system. For reasons more particularly set out in this opinion, we believe that, essentially, the court's decree was in all respects correct and should be affirmed except as modified herein.

We turn first, then, to the question as to whether the trial court was correct in its division of the property, giving most of the real estate to Mr. Ruhnke and directing that he pay to Mrs. Ruhnke moneys over a period of years.

Neb. Rev. Stat. § 42-365 (Cum. Supp. 1982) gives guidance to the trial court as to how the property of the parties is to be divided and whether alimony is to be awarded. Section 42-365 provides in part:

> When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party. . . .
>
> While the criteria for reaching a reasonable division of property and a reasonable award of alimony may overlap, the two serve different purposes and are to be considered separately. The purpose of a property division is to distribute the marital assets equitably between the parties. The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances and the other criteria enumerated in this section make it appropriate.

We have frequently held that there is no precise mathematical formula which can be employed to determine the equitable division of property in an action for dissolution of marriage. *Pittman v. Pittman*, 216 Neb. 746, 345 N.W.2d 332 (1984). In *Koubek v. Koubek*, 212 Neb. 2, 5, 321 N.W.2d 55, 58 (1982), we once again observed:

> Generally speaking, awards in cases of this kind vary from

> one-third to one-half of the value of the property involved, depending upon the facts and circumstances of the particular case, and particularly so when the marriage is of long duration and the parties are the parents of all the children involved.

The ultimate test for determining the correctness of the division of marital property and an award of alimony is one of reasonableness. *Burger v. Burger*, 215 Neb. 699, 340 N.W.2d 400 (1983). Also, in an action for dissolution of marriage, the courts may divide the property between the parties according to the equities, regardless of how legal title is held. *Cozette v. Cozette*, 196 Neb. 780, 246 N.W.2d 473 (1976).

It appears clear to us that the purpose of requiring Mr. Ruhnke to pay to Mrs. Ruhnke the sum of $1,400 per month for a period of 15 years, and to further provide that it is not to be terminable upon the death of either of the parties or the remarriage of Mrs. Ruhnke, was an attempt by the trial court to equitably divide the property without destroying the farming entity. While we agree with the action taken by the trial court, we believe that the moneys awarded to Mrs. Ruhnke should not be considered alimony but in fact should be considered a division of property and should be properly so identified. By doing so we recognize that this may alter the tax consequences for each of the parties. Nevertheless, we believe that it would be more appropriate that the moneys ordered paid to Mrs. Ruhnke by Mr. Ruhnke should have been in lieu of the property itself, and for this reason we direct that the payment of these monthly sums should not be considered alimony but, rather, should be considered to be in lieu of division of property.

To that extent, therefore, we direct that the decree of the trial court should be modified. Paragraph 10 of the court's findings should read as follows:

> That petitioner should pay to respondent by way of division of property the sum of $252,000, payable $1,400 on September 1, 1983, and a like sum of $1,400 on the first day of each and every month thereafter for a period of 180 months, or until all of said sum has been paid; said payment to be made in any event and not to terminate upon the death of either party or upon the remarriage of

respondent, the same being deemed vested in her.

Furthermore, the decretal portion, paragraph 5, should likewise be amended to provide: "That petitioner be, and hereby is, ordered to pay such sums of money in lieu of property division to respondent in manner and amount and subject to terms and conditions as set forth in the court's findings."

Mrs. Ruhnke argues to the court that if the court should determine, as we have, that the payment to her should be considered as a division of property, then she should be entitled to alimony to permit her to adjust and to acquire whatever additional skills she may need in order to become self-sufficient. While the argument has merit, unfortunately the record is totally devoid of any evidence to adequately support any order by this court for any such sum. There is no evidence to indicate what it is that Mrs. Ruhnke proposes to do or what will be required to assist her in obtaining skills necessary to become self-sufficient. We simply have no basis upon which we can make any such award. However, we do not wish to deny to Mrs. Ruhnke the opportunity, should it be appropriate for her to do so, to seek modification of the decree as to alimony payments. For this reason, and because of the limitations imposed by the provisions of § 42-365 regarding alimony and modification of awards of alimony, we believe that the decree should provide that Mrs. Ruhnke shall receive, by way of alimony, the sum of $12 per year, payable on the first day of January 1985 and the first day of January of each succeeding year, for a period of 15 years. In doing so we recognize that we are not providing any income to Mrs. Ruhnke, but we are affording her the opportunity to seek modification of the decree if facts should warrant it. In view, however, of the income she now has, and in view of the evidence now in the record, we would be engaging in pure speculation to take any other steps.

The last matter raised by Mrs. Ruhnke has to do with her claim that we should award her some part of the enhanced value of the real estate which Mr. Ruhnke acquired by gift from his family. While the record does support the claim that the property has increased in value, and while there is evidence that

joint moneys of the parties were used more than 10 years ago to install the irrigation system, there is no evidence in the record to establish what part of the increase in value is due to appreciation in land values generally and what portion is due to the presence of irrigation. For us to therefore arbitrarily award a sum of money without any evidence would be to again engage in speculation. Furthermore, it is apparent that during the years that the parties were together, each of them benefited from the income from the irrigated farms. For this reason we believe that the trial court did not commit error when it did not allow to Mrs. Ruhnke any increased value for the irrigated property set over to Mr. Ruhnke.

Except, therefore, as to the modifications made herein, the judgment of the trial court is in all respects affirmed. An attorney fee in the amount of $750 is awarded to Mrs. Ruhnke to apply upon her attorney fees.

AFFIRMED AS MODIFIED.

COLWELL, D.J., Retired, dissenting.

I respectfully dissent.

The majority places undue emphasis on a mathematical division of property, without regard for all of the attending circumstances and the alimony needs of the appellant. The parties did not own a family home.

Most of the assets are related to the production of farm income by the husband, who remains responsible for alimony, child education and support, and the payment of debts.

Some of the asset values are not realistic when considering the overlapping questions of alimony and division of property. Appellee owns an undivided one-half interest in a four-unit apartment house in Lincoln, Nebraska, having a total value of $65,000, subject to a mortgage of $45,000. The rental income is consumed by the mortgage loan payments, insurance, taxes, and repairs; it is not an "income" asset. It is valued at $10,000. He owns an undivided interest in a combine, corn head, augers (two), parts of a pivot system, and irrigation motors, having a total assigned value of $41,000. These undivided interests have limited salability. Appellee owns stock in a farm cooperative valued at $22,887; it cannot be transferred for value, and it cannot be redeemed until age 65 years.

Under the circumstances the trial judge made a considered effort to comply with Neb. Rev. Stat. § 42-365 (Cum. Supp. 1982) and at the same time do justice to both parties.

I would affirm.

STATE OF NEBRASKA, APPELLEE, V. GARY W. POPE, APPELLANT.
355 N.W.2d 216

Filed September 21, 1984. No. 83-956.

1. **Post Conviction: Appeal and Error.** A motion for post conviction relief cannot be used as a substitute for an appeal or to secure a further review of issues already litigated.
2. _____: _____. A petitioner in a post conviction proceeding may not raise questions which could have been raised on direct appeal unless the questions are such that they would make the judgment of conviction void or voidable under the state or federal Constitution.
3. _____: _____. Matters already litigated or which could have been raised on direct appeal are not properly included in an action seeking post conviction relief.
4. **Appeal and Error.** Where an issue is known to the defendant at trial and he fails to raise it in his direct appeal, the appeal is waived.

Appeal from the District Court for Saunders County: WILLIAM H. NORTON, Judge. Affirmed.

Steven Lefler, 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, Gary W. Pope, appeals from an order entered by the district court for Saunders County, Nebraska, denying him post conviction relief sought pursuant to the provisions of Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1979). After reviewing the record we believe the judgement should be

affirmed.

This is the second time this matter has been before this court. Pope was originally convicted of first degree murder and sentenced to life imprisonment. On direct appeal to this court the decision and sentence were affirmed. See *State v. Pope*, 211 Neb. 425, 318 N.W.2d 883 (1982) (*Pope I*). The facts of the case are set out in detail in *Pope I* and will not be repeated here. The important factor is that the issues raised in *Pope I* are nearly identical to those raised here. In *Pope I* it was claimed that the trial court erred in failing to declare a mistrial on the court's own motion when, during trial, it allegedly became apparent that Pope's trial counsel was acting under an actual conflict of interest. We examined that claim in *Pope I* and found that it was without merit. In this appeal Pope maintains that the trial court erred in two respects: (1) That the court erred in failing to grant post conviction relief because Pope's trial counsel was acting under an actual conflict of interest, and (2) That the trial court, being privy and witness to the various conversations and communications which were the subject matter of the exhibits contained within the post conviction appeal, should have disqualified itself.

We may easily dispose of both matters. The purpose of affording post conviction relief is not to permit the defendant endless appeals on matters already decided. Rather, the purpose is to correct errors of constitutional proportion which could not otherwise be raised on direct appeal, such as ineffectiveness of counsel who brought the direct appeal in the first place. We have repeatedly held that a motion for post conviction relief cannot be used as a substitute for an appeal or to secure a further review of issues already litigated. See, *State v. Hochstein*, 216 Neb. 515, 344 N.W.2d 469 (1984); *State v. Ohler*, 215 Neb. 401, 338 N.W.2d 776 (1983); *State v. Freeman*, 212 Neb. 278, 322 N.W.2d 437 (1982); *State v. Meredith*, 212 Neb. 109, 321 N.W.2d 456 (1982). Furthermore, we have held that a petitioner in a post conviction proceeding may not raise questions which could have been raised on direct appeal unless the questions are such that they would make the judgment of conviction void or voidable under the state or federal Constitution. See, *State v. Hochstein, supra; State v.*

Stranghoener, 212 Neb. 203, 322 N.W.2d 407 (1982); *State v. Shepard*, 208 Neb. 188, 302 N.W.2d 703 (1981); *State v. Cole*, 207 Neb. 318, 298 N.W.2d 776 (1980). We have further held that matters already litigated or which *could* have been raised on direct appeal are not properly included in an action seeking post conviction relief. See *State v. Shepard, supra*. Moreover, where an issue is known to the defendant at trial and he fails to raise it in his direct appeal, the appeal is waived. See, *State v. Cole, supra; State v. Fowler*, 201 Neb. 647, 271 N.W.2d 341 (1978).

The record in this case and our opinion in *Pope I* make it clear that all of the above rules are applicable. Pope is not entitled to any post conviction relief because the matters involved in this post conviction action were matters which either had in fact been decided by this court on direct appeal or were matters known to the defendant and therefore could have been raised on direct appeal.

Pope knew that the trial judge had not disqualified himself when he perfected his direct appeal to this court, yet he did not raise that as an error. In passing, we might note that the judge's failure to disqualify himself was not error, see *State v. Herren*, 212 Neb. 706, 325 N.W.2d 151 (1982), which undoubtedly was the reason counsel did not raise the matter on direct appeal, though he now attempts to do so on post conviction relief. In any event, the issue is not one which can now be considered in this post conviction action.

Additionally, we specifically addressed the issue of counsel's alleged conflict of interest in *Pope I* and determined that a conflict did not exist. Pope's counsel in this action, who was the same counsel as in the direct appeal though not the trial counsel, argues that our opinion in *Pope I* was based upon a lack of evidence as to what the specific conflict was and that we now have that evidence; therefore, we should consider granting post conviction relief in spite of our rules to the contrary. We do not believe that that is what we said in *Pope I*. Although we acknowledged in *Pope I* that the record was silent as to what gave rise to a possible conflict of interest or what the results of the weekend activities were, we said: "Nevertheless, the record does disclose that the trial resumed following the weekend recess, and Pope's trial counsel, Troia, went forward with

defense surrebuttal. No objection to the procedure was ever made by anyone, including Mr. Inbody." *State v. Pope*, 211 Neb. 425, 429, 318 N.W.2d 883, 885 (1982). Mr. Inbody had been appointed by the trial court to investigate the possible conflict of interest and had advised Pope on such matters.

We concluded in *Pope I* that " 'the possibility of conflict is insufficient to impugn a criminal conviction. In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an *actual* conflict of interest adversely affected his lawyer's performance.' " (Emphasis supplied.) *Id.* at 431, 318 N.W.2d at 886. The missing evidence which is now presented to us and which was not present in the direct appeal is that at the time the murder was being committed, allegedly by another, Pope allegedly was engaged in sexual intercourse with his fiance in the back of the car parked next to where the murder was taking place. Further, Pope claims he knew at the time of his trial who in fact the real killer was, even though he refused to disclose that fact at trial. From all of this we are somehow asked to conclude that his trial counsel had an actual conflict of interest which resulted in counsel being ineffective, thereby entitling Pope to post conviction relief. With the exception of perhaps one other person, no one knew better about what allegedly took place than Pope, and he voluntarily chose not to disclose that to either the trial court or to this court on direct appeal. He could have easily done that when the court interrupted the trial to investigate the potential conflict of interest. The decision not to disclose was made by Pope, who apparently was willing to gamble on the outcome of the trial. This was not a case where Pope wanted evidence adduced or witnesses examined, and his counsel refused, but, rather, a case where Pope, with full knowledge, refused to permit his counsel to disclose the evidence. Having failed to permit his counsel to act, he waived that right on direct appeal and cannot now seek post conviction relief on that ground.

In passing, we should further note that we are at a loss to understand how the social event described by Pope establishes an actual conflict of interest that would have entitled him to any relief on direct appeal, let alone now on post conviction relief.

In view of the fact that the record clearly establishes that Pope is seeking to use post conviction relief as a means of simply relitigating issues already considered on direct appeal, we believe the trial court was correct in refusing to grant any relief and in denying the petition. The judgment of the trial court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DONNA L. TURNER, APPELLANT.
355 N.W.2d 219

Filed September 21, 1984. No. 84-039.

1. **Criminal Law: Courts: Appeal and Error.** In criminal appeals from the county court, the district court serves as an intermediate court of appeals reviewing for error appearing on the record.
2. **Criminal Law: Records: Appeal and Error.** In a criminal prosecution an assignment of error which requires an examination of evidence cannot prevail in the absence of a bill of exceptions; in such a case the only question is whether the pleadings are sufficient to sustain the judgment of the trial court.
3. **Sentences.** A sentence imposed within statutory limits will not be set aside absent an abuse of discretion.

Appeal from the District Court for Box Butte County: ROBERT R. MORAN, Judge. Affirmed.

James T. Hansen, 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.

CAPORALE, J.

Defendant, Donna L. Turner, appeals from the affirmance by the district court of the sentence imposed by the county court for reckless driving. The gravamen of Turner's assignments of error is that she was not properly arraigned by the county court.

The posture of the matter is such, however, that the only question before us is whether the record supports the sentence. The record does support the sentence; we therefore affirm.

The transcript reveals that this case began as a prosecution in the county court for third offense driving while intoxicated and refusal to submit to a chemical test. The driving while intoxicated charge was later reduced to reckless driving. On October 27, 1983, Turner was sentenced on the reckless driving charge to 20 days in the Box Butte regional jail, fined $100, and assessed the costs. She was also sentenced on the charge of failure to submit to a chemical test. She then appealed to the district court only the sentence imposed for the reckless driving offense. The appeal was submitted to the district court on January 6, 1984. On January 10, 1984, that court affirmed the sentence imposed by the county court. The appeal to this court followed.

Although there has been filed in this court a bill of exceptions from the county court, it is not, for reasons which will be discussed hereinafter, properly before us. Therefore, the State's motion to strike the same is hereby sustained. No bill of exceptions of the proceedings in the district court has been filed in this court.

The district court in this case served as an intermediate court of appeals reviewing for error appearing on the record. Neb. Rev. Stat. § 24-541.06(1) (Cum. Supp. 1982); Neb. Rev. Stat. § 29-613 (Reissue 1979); *State v. Olson*, 217 Neb. 130, 347 N.W.2d 862 (1984); *State v. Ferris*, 216 Neb. 606, 344 N.W.2d 668 (1984).

Section 24-541.06(2) provides that the county court bill of exceptions, if filed with the district court before the hearing, shall be considered admitted in evidence on the hearing of the appeal. The record establishes that the county court bill of exceptions was not filed in the district court until April 19, 1984; that is to say, not until 104 days after the appeal was submitted and 100 days after the district court rendered its decision. The county court bill of exceptions was therefore not in evidence before the district court.

In a criminal prosecution an assignment of error which requires an examination of evidence cannot prevail in the

absence of a bill of exceptions. In such a case the only question is whether the pleadings are sufficient to sustain the judgment of the trial court. *State v. Robinson*, 215 Neb. 449, 339 N.W.2d 76 (1983); *State v. Harris*, 205 Neb. 844, 290 N.W.2d 645 (1980). In the absence of the county court bill of exceptions, the only question before the district court was whether the sentence imposed by the county court was sustained by the operative complaint. The question is the same in this court.

The complaint clearly supports the sentence; reckless driving is punishable by imprisonment in the county jail for not less than 5 days nor more than 30 days, or by a fine of not less than $25 nor more than $100, or by both such fine and imprisonment.

Any claim that the sentence is excessive would be bound to fail. The presentence report established Turner has an alcohol addiction and has been convicted of a variety of traffic offenses, including at least five driving while intoxicated offenses. As has repeatedly been said, a sentence imposed within statutory limits will not be set aside absent an abuse of discretion. *State v. Clark*, 217 Neb. 417, 350 N.W.2d 521 (1984). No such abuse of discretion is present here.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. VINCENT C. HAVORKA, APPELLEE.

355 N.W.2d 343

Filed September 21, 1984. No. 84-113.

Drunk Driving: Sentences. A trial court does not have the authority under Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1982) to interrupt the period of suspension or permit one convicted of driving under the influence of alcoholic liquor or drug, first or second offense, to drive for limited work-related purposes. On second offense the period of prohibition against driving must be for a period of 6 continuous months computed from the date the order of probation is entered.

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

William C. Luben, Deputy Cheyenne County Attorney, for appellant.

John P. Peetz III of John Peetz, P.C., for appellee.

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

KRIVOSHA, C.J.

This appeal, brought by the State pursuant to Neb. Rev. Stat. § 29-2315.01 (Cum. Supp. 1982), raises the question of whether a trial court, when placing an individual on probation for second offense drunk driving pursuant to the provisions of Neb. Rev. Stat. § 39-669.07(2) (Cum. Supp. 1982), may interrupt the 6-month period in which the probationer is not to drive as required by law, or whether the 6-month period during which the defendant is not to drive must be 6 continuous months from the date of the order of probation. The county court for Cheyenne County, Nebraska, determined that the trial court could interrupt the time. On appeal the county court's determination was affirmed by the district court. We believe, however, that the statute is clear on its face and does not permit such interruption and that the prohibition against driving during probation must begin on the date of the order and extend for 6 continuous months.

On January 29, 1983, Vincent C. Havorka was charged with driving while under the influence of alcohol, third offense. The charge was later reduced to second offense. Havorka pled guilty, and the county court for Cheyenne County placed him on probation for 1 year, pursuant to § 39-669.07(2). As one of the conditions of probation, the court ordered Havorka not to operate a motor vehicle for any purpose for a period of 6 months commencing on May 2, 1983, that being the day upon which the probation order was entered. This condition is required by § 39-669.07(2).

Havorka then filed a motion seeking to modify his probation in order to allow him to operate a motor vehicle for work-related purposes during the summer and fall of 1983. On July 15, 1983, an evidentiary hearing was held, and the trial

court, finding that Havorka would lose his employment if not allowed to operate a motor vehicle during the summer and fall months, modified the order of probation to permit Havorka to drive under a restricted license for work-related purposes only until December 1, 1983. The court further ordered that the balance of the 6-month suspension would commence on December 1, 1983. The State appealed the order of modification to the district court for Cheyenne County, Nebraska, and, as we have already indicated, on November 8, 1983, the district court dismissed the appeal, finding that it was within the power of the county court to modify the probation order not to operate a motor vehicle entered pursuant to § 39-669.07(2).

We should note at the outset that neither party raises, nor do we decide by this appeal, whether the Legislature may, under any circumstance, limit a court's authority to suspend a sentence and impose probation under such conditions as it may prescribe. We merely address the question of whether the provisions of § 39-669.07(2), if valid and constitutional, permit the trial court to adjust the period of time during which the defendant may not operate a motor vehicle.

Section 39-669.07, dealing with the offense of operating a motor vehicle while under the influence of alcohol, was amended by the Nebraska Legislature in 1982. The punishments for various offenses involving driving while intoxicated were amended, and the Legislature provided for mandatory sentences in either the case where the defendant is sentenced to incarceration or placed on probation. Driving while under the influence of alcoholic liquor or drug was divided into three separate categories, depending upon the number of previous similar convictions. Section 39-669.07(1) deals with a person who has not previously been convicted. It provides in part:

> [T]he court shall, as part of the judgment of conviction, order such person not to drive any motor vehicle for any purpose for a period of six months from the date of his or her conviction, and shall order that the operator's license of such person be revoked for a like period.

The section then sets out what is to occur in the event the

individual is placed on probation, providing:

> 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 *for any purpose* for a period of sixty days *from the date of the order*.

(Emphasis supplied.)

Section 39-669.07(2) deals with individuals who have one previous conviction and provides that if convicted a second time:

> [T]he court shall, as part of the judgment of conviction, order such person not to drive any motor vehicle for any purpose for a period of one year from the date of his or her conviction, and shall order that the operator's license of such person be revoked for a like period.

As in the case of subsection (1), the act then addresses what is to occur in the event the individual is placed on probation, providing:

> 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 six months *from the date of the order* and such order of probation shall include as one of its conditions confinement in the city or county jail for forty-eight hours.

(Emphasis supplied.)

Finally, the act deals with persons who have been convicted two or more times, providing that upon conviction 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."

As with first and second offenses, the act then addresses what is to happen in the event the individual is placed on probation, providing:

> 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.

(Emphasis supplied.)

It would appear on its face, with regard to a conviction of driving under the influence of alcoholic liquor or drug, first offense or second offense, that the statute requires the court as a condition of probation to order the individual not to operate a motor vehicle "for any purpose" for a specified period of time "from the date of the order." "For any purpose" would seem to include work-related purposes. Furthermore, requiring that the period of prohibition be computed "from the date of the order" would seem to be fairly clear, thereby precluding any interpretation and preventing the action taken by the county court. Six months from the date of the order is a precise time.

In *Kellogg Company v. Herrington*, 216 Neb. 138, 343 N.W.2d 326 (1984), we held that where words of a statute are plain and unambiguous, no interpretation is needed to ascertain their meaning, and in the absence of anything to indicate the contrary, words are to be given their ordinary meaning. We further held in *Kellogg, supra*, that in construing statutes which are clear and unambiguous, courts cannot supply missing language, and it is not within the court's power to read into a statute meaning which the clear language does not warrant. Further, in *State v. Palmer,* 215 Neb. 273, 338 N.W.2d 281 (1983), we held that where the language of the statute was plain and unambiguous, no interpretation was needed, and the court was without authority to change the language. And in *In re Zoellner Trust,* 212 Neb. 674, 325 N.W.2d 138 (1982), we held that if the statute is ambiguous, the court, if possible, should attempt to discover the legislative intent but that if the language is unambiguous, there is no necessity for construction and this court has no jurisdiction to change the language.

We have difficulty, assuming that the Legislature has the

authority, to conceive how the Legislature could have been clearer in its direction. With regard to both first and second offenses, it specifically provided that as one of the conditions of probation, the individual was to be ordered not to operate a motor vehicle for any purpose and the time was to be computed from the date of the order. To do what the appellee urges and what the county court did would require us to hold that there was an ambiguity in the language. This we are unable to find.

Appellee argues that there is an ambiguity because, while the subsections dealing with both first and second offenses provide that one is not to operate a motor vehicle for any purpose for a specific time "from the date of the order," the subsection dealing with third offense has no such language, and it would therefore be inconsistent and silly to conclude that the Legislature intended the time to run continuously with regard to first and second offenses but interrupted with regard to third offense. It may very well be that in its drafting of this act the Legislature has created an ambiguity with regard to third offense driving while under the influence of alcoholic liquor or drug. The fact, however, that an ambiguity may exist with regard to third offense does not thereby of necessity create an ambiguity with regard to either first or second offense. Nor does the fact that one convicted of third offense drunk driving may argue for interrupted suspension give one convicted of second offense drunk driving such an argument. There is simply no ambiguity with regard to those situations in which an individual is convicted of driving while under the influence of alcohol or drug, first or second offense; and unless it is ultimately determined that the Legislature cannot restrict a trial court's inherent authority to suspend any sentence and place an individual on probation under whatever conditions the court determines, a matter we do not today decide, we must conclude that a trial court does not have the authority under § 39-669.07 to interrupt the period of suspension or permit one convicted of driving under the influence of alcoholic liquor or drug, first or second offense, to drive for limited work-related purposes. On second offense the period of prohibition against driving must be for a period of 6 continuous months computed from the date the order of probation is entered.

Havorka further argues that, regardless of the language found in § 39-669.07, the trial court has general authority to modify an order of probation under the provisions of Neb. Rev. Stat. § 29-2263(2) (Reissue 1979), which provides that "[d]uring the term of probation, the court on application of a probation officer or of the offender, or its own motion, may modify or eliminate any of the conditions imposed on the offender or add further conditions authorized by section 29-2262." The difficulty with this argument is that it fails to recognize that § 29-2263 refers to the conditions imposed by the court at the court's discretion under Neb. Rev. Stat. § 29-2262 (Reissue 1979) and not under the required provisions of § 39-669.07. We therefore have a conflict between a general statute and a specific statute. We have many times determined how that conflict is to be resolved, saying: " 'Where general and special provisions of statutes are in conflict, the general law yields to the special, without regard to priority of dates in enacting the same, and a special law will not be repealed by general provisions unless by express words or necessary implication. . . .' " *Hall v. Cox Cable of Omaha, Inc.*, 212 Neb. 887, 894, 327 N.W.2d 595, 600 (1982). Again, assuming but not deciding that the Legislature has the authority to impose a condition of probation, it is clear that the provisions of § 39-669.07 are part of a specific act, as opposed to § 29-2263, which is a general act. Therefore, the specific applies over the general.

Because this is an appeal proceeding presented by leave of court pursuant to § 29-2315.01, we do not reverse and remand but merely declare that the trial court was in error and should not have entered such an order.

EXCEPTION SUSTAINED.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL L. KLAPPAL, APPELLANT.

355 N.W.2d 221

Filed September 21, 1984. No. 84-141.

1. **Statutes: Presentence Reports: Mentally Disordered Sex Offender.** Neb. Rev. Stat. § 29-2912 (Reissue 1979) imposes upon the sentencing court the mandatory duty to order a presentence investigation for the purpose of evaluating whether one guilty of a felony sexual offense is a mentally disordered sex offender.
2. **Statutes: Words and Phrases.** The term "sexual offense," as used in Neb. Rev. Stat. § 29-2912 (Reissue 1979), includes any felony in which the sexual excitement of the person committing the crime is a substantial motivational factor.
3. **Sentences: Appeal and Error.** This court may reduce excessive criminal sentences.
4. _____: _____. A sentence imposed within statutory limits will not be disturbed on appeal absent evidence of an abuse of discretion by the trial court.
5. **Criminal Law: Rules of Evidence: Pleas.** The evidentiary rule provided in Neb. Rev. Stat. § 27-410 (Reissue 1979), that a withdrawn guilty plea is not admissible in any civil or criminal action or proceeding against the person who made it, does not apply to the sentencing stage of a criminal proceeding.

Appeal from the District Court for Douglas County: PAUL J. HICKMAN, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Bennett G. Hornstein, for appellant.

Paul L. Douglas, Attorney General, and L. Jay Bartel, for appellee.

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

CAPORALE, J.

Defendant-appellant, Michael L. Klappal, challenges the 3- to 5-year prison sentence imposed following conviction upon his plea of nolo contendere to the charge of creating obscene material. Klappal assigns as error the failure of the sentencing court to determine that he is a mentally disordered sex offender subject to disposition as such, and the claimed excessiveness of his sentence. The record fails to sustain either assignment; we affirm.

Klappal had originally been charged with first degree sexual

assault on a minor, which charge was dismissed pursuant to a plea bargain agreement. An information was then filed charging Klappal with creating obscene material in violation of Neb. Rev. Stat. § 28-1463 (Reissue 1979). The information states in part that "on or about the 6th day of June, 1983, [he] . . . did then and there make, publish, direct or create obscene material having as one of its participants or portrayed observer a child under the age of sixteen years . . . ." It is this latter charge, involving three photographs depicting frontal nudity, a Class III felony, to which Klappal pled.

It is to be noted that by pleading nolo contendere Klappal admitted that the photographs in question were obscene. See, *State v. Luther*, 213 Neb. 476, 329 N.W.2d 569 (1983); *State v. Herren*, 212 Neb. 706, 325 N.W.2d 151 (1982). We therefore do not concern ourselves in this case with whether frontal photographs of the nude male human body, without more, may be constitutionally defined as such.

Klappal discusses at length the mandatory nature of the sentencing court's duty to order an evaluation as to whether one guilty of a felony sexual offense is a mentally disordered sex offender pursuant to Neb. Rev. Stat. § 29-2912 (Reissue 1979). There is no question the statute imposes such a mandatory duty upon the sentencing court. Section 29-2912 provides in part: "After a person is convicted of a felony sexual offense, the court, prior to sentencing, shall order a presentence investigation which shall include an evaluation to determine whether the defendant is a mentally-disordered sex offender." Thus, the question is not whether such a mandatory duty exists, but, rather, whether the offense in question is indeed a felony "sexual offense" within the meaning of the statute.

The term "sexual offense," as it is used in § 29-2912, is defined in Neb. Rev. Stat. § 29-2911(1)(b) (Reissue 1979) to include any felony in which the sexual excitement of the person committing the crime is a substantial motivational factor. Klappal relies on this definition, claiming that sexual excitement was a substantial motivating factor in his creating the obscene material.

