Nebraska Supreme Court Online Library
www.nebraska.gov/apps-courts-epub
11/08/2026 01:05 PM CST

REPORTS OF CASES

DECIDED BETWEEN

MAY 17, 1985 and OCTOBER 3, 1985

IN THE

Supreme Court of Nebraska

VOLUME CCXX

DONALD C. PATTON

OFFICIAL REPORTER

PUBLISHED BY

THE STATE OF NEBRASKA

LINCOLN

1986

Copyright A. D. 1986

By Donald C. Patton, Reporter of the Supreme Court

For the benefit of the State of Nebraska

SUPREME COURT
DURING THE PERIOD OF THESE REPORTS

NORMAN KRIVOSHA, Chief Justice
LESLIE BOSLAUGH, Associate Justice
C. THOMAS WHITE, Associate Justice
WILLIAM C. HASTINGS, Associate Justice
D. NICK CAPORALE, Associate Justice
THOMAS M. SHANAHAN, Associate Justice
JOHN T. GRANT, Associate Justice

DONALD C. PATTON	Reporter
TRINA SOLLARS	Assistant Reporter
STEVEN R. SCHROEDER	Administrative Assistant
SARA BATES	Administrative Assistant
JOHN D. CARIOTTO	Acting Clerk
JAN CULVER	Deputy Clerk
KENNETH A. WADE	Acting Deputy Clerk
MYRLIN K. REIBOLDT	Bailiff
JUDY DIETZ	Appellate Clerk
PAMELA J. KRAUS	Appellate Clerk

DEPARTMENT OF JUSTICE

ROBERT M. SPIRE ..... Attorney General
A. EUGENE CRUMP ..... Deputy Attorney General
JOHN R. THOMPSON ..... Deputy Attorney General, Tort Claims
BERNARD L. PACKETT ..... Assistant Attorney General
MELVIN K. KAMMERLOHR ..... Assistant Attorney General
WARREN D. LICHTY, JR. ..... Assistant Attorney General
HAROLD I. MOSHER ..... Assistant Attorney General
GARY R. WELCH ..... Assistant Attorney General
JOHN P. REGAN ..... Assistant Attorney General
ROYCE N. HARPER ..... Assistant Attorney General
WILLIAM J. ORESTER ..... Assistant Attorney General
DALE L. BABCOCK, JR. ..... Assistant Attorney General
ROBERT G. AVEY ..... Assistant Attorney General
JOHN E. BROWN ..... Assistant Attorney General
TERRY R. SCHAAF ..... Assistant Attorney General
MARILYN B. HUTCHINSON ..... Assistant Attorney General
SHARON M. LINDGREN ..... Assistant Attorney General
JOHN M. BOEHM ..... Assistant Attorney General
LYNNE RAE FRITZ ..... Assistant Attorney General
RUTH ANNE EVANS ..... Assistant Attorney General
DALE A. COMER ..... Assistant Attorney General
MARTEL J. BUNDY ..... Assistant Attorney General
MARK D. STARR ..... Assistant Attorney General
DALE D. BRODKEY ..... Assistant Attorney General
LINDA L. WILLARD ..... Assistant Attorney General
CALVIN D. HANSEN ..... Assistant Attorney General
L. JAY BARTEL ..... Assistant Attorney General
JILL GRADWOHL ..... Assistant Attorney General
LEROY W. SIEVERS ..... Assistant Attorney General
CHARLES E. LOWE ..... Assistant Attorney General
YVONNE E. GATES ..... Assistant Attorney General
LAURA L. FREPPEL ..... Assistant Attorney General
JANIE C. CASTANEDA ..... Assistant Attorney General

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
		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
		J. Patrick Mullen	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	Robert E. Otte	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
Seventeenth	Scotts Bluff, Morrill, and Garden	Alfred J. Kortum Robert O. Hippe	Gering Gering
Eighteenth	Jefferson and Gage	William B. Rist	Beatrice
Nineteenth	Banner, Kimball, Cheyenne, and Deuel	John D. Knapp	Kimball
Twentieth	Blaine, Loup, Garfield, Greeley, Wheeler, Valley, and Custer	Ronald D. Olberding	Burwell
Twenty-first	Boone, Platte, Colfax, Nance, and Merrick	John C. Whitehead John M. Brower	Columbus Fullerton

ATTORNEYS

Admitted Since the Publication of Volume 219

ANDREW M. BATH
TRISTAN BONN
SUSAN ELIZABETH BRYANT
HERBERT WILLIAM DAKIN
DOROTHY ROW DORNAN
DEBRA ANN EGLI
KATHRYN ANNE EKELER
ROGER CHARLES ELLETSON
JERRY RAY FOXHOVEN
R. CHERYL FRIEDMAN
SUSAN LEA GILLEN
TODD LUCAS JENSEN
LORI SUE KORNBLUM
ROBERT JAMES LAUCHLAN, JR.
CLIFFORD LEON LEE II
JOHN P. LENICH
WILLIAM FOLLMER LEONARD
DENNIS RAYMOND LOCKARD
JAMES BRIAN MALLOY
DAVID JOHN MARGRAVE
SAMUEL PYEATT MENEFEE
DONALD JOSEPH BURGERT MILLER
BARBARA KAY NIEVEEN MOSS
TIM I. MUNSON
CATHLEEN ANN NELSON
CARL EVERETTE OATES
SHANNON PATRICK O'CONNOR
CURTIS LAMAR OWEN
CHRISTY BELLE MELTON PENDLEY
JOHN PAUL PENDLEY
ESTHER ANNA RADA
JODY LYNNE RICHARDSON
ANNE JOCELYN RITCHIE
TODD PATRICK RODDY
SANDRA IRENE SCHEFCIK
LENNOX JACINTO SIMON
JAMES LEE STANTON
KAY FRANCES THOMAS
DAVID E. VOHS
DAVID BROOKS WILES

TABLE OF CASES REPORTED

Aetna Cas. & Surety Co.; Kracl v. 869
Ainsworth; Bernstein v. 670
Airport Auth., Lincoln; Nebraska Sch. Dist. No. 148 v. 504
Allis-Chalmers Corp. v. Haumont 509
American Trencher, Inc.; Timmerman v. 175
Amsberry, Inc., In re Application of 353
Anderson-Divan-Cottrell Ins.; Kearney Conv'n Center v. 319
Application of Amsberry, Inc., In re 353
Auman v. Toomey 70
Automobile Ins. Co. of Hartford; Kracl v. 869

Baggett v. City of Omaha 805
Baker; McKinnon v. 314
Bank of Norfolk; Norfolk Prod. Credit Assn. v. 593
Bank of Stapleton; Peterson v. 573
Bapat v. Jensen 763
Bartholomew; Wells v. 210
Bates v. Jones 585
Battershaw; State v. 661
Beatrice First Nat. Bank & Trust Co.; Reilly v. 443
Beatrice Nat. Bank v. Mid-America Dairymen 757
Beerbohm v. Wagner 32
Belsky v. County of Dodge 76
Benzel; State v. 466
Bernstein v. Ainsworth 670
Birkel; Wellman v. 1
Birmingham v. Hill 168
Black; Moore v. 122
Bockbrader v. Department of Insts. 17
Boris v. Heyd 569
Box Butte County, In re 1983-84 Tax Levy by 897
Boyer; State v. 312
Branch; State v. 754
Braunbeck v. Braunbeck 912
Breeden; United Laboratories, Inc. v. 412
Broken Bow Security State Bank; Haumont v. 809
Brown; Overman v. 788
Brown; State v. 305

Brown; State v. 849
Brown v. United States Nat. Bank 684

C.S. v. Sophir 51
Carman v. Gibbs 603
Carney; State v. 906
Casey's Gen. Stores v. Nebraska Liq. Cont. Comm. 242
Chalupa v. Chalupa 704
City Bank & Trust Co. v. Van Andel 152
City of Lincoln; T.V. Transmission v. 887
City of Omaha; Baggett v. 805
City of Omaha; Smith v. 217
City of Omaha; Vrana Paving Co. v. 269
Clark v. Clark 771
Coffey; Flansburgh v. 381
Commercial Fed. Sav. & Loan; Sorensen v. 457
Commissioner of Labor; First Data Resources v. 645
Commissioner of Labor; Norman v. 408
Commissioner of Labor; United Laboratories, Inc. v. 412
Commissioner of Labor v. Meyer 457
Coniglio v. Hansl 580
Consolidated Freightways Corp.; Maloney v. 55
Continental Can Co.; Gast v. 456
Cooper; First Data Resources v. 645
Countryside Homes; Jeffres v. 26
County Bd. of Equal.; Spencer Holiday House v. 607
County of Dodge; Belsky v. 76
County of Sarpy; Sarpy Co. Pub. Emp. Assn. v. 431
Culbertson, Village of; Wood v. 94

Daniels; State v. 480
Department of Insts.; Bockbrader v. 17
Department of Insts.; Haeffner v. 560
Department of Motor Vehicles; Bapat v. 763
Department of Roads; NAPE v. 883
Department of Social Servs.; Kirk v. 359
Department of Utilities, Fremont; Maxey v. 627
Dodge, County of; Belsky v. 76
Douglas, State ex rel. v. Wiener 502
Dubas v. Farmers Mut. Ins. Co. 40
Dunning; Kirk v. 359

Edwards; National Farmers Union Serv. Corp. v. 231
Eggers; State v. 862
Ely, In re Interest of 731
Erb v. Erb 853
Ernst; Lustgarten v. 585
Erstrom v. Erstrom 303

Estate of Ford; Jordan v. ... 492
Estate of Hulse v. Schelkopf ... 617
Estate of Kennedy, In re ... 212
Estate of Kesting, In re ... 524
Estate of Maloney v. Kaminski ... 55
Estate of Odineal, In re ... 168
Estate of Shepard v. Jacobson ... 235
Estate of Smith; Heyd v. ... 569
Estate of Van Pelt; McKinnon v. ... 314
Estate of Wagner, In re ... 32

Fales; Allis-Chalmers Corp. v. ... 509
Farmers Mut. Ins. Co.; Dubas v. ... 40
Farmers Mut. Ins. Co.; Kracl v. ... 869
Farmers Mut. Ins. Co.; Roth v. ... 612
Fehncke; State v. ... 135
First Data Resources v. Sorensen ... 645
First Nat. Bank v. Greene Bldg. & Supply ... 205
First Nat. Bank & Trust Co.; Reilly v. ... 443
Fischer; State v. ... 664
Flansburgh v. Coffey ... 381
Flynn & Larsen Implement Co.; Tobin v. ... 259
Ford v. Jordan ... 492
Forehead v. Galvin ... 578
Fowler v. Fowler ... 258
Freedom Drilling Co.; Kopfman v. ... 323
Fremont Department of Utilities; Maxey v. ... 627

Gage County Bd. of Equal.; Spencer Holiday House v. ... 607
Galvin; Forehead v. ... 578
Game & Parks Comm.; NAPE v. ... 883
Gast v. Continental Can Co. ... 456
George A. Hormel & Co.; Hallett v. ... 387
Gibb v. Gibb ... 649
Gibbs; Carman v. ... 603
Graber v. Graber ... 816
Grand Lodge I.O.O.F. v. Marvin ... 197
Great Plains Ins. Co.; Kracl v. ... 869
Greene Bldg. & Supply; First Nat. Bank v. ... 205
Gregory; State v. ... 778
Guaranty Bank & Trust Co.; Brown v. ... 684
Guardian State Bank & Trust Co. v. Jacobson ... 235

H.W., In re Interest of ... 423
Hadley v. Ideus ... 878
Haeffner v. State ... 560
Hai Dang; State v. ... 120
Hallett v. George A. Hormel & Co. ... 387

Hanika v. Rawley 45
Hansl; Coniglio v. 580
Hardin; Flansburgh v. 381
Hare v. Watts Trucking Service 403
Harkins; Nixon v. 286
Harris v. Misty Lounge, Inc. 678
Haumont; Allis-Chalmers Corp. v. 509
Haumont v. Security State Bank 809
Havelock Bank v. McArthur 364
Heimbouch v. Victorio Ins. Serv., Inc. 279
Hemingford, School Dist. of; Jesse v. 897
Hert; State v. 447
Heyd; Boris v. 569
Hill; Thomas and Birmingham v. 168
Hinchey; State v. 825
Hockenberger & Chambers Co.; Bernstein v. 670
Hoekstra; State v. 309
Hormel & Co., George A.; Hallett v. 387
Hoschar v. Hoschar 913
Howard; Kopfman v. 323
Howard; Mayer v. 328
Hulse v. Schelkopf 617
Hunt; State v. 707
Hynes; Peterson v. 573

I.O.O.F., Grand Lodge v. Marvin 197
Ideus; Hadley v. 878
In re Application of Amsberry, Inc. 353
In re Estate of Kennedy 212
In re Estate of Kesting 524
In re Estate of Odineal 168
In re Estate of Wagner 32
In re Interest of Ely 731
In re Interest of H.W. 423
In re Interest of J.N.J. 102
In re Interest of L.J. and J.J. 102
In re Interest of S.W. 734
In re Interest of V.B. and Z.B. 369
In re Interest of V.T. and L.T. 256
In re Interest of W.C.O. 417
In re 1983-84 County Tax Levy 897
Iowa Beef Processors; Masters v. 835

J. C. Robinson Seed Co.; Schmidt v. 344
J.N.J., In re Interest of 102
Jackson; State v. 656
Jacobson; Guardian State Bank & Trust Co. v. 235

Jeffres v. Countryside Homes 26
Jensen; Bapat v. 763
Jesse v. Box Butte County Bd. of Equal. 897
Johnson; State v. 392
Johnston's Fuel Liners, Inc.; Amsberry, Inc. v. 353
Jones; Lustgarten v. 585
Jordan; Ford v. 492
Joy; State v. 535

Kaminski; Maloney v. 55
Karnes v. Wilkinson Mfg. 150
Kearney Conv'n Center v. Anderson-Divan-Cottrell Ins. 319
Kelly v. Kelly 441
Kennedy, In re Estate of 212
Kesting, In re Estate of 524
Kirk v. Dunning 359
Kirkham-Michael & Assoc.; Overland Constructors v. 220
Knight; State v. 666
Knudsen v. Metropolitan Utilities Dist. 902
Kopfman v. Freedom Drilling Co. 323
Korbelik v. Korbelik 414
Kracl v. Aetna Cas. & Surety Co. 869
Kresha v. Kresha 598
Kristensen v. Reese 668
Kropatsch; Sherman v. 375

L.J. and J.J., In re Interest of 102
Lee; State v. 342
Liberty Mut. Ins. Co.; Rutt v. 255
Lien v. Lien 352
Lincoln Airport Auth.; Nebraska Sch. Dist. No. 148 v. 504
Lincoln, City of; T.V. Transmission v. 887
Lincoln, Havelock Bank of v. McArthur 364
Liquor Cont. Comm., Nebr.; Casey's Gen. Stores v. 242
Litzenburg; State v. 807
Lustgarten v. Jones 585

Maloney v. Kaminski 55
Manchester; State v. 41
Manewal v. Manewal 867
Manns; State v. 426
Marco; State v. 96
Marvin; Grand Lodge I.O.O.F. v. 197
Masters v. Iowa Beef Processors 835
Maxey v. Fremont Department of Utilities 627
Mayer v. Howard 328
McArthur; Havelock Bank v. 364
McKinnon v. Baker 314

Mellor; O'Neill Prod. Credit Assn. v. ... 555
Merithew; State v. ... 530
Metro Area Transit; Turner v. ... 189
Metropolitan Utilities Dist.; Knudsen v. ... 902
Mettenbrink v. Mettenbrink ... 650
Meyer; Sorensen v. ... 457
Mid-America Dairymen; Beatrice Nat. Bank v. ... 757
Midwest Refuse Service; Rutt v. ... 255
Millard School Dist.; Overland Constructors v. ... 220
Misty Lounge, Inc.; Harris v. ... 678
Montclair Nursing Center v. Wills ... 547
Moore v. Black ... 122
Morrow; State v. ... 247
Mueller v. Union Pacific Railroad ... 742
Murphrey; State v. ... 699

NAPE v. Department of Roads ... 883
NAPE v. Game & Parks Comm. ... 883
National Farmers Union Serv. Corp. v. Edwards ... 231
Nebraska Liq. Cont. Comm.; Casey's Gen. Stores v. ... 242
Nebraska Sch. Dist. No. 148 v. Lincoln Airport Auth. ... 504
Nielsen; Omaha World-Herald Co. v. ... 294
Nixon v. Harkins ... 286
Norfolk Prod. Credit Assn. v. Bank of Norfolk ... 593
Norman v. Sorensen ... 408
North Platte State Bank; PWA Farms v. ... 516
Nursing Center, Montclair v. Wills ... 547

Odineal, In re Estate of ... 168
Ohler v. Ohler ... 272
Omaha, City of; Baggett v. ... 805
Omaha, City of; Smith v. ... 217
Omaha, City of; Vrana Paving Co. v. ... 269
Omaha Personnel Board; Baggett v. ... 805
Omaha World-Herald Co. v. Nielsen ... 294
O'Neill Prod. Credit Assn. v. Mellor ... 555
Ord, First Nat. Bank in v. Greene Bldg. & Supply ... 205
Overland Constructors v. Millard School Dist. ... 220
Overman v. Brown ... 788

P.P. Dist., York County Rural; Simacek v. ... 484
PWA Farms v. North Platte State Bank ... 516
Pamida, Inc.; Norman v. ... 408
Pearson; State v. ... 183
Peterson v. Hynes ... 573
Potter; State v. ... 866
Predmore; State v. ... 336
Production Credit Assn., O'Neill v. Mellor ... 555

Prohaska v. Prohaska 762

Quad-States, Inc. v. Vande Mheen 161

Radant v. Vargason 116
Rawley; Hanika v. 45
Redick v. Redick 86
Reese; Kristensen v. 668
Reilly v. First Nat. Bank & Trust Co. 443
Reiser v. Reiser 416
Richter; State v. 551
Robinson Seed Co., J. C.; Schmidt v. 344
Rock County, Sheriff of; Radant v. 116
Rodriquez; State v. 808
Ross; Jordan v. 492
Ross; State v. 843
Roth v. Farmers Mut. Ins. Co. 612
Rubek; State v. 537
Rutt v. Midwest Refuse Service 255

S.W., In re Interest of 734
Sanders; State v. 308
Sandobal; Grand Lodge I.O.O.F. v. 197
Saporta v. State 142
Sarpy Co. Pub. Emp. Assn. v. County of Sarpy 431
Sazama v. Wagner 32
Sch. Dist. No. 148, Nebraska v. Lincoln Airport Auth. 504
Schake; Wausau Ins. Co. v. 802
Schelkopf; Hulse v. 617
Schmidt v. J. C. Robinson Seed Co. 344
School Dist., Millard; Overland Constructors v. 220
School Dist. of Hemingford; Jesse v. 897
Schulz; Sherman v. 375
Scribner Raceways; Mayer v. 328
Security State Bank; Haumont v. 809
Sheridan; Webster Street Partnership v. 9
Sheriff of Rock County; Radant v. 116
Sherman v. Schulz 375
Simacek v. York County Rural P.P. Dist. 484
Sinica; State v. 792
Smith; Heyd v. 569
Smith v. City of Omaha 217
Sophir; C.S. v. 51
Sorensen; First Data Resources v. 645
Sorensen; Norman v. 408
Sorensen; United Laboratories, Inc. v. 412
Sorensen v. Meyer 457
Spencer Holiday House v. County Bd. of Equal. 607

Stapleton, Bank of; Peterson v. 573
State ex rel. Douglas v. Wiener 502
State; Haeffner v. 560
State; Saporta v. 142
State v. B.T. 256
State v. Battershaw 661
State v. Benzel 466
State v. Boyer 312
State v. Branch 754
State v. Brown 305
State v. Brown 849
State v. Carney 906
State v. Daniels 480
State v. Eggers 862
State v. Ely 731
State v. Fehncke 135
State v. Fischer 664
State v. G.J.A. 102
State v. Gregory 778
State v. H.W. 423
State v. Hai Dang 120
State v. Hert 447
State v. Hinchey 825
State v. Hoekstra 309
State v. Hunt 707
State v. Jackson 656
State v. Johnson 392
State v. Joy 535
State v. K.W. 734
State v. Knight 666
State v. Lee 342
State v. Litzenburg 807
State v. Manchester 41
State v. Manns 426
State v. Marco 96
State v. Merithew 530
State v. Morrow 247
State v. Murphrey 699
State v. Pearson 183
State v. Potter 866
State v. Predmore 336
State v. R.B. and H.B. 369
State v. Richter 551
State v. Rodriquez 808
State v. Ross 843
State v. Rubek 537

State v. Sanders 308
State v. Sinica 792
State v. Stratton 854
State v. Sutton 128
State v. Terrell 137
State v. Thierstein 766
State v. Toth 311
State v. Trimble 639
State v. W.D.O. 417
State v. White 527
State v. Williams 415
State v. Wood 388
State v. Wright 847
Stratton; State v. 854
Sutton; State v. 128

T.V. Transmission v. City of Lincoln 887
Tank v. Wagner 32
Tax Commissioner v. Wilkinson Mfg. 150
Tax Levy, In re 1983-84 County 897
Tejral v. Tejral 264
Terrell; State v. 137
Thierstein; State v. 766
Thomas v. Hill 168
Timmerman v. American Trencher, Inc. 175
Tobin v. Flynn & Larsen Implement Co. 259
Toomey; Auman v. 70
Toth; State v. 311
Trimble; State v. 639
Turner v. Metro Area Transit 189

Union Pacific Railroad; Mueller v. 742
United Laboratories, Inc. v. Sorensen 412
United States Nat. Bank; Brown v. 684

V.B. and Z.B., In re Interest of 369
V.T. and L.T., In re Interest of 256
Van Andel; City Bank & Trust Co. v. 152
Vande Mheen; Quad-States, Inc. v. 161
Van Pelt; McKinnon v. 314
Vargason; Radant v. 116
Victorio Ins. Serv., Inc.; Heimbouch v. 279
Village of Culbertson; Wood v. 94
Vrana Paving Co. v. City of Omaha 269

W.C.O., In re Interest of 417
Wagner, In re Estate of 32
Walton v. Walton 625

Ward v. Ward 799
Watts Trucking Service; Hare v. 403
Wausau Ins. Co. v. Schake 802
Webster Street Partnership v. Sheridan 9
Wellman v. Birkel 1
Wells v. Bartholomew 210
Wheeler Transp. Serv., Inc.; Amsberry, Inc. v. 353
White; State v. 527
Wiener; State ex rel. Douglas v. 502
Wilkinson Mfg.; Karnes v. 150
Williams; State v. 415
Wills; Montclair Nursing Center v. 547
Wilwerding; Webster Street Partnership v. 9
Wood; State v. 388
Wood v. Village of Culbertson 94
Wright; State v. 847

York County Rural P.P. Dist.; Simacek v. 484

CUMULATIVE LIST OF CASES DISPOSED OF WITHOUT OPINION

No. 83-392: **National Bank of Commerce v. Stinehagen.** Stipulation allowed; appeal dismissed.

No. 84-378: **Gering National Bank & Trust Co. v. Robertshaw Controls Co.** Stipulation allowed; appeal dismissed.

No. 84-410: **Guest v. Robertshaw Controls Co.** Stipulation allowed; appeal dismissed.

No. 84-411: **Guest v. Robertshaw Controls Co.** Stipulation allowed; appeal dismissed.

No. 84-412: **Guest v. Robertshaw Controls Co.** Stipulation allowed; appeal dismissed.

No. 84-413: **Guest v. Robertshaw Controls Co.** Stipulation allowed; appeal dismissed.

No. 84-414: **Guest v. Robertshaw Controls Co.** Stipulation allowed; appeal dismissed.

No. 84-456: **Campbell, Howard, Love, Haskell Co. v. Young.** Appellant's motion for summary dismissal denied; appellee's motion for summary affirmance denied. Judgment affirmed; see Rule 7A.

No. 84-470: **Richert v. Richert.** Affirmed as modified by order of the court.

No. 84-476: **Bruner v. Bruner.** By order of the court, appeal dismissed for lack of jurisdiction.

Nos. 84-661, 84-662: **State v. Evans.** Motion of appellant's counsel to dismiss appeal sustained; appeal dismissed. Appellant is deceased.

No. 84-721: **Raile v. Raile.** Stipulation allowed; appeal dismissed.

No. 84-750: **First National Bank of Atkinson v. Olson.** Affirmed as modified by order of the court.

No. 84-769: **In re Application of Safeway Cabs, Inc. v. Hunt Transportation, Inc.** Stipulation allowed; appeal dismissed.

No. 84-789: **Samson v. Samson.** Affirmed as modified by order of the court.

No. 84-812: **State Code Agencies Education Association v. Department of Social Services.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 84-829: **Berry v. Cox Cable of Omaha, Inc.** Motion of appellant to dismiss appeal with prejudice sustained; appeal dismissed.

No. 84-852: **Dain, Kalman & Quail Municipal-Nebraska, Inc. v. Karnes.** Stipulation allowed, appeal dismissed.

No. 84-868: **Bailey v. Midwest Animal Products.** By order of the court, appeal dismissed for failure to file briefs.

No. 84-872: **Brestel v. Sayler.** By order of the court, appeal dismissed for failure to file briefs.

No. 84-880: **Wupper v. Shukert.** Stipulation allowed; appeal dismissed with prejudice.

No. 84-885: **Muhlbach v. Muhlbach.** Motion of appellee for summary dismissal sustained; see Rule 7B(1).

No. 84-889: **Gilmore v. Dravo/Hastings and Liberty Mutual Insurance Company.** Stipulation allowed; appeal dismissed.

No. 84-908: **Fuller v. Fuller.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

Nos. 84-909, 84-910: **State v. Thomas.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-915: **Security State Bank of Broken Bow v. Bay.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 84-933: **Cullinane v. Interstate Iron and Metal, Inc.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 84-942: **State v. Martino.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 84-944: **Squires v. Squires.** Stipulation allowed; appeal dismissed.

No. 84-960: **Cain v. Omaha Joint Electrical Apprentice Committee.** Stipulation allowed; appeal dismissed at cost of

appellant.

No. 84-967: **Arcadia State Bank v. Nelson.** Appellant failed to comply with the order of the court to show cause. Appeal dismissed; judgment affirmed; see Rule 7A.

No. 84-970: **Melies v. Melies.** Stipulation allowed; appeal dismissed.

No. 84-971: **Hicks v. Airlite Plastics Co.** By order of the court, appeal dismissed for failure to file briefs.

No. 84-977: **State v. Marzullo.** Judgment affirmed; see Rule 7A.

No. 85-008: **Daniels v. Rock.** Stipulation allowed; appeal dismissed.

No. 85-009: **State v. Jeffries.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-013: **State v. Johnson.** Judgment affirmed; see Rule 7A.

No. 85-016: **State v. Harris.** Stipulation disallowed; judgment affirmed; see Rule 7A.

No. 85-027: **State v. Rice.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-030: **State v. Yellowboy.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-031: **State v. Williams.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-064: **State v. Feller.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-077: **Kalinger v. Meints.** By order of the court, appeal dismissed for failure to file briefs.

No. 85-078: **American Energy v. Haynes.** Motion of

appellant to dismiss appeal sustained; appeal dismissed.

No. 85-083: **State v. Roland.** Judgment affirmed; see Rule 7A.

No. 85-087: **State v. McLean.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

Nos. 85-095, 85-096, 85-097, 85-098: **State v. Campbell.** Court finds appeals wholly frivolous. Motions of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-099: **Morton v. One Hour Martinizing.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 85-101: **Cattle Brokers, Inc. v. O'Neill National Bank.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 85-104: **State v. Williams.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-105: **Lands, Inc. v. Sorensen.** Stipulation allowed; appeal dismissed.

No. 85-106: **State v. Wesley.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-109: **Mid City Bank, Inc. v. Copple.** Judgment affirmed; see Rule 7A.

No. 85-110: **State v. Herrick.** Judgment affirmed; see Rule 7A.

No. 85-114: **First National Bank v. Swim.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 85-118: **Fischer v. Fischer.** Stipulation of settlement approved. Affirmed as modified by order of the court.

Nos. 85-119, 85-120: **State v. Nollett.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-124: **State v. Robinson.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 85-136: **Pierson v. Combs.** By order of the court, appeal dismissed for failure to file briefs.

No. 85-138: **Bushnell v. Eastern Nebraska Community Office of Retardation.** Stipulation allowed; appeal dismissed.

No. 85-140: **Colonial Research Chemical Corp. v. Commissioner of Labor.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 85-143: **Robbins v. State of Nebraska Dept. of Welfare.** By order of the court, cause remanded to the district court for Douglas County.

No. 85-150: **State v. Roemen.** By order of the court, appeal dismissed for failure to file briefs.

No. 85-152: **Leseberg v. Meints.** By order of the court, appeal dismissed for failure to file briefs.

No. 85-157: **Halcott v. County of Lincoln.** Stipulation allowed; appeal dismissed.

No. 85-158: **State v. Ramsey.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-161: **State v. Talbot.** By order of the court, appeal dismissed for failure to file briefs.

No. 85-164: **Schindler v. Thompson.** Stipulation allowed; appeal dismissed.

No. 85-165: **Deutsche Credit v. Rosberg.** By order of the court, appeal dismissed for failure to file proper cost bond within 10 days as directed by order of June 27, 1985.

No. 85-168: **In re Interest of Garrison.** Appeal dismissed.

No. 85-169: **Lipker v. Lipker.** Stipulation allowed; appeal dismissed.

No. 85-172: **State v. Garlick.** Judgment affirmed; see Rule 7A.

No. 85-173: **In re Estate of Oliverius.** Motion of appellee for summary affirmance overruled; appeal dismissed as premature.

No. 85-174: **State v. Sianis.** By order of the court, appeal dismissed for failure to file briefs.

No. 85-176: **State v. Witt.** Court finds appeal wholly frivolous; motion of court-appointed counsel for leave to

withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-181: **Agena v. Agena.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 85-184: **State v. Jones.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-189: **TLW Enterprises, Inc. v. Board of Adjustment of York.** Stipulation of settlement approved. Appeal dismissed with prejudice.

No. 85-190: **Switzer v. Hughes.** By order of the court, appeal dismissed for failure to file briefs.

No. 85-191: **State v. Umphenour.** By order of the court, appeal dismissed for failure to file briefs.

No. 85-199: **State v. Phinney.** Judgment affirmed; see Rule 7A.

No. 85-204: **Engberg v. Wyllie.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 85-214: **State v. Patz.** Judgment affirmed; see Rule 7A.

No. 85-215: **State v. Moss.** Judgment affirmed; see Rule 7A.

Nos. 85-217, 85-218: **State v. Pillard.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-219: **State v. Reeder.** Judgment affirmed; see Rule 7A.

No. 85-220: **Anderson v. Department of Banking & Finance.** Appeal dismissed for lack of jurisdiction.

No. 85-224: **State v. Sowl.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-225: **State v. Liner.** By order of the court, appeal dismissed for failure to file briefs.

No. 85-230: **State v. Robinson.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-231: **Stratman v. Richardson.** By order of the court, appeal dismissed for failure to file briefs.

No. 85-234: **In re Application of Millicom Information Services, Inc.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 85-236: **State v. Owens.** Judgment affirmed; see Rule 7A.

No. 85-247: **State v. Prauner.** Stipulation allowed; appeal dismissed.

No. 85-248: **State v. Rooks.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-249: **Buffalo County v. Fox.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 85-251: **Henderson v. Livingston.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 85-256: **State v. Tyrrell.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 85-258: **Kelliher v. Paul W. Mousel and Associates.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 85-259: **Bieber v. Colfax County Board of Equalization.** Stipulation allowed; appeal dismissed.

No. 85-260: **Ehernberger v. Colfax County Board of Equalization.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 85-263: **State v. Liner.** By order of the court, appeal dismissed for failure to file briefs.

No. 85-264: **T & M Construction v. Smith.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 85-267: **J. R. Simplot Company v. Weber.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 85-269: **State v. Foley.** Judgment affirmed; see Rule 7A.

No. 85-271: **State v. Gibbs.** Judgment affirmed; see Rule 7A.

No. 85-272: **Schneider v. Crossman.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 85-274: **State v. Cover.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 85-279: **State v. Esslinger.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-283: **State v. White.** Judgment affirmed; see Rule 7A.

No. 85-284: **Tri-County Bank & Trust v. Smiley.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 85-287: **Potthoff v. Board of Education.** By order of the court, appeal dismissed for failure to file briefs.

No. 85-290: **Farhart v. Northwestern Bell Telephone Co.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 85-293: **State v. Wermuth.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-294: **Dodd v. Hovland-Swanson Company.** Stipulation allowed; appeal dismissed.

No. 85-297: **Bieber v. Colfax County Board of Equalization.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 85-298: **Konicek v. Colfax County Board of Equalization.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 85-299: **Krula v. Colfax County Board of Equalization.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 85-301: **State v. Irwin.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-302: **State v. Graves.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-304: **State v. Patryas.** Judgment affirmed; see Rule 7A.

No. 85-305: **State v. Skinner.** Judgment affirmed; see Rule

7A.

No. 85-308: **Larsen v. Larsen.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 85-311: **State v. Pecoraro.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-320: **Hogue v. State of Nebraska.** By order of the court, cause remanded to the district court for Lancaster County.

No. 85-326: **State v. Bouwens.** Stipulation allowed; appeal dismissed.

No. 85-327: **State v. Westerlund.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-329: **Timm v. Cozad State Bank.** Stipulation allowed; appeal dismissed.

No. 85-331: **Cavaness v. Brown.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 85-339: **State v. Stewart.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-340: **State v. Brooks.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-343: **State v. Stark.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-348: **State v. American Horse.** Judgment affirmed; see Rule 7A.

No. 85-350: **Winner v. State.** Stipulation allowed; appeal dismissed.

No. 85-352: **Frisch v. Majerus.** Stipulation allowed; appeal dismissed.

No. 85-353: **State v. Elliott.** Court finds appeal wholly

frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-354: **State v. Skinner.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-356: **State v. Barbee.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-362: **Russell v. Prell.** Judgment affirmed; see Rule 7A.

No. 85-363: **Lopez v. Midstates Construction Products, Inc.** Stipulation allowed; appeal dismissed.

No. 85-368: **Hicks v. Hicks.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 85-375: **State v. Bahrs.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 7B(2).

No. 85-381: **State v. Erb.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-382: **Poppe v. Teachers Insurance and Annuity Association.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 85-386: **Mackey v. City of North Platte.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 85-390: **Bochek v. Bochek.** Stipulation to dismiss appeal allowed; appeal dismissed at cost of appellant.

No. 85-397: **Pleasanton State Bank v. Humphrey.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 85-402: **Bishop-Siems v. Spicer Enterprises.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 85-407: **State v. Butler.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-409: **Durant v. Durant.** Motion of appellant to

dismiss appeal sustained; appeal dismissed.

No. 85-413: **Gothenburg Feed v. Barnum.** Stipulation to dismiss appeal allowed; appeal dismissed with prejudice.

No. 85-417: **State v. Ingoglia.** Motion of appellant to dismiss appeal granted. Appellee's motion denied.

No. 85-418: **State v. Lackey.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-419: **State v. Schott.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 85-423: **Federal Land Bank of Omaha v. Covert Farms, Ltd.** By order of the court, appeal dismissed; see Rule 7A.

Nos. 85-424, 85-425: **Hurley v. George A. Hormel & Co.** Stipulation allowed; appeal dismissed.

No. 85-429: **State v. Dillon.** Judgment affirmed; see Rule 7A.

No. 85-433: **State v. Hopkins.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-435: **State v. Perdew.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-438: **Landers v. Gulfstream Aerospace Corp.** Stipulation allowed; appeal dismissed.

No. 85-444: **State v. Collins.** Judgment affirmed; see Rule 7A.

No. 85-446: **State v. Brown.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 85-457: **C.K. of Kearney, Inc. v. Gardner.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 85-461: **State v. Whittlesey.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-472: **Sabin v. Sabin.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 85-476: **Jones v. Dependable Mfg. Co.** By order of the court, appeal dismissed at cost of appellant.

No. 85-483: **Homan v. Hinze.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 85-489: **Krejci v. Falt.** Stipulation allowed; appeal dismissed at cost of appellant.

No. 85-497: **Tires, Inc. v. U.S. Fire Ins. Co.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 85-516: **State v. Wagner.** Court finds appeal wholly frivolous. Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 3B.

No. 85-543: **Vercillino v. Gahm.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 85-553: **Simonsen v. General Motors Corp.** Stipulation allowed; appeal dismissed.

No. 85-568: **Smith v. Bhakta.** Stipulation allowed; appeal dismissed.

No. 85-570: **Judkins v. Judkins.** Stipulation allowed; appeal dismissed.

No. 85-577: **Plith v. Plith.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. 85-605: **Bank v. Bank.** Stipulation allowed; appeal dismissed.

No. 85-623: **Timme v. First State Bank of Fremont.** Stipulation allowed; appeal dismissed.

ELIZABETH ANN WELLMAN, APPELLEE, V. WILLIAM H. BIRKEL ET AL., APPELLANTS, OLIVIA A. BIRKEL, PERSONAL REPRESENTATIVE OF THE ESTATE OF PETER M. BIRKEL, DECEASED, APPELLEE.

367 N.W.2d 716

Filed May 17, 1985. No. 83-725.

1. **Evidence: Verdicts.** In testing the sufficiency of evidence to support a verdict, it must be considered in the light most favorable to the successful party.
2. **Verdicts: Damages: Appeal and Error.** A damages award by a jury will not be set aside as exorbitant unless it is so clearly excessive as to indicate that it was the result of passion, prejudice, mistake, or disregard of the evidence or applicable rules of law.
3. **Verdicts: Appeal and Error.** A jury verdict will not be reversed on appeal unless it is clearly erroneous.
4. **Replevin: Damages.** The measure of damages in a replevin action when the property is not returned is the value of the property, together with interest, from the date of the unlawful taking.
5. _____: _____. When the property is returned in a replevin action, the party recovering possession of the property is entitled to recover as damages any deterioration or depreciation in the value which has taken place during the wrongful detention.
6. **Appeal and Error.** The general rule is that the consideration of appeals to this court is limited to errors assigned and discussed. Unless assigned and argued, claimed errors relied upon for reversal will not be considered.

Appeal from the District Court for Butler County: WILLIAM H. NORTON, Judge. Affirmed.

James M. Egr of Egr & Birkel, for appellants.

Larry J. Karel of Karel Law Offices, for appellee Wellman.

KRIVOSHA, C.J., WHITE, and GRANT, JJ., and BRODKEY, J., Retired, and WOLF, D.J.

BRODKEY, J., Retired.

This action involves an alleged farming arrangement between the plaintiff, Elizabeth Ann Wellman, and the defendants Peter M. Birkel, William H. Birkel, and Max Birkel. The plaintiff had previously been married to Michael Birkel, who was the son of Peter Birkel and the brother of William and Max Birkel.

Subsequent to their marriage in 1963, Michael and Elizabeth acquired certain real estate, to wit, a 320-acre farm known as the Valley Farm and an 80-acre farm known and referred to as the Brokevelt 80, and they also rented an 80-acre tract known as the Hanus 80. They also acquired farm machinery and equipment, both alone and with Michael's father, Peter, and had a farming relationship until Michael's death in 1973. Prior to Michael's death, however, he was incapacitated, and the farming of the properties referred to was performed by the father, Peter, and the brothers, William and Max, under an agreement between them that they would use the equipment, tools, and implements belonging to the plaintiff and her husband both on their land and on other lands farmed by the defendants.

Under the arrangement existing between them after Michael's death, all of the crops were to go to the plaintiff, the father and brothers having the use of the equipment of the plaintiff. This arrangement was changed in 1977 to provide for a 50-50 sharecrop basis on the Valley Farm and the Brokevelt 80, and with all the tenant's share of the rented Hanus 80 going to the plaintiff, the father and the brothers receiving the use of the machinery for their services. Under the arrangement at that time, plaintiff was required to pay one-half of the crop expense and all of the upkeep and repairs on her machinery.

However, on January 10, 1978, the defendants entered into written leases with plaintiff for the Valley Farm and the Brokevelt 80 with respect to the 1978 and 1979 crop years. Both tracts were irrigated and rented on a 50-50 sharecrop basis. The plaintiff continued to rent the Hanus 80 from John Hanus, and the defendants farmed that tract for the plaintiff, who received the entire crop, with the defendants receiving the use of the machinery owned totally or partially by the plaintiff and

inherited from her deceased husband, Michael Birkel. Elizabeth married her present husband, Alvin Wellman, in June of 1978, and at that point the relationship between the parties commenced to deteriorate.

A dispute arose between the parties at the expiration of the lease period, which eventually culminated in the filing of this action in the district court for Butler County, Nebraska. The action referred to contained three counts or causes of action.

In the first cause of action the plaintiff refers to the real estate owned and leased in Butler County, Nebraska, and alleges that she had entered into written leases with the defendants on such real estate; and further asserts that prior to the 1979 crop year, she entered into an oral amendment of the written leases whereby the defendants agreed to pay to the plaintiff the sum of $35 per acre for 60 acres of pasture included in the acreage covered by the leases. Also included in her first cause of action is the claim that defendants harvested crops in 1979 on the real estate in question but have failed and refused to deliver her share to her or to make payment to plaintiff pursuant to the lease agreements, and have failed to provide a true, correct, and complete accounting of her share of the crops for the crop year 1979. Whereupon, she prays for an accounting and judgment against the defendants on the claims contained in her first cause of action.

In her second cause of action she alleges that defendants were in possession of certain farm machinery, equipment, and tools under a certain arrangement with her and that she has made demand upon the defendants for the return of the same and also for return of 9,936.76 bushels of corn that she was entitled to as the owner, and she seeks judgment for possession of such property.

In her third cause of action plaintiff alleges that during the years 1978 and 1979, the defendants harvested certain crops from the real estate leased or subleased to them and stored in a grain bin on her property but that the grain was not properly stored and the defendants failed to properly dry and level the same, and that by reason thereof she suffered damages in the amount of $2,424.18, for which she prays judgment.

The defendants, in their answer to the amended petition,

generally deny the allegations contained in the three separate causes of action.

Peter Birkel died after suit was filed, and Olivia Birkel, his personal representative, was joined as a necessary party. The trial court, however, granted a directed verdict in favor of Olivia and dismissed her as a defendant because of lack of evidence presented against Peter Birkel. Prior to trial to the jury, the parties to the action entered into several stipulations, one of which was that, with reference to the replevin action contained in the second cause of action, the parties agreed all of the farm equipment and machinery referred to, except a John Deere 4020 tractor, would be returned to the plaintiff within 30 days of the close of the trial. They also agreed that plaintiff could introduce evidence as to the price of grain at the Bellwood elevator at the date the grain was delivered to the elevator and on the day of the trial. The judge also instructed the jury that the parties had agreed that there were four separate items in dispute in the lawsuit, the first being the matter of the pasture rentals; the second being the grain which the plaintiff alleges belongs to her and which the defendants refuse to deliver; the third, a 4020 tractor which was held by the defendants until April 1981; and the fourth, damage to grain in storage.

Following a trial at which evidence was adduced and presented for consideration of the jury, the jury returned its verdict on May 24, 1983, generally in favor of the plaintiff and against the defendants, and specifically on the issues as follows.

On the issue of damages for wrongful detention of plaintiff's John Deere 4020 tractor, the jury found for the plaintiff and against the defendants William H. Birkel and Max Birkel in the sum of $1,200; on the issue of damages caused to the plaintiff's grain, the jury found for the plaintiff and against defendants William H. Birkel and Max Birkel in the sum of $1,212.09; on the issue of the pasture rent due plaintiff, the jury found for the plaintiff and against the defendant William H. Birkel in the sum of $289.44, and for the plaintiff and against the defendant Max Birkel in the sum of $289.44; on the issue of the ownership of grain, the jury found for the plaintiff and against the defendants William H. Birkel and Max Birkel in the sum of $24,543. The court entered judgment on the verdict and also

found that the plaintiff was entitled to prejudgment interest on the amount of grain held at the Bellwood Co-op Elevator in the amount of 4,968.40 bushels times $3.03, which equals $15,054.25, with interest thereon from the 7th day of February 1980 at the rate of 12 percent per annum. The court also awarded prejudgment interest at the rate of 12 percent per annum from the 1st day of March 1980 on the $1,200 damages awarded for wrongful detention of the tractor.

Defendants then perfected their appeal to this court, assigning as error that (1) the preponderance of the evidence was so clearly contrary to the findings that the jury should have returned the verdict in favor of the defendants on all issues; (2) the award is so clearly exorbitant as to indicate it was the result of the jury's disregarding the evidence of the rules of law; and (3) the court failed to determine that a reasonable controversy existed and, therefore, should not have awarded prejudgment interest.

The instant case represents a classical case where the evidence is contradicted on almost every issue. To set out the conflicting claims and testimony of the parties in detail in this opinion would unduly lengthen the opinion. Suffice it to say that there appears in the record sufficient evidence to justify the jury in reaching the result it did on each of the issues in question. Defendants admit that they owe plaintiff 4,968.40 bushels of grain and that they had placed it in the Bellwood elevator in the joint names of the defendants. One of the reasons the jury may have looked askance at the testimony presented by the defendants is because of the testimony given during the trial by the defendant William Birkel, who testified that he had attended a meeting concerning the 1978 grain claimed in the replevin action and that at that meeting the defendants had a "distinct battle plan worked out" to force plaintiff to release a mortgage on his father's farm in exchange for the grain. The plan called for a prerelease of the mortgage, which the plaintiff rejected but did make a counteroffer of a simultaneous release. William Birkel testified that even a simultaneous release was not acceptable because it was not part of the "battle plan," so he walked out of the meeting.

Also, on the issue of pasture rent due, plaintiff testified as to

the provision in the lease which allowed the parties to negotiate for pasture rent, and, furthermore, testimony was presented as to an oral agreement between the parties. This, however, was denied by the defendants.

On the issue of the detention of the John Deere tractor, defendants admitted to possession of the tractor, thus the issue before the jury was the amount of damages for the plaintiff. Also, on the issue of damages sustained to stored grain, plaintiff testified about the storage practices employed by defendants in previous years; and while defendants denied improper handling and asserted that any duty and care terminated at the close of the lease, the evidence clearly presented an issue for the jury's decision. Defendants have failed to show that the verdict is clearly against the weight of the evidence; in line with established law this court must consider the evidence in the light most favorable to the plaintiff under the circumstances of this case. See *Schimonitz v. Midwest Electric Membership Corp.*, 182 Neb. 810, 157 N.W.2d 548 (1968).

This is also true with regard to the claim that the amount of damages awarded by the jury is exorbitant. The established rule is that the amount of damages awarded by a jury will not be set aside as exorbitant unless it is so clearly excessive as to indicate that it was the result of passion, prejudice, mistake, or disregard of the evidence or applicable rules of law. *Siciunas v. Checker Cab Co., Inc.*, 191 Neb. 766, 217 N.W.2d 824 (1974); *Schmidt v. Richman Gordman, Inc.*, 191 Neb. 345, 215 N.W.2d 105 (1974); *Winston v. Davis*, 187 Neb. 522, 192 N.W.2d 413 (1971); *Schimonitz v. Midwest Electric Membership Corp., supra*.

A review of the record convinces us that the damages awarded were not exorbitant. First, on the action for pasture rent, the jury awarded damages as measured by the oral agreement of the parties, which is an appropriate measure of damages in a contract action. Defendants failed to show that this measure of damages was inappropriate and resulted in an excessive award. Plaintiff contends on appeal that the award was improperly determined and should be increased. However, this court will not address that issue because of the fact that

plaintiff did not cross-appeal for additional damages.

Also, in computing the damage to the corn stored and cared for by the defendants, the jury awarded damages equal to the financial deduction taken by the elevator at the time the corn was delivered. This was not so clearly excessive as to be contrary to the finding of negligence by the jury. See *Maricle v. Spiegel*, 213 Neb. 223, 329 N.W.2d 80 (1983). Therefore, the award will not be disturbed.

With regard to the corn which was withheld for the purpose of inducing a release of the mortgage, the jury returned a verdict for the plaintiff for 8,100 bushels at the price per bushel in effect at the time of the trial. The explanation given for the award of 8,100 bushels was that the corn came from the Hanus 80, which was, according to the testimony, all to be the property of the plaintiff and not subject to the 50-50 split. Based on the evidence in the record, the award of the jury was not exorbitant.

With regard to the detention of the tractor in question, the jury found from the evidence that defendants had wrongfully detained the tractor for 1 year and awarded plaintiff the sum of $1,200 as damages based upon evidence of its depreciation. This award appears to be within the statutory provision for replevin matters and should not be set aside. Neb. Rev. Stat. § 25-10,105 (Reissue 1979).

The law is well established in this state that a jury verdict will not be reversed on appeal unless it is clearly erroneous. *Maricle v. Spiegel, supra*. In this case the evidence in most respects was conflicting, and the jury resolved the conflicts.

One further matter remains to be discussed, and that is with reference to the award of prejudgment interest issued by the trial court after the return of the jury verdict. In its judgment the court awarded the plaintiff prejudgment interest on the sum of $15,054.25, computed on the basis of 4,968.40 bushels of corn remaining at the elevator at the established price of $3.03 per bushel. Defendants contend that the award of prejudgment interest was error.

The general rule in Nebraska is that where property is not returned in a replevin action, the measure of damages is the value of the property, together with interest, from the date of the unlawful taking. *Hickman-Williams Agency v. Haney*, 152

Neb. 219, 40 N.W.2d 813 (1950). Where the property is returned in a replevin action, the party recovering possession of the property is entitled to recover as damages any deterioration or depreciation in the value which has taken place during the wrongful detention. *White Motor Credit Corp. v. Sapp Bros. Truck Plaza, Inc.*, 197 Neb. 421, 249 N.W.2d 489 (1977). See, also, *Morfeld v. Bernstrauch*, 216 Neb. 234, 343 N.W.2d 880 (1984).

In the instant replevin action defendants had wrongfully retained all of the corn produced on the Hanus 80. The jury determined the amount of that corn to be 8,100 bushels. The court only awarded prejudgment interest on the 4,968.40 bushels that the defendants admitted to have retained. Plaintiff argued in her brief that she should have received prejudgment interest on the entire 8,100 bushels. However, she has neglected to cross-appeal and assign the inadequacy of the prejudgment interest as error. The general rule is that the court will only consider errors that are assigned and discussed. Neb. Rev. Stat. § 25-1919 (Reissue 1979); *Tautfest v. Tautfest*, 215 Neb. 233, 338 N.W.2d 49 (1983). Therefore, we will not consider whether the court's award of prejudgment interest is inadequate. The trial court's award of prejudgment interest on the 4,968.40 bushels of corn is affirmed.

The court also awarded prejudgment interest on the damages which resulted from the defendants' failure to return a John Deere 4020 tractor for a period of 1 year. Although the defendants assigned prejudgment interest as error, they failed to discuss in their brief or argue to the court the prejudgment interest that was awarded on the damages to the tractor. Only assignments of error which are argued and discussed may be considered by this court on appeal. Neb. Ct. R. 9D(1)d (rev. 1983). See, also, *Stungis v. Union Packing Co. of Omaha, Inc.*, 196 Neb. 126, 241 N.W.2d 660 (1976). Since the defendants did not discuss it in their brief, we will not consider whether the award of prejudgment interest on the amount of damages to the tractor was correct.

In view of what we have stated above, we believe that the verdict of the jury and the judgment entered thereon by the court are correct and must be affirmed.

AFFIRMED.

WEBSTER STREET PARTNERSHIP, LTD., APPELLANT AND CROSS-APPELLEE, V. MATTHEW SHERIDAN AND PAT WILWERDING, APPELLEES AND CROSS-APPELLANTS.

368 N.W.2d 439

Filed May 17, 1985. No. 84-037.

1. **Minors: Contracts.** As a general rule, an infant does not have the capacity to bind himself absolutely by contract.
2. _____: _____. The right of the infant to avoid his contract is one conferred by law for his protection against his own improvidence and the designs of others.
3. _____: _____. The policy of the law is to discourage adults from contracting with an infant; they cannot complain if, as a consequence of violating that rule, they are unable to enforce their contracts.
4. **Minors: Necessaries: Liability.** The privilege of infancy will not enable an infant to escape liability in all cases and under all circumstances. For example, it is well established that an infant is liable for the value of necessaries furnished him.
5. **Necessaries: Words and Phrases.** The meaning of the term "necessaries" cannot be defined by a general rule applicable to all cases; the question is a mixed one of law and fact, to be determined in each case from the particular facts and circumstances in such case. A number of factors must be considered before a court can conclude whether a particular product or service is a necessary.
6. **Minors: Necessaries: Liability.** Articles are not necessaries for an infant if he has a parent or guardian who is able and willing to supply them, and an infant residing with and being supported by his parent according to his station in life is not absolutely liable for things which under other circumstances would be considered necessaries.

Appeal from the District Court for Douglas County: SAMUEL P. CANIGLIA, Judge. Reversed and remanded with directions.

Thomas R. Wolff, for appellant.

Kirk L. Meisinger, and, on brief, Richard C. Sheridan, for appellees.

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

KRIVOSHA, C.J.

Webster Street Partnership, Ltd. (Webster Street), appeals from an order of the district court for Douglas County, Nebraska, which modified an earlier judgment entered by the municipal court of the city of Omaha, Douglas County, Nebraska. The municipal court entered judgment in favor of

Webster Street and against the appellees, Matthew Sheridan and Pat Wilwerding, in the amount of $630.94. On appeal the district court found that Webster Street was entitled to a judgment in the amount of $146.75 and that Sheridan and Wilwerding were entitled to a credit in the amount of $150. The district court therefore entered judgment in favor of Sheridan and Wilwerding and against Webster Street in the amount of $3.25. It is from this $3.25 judgment that appeal is taken to this court.

Webster Street is a partnership owning real estate in Omaha, Nebraska. On September 18, 1982, Webster Street, through one of its agents, Norman Sargent, entered into a written lease with Sheridan and Wilwerding for a second floor apartment at 3007 Webster Street. The lease provided that Sheridan and Wilwerding would pay to Webster Street by way of monthly rental the sum of $250 due on the first day of each month until August 15, 1983. The lease also required the payment of a security deposit in the amount of $150 and a payment of $20 per month for utilities during the months of December, January, February, and March. Liquidated damages in the amount of $5 per day for each day the rent was late were also provided for by the lease.

The evidence conclusively establishes that at the time the lease was executed both tenants were minors and, further, that Webster Street knew that fact. At the time the lease was entered into, Sheridan was 18 and did not become 19 until November 5, 1982. Wilwerding was 17 at the time the lease was executed and never gained his majority during any time relevant to this case.

The tenants paid the $150 security deposit, $100 rent for the remaining portion of September 1982, and $250 rent for October 1982. They did not pay the rent for the month of November 1982, and on November 5 Sargent advised Wilwerding that unless the rent was paid immediately, both boys would be required to vacate the premises. The tenants both testified that, being unable to pay the rent, they moved from the premises on November 12. In fact, a dispute exists as to when the two tenants relinquished possession of the premises, but in view of our decision that dispute is not of any relevance.

In a letter dated January 7, 1983, Webster Street's attorney made written demand upon the tenants for damages in the amount of $630.94. On January 12, 1983, the tenants' attorney denied any liability, refused to pay any portion of the amount demanded, stated that neither tenant was of legal age at the time the lease was executed, and demanded return of $150 security deposit.

Webster Street thereafter commenced suit against the tenants and sought judgment in the amount of $630.94, which was calculated as follows:

Rent due Nov.	$250.00
Rent due Dec.	250.00
Dec. utility allowance	20.00
Garage rental	40.00
Clean up and repair	
Broken window, degrease kitchen stove, shampoo carpet, etc.	46.79
Advertising	24.15
Re-rental fee	150.00
	780.94
Less security deposit	150.00
	$630.94

To this petition the tenants filed an answer alleging that they were minors at the time they signed the lease, that the lease was therefore voidable, and that the rental property did not constitute a necessary for which they were otherwise liable. In addition, Sheridan cross-petitioned for the return of the security deposit, and Wilwerding filed a cross-petition seeking the return of all moneys paid to Webster Street. Following trial, the municipal court of the city of Omaha found in favor of Webster Street and against both tenants in the amount of $630.94.

The tenants appealed to the district court for Douglas County. The district court found that the tenants had vacated the premises on November 12, 1982, and therefore were only liable for the 12 days in which they actually occupied the apartment and did not pay rent. The district court also

permitted Webster Street to recover $46.79 for cleanup and repairs. The tenants, however, were given credit for their $150 security deposit, resulting in an order that Webster Street was indebted to the tenants in the amount of $3.25.

Webster Street then perfected an appeal to this court assigning but one error in terms which provide little assistance to the court in considering the appeal. The assignment of error, in pertinent part, reads as follows: "The District Court . . . abused [its] discretion and committed errors of law in improperly modifying the judgment of the Municipal Court . . . ." It appears, in fact, to be Webster Street's position that the district court erred in failing to find that Sheridan had ratified the lease within a reasonable time after obtaining majority, and was therefore responsible for the lease, and that the minors had become emancipated and were therefore liable, even though Wilwerding had not reached majority. Webster Street is simply wrong in both matters.

As a general rule, an infant does not have the capacity to bind himself absolutely by contract. See, *Smith v. Wade*, 169 Neb. 710, 100 N.W.2d 770 (1960); 43 C.J.S. *Infants* § 166 (1978). The right of the infant to avoid his contract is one conferred by law for his protection against his own improvidence and the designs of others. See *Burnand v. Irigoyen*, 30 Cal. 2d 861, 186 P.2d 417 (1947). The policy of the law is to discourage adults from contracting with an infant; they cannot complain if, as a consequence of violating that rule, they are unable to enforce their contracts. As stated in *Curtice Co. v. Kent*, 89 Neb. 496, 500, 131 N.W. 944, 945 (1911): "The result seems hardly just to the [adult], but persons dealing with infants do so at their peril. The law is plain as to their disability to contract, and safety lies in refusing to transact business with them."

However, the privilege of infancy will not enable an infant to escape liability in all cases and under all circumstances. For example, it is well established that an infant is liable for the value of necessaries furnished him. 42 Am. Jur. 2d *Infants* § 65 (1969). See, also, *Burnand v. Irigoyen, supra; Merrick v. Stephens*, 337 S.W.2d 713 (Mo. App. 1960); *Englebert v. Troxell*, 40 Neb. 195, 58 N.W. 852 (1894). An infant's liability for necessaries is based not upon his actual contract to pay for

them but upon a contract implied by law, or, in other words, a quasi-contract. 42 Am. Jur. 2d, *supra*.

Just what are necessaries, however, has no exact definition. The term is flexible and varies according to the facts of each individual case. In *Cobbey v. Buchanan*, 48 Neb. 391, 397, 67 N.W. 176, 178 (1896), we said: " 'The meaning of the term "necessaries" cannot be defined by a general rule applicable to all cases; the question is a mixed one of law and fact, to be determined in each case from the particular facts and circumstances in such case.' " A number of factors must be considered before a court can conclude whether a particular product or service is a necessary. As stated in *Schoenung v. Gallet*, 206 Wis. 52, 54, 238 N.W. 852, 853 (1931):

> "The term 'necessaries,' as used in the law relating to the liability of infants therefor, is a relative term, somewhat flexible, except when applied to such things as are obviously requisite for the maintenance of existence, and depends on the social position and situation in life of the infant, as well as upon his own fortune and that of his parents. The particular infant must have an actual need for the articles furnished; not for mere ornament or pleasure. The articles must be useful and suitable, but they are not necessaries merely because useful or beneficial. Concerning the general character of the things furnished, to be necessaries the articles must supply the infant's personal needs, either those of his body or those of his mind. However, the term 'necessaries' is not confined to merely such things as are required for a bare subsistence. There is no positive rule by means of which it may be determined what are or what are not necessaries, for what may be considered necessary for one infant may not be necessaries for another infant whose state is different as to rank, social position, fortune, health, or other circumstances, the question being one to be determined from the particular facts and circumstances of each case."

(Citation omitted.) This appears to be the law as it is generally followed throughout the country.

In *Ballinger v. Craig*, 95 Ohio App. 545, 121 N.E.2d 66, (1953), the defendants were husband and wife and were 19 years

of age at the time they purchased a house trailer. Both were employed. However, prior to the purchase of the trailer, the defendants were living with the parents of the husband. The Court of Appeals for the State of Ohio held that under the facts presented the trailer was not a necessary. The court stated:

> " 'To enable an infant to contract for articles as necessaries, he must have been in actual need of them, and obliged to procure them for himself. They are not necessaries as to him, however necessary they may be in their nature, if he was already supplied with sufficient articles of the kind, or if he had a parent or guardian who was able and willing to supply them. The burden of proof is on the plaintiff to show that the infant was destitute of the articles, and had no way of procuring them except by his own contract.' "

(Citation omitted.) *Id.* at 547, 121 N.E.2d at 67. Under Ohio law the marriage of the parties did not result in their obtaining majority.

In 42 Am. Jur. 2d *Infants* § 67 at 68-69 (1969), the author notes:

> Thus, articles are not necessaries for an infant if he has a parent or guardian who is able and willing to supply them, and an infant residing with and being supported by his parent according to his station in life is not absolutely liable for things which under other circumstances would be considered necessaries.

The undisputed testimony is that both tenants were living away from home, apparently with the understanding that they could return home at any time. Sheridan testified:

> Q. During the time that you were living at 3007 Webster, did you at any time, feel free to go home or anything like that?
>
> A. Well, I had a feeling I could, but I just wanted to see if I could make it on my own.
>
> Q. Had you been driven from your home?
>
> A. No.
>
> Q. You didn't have to go?
>
> A. No.
>
> Q. You went freely?

A. Yes.

Q. Then, after you moved out and went to 3417 for a week or so, you were again to return home, is that correct?

A. Yes, sir.

It would therefore appear that in the present case neither Sheridan nor Wilwerding was in need of shelter but, rather, had chosen to voluntarily leave home, with the understanding that they could return whenever they desired. One may at first blush believe that such a rule is unfair. Yet, on further consideration, the wisdom of the rule is apparent. If, indeed, landlords may not contract with minors, except at their peril, they may refuse to do so. In that event, minors who voluntarily leave home but who are free to return will be compelled to return to their parents' home—a result which is desirable. We therefore find that both the municipal court and the district court erred in finding that the apartment, under the facts in this case, was a necessary.

Having therefore concluded that the apartment was not a necessary, the question of whether Sheridan and Wilwerding were emancipated is of no significance. The effect of emancipation is only relevant with regard to necessaries. If the minors were not emancipated, then their parents would be liable for necessaries provided to the minors. As we recently noted in *Accent Service Co., Inc. v. Ebsen*, 209 Neb. 94, 96, 306 N.W.2d 575, 576 (1981):

> "In general, even in the absence of statute, parents are under a legal as well as a moral obligation to support, maintain, and care for their children, the basis of such a duty resting not only upon the fact of the parent-child relationship, but also upon the interest of the state as parens patriae of children and of the community at large in preventing them from becoming a public burden. However, various voluntary acts of a child, such as marriage or enlistment in military service, have been held to terminate the parent's obligation of support, the issue generally being considered by the courts in terms of whether an emancipation of the child has been effectuated. In those cases involving the issue of whether a parent is obligated to support an unmarried minor child

> who has voluntarily left home without the consent of the parent, the courts, in actions to compel support from the parent, have uniformly held that such conduct on the part of the child terminated the support obligation. . . ."

If, on the other hand, it was determined that the minors were emancipated and the apartment was a necessary, then the minors would be liable. But where, as here, we determine that the apartment was not a necessary, then neither the parents nor the infants are liable and the question of emancipation is of no moment.

Because the rental of the apartment was not a necessary, the minors had the right to avoid the contract, either during their minority or within a reasonable time after reaching their majority. See *Smith v. Wade*, 169 Neb. 710, 100 N.W.2d 770 (1960). Disaffirmance by an infant completely puts an end to the contract's existence, both as to him and as to the adult with whom he contracted. *Curtice Co. v. Kent*, 89 Neb. 496, 131 N.W. 944 (1911). Because the parties then stand as if no contract had ever existed, the infant can recover payments made to the adult, and the adult is entitled to the return of whatever was received by the infant. *Id.*

The record shows that Pat Wilwerding clearly disaffirmed the contract during his minority. Moreover, the record supports the view that when the agent for Webster Street ordered the minors out for failure to pay rent and they vacated the premises, Sheridan likewise disaffirmed the contract. The record indicates that Sheridan reached majority on November 5. To suggest that a lapse of 7 days was not disaffirmance within a reasonable time would be foolish. Once disaffirmed, the contract became void; therefore, no contract existed between the parties, and the minors were entitled to recover all of the moneys which they paid and to be relieved of any further obligation under the contract. The judgment of the district court for Douglas County, Nebraska, is therefore reversed and the cause remanded with directions to vacate the judgment in favor of Webster Street and to enter a judgment in favor of Matthew Sheridan and Pat Wilwerding in the amount of $500, representing September rent in the amount of $100, October rent in the amount of $250, and the security deposit in the amount of $150.

REVERSED AND REMANDED WITH DIRECTIONS.

GOLDA BOCKBRADER, APPELLANT, V. DEPARTMENT OF PUBLIC INSTITUTIONS, STATE OF NEBRASKA, APPELLEE.

367 N.W.2d 721

Filed May 17, 1985. No. 84-302.

1. **Administrative Law: Due Process: Notice: Appeal and Error.** A court reviewing an order of an administrative agency to determine whether there has been due process of law must determine whether there was reasonable notice and an opportunity for fair hearing.
2. **Administrative Law: Due Process.** There must be a hearing before an impartial board at some time before an order of dismissal from an administrative agency becomes effective, to ensure due process of law.
3. **Administrative Law: Public Officers and Employees: Due Process.** Due process requires a pretermination hearing to determine whether there are reasonable grounds to believe that the charges against a tenured public employee are true and support the proposed action.
4. _____: _____: _____. A tenured public employee is entitled to notice of the charges against him, an explanation of the employer's evidence, and an opportunity to respond at a pretermination hearing.
5. **Final Orders: Jurisdiction.** The power to decide usually implies the power to reconsider.

Appeal from the District Court for Lancaster County: DARVID D. QUIST, Judge. Affirmed.

Elaine A. Waggoner of Waggoner Law Office, for appellant.

Paul L. Douglas, Attorney General, and Martel J. Bundy, for appellee.

BOSLAUGH, CAPORALE, SHANAHAN, and GRANT, JJ., and BRODKEY, J., Retired.

BOSLAUGH, J.

The plaintiff, Golda Bockbrader, appeals from the order of the district court which affirmed the order of the State Personnel Board approving the termination of her employment by the Department of Public Institutions (DPI) of the State of Nebraska.

The plaintiff was employed as the volunteer-recreation coordinator at the Nebraska Veterans' Home, Grand Island, Nebraska (Home). On March 18, 1980, the plaintiff's employment was terminated by Everett Phillips, the Home's administrator, for "continued inability to follow the direction

of management."

The termination of her employment was preceded by a series of complaints made against her by the Home's nursing department and a representative of the American Legion Auxiliary (Auxiliary). Specifically, on three occasions, despite requests by the nursing department, the plaintiff failed to provide volunteers for an enclosed area outside the home, which was used for recreational purposes. The plaintiff was aware that she was supposed to coordinate such activities with the nursing department, but refused to do so because she considered the fenced area like a prison camp and was sure that volunteers would not want to work within it.

Additionally, friction existed between the plaintiff and Eleanor Brown, the deputy representative from the Auxiliary to the Home. The plaintiff instructed an employee from the volunteer department not to assist the Auxiliary in turning on a bingo board. Brown complained to Phillips about the plaintiff's lack of cooperation with the Auxiliary. Phillips also received complaints from the department president of the Auxiliary that the plaintiff acted like she were the Auxiliary representative at the home, was trying to take over the Auxiliary program at the Home, and had a habit of representing herself as the representative at Auxiliary meetings.

In response to these complaints, Phillips discussed the problems with the plaintiff and issued six directives to her on July 25, 1979. They directed the plaintiff to (1) cooperate with specifically identified volunteers in the coming year; (2) cooperate with nursing programs as requested; (3) not represent the Home at veterans' meetings, and make sure the Auxiliary representative received credit for services performed at the Home; (4) give her employees written directives to cooperate in any way possible with all volunteers; (5) keep this conversation privileged; and (6) provide her three CETA workers to the nursing department on July 26, 1979, at 9:30 a.m.

When the plaintiff received a 5-percent merit pay increase in November 1979, she thought she had complied with the directives. However, beginning in January 1980, more problems arose. The plaintiff objected to Brown's receipt of free meals while at the Home as a representative of the Retired

Senior Volunteer Program (RSVP). The plaintiff's objections, which were voiced at an RSVP board meeting, embarrassed Brown. Subsequently, the plaintiff resigned from the RSVP board over the issue of meal reimbursement.

On January 21, 1980, Phillips received a request from the American Legion for the plaintiff to speak at an upcoming convention. When Phillips instructed the plaintiff to decline the invitation, several angry Legionnaires met with Phillips on January 31, 1980, to determine why the plaintiff could not speak.

On February 27, 1980, Phillips again met with the plaintiff and asked her about the RSVP incident and the Legionnaires' meeting. He also reminded her of the July directives. She claimed to know nothing of the Legionnaires' meeting, and requested a meeting with Brown. Phillips then presented the plaintiff with a written corrective action, pursuant to rule 14.12.5 of the Nebraska Personnel System Rules and Regulations (Oct. 24, 1977), for her "repeated failure to maintain satisfactory and harmonious working relations with other departments and various volunteer groups." The corrective stated that the plaintiff was working against management rather than with it. It warned of further disciplinary action if there was no evidence in the immediate future of a cooperative attitude between the plaintiff's office and the volunteer groups.

The meeting with Brown that the plaintiff had requested was held on February 28. By all accounts the meeting solved nothing, and the plaintiff antagonized Brown. The personnel manager, who attended this meeting and had been investigating complaints against the plaintiff, then recommended termination to Phillips, based on the meeting and a review of the plaintiff's performance records relating to cooperation with management.

Phillips met with the plaintiff on March 10, 1980, to discuss the results of the meeting with Brown. They also discussed her attitudes about providing volunteers in the enclosed area, which had not changed.

On March 18, 1980, Phillips terminated the plaintiff's employment. She was informed by Phillips that the termination

was based on her inability to cooperate with Brown and her inability to cooperate with management in utilizing the enclosed area.

The plaintiff then filed a grievance with the director of DPI, who affirmed the termination for violation of the same regulations referred to by Phillips in his written response to the grievance: (1) failure to comply with regulations, policies, and procedures of the Department of Personnel; (2) refusal to accept a reasonable work assignment; (3) use of undue influence to gain individual advantage; and (4) failure to maintain harmonious working relationships with the public or with other employees.

The plaintiff then appealed to Jan Pieper, the director of the Department of Personnel. Pieper, after hearing testimony, recommended reinstatement, based on management's failure to provide specific guidance as to how the plaintiff could correct her deficiencies.

The DPI then brought the matter before the State Personnel Board. A full evidentiary hearing was held on October 9 and 10, 1980, before four board members. This hearing resulted in a tie vote. On its own motion the board held a second hearing on July 16 and 17, 1981, before two new board members and one other member. This panel unanimously affirmed the termination.

The plaintiff then appealed to the district court, raising five errors which, upon hearing, were consolidated into two: (1) Whether the board's tie vote after the first hearing was a final order which deprived the board of jurisdiction to hold the second hearing, which thus deprived the plaintiff of due process; and (2) Whether the evidence on rehearing was sufficient to support the termination. The district court held that the board had acted within its jurisdiction, there had been no denial of due process, and the decision was supported by competent, material, and substantial evidence.

The plaintiff claims the district court erred in its finding of jurisdiction and substantial evidence. She also alleges other due process violations under the broad umbrella that the district court's decision is "contrary to the law." Specifically, she questions the sufficiency of her termination notice, as it did not

tell her why she was fired, and the sufficiency of the procedures used by Phillips prior to termination.

A court reviewing an order of an administrative agency to determine whether there has been due process of law must determine whether there was reasonable notice and an opportunity for a fair hearing. *In re Appeal of Levos*, 214 Neb. 507, 335 N.W.2d 262 (1983).

The requisite notice must inform the employee of the accusation made, identify the accuser, provide a factual basis for the accusation, and afford an opportunity to present evidence concerning the accusation. *Levos, supra; Benton v. Board of Ed. of Sch. Dist. No. 17*, 219 Neb. 134, 361 N.W.2d 515 (1985).

The hearing must be before an impartial board, *Levos, supra*, and *Benton, supra*, and occur at some point before the final order becomes effective. *Chase v. Board of Trustees of Nebraska State Colleges*, 194 Neb. 688, 235 N.W.2d 223 (1975).

Here, there was substantial compliance with the notice requirements, and there can be no doubt that the plaintiff knew why she was terminated. The termination notice itself was minimal, but Phillips informed the plaintiff at the termination meeting of the specific reasons for termination: lack of cooperation with Brown and lack of cooperation in staffing the enclosed area. While no specific regulations that had been violated were listed in the termination notice, these were supplied by Phillips in his answer to the plaintiff's grievance a full month and a half before the evidentiary hearing before the Director of Personnel. Any further clarification could have been obtained by utilizing discovery procedures provided under the personnel regulations.

In a recent decision the U.S. Supreme Court discussed the due process which must be afforded a public employee who has a constitutionally protected property right in his employment and who is in danger of termination. In *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. ____, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985), the Court held that a pretermination hearing is required to safeguard this property right. The pretermination hearing need not be elaborate and may be "something less" than a full evidentiary hearing. The Court said:

> Here, the pretermination hearing need not definitively resolve the propriety of the discharge. It should be an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action. See *Bell v. Burson,* 402 U.S., at 540, 91 S.Ct., at 1590.
>
> The essential requirements of due process . . . are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. See Friendly, "Some Kind of Hearing," 123 U.Pa.L.Rev. 1267, 1281 (1975). The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. See *Arnett v. Kennedy,* 416 U.S., at 170-171, 94 S.Ct., at 1652-1653 (opinion of POWELL, J.); *id.,* at 195-196, 94 S.Ct., at 1664-1665 (opinion of WHITE, J.); see also *Goss v. Lopez,* 419 U.S., at 581, 95 S.Ct., at 740. To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee.

105 S. Ct. at 1495-96.

The personnel rules and regulations in effect at the time of the plaintiff's dismissal provided the necessary due process. (See Nebraska Personnel System Rules and Regulations (Oct. 24, 1977).) The regulations provide that dismissal is a disciplinary action. Rule 14.17.5. Upon receipt of information indicating that either corrective or disciplinary action should be taken, the appointing authority (agency head) or his designated representative must meet with the employee to verify the information. The employee must be afforded an opportunity to refute the information or present mitigating evidence. Rule 14.12.3. Based on the information and evidence, the appointing authority makes a decision and informs the employee in writing of the nature of the offense, the action being taken, and the reason for the action. Rule 14.12.6. If the action is taken by a designated representative, the agency head retains authority to

modify the representative's action. Rule 14.12.1. Generally, a dismissed employee must be given written notice of his dismissal 2 weeks prior to its effective date, or 2 weeks' pay in lieu thereof.

Applying these requirements to the case at bar, the corrective issued in February 1980 put the plaintiff on notice that disciplinary action was pending if her relationship with certain volunteer groups did not improve. At the time the corrective was issued, the plaintiff had an opportunity to refute the charge in a counseling session with Phillips and then hold a meeting with Brown, the individual at the center of the controversy. After that meeting the plaintiff discussed the results with Phillips on March 10. The plaintiff admitted the meeting with Brown accomplished nothing. When questioned about utilizing the enclosed area, the plaintiff admitted that she had not changed her mind about using it.

One week later, the plaintiff met with Phillips and received written notice of her termination for "continued inability to follow the direction of management." The reasons behind the termination were explained to her, and she received 2 weeks' pay in lieu of notice.

The plaintiff then pursued administrative and judicial review of the decision, during which three evidentiary hearings were held.

While the plaintiff may not have been afforded an opportunity to refute the charges against her on the date of the termination, the evidence is clear that from the time the corrective action was first served on her on February 27, 1980, the plaintiff has had at least two opportunities to refute the charges which were the basis of her dismissal.

In addition, she was on notice of her deficiencies from July 1979, when directives outlining the problems were given to her. She admitted to the personnel board that she believed her dismissal was triggered by her failure to follow the July 25, 1979, directives.

Since the plaintiff received adequate notice of the charges against her and had ample opportunity to refute them prior to her dismissal, the requirements of *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. ____, 105 S. Ct. 1487, 84 L. Ed. 2d 494

(1985), were met, and it cannot be said that she was denied due process.

Since the notice here was sufficient, this case may be distinguished from those where the dismissed employee was not afforded adequate information of the allegations against him and, therefore, was unable to defend himself at the hearing. See, *Benton v. Board of Ed. of Sch. Dist. No. 17*, 219 Neb. 134, 361 N.W.2d 515 (1985); *Irwin v. Board of Ed. of Sch. Dist. No. 25*, 215 Neb. 794, 340 N.W.2d 877 (1983).

As to the question of the personnel board's jurisdiction to rehear the appeal after a tie vote, the rule followed by some appellate courts that an equal division is a judgment of affirmance is not applicable here. See *Durant v. Essex Company*, 74 U.S. 107, 19 L. Ed. 154 (1869).

Administrative bodies which exercise judicial or quasi-judicial powers have the power to decide controversies. "The power to decide usually implies the power to reconsider." *Andrews Van Lines, Inc. v. Smith*, 187 Neb. 533, 536, 192 N.W.2d 406, 408 (1971). The power to reconsider exists until the aggrieved party files an appeal or the statutory appeal period has expired.

Here, no final decision was reached after the first personnel board hearing. The board was equally divided both as to termination and as to allowing the decision of the Director of Personnel to stand. The vote as such was ineffective to render a final decision. "An agency determination obviously cannot be final if it is not an effective determination, much less if it is no determination at all." *Chase v. Board of Trustees of Nebraska State Colleges*, 194 Neb. 688, 694, 235 N.W.2d 223, 227 (1975). Since the decision of the board was ineffective, and not final, it did not divest the board of its jurisdiction to render a final decision upon rehearing. The board rendered a final decision on October 26, 1981, and an appeal was perfected on November 4, 1981. The board retained jurisdiction over the controversy until the October decision was rendered.

There was also substantial evidence on the record for the district court to sustain the personnel board's action affirming termination.

On appeal this court's review is limited to considering

whether the agency decision was supported by substantial evidence. *Beatrice Manor v. Department of Health*, 219 Neb. 141, 362 N.W.2d 45 (1985). This standard requires the reviewing court to search the entire record and determine whether, on the evidence before the agency, it could fairly and reasonably find facts as it did. *Beatrice Manor, supra; Simonds v. Board of Examiners*, 213 Neb. 259, 329 N.W.2d 92 (1983).

Here, the record reveals the plaintiff did not follow the directives given her with respect to cooperating with the volunteer workers or providing volunteer workers in the enclosed area. She therefore violated two regulations: (1) failure to maintain harmonious working relationships with the public or employees; and (2) refusal to accept a reasonable work assignment. Rules 14.13.9, 14.13.2. The violation of either regulation was a sufficient ground for her termination. Rule 14.17.5.

With regard to providing volunteer workers for the enclosed area, three meetings were held in 1979 with the nursing department to solicit the plaintiff's help. Each time she refused, claiming that no volunteers would want to work in the area or that the area destroyed the dignity of the veterans. The nursing department finally gave up on asking for volunteers in the area, feeling that any more attempts were useless. Even when the plaintiff was directed by Phillips to provide workers, though she complied with one request her attitude toward working in the area never changed. It was the totality of the plaintiff's behavior with reference to the area, and not one specific, subsequent refusal, which caused the board to uphold her termination on this ground. The board's finding is bolstered by the fact that after the plaintiff's dismissal an adequate number of volunteers was found to work in the area.

With respect to working with the Auxiliary volunteers, the record reveals the plaintiff's attitude and behavior toward Eleanor Brown, a deputy representative, only worsened in 1979 and 1980. The plaintiff was given a specific directive to cooperate with Brown. However, the situation continued to deteriorate with reference to the RSVP meal reimbursement. A corrective was issued and a meeting set up with Brown to try and alleviate the problem. However, the plaintiff was rude to

Brown during the meeting, and nothing was accomplished. She was terminated only after Phillips received word of the meeting from the Home's director of personnel and the results of the meeting were discussed with her. The plaintiff's dissentive attitude and lack of cooperation were amply documented on the record and constituted substantial evidence for the district court to uphold her termination.

The judgment of the district court is affirmed.

AFFIRMED.

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

367 N.W.2d 728

Filed May 17, 1985. No. 84-382.

1. **Damages: Appeal and Error: New Trial.** When error exists only as to the issue of damages and the judgment is in other respects free from error, and it is clear that no injustice will result from doing so, a reviewing court may, when remanding a cause for a new trial, limit the new trial to such issue.
2. **Trial: Evidence: Appeal and Error.** In a case tried to the court, the presumption obtains that the trial court, in arriving at its decision, considered only such evidence as was competent and relevant.
3. **Trial: Evidence: Witnesses.** It is the province of the trier of the facts to harmonize the testimony insofar as that is possible and, in case of conflicts, to decide as to the weight to be given the testimony of the witnesses.
4. **Prejudgment Interest.** Where a reasonable controversy exists as to the plaintiff's right to recover or as to the amount of such recovery, the claim is generally considered to be unliquidated and prejudgment interest is not allowed.

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

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

Douglas McArthur, for appellee.

KRIVOSHA, C.J., WHITE, and GRANT, JJ., and BRODKEY, J., Retired, and WOLF, D.J.

PER CURIAM.

The appellee, Darlene Jeffres, brought this action to recover damages to her mobile home caused by the appellant's, Countryside Homes of Lincoln, Inc.'s, negligent conduct when it moved the home from its premises pursuant to a writ of restitution. After a bench trial judgment was entered for the appellee. In *Jeffres v. Countryside Homes*, 214 Neb. 104, 333 N.W.2d 754 (1983), this court affirmed the district court's order as to the appellant's liability. However, as to the issue of damages, this court found the evidence insufficient and remanded the cause for a rehearing. Specifically, this court stated that

> our review of the record has convinced us that the testimony presented with reference to the amount of damages to the mobile home in question leaves much to be desired, and that issue should be remanded for rehearing in the court below. For example, the evidence is clear that when appellee purchased the motor home in question it contained a substantial amount of furniture. The record is also clear that appellee removed all of such furniture before the home was sold at sheriff's sale, and there is no evidence in the record as to the value of the items removed. If these items had any value at all (and they undoubtedly did), the appellant should be given credit for such value, rather than having the damages determined by the application of the price at the sale of $900 only.

Id. at 124, 333 N.W.2d at 764-65.

After a new trial on the issue of damages, the district court for Lancaster County, Nebraska, awarded the appellee $5,145 plus interest on that amount at the legal rate.

Basically, the errors assigned by the appellant raise two issues for this court's review: (1) Whether the trial court erred in its findings as to the fair market value of the mobile home both before and after it was damaged, and as to the fair market value of the personal property removed from the home; and (2) Whether the trial court erred in its award of prejudgment interest.

At the rehearing the trial judge, sitting without a jury, received the bill of exceptions from the original trial into

evidence. The evidence therein demonstrates that the appellee purchased the mobile home on June 27, 1975, for $9,832.50 and that it was damaged by the appellant on August 29, 1979. Thereafter, it was sold at a police sale on March 1, 1980, for $900.

Joel Phipps, a former vice president of Commonwealth Savings, testified that the day before the mobile home was damaged, $7,324.54 remained outstanding on the loan for the home; he further testified that the value of a mobile home should be approximately equal to the unpaid balance of the loan. Phipps also indicated that the Kelley Blue Book value of the home was $7,125. In Phipps' opinion, after the mobile home was damaged it was not worth in excess of $1,000. Additionally, Kenneth Ferguson, owner of a mobile home sale and repair business, testified that upon the request of Commonwealth Savings Co., he inspected the home after it was damaged and concluded "it wasn't salvageable."

At the rehearing Robert Dula, a real estate broker, testified that he had inspected the mobile home on or about January 11, 1979, and as a result of such inspection, he listed the home for sale for $9,975. Also, at the rehearing, appellee, the owner of the mobile home, testified that immediately before it was damaged it was worth $7,000 to $8,000.

With regard to the furniture removed from the mobile home prior to the salvage sale, appellee testified as to the value of each item so removed; the district court totaled the values, which, according to its calculations, amounted to $655.

The evidence presented by the appellant was in substantial conflict with that offered by the appellee.

In its order after rehearing, the district court found that the mobile home was valued at $7,000 immediately before appellant damaged it; that it was valued at $1,200 immediately afterwards; and that appellee had removed $655 worth of furniture and personal property.

When error exists only as to the issue of damages and the judgment is in other respects free from error, and it is clear that no injustice will result from doing so, a reviewing court may, when remanding a cause for a new trial, limit the new trial to such issue. *O'Neil v. Behrendt*, 212 Neb. 372, 322 N.W.2d 790

(1982).

The trial court having the issue of damages before it for a new trial on that issue, it was within the sound discretion of the trial court to decide the issue on evidence contained in the record already made at the first trial, or to take additional evidence or to try the case de novo. *Botsch v. Leigh Land Co.*, 205 Neb. 401, 288 N.W.2d 31 (1980), *appeal after remand* 210 Neb. 290, 313 N.W.2d 696 (1981). In light of this court's previous finding that the evidence as to damages left "much to be desired," it was not inconsistent with the opinion directing remand, and it was within the trial court's discretion, to receive the record from the first trial and to receive new evidence.

Appellant argues, however, that evidence of the original purchase price of the mobile home, the sale price of the mobile home at the sheriff's sale, and the principal balance of a mortgage against the mobile home was improperly received under the precedent established in *Neill v. McGinn*, 175 Neb. 369, 122 N.W.2d 65 (1963). In *Neill* the plaintiff's automobile was converted by the defendant and subsequently wrecked. The only evidence offered by the plaintiff to prove the value of the automobile before the taking and the salvage value thereafter was the purchase price and the sale price of the salvage, respectively. This court held that those prices "in no way tended to prove the proper measure of plaintiff's damage in this cause. . . . It is obvious that neither the purchase price nor the amount received as salvage was material to show the reasonable market value of the automobile before and after the injury." *Id.* at 373, 122 N.W.2d at 68.

In *Torrey v. Torrey*, 206 Neb. 485, 491, 293 N.W.2d 402, 406 (1980), this court reiterated the rule:

> In a case tried to the court, either in law or in equity, the presumption obtains that the trial court, in arriving at its decision, considered only such evidence as was competent and relevant. This court will not reverse a case so tried because other evidence was admitted, if there is sufficient competent and relevant evidence in the record to sustain the judgment.

See, also, *Kockrow v. Kockrow*, 191 Neb. 657, 217 N.W.2d 89 (1974).

In this case it cannot be said that there was not sufficient competent and relevant evidence presented. For instance, the appellee, the owner of the mobile home, testified as to its value. While the rule may be different in the case of realty, at least with respect to personal property such as the mobile home in question, the law is well settled that the owner of personalty is qualified to express an opinion of its value solely because of her status as owner. *Peck v. Masonic Manor Apartment Hotel*, 203 Neb. 308, 278 N.W.2d 589 (1979). Cf. *Langfeld v. Department of Roads*, 213 Neb. 15, 328 N.W.2d 452 (1982).

Notwithstanding the sufficient competent and relevant evidence in this case, the appellee contends that evidence of the purchase and salvage price was not inadmissible pursuant to the *Neill* decision but, rather, was admissible under the more recent Nebraska Evidence Rules, particularly Neb. Rev. Stat. § 27-401 (Reissue 1979), which defines relevant evidence. Because of this court's holding in *Torrey, supra*, and other similar decisions, it is unnecessary to decide this question.

It is likewise unnecessary to consider appellant's contention that the trial court should not have admitted the Kelley Blue Book as evidence of the value of the mobile home. Although it may be generally held that evidence of the blue book value of a vehicle of a certain make, model, and year is inadmissible absent other evidence of the condition of the particular vehicle involved in the litigation, or its optional equipment, or that the values set forth in the blue book would apply to the particular vehicle involved, see, *Jones v Morgan*, 58 Mich. App. 455, 228 N.W.2d 419 (1975); *Gaylord v. Hoar*, 122 Vt. 143, 165 A.2d 358 (1960); see, also, *Arcon Const. Co. v. S.D. Cement Plant*, 349 N.W.2d 407 (S.D. 1984), this court need not go so far as to apply the rule in this case. As stated previously, in a case tried to the court, the presumption obtains that the trial court in arriving at its decision considered only such evidence as was competent and relevant. Here, the plaintiff's testimony and the experts' testimony regarding the value of the mobile home constituted sufficient competent and relevant evidence to sustain the judgment. *Torrey, supra*. If indeed it was error to admit the blue book, such error was harmless.

As to the conflicting evidence presented by the experts, the

question, it seems, became one of credibility. "It is the province of the trier of the facts to harmonize the testimony insofar as that is possible, and in case of conflicts, to decide as to the weight to be given the testimony of the witnesses." Absent obvious error, this court is bound by that determination. *Reed v. County of Hall*, 199 Neb. 134, 140, 256 N.W.2d 861, 865 (1977). Suffice it to say that the trial court found the appellee's witnesses and the values quoted to be credible.

Concerning the first assignment of error, then, it cannot be said that the trial court erred in its findings relating to the fair market value of the mobile home both before and after it was damaged, and as to the fair market value of the personal property removed from the home. The case was tried on the theory that the mobile home was not repairable, and the trial court properly measured the damages. The measure of damages for injury to personal property which cannot be restored to its condition before the injury is the difference in the market value of the property immediately before and after the injury. *Neill v. McGinn*, 175 Neb. 369, 122 N.W.2d 65 (1963).

The appellant's final assignment of error concerns the award of prejudgment interest. The rule is well established that "[w]here a reasonable controversy exists as to the plaintiff's right to recover or as to the amount of such recovery, the claim is generally considered to be unliquidated and prejudgment interest is not allowed." *Slusarski v. American Confinement Sys.*, 218 Neb. 576, 582, 357 N.W.2d 450, 455 (1984). Owing to the conflicting evidence presented by the parties, it would seem to establish that a reasonable controversy existed. The amount of damages was the subject of diverse opinion testimony. In the past this court has disallowed prejudgment interest where the amount of the loss could not be computed without opinion or discretion. *Erin Rancho Motels v. United States F. & G. Co.*, 218 Neb. 9, 352 N.W.2d 561 (1984).

We conclude, therefore, that under the standard of review applicable in this case, the trial judge was not "clearly wrong" in his judgment for damages herein, but was correct in his computations, conclusions, and assessment of such damages except as to the allowance of prejudgment interest, and that such judgment as modified must be, and hereby is, affirmed.

Nerud v. Haybuster Mfg., 215 Neb. 604, 340 N.W.2d 369 (1983).

AFFIRMED AS MODIFIED.

IN RE ESTATE OF DELPHINE WAGNER.
LYMAN WAGNER, GENEVIEVE BEERBOHM, LOIS ANN TANK, AND DEL NOR SAZAMA, APPELLANTS, V. DELPHINE WAGNER, APPELLEE.

367 N.W.2d 736

Filed May 17, 1985. No. 84-457.

1. **Guardians and Conservators.** Before one may be subject to the control of a conservator, the requirements of the statute concerning the appointment of a conservator must be met.
2. _____. A guardian should not be appointed either of the person or property of an adult simply because he is aged or infirm or because his mind is to some extent impaired by age or disease.
3. **Undue Influence.** Mere suspicion, surmise, or conjecture does not warrant a finding of undue influence; there must be a solid foundation of established facts on which to rest the inference of its existence.
4. _____. It is not mere influence that the court is to be concerned with, but undue influence as defined by the law.

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

Ray C. Simmons of Simmons & Schneider, P.C., for appellants.

William G. Line of Kerrigan, Line & Martin, for appellee.

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

KRIVOSHA, C.J.

The appellants, Lyman Wagner, Genevieve Beerbohm, Lois Ann Tank, and Del Nor Sazama, four of the six children of the appellee, Delphine Wagner, appeal from an order entered by the district court for Dodge County, Nebraska, vacating a previous order entered by the county court for Dodge County appointing a conservator for Delphine Wagner and setting aside

a certain lease of land owned by her. We affirm the decision of the district court vacating the appointment of a conservator and reinstating the lease.

The appellants assign essentially two errors. One, that the district court reviewed the record of the county court proceedings de novo rather than for error appearing on the record as required by statute; and, two, that the evidence adduced at the hearing in the county court supports the action taken by the county court in appointing a conservator for Delphine Wagner.

The standard of review of an order either appointing or denying the appointment of a conservator under the provisions of Neb. Rev. Stat. § 30-2630 (Cum. Supp. 1984) is set out by statute. Neb. Rev. Stat. § 30-1601 (Cum. Supp. 1984) provides that "[i]n all matters arising under the Nebraska Probate Code, appeals shall be allowed as provided in sections 24-541.01 to 24-541.10 and 24-551." The manner for hearing, trying, and determining such appeals is set out in Neb. Rev. Stat. § 24-541.06 (Cum. Supp. 1982), which provides: "(1) In all cases other than appeals from the Small Claims Court, the district court shall review the case for error appearing on the record made in the county court . . . ." See, also, *In re Estate of Oltmer*, 214 Neb. 830, 336 N.W.2d 560 (1983). Even if we were to agree with appellants that the scope of review is for error appearing on the record, a question we do not in fact decide, we would not have any reason to reverse the decision of the district court. An examination of the record for error only and not for the purpose of making determinations anew leads to the inescapable conclusion that the record is devoid of evidence sufficient to permit the appointment of a conservator under the provisions of § 30-2630. Taking the evidence in a light most favorable to the appellants fails to support the appointment of a conservator.

As a result, we turn to what is really the only issue presented to us in this case, that is, whether the requirements of § 30-2630 were met so as to justify the appointment of a conservator for Mrs. Wagner.

While there are relatively few cases decided under the provisions of § 30-2630, the clear language of the statute and

cases decided under earlier statutes having similar purposes make it abundantly clear that one may not have his or her property taken away and placed in the hands of a conservator merely because potential heirs believe that there will be more left for them if the owner of the property is not free to deal with the property as he or she chooses. Before one may be subject to the control of a conservator, the requirements of the statute concerning the appointment of a conservator must be met. See, *Hyde v. Crocker*, 185 Neb. 428, 176 N.W.2d 234 (1970); *Cass v. Pense*, 155 Neb. 792, 54 N.W.2d 68 (1952). The requirements are clearly set out by statute in § 30-2630(2) and provide:

> (2) Appointment of a conservator or other protective order may be made in relation to the estate and property affairs of a person *if* the court *determines* that (i) the person is unable to manage his or her property and property affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, confinement, or lack of discretion in managing benefits received from public funds, detention by a foreign power, or disappearance; *and* (ii) the person has property which will be wasted or dissipated unless proper management is provided . . . .

(Emphasis supplied.)

In its order appointing the conservator, the county court determined that Mrs. Wagner was unable to manage her property due to "advanced age, a continuing grief caused by the death of her husband, Roy Wagner, and the subtle direct undue influence of her daughter, Clarinda Foote, as well as the indirect influence of Clara Mae and Charles Lange." Notwithstanding the fact that the county court determined that Mrs. Wagner was unable to manage her affairs, the court, nevertheless, found and directed that she be paid the sum of $1,200 per month in order that she may "handle her day to day affairs and expenses." The reason for concluding that she was unable to manage her property due to those matters set out in the order but, nevertheless, was able to handle her day-to-day affairs and still to subject her to the appointment of a conservator under the language of § 30-2630 is difficult to

understand. Perhaps the county court was concerned with the manner in which Mrs. Wagner would choose to deal with her assets rather than whether she would be able to effectively manage them. If that was the case, the county court was in error.

Mrs. Wagner was 79 years of age at the time of the conservatorship hearing. Her husband, Roy, had died approximately 3 months prior to the institution of the proceedings. Advanced age alone, however, is not a basis for appointing a conservator. As we observed in *Cass v. Pense, supra* at 796-97, 54 N.W.2d at 73:

> A guardian should not be appointed either of the person or property of an adult simply because he is aged or infirm or because his mind is to some extent impaired by age or disease. On the other hand the object of the statute under which this proceeding is brought is primarily the protection of property and if one does not possess sufficient mentality to understand in a reasonable manner the business he is transacting, or the nature and effect of his acts with reference to business affairs, or if he has lost his reasoning powers to such an extent that he is incapable of understanding or acting with ordinary discretion in common affairs and his property has thus become subject to loss or waste, then a guardian should be appointed to manage his affairs.

The evidence in this case establishes beyond any question that Mrs. Wagner possessed sufficient mentality to understand in a reasonable manner the business she was transacting and to know the nature and effect of her acts with reference to business affairs. As a matter of fact, it was her knowledge which apparently disturbed four of the children and caused them to seek the appointment of a conservator.

Dr. Roger Dilley, a specialist in internal medicine, testified that Mrs. Wagner had been a patient of his since 1978 and that he had seen her every 3 to 6 months for treatment of diabetes and hypertension. He testified that, in general, Mrs. Wagner was in good health, had not shown any evidence of problems with her memory, was well oriented, and answered questions appropriately, with good comprehension.

Dr. Philip G. McLeod, a clinical psychologist, examined Mrs. Wagner on October 19, 1983. The results of the tests conducted by Dr. McLeod and two of his associates disclosed no evidence that she was unable to handle her affairs. In one report she was described as "cleanly dressed in slacks, a blouse, and sweater. She had bathed and her hair was neat and combed. She maintained good eye contact and was friendly and cooperative. She did not cry when discussing her family but had a dejected look on her face." The report further indicated that "[t]he patient was spontaneously productive and answered questions in a logical manner. She was relevant and her associations were good in quality and continuity. She did not show any signs of delusional thinking, and no discontinuities were manifested in the stream of thought." And, further, the report noted, "[t]he patient is oriented to time, place, and person. Her insight is fair as she understands her motivations and her judgement has been good in the past and there was no evidence of poor decisions after her husband died." While the report noted that she appeared "depressed," one might conclude that such reaction was quite normal in view of the fact that four of her six children were attempting to have a conservator appointed for her and she was being examined by strangers in order to try and retain control over her own property. Any normal, healthy individual would undoubtedly have some sense of depression about that event.

As we very properly observed in *Cass v. Pense*, 155 Neb. 792, 796, 54 N.W.2d 68, 72-73 (1952):

> It is inevitable that if life is prolonged to old age the advance of the years will be marked by greater or less decrease of bodily powers and mental efficiency. But generally if that course be normal, if it be such only as attends age unaffected by abnormal brain conditions, there will not be mental incompetency within the meaning of the law and nothing to justify a court in depriving a person involuntarily of the control of his property. The purpose of a guardianship of this kind has reference to the preservation of the property of the ward and any assistance he may personally require. The mere fact that he manifests the weakness, forgetfulness, and normal

> characteristics of age is quite immaterial unless his debility has reached the stage where he cannot manage or intelligently direct the management of his affairs and his estate is liable to suffer material loss or waste for want of a responsible person in charge.

There is simply no evidence to support a conclusion that Mrs. Wagner is unable to manage her property because of advanced age. As a matter of fact, there is no evidence that she could not manage her property for any reason.

The only evidence presented in the trial regarding the management of property by Mrs. Wagner had to do with the leasing of some land by Mrs. Wagner to Scribner Alfalfa, Inc. The land leased to Scribner Alfalfa, Inc., had previously been farmed by Mrs. Wagner's son and son-in-law. The evidence established that the lease to Scribner Alfalfa, Inc., produced 160 percent greater income to Mrs. Wagner than did the leases to her son and son-in-law. This, in some manner, is intended to prove that she is unable to properly manage her own affairs. This logic is difficult to grasp. One of the children who sought the appointment of a conservator concluded that the transaction was evidence of mismanagement of Mrs. Wagner's affairs because by receiving more income for the land, Mrs. Wagner would be required to pay more income tax. Her son testified as follows:

> Q. You don't know whether she is mismanaging it or not?
>
> A. Oh, I can see she's mismanaging it. I can see that. I don't have to go over.
>
> Q. How can you see that?
>
> A. Well, she rented it to the alfalfa mill. That's not very good business. She's only one person, that's money she's going to have to give to Uncle Sam. If my dad would have wanted more money, he'd have asked for it.
>
> Q. She rented it to the alfalfa mill for 160 percent of what you were paying and that was a bad business decision?
>
> A. She ain't going to gain nothing.
>
> Q. Because of the taxes?
>
> A. That's right. . . .

The evidence regarding the lease to the alfalfa mill is hardly evidence of Mrs. Wagner's inability to manage her own property. Quite to the contrary, it indicated that she knew exactly what to do with her property. There is simply no evidence in the record to establish that Mrs. Wagner is unable to manage her property.

And, finally, the evidence with regard to undue influence is likewise insufficient as a matter of law. The order of the county court makes it clear that the county court had some difficulty with that claim. The finding is that one of the daughters, Clarinda Foote, was subjecting Mrs. Wagner to "subtle direct undue influence" and that a second daughter and son-in-law were subjecting Mrs. Wagner to "indirect influence."

Mere suspicion, surmise, or conjecture does not warrant a finding of undue influence; there must be a solid foundation of established facts on which to rest the inference of its existence. See *Craig v. Kile*, 213 Neb. 340, 329 N.W.2d 340 (1983). In order to prove undue influence, the children maintaining that such undue influence existed had the burden of proving (1) that Mrs. Wagner 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, *In re Estate of Massie*, 218 Neb. 103, 353 N.W.2d 735 (1984); *McDonald v. McDonald*, 207 Neb. 217, 298 N.W.2d 136 (1980). It is not mere influence that the court is to be concerned with, but *undue* influence as established in the law. See *In re Estate of Saathoff. Saathoff v. Saathoff*, 206 Neb. 793, 295 N.W.2d 290 (1980).

Dr. McLeod, who had examined Mrs. Wagner, specifically found that she did not appear to be one easily subject to undue influence. He testified as follows:

> Q. Were you able to tell from the test and from the interview you did of Delphine Wagner, anything regarding her personality, whether she had a mind of her own, whether she would be influenced by others?
>
> A. Yes. She looked like quite a strong-willed gal; has her own opinion. I don't know her past situation. May be somewhat opinionated; feisty. Those kind of descriptive

terms come to mind.

While the children who filed the petition seeking the appointment of a conservator maintained that their mother was subject to undue influence, they testified to the contrary. Mrs. Wagner's son, Lyman, testified as follows:

> Q. Your mother is too bullheaded. She makes up her own mind?
>
> A. She's stubborn. You can't talk to her.
>
> Q. And she sticks to it when she's made it up?
>
> A. Whether it's right or wrong.

A daughter, Del Nor Sazama, further maintained that Mrs. Wagner was being influenced by her daughter Clarinda. However, on cross-examination she testified as follows:

> Q. You have mentioned that Clarinda has been influencing Delphine. Is there any other way that she has influenced Delphine other than those that you have mentioned?
>
> A. No, not that I can think of.
>
> Q. So, in the matter of the funeral arrangements, is that correct?
>
> A. Well, she's been helping her in other ways, but I mean I can't — I don't have proof that she has. It's just my idea that she has been. She's there all the time.
>
> Q. Helping her do things that - - -
>
> A. She's probably telling mom how to do everything.
>
> Q. Do you know that for a fact?
>
> A. No, I do not. But, I'm sure she is. Because I've never seen Clarinda in my life just sit there and keep her mouth shut. She's always got some opinion.
>
> Q. Do you know for a fact that Clarinda has been influencing your - - -
>
> A. Not for a fact, no. Just knowing Clarinda, I think she is.

That supposition falls far short of the evidence necessary to establish undue influence.

It is apparent that what we are confronted with in the instant case is a situation in which Mrs. Wagner's husband, for many years, for whatever reasons, permitted several of his children to use land belonging to the Wagners at less than market rental and

that upon his death Mrs. Wagner determined to become a better business person. This caused a change in the arrangements which several of her children had previously enjoyed and, for that reason, caused dissension in the family. An effort, however, to relieve dissension is not grounds for the appointment of a conservator.

The district court was correct in concluding that an examination of the record failed to disclose sufficient evidence as a matter of law to justify the appointment of a conservator or to set aside the lease between Mrs. Wagner and the Scribner Alfalfa mills. The judgment of the district court is therefore in all respects affirmed.

AFFIRMED.

EDWIN DUBAS, APPELLANT, V. FARMERS MUTUAL INSURANCE COMPANY OF NEBRASKA, A NEBRASKA CORPORATION, APPELLEE.

367 N.W.2d 741

Filed May 17, 1985. No. 84-510.

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

Philip T. Morgan of Morgan & Morgan, for appellant.

Daniel M. Placzek of Luebs, Dowding, Beltzer, Leininger, Smith & Busick, for appellee.

BOSLAUGH, WHITE, and HASTINGS, JJ., and BRODKEY, J., Retired, and FAHRNBRUCH, D.J.

PER CURIAM.

In this action for damages from alleged vandalism brought against appellee insurance company, the sole question on appeal concerns the sufficiency of the evidence in support of the trial court's judgment. We have examined the record and determined that the judgment should be affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GRANT MANCHESTER, APPELLANT.

367 N.W.2d 733

Filed May 17, 1985. No. 84-862.

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 defendant 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. _____: _____. One seeking post conviction relief has the burden of establishing the basis for such relief, and the findings of the district court will not be disturbed on appeal unless they are clearly erroneous.
4. **Tape Recordings.** Conversations in which one party has consented to the recording of the conversation are not "oral communications" within the meaning of communication interception statutes.
5. **Effectiveness of Counsel: Proof.** Nebraska employs a two-part test for determining whether an attorney has effectively counseled a criminal defendant. First, counsel must perform at least as well as one with ordinary criminal law skill and training in his or her region. Counsel must also conscientiously protect his client's interests.
6. _____: _____. A defendant challenging competency of counsel has the burden to establish it. In addition, defendant must show that he suffered prejudice in the defense of his case as a result of his attorney's actions or inactions.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Affirmed.

Grant Manchester, pro se.

A. Eugene Crump, Deputy Attorney General, and Mel Kammerlohr, for appellee.

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

PER CURIAM.

The defendant, Grant Manchester, appeals from the order of the district court for Douglas County, Nebraska, denying his motion for post conviction relief.

In 1983 the defendant was convicted of attempted first degree murder and sentenced to imprisonment for 16 to 30 years. The conviction was affirmed in *State v. Manchester*, 213

Neb. 670, 331 N.W.2d 776 (1983).

The defendant makes three principal contentions: (1) That the district court erred in failing to find that Neb. Rev. Stat. § 28-201 (Reissue 1979) was unconstitutional; (2) That the district court erred in failing to find that Neb. Rev. Stat. §§ 86-701 et seq. (Reissue 1981) were applicable to the facts underlying defendant's conviction; and (3) That the district court erred in failing to find that the defendant was denied effective assistance of counsel.

> "A motion for post conviction relief can not be used as a substitute for an appeal or to secure a further review of issues already litigated." *State v. Ohler*, 215 Neb. 401, 405, 338 N.W.2d 776, 778 (1983). Additionally, a defendant 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. Stranghoener*, 212 Neb. 203, 322 N.W.2d 407 (1982). One seeking post conviction relief has the burden of establishing the basis for such relief, and the findings of the district court will not be disturbed on appeal unless they are clearly erroneous. See, *State v. Paulson*, 211 Neb. 711, 320 N.W.2d 115 (1982); *State v. Stranghoener, supra*. The reasons for such rules are obvious. As we noted in *State v. Weiland*, 190 Neb. 111, 113, 206 N.W.2d 336, 338 (1973): "There must be an end to litigation. A defendant will not be permitted to rephrase issues previously raised or raise new issues which could have been previously raised for the purpose of securing another review on appeal."

State v. Hochstein, 216 Neb. 515, 517, 344 N.W.2d 469, 472 (1984); *State v. Williams*, 217 Neb. 539, 352 N.W.2d 538 (1984).

Moreover, this court has stated that "where an issue is known to the defendant at trial and he fails to raise it in his direct appeal, the appeal is waived." *State v. Pope*, 218 Neb. 361, 363, 355 N.W.2d 216, 217 (1984).

Referring first to defendant's contention that § 28-201 is unconstitutional, the district court properly found under the rules set forth above that this was not a proper ground for post

conviction relief. Previously, § 28-201 has been held not unconstitutionally vague. See, e.g., *State v. Sodders*, 208 Neb. 504, 304 N.W.2d 62 (1981); *Sodders v. Parratt*, 693 F.2d 811 (8th Cir. 1982). This matter was discussed in *State v. Manchester, supra.*

The defendant next contends that the district court erred in finding that the provisions of §§ 86-701 et seq. were inapplicable to the facts of this case. Those facts were fully set out in *State v. Manchester, supra.*

Part of the State's evidence consisted of tape recordings of conversations between the defendant and Carthell Sherrill in which the plans for killing Donald Rickard were discussed. Sherrill, who had been offered $800 by the defendant to kill Rickard, had informed the police of the defendant's plan and agreed to be outfitted with a microphone and to meet with the defendant while under police surveillance. The defendant argues that his conversations with Sherrill were "oral communications" under § 86-701(2) and 18 U.S.C. § 2510(2) (1982), both of which provide: "Oral communication shall mean any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation." The defendant contends that the conversations could not have been monitored legally unless the provisions of the Nebraska and federal statutes had been fully complied with.

The congressional findings made concerning the federal act in 18 U.S.C.A. §§ 2510 to 2520 (West 1970) provide:

> "(d) To safeguard the privacy of innocent persons, the interception of wire or oral communications *where none of the parties to the communication has consented to the interception* should be allowed only when authorized by a court of competent jurisdiction and should remain under the control and supervision of the authorizing court. . . ."

(Emphasis supplied.) *Id.*, note at 469.

The courts which have considered the issue under similar circumstances have held that conversations in which one party has consented to the recording of the conversation are not "oral communications" the interception of which is prohibited by communication interception statutes. See, generally, Annot.,

27 A.L.R.4th 449 (1984).

Section 86-702(2)(c) specifically provides that it is not unlawful to intercept a wire or oral communication where one of the parties to the communication has given prior consent unless the communication is intercepted for the purpose of committing a criminal or tortious act or other injurious act. The finding of the district court was correct.

Lastly, the defendant contends that he was denied effective assistance of counsel. In this regard the defendant lists 24 separate actions (or inactions) on the part of his trial counsel to substantiate his claim. Those allegations essentially can be summarized as follows: That counsel's physical condition inhibited his ability to act as trial counsel; that counsel failed to obtain all necessary police reports, and otherwise adequately prepare for trial; that counsel failed to file a discovery motion for a missing tape cassette; that counsel failed to call an important witness; that counsel failed to inform the defendant of an offer to plea bargain; that counsel failed to obtain a mental evaluation of the defendant; that counsel failed to object to a jury instruction regarding aiding and abetting; that counsel failed to advance an entrapment defense; and that counsel failed to make certain evidentiary objections.

We have previously held:

> "Nebraska employs a two-part test for determining whether an attorney has effectively counseled a criminal defendant. First, counsel must perform at least as well as one with ordinary criminal law skill and training in his or her region. Counsel must also conscientiously protect his client's interests. *State v. Leadinghorse*, 192 Neb. 485, 222 N.W.2d 573 (1974); *State v. Lang*, 202 Neb. 9, 272 N.W.2d 775 (1978). A defendant challenging competency of counsel has the burden to establish it. *State v. Auger & Uitts*, 200 Neb. 53, 262 N.W.2d 187 (1978). In addition, defendant must show that he suffered prejudice in the defense of his case as a result of his attorney's actions or inactions. *State v. Mays*, 203 Neb. 487, 279 N.W.2d 146 (1979); *State v. Lang, supra; State v. Bartlett*, 199 Neb. 471, 259 N.W.2d 917 (1977)."
>
> See *State v. Evans, ante* p. 849, 359 N.W.2d 790 (1984).

State v. Ohler, 219 Neb. 840, 843, 366 N.W.2d 771, 773-74 (1985).

Throughout the course of the trial in this case, the defendant's counsel, Walter Matejka, now deceased, was assisted by a second attorney, James McBride. McBride testified at the post conviction hearing that he was present during at least 80 percent of the trial and that Matejka proceeded in a professional manner at all times. Furthermore, McBride's testimony shows that there is no foundation for defendant's claim of ineffective counsel. The record supports the finding that defendant failed to sustain his burden in challenging the competency of his counsel.