It should be noted at the outset that the precise meaning of the term "sexual offense," as used in the statute, has not yet

been interpreted by this court. In *State v. Sell*, 202 Neb. 840, 277 N.W.2d 256 (1979), we were asked to consider whether a "sexual offense" under the previous Sexual Sociopath Act, Neb. Rev. Stat. §§ 29-2901 et seq. (Cum. Supp. 1978) (repealed 1979), included the crime of second degree murder, where the defendant argued his sexual excitement was a "substantial motivating factor." 202 Neb. at 844, 277 N.W.2d at 259. That act defined a sexual offense as "the commission of any crime as defined by law in which sexual excitement of the person committing the crime is a substantial motivating factor." § 29-2901(1)(c). We found it unnecessary to interpret that section, however, and decided the case on other grounds.

The issue which Klappal presents to us, on first glance, appears to afford us an opportunity to interpret present §§ 29-2911(1)(b) and 29-2912 for the first time. However, there is not sufficient competent evidence in the record pertaining to the incident which resulted in Klappal's conviction to support his contention that he was substantially motivated by sexual excitement while he created the obscene material.

The record supports a finding that on or about June 6, 1983, Klappal took three frontal photographs of a nude 14-year-old boy, hereinafter called the subject, at Klappal's home.

Although the factual basis before the sentencing judge at the time he accepted Klappal's plea was that Klappal took the photographs of the subject at Klappal's home, Klappal's description of the incident in his presentence report is otherwise. His description in that report is as follows:

> [Klappal] stated the 4th of July, 1982, was the first time he met [the subject] when he was visiting Jim Lesch at his trailer located 6048 P Street. [Klappal] stated that Jim Lesch had been telling him about the young boy he had for a sex partner, and [the subject] was in the trailer, and Jim Lesch told [the subject] to drop his pants and show himself to [Klappal]. [Klappal] stated on a later date that Jim Lesch brought [the subject] to [Klappal's] apartment, and [Klappal] took pictures of him fully clothed.
>
> [Klappal] stated on the 1st of June, 1983, Jim Lesch, [the subject], and [another] stopped by his apartment to visit in the early evening, and [Klappal] stated he was low

> on groceries and had [said other] drive him to the grocery store to pick up a few items, and they were gone for only 15 minutes. [Klappal] stated he believes that Jim Lesch took pictures of [the subject] nude with [Klappal's] camera.

The remaining information in Klappal's presentence report does not detail the incident underlying the charge in question or the events leading to it.

Klappal relies on the presentence report of his acquaintance, Lesch, who was convicted of creating obscene material shortly before Klappal's conviction, to provide facts to demonstrate Klappal's requisite sexual motivation.

A review of Lesch's presentence report fails to reveal any elaboration on the specific incident between Klappal and the subject. Klappal is mentioned several different times in various police reports contained in Lesch's presentence report. However, contrary to Klappal's assertion (Brief for Appellant at 8), there is nothing in any of these reports which shows that Klappal performed oral sex on the subject at the time the subject photographs were taken. There is no evidence in the reports that the subject was stimulated by Klappal or that Klappal stimulated himself while in the presence of the subject.

It appears that Klappal has attempted to paint a broad background of sexual stimulation and activity, against which his offense and that of Lesch could be viewed, in order to show that Klappal was motivated by sexual excitement when he took the photographs in question. However, while there is ample evidence to conclude Lesch was motivated by sexual excitement at the time covered by those reports, there is no evidence to indicate that Klappal was so motivated on the occasion in question.

Although there is no evidence in the record to indicate that Klappal took the photographs to titillate a third person or for some nonsexual purpose, such as for commercial exploitation, neither is there any evidence to show that Klappal was himself substantially motivated by sexual excitement. Klappal has quite simply failed to show that there is any basis upon which to find that he committed a felony sexual offense as defined by § 29-2911(1)(b). Therefore, the district court did not err in not

ordering an investigation to determine whether Klappal was a mentally disordered sex offender pursuant to § 29-2912.

Klappal's claim that his sentence is excessive is based upon the fact that while he was sentenced to imprisonment in the Nebraska Penal and Correctional Complex for not less than 3 nor more than 5 years, Lesch, who was also convicted of creating obscene material, received a sentence of 5 years at the Lincoln Regional Center, after being identified as a treatable mentally disordered sex offender.

While it is true that this court may reduce criminal sentences when deemed to be excessive, Neb. Rev. Stat. § 29-2308 (Cum. Supp. 1982), it must also be remembered that a sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Hurlburt, ante* p. 121, 352 N.W.2d 602 (1984).

Under Neb. Rev. Stat. § 28-1464 (Reissue 1979), creating obscene material constitutes a Class III felony for a first offense. Neb. Rev. Stat. § 28-105(1) (Reissue 1979) provides a maximum penalty for such a felony of 20 years' imprisonment or a $25,000 fine, or both, and a minimum sentence of 1 year's imprisonment. Klappal's sentence of not less than 3 nor more than 5 years is well within the statutory limits.

Klappal argues, however, that the sentencing judge abused his discretion because his "codefendant" Lesch was treated less harshly as a mentally disordered sex offender. In so arguing, Klappal cites a number of cases in which this court has reduced sentences where equally culpable coperpetrators had been treated less harshly. The difficulty with this argument, from Klappal's point of view, is that Lesch in this case was not shown to be a coperpetrator of Klappal's. Klappal's charge and subsequent conviction resulted from an incident occurring on or about June 6, 1983, involving a particular subject. Lesch's conviction on a similar charge arose from an incident which occurred on or about October 27, 1981, involving a different victim. While both Klappal and Lesch were charged with creating obscene material, the charges arose from two separate incidents occurring over 1½ years apart. Klappal and Lesch cannot be considered coperpetrators for the purpose of sentencing when the incidents which led to each man's arrest

and subsequent conviction were not related to each other.

Klappal further argues in his brief that his guilty plea to a sodomy charge in Sioux City, Iowa, in 1972 should not have been considered by the sentencing judge in determining his sentence. Klappal claims that following a successful completion of probation, Klappal was allowed to withdraw his plea and the charge was dismissed. Brief for Appellant at 13. He cites Neb. Rev. Stat. § 27-410 (Reissue 1979) as authority for the proposition that a withdrawn guilty plea "is not admissible in any civil or criminal action . . . or proceeding against the person who made [it]." Section 27-410 does indeed so provide. However, Klappal fails to distinguish between the trial stage of a criminal proceeding and the sentencing stage. Section 27-410 is an evidentiary rule and does not apply to the sentencing stage. *State v. Goodpasture*, 215 Neb. 341, 338 N.W.2d 446 (1983). Therefore, it was within the sentencing judge's broad discretion to consider Klappal's prior withdrawn guilty plea in sentencing him.

Lastly, Klappal urges us to apply the preference of *State v. Burkhardt*, 194 Neb. 265, 231 N.W.2d 354 (1975), that all participants in the same crime be sentenced by the same judge in order to eliminate disparities between sentences. As we have already seen, however, Klappal and Lesch were not involved in the same crime; the *Burkhardt* preference therefore has no application to the case at hand.

AFFIRMED.

ROBERT L. BASS, M.D., APPELLEE, V. KENNETH R. DALTON, M.D., APPELLANT.

355 N.W.2d 225

Filed September 21, 1984. No. 84-155.

1. **Appeal and Error.** Holdings of this court on questions presented to it in reviewing the proceedings of the trial court become the law of the case.
2. _____. Where questions are presented to this court on appeal, our holdings

conclusively settle, for the purpose of that litigation, all matters ruled upon, either expressly or by necessary implication.

3. **Partnerships.** The dissolution of a partnership is but a preparatory step to its termination; a partnership continues after dissolution until the winding up of its affairs is completed.
4. _____. Equal partners are to share equally in the net profits of the partnership until dissolution; from the date of dissolution on, the use of each partner's interest in the capital and assets of the partnership and the time and skill devoted by a partner to winding up the partnership are factors to be considered in determining each partner's share of profits.
5. **Appeal and Error: Final Orders.** Where substantial rights of the parties remain undetermined and the cause is retained for further action, the order is interlocutory and not final.
6. **Appeal and Error: Final Orders: Accounting.** In the absence of a final judgment, an order granting an accounting is not appealable.

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

Philip T. Morgan of Morgan & Morgan, for appellant.

Donald R. Treadway of Treadway, Bird & Albin, P.C., for appellee.

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

CAPORALE, J.

In this appeal Kenneth R. Dalton, M.D., defendant-appellant, contends the trial court misinterpreted and misapplied the mandate issued in *Bass v. Dalton*, 213 Neb. 360, 329 N.W.2d 115 (1983) (*Bass v. Dalton I*). We disagree with that contention and affirm.

The relevant facts concerning the dissolution of the partnership consisting of Dalton and Robert L. Bass, M.D., plaintiff-appellee, are set forth in *Bass v. Dalton I* and will not be reiterated here. It is sufficient to recall that *Bass v. Dalton I* held that the method of dissolving the partnership was such that Bass was not entitled to any portion of the partnership assets but that the partnership's profits were a debt of the partnership to the partners rather than an asset of the partnership.

The trial court's adjudication on the accounting was controlled by the rule that holdings of this court on questions presented to it in reviewing the proceedings of the trial court

become the law of the case. Where questions are presented to this court on appeal, our holdings conclusively settle, for the purpose of that litigation, all matters ruled upon, either expressly or by necessary implication. *System Meat Co. v. Stewart*, 190 Neb. 682, 211 N.W.2d 902 (1973). See, also, *School Dist. of Gering v. Stannard*, 196 Neb. 367, 242 N.W.2d 889 (1976).

The accounting herein established that the net profits of the partnership for services rendered prior to its dissolution, less costs and expenses, were $39,832.69. Accordingly, the trial court correctly entered judgment in favor of Bass for half that amount, $19,916.35.

The trial court's adjudication not only comported with the law of this case, it fully complied with the general law of this state. The dissolution of a partnership is but a preparatory step to its termination; a partnership continues after dissolution until the winding up of its affairs is completed. Neb. Rev. Stat. § 67-330 (Reissue 1981); *Essay v. Essay*, 175 Neb. 689, 123 N.W.2d 20 (1963), *op. modified, reh'g denied* 175 Neb. 730, 123 N.W.2d 648. *Essay* held that equal partners were to share equally in the net profits of the partnership until dissolution but that, from the date of dissolution on, the use of each partner's interest in the capital and assets of the partnership and the time and skill devoted by a partner to winding up the partnership were factors to be considered. There is no competent evidence in this case that any partner's capital, assets, time, or skill was devoted to the winding up of the partnership.

In order to avoid future confusion we acknowledge that the review undertaken by this court in *Bass v. Dalton I* was premature and therefore improvident. At that point the trial court had only construed the partnership agreement and ordered an accounting which had not yet been conducted. Therefore, no final order had been entered at the time *Bass v. Dalton I* was appealed, for where substantial rights of the parties remain undetermined and the cause is retained for further action, the order is interlocutory. *Z & S Constr. Co., Inc. v. Collister*, 211 Neb. 348, 318 N.W.2d 728 (1982). The trial court's order in *Bass v. Dalton I* retained the cause for further

action and left substantial rights of the parties undetermined. In the absence of a final judgment, an order granting an accounting is not appealable. *Berry v. Berry*, 140 Cal. App. 2d 50, 294 P.2d 757 (1956); *Page v. Sherman*, 290 P.2d 132 (Okla. 1955). Our oversight in this regard has made it necessary for us to review this case in a piecemeal fashion, a circumstance we do not wish to repeat in future cases.

AFFIRMED.

GRANT, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. PAUL W. JONES, APPELLANT.
355 N.W.2d 227

Filed September 21, 1984. No. 84-290.

1. **Due Process: Pleas.** Mere failure to comply with precise ceremonial or verbal formality in respect to arraignment and entry of a plea is not a denial of due process for which conviction must be set aside if the essential requisites of clearly informing the accused and an understanding admission of the offense on his part are shown.
2. _____: _____. Due process of law does not require the State to adopt any particular form of procedure so long as it appears that the accused has had sufficient notice of the accusation and an adequate opportunity to defend himself in the prosecution.

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

James P. Miller and Owen A. Giles, 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, Paul W. Jones, appeals from the judgment of the district court for Sarpy County, Nebraska, finding him guilty of criminal mischief in excess of $300 in violation of Neb.

Rev. Stat. § 28-519(2) (Reissue 1979). We have now reviewed the record and find that the claim of error is without merit, and accordingly affirm the judgment and sentence imposed by the trial court.

On January 20, 1984, Jones, having been previously charged with the crime described above, accompanied by counsel, was arraigned before the trial court and entered a plea of not guilty. At a subsequent hearing held on March 23, 1984, Jones requested permission to withdraw his plea of not guilty and, pursuant to a plea agreement reached with the county attorney's office, to enter a plea of guilty to the crime charged. Jones now maintains that because he did not specifically say "I plead guilty," the trial court committed error in adjudging him guilty and imposing a sentence.

The record of the proceedings does not, however, support that position. To begin with, after entering a plea of not guilty, Jones, through his counsel, advised the court that he wished to again appear before the court, withdraw his plea of not guilty, and enter a plea of guilty. At the hearing held on March 23, 1984, the following colloquy between the court and Jones occurred:

> THE COURT: . . . Mr. Jones, you previously entered a plea of not guilty to the Information. You wish to change that plea?
>
> PAUL W. JONES: Yes, sir.
>
> THE COURT: Is this done freely and voluntarily?
>
> PAUL W. JONES: Yes, sir.

The county attorney then set out the factual basis to support the plea, and Jones confirmed the facts as recited. Jones objected to some evidence with regard to certain property, but admitted to sufficient facts to support a finding of guilty. Thereafter, the following conversation between the parties occurred:

> THE COURT: . . . If you're dissatisfied with the Court's sentence, you may appeal this; however, it is not a ground for withdrawing your plea of guilty if this is accepted. Do you still wish to plead guilty?
>
> PAUL W. JONES: Yes, sir.
>
> THE COURT: The Court finds that the defendant understands the charge, the penalties, his constitutional

> rights, the consequences of pleading guilty, and that the guilty plea is given voluntarily, freely, intelligently, and with advice of counsel. The plea is accepted and the defendant is adjudged guilty as charged.

No objections were made by either Jones or his attorney.

Jones now argues that because he never said "I plead guilty," the trial court erred in sentencing him. While Jones makes the argument, he cites us to no authority to support that position. And, in fact, the authorities seem clearly to the contrary. Neb. Rev. Stat. § 29-1819 (Reissue 1979) provides in part that if the accused offers no plea in bar, "he shall plead guilty, not guilty, or nolo contendere." It has long been recognized in this jurisdiction, as in most other jurisdictions, that a plea of nolo contendere, for certain purposes relevant here, is the same as a plea of guilty. See *State v. Neuman*, 175 Neb. 832, 125 N.W.2d 5 (1963). It therefore should be clear to everyone that by advising the court that he wished to withdraw his plea of not guilty, he must of necessity desire to either enter a plea of guilty or nolo contendere, there being no other possible pleas available. Furthermore, Jones admits in his brief that "everyone present when Appellant was adjudged guilty knew the nature and purpose of the proceedings." Brief for Appellant at 3. Still, he maintains that the magic words were not spoken by the defendant himself.

In the case of *Mayes v. United States*, 177 F.2d 505 (8th Cir. 1949), the U.S. Court of Appeals for the Eighth Circuit rejected an argument very similar to that now presented to us by Jones. The record of the arraignment in *Mayes* discloses that Mayes' attorney informed the court that Mayes wished to enter a plea of guilty. The court then inquired of Mayes whether he had heard the charges and whether they were correct. He answered affirmatively. In rejecting the contention that he had never actually entered a guilty plea, the *Mayes* court reasoned as follows:

> It is clear from the reporter's records that the arraignment of appellant and his entering his plea of "Guilty" were not made manifest in the open court in the formal words of the established tradition of criminal procedure. Traditionally the accused has the indictment

> read to him or the substance of the charge stated to him, and he is called upon to plead thereto by having the interrogatory propounded to him to "How do you plead: Guilty or Not Guilty?" to which the defendant answers "Guilty" or "Not Guilty" or else he stands mute. . . .
>
> But since the decision of the Supreme Court in Crain v. United States, 162 U.S. 625, 16 S. Ct. 952, 40 L. Ed. 1097, was overruled by that court in Garland v. Washington, 232 U.S. 642, 34 S. Ct. 456, 58 L. Ed. 772, it can no longer be said that mere failure to comply with precise ceremonial or verbal formality in respect to arraignment and entry of a plea is a denial of due process for which conviction must be set aside. If the essential requisites of clearly informing the accused and an understanding admission of the offense on his part are shown, we must hold the requirements of due process are fulfilled.

177 F.2d at 507.

The court in *Mayes* further observed:

> And when the court called upon the appellant himself with the words, "You have heard the charges. They are correct?", the appellant's response, "Yes, Sir", had no fair meaning other than that he admitted the charges were true. The admission of guilt when called upon by the court to answer to the charges is all that a plea of guilty on arraignment amounts to, and when appellant was called upon and he made his answer his plea was complete. It must be held there was a plea of guilty by the defendant in person as well as by his attorney.

Id.

To the same extent, when the trial court, after engaging in conversation with Jones about the facts of the case, inquired whether he still wished to plead guilty and Jones said he did, all of the requirements of due process were satisfied. To be sure, the better practice is to ask the defendant, "How do you wish to plead?" and to have the defendant specifically say "I plead guilty." An arraignment, however, is not a game of "Simon Says," and the failure to specifically parrot the words does not entitle the defendant to relief on appeal on the basis that he did not freely, knowingly, and voluntarily enter a plea of guilty to

the charge. Unlike the requirements to establish the negotiability of commercial paper, there are no magic words necessary to satisfy the due process requirements regarding a defendant entering a plea of guilty freely, knowingly, and voluntarily.

This, indeed, is the message of the U.S. Supreme Court in *Garland v. Washington*, 232 U.S. 642, 645, 34 S. Ct. 456, 58 L. Ed. 772 (1914), where the Court said:

> Due process of law, this court has held, does not require the State to adopt any particular form of procedure, so long as it appears that the accused has had sufficient notice of the accusation and an adequate opportunity to defend himself in the prosecution. *Rogers v. Peck*, 199 U.S. 425, 435, and previous cases in this court there cited.

The judgment and sentence of the trial court are therefore affirmed.

AFFIRMED.

AGRISTOR CREDIT CORPORATION, A FOREIGN CORPORATION, APPELLEE, V. FERNAN RADTKE AND ESTELLA L. RADTKE, DEFENDANTS AND THIRD-PARTY PLAINTIFFS, APPELLANTS AND CROSS-APPELLEES, PLATTE VALLEY HARVESTORE, INC., A CORPORATION, THIRD-PARTY DEFENDANT, APPELLEE AND CROSS-APPELLANT, A. O. SMITH HARVESTORE PRODUCTS, INC., A CORPORATION, THIRD-PARTY DEFENDANT, APPELLEE.

356 N.W.2d 856

Filed September 28, 1984. No. 83-522.

1. **Actions: Parties.** At any time after commencement of the action, a defendant, as a third-party plaintiff, may cause a summons to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him.
2. _____: _____. The basic function of third-party practice is the original defendant's seeking to transfer to the third-party defendant the liability asserted by the original plaintiff.

3. _____: _____. A third-party claim may be asserted only when the third party's liability is in some way dependent on the outcome of the main claim or when the third party is secondarily liable to defendant.
4. **Uniform Commercial Code: Contracts: Assignments.** Subject to any statute or decision which establishes a different rule for buyers of consumer goods, an agreement by a buyer that he will not assert against an assignee any claim or defense which he may have against the seller is enforceable by an assignee who takes his assignment for value, in good faith and without notice of a claim or defense.

Appeal from the District Court for Furnas County: JACK H. HENDRIX, Judge. Affirmed in part, and in part reversed and dismissed.

William H. Sherwood of Sherwood & Cuypers, and Patricia E. Dodson of Dodson & Dodson, for appellants.

Barlow, Johnson, DeMars & Flodman, for appellee AgriStor Credit Corporation.

Tye, Hopkins & Williams, for appellee A. O. Smith Harvestore Products, Inc.

Jeffrey Jacobsen of Jacobsen, Orr & Nelson, and Richard G. Kopf of Cook & Kopf, P.C., for appellee Platte Valley Harvestore, Inc.

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

COLWELL, D.J., Retired.

Defendants Fernan Radtke and Estella L. Radtke, husband and wife, appeal a deficiency judgment in favor of plaintiff, AgriStor Credit Corporation (AgriStor), arising out of a replevin suit. Third-party defendant Platte Valley Harvestore, Inc. (Platte Valley), appeals a $15,800 judgment in favor of the Radtkes as third-party plaintiffs for negligent performance of its duties under a contract for the sale of a silo.

The Radtkes operated a farm and a dairy near Hendley, Nebraska. Shortly before April 1977, they were contacted by a salesman for Platte Valley, Lexington, Nebraska. The salesman told the Radtkes that if they were to install and use a "Harvestore" silo to store feed for their dairy herd, they could expect an increase in milk production to more than justify the

cost of the silo. The Harvestore is manufactured by A. O. Smith Harvestore Products, Inc. (A.O.S.H.P.), a subsidiary of A. O. Smith, Inc.

Harvestore is the trade name of a vertical silo-type feed grain farm storage facility. One feature is the minimum presence of oxygen. Units are assembled onsite. The Harvestore unit in question here was a used 1969 model acquired and rebuilt by Platte Valley. Some new parts were required, including an unloader and 5-horsepower motor.

On April 17, 1977, Platte Valley's sales manager helped the Radtkes prepare a credit application which was submitted to plaintiff, a credit company affiliate of A. O. Smith, Inc. The credit application was reviewed by AgriStor and the loan was approved. On April 27, 1977, a sales agreement for the used Harvestore was executed by the Radtkes as buyers and with Platte Valley as seller; the $62,460.05 sale price was financed over a 108-month period at 12 percent interest; the installment sales contract was assigned by Platte Valley to AgriStor on May 4, 1977. Both the sales agreement and installment contract contain disclaimers of express warranty and implied warranties of fitness and merchantability.

On July 6, 1977, a certificate of completion stating that the Harvestore was satisfactorily installed was signed by the Radtkes and sent to AgriStor. The Radtkes claimed, and the evidence shows, that after the Harvestore was placed into use, milk production dropped dramatically. They made no payment on the installment contract until June of 1978, although the first payment was due in September of 1977. Thereafter, their monthly payments were regularly in default.

After the Radtkes noticed the drop in milk production, they contacted the Platte Valley salesman who had sold the Harvestore to them. He recommended that the Radtkes make a change in the feed. The salesman also suggested that the well water be tested, and as a result of the test recommended that they haul water from other wells to their cattle, as the waters tested indicated a high nitrate level. The feed changes and new water did nothing to improve the milk production. Two veterinarians testified that the problem with the milk production was nutritional, i.e., a protein deficiency. One of

the veterinarians and another expert witness testified that the nutritional deficiency was the result of heat damage to the hay placed in the Harvestore.

Because of the Radtkes' payment defaults, AgriStor brought a replevin action in October of 1980. An order of delivery was issued on December 4, 1980. On December 22, 1980, a letter from AgriStor was delivered to the Radtkes informing them that the Harvestore would be sold by private sale on or after December 30, 1980. On December 30 AgriStor sold the Harvestore to Platte Valley for $50,000, and Platte Valley removed it from the Radtke farm in early 1981.

The present case was instituted by AgriStor for a deficiency judgment against the Radtkes. The Radtkes' answer includes a defense of breach of warranties. They cross-claimed against AgriStor for negligence and breach of warranty. The trial judge ruled that the implied warranty of merchantability was waived by the conspicuous disclaimer, and the express warranties, if any, were excluded by the parol evidence rule. The cross-claim was dismissed at the close of the Radtkes' case.

On May 6, 1981, the Radtkes filed a third-party petition and supporting motion naming A.O.S.H.P. and Platte Valley as third-party defendants, alleging negligence and breach of warranty. Over objection, the court granted leave to file the petition on July 14, 1981. Third-party defendants objected to the subject matter jurisdiction as being contrary to Neb. Rev. Stat. § 25-331 (Reissue 1979). Upon the completion of the evidence the trial court dismissed the warranty issue and allowed the negligence claim to go to the jury.

The jury returned a verdict against the Radtkes for $46,157.11 in AgriStor's deficiency action. The jury also returned a $15,800 special verdict against third-party defendant Platte Valley, finding that its negligence contributed to the Radtkes' milk loss, extra worktime, and the cost of obtaining water. The jury found in favor of third-party defendant A.O.S.H.P.

The Radtkes assign three errors: (1) Dismissal of their third-party claim for breach of warranty, (2) dismissal of their cross-petition against AgriStor, and (3) overruling of their motion for directed verdict and motion for judgment

notwithstanding the verdict as against AgriStor.

Platte Valley cross-appeals, alleging several errors; among them a claim that the district court improperly allowed the third-party petition to be filed. We discuss this assignment of error first.

Section 25-331 provides in part:

> At any time after commencement of the action, a defendant, as a third-party plaintiff, may *cause a summons to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him*. The third-party plaintiff must obtain leave of the trial court on motion upon notice to all parties to the action before filing a third-party complaint. When authorized by the trial court the person served with the summons, hereinafter called the third-party defendant, shall have all the rights of a defendant including the rights authorized by this section.

(Emphasis supplied.)

Prior to trial, Platte Valley filed a motion for dismissal, alleging that the trial court lacked subject matter jurisdiction because of noncompliance with § 25-331. The motion was overruled.

Church of the Holy Spirit v. Bevco, Inc., 215 Neb. 299, 338 N.W.2d 601 (1983), recently discussed our third-party practice rules, including:

> The policy underlying third-party practice is to avoid circuity of actions and multiplicity of suits, as well as to expedite the resolution of secondary actions arising out of or as a consequence of the same facts involved in the action originally instituted. See *Colton v. Swain*, 527 F.2d 296 (7th Cir. 1975). The basic function of third-party practice is the original defendant's seeking to transfer to the third-party defendant the liability asserted by the original plaintiff.

Id. at 306-07, 338 N.W.2d at 606.

> "A third-party claim may be asserted . . . only when third party's liability is in some way dependent on the outcome of the main claim or when the third party is secondarily liable to defendant." 6 C. Wright & A. Miller, Federal

Practice and Procedure: Civil § 1446 at 246 (1971).

Availability and proper use of third-party practice was described in *United States v. Joe Grasso & Son, Inc.*, 380 F.2d 749, 751-52 (5th Cir. 1967), as "only in cases where the third party's liability was in some way derivative of the outcome of the main claim. In most such cases it has been held that for impleader to be available the third party defendant must be 'liable *secondarily* to the original defendant in the event that the latter is held liable to the plaintiff.' . . . Stating the same principle in different words, other authorities declare that the third party must necessarily be *liable over* to the defendant for all or part of the plaintiff's recovery . . . or that the defendant must attempt to *pass on* to the third party all or part of the liability asserted against the defendant . . . ."

Id. at 306, 338 N.W.2d at 605-06.

When the Radtkes presented their third-party petition, the trial judge had discretion to permit its filing only if the motion or other accompanying pleadings complied with § 25-331, particularly that a named third-party defendant "is or may be liable to him for all or part of the plaintiff's claim against him."

The Radtkes' motion and third-party petition neither allege nor advance the theory that both or either of the third-party defendants may be liable to the Radtkes for all or a part of plaintiff's claim for a deficiency judgment against the Radtkes or that the Radtkes are attempting to pass on to either of them the Radtkes' possible liability to plaintiff on the theory of either indemnity or contract. On the contrary, the amended petition alleges that the named third-party defendants were liable to the Radtkes on two causes of action, (1) their breach of warranty and (2) their negligence. This was also their theory of recovery during trial. Neither of these two alleged causes of action are related in any way to the main claim of AgriStor against the Radtkes for a deficiency judgment.

It was error for the trial court to permit the filing of the third-party petition, and it is dismissed.

It is not necessary to discuss Platte Valley's other assigned errors concerning an evidentiary question and the running of the statute of limitations.

Due to the dismissal herein of the Radtkes' third-party petition, it is not necessary to address their first assignment of error, since it concerns their third-party petition against Platte Valley and A.O.S.H.P., third-party defendants.

Turning to the Radtkes' second assignment, they claim error in the dismissal of their cross-petition. At the close of the Radtkes' evidence, AgriStor made a motion to dismiss the Radtkes' cross-petition and an alternative motion to direct a verdict on the Radtkes' cross-petition, because the evidence did not show that AgriStor ever made any warranties or acted negligently. The trial court granted the final motion and dismissed the Radtkes' cross-petition against AgriStor.

The installment contract assigned to AgriStor by Platte Valley included:

> 14. CONSENT TO ASSIGNMENT. Seller intends to assign this contract to the assignee named on the face hereof. Buyer hereby consents to such assignment and to the extent permitted under the Governing Law agrees not to assert against said assignee any claim or defense which he may have against Seller or Manufacturer; and upon receipt of notice thereof, to pay said Deferred Payment Price and any other amount due hereunder without deduction, counter-claim, or offset of any kind to said assignee at its office designated on the face hereof. . . .

The Radtkes' main argument is that the assignee, AgriStor, cannot claim the benefits of the consent to assignment clause because it is "closely connected" with A.O.S.H.P., the manufacturer of Harvestores, and with the seller-dealer, Platte Valley; therefore, it is not a good faith holder without notice, as in Neb. U.C.C. § 9-206(1) (Reissue 1980), which provides in part:

> Subject to any statute or decision which establishes a different rule for buyers of consumer goods, an agreement by a buyer that he will not assert against an assignee any claim or defense which he may have against the seller is enforceable by an assignee who takes his assignment for value, in good faith and without notice of a claim or defense . . . .

> [C]lose-connectedness exists when it has been shown that the assignee has 1) a substantial voice in, or control of, or a vested interest in the underlying transaction, or 2) if the assignee has knowledge of the particular transaction or of the way the seller does business, so that he knows of claims the buyer has against the seller. . . . The mere fact that the assignee supplied the forms to the seller or was a corporation formed by a manufacturer to finance sales of its products is not enough to establish the close connection required for application of the doctrine.

Valmont Credit Corp. v. McIlravy, 344 N.W.2d 691, 694 (S.D. 1984).

At most, the evidence shows that plaintiff and A.O.S.H.P. are each a subsidiary of a parent company, A. O. Smith, Inc., each having some board of directors members in common; that Platte Valley is a dealer but not a franchised dealer for A.O.S.H.P.; and that, sometimes, Platte Valley submits customer credit applications to plaintiff, using forms furnished by it. There is neither evidence nor a reasonable inference that plaintiff either participated in the sale negotiations except as creditor or that it had notice of any claimed warranties or defenses. The cross-petition was properly dismissed.

The Radtkes' third assignment is that the district court erred in overruling the Radtkes' motion for directed verdict and motion for judgment notwithstanding the verdict as against AgriStor (deficiency judgment), claiming that notice of the sale of the Harvestore was not given prior to the sale; that, as a matter of law, the sale of collateral was not in good faith nor conducted in a commercially reasonable manner as required by Neb. U.C.C. § 9-504(3) (Reissue 1980).

The trial court instructed the jury that prior to allowing AgriStor to recover on its deficiency, it must find a minimum of 3 business days' notice of the sale and that the sale was made in good faith and was commercially reasonable. The evidence fully supported the jury verdict on these issues.

Plaintiff's evidence showed that the best method to resell Harvestores was through a Harvestore agency because ultimate reuse or resale requires dismantling, repair, new parts, and new assembling that all required special equipment. Public sales

produced poor results. Plaintiff furnished all required new parts and offered an attractive short-term loan. All of the evidence was that the $50,000 price was fair. The Radtkes produced no contrary evidence.

Lastly, the Radtkes claim that the sale of the Harvestore was made prior to notice. The sale terms were negotiated on December 18 or 19, 1980, by AgriStor with Platte Valley to buy the collateral. On December 18 a letter was sent to, and on December 22, 1980, received by, the Radtkes, informing them that the collateral would be sold on or after December 30 and that they could purchase the collateral by tendering the amount of $79,239.40. AgriStor's attorney then sent a promissory note and security agreement to Platte Valley, instructing it to execute the documents on December 30, 1980, which was done.

The term "sale" is defined in Neb. U.C.C. § 2-106 (Reissue 1980) as "the passing of title from the seller to the buyer for a price." The negotiations concerning the sale relate to good faith, which was a jury question.

On a motion for a directed verdict the party against whom the motion is directed is entitled to have all disputed facts decided in its favor and the benefit of every reasonable inference. *Otto v. Hongsermeier Farms*, 217 Neb. 45, 348 N.W.2d 422 (1984).

The evidence fully supports the denial of the Radtkes' motion for directed verdict and motion for judgment notwithstanding the verdict. See *Weston v. Gold & Co.*, 167 Neb. 692, 94 N.W.2d 380 (1959).

The judgment for AgriStor is affirmed. The judgment in favor of third-party plaintiffs, Radtkes, against third-party defendant Platte Valley, including assessed costs, is reversed and set aside.

AFFIRMED IN PART, AND IN PART REVERSED AND DISMISSED.

STATE OF NEBRASKA, APPELLEE, V. EARL P. BOTHWELL, APPELLANT.

355 N.W.2d 506

Filed September 28, 1984. No. 84-196.

Evidence: Hearsay: Witnesses. As a prerequisite to the admission of hearsay statements into evidence under Neb. Rev. Stat. § 27-804 (Reissue 1979), the proponent of the statement must make a showing that the declarant is unavailable as a witness. It is within the discretion of the trial court to determine whether the unavailability of the witness has been shown.

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 Linda L. Willard, for appellee.

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

WHITE, J.

The appellant, Earl P. Bothwell, appeals from an order of the district court for Douglas County, Nebraska, denying Bothwell's motion for a new trial on the basis of newly discovered evidence. Bothwell's original conviction and sentence for robbery were affirmed by this court pursuant to Neb. Ct. R. 3B(4) (rev. 1983).

In support of his motion for new trial, the appellant attached an affidavit from his son, Bradley Bothwell, a witness for the State, in which Bradley admitted that he testified falsely at the appellant's trial. At the hearing on the motion for new trial, the appellant presented additional affidavits and testimony from three individuals concerning conversations with Bradley Bothwell. In those conversations Bradley had told the witnesses that he had lied at the appellant's trial. The appellant also testified that he had heard that his son had lied at trial. The testimony of the witnesses and the affidavits were objected to by the State and excluded by the trial court as hearsay.

On appeal to this court Bothwell relies on Neb. Rev. Stat.

§ 27-804 (Reissue 1979) for the proposition that the evidence was admissible as an exception to the rule against hearsay, Neb. Rev. Stat. § 27-801 (Reissue 1979), and as such the trial court abused its discretion in sustaining the State's objections to the evidence. Section 27-804 states in part:

> (1) Unavailability as a witness includes situations in which the declarant:
>
> (a) Is exempted by ruling of the judge on the ground of privilege from testifying concerning the subject matter of his statement; or
>
> . . . .
>
> (e) Is absent from the hearing and the proponent of his statement has been unable to procure his attendance by process or other reasonable means.
>
> (2) Subject to the provisions of section 27-403, the following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> . . . .
>
> (c) A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

It is elementary that as a prerequisite to the availability of this exception, the proponent of the hearsay evidence, Earl Bothwell, make some showing that the declarant, Bradley Bothwell, is unavailable as a witness. In *Davis v. State*, 171 Neb. 333, 336, 106 N.W.2d 490, 494 (1960), quoting from *Callies v. State*, 157 Neb. 640, 61 N.W.2d 370 (1953), we held that " '[t]here must be evidence of diligence on the part of the prosecution to locate the witness, and evidence of the unavailability of the witness . . . .' " We believe that this standard must apply to the defense as well as the prosecution.

It is within the sound discretion of the trial court to

determine whether the unavailability of the witness has been shown. *State v. Howard*, 184 Neb. 461, 168 N.W.2d 370 (1969); *Jackson v. State*, 133 Neb. 786, 277 N.W. 92 (1938).

With the exception of testimony from Doris Hyde, Bradley Bothwell's aunt and appellant's sister, who stated that she had heard Bradley had moved to Missouri, that one of her nephews had seen Bradley at a party in Missouri, that she had heard that Bradley would not appear in court for fear of possible perjury charges, and that she had been asked to try and locate Bradley, the record is entirely silent as to what efforts, if any, had been made to contact Bradley Bothwell and procure his testimony at the hearing. Absent a showing by the appellant that Bradley Bothwell was "unavailable" as a witness as defined by § 27-804(1), we are unable to determine that the trial court abused its discretion in not allowing the affidavits and oral testimony into evidence.

In view of our holding that the appellant failed to make the requisite showing of unavailability of the declarant, we need not decide whether the statements of Bradley Bothwell would have been admissible under § 27-804(2)(c). There being no competent evidence on which to sustain the appellant's motion for new trial, we affirm the order of the lower court.

AFFIRMED.

FIRST NATIONAL BANK IN ORD, NEBRASKA, APPELLEE AND CROSS-APPELLANT, V. J. H. SCHROEDER, APPELLANT AND CROSS-APPELLEE.

355 N.W.2d 780

Filed October 5, 1984. No. 83-490.

Secured Transactions: Contracts: Attorney Fees. A provision in a security agreement which seeks to impose an attorney fee on a debtor as part of the costs of suit to enforce the security agreement and its underlying contract is contrary to the public policy of Nebraska and, therefore, void and unenforceable.

Appeal from the District Court for Valley County: JAMES R. KELLY, Judge. Affirmed in part, and in part reversed.

J. H. Schroeder, pro se, and, on brief, Richard E. Gee.

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

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

SHANAHAN, J.

J. H. Schroeder appeals the judgment of the district court for Valley County which dismissed his counterclaims and entered summary judgment in favor of First National Bank in Ord. The district court also awarded First National attorney fees which First National has cross-appealed, arguing the awarded attorney fee was insufficient.

On December 31, 1981, First National sued J. H. Schroeder to recover on a promissory note for $6,223 and to determine the validity of a financing statement-security agreement given in conjunction with Schroeder's promissory note. Schroeder answered and also filed several counterclaims. First National moved to strike Schroeder's counterclaims and moved to amend its petition to request an attorney fee in view of a provision in the security agreement entitling the secured party to recover from the debtor "any and all costs and expenses incurred in recovering possession of the Collateral and incurred in enforcing this security agreement . . . ." Before the trial court had ruled on these motions, Schroeder filed amended counterclaims. First National moved to dismiss the first amended counterclaims. (For our purpose in disposing of this appeal, we will treat First National's motion to dismiss as a demurrer. Cf. *Nelson v. Sioux City Boat Club*, 216 Neb. 484, 344 N.W.2d 634 (1984).) The district court sustained the motion to dismiss, but allowed Schroeder 20 days to amend his counterclaims by the following: "Plaintiff's Motion to Dismiss Defendant's Cross Claim is granted, but the Defendant shall have 20 days from the date of this hearing to file a Motion to Reinstate Meritoreous [sic] Claims and to accompany said Motion with a proposed pleading." Schroeder filed his motion to reinstate his claims but never filed the proposed pleading

stating his claims as ordered by the trial court. (Consequently, Schroeder's second amended counterclaims are not part of the record.) Nevertheless, First National filed a demurrer concerning the unfiled counterclaims. As reflected by the record, the trial court sustained the demurrer to the amended but unfiled counterclaims and allowed Schroeder 20 days to amend his answer only.

Proceeding pro se, Schroeder filed his amended answer. In substance, the amended answer contained a general denial with numerous allegations essentially the same as the contents of the counterclaims. First National filed a motion to strike from the amended answer those parts identical to the counterclaims and also filed a motion for summary judgment on the promissory note. The trial court sustained the motion to strike and allowed Schroeder no further time to amend. Further, the district court sustained First National's motion for summary judgment on the note and proceeded to trial on the remaining issues, namely, validity of the security agreement and recovery of an attorney fee. The district court held the security agreement was valid and awarded First National a $1,000 attorney fee.

Schroeder contends the district court erred in dismissing his amended counterclaims, refusing to allow extra time to amend his amended answer, and awarding an attorney fee. First National cross-appeals and claims the awarded attorney fee is insufficient.

Concerning the cross-appeal, First National argues two theories as bases for an attorney fee. First National points to Neb. U.C.C. § 9-504 (Reissue 1980), in part providing:

> Secured party's right to dispose of collateral after default; effect of disposition.
>
> (1) A secured party after default may sell, lease or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing. Any sale of goods is subject to the article on Sales (article 2). The proceeds of disposition shall be applied in the order following to
>
> (a) the reasonable expenses of retaking, holding, preparing for sale or lease, selling, leasing, and the

> like and, to the extent provided for in the agreement, the reasonable attorney's fees and legal expenses incurred by the secured party.

The foregoing section of the U.C.C. is clearly unsupportive of First National's claim. Section 9-504 deals with the disposition of proceeds from a sale of collateral. Nowhere does § 9-504 authorize an attorney fee in a suit on a contract, here, the promissory note, which underlies and supports the security agreement, or in a suit to enforce or establish the validity of a security agreement.

First National, the secured party, argues the security agreement requires the debtor, Schroeder, to pay First National's costs and expenses incurred in enforcing the security agreement and relies upon the contents of the security agreement as follows: "DEBTOR WARRANTS AND COVENANTS: . . . (10) Debtor will pay Secured Party any and all costs and expenses incurred in recovering possession of the Collateral and incurred in enforcing this security agreement, and the same shall be secured by this security agreement."

441, 442, 348 N.W.2d 893, 894 (1984), stated: "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." In *Quinn* we specifically held that a provision in a contract which provided that in the event of litigation involving the contract, the prevailing party shall be entitled to costs, including attorney fees, was contrary to public policy and void. If public policy of Nebraska precludes awarding an attorney fee as costs otherwise authorized in a contract for which suit is brought, the corollary prohibits an attorney fee awarded as part of the costs in a suit involving a security agreement which provides that the secured party shall recover from the debtor "any and all costs and expenses incurred in recovering possession of the Collateral and incurred in enforcing" the security agreement. It would be a legal anomaly that Nebraska law prohibits recovery of an attorney fee as costs in a contract suit but permits recovery of an attorney fee in a suit involving a security agreement, a form of contract given to secure performance of the basic contract

underlying the security agreement. Consequently, we hold that a provision in a security agreement which seeks to impose an attorney fee on a debtor as a part of the costs of suit to enforce the security agreement and its underlying contract is contrary to the public policy of Nebraska and, therefore, void and unenforceable. Under the circumstances the district court erroneously awarded an attorney fee to First National. In view of the trial court's error in awarding an attorney fee, there is no merit to First National's cross-appeal concerning the amount of the attorney fee awarded.

Schroeder maintains that the district court incorrectly dismissed his amended counterclaims. As already mentioned, the record does not contain Schroeder's final amended counterclaims. " 'A judgment of the district court brought to this court for review is supported by a presumption of correctness, and the burden is upon the party complaining of the action of the district court *to show by the record* that it is erroneous. . . .' " (Emphasis supplied.) *Scarpello v. Continental Assur. Co.*, 187 Neb. 395, 397, 191 N.W.2d 444, 446 (1971).

> We need not belabor the legal proposition that the appellate courts, including this one, will not consider rulings which are not part of the trial record, in the absence of extraordinary circumstances. [Citation omitted.] Appellate courts will not speculate about the proceedings below, but will rely only on the record made. Meaningful review requires a record that elucidates the factors contributing to the judge's decision . . . .

Coe v. Yellow Freight System, Inc., 646 F.2d 444, 454 (10th Cir. 1981). As the amended counterclaims are not part of the record, we are left with no alternative but to presume the trial court was correct in its disposition of the counterclaims.

Reconstructing the entire situation as best we can from the incomplete record and the briefs, and based on such reconstructed record, the district court was correct in dismissing Schroeder's amended counterclaims. Apparently, Schroeder alleged First National had orally promised to extend credit for Schroeder's cookware business in September 1975 but, to Schroeder's damage, failed to perform that oral

agreement in February 1977. Clearly, such an action would be barred by the 4-year statute of limitations provided in Neb. Rev. Stat. § 25-206 (Reissue 1979), governing commencement of an action based on oral contract. Since Schroeder does not allude to or allege any reason or facts which would toll the statute of limitations or exonerate him from the 4-year time limit for filing an action based on an oral contract, at least as appears from the record before us, Schroeder's counterclaims were barred by the statute of limitations.

Finally, Schroeder alleges it was error not to allow him additional time to amend his answer. The facts indicate that Schroeder had already filed several answers and counterclaims to First National's petition. Thus, Schroeder was offered several opportunities to supply a proper pleading. Schroeder argues that since he was representing himself at this point, he could not be expected to allege available defenses. However, Schroeder ignores the fact that his initial answers and counterclaims were filed by his attorney. Further, Schroeder did not give the trial court any reason why further amendment should have been permitted. Apparently, Schroeder maintains that First National sued the wrong party and he should have been allowed to amend his answer to allege such mistake in parties. Schroeder's name and signature were on the promissory note on which suit was commenced by First National. The rule is clear that permission to amend pleadings is addressed to the sound discretion of the trial court and absent an abuse of discretion the trial court's decision will be affirmed. *Mahoney v. May*, 207 Neb. 187, 297 N.W.2d 157 (1980). The trial court did not abuse its discretion in refusing Schroeder additional time to amend his answer.

Therefore, the judgment of the district court is reversed regarding the attorney fee awarded to First National. Summary judgment in favor of First National is affirmed.

AFFIRMED IN PART, AND IN PART REVERSED.

RUTH D. McCAULEY, APPELLANT, V. JOHN BRIGGS, DOING BUSINESS AS BRIGGS BROKERAGE, AND MIKE H. WEYER, APPELLEES.

355 N.W.2d 508

Filed October 5, 1984. No. 83-570.

1. **Motor Vehicles: Negligence.** The general rule in Nebraska is that it is negligence as a matter of law for a motorist to drive his vehicle on the highway in such a manner that he is unable to stop in time to avoid a collision with an object within the range of his vision.
2. _____: _____. The applicability of the general "range of vision" rule depends on the individual circumstances and is for the court's initial determination.
3. _____: _____. Where one vehicle has been struck from the rear by another, but where the evidence presents facts from which reasonable minds might draw different conclusions, the question of the negligence of the driver of the following vehicle is for the jury.
4. **Jury Instructions.** It is the duty of the trial court to instruct the jury, without any request to do so, on the issues presented by the pleadings and supported by the evidence.
5. _____. The trial court need not instruct on an issue not pleaded or proved.
6. **Jury Instructions: Appeal and Error.** Ordinarily, the failure to object to instructions after they have been submitted to counsel for review will preclude raising an objection on appeal, unless there is a plain error indicating a probable miscarriage of justice.
7. _____: _____. Where an instruction presents an issue to the jury and correctly reflects the law on the issue, it is not error for the trial court, in the absence of a request for a more specific instruction, to fail to give a more elaborate one.

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

Wagoner & Wagoner, for appellant.

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

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

PER CURIAM.

Plaintiff, Ruth D. McCauley, brought this action for personal injuries and damages resulting from a collision between a motor vehicle in which she was a passenger and a tractor-trailer rig being driven by defendant Mike H. Weyer while within the scope of his employment with defendant John

Briggs, doing business as Briggs Brokerage. After jury trial the jury returned a verdict in favor of defendants. Plaintiff appeals from the trial court's denial of her motion for new trial, assigning error in the following respects: (1) That the trial court refused to sustain plaintiff's motion for a directed verdict on the issue of liability; (2) That the trial court failed to instruct the jury concerning the status of plaintiff as a passenger; and (3) That the trial court failed to instruct the jury that any negligence of the driver of the car in which plaintiff was a passenger could not be imputed to plaintiff. For the reasons hereinafter set out we affirm.

At the time of the accident on February 10, 1977 (a clear, dry day), plaintiff was a passenger in an automobile jointly owned by plaintiff and her husband and being driven by her husband, Robert McCauley. The McCauleys were traveling west on Interstate 80, and at approximately 6:40 p.m. were at a point just west of the Seward interchange in Seward County, Nebraska. They were returning to their home in Grand Island, Nebraska, after a day's shopping in Lincoln. At this point Interstate 80 is a divided four-lane highway, with two lanes westbound and two eastbound. Mr. McCauley was proceeding in the north or driving lane at about 55 miles per hour when he reached the crest of a hill and became aware of flashing red lights about one-quarter of a mile ahead of him and coming toward him. From the crest to the bottom of this hill was approximately four-tenths of a mile. Mr. McCauley testified that "when I saw the flashing red lights, I looked in my side mirror and I saw no vehicles behind me, I put on my turn signals and moved over to the passing lane then I immediately let up on my foot feed so I could slow the vehicle down." The driver then testified that he had traveled in the passing lane for about an eighth of a mile when the car was struck in the rear by defendants' rig.

The origin of the red lights coming toward Mr. McCauley was explained by a state highway patrolman. Earlier on the day of the accident, a semitrailer going east on the Interstate had blown its left front tire and had gone out of control across the median, across the westbound lanes, and into the ditch north of the westbound lanes. The semitrailer rolled over and spilled its

cargo. Another semitrailer came to the scene, and the spilled cargo was reloaded, over a period of several hours, into the second semitrailer. The reloading was done while the second semitrailer was parked on the north shoulder, facing east. When the reloading was completed, the highway patrolman, in his patrol car with the overhead red lights flashing, started to lead the loaded semitrailer east on the north shoulder. The patrolman proceeded in front of the semitrailer "to warn oncoming traffic that there was something unusual that would be coming to be facing traffic on the shoulder of the roadway." The plan was to proceed to the "next rock-crossover on the interstate" and get the eastbound semitrailer from the westbound lanes into its proper eastbound lanes so that it could finish its trip to the east.

The patrol vehicle and the semitrailer went east on the north shoulder up a grade, and as the patrol car was near the crest of the hill the patrolman became aware of the accident which is the subject of this case. The highway patrolman testified the McCauley-Weyer accident occurred about two-tenths of a mile to the west of the patrolman as he neared the crest of the hill while proceeding from the west.

Defendant Weyer testified that he was driving defendant Briggs' tractor-trailer rig, weighing approximately 72,000 pounds, west on the Interstate and that he was first informed of the possibility of a traffic problem when a driver going east on the Interstate told him over his CB radio that there was an accident further down the road beyond, or west of, the Seward interchange. At this time Weyer was east of that interchange. When he heard the CB message telling him to "get in the left lane," Weyer testified he moved from the north or driving lane to the south or passing lane of westbound Interstate 80, and slowed down a little bit. He then approached the crest of the hill, and as he got to the top of the hill he could see the highway patrol car going east on the north shoulder with a semitrailer rig behind him, also going east.

At approximately the same time, Weyer testified, there was a station wagon, which later turned out to be the McCauley vehicle, just ahead of him in the north or driving lane. Weyer testified that as he approached the McCauley station wagon

from the rear, he could not recall if the station wagon's taillights or driving lights were on but that the station wagon pulled over in front of Weyer when the red lights of the patrol car became visible as the station wagon and the Weyer rig passed the top of the hill. Weyer further testified that the McCauley vehicle's brake lights did not come on but that the McCauley vehicle slowed as if the driver had taken his foot off the accelerator. Before this time and since he had reached the crest of the hill, Weyer had not applied his brakes in an effort to slow down. Weyer testified that he immediately put on his tractor-trailer brakes when he saw the station wagon turn into his lane and slow down. It is undisputed that there were 84 feet of truck tire skid marks up to the apparent point of impact, and 176 feet of truck skid marks from that point of impact to the point where the two vehicles, still hooked together by the front bumper of the tractor-trailer rig and the rear of the station wagon, came to rest.

The general rule in Nebraska is that it is negligence as a matter of law for a motorist to drive a motor vehicle on the highway in such a manner that he is unable to stop in time to avoid a collision with an object within the range of his vision. *Duling v. Berryman*, 193 Neb. 409, 227 N.W.2d 584 (1975); *Maurer v. Harper*, 207 Neb. 655, 300 N.W.2d 191 (1981).

There are, of course, exceptions to the general rule, but the applicability of the rule, as a matter of law, depends on the individual circumstances and is for the court's initial determination. *Bartosh v. Schlautman*, 181 Neb. 130, 147 N.W.2d 492 (1966). In *Bartosh, supra* at 133, 147 N.W.2d at 495, we said:

> The so-called general rule is a rule of law which, from its inception in Roth v. Blomquist, 117 Neb. 444, 220 N.W. 572, 58 A.L.R. 1473, has been stated as being subject to many exceptions. The exceptions are discussed and referred to in Robins v. Sandoz, 177 Neb. 894, 131 N.W.2d 648, and in Guynan v. Olson, supra. To say the least, it is difficult to determine the exact extent to which the exceptions have undercut the general rule, but we have consistently announced our adherence to it. The general rule is not an automatic rule of thumb nor a rigid formula

> to be applied regardless of circumstances. The applicability of the rule, as a matter of law, depends on the individual circumstances and is for the court's determination.

In this case the trial court initially properly determined that the fact that Weyer drove into the rear of the McCauley vehicle did not require a finding that Weyer was guilty of negligence as a matter of law because a factual question was presented by the evidence. That factual question arose because the evidence sharply conflicted as to whether Robert McCauley, without looking to the rear and without signaling his intention to change lanes (as required by applicable Nebraska statutes), turned so quickly in front of Weyer's rig that Weyer could not avoid the collision, or whether Robert McCauley, when he saw the oncoming lights, looked to the rear, put on his turn signal, changed lanes safely, and proceeded one-eighth of a mile before being struck in the rear. We held in *Maurer v. Harper, supra* at 657, 300 N.W.2d at 193, quoting from *Duling v. Berryman, supra*:

> It is not "the duty or the function or the power of the District Court to decide between the directly contrasting factual theories of this accident. . . . Where the testimony is conflicting as to whether the range of vision rule is applicable or whether another factual version of how the accident occurred is supported by the evidence, then it becomes the duty of the court to submit both factual issues to the jury."

If the jury determined the facts to be as defendant Weyer claimed, that Robert McCauley, without looking and without giving any signal, had changed lanes so closely in front of Weyer that Weyer could not avoid hitting him, the general rule would not apply. The defendant Weyer was not negligent as a matter of law, and the trial court was correct in refusing to direct a verdict for plaintiff.

Plaintiff's remaining assignments of error are concerned with the instructions given by the court. Plaintiff alleges that the court failed to instruct the jury on plaintiff's status as a passenger and "as to the non-imputation of negligence of the driver to the Plaintiff-passenger." Brief for Appellant at 3. It

has long been established that it is the duty of the trial court, without any request to do so, to instruct the jury on the issues presented by the pleadings and supported by the evidence. *Zavoral v. Pacific Intermountain Express*, 178 Neb. 161, 132 N.W.2d 329 (1965); *High-Plains Cooperative Assn. v. Stevens*, 204 Neb. 664, 284 N.W.2d 846 (1979).

In applying that principle we have established that the failure to object to instructions after they have been submitted to counsel for review or to offer more specific instructions if counsel feels the court-tendered instructions are not sufficiently specific will preclude raising an objection on appeal, unless there is a plain error indicative of a probable miscarriage of justice. *Fisher v. Gate City Steel Corp.*, 190 Neb. 699, 211 N.W.2d 914 (1973); *Keating v. Klemish*, 214 Neb. 458, 334 N.W.2d 440 (1983).

In this case plaintiff did not tender any proposed instructions, did not orally request any further instructions, nor did the plaintiff object to any of the proposed instructions, insofar as to issues presented on this appeal, at the time of the instruction conference held by the court before the instructions were read to the jury. Plaintiff did object specifically to subparagraph (c) of instruction No. 9, with regard to certain statutory duties of drivers, but the ruling on this objection is not a subject of this appeal.

Plaintiff states in her brief at 19 that "[u]nder the circumstances, it is submitted that the Court should have submitted to the jury Nebraska Jury Instruction No. 7.53." That instruction is concerned with "Automobile Guest Statute—Contributory Negligence." Suffice it to say that in this case no defense of contributory negligence was pleaded by defendants, nor did they adduce any evidence on that issue. The trial court is not required to instruct on an issue as to which there has been neither pleading nor proof. *Fisher v. Gate City Steel Corp., supra.*

The trial court specifically instructed the jury:

> Before the plaintiff can recover against the defendants on her petition in this action, the burden is upon the plaintiff to prove . . . 1. That the defendant Mike Weyer was negligent in one or more of the particulars claimed

> against him . . . . 2. That such negligence, if any . . . was the proximate cause or a proximately-contributing cause of the accident.

The instruction submitted and the factual situation presented insofar as it concerns the negligence of a third person (in this case, plaintiff's husband) are remarkably similar to *Fisher v. Gate City Steel Corp., supra*, where we stated at 701-02, 211 N.W.2d at 916-17:

> To require the jury to be instructed that no negligence of a third party could be imputed to the plaintiff would require instructions on an issue which was not presented by the pleadings or evidence. It would have been a negative instruction on a nonexistent issue.
>
> It is inferentially argued that some more specific or elaborate instruction should have been given as to the effect of negligence on the part of both Peter Kiewit Sons' Co. and the defendant. The answer is simply that the plaintiff requested no such specific instruction. " 'Instructions must be considered and construed together, and if they are not sufficiently specific in some respects, it is the duty of counsel to offer requests for instructions that will supply the omission, and, unless this is done, the judgment will not ordinarily be reversed for such defects.' " McKinney v. County of Cass, 180 Neb. 685, 144 N.W.2d 416.
>
> The instruction on the liability of the defendant to the plaintiff on the theory of negligence presented the issue to the jury and correctly reflected the law on the issue. Where instructions correctly state the law, it is not error for the court, in the absence of a request for a more specific instruction, to fail to give a more elaborate one. Younker v. Peter Kiewit Sons Co., 180 Neb. 835, 146 N.W.2d 202.

We do not hold that the instruction referred to on appeal as to the nonimputation of Robert McCauley's negligence, if any, to plaintiff could not properly have been given, but only that it is an elaboration on the basic instructions required to be given by the court and, as such, need not be given by the court unless requested to do so. If requested, the trial court, in its discretion, would then determine if the proposed instructions should be

given. The trial court, in its instructions, properly presented all issues to the jury, and there is no error in that regard.

The judgment of the trial court was correct in all respects and is affirmed.

AFFIRMED.

GRANT, J., dissenting.

I respectfully dissent. I fully agree with the court's decision as to the instruction question presented, but I believe the trial court should have directed a verdict in favor of plaintiff at the conclusion of all the evidence, leaving only the question of damages to be determined by the jury.

In my view, the dispositive fact was admitted by defendant Weyer when he testified that while *east* of the Seward interchange, he was informed by CB radio of a traffic problem *west* of the interchange. Upon being informed of this problem and in response to the direct suggestion of his unknown CB adviser, Weyer prudently moved his 72,000-pound tractor-trailer rig from the driving lane to the passing lane. He testified that at that time he slowed up slightly but that as he reached the crest of the hill—at the bottom of which he knew a problem existed—he was traveling 45 or 50 miles per hour and was overtaking a station wagon which apparently was going to remain in the lane in which Weyer knew a traffic problem might exist. Weyer testified that as he passed the crest of the hill, he did not decrease his speed until he reacted to the McCauley car (which did not apply its brakes) coming into his lane, at which time Weyer was traveling approximately 55 miles per hour. After his reaction time Weyer applied his brakes and left 84 feet of skid marks before striking the rear of the McCauley vehicle. After this contact Weyer's rig remained connected to the McCauley car and the rig left another 176 feet of skid marks. When it is realized that the McCauley car was going the same direction and approximately the same speed as the rig, and the McCauley car had not braked before the collision, although Robert McCauley had removed his foot from the accelerator, the conclusion is inescapable that Weyer's rig was not under control and that the resulting collision was, at least in part, the proximate result of Weyer's negligence.