The decision of the district court was in all respects correct, and the judgment is affirmed.

AFFIRMED.

HAROLD E. HANIKA, DECEASED, APPELLEE, AND NEVA M. HANIKA, APPELLANT, V. ROBERT NEAL RAWLEY, ALSO KNOWN AS ROBERT C. RAWLEY, ET AL., APPELLEES.

368 N.W.2d 32

Filed May 24, 1985. No. 84-122.

1. **Evidence: Appeal and Error.** In a trial de novo, evidence which should not have been admitted by the trial court will be disregarded by this court in arriving at its decision.
2. **Court Rules: Waiver: Appeal and Error.** A technical violation of a local court rule which has been waived by opposing counsel may not be raised in this court.
3. **Estoppel: Property.** While estoppel may not be used to create a title to real estate, the doctrine may be used in defense of title.
4. **Estoppel: Fraud.** Equitable estoppel generally is such conduct by a party that it would be fraudulent or a fraud upon the rights of another for that party afterward to repudiate and to set up claims inconsistent with it.
5. **Estoppel: Property.** Where silence enables one to acquire an unfair advantage over another in the settlement of property rights, it is that person's duty to speak.
6. **Evidence.** Substantial evidence is that which would justify a court in refusing to direct a verdict when the conclusion sought would be one of fact for the jury.

Appeal from the District Court for Richardson County: ROBERT T. FINN, Judge. Affirmed.

Richard L. Halbert, for appellant.

Gerald P. Laughlin and Deborah A. MacDonald of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, for appellees Rawley et al.

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

WHITE, J.

The plaintiffs, Harold E. and Neva M. Hanika, brought this action in the district court for Richardson County, Nebraska, to quiet title to two separate 80-acre tracts. Defendants cross-petitioned to quiet title to the tracts in themselves. The trial court granted the cross-petition. This appeal follows.

Six assignments of error are urged. They are: (1) The court erred in holding that plaintiffs were equitably estopped from asserting title to the real estate by deed; (2) and (3) The judgment is contrary to law and the evidence; (4) The judgment is not sustained by sufficient evidence; (5) The court erred in admitting certain evidence; and (6) The court erred in allowing the testimony of a witness not named as a witness in a pretrial conference. We affirm.

We review the case de novo as we do in equity matters. *Egan v. Catholic Bishop*, 219 Neb. 365, 363 N.W.2d 380 (1985). Therefore, an extended recitation of the facts is necessary.

The plaintiffs are the son and daughter-in-law and the defendants, among others, are the grandson and granddaughter of Herman J. Hanika, a farmer of Richardson County who died on September 4, 1955. His will was admitted to probate on September 30, 1955. The provisions of the will with respect to the subject real estate are:

> SECOND, I give and devise to my grandson, Robert Neal Rawley
>
> The East Half (E1/2) of the Northeast Quarter (NE1/4) of Section Nine (9), Township Three North, Range 16, East of the 6th P. M. in Richardson County, Nebraska,
>
> except that my son, Harold E. Hanika shall have the use

and income from said real estate during his life time.

THIRD, I give and devise to my granddaughter Rita Mae Neville the following real estate:

The North Half (N1/2) of the Southwest Quarter (SW1/4) of Section Three (3) in Township Three (3), North, Range 16 East of the 6th P. M. in Richardson County, Nebraska,

except that my son, Harold E. Hanika shall have the use and income from said real estate during his life time.

The estate was duly administered and a final decree entered repeating the terms of the devise, i.e., a life estate to plaintiff Harold and a remainder in fee to defendants Robert Rawley and Rita Mae Neville. Harold did not dispute the will, nor did he assert any interest in the real estate different from that mentioned in the will.

The record reveals evidence that the first marriage of Harold ended in divorce and, though disputed, that a rift developed between Harold and his father, Herman, on the one hand, and between Harold and his children on the other, and that Herman did not wish to have any property other than a modest bequest to descend to Harold's children.

On June 23, 1955, Herman Hanika executed the following documents: an oil and gas lease to an R.L. Ferguson, covering the subject property, and an affidavit of possession of the same tracts. Both documents were acknowledged or sworn to in the presence of a notary public.

The third document executed on June 23, 1955, bearing the alleged signature of Herman Hanika, is a purported warranty deed and, though it bears the signatures of witnesses, does not bear an acknowledgment. The signature of Herman on the first two documents was on the line appropriate for the signature, while the signature on the deed was less orderly, the name "Herman" being written through the first line for signature, and below, on the next line, appearing the name "J. Hanika."

The deed was taken from a safety-deposit box at a time unknown to Neva Hanika, Harold's widow. Subsequently, it was filed for record on July 21, 1982. Harold, who died prior to the trial of the case, had not disclosed its existence to anyone, including his widow. Attached to the deed was the certificate of

a notary public, certifying to the execution of the deed by the grantor and the now deceased witnesses pursuant to Neb. Rev. Stat. § 76-231 (Reissue 1981). The evidence as to the genuineness of Herman's signature was provided by the plaintiffs, Harold and Neva, and by the notary's comparison of the signature of Herman on his will. Defendants question whether the deed should have been admitted in evidence, as the "proof was taken upon the oath of an interested . . . witness" and therefore not admissible. Neb. Rev. Stat. § 76-235 (Reissue 1981). That issue was not decided by the trial court and will not be considered by us as it is unnecessary to our resolution of the dispute.

Defendants also question the genuineness of Herman's signature and whether the signing witnesses actually saw Herman sign, but, again, as the trial court did not decide the issue, we shall not do so.

In disposing of the assignments of error we shall consider assignment (5) first. We merely note that in a trial de novo, " 'evidence which should not have been admitted by the trial court will be disregarded by this court in arriving at its decision. . . .' " *In re Interest of Aufenkamp*, 214 Neb. 297, 300, 333 N.W.2d 681, 684 (1983).

As to assignment (6), the record reveals that a week prior to trial, the intention of defendants' counsel to call the witness was made known to plaintiffs' counsel, and no objection was made to defendants' counsel. We will not permit a technical violation of a local court rule which has been waived by opposing counsel to be raised in this court. The law is practiced by honorable persons, and among persons of honor, one's word is one's bond. No more need be said on this subject. The assigned error is without merit.

As assignments (1) through (4) are interrelated, we shall consider them together.

For a period in excess of 27 years, Harold Hanika was in secret possession of an instrument that, if valid, would defeat the title of the defendants Rawley and Neville. Though bitterly opposed to the disposition of property made by his father's will, he allowed the estate proceeding to be completed. The existence of the deed was not disclosed during the lifetimes of the alleged

subscribing witnesses. The defendants, to the extent that remaindermen can do so during the life of the life tenant, exercised their rights of ownership, i.e., procured liability insurance and listed remainder interests on required property statements for bank loan purposes.

The essential question is whether this secret possession of the alleged deed is of such a character that the assertion of title derived thereunder is prohibited by the equitable principles of estoppel. While estoppel may not be used to create a title to real estate, the doctrine may be used in defense of title. *O'Toole v. Yunghans*, 211 Neb. 852, 320 N.W.2d 768 (1982). The title of defendants was created by the will of Herman J. Hanika.

In *Rihner v. Jacobs*, 79 Neb. 742, 749, 113 N.W. 220, 223 (1907), the court describes its understanding of the doctrine of equitable estoppel.

> There is a theory approved and adopted by the courts of some states which makes the very essence of equitable estoppel to consist of fraud, and affirms that an actual fraudulent intention to deceive or mislead is a necessary requisite in the conduct of the party in order that it may create an equitable estoppel. *Boggs v. Merced Mining Co.*, 14 Cal. 279; *Martin v. Zellerbach*, 38 Cal. 300. In a general discussion of the principles, elements, operation and effect of equitable estoppel, Mr. Pomeroy comes to the conclusion that such fraud is not a necessary element, except as the word fraud is used as synonymous with "unconscientious" or "inequitable," and that it is accurate to describe equitable estoppel in general terms as such conduct by a party that it would be fraudulent or a fraud upon the rights of another for him afterwards to repudiate and to set up claims inconsistent with it. 2 Pomeroy, Equity Jurisprudence (3d ed.), sec. 803.

The withholding of the alleged deed until after the death of the grantor and the subscribing witnesses obviously afforded to the plaintiffs a distinct advantage and a distinct disadvantage to the defendants, to wit, the lack of opportunity to explore firsthand the genuineness of the signatures on the deed and the validity of its execution. "Although a person is not bound under all circumstances to speak out, but where his silence

enables him to acquire unfair advantage over another in the settlement of property rights, it is his duty to speak. Guilty silence may work an estoppel as effectually as an express representation." 5 G. Thompson, Commentaries on the Modern Law of Real Property § 2525 at 555 (repl. 1979).

In this circumstance the assertion of the stale deed is barred by elementary equitable principles of fairness, and probably, though not advanced by counsel, by the doctrine of laches.

As to the remaining assignments, the evidence convinces us on de novo review that the trial court was correct in its decision and that the evidence would justify a court in refusing to direct a verdict when the conclusion sought would be one of fact for the jury. The judgment in this equitable action is supported by sufficient evidence. *Weiner v. State ex rel. Real Estate Comm.*, 214 Neb. 404, 333 N.W.2d 915 (1983).

The decision of the trial court is affirmed.

AFFIRMED.

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

I concur in the result reached by the majority in this case. I write separately, however, because I fear that the majority opinion may be read to say more than the opinion intends. In particular, I am concerned about the broad statement to the effect that "[a]lthough a person is not bound under all circumstances to speak out, but where his silence enables him to acquire unfair advantage over another in the settlement of property rights, it is his duty to speak." I believe that this is too broad a statement of the law. It is this "silence" which often entitles one to acquire an interest in land by adverse possession. An individual who owes no duty to others is not required to disclose that he or she holds title to any property, regardless of what advantage that silence may accrue to the lawful owner of the property.

What defeats the plaintiffs' title in this case is not the fact that Harold Hanika remained silent as to the fact that he held title to the land in question but, rather, that he took positive steps, inconsistent with that title, to the detriment of others. He participated in the estate proceedings, at least to the extent of requesting a determination of inheritance tax in a manner contrary to what he knew to be the truth. Moreover, he knew

that the estate was being administered, having received notice of that fact, and yet he permitted the court to make a finding to the effect that he held only a life estate in the property, when he knew that not to be the fact of the matter. It is not his silence with regard to the deed which precludes him from claiming title to the land; rather, it is his action in participating in proceedings or his failure to object to the proceedings when he knew that the findings were not correct. Where, as here, the signature on the deed is accepted as valid, holding that "silence" precludes the holder of title lawfully conveyed to retain title is not, in my view, correct. I would have affirmed on the basis of Hanika's active participation in this matter and not on the basis of silence.

C.S., APPELLANT, V. JAMES SOPHIR, APPELLEE.

368 N.W.2d 444

Filed May 24, 1985. No. 84-136.

1. **Landlord and Tenant: Negligence.** In order to impose liability on a landlord regarding injuries sustained by a tenant, a duty must exist.
2. _____: _____. Whether a duty exists on the part of a landlord to a tenant is ultimately a question of fairness.
3. _____: _____. Factors to consider in imposing a duty on a landlord to a tenant include weighing the relationship of the parties against the nature of the risk and the public interest in the proposed solution, as well as the likelihood of injury, the magnitude of the burden of guarding against it, and the consequences of placing that burden on a defendant.
4. _____: _____. Landlords are not insurers that a tenant will be protected at all times.
5. _____: _____. There is no duty to warn of a known danger.
6. _____: _____. The duty of a landlord toward its tenants may be compared with that of a possessor of land who holds it open for public entry; i.e., there is a duty to exercise reasonable care toward the patrons. Such care may require giving a warning or providing greater protection where there is a likelihood third persons will endanger the safety of visitors. However, that rule does not require a party in the position of a landlord or possessor of land to anticipate the unforeseeable independent acts of third persons, not reasonably anticipated.
7. **Negligence.** It is not sufficient that the negligence charged furnishes only a condition by which the injury is made possible, for if such condition causes an

injury by the subsequent independent act of a third person, the two acts are not concurrent, and the existence of the condition is not the proximate cause of the injury.

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

H. Daniel Smith of Stehlik, Smith & Trustin, for appellant.

William J. Brennan, Jr., of Fitzgerald, Brown, Leahy, Strom, Schorr & Barmettler, for appellee.

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

HASTINGS, J.

The question presented is whether the plaintiff's amended petition stated a cause of action. The trial court held that it did not, and we affirm.

In her amended petition plaintiff alleged that she was a tenant in residence at an apartment complex owned and operated by the defendant. She stated that on November 27, 1982, at an unspecified time, while at her car which was parked in the defendant's parking lot provided for tenants, she was sexually assaulted by a male assailant. Plaintiff further alleged that defendant's manager had actual knowledge of an earlier sexual assault occurring in the same area within 2 months prior to this assault and that the defendant was negligent in failing to warn plaintiff of that assault.

In her second cause of action plaintiff alleged that defendant, after having had actual knowledge of a prior sexual assault on these premises, the lack of proper lighting, and the presence of excessive growth of shrubbery in the area, nevertheless failed to provide adequate security measures and to warn tenants of the danger of sexual assault in the parking area. For the purpose of a demurrer we must assume the truth of all well-pleaded facts.

We deal first with the failure to warn. In order to impose liability on the landlord, a duty must exist. *Travelers Indemnity Co. v. Center Bank*, 202 Neb. 294, 275 N.W.2d 73 (1979). "Whether a duty exists is ultimately a question of fairness." *Goldberg v. Housing Auth. of Newark*, 38 N.J. 578, 583, 186

A.2d 291, 293 (1962); *King v. Ilikai Properties, Inc.*, 2 Hawaii App. 359, 632 P.2d 657 (1981).

Factors to consider in imposing a duty on a landlord include weighing the relationship of the parties against the nature of the risk and the public interest in the proposed solution, *Goldberg, supra*, as well as the likelihood of injury, the magnitude of the burden of guarding against it, and the consequences of placing that burden on a defendant. *Smith v. Chicago Housing Authority*, 36 Ill. App. 3d 967, 344 N.E.2d 536 (1976); *King, supra*.

Under the facts as alleged in this case, it would be unfair to impose a duty upon the landlord based on a single prior assault at the complex.

First, landlords are not insurers that a tenant will be protected at all times. *Foster v. Winston-Salem Joint Venture*, 50 N.C. App. 516, 274 S.E.2d 265 (1981); *Kline v. 1500 Massachusetts Avenue Apartment Corp.*, 439 F.2d 477 (D.C. Cir. 1970). See *Carrigan v. New World Enterprises, Ltd.*, 112 Ill. App. 3d 970, 446 N.E.2d 265 (1983).

Second, there is no duty to warn of a known danger. *Waegli v. Caterpillar Tractor Co.*, 197 Neb. 824, 251 N.W.2d 370 (1977). The ordinary, reasonable person is aware or should be aware that open parking lots provide an optimum place for crime to occur.

Third, there is no guarantee that if the duty to warn was imposed, a crime would be averted. As pointed out by the Illinois court in *Stelloh v. Cottage 83*, 52 Ill. App. 2d 168, 201 N.E.2d 672 (1964), in affirming the dismissal of the plaintiff's case on facts similar to the present case, "[w]e doubt that the giving of [a] warning, under all the circumstances alleged, would have lessened the probability of the [rape], or that the failure so to notify plaintiff would have increased the hazard in any way." *Id.* at 171 n.3, 201 N.E.2d at 673 n.3. To impose liability over the mere possibility of a crime occurring is folly. *Kline, supra*.

Plaintiff asks the court to invoke the minority rule which imposes liability upon a landlord with notice of a prior criminal act on the premises. *Kline, supra*. However, even in cases where such liability was imposed, there was a history of criminal

activity at the leased premises sufficient to create in the landlord constructive notice of the foreseeability that such activity would recur in the future. *Kline, supra.* See *Flood v. Wisconsin Real Estate Inv. Trust, Inc.*, 497 F. Supp. 320 (D. Kan. 1980).

No cases were found which impose liability on a landlord based on a *single* prior criminal act perpetrated upon a tenant. That none were found appears consistent with Nebraska's position with reference to a similar class of individuals, business invitees. A possessor of land who holds it open for public entry for business purposes is under a duty to exercise reasonable care to protect his patrons. Such care may require giving a warning or providing greater protection where there is a *likelihood* that third persons will endanger the safety of the visitors. *Harvey v. Van Aelstyn*, 211 Neb. 607, 319 N.W.2d 725 (1982); Restatement (Second) of Torts § 344 (1965).

The rule, however, does not require the possessor to anticipate the unforeseeable independent acts of third persons. Only such acts as can be reasonably anticipated impose a duty on the landowner. In *Harvey* the court refused to impose liability on a tavern owner where a patron was assaulted by a third party who had become violent on the premises on a prior occasion. The foreseeability requirement necessary to impose liability was missing.

Likewise, in the present case there would be no foreseeability, based on one prior assault, upon which to predicate liability.

With respect to the landlord's alleged failure to clear weeds from areas adjacent to the parking lot and his failure to provide adequate lighting, these failures do not constitute active negligence but merely conditions of negligence. *Childers v. LCW Apartments*, 214 Neb. 291, 333 N.W.2d 677 (1983). It is not sufficient that the negligence charged furnishes only a condition by which the injury is made possible, for if such condition causes an injury by the subsequent independent act of a third person, the two acts are not concurrent, and the existence of the condition is not the proximate cause of the injury. *Steenbock v. Omaha Country Club*, 110 Neb. 794, 195 N.W. 117 (1923).

Therefore, as the landlord had no duty to warn the plaintiff under the circumstances, and as the landlord's alleged failure to

maintain the grounds does not constitute active negligence, the district court was correct in sustaining the defendant's demurrer.

AFFIRMED.

JAMES MALONEY, PERSONAL REPRESENTATIVE OF THE ESTATE OF FRANK T. MALONEY, DECEASED, APPELLEE, V. ROBERT L. KAMINSKI, APPELLEE, AND CONSOLIDATED FREIGHTWAYS CORPORATION, APPELLANT.

368 N.W.2d 447

Filed May 24, 1985. No. 84-300.

1. **Directed Verdict.** On a motion for a directed verdict, the moving party is deemed to have admitted as true all the material and relevant evidence admitted which is favorable to the party against whom the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences which can reasonably be deduced therefrom.
2. **Verdicts: Appeal and Error.** In determining the sufficiency of the evidence to sustain a verdict, the evidence must be considered most favorably to the successful party, every controverted fact must be resolved in his favor, and he is entitled to the benefit of any inferences reasonably deducible from it; a jury's verdict will not be disturbed unless it is clearly wrong.
3. **Negligence: Proof.** A plaintiff has the burden of proving the defendant was negligent; merely establishing that an accident happened does not prove negligence.
4. **Juries: Witnesses: Evidence.** A jury is not required to accept as absolutely true every statement of a witness, even though such is not contradicted by direct evidence; the persuasiveness of uncontradicted testimony can be destroyed in other ways.
5. **Witnesses: Juries.** The credibility of a witness and the weight to be given to his testimony are issues for the jury to resolve.
6. **Proximate Cause: Juries.** Proximate causation is generally a question for the jury; only where but one inference can be drawn is it proper for the court to decide the issue.
7. **Proximate Cause.** Proximate cause is that cause which, in a natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which the injury would not have occurred.
8. **Negligence: Liability: Damages.** When separate and independent acts of negligence by different persons combine to produce a single injury, each participant is liable for the damage, although one of them alone would not have

caused the result.

9. **Jury Instructions: Appeal and Error.** Jury instructions are to be read as a whole; when they fairly submit the case and did not mislead the jury, there is no prejudicial error.
10. _____: _____. It is not error for a trial court to refuse a request for additional instructions where it has, on its own motion, fairly and fully instructed the jury on a party's theory of the case.
11. **Negligence: Words and Phrases.** An act of God is a manifestation of nature so unusual and extraordinary that it could not under normal conditions have been reasonably anticipated or expected.
12. **Jury Instructions.** It is the duty of the trial court to instruct the jury only on issues which are pled and which find support in the evidence.
13. **Jury Instructions: Appeal and Error.** Where a jury is properly instructed concerning the plaintiff's burden to prove that the defendant's negligence was the proximate cause of the injury, it is ordinarily not error to either give or refuse to give an instruction on unavoidable accident.
14. **Motor Vehicles: Negligence.** In order for the unavoidable accident doctrine to be invoked, there must exist (1) a sudden emergency not of the actor's own making, (2) alternative courses of action from which to choose, and (3) a need for instant decision.
15. **Jury Instructions: Motor Vehicles: Evidence: Negligence.** The sudden emergency doctrine is to be submitted to the jury where there is evidence that a wrong course of action was pursued, from the results of which the actor is to be excused because of the stress and shortness of time under which the decision was made.
16. _____: _____: _____: _____. 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.
17. **Wrongful Death: Damages.** A wrongful death plaintiff may only recover for a pecuniary loss, meaning a loss which has a money value.
18. **Wrongful Death: Damages: Juries.** The law does not provide any positive, definite mathematical formula or legal rule by which a jury shall fix the amount of pecuniary loss in a wrongful death case; such loss must be determined upon a consideration of the circumstances of each case.
19. **Wrongful Death: Evidence: Damages.** There is no requirement in a wrongful death case that there be evidence of the dollar value of companionship, counseling, or advice.
20. **Wrongful Death: Verdicts: Juries.** The Nebraska Supreme Court will interfere with a wrongful death verdict only where it results from passion and prejudice on the part of a jury.

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

Steven G. Seglin of Crosby, Guenzel, Davis, Kessner & Kuester, for appellant.

Gary J. Nedved of Marti, Dalton, Bruckner, O'Gara & Keating, P.C., for appellee Maloney.

KRIVOSHA, C.J., CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

CAPORALE, J.

Decedent, Frank T. Maloney, died as the result of injuries he sustained in a multivehicle accident occurring in the two eastbound lanes of Interstate 80 near Milford, Nebraska, at approximately 8 p.m. on April 7, 1982. As a consequence, James Maloney, decedent's personal representative, the plaintiff-appellee, brought an action against Robert L. Kaminski, the driver of one of the other automobiles involved, and Consolidated Freightways Corporation, the defendant-appellant, whose semitrailer tractor was also involved. Kaminski then brought a third-party action against the estate of Leah Jones, the driver of the automobile in which the decedent was a passenger. A trial by jury was had, wherein the trial court sustained Kaminski's motion for a directed verdict on plaintiff's petition and dismissed Kaminski's third-party action against Jones. The trial court then entered judgment in the sum of $92,500 in favor of plaintiff against Consolidated Freightways, adjusting the jury's verdict of $105,000 by subtracting therefrom the $12,500 plaintiff had received in settlement from the Jones estate. In this appeal Consolidated Freightways assigns five errors: (1) The trial court's failure to find there was insufficient evidence to submit the issue of negligence to the jury; (2) The trial court's failure to find there was insufficient evidence to submit the issue of proximate cause to the jury; (3) The trial court's refusal to give Consolidated Freightways' requested instructions on the act of God defense and the unavoidable accident and sudden emergency doctrines; (4) The trial court's giving of an instruction on the range of vision rule; and (5) The claimed excessiveness of the jury's verdict. We affirm.

FACTS

The events leading to the accident began when Kaminski drove his automobile east at 55 miles per hour onto a bridge, at the location described previously, and the driver of an

automobile traveling five or six car lengths in front of Kaminski applied his brakes in order to turn into a rest area. Kaminski, noticing that the automobile ahead of him fishtailed when its brakes were applied, tapped his brakes. As a result, Kaminski's automobile began swerving out of control. The automobile driven by Jones at a rate less than the legal speed limit struck the Kaminski automobile when the latter was at an angle facing southeast and blocking both lanes of traffic on the bridge. This collision, according to Kaminski, the state trooper who investigated the accident, and the two surviving Jones passengers, took place in the right, or southernmost, lane.

The Consolidated Freightways truck then struck the Jones automobile. The state trooper and the two surviving Jones passengers testified that the collision between the Jones automobile and truck also occurred in the right lane near the south guardrail where the Jones automobile had come to rest.

Luciano Lucero, the driver of the Consolidated Freightways truck, testified that he was traveling at 45 miles per hour. When he first saw the Kaminski and Jones automobiles, he was approximately 110 feet from them, and they were in the left, or northernmost, lane. He attempted to stop but found that because of his speed and the condition of the roadway, he could not bring the truck to a stop before colliding with one or both of the automobiles. He therefore decided to go around them on the right. The Kaminski and Jones automobiles suddenly moved sideways into the right lane, at which time he was approximately a truck length to 55 feet from them. Lucero then drove the truck into the left lane, but the Jones automobile suddenly moved back into that lane and the collision between those two vehicles occurred.

The passenger sitting in the front seat of the Jones automobile, one of the two surviving passengers, testified that once the Kaminski automobile was hit, the Jones automobile was hit in the rear "almost instantaneously" by the truck. The back seat passenger testified that after the first collision the Jones automobile came to a stop, whereupon she looked over her shoulder and saw the truck, which was right upon them. The collision with the truck, in her words, occurred "very fast."

A third collision, not involving the truck or the Jones

automobile, occurred between the Kaminski automobile and an automobile driven by one Macfie, wherein the Kaminski and Macfie automobiles came to rest 313 feet west of the point where the truck came to rest. (This collision is the subject of *Macfie v. Kaminski*, 219 Neb. 524, 364 N.W.2d 31 (1985), in which the trial court's dismissal of the action brought against Kaminski by the passenger in the Macfie automobile was affirmed.)

The state trooper made numerous measurements and calculations during his investigation of the accident. He testified that the bridge, located a mile west of the Milford interchange, is approximately 380 feet long and crosses the Blue River. The width of the bridge totaled 30 feet from abutment to abutment, whereas the width of the traveled portion of the roadway off the bridge was 24 feet, with a 10-foot shoulder on the right, or south, side and a 3-foot shoulder on the left, or north, side.

The trooper determined that the point of impact between the Kaminski and Jones automobiles occurred 122 feet west of the east end of the bridge and 3 feet north of the right, or south, guardrail. Debris and a trail of diesel fuel from the place at which the truck's diesel tanks burst enabled the trooper to determine that the point of impact between the truck and the Jones automobile occurred 101 feet west of the east end of the bridge and 4 feet north of the right guardrail, or 21 feet east of where the Jones-Kaminski collision occurred. After the collision the Jones automobile and the truck remained in contact with each other. The left front of the truck stopped 240 feet east of the east end of the bridge, and the left front of the Jones car was 6 feet further east, with the car wedged between the truck and the guardrail.

The trooper also testified about the terrain west of the eastbound bridge, or, in other words, the terrain over which the automobiles and truck would have passed before entering the bridge where the collisions occurred. His testimony was that traffic would go down a slight incline, and then just prior to entering the bridge, traffic would "kind of go up another slight incline." According to the trooper, the roadway approaching the bridge is straight, and there is nothing to obscure a driver's

vision. Lucero's testimony was that the terrain "goes down, then kind of levels up and then kind of a little rise" before entering the bridge. According to Lucero, the Kaminski and Jones automobiles had no lights when they were on the bridge, and he did not see them until he "leveled off on the bridge . . . when the lights hit them." Lucero had his own lights on dim, in accordance with Consolidated Freightways' policy.

The condition of the roadway is in dispute. The trooper testified that it was around 28 to 30 degrees the evening of the accident, and sleet, or frozen water, was falling. Kaminski also testified that it was raining, misting, and sleeting when he left Grand Island. After receiving the accident report the trooper left Seward and drove to the accident scene. He stated it took longer than usual for him to get there "[b]ecause the road conditions were icy and very, very slick." There was "very little difference, if any," between the condition of the roadway and that of any bridges he passed over.

Lucero's testimony was that it started raining or misting when he drove by Grand Island at approximately 6 p.m. He did not notice any sleet, but the road was wet. Lucero was not aware of the temperature, but he did realize it was getting colder. He was "afraid" that it would ice up somewhere along the road, especially on the bridges, so he slowed his truck in stages from 55 to 45 miles per hour. There is also a sign posted just before entering the bridge, warning that it might be icy. Lucero noticed no ice when the truck crossed a railroad overpass a quarter to a third of a mile before reaching the bridge. However, in anticipation of the roadway becoming slick, Lucero had made some valve adjustments so as to put more weight on the truck's drive axle before he entered the bridge on which the accident occurred. This was done so he would have more traction.

The passenger in the front seat of the Jones automobile testified that as they approached the bridge, the road began to get slick and Jones slowed down. Everyone agrees that the bridge was icy at the time of the collisions.

As a result of the accident, decedent was pinned between the front and rear seats. He remained conscious at the scene and told one of the other passengers that his legs hurt and that he

was cold. There was blood in his eyes and around his head. He was also conscious and in pain when brought to Lincoln General Hospital at 12:35 a.m. on April 8, the day after the accident, after being stabilized at the Seward hospital. Around noon on April 9, decedent lost consciousness and remained so until he died on April 28, after the life support system had been disconnected on the previous day.

The evidence establishes that no one in the Jones automobile was injured until that automobile was struck by the truck and that decedent died as a result of the injuries sustained in that collision.

Decedent was 72 years old at the time of his death and had a life expectancy of 9.15 years. His widow's life expectancy is somewhat longer. The decedent and his widow had been married for 41 years and had raised a family of six children, including a retarded son who lived with his parents and requires the same care as an infant. The decedent had been employed in a grocery store and later as a custodian for the University of Nebraska. He retired at age 63, evidently in 1973.

The evidence portrays the decedent and his widow as devoted to each other and demonstrates that their lives revolved around their family and home. During their retirement, they had taken several trips together and planned more in the future.

Decedent received Social Security benefits in the amount of $388 per month. While decedent was living, the widow received $220 per month in Social Security benefits. After decedent's death her Social Security benefits increased to the amount decedent had been receiving. The retarded son also receives Social Security benefits, which increased in amount following decedent's death. The amount of that increase is not reflected by the record. Decedent had contributed $200 to $300 a month toward the family's living expenses.

Decedent's medical bills totaled $42,145.68, and his funeral expenses totaled $3,579.64. Of the $105,000 verdict, then, $45,725.32 is accounted for by direct out-of-pocket expenses, leaving $59,274.68 as compensation for all other losses.

NEGLIGENCE

Plaintiff alleges Consolidated Freightways was negligent in failing to keep a proper lookout, in failing to keep its vehicle

under reasonable control, and in driving at an excessive rate of speed in view of the existing conditions.

In its first assignment of error Consolidated Freightways asserts there was insufficient evidence of negligence on its part to submit the case to the jury, and, therefore, its motion for a directed verdict should have been sustained on that ground.

We begin by reviewing the rules applicable to the resolution of this issue.

On a motion for a directed verdict, the moving party is deemed to have admitted as true all the material and relevant evidence admitted which is favorable to the party against whom the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences which can reasonably be deduced therefrom. *Farm Bureau Life Ins. Co. v. Luebbe*, 218 Neb. 694, 358 N.W.2d 754 (1984); *Eden v. Spaulding*, 218 Neb. 799, 359 N.W.2d 758 (1984); *Jershin v. Becker*, 217 Neb. 645, 351 N.W.2d 48 (1984); *Five Points Bank v. Scoular-Bishop Grain Co.*, 217 Neb. 677, 350 N.W.2d 549 (1984). Further, in determining the sufficiency of the evidence to sustain a verdict, the evidence must be considered most favorably to the successful party, every controverted fact must be resolved in his favor, and he is entitled to the benefit of any inferences reasonably deducible from it. A jury's verdict will not be disturbed unless it is clearly wrong. *Farm Bureau Life Ins. Co. v. Luebbe, supra; Steinauer v. Sarpy County*, 217 Neb. 830, 353 N.W.2d 715 (1984).

It is also clear, however, that the plaintiff has the burden of proving the defendant was negligent, and merely establishing that an accident happened does not prove negligence. *Macfie v. Kaminski*, 219 Neb. 524, 364 N.W.2d 31 (1985).

Consolidated Freightways argues the evidence shows its driver, Lucero, was maintaining a proper lookout and had his truck under reasonable control. Ordinarily, issues regarding lookout and control are to be determined by the jury. *Sacco v. Gau*, 188 Neb. 808, 199 N.W.2d 605 (1972). We find nothing in the record to take this case out of that general rule.

Lucero testified he did not see the Kaminski and Jones vehicles until he was only 110 feet away. He was then unable to stop before colliding with the Jones automobile. Lucero's

explanation was that because there was a "kind of a little rise" before entering the bridge, his headlights did not pick up the automobiles until that time. The state trooper described the same terrain as a "slight incline." However stated, there is nothing in the description of the terrain to prevent the jury from finding that there was no obstruction to Lucero's view and that he should have seen what was taking place ahead of him before he actually did so.

In addition to the question of whether the terrain made it impossible for Lucero to see, as he claimed, his version of the accident did not comport with that of the other eyewitnesses, and did not match the testimony of the state trooper, who relied on physical evidence in determining where the accident had occurred.

The credibility of a witness and the weight to be given to his testimony are issues for the jury to resolve. *Hancock v. Paccar, Inc.*, 204 Neb. 468, 283 N.W.2d 25 (1979); *Wisnieski v. Harms*, 188 Neb. 721, 199 N.W.2d 405 (1972). A jury is not required to accept as absolutely true every statement of a witness, even though such is not contradicted by direct evidence. The persuasiveness of uncontradicted testimony can be destroyed in other ways. *Batterman v. Richardson*, 189 Neb. 303, 202 N.W.2d 613 (1972); *Schmeeckle v. Peterson*, 178 Neb. 476, 134 N.W.2d 37 (1965).

The evidence supports a finding both that Lucero was not maintaining a proper lookout and that he did not have the truck under reasonable control by virtue of his speed. Such being the case, the issue of Consolidated Freightways' negligence was for the jury to determine.

PROXIMATE CAUSE

Consolidated Freightways next urges that Lucero's negligence was not the proximate cause of decedent's death, but, rather, the negligence of Kaminski and Jones was such cause.

Proximate causation is generally a question for the jury, and only where but one inference can be drawn is it proper for the court to decide the issue. *Shelton v. Board of Regents*, 211 Neb. 820, 320 N.W.2d 748 (1982); *Libbey-Owens Ford Glass Co. v. L & M Paper Co.*, 189 Neb. 792, 205 N.W.2d 523 (1973).

Our cases have consistently defined proximate cause as that cause which, in a natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury, and without which the injury would not have occurred. *Corbet, Inc. v. County of Pawnee,* 219 Neb. 622, 365 N.W.2d 437 (1985); *Shelton v. Board of Regents, supra,* quoting *Weichel v. Lojka,* 185 Neb. 819, 179 N.W.2d 112 (1970).

There are three elements to proximate causation, the first being a factual cause, commonly called the "but for" rule. *Shelton v. Board of Regents, supra.* In the present case the evidence is uncontradicted that "but for" the collision between the truck and the Jones automobile, the decedent would not have sustained the injuries which ultimately led to his death.

The next element is that the injury be the natural and probable result of the negligence. No argument is, or could successfully be, made that such is not the situation in the present case.

The final element, the one which Consolidated Freightways apparently urges is missing, is that there be no efficient intervening cause which breaks the causal connection between the defendant's negligence and the injury. There is no allegation or evidence of any intervening cause occurring *after* the negligence of Consolidated Freightways' driver which caused decedent's death. Kaminski received a directed verdict in his favor on the issue of his negligence, from which no appeal has been taken. A settlement was entered into between decedent's estate and Jones' estate, but the negligence of Jones, if any, did not occur after the negligence of Lucero and cannot, therefore, be an intervening cause sufficient to relieve Lucero from the consequences of his own negligence. Further, "[w]hen separate and independent acts of negligence by different persons combine to produce a single injury, each participant is liable for the damage although one of them alone would not have caused the result." *Libbey-Owens Ford Glass Co. v. L & M Paper Co., supra* at 802, 205 N.W.2d at 530; *Lindgren v. City of Gering,* 206 Neb. 360, 292 N.W.2d 921 (1980).

Consolidated Freightways erroneously focuses on whether the negligence of Jones or Kaminski was the proximate cause of decedent's injuries. Reasoning that any negligence on the part

of its driver would not be an intervening cause sufficient to relieve other drivers from the consequences of their negligence, Consolidated Freightways somehow concludes that the negligence of Lucero cannot be the proximate cause. This approach does not comport with proximate cause analyses of our prior cases and ignores the fact that more than one individual can be the proximate cause of a single incident.

INSTRUCTIONS REFUSED

The law is well settled that in determining the sufficiency of jury instructions on appeal to this court, such instructions are to be read as a whole; and when they fairly submit the case and did not mislead the jury, there is no prejudicial error. We have also held that it is not error for the court to refuse a request for additional instructions where it has, on its own motion, fairly and fully instructed the jury on a party's theory of the case. *Kresha v. Kresha*, 216 Neb. 377, 344 N.W.2d 906 (1984); *Erickson v. Monarch Indus.*, 216 Neb. 875, 347 N.W.2d 99 (1984).

It is with this rule in mind that we consider Consolidated Freightways' contention that the trial court should have instructed on the act of God defense and the unavoidable accident and sudden emergency doctrines.

Act of God

Consolidated Freightways requested that NJI 2.02B be given. This instruction, after stating it is the defendant's burden to prove that the sole proximate cause of the accident was an act of God, defines such an act as "a manifestation of nature so unusual and extraordinary that it could not under normal conditions have been reasonably anticipated or expected." This instruction mirrors the applicable case law. *Cover v. Platte Valley Public Power & Irr. Dist.*, 167 Neb. 788, 95 N.W.2d 117 (1959); *Snyder v. Farmers Irr. Dist.*, 157 Neb. 771, 61 N.W.2d 557 (1953).

Even though the act of God defense was pled and timely objection was made to the trial court's refusal to so instruct, this assignment of error must fail because the evidence does not support the defense. It is clear that it is the duty of the trial court to instruct the jury only on issues which are pled and which find support in the evidence. *Herman v. Midland Ag Service, Inc.*,

200 Neb. 356, 264 N.W.2d 161 (1978); *Swartz v. Peterson*, 199 Neb. 171, 256 N.W.2d 681 (1977); *Golonka v. Gatewood*, 199 Neb. 216, 257 N.W.2d 403 (1977); *Schmidt v. Johnson*, 184 Neb. 643, 171 N.W.2d 64 (1969).

Lucero knew it was misting or raining, that it was getting colder, and that bridges often become icy before the rest of a highway. In fact, he took measures in recognition of that latter fact to prepare for encountering the first icy spot. Under those circumstances, coming upon an icy bridge is clearly not "a manifestation of nature so unusual and extraordinary that it could not under normal conditions have been reasonably anticipated or expected."

Unavoidable Accident

Consolidated Freightways also complains that its requested instruction concerning the unavoidable accident rule was not given. In the present case the jury was adequately instructed that the plaintiff, before receiving a favorable verdict, must prove by a preponderance of the evidence that Consolidated Freightways was negligent and that such negligence was the proximate cause of the collision and decedent's injuries and death. Preponderance of the evidence, negligence, and proximate cause were all defined in other instructions.

Where the jury is properly instructed concerning the plaintiff's burden to prove that the defendant's negligence was the proximate cause of the injury, it is ordinarily not error to either give or refuse to give an instruction on unavoidable accident. *Schmidt v. Johnson, supra; Harding v. Hoffman*, 158 Neb. 86, 62 N.W.2d 333 (1954); *Bonacci v. Cerra*, 134 Neb. 476, 279 N.W. 173 (1938).

The unavoidable accident issues were adequately before the jury.

Sudden Emergency

Consolidated Freightways requested that NJI 3.09 be given, which reads as follows:

> When a person by a sudden emergency which is not due to his own negligence is placed in a position of immediate danger and has insufficient time to determine with certainty the best course to pursue, he is not held to the same accuracy of judgment as is required under ordinary

> circumstances, and if he pursues a course of action to avoid an accident, such as an ordinary, prudent person placed in a similar position might choose, he is not guilty of negligence, even though he did not adopt the wisest choice.

Thus, in order for the doctrine to be invoked, there must exist (1) a sudden emergency not of the actor's own making, (2) alternative courses of action from which to choose, and (3) a need for instant decision. The rule holds that one confronted with such demands is not necessarily negligent in pursuing a course of action which more mature reflection or deliberate judgment might prove to be wrong. *Swartz v. Peterson, supra; Kraft v. Fundum*, 175 Neb. 821, 124 N.W.2d 225 (1963).

The sudden emergency doctrine is to be submitted to the jury where there is evidence that a wrong course of action was pursued, from the results of which the actor is to be excused because of the stress and shortness of time under which the decision was made. *Kraft v. Fundum, supra.* In *Kraft* the driver could not move to the right but only to the left in an effort to avoid the collision. He attempted to move to the left but was unable to avoid the collision. We held it was not error to refuse to instruct the jury on the sudden emergency doctrine. In doing so we said the doctrine did not apply because there was no evidence a wrong choice was made because of the stress of the occasion. There simply was no choice.

In the present case Lucero had no real choices. He testified that when he saw what was happening ahead of him, he was but 110 feet away from the Kaminski and Jones automobiles. He realized he could not stop. Since he could not leave the bridge, the only thing he could do in an effort to avoid a collision was to go around the automobiles, as he claimed he unsuccessfully attempted. Just as in *Kraft*, Lucero was not presented with any reasonable alternatives from which to choose. That being the case, it was not error to refuse to instruct the jury on the sudden emergency doctrine.

INSTRUCTION GIVEN

This assignment claims it was error for the trial court to give the following range of vision instruction:

> A motorist ordinarily has a duty to drive an automobile

> on a public street or highway at night in such a manner that he can stop in time to avoid a collision with an object within the area lighted by his headlights, and he is negligent if he fails to do so.
>
> A motorist is not, however, negligent where the object cannot be observed by the exercise of ordinary care in time to avoid a collision.

In effect, then, the trial court instructed on the range of vision rule, as well as an exception to it. Consolidated Freightways claims this was error, relying primarily on *Bartosh v. Schlautman*, 181 Neb. 130, 147 N.W.2d 492 (1966), in which the trial court refused to give a range of vision instruction which did not contain an exception such as that contained in the last paragraph of the instruction given in the present case. The *Bartosh* majority said:

> The applicability of the rule, as a matter of law, depends on the individual circumstances and is for the court's determination. Where an exception clearly applies, the general rule does not apply. Where the general rule does not apply as a matter of law, the determination of negligence is for the jury under the rules and standards of due care under the particular circumstances as applied in motor vehicle cases.

Id. at 133-34, 147 N.W.2d at 495.

The *Bartosh* holding, therefore, does not apply to this case, for it does not deal with the situation where neither the rule nor an exception clearly applies as a matter of law. That is the situation presented by this case.

Consolidated Freightways' evidence was that Lucero could not see the automobiles sooner because they were without lights, and the terrain of the roadway caused the truck's own headlights to shine up over them. Plaintiff's evidence, together with the proper inferences to be drawn from it, is that the terrain was not so steep, and, therefore, the headlights would not shine over the automobiles, and that Lucero was following too closely, considering the weather and road conditions. The first paragraph of the instruction supports plaintiff's theory, whereas the second paragraph supports that of Consolidated Freightways. The instruction does not, as Consolidated

Freightways argues, require the finding of a verdict for the plaintiff.

As stated in *Duling v. Berryman*, 193 Neb. 409, 412, 227 N.W.2d 584, 586 (1975): "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." See, also, *McCauley v. Briggs*, 218 Neb. 403, 355 N.W.2d 508 (1984); *Maurer v. Harper*, 207 Neb. 655, 300 N.W.2d 191 (1981).

Taken as a whole, the instruction given fairly submitted the issue to the jury.

AMOUNT OF VERDICT

In its last assignment of error, Consolidated Freightways contends the verdict is excessive, as plaintiff failed to prove the money value of decedent's companionship, counseling, and advice lost by the widow and next of kin.

Neb. Rev. Stat. § 30-810 (Reissue 1979) provides that a verdict or judgment in a wrongful death action "should be for the amount of damages which the persons [the widow and next of kin] in whose behalf the action is brought have sustained."

We have held that a wrongful death plaintiff may only recover for a pecuniary loss, meaning a loss which has a money value. *Godden v. Department of Public Welfare*, 193 Neb. 269, 226 N.W.2d 627 (1975); *Dow v. Legg*, 120 Neb. 271, 231 N.W. 747 (1930); *Fisher v. Trester*, 119 Neb. 529, 229 N.W. 901 (1930).

We have also noted, however, that the word "pecuniary" is not to be construed in a strict sense, that it is difficult to determine its exact measure, and that the task of determining such must be left to the good judgment and ordinary common sense of the jurors. The law does not provide any positive, definite mathematical formula or legal rule by which a jury shall fix the amount of pecuniary loss; it must be determined upon a consideration of the circumstances of each case. *Selders v. Armentrout*, 192 Neb. 291, 220 N.W.2d 222 (1974); *Mabe v. Gross*, 167 Neb. 593, 94 N.W.2d 12 (1959). There is no requirement that there be evidence of the dollar value of companionship, counseling, or advice. It is a matter left to the

sound discretion of the jury.

As we have said in the past, it is only where a wrongful death verdict is such that it can be accounted for only on the basis of passion and prejudice on the part of a jury that this court will interfere. *Caradori v. Fitch*, 200 Neb. 186, 263 N.W.2d 649 (1978); *Kroeger v. Safranek*, 165 Neb. 636, 87 N.W.2d 221 (1957).

Considering the nature and duration of the relationship between decedent and his widow and decedent's life expectancy, we conclude that for the widow's loss of decedent's companionship, counseling, and advice alone, the portion of the verdict for other than the out-of-pocket expenses is not so excessive as to warrant our interference. This conclusion makes further discussion of the amount of the verdict unnecessary.

The record sustaining none of Consolidated Freightways' assignments of error, the judgment of the trial court is affirmed.

AFFIRMED.

MARY JANE AUMAN, NATURAL MOTHER OF ANN MARIE AUMAN, APPELLANT, V. CAROL ANN TOOMEY AND MICHAEL J. TOOMEY, APPELLEES.

368 N.W.2d 459

Filed May 24, 1985. No. 84-741.

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.
2. **Parental Rights: Adoption: Proof.** The burden is on a natural parent challenging the validity of a relinquishment to prove that it was not voluntarily given.
3. **Parental Rights: Adoption.** In the absence of threats, coercion, fraud, or duress, a properly executed relinquishment of parental rights and consent to adoption signed by a natural parent knowingly, intelligently, and voluntarily is valid.
4. _____: _____. A relinquishment conditioned upon the retention of some parental rights is invalid.

5. _____: _____. A change of attitude subsequent to signing a relinquishment is insufficient to invalidate it.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Affirmed.

Laureen Van Norman, for appellant.

Craig D. Wittstruck of Berry, Anderson, Creager & Wittstruck, for appellees.

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

BOSLAUGH, J.

On May 1, 1984, the petitioner, Mary Jane Auman, executed and delivered a written relinquishment and consent to the adoption of her daughter, Ann Marie, by the respondents, Carol Ann Toomey and Michael J. Toomey. The child has been in the custody of the respondents since that date.

On May 18, 1984, the petitioner executed a written revocation of the relinquishment and commenced this proceeding on June 14, 1984, for a writ of habeas corpus to obtain custody of the child. The trial court found that the relinquishment and consent to adoption executed by the petitioner was valid and that it was in the best interests of the child that she remain in the custody of the respondents, and dismissed the petition. The petitioner has appealed.

The issue presented by the petitioner is whether the relinquishment and consent to adoption she executed was valid.

The record shows that on April 30, 1984, the petitioner contacted an attorney, Clay Statmore, and made an appointment for the next day to discuss adoption procedures for the child, who was then 22 months old. Statmore informed her he represented a couple interested in adopting a child.

On May 1, 1984, the petitioner and the child's natural father, Scott Squires, met with Statmore on two occasions. At the morning meeting Statmore informed them he could not represent them in this matter and that they had a right to speak to an attorney. He asked them if they wanted to adopt out their child. Squires said they had been thinking about it for a year and a half. When asked, neither was interested in temporarily

placing the child with relatives, as the responsibility for caring for her would still be with them.

After gathering all the necessary information, Statmore told them he would contact them later that afternoon after checking with the prospective adoptive parents. He informed them that once they signed the relinquishment, it would be final. Up until that point they could change their minds.

That afternoon the couple met again with Statmore and his associate, Dana London. Statmore repeated several times that he did not represent them, that signing the document relinquished all of their rights to the child, and that it was final and irrevocable. He also advised them of the availability of temporary foster care and of their right to an attorney. Both the petitioner and Squires read the relinquishment, had no questions, and signed the documents. The relinquishment was witnessed by Dana London and acknowledged before Statmore, a notary public. The petitioner then made arrangements for Statmore to collect the child and her belongings that evening. That night Statmore delivered the child to the respondents.

On May 4, 1984, the petitioner and Squires returned to Statmore's office and requested the return of their daughter. Statmore told them the relinquishment was final and that court action was the only way to recover the child. He told them they would need to get their own attorney because he represented the respondents.

On June 14, 1984, the petitioner filed this action alleging that the relinquishment and consent to adoption was involuntary and had been made under duress and, therefore, was invalid. She prayed that the custody of the child be returned to her.

At trial the petitioner testified that she relinquished her child due to personal and financial problems. Both she and Squires testified they were under the impression when they signed the relinquishment that there was a 2-week waiting period before the relinquishment would be final, during which they could get their daughter back.

A therapist who had counseled the petitioner over a period of time beginning May 9, 1984, testified that in her opinion the petitioner had impaired judgment at the time she signed the

relinquishment and was unable to correctly assess the consequences of her behavior. The petitioner's sister also testified as to the petitioner's "dazed" state on April 30.

The trial court found that the relinquishment was voluntary and valid and that it was in the best interests of the child that she remain in the custody of the respondents.

The petitioner has assigned three errors, all which center on whether the district court erred in finding the relinquishment to have been voluntarily executed and valid.

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. *McCormick v. State*, 218 Neb. 338, 354 N.W.2d 160 (1984); *Gray v. Maxwell*, 206 Neb. 385, 293 N.W.2d 90 (1980).

The burden is on a natural parent challenging the validity of a relinquishment to prove that it was not voluntarily given. *Lum v. Mattley*, 208 Neb. 789, 305 N.W.2d 878 (1981); *State v. Nebraska Children's Home Society*, 94 Neb. 255, 143 N.W. 203 (1913).

In the absence of threats, coercion, fraud, or duress, a properly executed relinquishment of parental rights and consent to adoption signed by a natural parent knowingly, intelligently, and voluntarily is valid. *McCormick, supra; Lum, supra; Kane v. United Catholic Social Services*, 187 Neb. 467, 191 N.W.2d 824 (1971). However, a relinquishment conditioned upon the retention of some parental rights is invalid. *McCormick, supra.*

Here, there is no claim that the relinquishment is facially invalid or fails to meet the statutory requirement of acknowledgment. Neb. Rev. Stat. § 43-106 (Reissue 1984).

The petitioner claims only that the relinquishment was not voluntary due to her mental incompetence at the time of signing and the impression she had that she had 2 weeks from the time of signing in which to change her mind.

At the time the relinquishment was executed, the petitioner was not married or employed. Her only source of income was ADC benefits and food stamps. She received very little support from the child's natural father because he, too, was without

work. She claims her financial stress at the time rendered her incompetent to make the decision to relinquish her child. The stresses, motivation, and circumstances that were present in this case are present in many such cases and do not form a basis for revocation. See *Kane, supra.*

Here, the evidence discloses the decision to relinquish was made by the petitioner herself without outside influence or pressure from anyone. She had thought about relinquishing the child for adoption since the time of her birth. She initiated the proceedings by contacting Statmore and setting up the initial appointment. She did not discuss her intention to relinquish the child for adoption with her parents, who in fact were against the idea. She only informed Squires of the appointment after she had made it.

At the meetings with Statmore she was coherent and participated actively in the conversation. She understood the finality of the relinquishment and declined advice that she needed an attorney. She rejected the suggestions of alternate placement as unworkable. She signed the document only after reading it. She rejected Statmore's final offer to destroy the document after signing, if she was unsure of relinquishing the child. She then made the arrangement for delivering the child to Statmore that evening. The procedure used by Statmore was informative and proper, and his testimony was corroborated by his associate, London.

The evidence indicates the petitioner changed her mind and succumbed to the influence of relatives only *after* the relinquishment had been signed. A change of attitude subsequent to signing a relinquishment is insufficient to invalidate it. See *Batt v. Nebraska Children's Home Society*, 185 Neb. 124, 174 N.W.2d 88 (1970).

After the relinquishment had been executed, the petitioner's parents voiced their opposition and attempted to regain custody of the child on their own. Squires' parents offered to take the child for 5 years to allow the couple to work out their problems. Prompted by their parents, the petitioner and Squires approached Statmore the second time to revoke the relinquishment. During this meeting, the petitioner uttered but one word and was silent while Squires stated his intent to try

and regain custody.

The petitioner's claim that the relinquishment had been obtained by misleading them into believing they had a 2-week waiting period is not supported by the record.

Both Mary Jane and Squires had vague recollections that Statmore mentioned a 2-week waiting period during the afternoon session on May 1. However, neither was able to recall exactly what Statmore had said in that regard. Further, neither Statmore's testimony nor that of his associate made mention of a 2-week waiting period. In light of the petitioner's admission that she understood the relinquishment was final, this claim is without merit.

When the record is considered as a whole, the evidence is insufficient to prove that the petitioner was coerced or misled into signing the relinquishment or that it was unintelligently or involuntarily made.

The remaining question is what is in the best interests of the child. *McCormick v. State*, 218 Neb. 338, 354 N.W.2d 160 (1984); *Gray v. Maxwell*, 206 Neb. 385, 293 N.W.2d 90 (1980).

The burden remains with the petitioner to show that the best interests of the child *require* that the custody of the child be returned to her natural parents. *Lum v. Mattley*, 208 Neb. 789, 305 N.W.2d 878 (1981). Since the relinquishment was valid, the natural parents lose any superior rights they may have to custody, and stand on equal footing with the prospective adoptive parents. *Lum, supra.*

There is no evidence to suggest that the respondents are unfit to have custody of the child. In fact, the testimony reveals the child is happy and well adjusted. She refers to the respondents as "Mom" and "Daddy" and has progressed both physically and mentally. There is no evidence to support a finding that the child's interests would be best served by uprooting her after approximately a year in her present environment. See *Lum, supra.*

The judgment of the district court is affirmed.

AFFIRMED.

KRIVOSHA, C.J., dissenting.

It is said that consistency is the hobgoblin of small minds. While it is not my desire to run with the hobgoblins,

nevertheless I do believe that consistency in this case is desirable. For reasons more fully set out in my dissent in *Lum v. Mattley*, 208 Neb. 789, 305 N.W.2d 878 (1981), I likewise dissent in this case. Perhaps the solution to the problem and the apparent inconsistency lies with the Legislature. The inconsistent position we have created between licensed agencies on the one hand and private placement on the other does not, in my view, make much sense either legally or as a matter of policy.

LAWRENCE BELSKY ET AL., APPELLANTS, V. COUNTY OF DODGE ET AL., APPELLEES.

369 N.W.2d 46

Filed May 31, 1985. No. 83-870.

1. **Waters: Words and Phrases.** As defined by Neb. Rev. Stat. § 31-202 (Reissue 1984), a watercourse is "[a]ny depression or draw two feet below the surrounding lands and having a continuous outlet to a stream of water, or river or brook."
2. _____: _____. Floodwaters are those that spill over banks of a stream during high water, flow over adjacent lands in the stream's flood plain, and return to the stream at a point or points downstream.
3. _____: _____. Surface waters are waters which appear upon the surface of the ground in a diffused state, with no permanent source of supply or regular course, which ordinarily result from rainfall or melting snow.
4. **Waters.** The flow of surface waters in any well-defined course, whether it be a ditch, swale, or draw in its primitive condition, and whether or not it is 2 feet below the surrounding land, cannot be interfered with or arrested to the injury of a neighboring proprietor.
5. _____. One building a structure across a natural drainway has a continuing duty to provide natural passage for water reasonably anticipated to move in the drainway occupied by the obstruction.

Appeal from the District Court for Dodge County: DARVID D. QUIST, Judge. Affirmed.