Unless we attribute to Weyer the disposition intentionally to

funnel the station wagon directly into the trouble ahead, Weyer's conduct can be classified as nothing except negligence as a matter of law. Weyer did not have his rig under the control necessary to permit the driver of the station wagon to take the steps which he would have to take to avoid the apparent danger, which danger was known to Weyer and not known to the driver of the McCauley station wagon. The accident that occurred was clearly foreseeable by Weyer. Weyer was aware of possible traffic problems over the crest of the hill he was approaching, and he himself had moved his vehicle to an appropriate safer spot—the passing lane. Weyer could certainly foresee that other drivers in the normal driving lane would shift to the left or passing lane if, as they topped the hill, there was an apparent danger presented to them in their driving lane. Nevertheless, Weyer approached the McCauley station wagon so closely that when the station wagon made the move that Weyer could foresee, Weyer could not control his truck and collided with the rear of the McCauley vehicle.

The action of Robert McCauley in moving to the passing lane in the apparent circumstances confronting him was foreseeable by Weyer, and when Weyer conducted himself so as to deny McCauley room to make that maneuver safely, Weyer was guilty of negligence as a matter of law. As set out in Restatement (Second) of Torts § 302 at 82 (1965), "A negligent act or omission may be one which involves an unreasonable risk of harm to another through . . . the foreseeable action of . . . a third person." Further, as stated in *McClelland v. Interstate Transit Lines*, 142 Neb. 439, 445, 6 N.W.2d 384, 389 (1942), " 'It suffices to charge a person with liability for a negligent act if some injury to another ought reasonably to have been foreseen as the probable result thereof by the ordinarily intelligent and prudent person under the same circumstances . . . ' "

The action of Weyer in this case in driving his rig into the McCauley vehicle from the rear was negligent as a matter of law, and a verdict should have been directed in favor of the plaintiff passenger. I would reverse and remand for a new trial on the issue of the amount of damages proximately resulting from defendants' negligence.

MARIANNE L. MORISCH, APPELLEE, V. LEE R. MORISCH, APPELLANT.
355 N.W.2d 784

Filed October 5, 1984. No. 83-653.

Child Support: Modification of Decree. Alteration of ability to pay is a factor in determining whether there has been a material change in circumstances justifying a modification of a child support order.

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

Glenn A. Rodehorst, for appellant.

John H. Albin of Treadway, Bird & Albin, P.C., for appellee.

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

SHANAHAN, J.

The district court for Nance County denied Lee R. Morisch's motion to modify the Morisch decree of dissolution of marriage, namely, child support payments ordered in that decree. We affirm.

On October 7, 1981, Marianne L. Morisch and Lee R. Morisch were granted a decree dissolving their marriage. Pursuant to that decree, Marianne received custody of the 4-year-old child of the parties and Lee was ordered to pay $180 per month ($45 per week) in child support until the "minor child reaches her majority, dies, or is emancipated, whichever shall first occur." On May 9, 1983, Lee filed a motion to modify the decree regarding child support and alleged there had been a material change in circumstances.

When the decree was entered, Lee was working as a machine operator, earning $7.80 per hour in California. However, during the 5 months before the hearing on the motion to modify, Lee was unemployed and lived with his aunt and uncle in California. Lee received $126 a week ($504 per month) in unemployment compensation from the State of California. The record does not indicate why Lee was unemployed. Lee and Marianne stipulated, subject to court approval, that Lee's "child support obligation shall be satisfied through a one time

lump sum payment of $10,000.00." According to the stipulation, Lee's payment of $10,000 within 15 days after the court's approval of the stipulation would discharge Lee from any further payment of child support prescribed by the decree. According to the proposed stipulation, Lee would remain liable for his daughter's medical expenses not covered by Marianne's insurance or paid by the Nebraska Crippled Children's Program regarding hip surgery, special braces, and special shoes. The source of the $10,000 would be a loan to Lee from his father. The trial court denied Lee's motion to modify the decree.

A judgment concerning modification of a decree of dissolution of marriage is reviewed by this court de novo on the record. *Sholl v. Sholl*, 216 Neb. 289, 343 N.W.2d 742 (1984). To justify a modification of a divorce decree, there must be a showing of a material change in the circumstances subsequent to the entry of the dissolution decree. *Helgenberger v. Helgenberger*, 209 Neb. 184, 306 N.W.2d 867 (1981).

"Material change in circumstances" in reference to modification of child support is analogous to modification of alimony for "good cause." See Neb. Rev. Stat. § 42-365 (Cum. Supp. 1982); cf. *Chamberlin v. Chamberlin*, 206 Neb. 808, 814, 295 N.W.2d 391, 395 (1980) (modification of alimony on account of a "change of circumstances of a material and substantial nature"). "Material change in circumstances" eludes precise and concise definition. Courts may consider various factors to determine if a material change in circumstances has occurred. Among some of the factors or circumstances considered by a court are a change in the financial resources or ability to pay on the part of the parent obligated to pay support, needs of the child or children for whom support is paid, good or bad faith motive of the obligated parent in sustaining a reduction of income, and the duration of the change, namely, whether the change is temporary or permanent. See 24 Am. Jur. 2d *Divorce and Separation* §§ 1082-1088 (1983). Alteration and passage from one condition to another is essential for a material change in circumstances.

In substance, Lee contends his present unemployment in and

of itself establishes a material change in circumstances. We do not agree. While his monthly receipt of unemployment benefits is $504, Lee's present monthly payment of child support is $180, resulting in a net difference of $324 in favor of Lee. As far as the record reflects, the needs of the Morisch child remain the same as existed when the district court entered the decree of dissolution in 1981. Moreover, Lee testified that his father's funds for the proposed, but to be approved, lump sum payment were a loan. A loan requires repayment. If he has the current capacity to repay the loan described, Lee has the ability to continue paying child support.

The district court indicated prospective disapproval of the stipulation and declined to decide whether Lee, in exchange for paying $10,000, should be entitled to a release from a child support obligation having a projected value of approximately $28,000 and a present worth or commuted value of $22,537.24. Accordingly, we forgo further comment and need not decide the propriety of the proposed lump sum settlement of Lee's child support obligation.

We can reach no conclusion other than that Lee has failed to meet his burden in proving a material change in circumstances.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. THOMAS BAXTER, APPELLANT.
355 N.W.2d 514

Filed October 5, 1984. No. 83-732.

1. **Prior Convictions: Right to Counsel.** A transcript of conviction which fails to show on its face that counsel was afforded or the right waived cannot be used for enhancement purposes.
2. **Prior Convictions: Appeal and Error.** Objections to the validity of the judgment other than those pertaining to inadequate waiver of counsel must be raised by direct appeal or in a separate proceeding commenced for the express purpose of setting aside the judgment alleged to be invalid.

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

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

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

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

BOSLAUGH, J.

Upon a plea of guilty the defendant was convicted in the district court of driving while under the influence of alcoholic liquor on June 20, 1982. Following an enhancement hearing, he was found to have committed a third offense and was sentenced to 120 days in jail, fined $300 and costs, and his license revoked for 1 year. The prosecution was under Neb. Rev. Stat. § 39-669.07(3) (Reissue 1978), prior to the 1982 amendment.

The defendant has appealed and contends that the records of his prior convictions offered at the enhancement hearing were insufficient to support a finding that the offense charged in this case was a third offense.

At the enhancement hearing the State offered records of prior convictions on April 25, 1977, April 27, 1977, and April 19, 1978. The trial court sustained objections to exhibit 1, the record of the April 25, 1977, conviction, but received exhibits 2 and 3, the records of the other two offenses. The defendant contends that these exhibits should not have been received in evidence because they fail to show compliance with the requirements set out in *State v. Tweedy*, 209 Neb. 649, 309 N.W.2d 94 (1981).

Exhibit 2 is a certified copy of a record of the municipal court of the city of Lincoln, Nebraska, and includes a uniform citation and complaint charging the defendant with "operat[ing] a motor vehicle while under the influence of alcoholic liquors" on April 26, 1977. The complaint was later amended to include "second offense." The record shows the defendant was represented by the public defender.

Exhibit 3 is a certified copy of a record of the county court

for Lancaster County, Nebraska, concerning proceedings on a second DWI charge occurring on March 27, 1978. The record shows the defendant was found to be an indigent, the public defender was appointed to represent him, and the public defender appeared in court with the defendant at the time his guilty plea was accepted and the sentence imposed.

These exhibits clearly show that the defendant was represented by counsel at every critical stage of the proceedings in both cases.

In *State v. Smith*, 213 Neb. 446, 449, 329 N.W.2d 564, 566 (1983), we said:

> We agree that in an enhancement proceeding, a defendant should not be able to relitigate the former conviction, and to that extent such conviction cannot be collaterally attacked. However, under the present circumstances, the burden remains with the State to prove the prior convictions. This cannot be done by proving a judgment which would have been invalid to support a sentence of imprisonment in the first instance. *Baldasar v. Illinois, supra*. Where a record is silent as to a defendant's opportunity for counsel, we may not presume that such rights were respected. *Burgett v. Texas, supra; State v. Tweedy, supra*. A defendant's objection to the introduction of a transcript of conviction which fails to show on its face that counsel was afforded or the right waived does not constitute a collateral attack on the former judgment.

The defendant argues that the *Smith* case stands for the proposition that a constitutionally invalid prior conviction cannot be used to enhance the penalty for a subsequent offense. The *Smith* case held that a transcript of conviction which fails to show on its face that counsel was afforded or the right waived cannot be used for enhancement purposes. Other objections to the validity of the judgment must be raised by direct appeal or in a separate proceeding commenced for the express purpose of setting aside the judgment alleged to be invalid.

In *State v. Ziemba*, 216 Neb. 612, 619, 346 N.W.2d 208, 214 (1984), we said:

> The transcript of a judgment used to prove a prior

conviction must show that at the time of the conviction the defendant was represented by counsel or waived his right to counsel. A defendant may, as in *State v. Smith, supra*, object to the admission of the record of a prior conviction on the basis that the record does not affirmatively establish that he was represented by counsel or waived his right to counsel. A transcript of judgment which does not contain such an affirmative showing is not admissible and cannot be used to prove a prior conviction. *State v. Smith, supra*.

State v. Ziemba, supra, involved a direct appeal. In that case we noted that "[a] defendant who has entered a guilty plea may, on direct appeal, challenge the validity of his plea." *Id.* at 620, 346 N.W.2d at 214.

The defendant further contends that exhibit 3 was insufficient because it did not contain a copy of either the original complaint or the amended complaint. The captions to the orders which appear in the exhibit recite that the offense charged was operating a motor vehicle while under the influence of alcoholic liquors—third offense, which was reduced by amendment to second offense. While it would have been preferable to include a copy of the amended complaint in the exhibit, the record as offered was sufficient to establish a prior conviction for enhancement purposes.

The judgment of the district court is affirmed.

AFFIRMED.

JERRY ERNEST ROTH, APPELLANT, V. CAROL SUE ROTH, APPELLEE.

355 N.W.2d 516

Filed October 5, 1984. No. 83-758.

1. **Modification of Decree: Alimony: Good Cause.** An award of alimony may be modified or revoked for good cause shown.
2. **Good Cause: Words and Phrases.** Good cause means a material and substantial

change in circumstances and depends upon the circumstances of the individual case. A finding of its existence lies largely in the discretion of the court to which it is committed.

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

Mark M. Sipple of Luckey, Sipple & Hansen, for appellant.

Peter Smith Ely, for appellee.

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

BOSLAUGH, J.

The petitioner appeals from the order of the district court denying his application to modify the decree in a dissolution of marriage proceeding by terminating his obligation for alimony. The application alleged a change of circumstances in that the respondent wife was living with a male individual "the same as if she were married."

The decree of dissolution, filed March 16, 1982, dissolved the marriage, awarded custody of the minor children and child support to the respondent wife, and approved the property settlement agreement into which the parties had entered.

The property settlement agreement provided for alimony in the amount of $50,000, $10,000 of which was to be paid upon entry of the decree and the balance in annual installments of $4,000 on March 1 of each year until paid in full. The petitioner paid the first installment but has paid none of the remaining installments.

Although there is no evidence concerning the property settlement agreement other than the agreement itself, a reading of the agreement indicates that the alimony provision may have been intended as a part of the division of property rather than alimony as such. The distinction between alimony and division of property is codified in Neb. Rev. Stat. § 42-365 (Cum. Supp. 1982). See, also, *Pyke v. Pyke*, 212 Neb. 114, 321 N.W.2d 906 (1982).

The record shows that after the dissolution the respondent moved with the couple's two children from Columbus, Nebraska, to Littleton, Colorado, where she rented a home.

Four months later, she moved to Englewood, Colorado, where she began residing with Peter Ely. The rent at the new location is $1,000 per month, and is shared by Mr. Ely, who pays $350 per month. He also contributes toward food and has used the house as an office for his law practice. The record reveals no other shared assets between the couple.

Mrs. Roth's income is derived from the alimony she receives and the income generated from commercial rental property received in the property settlement. The property netted $20,000 in 1982 and $19,500 in 1983, after expenses. In addition, Mrs. Roth has incurred a present indebtedness of $10,000 from a loan used to finance her education.

Section 42-365 provides in pertinent part:

> When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other . . . . *[A]limony may be modified or revoked for good cause shown* . . . . Except as otherwise agreed by the parties in writing or by order of the court, alimony orders shall terminate upon the death of either party or the remarriage of the recipient.

(Emphasis supplied.)

The only issue on appeal is whether the district court erred in failing to find "good cause shown" for modification of alimony where the spouse receiving support is cohabiting with a man with whom she shares the cost of rent and food. The petitioner argues that the $4,200 received by Mrs. Roth in a year's time for payment of rent should effectively wipe out the $4,000 yearly alimony payment and constitutes "good cause shown" to terminate alimony.

Good cause means a material and substantial change in circumstances, and depends upon the circumstances of the individual case. A finding of its existence lies largely in the discretion of the court to which it is committed. *Chamberlin v. Chamberlin*, 206 Neb. 808, 295 N.W.2d 391 (1980). See, also, *Sloss v. Sloss*, 212 Neb. 610, 324 N.W.2d 663 (1982).

In *Bowman v. Bowman*, 163 Neb. 336, 79 N.W.2d 554 (1956), cohabitation standing alone was held to be insufficient to terminate the alimony obligations of the supporting spouse where the decree provided alimony was to terminate upon

remarriage. However, cohabitation, together with a showing that such an arrangement improved the spouse's overall financial condition, might warrant a modification of alimony. The requirement that cohabitation be accompanied by an improvement in the financial situation is the rule in many jurisdictions which have considered the matter. *Bisig v. Bisig*, 124 N.H. 372, 469 A.2d 1348 (1983); *Van Gorder v. Van Gorder*, 110 Wis. 2d 188, 327 N.W.2d 674 (1983); *Myhre v. Myhre*, 296 N.W.2d 905 (S.D. 1980); *Abbott v. Abbott*, 282 N.W.2d 561 (Minn. 1979); *Alibrando v. Alibrando*, 375 A.2d 9 (D.C. 1977); *Sieber v. Sieber*, 258 N.W.2d 754 (Minn. 1977); *Eames v. Eames*, 153 N.J. Super. 99, 379 A.2d 67 (1976).

There is no evidence that the cohabitation of the respondent and Peter Ely "materially and substantially" improved her financial condition. There is no showing of her actual living expenses or that she has actually benefited from the rent contribution from Peter Ely. The only evidence is that rent is shared proportionately between the two and that he contributes to the food budget. The evidence further shows that the respondent's income from rental property has gone down from the preceding year and that she has incurred debt to seek an education.

The evidence fails to show a material and substantial change in circumstances. The judgment of the district court is, therefore, affirmed.

AFFIRMED.

KRIVOSHA, C.J., concurs in the result.

STATE OF NEBRASKA, APPELLEE, V. KEVIN J. HUTTON, APPELLANT.
355 N.W.2d 518

Filed October 5, 1984. No. 83-881.

1. **Pleas.** A factual basis for a plea of guilty may be obtained from sources other than the defendant, including information furnished by the county attorney.
2. _____. In the final analysis it is only necessary that the record

affirmatively disclose that a counseled defendant entered the guilty plea understandingly and voluntarily.

3. **Sentences: Plea Bargains.** A defendant has no legal basis to rely on a sentence recommendation as a part of a plea bargain where the trial court has made it clear that it was not in any way bound by such agreement. Therefore, the failure to make a recommendation under such circumstances would also furnish no basis for setting aside the plea and conviction of the defendant.
4. **Sentences.** Where the term of a sentence of imprisonment is the statutory maximum for the offense, credit must be given for presentence jail time. However, it is not an abuse of discretion for a court to fail to give credit, under such circumstances, for time spent by a defendant in a voluntary alcohol treatment program.

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

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

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

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

HASTINGS, J.

The defendant appeals a conviction and sentence of 1 year in the county jail for threatening another in a menacing manner in violation of Neb. Rev. Stat. § 28-310(1)(b) (Reissue 1979), a Class I misdemeanor.

The defendant was originally charged with the December 15, 1982, attempted first degree sexual assault of a 19-year-old female, which is a Class III felony. The defendant entered a plea of guilty to the misdemeanor, pursuant to a plea bargain whereby the attempted first degree sexual assault charge was dismissed, as was a charge of false imprisonment, and the county attorney was to make a sentencing recommendation to the probation officer.

On his appeal to this court the defendant assigns three errors. He claims that (1) the court erred in receiving a guilty plea which was not made freely, voluntarily, and intelligently; (2) the court erred in proceeding to sentence the defendant when the State of Nebraska failed to honor its plea agreement; and (3) having

sentenced the defendant to the maximum term of imprisonment provided by law, the court erred in failing to give defendant all previous time served pending disposition of this case. We affirm.

The defendant was represented by counsel during all stages of these proceedings. The court fully and accurately explained to the defendant his rights and to what he would be subjecting himself in the event that he pleaded guilty. The arraignment was a splendid example of how such a proceeding should be conducted. The only problem arose on the establishment of a factual basis for the plea.

The factual basis for the plea was supplied originally by the county attorney. In general, he related that the victim had been babysitting for the defendant and his wife; the victim was sitting on the couch when the defendant came home; the defendant pushed the victim onto the couch, fondled her, and would not move from the couch until she agreed not to tell anyone what had transpired. She attempted to call on the telephone, but the defendant would not allow her to do so; he stood "in a menacing manner" and would not allow her to leave the premises until she made the promise that she would not report the incident or the fondling to anyone.

The defendant admitted "some of it," but denied not letting her call, or holding her physically. However, he did state that "I suppose I did push her on the couch or something, you know, of that nature. . . . I think once she did want to call somebody or something and I didn't let her use it."

Following the foregoing exchange, the court was assured by defendant's counsel that the plea was consistent with the law and the facts, was in defendant's best interest, and was freely, voluntarily, and intelligently made. The court then again addressed the defendant and was told he was entering the plea without threats or promises, that he understood that once the court imposed sentence he could not withdraw the plea, and that he still wanted to offer the plea of guilty.

It is on the basis of the foregoing facts that the defendant now claims his plea was not entered freely, voluntarily, and intelligently. Such a claim is frivolous and utter nonsense. The

defendant was not sentenced until some 4 months later, at which time, in response to a question from the court, the defendant agreed that he knew of no reason why sentence should not then be imposed.

A factual basis for a plea of guilty may be obtained from sources other than the defendant, including information furnished by the county attorney. *State v. Sare*, 209 Neb. 91, 306 N.W.2d 164 (1981). In the final analysis it is only necessary that the record affirmatively disclose that a counseled defendant entered the guilty plea understandingly and voluntarily. *State v. Tweedy*, 209 Neb. 649, 309 N.W.2d 94 (1981). The record in this instance leaves no doubt that such was the case here.

Although the record indicates that the county attorney, as a part of the plea bargain, was to make a recommendation as to sentencing to the probation officer, the court specifically stated to the defendant that he should understand that regardless of whatever recommendation was made, the court was not bound by it.

Although the defendant makes the assumption that the recommendation would be favorable to him, that fact is not disclosed by the record. In any event, a defendant has no legal basis to rely on a sentence recommendation as a part of a plea bargain where the trial court has made it clear that it was not in any way bound by such agreement. *State v. Tweedy, supra.* Therefore, the failure to make such a recommendation, if such was the case here, would also furnish no basis for setting aside the conviction of the defendant.

Regarding the defendant's claim that he was entitled to credit as jail time the time which he spent at the Hastings Regional Center for voluntary alcoholism treatment, there is nothing in the bill of exceptions concerning this matter. However, the transcript does reveal that an order was entered by the county court for Sarpy County authorizing transportation of the defendant by the sheriff to the regional center for such voluntary treatment, and directing the sheriff to return the defendant to jail upon completion of treatment. Endorsed on the order is the return of the sheriff indicating that he did in fact transport the defendant to that facility on January 6, 1983.

The record does not disclose when the defendant was returned to the custody of the sheriff. The presentence investigation report contains a "discharge summary" from the Hastings Regional Center, stating that the defendant was admitted on January 6, 1983, and discharged January 28. The record "suggests" that defendant was admitted to bond on that date. In any event, the defendant only asks for credit from December 15, 1982, the date of his arrest, until January 28, 1983, the date of his discharge from the Hastings facility.

It is true, where the term of a sentence of imprisonment is the statutory maximum for the offense, credit must be given for jail time. *State v. Holloway*, 212 Neb. 426, 322 N.W.2d 818 (1982). The sentence imposed on the defendant in this case was the maximum term. He was given credit for but 1 day in jail. He should have been given credit for 22 days served from December 15, 1982, until January 6, 1983.

In *State v. Prosser*, 209 Neb. 766, 311 N.W.2d 525 (1981), a case not involving a maximum sentence, we held that the failure of a trial court to give credit on a sentence for presentence time spent in a mental institution was not an abuse of discretion.

We adopt the reasoning of the Iowa Supreme Court as expressed in *State v. Wiese*, 342 N.W.2d 858 (Iowa 1984), that crediting time spent in a voluntary alcohol treatment program following a conviction for driving while intoxicated, as compared to an involuntary commitment by the court authorized by statute, would be akin to allowing a defendant to choose his own place and length of confinement, and the denial of such credit was not an abuse of discretion. To hold otherwise would be to permit credit for time served in connection with wholly unrelated charges based on conduct other than that for which the defendant is ultimately sentenced, condemned in *State v. Eugene*, 340 N.W.2d 18 (N.D. 1983).

The judgment and sentence of the district court should have provided credit for jail time totaling 22 days, and as so modified, they are affirmed.

AFFIRMED AS MODIFIED.

MICHAEL A. ENYEART, APPELLANT, V. STEVEN P. SWARTZ, APPELLEE.

355 N.W.2d 786

Filed October 5, 1984. No. 83-975.

1. **Jury Instructions: Appeal and Error.** Generally, failure to object to instructions after they have been submitted to counsel for review, or failure to offer more specific instructions if counsel feels the court's instructions are not sufficiently specific, will preclude raising an objection on appeal.
2. **Jury Instructions: Proximate Cause: Appeal and Error.** The failure to give an instruction on the definition of proximate cause where it is one of the principal issues in the case must be considered by the court to be plain error, requiring reversal.

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

Jeffrey A. Silver, for appellant.

Jerry J. Milner, for appellee.

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

KRIVOSHA, C.J.

This is the second time this case has appeared before this court. Unfortunately, an examination of the record makes it clear that practice does not always make perfect. The facts of the case are set out in detail in our first opinion in this case (see *Enyeart v. Swartz*, 213 Neb. 732, 331 N.W.2d 513 (1983)), and will not be repeated here. Suffice it to say this was a case involving a collision between an automobile driven by the plaintiff-appellant, Enyeart, and a motorcycle driven by the defendant-appellee, Swartz. In the first case we reversed and remanded the judgment for defendant and ordered a new trial due to the trial court's failure to instruct the jury on the meaning of and rules regarding right-of-way. Neither party objected at trial to the court's failure to instruct on right-of-way, but we concluded, as we must, that the issue was so basic to the cause of action that the failure to instruct on right-of-way constituted such error as to require a new trial. Following our opinion in *Enyeart*, the case was again tried to the jury and resulted this time in a verdict for the defendant on his counterclaim in the

amount of $12,197.75, that being the specific amount of the special damages sought by him. While there was evidence that he sustained additional injury to himself, the jury apparently determined not to award him anything for that on his counterclaim, perhaps because of the comparative negligence instruction given by the court. Enyeart now appeals to this court, maintaining that the trial court erred in failing to give certain instructions not requested by Enyeart, or in giving certain instructions not objected to by Enyeart.

In some respects the instructions given by the trial court did not specifically follow the Nebraska Jury Instructions fully, as the rules require. See, *Jones v. Foutch*, 203 Neb. 246, 278 N.W.2d 572 (1979); *Kresha v. Kresha*, 216 Neb. 377, 344 N.W.2d 906 (1984). Nevertheless, were we presented only with the issues raised by Enyeart we might be inclined to affirm on the basis of our prior cases holding that failure to object to instructions after they have been submitted to counsel for review or failure to offer more specific instructions if counsel feels the court's instructions are not sufficiently specific will preclude raising an objection on appeal. See, *Haumont v. Alexander*, 190 Neb. 637, 211 N.W.2d 119 (1973); *Fisher v. Gate City Steel Corp.*, 190 Neb. 699, 211 N.W.2d 914 (1973); *Keating v. Klemish*, 214 Neb. 458, 334 N.W.2d 440 (1983). However, we are compelled in this case to once again reverse and remand because an examination of the instructions given by the court discloses plain error indicative of a probable miscarriage of justice sufficient to require us to act, even absent a proper objection by counsel. See *Barta v. Betzer*, 190 Neb. 752, 212 N.W.2d 352 (1973).

Although neither party raised any objection at the time of the instruction conference and appellant does not assign it as one of his errors, an examination of the instructions tendered by the court to the jury discloses that the court did not provide the jury with an instruction on the definition of "proximate cause" as required by NJI 3.41. No such instruction was given even though this was a case in which the issue of the proximate cause of the accident was vigorously disputed. The plaintiff maintained that the proximate cause of the accident was the negligence of the defendant; the defendant counterclaimed,

maintaining that the proximate cause of the accident was the negligence of the plaintiff; and the trial court instructed the jury that in order to recover, one of the parties had to prove that the accident and resulting damages were proximately caused by the other. The court further instructed the jury that if it found that both parties were negligent "and the negligence of each proximately caused the accident," the jury was then to compare the negligence. While it may not be error, per se, to fail to give a definition of proximate cause as set out in NJI 3.41 if the matter is not an issue (see *Morton v. Travelers Indemnity Co.*, 171 Neb. 433, 106 N.W.2d 710 (1960)), the failure to give an instruction on the definition of proximate cause where, as here, it is one of the principal issues in the case must be considered by the court to be plain error, requiring reversal. See *Enyeart v. Swartz*, 213 Neb. 732, 331 N.W.2d 513 (1983).

While we are ever committed to our view that the failure to object to instructions or the failure to tender instructions generally precludes one from raising the matter on appeal (see *McCauley v. Briggs, ante* p. 403, 355 N.W.2d 508 (1984)), and we continue to urge counsel to assist the court in the interest of both conserving judicial time and eliminating the unnecessary occurrence of trial costs which ultimately must be borne by one or the other litigant, we nevertheless believe that we cannot ignore the error present here. Hopefully, the third time will be the magic time. Having thus disposed of this appeal on this issue, we need not consider any of the assignments raised by the parties. The judgment of the trial court is reversed and the matter remanded with instructions to grant a second new trial. Each party is to pay his own costs on appeal.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA EX REL. CATHERINE TOLEDO, APPELLEE, V. PAUL C. BOCKMANN, APPELLANT.

355 N.W.2d 521

Filed October 5, 1984. No. 84-034.

1. **Paternity: Jurisdiction: Child Support: Modification of Decree.** In a contested filiation proceeding under Neb. Rev. Stat. ch. 13 (Reissue 1983), the district court has jurisdiction to modify the amount of child support where there is a change of circumstances of the parties after the entry of a support order.
2. **Paternity: Attorney Fees.** Attorney fees may not be awarded in a filiation proceeding under Neb. Rev. Stat. ch. 13 (Reissue 1983).

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

Donald C. Hosford, Jr., of Crossman, Norris & Hosford, for appellant.

No appearance for appellee.

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

GRANT, J.

On September 7, 1983, relator, Catherine Toledo, filed an application to increase the child support payments made by defendant, Paul C. Bockmann, in a filiation proceeding that had been initiated by Toledo sometime prior to January 29, 1981. After hearing on the application, Bockmann was ordered to increase the child support payments of $100 per month to $130 per month beginning December 1, 1983, with a further increase to $150 per month beginning July 1, 1984. Bockmann was also ordered to pay $250 as attorney fees for Toledo. Bockmann has timely appealed from the trial court's denial of his motion for new trial. Bockmann alleges that the trial court erred in increasing the child support payments where there was no evidence adduced of a material change in the circumstances of either party, in prospectively further increasing the child support payments effective at a date 7 months after the hearing, and in awarding attorney fees. For the reasons hereinafter stated we affirm the trial court's order in part, and in part reverse.

The transcript before us is sketchy in that the particulars of the initial pleadings and orders are not shown. We can determine that the filiation proceedings were begun sometime prior to January 29, 1981, because an exhibit introduced at the modification hearing by Bockmann shows that on that date of January 29, 1981, the court entered an order for $100 child support payments "com 6-1-81," a phrase we assume to mean "commencing June 1, 1981." From the same exhibit we also note that the right to the child support payments was assigned to "Welfare" on May 12, 1981, and that this assignment was terminated on April 20, 1983.

The same record indicated that the child support payments were suspended on March 17 and reinstated on May 28, effective June 1, 1982. At the time of the modification hearing in November of 1983, Bockmann was $100 delinquent in his payments.

With regard to Bockmann's first assignment of error—that the trial court erred in increasing the amount of child support where there was no evidence of a material change in circumstances of the parties—we agree with Bockmann's statement of the applicable law. In *Riederer v. Siciunas*, 193 Neb. 580, 228 N.W.2d 283 (1975), we determined that the court, in a proceeding under Neb. Rev. Stat. ch. 13 (Reissue 1974), can modify the amount of child support if there has been a change of circumstances. We disagree with Bockmann's assertion that a change of circumstances was not shown in this case. The evidence before the trial court showed that Toledo was no longer receiving welfare assistance in September of 1983, when she filed her application to modify—a different situation than in either January of 1981 or April of 1983. The evidence further showed that Toledo was 20 years old in November of 1983, was employed, and desired to move out of her parents' home and establish her own home with her child. Toledo's circumstance had materially changed.

Additionally, the evidence showed that Bockmann was a 1979 high school graduate attending college in November 1983. He lived in his own apartment at a rental of $275 per month, owned his own car, owned a new $1,600 stereo system, a new $277 water bed, and had just returned from a 3-week, $700

vacation with his girl friend. He apparently financed this lifestyle with summer work at $10 per hour, student loans, and educational grants. The court would be justified in finding that Bockmann's circumstances had changed. The court was well within its discretion in ordering the $30 per month increase in child support.

With regard to the automatic increase of $20 per month, the question is closer. Bockmann relies on the law as set out in the court's syllabus point in *Shald v. Shald*, 216 Neb. 897, 346 N.W.2d 406 (1984), "It is in the best interests of the children that the amount set for child support in the decree remain constant without reduction based on supposition of an event that may or may not take place in the future." We adhere to that general statement. In this case, however, the record establishes enough of a pattern to justify the trial court's prospective order. Beginning with the court's initial order of January 29, 1981, the court realized that at this stage of Bockmann's life he earned the bulk of his income in the summertime. Again, in 1982 the court suspended Bockmann's child support payments in March and reinstated them effective June 1, 1982. We determine that in the specific circumstances of this case, the trial court did not abuse its discretion in ordering the additional $20 per month increase on July 1, 1984.

With regard to Bockmann's last assignment of error, we determine that the court erred in awarding an attorney fee to Toledo in this filiation proceeding under chapter 13 (Reissue 1983). As stated recently in *City of Gering v. Smith Co.*, 215 Neb. 174, 181, 337 N.W.2d 747, 751 (1983), quoting from *Higgins v. Case Threshing Machine Co.*, 95 Neb. 3, 144 N.W. 1037 (1914), " '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. . . .' " We find no statutory authority in chapter 13 (Reissue 1983) for the allowance of attorney fees. The record in this case does not show any "uniform course of procedure" allowing such fees. Accordingly, the order of the trial court allowing Toledo an attorney fee is reversed and set aside.

AFFIRMED IN PART, AND IN PART REVERSED.

KRIVOSHA, C.J., concurring in part, and in part dissenting.

I concur with all of the majority opinion in this case except for that portion which determined that an attorney fee should not be allowed. By continually adhering to a rule that we will " '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 . . .' " (*City of Gering v. Smith Co.*, 215 Neb. 174, 181, 337 N.W.2d 747, 751 (1983)) is, in reality, to say we shall allow such fees only where provided for by law. For, obviously, a uniform course of procedure can never come about if we refuse to permit even the first case. While the rule regarding uniform course of procedure has been regularly repeated by this court since our holding first in *Higgins v. Case Threshing Machine Co.*, 95 Neb. 3, 144 N.W. 1037 (1914), a reading of *Higgins* fails to disclose either the origin of that rule or its need. The lesson, however, is that if between 1914 and 1984, one has been unable to discover how to develop a uniform course of procedure, it is not likely that such procedure will ever come about.

In the instant case we have an anomalous situation where, if the parties were married and the custodial parent sought support, attorney fees would be allowed. But where, as here, the parties are not married and the need for the funds is even greater, attorney fees are disallowed.

While we refuse to recognize the reality of the matter in this case, we had less difficulty with it recently in *Holt County Co-op Assn. v. Corkle's, Inc.*, 214 Neb. 762, 336 N.W.2d 312 (1983), where, for the first time, we recognized "a uniform course of procedure" and allowed attorney fees, noting that although there was neither a statute nor a uniform course of procedure, that "courts of general jurisdiction have inherent power to do all things necessary for the proper administration of justice and equity within the scope of their jurisdiction." *Id.* at 767, 336 N.W.2d at 315.

It occurs to me that in cases brought under Neb. Rev. Stat. ch. 13 (Reissue 1983), awarding attorney fees under circumstances similar to these presented here is necessary to do "all things necessary for the proper administration of justice and equity" and should have been allowed. I would affirm the trial court's awarding attorney fees.

LEE TAYLOR, APPELLEE, V. COLLATERAL CONTROL CORPORATION, APPELLEE, COMMISSIONER OF LABOR, STATE OF NEBRASKA, APPELLANT.

355 N.W.2d 788

Filed October 5, 1984. No. 84-096.

1. **Employment Security Law: Appeal and Error.** Appeals under the Nebraska Employment Security Law are reviewed de novo on the record from the district court, and it is the duty of this court to retry the issues of fact involved in the findings complained of and reach an independent conclusion thereof.
2. **Employment Security Law: Proof: Appeal and Error.** Under the Nebraska Employment Security Law, where an employee appeals from a disqualification of unemployment compensation benefits, the burden of proof is on the employee to show that he involuntarily left his employment or did so with good cause.

Appeal from the District Court for Holt County: HENRY F. REIMER, Judge. Reversed.

Pamela A. Mattson, for appellant.

Jerom E. Janulewicz, for appellee Taylor.

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

WHITE, J.

Lee Taylor, the claimant-appellee, filed for unemployment compensation benefits under the Nebraska Employment Security Law. Both the claims deputy and the Nebraska Appeal Tribunal determined that the claimant voluntarily left his employment in early August 1982 without good cause, and disqualified claimant from receiving benefits for a period of 8 weeks. On appeal to the district court for Holt County, the court found that on August 3, 1982, the claimant's employment was terminated for the employer's convenience and reversed the decision of the appeal tribunal. We reverse and order the decision of the appeal tribunal reinstated.

The scope of review in this court is de novo on the record from the district court, and "it is the duty of this court to retry the issues of fact involved in the findings complained of and reach an independent conclusion thereof." *Heimsoth v. Kellwood Co.*, 211 Neb. 167, 169, 318 N.W.2d 1, 2 (1982). See,

also, *School Dist. No. 21 v. Ochoa*, 216 Neb. 191, 342 N.W.2d 665 (1984).

Neb. Rev. Stat. § 48-628 (Cum. Supp. 1982) provides in part:

> An individual shall be disqualified for benefits:
>
> (a) For the week in which he or she has left work voluntarily without good cause, if so found by the Commissioner of Labor, and for not less than seven weeks nor more than ten weeks which immediately follow such week, as determined by the commissioner according to the circumstances in each case.

Keeping in mind that in voluntary termination cases the burden of proof is on the employee to prove that the leaving was for good cause, *Glionna v. Chizek*, 204 Neb. 37, 281 N.W.2d 220 (1979), we find the following to be the factual situation.

Claimant began his employment in October 1981 for Herd Co. Thunderbolt Feed Lot, a subsidiary of Collateral Control Corporation, as a night watchman for the cattle feedlot. His hours of employment were from 5 p.m. until 7 a.m. the following morning. In February 1982 the claimant was promoted to the position of security foreman. The job description for this position, a copy of which was introduced into evidence and which bears the claimant's signature, provided that "[h]is duties include patrolling all areas of the feedlot at all times making sure that the cattle are comfortable and have feed and water . . . ." Apparent from the record, and not seriously disputed, is the conclusion that this job necessarily included lifting bales of hay and that such a duty could be described as "heavy" rather than "light" work.

In July 1982 the claimant was hospitalized for a period of 10 or 11 days for a gall bladder condition. After obtaining a release from his physician that his work be restricted to "light" duty, claimant reported for work as usual on the evening of August 1, 1982. When claimant reported for work, he noticed that he did not have a timecard. Instead he found a note directing him to report for work the following morning, August 2, as he had been transferred to the day shift. Claimant was assigned work of watching a corn cracking machine and of washing the machine after the task was finished. He was then asked to lift

hay bales. He declined because of his physical condition. His supervisor spoke with claimant's physician on the telephone and verified the claimant's light work restriction. As no other light work was then available and since claimant's "side hurt a little bit," claimant informed his supervisor that "I'll just go home and I'll get some medicine and I'll be back in the morning." Claimant left work at approximately 2 p.m., August 2, 1982.

On August 3 he reported for work at 7 a.m. and was assigned work sweeping near a pit. As a result of the sweeping by another employee, stones were deposited in the pit, and a supervisor directed the claimant and the other employee to remove them. A dispute arose whether Taylor should go down into the pit to remove the stones or to remain on the surface. In any event, Taylor refused to continue and was told to check out for the day.

Taylor reported for work the following day and was assigned work painting. Taylor refused and announced to the manager that he considered himself laid off the previous day as there was no light work available for him. Taylor handed his timecard to his manager and did not report to the feedlot again.

No evidence was presented that the employer did not in good faith assign to Taylor alternative work it considered to comply with his "light duty" restriction. There is, however, sufficient evidence that on August 4, 1982, the employer had light duty work for Taylor, which he refused to perform. Taylor has thus failed to prove that his termination was anything but voluntary and without good cause.

REVERSED.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL ANGELO SACCOMANO, APPELLANT.

355 N.W.2d 791

Filed October 5, 1984. No. 84-138.

1. **Weapons: Words and Phrases.** A weapon is concealed on or about the person if it is concealed in such proximity to the driver of an automobile as to be convenient of access and within immediate physical reach.
2. **Convictions: Weapons: Evidence.** Ordinarily, when an object is found in an automobile possessed and operated by the defendant, the evidence of unlawful possession is sufficient to sustain a conviction.
3. **Weapons: Evidence: Words and Phrases.** The requirement that the State prove that the defendant "knowingly and intentionally" concealed the weapon is satisfied by evidence that the defendant voluntarily and intentionally concealed the weapon.

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

Philip P. Lyons of Colfer, Lyons, Wood, Malcom & Goodwin, for appellant.

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

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

BOSLAUGH, J.

After trial to a jury the defendant, Michael Angelo Saccomano, was convicted of carrying a concealed weapon, sentenced to jail for 80 days, and fined $1,000. He has appealed, and contends that the evidence was insufficient to support the judgment and that the sentence imposed was excessive.

The defendant is 28 years of age and is employed as a heavy equipment operator by the Burlington Northern railroad. At the time of his arrest he was working in the vicinity of McCook, Nebraska, and staying in a motel in McCook.

The defendant spent the July 4, 1983, weekend in Denver, Colorado, visiting his mother. He returned to McCook by train, arriving at about 2:30 a.m. on July 5, 1983. Prior to leaving for Denver, he had placed a loaded .22-caliber revolver under the

front seat of his automobile so that it would not be stolen from his parked car while he was in Denver.

While driving to his motel after returning from Denver, he was stopped by the police for speeding. Because the defendant had been drinking, he was arrested for driving while intoxicated and taken to the police station. At the station the defendant discovered that he had left his wallet in the automobile and requested that the police look for it. The officers returned to the car and in looking for the wallet discovered the loaded revolver under the front seat of the automobile.

It is undisputed that the defendant had placed the gun under the front seat of his automobile and that it was under the seat at the time he was stopped by the police and arrested. The defendant argues that this evidence is not sufficient to support a conviction because he was in jail at the time the gun was found under the front seat of his automobile, and he had forgotten that he had placed the gun there before leaving for Denver.

The fact that the defendant was in jail at the time the gun was discovered is of no consequence. The offense was committed when the defendant operated the automobile with the gun concealed under the front seat. A weapon is concealed on or about the person if it is concealed in such proximity to the driver of an automobile as to be convenient of access and within immediate physical reach. *State v. Goodwin*, 184 Neb. 537, 169 N.W.2d 270 (1969).

The defendant's testimony that he had forgotten that he had placed the gun under the seat of his automobile does not prevent a conviction. The evidence was such that the jury could find that the defendant "knowingly and intentionally" placed the gun under the front seat of the automobile, and from the facts and circumstances conclude that the defendant had knowledge of the presence of the gun in the automobile.

Ordinarily, when an object is found in an automobile possessed and operated by the defendant, the evidence of unlawful possession is sufficient to sustain a conviction. *State v. Harris, ante* p. 75, 352 N.W.2d 581 (1984).

The requirement that the State prove that the defendant "knowingly and intentionally" concealed the weapon is satisfied by the evidence that he placed the gun under the front

seat of the automobile before he left for Denver. It is sufficient if the evidence shows that the defendant voluntarily and intentionally concealed the weapon. See *United States v. Barber*, 594 F.2d 1242 (9th Cir. 1979).

With respect to the sentence, the period of incarceration is minimal when compared to the maximum authorized by statute. The jail sentence, however, may be a hardship on the defendant in that it may cause him to lose his employment.

The record shows that in addition to the .22-caliber revolver found under the front seat of the automobile, the police removed a loaded .357 Magnum pistol and a loaded .22-caliber rifle from the trunk of the automobile. The presentence report states that this was the second time a loaded .357 Magnum pistol was removed from the defendant's automobile when he was arrested. Further, the record shows the defendant was on probation at the time this offense was committed.

The purpose of the statute is to prevent the carrying of weapons "because of the opportunity and temptation to use them which arise from concealment." *Nugent v. State*, 104 Neb. 235, 236, 176 N.W. 672 (1920). The fact that the weapon was loaded is an aggravating circumstance.

Under the facts and circumstances in this case, we find that the sentence imposed was not excessive. The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. STEVEN J. SCHAF, APPELLEE.
355 N.W.2d 793

Filed October 5, 1984. No. 84-177.

Pleas: Prior Convictions. A checklist may properly constitute a part of the record, and may affirmatively establish a voluntary and intelligent waiver of a defendant's rights and a counseled misdemeanor conviction for purposes of an enhanced penalty statute.

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

Vincent Valentino, York County Attorney, and Charles W. Campbell, for appellant.

Ronald E. Colling and Philip H. Nyberg, for appellee.

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

SHANAHAN, J.

On October 25, 1983, Steven J. Schaf, appellee, was arraigned in the county court for York County on the charge of driving while under the influence of alcoholic liquor. See Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1982). With his attorney, Schaf appeared for arraignment and entered a guilty plea to the charge. After Schaf's guilty plea an enhancement proceeding was held on November 22 to determine whether Schaf had been previously convicted of driving while under the influence of alcoholic liquor. At the enhancement hearing, and over Schaf's objection, the court admitted a certified transcript of Schaf's conviction on July 16, 1982, in the county court for Polk County for the offense of driving while under the influence of alcoholic liquor.

The certified transcript of the judgment in the county court for Polk County reflected Schaf's appearance with counsel before the county judge. The Polk County judgment was signed by the county judge and showed on its face:

> On this 16th day of July, 1982, above-named defendant appeared ( ) without counsel (X) with counsel, for (X) TRIAL ( ) SENTENCING ( ) HEARING on the complaint charging Count 1 - Driving Without Headlights; Count 2- Minor in Possession; Count 3 - Driving Under the Influence of Alcohol. (X) County (Deputy) Attorney ( ) City (Deputy) Attorney (X) appeared ( ) was excused and presence waived by defendant.
>
> DEFENDANT ( ) requested court-appointed counsel ( ) waived right to counsel and requested to proceed.
>
> ( ) DEFENDANT TO FILE AFFIDAVIT OF

FINANCIAL STATUS.

MATTER CONTINUED TO_____ on request of ( ) defendant ( ) State.

(X) Defendant requested leave to withdraw his previously tendered plea of not guilty to Count(s) 3 and entered a plea of guilty to Count(s) 3. State asked leave to ( ) Amend Count(s)_____to_____Amend Complaint to read To dismiss Counts 1 & 2.

On defendant's plea~~(s)~~ of guilty, the court finds that the defendant is competent, understands the nature of the charges against him/her and the possible penalties, both minimum and maximum, which may be imposed; that the defendant understands the consequences of such plea~~(s)~~ and that said plea~~(s)~~ waive defendant's rights to counsel, confrontation, privilege against self-incrimination and right to jury trial on misdemeanors. Further, the court finds the defendant's plea~~(s)~~ were entered voluntarily and not as a result of threats or promises; and, that there is a factual basis for the plea~~(s)~~. Therefore, the defendant's plea(s) are accepted and the defendant is found guilty as charged in Ct. 1( ) Ct. 2( ) Ct. 3(X) Ct. 4( ) Ct. 5( ) upon said plea~~(s)~~.

The York County Court found Schaf guilty of driving while under the influence of alcoholic liquor, second offense, and sentenced Schaf to 30 days in jail, a $500 fine, and 1 year's suspension of his driver's license. Schaf appealed to the district court for York County, which, on January 23, 1984, affirmed Schaf's conviction on his guilty plea entered in the county court on October 25, 1983, but reversed the county court's judgment of an enhanced penalty resulting from the hearing of November 22. In setting aside the county court's sentence, the district court explained:

> The defendant, Steven J. Schaf, freely, voluntarily, knowingly and intelligently entered a plea of guilty to driving while intoxicated on October 25, 1983.
>
> The State has failed to prove Constitutional convictions for any other driving while intoxicated offense under the standards enunciated in State v. Prichard, 215 Neb. 488 ____ N.W.2d ____ (1983).

> By reason thereof, the defendant's sentence must be and is hereby vacated.

We note that the district court decided this case almost 1 month to the day before our opinion in *State v. Ziemba*, 216 Neb. 612, 346 N.W.2d 208 (1984), which was issued on February 24, 1984. Consequently, the district court did not have the benefit of *Ziemba* when it decided Schaf's case.

The State appeals the judgment of the district court vacating Schaf's sentence, and claims the certified transcript of Schaf's conviction in Polk County can be used in enhancement proceedings.

The only issue before us is whether admission of the certified transcript of Schaf's Polk County conviction was proper to prove Schaf's prior conviction for driving while under the influence of alcoholic liquor. In *State v. Smith*, 213 Neb. 446, 329 N.W.2d 564 (1983), this court decided that in an enhancement proceeding the State has the burden to prove a prior valid conviction. In *State v. Smith, supra*, we noted the U.S. Supreme Court had held in *Baldasar v. Illinois*, 446 U.S. 222, 100 S. Ct. 1585, 64 L. Ed. 2d 169 (1980), that an uncounseled misdemeanor conviction cannot be used under an enhanced penalty statute upon a subsequent conviction. In *State v. Smith, supra* at 449, 329 N.W.2d at 566, we stated:

> We agree that in an enhancement proceeding, a defendant should not be able to relitigate the former conviction, and to that extent such conviction cannot be collaterally attacked. However, under the present circumstances, the burden remains with the State to prove the prior convictions. This cannot be done by proving a judgment which would have been invalid to support a sentence of imprisonment in the first instance. [Citation omitted.] Where a record is silent as to a defendant's opportunity for counsel, we may not presume that such rights were respected. [Citations omitted.] A defendant's objection to the introduction of a transcript of conviction which fails to show on its face that counsel was afforded or the right waived does not constitute a collateral attack on the former judgment.

In *State v. Ziemba, supra* at 619, 346 N.W.2d at 214, we held:

> The transcript of a judgment used to prove a prior conviction must show that at the time of the conviction the defendant was represented by counsel or waived his right to counsel. A defendant may . . . object to the admission of the record of a prior conviction on the basis that the record does not affirmatively establish that he was represented by counsel or waived his right to counsel. A transcript of judgment which does not contain such an affirmative showing is not admissible and cannot be used to prove a prior conviction.

Further, in *State v. Ziemba, supra*, we made clear that a checklist may properly constitute a part of the record and can serve to affirmatively establish a voluntary and intelligent waiver of rights and, at 628, 346 N.W.2d at 218, that

> a verbatim transcript of the rendition of a guilty plea is not constitutionally required, nor does absence of such a transcript require a finding that the plea was invalid. A checklist or other docket entry which is sufficiently complete to comply with the requirements of *State v. Tweedy*, 209 Neb. 649, 309 N.W.2d 94 (1981), *State v. Smith*, 213 Neb. 446, 329 N.W.2d 564 (1983), and the requirements previously set out in this opinion can establish a valid waiver. A checklist or other such docket entry which is made by one authorized to make it imports verity, and unless contradicted it stands as a true record of the event. To the extent that *State v. Prichard*, 215 Neb. 488, 339 N.W.2d 748 (1983), implies that a verbatim transcript is necessary, it is disapproved.

See, also, *State v. Tonge*, 217 Neb. 747, 350 N.W.2d 571 (1984).

There is no doubt that the certified transcript of Schaf's previous conviction in Polk County affirmatively established on its face that Schaf with counsel appeared before the court when Schaf entered his guilty plea. The certified copy of the transcript of proceedings in the county court for Polk County was properly admitted to prove Schaf's prior conviction. It was error for the district court to hold the certified transcript from the Polk County Court could not be used to prove Schaf's prior conviction. The State has met its burden in proving Schaf's valid prior conviction for driving while under the influence of

alcoholic liquor.

Therefore, we reverse the judgment of the district court setting aside Schaf's sentence in the county court, and this matter is remanded to the district court with directions to reinstate the judgment entered and sentence imposed on November 22, 1983, in the York County Court.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. ROBERT G. MAIRE, APPELLANT.

355 N.W.2d 796

Filed October 5, 1984. No. 84-210.

Appeal from the District Court for Jefferson County: WILLIAM B. RIST, Judge. Affirmed as modified.

William J. Panec, for appellant.

Paul L. Douglas, Attorney General, and Calvin D. Hansen, for appellee.

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

PER CURIAM.

Robert G. Maire appeals the sentence imposed by the district court for Jefferson County, and assigns as error abuse of discretion on the part of the trial court in imposing a minimum sentence in excess of the minimum limit prescribed by Neb. Rev. Stat. § 83-1,105 (Reissue 1981). We reverse and remand for sentence.

Maire was initially charged with two criminal offenses which occurred on September 12, 1983. Pursuant to a plea agreement, Maire entered his guilty plea to a charge of theft in violation of Neb. Rev. Stat. § 28-511(1) (Cum. Supp. 1982), a Class IV felony pursuant to Neb. Rev. Stat. § 28-518(2) (Reissue 1979). A Class IV felony is punishable by imprisonment from 0 to 5

years, a fine of $10,000, or both imprisonment and fine. See Neb. Rev. Stat. § 28-105 (Reissue 1979). The district court accepted Maire's guilty plea and, after rendition of a presentence report, on February 21, 1984, sentenced Maire to imprisonment in the Nebraska Penal and Correctional Complex for a term not less than 2 nor more than 4 years.

Maire alleges abuse of discretion in the sentence imposed. To support his claim of error Maire relies upon § 83-1,105(1) concerning an indeterminate sentence, that is, a court may "[f]ix the minimum and maximum limits of the sentence, but the minimum limit fixed by the court shall not be less than the minimum provided by law nor more than one-third of the maximum term, and the maximum limit shall not be greater than the maximum provided by law." On account of the foregoing statute Maire contends that his sentence is excessive, namely, the permissible minimum sentence should have been 20 months, not 2 years or 24 months imposed by the trial court.

The State concedes there has been an abuse of discretion in sentencing Maire insofar as the minimum sentence imposed does exceed the statutory minimum permissible.

Disposition in this court is achieved pursuant to Neb. Rev. Stat. § 29-2308 (Cum. Supp. 1982), which in pertinent part provides:

> In all criminal cases that are now, or may hereafter be pending in the Supreme Court, the court may reduce the sentence rendered by the district court against the accused, when in its opinion the sentence is excessive, and it shall be the duty of the Supreme Court to render such sentence against the accused as in its opinion may be warranted by the evidence.

The presentence report reveals that appellant is 23 years of age and unmarried. Prior criminal episodes include: window peeping and disturbing the peace (8/10/81, fine and 10 days in jail); burglary (8/19/81, 1 to 3 years in the Nebraska Penal and Correctional Complex); procuring liquor for a minor (10/5/83, 7 days in jail); and a pending charge of an insufficient fund check to which appellant has entered a plea of guilty and is awaiting sentence.

Under the circumstances the appropriate sentence is: Maire

shall be imprisoned in the Nebraska Penal and Correctional Complex in Lincoln, Nebraska, for a period of not less than 20 months nor more than 4 years, at hard labor, Sundays and holidays excepted, and solitary confinement to be no part of said sentence, provided that Maire shall receive credit for time confined in the Jefferson County jail awaiting disposition in the district court.

Therefore, the judgment and sentence of February 21, 1984, shall be and hereby are affirmed but modified in accordance with this opinion.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. GEORGE J. TICHOTA, APPELLANT.

356 N.W.2d 85

Filed October 5, 1984. No. 84-217.

Prior Convictions: Proof: Waiver. Although proof of prior convictions to establish a charge of driving while intoxicated, third offense, may be waived by the voluntary and intelligent admission of the defendant, nevertheless, there must be proof in the record in some form that the prior convictions were obtained at a time when the defendant was represented by counsel or had knowingly waived such right.

Appeal from the District Court for Colfax County: JOHN C. WHITEHEAD, Judge. Reversed and remanded with directions.

Tim B. Streff and Jon S. Okun of Higgins & Okun, 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.

HASTINGS, J.

This appeal involves primarily a defendant's rights in connection with a proceeding for enhancement of a charge of driving while under the influence of alcohol.

The defendant was charged in three separate complaints: (1) Driving while intoxicated, third offense, November 1, 1983; (2) Third degree assault, October 29, 1983; and (3) Driving while intoxicated, third offense, and refusal to submit to a chemical test, November 25, 1983. He was found guilty in the county court for Colfax County after pleas of no contest. He was sentenced on the first complaint to 6 months in jail and was ordered not to operate any motor vehicle during his lifetime, and on the second complaint, for assault, to 2 years of probation and 30 days in the county jail consecutive to complaint No. 1. On the third complaint he was placed on 5 years' probation, concurrent with complaint No. 2, and was ordered to perform 500 hours of community service for the city of Clarkson, Nebraska, such penalty apparently to cover both counts collectively. On appeal to the district court all sentences were affirmed, except the community service ordered was reduced to 200 hours.

On appeal to this court the defendant attacks the findings of the court as to prior DWI convictions, the failure of the trial court to advise the defendant as to the penalties for first, second, or third offense refusal to submit to a chemical test, and the failure of the court to find the defendant's plea to the assault charge was not voluntary and intelligent and to allow withdrawal of such plea.

State v. Smyth, 217 Neb. 153, 347 N.W.2d 859 (1984), provides that although proof of prior convictions for DWI, third offense, may be waived by the voluntary and intelligent admission of the defendant, nevertheless there must be proof in the record in some form that the prior convictions were obtained at a time when the defendant was represented by counsel or had knowingly waived such right. See, also, *State v. Baxter, ante* p. 414, 355 N.W.2d 514 (1984).

In each case involving DWI, third offense, the defendant stated that he did not deny the prior convictions. However,

there is absolutely no proof in the record, by admission or otherwise, that the defendant had been represented or had waived counsel on those previous occasions. An equivocal admission by the defendant that one or more of the convictions might have been the result of a jury trial is not sufficient to establish that the defendant had an attorney.

Although the convictions for driving while intoxicated, pursuant to the no contest pleas, were proper, the court's sentences for third offense are not supported by the record, and those causes are reversed and remanded to the trial court for sentencing in accordance with law.

The defendant also contends that by analogy, under the rule laid down in *State v. Ziemba*, 216 Neb. 612, 346 N.W.2d 208 (1984), the court must advise a defendant who is charged under Neb. Rev. Stat. § 39-669.08 (Cum. Supp. 1982) of the penalties for first, second, or third offense refusal to submit to a chemical test. We agree. The court in this instance advised him only of the penalty for first offense, which was all that he was charged with and of which he was found guilty. To that extent there was no error. However, because the conviction for DWI, third offense, the other count in this complaint, has been reversed, neither of the convictions as they stand will support a sentence of 5 years' probation. Neb. Rev. Stat. § 29-2263(1) (Reissue 1979). Therefore, that cause is also reversed and remanded for proper sentencing.

Finally, as to the complaint involving third degree assault, it is apparent from the record that the incident which defendant and his counsel understood formed the basis of the charge was at a different time and place than the one which the prosecution eventually established in providing a factual basis for the plea. When the mistake was discovered, defendant's counsel requested leave to withdraw the plea. The request was denied. It should have been granted. *State v. Tweedy*, 209 Neb. 649, 309 N.W.2d 94 (1981); *State v. Luther*, 213 Neb. 476, 329 N.W.2d 569 (1983). The judgment and sentence are reversed, and that cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

MORRIS J. SWEDBERG, APPELLEE, V. BATTLE CREEK MUTUAL INSURANCE COMPANY, APPELLANT.

356 N.W.2d 456

Filed October 12, 1984. No. 83-315.