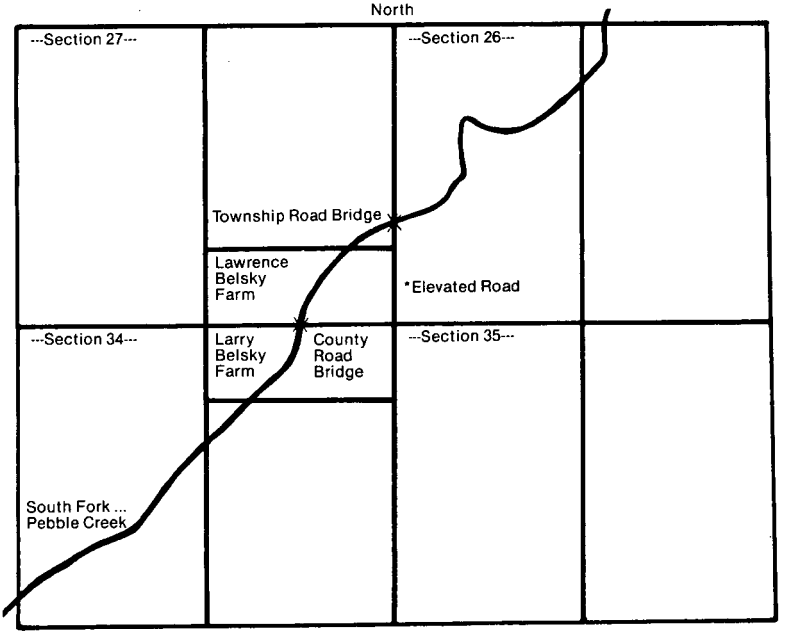
Hurt, Gallant & Flores, for appellants.

Dean Skokan, Dodge County Attorney, for appellees.

BOSLAUGH, HASTINGS, CAPORALE, and SHANAHAN, JJ., and COLWELL, D.J., Retired.

SHANAHAN, J.

In the district court for Dodge County, Lawrence and Marie Belsky (Belsky), owners of an 80-acre farm (south half of the southeast quarter of Section 27, Township 20 North, Range 5 East of the 6th P.M.), requested an injunction against the County of Dodge, the county's supervisors and highway superintendent, and Webster Township to prevent obstruction of drainage from Belsky's farm. Belsky's son, Larry, and his wife, Kathleen, own an 80-acre farm (north half of the northeast quarter of Section 34, Township 20 North, Range 5 East of the 6th P.M.), south of the farm owned by Lawrence and Marie. The farms owned by the Belsky families are separated by an east-west county road. On the east side of Belsky's farm is a north-south township road. Pebble Creek is a drainway running generally northeasterly through Belsky's farm. The source of water for Pebble Creek is rain and melted snow, but the creek is dry approximately 90 percent of the time. The outlet for Pebble Creek is undisclosed.



Land on both sides of the township road is devoted to agriculture. Before 1979, area drainage collected in a depression near the southeast corner of Belsky's farm, approximately 300 to 400 feet south of the bridge for the township road. The collected water drained eastward across the road and rendered it impassable much of the time. Belsky complained to Dodge County about drainage from his farm and the intermittent water problem on the township road. Dodge County, in 1979, undertook extensive grade work on the road and built a new bridge across Pebble Creek. In connection with the county's project to remedy the drainage problem, Belsky indicated he would take the bow out of Pebble Creek across his farm to provide more direct flow from the county road bridge to the location of the new bridge.

Before the 1979 project, fields immediately adjacent to the road had an elevation the same as the road. The opening beneath the old bridge on the township road was 105 square feet, although the greater part of such opening was clogged with debris.

The new bridge's opening is 313 square feet. This new bridge did not intercept Pebble Creek at a right angle. Rather, contemplating Belsky's straightening the creek, the county constructed its new bridge in a northwesterly-southeasterly direction so that an oblique angle was formed as the bridge crossed Pebble Creek. In this manner water in Pebble Creek, after removal of the creek bow by Belsky, would flow perpendicular to the opening beneath the new bridge for direct and unobstructed passage. In constructing the new bridge with its larger opening for passage of water, the county elevated the bridge approach of the road 2.4 feet. This increased elevation caused previously eastward draining water to run north on the west side of the road and then into Pebble Creek at the site of the new bridge. Additionally, after the increased road elevation, water collects on Sections 26 and 27 at an identical level on both sides of the road. Belsky never straightened the bow of Pebble Creek as it crossed his farm.

Belsky filed suit, asserting that the defendants by "negligent, wrongful and unlawful acts" have caused irreparable injury, namely, the opening beneath the new bridge was insufficient for

passage of water in a watercourse and the postconstruction elevation of the township road obstructed a natural drainway, resulting in flooding and standing water on Belsky's farm. Belsky prayed for restoration of drainage as such existed before the 1979 bridge-road construction. On the other hand, Dodge County contends that water had drained across the previous township road because the debris-clogged opening under the old bridge was insufficient for passage of Pebble Creek and caused the creek to back up and drain across the old road. The county also contends that design of the bridge was modified in the light of Belsky's assurance that he would straighten Pebble Creek across his farm and that Belsky's failure to do so bars equitable relief.

At trial all expert witnesses agreed that the increased elevation of the township road may contribute to an increased depth and duration of standing water.

Belsky's expert witness testified that the opening under the new bridge is inadequate to accommodate area drainage in the event of a 50-year storm. A 50-year storm has a 2-percent chance of occurring in any given year. In the opinion of Belsky's expert, a bridge opening of 427 square feet was necessary for adequate drainage from a 50-year storm. To obtain an opening of 427 square feet, it would be necessary to raise the new bridge another 2 feet above its present elevation or dredge a deeper channel for Pebble Creek beneath the new bridge.

An expert witness for Belsky also testified that water would be found on both sides of the road, that is, on Sections 26 and 27, even if there had been no road separating the sections; that the new road did not create backwater on section 34; and that there would be standing water on Section 27 irrespective of the county's "improvements."

The new bridge was constructed to handle runoff from a 25-year storm. A 25-year storm has a 4-percent chance of occurring in any given year. The 25-year standard is widely utilized by state and public subdivisions in bridge design and construction. The new bridge's capacity for passage of water is greater than the capacity of the county road bridge located south of the new bridge and upstream on Pebble Creek. Water will leave Pebble Creek somewhere south of the new bridge

before there is any obstruction to the creek as it flows toward and passes beneath the new bridge. Overbank flows of Pebble Creek can be expected at 1.4- to 2.5-year frequencies and will move in a northeasterly direction parallel to Pebble Creek. These overbank flows eventually leave Belsky's farm by way of the creek channel under the new bridge. On account of the increased capacity for drainage beneath the new bridge, the road-bridge project has improved area drainage, including drainage from Belsky's farm.

The county's expert testified that previous drainage had flowed easily across the old road because the maintained road was capable of conducting a greater flow of water than would be conveyed by agricultural land on either side of the road. As explained by such expert witness, more water was conducted by the old road than by the adjacent cultivated fields because crops in the fields caused a "retardance" to flow, whereas the maintained road, due to an absence of surface obstruction such as vegetation or crops, permitted a greater conveyance of water over the road's surface.

Apart from Pebble Creek, there was no evidence concerning existence or location of a natural drainway for Belsky's farm before installation of a road.

The district court found that Belsky had failed to prove negligence or the existence of a watercourse and dismissed Belsky's action.

For assignments of error Belsky claims the district court erred (1) in determining a statutory watercourse did not exist; (2) in applying the common enemy rule regarding surface waters; and (3) in finding that the county had provided for sufficient passage of all waters reasonably anticipated to flow beneath the new bridge placed in a natural drainway.

Since this is an action in equity, we review the matter de novo without reference to findings of fact made by the trial court. *Barry v. Wittmersehouse*, 212 Neb. 909, 327 N.W.2d 33 (1982); *Jameson v. Nelson*, 211 Neb. 259, 318 N.W.2d 259 (1982). Where testimony or evidence is in conflict, we take into account that the trial court observed the witnesses. *Barry v. Wittmersehouse, supra*. A party seeking an injunction must establish by competent evidence every controverted fact

necessary to entitle the claimant to relief. *Grint v. Hart*, 216 Neb. 406, 343 N.W.2d 921 (1984). Our review of the record and disposition of this matter is governed accordingly.

Without becoming swamped by or bogged down in terminology, nevertheless we are reminded that applicable to this case are certain definitions and characteristics of distinctive waterways.

Regarding Belsky's claim that he is entitled to relief due to the county's obstruction of Pebble Creek as a statutory "watercourse," there is a double deficiency in Belsky's proof. A watercourse is defined or characterized by Neb. Rev. Stat. § 31-202 (Reissue 1984): "Any depression or draw two feet below the surrounding lands and having a continuous outlet to a stream of water, or river or brook shall be deemed a watercourse." Belsky adduced no evidence regarding the depth of any "depression or draw," and no proof of any continuous outlet to a stream, river, or brook. The destination of Pebble Creek is undisclosed. Absence of such evidence precludes any finding that Pebble Creek is a watercourse within § 31-202. We conclude that there is no statutory watercourse involved in the case before us.

Although Belsky refers to "flooding," this case does not involve floodwaters—waters that spill over banks of a stream during high water, flow over adjacent lands in the stream's flood plain, and return to the stream at a point or points downstream. See *Wiese v. Klassen*, 177 Neb. 496, 129 N.W.2d 527 (1964). Pebble Creek is not a watercourse and, therefore, any over-the-bank waters from the creek are not floodwaters.

Rather, it appears to us that waters involved in this case are characterized as surface waters. "Surface waters are waters which appear upon the surface of the ground in a diffused state, with no permanent source of supply or regular course, which ordinarily result from rainfall or melting snow." *Kuta v. Flynn*, 182 Neb. 479, 481, 155 N.W.2d 795, 797 (1968); *Sullivan v. Hoffman*, 207 Neb. 166, 296 N.W.2d 707 (1980).

In his claim that the county has obstructed a natural drainway located south of the new bridge, Belsky relies on *Nichol v. Yocum*, 173 Neb. 298, 113 N.W.2d 195 (1962). In *Nichol* this court rejected categorical application of the

"common enemy" doctrine regarding surface waters and adopted the doctrine of the "common law" as controlling in Nebraska. In *Nichol* this court stated:

> [D]iffused surface waters may be dammed, diverted, or otherwise repelled, if necessary, and in the absence of negligence. But when 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. . . . "[A] natural drainway must be kept open to carry the water into the streams, and as against the rights of the upper proprietor, the lower proprietor cannot obstruct surface water when it has found its way to and is running in a natural drainage channel or depression. Thus, it has been held that it is the duty of a lower landowner who builds a structure across a natural drainway to provide for the natural passage through such obstruction of all the water which may be reasonably anticipated to drain therein, and that this is a continuing duty."
>
> At common law the right to drain surface waters into depressions, draws, swales, and drainways which existed in the state of nature was recognized. Lower lands are, at common law, under a natural servitude to receive the surface water of higher lands flowing along natural depressions on the surface of the ground. This is so, whether or not a live watercourse occupies the natural course. . . .
>
> . . . .
>
> This court has recognized the right of an upper proprietor to drain surface waters through a well-defined natural course, whether the course be ditch, swale, or drain in its primitive condition, and that such flow cannot be arrested or interfered with to the injury of neighboring proprietors.

Nichol v. Yocum, supra at 306-08, 113 N.W.2d at 200-01.

To prevail on the theory that the altered road obstructed a natural drainway, Belsky must prove by a preponderance of the evidence that a drainway: (1) traversed the township road before the county's alteration; (2) was formed and existed in a

state of nature; and (3) carried water from a higher to a lower estate.

The crucial question is whether a natural drainway existed for water moving north and east across the township road before the county's bridge-road project in 1979.

Although the evidence indicates that water historically had flowed northeasterly across the road, there is no evidence that there was a natural depression, draw, swale, or other drainway existing as a result of natural forces or conditions. The general area, including Section 27, may be characterized by an absence of discernible higher and lower (dominant and servient) estates. After the county's construction in 1979, water having the same level collects on both sides of the road. This indicates that the road was not an element of Belsky's water problem, as borne out by Belsky's expert.

To paraphrase and summarize testimony of expert witnesses: Subject to the law of gravity, water generally follows a line of least resistance. Vegetation on agricultural land offers obstruction, and, therefore, resistance, to flowing water, while a maintained road surface presents no such obstruction. Hence, water tends to flow over an unobstructed road surface rather than a vegetated surface on an adjoining field, when the two surfaces are of equal elevation.

Although Belsky claims a "natural drainway" crossed the township road somewhere south of the new bridge, the very existence of the township road, as an integral but artificial component of the drainway, prevents characterizing any traversing drainway as one existing in a state of nature. Water crossed the road due to diminished resistance of the flat, unobstructed roadway and the obstructed passage under the old bridge. There is no evidence that water, previously flowing northeasterly, would have collected in a state of nature and flowed across the area where the township road is located. Drainage of Belsky's farm resulted from the road's surface and was not attributable to characteristics of land in a natural state.

This is not to say that every artificial element involved in a drainway destroys characterization of the drainway as natural or in a state of nature, but, as in this case, where an essential part of the drainway is artificial or man made, such quality

precludes a natural drainway. As the face of nature becomes less recognizable due to artificial elements injected by man, such reconstruction affecting drainage of diffused surface water may necessitate formulation of rules based on reasonable use instead of rights and duties "referenced to a 'state of nature.' " See R. Harnsberger & N. Thorson, Nebraska Water Law & Administration § 4.09 at 173 (1984). However, so long as Nebraska adheres to the requirement that a drainway be impressed upon the land by nature, a conduit involving an artificial component such as exists in the present case cannot qualify as a natural drainway.

Although there is no natural drainway crossing the road south of the new bridge, and although no watercourse exists in this case, the south fork of Pebble Creek is a natural drainway within the rule prescribed in *Nichol v. Yocum*, 173 Neb. 298, 113 N.W.2d 195 (1962), namely, a drainway which has been formed and exists in a state of nature and carries water from a higher to a lower estate.

The flow of surface waters in any well-defined course, whether it be a ditch, swale, or draw in its primitive condition, and whether or not it is 2 feet below the surrounding land, cannot be interfered with or arrested to the injury of a neighboring proprietor. *Town of Everett v. Teigeler*, 162 Neb. 769, 77 N.W.2d 467 (1956). There may be occasions when surface waters are concentrated in force and volume in a natural drainway, other than a "watercourse," so that rules relating to diffused surface waters, as a common enemy, do not apply. See *Nichol v. Yocum, supra*. A natural drainway must be kept open to carry water into streams, and, as against the rights of an upper proprietor, a lower proprietor cannot obstruct surface water which has found its way into and is moving in a natural drainage channel or depression. *Id.* Thus, in Nebraska water law a watercourse is a drainway, but the converse is not necessarily true. The fact that Pebble Creek is not a watercourse is irrelevant in determining whether Pebble Creek is a natural drainway.

The county constructed the bridge across a natural drainway, and one building a structure across a natural drainway has a continuing duty to provide natural passage for water

reasonably anticipated to move in the drainway occupied by the obstruction. See *McGill v. Card-Adams Co.*, 154 Neb. 332, 47 N.W.2d 912 (1951); cf., *Fellows v. Buffalo County*, 181 Neb. 269, 147 N.W.2d 801 (1967); *Wilson Concrete Co. v. County of Sarpy*, 189 Neb. 312, 202 N.W.2d 507 (1972). Such duty to refrain from structural obstruction of a natural drainway is imposed upon private proprietors and public authorities as well. See *Purdy v. County of Madison*, 156 Neb. 212, 55 N.W.2d 617 (1952).

> "Failure to make proper provision for the flow of water under a bridge or culvert has been held to impose liability, although such bridge or culvert may be constructed according to approved principles of engineering; the fact that it does materially obstruct the flow being held to be in itself evidence that it was not properly constructed, regardless of the principles upon which it was built."

Gledhill v. State, 123 Neb. 726, 730-31, 243 N.W. 909, 912 (1932). See, also, *Schmutte v. State*, 147 Neb. 193, 22 N.W.2d 691 (1946).

The new bridge was constructed to provide passage for runoff from a 25-year storm. The 25-year storm standard is commonly utilized by the state and counties in bridge construction. Such compliance with a common standard does not exonerate the county from liability. The commonly accepted standard must be viewed with the new bridge's hydraulic capacity, which is greater than the capacity of the upstream county road bridge and that of the channel traversed by the new bridge.

Regardless of the theory for imposition of liability for obstructing a drainway, to impose liability a structure must obstruct water moving in the drainway. The evidence demonstrates that out-of-bank flows may be expected on Pebble Creek at frequencies of 1.4 to 2.5 years. Out-of-bank flows move in a northeasterly direction, generally parallel to Pebble Creek, until flow reaches the roadbed and is directed northward toward the site of the new bridge where flow passed beneath the bridge because the new bridge's capacity is not reached. Overbank flows occur upstream before water reaches any impediment or obstruction caused by the bridge. *Cause* is

defined as "that which produces an effect, result, or consequence." The American Heritage Dictionary of the English Language 214 (1981). See, also, Webster's New Universal Unabridged Dictionary 288 (2d ed. 1983). We find there is no causal relationship between the hydraulic capacity of the new bridge and any water problem on Belsky's farm. This compels our conclusion that there is no liability on the part of the county.

In view of our determinations we do not have to adddress the contention of the county that Belsky's failure to carry out his promise to straighten Pebble Creek precludes equitable relief.

AFFIRMED.

ANNE REDICK, APPELLEE, V. JOHN S. REDICK, APPELLANT.
368 N.W.2d 463

Filed May 31, 1985. No. 84-030.

1. **Statutes: Presumptions.** Where the law of a sister state is not pled nor proved, it is presumed to be the same as the law of this jurisdiction.
2. **Pleadings: Estoppel: Proof.** The burden of proof rests on the party who pleads an estoppel to establish the facts upon which the estoppel is based.
3. **Estoppel.** Among the elements necessary to be proved to establish the defense of estoppel are: conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; and action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice.

Appeal from the District Court for Douglas County: PAUL J. HICKMAN, Judge. Affirmed.

Albert L. Feldman of Harris, Feldman, Stumpf & Pavel, for appellant.

Roger R. Holthaus, for appellee.

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

GRANT, J.

Respondent appeals from a district court order denying him equitable relief in estopping his former wife, Anne Redick, from collecting previously ordered child support. We affirm the decision of the district court.

The petitioner-appellee, Anne Redick, married the respondent-appellant, John S. Redick, in December of 1971. Anne Redick at the time of the marriage had custody of four children from her previous marriage to William C. Piper. John Redick adopted the four children in October of 1972. The petition to adopt was based on abandonment by the natural father, William C. Piper. After 10 years of marriage Anne Redick filed for divorce from John. A decree of dissolution was entered on September 30, 1981. She was granted custody of the couple's four minor children, and John Redick was ordered to pay a total of $320 per month child support.

Anne Redick reestablished a relationship with her former husband, the children's biological father, William C. Piper, and remarried Piper on June 18, 1982. On May 19, 1982, prior to that remarriage, John Redick signed a "Voluntary Appearance, Waiver of Notice, and Consent" whereby he waived notice of hearing on any petition for adoption of his minor children and consented "that said minor children may be adopted by their natural father William C. Piper." Six days later, on May 25, 1982, Anne and John Redick filed a "Joint Application and Order" seeking to extinguish all John Redick's parental rights and terminate his obligation to pay child support after December 31, 1982. Attached to the application was a letter signed by Piper offering to renew his support and responsibilities for the children beginning January 1, 1983. In the application Anne Redick stated that it was in the best interests of the children to allow respondent to relinquish his rights and to allow Piper to "re-establish" himself as the "de jure father" of the children. A district judge refused to sign the order prospectively terminating John Redick's child support obligations and parental rights. That same day, Anne and John Redick filed a "Stipulation and Order." This May 25, 1982, order was signed by a district judge and granted Anne's motion to amend the 1981 divorce decree to allow her to move the

children to California.

After Anne's remarriage to her first husband, Piper, in June of 1982, Anne and the four children moved to California with Piper to live as a family. John Redick and Anne testified that, pursuant to an agreement between them, John signed the documents relinquishing his parental rights and allowing Anne to move the children. Anne instituted adoption proceedings in California. Both parties also testified that, in contemplation of the adoption, they agreed that John Redick's support obligation was to end December 31, 1982.

Beginning in July of 1982, Anne Redick had difficulty collecting child support from John Redick. John testified he quit paying child support when he learned Anne had remarried because he "felt rather foolish sending money to somebody else's family." Anne garnisheed John Redick's wages. On July 12, 1982, Anne's California attorney wrote a letter to John Redick's attorney informing him that an adoption petition would be filed and confirming a phone conversation in which John Redick had apparently agreed not to file a motion to set aside the order permitting the removal of the children to California while the adoption was pending. On July 29, 1982, Anne Redick's Omaha attorney wrote a letter to John Redick's attorney, which said in part:

> As we discussed, the adoption by Mr. Piper is proceeding without incident, and it is my client's intent to follow through with the termination of Mr. Redick's parental rights as soon as the children are adopted by Mr. Piper. . . . In the meantime, please remind your client that he has an obligation to pay child support up until the time the parental rights are terminated.

During all this time, of course, John Redick was and remained the father of the four children in the middle of this marital, musical chairs contest. While the three adults involved treated these four minors as if they were chattels, the children themselves retained their identities and, as the later facts herein show, finally helped put an end to this discord over who was to be their father.

The four children registered in school in California under the name Piper, and the California adoption proceedings

progressed routinely. In October of 1982 Anne Redick's and Piper's remarriage became re-strained, and the children, whose adoption hearing had been set, expressed their refusal to be adopted by Piper. Anne testified that the children were required to consent to their California adoption, since they were over 14 years of age, and it was clear they would not so consent. Where the California law is not pled nor proved, it is presumed to be the same as the law of this jurisdiction. *Cockle v. Cockle*, 215 Neb. 329, 339 N.W.2d 63 (1983). We presume that the consent necessary to an adoption in California is the equivalent of Neb. Rev. Stat. § 43-104 (Reissue 1984). The Redick children, therefore, all being over 14 years old, would need to consent to the adoption by Piper before it could be ordered by the California court. Apparently, none of the three adults had determined if the children desired that John's parental rights be terminated so they could be adopted by William Piper. Because of the children's refusal before the final hearing, and because of her marital difficulties with Piper, Anne was required to ask her California attorney to put the adoption proceedings on the "back burner." The adoption was not completed.

In February of 1983 Anne Redick, realizing the adoption would not be completed because of her strained situation with Piper, wrote a letter to John Redick informing him of the situation. Anne filed in California for dissolution of her marriage on April 9, 1983, and moved back to Omaha with the children in August of 1983. The divorce decree dissolving the Piper marriage was signed on June 16, 1983, and provided that Piper pay Anne Redick $500 per month alimony but no child support.

On March 22, 1983, Anne Redick filed an application requesting an order from the Douglas County District Court stating that John Redick's obligation to pay child support under the September 1981 decree was valid and continuing. Although Anne Redick's petition did not state a claim for relief, John Redick filed a response to Anne Redick's application, alleging that Anne was estopped from collecting the child support ordered under the Redick divorce decree, thus placing the issue before the court. In the alternative John Redick asked for a modification of the divorce decree because a substantial change

of circumstances required the reduction of the child support payments.

The district court, on December 13, 1983, issued its order estopping Anne from collecting the January and February 1983 child support payments but requiring John to pay child support accumulating after February 28, 1983, and owing before January 1, 1983. John Redick's motion for new trial was overruled on January 6, 1984, and he timely appealed. John Redick asserts the trial court erred in not finding Anne was estopped from collecting all child support payments. Anne Redick filed no cross-appeal from the December 13, 1983, order estopping her from collecting the accrued January and February 1983 child support.

Appellant relies on *Smith v. Smith*, 201 Neb. 21, 265 N.W.2d 855 (1978). In that case the parties were divorced, custody of the couple's minor child was awarded to Barbara Smith, and Delbert Smith was ordered to pay child support. Subsequently, Barbara Smith remarried and asked Delbert Smith to sign a consent to adoption by William Harrison, Barbara's new husband. Delbert Smith did so. The district court also consented to the adoption. The adoption process went smoothly, but before it was completed Barbara's second husband, who was in the service, was transferred to another state and the adoption proceedings were never completed. Later, Harrison died, and Barbara attempted to collect the child support from Delbert. Barbara had refrained from collecting child support after Delbert consented to the proposed adoption, up until the time of Harrison's death. We held that "[t]he securing of the consent of the father to an adoption by another of his child is such action which by its nature should terminate further liability for child support." *Id.* at 28, 265 N.W.2d at 860.

In *Williams v. Williams*, 206 Neb. 630, 294 N.W.2d 357 (1980), we more fully explained our position in *Smith* and, to the extent *Smith* was inconsistent, modified it. *Williams* sets out the standard to be applied in this case. In *Williams*, Delores Williams, who had custody of her one daughter from a previous marriage, remarried. Delores' attorney sent a letter to Paul Williams, her first husband, asking for his consent to adoption

of their daughter by Delores' second husband. Delores stated that Paul's child support obligation would end if the adoption were completed. Paul executed the necessary consents to the proposed adoption. The court that had handled the Williams divorce did not grant its consent to the adoption. Based on *Smith*, the trial court sustained Paul's motion for summary judgment, and we reversed and remanded for a factual determination of whether equitable estoppel existed. We noted that more than just the father's consent to the adoption was needed to equitably estop his former wife from collecting child support. We stated at 636, 294 N.W.2d at 362:

> In *Smith* . . . the trial court that had granted the divorce approved the proposed adoption and the former wife and her new husband actually took the child into their home, supported her, cared for her, raised her, and treated her just as if the adoption had been completed. Under such facts, we found it would be inequitable to permit the mother to subsequently seek to enforce the payment of the accrued, but unpaid, child support and, therefore, applied the doctrine of equitable estoppel.

John Redick pled a defense of equitable estoppel to Anne Redick's petition of continued child support. This matter is an equity action, and on appeal we review the case de novo without reference to the findings of fact made by the trial court; but where testimony or evidence is in irreconcilable conflict, we will take into consideration that the trial court observed the witnesses. *Barry v. Wittmersehouse*, 212 Neb. 909, 327 N.W.2d 33 (1982). In *Williams v. Williams, supra* at 637, 294 N.W.2d at 362, we reiterated the essential elements of equitable estoppel set out in *Chappelear v. Grange & Farmers Ins. Co.*, 190 Neb. 589, 210 N.W.2d 921 (1973), quoting in part as follows:

> As to party estopped, (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive,

> of the real facts; as to the other party, (4) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (5) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice.

We find that the district court's decision should be affirmed. John Redick failed to prove at least the first and last of the elements listed above in the *Chappelear* case necessary to establish equitable estoppel. The burden of proof rests on the party who pleads an estoppel to establish the facts upon which the estoppel is based. *Bors v. McGowan*, 159 Neb. 790, 68 N.W.2d 596 (1955).

In this case John did not prove that Anne Redick's conduct amounted to a false representation or concealment of material facts or that it was calculated to convey the impression that the facts were otherwise than, and inconsistent with, those which Anne subsequently attempted to assert. At the time of John Redick's granting his consent to adopt, he knew full well that the court might refuse to terminate his rights and refuse to grant the adoption. He knew that the district court for Douglas County had refused to consent to the adoption and had refused to terminate his child support payment prospectively when he and Anne had earlier applied for termination of his parental rights and his obligation to support the children. There is no indication that consent to adoption alone was a basis for Anne's promise to refrain from collecting child support. Indeed, quite to the contrary, the letters and testimony of both parties indicate the termination of rights and obligations was to occur after the adoption was completed. The agreement was entered into in contemplation of a completed adoption by William C. Piper. John Redick testified at the September 13, 1983, hearing that he relied on and expected the adoption to proceed as intended when he signed the consent to adopt. Paragraph 8 of John Redick's "Response to Application and Notice" states:

> Upon learning that said second order for the termination of child support had not been entered, respondent's attorney, after extended correspondence and

> conversation with petitioner's attorney, agreed that respondent would not move to set aside the order for removal of the children to California on the condition that a petition for adoption by the natural father would be filed forthwith in the State of California.

The facts of the record indicate that the deal was struck in contemplation of an actual adoption, and it is also clear from the record that the children themselves, whom neither John nor Anne consulted concerning the termination of John's rights, helped put an end to the adoption proceedings.

Further, a party invoking the doctrine of equitable estoppel must have changed his position in reliance on the misrepresentation, to his injury, detriment, or prejudice. In this case John Redick still has all his rights as a father. The fact that he consented to Anne's moving the children and Piper's adopting the children is not controlling, as the children were back in Omaha in less than a year and no adoption took place.

John Redick claims that his relationship with his children was damaged when he signed the consent to adopt and cut off his communication with them. This, he says, was done for their benefit. Both Anne and the children have encouraged contact with their father, John Redick, and he has a right to see them. John Redick had ended communication with the children before he signed his consent to adopt; therefore, his argument that he had irreparably damaged his relationship with his children because of his action done on reliance of the termination of his support obligation is not supported by the record.

John Redick points out that he was but a "walk-on" father for the children and felt that divorcing himself from the children enabled them to rebond with their biological father, William C. Piper. Nebraska law does not recognize a "walk-on" father, and such a classification is not recognized by this court. Neb. Rev. Stat. § 43-110 (Reissue 1984) states:

> After a decree of adoption is entered, the usual relation of parent and child and *all the rights, duties and other legal consequences of the natural relation of child and parent shall thereafter exist* between such adopted child and the person or persons adopting such child and his, her or their

kindred.

(Emphasis supplied.)

In the eyes of the law, therefore, as set out in § 43-110, there exists between the adoptive father, John Redick, and the four children he adopted "the usual relation of parent and child and all the rights, duties and other legal consequences of the natural relation of child and parent . . . ." See, also, *In re Estate of Luckey. Bailey v. Luckey*, 206 Neb. 53, 291 N.W.2d 235 (1980). John Redick had been the children's legal father for 9 years at the time of his divorce, and continues to be their father. The oldest child was 7 years old and the youngest was 3 years old when John Redick adopted them. Even the oldest child had a much longer and more stable relationship with John Redick than with William C. Piper. John Redick was the person these children thought of as their father. Their connection with Piper was of short duration.

We agree with the district court, and find from the facts of this case, that John Redick has not sustained the burden of proving that Anne Redick should be equitably estopped from collecting child support.

AFFIRMED.

HASTINGS, J., participating on briefs.

WILLIAM J. WOOD, APPELLANT, V. VILLAGE OF CULBERTSON, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE.

368 N.W.2d 468

Filed May 31, 1985. No. 84-345.

1. **Jurisdiction: Time: Appeal and Error.** The right of appeal is statutory, and the time requirements set forth in the statute are mandatory in order for the reviewing court to acquire jurisdiction.
2. **Jurisdiction: Demurrer.** Objection to jurisdiction of the court over subject matter may be raised by demurrer.

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

William J. Wood, pro se, and, on brief, G. Peter Burger of Burger, Bennett & Green, P.C., for appellant.

Philip P. Lyons of Colfer, Lyons, Wood, Malcom & Goodwin, for appellee.

BOSLAUGH, WHITE, and SHANAHAN, JJ., and BRODKEY, J., Retired, and COLWELL, D.J., Retired.

WHITE, J.

A demurrer to appellant's petition was sustained by the district court. Appellant announced in open court that he stood on the petition, whereupon the court dismissed the petition. This appeal follows.

The petition, filed July 6, 1983, requests relief from the levy of a special assessment for a sanitary sewer extension district, Neb. Rev. Stat. §§ 19-2401 et seq. (Reissue 1983), which action was taken by the board of trustees of the Village of Culbertson on June 7, 1983. The grounds alleged to justify that relief are immaterial to a disposition of this appeal. The petition recites that a copy of the proceedings is attached to the exhibit and incorporated by reference.

In its demurrer appellee village stated as its grounds that the notice of appeal "was filed too late and this Court has no jurisdiction over the subject matter of this action." Section 19-2423 provides that a notice of appeal shall be filed with the village clerk within 10 days from the date of the levy of a special assessment. We have uniformly held that the right of appeal is statutory, and the time requirements set forth in the statute are mandatory in order for the reviewing court to acquire jurisdiction. *Nicholson v. City of Bellevue*, 215 Neb. 540, 339 N.W.2d 758 (1983). Objection to jurisdiction of the court over the subject matter may be raised by demurrer. *Knapp v. City of Omaha*, 175 Neb. 576, 122 N.W.2d 513 (1963).

We note that while a photocopy of what is obviously published minutes of the village board proceedings is present, no transcript of the proceedings certified by the village clerk is in the record. A certified transcript of the board proceedings is required to be filed with a petition within 30 days from the date of the levy of the special assessment. § 19-2425. The trial court

did not rule on the effect of this failure to include a certified transcript, nor do we.

Finally, we note that the petition does not disclose when, or even if, a notice of appeal was filed with the village clerk. However, a copy of the notice of appeal filed in the district court on July 6, 1983, the same date as the petition, is dated June 21, 1983, 2 weeks from the date of the levy.

The trial court determined that the proceedings were incorporated in the petition, that the notice of appeal was properly part of that petition, and that the failure to file the notice within 10 days was a jurisdictional defect. We agree.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JERRY A. MARCO, APPELLANT.

368 N.W.2d 470

Filed May 31, 1985. No. 84-376.

1. **Witnesses: Evidence: Prior Statements.** Proof of contradictory extrajudicial statements of a witness may be received in evidence for the purpose of assisting the jury in estimating the credibility of the witness, but unless otherwise admissible, such statements may not be utilized as substantive evidence of the facts declared.
2. **Witnesses: Evidence: Impeachment: Extrajudicial Statements.** A party is not permitted to get before the jury, under the guise of impeachment, an extrajudicial statement of a witness by calling him to the stand when there is good reason to believe he will decline to testify as desired, and when in fact he only so declines.
3. **Witnesses: Evidence: Impeachment: Prior Statements.** The State may not use a prior inconsistent statement of a witness, under the guise of impeachment, for the primary purpose of placing before the jury substantive evidence which is not otherwise admissible.
4. **Witnesses: Evidence: Impeachment: Extrajudicial Statements.** The rule allowing a party to impeach his own witness may not be used as an artifice by which inadmissible matter may be gotten to the jury through the device of offering a witness whose testimony is or should be known to be adverse in order, under the name of impeachment, to get before the jury for its consideration a favorable extrajudicial statement the witness had made.
5. **Evidence: Impeachment: Prior Statements.** Where the need for impeachment is

small or nonexistent and the danger that the prior inconsistent statement will be considered substantively is great, the statement should be excluded.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Reversed and remanded for a new trial.

James Martin Davis of Dolan, Davis & Gleason, for appellant.

Paul L. Douglas, Attorney General, and Jill Gradwohl, for appellee.

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

WHITE, J.

Appellant, Jerry A. Marco, was informed against in the district court for Sarpy County of the crime of attempted first degree murder. The jury found him guilty of third degree assault. Appellant was sentenced to 1 year at the Nebraska Department of Corrections. He appeals. We reverse and remand for a new trial.

Appellant assigns as error (1) the alleged improper impeachment of a prosecution witness and (2) the denial by the trial court of the defendant's motion for a mistrial.

The complainant, David J. Vermeulen, an acknowledged paid drug informer for the Sarpy County Sheriff's Department, testified that on October 14, 1982, he was operating his automobile west on Josephine Street, near 72d Street, in La Vista, Sarpy County, Nebraska. As he approached 72d Street, a shot was fired toward his car from a red and white pickup truck. Vermeulen identified the defendant as the person who fired the shot. There were no other witnesses to the shooting. Upon investigation police found a smashed shell casing and broken glass, and photographed a shattered window on the complainant's car.

Prior to the time of the shooting incident, Brenda Marco, the appellant's daughter, had been charged with two counts of distribution of marijuana, based on the evidence furnished by the complainant of sales to him. The exact times of the following events are unclear; however, it is established that Brenda gave a statement to police implicating the appellant in

the shooting. Thereafter, Brenda pled guilty to one of the marijuana counts and was placed on probation. Later, Brenda gave additional statements contradicting the first statement, including testimony at a previous court proceeding against the appellant in which she either denied knowledge of the events referred to in her first statement or denied memory of the statements and the events referred to in the statements. At the time of trial, charges were pending against Brenda Marco for violations of probation.

During appellant's trial, at a conference, Brenda's counsel objected to the order compelling his client to testify. In his statement to the court, Brenda's counsel asserted, with respect to various statements she had given, "I do know that she's given me a statement and where she vehemently denied that she knew anything about this case." The trial court granted limited immunity to Brenda and ordered her to testify.

Both of appellant's assigned errors relate to Brenda Marco's testimony.

On direct examination she first recited that she had discovered that the complainant was responsible for her arrest on the marijuana charge. In response to questions by the county attorney, Brenda then denied having a conversation with her father about Vermeulen being the informant, making arrangements with her father to harm Vermeulen, being with her father on the night of the alleged shooting, and being in the pickup truck with her father at 72d and Josephine Streets. The prosecutor then asked Brenda if she remembered giving a statement on June 17, 1983, at the Sarpy County Courthouse, to Officer Steven Knievel of the La Vista Police Department and Deputy County Attorney Stephen Sturek. Brenda responded, "I'm not sure if I do or not." The prosecutor then asked if she remembered a portion of the June 17 statement in which she related that her father had learned the informant's identity and had asked her several questions about him, e.g., where he lived and what he looked like. Brenda replied she did not remember. The prosecutor continued his questioning, and further read a passage from the statement where Brenda had stated that a few nights before the shooting she and the appellant had been looking for Vermeulen. The appellant's

counsel interposed an objection to the form of questioning, which was sustained. The questioning of the witness then proceeded in much the same format, with the prosecutor reading selected portions of the statement and the witness in turn either denying any recollection of making such statements or the underlying events. Appellant's counsel's further objections to the questioning of the witness as an improper form of impeachment were overruled.

Brenda was then asked by the prosecutor, "Have you ever been afraid of your dad within the last — since this incident occurred?" Appellant's counsel objected to the question, but the objection was overruled. This question was repeated, and Brenda responded, "Once. Q. Tell — when was that? A. When Officer Knieval [sic] told me that he killed two other people already." Appellant's counsel immediately moved for a mistrial, which was taken under advisement and subsequently denied. The jury was instructed to disregard the remark as nonresponsive.

The prosecutor then continued his direct examination by asking Brenda if she remembered a remark in her June 17 statement that she had seen her father in jail and was afraid of him. The examination of the witness then continued, with the prosecutor confronting Brenda with prior sworn testimony from other proceedings and from a deposition.

At the conclusion of Brenda's testimony, the jury was admonished that inconsistent statements brought out during her testimony were to be used solely for assessing credibility. Proper limiting instructions were also given to the jury prior to its deliberations.

Generally, the credibility of a witness may be attacked by any party, including the party who called the witness. Neb. Rev. Stat. § 27-607 (Reissue 1979). One means of attacking the credibility of a witness is by showing inconsistency between her testimony at trial and what she said on previous occasions. *State v. Price*, 202 Neb. 308, 275 N.W.2d 82 (1979). Appellant's first assignment of error presents us with two issues: (1) Whether, as a matter of law, prior statements may be inconsistent with a present denial of recollection of having made them; and (2) Whether the recitation by the prosecutor of such statements in

the presence of the jury denied the appellant a fair trial.

Appellant first contends that because of the very nature of the witness' answers, i.e., "I don't know" or "I don't remember," her statements were not really inconsistent. As a general rule, it may be shown that a witness made an inconsistent or contradictory statement if she refuses either to deny or affirm that she did, or if she answers that she does not remember whether or not she made it, or if she does not unequivocally admit that she did. 98 C.J.S. *Witnesses* § 612 (1957). The trial court has considerable discretion in determining whether testimony is "inconsistent" with prior statements; inconsistency is not limited to diametrically opposed answers but may also be found in evasive answers, inability to recall, silence, or changes of position. *United States v. Russell*, 712 F.2d 1256 (8th Cir. 1983). Upon examination of Brenda Marco's testimony, the trial court did not abuse its discretion in finding Miss Marco's testimony inconsistent with her prior statements.

However, the record does reveal error in the use of Miss Marco's prior statements. Although a party is free to impeach his own witness, this rule is not without limitations. It is elementary that out-of-court statements offered to prove the truth of the matter asserted are hearsay. Neb. Rev. Stat. § 27-801(3) (Reissue 1979). Prior extrajudicial statements of a witness may be received into evidence for the purpose of assisting the jury in ascertaining the credibility of the witness, but unless they are otherwise admissible, they may not be considered as substantive evidence of the facts declared in the statements. *State v. Brehmer*, 211 Neb. 29, 317 N.W.2d 885 (1982). Because of the recognized conceptual difficulties juries may have in distinguishing testimony admissible for impeachment from testimony admissible for its substance, the maximum legitimate effect of the impeaching testimony can never be more than the cancellation of adverse testimony. *United States v. Crouch*, 731 F.2d 621 (9th Cir. 1984). As the Circuit Court for the Seventh Circuit recently said:

> [I]t would be an abuse of the rule, in a criminal case, for the prosecution to call a witness that it knew would not give it useful evidence, just so it could introduce hearsay

> evidence against the defendant in the hope that the jury would miss the subtle distinction between impeachment and substantive evidence—or if it didn't miss it, would ignore it.

United States v. Webster, 734 F.2d 1191, 1192 (7th Cir. 1984).

In the present case it would strain credibility to suggest that the prosecutor did not expect Brenda to repeat her lack of knowledge of the incident, or deny facts recited in her June 17 statement. As in *Brehmer*, although the substance of the extrajudicial statements alleged to have been made by the witness was an important element of the prosecution's case, i.e., motive and identity, there was no affirmative damage done to the prosecution's case by the witness' answers.

> "The rule allowing a party to impeach his own witness may not be used as an artifice by which inadmissible matter may be gotten to the jury through the device of offering a witness whose testimony is or should be known to be adverse in order, under the name of impeachment, to get before the jury for its consideration a favorable ex parte statement the witness had made."

State v. Brehmer, supra at 44, 317 N.W.2d at 893.

Where, as in this case, the need for impeachment is small or nonexistent and the danger that the prior inconsistent statement will be considered substantively is great, the statement should be excluded. *State v. Price*, 202 Neb. 308, 275 N.W.2d 82 (1979).

The appellee argues that even if the admission of the impeaching evidence was erroneous, no substantial miscarriage of justice is shown to have occurred, and therefore the case should not be reversed. Neb. Rev. Stat. § 29-2308 (Cum. Supp. 1984). We are not so convinced, nor are we prepared to say that the impeaching evidence had no influence on the jury's verdict. Prejudice, disguised as impeachment, appears to have slipped into this case. The case must be reversed for a new trial. In view of the result it is not necessary to discuss the second assignment of error.

REVERSED AND REMANDED FOR A NEW TRIAL.

BOSLAUGH, J., concurs in the result.

IN RE INTEREST OF L.J. AND J.J., CHILDREN UNDER 18 YEARS OF AGE.
IN RE INTEREST OF J.N.J., A CHILD UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. G.J.A., APPELLANT.

368 N.W.2d 474

Filed May 31, 1985. Nos. 84-517, 84-518.

1. **Parental Rights: Appeal and Error.** In appeals from the termination of parental rights in a county court sitting as a juvenile court, the Supreme Court reviews such cases de novo on the record.
2. **Parental Rights: Proof.** To justify termination of parental rights under the provisions of Neb. Rev. Stat. § 43-292(2) (Reissue 1984), the State must prove by clear and convincing evidence that a parent has substantially and continuously or repeatedly neglected the child.
3. **Parental Rights.** While there is no requirement that a juvenile court must institute a plan for rehabilitation of a parent, where the failure of a parent to comply with a rehabilitation plan is an independent ground for termination of parental rights, the rehabilitation plan must be reasonable and conducted under the direction of the juvenile court.
4. _____. Where parental rights are terminated on a certain date, the effective date of the termination shall not be made effective at a later date.

Appeal from the District Court for Brown County: EDWARD E. HANNON, Judge. Reversed and remanded for further proceedings.

John P. Heitz, for appellant.

Teresa M. Hampton, for appellee.

Tad D. Eickman, guardian ad litem.

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

GRANT, J.

These consolidated cases are before us on appeal from the district court for Brown County, Nebraska, which affirmed the order of the county court for Brown County, sitting as a juvenile court (hereinafter juvenile court), terminating the parental rights of G.J.A., formerly G.J., as to her three children: L.J., born November 24, 1976; J.J., born July 13, 1978; and J.N.J., born September 6, 1979. The two older children were born to G. and her husband after their marriage

in 1976, when G. was 17 years old, and the youngest child was born to G. out of wedlock after her divorce from her husband. The fathers of the children have not appealed and will not be considered further herein. Having reviewed the record, we reverse and remand with directions.

The cases were initiated by petitions filed in the county court on October 22, 1979. One petition alleged that the two older children were neglected and dependent children as defined in Neb. Rev. Stat. § 43-202(2)(b) and (c) (Reissue 1978), now replaced by Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1984), and the other that the youngest child was also so neglected and dependent. The petitions alleged that the children were in the custody of the Brown County Welfare Department. On November 1, 1979, a "Stipulation & Agreement" was signed in each case by G. and the county attorney. The "agreements" provided that the children would be returned immediately to G. and that the cases would be continued for 6 months "unless a substantiated incident of child abuse or neglect is received by any law enforcement official in Brown County, at which time the case will be subject to review." The agreements also provided that G. was to provide a proper home and was to seek educational courses in child care and housekeeping. The record shows no involvement of the court at any time in these proceedings.

On February 11, 1980, the three children were placed in foster care after J.N.J. was left with a babysitter for 10 days. The infant had been left pursuant to an agreement between G. and the babysitter and was to have been picked up in 2 or 3 days, but G. failed to do so. G. testified that she had returned to Ainsworth and picked up the two older children, who had been left with a different babysitter pursuant to a similar understanding. G. testified that J.N.J.'s babysitter wanted to keep him longer and G. agreed. The babysitter, with J.N.J., went to the welfare authorities, and J.N.J. and the other two children were taken into the custody of the Department of Public Welfare. An adjudication hearing, as to J.N.J. only, was held on March 12 and 14, 1980. At this hearing a guardian ad litem was appointed for J.N.J. only. Evidence was adduced which showed that the mother on four occasions left J.N.J. and

the older children with babysitters overnight while she went to Valentine, Nebraska, 45 miles away, for work or for social occasions. On another occasion the children were left alone in a car, warmly dressed and covered with blankets, for 2 hours while the mother and a female friend were in a tavern. The mother and friend checked the children periodically. In another instance, the younger children were left alone at home while the mother and L.J. were at G.'s mother's house returning a vacuum cleaner. The fourth incident involved G.'s leaving the children with an 11-year-old girl and a 12-year-old girl until 2:30 a.m.

One of the babysitters testified that J.N.J. had diaper rash severe enough to cause blistering and bleeding. There was no evidence of any type of physical or mental abuse of the children, either by G. or any other person.

That hearing did not go to conclusion. The State had been adducing evidence when the parties agreed to a "Stipulation and Agreement," again between G. and the county attorney, by which G. temporarily relinquished custody of the three children to the Brown County Court. She also agreed to work with the Department of Public Welfare to aid in an investigation of herself, to provide a stable home for the children, to refrain from alcohol use, and to seek treatment at the Norfolk Regional Center. The agreement also provided that:

> 3. It is understood and agreed between the parties hereto that [G.] shall not come back into Court nor attempt to petition the Court for restoration of her parental rights for at least six months from the date of this agreement.
>
> 4. It is further agreed between the parties hereto that before [G.] shall petition the Court for restoration of her parental rights that the burden of proof shall be upon her to substantiate satisfactorily to the Court that she is a fit and proper person to have the care and custody of said children; that her social life, financial ability, housekeeping skills and child rearing skills are adequate and that she had developed mentally to show proper regard for the health, safety, moral, physical and emotional well being of said children.

The record shows G.'s relinquishments were temporary and that the hearing was recessed by the court without making any findings as to neglect, and the court specifically continued the case as an adjudication hearing. The court order adjourning the hearing stated that "a Stipulation and Agreement would be entered into between the parties setting forth the rights of [G.] in regard to petitioning the Court for restoration of her parental rights." The agreement was not incorporated into a court order, nor does the record show any participation of the court. The children were separated (the older two in one home and the youngest in another) and have remained in foster care, in different homes and locations, from March 14, 1980, to this date.

On June 17, 1981, a third amended petition was filed in each case seeking termination of G.'s parental rights. No court adjudication as to the status of any of the children had been held at this point, nor was one prayed for in the amended petitions. No hearing of any kind had been held as to the older two children, except that they had been mentioned in J.N.J.'s hearing.

A hearing on this petition was held on February 3, 1982. At this hearing the two cases were consolidated. A different guardian ad litem represented the three children. No explanation is found in the record for the delays in holding hearings on the adjudication phase of the case from the mother's voluntary relinquishment in March of 1980 until February of 1982; no explanation as to the timelag from the petition seeking termination to the hearing date; and no explanation of the combining of the adjudication portion of the hearings with the disposition of the case, when Neb. Rev. Stat. § 43-206.03 (Reissue 1978) established a procedure for adjudication and then disposition.

At the February 1982 hearing, the transcript of the March 1980 hearing was introduced as evidence. Much of the evidence at the February hearing centered around G.'s financial situation and whether she and her new husband could support a family with three young children on his income as a roofer and a fire-extinguisher refiller. Additional testimony concerned her unstable employment history (8 to 10 jobs in 2 years) and

transient lifestyle (5 homes in 2 years). There was also evidence adduced concerning bad checks she had written and had been placed on probation for writing. A social worker testified about her failure to complete a parenting course, although G. had taken about 10 classes. There was no further evidence of the activities of G. toward her children, although there was evidence as to the children's interaction with their foster parents. At this time J.N.J. was in a home in Ainsworth and the two older children were in a home in Oakland, Nebraska, having been removed from a home in Ainsworth about 1 year before the hearing.

Upon completion of the hearing the judge took the matter under advisement. On May 19, 1982, the court issued its order terminating the parental rights of G. "effective December 31, 1982, unless, before that date [G.] has satisfactorily improved her behavior, activities and lifestyle sufficient to conform to the plan of rehabilitation prepared by the State Department of Public Welfare of the State of Nebraska." The court's order went on,

> It is further ordered that if the Department of Welfare declines to proceed with a plan for rehabilitation before June 30, 1982, that the Court will, after notice and hearing, set up guidelines and requirements for [G.'s] rehabilitation and possible restoration of parental rights.
>
> This cause stand [sic] continued until January 5, 1983, at 10:00 a.m.

Apparently pursuant to the order of May 19, 1982, a plan for G. and her husband and for the children was prepared by the Nebraska Department of Public Welfare. The plan was developed by G.'s caseworker in Grand Island in consultation with the caseworker's supervisor in Grand Island, a caseworker supervisor in the Norfolk field office, another caseworker, the director of Multi-County Service Unit No. 144, and a service worker in Multi-County Service Unit No. 142. The plan required G. and her husband to receive marital counseling, to complete a parenting course, to report changes of address and changes in legal, health, family, and employment status to the caseworker, and to acquire and reside in a three-bedroom house or apartment. G. was also required to undergo psychotherapy,

to satisfy all county court orders regarding her bad check cases, to attend Al-Anon meetings, and to pay to the department $50 per month child support for each child "as a token of good faith." Her husband was to maintain his sobriety and maintain steady employment. Visitation with the children was to be for 1 hour once a month, beginning in July, until October, when the visitations would be increased to twice a month. In November and December multiple day visitations would be allowed. The record shows no court input into this plan, no court review of the plan, and no court order putting it into effect.

A hearing was held on December 23, 1982, and on January 5, 1983. At this hearing evidence was adduced concerning G.'s compliance with the plan. Evidence showed she had not complied fully with the visitation plan nor with the required child support payments, and had not fully complied with other requirements. She was living in a properly furnished, appropriate three-bedroom rented home. Other testimony centered around G.'s financial situation and whether it was sufficient to raise her children. At the conclusion of the hearing, the court found that G. "has not complied with the terms of the Court Order of February 3, 1982 and that [G.] has not complied with the plan devised by the Department of Public Welfare and her parental rights are terminated." On appeal the district court reviewed de novo on the record and affirmed. This appeal followed.

In appeals from the termination of parental rights in a county court sitting as a juvenile court, the Supreme Court reviews such cases de novo on the record. *In re Interest of M.S.*, 218 Neb. 889, 360 N.W.2d 478 (1984). An order terminating parental rights must be based upon clear and convincing evidence and should only be issued as a last resort and when no reasonable alternative exists. *In re Interest of M.*, 215 Neb. 383, 338 N.W.2d 764 (1983).

G. argues that the proof offered did not rise to the level of "clear and convincing." We agree. Neb. Rev. Stat. § 43-292(2) (Reissue 1984), which was in effect when the parental rights were terminated, requires that the parents must have "substantially and continuously or repeatedly neglected the juvenile."

While the seriousness of the three instances of G.'s leaving the children with babysitters overnight, or leaving two of the children unattended while she was at her mother's house in the daytime, and leaving the youngest child with a babysitter for an extended period of time should not be diminished, such instances over a relatively short period of time do not reach the pattern of neglect contemplated by the statute.

The juvenile court's findings must be considered in two phases. After the February 3, 1982, hearing, the juvenile court, in its order of May 19, 1982, found that "the parents of [J.J., L.J., and J.N.J.] have substantially and continuously or repeatedly neglected the children and have refused to give the children the necessary care and protection," and terminated G.'s parental rights effective December 31, 1982. This finding is substantially in the words of Neb. Rev. Stat. § 43-209 (Reissue 1978), which was then in effect.

The second phase of the juvenile court's findings was made by the juvenile court in its order of January 12, 1983, after additional hearings on December 23, 1982, and January 5, 1983. This phase of the findings was concerned only with G.'s conduct between February 3 and December 31, 1982. At this time § 43-292 had become effective, as of July 1, 1982. Former statute § 43-209 and the current statute § 43-292 contain substantially the same, and in many cases identical, language, and only the current statute need be considered.

In reviewing these matters de novo on the record, more than 5 years after the incidents which are the basis for all of the court's later actions, a reviewing court must give great weight to the findings of the juvenile court in all cases where there is a dispute in the evidence, " 'because the trial court heard and observed the parties and witnesses . . . .' " *In re Interest of Hollenbeck*, 212 Neb. 253, 262, 322 N.W.2d 635, 640 (1982). In our review we cannot agree with the findings of the juvenile court in respects that controlled that court's decisions, and we therefore have difficulty in determining disputed fact questions. The juvenile court found in its May 19, 1982, order that "for several years prior to the removal of her children by this Court on February 27, 1980," G. had engaged in a pattern of neglect of her children. The "several years" indicated by the

juvenile court could have extended, at the extreme, to 3 years and 3 months—the age of the oldest child. The only evidence before the court was that of incidents between October 2, 1979, and approximately February 1, 1980—a period of 4 months, not several years. The juvenile court also found that J.N.J., according to a foster mother's testimony, " 'didn't do nothing for the first 10 months' " and " 'has only recently began to show progress.' " We find that for the last 5 of the 10 months referred to, J.N.J. had been in foster care, and it is not proper to imply blame to G. for his condition during that time. The juvenile court also found that "[J.J. and L.J.] were described by their foster parents as having lost their previously manifested intense fear of being left alone and have begun to progress normally." We find the facts to be that the foster parents who so testified are indeed decent people, but they received the two older children into their home on February 24, 1981. At that time the children had just been removed from a foster home selected and supervised by the State and where the children had been placed since March 14, 1980, until early February of 1981. Whether the condition of the children in February of 1981 can partly be blamed on G. (for so conducting herself as to require the initiation of these proceedings) cannot be determined from this record. We do know, however, that in the year immediately preceding the intervention of the foster parents referred to, in February of 1981, the condition of the children was the sole responsibility of the State, which had sole custody of the children between March of 1980 and February of 1981.

We find that in her actions toward her children between October 2, 1979, and February 1, 1980, G. did not "substantially and continuously or repeatedly" neglect her children in such a fashion as to require termination of her parental rights.

That determination, however, does not dispose of this case. Section 43-292, in part, provides for termination of all parental rights if it appears "by the evidence that one or more of the following conditions exist." Six "conditions" are then listed. Subsection (6) provides that termination may be ordered if, "[f]ollowing a determination that the juvenile is one as described in subdivision (3)(a) of section 43-247, reasonable

efforts, under the direction of the court, have failed to correct the conditions leading to the determination." Applying this section of the statute, the court determined in its January 12, 1983, order that G. had not corrected the problems.