1. **Insurance.** The parties to an insurance contract may make the contract in any legal form they desire, and in the absence of statutory provisions to the contrary, insurance companies have the same right as individuals to limit their liability and to impose whatever conditions they please upon their obligations, not inconsistent with public policy. If plainly expressed, insurers are entitled to have such exceptions and limitations construed and enforced as expressed.
2. _____. In order to recover upon a policy of insurance of limited liability, the insured must bring himself within its express provisions.
3. **Insurance: Words and Phrases.** In general, the terms "vandalism" and "malicious mischief" refer to wanton or malicious acts intended to damage or to destroy property. Thus, to recover under a policy assuring against loss caused by vandalism and malicious mischief, the plaintiff must show by a preponderance of the evidence, direct or circumstantial, that the damage was caused by acts intended to damage the property in question.
4. _____: _____. Regardless of how careless, negligent, or even illegal an act might be, it is not malicious mischief absent evidence that the act was motivated by malice toward the property or its owner.

Appeal from the District Court for Burt County: DARVID D. QUIST, Judge. Reversed and remanded with directions to dismiss.

Jewell, Otte, Gatz & Collins, for appellant.

Wyman E. Nelson, for appellee.

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

KRIVOSHA, C.J.

Battle Creek Mutual Insurance Company (Battle Creek) appeals from a judgment entered by the district court for Burt County, Nebraska, in favor of the appellee, Morris J. Swedberg, and against Battle Creek in the sum of $7,350, together with attorney fees and costs. Swedberg was an insured under a policy of insurance issued by Battle Creek which, among other coverage, insured Swedberg against direct loss to property owned by Swedberg by reason of vandalism and malicious mischief. Battle Creek has assigned two errors in

support of its appeal. First, it maintains that Swedberg did not file a proper proof of loss as required by the policy. Second, it maintains that the trial court erred in finding that the damages sustained by Swedberg were a direct loss from vandalism and malicious mischief, as required by the policy. Because we believe that Battle Creek is correct with regard to its contentions that the trial court erred in finding that the loss sustained by Swedberg was due to vandalism and malicious mischief as defined by the policy and therefore erred in awarding any damages, we need not consider the matter regarding the proof of loss.

The record discloses that sometime prior to the date upon which Swedberg suffered the loss, a policy of insurance was issued by Battle Creek to Swedberg. Section III, the relevant portion of the policy, reads in part: "This policy insures under Section III against direct loss to the property covered by the following perils as defined and limited herein:

. . . .

"9. Vandalism and malicious mischief, meaning only the willful and malicious damage to or destruction of the property covered . . . ."

The evidence discloses that in late December of 1979 or early January of 1980, Swedberg observed that some of his livestock were ill and dying. The livestock were maintained on leased land, in an area away from a main traveled road and accessible only by farm trails. The parties stipulated that the death of the animals was caused by the cattle eating a poisonous substance found in a pail or bucket. It was further undisputed that the poisonous substance ingested by the cattle was a white crystalline substance containing chlorate. The bucket was apparently dumped on the ground, together with other junk and debris, including some molasses and oats. The area where the pail was dumped had earlier been littered with an abandoned disk, a haystacker, and a car body. While Swedberg claims that he did not know of the existence of the molasses, oats, and chlorate before the injury to his livestock, he did know about the abandoned farm machinery. He further testified that before he rented the property he was aware of another dump area on the land some quarter of a mile away. In

order to protect the cattle before placing them on the property, he had specifically fenced around that dump area but did not do so around the area where the abandoned disk, haystacker, and car body were located.

There was no evidence as to who dumped the molasses, oats, and other debris, including the chlorate, nor any evidence as to how it was placed there. Swedberg admitted that he did not believe anyone did it to harm him or his livestock. The evidence simply established that the pail was there and that the chlorate caused the damage.

The central question which we must decide is whether the mere fact that harmful material is placed in an area where harm follows to persons or property establishes coverage under a policy of insurance which insures *only* against vandalism and malicious mischief, defined by the policy as meaning only the willful and malicious damage to or destruction of the property covered. While we have found no Nebraska authority construing such coverage, other jurisdictions have addressed this issue. The better reasoned cases seem to deny coverage.

In attempting to determine whether liability exists under this policy of insurance, we are not at liberty to simply determine what "seems fair" but, rather, are limited in determining whether, under the clear language of a policy, the insurer has in fact insured against the risk involved. Recently, in the case of *Safeco Ins. Co. of America v. Husker Aviation, Inc.*, 211 Neb. 21, 317 N.W.2d 745 (1982), we had occasion to examine and review certain rules of construction regarding policies of insurance. In *Safeco, supra* at 24-25, 317 N.W.2d at 748, quoting from *Adolf v. Union Nat. Life Ins. Co.*, 170 Neb. 38, 101 N.W.2d 504 (1960), we said:

> "Under the law of this state the acquiring of insurance has always been a matter of contract. Insurance is a contract by which one party assumes specified risks of the other party for a consideration, and promises to pay him or his beneficiary an ascertainable sum of money on the happening of a specified contingency. It is true, however, that an insurance contract will be construed against the insurance company when the contract or policy is indefinite or ambiguous because it drafted the contract or

policy and is responsible for any indefiniteness or ambiguity therein. But where the contract is plain and unambiguous in its meaning the contract will be enforced according to its terms. Unless this be the law, the attaching of liability on an insurance company, contrary to the plain meaning of the contract, would be nothing less than a rewriting of the liability provisions of the contract. It appears to us that it would be a dangerous innovation of contract law to hold that one is not bound by what he signs, and that that which he fails to read or understand should be read out of the contract."

Furthermore, the *Safeco* case, *supra* at 25-26, 317 N.W.2d at 748, defined this court's rule in construing policies of insurance:

"An insurance policy should be construed as any other contract to give effect to the intent of the parties at the time it was made. The language should be considered not in accordance with what the insurer intended the words to mean, but what a reasonable person in the position of insured would have understood them to mean. If the contract was prepared by the insurer and contains provisions reasonably subject to different interpretations, one favorable to the insurer and one advantageous to the insured, the one favorable to the latter will be adopted. There is, however, a difference between a favorable construction and a favorable finding for the insured. The former does not mean imposing upon the insurer a gratuitous obligation not justified by the usual meaning of the words employed. In giving effect to this principle of law, it is imperative that the contract made by the parties shall be respected and that a new contract is not interpolated by construction. Construction ought not to be employed to make a plain agreement ambiguous for the purpose of interpreting it in favor of the insured. The policy should be given meaning and effect according to the sense of the terms which the parties have used, and if they are clear they should be taken in their plain and ordinary sense."

The fact that an insurer drafts a policy and offers to provide coverage for a specific loss does not mean that courts may

expand that limited liability. In *Lonsdale v. Union Ins. Co.*, 167 Neb. 56, 58-59, 91 N.W.2d 245, 248 (1958), we said:

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

We have previously held that in order to recover upon a policy of insurance of limited liability, the insured must bring himself within its express provisions. See, *Hazuka v. Maryland Cas. Co.*, 183 Neb. 336, 160 N.W.2d 174 (1968); *Sampson v. State Farm Mut. Ins. Co.*, 205 Neb. 164, 286 N.W.2d 746 (1980).

One could reasonably argue that a poisonous substance such as that involved in this case could not have unintentionally or unwillfully appeared on the property. If it was indeed on the property, it must have been placed there by someone, and therefore the placing of the poison was a willful act providing coverage. If that is all that the policy of insurance in question required, then Swedberg would be entitled to recover. However, the policy provides coverage *only* if the loss is due to a willful *and* malicious act. Not only must the substance be intentionally placed upon the property but it must be done with a malicious intent. Here is where the difficulty occurs. Malice is defined as "intention or desire to harm another usu. seriously through doing something unlawful or otherwise unjustified." Webster's Third New International Dictionary, Unabridged 1367 (1968). Certainly, if a can of poisonous substance is placed on the front steps of a home or near the feeding troughs of livestock, both places where one would not expect to find such a substance, the intent of doing harm may be presumed and malice established by reason of the act of placing the poison. But where, as here, the evidence establishes that the area in which the poison was placed had previously been used to dump other debris, we are unable to infer malice on the part of the actor. There is no evidence presented in this case to show that whoever dumped

the junk knew or should have known that cattle were kept in the immediate area or that by dumping this refuse, including the pail with poison, persons or property would be injured. To be sure, there may be sufficient evidence to establish negligence or gross carelessness on the part of someone, but evidence of negligence or carelessness falls far short of establishing malice as required by the policy.

In its judgment order the trial court specifically found as follows: "There is no evidence that the dumper of the rubbish intended to kill animals. However, the rubbish was placed on the property of the insured by a willful or deliberate act." As we have already indicated, the fact that it was done willfully or deliberately would appear to establish half the coverage but fails to satisfy the policy's requirement of proving malice.

Other courts have examined this specific question and appear to have reached similar conclusions. In the case of *Larson v. Fireman's Fund Insurance Co.*, 258 Iowa 348, 139 N.W.2d 174 (1965), the Iowa Supreme Court was presented with a situation where an insured sought to recover for the loss of destroyed turkeys, under a policy similar to this one, on the theory that their death was caused by malicious mischief when an airplane flew over their enclosure at 150 to 200 feet. The court held that the insurer was not liable under its policy where there was no evidence that the unidentified pilot was bent on mischief against the property and was prompted by an evil mind. The Iowa court said at 352, 139 N.W.2d at 176:

> Malice is an essential ingredient of malicious mischief both at common law and under most statutes defining the offense. . . .
>
> . . . .
>
> The established rule is that if, at the time of doing the acts charged, the accused was bent on mischief against some person, ordinarily the owner, and was prompted by an evil mind to destroy or injure the property, then malice is shown, and it is immaterial whether he knew who owned the property. [Citations omitted.]

The record in this case is silent as to the identity of the person who dumped the material, as well as the circumstances surrounding the dumping. The mere fact that a poisonous

substance is placed in a junk pile and is consumed by cattle, absent any other evidence, does not appear to us to be sufficient to prove a malicious act.

Courts generally have been unwilling to presume malice, absent some evidence to support the conclusion. The Louisiana court, in *Nicholas v. New York Underwriters Insurance Co.*, 148 So. 2d 830, 831 (La. App. 1963), said:

> " 'The word "malicious" is characterized by or involves malice; the word "malice" in common speech means ill will or a purpose to harm. Any unlawful act done wilfully and purposely to injure another is malicious as to that person. And malicious mischief has been well defined as the wanton or reckless destruction of or injury to property, implying in some cases a wrong inflicted on another with an evil intent or purpose, or motivated by black and diabolical revenge. * * *' "

And in *Lanza Enterprises, Inc. v. Continental Insurance Co.*, 142 So. 2d 580 (La. App. 1962), the Louisiana court further said at 581:

> In general, the terms "vandalism" and "malicious mischief" refer to wanton or malicious acts *intended* to damage or to destroy property. . . . Thus, to recover under a policy assuring against loss caused by vandalism and malicious mischief, the plaintiff must show by a preponderance of the evidence, direct or . . . circumstantial, that the damage was caused by acts *intended* to damage the property in question.

(Emphasis in original.) See, also, *Ducote v. United States Fidelity & Guaranty Co.*, 241 La. 677, 130 So. 2d 649 (1961).

Swedberg seems to argue that the placing of a can containing poisonous substance in a field where livestock are fed is sufficient evidence of a malicious and willful act. However, the evidence in this case does not support that view. The placing of the debris was not so unusual. Swedberg knew that just a quarter of a mile away the owner of the property had previously dumped junk, and Swedberg had erected a fence in order to keep his cattle away. Likewise, he knew that other junk had already been dumped at the very site where the poisonous substance was placed. As we have previously indicated, it may

very well be that someone was careless or negligent and should be held accountable. That, however, is not enough: "Regardless of how careless, negligent or even illegal an act might be, it is not malicious mischief absent evidence that the act was motivated by malice towards the property or its owner, i.e., by fixed intent to cause injury to specific property." *Imperial Casualty & Indem. Co. of Omaha, Neb. v. Terry*, 451 S.W.2d 303, 305 (Tex. Civ. App. 1970). See, also, *McKinney v. Educator & Executive Insurers, Inc.*, 569 S.W.2d 829 (Tenn. App. 1977); *Rea v. Motors Ins. Corporation*, 48 N.M. 9, 144 P.2d 676 (1944). The burden of proving coverage under a policy where coverage is denied is upon the insured. See *Pintsopolous v. Home Ins. Company*, 340 Mass. 734, 166 N.E.2d 559 (1960).

We simply must conclude that where an insurer contracts to cover a loss for "vandalism and malicious mischief, meaning *only* the willful and malicious damage to or destruction of the property covered" (emphasis supplied), the mere showing that dangerous material was placed in a junk pile and cattle got to it does not fulfill the insured's obligation to come within the limited terms of the policy. For that reason we are compelled to reverse the decision of the trial court and remand the cause with instructions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

STATE OF NEBRASKA, APPELLEE, V. KENNETH E. BRENNEN, APPELLANT.

356 N.W.2d 861

Filed October 12, 1984. No. 83-777.

1. **Wiretaps.** Although interceptions of telephonic communications need not cease upon the obtaining of a described communication, unless the order authorizing them so provides, they must cease when the objective of the authorization has been achieved, whether the order authorizing them so states or not, and in no event may the interceptions extend beyond 30 days.
2. **Convictions: Appeal and Error.** In reviewing whether there is sufficient evidence

to support a conviction, this court neither determines the plausibility of explanations nor weighs the evidence, such matters being for the trier of fact; the conviction must be sustained if, viewing the evidence most favorably to the State, there is sufficient evidence to support it.

3. **Controlled Substances: Evidence.** Evidence that an accused has physical or constructive possession of a drug with knowledge of its presence and its character as a controlled substance is sufficient to support a finding of possession.
4. _____: _____. Although one's mere presence at a place where narcotics are found is not sufficient to prove possession, proof of guilty knowledge may be made by evidence of acts, declarations, or conduct of the accused from which the inference may be fairly drawn that he knew of the existence and nature of the narcotics at the place where they were found.
5. **Controlled Substances: Evidence: Convictions.** Ordinarily, when narcotics or contraband materials are found on a defendant's premises, the evidence of unlawful possession is deemed sufficient to sustain a conviction in the absence of any other reasonable explanation for its presence.

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

James Martin Davis of Dolan, Davis & Gleason, for appellant.

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

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

CAPORALE, J.

Defendant, Kenneth E. Brennen, appeals from the convictions, following a bench trial, and concurrent sentences of imprisonment for a period of 1 year on each of two counts of unlawful possession of controlled substances, to wit, cocaine and hashish. He questions the validity of the interceptions of certain telephonic conversations and the sufficiency of the evidence. We affirm.

The relevant facts concerning the interceptions are set forth in *State v. Brennen*, 214 Neb. 734, 336 N.W.2d 79 (1983) (*Brennen I*), a single-judge opinion which determined that the district court erred in suppressing evidence seized as a result of the interceptions.

The first five of the issues presented by the seven errors Brennen assigns to the interceptions were dealt with in *Brennen*

I. These issues are whether the interceptions were routinely employed and undertaken too early in the ongoing drug investigation, whether there was probable cause to undertake them, whether they were minimized sufficiently, whether interceptions of confidential communications were avoided, and the State's failure to file written reports. With respect to those issues we adopt the reasoning and rationale set forth in *Brennen I* and find the assignments of error presenting those issues to be without merit.

The remaining two assignments of error dealing with the interceptions concern themselves with whether the interceptions were defective in that they were not conducted in accordance with the termination provisions of the relevant statutes and were of excessive duration. Since these two issues overlap, we deal with them together.

Two provisions of Neb. Rev. Stat. § 86-705 (Reissue 1981) bear upon the termination of interceptions. Section 86-705(6) states in relevant part:

> No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. . . . Every order and extension thereof shall contain a provision that the authorization to intercept . . . must terminate upon attainment of the authorized objective, or in any event in thirty days.

Section 86-705(4) reads in relevant part:

> Each order authorizing or approving the interception of any wire or oral communication shall specify . . . (e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

Essentially, the interception order and amended order provided that interceptions would be valid for a total of one 30-day period and were not to automatically terminate when the described communications were first obtained. Brennen argues that the failure to require termination as soon as the described communications were first obtained constitutes a

violation of § 86-705(6), making a distinction between the issues of duration and termination. It is Brennen's position that even though interceptions can last for as long as 30 days, they must terminate sooner if the objective of the authorization has been achieved. This is a correct statement of the law, as far as it goes. See *United States v. Cafero*, 473 F.2d 489 (3d Cir. 1973). However, there is more to the law than that. Brennen ignores § 86-705(4), the language of which the orders parrot. Obviously, to say that interceptions must terminate as soon as the objective of the authorization has been achieved is different than saying that interceptions must terminate as soon as the described communication has been obtained. It may take more than the interception of a single described communication to accomplish the objective of an authorization. Thus, the statutory scheme is that although interceptions need not cease upon the obtaining of a described communication, unless the order authorizing them so provides, they must cease when the objective of the authorization has been achieved, whether the order so states or not, and in no event may the interceptions extend beyond 30 days. See *United States v. Cafero, supra*.

Brennen argues that the failure of the orders to require by their own language that the interceptions terminate upon attainment of the authorized objective makes them fatally defective. Although there are cases which support that point of view, *State v. Maloof*, 114 R.I. 380, 333 A.2d 676 (1975), and *Johnson v. State*, 226 Ga. 805, 177 S.E.2d 699 (1970), we do not find them persuasive. We, as did Judge Hastings in his single-judge opinion in *State v. Whitmore, White, and Henderson*, 215 Neb. 560, 340 N.W.2d 134 (1983), accept and adopt the reasoning of *United States v. Cafero, supra*, and the line of cases cited in *Whitmore, White, and Henderson* that substantial, but not strict, compliance with the statutes is required. That is to say, the interceptions must be conducted in such a manner as not to violate substantive rights.

There is no showing the statutory scheme for intercepting telephonic communications was violated. Therefore, the record fails to sustain the last two assignments of error relating to the interceptions.

Having disposed of the issues dealing with the validity of the

interceptions, we turn our attention to Brennen's last assignment of error by which he claims that the evidence is not sufficient to support a conviction on either count. In reviewing this question we neither determine the plausibility of explanations nor weigh the evidence, such matters being for the trier of fact. The conviction must be sustained if, viewing the evidence most favorably to the State, there is sufficient evidence to support it. *State v. Miner*, 216 Neb. 309, 343 N.W.2d 899 (1984); *State v. Pierce and Wells*, 215 Neb. 512, 340 N.W.2d 122 (1983).

The record establishes that pursuant to a search warrant, police officers stopped a vehicle owned by Brennen, which was being operated by his paramour. The officers proceeded with Brennen's vehicle to his residence. Access to the residence was then obtained through the use of the garage door opener located in the vehicle. Among the items found by the officers while executing the search warrant at Brennen's residence was a glass vial located in a duffelbag in the bedroom closet. The vial contained a white powder residue, which was subsequently tested and found to be cocaine. In addition, the officers found a plastic container of hashish under the coffee table in the living room. Although the paramour had been sharing Brennen's residence for about 3 weeks, she told the police officers that she knew nothing of any drugs or dealings in drugs by Brennen.

Evidence that an accused has physical or constructive possession of a drug with knowledge of its presence and its character as a controlled substance is sufficient to support a finding of possession. *State v. Foster*, 196 Neb. 332, 242 N.W.2d 876 (1976). It has also been held that, although one's mere presence at a place where narcotics are found is not sufficient to prove possession, proof of guilty knowledge may be made by evidence of acts, declarations, or conduct of the accused from which the inference may be fairly drawn that he knew of the existence and nature of the narcotics at the place where they were found. *State v. Coca*, 216 Neb. 76, 341 N.W.2d 606 (1983); *State v. Bartlett*, 194 Neb. 502, 233 N.W.2d 904 (1975). It is well established that, ordinarily, when narcotics or contraband materials are found on a defendant's premises, the evidence of unlawful possession is deemed sufficient to sustain

a conviction in the absence of any other reasonable explanation for its presence. *State v. Matthews*, 205 Neb. 709, 289 N.W.2d 542 (1980); *State v. Britt*, 200 Neb. 601, 264 N.W.2d 670 (1978). *State v. Matthews, supra*, held the evidence sufficient to support the jury's finding that the defendant possessed a controlled substance found in his residence notwithstanding the presence of other persons at the residence at the time of the search. *State v. Britt, supra*, determined evidence that the defendant shared the residence with his girl friend did not defeat the jury's finding that the cocaine residue found in a plastic tube in the living room was possessed by the defendant.

In light of the above-stated principles, the evidence is clearly sufficient to establish Brennen's illegal possession of the controlled substances. He was living at the location where the controlled substances were found, his paramour had been living there but a short time and was not shown to have any guilty knowledge, the hashish was found in the living room area, and the cocaine was found in the closet in a duffelbag. The record provides no overriding explanation for the presence of the controlled substances. Therefore, Brennen's last assignment of error is likewise without merit.

AFFIRMED.

GRANT, J., not participating.

SHANAHAN, J., dissenting.

In apparently answering one question, the majority raises but avoids a more serious question.

In response to Brennen's motion to suppress, the State presented no witness to establish that minimization in any degree had been achieved or even attempted in compliance with the order expressly directing minimization throughout the wiretap. The wiretap logs, reflecting only some of the conversations monitored, are conspicuously incomplete and, therefore, lay an insufficient foundation concerning minimization. Neb. Rev. Stat. § 86-705(6) (Reissue 1981) in pertinent part provides: "Every order . . . shall contain a provision [that the wiretap] shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception . . . ." Brennen has assigned as error "interception [of his communications] was not conducted in

such a way as to minimize the interception of communication not subject to interception." Brief for Appellant at 3.

With regard to minimization *Brennen I* treated only the omission of statutory language in reference to the wiretap order, namely, the order's failure to include a verbatim recital of the provision for minimization found in § 86-705. See *State v. Brennen*, 214 Neb. 734, 336 N.W.2d 79. *Brennen I* did not dispose of the question "whether they [interceptions of communications] were minimized sufficiently," notwithstanding such averment in the majority opinion. As a result of osmosis, a question concerning statutory language relative to the wiretap order (*Brennen I*) has become resolution of a factual question about sufficiency of minimization in the present case. More fascinating is the process by which police inaction in minimization has been transformed into substantial compliance with the minimization requirement of § 86-705(6).

Protection of personal security found in the fourth amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution extends to conversations as subjects of a wiretap "search." Cf. *Berger v. New York*, 388 U.S. 41, 87 S. Ct. 1873, 18 L. Ed. 2d 1040 (1967) ("search" of conversations); cf., also, *Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967) ("search and seizure" of conversations).

"Unreasonable searches and seizures" prohibited by the Constitutions, state and federal, are in part prevented in Nebraska's wiretap law by requiring a magistrate's determination of "probable cause" and the additional requirement of minimized intrusion on conversations tapped. Clearly, minimization is an integral part of any wiretap order and an indispensable condition to be fulfilled for a valid wiretap. "The duty of minimization arises from the particularity and reasonableness requirements of the fourth amendment . . . ." *Post-Authorization Problems in the Use of Wiretaps: Minimization, Amendment, Sealing, and Inventories*, 61 Cornell L. Rev. 92, 93 (1975). Absent minimization in execution of a wiretap, an officer has "a roving commission to 'seize' any and all conversations." *Berger v. New York, supra* at 59.

While Nebraska's wiretap law, Neb. Rev. Stat. §§ 86-701 et

seq. (Reissue 1981), may impose a greater restriction on electronic surveillance and may afford greater protection against unreasonable searches and seizures than is provided by the Constitutions, the wiretap law of Nebraska cannot expand the use of electronic surveillance beyond the constitutional safeguard against unreasonable "searches and seizures." See *State v. Golter*, 216 Neb. 36, 342 N.W.2d 650 (1983). Required minimization is crucial to preserve the constitutional guarantee transcending any statute or order making a wiretap available to police.

> The minimization directive is a shorthand method of instructing the executing officers to remain within the authority granted by the terms of the eavesdropping order and obey the constitutional proscription of general searches. Its purpose is "to prevent improper invasion of the right of privacy provided by the fourth amendment and to curtail the indiscriminate seizure of communications." Without minimization, the execution of a surveillance order amounts to a general search.

J. Carr, The Law of Electronic Surveillance, *Executing an Electronic Search* § 507[1] at 256 (1977).

"The bedrock of our wiretap law is stringent judicial monitoring of law enforcement agencies seeking to use and using electronic surveillance—an investigative technique highly intrusive upon the privacy of the citizenry." *State v. Golter, supra* at 41, 342 N.W.2d at 653. Consequently, without minimization of intrusion a wiretap is no better than or different from a general search, which is condemned by the Constitutions.

It is noteworthy that some of the questioned taps related to pay phones and necessarily involved a high expectation of privacy of persons using public phones. A lack of specified minimization under such circumstances is a serious deficiency concerning minimization required by § 86-705(6) of the Nebraska wiretap law. Cf., *United States v. James*, 494 F.2d 1007 (D.C. Cir. 1974) (government must adopt procedures to limit interception when wiretapping public phones used by persons not under investigation); *United States v. John*, 508 F.2d 1134, 1139 n.8 (8th Cir. 1975) (interception of

communications only when it was determined by physical surveillance that a suspect was using the pay telephone).

The majority imposes no obligation on the State to make a prima facie case of compliance with the minimization requirement in the order and statute on which a wiretap is based. Requirement of a prima facie showing of minimization by the government has been adopted in various federal and state courts. See, *United States v. Armocida*, 515 F.2d 29 (3d Cir. 1975); *United States v. Quintana*, 508 F.2d 867 (7th Cir. 1975); *People v. Di Stefano*, 38 N.Y.2d 640, 345 N.E.2d 548, 382 N.Y.S.2d 5 (1976).

In demanding minimization of intrusion Nebraska's wiretap law contains a constitutionally compulsory condition precedent before the State is entitled to utilize information obtained through a wiretap. Without fulfillment of such condition the State's claim to wiretap information cannot be constitutionally honored. Fulfillment of a condition precedent before a claim can be honored is not a novelty in our jurisprudence. Protection of a substantial right of the people far outweighs any comparatively small burden on the government in requiring a prima facie showing of minimization of intrusion regarding a wiretap. Exempting the State from such a relatively minor burden is obvious in the majority opinion, but, as expressed by Justice Bradley in the not-so-recent case of *Boyd v. United States*, 116 U.S. 616, 635, 6 S. Ct. 524, 29 L. Ed. 746 (1886):

> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis* [trans: resist initial encroachments; TMS].

Any product of the Brennen wiretap is inadmissible.

In dispensing police from categorical compliance with mandatory minimization, the majority makes reduction of intrusion a meaningless matter. One does not need a wiretap to hear the call to the Constitutions as another segment of the wall around personal security collapses. In the meantime, who guards us against the guardians?

WHITE, J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V. JAMES E. FERRELL, APPELLANT.

356 N.W.2d 868

Filed October 12, 1984. No. 83-961.

1. **Criminal Law: Arrests: Words and Phrases.** "Fresh pursuit" is pursuit instituted immediately and with intent to take into custody a person fleeing and reasonably believed to have committed a crime.
2. **Criminal Law: Words and Phrases.** Fresh pursuit is a relative term and has reference to time or distance, or both, depending on the facts of the case.
3. **Criminal Law: Arrests: Jurisdiction.** A failure to take a prisoner arrested in a foreign state before a magistrate as required by statute does not invalidate an arrest made by officers in fresh pursuit.
4. **Search and Seizure: Appeal and Error.** A finding by the trial court that a consent to search was given voluntarily will not be set aside on appeal unless clearly erroneous.
5. **Sentences: Appeal and Error.** On direct appeal this court has the power to remand the cause for a lawful sentence where the one pronounced was erroneous or void as being beyond the power of the trial court to pronounce and where the accused himself invoked appellate jurisdiction for the correction of errors.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Affirmed in part, and in part reversed and remanded for resentencing.

Thomas M. Kenney, Douglas County Public Defender, and Victor Gutman, for appellant.

Paul L. Douglas, Attorney General, and Timothy E. Divis, for appellee.

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

BOSLAUGH, J.

The defendant, James E. Ferrell, was convicted of robbery and use of a firearm in the commission of a felony. He was sentenced to imprisonment for 15 years on count I and 2 to 5 years on count II, the sentence to run consecutively to the sentence on count I. The defendant was also adjudged to be a habitual criminal. He has appealed and contends that the district court erred in overruling his motion to suppress.

The record shows that the Ames Bank at 89th and Fort Streets in Omaha, Nebraska, was robbed at about 9:30 a.m. on July 12, 1983.

At approximately 9:37 a.m. a police radio broadcast reported the robbery at the Ames Bank and described a suspect car as yellow, possibly with Texas plates. Minutes later, a second broadcast reported that the suspect car possibly had Missouri plates. At this time Det. Sgt. Glenn Steimer relayed that he had seen a yellow car with Missouri plates driven by an older female eastbound on Interstate 680. These broadcasts were heard by Officer David Wilson, who then positioned his cruiser on the 30th Street entrance ramp to Interstate 680 to look for the suspect car. Seeing the car almost immediately, Officer Wilson followed it and turned on his red lights in an attempt to stop it; the driver of the car traveled approximately 1 mile and crossed the bridge into Iowa before stopping. At this time the defendant sat up in the passenger seat and attempted to exit the car. He was told to remain inside.

After other Omaha police officers arrived, Officer Wilson and Officer William Friend approached the car. Among other things in plain view were a gun inside a lady's open purse, an open gym bag jammed full of money, and a white cloth moneybag.

The defendant and the woman driver, Marianne McCormack, were arrested, and the suspect car towed to the Omaha police station. Numerous articles of clothing, including gloves and a ski mask, remained on the front seat of the car. With the permission of the driver of the car, a search was made

of the trunk of the car, yielding maps and various other pieces of evidence. Among the items found in the trunk was a sketch of the interior of the Ames Bank prepared by Marianne McCormack.

Marianne McCormack testified as a witness for the State that on the day before the robbery she drove around Omaha looking at banks. She further testified that she waited in her automobile while the defendant robbed the Ames Bank.

Iowa Code Ann. § 806.1 (West 1979) provides:

> Any member of a duly organized state, county, or municipal law enforcing unit of another state of the United States who enters this state in fresh pursuit, and continues within this state in such fresh pursuit, of a person in order to arrest the person on the ground that the person is believed to have committed a felony in such other state, shall have the same authority to arrest and hold such person in custody, as has any member of any duly organized state, county, or municipal law enforcing unit of this state, to arrest and hold in custody a person on the ground that the person is believed to have committed a felony in this state.

This statute section is followed by a definition of terms, Iowa Code Ann. § 806.5 (West 1979), stating:

> The term "fresh pursuit" as used in this division shall include fresh pursuit as defined by the common law, and also the pursuit of a person who has committed a felony or who is reasonably suspected of having committed a felony. It shall also include the pursuit of a person suspected of having committed a supposed felony, though no felony has actually been committed, if there is reasonable ground for believing that a felony has been committed. Fresh pursuit as used herein shall not necessarily imply instant pursuit, but pursuit without unreasonable delay.

In *State v. Goff*, 174 Neb. 548, 118 N.W.2d 625 (1962), this court defined "fresh pursuit" in light of Nebraska's identically worded fresh pursuit statute. The court defined "fresh pursuit" as a " 'pursuit instituted immediately and with intent to reclaim or recapture, where an animal has escaped, or a thief is *fleeing* with stolen goods, etc.' (Emphasis supplied.)" *Id.* at

555, 118 N.W.2d at 630. The court emphasized that the individual sought must be attempting to escape or fleeing to avoid an arrest, or at least have knowledge that he was pursued, and each case must be determined by the circumstances.

The requirement of "flight" was clearly satisfied in this case. The robbery was reported at 9:37 a.m., and the arrest was made between 9:45 and 9:50 a.m. Furthermore, the driver testified that "right after the bridge I realized that there was a police car behind us that was trying to stop us."

The defendant contends, however, the pursuit was valid only if Officer Wilson had probable cause to make an arrest at the time he crossed into Iowa.

This is too strict an interpretation of the statute which authorizes pursuit of a person "who is reasonably *suspected* of having committed a felony." (Emphasis supplied.) This is sufficient to authorize an investigatory stop. *State v. Ebberson*, 209 Neb. 41, 305 N.W.2d 904 (1981).

"Fresh pursuit" is "a relative term and has reference to time or distance, or both, depending on the facts of the case." *Reyes v. Slayton*, 331 F. Supp. 325, 327 (W.D. Va. 1971).

The history and purpose of the fresh pursuit statutes were stated in *Hutchinson v. State*, 38 Md. App. 160, 168, 380 A.2d 232, 236 (1977), as follows:

> "At the present time our most desperate criminals head straight across state lines after the commission of a crime, knowing that there is comparative safety beyond the border. For in the foreign state the pursuing officer from the state wherein the crime was committed is, in general, no longer an officer. This abnormality, so contrary to all justice and reason, is remedied in a simple manner by the Fresh Pursuit Act. Thereunder, the moment an officer in fresh pursuit of a criminal crosses a state line, the state he enters will authorize him to catch and arrest such criminal within its bounds. . . ."

The court concluded:

> Accordingly, we hold that the statute was intended to permit any member of an organized peace unit of any State to enter in fresh pursuit; to continue in fresh pursuit within the District; and to arrest the person pursued,

whom he has probable cause to believe, at the time of arrest, committed a felony in the place of the officer's jurisdiction.

(Emphasis omitted.) *Id.* at 172, 380 A.2d at 238. See, also, *State v. Tillman*, 208 Kan. 954, 494 P.2d 1178 (1972) (where police chasing robbers across the Missouri line were supplied with missing factor essential to probable cause only after they had entered the foreign state).

In *Charnes v. Arnold*, 198 Colo. 362, 600 P.2d 64 (1979), immediately following an accident, an officer received a description of a hit-and-run driver and a description of his car, including the license plate number. The officer ran a check on the license number and learned that it was registered to the defendant, who lived in a neighboring jurisdiction. The officer drove to that address, where he saw the defendant pull into his driveway. The lower court held that these actions did not constitute fresh pursuit because the officer "did not pursue the suspect's trail but merely followed a hunch." *Id.* at 364, 600 P.2d at 65. Reversing, the Colorado Supreme Court utilized its statutory definition of fresh pursuit, which is similar to Iowa's. The court explained that the plain language from the statutes and cases from other jurisdictions indicate three criteria to be used in an analysis of fresh pursuit: (1) That the police act without unnecessary delay; (2) That the pursuit must be continuous and uninterrupted, but there need not be continuous surveillance of the suspect nor uninterrupted knowledge of his whereabouts; and (3) That there be a relationship in time between the commission of the offense, the commencement of the pursuit, and the apprehension of the suspect.

The defendant further contends that the officers violated another provision of the fresh pursuit law when they failed to take the defendant before an Iowa magistrate. This, it is argued, made the arrest illegal and prohibited the use in court of the physical evidence obtained.

The applicable Iowa statute, Iowa Code Ann. § 806.2 (West 1979), provides:

Procedure following arrest

If an arrest is made in this state by an officer of another

> state in accordance with the provisions of section 806.1, the officer shall without unnecessary delay take the person arrested before a magistrate of the county in which the arrest was made, who shall conduct a hearing for the purpose of determining the lawfulness of the arrest. If the magistrate determines that the arrest was lawful the magistrate shall commit the person arrested to await for a reasonable time the issuance of an extradition warrant by the governor of this state or admit the person to bail for such purpose. If the magistrate determines that the arrest was unlawful the magistrate shall discharge the person arrested.

The statute prescribes a procedure to be followed after an arrest has been made. A violation of the statute does not affect the validity of the arrest which is complete before the statute has any application.

In *State v. Bonds*, 98 Wash. 2d 1, 653 P.2d 1024 (1982), *cert. denied* 464 U.S. 831, 104 S. Ct. 111, 78 L. Ed. 2d 112 (1983), the court held that the summary removal of an arrestee from Oregon to Washington did not make the arrest illegal and require the suppression of a confession even though the extradition statute had been ignored. The court said:

> [S]uch illegality does not constitute a violation of due process. *Gerstein v. Pugh*, 420 U.S. 103, 43 L. Ed. 2d 54, 95 S. Ct. 854 (1975); *Frisbie v. Collins*, 342 U.S. 519, 96 L. Ed. 541, 72 S. Ct. 509 (1952); *Mahon v. Justice*, 127 U.S. 700, 32 L. Ed. 283, 8 S. Ct. 1204 (1888); *Ker v. Illinois*, 119 U.S. 436, 30 L. Ed. 421, 7 S. Ct. 225 (1886). Nor, in our opinion, does it constitute reason for the operation of the exclusionary rule. The summary removal of defendant into Washington took only a few minutes and was accomplished peacefully, without threats and with defendant's concurrence. The improper interstate rendition was merely incidental to the arrest and represented no new intrusion into defendant's privacy. It represented more of an affront to the rights of the State of Oregon than of the defendant.

Id. at 14, 653 P.2d at 1032.

In *Jackson v. Olson*, 146 Neb. 885, 899, 22 N.W.2d 124, 132

(1946), this court said:

> "[I]t is settled by the decisions of this court that . . . there is nothing in the Constitution, treaties or laws of the United States which exempts an offender, brought before the courts of a State for an offence against its laws, from trial and punishment, even though brought from another State by unlawful violence, or by abuse of legal process."

See, also, *State v. Costello*, 199 Neb. 43, 256 N.W.2d 97 (1977).

The defendant's final argument is that the driver-owner's consent to search the trunk of the automobile was invalid. The determination of whether a consent to search is voluntarily given is a question of fact, and voluntariness is to be determined from the totality of the circumstances. *State v. Van Ackeren*, 194 Neb. 650, 235 N.W.2d 210 (1975). Other than the fact that the driver was in custody when the consent form was signed, there is no evidence that the consent was other than voluntary.

On direct examination Marianne McCormack testified that she had given the police permission to search her car. She made no contention that the consent to search was not voluntarily given.

"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. Garcia*, 216 Neb. 769, 773, 345 N.W.2d 826, 829 (1984).

From our examination of the record we find that the motion to suppress was properly overruled.

There is a plain error as to the sentence on count II. The minimum sentence for a person convicted as a habitual criminal is imprisonment for 10 years. Neb. Rev. Stat. § 29-2221 (Reissue 1979). See *State v. Gaston*, 191 Neb. 121, 214 N.W.2d 376 (1974). The sentence on count II was erroneous.

The sentence and judgment on count I are affirmed. The sentence on count II is vacated and the cause remanded for imposition of a proper sentence.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR RESENTENCING.

STATE OF NEBRASKA, APPELLEE, V. JAMES A. HATFIELD, APPELLANT.

356 N.W.2d 872

Filed October 12, 1984. No. 83-969.

1. **Criminal Law: Prosecuting Attorneys: Conflict of Interest.** A prosecutor who has previously represented the spouse of one who is now being prosecuted for a crime is not necessarily disqualified as a prosecutor unless the alleged criminal act arose out of the marital relationship or, because of such prior representation, the attorney has obtained confidential information which may be prejudicial to the interest of the defendant.
2. **Criminal Law: Assault: Evidence: Self-Defense.** The questions as to who was the aggressor, whether there existed in the mind of the defendant apprehension based upon reasonable grounds therefor of imminent peril to life or limb of the defendant so as to justify his using force, and whether the means adopted for his defense were reasonable and appropriate for that purpose, in view of all the circumstances surrounding him at the time, are all essentially questions of fact of which the judge or jury, as the case may be, is the sole judge.
3. **Criminal Law: Assault.** In dealing with a criminal charge all attempts to do physical violence which amount to a statutory assault are unlawful and a breach of the peace, and a person cannot consent to an unlawful assault.
4. **Courts: Ordinances: Appeal and Error.** Courts of general jurisdiction will not take judicial notice of municipal ordinances not present in the record, nor will the Supreme Court.
5. **Records: Appeal and Error.** In a review on the record, where the bill of exceptions contains nothing to the contrary, the reviewing court will be limited in its consideration of the particular error alleged to a determination of whether the transcript supports the judgment.

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

John R. Brogan of Brogan & McCluskey, for appellant.

Charles W. Campbell and Vincent Valentino, for appellee.

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

HASTINGS, J.

Following a bench trial in the county court for York County, the defendant was convicted of an assault based on a York, Nebraska, city ordinance. He was sentenced to a jail term of 10 days and was fined $100. His conviction and sentence were affirmed by the district court.

Defendant appeals to this court and assigns as error the following: (1) The court failed to disqualify the deputy city attorney from prosecuting this complaint; (2) The record fails to support a conviction for assault; (3) The sentence imposed was void as being contrary to the city ordinance; and (4) The district court erred in failing to take judicial notice of the applicable city ordinance. We affirm.

During the late afternoon of January 13, 1983, the defendant and the victim had been drinking at the Midway Bar in York, Nebraska, and became involved in an argument. The defendant invited the victim to go outside, where they would settle the dispute. Both men eventually went outside the tavern. A fight ensued in which the victim was badly beaten. According to an eyewitness, the victim made no effort to fight, but was just trying to cover up. The defendant, on the other hand, spent about 10 minutes punching and kicking the victim. The defendant also grabbed the victim by the hair and would hold up his face so that he could hit him, and, while the victim was still lying on the ground, the defendant repeatedly kicked him. The victim's specific injuries included multiple facial abrasions, contusions around both eyes, black eyes, bleeding into the whites of the eyes, a fractured nose, and lacerations of the lower lip and of the mouth.

The defendant had moved to disqualify the prosecuting attorney in this case because one of five members of the attorney's law firm had represented the defendant's wife in a marriage dissolution action. Although a final decree had been entered some time earlier, it is claimed that there was still some activity, apparently with reference to a property settlement. Defendant's wife was in no way involved in the present litigation. The court would not order the prosecutor to be disqualified. This is the basis of the defendant's first assignment of error.

The defendant states as a proposition of law that a prosecutor should avoid the appearance or reality of a conflict of interest with respect to his official duties. In support of that statement, he cites us to the ABA Standards Relating to the Prosecution Function and the Defense Function § 1.2 (Approved Draft 1971). That standard reads in part as follows:

> 1.2 Conflicts of interest.
>
> (a) A prosecutor should avoid the appearance or reality of a conflict of interest with respect to his official duties.
>
> (b) A conflict of interest may arise when, for example,
>
> (i) a law partner or other lawyer professionally associated with the prosecutor or a relative appears as, or of, counsel for a defendant.

We do not disagree with that principle, but certainly the facts of this case do not in any way parallel the example set forth above.

Defendant also cites us to a number of cases, including *Fitzsimmons v. State*, 116 Neb. 440, 218 N.W. 83 (1928), in which a judgment of conviction was reversed because of the appointment as a special assistant to the prosecutor of a lawyer who still retained some partnership interest in the practice of law with the attorneys representing the defendant. That case is not applicable here.

Ress v. Shepherd, 84 Neb. 268, 120 N.W. 1132 (1909), stands for the proposition that no public prosecutor may become financially interested in a civil suit depending upon facts that might warrant the commencement of a criminal prosecution. Again, such facts are not present in this case.

In *Stewart v. McCauley*, 178 Neb. 412, 133 N.W.2d 921 (1965), this court came to the obvious conclusion that a county attorney who had represented the natural parents in a child custody dispute was disqualified from acting in a juvenile court proceeding to provide for the welfare of that same child claimed to have been neglected by the parents. That situation is not in any way similar to the facts of the present case.

On the other hand, this court affirmed the action of the district court in refusing to disqualify a prosecuting attorney in a prosecution for unlawfully detaining a police officer. The offense was committed with the intention on the part of the defendant of committing a subsequent and different crime against the person of that prosecuting attorney. *State v. Boyce*, 194 Neb. 538, 233 N.W.2d 912 (1975). The court agreed that, generally, a prosecuting attorney who has a personal interest in the obtaining of a conviction of a defendant, as where such attorney is the *actual* victim of the alleged crime, or his property is the subject of it, *may* be disqualified.

We do agree that a prosecuting attorney who himself, or a member of his same firm, has represented the spouse of a defendant should be disqualified from prosecuting such defendant for a crime arising out of the marriage relationship. Disqualification would also be proper where, because of such representation, it is shown that the attorney has obtained confidential information which would be helpful in such criminal prosecution. See, *Ganger v. Peyton*, 379 F.2d 709 (4th Cir. 1967); *Davenport v. State*, 157 Ga. App. 704, 278 S.E.2d 440 (1981); *Lykins v. State*, 288 Md. 71, 415 A.2d 1113 (1980).

Personal animosity on the part of the prosecuting attorney toward the defendant of such a degree that it was likely to color the prosecutor's judgment as to whether to prosecute, or would cause such attorney to make highly inflammatory and prejudicial statements to the court during trial, may be sufficient to cause a conviction to be set aside. *May v. Commonwealth*, 285 S.W.2d 160 (Ky. 1955) (prosecution for assault where prosecuting attorney was the victim); *State v. Marcotte,* 229 La. 539, 86 So. 2d 186 (1956). See, also, Annot., 31 A.L.R.3d 978 (1970).

The only suggestion of animosity in this case was the bald assertion by the defendant that he had heard that the prosecutor's associate, who had represented his wife in the dissolution case, "didn't like me." On the other hand, there was testimony that the prosecutor was not even aware of the domestic relations representation until after the complaint had been filed. There is no merit to the first assignment of error.

In support of his claim that the record fails to sustain a conviction for assault, the defendant argues that the victim's agreement to enter into a fight constitutes an absolute defense to the charge of assault. He also states that the reputation of the defendant for peaceful behavior must be contrasted with the reputation of the victim for violent behavior.

Considering the second half of that argument first, the defendant is talking about the defense of justification, or "self-defense." The court received opinion testimony as to the reputations of both the defendant and the victim. It also heard direct testimony of the facts leading up to the altercation and obviously chose to find against the defendant on his claimed

defense. The questions as to who was the aggressor, whether there existed in the mind of the defendant apprehension based upon reasonable grounds therefor of imminent peril to life or limb of the defendant so as to justify his using force, and whether the means adopted for his defense were reasonable and appropriate for that purpose, in view of all the circumstances surrounding him at the time, are all essentially questions of fact of which the judge or jury, as the case may be, is the sole judge. *State v. Kimbrough*, 173 Neb. 873, 115 N.W.2d 422 (1962).

Although we do not have the city ordinance before us, under statutory law the defendant was guilty of either assault in the first degree or assault in the third degree, i.e., "he intentionally or knowingly causes serious bodily injury to another person," Neb. Rev. Stat. § 28-308(1) (Reissue 1979), or "[i]ntentionally, knowingly, or recklessly causes bodily injury to another person." Neb. Rev. Stat. § 28-310(1)(a) (Reissue 1979).

Although there is authority to the contrary, in dealing with a criminal charge all attempts to do physical violence which amount to a statutory assault are unlawful and a breach of the peace, and a person cannot consent to an unlawful assault. *Morris v. Miller*, 83 Neb. 218, 119 N.W. 458 (1909); *Archer v Burton*, 91 Mich. App. 57, 282 N.W.2d 833 (1979); *State v. Roby*, 194 Iowa 1032, 188 N.W. 709 (1922); *Banovitch v. Commonwealth*, 196 Va. 210, 83 S.E.2d 369 (1954); *People v. Samuels*, 250 Cal. App. 2d 501, 58 Cal. Rptr. 439 (1967); *State v. Brown*, 154 N.J. Super. 511, 381 A.2d 1231 (1977); *Barholt v. Wright*, 45 Ohio St. 177, 12 N.E. 185 (1887), citing *Champer v. The State of Ohio*, 14 Ohio St. 437 (1863).

The defendant next claims that the sentence is void because the city ordinance provides for a fine not to exceed $300 *or* imprisonment not to exceed 30 days. The problem with that contention is that a copy of the ordinance is nowhere to be found in the record. It appears only in defendant's brief. Reference is made to it in the complaint found in the transcript, which recites "ASSAULT 0-30 Days 0-$300 Fine City Ord. 24-23."

The defendant insists that the district court should have taken judicial notice of that ordinance under the authority of *Wells v. State*, 152 Neb. 668, 42 N.W.2d 363 (1950). However,

that case involved an appeal from the municipal court to the district court, which at the time resulted in a trial de novo. Presently, appeals in criminal matters taken from the county court are reviewed only for error appearing on the record made in county court. Neb. Rev. Stat. § 24-541.06 (Cum. Supp. 1982).

As stated in *Andrews v. City of Fremont*, 213 Neb. 148, 151-52, 328 N.W.2d 194, 196 (1982), "Courts of general jurisdiction will not take judicial notice of municipal ordinances not present in the record, nor will the Supreme Court." In a review on the record, where the bill of exceptions contains nothing to the contrary, the reviewing court will be limited in its consideration of the particular error alleged to a determination of whether the transcript supports the judgment. *Andrews v. City of Fremont, supra.*

The judgment of the court below was correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. THOMAS L. ABRAHAM, APPELLANT.

356 N.W.2d 877

Filed October 12, 1984. No. 84-166.

1. **Search Warrants: Probable Cause: Appeal and Error.** The duty of this court in determining whether probable cause to issue a search warrant exists is only to ensure that the magistrate had a substantial basis for concluding that such existed.
2. **Search Warrants: Probable Cause.** Probable cause is a reasonable suspicion founded on articulable facts.
3. _____: _____. In evaluating the showing of probable cause necessary to support the issuance of a search warrant, only the probability, and not a prima facie showing, of criminal activity is required.
4. _____: _____. A search warrant may be issued for a location where it is probable that the property described would be found.

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

James Martin Davis of Dolan, Davis & Gleason, for appellant.

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

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

CAPORALE, J.

Defendant, Thomas L. Abraham, appeals from the conviction, following a bench trial, and jail sentence of 4 months on the charge of being in possession of a controlled substance, to wit, cocaine. In this companion case to *State v. Brennen, ante* p. 454, 356 N.W.2d 861 (1984), decided this day, Abraham questions the validity of the interceptions of certain telephonic communications and of the search warrant. We affirm.

This case arises out of the same investigation and orders authorizing the interception of telephonic communications discussed in *Brennen, supra*. Although Abraham was not mentioned in the affidavit, or amendment thereto, underlying those orders, he was discovered through the interceptions authorized by them. The issues which Abraham raises with respect to the validity of the interceptions are the same issues which were raised in *Brennen, supra*. Having determined that the orders in *Brennen* were lawful, it follows that the interceptions of Abraham's conversations under those orders were also lawful.

The sole question remaining, therefore, is that raised by Abraham's claim that there was not sufficient probable cause to issue a warrant for the search of Abraham's residence and person.

The affidavit offered in support of the application for the search warrant incorporated the information offered in support of the interceptions of telephonic communications. The former document establishes that in February of 1982 a confidential informant advised a police sergeant that Abraham, of a particular address in Omaha, was a cocaine

dealer. That officer independently investigated the information about Abraham provided by the informant and found it to be accurate. The informant, wired with an electronic device, then went to Abraham's residence where he engaged in a conversation with Abraham, which was overheard by the investigating officer. According to that officer, the conversation he overheard indicated that Abraham was in fact a cocaine distributor who was willing to deliver cocaine. Those documents also establish that the defendant in *Brennen, supra*, contacted Abraham's residence by phone in January of 1982. Telephone conversations on March 14 and 15, 1982, among Brennen and others, including Abraham and one Linda, reveal that Brennen had a supply of cocaine he was preparing to deliver. Linda contacted Brennen on March 14 to get "one of them things." Brennen advised Linda to call back later. On March 15 telephone conversations took place between Brennen and Abraham wherein Brennen told Abraham that he, Brennen, would come to Abraham's residence that evening. Police officers followed Brennen to Abraham's residence. After a period of time the two were followed to a bar which had been part of the ongoing drug investigation. The search warrant was then obtained on March 15.

As will be seen from the discussion which follows, the totality of the foregoing circumstances supports a finding of probable cause to believe that cocaine was present at Abraham's residence. There was also probable cause to believe that Brennen delivered said substance to Abraham at that location shortly before the warrant was issued. There further existed probable cause to believe Abraham was currently distributing cocaine and to believe that the cocaine remained at his residence.

That being so, we need not determine at this time whether any provision of the Nebraska Constitution requires something more with respect to search warrants than does the fourth amendment to the U.S. Constitution, as recently interpreted by the U.S. Supreme Court in *United States v. Leon,* 468 U.S. ____, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984), and *Massachusetts v. Sheppard,* 468 U.S. ____, 104 S. Ct. 3424, 82 L. Ed. 2d 737 (1984). In those cases the U.S. Supreme Court

held that the fourth amendment does not require, during the prosecution's case in chief, the exclusion of evidence obtained by law enforcement officers in an objectively reasonable reliance upon a search warrant issued by an impartial magistrate, but which is later found to be invalid.

Following the lead of the U.S. Supreme Court in *Illinois v. Gates,* 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983), Nebraska adopted a "totality of the circumstances" analysis for probable cause determinations with respect to search warrants. *State v. Gilreath*, 215 Neb. 466, 339 N.W.2d 288 (1983); *State v. Arnold*, 214 Neb. 769, 336 N.W.2d 97 (1983); *State v. Robish*, 214 Neb. 190, 332 N.W.2d 922 (1983). Under that standard the duty of this court is only to ensure that the magistrate had a substantial basis for concluding that probable cause existed. *State v. Gilreath, supra.* Probable cause is a reasonable suspicion founded on articulable facts. *State v. Robish, supra.* In evaluating the showing of probable cause necessary to support the issuance of a search warrant, only the probability, and not a prima facie showing, of criminal activity is required. *State v. Stickelman*, 207 Neb. 429, 299 N.W.2d 520 (1980). Moreover, a search warrant may be issued for a location where it is probable that the property described would be found. *State v. LeBron*, 217 Neb. 452, 349 N.W.2d 918 (1984).

As noted earlier, this case falls within the above-cited principles for finding probable cause to issue a search warrant; the warrant was validly issued.

The record failing to sustain Abraham's various assignments of error, the conviction and sentence are affirmed.

AFFIRMED.

GRANT, J., not participating.

SHANAHAN, J., dissenting.

As expressed in the dissent registered in the companion case, *State v. Brennen, ante* p. 454, 356 N.W.2d 861 (1984), there has been an invalid wiretap. Since the "totality of the circumstances" is predicated on the invalid wiretap in *State v. Brennen* as the foundation for the search warrant in this case, the search warrant regarding Abraham is invalid.

WHITE, J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V. JACK L. FISHER, APPELLANT.

356 N.W.2d 880

Filed October 19, 1984. No. 84-050.

1. **Sentences: Words and Phrases.** "Jail time" is commonly understood to be the time an accused spends in detention pending trial and sentencing.
2. **Convictions: Sentences.** The fact that a conviction is later reversed does not transform the period of time served in prison as a result of that conviction to jail time for which credit must be given.
3. **Constitutional Law: Criminal Law.** It is differing treatment accorded on the basis of an arbitrary and unreasonable classification which is prohibited by the fourteenth amendment to the U.S. Constitution.
4. **Sentences.** Credit for jail time must be granted where an indefinite sentence up to the maximum prison term possible is imposed.
5. **Judgments: Appeal and Error.** A proper decision will not be disturbed on review merely because it was rendered for the wrong reason.

Appeal from the District Court for Hall County: RICHARD L. DEBACKER, Judge. Affirmed as modified, and cause remanded with directions.

Jack L. Fisher, pro se.

Paul L. Douglas, Attorney General, and Timothy E. Divis, for appellee.

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

CAPORALE, J.

Defendant, Jack L. Fisher, appeals from the denial of his second post conviction motion seeking credit as jail time for the periods of incarceration following his conviction of having made certain threats but preceding his sentencing for being a felon in possession of a firearm. We affirm as modified and remand with directions.

It appears Fisher was arrested and jailed in the Hall County jail on November 16, 1982. He was charged with having made "terroristic threats" and, as the result of a separate incident, with having committed a robbery.

He was convicted on April 14, 1983, of having made terroristic threats and on May 20, 1983, was sentenced on that conviction to a term of imprisonment at the Nebraska Penal

and Correctional Complex of not less than 18 months nor more than 5 years. He was given credit for certain time he spent in jail awaiting disposition of this charge.

As the result of a plea bargain, the robbery charge was reduced to that of being a felon in possession of a firearm. Upon conviction of that reduced charge Fisher was sentenced on June 9, 1983, to a term of imprisonment at the Nebraska Penal and Correctional Complex for a period of not less than 18 months nor more than 5 years, to be served concurrently with the earlier terroristic threats sentence. No jail time credit was given when the later sentence was imposed.

On November 2, 1983, Fisher filed a motion for post conviction relief, seeking credit for the entire period of his incarceration from November 16, 1982, the date of his arrest, to the date he was sentenced as being a felon in possession of a firearm, June 9, 1983. The district court granted jail time credit from the date of arrest to the date of Fisher's conviction on the terroristic threats charge, April 14, 1983.

On November 18, 1983, this court filed its opinion in *State v. Hamilton*, 215 Neb. 694, 340 N.W.2d 397 (1983), holding the terroristic threats statute to be unconstitutional. On December 12, 1983, Fisher filed his second and present motion for post conviction relief, seeking credit as jail time for all the time he has been incarcerated following his April 14, 1983, conviction for having made terroristic threats to the June 9, 1983, sentence for being a felon in possession of a firearm. The district court denied any relief. On February 17, 1984, this court applied the *Hamilton* ruling to Fisher's appeal from his terroristic threats conviction and vacated his sentence on that charge. *State v. Fisher*, 216 Neb. 530, 343 N.W.2d 772 (1984).

As framed by Fisher's assignments of error, the dispositive issues which emerge from this appeal are whether the refusal of the district court to grant credit for any of the time Fisher has spent incarcerated for having made terroristic threats prior to his being sentenced as a felon in possession of a firearm (1) results in a total period of incarceration which is longer than the maximum statutory period prescribed for that latter offense and (2) constitutes a violation of the equal protection clause of the fourteenth amendment to the U.S. Constitution.

Fisher characterizes the time he was incarcerated as the result of the terroristic threats charge, both from April 15 through May 19, 1983 (before he was sentenced on the felon in possession of a firearm charge), and from May 20 through June 9, 1983 (on which later date he was sentenced on the latter charge), as jail time. In this claim he is, as we shall see, but partially correct.

Neb. Rev. Stat. § 83-1,106(1) (Reissue 1981) provides:

> Credit against the maximum term and any minimum term may be given to an offender for time spent in custody as a result of the criminal charge for which a prison sentence is imposed or as a result of the conduct on which such a charge is based. This shall specifically include, but shall not be limited to, time spent in custody prior to trial, during trial, pending sentence, pending the resolution of an appeal, and prior to delivery of the offender to the custody of the Department of Correctional Services.

"Jail time" is commonly understood to be the time an accused spends in detention pending trial and sentencing. See, *State v. Rathbun*, 205 Neb. 329, 287 N.W.2d 445 (1980); *State v. Blazek*, 199 Neb. 466, 259 N.W.2d 914 (1977); § 83-1,106(1). The period of time which Fisher spent incarcerated between his terroristic threats conviction and his felon in possession of a firearm conviction was not time spent awaiting trial and sentencing for the second conviction. It was time served after sentencing on the first conviction for what was then defined as a criminal offense. It was therefore prison time, not jail time.

The fact that the conviction for which Fisher was first imprisoned was later reversed does not serve to magically transform that period of time from prison time to jail time for which credit must be given.

One need only examine what happens when the conviction of an accused charged with but a single crime is reversed and the charge dismissed to understand the fatal flaw in Fisher's argument. Such an accused is discharged from custody, but no one can give back to him the days he wrongfully spent in prison. There is no way to properly "credit" such an accused's life with those lost days. And yet, that is essentially what Fisher is demanding the State do when he contends that he is entitled to

jail time credit for the period he served toward his vacated terroristic threats prison sentence.