In this connection the juvenile court found that G. had not rehabilitated herself, first in the time between March 14, 1980, and February 3, 1982, and then during the period between May 19, 1982, and January 5, 1983. This finding was used by the juvenile court in its final order terminating G.'s parental rights on January 12, 1983, and this finding is challenged in G.'s assignments of error.

The question of whether G. has rehabilitated herself is central to this case as it is presented. We have held that there "is no requirement that the court must implement a rehabilitation plan for the parent of a child found to be dependent and neglected." *In re Interest of Carlson*, 207 Neb. 540, 543, 299 N.W.2d 760, 762 (1980); *In re Interest of Hollenbeck*, 212 Neb. 253, 322 N.W.2d 635 (1982). We have also held that failure to comply with a plan of rehabilitation is an independent reason justifying termination of parental rights if the court in its discretion had ordered the parent to make reasonable efforts to rehabilitate. *In re Interest of Wood and Linden*, 209 Neb. 18, 306 N.W.2d 151 (1981).

While there is no requirement that a juvenile court must institute a plan for rehabilitation of a parent, where the failure of a parent to comply with a rehabilitation plan is an independent ground for termination of parental rights, the rehabilitation plan must be reasonable and conducted under the direction of the juvenile court. We are required by considerations of due process to follow the directives of § 43-292(6), set out above, referring to "reasonable efforts, under the direction of the court," seeking to correct any substandard conditions.

In this case the State's plan, with which the court found G. did not comply, is deficient in two respects. First, the plan was not reasonable. It is apparent that, from the start, G. would not be able to comply with the plan, not necessarily because she was unfit, but because she was poor and because she was located at such a great distance from the children. We have said that a

parent's rights may not be terminated because the parent has financial difficulties or because some other person may be able to better provide for the children. *In re Interest of D.*, 209 Neb. 529, 308 N.W.2d 729 (1981). This must be borne in mind when formulating a plan. Here, in testimony at the December 23, 1982, and January 5, 1983, hearings, it was undisputed that G. objected to paying a total of $150 per month to the welfare department as child support because she did not have any extra money. G.'s husband had a take-home pay of $600 to $700 per month. Their groceries, utilities, and rent amounted to approximately $400 to $450 per month. Out of the surplus, the plan required G. to pay $150 child support "as a token of good faith." To someone on a budget this limited, $150 seems to be a bit more than a token. Additionally, G. was to undergo psychotherapy. She testified that she was unable to comply with that part of the plan because the mental health center told her that she could not receive therapy until she paid a bill of $78 she already owed there. At the time, G. was indebted for more than $5,000 in hospital bills.

G. rightly objected to the caseworker concerning the child support payments. Her objections were that she could raise her children in her own home for less and that she just could not afford that amount. The caseworker made no adjustment in the amount. The caseworker testified that "I simply told her that it was a part of the plan and that I felt it was a necessary part to show that they were going to be financially able to take care of children. . . . She said she could not. That was about the size of it." The caseworker was aware that G.'s lack of funds caused some cancellation of visitation and trouble with counseling and rent. Those facts were specific reasons for the welfare agency's recommendations that G.'s parental rights be terminated.

With regard to visitation the plan required G. to visit L.J. and J.J. at the welfare office in Norfolk, Nebraska, on July 17, 1982, from 11 a.m. until 12 noon, and once monthly thereafter. L.J. and J.J. were living in Oakland, Nebraska, at this time. She was to visit J.N.J. on the same day, in Ainsworth, from 4 p.m. until 5 p.m. We note that Norfolk and Ainsworth are 150 miles apart, while Oakland is an additional 75 miles east of Norfolk. Such a visitation plan can only be considered as

designed for failure—if for nothing other than the distances involved.

At the December 1982 hearing, G. testified, on the State's cross-examination, that she was unable to visit the children in September 1982 because she had just gotten out of the hospital. G. testified that she had colitis, which had the effect of making her "very ill. Violently ill. Throwing up. Having diarrhea. Throwing up blood." G. testified that seeing her children for such a short time and so infrequently caused her such stress that the doctor recommended she not attempt to see the children, under the circumstances. She presented a report from her doctor which apparently stated she should not travel. This medical report was received in evidence by the court but is not in the record for our review, and neither its reception nor location are set out in the index to the bill of exceptions. (Missing from the record also is a document which G. offered, and the court received in evidence, showing that she had completed a parenting class.) In connection with her physical condition, G. testified she could not bear any more children.

Aside from the unreasonableness of the plan, the other flaw is that it was not put into effect under the direction of the juvenile court. It was drawn up by the welfare authorities after the court had ordered rehabilitation and was not the subject of any court order or any court review. In transferring its authority, in blank, to the faceless forces comprising a state agency, the juvenile court abdicated its jurisdiction. Such a transfer of jurisdiction is totally improper. In the situation presented in this case, this is not sufficient proper evidence to justify termination of G.'s parental rights.

Since the causes must be remanded for further proceedings, we are forced to note the deficiencies in the procedures afforded G. and her children in order that such procedures are not repeated. The general rights of both G. and her children, with regard to the termination of her parental rights, have been discussed. The U.S. Supreme Court recently held in *Santosky v. Kramer*, 455 U.S. 745, 753-54, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982):

> In *Lassiter* [*Lassiter v. Department of Social Services*, 452 U.S. 18, 101 S. Ct. 2202, 68 L. Ed. 2d 627 (1981)], it

> was "not disputed that state intervention to terminate the relationship between [a parent] and [the] child must be accomplished by procedures meeting the requisites of the Due Process Clause." . . . The absence of dispute reflected this Court's historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment. [Citations omitted.]
>
> The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.

Initially, we specifically disapprove of the procedure used in this case of terminating parental rights on a certain date with the provision that the termination shall become effective at a later date. We agree with the Supreme Court of North Dakota, which specifically disapproved this approach in *In re A. N.*, 201 N.W.2d 118 (N.D. 1972). In that case the court stated at 121-22:

> This court does not approve of a termination that is, in effect, prospective in operation. If a possibility of a correction in an existing situation exists, it would be preferable, we believe, to adjourn the hearing under a temporary order of placement without a future termination date. Upon a rehearing, if the conditions still exist, an immediate termination may then be made. A time lapse in the effectiveness of a termination order has a disruptive influence on both parent and child. It is with regret that false hopes are raised, and we should discourage continuing controversy over child custody.

We further hold that such a delayed effective date for

termination, when ordered as it was in this case, operates to change the burden of proof to a parent to prove the parent has complied with a plan. Such a shifting of the burden of proof is improper. The burden remains on the State throughout both the adjudication and disposition hearings, although such hearings may be heard in segments, to prove all facts necessary for the termination of parental rights.

We note that such a delayed time also raises questions as to the finality of a court order. In this case, however, where there was a specific continuance of the hearing from May 19, 1982, to January 5, 1983, there is no question that G.'s appeal to the district court has been properly taken from the January 12, 1983, order.

We further note that Neb. Rev. Stat. § 43-246(4) (Reissue 1984), formerly substantially set out in § 43-201.01(4) (Reissue 1978), states that the juvenile court act shall be construed to "assure every reasonable effort possible to reunite the juvenile and his or her family." In this case we see no effort to reunite G. with her three children at any time, nor can we see any effort to keep the children together or at least in some proximity with one another and G. Aside from G.'s rights, juvenile courts must recognize, if possible, the rights of siblings. In this case J.N.J. has the right to know his older brother and sister, and the older children have the right to know their younger brother.

We disapprove of combining the adjudication and disposition phases of a case in juvenile court in one hearing. We note that in Neb. Rev. Stat. § 43-279 (Reissue 1984), statutory provision is made for adjudicating the status of children "by a preponderance of the evidence." It is clear that parental rights may not be terminated except by "clear and convincing evidence." *Santosky v. Kramer, supra* at 748. Without in any way determining the effect of the two statutory burden of proof requirements, we simply note that the combination of both issues in one hearing can lead only to confusion.

Finally, we disapprove of the extraordinary lapses of time occurring in this case both with and without court participation. At the time of the temporary relinquishment of the children in March of 1980, Neb. Rev. Stat. § 43-206.03(1) (Reissue 1978) provided, "The hearing as to a child in custody

of . . . the court shall be held as soon as possible after the petition is filed." Effective July 1, 1982, Neb. Rev. Stat. § 43-278 (Reissue 1984) provides, "The hearing as to a juvenile in custody of . . . the court shall be held as soon as possible but, in all cases, within a six-month period after the petition is filed." In this case, after G.'s temporary relinquishment was signed on March 14, 1980, the next hearing as shown by the record was February 3, 1982, and the final hearing was held on January 5, 1983. The matter was appealed, and affirmed by a district court on October 18, 1983. On G.'s motion, a new trial was granted by a successor district judge because proper evidence of prior hearings was not submitted by the State. The juvenile court's decision was finally affirmed on April 30, 1984. After the last of the briefs herein was filed on November 13, 1984, the case was argued to this court on February 4, 1985.

The 5½-year period that has passed in this case since the filing of the original petition on October 22, 1979, is almost equal to J.N.J.'s current age of 5½ years, and is a very substantial part of L.J.'s current age of 8½ years and J.J.'s age of 6½ years. For the State to now argue that the children have now become so "bonded" to their foster parents as to require termination of parental rights in this case is to defy legal logic. By separating a parent from that parent's children for extraordinary lengths of time, the State could justify termination of any parental rights. This cannot be, and is not, the law.

We have said that a child must not be made to await uncertain parental maturity. *In re Interest of M.S.*, 218 Neb. 889, 360 N.W.2d 478 (1984). That rule is sound. However, the rule should not be used to trod upon the rights of the parent or the children.

It is true that parental rights are not inalienable. *State v. Wedige*, 205 Neb. 687, 289 N.W.2d 538 (1980). Nonetheless, "The integrity of the family unit, in this instance the continuing legal and social relationship of parent and minor child, is one of the fundamental rights guaranteed by the Constitution of the United States." *State v. Metteer*, 203 Neb. 515, 519, 279 N.W.2d 374, 377 (1979). See, also, *Stanley v. Illinois*, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972). Constitutional rights should

not lightly be alienated.

The orders terminating G.'s parental rights are reversed. The causes are remanded to the district court to be remanded to the appropriate juvenile court for further proceedings pursuant to this opinion. Such proceedings shall begin within 30 days of the issuance of the mandate herein. In this connection we note the provisions of Neb. Rev. Stat. § 43-288 (Reissue 1984), which shall be applied in this extraordinary case if consistent with the safety of the children at this late date.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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

LARRY DEAN RADANT, APPELLANT, V. BURTON VARGASON, SHERIFF OF ROCK COUNTY, NEBRASKA, APPELLEE.

368 N.W.2d 483

Filed May 31, 1985. No. 84-660.

1. **Extradition and Detainers.** Once the governor of the asylum state has acted on a requisition for extradition based on the demanding state's judicial determination that probable cause existed that an offense occurred and that the accused committed it, no further judicial inquiry may be had on that issue in the asylum state.
2. _____. Once the governor of an asylum state has granted extradition, a court of that state, considering release on habeas corpus, can do no more than decide (1) whether the extradition documents on their face are in order, (2) whether the petitioner has been charged with a crime in the demanding state, (3) whether the petitioner is the person named in the request for extradition, and (4) whether the petitioner is a fugitive.
3. _____. In an extradition proceeding the requisition may refer to, annex, and authenticate accompanying papers, and if together they meet statutory requirements, that is sufficient.
4. **Extradition and Detainers: Appeal and Error.** The term "authenticate," as used in extradition statutes, simply means a statement that the documents are what they purport to be.
5. **Extradition and Detainer: Habeas Corpus.** In an action to procure a writ of habeas corpus, the guilt or innocence, or probable cause to believe one guilty who is held under extradition as a fugitive from justice from another state, is a matter exclusively for the courts of the demanding state.

Appeal from the District Court for Rock County: EDWARD E. HANNON, Judge. Affirmed.

James F. Brogan, and, on brief, John P. Heitz, for appellant.

Avery L. Gurnsey, Rock County Attorney, for appellee.

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

BOSLAUGH, J.

This is an appeal in a proceeding for a writ of habeas corpus. The petitioner, Larry Dean Radant, seeks his release from the custody of the respondent, Burton Vargason, the sheriff of Rock County, Nebraska. The petitioner is in the custody of the sheriff pursuant to a warrant issued by the Governor of Nebraska in extradition proceedings commenced by the State of Colorado.

After an evidentiary hearing the county court quashed the writ. On appeal to the district court, the order of the county court was affirmed. The petitioner contends that the district court erred in finding that the documents submitted by the State of Colorado complied with the provisions of the Uniform Criminal Extradition Act, Neb. Rev. Stat. §§ 29-729 et seq. (Reissue 1979 & Cum. Supp. 1984).

On August 12, 1983, the Governor of the State of Colorado made a written demand for the extradition of the petitioner, stating:

> WHEREAS, it appears by the annexed application for requisition and copies of Complaint, Warrant, Affidavit, and Supporting Documents, which I certify are authentic and duly authenticated in accordance with the laws of the State of Colorado, that under the laws of this state Larry Dean Radant aka Larry Radant aka Larry D. Radant stands charged with the crime of Hunting Big Game without a valid license; /Possessing * committed in this state, and it has been represented and is satisfactorily shown to me that the accused was present in Colorado at the time of the commission of said crime and thereafter fled from the justice of this state, and has taken refuge and is now to be found in the State of Nebraska.

At the same time, the Governor of the State of Colorado authorized Verne Soucie or his agent to receive the petitioner from the proper authorities of the State of Nebraska and convey him to the State of Colorado to be dealt with according to the law. Thereafter, on August 31, 1983, the Governor of the State of Nebraska issued the warrant authorizing the petitioner's arrest and his delivery to the agent of the State of Colorado. After his arrest the petitioner filed an application pursuant to § 29-738 for a writ of habeas corpus to test the legality of his arrest.

The matters which may be considered by the courts of the asylum state upon an application for a writ of habeas corpus are very limited. In *Michigan v. Doran*, 439 U.S. 282, 289, 99 S. Ct. 530, 58 L. Ed. 2d 521 (1978), the U.S. Supreme Court held:

> A governor's grant of extradition is prima facie evidence that the constitutional and statutory requirements have been met. Cf. *Bassing v. Cady*, 208 U.S. 386, 392 [28 S. Ct. 392, 52 L. Ed. 540] (1908). Once the governor has granted extradition, a court considering release on habeas corpus can do no more than decide (a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive.

See, also, *West v. Janing*, 202 Neb. 141, 274 N.W.2d 161 (1979); *Rodgers v. Adams*, 212 Neb. 716, 325 N.W.2d 157 (1982); *Wise v. State*, 197 Neb. 831, 251 N.W.2d 373 (1977).

The record demonstrates that all of the essential requirements of § 29-731, which sets out the requisites for a demand for extradition, have been met. See *Austin v. Brumbaugh*, 186 Neb. 815, 186 N.W.2d 723 (1971). Also, the essential requirements of § 29-736 have been complied with. The warrant which was issued authorizes that the accused be delivered to the duly authorized agent of the demanding state, Verne F. Soucie. The fact that the application for requisition set forth his name as Verne E. Soucie is of no consequence.

The petitioner further contends that the warrant issued by the Governor of Nebraska was defective in that it was signed

"Bob Kerrey" as opposed to "Robert Kerrey." Neb. Rev. Stat. § 29-735 (Reissue 1979) provides:

> If the Governor decides that the demand should be complied with, he shall sign a warrant of arrest, which shall be sealed with the state seal, and be directed to any peace officer or other person whom he may think fit to entrust with the execution thereof. The warrant must substantially recite the facts necessary to the validity of its issuance.

The petitioner argues that because the Governor of the State of Nebraska had previously signed an affidavit directed to the Secretary of State of the State of Nebraska stating that "your affiant now swears that for official purposes and as Governor in and for the State of Nebraska, it is his voluntary act and personal desire to be known as Robert Kerrey," a warrant signed "Bob Kerrey" is not an official act of the Governor of the State of Nebraska. The petitioner contends that the Governor's warrant is absolutely void. This argument is without merit.

The affidavit which the petitioner refers to in support of his argument also states that various signatures used by the Governor of the State of Nebraska "represent one and the same person, namely Robert Kerrey, generally known as Bob Kerrey." We take judicial notice of the fact that Bob Kerrey is the Governor of the State of Nebraska. Neb. Rev. Stat. § 27-201 (Reissue 1979).

The judgment of the district court was correct and it is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. HAI DANG, APPELLANT.
368 N.W.2d 486

Filed May 31, 1985. No. 84-690.

Verdicts: Appeal and Error. This court on appeal will reverse a verdict of guilty based on evidence whenever it is so lacking in probative force that the court can say as a matter of law it is insufficient to support a finding of guilty beyond a reasonable doubt.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Reversed and remanded with directions to dismiss.

Dennis R. Keefe, Lancaster County Public Defender, and Dorothy A. Walker, for appellant.

Patrick T. O'Brien, Deputy Attorney General, and Timothy E. Divis, for appellee.

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

HASTINGS, J.

The defendant was convicted in the county court for Lancaster County on the May 4, 1984, charge of disturbing the peace, a violation of Neb. Rev. Stat. § 28-1322(1) (Reissue 1979). On appeal to the district court, that conviction was affirmed, but the sentence was modified to provide for a fine of $5 rather than $50. Defendant has appealed to this court, assigning four different errors. We consider only the claim as to the insufficiency of the evidence, and reverse and dismiss.

Basically, this case deals with the alleged disturbance of the peace of a former girl friend of the defendant, by use of the telephone. Simply stated, the victim alleged that she had broken up with the defendant, that he continued to call her, and that on the occasion of the last phone call informed her that he was bringing over a birthday card. She told him not to do so and called the police, and when the defendant arrived at her house he was arrested and charged with this offense.

Disturbing the peace is defined as a Class III misdemeanor by § 28-1322. As such, it is necessary for the State to prove the defendant guilty beyond a reasonable doubt. *Haswell v. State*,

167 Neb. 169, 92 N.W.2d 161 (1958).

This court on appeal will reverse a verdict of guilty based on evidence whenever it is so lacking in probative force that the court can say as a matter of law it is insufficient to support a finding of guilty beyond a reasonable doubt. *State v. French*, 206 Neb. 92, 291 N.W.2d 248 (1980).

The defendant and the victim had been going together for 2½ years. In support of the State's case, she testified variously that the parties broke up at her insistence after her birthday, which was April 27, 1984; she asked him not to call her any more, but he continued to call her "only once"—"just twice"; the parties split up on May 8, 1984, when she asked the defendant not to contact her any more, but he called her twice after that; and the parties broke up in February of 1984.

The victim also testified that the defendant called her on May 4, 1984, and wanted to bring over her birthday card, but she told him "no" and called the police. According to her, the defendant came over anyway, but she did not go out to talk to him.

At still another point in her testimony, the victim stated that after telling the defendant not to call her again she could not remember for sure when she got the next call, but received the second call on "May 27th — 24th. It was the 24th." She characterized that as a friendly call, but she hung up on him. During the course of that testimony, she stated that it was following that May 24 call that defendant brought over the birthday card. She testified first that defendant had not told her on the phone why he wanted to come over, but immediately thereafter she stated that she knew he was bringing a birthday card because he had told her that on the phone.

The one fact that does not seem to be in doubt is that the police were outside the victim's home when the defendant arrived, and it was at that time that he was ticketed for disturbing the peace. There was absolutely no testimony from anyone that the defendant created any sort of a disturbance during that time.

From our review of the record, we are forced to the conclusion that the testimony of the State's witness was so confusing and disconnected that it was utterly lacking in

probative force sufficient to support a finding of guilty beyond a reasonable doubt.

The judgment of conviction is reversed, and the cause is remanded with directions to dismiss the complaint.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

ROBERT N. MOORE, JR., ALSO KNOWN AS ROBERT THOMAS, APPELLANT, V. CHARLES BLACK, WARDEN, NEBRASKA STATE PENITENTIARY, ET AL., APPELLEES.

368 N.W.2d 488

Filed May 31, 1985. No. 84-715.

1. **Appeal and Error.** Where no other method of appeal is provided, one may obtain judicial review by proceedings in error under Neb. Rev. Stat. §§ 25-1901 et seq. (Reissue 1979).
2. **Jurisdiction: Time: Appeal and Error.** The time within which an appeal must be taken is mandatory and must be met in order for the appellate tribunal to acquire jurisdiction of the subject matter.
3. **Administrative Law: Collateral Attack.** Unless void, the determination of state and county officers or boards of officers who act judicially in matters of administration is not subject to collateral attack.
4. **Declaratory Judgments.** A declaratory judgment action is not a substitute for new trial or appeal, nor does it operate to supersede former adjudications or proper proceedings already pending in a court.
5. _____. Ordinarily, an action for a declaratory judgment will not be entertained where another equally serviceable remedy has been provided by law.

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

Dennis R. Keefe, Lancaster County Public Defender, and Richard L. Goos, Special Deputy Public Defender, for appellant.

A. Eugene Crump, Deputy Attorney General, and Linda L. Willard, for appellees.

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

CAPORALE, J.

Plaintiff, Robert N. Moore, Jr., appeals from the dismissal of his petition against the defendant prison warden and others, which petition sought a declaration that his rights were violated by the manner in which his prison disciplinary proceeding was conducted, and for restoration of his good time and other relief. His five assignments of error present two issues: (1) Whether the sole avenue for judicial review of the decision of the Administrative Appeal Board of the Nebraska Penal Complex was by a proceeding in error; and (2) Whether the hearing before the disciplinary committee of the Nebraska Penal Complex was conducted in such a manner as to violate his rights under the statutes of this state, under the state and federal Constitutions, and under the rules and regulations of the Department of Correctional Services. We determine that Moore's sole avenue of review was by a proceeding in error. In view of that determination we do not reach the second issue. We affirm.

Moore, an inmate at the Nebraska Penal and Correctional Complex, was charged with assault and possession or manufacture of a weapon, in violation of prison disciplinary rules, in connection with a stabbing incident in which another inmate was injured. The disciplinary committee, on September 1, 1982, found, after an evidentiary hearing, that Moore was guilty of both charges. The committee then ordered him to serve 4 years in the Adjustment Center at the penal complex and revoked all of his good time. Moore appealed to the Administrative Appeal Board which, on November 23, 1982, denied relief.

On May 19, 1983, Moore made a pro se filing in the district court of a document entitled "Petition for Writ of Habeas Corpus" against Charles Black, warden of the penitentiary, seeking restoration of his good time. No transcript of the proceedings before the board was filed with the petition.

On June 6, 1983, the Lancaster County public defender's office entered the case by filing a document entitled "Amended Petition for Declaratory Judgment," seeking the reliefs mentioned in the first paragraph of this opinion. This document alleges that at the hearing before the disciplinary

committee a variety of Moore's constitutional rights were violated by the denial of his right to produce witnesses and his right to have his accusers present and that the evidence was inadequate to support the committee's findings. On July 21, 1983, Moore made a second pro se filing, entitled "Second Amended Petition for Declaratory Judgement," against Black and the unnamed members of the disciplinary committee, setting forth in greater detail the events which allegedly violated his constitutional rights.

On June 27, 1984, following a trial at which evidence was presented, the district court dismissed the action on the basis that an appeal from the board can only be had by a proceeding in error under the provisions of Neb. Rev. Stat. §§ 25-1901 et seq. (Reissue 1979). The trial court concluded that Moore's failure to file his appeal within a month of the date of the board's order deprived that court of jurisdiction.

The statutes dealing with disciplinary proceedings in adult institutions administered by the Department of Correctional Services do not make any provision for an appeal from the determinations of the board. Neb. Rev. Stat. §§ 83-4,109 through 83-4,123 (Reissue 1981). However, § 83-4,123 provides: "Nothing in sections 83-4,109 to 83-4,123 shall be construed as to restrict or impair an inmate's free access to the courts and necessary legal assistance in any cause of action arising under sections 83-4,109 to 83-4,123."

Section 25-1901 provides: "A judgment rendered, or final order made, by any tribunal, board or officer exercising judicial functions, and inferior in jurisdiction to the district court, may be reversed, vacated or modified by the district court."

We have held that where no other method of appeal is provided, one may obtain judicial review by proceedings in error under §§ 25-1901 et seq. *Fisher v. Housing Auth. of City of Omaha*, 214 Neb. 499, 334 N.W.2d 636 (1983), discussed in detail later in this opinion; *Languis v. De Boer*, 181 Neb. 32, 146 N.W.2d 750 (1966); *Cacek v. Munson*, 160 Neb. 187, 69 N.W.2d 692 (1955). However, as in all appeals, the time requirements are mandatory and must be met in order for the appellate tribunal to acquire jurisdiction of the subject matter.

Wood v. Village of Culbertson, ante p. 94, 368 N.W.2d 468 (1985); *Marcotte v. City of Omaha,* 196 Neb. 217, 241 N.W.2d 838 (1976).

Section 25-1931 provides: "No proceedings for reversing, vacating, or modifying judgments or final orders shall be commenced unless within one calendar month after the rendition of the judgment or making of the final order complained of . . . ." Section 25-1905 further requires: "The plaintiff in error shall file with his petition a transcript of the proceedings containing the final judgment or order sought to be reversed, vacated or modified."

Since Moore failed to satisfy the requirements of §§ 25-1905 and 25-1931, it is clear that no valid proceeding for review by error was perfected. *Fisher v. Housing Auth. of City of Omaha, supra.*

Thus, we confront Moore's claim that he is entitled to a judicial review by his suit for a declaratory judgment.

Neb. Rev. Stat. §§ 25-21,149 through 25-21,164 (Reissue 1979) address the nature and the use of such actions. Section 25-21,149 provides:

> Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

Section 25-21,150 provides in pertinent part: "Any person . . . whose rights, status or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status or other legal relations thereunder."

In *Fisher v. Housing Auth. of City of Omaha, supra,* Fisher brought an appeal to the district court under the Administrative Procedures Act, Neb. Rev. Stat. §§ 84-901 et seq. (Reissue 1981), together with a separate claim for damages on the ground that his constitutional rights had been violated by the

termination of his employment with the Omaha Housing Authority.

This court affirmed the district court's dismissal of the action, holding that the appeal under the Administrative Procedures Act was improper because the Omaha Housing Authority was not a state agency. We noted that no other provision existed for an appeal from the decision of the board of commissioners of a housing authority in the Nebraska housing authorities law, and concluded that the proper method of seeking judicial review in such cases was by a proceeding in error. Since a transcript of the proceedings before the board of commissioners had not been filed pursuant to § 25-1905 until well after the 1-month deadline had passed, we held that the district court lacked jurisdiction to hear the proceeding in error and affirmed the dismissal.

We went on to discuss Fisher's cause of action for damages based on the alleged violation of his constitutional rights and observed that no new facts had been pled to support those allegations but that "[p]laintiff is simply trying to raise the same issues in an original action which he attempted to raise on direct appeal from the board of commissioners." 214 Neb. at 505, 334 N.W.2d at 640. We then held Fisher's actions to be an impermissible collateral attack on the decision of the Omaha Housing Authority, and affirmed our earlier ruling that the prohibition against collateral impeachment of judicial decisions applies to the determinations of state and county officers or boards of officers who are called upon to act judicially in matters of administration.

In *Cacek v. Munson*, 160 Neb. 187, 69 N.W.2d 692 (1955), plaintiffs sought to enjoin various officials from asserting dominion or control over their school district. Plaintiffs alleged that the petitions proposing the merger of their district were not signed by the requisite percentage of legal voters in the county, and so were not valid. The district court sustained the defendants' motion to dismiss the action. We affirmed, holding that where the county superintendent, in a proper hearing on the matter, found that the petitions were signed by the requisite number of voters, the superintendent had the jurisdiction and the mandatory duty to order the boundary changes requested

by the petitions and that his decision was judicial in nature. We further held that a proceeding in error was the proper means to review the county superintendent's decision, and not the injunction action brought by plaintiffs. We also held that the order could not be attacked collaterally unless fraud was alleged or the decision of the superintendent was void because of lack of jurisdiction.

State ex rel. Ritthaler v. Knox, 217 Neb. 766, 351 N.W.2d 77 (1984), is one of the more recent cases applying the principle that only a void judgment may be attacked collaterally.

In discussing the nature of an action for declaratory judgment in *Zarybnicky v. County of Gage*, 196 Neb. 210, 215, 241 N.W.2d 834, 837 (1976), we said: "[A] declaratory judgment action 'is not a substitute for new trial or appeal, nor does it operate to supersede former adjudications *or proper proceedings already pending in a court*.' (Emphasis supplied.) Phelps County v. City of Holdrege, 133 Neb. 139, 274 N.W. 483." We also stated: " 'Ordinarily an action for a declaratory judgment will not be entertained where another equally serviceable remedy has been provided by law.' " *Id.*

Fisher, *Cacek*, *Ritthaler*, and *Zarybnicky* teach that an original action which does not state a valid, independent cause of action apart from the appeal of a lower tribunal's decision constitutes an impermissible collateral attack on that decision and is not maintainable as an action for a declaratory judgment unless the decision was procured by fraud or the lower tribunal lacked jurisdiction, thus rendering its decision void.

Nonetheless, Moore appears to argue that our decision in *Reed v. Parratt*, 207 Neb. 796, 301 N.W.2d 343 (1981), says otherwise. It does not. In *Reed* the appellant had escaped from the Lincoln Work Release Center. His escape then served as the basis for prison disciplinary action, as well as a criminal prosecution. As a result of a hearing before the then Nebraska Penal Complex Adjustment Committee, Reed lost all of his accumulated good time and was placed in the Nebraska Penal Complex Adjustment Center. That action was affirmed by the then Nebraska Penal Complex Appeal Board. Reed thereafter appealed to the district court under the Administrative Procedures Act, and also sought a declaration of his rights and

a mandatory injunction to restore his good time. A majority of this court held that the Administrative Procedures Act did not apply to appeals from the Nebraska Penal Complex Appeal Board. The majority opinion also stated, however:

> [I]t is not clear from the record that the petitioner had no right to declaratory judgment relief. Such relief, *if available at all*, would necessarily be limited in nature since such an action is a collateral attack upon the decision of the disciplinary committee and any issue concerning the fact of the escape was fully litigated in the criminal prosecution.

(Emphasis supplied.) *Id.* at 799, 301 N.W.2d at 345.

The judgment was reversed and remanded for "the limited purpose of determining" if the petitioner had any right to declaratory judgment relief. *Id.*

Whatever the situation may have been in *Reed*, the record here presents no question of fraud or lack of jurisdiction. The decision of the Administrative Appeal Board is therefore not void and consequently may not be attacked collaterally.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT A. SUTTON, APPELLANT.

368 N.W.2d 492

Filed May 31, 1985. No. 84-728.

1. **Convictions: Appeal and Error.** In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence.
2. **Burglary: Evidence: Proof.** A person commits burglary if such person willfully, maliciously, and forcibly breaks and enters any real estate or any improvements erected thereon with intent to commit any felony or with intent to steal property of any value. Evidence of any act of physical force, however slight, by which the obstruction to entering is removed is sufficient to prove a breaking.
3. **Robbery: Evidence: Proof.** Robbery is committed when property is taken from a person through the use of force, violence, or intimidation. It is not necessary

that the property be taken from the "person." It is sufficient if it is taken from the individual's personal presence, protection, or control.

4. **Criminal Law: Evidence: Proof.** A defendant, to establish an alibi, must not only show he was present at some other place about the time of the alleged crime but also that he was at such other place such a length of time that it was impossible for him to have been at the place where the crime was committed, either before or after the time he was at such other place.
5. _____: _____: _____. Ordinarily, evidence tending to prove an alibi does not destroy the sufficiency of the evidence to support a finding of guilt, but only presents conflicting evidence on a question of fact.

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

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

A. Eugene Crump, Deputy Attorney General, and Lynne R. Fritz, for appellee.

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

BOSLAUGH, J.

The defendant, Robert A. Sutton, was convicted of burglary and robbery and sentenced to 3 years' probation. One of the conditions of probation was that the defendant be confined in jail for 90 days and make restitution. The defendant has appealed and contends the evidence was insufficient to support a finding of guilty.

The record shows that the victim, Bonnie Stephens, lived in a third-floor apartment in Bellevue, Nebraska. The theory of the State is that the burglar climbed up to the balcony of the victim's apartment from a lower balcony and entered the apartment from the balcony.

On September 10, 1983, the victim was awakened around 1:30 a.m. when she heard the sound of coins being dropped on her dining room table. When she went to investigate, she saw the defendant standing by her dining room table taking money from her billfold. When she asked him what he was doing, he replied, "I'm stealing from you."

The victim ran out the front door to a neighbor's apartment. The defendant pursued and attempted to grab her, but then ran down the back stairs when the neighbor, Richard Tucker,

answered the door. Another neighbor from a lower floor came to her aid after hearing her scream. Both tried to calm her and returned with her to her apartment.

Richard Tucker then called the police, who recorded the call at 1:27 a.m.

Upon returning to her apartment the victim discovered that a gold ring worth $200 was gone from her billfold. She also noticed the screen door to her balcony had been opened, and the curtain above the door was down. She remembered shutting the screen door when she went to bed but leaving the balcony sliding glass door open. When the police arrived, the victim gave them a description of the burglar. Later, she gave them a description of the burglar for a composite drawing.

Following the incident, the victim saw the defendant near her apartment on two occasions. She first saw him as he was carrying a stereo into a neighbor's apartment. She did not call the police at that time because it was dusk and the hall was poorly lighted. She saw the defendant again on November 9 on the street near her apartment. She notified the police at that time, and the defendant was arrested.

The defendant waived a jury trial, and at the conclusion of the trial was found guilty of both counts.

In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact, and a verdict made by the trier of fact must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Goodon*, 219 Neb. 186, 361 N.W.2d 537 (1985); *State v. Smith*, 219 Neb. 176, 361 N.W.2d 532 (1985).

With respect to the burglary, Neb. Rev. Stat. § 28-507(1) (Reissue 1979) provides, "A person commits burglary if such person willfully, maliciously, and forcibly breaks and enters any real estate or any improvements erected thereon with intent to commit any felony or with intent to steal property of any value." Evidence of any act of physical force, however slight, by which the obstruction to entering is removed is sufficient to prove a breaking. *State v. Classen*, 216 Neb. 323, 343 N.W.2d

749 (1984); *State v. Campbell*, 190 Neb. 394, 208 N.W.2d 670 (1973). The opening of a closed door to enter a building is a "breaking" within the definition of burglary. *State v. Sedlacek*, 178 Neb. 322, 133 N.W.2d 380 (1965).

The victim testified that she had closed the screen door to the balcony before she went to bed. After the incident the door was open and the curtain above the doorway had been knocked down. This was evidence of physical force sufficient to sustain the burglary conviction.

Robbery is committed when property is taken from a person through the use of force, violence, or intimidation. *State v. Davis*, 214 Neb. 474, 334 N.W.2d 450 (1983); Neb. Rev. Stat. § 28-324 (Reissue 1979). "As interpreted by this court, it is not necessary that the property be taken from the 'person.' It is sufficient if it is taken from the individual's personal presence, protection, or control." *State v. Welchel*, 207 Neb. 337, 342-43, 299 N.W.2d 155, 159 (1980). The force relied upon must be sufficient to effect a transfer of the property from the victim to the robber, and if it is sufficient to overcome resistance, the degree is immaterial. *Welchel, supra.*

In the present case it was 1:30 in the morning when the victim found a stranger in her dining room, going through her billfold. She was only 1 or 2 feet from him when he told her, "I'm stealing from you." The proximity, time, words, and actions of the defendant were sufficient to intimidate and scare the victim. As she ran screaming from her apartment, the defendant pursued her. The intimidation coupled with the theft of the gold ring from the victim's billfold was sufficient evidence to constitute robbery. The evidence shows that the fear continued for several days after the robbery.

The victim's testimony at trial was sufficient to sustain the conviction on both counts. The fact that all of the events of the robbery were not directly corroborated does not impair the sufficiency of the evidence. See *Davis, supra.*

The victim provided the police with a description of the burglar on several occasions. The composite drawing which was prepared from her description bears a striking resemblance to the defendant. The victim made a positive identification of the defendant in a photo lineup and at the trial.

The defendant's principal contention is that his evidence of an alibi prevented a finding of guilty. The manager of the Crown Court Lounge testified that the defendant was working at the bar on the evening of September 9 and that his timecard indicated he "clocked out" at 1:21 a.m. on September 10. The arresting officer testified it would take 4 to 4 1/2 minutes to drive from the bar to the victim's apartment. The police recorded the burglary and robbery as having happened at 1:25 a.m.

This evidence presented a question of fact for the trial court. See *State v. Martinez*, 181 Neb. 392, 148 N.W.2d 841 (1967). Evidence tending to prove an alibi does not destroy the sufficiency of the evidence to support a finding of guilt, but only presents conflicting evidence on a question of fact. *Duffey v. State*, 124 Neb. 23, 245 N.W. 1 (1932).

> "A defendant, to establish an *alibi*, must not only show he was present at some other place about the time of the alleged crime, but also that he was at such other place such a length of time that it was impossible for him to have been at the place where the crime was committed, either before or after the time he was at such other place."

Mays v. State, 72 Neb. 723, 725, 101 N.W. 979, 980 (1904).

Although there is evidence that the defendant was working at the Crown Court Lounge on the evening of September 9, 1983, and his timecard shows that he was "clocked out" at 1:21 a.m. on September 10, there was no testimony that anyone saw the defendant "clock" himself out that night. The manager of the bar testified it is possible for employees to clock each other out. There was no evidence that the clocks at the bar and the police station reflected the exact same time.

No witnesses other than the victim testified that they saw the defendant at the time of the crime. The defendant's evidence of an alibi was not such as to prevent a finding of guilty beyond a reasonable doubt.

The judgment is affirmed.

AFFIRMED.

GRANT, J., dissenting in part.

I agree that the facts presented to the trial judge in this jury-waived case are sufficient to prove that a burglary was committed and to convict defendant of that burglary, in that the

victim positively identified defendant as the man she saw in the semidarkness of her dining room for "just a few seconds" and then identified 2 months later when she saw him on the streets of Bellevue and called the police. The victim also testified she had some further opportunity to identify defendant:

Q. [Defense counsel] . . . There was enough light in the apartment to see him?
A. I saw him more when he chased me out into the hallway.
Q. Was he still face to face with you at that time?
A. Yes.
Q. Still didn't notice anything about him?
A. I was too scared.

In connection with this further identification, it must be noted that the victim escaped from defendant by running quickly to the front door of the apartment, unlocking the door, taking the chain lock off, turning the knob, throwing the door open, and running across the hall, and that during this time while defendant was chasing the victim, he did not, according to the victim's testimony, touch her at all. The positive identification evidence, however, if believed by the trier of fact, is legally sufficient to overcome defendant's alibi evidence as presented to the trial court and as discussed in our opinion.

While I think we have stretched to the limit the holding of *State v. Ammons*, 208 Neb. 812, 813-14, 305 N.W.2d 812, 814 (1981), that "[i]t has long been the rule in this state that except in certain crimes such as sexual assault, a conviction may rest upon the testimony of a single eyewitness," I believe the evidence is legally sufficient to support a conviction of the crime of burglary. I therefore join in the court's affirmance of that conviction.

As I read the record, however, I do not think the evidence supports the conviction of robbery. When he was first seen by the victim, defendant had the victim's billfold in his hands. The victim testified as follows:

Q. [Deputy county attorney] What did you see once you got out there?
A. Someone was standing at my kitchen table with my billfold and my money in their hands. The light came

in from my patio door. There was an outside light in the apartment and it shined in my apartment. Someone was standing at my dining room table with my billfold in their hands.

. . . .

Q. What was the person doing?

A. They had my billfold in their hands and they were taking money out of it.

. . . .

Q. Did you discern that anything was missing from the apartment?

A. There was a ring that was taken out of my billfold.

. . . .

Q. Okay. Did you ever discover that anything else was missing from the apartment - - -

A. No.

Q. - - - other than the ring?

A. No.

The testimony of the victim is clear that nothing was taken except her ring. In view of the immediate chase toward the door, the ring had to have been removed from the billfold before the victim first saw the defendant. Apparently, the victim's appearance startled defendant and no money was removed from the apartment. The only property taken from the victim, therefore, was not taken from her through the use of force, violence, or intimidation. Any loss occurred before the victim was aware that a loss had occurred—a typical burglary. I do not believe the evidence supports a conviction of the crime of robbery. I would reverse defendant's conviction of that crime.

I believe it should be noted that counsel representing defendant on this appeal did not try this case.

STATE OF NEBRASKA, APPELLEE, V. TIM FEHNCKE, APPELLANT.

368 N.W.2d 497

Filed May 31, 1985. No. 84-764.

Courts: Jurisdiction: Appeal and Error. In an appeal from a misdemeanor conviction in county court, where no notice of appeal was filed as required by Neb. Rev. Stat. § 24-541.02 (Cum. Supp. 1982), and no bond was deposited as required by Neb. Rev. Stat. § 29-611 (Reissue 1979), the district court lacked jurisdiction to hear an appeal from the county court and, therefore, the Supreme Court has no jurisdiction to hear an appeal from the district court.

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

Ronald Rosenberg of Rosenberg Law Offices, for appellant.

A. Eugene Crump, Deputy Attorney General, and Mark D. Starr, for appellee.

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

GRANT, J.

Defendant, Tim Fehncke, appeals from a district court order affirming his county court jury trial conviction and sentence of 7 months in the county jail. We dismiss Fehncke's appeal because we determine that the record here does not show that Fehncke perfected his appeal to the district court from the county court. Since the district court was without jurisdiction, this court has no jurisdiction to hear the appeal from the district court.

On August 1, 1983, Fehncke, then a police officer in Columbus, Nebraska, was charged in a complaint with false reporting to a police officer with the intent to instigate an investigation of an alleged criminal matter or to impede the investigation of an actual criminal matter, a violation of Neb. Rev. Stat. § 28-907(1)(a) (Cum. Supp. 1984). The underlying facts of the case are those set out in a companion case, *State v. Cooley*, 217 Neb. 90, 348 N.W.2d 433 (1984). A special prosecutor was appointed on October 5, 1983. A jury trial was concluded on December 28, 1983, and a guilty verdict was returned on that same day.

The record shows that immediately after the sentencing of February 6, 1984, Fehncke's counsel stated to the court, "We would like to give notice of appeal." The special prosecutor, Fehncke's attorney, and the court then discussed the appropriate bond to be set. The court ultimately set the bond, on the same day in the same hearing, at $2,500, and defendant's counsel told the court a surety bond would be prepared.

Thereafter, the record does not show the filing of any notice of appeal, as required by Neb. Rev. Stat. § 24-541.02(1)(a) (Cum. Supp. 1982) (effective August 30, 1981), nor the depositing of any bond under Neb. Rev. Stat. § 29-611 (Reissue 1979) (effective January 24, 1973). As stated in *State v. Schroder*, 218 Neb. 860, 864-65, 359 N.W.2d 799, 803 (1984):

> The appeal in this case is grounded in Neb. Rev. Stat. §§ 24-541.01 (Cum. Supp. 1982) and 29-611 (Reissue 1979), each of which grants the right to appeal any county court final order or judgment and any judgment imposing a fine or imprisonment, or both, to the district court. The provisions of these statutes govern the exercise of that right. As such, that right to appeal is of a different nature than the constitutionally based right to a speedy trial, as evidence by our well-established rule that there must be compliance with the requirements set forth in a statute granting the right to appeal or this court gains no jurisdiction over the case. *Nicholson v. City of Bellevue*, 215 Neb. 540, 339 N.W.2d 758 (1983); *Whitehouse Energy Savers v. Hanlon*, 214 Neb. 572, 334 N.W.2d 802 (1983); *State v. Mills*, 179 Neb. 853, 140 N.W.2d 826 (1966).

Whatever practice was permitted under § 29-611 before August 30, 1981, an additional requirement for appeals to district court has been set out in § 24-541.02(1)(a), which requires that the appealing party must "[f]ile with the clerk of the county . . . court a notice of appeal." Necessarily such a notice, if it is to be filed, must be in writing. Therefore, in an appeal from a misdemeanor conviction in county court, where no notice of appeal was filed as required by § 24-541.02, and no bond was deposited as required by § 29-611, the district court lacked jurisdiction to hear an appeal from the county court and, therefore, the Supreme Court has no jurisdiction to hear

an appeal from the district court.

As stated above, the record in this case shows no compliance with the requirements of either § 24-541.02 or § 29-611. The point that appellant had not filed a notice of appeal was raised by the appellee's brief. No reply brief nor any supplements to the record were filed.

Fehncke's appeal is dismissed. The district court lacked jurisdiction to hear the appeal from the county court and, therefore, this court lacks jurisdiction to hear the appeal from the district court.

APPEAL DISMISSED.

STATE OF NEBRASKA, APPELLEE, V. JACK L. TERRELL, APPELLANT.
368 N.W.2d 499

Filed May 31, 1985. No. 84-928.

1. **Post Conviction: Appeal and Error.** In post conviction proceedings under Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1979), the district court is the trier of disputed questions of fact and it is not ordinarily for the Supreme Court to determine questions of credibility.
2. **Post Conviction: Proof.** In a post conviction proceeding the petitioner has the burden of establishing the basis for relief.
3. **Pleas: Post Conviction.** Where the record discloses that a plea of guilty was understandingly and voluntarily entered, it is not subject to post conviction relief.
4. **Judges: Recusal.** A motion to disqualify a trial judge on account of prejudice is addressed to the sound discretion of the trial court.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Affirmed.

Tony L. Fugit, for appellant.

A. Eugene Crump, Deputy Attorney General, and Terry R. Schaaf, for appellee.

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

KRIVOSHA, C.J.

Jack L. Terrell appeals from an order of the district court for Sarpy County, Nebraska, denying his request for post conviction relief pursuant to the provisions of the Nebraska Post Conviction Act, Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1979). Terrell appeals on the basis that the district court erred in several respects in denying post conviction relief. Specifically, Terrell maintains that the district judge erred in the following respects: (1) In refusing to recuse himself from consideration of this matter due to his alleged bias and prejudice evidenced by comments made by him at the original sentencing hearing; (2) In failing to grant post conviction relief based upon the fact that Terrell's guilty plea was induced through promises which were not revealed to the court or to Terrell's counsel; (3) In failing to grant post conviction relief based upon the fact that Terrell was denied adequate and effective assistance of counsel at the time his plea of guilty was entered; and (4) In failing to grant post conviction relief based upon the fact that Terrell's guilty plea was not knowingly and intelligently made.

Terrell begins his argument by advising the court that "[t]he legal arguments with regard to this defendant are intermingled so as to make clarity difficult." Brief for Appellant at 9. With that we are in complete agreement. We are unable, however, to agree with any other argument made by Terrell, and for that reason we affirm the judgment of the district court denying post conviction relief.

On May 14, 1981, Terrell was charged with first degree sexual assault on a child in violation of Neb. Rev. Stat. § 28-319(1)(c) (Reissue 1979). This is a Class II felony punishable by not less than 1 nor more than 50 years' imprisonment. All of the facts of the case are not before the court in this post conviction proceeding. The record available, however, indicates that this was apparently a sexual assault by Terrell upon his then 15-year-old stepdaughter. The record of the proceedings indicates that it was a particularly vicious and heinous attack in which Terrell tied the child down and repeatedly assaulted her. But for some secret agreement allegedly entered into between Terrell and several federal police officials, the record discloses

that all of his constitutional rights were explained to Terrell and that he freely, knowingly, and intelligently entered his plea of guilty. Following an examination and presentence investigation, the district court sentenced Terrell to imprisonment for not less than 15 nor more than 50 years. Terrell did not file a direct appeal. He now seeks post conviction relief with regard to those matters set out above, even though all of the matters were known to Terrell at the time the sentence was imposed and could have been attacked by way of direct appeal. He maintains that he waived his right to a direct appeal because of promises made to him by authorities upon which he relied.

Terrell's principal contention is that he entered into a plea agreement with federal authorities to the effect that if he would give testimony against certain members of the Hell's Angels, he would be sentenced to not less than 3 nor more than 5 years' imprisonment in the state proceeding. As noted earlier, Terrell maintains that he did not file a direct appeal because federal agents had promised to help him get a reduced sentence through the Nebraska Parole Board. All of these matters are denied by the authorities, both state and federal. Each of the officials represents, by affidavit, that no promise with regard to the sentence in the present case was made and that the only promise made by the federal agents was that if Terrell gave testimony to aid the federal government in its prosecution of the Hell's Angels, the district court for Sarpy County, Nebraska, would be made aware of that fact. In support of that position the record reflects that at the time Terrell was sentenced the deputy county attorney did advise the district court of Terrell's cooperation with federal authorities. It is further clear from the record that the district court took that fact into account in sentencing Terrell. In sentencing Terrell to a term of 15 to 50 years, the district court said:

> And if it weren't for your cooperation, Mr. Terrell, I think today I would have given you a flat 50 years and immediately sent a letter to the Board of Pardons and Paroles that under no circumstances should you be released earlier than that, less your accumulated good time and earned credit. But since in fact you cooperated I am giving you the indeterminate sentence and let you have

> that opportunity. But I hope that it's at least that long and at least give this young girl an opportunity to rest in peace at night, knowing that the perpetrator of this horrid crime is behind bars.

The most that can be said about Terrell's argument is that it raises a dispute as to the facts. On the one hand, Terrell maintains certain promises were made to him, while, on the other hand, those who allegedly made the promises deny such promises were made. We have frequently held that in post conviction proceedings under §§ 29-3001 et seq. the district court is the trier of disputed questions of fact and it is not ordinarily for the Supreme Court to determine questions of credibility. See, *State v. Tiff*, 212 Neb. 565, 324 N.W.2d 393 (1982); *State v. Davis*, 203 Neb. 284, 278 N.W.2d 351 (1979). Further, in a post conviction proceeding the petitioner has the burden of establishing the basis for relief. *State v. Tiff, supra.* Our review of the record convinces us beyond question that there was simply no basis upon which the trial court could have believed Terrell's claims. But, in any event, the decision of the district court not to believe Terrell and to believe the state and federal officials was not error. In view of the fact that we find that the district court did not commit error in refusing to believe Terrell's claims, we likewise must conclude that Terrell's guilty plea was not induced through promises which were not revealed to the court or to Terrell's counsel.

Nor can we say that this record supports Terrell's claim that he was denied adequate and effective assistance of counsel. Nebraska employs a two-part test for determining whether an attorney has effectively counseled a criminal defendant. We have previously held:

> "First, counsel must perform at least as well as one with ordinary criminal law skill and training in his or her region. Counsel must also conscientiously protect his client's interests. *State v. Leadinghorse*, 192 Neb. 485, 222 N.W.2d 573 (1974); *State v. Lang*, 202 Neb. 9, 272 N.W.2d 775 (1978). A defendant challenging competency of counsel has the burden to establish it. *State v. Auger & Uitts*, 200 Neb. 53, 262 N.W.2d 187 (1978). In addition, defendant must show that he suffered prejudice in the

> defense of his case as a result of his attorney's actions or inactions. *State v. Mays*, 203 Neb. 487, 279 N.W.2d 146 (1979); *State v. Lang, supra; State v. Bartlett*, 199 Neb. 471, 259 N.W.2d 917 (1977)."

State v. Evans, 218 Neb. 849, 852-53, 359 N.W.2d 790, 793 (1984).

Our review of the record as presented to us fails to disclose any evidence that Terrell was denied effective assistance of counsel or that such alleged denial resulted in any prejudice to Terrell.

An examination of the record makes it clear that Terrell freely, knowingly, and intelligently entered a plea of guilty in this case. Where the record discloses that a plea of guilty was understandingly and voluntarily entered, it is not subject to post conviction relief. See, *State v. Mayes*, 190 Neb. 833, 212 N.W.2d 621 (1973); *State v. Turner*, 186 Neb. 424, 183 N.W.2d 763 (1971).

We believe our review of the matters thus far has disposed of all of Terrell's assignments of error except with regard to the district judge's refusal to recuse himself. We may, however, dispose of that in short order. In the first place, Terrell, while assigning it as error, does not discuss it in his brief. We have frequently held that we will not consider errors assigned but not discussed. See *State v. Heathman*, 216 Neb. 609, 344 N.W.2d 670 (1984). Furthermore, an examination of the record clearly discloses that there was no basis for requiring the district judge to disqualify himself. A motion to disqualify a trial judge on account of prejudice is addressed to the sound discretion of the trial court. See *State v. Goodpasture*, 215 Neb. 341, 338 N.W.2d 446 (1983). There is no indication here that the district judge in any manner abused his discretion. For these reasons the judgment of the district court denying Terrell post conviction relief is affirmed.

AFFIRMED.

DR. JOSE A. SAPORTA, AS CONSERVATOR AND GUARDIAN OF VICTOR J. SAPORTA, AN INCAPACITATED PROTECTED PERSON, APPELLANT, V. STATE OF NEBRASKA, APPELLEE.

368 N.W.2d 783

Filed June 7, 1985. No. 83-798.

1. **Medical Malpractice: Proof: Proximate Cause.** In a malpractice action the burden is on the plaintiff to prove the generally recognized medical standard involved, that there was a deviation from that standard by the defendant, and that such deviation was the proximate cause of the plaintiff's injury.
2. **Proximate Cause.** Conduct is not a cause of an event if the event would have occurred without the questioned conduct.

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

William M. Lamson, Jr., and Patricia A. Zieg, for appellant.

Paul L. Douglas, Attorney General, and Martel J. Bundy, for appellee.

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

PER CURIAM.

Jose A. Saporta, conservator and guardian of Victor J. Saporta, an incapacitated protected person, appeals the dismissal of an action brought pursuant to the State Tort Claims Act, Neb. Rev. Stat. §§ 81-8,209 to 81-8,235 (Reissue 1981). We affirm.

Victor Saporta had attempted suicide in August 1980 and February 1981. Victor's illness had been diagnosed as schizophrenia, an illness "manifested primarily by disorganization of thought processes; changes of affect, which is the amount of facial expression; changes in a person's level of motivation; changes in a person's level of energy; changes in a person's ability to work and interact with other people." Victor was treated in a private hospital. Following release from private hospitalization in 1981, Victor threatened suicide by carbon monoxide from a running engine of an automobile in a closed garage. On May 27, 1981, Victor was admitted to the Norfolk Regional Center by order of the Douglas County Board of

Mental Health.

At the regional center, Victor stayed in ward 20 during the course of his treatment, which included participation in socialized activities and medication, the mainstay and an "absolute imperative" for the psychotic condition of Victor. Victor was a "nonresponder" to virtually every class of antipsychotic drug. Medication administered to Victor included Navane, Thorazine, Cogentin, and Benadryl. Navane, a potent antipsychotic medication, produces side effects such as cramps, spasms, and akathisia—restlessness and an inability to remain at rest. Thorazine offsets agitation, which a schizophrenic often encounters. Cogentin and Benadryl control the side effects of Navane. At the regional center Victor's physician felt previous dosages of Navane were an "undertreatment" by medication and increased Victor's daily dosage of Navane from the 20 milligrams daily administered in private hospitalization to 60 milligrams daily in the state hospital.

During the evening of July 20 and as the result of increased restlessness and agitation, Victor met with his "treatment team," which included a psychiatrist, a social worker, a registered nurse, and a licensed practical nurse. Progress notes from this meeting included: "The patient stated that he was experiencing quite a bit of anxiety, and that he was quite upset in general. We have seen him much more anxious and much more upset then [sic] this, but he did hint something about suicide, as he has done in the past." Upon inquiry by the treating team, whether Victor was threatening to harm himself, all members of the treating team concluded that Victor was not threatening suicide. After the July 20 meeting with the treatment team, Victor received an increased dosage of Benadryl and retired for the night. None of the treating team informed the night shift about the discussion with Victor.

During the early morning of July 21, Victor was restless and was given Thorazine. Victor fell asleep and awakened at 9 a.m., as observed by a hospital technician. That morning there was nothing out of the ordinary in Victor's behavior. In keeping with the hospital's procedure of minimal restriction on a patient's freedom, Victor was permitted to leave ward 20. As

described by one physician, permitting a patient as much freedom as possible demonstrated that the hospital was "not simply warehousing somebody and snowing them with medications and locking them on a back ward someplace." By the least restrictive confinement, a patient might remain involved with the world in the hope that a patient would leave the hospital for a productive life.

After leaving the ward on July 21, Victor went to the lobby of the regional center and from a pay telephone called his mother at 9:10 a.m. Victor told his mother he was never going to repeat a night such as that which had just passed and he was going to kill himself immediately by throwing himself beneath a car. Victor's conversation with his mother ended at 9:19 a.m. Immediately, at 9:20 a.m., Mrs. Saporta called Victor's social worker at the regional center and informed him that Victor, in a telephone call from a public telephone, had threatened suicide. This telephone call to the social worker concluded at 9:25 a.m. The social worker walked 20 to 25 feet to the office of the nurse in charge of ward 20. The social worker and the nurse decided no immediate action was necessary, although the social worker failed to tell the nurse that Victor had threatened suicide.

No one at the regional center was aware that, after concluding his telephone call to his mother, Victor walked out of the regional center, went down the quarter-mile drive from the regional center to a public highway, and, while walking along the shoulder of a highway, encountered vehicular traffic. Victor met one motorist who, shortly after seeing Victor, contacted a Norfolk police officer. The police officer, in his cruiser, set out to locate Victor. In the meantime, still walking along the road, Victor jumped from the side of the road into the path of a truck. The truck struck and seriously injured Victor. Police arrived 3 to 4 minutes after the accident.

The investigating officer radioed his dispatcher about the accident. There is a discrepancy regarding the exact time of the radio transmission, which is placed sometime between 9:40 and 9:43 a.m.

Suit was filed against the State and charged negligence: insufficient communication among the staff regarding Victor's threat of suicide on the night of July 20; failure to restrict Victor

to his ward on the morning of July 21; failure to conduct an immediate search on the morning of July 21, when Victor threatened suicide; and failure to properly treat Victor's symptoms, especially on the evening of July 20 and the morning of July 21.

The plaintiff presented evidence that Thorazine would exacerbate Victor's akathisia of July 20; that the dosage of Navane was "inordinate"; and that the side effects of Navane, notwithstanding administration of Cogentin and Benadryl, resulted in Victor's attempted suicide. Witnesses for the State testified that the regimen of medications for Victor was "normal procedure and a good standard of care."

There was evidence on behalf of the plaintiff that Victor was not receiving the appropriate socialization therapy, while one of the State's expert witnesses testified that Victor was provided with suitable therapy in that regard.

Concerning communication between shifts, a medical witness for the plaintiff testified that the morning shift should have been alerted to Victor's condition of agitation and restlessness and instructed to keep watch over Victor. A medical witness on behalf of the State, after reviewing Victor's history and the meeting with the treating team on July 20, expressed an opinion that Victor had not made a threat of suicide in the course of the meeting on the evening of July 20. According to the State's expert witnesses, since Victor had made no suicide threat at the July 20 meeting and the treating team had thoroughly questioned Victor about such possibility, there was no need for the treating team to inform the night shift or any succeeding shift of the discussion with Victor. At least two expert witnesses on behalf of the plaintiff conceded that Victor had not threatened suicide during the July 20 meeting with the treating team.

The plaintiff presented evidence concerning the types of searches which certain individuals associated with the hospital would have undertaken to locate Victor.

The ward nurse testified he would have instituted an immediate search for Victor by searching the hospital grounds and then looked for Victor on some of the highways adjacent to the hospital. The social worker testified that he would have

looked for Victor on the regional center's driveway leading to the public highways. The hospital's administrator testified the situation warranted a "code green," that is, every available male nurse at the hospital reacts to an emergency call. Within 3 to 5 minutes there would have been 15 to 20 employees available to search for Victor. Following assembly of personnel, a code green search would take from 5 to 10 minutes to expand from the hospital to the accident site where Victor was injured. The administrator conceded that a code green procedure had never been placed in operation at the hospital so that any time elements indicated by the administrator were somewhat speculative.

After reviewing the time elements of July 21 and the specific facts preceding the accident involving Victor, a psychiatrist, as an expert witness for the State, testified concerning a proper search procedure under the circumstances. This expert witness testified that, upon word of Victor's threatened suicide, the ward nurse should be contacted for an impression of Victor's mental state on the morning in question. In fact, this was done on the morning of Victor's disappearance. If there was a likelihood of harm to a missing patient, a systematic search would then be undertaken. First, the patient's ward would be checked. If such search disclosed that a patient was missing from his or her ward, all wards of the hospital were then checked. If a search of the wards was unproductive, the rest of the hospital building proper would be searched. With the hospital building as the center, the area of the searches would be expanded in an ever-increasing circle throughout the grounds and area adjacent to the hospital grounds. If a missing patient were not discovered after the foregoing procedure, law enforcement authorities were contacted. Notwithstanding Victor's threat to throw himself beneath a vehicle, the expert testified that statements by a patient describing a method of threatened suicide should not govern the nature of the search; rather, a systematic search should commence in the hospital building and on the hospital grounds before expanding into a search of the area outside the hospital grounds. As expressed by that expert: "You have to make [the search] fairly systematic and gradually expand the search to the outside and then hope

you find [the patient] outside if you cannot find him inside the premises."

The district court made the following findings: (1) The plaintiff had failed to prove negligence in Victor's care and treatment on July 20 and 21. (2) Victor terminated the telephone call with his mother at 9:19 a.m. and immediately left the hospital grounds; Mrs. Saporta's telephone call to Victor's social worker terminated at 9:25 a.m.; the social worker contacted the ward nurse, with no subsequent search for Victor, so that there was negligence in failing to undertake an immediate search; but if there had been an immediate search of the wards, buildings, and grounds, such search would have been unsuccessful because Victor had already departed from the regional center. The court concluded that any negligence of hospital personnel was not a proximate cause of Victor's injury.

The State Tort Claims Act requires that actions of this nature be heard without a jury, but otherwise determined in the same manner as other suits. The action is similar to a law action in which a jury has been waived and is governed by the same rules. See, §§ 81-8,214 to 81-8,216; *Brown v. State*, 205 Neb. 332, 287 N.W.2d 676 (1980).

The action commenced by Victor's conservator-guardian is based upon professional negligence (malpractice) in the actions of the physicians and staff at the Norfolk Regional Center. As expressed in *Anderson v. Moore*, 202 Neb. 452, 464-65, 275 N.W.2d 842, 849 (1979):

> In a malpractice action, the burden is on the plaintiff to prove the generally recognized medical standard involved; that there was a deviation from that standard by the defendant; and that such deviation was the proximate cause of the plaintiff's injury.
>
> . . . .
>
> In Kortus v. Jensen, 195 Neb. 261, 237 N.W.2d 845 (1976), we said: "In determining what constitutes reasonable and ordinary care, skill, and diligence on the part of a doctor in a particular community, the test is that which physicians or surgeons in the same neighborhood and in similar communities engaged in the same or similar lines of work would ordinarily exercise for the benefit of

> their patients. * * * Under the foregoing rules, proof of medical negligence (malpractice) requires two basic evidentiary steps, followed by proof relating to proximate cause and damages: (1) Evidence of the generally accepted and recognized standard of care or skill of the medical community in the particular kind of care; and (2) a showing that the physician or surgeon in question negligently departed from that standard in his treatment of the plaintiff. The burden of establishing *both* these essential elements rests upon the plaintiff's introduction of expert medical testimony."

The *Anderson* court also went on to state that

> [a] medical expert witness cannot set up his own standard and bind a physician charged with malpractice with that standard. To permit this practice would put every physician at the mercy of any so-called expert willing to conjure up a standard to fit the case in which the expert is testifying.

Anderson v. Moore, supra at 467, 275 N.W.2d at 850.

Concerning the regimen of medications and therapy prescribed for Victor, there is conflicting evidence concerning the appropriate care and treatment for Victor. Likewise, there was conflicting testimony regarding action which should have been taken regarding intershift communication about Victor's meeting with the treatment team on July 20. All situations regarding care, treatment, and communication presented issues of fact to be disposed by the district court as the trier of fact. Upon a review of the record we cannot state that the conclusions reached by the district court in the foregoing areas are clearly wrong.

The focal point of the appeal is the issue of proximate cause concerning Victor's injuries. The district court, as trier of fact, determines the questions of proximate cause. See *Brown v. State, supra*.

In *Daniels v. Andersen*, 195 Neb. 95, 101-02, 237 N.W.2d 397, 402 (1975), we observed:

> Once the defendant's negligence has been established, it is necessary to find that the plaintiff's injuries were proximately caused by the defendant's negligence. . . .

> There are three basic requirements in establishing proximate cause. The first requirement is that the negligence be such that "without which the injury would not have occurred," commonly known as the "but for" rule. . . .
>
> The second requirement is that the injury be the natural and probable result of the negligence. . . .
>
> . . . .
>
> The third requirement is that there be no efficient intervening cause.

In view of the findings of the trial court in this case, the district court determined that the search procedure outlined and described by the State's expert witnesses was a proper search procedure under the circumstances and, had such search procedure been undertaken, in view of the time element the search procedure would not have located Victor in time to prevent the accident. Expressed differently, the district court concluded that, had a search been undertaken, the time consumed in an appropriate search locating Victor exceeded the time which would have elapsed between commencement of such search and occurrence of the accident injuring Victor on July 21. As one notable authority states: "The defendant's conduct is a cause of the event if the event would not have occurred but for that conduct; conversely, the defendant's conduct is not a cause of the event, if the event would have occurred without it." Prosser and Keeton on the Law of Torts, *Proximate Cause* § 41 at 266 (5th ed. 1984).

Under the evidence presented and the trial court's resolution of conflicting testimony and opinions, we cannot state that the trial court's finding and disposition are clearly wrong.

AFFIRMED.

DONNA KARNES, TAX COMMISSIONER OF THE STATE OF NEBRASKA, APPELLANT, V. WILKINSON MANUFACTURING COMPANY, A NEBRASKA CORPORATION, ET AL., APPELLEES.

368 N.W.2d 788

Filed June 7, 1985. No. 83-914.

1. **Jurisdiction: Appeal and Error.** The right of appeal is statutory and the requirements of a particular statute are mandatory and must be complied with before the appellate court acquires jurisdiction of the subject matter of an action.
2. **Taxation: Public Officers and Employees: Appeal and Error.** The Tax Commissioner is not a "person aggrieved" and therefore does not have the right to appeal a decision of the State Board of Equalization and Assessment, as provided by Neb. Rev. Stat. §§ 77-27,127 and 84-917 (Reissue 1981).

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

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

Paul S. Dye and Sharon R. Kresha of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, for appellee Wilkinson Manufacturing.

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

WHITE, J.

The plaintiff, Donna Karnes, Tax Commissioner of the State of Nebraska, appeals from an order of the district court for Lancaster County, Nebraska, denying the plaintiff standing to appeal a decision of the State Board of Equalization and Assessment.

The defendant, Wilkinson Manufacturing Company, is a primary contractor with the U.S. Department of Defense. Under the terms of Wilkinson's contracts with the United States, the machinery and tooling acquired to manufacture the contracted-for items are owned by the United States. At the termination of the contracts the items remain the property of the United States.

The Nebraska Department of Revenue issued a notice of deficiency determination imposing use tax on the above-described items of machinery and tooling. Wilkinson

paid the tax and filed a claim for refund with the Department of Revenue. Following a hearing, the Tax Commissioner denied Wilkinson's claim for refund and upheld the deficiency assessment, penalty, and interest. Wilkinson Manufacturing appealed the Tax Commissioner's decision to the state board. Following a hearing before the state board, on which the Tax Commissioner sat as a member, the board reversed the Tax Commissioner's decision and ordered that the tax, penalty, and interest be refunded to Wilkinson Manufacturing.

The plaintiff appealed the decision of the state board to the Lancaster County District Court. The district court dismissed the action on the ground that the Tax Commissioner did not have standing to appeal the decision of the state board. The question is simply whether the Legislature has given the Tax Commissioner the right of appeal from the decisions of the board of which she is a member. We agree with the district court that the Legislature has not given her that right.

It is a well-recognized rule that the right of appeal is statutory and the requirements of a particular statute are mandatory and must be complied with before the appellate court acquires jurisdiction of the subject matter of an action. *Whitehouse Energy Savers v. Hanlon*, 214 Neb. 572, 334 N.W.2d 802 (1983). The applicable statutes do not give the Tax Commissioner the right to appeal from a final decision of the state board.

Neb. Rev. Stat. § 77-27,127 (Reissue 1981) describes the appeal procedure from the state board and states:

> Any final decision of the State Board of Equalization and Assessment shall be *subject to judicial review as provided in sections 84-917 to 84-919.* Any final action of the Tax Commissioner, if the person aggrieved thereby elects not to appeal first to the State Board of Equalization and Assessment, shall be subject to judicial review as provided in sections 84-917 to 84-919, as though it were a final decision of the State Board of Equalization and Assessment. The review provided by this section shall be the exclusive remedy available to any taxpayer and no other legal or equitable proceedings shall issue to prevent or enjoin the assessment or collection of any tax imposed

> under the provisions of sections 77-2701 to 77-27,135. (Emphasis supplied.)

In accordance with § 77-27,127 judicial review of a final decision of the state board is governed by Neb. Rev. Stat. § 84-917 (Reissue 1981), which provides in part:

> Any *person aggrieved* by a final decision in a contested case, whether such decision is affirmative or negative in form, is entitled to judicial review under sections 84-917 to 84-919. Nothing in this section shall be deemed to prevent resort to other means of review, redress, or relief provided by law.

(Emphasis supplied.) "Person aggrieved" as used in § 84-917 is not defined under the provisions of Neb. Rev. Stat. §§ 84-901 et seq. (Reissue 1981). However, "person aggrieved" as used in § 77-27,127 clearly does not include the Tax Commissioner, since the commissioner could hardly have been "aggrieved" by her own decision. The provisions of § 84-917 are simply not applicable to her.

Section 84-917, which governs judicial review of the state board, limits such review to a "person aggrieved." Since the Tax Commissioner is not a person as defined by the statutes, she does not have the right to appeal a decision of the state board. We affirm the decision of the district court denying standing to the plaintiff to appeal the decision of the State Board of Equalization and Assessment.

AFFIRMED.

CAPORALE, J., not participating.

CITY BANK & TRUST CO., CRETE, NEBRASKA, A NEBRASKA CORPORATION, APPELLANT, V. HELEN L. VAN ANDEL, APPELLEE.

368 N.W.2d 789

Filed June 7, 1985. No. 84-127.

1. **Summary Judgment.** A motion for summary judgment shall be granted if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the

moving party is entitled to a judgment as a matter of law. If there is a genuine issue of fact, summary judgment may not be granted.

2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment this court must take the view of the evidence most favorable to the party against whom the motion is directed and give that party the benefit of all favorable inferences which may be drawn from the evidence.
3. **Summary Judgment.** The party moving for summary judgment has the burden of showing that no genuine issue as to any material fact exists; therefore, that party must produce enough evidence to demonstrate his entitlement to a judgment if the evidence remains uncontroverted, after which the burden of producing contrary evidence shifts to the party opposing the motion.
4. _____. Summary judgment is an extreme remedy to be awarded only when the issue is clear beyond all doubt.
5. **Uniform Commercial Code: Security Interests: Notice.** Compliance with the requirements of the Uniform Commercial Code for notification as to the disposition of collateral, Neb. U.C.C. § 9-504(3) (Reissue 1980), is a condition precedent to a secured creditor's right to recover a deficiency.
6. **Uniform Commercial Code: Security Interests: Notice: Waiver.** A debtor's right to notice under Neb. U.C.C. § 9-504(3) (Reissue 1980) may be waived by conduct after default amounting to waiver or estoppel.

Appeal from the District Court for Seward County: BRYCE BARTU, Judge. Reversed and remanded for further proceedings.

Adrian R. Fiala II, for appellant.

J. David Thurber of Doyle and Doyle, for appellee.

William B. Brandt and Robert J. Hallstrom of Brandt, Horan, Hallstrom & Sedlacek, for amicus curiae Nebraska Bankers Association.

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

BOSLAUGH, J.

This is an action on a guaranty executed by the defendant, Helen L. Van Andel, on January 5, 1976, to secure indebtedness of her son, Ronald Van Andel, to the plaintiff, City Bank & Trust Co., Crete, Nebraska. The petition alleged that there was $94,819.82 due the bank on August 2, 1982, the date on which Ronald Van Andel and his wife, Pamela, filed a petition in bankruptcy. Through liquidation of collateral and payments by the debtor, the amount due the bank was reduced to $71,003.35,

which amount the plaintiff sought to recover under the guaranty.

The defendant's answer alleged that the plaintiff had sold collateral without notice to the defendant as required by Neb. U.C.C. § 9-504(3) (Reissue 1980). The trial court sustained the defendant's motion for summary judgment on this ground and dismissed the petition. The plaintiff has appealed.

The motion was heard upon the pleadings, the depositions of the president of the plaintiff bank and the defendant, documentary evidence including an affidavit by plaintiff's counsel, and testimony by defendant's counsel. Although the affidavit and testimony of counsel were received without objection to counsels' further participation in the case, we call the attention of counsel to Canon 5, DR 5-102(A), of the Code of Professional Responsibility, which provides that a lawyer upon learning that he ought to be called as a witness as to a contested matter shall withdraw from the conduct of the trial, and his firm, if any, shall not continue representation in the trial.

The plaintiff contends: (1) The district court erred in granting summary judgment because there are genuine issues of material fact; (2) The district court erred in failing to find that the defendant had waived her right to notice of the sale of the collateral or was estopped to rely upon the lack of notice as specified in § 9-504(3); and (3) The district court erred in finding that a notice of sale was required even though the collateral was perishable or threatened to decline speedily in value.

The record shows that the indebtedness of Ronald Van Andel to the plaintiff was delinquent in March of 1982. The Van Andels and the defendant were notified in a letter from the plaintiff dated March 22, 1982, that the loan was delinquent. Thereafter, William Fulton, the president of City Bank, and Ronald Van Andel, together with the Van Andels' attorney, J. David Thurber, attempted to "work out" the problems associated with the loan.

On May 17, 1982, Thurber wrote Fulton regarding City Bank's most recent offer to "work out" the Van Andels' delinquent debt situation. The letter stated that "Ron and Pam

will accept the transfer of the current indebtedness . . . to a 10-year note with a 3-year balloon and a variable interest rate. Helen VanAndel also will agree to secure the new 10-year note with unencumbered real estate in Seward County, Nebraska." In exchange the letter requested that the defendant be released from her obligations under any previous guarantees. A carbon copy of this letter was sent to the defendant. Subsequently, on June 29, 1982, City Bank sent copies of a promissory note, mortgage, financing statement/security agreement, and a letter outlining to Thurber, the Van Andels, and the defendant the agreed-upon transfer of indebtedness. By the terms of these documents, the Van Andels were to be extended credit in the amount of $80,000 with interest at the rate of 17 percent; the loan was to be secured by a mortgage on real estate owned by the defendant, and by equipment, livestock, and crops owned by the debtor.

On August 2, 1982, the Van Andels filed a voluntary petition in bankruptcy under 11 U.S.C. ch. 7 (1982). Thereafter, on August 17, 1982, Adrian Fiala, as attorney for City Bank, sent a letter to Thurber acknowledging receipt of the bankruptcy notice. The letter indicated that City Bank was "quite concerned" as to the status of its secured collateral and requested Thurber to notify the Van Andels that Fulton would be making a physical inventory of the collateral on August 19, 1982. The letter also inquired as to whether Thurber represented the defendant.

On August 17, 1982, Fiala sent a letter to the defendant demanding payment under the guaranty of the Van Andels' indebtedness. A copy of this letter was sent to Thurber. On August 20, 1982, Thurber sent a letter to Fiala stating that his office represented the defendant and that he may be contacted regarding the matter. From that point on the parties and the Van Andels, acting through their attorneys, undertook negotiations regarding the collateral.

On August 19, 1982, City Bank filed a request in the U.S. Bankruptcy Court for relief from the automatic stay, based on the alleged perishable condition of the livestock. The record contains a veterinarian's affidavit attesting to the sickly condition of the livestock concerned. Relief from the stay was

granted on September 15, 1982. Prior to that, on September 2, 1982, the Van Andels, after orally notifying City Bank and receiving no objection, sold a number of hogs at the Beatrice Sales Pavilion. City Bank then physically repossessed the remainder of the livestock on September 27 and November 22, 1982. In the first repossession, 7 mixed feeder pigs were sold at the Crete Livestock Market; the second time, 14 cows and 18 calves were sold. Although no specific written notice was given to the defendant of these sales, the defendant did supervise the loading of the livestock repossessed by City Bank on September 27, 1982. Fulton testified by way of deposition that "we did everything possible to jointly coordinate all activities of disposition of the collateral with you [Thurber] with verbal communication with Helen, Ron and Pam, and acknowledged the seriousness of the situation."

Throughout this time, lengthy conversations had begun, and there was correspondence between the attorneys, Van Andels, and the defendant concerning the equipment that was collateral. On January 6, 1983, Fiala notified the debtors, through a letter to Thurber, of the impending sale of equipment. The equipment was sold at a public auction on January 16, 1983.

Neb. Rev. Stat. § 25-1332 (Reissue 1979) provides that a motion for summary judgment shall be granted "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." If there is a genuine issue of fact, summary judgment may not be granted. *Moore v. American Charter Fed. Sav. & Loan Assn.*, 219 Neb. 793, 366 N.W.2d 436 (1985). In reviewing a summary judgment this court must take the view of the evidence most favorable to the party against whom the motion is directed and give that party the benefit of all favorable inferences which may be drawn from the evidence. *Yankton Prod. Credit Assn. v. Larsen*, 219 Neb. 610, 365 N.W.2d 430 (1985); *Gall v. Great Western Sugar Co.*, 219 Neb. 354, 363 N.W.2d 373 (1985). The party moving for summary judgment has the burden of showing that no genuine issue as to any material fact exists; therefore, that party must produce

enough evidence to demonstrate his entitlement to a judgment if the evidence remains uncontroverted, after which the burden of producing contrary evidence shifts to the party opposing the motion. *Moore, supra; Gall, supra.* Summary judgment is an extreme remedy to be awarded only when the issue is clear beyond all doubt. *Yankton Prod. Credit Assn., supra.*

The record discloses that there are a number of genuine issues of material fact and that it was error to sustain the defendant's motion for summary judgment.

Principally of concern herein is the application of § 9-504(3), which provides in relevant part:

> Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor . . . .

The underlying purpose of the notice provision was stated in *First Nat. Bank of Omaha v. Kizzier*, 202 Neb. 369, 376, 275 N.W.2d 600, 604 (1979), where this court quoted:

> "Our first consideration in construing section 9-504 is to consider the reason for the notice provision. Obviously it is intended for the benefit and protection of the debtor. If he is given notice, he will have at least an opportunity to protect his interests by redemption, finding prospective purchasers for the property, or otherwise."

With but one exception the plaintiff does not claim that it gave written notice to the defendant of the several sales. Rather, City Bank contends that the defendant's conduct subsequent to default constituted a waiver of notice of sale or estopped the defendant from relying upon a defense of failure to give such notice.

In *Citizens State Bank v. Sparks*, 202 Neb. 661, 664, 276 N.W.2d 661, 663-64 (1979), this court stated the general rule:

> "Compliance with the Uniform Commercial Code for notification as to the disposition of collateral is a condition precedent to a secured creditor's right to recover a deficiency." Bank of Gering v. Glover, 192 Neb. 575, 223

N.W.2d 56.

> "* * * the burden of proof is on the secured party to prove compliance with the statutory requirements of notice and reasonableness of notice. * * * Failure to give notice is an absolute bar to the recovery of a deficiency." DeLay First Nat. Bank & Trust Co. v. Jacobson Appliance Co., *supra*.

In other cases we have stated: "It is the rule in this jurisdiction that compliance with the notice provisions of the Uniform Commercial Code is a condition precedent to the right of a creditor to recover a deficiency judgment." (Citations omitted.) *First Nat. Bank & Trust Co. v. Hughes*, 214 Neb. 42, 47, 332 N.W.2d 674, 677 (1983); *Butte State Bank v. Williamson*, 215 Neb. 296, 338 N.W.2d 598 (1983); *Borg-Warner v. Watton*, 215 Neb. 318, 338 N.W.2d 612 (1983).

Although reasonable notice had not been given to the debtor in *Citizens State Bank*, this court continued:

> The ruling of the lower courts must stand unless the defendant's right to notice was waived by his subsequent conduct amounting to waiver or estoppel.
>
> . . . .
>
> While not denying that a case of waiver or estoppel could arise under section 9-504(3), U.C.C., we do not feel the circumstances in this case rise to that level.

202 Neb. at 664-65, 276 N.W.2d at 664.

We have held that in a suit for conversion a jury could find that the course of dealing between the bank and a seller amounted to a waiver of notice where it implied consent and authority for the sale of grain free of the bank's security interest. In *State Bank v. Scoular-Bishop Grain Co.*, 217 Neb. 379, 349 N.W.2d 912 (1984), we set forth the general definition of waiver as contained in previous opinions:

> " 'Waiver' has been defined as a voluntary and intentional relinquishment or abandonment of a known existing legal right, advantage, benefit, claim, or privilege, which except for such waiver the party would have enjoyed; the voluntary abandonment or surrender, by a capable person, of a right known by him to exist, with the intent that such right shall be surrendered and such person

> forever deprived of its benefits; *or such conduct as warrants an inference of the relinquishment of such right*; or the intentional doing of an act inconsistent with claiming it."

Id. at 386, 349 N.W.2d at 916; *Five Points Bank v. Scoular-Bishop Grain Co.*, 217 Neb. 677, 350 N.W.2d 549 (1984).

In *Simmons Mach. Co. v. M & M Brokerage, Inc.*, 409 So. 2d 743, 748 (Ala. 1981), the Alabama Supreme Court held that a debtor may waive his right to notice under U.C.C. § 9-504(3) after default. The court concluded:

> We are mindful that a default debtor's right to notice of the intended disposition of the secured collateral is one of the most important rights affording a debtor protection of his interest in the secured collateral under the U.C.C. Accordingly, we hold that a post-default waiver by a debtor of his right to notice under § 7-9-504(3) can be made where the debtor knowingly and specifically agrees to waive his right to such notice.

The Alabama court, however, specifically rejected *Nelson v. Monarch Invest. Plan of Henderson, Inc.*, 452 S.W.2d 375 (Ky. 1970), insofar as it recognized an implicit waiver by the act of a debtor.

In *Commercial Credit v. Wollgast*, 11 Wash. App. 117, 521 P.2d 1191 (1974), the Court of Appeals for the State of Washington held that a creditor's failure to give timely notice of a sale did not deprive the creditor of its right to a deficiency judgment. The court reasoned:

> In the case at bar, defendant had voluntarily relinquished possession of the collateral because he had been unable to sell the machines. The purpose of relinquishment was to allow plaintiff to sell them. Furthermore, defendant had notice of plaintiff's intention to sell the snowmobiles, made no response, and was financially unable to take any action. Under these circumstaces [sic] the holding in *Nelson v. Monarch Inv. Plan of Henderson, Inc., supra*, would appear pertinent. In that case, the debtor voluntarily transferred possession of the collateral to the plaintiff, indicating that he had no

> further interest in it and did not intend to bid on it. There was no evidence that any notice to him would have resulted in a higher sales price. The Kentucky court concluded that the debtor either waived his right to notice or was estopped to claim damage by reason of the creditor's failure to give it. *Grant County Tractor Co. v. Nuss, supra.* We think that ruling is applicable here.

Id. at 123-24, 521 P.2d 1195-96.

The record in this case is replete with correspondence between individuals involved which, when combined with the actions of the Van Andels and the defendant, might be found to be a waiver or estoppel under § 9-504(3). There are genuine issues of material fact present which prevent the case from being decided upon a motion for summary judgment.

The third assignment of error is whether a notice of sale is required where the collateral is perishable. As quoted previously, § 9-504(3) requires notification "[u]nless collateral is perishable or threatens to decline speedily in value . . . ." This provision was applied in *United States v. Mid-States Sales Company*, 336 F. Supp. 1099 (D. Neb. 1971), where the court considered conflicting evidence as to the condition of the cattle therein, ultimately concluding that the cattle involved were not "perishable," nor did they threaten to "decline speedily in value," within the meaning of the statute. In this case the condition of the livestock is a question of fact. If indeed they were perishable, a notice of sale was not required under the language of § 9-504(3).

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

QUAD-STATES, INC., A NEBRASKA CORPORATION, APPELLEE, V. GILBERT VANDE MHEEN, APPELLANT.

368 N.W.2d 795

Filed June 7, 1985. No. 84-165.

1. **Directed Verdict.** On a motion for a directed verdict, the moving party is deemed to have admitted as true all the material and relevant evidence admitted which is favorable to the party against whom the motion is directed, and the party against whom the motion is directed is entitled to the benefit of all proper inferences which can reasonably be deduced therefrom.
2. **Motions to Dismiss: Evidence: Trial.** Where the evidence is insufficient to sustain a verdict in favor of the plaintiff, it is the duty of the trial court, on the motion of the defendant, to dismiss the action.
3. **Breach of Contract: Damages.** As a general rule, one injured by a breach of contract is entitled to recover all of his damages, including the gains prevented as well as losses sustained, provided they are reasonably certain and such as might naturally be expected to follow the breach.
4. **Breach of Contract: Restrictive Covenants: Damages.** Broadly speaking, the amount recoverable for the breach of a covenant not to compete is the loss sustained by the covenantee as a natural result of the breach.
5. **Breach of Contract: Restrictive Covenants: Damages: Proof.** The fact that the damages flowing from the breach of a covenant not to compete are not susceptible of exact computation will not preclude recovery; however, in order to recover substantial damages, a plaintiff must furnish sufficient data to enable the trier of fact to estimate the actual damages with a reasonable degree of certainty and exactness; if a plaintiff fails to so do, he can nevertheless, if there is evidence of a specific monetary loss, recover a nominal sum.
6. **Damages: Trial: Evidence.** It is the duty of a trial court to refrain from submitting to a jury the issue of damages when the evidence is such that it cannot determine such issue except by indulging in speculation and conjecture.

Appeal from the District Court for Dakota County: SAMUEL P. CANIGLIA, Judge. Reversed and remanded with the direction to dismiss.

David L. Updegraff of Qualley & Larson, for appellant.

Sam S. Killinger and Michael W. Ellwanger of Kindig, Beebe, Rawlings, Nieland & Killinger, for appellee.

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

CAPORALE, J.

Appellee, Quad-States, Inc., sued appellant, Gilbert Vande Mheen, for damages resulting from Vande Mheen's breach of a

covenant not to compete executed in connection with the sale of Vande Mheen's business to Quad-States. Judgment was entered on the verdict of $615,833.51 in favor of Quad-States. Among Vande Mheen's assignments of error in this appeal is the trial court's failure to sustain his motion for a directed verdict, made at the close of all the evidence, on the basis that Quad-States failed to prove its damages with the requisite degree of certainty. We reverse and remand with the direction that the cause be dismissed.

We observe that on a motion for a directed verdict, the moving party is deemed to have admitted as true all the material and relevant evidence admitted which is favorable to the party against whom the motion is directed, and the party against whom the motion is directed is entitled to the benefit of all proper inferences which can reasonably be deduced therefrom. *Maloney v. Kaminski, ante* p. 55, 368 N.W.2d 447 (1985). However, where the evidence is insufficient to sustain a verdict in favor of the plaintiff, it is the duty of the trial court, on the motion of the defendant, to dismiss the action. *Sinnett v. Dial Constr. Co.*, 187 Neb. 190, 188 N.W.2d 681 (1971).

As a general rule, one injured by a breach of contract is entitled to recover all of his damages, including the gains prevented as well as losses sustained, provided they are reasonably certain and such as might naturally be expected to follow the breach. Broadly speaking, the amount recoverable for the breach of a covenant not to compete is the loss sustained by the covenantee as a natural result of the breach. It must also be borne in mind that the measure of damages in an action for the breach of a covenant not to compete is usually difficult of exact computation and in the final analysis is an estimate or approximation. The fact that the damages are not susceptible of exact computation will not preclude recovery, but in order to recover substantial damages, a plaintiff is called upon to furnish sufficient data to enable the trier of fact to estimate the actual damages with a reasonable degree of certainty and exactness. If a plaintiff fails to so do, he can recover only a nominal sum. Even to recover a nominal sum, there must be evidence of a specific monetary loss. *Dana F. Cole & Co. v. Byerly*, 211 Neb. 903, 320 N.W.2d 916 (1982); *D. W.*

Trowbridge Ford, Inc. v. Galyen, 200 Neb. 103, 262 N.W.2d 442 (1978); *Midlands Transp. Co. v. Apple Lines, Inc.*, 188 Neb. 435, 197 N.W.2d 646 (1972); *Gallagher v. Vogel*, 157 Neb. 670, 61 N.W.2d 245 (1953).

Vande Mheen had done business at South Sioux City, Nebraska, through Van's Used Trucks & Parts, Inc., for a number of years. The venture consisted of the buying and selling at a profit used trucks, parts, and scrap. On October 1, 1979, Vande Mheen sold the business to Quad-States. As a part of that transaction, Vande Mheen agreed personally, in relevant part, that for a period of 5 years he would not compete with Quad-States for business "falling within a 100 mile radius of South Sioux City, Nebraska."

The evidence is such that the jury could find that Vande Mheen breached the covenant, at least until the last few months of the relevant period, when he moved to O'Neill, Nebraska, a town more than 100 miles from South Sioux City.

In order to prove its damages, Quad-States adduced evidence as to all the purchases of trucks, parts, and scrap made by Vande Mheen during the prohibited period. It then declared through one of its officers that Quad-States would have made 90 percent of those purchases had Vande Mheen not done so. However, no records were introduced to show how much Quad-States had purchased from any source after it first acquired the business. Neither was there any evidence adduced as to the percentage of the trucks, parts, or scrap available in the restricted area actually purchased by Quad-States. There is, however, uncontradicted evidence from a Quad-States employee, who had also worked for Vande Mheen, that Quad-States was not making many purchases from any source. The evidence is that Quad-States did very little traveling in search of available items and that few sellers of scrap called on Quad-States because of the reduced-level buying. Quad-States' accountant nonetheless cast a formula which in essence applied Quad-States' profit margin to the purchases made by Vande Mheen, adjusted for the additional costs it could be assumed Quad-States would have incurred in doing the additional business, and extrapolated therefrom Quad-States' lost profits or damages. The accountant's reckoning converted

Quad-States' actual loss of $141,062 for the period in question into a projected profit of $2,436,111.

In order to determine whether that evidence is sufficient to support an award of damages, we must analyze factual situations in which the damage rules cited above have been applied.

In *D. W. Trowbridge Ford, Inc. v. Galyen, supra*, the plaintiff purchased the defendant's automobile dealership in O'Neill in 1967. The contract provided, among other things, that the defendant would stop selling new vehicles after a certain date. The evidence with respect to that breach established that the defendant sold 291 new automobiles. Taking into account the newness of plaintiff's venture and the existence of other competition, the trial court concluded that the plaintiff would have sold half of the units that the defendant sold during the prohibited period. The court then awarded damages for that breach on a per automobile basis, using the plaintiff's financial records to compute an average net profit per automobile. This court found the method of computing plaintiff's loss reasonable and the evidence sufficient, on a de novo review as the action was one for injunction, to support an award of damages.

Midlands Transp. Co. v. Apple Lines, Inc., supra, presented an issue as to whether sufficient evidence existed to allow the jury to consider the question of damages. The seller had agreed not to transport any commodity in the restricted area for a period of 5 years, but apparently did so nonetheless. There was evidence that the buyer lost a customer to the seller. Without producing any books or records, which had been destroyed in a fire, the buyer's general manager testified that the loss of this customer reduced the buyer's gross income by a stated amount. This same witness testified that the buyer made a profit from its operation, but because of the loss of the records could not state the amount or extent thereof. This court held that the lack of evidence as to the amount of profit lost as a result of the loss of the customer rendered it impossible for a jury to estimate the buyer's damage with the requisite degree of certitude and exactness. Thus, the issue of damages could not be submitted to the jury. In so holding, this court stated:

> It is the duty of the district court to refrain from submitting to a jury the issue of damages when the evidence is such that it cannot determine such issue except by indulging in speculation and conjecture. [Citation omitted.] To submit the issue of damages in this case to the jury would be to "leave the jury to rove without guide or compass through the limitless fields of conjecture and speculation." [Citation omitted.]

Id. at 440, 197 N.W.2d at 649.

The plaintiff in *Gallagher v. Vogel*, 157 Neb. 670, 61 N.W.2d 245 (1953), sued to enjoin future breaches of a covenant not to compete and for damages resulting from past breaches. The records of plaintiff's purchases and sales were put into evidence. Therefrom, a comparison was made of the business done by plaintiff, during the period defendant competed, to the business plaintiff did during the period no such competition existed. From that comparison the plaintiff estimated the amount of his monthly loss during the period of the breach. This court, again on a de novo review, found such evidence and computations sufficient to support an award of damages.

The foregoing cases teach that in a suit for the breach of a covenant not to compete, a claim for lost profits must be supported by some financial data which permit an estimate of the actual loss to be made with reasonable certitude and exactness.

The data in *D. W. Trowbridge Ford, Inc. v. Galyen*, 200 Neb. 103, 262 N.W.2d 442 (1978), consisted of the actual number of vehicles proved to have been sold by defendant in violation of the covenant and the records of plaintiff's operation. This data enabled an estimate of the lost profit on each such automobile to be computed with reasonable certainty. With that information the amount of plaintiff's loss could be ascertained with reasonable exactness. In *Gallagher v. Vogel, supra*, the records of the buyer's operation enabled the effect of the breach to be measured by a comparison of the business done by the plaintiff with and without defendant's competition.

Unlike the situation in those two cases and like the situation in *Midlands Transp. Co. v. Apple Lines, Inc.*, 188 Neb. 435, 197 N.W.2d 646 (1972), the present case contains no data which

in any way support Quad-States' declaration that it would have purchased 90 percent of what Vande Mheen bought. Without some financial records tending to support that underlying assumption, Quad-States' formula for estimating its lost profits fails. It is beyond question that Quad-States has the burden of proving its own loss, not any gain which may have been made by Vande Mheen. *D. W. Trowbridge Ford, Inc. v. Galyen, supra; Gallagher v. Vogel, supra.* We recognize that if Vande Mheen competed throughout the existence of Quad-States, the latter cannot be expected to produce records of its profits before and after the breach, as was done in *Gallagher.* However, evidence of the volume of purchases actually made by Quad-States is indispensable to establish its premise that it would have purchased 90 percent of the items purchased by Vande Mheen. The record in the present case is such that the jury could only engage in speculation and conjecture as to Quad-States' loss; speculation and conjecture will not support an award of damages.

Indeed, the record will not even support the award of nominal damages. In *Dana F. Cole & Co. v. Byerly*, 211 Neb. 903, 320 N.W.2d 916 (1982), we held evidence that the covenantor had accepted some of the covenantee's accounting clients without a showing of an actual monetary loss therefrom would not support an award of nominal damages. As in *Cole*, there is in the present case no competent evidence of any specific monetary loss.

Accordingly, the judgment of the trial court is reversed and the cause remanded with the direction that it be dismissed.

REVERSED AND REMANDED WITH
THE DIRECTION TO DISMISS.

WHITE, J., participating on briefs.

GRANT, J., dissenting.

I respectfully dissent. I agree with the court's statement that "[t]he evidence is such that the jury could find that Vande Mheen breached the covenant, at least until the last few months of the relevant period," in that the evidence shows a flagrant and continuous violation of the covenant not to compete throughout the entire applicable period from the date of the signing of the contract up to the date of the filing of the petition

herein.

As I view the record, the evidence shows that the fact of damage has been proven beyond doubt and that sufficient evidence was adduced by Quad-States to prove the amount of those damages to a degree sufficient to support the jury's verdict. I agree fully with the statement in the majority opinion that the measure of damages in an action for the breach of a covenant not to compete is usually difficult of exact computation and in the final analysis is an estimate or approximation. As an example of the problems facing a plaintiff in this type of case, Quad-States did not have available the approach approved by this court in *Gallagher v. Vogel*, 157 Neb. 670, 61 N.W.2d 245 (1953). In the *Gallagher* case the plaintiff was able to adduce evidence of business operations during the time that no improper competition existed and during the time the defendant was improperly competing. In this case Quad-States could not introduce evidence of such a comparison because defendant competed improperly throughout the entire period.

I believe the jury could calculate Quad-States' damages, however, without indulging in the "speculation and conjecture" condemned in *Midlands Transp. Co. v. Apple Lines, Inc.*, 188 Neb. 435, 197 N.W.2d 646 (1972). Quad-States produced evidence of specific instances where defendant had breached his contract with Quad-States by directly competing, and adduced testimony that Quad-States would have purchased 90 percent of the items that defendant had prevented Quad-States from purchasing and that such purchases would have resulted in a certain percentage of profit. This approach is not unlike the method approved in *D. W. Trowbridge Ford, Inc. v. Galyen*, 200 Neb. 103, 262 N.W.2d 442 (1978). Quad-States' figures and theories were supported by expert testimony, and the jurors were properly instructed that they could believe such testimony or not, according to their own best judgment. The jury obviously chose to believe Quad-States' evidence. If the jury believed such evidence, the jury had a basis to calculate damages.

The majority opinion relies, in part, on evidence adduced which showed, as stated in the majority opinion, that

Quad-States "did very little traveling in search of available items" and that Quad-States "was not making many purchases from any source." The latter testimony came from one of plaintiff's employees who formerly had been an employee of defendant. The jury could properly choose not to believe such evidence or could have concluded that defendant had so acted as to make such activities on the part of Quad-States futile.

I would affirm the jury verdict.

IN RE ESTATE OF LELA B. ODINEAL, DECEASED. JOHN THOMAS, PERSONAL REPRESENTATIVE, AND PATRICK J. BIRMINGHAM, HIS ATTORNEY, APPELLANTS, V. ODINEAL HILL ET AL., APPELLEES.

368 N.W.2d 800

Filed June 7, 1985. No. 84-245.

1. **Decedents' Estates: Costs: Fees: Attorney Fees.** If any personal representative or person nominated as personal representative defends or prosecutes any proceeding in good faith, whether successful or not, he is entitled to receive from the estate his necessary expenses and disbursements including reasonable attorney fees incurred.
2. **Decedents' Estates: Costs: Fees: Attorney Fees: Evidence.** The good faith required in Neb. Rev. Stat. § 30-2481 (Reissue 1979) is an ultimate fact for the court's determination upon all of the evidence. There are no rules defining it; rather, it depends upon the peculiar facts and circumstances existing in each case.
3. **Appeal and Error.** It is not the province of this court to weigh or resolve conflicts in the evidence, the credibility of witnesses, or the weight to be given to their testimony.

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

Patrick J. Birmingham, for appellants.

Thomas H. DeLay of Mueting, DeLay & Stoffer, for appellees Hengstler.

Dennis W. Collins of Jewell, Gatz & Collins, for appellee Odineal Hill.

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

COLWELL, D.J., Retired.

John Thomas, the nominated personal representative in a will filed by him in the estate of Lela B. Odineal, deceased, Knox County, Nebraska, and his attorney, Patrick J. Birmingham, appeal a court order allowing and denying fees and expenses, and for them to make restitution. Their appeal to the district court was affirmed as modified. We affirm.

Issues not presented here are whether a nominated personal representative is either (1) included in the definition of a personal representative, Neb. Rev. Stat. § 30-2209(33) (Reissue 1979), or (2) a personal representative who can recover reasonable compensation for services, Neb. Rev. Stat. § 30-2480 (Reissue 1979). Appellants narrowed the issue to whether, under Neb. Rev. Stat. § 30-2481 (Reissue 1979), they are entitled to compensation and fees for services in defending a will not admitted to probate. Section 30-2481 provides, "If any personal representative or person nominated as personal representative defends or prosecutes any proceeding in *good faith*, whether successful or not he is entitled to receive from the estate *his necessary expenses and disbursements including reasonable attorneys' fees incurred.*" (Emphasis supplied.) Further, the comment to § 30-2481 states in part, "Litigation prosecuted by a personal representative for the primary purpose of enhancing his prospects for compensation would not be in good faith."

Section 30-2481 is authority for a personal representative or a nominated personal representative to recover from the estate the expenses and fees incurred. That person must first establish good faith, and then prove (1) that the claimed expenses and disbursements were necessary and (2) that the attorney fees were necessary and reasonable. Section 30-2481 is not authority for such person to recover compensation for his own services.

The assigned errors are consolidated as follows: (1) Did Thomas defend the will in good faith? (2) Contrary to

§ 30-2481, the court arbitrarily assigned as factors (a) "success" and (b) "benefits to the estate" in determining necessary expenses and reasonable attorney fees. (3) County Judge Philip Riley refused to disqualify himself, although he had done so at a prior hearing in the estate.

In cases of this nature arising on appeal under § 30-2481 and Neb. Rev. Stat. § 30-2482 (Cum. Supp. 1984), the standard of review provided in Neb. Rev. Stat. § 24-541.06 (Cum. Supp. 1982) and Neb. Rev. Stat. § 25-1911 (Reissue 1979) in both the district court and in this court is for error appearing on the record. *In re Estate of Snyder*, 217 Neb. 356, 348 N.W.2d 136 (1984). It is not the province of this court to weigh or resolve conflicts in the evidence, the credibility of witnesses, or the weight to be given to their testimony. *Brennan v. Brennan*, 214 Neb. 125, 332 N.W.2d 696 (1983).

Ordinarily, in the first instance, the fixing of reasonable compensation, fees, and expenses, pursuant to §§ 30-2480, 30-2481, and 30-2482, is within the sound discretion of the county court. *In re Estate of Casselman*, 219 Neb. 653, 365 N.W.2d 805 (1985).

Lela B. Odineal, a widow, age 81 years, died testate June 30, 1982, in and a resident of Knox County, Nebraska; she was described as independent and eccentric. Her estate, valued at $800,000, was then under conservatorship.

In her later years Lela executed several wills. On September 9, 1979, she executed a will (Webster will) prepared by attorney William E. Webster, Pierce, Nebraska, naming him personal representative; this will was ultimately admitted to probate pursuant to a July 18, 1983, stipulation of all interested parties, not including Thomas. In September 1980 Lela began consulting with John Thomas, attorney, Center, Nebraska, who thereafter drafted seven wills for Lela's execution—the first October 10, 1980, and the last February 4, 1982—all naming Thomas as personal representative.

On July 1, 1982, Thomas filed a petition for the formal probate of Lela's will dated February 4, 1982 (Thomas will). From July 21, 1982, to June 30, 1983, objections to the Thomas will were made and pursued by personal representatives of competing wills and heirs at law, all represented by their own

counsel. The issues were undue influence and testamentary capacity. This matter was twice set for trial before the settlement.

On June 30, 1982, Thomas engaged the legal services of Patrick J. Birmingham, attorney, Bloomfield, Nebraska. From that time forward both Thomas and Birmingham as his attorney claim compensation for services and expenses in the defense of the Thomas will, including legal research, trial preparation, interviewing witnesses, preparing pleadings and correspondence, consultation between themselves, and attending depositions and hearings. In connection with the last item the record shows that appellants attended several court hearings and depositions wherein they were neither noticed nor had a direct interest. Thomas' explanation was they might develop some information helpful in the will contest and trial preparation.

Not part of this appeal are special administration proceedings that are relevant. On July 1, 1982, without notice and representing an emergency, Thomas had himself appointed special administrator in an informal proceeding. Neb. Rev. Stat. § 30-2457(1) (Reissue 1979). Objections were filed, and, after hearing, his special letters were revoked; the First National Bank, Omaha, Nebraska, was appointed special administrator. Thomas appealed the revocation to the district court. On June 6, 1983, Thomas made application to the county court for his compensation and expenses, $27,453.81, and for $11,726.79 as a reasonable attorney fee for Birmingham, including costs of $228.79. After objections were filed this application was dismissed by Thomas on July 18, 1983. On June 30, 1983, the district court reversed the revocation of Thomas as special administrator and special letters were reissued to Thomas on July 11, 1983. He forthwith drove to Omaha and collected the estate funds from the First National Bank; he then made the following disbursements: $30,486.81 as compensation to himself, court costs of $720, a $14 mowing bill, and $15,488 to Birmingham as attorney fees. These payments to appellants represented all their claims for fees and compensation on behalf of Thomas as proponent and as special administrator during the duration of his two appointments.

The powers and duties of a special administrator appointed informally are limited, having "the duty to *collect* and *manage* the assets of the estate, to *preserve* them, to *account* therefor and to *deliver* them to the personal representative upon his qualification . . . . The special administrator has the power of a personal representative under this code *necessary to perform his duties*." (Emphasis supplied.) Neb. Rev. Stat. § 30-2459 (Reissue 1979).

An interested party filed a motion, § 30-2482, to review Thomas' disbursements. After hearing, a judgment was filed October 12, 1983, including these findings and orders: Thomas was allowed $1,245 attorney fees for 20 3/4 hours' services between June 30 and July 21, 1982, in preparing documents as proponent for the probate of the Thomas will, and $1,080 attorney fees for 18 hours' services in his revocation appeal, for a total of $2,325 attorney fees. He was allowed compensation, as personal representative, of $370 for 18 1/2 hours' services, and expenses of $65.69. His total allowances were $2,760.60; he was ordered to repay the estate $27,725.92. Birmingham was allowed $2,640 attorney fees for 44 hours' services to Thomas as special administrator, and $100 expenses; he was ordered to repay the estate $12,748. All ordered reimbursements were due within 10 days at 9 3/4 percent interest. Appellants were allowed no compensation or fees for the time Thomas was acting as proponent of the Thomas will after July 21, 1982, which is the basis for this appeal. Particularly, the court found, "I further specifically find that all other time charged to the estate by Mr. Thomas was for the sole and only purpose of generating a fee, was of no value to the estate and was not necessary and did not result in any benefit to the estate." Thomas and Birmingham appealed to the district court, where the judgment was affirmed as modified to provide interest at 14 percent after October 5, 1984. They posted security and appealed to this court.

The good faith required in § 30-2481 is an ultimate fact for the court's decision upon all of the evidence. *Matter of Estate of Brady*, 308 N.W.2d 68 (Iowa 1981). There are no rules defining it; rather, it depends upon the peculiar facts and circumstances existing in each case, including the duties imposed upon him by law. All parties agree that as the nominated personal

representative in Lela's will, Thomas had a duty to file it for probate, followed by a duty to defend it. Thomas' good faith closely relates to these duties. The first duty is clear and it was performed. The extent of the duty to defend is not clear, again depending upon the facts and circumstances in each case, bearing in mind that he had a high degree of trust and responsibility as the nominee and as imposed by the Code of Professional Responsibility adopted by this court.

Appellants cite *In re Estate of Healy*, 247 Minn. 205, 76 N.W.2d 677 (1956), that interprets a statute similar to § 30-2481. "We believe that the only reasonable interpretation of 'good faith and with just cause' . . . relates . . . to the executor's honest, even though mistaken, belief in the validity of the will." *Id.* at 209, 76 N.W.2d at 680. While Thomas' testimony that he honestly believed in the validity of the Thomas will was relevant and a factor in the "good faith" issue, its weight and credibility was for the trier of fact, along with all the other evidence.

No purpose would be served to further review the evidence; however, the court made these findings. As the county court noted, Thomas' statement contained 26 single-line pages which with Birmingham's 5 pages totaled 700 hours; Thomas never collected any estate assets except from the First National Bank, which he used to pay two bills and the fees to himself and Birmingham; all hours were charged at a lawyer's rate; during the will contest, all interested parties in the Thomas and Webster wills and the heirs at law were represented by their own counsel, except some minor interests valued at $27,000; Thomas did not participate in the contest settlement; he charged an hourly rate for auto trips that could have been handled by mail; the fees in question were paid without notice and hearing; there was an overlapping of charges made by the appellants; and Thomas made a statement to Randall Hanson, attorney for the First National Bank, "You know we're in this for the attorney fee, don't you?" which he explained was a joke, but Hanson felt otherwise.

Matter of Estate of Painter, 671 P.2d 1331 (Colo. App. 1983), held that to collect fees under their version of Unif. Prob. Act § 3-720, 8 U.L.A. 343 (1983), the same section upon

which § 30-2481 is based, the fees must necessarily have been related to services rendered to benefit the estate, rather than to benefit the personal interest of the administrator or estate's counsel. See, also, *Matter of Estate of Estes*, 134 Ariz. App. 70, 654 P.2d 4 (1982); *Matter of Estate of Stephens*, 117 Ariz. App. 579, 574 P.2d 67 (1978).

From a careful reading of the court's judgment and the evidence, we conclude that the finding "that all other time charged to the estate by Mr. Thomas was for the sole and only purpose of generating a fee" was a finding that Thomas did not act in good faith after July 21, 1982, and that such was the basis for denying appellants the compensation, fees, and expenses here claimed. There was no error in that finding, and it is not necessary to discuss the other claimed errors under § 30-2481.

Lastly, appellants complain that Judge Riley should have recused himself upon their oral motion made at the commencement of the fee allowance hearing, for the reason that he had disqualified himself at an earlier conservatorship hearing in October 1982. Prior to denying the motion, Judge Riley explained in the record that he previously disqualified himself to avoid the appearance of bias because he was personally acquainted with both the conservator and the decedent during her lifetime; that since the will contest had been settled, there no longer existed any reason for his disqualification on any grounds.

When the cause for disqualification in the first instance has been removed, a judge may assume supervision and jurisdiction in the case. See *Flannery v. Flannery*, 203 Kan. 239, 452 P.2d 846 (1969).

> A motion to disqualify a trial judge on account of prejudice is addressed to the sound discretion of the trial court. [Citation omitted.] Generally, the ruling on a motion to disqualify a trial judge on the ground of bias and prejudice will be affirmed on appeal unless the record establishes bias and prejudice as a matter of law.

Kennedy v. Kennedy, 205 Neb. 363, 365, 287 N.W.2d 694, 696 (1980). See, also, Model Code of Judicial Conduct Canon 3 (1981).

Neb. Rev. Stat. § 24-315 (Reissue 1979) enumerates the

grounds for the disqualification of a judge, none of which apply here. The record fails to show either personal bias, prejudice, or an abuse of discretion.

It is noted that there was no cause shown for the untimely filing without notice of the oral disqualification motion, such being a practice that is discouraged.

There is no error in this record.

AFFIRMED.

JOHN B. TIMMERMAN, APPELLANT, V. AMERICAN TRENCHER, INC., ET AL., APPELLEES.

368 N.W.2d 502

Filed June 7, 1985. No. 84-346.

1. **Corporations.** A corporation which purchases the assets of another corporation does not succeed to the liabilities of the selling corporation unless (1) the purchasing corporation expressly or impliedly agreed to assume the selling corporation's liability; (2) the transaction amounts to a consolidation or merger of the purchasing and selling corporations; (3) the purchasing corporation is merely a continuation of the selling corporation; or (4) the transaction has been entered into fraudulently to escape liability for the obligations of the selling corporation.
2. _____. Commonality of officers, directors, or stockholders is an important consideration in determining whether a purchasing corporation is but a continuation of the corporate entity of a selling corporation.
3. _____. The fact that a purchasing corporation continues the business operations of a selling corporation does not, in and of itself, establish that the purchasing corporation is a continuation of the corporate entity of the selling corporation.
4. **Summary Judgment.** A summary judgment does not lie where the ultimate inferences to be drawn from material facts as to which there is no genuine issue are not clear.

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

Thomas A. Grennan and Larry E. Welch of Gross, Welch, Vinardi, Kauffman & Day, P.C., for appellant.

William M. Lamson and Joni R. Kerr of Kennedy, Holland, DeLacy & Svoboda, for appellees.

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

CAPORALE, J.

Appellee American Trencher, Inc., purchased the assets of and assumed a certain liability of Bradco, Inc. Appellant, John B. Timmerman, filed suit against American Trencher and others, alleging he was injured by a defectively designed and unreasonably dangerous drophammer manufactured by Bradco. The trial court sustained American Trencher's motion for summary judgment. In this appeal Timmerman urges the trial court erred in concluding that American Trencher was entitled to judgment as a matter of law. He argues that the facts support an inference that American Trencher is a continuation of the corporate entity of Bradco. We agree with Timmerman and therefore reverse and remand for further proceedings.