The Illinois Appellate Court addressed a similar issue in *People v. Fischer*, 100 Ill. App. 3d 195, 426 N.E.2d 965 (1981). The defendant in that case was convicted of voluntary manslaughter because of an incident which occurred in 1978, and sentenced to 7 years' imprisonment. On appeal the defendant argued he should receive credit against that sentence for the time he had served pursuant to a 1965 conviction for possession of marijuana. Defendant requested "compensation" for that time because the statute under which he was convicted in 1965 was later declared unconstitutional. Defendant based his claim on the Illinois Constitution, which provided in part: "Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. . . ." Ill. Const. art. 1, § 12. The Illinois court found defendant's argument to be "patently without merit," stating:

> In fact, if defendant were given the credit he now requests, this court would be encouraging the commission of crime. A defendant who had wrongly served a prison sentence would then have license to commit a "free" crime or a crime with a diminished sentence. We cannot condone such an absurd result.

100 Ill. App. 3d at 201, 426 N.E.2d at 970.

Fisher's argument here is based upon essentially the same contention as was the defendant's argument in the Illinois case, that he should somehow be compensated for the time he spent in prison for the terroristic threats sentence. Although Fisher's argument initially may appear to be stronger than the argument in the Illinois case because the sentences here ran concurrently and so overlapped in time, while in the Illinois case the prior sentence was removed in time from the subsequent sentence by several years, the net result is the same. Both cases involve credit claimed for time served under a conviction which was later reversed. The Illinois court's policy analysis applies with equal force to this case. To credit Fisher for the time he served for his conviction of making terroristic threats would in effect give him license to commit a "free" crime or a crime with a diminished

sentence.

It is also important to note that the convictions for which Fisher was sentenced to imprisonment were for two separate offenses arising out of two separate incidents. Fisher was arrested on November 16, 1982, and charged with making terroristic threats in an incident involving his wife. The robbery charge, which later was bargained down to being a felon in possession of a firearm, arose from an alleged robbery of a different victim on October 29, 1982. In *State v. Doherty*, 281 N.W.2d 84 (S.D. 1979), the defendant argued that the time he had served on a prior invalid rape sentence should be credited on a subsequent sentence imposed for burglary, a totally unrelated crime. The court, holding that the credit should not be given, stated:

> Under such circumstances, the applicable rule is that time served by a defendant under a void judgment and sentence will not be credited upon another sentence imposed upon defendant under a judgment and sentence for an entirely different offense. . . . To hold otherwise, it has been noted: "[W]ould mean that the situation could be created wherein a person might have several years of prison time to apply to a sentence for a crime that he has not as yet committed *or for which he has not yet been prosecuted*." *Bauers v. Yeager*, 261 F. Supp. 420, 424 (D.N.J. 1966) (emphasis supplied).

Id. at 85.

Since Fisher was convicted of two totally unrelated offenses, the rationale in *Doherty* would apply in this case as well. See, also, 24B C.J.S. *Criminal Law* § 1995(4) at 641 (1962), which states:

> Even under statutes providing that time spent in jail prior to conviction may be credited toward the term of imprisonment imposed on conviction, a period of confinement under conviction of one crime may not be deducted from the term of a sentence imposed on conviction of another crime; and this is so even though the prior conviction was subsequently set aside . . . .

The discretionary power conferred by § 83-1,106(2) to credit an offender for time spent in custody under a prior sentence if

he is later reprosecuted and resentenced for the same offense or for another offense based on the same conduct, a codification of our prior holding in *State v. King*, 180 Neb. 631, 144 N.W.2d 438 (1966), that the crediting of time served under a void sentence against a sentence imposed upon a new conviction for the same offense is a matter within the discretion of the sentencing court, has no application here, because the sentences imposed upon Fisher were for different offenses based on different conduct.

Therefore, there is no legal basis for crediting Fisher with the time he spent incarcerated from and after May 20, 1983, when he was sentenced for having made terroristic threats.

The period from April 15 through May 19, 1983, during which Fisher was incarcerated while no sentence had been imposed for any offense is, however, a different matter. Since Fisher was sentenced to an indefinite term up to the maximum prison term possible for being a felon in possession of a firearm, Neb. Rev. Stat. §§ 28-105 and 28-1206(1) and (3) (Reissue 1979), he must be given credit for those 35 days of jail time. *State v. Holloway*, 212 Neb. 426, 322 N.W.2d 818 (1982), required the granting of credit for jail time where the prison sentence imposed was from 20 months to 5 years in the face of a statute which made 5 years the maximum term. See, also, *State v. Rathbun*, 205 Neb. 329, 287 N.W.2d 445 (1980); *State v. Blazek*, 199 Neb. 466, 259 N.W.2d 914 (1977).

As to the equal protection claims, there is an obvious and important difference between an offender who serves all or any part of a sentence which is later vacated and who is then retried for the same crime and an offender who serves all or any part of a sentence which is later vacated but who is not retried because the statute under which he was convicted was determined to be unconstitutional. The retried offender is not being given a "free" crime, as discussed earlier; he is merely being made to pay the appropriate price, taking into account the total time served, for the offense he committed. Therefore, the differing discretionary treatment permitted as between the two types of offenders by § 83-1,106(2) rests upon a real difference between the two categories of offenders and is not an arbitrary and unreasonable classification. That being so, there is no equal

protection violation of the fourteenth amendment to the U.S. Constitution for the aforesaid period of time. See *State v. Maez*, 204 Neb. 129, 281 N.W.2d 531 (1979), holding that it is differing treatment accorded on the basis of an arbitrary and unreasonable classification which is prohibited by the fourteenth amendment to the U.S. Constitution.

Neither is there any merit to Fisher's claim that he is being penalized because he is indigent. He argues that were he not indigent, he could have posted bail and therefore bought out of his jail time. As we have seen, neither an indigent nor a moneyed offender would be given jail time credit for prison time served pursuant to a sentence imposed for the violation of a criminal statute subsequently found to be unconstitutional.

In the interest of completeness we comment on Fisher's speculation that the district court may have denied his second post conviction request because it was a subsequent motion for post conviction relief from the same conviction and sentence. He notes the rule that once a motion for post conviction relief has been judicially determined, any subsequent motion will not be entertained unless the subsequent motion affirmatively shows on its face that the basis relied upon for relief was not available at the time of filing the prior motion. He calls attention to the fact that *State v. Hamilton*, 215 Neb. 694, 340 N.W.2d 397 (1983), had not been decided at the time of his first motion, and, therefore, the unconstitutionality of the terroristic threats statute was not then available to him. The short answer to this concern, even if the record were to show such to have been the basis of the trial court's decision, and it does not, is that a proper decision will not be disturbed on review merely because it was rendered for the wrong reason. *Nerud v. Haybuster Mfg.*, 215 Neb. 604, 340 N.W.2d 369 (1983).

The district court having erred only in part, its decision is affirmed as modified and the cause remanded for further proceedings consistent with this opinion.

AFFIRMED AS MODIFIED, AND CAUSE REMANDED WITH DIRECTIONS.

GRANT, J., dissenting in part.

While I agree with the majority that Fisher is entitled to credit

for 35 days of jail time covering the period of April 15 through May 19, 1983, I respectfully dissent from the failure to credit him with the 21 days bounded by May 20 and June 9, 1983. Fisher has specifically requested credit for the entire 56 days from April 15 through June 9, 1983. The rationale upon which the majority relies in denying the additional 21 days' credit is that "[a] defendant who had wrongly served a prison sentence would then have license to commit a 'free' crime or a crime with a diminished sentence." *People v. Fischer*, 100 Ill. App. 3d 195, 201, 426 N.E.2d 965, 970 (1981). That the law of this state cannot tolerate such a scenario is beyond argument. However, allowing credit for the additional time in this peculiar, particular fact situation would not tread upon that policy, as will be noted below.

In *Miller v. Cox*, 443 F.2d 1019 (4th Cir. 1971), the fourth circuit distinguished three categories of defendants and computation of each defendant's sentence. The first situation, where a conviction is set aside and the prisoner is retried and convicted of the same offense, is inapplicable here. "A second and distinct situation is presented where a prisoner serving consecutive sentences on several convictions succeeds in having one of the sentences invalidated after it has been fully or partially served." *Id.* at 1020. This is the situation in the instant appeal. The third category includes an individual who, "after his conviction has been invalidated and he has regained his freedom, commits a new crime and receives a new sentence. The issue is then posed whether credit should be allowed on that sentence for time served on the prior invalidated conviction." *Id.* at 1021. The majority's reasoning addresses this third fact pattern.

The fourth circuit's treatment of the third category matches that of the majority. Both would condemn the practice of allowing a prisoner to establish " 'a line of credit for future crimes.' " *Id.* at 1021. I agree. However, I feel that the instant appeal involves circumstances factually distinct from the situation to which the majority's rationale applies. This case involves the second category suggested in *Miller v. Cox, supra*. I would apply the fourth circuit's reasoning and grant credit for the entire 56 days. "Common sense and fundamental fairness

require that under such circumstances the state should not ignore the period of imprisonment under the invalid sentence when an appropriate remedy is so readily available." *Id.* at 1021.

To allow Fisher credit for the 21 days served after sentencing on the invalid charge does not create a risk of allowing him a "free crime." He was already in jail. The credit would be applied to a sentence Fisher is serving for a crime already committed at the time of his arrest on the invalid charge.

To deny Fisher the credit would be to punish him for violating a statute we have declared to be unconstitutional. This is one of those rare cases in which we can return to Fisher the days wrongfully exacted from him under an unconstitutional law. I believe that fundamental fairness requires that we do so.

SOUTH SIOUX CITY STAR, APPELLEE, V. ILA M. EDWARDS, APPELLANT, VEARL E. EDWARDS, DOING BUSINESS AS EDWARDS IGA, APPELLEE.

357 N.W. 2d 178

Filed October 26, 1984. No. 83-373.

1. **Actions: Breach of Contract.** A suit to recover monetary damages for services rendered presents an action at law for the breach of a contract.
2. **Partnerships: Evidence: Juries.** Where the evidence is contradictory, the determination of whether a partnership exists presents questions of fact for the jury.
3. **Judgments: Appeal and Error.** Where a jury is waived in a law action, the disposition of the trial court has the effect of a jury verdict and is not to be disturbed on appeal unless it is clearly wrong.
4. **Partnerships: Words and Phrases.** A partnership is a contract of two or more competent persons to place their money, effects, labor, or skill, or some or all of them, in lawful commerce or business, and to divide the profit or bear the loss in certain proportions.
5. **Partnerships: Intent.** The intention to form a partnership, where in dispute, is to be ascertained objectively from all the evidence and circumstances.
6. _____: _____. The sharing of profits is a primary factor to be considered in ascertaining the intention of the parties to form a partnership.

7. _____: _____. The extent to which one has a voice in the management of the business is a factor to be considered in ascertaining the intention to form a partnership.
8. **Partnerships.** The fact that a wife signs notes, security agreements, or financing statements with her husband is not, without further explanation of the circumstances, determinative that a partnership exists.
9. **Partnerships: Estoppel: Evidence.** In order to prove a partnership by estoppel, there must be evidence that a nonpartner held himself or herself out as a partner, or permitted himself or herself to be so held out, and that the third person relied on that misrepresentation to his or her detriment.

Appeal from the District Court for Dakota County: FRANCIS J. KNEIFL, Judge. Reversed and remanded with directions to dismiss.

Kurt A. Hohenstein, for appellant.

Mohummed Sadden, for appellee Star.

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

CAPORALE, J.

Defendant-appellant, Ila M. Edwards, contends the evidence does not support the $9,844.41 judgment entered against her, following a trial without a jury, for advertising services rendered to Edwards IGA grocery store by plaintiff-appellee, South Sioux City Star. For the reasons hereinafter stated we conclude the evidence does not support the finding that Mrs. Edwards was her husband's business partner in the operation of Edwards IGA, and therefore reverse with directions to dismiss the action.

Shortly after the Star instituted the present action against Mr. and Mrs. Edwards in 1982, Mr. Edwards sought certain relief under the federal Bankruptcy Reform Act of 1978. The Star then proceeded against Mrs. Edwards, taking the position she was a partner in the operation of Edwards IGA and therefore liable for the partnership's debts. Mrs. Edwards denied she was her husband's business partner.

We must first settle the scope of our review. As a suit to recover monetary damages for services rendered, this case presents an action at law for the breach of a contract, *Rudolf v. Tombstone Pizza Corp.*, 214 Neb. 276, 333 N.W.2d 673 (1983),

and *Grubbs v. Kula*, 212 Neb. 735, 325 N.W.2d 835 (1982), in which the principal issue is whether a partnership existed. Where the evidence is contradictory, the determination of whether a partnership exists presents questions of fact for the jury. *Carlson v. Peterson*, 130 Neb. 806, 266 N.W. 608 (1936); *Interstate Airlines, Inc. v. Arnold*, 124 Neb. 546, 247 N.W. 358 (1933); *Blue Valley State Bank v. Milburn*, 120 Neb. 421, 232 N.W. 777 (1930). A jury having been waived, the disposition of the trial court in these circumstances has the effect of a jury verdict and is not to be disturbed on appeal unless it is clearly wrong. *West Town Homeowners Assn. v. Schneider*, 215 Neb. 905, 341 N.W.2d 588 (1983); *Grubbs v. Kula, supra*. Thus, the question is whether the trial court's finding of liability on the part of Mrs. Edwards is clearly wrong. We conclude that it is.

The Star's managing editor, Henry Trysla, testified it was his understanding that the grocery store was a "family owned business." He admitted, however, that he spoke with Mrs. Edwards "very few" times about advertising, since "[s]he was not around." Billings were sent directly to the store. The substance of the Edwardses' testimony is that although Mrs. Edwards had done bookkeeping work at the store from 1971 to perhaps as late as 1974, she had "basically had no dealings in this business" since 1974 or 1975. She at no time dealt directly with any suppliers, made any management decisions, ordered any food or supplies, supervised any employees, or placed any advertising orders. The leases for the store were executed solely by Mr. Edwards. The Edwardses filed joint tax returns in connection with which the business schedules listed them both as proprietors of the store. The Edwardses' accountant, James Getting, testified the latter was done only to identify to whose returns the schedules applied. No partnership tax returns were ever filed. Certain security agreements and financing statements executed for the operation of the store were signed by both Mr. and Mrs. Edwards, while others were signed only by Mr. Edwards. One creditor testified its policy was "to require the spouse's signature in most cases." There is no evidence that Mrs. Edwards contributed to the resources of the business nor that she shared in the profits or losses of the business, except as the wife of Mr. Edwards.

Baum v. McBride, 143 Neb. 629, 630, 10 N.W.2d 477, 478 (1943), quoting *Waggoner v. First Nat. Bank of Creighton*, 43 Neb. 84, 61 N.W. 112 (1894), defines a partnership as " 'a contract of two or more competent persons to place their money, effects, labor, skill, or some or all of them, in lawful commerce or business, and to divide the profit or bear the loss in certain proportions.' " Although the existence of a partnership depends upon the intention of the parties to form such an entity, that intention, where in dispute, is to be ascertained objectively from all the evidence and circumstances. *Byram v. Thompson*, 154 Neb. 756, 49 N.W.2d 628 (1951); *Baum v. McBride, supra*.

The sharing of profits is a primary factor to be considered in ascertaining the intention of the parties. *Frisch v. Svoboda*, 182 Neb. 825, 157 N.W.2d 774 (1968), held that the absence of a mutual interest in the profits or benefits of an undertaking is conclusive that a partnership does not exist. See, also, Neb. Rev. Stat. § 67-307(4) (Reissue 1981), which provides that the receipt of a share of the profits of a business, with certain exceptions not relevant here, is prima facie evidence that one is a partner.

Another of the factors to be considered is the extent to which one has a voice in the management of the business. *Frisch v. Svoboda, supra*.

Applying the above principles to the facts of this case, it is evident that there are no circumstances from which an intention to form a partnership may be imputed to the Edwardses. The evidence shows only that Mr. Edwards supported his family with money made from operating the store, not that Mrs. Edwards had a direct right to a certain percentage of the store's profits. Such evidence may indicate the existence of a sound marriage, but it certainly does not establish a business partnership. See *In re Estate of Carman*, 213 Neb. 98, 327 N.W.2d 611 (1982), which held that a widow's contention that she did more than merely perform as a farm wife and in fact functioned as a partner in her deceased husband's farming operation did not, in the absence of an express contract to compensate her for those extra and unusual services, entitle her to remove from the augmented estate one-half the value of the

jointly produced and acquired assets. Were the evidence in this case to be held sufficient to establish a partnership, every spouse would become a partner in the other spouse's occupation if the working spouse's income were used to support the family. This cannot be.

The trial judge was persuaded that a partnership existed because the Edwardses filed joint tax returns with schedules which listed both of them as proprietors. However, the accountant who prepared the filings explained, as stated earlier, why the schedules were so prepared, and testified further that the returns would not be proper filings for a partnership and that the Edwardses never represented to him they were partners.

Neither is the fact that Mrs. Edwards signed a note and some security agreements and financing statements indicative that a partnership existed. In *Ogallala Fertilizer Co. v. Salsbery*, 186 Neb. 537, 184 N.W.2d 729 (1971), a case denying a grain supplier recovery from a farm wife on the theory she was her husband's partner, we said the fact that a wife signs notes with her husband is not, without further explanation of the circumstances, determinative that a partnership exists. The only explanation of the circumstances in this case is that one of the grocery store's suppliers "require[s] the spouse's signature in most cases." This hardly constitutes a showing of an intention by the Edwardses to be partners.

There being no intentional partnership between Mr. and Mrs. Edwards, the only ground left on which to base the trial judge's decision would be on the theory that a partnership existed by estoppel. However, *Havelock Meats, Inc. v. Roberts*, 186 Neb. 73, 180 N.W.2d 875 (1970), states that in order to prove such a partnership, there must be evidence that a nonpartner held himself or herself out as a partner, or permitted himself or herself to be so held out, and that the third person relied on that misrepresentation to his or her detriment. That holding makes it clear the statement of the Star's managing editor, that he understood the grocery store was a "family owned business," falls far short of the quantum of proof needed to establish a partnership by estoppel. See, also, § 67-307(1), providing that persons who are not partners as to

each other are not partners as to third persons, and Neb. Rev. Stat. § 67-316 (Reissue 1981), requiring detrimental reliance upon a misrepresentation as to a nonpartner's status as a partner, which statutes were applied in *Havelock Meats, Inc.* No such evidence exists in this case.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

STATE OF NEBRASKA, APPELLEE, V. WESLEY MASSEY, APPELLANT.
357 N.W.2d 181

Filed October 26, 1984. Nos. 83-576, 83-577.

1. **Convictions: Appeal and Error.** In determining whether to uphold a conviction, this court will sustain the jury's verdict if, viewing the evidence in a light most favorable to the State, there is sufficient evidence to support it.
2. **Judgments: Evidence: Appeal and Error.** In a criminal case this court will not set aside a judgment on the grounds of the improper admission of evidence if, after an examination of the entire case, we consider that no substantial miscarriage of justice actually occurred.
3. **Homicide: Lesser-Included Offenses: Jury Instructions.** Where an information charges a defendant with a killing committed in the perpetration of or an attempt to perpetrate one of the specific felonies set out in Neb. Rev. Stat. § 28-303(2) (Reissue 1979), second degree murder and manslaughter are not lesser-included offenses, and it is ordinarily error for the trial court to instruct the jury that it may find the defendant guilty of second degree murder or manslaughter, even though such an instruction is requested.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Affirmed.

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

Paul L. Douglas, Attorney General, and Sharon M. Lindgren, for appellee.

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

WHITE, J.

The defendant, Wesley Massey, appeals from convictions on charges of felony murder, Neb. Rev. Stat. § 28-303(2) (Reissue 1979), and kidnaping, Neb. Rev. Stat. § 28-313 (Reissue 1979). The defendant's conviction for first degree murder was based upon a jury verdict finding him guilty of killing another person in the perpetration of a robbery. Massey was sentenced to life imprisonment on the felony murder conviction, such sentence to be served consecutively with any and all sentences currently being served in the State of Colorado. Massey was also convicted and sentenced to 50 years' imprisonment on the charge of kidnaping, such sentence to be served consecutively with any and all sentences being served in Colorado, but to be served concurrently with the sentence for first degree felony murder.

The defendant assigns the following errors: (1) The trial court improperly admitted into evidence exhibit 36B, the .38-caliber revolver allegedly used in the killing, and (2) The trial court erred in failing to instruct the jury that it could find the defendant guilty of second degree murder or manslaughter. We believe the appellant's claims of error are without merit, and the judgment and sentences imposed are affirmed in all respects.

The record reveals that the gun, which was admitted into evidence over defense counsel's objection, came into the possession of Omaha police officers in the following manner.

On the evening of May 23, 1977, Omaha police officers responded to a reported shooting at the Ramada Inn hotel, located at 7007 Grover Street in Omaha, Nebraska. Officer G. W. Goodrich, responding to a description of a vehicle believed to be involved in the shooting, observed a similar vehicle a few blocks from the scene of the shooting and stopped it near the vicinity of 50th and L Streets. A female occupant of the vehicle was arrested and later identified as Mary Catherine Larson, a companion of the defendant. Upon her arrest the contents of Larson's purse were searched. Among other miscellaneous items, the purse contained a photograph of a white male, rubber surgical gloves, keys to a couple of motel rooms, and .38-caliber bullets. Officers later identified the male in the

photograph as the defendant.

Later that evening while in custody, after learning of the death of the victim, Gary Damron, and after being fully advised of her *Miranda* rights and subsequently waiving those rights, Larson gave the Omaha police a statement implicating herself and the defendant, Wesley Massey, in the murder. Larson also informed the police of an address in Colorado Springs where she and the defendant had previously lived. As a result of this information and an initial investigation made at the scene of the murder, a "wanted" bulletin was issued for the arrest of Massey.

During the course of the next 2 days, the information gathered about Massey was communicated to Larson's parole officer in Colorado and passed along by him to the Colorado Springs Police Department. At the suppression hearing prior to trial, Officer Bruce Baxter of the Colorado Springs Police Department testified that someone in his office had spoken with the parole officer around 10 a.m. on May 26, 1977. Approximately 4 hours after receiving this information, three Colorado Springs officers went to the address provided by Larson. At the time the officers went to this address, they had additional information that Massey was a suspected escapee from the Colorado State Penitentiary. The officers had not, however, secured a warrant for Massey's arrest.

When the officers arrived at the address, they discovered a 1972 Plymouth vehicle bearing Nebraska license plates parked behind the apartment. A check on the car revealed that it was a stolen vehicle, the owner of which had been kidnaped in Omaha, released somewhere near Brighton, Colorado, and the defendant was a suspect in the kidnaping.

The police then knocked on the door of the address provided by Larson. They noticed a person inside, but no one answered the door. The officers then went to an upper apartment in the building and showed the occupant a photograph of the defendant. The occupant told the police that someone similar to the person in the photograph was living in the lower apartment. Upon their return to the lower apartment, one of the officers found an unlocked window to the apartment. The officer lifted up the window, entered the apartment, and unlocked the door for the other two officers. While inside the

apartment, the officers heard a noise coming from one of the bedrooms, and they ordered the occupants to come out. Massey came out of the bedroom and was arrested without incident. Officers then secured the apartment and brought Massey to the police station. After being advised of his *Miranda* rights, Massey agreed to discuss the kidnaping, but refused to discuss the homicide that had occurred in Omaha.

Later in the afternoon of May 26, Colorado police officers obtained a search warrant for the apartment where Massey had been arrested. The affidavit accompanying the application for the warrant contained, along with other information, a statement that the defendant had been arrested on the premises. The warrant was issued and executed around 6 p.m. that same evening. Pursuant to the search warrant, the officers found a .38-caliber revolver in a small box inside one of the bedroom closets. At the suppression hearing Officer Baxter conceded that at the time Massey was arrested none of the officers had seen the gun.

Prior to trial, the defendant moved to suppress any evidence found as a result of the search, contending that any evidence seized as a result of his illegal arrest in his home should be suppressed as "fruit of the poisonous tree," under *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). The defendant's motion to suppress was denied. At trial the .38-caliber revolver was admitted into evidence. Appellant's chief contention before this court is that such "critical evidence" should have been suppressed and that its admission into evidence is reversible error.

Although this court has previously condemned warrantless arrests in the home, we need not decide whether the gun was indeed "tainted," because, under the circumstances of this case, the admission of the gun into evidence was harmless error beyond a reasonable doubt. *Payton v. New York*, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980); *State v. George*, 210 Neb. 786, 317 N.W.2d 76 (1982). In a criminal case this court will not set aside a judgment on the grounds of the improper admission of evidence if, after an examination of the entire case, we consider that no substantial miscarriage of justice has actually occurred. *State v. Smith, ante* p. 201, 352 N.W.2d 620

(1984).

The jury's verdict in this case is amply supported by overwhelming evidence which is not tainted by the warrantless arrest nor the search warrant obtained as a result thereof. Larson, the defendant's accomplice, testified that on the evening of the murder she and Massey had registered at the Ramada Inn at 7007 Grover Street. As both were short of cash, Larson and Massey devised a plan whereby Larson would make contact with a customer of the hotel and lure the victim to one of the hotel rooms where Massey would rob the victim. On the evening of May 23, 1977, the victim, Damron, was a guest of the hotel. Damron was in the hotel lounge that evening, and according to Larson's testimony, she approached the victim and the two shared a few drinks. Larson also testified that when Damron left the lounge for a brief period of time during the evening, she met Massey in the hall outside the lounge "[t]o let him know that [she] had found someone." Larson and Damron later left the lounge and went to room 219 of the hotel, the room that she and Massey had checked into earlier that evening. Larson testified that once she and Damron were in the room, Massey hit Damron over the head with a liquor bottle. The blow stunned Damron and he started bleeding. Massey then pulled a gun, the .38-caliber revolver obtained during the search, on Damron and demanded his money. Damron refused, and Massey hit him over the head with the gun. This blow knocked Damron unconscious. Massey then took a $5 bill out of Damron's pocket and a bracelet off his wrist.

When Damron regained consciousness, Massey ordered him to take off his clothes. Damron took off his suit jacket, vest, and shoes. These items of clothing were recovered from the scene by the police, identified by Larson in court, and admitted into evidence. Larson further testified that after Damron had removed part of his clothing, a fight broke out between Massey and the victim. According to Larson, the fight was precipitated by Damron's insistence that he did not have any more money. The struggle between Massey and Damron continued out into the hallway of the hotel. Larson remained in the room and lost sight of both men. She testified that Massey returned to the room a minute or two later and told Larson to "get the stuff

together." Larson testified that Massey remained in the room for a couple of minutes, during which time he expressed concern about the amount of blood on his clothing. Massey then left the room. Shortly thereafter, as Larson left the hotel room and was walking down the hallway, she saw Massey and Damron struggling again in front of the elevator. She did not see Damron strike Massey at any time, but she did see the two get on the elevator.

Mr. Keith Bjerk, a business acquaintance of Damron's, also testified for the State. Bjerk testified that he had been with Damron earlier on the evening of the shooting. He had asked Damron to join him for dinner, but Damron had declined. After returning from dinner that evening, Bjerk walked through the lobby of the hotel, saw the elevator doors open, and noticed two men pushing each other. He then saw Damron stumble out of the elevator, "looking like somebody had poured a can of red paint on his head." Damron then shouted at Bjerk, "Help me, Keith. This guy's trying to kill me." Bjerk testified that Damron tried to get away from the defendant but was unsuccessful in his attempt. Bjerk stated that he then walked over and put his hand on Massey's shoulder and said to him, "Come on, man, this guy's had enough." Bjerk testified that at that time the defendant hit Damron's head with the gun and then stuck the gun to Damron's side and shot him. Bjerk saw the gun go off and recalled the flash. Bjerk testified that he then ran into the hotel lounge to warn people that there was a man in the lobby with a gun. As Bjerk ran back out into the lobby, he saw the defendant leave the hotel. At trial Bjerk identified the defendant as the man who shot Damron.

The pathologist who conducted the autopsy on Damron also testified at the defendant's trial. With the assistance of photographs of the victim to illustrate his testimony, the pathologist identified the various injuries to Damron. It was the pathologist's conclusion that the primary cause of the victim's death was a gunshot wound to his chest. In his opinion, the type of wound suffered by the victim was produced by a gun placed directly against the body before firing.

Further physical evidence linking the defendant to the crime was introduced at trial, specifically a white baseball cap. Both

the hotel bartender on duty the evening of the murder and Larson identified a white hat recovered by the police from room 219 as the hat worn by the defendant that evening.

In determining whether to uphold a conviction, this court will sustain the jury's verdict if, viewing the evidence in a light most favorable to the State, there is sufficient evidence to support it. *State v. Weible*, 211 Neb. 174, 317 N.W.2d 920 (1982). In light of the foregoing summary of testimony from the defendant's accomplice, an eyewitness to the murder, and the examining pathologist, plus the additional physical evidence recovered from the scene and admitted into evidence, there is clearly sufficient evidence to support the jury's verdict. The admission of the .38-caliber revolver into evidence in this case did not unduly prejudice the defendant.

The defendant's second assignment of error is also without merit. In *State v. Reeves*, 216 Neb. 206, 217, 344 N.W.2d 433, 442 (1984), this court clearly stated that

> "[w]here an information charges a defendant with a killing committed in the perpetration of or an attempt to perpetrate one of the specific felonies set out in § 28-303(2), second degree murder and manslaughter are not lesser-included offenses, and it is ordinarily error for the trial court to instruct the jury that it may find the defendant guilty of second degree murder or manslaughter, even though such an instruction is requested."

As Massey was charged with felony murder, the trial court properly refused to grant the requested instructions. The convictions and sentences imposed are affirmed.

AFFIRMED.