Both Timmerman and American Trencher acknowledge that the controlling rule of substantive law is set forth in *Jones v. Johnson Machine & Press Co.*, 211 Neb. 724, 320 N.W.2d 481 (1982), also a products liability action. Therein, various corporations succeeded to the corporation which had manufactured the allegedly defective product. In affirming the trial court's summary judgment dismissing the action against the successor corporations, we adopted the rule that a corporation which purchases the assets of another corporation does not succeed to the liabilities of the selling corporation unless (1) the purchasing corporation expressly or impliedly agreed to assume the selling corporation's liability; (2) the transaction amounts to a consolidation or merger of the purchasing and selling corporations; (3) the purchasing corporation is merely a continuation of the selling corporation; or (4) the transaction has been entered into fraudulently to escape liability for the obligations of the selling corporation.

There is no dispute as to any material fact relating to the arrangement leading to the creation of American Trencher. The ultimate inference to be drawn from those facts is, however, another matter.

Bradco was incorporated in Iowa in 1964 and did business at Delhi, Iowa, a small community of about 500 residents. It was dissolved in 1976, after the sale of its assets on March 31, 1976, for failure to file its 1976 annual report.

The Schnittjer brothers, Bradley and Roger, were, together, either the majority shareholders or virtually so from the time of Bradco's incorporation to the time of its dissolution. At that time Roger and Bradley owned approximately 46 percent of Bradco's capital stock; they and other Schnittjer family members owned a combined total of 73 percent. At one time or another a total of approximately 40 people owned stock in Bradco, but most owned a very small amount, usually less than 1 percent, and a substantial number of these shareholders were either relatives of the Schnittjers or residents of Delhi.

The final officers of Bradco were Bradley, president, Patrick Lenane, secretary, and Mary Nefzger, temporary secretary. Roger had been the vice president until August of 1975, when he resigned in an effort to save money. Bradley served as Bradco's engineer, and both Schnittjer brothers were involved in Bradco's day-to-day operations.

Roger was Bradco's lone director at the time Bradco's assets were sold. Russell Schnittjer and the other director, Richard Sutton, had resigned as such approximately 3 weeks earlier.

In the mid-1970s Bradco began to experience financial difficulties. At that time it had a number of unsecured creditors and two secured creditors, the Delhi Savings Bank and the Iowa Business Development Credit Corporation. The bank was sold under conditions whereby its sellers retained the loan. The fact that this loan was retained by the sellers of the bank has no legal significance to the issue before us, and we therefore refer to this loan as if it continued to be owned by the bank. Each secured loan was delinquent, and the secured creditors demanded that Bradco pay the delinquent loans in full. As a consequence, it became impracticable for Bradco to continue operating, since substantially all of its assets served as collateral for these two loans.

Bradley and a financial consultant-"venture capitalist" began exploring alternatives to save the business. Any thought of reorganizing under the federal bankruptcy law was rejected

because there was not enough money to even pay legal expenses. Since there were no other viable alternatives, either the consultant-capitalist or Bradley, or both, contacted the credit corporation about the possibility of its extending credit to a new venture which would be formed to manufacture the same product line as manufactured by Bradco. The credit corporation agreed to extend credit to such a venture under certain conditions, including an infusion of capital to pay off the bank loan.

In accordance with this agreement American Trencher was then incorporated on March 15, 1976. On March 17, 1976, Bradley and Roger met as the sole members of the board of directors of American Trencher and authorized American Trencher to bid on the assets of Bradco.

On March 18, 1976, Bradley, as Bradco's president, signed an agreement appointing the credit corporation as trustee and receiver of Bradco, thereby allowing the credit corporation to take possession of all the property listed in its security agreement without any judicial action and to also manage or sell such property. The single attorney acting for both Bradco and American Trencher testified that to do otherwise would merely postpone the inevitable, there being no question about the enforceability of the two secured loans.

Bradco's assets were then sold at a public auction held on March 31, 1976, in Delhi, Iowa. At least 50 people attended the auction, which had been advertised in numerous newspapers, but American Trencher was the only bidder. The Bradco trademark was one of the assets serving as collateral for the credit corporation's loan and one of the assets American Trencher acquired and continues to use on its letterhead.

Bradley then executed an assumption agreement, as president of American Trencher, binding that corporation to payment of the credit corporation loan. Capital contributed by an uncle of the Schnittjer brothers was used to pay off the bank loan. Bradley, Roger, and one of their sisters, Marilyn Schnittjer, as personal guarantors, and Bradco as a corporate entity, signed forms consenting to the assumption by American Trencher. Bradley, Roger, and Marilyn also signed a small business administration guarantee "[i]n order to induce IOWA

BUSINESS DEVELOPMENT CREDIT CORPORATION . . . to consent to the assumption . . . by American Trencher." In addition, Bradley and Roger signed a security agreement listing American Trencher as the debtor.

By April 22, 1976, American Trencher had issued 10,000 shares of stock, 7,000 of which were acquired by members of the Schnittjer family. Bradley and Roger each acquired 2,750 shares for their past service. They paid no cash. Their mother, Agnes Schnittjer, acquired 1,500 shares. The other four shareholders included the consultant-capitalist, who initially acquired 1,000 shares and later acquired an additional 150 shares each from Bradley and Roger.

Elected as officers of American Trencher at an April 6, 1976, meeting were Bradley, president and treasurer, Roger, vice president and secretary, and Robert Downer, assistant secretary. Patrick Lenane, who had served as Bradco's sales manager as well as its secretary, did not continue with American Trencher because there was not sufficient money. Bradley became American Trencher's engineer, as he had been with Bradco.

Although American Trencher had renegotiated with every one of its employees and dealers, on the first day of American Trencher's operations every one of its employees had formerly been employed by Bradco. There was but a day or two work stoppage between the time Bradco ceased and American Trencher began operations. Approximately 90 to 95 percent of Bradco's dealers continued to serve American Trencher.

American Trencher did not honor Bradco's warranties, but parts for Bradco's products were stocked. In fact, at least in the beginning, American Trencher's product line was identical to that of Bradco. American Trencher has continued to manufacture the drophammer which is the subject of this suit, and has also continued to use the Bradco trademark on the drophammer, as well as most other items manufactured previously by Bradco.

American Trencher correctly argues that the fact that it may be continuing the business operations of Bradco does not, in and of itself, establish that American Trencher is a continuation of Bradco's corporate entity. *Jones v. Johnson Machine & Press*

Co., 211 Neb. 724, 320 N.W.2d 481 (1982). As put by *Armour-Dial, Inc. v. Alkar Engineering Corp.*, 469 F. Supp. 1198, 1201 (E.D. Wis. 1979): "The mere fact that the purchaser continues the operations of the seller does not of itself render the purchaser liable for the obligations of the seller; in order to impose liability on the purchaser, it must be shown that the purchaser represents 'merely a "new hat" for the seller.' "

Jones v. Johnson Machine & Press Co., supra, does not undertake to analyze the factors to be considered in determining whether the purchasing corporation is the continuation of the corporate entity of the selling corporation. However, *Douglas Printing Co. v. Over*, 69 Neb. 320, 95 N.W. 656 (1903), provides insight as to the factors to be considered. Douglas Printing Company had three shareholders, each of whom owned one-third of its capital stock. It was not prospering financially, and many of its assets were mortgaged to Carpenter Paper Company. Two of the stockholders decided to transfer all their stock to one of their number, John Douglas. John Douglas then turned over all the printing company's capital stock to the paper company. The paper company then turned over the printing company's assets to a newly formed corporation, Douglas-Watters Company, which in turn gave the paper company a mortgage equal in amount to the paper company's claim against the printing company. The mortgage on the printing company's assets was then released. For a monetary consideration the printing company conveyed all its other assets, including good will, to the Douglas-Watters Company. John Douglas, who was the "leading spirit" of both the printing company and the Douglas-Watters Company, and two Watters brothers became the shareholders of the latter company. It was held that the Douglas-Watters Company was a mere continuation of the Douglas Printing Company and that the former was therefore liable for the printing company's debts. A judgment against the Douglas-Watters Company in favor of a judgment creditor of the printing company was therefore affirmed.

Cases from other jurisdictions follow the same approach and hold that a commonality of officers, directors, or stockholders is an important consideration in determining whether a

purchasing corporation is but a continuation of the corporate entity of a selling corporation. *Leannais v. Cincinnati, Inc.*, 565 F.2d 437 (7th Cir. 1977); *Travis v. Harris Corp.*, 565 F.2d 443 (7th Cir. 1977); *Armour-Dial, Inc. v. Alkar Engineering Corp., supra; Weaver v. Nash Intern., Inc.*, 562 F. Supp. 860 (S.D. Iowa 1983), *aff'd* 730 F.2d 547 (8th Cir. 1984).

The present case is analogous to *Douglas Printing Co.* in that there was commonality of both ownership and leadership between the selling and purchasing corporations, and in that creation of the purchasing corporation simply became a means of refinancing a major secured debt of the selling corporation. Such was not the situation in *Jones v. Johnson Machine & Press Co., supra.* In *Jones* no officer or director of the ultimate purchasing corporation was ever an officer, director, stockholder, or employee of the intermediate purchasing corporation or of the manufacturing corporation, and no officer of either the manufacturing corporation or intermediate purchasing corporation was an officer or director of the ultimate purchasing corporation prior to the latter's purchase. *Jones*, then, represents the factual antithesis of the present case.

American Trencher further argues that it cannot be considered a continuation of the corporate entity of Bradco because American Trencher in reality came into existence involuntarily as the result of the actions of Bradco's creditors. That is to say, there was an involuntary reorganization forced upon Bradco by its secured creditors.

There appears to be authority for American Trencher's position that an involuntary reorganization forced upon a corporation by its creditors ordinarily leaves the unsecured creditors of the predecessor corporation without recourse against the successor corporation. 15 W. Fletcher, Cyclopedia of the Law of Private Corporations §§ 7327-7329 (rev. perm. ed. 1983).

The reasoning of *People ex rel. Donahue v. Perkins & Will*, 90 Ill. App. 3d 349, 413 N.E.2d 29 (1980), cited by American Trencher in support of the above proposition, is, however, instructive. Therein, the State of Illinois filed suit against several defendants, alleging numerous defects in the construction of a building. In the early 1970s, about the same

time defective windows were installed by T-O-W Industries, T-O-W began experiencing financial difficulties. T-O-W obtained a substantial loan from a group of six lenders in exchange for which the lenders received a security interest in all of T-O-W's assets. As part of this transaction, one Wright, T-O-W's president and sole shareholder, put his T-O-W stock in a voting trust, which enabled the lenders to have voting control of the corporation. In 1975 T-O-W became insolvent, and the six lenders then used their voting power to elect their own representatives as directors of T-O-W. A new president and controller, not employees of the lenders, were hired. When it became apparent that T-O-W would fold, the lenders, using their voting power, caused T-O-W's assets to be transferred to an assignee for the benefit of creditors. This assignee was independent of the lenders. The six lenders then developed a plan to form a new corporation, Temp-Tech Industries, Inc., which would acquire T-O-W's assets and pay off the loan. The assignee then sold all of T-O-W's assets, subject to the security interest, to Temp-Tech. Temp-Tech then began operating in the same facilities and made the same products as T-O-W had previously made. Temp-Tech's initial shareholders were the six lenders, and its board of directors were the individuals who had represented the lenders on T-O-W's board. After this transaction T-O-W's charter was revoked for failure to pay the franchise tax. Temp-Tech made payments to T-O-W's secured creditors, but the unsecured creditors were left unpaid. The court determined that the lenders' action of assigning T-O-W's assets for the benefit of creditors was the functional equivalent of foreclosure and represented an involuntary reorganization. After citing the four traditional exceptions to the general rule of nonliability, the reviewing court found that none were applicable and affirmed the dismissal of Temp-Tech as a defendant.

As can readily be observed from comparing the facts of *Perkins & Will* to the facts of the present case, the two appear very similar. There is, however, an important factual difference. In *Perkins & Will* there was no continuity of shareholders. Wright was T-O-W's sole shareholder, and the six lenders were Temp-Tech's initial shareholders. It was the lack of

a commonality of ownership, not the fact there was an involuntary reorganization, which served as the basis for rejecting the argument that Temp-Tech was a mere continuation of T-O-W. In the words of the court, "plaintiff's arguments for 'mere continuation' are not compelling without a finding that the equitable owners of the new corporation had an ownership interest in the [predecessor] corporation." 90 Ill. App. 3d at 354, 413 N.E.2d at 33.

Given the commonality of ownership and leadership between Bradco and American Trencher, it cannot be said the undisputed facts do not support at least an inference that American Trencher is but a continuation of the corporate entity of Bradco.

A summary judgment does not lie where the ultimate inferences to be drawn from material facts as to which there is no genuine issue are not clear. *City Bank & Trust Co. v. Van Andel, ante* p. 152, 368 N.W.2d 789 (1985); *Yankton Prod. Credit Assn. v. Larsen,* 219 Neb. 610, 365 N.W.2d 430 (1985); *De Los Santos v. Great Western Sugar Co.*, 217 Neb. 282, 348 N.W.2d 842 (1984).

Accordingly, the judgment of the district court is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. ROBERT W. PEARSON, APPELLANT.
368 N.W.2d 804

Filed June 7, 1985. No. 84-584.

1. **Criminal Law: Right to Counsel: Effectiveness of Counsel.** A defendant in a criminal action is not only entitled to counsel but to the effective assistance of counsel.
2. **Criminal Law: Effectiveness of Counsel.** The standard for determining whether an attorney adequately represented a criminal defendant is whether the attorney,

in representing the accused, performed at least as well as a lawyer with ordinary training and skill in the criminal law in the area. He is also required to conscientiously protect the interests of the client.

3. **Effectiveness of Counsel: Proof.** The burden to prove ineffectiveness of counsel is upon the person challenging the competency of counsel.
4. **Convictions: Effectiveness of Counsel: Proof.** In order to successfully attack a conviction because of ineffective assistance of counsel, it is necessary that the defendant prove that prejudice resulted to him because of such ineffectiveness.
5. **Effectiveness of Counsel: Proof.** The defendant must show 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.
6. **Post Conviction: Appeal and Error.** In a proceeding for post conviction relief, the findings of the trial court will not be disturbed on appeal unless clearly erroneous.
7. **Entrapment: Proof.** In order to substantiate the defense of entrapment, it must be shown that the government induced the defendant to commit the crime charged and that defendant's predisposition to commit the crime was such that defendant was not otherwise ready and willing to commit the offense on any propitious opportunity.
8. **Police Officers and Sheriffs: Entrapment.** Merely because a police officer has afforded a defendant a favorable opportunity for commission of a crime already conceptualized in the accused's mind, it is not entrapment.
9. **Jury Instructions.** It is the duty of the trial court, upon request of the accused, to instruct the jury upon any valid defense if there is credible evidence to support it.
10. **Jury Instructions: Effectiveness of Counsel.** Failure of counsel to request a jury instruction which finds support in the record may constitute ineffective assistance of counsel, which may require the granting of relief only if it appears that the defendant was prejudiced by counsel's conduct.
11. **Entrapment.** The defense of entrapment is comprised of two essential elements: (1) The defendant must not have been predisposed to commit the crime; and (2) The defendant must have been improperly induced by law enforcement officers to commit the crime.
12. **Entrapment: Proof.** If the defendant has submitted no more than a scintilla of credible evidence tending to prove entrapment, the question of entrapment then becomes one of fact to be decided by the jury.

Appeal from the District Court for Washington County: DARVID D. QUIST, Judge. Affirmed.

Kirk E. Naylor, Jr., 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.

Following the affirmance by this court of defendant's conviction for the felony offense of delivering cocaine, *State v. Pearson*, 215 Neb. 339, 338 N.W.2d 445 (1983), he filed a motion for post conviction relief, alleging ineffective assistance of counsel. That motion was denied and he has appealed. We affirm.

As stated in *State v. Pearson, supra*:

> Critical to the conviction of the defendant were two tape recordings of telephone conversations between the defendant and Paul R. Wagner, supervisor with the State Patrol drug division. Wagner testified in substance that he was acquainted with the defendant; that during the 3 or 4 months preceding the calls in question he had approximately 20 phone conversations and 6 personal meetings with the defendant . . . .

Id. at 340, 338 N.W.2d 445-46.

It was the defendant's contention that from the inception of the prosecution, trial defense counsel had told defendant and his family that his only viable defense was entrapment. In his opening statement to the jury, defense counsel argued that the defendant was badgered and harassed by the law enforcement officials and that he had no intent to deliver anything, but was entrapped by the particular officer. A similar argument was made in his closing statement.

Defendant further insists that although the evidence supported the giving of a jury instruction on entrapment, none was requested by defense counsel, and, by inference at least, we conclude that none was given by the trial court.

According to defense counsel's deposition testimony, he did not request an entrapment instruction because, in his opinion, it was not necessary and there was the possibility that the court would not have allowed it due to the fact that he did not feel the court believed the defendant's testimony. He came to this conclusion even though he realized the court, the judge, was not the trier of fact in the case.

A defendant in a criminal action is not only entitled to counsel but to the effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 90 S. Ct. 1441, 25 L. Ed. 2d 763

(1970). The standard for determining whether an attorney adequately represented a criminal defendant is whether the attorney, in representing the accused, performed at least as well as a lawyer with ordinary training and skill in the criminal law in the area. He is also required to conscientiously protect the interests of the client. *State v. Hochstein*, 216 Neb. 515, 344 N.W.2d 469 (1984).

The burden to prove such ineffectiveness is upon the person challenging the competency of counsel. The record must affirmatively support a claim of ineffective assistance of counsel, and the assistance is not to be judged by hindsight. *State v. Hochstein, supra.*

In order to successfully attack a conviction because of ineffective assistance of counsel, it is necessary that the defendant prove that prejudice resulted to him because of such ineffectiveness. It is not sufficient for the defendant to show that the deficiency of counsel had some conceivable effect on the outcome of the proceeding. "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." *Strickland v. Washington,* 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Finally, as a preliminary rule, we must remember that in a proceeding for post conviction relief, the findings of the trial court will not be disturbed on appeal unless clearly erroneous. *State v. Hochstein, supra.*

In light of the foregoing rules it is necessary to examine the record to determine whether it would have supported the giving of an instruction on entrapment.

In order to substantiate the defense of entrapment, it must be shown that the government induced the defendant to commit the crime charged and that defendant's predisposition to commit the crime was such that defendant was not otherwise ready and willing to commit the offense on any propitious opportunity. *State v. Swenson*, 217 Neb. 820, 352 N.W.2d 149 (1984).

In *Swenson, supra*, we said:

> In order to submit the defense of entrapment to the jury, a defendant's evidence of entrapment must be "more than a

> scintilla." [Citations omitted.] To be more than a scintilla, evidence cannot be vague, conjectural, or the mere suspicion about the existence of a fact, but must be real and of such quality as to induce conviction. . . .
>
> . . . .
>
> . . . An undercover police officer's merely affording the defendant a favorable opportunity for commission of a crime already conceptualized in the accused is not entrapment.

Id. at 824-25, 352 N.W.2d at 153.

Officer Wagner testified that he met the defendant in April of 1982 and from that time until August 17 had had approximately 20 phone conversations and 6 face-to-face meetings with Pearson. It was the August 16 phone conversation that set up the August 17 drug delivery.

The August 17 delivery was actually made by the defendant. Wagner testified that during the course of that conversation, defendant offered to deliver more of the cocaine that evening at 120th and L Streets in Omaha because he had to make another delivery that night.

During cross-examination, Wagner denied that defendant ever told him that he did not want to do business with him; he admitted that defendant was naive in the way he went about his business; but nevertheless he insisted that defendant had a great deal of knowledge as far as the drug activities were concerned.

As part of the State's case, recordings of certain telephone conversations between the defendant and Wagner were played to the jury. These calls were made on June 24, July 26, 27, and August 16 and 17. During these calls, defendant told Wagner he was getting into the "toot" business and had a new connection that had been fronting it out for him. Pearson told Wagner he was able to get some additional drugs. Defendant volunteered to try to get Wagner 1 or 2 ounces of cocaine for $2,100 per ounce.

Against this rather overwhelming evidence of defendant's apparent willingness, even eagerness, to engage in drug trafficking is the testimony of the defendant himself.

Pearson testified that after meeting Wagner in April the officer called him constantly, wanting to buy drugs. His reply

was always that he was not selling drugs but his roommate was. Pearson claimed he received at least 10, possibly 15, phone calls wanting him to sell 5 pounds of marijuana, which he said he could not do. Defendant insisted he told the officer four or five times he was not involved personally and that he would have to talk to his roommate.

Pearson's explanation as to why he made the responses he did during the recorded calls, offering to sell drugs, was that he was "[j]ust talking big. . . . just talking out of my ears. To think I was a big shot." He said that after he had received six or seven calls, he decided to arrange the sale on August 17 as a favor to his roommate. He said he did not have any intent to sell or deliver drugs until "this guy kept calling me . . . I was scared of him. I didn't know what to do."

Pearson claimed his roommate would not sell Wagner any drugs, but told him, Pearson, to do it, "[s]o, I did it as a favor for him . . . ." He said he would not have delivered any drugs if the party had not constantly called him and that he never had any intent to deliver drugs in the first place "except for him just calling me." Defendant explained his offer to give Wagner a better price if he would buy more of a quantity was that he was just blowing smoke, "talking big, which I have done before."

According to defendant's trial counsel, he abandoned the entrapment theory of defense and relied on a lack of intent to commit the crime as being the stronger defense.

It is the duty of the trial court, upon request of the accused, to instruct the jury upon any valid defense if there is credible evidence to support it. *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984). Failure to request such a jury instruction may constitute ineffective assistance of counsel, *Grooms v. State*, 320 N.W.2d 149 (S.D. 1982), *Corsa v. Anderson*, 443 F. Supp. 176 (E.D. Mich. 1977), which may require the granting of relief only if it appears that the defendant was prejudiced by counsel's conduct, *McNulty v. Olim*, 488 F. Supp. 1384 (D. Hawaii 1980).

Stated another way, in order to be entitled to relief under such circumstances, the defendant must show that there is a reasonable probability that but for counsel's ineffective assistance, the result of the proceeding would have been

different. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington,* 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Did the record support the giving of an instruction on entrapment? The defense of entrapment is comprised of two essential elements: (1) The defendant must not have been predisposed to commit the crime; and (2) The defendant must have been improperly induced by law enforcement officers to commit the crime. *State v. Parks*, 212 Neb. 635, 324 N.W.2d 673 (1982). If the defendant has submitted more than a scintilla of evidence tending to prove entrapment, the question of entrapment then becomes one of fact to be decided by the jury. *State v. Parks, supra.*

At best, defendant made a conclusory statement that he would not have delivered any drugs in the first place except for Wagner's constant calls. His explanation that he was "blowing smoke," talking big, or making the sale as a favor to his roommate does not establish that he was not predisposed to commit the crime or that he was improperly induced by law enforcement officers to do so.

We do not believe there was more than a scintilla of credible evidence to support a defense of entrapment. At most, his testimony went to the matter of lack of intent, which was what the defense counsel argued. Post conviction relief was properly denied. The judgment of the district court is affirmed.

AFFIRMED.

LINDA TURNER, APPELLANT, V. METRO AREA TRANSIT, APPELLEE.
368 N.W.2d 809

Filed June 7, 1985. No. 84-607.

1. **Workmen's Compensation: Damages: Subrogation: Statutes.** When an employee sues and recovers damages from a third party for injuries received, an employer is statutorily entitled to subrogation for amounts paid to the injured employee as workmen's compensation payments. Neb. Rev. Stat. § 48-118

(Reissue 1984).

2. **Workmen's Compensation: Subrogation: Waiver.** When an employee settles with a third party for injuries received, waiver of an employer's statutory right to subrogation for future payments of benefits will not be inferred absent a showing of either an agreement by the employer to a settlement, which by its terms excludes reimbursement for future benefits paid, or other such action intentionally and voluntarily relinquishing that right.
3. _____: _____: _____. Mere receipt by the employer of its subrogated interest for compensation benefits paid does not waive its right to future payments or offsets.

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

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

Melvin C. Hansen of Hansen, Engles & Locher, P.C., for appellee.

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

WHITE, J.

At issue in this appeal from the judgment of the Workmen's Compensation Court is the question of whether an employer's insurer is entitled to treat as advances against possible future compensation payments amounts received in settlement by an employee from a third-party tort-feasor in excess of compensation benefits paid by the employer. The court concluded that the employer's insurer was entitled to such credit, and the employee appeals. We affirm.

Linda Turner, appellant, was injured when the Metro Area Transit bus she was operating was struck by the third party's automobile. Appellant asserted a claim against the third party. As a result of negotiations between the parties, the third party paid the sum of $23,617.82 in full settlement of the appellant's claim. The appellee, Metro Area Transit, and its compensation insurer agreed to the settlement and received an agreed amount in payment, consisting of 67.5 percent of its subrogation interest. The balance of the recovery, after payments of attorney fees, costs, and compensation advances, was retained by the appellant.

After the settlement appellant was temporarily totally disabled for 1 week and incurred additional medical expenses. The appellee refused to make any further payment and claimed it was entitled to set off the expense against the sum received by appellant. The Workmen's Compensation Court generally found for the employer and held that it was entitled to a credit in the amount of $5,600.09. This appeal followed.

The right of an employer to subrogation for amounts paid to the injured employee as workmen's compensation payments is well established in Nebraska statutory law. Rev. Stat. § 3659 (1913) provided:

> Where a third person is liable to the employe or to the dependents, for the injury or death, the employer shall be subrogated to the right of the employe or to the dependents against such third person, and the recovery by such employer shall not be limited to the amount payable as compensation to such employe or dependents, but such employer may recover any amount which such employe or his dependents would have been entitled to recover. Any recovery by the employer against such third person, in excess of the compensation paid by the employer after deducting the expenses of making such recovery, shall be paid forthwith to the employe or to the dependents, and shall be treated as an advance payment by the employer, on account of any future installments of compensation.

The quoted language remains a part of Neb. Rev. Stat. § 48-118 (Reissue 1984).

In *Muncaster v. Graham Ice Cream Co.*, 103 Neb. 379, 172 N.W. 52 (1919), and in *Thomas v. Otis Elevator Co.*, 103 Neb. 401, 172 N.W. 53 (1919), this court construed § 3659. Notwithstanding the language of the section, we decided in *Muncaster* that

> [u]nder the provisions of section 3659, the legislature intended, beyond question, to give to the injured employee a right of action where the injury complained of grew out of carelessness or negligence of a third party, and we hold that plaintiff has the right to maintain this cause of action under section 3659, and is bound under its provisions to strictly follow the procedure provided for,

> and, in case of recovery of damages, the funds must be distributed in the matter of expense, etc., under the provisions of this act. Evidently the intent of the legislature was not to limit an employee to the recovery only of the workmen's compensation act; but when, as a matter of justice, the employee was entitled to recover a greater compensation than is provided for in the act, then he had the right to proceed under the provisions of section 3659, and to recover as much as a jury would warrant for his damages and injuries, and, after so recovering, to deduct therefrom the necessary expenses which his employer had been to in paying out under the provisions of the act. In other words, the plain provisions of this act must be carefully and accurately followed in all of its provisions.

103 Neb. at 380-81, 172 N.W. at 52.

In *Thomas* we again reiterated that the employee retains his right of action against the third party, and the third party may not complain when the employer has assigned his subrogation interest to the employee.

In 1963 the above section (then § 48-118 (Reissue 1960)) was amended. The announced purpose of the amendment "would . . . allow the attorney fees [employee's] to be prorated and one party must give to the other party notice of filing of suit . . . ." Labor and Public Welfare Committee Hearing, L.B. 699, 73d Leg. 1 (Apr. 24, 1963). See, also, *Gillotte v. Omaha Public Power Dist.*, 189 Neb. 444, 203 N.W.2d 163 (1973).

Section 48-118 provides that

> nothing in this section or act shall be construed to deny the right of an injured employee or of his personal representative to bring suit against such third person in his own name or in the name of the personal representative based upon such liability, but in such event an employer having paid or paying compensation to such employee or his dependents shall be made a party to the suit for the purpose of reimbursement, under the above provided right of subrogation, of any compensation paid. . . .
>
> . . . A settlement of any lawsuit commenced under the provisions of this section shall be void unless (1) such

> settlement and the distribution of the proceeds of the settlement thereof are agreed upon in writing by the employee or his personal representative and the insurer of the employer if there be one, and if there be no insurer, then by the employer, or (2) in the absence of such agreement, such settlement is approved by the court before which the action is pending.

Both parties concede that in the settlement documents no mention is made of the right of appellee, Metro Area Transit, or its compensation carrier to set off future claims against the balance recovered by appellant. Professor Larson suggests that "[t]he carrier's right to have the excess of a third-party recovery credited against future compensation liability is a right that can be waived as part of a settlement." 2A A. Larson, The Law of Workmen's Compensation § 74.31(e) at 14-427 (1983).

In *Flott v. Wenger Mixer Manufacturing Co.*, 189 Kan. 80, 367 P.2d 44 (1961), that court held that the carrier's agreement to continue making all future disability benefits and medical expenses waived the provision of a Kansas statute that third-party recovery in excess of compensation payments paid will be credited against future compensation payments.

Larson adds, "Note that this waiver may come about, not necessarily as a result of an express waiver, but also as the result of agreeing to a settlement which does not by its terms include reimbursement for future benefits." 2A A. Larson, *supra* at 14-428; *Hladek v. John A. Dalsin & Son*, 310 Minn. 178, 245 N.W.2d 593 (1976). This question has not previously been considered by this court.

Has the appellee waived its right to offset future payments? Waiver, according to Black's Law Dictionary 1417 (5th ed. 1979), is "[t]he intentional or voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right . . . ." The right of subrogation in these cases arises by statute. The simple acceptance of payment for what one is by statute entitled to receive cannot waive the rights to future payments or offsets, absent something more than mere receipt of money due.

We note that the Supreme Court of Pennsylvania in *Rollins Outdoor Advertising v. W.C.A.B.*, 506 Pa. 592, 487 A.2d

794 (1985), held that provisions waiving an employee's right to future compensation and an employer's acceptance of a payment in full of accrued subrogation were void as against public policy, and also that the employer was entitled to credit for future payments against the proceeds of a third-party settlement. However, no agreement is before us. We can no more infer from the absence of evidence the waiver of the employee's right to future compensation after a third-party settlement than the waiver of the employer's subrogation interest in the excess in the event of future payments.

The judgment of the compensation court is affirmed.

AFFIRMED.

KRIVOSHA, C.J., dissenting.

I must respectfully dissent from the majority opinion in this case. I do so because I do not believe that the majority has properly applied the facts of this case to the law.

The majority quite properly notes that under the provisions of Neb. Rev. Stat. § 48-118 (Reissue 1984):

> Any recovery by the *employer* against such third person, in excess of the compensation paid by the employer after deducting the expenses of making such recovery, shall be paid forthwith to the employee or to the dependents, and shall be treated as an advance payment by the employer, on account of any future installments of compensation . . . .

(Emphasis supplied.) Section 48-118, however, further provides that the employee as well may seek recovery against a third party, in which event an employer having paid or paying compensation to the employee is made a party to the suit for the purpose of reimbursement. However, the language with regard to the effect of future payments found in § 48-118 when the employer brings suit is not found in the act when suit is brought by the employee. One may conclude that if the Legislature omitted the language when discussing the rights of the employee to bring suit, the Legislature intended to relieve the employee of such obligation.

Furthermore, the majority notes that the right to consider such recovery as future payment may be waived by the employer, and, as noted by the majority, such waiver may be the

result of an intentional or voluntary relinquishment of a known right, "or such conduct as warrants an inference of the relinquishment of such right." The majority concludes, however, that "the simple acceptance of payment for what one is by statute entitled to receive cannot waive the rights to future payments or offsets, absent something more than mere receipt of money due." While I do not quarrel with the statement, I do quarrel with its application in the instant case. Here, the employer did not receive "payment for what [it] is by statute entitled to receive" but, rather, compromised and settled its claim for less than what it was entitled to receive. It accepted 67.5 percent of what it was otherwise entitled to receive under the law. It seems clear to me that where one compromises a claim and accepts something less than what one is entitled to receive, the entity accepting the compromise has indeed "waived" what it was otherwise entitled to and should not thereafter be entitled to improve its position. Once the employer has agreed to compromise and accept less, it should not thereafter be entitled to credit on the employee's share of the compromise. It is difficult to imagine what more the employer could have done to manifest its "inference of the relinquishment of such right."

The Pennsylvania Superior Court, in the case of *Meehan v. Philadelphia*, 184 Pa. Super. 659, 136 A.2d 178 (1957), was presented with a somewhat similar situation. In that case the employer and employee joined in an action against a third party to recover for injury sustained by the employee for which compensation paid or payable, recognized an exception where the employer is a party to the employee's third-party settlement. In essence, it held that where the employer joins in the settlement with a third party, thereby compromising his claim, employer attempted to credit the employee's share of the settlement against its additional compensation liability. The court, while acknowledging that the employer is generally entitled to recover from the third party the full extent of compensation paid or payable, recognized an exception where the employer is a party to the employee's third-party settlement. In essence, it held that where the employer joins in the settlement with a third party, thereby compromising his claim,

the settlement is as to both the compensation paid by the employer and that payable in the future. In so holding, the Pennsylvania court said at 184 Pa. Super. at 666, 136 A.2d at 181:

> "We think the city in compromising its claim in the trespass action, gave up its subrogation rights in return for the amount then paid, and that it is now bound by that settlement."
>
> The city in compromising its claim in the trespass action, gave up any additional subrogation rights in return for the amount then paid.

A similar result was reached by the Minnesota court in *Hladek v. John A. Dalsin & Son*, 310 Minn. 178, 245 N.W.2d 593 (1976).

We are repeatedly advised that the Workmen's Compensation Act is to be construed liberally so that its beneficent purposes may not be thwarted by technical refinement of interpretation. See, *Friedeman v. State*, 215 Neb. 413, 339 N.W.2d 67 (1983); *Wilson v. Brown-McDonald Co.*, 134 Neb. 211, 278 N.W. 254 (1938). In interpreting the act as we have herein, this employee has now become exempted from the provisions of the Nebraska Workmen's Compensation Act until such time as she receives more than $5,000 in benefits. What is it that the employer compromised? I cannot believe that this is what the Legislature intended. If, indeed, the majority is correct in its view, one would hope that the Legislature would see fit to correct the provisions of the act so as to permit § 48-118 to be consistent with the intended beneficent purposes of the Workmen's Compensation Act.

SHANAHAN, J., dissenting.

In view of *Meehan v. Philadelphia*, 184 Pa. Super. 659, 136 A.2d 178 (1957), and *Hladek v. John A. Dalsin & Son*, 310 Minn. 178, 245 N.W.2d 593 (1976), the better rule appears to be that, when Metro settled its claim against the tort-feasor and gave up its right of future subrogation, Metro correspondingly gave up its right to any credit equal to Turner's share of the settlement. Otherwise, the compromise intended and entered in view of the respective claims of the employer and employee

would be frustrated. The settlement operated not only as a compromise of claims against the third-party tort-feasor but also as a compromise of respective rights in the proceeds of settlement. See *Hladek v. John A. Dalsin & Son, supra.*

GRAND LODGE INDEPENDENT ORDER OF ODD FELLOWS OF NEBRASKA, APPELLEE, V. LAWRENCE D. MARVIN, APPELLANT, DIANA WELSTEAD SANDOBAL ET AL., APPELLEES.

369 N.W.2d 54

Filed June 14, 1985. No. 83-829.

Estoppel. Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person who in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right either of property, of contract, or of remedy.

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

Avis R. Andrews, for appellant.

Thomas B. Thomsen, for appellee Grand Lodge.

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

GRANT, J.

The defendant-appellant, Lawrence D. Marvin, appeals from the October 5, 1983, Dodge County District Court order overruling his motion for new trial. The district court, on December 2, 1982, found for plaintiff-appellee, Grand Lodge Independent Order of Odd Fellows of Nebraska, a nonprofit Nebraska corporation (hereinafter Grand Lodge), on a petition in ejectment removing Marvin from the south 44 feet and the north 4 feet of the south 48 feet of the west 89 feet of Lots 1 and

2 in Block 124 of the City of Fremont, as surveyed, platted, and recorded, in Dodge County, Nebraska. We reverse the decision of the district court, finding, as a matter of law, that the Grand Lodge is estopped from claiming Marvin's sales contract is not valid.

This case arises out of a real estate contract for the sale of property. The local lodge of the Independent Order of Odd Fellows, Centennial Lodge No. 59, in Fremont, Nebraska, a nonprofit Nebraska corporation (hereinafter Fremont Odd Fellows), signed a contract to sell its lodge building to Marvin and to Daniel W. Welstead, Sr., on December 4, 1976. The Fremont Odd Fellows had been in financial trouble and owed $26,574.90 in back taxes on the above-described property. In an effort to avoid the embarrassment of a tax foreclosure, the Fremont Odd Fellows negotiated with Marvin and Welstead for a sale of the property. On August 31, 1976, Marvin and Welstead paid the back taxes on the property, with the aid of $10,000 advanced by the Fremont Lodge. That day they expected to sign a sales contract for the property, but the officers of Fremont Odd Fellows did not appear at the courthouse or at Marvin's attorney's office as agreed. On December 4, 1976, after the delinquent taxes had been paid and before any communication with the Grand Lodge, the Fremont Odd Fellows signed the real estate contract in question. The contract required a deed conveying the property above described to Marvin and Welstead be placed in escrow at the Fremont National Bank & Trust Co. and delivered to Marvin and Welstead when the full purchase price had been paid. A warranty deed was executed by the Fremont Odd Fellows and placed in escrow as agreed. The sales contract listed the sale price of the property as $32,000, the downpayment as $26,574.90 ($10,000 of which had been advanced by the seller, Fremont Odd Fellows, to the buyers and used to pay the delinquent taxes), and the balance due under the contract as $15,625.10 (which included the $10,000 advanced by the lodge). Marvin and Welstead were also required to pay various other expenses of the sale and interest on the balance at the rate of 7 percent per annum simple interest. Marvin and Welstead's monthly payments to the Fremont Odd Fellows were set at

$1,065. This amount was to be paid by monthly payments of $65 cash and $1,000 credit for rent of the building's basement to the Fremont Odd Fellows. The third year, the monthly payments increased to $1,165, $65 cash and $1,100 rental credit. The contract did not provide for payment of rent to the buyers after the third year nor a right of the sellers to rent any part of the building.

On the day that the real estate sales contract was signed, Marvin typed up a document stating that the Fremont Odd Fellows conducted a meeting on December 4, 1976, and certifying that the proper procedures for the sale were carried out according to the bylaws of the Fremont lodge, that the lodge had notified all members in writing, that two-thirds or more of the members had voted to sell, and that the Grand Lodge had given the Fremont Odd Fellows dispensation to sell. This document was signed by the Fremont Odd Fellows' noble grand, the financial secretary, two trustees, Welstead as a past trustee, and the president of the building board, and certified that the statements were true and that the exact minutes of the meeting would be looked up later. Marvin had never been a member of the Fremont Odd Fellows, but was a lifetime member, and had been since 1964, of the Grand Lodge. Marvin testified that he typed up the document for the Fremont Odd Fellows' officers to sign, not at a meeting, but either at his attorney's office or in the Fremont lodge building while the Fremont officers were looking in the basement files for the dispensation they said they had obtained. Marvin also admitted that he knew the Fremont Odd Fellows needed dispensation from the Grand Lodge to sell the property, but he testified that each of the officers who signed the document attached to the real estate contract verbally assured him they had dispensation to sell. There was no testimony from any of the Fremont Odd Fellows who had signed the December 4, 1976, contract that Marvin's testimony was not correct.

The 1970-71 past grand master of the Grand Lodge testified that general dispensation to sell the property had been granted the Fremont Odd Fellows during his tenure but that specific approval to a sale was still necessary. He further testified that no mention was made to Fremont Odd Fellows of the need for

future approval. This dispensation was the only one received by the Fremont Odd Fellows before the signing of the contract of December 4, 1976. After the contract was signed the Fremont Odd Fellows attempted to receive dispensation for the sale which had already occurred. On February 8, 1977, the Grand Lodge sent a letter to the Fremont Odd Fellows allowing it dispensation to sell. This first letter was followed by a second the same day, conditioning the permission on the approval of the sales contract. The evidence shows more than a year of correspondence between the two lodges attempting to get approval of various contracts, even though a contract had been signed on December 4, 1976, and a deed had been deposited in escrow. The minutes of the Fremont Odd Fellows' meetings throughout this period show that Marvin was considered to be the owner and the Fremont Odd Fellows the tenant.

Marvin had taken possession of the building, made regular payments to Fremont Odd Fellows, $1,065 and $1,165 (receiving $1,000 and $1,100 credit for rent to the lodge), paid the real estate taxes in 1977 and succeeding years, and took care of the other expenses of the building. In 1979 Fremont Odd Fellows became defunct, and, according to a provision in its constitution, all its property became the property of the Grand Lodge when it became defunct.

From the time the Fremont Odd Fellows became defunct until July 20, 1981, when the Grand Lodge filed its petition to eject Marvin, Marvin paid the property taxes and tendered the $65 a month to the Grand Lodge. The Grand Lodge, while not cashing any of the checks, allowed Marvin to pay the taxes and did not attempt to return the original downpayment to Marvin.

On July 20, 1981, the Grand Lodge filed a petition to eject the defendant Marvin (who, in the meantime, had purchased Welstead's interest in the property from Welstead's heirs) and for an accounting of the rents and profits. Trial was had to the court on October 12, 1982. On December 2, 1982, the trial court ordered that the Grand Lodge should recover the property in question. On September 7, 1983, the trial court issued "Findings of Fact and Conclusions of Law," which set out the damages to be awarded to the Grand Lodge from Marvin as $1,760.92.

Marvin timely appealed to this court from the denial of his motion for new trial. He sets out 22 assignments of error, only 1 of which is necessary for our disposition of this case: "The Court erred in failing to find that Plaintiff was estopped from denying the validity of the Real Estate Contract."

With regard to this assignment of error, the Grand Lodge contends that since Marvin did not specifically plead estoppel, he is barred from asserting that defense. We have held: " ' "A party entitled to an estoppel need not in all cases formally plead the estoppel. If the facts constituting the estoppel are in any way sufficiently pleaded, he is entitled to the benefit of the law arising therefrom." . . .' " *Greer v. Chelewski*, 162 Neb. 450, 455, 76 N.W.2d 438, 442 (1956), quoting from earlier cases. See, also, *Robbins v. National Life & Acc. Ins. Co.*, 182 Neb. 749, 157 N.W.2d 188 (1968). Marvin has pled such facts.

This case is difficult and confusing factually and procedurally in its creation and disposition. Both parties discuss a "reversionary interest" belonging to the Grand Lodge, although the record shows no prior title in the Grand Lodge. The second dispensation, or permission, of the Grand Lodge occurred after the minutes of Fremont Odd Fellows showed that a sales contract had already been signed, an event which occurred after the de facto sale of August 31, 1976, which apparently occurred when the downpayment was made, which occurred after possession—all precisely in reverse order of normal proceedings.

Despite this confusion, the Grand Lodge managed to file a petition which complied with Neb. Rev. Stat. § 25-2124 (Reissue 1979):

> In an action for the recovery of real property, it shall be sufficient if the plaintiff states in his petition that he has a legal estate therein, and is entitled to the possession thereof, describing the same, and that the defendant unlawfully keeps him out of the possession. It shall not be necessary to state how the plaintiff's estate or ownership is derived.

The Grand Lodge pled that it had a legal estate in the property and was entitled to possession. Marvin, while not directly challenging the proof of the Grand Lodge's legal estate, claimed

an equitable interest in the property under the December 4, 1976, sales contract and the warranty deed held in escrow, as a defense to the ejectment action. The Grand Lodge claimed the contract was voidable for lack of the Grand Lodge's dispensation as required by Fremont Odd Fellows' bylaws and constitution.

Whether there was dispensation for Fremont Odd Fellows to sell its lodge property was a factual question. If dispensation was given the local lodge, the sales contract is valid and Marvin has an equitable interest in the property, which precludes his ejectment. If, however, dispensation was not given, the contract is not valid unless Marvin is a bona fide purchaser without notice. In *Bejot v. Ainsworth Lodge No. 130, I.O.O.F.*, 128 Neb. 631, 259 N.W. 745 (1935), we were faced with a case similar to the one before us. A local lodge of the Odd Fellows incurred some debts without the approval of the Grand Lodge and in violation of the constitution of the Grand Lodge and the bylaws of the local lodge. A third person, not familiar with the Grand Lodge or the local lodge, or their internal regulations, financed a mortgage signed by the local lodge. We held in that case that the constitution and bylaws of the Grand Lodge and local lodge were merely internal regulations and not binding on someone without actual or imputed knowledge of the provisions.

While the mortgagee in *Bejot* had no actual or imputed knowledge of the constitutional provisions limiting the contractual powers of the local lodge, in the case before us Marvin admitted he had actual knowledge of the dispensation requirement. Thus, Marvin is not a bona fide purchaser for value without knowledge, and the contract is voidable if dispensation was not given by the Grand Lodge.

While the real estate contract is voidable if no dispensation was given, it is clear under Nebraska law that Fremont Odd Fellows could not itself deny the validity of the contract. In *O'Toole v. Yunghans*, 211 Neb. 852, 857, 320 N.W.2d 768, 771 (1982), we said:

> One may not acquire title to real estate by estoppel. *Roll v. Martin*, 164 Neb. 133, 82 N.W.2d 34 (1957). However, " ' "a party may estop himself after the arrangements

> have been fully executed from asserting that the title he by his own acts has created or aided in creating is not the true title." . . .' " *Id.* at 140, 82 N.W.2d at 39.

Ejectment is a legal action, but we have held an equitable defense of estoppel is appropriate. *Abbas v. Demont*, 152 Neb. 77, 40 N.W.2d 265 (1949).

> " 'Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, or contract, or of remedy, as against another person who in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right either of property, of contract, or of remedy.' . . ."

Roll v. Martin, 164 Neb. 133, 139, 82 N.W.2d 34, 38 (1957), citing 3 J. Pomeroy, A Treatise on Equity Jurisprudence § 804 (5th ed. 1941).

The fact is undisputed that the Fremont Odd Fellows asserted verbally and in writing that they had dispensation to sell the property to Marvin, and signed a contract and a warranty deed formally stating that fact. Marvin relied on the seller's statements when he signed the contract and paid the back taxes and continued to pay taxes and keep the building in repair. The Fremont Odd Fellows accepted those benefits and are now estopped from claiming there was no dispensation to sell the property.

The next question, then, is whether the Grand Lodge, which succeeded to title to the property of the Fremont Odd Fellows by the operation of internal brotherhood constitutions, is in privity with the Fremont Odd Fellows and subject to the estoppel defense of Marvin. Nebraska case law has not addressed the question of whether a successor corporation is in privity with the corporation it succeeds, and thus makes it liable to a defense of equitable estoppel. In *Focht v. Wakefield*, 145 Neb. 568, 576, 17 N.W.2d 627, 631 (1945), we held, " 'An heir stands in privity with an ancestor, and an estoppel enforceable against the ancestor is likewise enforceable against the heir.' " The logic of binding privies, covering a wide range of persons

and entities, to estoppel claims validly raised against the privy's predecessor is discussed in 31 C.J.S. *Estoppel* § 131 (1964). It has been held that a successor corporation is privy to the defunct corporation it succeeded and thus subject to the estoppel claims against the defunct corporation. See *Union Provision & D. Corp. v. Thomas J. Fisher & Co.*, 49 A.2d 85 (D.C. 1946).

For the same reasons that an heir must stand in privity with an ancestor for purposes of an equitable estoppel defense, we hold a successor corporation must stand in privity with the defunct corporation under which it claims an interest in title. Such a successor corporation is subject to the same equitable estoppel defense as the defunct corporation. Holding thus prevents the Grand Lodge from claiming a greater interest in the property than the predecessor Fremont Odd Fellows could claim. It is also consistent with our rule that only parties and privies may claim a defense of equitable estoppel. *Armstrong v. Armstrong*, 192 Neb. 11, 218 N.W.2d 541 (1974). In this case, making the Grand Lodge subject to Marvin's defense prevents it from regaining the property for which Marvin has expended his money and time, which the Fremont Odd Fellows freely accepted, and from which the Grand Lodge indirectly reaped the benefits.

We find that the Grand Lodge, under this case, is estopped from claiming that the December 4, 1976, contract was voidable because its dispensation was not given to the Fremont Odd Fellows. The remaining 21 assignments of error need not be considered. The cause is remanded to the district court with directions to dismiss the Grand Lodge's petition.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

KRIVOSHA, C.J., and WHITE, J., concur in the result.

FIRST NATIONAL BANK IN ORD, APPELLANT, V. GREENE BUILDING AND SUPPLY, INC., ET AL., APPELLEES.

369 N.W.2d 59

Filed June 14, 1985. No. 83-902.

Summary Judgment: Affidavits. Evidence adduced by cross-examination of an affiant in an earlier summary judgment proceeding cannot be considered an affidavit within the meaning of Neb. Rev. Stat. § 25-1332 (Reissue 1979).

Appeal from the District Court for Valley County: JAMES R. KELLY, Judge. Reversed and remanded.

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

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

William B. Brandt and Robert J. Hallstrom of Brandt, Horan, Hallstrom & Sedlacek, for amicus curiae Nebraska Bankers Association.

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

GRANT, J.

On September 25, 1981, the plaintiff-appellant, First National Bank in Ord (hereinafter bank or plaintiff), filed its petition against Greene Building and Supply, Inc., a Nebraska corporation (hereinafter referred to as the debtor); Robert R. and Betty L. Greene, husband and wife; and John M. and Lucille N. Greene, husband and wife. The petition alleged that the debtor corporation had signed two promissory notes to the bank and that the debtor had duly executed a security agreement granting a security interest to the bank in "all machinery (including automotive equipment), furniture, fixtures, inventory, accounts rec., contract rights, chattel paper, all tangible and intangible personal property, whether now owned or after acquired and all proceeds therefrom." In addition, on June 13, 1979, the debtor corporation gave the bank a security interest in a truck-mounted crane in connection with note No. 5074.

The petition further alleged that on April 18, 1978, defendants Robert R. and Betty L. Greene and John M. and

Lucille N. Greene executed an unlimited guaranty agreement whereby each individual defendant guaranteed the payment of all debts of the debtor corporation whether then existent or later incurred.

The defendants acting jointly filed a general denial. Defendants' counsel then filed a suggestion in bankruptcy indicating that bankruptcy proceedings had been filed on behalf of the debtor corporation and defendants Robert R. and Betty L. Greene. No further action was taken against the debtor corporation or Robert R. and Betty L. Greene. The case continued, under the petition as originally filed, against John M. and Lucille N. Greene (hereinafter Greenes).

On October 11, 1983, the Greenes filed a general denial of all the allegations of the plaintiff's original petition. On this same date, after proper notice, hearing was held on plaintiff's motion for summary judgment against the Greenes. The motion had been earlier filed, and eight exhibits were received in evidence in support of it without any objection from Greenes. These exhibits showed, by the exhibits themselves and by the Greenes' answer to request for admissions, that the Greenes had duly executed the unlimited personal guaranty on April 18, 1978, and that the notes of the debtor were validly executed on June 13, 1979, and January 30, 1981. Exhibit 7 was supported by an affidavit of the bank's loan officer and showed, by a computer printout, that the June 13, 1979, note had apparently been paid off in full on July 13, 1982. Exhibit 7 also showed that payments totaling $79,647.48 had been made on the note of January 30, 1981, leaving a balance due as of September 15, 1983, of $66,758.77 (including interest of $33,318.95). Of the total paid on the note, $27,727.14 was received from "Wolf & Nolte sale account"; $96.19 was a setoff of "DDA #332080"; $500 was received "from United Grain option to purchase lots 6 & 7 Riverside Industrial Addition to City of Ord"; $14,217.42 was received as "proceeds from sale of Lot 6, Riverview Industrial Addition to the City of Ord"; and $35,000 was received as an "[a]greement on credit allowed upon sale of Lot 7, Riverview Industrial Addition to Ord." Plaintiff then rested.

Greenes' counsel then called plaintiff's executive vice president, Gary L. Garnick, as a witness. Plaintiff objected to

any testimony from Garnick for the reason that Garnick's affidavit had been timely filed with the court before the hearing and no opposing affidavits had been filed by defendants "prior to the day of hearing," as required by Neb. Rev. Stat. § 25-1332 (Reissue 1979). Plaintiff's objection was overruled, and Greenes' counsel examined Garnick, over plaintiff's continuing objection, for the stated purpose of establishing that a sale of collateral had been conducted by the debtor corporation; that the plaintiff had advised the debtor to have a sale; and that no written notice of such sale had been given to the Greenes. The Greenes then rested. The trial court then denied plaintiff's motion for summary judgment.

Plaintiff then moved for a rehearing of its motion for summary judgment. This motion was heard, pursuant to notice, on October 31, 1983.

In the meantime, on October 20, 1983, the Greenes filed a motion for summary judgment in their favor, and noticed this motion for hearing on October 31. This motion alleged that there was no controversy as to any facts nor any issue as to the law and that "Plaintiff has failed to comply with Section 9-504 of the Uniform Commercial Code. That said compliance with the aforementioned Section of the Uniform Commercial Code is a condition precedent that must be met before the Plaintiff is allowed to file suit against the Defendants." No affidavits or depositions were attached to, or mentioned in, the motion.

On October 31, 1983, the hearing was held on plaintiff's "Motion for Rehearing," which was treated by the court and the parties as a motion for summary judgment, and on defendants' motion for summary judgment. The exhibits offered at the October 11 hearing were offered and received without objection. Plaintiff's motion for summary judgment was denied by the court.

The Greenes' motion for summary judgment was then heard. Greenes offered "Exhibit No. 1," which was the typed original testimony of Garnick at the prior hearing on October 11, 1983. Plaintiff had not received notice that this document was to be filed by the Greenes in connection with Greenes' motion for summary judgment. The testimony of Garnick was offered to prove that there had been a sale of the collateral; that

the sale had been conducted by the debtor, but partly at the bank's suggestion; that proceeds of the sale had been applied to note No. 60950; and that the Greenes had not been notified of the sale. The bank objected, but the testimony, as typed, was received. The court file and the bank's exhibits were also offered on Greenes' motion for summary judgment and received without objection. The court then granted the Greenes' motion for summary judgment and entered a judgment in favor of the Greenes against plaintiff.

Plaintiff timely appealed to this court alleging in its two assignments of error that the court erred "in admitting oral testimony offered by Defendants at hearing on Plaintiff's Motion for Summary Judgment where the Defendants had given no notice of affidavits in opposition to the motion prior to hearing, and where the issue of repossession had not been framed by the pleadings," and that the court's "finding that the Plaintiffs were required to give notice under *Neb. U.C.C.* § 9-504(3) is contrary to both the law and the evidence." We reverse for the reasons hereinafter set out.

The bank's assignment of error as to the summary judgment procedures is correct and requires reversal without consideration of the bank's second assigned error. The procedures in summary judgment proceedings are established by statute and settled by our decisions. Section 25-1332 provides in part:

> The motion shall be served at least ten days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Here, the testimony of Garnick should have been excluded. That testimony had been adduced on cross-examination by Greenes' counsel at an earlier summary judgment hearing and was typed and presented at the later hearing on Greenes' motion for summary judgment. Greenes have thus introduced evidence in a summary judgment hearing by cross-examining

the affiant. We disapprove of such procedure as changing a hearing on a motion for summary judgment (statutorily required to be on the pleadings, admissions, depositions, and affidavits) to a minitrial.

The testimony could not be considered a deposition because this previous testimony does not fit in, in any way, under rule 32, Nebraska Discovery Rules (rev. 1983), concerning the taking and using of depositions. The testimony could not be considered an "affidavit" within the meaning of § 25-1332. In Neb. Rev. Stat. § 25-1241 (Reissue 1979), an affidavit is defined as "a written declaration under oath, made without notice to the adverse party." If Garnick be considered as the affiant, he has made no "written declaration." Testimony, adduced on cross-examination of an adverse party, cannot be typed up and be considered to be an affidavit.

As stated in *McHenry v. First Nat. Bank*, 216 Neb. 580, 583, 344 N.W.2d 652, 654 (1984), "one is entitled to summary judgment only when there is no genuine issue as to any material fact, the ultimate inferences to be drawn from the facts are clear, and he is entitled to judgment as a matter of law."

With or without the testimony, whether the bank has "disposed" of the collateral in question within the meaning of Neb. U.C.C. § 9-504 (Reissue 1980) is a fact question. The trial court could not determine the factual details of the method by which collateral was disposed of, or even if plaintiff's interest in the collateral was disposed of. The court therefore could not determine, on a summary judgment motion, whether and how plaintiff had disposed of its collateral.

We reverse and remand.

REVERSED AND REMANDED.

LEONARD LEE WELLS, APPELLANT, V. LOREN BARTHOLOMEW, AN INDIVIDUAL DOING BUSINESS AS BARTHOLOMEWS TREE SERVICE, AND BARTHOLOMEWS TREE SERVICE AND WELLS TREE SERVICE, A PARTNERSHIP, APPELLEES.

369 N.W.2d 62

Filed June 14, 1985. No. 83-928.

1. **Motions for New Trial: Time.** Application for a new trial must be made within 10 days after the verdict, report, or decision is rendered.
2. **Motions for New Trial: Appeal and Error: Time.** In the absence of a timely motion for new trial, a notice of appeal must be filed within 1 month after the rendition of the judgment or decree appealed from.

Appeal from the District Court for Gage County: WILLIAM B. RIST, Judge. Appeal dismissed.

E. Scott Otley of Brunette & Otley, and Patrick W. Healey of Healey Law Office, for appellant.

Robert T. Grimit of Baylor, Evnen, Curtiss, Grimit & Witt, for appellee Loren Bartholomew.

Kenneth E. Mahlin, for appellee partnership.

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

PER CURIAM.

Appellant, Leonard Lee Wells, brought suit in the district court for Gage County against appellees, Loren Bartholomew, doing business as Bartholomews Tree Service, and the partnership of Loren Bartholomew (doing business as Bartholomews Tree Service) and Leonard Lee Wells (doing business as Wells Tree Service). Wells alleged that while in pursuit of the business of the partnership, Bartholomew negligently allowed his chain saw to swing into appellant, striking Wells in the left knee and causing injury. Appellees moved for summary judgment on the ground that the partnership agreement barred the action. The district court granted summary judgment, and this appeal followed.

The order of the trial court granting summary judgment was signed and filed in the office of the clerk of the district court on October 26, 1983. The record shows that appellant filed his

motion for new trial on Tuesday, November 8, 1983. The motion for new trial indicates that copies of the motion for new trial were mailed on November 4, 1983, to all counsel of record.

It is clear that appellant has not complied with the requirements of Neb. Rev. Stat. § 25-1143 (Reissue 1979), which requires that application for a new trial "must be made, within ten days, . . . after the verdict, report or decision was rendered" unless the party applying was unavoidably prevented from timely filing the motion or is basing his motion on newly discovered evidence. In this case there is no showing as to any unavoidable reason for the delay in filing the motion, nor is the motion based on any newly discovered evidence. As stated in *Nebraska Children's Home Soc. v. Collins*, 195 Neb. 531, 536, 239 N.W.2d 258, 261 (1976), "A motion for a new trial which is not filed within the time specified by statute is a nullity and of no force and effect." See, also, *Sederstrom v. Wrehe*, 215 Neb. 429, 339 N.W.2d 74 (1983).

In the absence of a timely motion for new trial, a notice of appeal must be filed within 1 month after the judgment or decree was rendered. The record shows that the appellant's notice of appeal filed December 9, 1983, was not filed within 1 month after the judgment was rendered, as required by Neb. Rev. Stat. § 25-1912 (Cum. Supp. 1984).

This court cannot act without jurisdiction. The record presented to us by appellant shows this court is without jurisdiction to hear this appeal.

APPEAL DISMISSED.

IN RE ESTATE OF RONALD W. KENNEDY, DECEASED. WAYNE KENNEDY, APPELLANT, V. MARY JOYCE KENNEDY BOOKER, ADMINISTRATRIX OF THE ESTATE OF RONALD W. KENNEDY, DECEASED, APPELLEE.

369 N.W.2d 63

Filed June 14, 1985. No. 84-019.

1. **Decedents' Estates: Executors and Administrators.** The general rule is that a personal representative cannot deal with the estate's assets for personal profit or gain.
2. **Decedents' Estates: Debtors and Creditors: Joint Tenancy.** Upon the death of one joint tenant, the land passes to the surviving tenant free from the debts of the deceased joint tenant.
3. **Decedents' Estates: Joint Tenancy: Crops.** Crops standing on the land, whether matured or not, pass with the land to the surviving joint tenant and are not an asset of the estate of the deceased tenant subject to administration.
4. **Decedents' Estates: Taxation.** Federal estate taxes are to be apportioned among the persons interested in the estate.

Appeal from the District Court for Kimball County: JOHN D. KNAPP, Judge. Affirmed as modified.

James M. Carney of Atkins, Ferguson, Zimmerman, Carney and Law, for appellant.

Jack H. Myers of Van Steenberg, Myers & Burke, for appellee.

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

BOSLAUGH, J.

Ronald W. Kennedy died intestate on February 16, 1976. He was survived by his widow, Mary Joyce Kennedy, and three children. A petition for the appointment of Mrs. Kennedy as administratrix of his estate was filed on March 1, 1976, and she was appointed administratrix on March 19, 1976.

At the time of his death Ronald W. Kennedy was engaged in an extensive farming and ranching operation in Kimball County, Nebraska, involving more than 4,600 acres of land and several hired men. His land was owned in joint tenancy with his wife. His property subject to administration consisted of cattle, crops, machinery, and equipment. At the time of his death he was in debt to the Kimball County Bank, the federal land bank,

and the Farmers Home Administration for nearly $381,000, and was indebted to his father, Wayne Kennedy, on an open account in an amount of more than $48,000.

On March 31, 1976, the county court authorized the administratrix to continue the farming and ranching operations in which the deceased had been engaged at the time of his death.

The claim of Wayne Kennedy against the estate was finally allowed in the amount of $48,161.08 by the district court.

On September 22, 1978, the administratrix filed her report for the period February 16, 1976, to August 11, 1978. A report covering the period August 11, 1978, to April 27, 1981, was filed on May 19, 1981. Objections to these reports were filed by the claimant, Wayne Kennedy.

The account, as approved by the county court, showed that there was due the administratrix from the estate the sum of $189,335.67; that there was due from the administratrix $82,039.25 for items of receipt which belonged to the estate and items of disbursement which were personal; that the value of the remaining assets of the estate was substantially less than the $107,296.42 balance due the administratrix; and that there were no assets or funds remaining from which the claim of Wayne Kennedy could be paid. Upon appeal to the district court the order of the county court was affirmed. From that judgment the claimant has appealed to this court.

The claimant contends the trial court erred in not avoiding the "contract" between the administratrix and herself regarding care of the cattle; in allowing the administratrix the sum of $160,380 for care of the cattle; in finding that growing crops upon the land held in joint tenancy were not subject to the claims of creditors; and in failing to charge the administratrix for federal estate taxes paid on her behalf by the estate.

With respect to the first two assignments, the claimant seeks to set aside the $160,380 allowed the administratrix for cattle care, either because it was a voidable transaction or because it was unconscionable under the circumstances.

Although the decedent's death preceded the effective date of the Nebraska Probate Code, and the county court granted an application for the proceeding to continue under the former statute, the code governs the substantive rights of the parties.

See Neb. Rev. Stat. § 30-2901 (Reissue 1979).

Neb. Rev. Stat. § 30-2474 (Reissue 1979) provides in pertinent part:

> [A]ny transaction which is affected by a substantial conflict of interest on the part of the personal representative, is voidable by any person interested in the estate except one who has consented after fair disclosure, unless . . . (2) the transaction is approved by the court after notice to interested persons.

The general rule is that a personal representative cannot deal with the estate's assets for personal profit or gain. *In re Estate of Statz*, 144 Neb. 154, 12 N.W.2d 829 (1944). Any self-dealing is suspect and subject to close scrutiny by the court.

The only exception to self-dealing is where it is shown that the transaction was in good faith and promotive of the interests of the estate. 33 C.J.S. *Executors and Administrators* § 239 (1942); *Matter of Estate of Gaylord*, 552 P.2d 392 (Okla. 1976).

The record supports a finding that the transaction in this case was in good faith.

The administratrix was authorized by the county court to continue her husband's farming and ranching operations in order to preserve the assets of the estate. The assets included 296 head, or "units," of cattle and 9 bulls. The administratrix continued the procedures which had been used by the decedent in caring for the cattle. She, as landowner, provided winter and summer pasturing and the cost of one-half the feed grown on her land for use by the cattle. The estate provided labor, machinery, irrigation, and one-half the cost of feed.

There was no "contract" in the legal sense between the administratrix and herself concerning the care of the cattle. The entire matter was tried before the county court at the hearing on her reports and final accounting. The issue before the county court was what amount should be allowed to the administratrix for the use of her land and the hay furnished in caring for the cattle which were an asset of the estate. The issue here is whether the amount allowed was erroneous as a matter of law.

The application to continue the cattle operation was based in part upon the fact that the estate was approximately $430,000 in debt at the time of the decedent's death. According to the

inventory filed in November 1976, the estate had negative assets of $1,635.39 after secured claims were paid. The administratrix proposed to continue the decedent's farm operations in an attempt to preserve the assets of the estate by paying off the existing indebtedness. See Neb. Rev. Stat. § 30-2476 (Reissue 1979). As it turned out, she was able to pay off the major debts.

The record does not sustain the claimant's contention that the amount allowed the administratrix for cattle care was unconscionable under the circumstances. The appellant claims that the amount allowed included a profit for the administratrix, but the record does not support this contention. The administratrix was charged for expenses in pasturing and raising feed for the cattle before receiving a credit to reimburse her for land use and feed. She was not allowed to charge the estate for her expenses and then require an additional payment for the same things.

Both the administratrix and the claimant presented expert testimony in regard to the reasonable value of the care of the cattle by the administratrix. The expert witness called by the administratrix testified that the amount claimed by the administratrix, approximately $248,000, was fair and reasonable. The expert witness called by the claimant testified that $118,800 would be a fair and reasonable amount. This figure included 33 percent "profit" for labor and incidental expenses. Apparently, the county court accepted the administratrix's evidence and reduced it by 33 percent to arrive at approximately $160,000, the amount allowed. With such a reduction no profit is evident in the award.

The claimant next challenges the district court's failure to subject the proceeds from the decedent's 1976 wheat crop to the claims of creditors.

The 1976 wheat crop was grown on the land held in joint tenancy by the decedent and the administratrix. Upon the death of one joint tenant, the land passes to the surviving tenant free from the debts of the deceased joint tenant. *Schmidt v. Schmidt*, 254 N.W.2d 102 (N.D. 1977); *DeForge v. Patrick*, 162 Neb. 568, 76 N.W.2d 733 (1956); *Sherman County Bank v. Lonowski*, 205 Neb. 596, 289 N.W.2d 189 (1980). Crops standing on the land, whether matured or not, pass with the

land to the surviving joint tenant and are not an asset of the estate of the deceased tenant subject to administration. *In re Estate of Pope*, 83 Neb. 723, 120 N.W. 191 (1909).

The administratrix, as the surviving joint tenant, succeeded to the ownership of the land. The crops growing on the land became her own property when the decedent died. As the crops were hers, they were not an asset of the estate and not subject to the claims of creditors. *Schmidt, supra.*

The appellant's final claim is that the administratrix should reimburse the estate for federal estate taxes paid by the estate for her benefit. Federal estate taxes in the amount of $14,520.80 were paid out of the assets of the estate.

Neb. Rev. Stat. § 77-2108 (Reissue 1981) provides that federal estate taxes are to be apportioned among the persons interested in the estate. *Nielsen v. Sidner*, 191 Neb. 324, 215 N.W.2d 86 (1974). See *Naffziger v. Cook*, 179 Neb. 264, 137 N.W.2d 804 (1965). The policy behind this requirement is that every portion of the estate that created the tax should bear its fair share of the tax burden. *Nielsen, supra.*

The estate tax return filed by the administratrix shows that she was the only beneficiary of the estate. Since she was the recipient of whatever portion of the estate created the tax, she should be charged with its payment. This reduces the credit owed to her by the estate to $92,775.62.

Even with this reduction, there are no assets available with which to satisfy the appellant's claim.

The judgment of the district court should be modified to charge the federal estate taxes to the administratrix. As so modified, the judgment is affirmed.

AFFIRMED AS MODIFIED.

WHITE, J., participating on briefs.

BENARD SMITH, APPELLANT, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, ET AL., APPELLEES.

369 N.W.2d 67

Filed June 14, 1985. No. 84-132.

1. **Employment Contracts: Termination of Employment.** In the absence of any contractual or statutory restrictions on the employer's right to discharge an employee, the employer may lawfully discharge an employee for whatever cause the employer chooses.
2. **Employment Contracts: Termination of Employment: Proof.** Where an employee seeks the protection of a contract to avoid discharge, the burden is on the employee to prove such contract.

Appeal from the District Court for Douglas County: THEODORE L. CARLSON, Judge. Affirmed.

Sheri E. Long, for appellant.

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

KRIVOSHA, C.J., WHITE, and GRANT, JJ., and BRODKEY, J., Retired, and WOLF, D.J.

GRANT, J.

Benard Smith appeals from an order of the district court for Douglas County, affirming a decision of the personnel board of the city of Omaha. The board had modified and affirmed the termination of appellant's employment by the public works department. The department had suspended appellant for 15 days, pending dismissal. The board modified the department's action and suspended appellant for 39 days, pending dismissal. The district court affirmed the board's order, and this appeal followed. We affirm the district court's order.

Appellant was employed by the city as a semiskilled laborer. His duties involved inspection, repair, and replacement of barricades guarding road repair and road damage sites. He was required to maintain worksheets, indicating his activities during his working hours, and a barricade logbook, indicating where street barricades had been placed and which barricades had been repaired. Additionally, appellant did tree trimming and other yard work on his own time.

During the autumn of 1982, appellant's supervisor received

complaints from citizens concerning appellant's activities during the appellant's working hours. These complaints concerned primarily the presence of appellant at a residence on North 27th Street in his assigned area for extended periods of time. These stops were not recorded in any of the records that appellant was required to keep. On November 29, 1982, the supervisor followed appellant for approximately 4 hours. He testified that appellant's activities during that period did not conform at all to the entries in the appellant's records. Appellant occasionally parked his truck on side streets for a period of time and did nothing. He also stopped at a package liquor store and along a street to talk to some people. He drove by barricades which obviously needed repair but did not stop to repair them. As a result of these activities, appellant's employment was terminated. The termination was later changed to a 6-day suspension without pay.

On December 29, 1982, appellant's work performance was again monitored by his supervisor, who had again received complaints from citizens. The supervisor testified that appellant's barricade truck was parked at a house on North 27th Street. Appellant was not in the truck. The worksheet turned in by appellant did not include this stop. The supervisor then turned the matter over to the city's labor negotiator. On January 30, 1983, the city's labor negotiator followed appellant during his work shift and found that the logsheets did not accurately reflect appellant's activities.

There was also testimony before the board that appellant had solicited tree trimming jobs, during working hours, with a city vehicle. He had also attempted, on city time, to collect money allegedly owed to him by an elderly widow for whom he had done yard work. He visited her house, on a daily basis, from January 18 to January 25, 1983. On January 25, 1983, the elderly woman's granddaughter was at her grandmother's house and made a tape recording of a conversation between appellant and the granddaughter. The tape was received in evidence without objection and indicated, at the least, that appellant was trying to collect a personal debt for more than 20 minutes during his regular city work hours and that he arrived at the house in a city truck. The woman's granddaughter testified that

her grandmother was "scared to death" by appellant's activities and had called the police on several occasions.

Appellant was then suspended, pending dismissal, for "falsifying city records" and "offensive conduct toward the public." The record of the proceedings and the briefs of the parties indicate that both of these allegations are included in the collective bargaining agreement between appellant's union and the city as grounds for dismissal. After his suspension appellant was discharged. He timely appealed to the district court and to this court.

Appellant assigns three errors, which may be summarized as alleging that the district court erred in finding that the decision of the personnel board was supported by competent evidence and in finding that the board's decision was not contrary to law and arbitrary and capricious.

Appellant's contentions are without merit. " 'It is well settled in Nebraska that where it appears in an error proceeding that an administrative tribunal has acted within its jurisdiction and for that type of proceeding some competent evidence sustains its findings and order, the order of the administrative agency will be affirmed.' " *Sibert v. City of Omaha*, 201 Neb. 399, 400, 267 N.W.2d 753 (1978), citing *Shepherd v. City of Omaha*, 194 Neb. 813, 235 N.W.2d 873 (1975). The record herein discloses not only "some competent evidence" but overwhelming evidence justifying appellant's discharge.

Appellant argues that since the labor agreement was not introduced in evidence, the board's findings were not sustained by competent evidence. We note first that "[w]hen the employment is not for a definite term, and there are no contractual or statutory restrictions upon the right of discharge, an employer may lawfully discharge an employee whenever and for whatever cause he chooses, without incurring liability." *Alford v. Life Savers, Inc.*, 210 Neb. 441, 442, 315 N.W.2d 260, 261 (1982). It is therefore incumbent upon the appellant to introduce the labor agreement into evidence if the city is to be restricted by its terms in discharging him.

> In an action for breach of a contract of employment, the burden of proving the existence of a contract and all the facts essential to the cause of action is upon the person

> who asserts the contract. . . . A burden corresponding to that of the proving of the existence of the contract exists as to the proof of its terms.

Long v. Arthur Rubloff & Co., 27 Ill. App. 3d 1013, 1024, 327 N.E.2d 346, 354 (1975). See, also, *Lambert v. Equinox House, Inc.*, 126 Vt. 229, 227 A.2d 403 (1967); 17A C.J.S. *Contracts* § 579 (1963).

In his brief, appellant also contends that the district court erred in affirming the personnel board despite the board's failure to make specific written findings of fact. Appellant suggests that such findings are required by an Omaha city ordinance. However, such ordinance was never introduced in the district court. "This court will not take judicial notice of municipal ordinances not properly made a part of the record." *State v. Austin*, 219 Neb. 420, 423, 363 N.W.2d 397, 399 (1985). See, also, *State v. Hatfield*, 218 Neb. 470, 356 N.W.2d 872 (1984). As the ordinance requiring the personnel board to make specific written findings of fact is not a part of this record, the alleged failure of the board to do so cannot be grounds for reversal.

AFFIRMED.

OVERLAND CONSTRUCTORS, INC., APPELLEE, V. THE MILLARD SCHOOL DISTRICT, SCHOOL DISTRICT NO. 17, DOUGLAS COUNTY, NEBRASKA, DEFENDANT AND THIRD-PARTY PLAINTIFF, APPELLANT, KIRKHAM-MICHAEL & ASSOCIATES, INC., THIRD-PARTY DEFENDANT, APPELLEE.

369 N.W.2d 69

Filed June 14, 1985. No. 84-241.

1. **Administrative Law: Contracts: Arbitration and Award.** A contract to compel parties to arbitrate future disputes and, thus, to oust the courts of jurisdiction to settle such disputes is against public policy and is void. The distinction is whether the agreement to submit to arbitration is entered into before the dispute arises and before the parties know the nature and extent of their dispute or whether it is entered into after the dispute has arisen and at a time when the parties are aware

of the nature of the dispute and have agreed to a method of resolving that dispute.

2. **Architects: Words and Phrases.** A professional act or service is one arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or intellectual, rather than physical or manual. An architect performs professional services, as do lawyers, doctors, accountants, and investment advisers.
3. **Architects: Contracts: Negligence.** In determining whether an architect is negligent in failing to specifically set out the contractor's responsibility for charges in the contract, the test is whether the architect has exercised that degree of skill and diligence ordinarily exercised under like circumstances by architects in good standing in the same or similar communities.
4. **Architects: Evidence: Negligence: Proof.** The question of whether an architect has failed to perform in accordance with the standards of the profession is a matter which must be proved by expert testimony and cannot be left to lay witnesses.

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

Rjean K. Knowles and Frank M. Schepers of Young & White, for appellant.

David D. Ernst and John H. Cotton of Gaines, Otis, Haggart, Mullen & Carta, for appellee Overland Constructors.

Dean F. Suing and Moira B. White of Katskee & Henatsch, for appellee Kirkham-Michael & Associates.

KRIVOSHA, C.J., CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

KRIVOSHA, C.J.

This is a suit instituted by Overland Contractors, Inc. (Overland), seeking a declaration as to whether Overland or the Millard School District (School District), for which Overland constructed an elementary school building, was obligated to pay certain charges imposed by the Metropolitan Utilities District (M.U.D.). Overland maintained that the charges imposed by M.U.D. were the obligation of the School District. The School District, on the other hand, maintained that the charges were fees which, under the terms of the project contract, were to be paid by Overland. After the suit was commenced the School District obtained leave to implead

Kirkham-Michael & Associates, Inc., the architect for the project. The School District maintained that, while it believed that the M.U.D. charges should be paid by Overland, if the School District was obligated to make the payments to M.U.D., then the architect should be required to indemnify the School District.

Following trial, the district court for Douglas County, Nebraska, held that the M.U.D. charges were the obligation of the School District and not Overland. The district court also held that the architect was not obligated to indemnify the School District. It is from that decision that the School District appeals to this court. We believe that the judgment of the district court must be affirmed except as otherwise modified.

The School District has separated its assignments of error into two divisions. The first division relates to alleged errors committed by the district court with regard to the suit brought by Overland against the School District. The second division relates to alleged errors committed by the district court with regard to the School District's claim against the architect.

The assignments of error with regard to Overland are essentially as follows: (1) That the district court erred in failing to find as a matter of law that the contract between Overland and the School District was unambiguous and therefore not subject to explanation by parol evidence; (2) That the district court erred in failing to find that the project contract required Overland to pay the M.U.D. charges either because the contract clearly imposed that obligation upon Overland or because the architect, pursuant to an arbitration clause contained in the contract, previously determined so; and (3) That the district court erred in refusing to permit representatives of the architect to testify regarding the usual and customary arrangement as to payment of charges such as the M.U.D. charges.

While there is controversy regarding the law applicable in this case, there appears to be little disagreement concerning the facts. On October 6, 1980, the School District entered into an agreement with the architect in which the architect agreed to prepare the plans and specifications and all necessary documents, administer the construction contract, provide explanations of the drawings and specifications, and provide all

architectural services necessary for the construction of the school.

The architect prepared all of the documents necessary for the project, including the specifications and drawings for the project. The architect also prepared the project contract which is the subject of this litigation.

In late May 1981, bids for the project were submitted by various contractors and were opened by the architect. Some of the bids indicated that the M.U.D. charges or some part of them had not been included in the bid. Overland's bid did not indicate whether any of the M.U.D. charges had been included. Following an analysis of the bids, the architect recommended that the contract be awarded to Overland for a total cost of $1,672,500. Based upon the architect's recommendation, the School District awarded the contract for the project to Overland.

Shortly after the contract was awarded, a dispute arose as to who was responsible for the payment of the M.U.D. charges in the amount of $21,481.26. When the parties were unable to resolve their dispute, the architect, pursuant to the contract documents, determined that Overland was responsible for the payment of all M.U.D. charges. Overland disagreed with the architect's determination, and a meeting was held. Following that meeting, the architect modified its earlier determination, finding that certain of the charges were the responsibility of Overland, the others the responsibility of the School District. Each of the parties has paid various charges under protest, reserving its right to litigate the issues. With that background in mind we turn to the legal questions presented.

The first issue raised by the parties is the standard of review in this court. The School District asserts that this court should review the record de novo, while Overland argues that this court must review the record in the same manner as it would in any other action at law. The answer seems clear. In *Larutan Corp. v. Magnolia Homes Manuf. Co.*, 190 Neb. 425, 433, 209 N.W.2d 177, 182 (1973), we said:

> This court has treated the determination of factual issues in a declaratory judgment action which would otherwise be an action at law in the same manner as if a jury had

> been waived. The findings of the trial court therefore have the effect of the verdict of a jury and will not be set aside unless clearly wrong. See Belek v. Travelers Ind. Co., 187 Neb. 470, 191 N.W.2d 819.

See, also, *Quinn v. Godfather's Investments,* 213 Neb. 665, 330 N.W.2d 921 (1983); *Roth v. School Dist. of Scottsbluff,* 213 Neb. 545, 330 N.W.2d 488 (1983).

We turn to the next question, whether the parties are bound by the determination made by the architect pursuant to an arbitration clause contained in the contract documents. We believe that under the circumstances in this case the parties are not bound. While this court is supportive of parties resolving their differences through arbitration, if possible, we have consistently held that an arbitration agreement entered into *before* a dispute arises, denying to the parties their right to seek the assistance of the courts, is contrary to public policy and is not enforceable. In a long line of cases beginning with *German-American Ins. Co. v. Etherton*, 25 Neb. 505, 41 N.W. 406 (1889), and continuing through *City of Lincoln v. Soukup*, 215 Neb. 732, 340 N.W.2d 420 (1983), we have consistently held that a contract to compel parties to arbitrate *future* disputes and, thus, to oust the courts of jurisdiction to settle such disputes is against public policy and is void. See, also, *National Masonic Accident Association v. Burr*, 44 Neb. 256, 62 N.W. 466 (1895); *Schrandt v. Young*, 62 Neb. 254, 86 N.W. 1085 (1901); *Phoenix Ins. Co. v. Zlotky*, 66 Neb. 584, 92 N.W. 736 (1902); *Wilson & Co., Inc. v. Fremont Cake & Meal Co.*, 153 Neb. 160, 43 N.W.2d 657 (1950); *Heisner v. Jones*, 184 Neb. 602, 169 N.W.2d 606 (1969). The School District directs our attention to the cases of *Simpson v. Simpson*, 194 Neb. 453, 232 N.W.2d 132 (1975), and *Knigge v. Knigge*, 204 Neb. 421, 282 N.W.2d 581 (1979), in support of its contention that arbitration clauses are enforceable. It neglects, however, to note the significant distinction in both *Simpson* and *Knigge*. In each of those cases a dispute had already arisen and the parties agreed to submit their *known* dispute to arbitration. In such cases we do enforce the decision growing out of the arbitration proceeding. The distinction is whether the agreement to submit to arbitration is entered into *before* the dispute arises and

before the parties know the nature and extent of their dispute or whether it is entered into *after* the dispute has arisen and at a time when the parties are aware of the nature of the dispute and have agreed to a method of resolving that dispute. In the instant case the agreement to arbitrate was entered into before the dispute arose and is therefore unenforceable. We, therefore, must turn to the contract itself to determine whether the School District or Overland is liable for the M.U.D. charges.

The five specific charges made by M.U.D. were explained during the trial. According to a representative of M.U.D., the charges and the basis of the charges are as follows:

1. A "capital facilities charge." This is a charge which is to recover capital improvement costs on the district's system. The system charges the customer a certain amount per acre for every acre of land the customer improves.

2. A "water main connection charge." This is computed on the basis of a fixed number of dollars times the number of feet of water main abutting the particular property to be served.

3. A "gas main extension charge." This is the cost of extending the gas main to serve the property in question. The charge is based upon "the actual cost of construction of the size main needed to serve the customer."

4. A "gas service charge." This is "the cost of installing the service from the main to the building that is being served."

5. A "gas meter charge." This is "the cost of the meter and the installation of the meter."

With that background we turn to the language of the contract itself. The relevant portions are as follows:

> 4.7 PERMITS, FEES AND NOTICES
>
> 4.7.1 Unless otherwise provided in the Contract Documents, the Contractor shall secure and pay for the building permit and for all other permits and governmental fees, licenses and inspections necessary for the proper execution and completion of the Work which are customarily secured after execution of the Contract and which are legally required at the time the bids are received.

The second relevant provision is article 2 of § 15050, which reads: "2.1 The Contractor shall obtain and pay for all fees,

permits and licenses (but not assessments) required by his work . . . ."

A third provision which we believe to be relevant is article 4.4.1, which provides:

> 4.4.1 Unless otherwise provided in the Contract Documents, the Contractor shall provide and pay for all labor, materials, equipment, tools, construction equipment and machinery, water, heat, utilities, transportation, and other facilities and services necessary for the proper execution and completion of the Work, whether temporary or permanent and whether or not incorporated or to be incorporated in the Work.

The question we must decide is whether any or all of the charges made by M.U.D. are fees, permits, and licenses, on the one hand, or assessments, on the other. If they are fees, permits, and licenses, then, under article 4.7.1 and article 2 of § 15050, they are to be paid by Overland. On the other hand, if they are assessments, they are to be paid by the School District.

A second but related question requiring consideration is if the charges are neither fees, permits, or licenses nor assessments, who is obligated to pay them?

In connection with these issues the School District argues that the project contract was unambiguous and therefore the trial court erred in permitting any parol evidence to be offered and received. While we may agree that the specific words contained within the contract are unambiguous, we must still conclude that the manner in which the terms are to be applied to the facts in the case is not clear, and therefore we must find that the contract was ambiguous and subject to parol evidence. By simply looking at the title of each of the five charges made, one cannot, without further explanation, determine whether the item is a charge for a fee, permit, or license, on the one hand, or an assessment, on the other. In fact, it may be neither, but, instead, may be part of the construction costs. To that extent, therefore, parol evidence was admissible in order to assist the court in determining into which of the various categories, if any, the M.U.D. charges should be placed. See, *Pawnee Plastics, Inc. v. American Savings Co.,* 210 Neb. 131, 313 N.W.2d 262 (1981); *Quinn v. Godfather's Investments,* 213

Neb. 665, 330 N.W.2d 921 (1983); *Hansen v. Circle Lake Development Corp.*, 199 Neb. 678, 260 N.W.2d 609 (1977). Specifically, in *Frank McGill, Inc. v. Nucor Corp.*, 195 Neb. 448, 238 N.W.2d 894 (1976), we were presented with a case not dissimilar to the case at bar. In that case we specifically noted that while the language of the contract was not ambiguous, the manner in which it was to be applied was and that therefore parol evidence was admissible. The district court did not commit error by permitting parol evidence to be offered to explain the charges.

The district court, in applying the facts of this case to the language of the contract, concluded that none of the five items charged by M.U.D. were fees, permits, or licenses and therefore were not required to be paid by Overland. We agree with the district court's conclusion that the items were not for fees, permits, or licenses. We do not agree, however, that as a matter of law all of the charges should be paid for by the School District. The first two items clearly appear to be, by definition, in the nature of assessments or at least charges intended to permit M.U.D. to recover system-wide expenses and therefore, under the provisions of the contract, to be the obligation of the School District. Based upon what little evidence was produced, the charges seem to be related to the fact that the School District was improving its property and had no relationship to work directly being done in the construction. To that extent they were very much like assessments on real estate. The district court's determination, therefore, that the School District should be required to pay the capital facilities charge and the water main connection charge was correct.

A different result must be reached as to the remaining three charges. All three, the gas main extension charge, the gas service charge, and the gas meter charge, were incurred by reason of work actually performed in providing the building with gas service. Absent this construction, the building would have been without gas service and would have been incomplete as a school. These charges were merely costs incurred in making the heating system operative. We therefore believe that as a matter of law these last three charges fall within the provisions of article 4.4.1, which provides that the contractor shall pay for

such labor and materials. Therefore, Overland is obligated to pay the M.U.D. charge for the gas main extension, gas service charge, and gas meter charge.

That leaves us, then, with the claim by the School District against the architect. The School District maintains that the district court erred in not holding the architect liable to the School District because (1) the architect neglected and refused to make adequate provisions in the project contract for the payment of M.U.D. charges by Overland; (2) the architect neglected and refused to prepare and implement a project contract which was capable of producing a completed facility at a stated cost; (3) the architect neglected and refused to implement and enforce its contractual determination that the contractor, not the owner, was responsible for the M.U.D. charges; and (4) the district court concluded that the evidence adduced by the owner on the standard of care required of an architect under the facts of this case was inadequate to show that standard of care.

Turning first to the question of whether the architect was negligent in failing to implement the arbitration provisions of the contract, we can quickly dispose of that matter. Having already determined that such provision is not binding, the architect could not be negligent in failing to do that which is not enforceable. Regarding the School District's claim that the architect failed to produce a building within the estimated cost, we are unable to find that the evidence supports that claim. In the instant case the School District obtained a building at a cost which was within less than 1 percent of the amount estimated by the architect. It would seem that one must say that a building constructed for an amount which exceeds its estimated cost by less than 1 percent is constructed for its estimated cost. The architect was not, in this case, acting as a guarantor, and the School District obviously recognized that fact. See *Durand Associates, Inc. v. Guardian Inv. Co.*, 186 Neb. 349, 183 N.W.2d 246 (1971). See, also, *Palmer v. Dorn*, 196 Neb. 360, 243 N.W.2d 57 (1976). The School District's claim in this regard is simply without merit and must be overruled.

That leaves us with the last question, as to whether the district court erred in concluding that the evidence adduced by

the School District on the standard of care required of an architect under the facts of this case was inadequate to show that the architect failed to meet the required standard of care. We have examined the record and believe that the district court was correct.

In *Witherspoon v. Sides Constr. Co.*, 219 Neb. 117, 125, 362 N.W.2d 35, 42 (1985), we said: "A professional act or service is one arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or intellectual, rather than physical or manual." An architect performs professional services, as do lawyers, doctors, accountants, and investment advisers. *Id.* If the standard of conduct for an architect is analogous to that of other professions, including doctors, then in determining whether the architect was negligent in failing to specifically set out the contractor's responsibility for the M.U.D. charges in the contract, the test is whether the architect has exercised that degree of skill and diligence ordinarily exercised under like circumstances by architects in good standing in the same or similar communities. See, *Hanzlik v. Paustian*, 216 Neb. 575, 344 N.W.2d 649 (1984); *Kortus v. Jensen*, 195 Neb. 261, 237 N.W.2d 845 (1976). The question of whether an architect has failed to perform in accordance with the standards of the profession is a matter which must be proved by expert testimony and cannot be left to lay witnesses. The question as to whether the architect in this case should have required Overland to pay various charges imposed upon the School District by M.U.D. is not a matter which a lay witness can determine. The School District cites to us the case of *Aetna Insurance Co. v. Hellmuth, Obata & Kassabaum, Inc.*, 392 F.2d 472 (8th Cir. 1968), for the proposition that expert testimony is only required where an ordinary layman cannot completely understand the particular factual situation. We believe, however, that *Bartak v. Bell-Galyardt & Wells, Inc.*, 629 F.2d 523 (8th Cir. 1980), better explains the rule. In *Bartak, supra* at 530, the U.S. Court of Appeals for the Eighth Circuit said:

> Further, in the majority of cases involving an architect's liability for harm, there can be no finding of negligence

> unless there is expert testimony to support it, because laymen would be unable to understand highly technical architectural requirements without hearing other architects testify as to those requirements. *Aetna Insurance Co. v. Hellmuth, Obata & Kassabaum, Inc., supra*, 392 F.2d at 478. There is, however, a "common knowledge" exception to the requirement of expert testimony; the jury is competent to pass on issues of negligence that do not require a knowledge of professional skills. *Id.*; . . . .

The court then went on to hold that proof of alleged negligence in planning or document preparation requires "a technical analysis of the specifications, drawings and manufacturer's specifications that was beyond the competence of ordinary lay persons, *id.*," and therefore required expert testimony. The question raised by the School District in this case was not a matter of "common knowledge." There was no expert testimony with regard to the preparation of the contract documents. The questions that were asked of the architects concerned opinions as to the meaning of this particular contract and who should be required to pay the charges. That is not the same as producing expert testimony to establish whether the architect's conduct in preparing these plans and specifications failed to meet the standard of care and conduct required to be performed by an architect. There being no evidence on the applicable standard of care, the district court was correct in refusing to address the School District's allegation of negligence on the part of the architect in preparing the contract documents.

For these reasons, therefore, the decision of the district court is affirmed in all respects except that Overland is directed to pay the gas main extension charge, the gas service charge, and the gas meter charge, or to reimburse the School District for the payment of those charges.

AFFIRMED AS MODIFIED.

NATIONAL FARMERS UNION SERVICE CORPORATION, APPELLANT, V. BRUCE R. EDWARDS, APPELLEE.

369 N.W.2d 76

Filed June 14, 1985. No. 84-278.

1. **Breach of Contract: Restrictive Covenants: Appeal and Error.** The review of a case involving the enforcement of a noncompete clause by injunctive process is done de novo on the record, and it is necessary for this court to reach an independent conclusion without being influenced by the findings of the trial court, absent conflicting credible evidence.
2. **Contracts.** There can be no ambiguity in a contract unless and until an application of the pertinent rules of interpretation leaves it really uncertain which of two or more possible meanings represents the true intention of the parties.
3. _____. Where contract language is plain and unambiguous, the court will not read an ambiguity into it in order to construe it against the one who prepared the contract.
4. **Contracts: Restrictive Covenants.** Covenants not to compete, if reasonable, are enforceable. The considerations to be balanced are the degree of inequality in bargaining power; the risk of the covenantee losing customers; the extent of respective participation by the parties in securing and retaining customers; the good faith of the covenantee; the existence of sources or general knowledge pertaining to the identity of customers; the nature and extent of the business position held by the covenantor; the covenantor's training, health, education, and needs of his family; the current conditions of employment; the necessity of the covenantor changing his calling or residence; and the correspondence of the restraint with the need for protecting the legitimate interests of the covenantee.
5. _____: _____. Where a noncompete clause is overly broad, it may be found unreasonable to enforce.
6. **Breach of Contract: Restrictive Covenants: Damages: Proof.** In order to recover substantial damages flowing from a breach of a covenant not to compete, a plaintiff must furnish sufficient data to enable the trier of fact to estimate the actual damages with a reasonable degree of certainty and exactness, although, failing to do so, if there is evidence of a specific monetary loss, recovery of a nominal sum may be had.

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

Wagoner and Wagoner, for appellant.

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

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

HASTINGS, J.

Plaintiff has appealed the final order of the district court which denied its petition for an injunction and for damages allegedly arising out of the violation by the defendant of a noncompete agreement. We affirm the judgment as modified.

The defendant, Bruce R. Edwards, entered into an employment contract in December of 1980 with the plaintiff, National Farmers Union Service Corporation, to sell insurance. By the terms of that contract Edwards was required to act as an exclusive agent of National Farmers in that he agreed not to "place any insurance of the types offered by INSURERS with any insurance company other than INSURERS without the written consent of the COMPANY." Plaintiff agreed to pay Edwards a salary, along with his commission, on a decreasing basis over a 3-year period.

As a part of the contract, Edwards also agreed as follows:

> 13. AGENT agrees he will not engage in the sale or solicitation of any insurance of the types offered by INSURERS within twenty-five (25) miles of AGENT'S principal place of business for a period of one year from and after the date of voluntary or involuntary termination of this AGREEMENT. . . .

The contract called for Edwards to perform his services in and around St. Paul, Nebraska.

Edwards voluntarily terminated his relationship with the plaintiff effective April of 1982. At that time defendant had received salary and commissions of $16,976.17 in 1981 and $7,592.06 in 1982. There is no question but that Edwards has been soliciting and selling insurance in competition with the plaintiff and in violation of the plain wording of the contract.

It apparently was the trial court's theory in denying relief that the noncompete provisions of the contract were ambiguous, that they were unreasonable and unenforceable if interpreted as urged by plaintiff, and that the parties' bargaining powers were unequal.

The plaintiff for its assignments of error simply states that the court erred in finding that the restraints imposed by the noncompete clause were ambiguous and in misapplying *Dana F. Cole & Co. v. Byerly*, 211 Neb. 903, 320 N.W.2d 916 (1982).

It is necessary that we review this type of case, where an injunction is sought, de novo on the record and reach an independent conclusion without being influenced by the findings of the trial court, absent conflicting credible evidence. *Dana F. Cole & Co. v. Byerly, supra; Sturm v. Mau*, 209 Neb. 865, 312 N.W.2d 272 (1981). There are no evidentiary disputes in the record.

We dispose first of the claimed ambiguity of the language of the contract. In *Meyers v. Frohm Holdings, Inc.*, 211 Neb. 329, 333, 318 N.W.2d 716, 719 (1982), this court stated "there can be no ambiguity . . . unless and until an application of the pertinent rules of interpretation leaves it really uncertain which of two or more possible meanings represents the true intention of the parties."

The language could not be more clear. There is no merit to defendant's contention in that regard. Defendant agreed not to sell or solicit the types of insurance offered by plaintiff for a period of 1 year in an area within 25 miles of St. Paul, Nebraska. Where contract language is plain and unambiguous, the court will not read an ambiguity into it in order to construe it against the one who prepared the contract. *Cillessen Constr. v. Scotts Bluff Co. Hous. Auth.*, 217 Neb. 39, 348 N.W.2d 418 (1984).

Furthermore, we dispose of the claim of unequal bargaining power summarily. Defendant was in the insurance business before he allied himself with National Farmers. The company agreed to give him additional training and to pay him a salary during a 3-year period. In return for that, defendant was required to sign the noncompete agreement. Edwards had the full choice of accepting the employment opportunity with the restriction, or continuing in business as before. There was no inequality of bargaining power.

Finally, we reach the issue of reasonableness of the restriction. In that regard we are guided by the holding of *Philip G. Johnson & Co. v. Salmen*, 211 Neb. 123, 317 N.W.2d 900 (1982). Therein this court stated:

> At the early common law, a contract in restraint of trade was held to be against public policy and void. Over the years we have developed a balancing test and have held

> that such restraints, if reasonable, are enforceable. The considerations to be balanced are the degree of inequality in bargaining power; the risk of the covenantee losing customers; the extent of respective participation by the parties in securing and retaining customers; the good faith of the covenantee; the existence of sources or general knowledge pertaining to the identity of customers; the nature and extent of the business position held by the covenantor; the covenantor's training, health, education, and needs of his family; the current conditions of employment; the necessity of the covenantor changing his calling or residence; and the correspondence of the restraint with the need for protecting the legitimate interests of the covenantee. [Citations omitted.]
>
> We have also held that a contract to restrict a laborer from engaging in an occupation, if valid at all, must be restricted to the area in which the personal service was performed.

Id. at 128-29, 317 N.W.2d at 903-04. See, also, *Dana F. Cole & Co. v. Byerly, supra.*

The geographical constraint in this contract is the easiest with which to deal. The contract makes clear that the defendant's principal place of business was and is St. Paul, Nebraska. St. Paul was a district area unto itself. There was evidence that at times the St. Paul area would be served by an agent out of Grand Island, but there was no evidence of the reverse situation existing.

It is clear from the record that the 25-miles restriction would include the city of Grand Island. Included within that area were approximately 75,000 to 100,000 people. That is a vast area when compared with the relatively small size of St. Paul itself, the only area shown by the record where the defendant was to conduct his business for the plaintiff. It was incumbent upon the plaintiff to show the reasonableness of the justification of that great a geographical restriction. It has failed to do so.

We therefore reach the conclusion that the noncompete restriction of the contract was overly broad and therefore failed the test of reasonableness. The district court was correct in denying the injunction.

Concerning the issue of damages, the trial court did find "that the Defendant has been unjustly enriched in the amount of $33.00 premium dollars [which] should be returned to the Plaintiff." In order to recover substantial damages flowing from a breach of a covenant not to compete, a plaintiff must furnish sufficient data to enable the trier of fact to estimate the actual damages with a reasonable degree of certainty and exactness, although, failing to do so, if there is evidence of a *specific* monetary loss, recovery of a nominal sum may be had. *Quad-States, Inc. v. Vande Mheen, ante* p. 161, 368 N.W.2d 795 (1985). However, as in *Cole,* there was no evidence adduced at trial which would support the award of nominal damages or the determination of any sum as unjust enrichment. Accordingly, we order the judgment modified by deleting that portion of the award referring to the return of $33.

As modified, the judgment of the district court is affirmed.

AFFIRMED AS MODIFIED.

GUARDIAN STATE BANK AND TRUST CO., PERSONAL REPRESENTATIVE OF THE ESTATE OF MARJORIE SHEPARD, DECEASED, APPELLANT AND CROSS-APPELLEE, V. MYRON JOHN JACOBSON, APPELLEE AND CROSS-APPELLANT, JOHN JACOBSON ET AL., INTERVENORS-APPELLANTS AND CROSS-APPELLEES.

369 N.W.2d 80

Filed June 14, 1985. No. 84-284.

1. **Gifts.** The essential elements of a gift inter vivos are donative intent, delivery, and acceptance. Once it is ascertained that it was the intention of the donor to make a gift inter vivos of an undivided interest in a chattel or chose in action, and all is done under the circumstances which is possible in the matter of delivery, the gift will be sustained.
2. **Gifts: Debtors and Creditors.** A gift of a debt not evidenced by a written document may be made without delivery of any writing by the donor.
3. **Decedents' Estates: Evidence.** Generally, statements made by a deceased person against his pecuniary interest are admissible against the personal representative of the deceased.
4. **Prejudgment Interest.** Where a reasonable controversy exists as to the plaintiff's

right to recover or as to the amount of such recovery, the claim is generally considered to be unliquidated and prejudgment interest is not allowed.

Appeal from the District Court for Sheridan County: PAUL D. EMPSON, Judge. Affirmed in part, and in part reversed and remanded with directions.

Laurice M. Margheim of Bayer & Margheim, for appellant.

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

James R. Wefso of Hollstein & Wefso, and Patrick M. Connealy, for intervenors-appellants.

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

BOSLAUGH, J.

The Guardian State Bank and Trust Co., as the personal representative of the estate of Marjorie Shepard, deceased, commenced this action to recover amounts loaned or advanced to the defendant, Myron John Jacobson, by the deceased in her lifetime, and rent due her from the defendant for the years 1979 through 1982. The petition sought an accounting and a judgment for the amount due.

The case was submitted to the jury upon a form of special verdict. The jury found that the decedent had loaned the defendant $77,527.89 and had advanced $26,207.85 to the defendant but that these debts had been forgiven. The jury further found that rent in the amount of $2,100 per year was due for each of the years 1979 through 1982. Judgment was entered for the plaintiff in the amount of $8,400. Later, the trial court added prejudgment interest in the amount of $2,340.60 to the judgment. The plaintiff and several heirs of the deceased who intervened in the action have appealed. The defendant has cross-appealed.

The defendant has paid the judgment for the rent due the plaintiff. This appeal concerns only the loans and advances and the issue of prejudgment interest.

The record shows that Marjorie Shepard died testate on October 24, 1982, domiciled in South Dakota but owning

property in Nebraska. She left 15 heirs. During her lifetime, she was aware of financial difficulties of the defendant. Beginning in June of 1980, the decedent wrote 23 checks to the defendant or his creditors. A number of the checks were written to the defendant and marked "loan," while others were made payable directly to the defendant's creditors to cover specific debts. The checks varied in amount and purpose, the largest being a check dated October 14, 1981, to the order of Myron Jacobson for $70,000 and marked "Loan" in the lower left-hand corner; the defendant endorsed this check to the First National Bank in order to forestall foreclosure on his cattle herd. The defendant testified that he never asked the deceased for this money, nor did she ever request a note from him in return; rather, the check was marked "Loan" per his instructions. According to the defendant, there was never any discussion as to whether or how any of the loans were to be repaid. The defendant further testified, over objection, that the last time he mentioned the loans to the deceased she replied, "I want you to stop talking about those as loans. I want you to forget it, and don't talk about it no more."

The defendant's sons, Douglas, Merlyn, and Michael Jacobson, also testified, over objection, as to conversations with the deceased concerning the loans. Douglas Jacobson testified to overhearing a conversation between the deceased and the defendant in which the deceased said "[t]hat he didn't owe her nothing." Merlyn Jacobson testified concerning another conversation between the deceased and the defendant in which the deceased said "that she didn't want him to worry about the money." The defendant's son Michael Jacobson testified to a conversation he had with the deceased in which he stated: " 'Marjorie, I am concerned how we're going to pay back this money.' And she said, 'Just don't worry about it. Just forget about it.' " Lastly, the defendant's wife testified, over objection, that the decedent told the defendant to "[f]orget about the money he owes." There was no testimony contradicting the fact or content of these conversations or denying that the deceased was concerned for the defendant's financial welfare.

The appellants contend that delivery of a written document

of some nature is necessary in order to forgive a debt which itself is not evidenced by a writing and that they were misled by the pretrial order of the trial court which established this as a rule of law to govern the trial.

The pretrial order merely stated that the defendant had the burden of proof on the issue of forgiveness. The standard of proof to be required on this issue was not determined, and the parties were ordered to submit briefs as to that matter.

In a letter to counsel, sometime later, the trial court stated, "I intend to rule on the burden of proof on Issue nine [forgiveness] and to let you know what I have determined to be the law on certain other matters." In the rest of the letter there is a discussion of the question of whether written evidence of forgiveness is required and a statement that " 'the evidence of a donating [sic] intent must be clear and unmistakable and inconsistent with any other theory.' " The last sentence of the letter, which follows the above quotation, states: "I will probably instruct the jury to that effect."

While the writing of such letters is a practice that should be discouraged because of the opportunity for confusion and misunderstanding, we do not believe the record supports the contention of the appellants that the trial court had established the necessity of written evidence of forgiveness or a rule of law to govern the trial. Although the letter states that it was written as "an addition to the report of the pre-trial conference," it does not establish the defendant's burden of proof as contended by the plaintiff. It was by no means definitive and did not establish that forgiveness could be proved only by a writing.

The appellants' contention that written evidence is required, if accepted, would amount to establishing a judicial "statute of frauds." This is an area that traditionally has been left to legislation. Although authority in other jurisdictions can be found which supports the contention of the appellants, we do not choose to follow those decisions. Such a rule has never been adopted in Nebraska.

In *In re Estate of Scott*, 148 Neb. 182, 26 N.W.2d 799 (1947), one of the questions before the court was whether the deceased, during her lifetime, had made a gift of a federal farm mortgage bond to the plaintiff. This court stated:

> It is generally true that delivery is essential to constitute a gift inter vivos. Ordinarily actual delivery is necessary where the subject of the gift is capable of manual delivery, but where actual manual delivery cannot be made, the donor may do that which, under the circumstances, will in reason be considered equivalent to actual delivery.

Id. at 187, 26 N.W.2d at 801-02.

In *In re Estate of Saathoff. Saathoff v. Saathoff*, 206 Neb. 793, 801, 295 N.W.2d 290, 296 (1980), this court set forth:

> "To make a valid and effective gift inter vivos, there must be an intention to transfer title to the property, and a delivery by the donor and acceptance by the donee." [Citation omitted.] . . . "The essential elements of a gift inter vivos are donative intent, delivery, and acceptance. Once it is ascertained that it was the intention of the donor to make a gift inter vivos of an undivided interest in a chattel or chose in action, and all is done under the circumstances which is possible in the matter of delivery, the gift will be sustained. . . ." [Citation omitted.]

Rorabaugh v. Garvis, 198 Neb. 223, 226, 252 N.W.2d 161, 163 (1977), which was cited in the *Saathoff* case, continued: " 'In such cases, the delivery may be symbolical or constructive if as nearly perfect and complete as the nature of the property and the attendant circumstances will permit.' " See, also, *In re Estate of Scott, supra.*

Rorabaugh and *White v. Bank of America*, 53 Cal. App. 2d 831, 128 P.2d 600 (1942), which was cited in *Rorabaugh*, although not factually similar, are significant because of the rationale used to sustain the gifts therein. In both cases, deceased persons, while living, had intended to make gifts of a joint interest in bank accounts, but the essential paperwork was not completed before the donors' deaths. Quoting *White* in *Rorabaugh*, this court said: " 'When the clear intention of the donor to make a gift can be carried out without doing violence to the established principles of law the courts should not seek highly technical reasons for defeating the gift.' " 198 Neb. at 227, 252 N.W.2d at 164.

In *Dinslage v. Stratman*, 105 Neb. 274, 180 N.W. 81 (1920), the administrator of the deceased's estate brought an action to

recover $1,400 which the deceased had loaned to her son during her lifetime. The defendant admitted that he had been indebted to the deceased but stated that he had paid the money, at her direction, to the deceased's granddaughter as a gift.

In the *Dinslage* case none of the indebtedness was evidenced by a note or other writing. The deceased had, in her lifetime, promised to give her granddaughter $1,000, under certain conditions, and had instructed the defendant to pay the $1,000. As this court stated in outlining the facts: "Thus it will be seen that . . . [the deceased] did everything in her power to make final disposition of the chose in action arising from her loans of money to her son . . . ." *Id.* at 276, 180 N.W. at 82.

In holding that a valid gift to the granddaughter had been made, this court said at 280, 180 N.W. at 83:

> In the instant case, there was no promissory note or other documentary evidence of the $1,400 debt, and consequently there was nothing tangible that could be delivered by Thresa Stratman to any one. The whole thing rested in parol. The only thing that could be done by her was to direct her debtor to pay $1,000 of the money to Tracey, instead of to herself. It is conclusively established by the evidence that she gave this direction. Hence, she did everything in June, 1915, that was in her power to divest herself of the title to the chose in action, and invest Tracey with it. We think that there was a sufficient delivery. To hold otherwise would be to say that there can be no delivery of a chose in action unless it is accompained [sic] by delivery of written evidence of it, and this would be absurd.

The evidence in this case, if believed, was sufficient to prove a valid gift inter vivos and, thus, forgiveness of the indebtedness of the defendant.

The appellants contend that the testimony as to statements made by the deceased was hearsay and should not have been admitted.

In *Peters v. Wilks*, 151 Neb. 861, 866, 39 N.W.2d 793, 796 (1949), this court held, insofar as is relevant here, that "[d]eclarations of a deceased against interest are admissible . . . ." This is in accord with the general rule as expressed at 38 Am.

Jur. 2d *Gifts* § 98 at 899 (1968):

> While it often appears, in cases dealing with the admissibility of declarations by a donor subsequent to an alleged gift, on the issue as to the gift, that the donor had died before the time of the trial, such fact does not appear to affect the principles . . . involving the admission of such declarations when they were against his pecuniary interest or excluding them when they were merely self-serving declarations.

The statements in question were against the pecuniary interest of the deceased and were admissible as such.

The trial court awarded the plaintiff $2,340.60 as prejudgment interest on the $8,400 due the plaintiff for use of the decedent's pastureland during her lifetime. The defendant has cross-appealed from the award of prejudgment interest.

The rule in this jurisdiction was stated recently in *Jeffres v. Countryside Homes, ante* p. 26, 31, 367 N.W.2d 728, 732 (1985): " '[W]here a reasonable controversy exists as to the plaintiff's right to recover or as to the amount of such recovery, the claim is generally considered to be unliquidated and prejudgment interest is not allowed.' *Slusarski v. American Confinement Sys.*, 218 Neb. 576, 582, 357 N.W.2d 450, 455 (1984)."

The defendant testified that at one time he had paid the decedent and her husband (earlier deceased) $7 per month per cow-calf unit. The plaintiff's witness testified that the fair rental value of the grassland was $14 to $16 for a cow-calf unit, although it is unclear as to what time period this testimony referred. Since the rate was in dispute, the amount due was unliquidated. Prejudgment interest should not have been allowed.

The judgment awarding the plaintiff prejudgment interest is reversed; the judgment in all other respects is affirmed. The cause is remanded with directions to enter a judgment conforming to this opinion.

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

CASEY'S GENERAL STORES, INC., APPELLANT, V. NEBRASKA LIQUOR CONTROL COMMISSION, APPELLEE.

369 N.W.2d 85

Filed June 14, 1985. No. 84-459.

1. **Statutes: Legislature.** A legislative classification must operate uniformly on all within a class which is reasonable. Exemptions are allowed where they are made applicable to all persons of the same class similarly situated.
2. _____: _____. A regulation valid when made may become arbitrary by reason of later events.
3. _____: _____. The Legislature, under the guise of regulation, may not indulge in the destruction of lawful competition.
4. **Statutes: Courts: Constitutional Law.** It is the obligation of the judiciary to declare a statute invalid where it arbitrarily and unreasonably violates the Constitution.
5. **Case Overruled.** To the extent that *Safeway Stores, Inc. v. Nebraska Liquor Control Commission*, 179 Neb. 817, 140 N.W.2d 668 (1966), is in conflict with this opinion, it is overruled.

Appeal from the District Court for Lancaster County: DALE E. FAHRNBRUCH, Judge. Reversed and remanded with directions.

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

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

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

HASTINGS, J.

The appellant, Casey's General Stores, Inc., has appealed the decision of the district court which had dismissed its appeal from the Nebraska Liquor Control Commission's order denying its application for an off-sale retail beer license. We reverse.

Casey's is a chain of convenience stores which sells a wide range of grocery items, health and beauty aids, hardware items, and gasoline. It operates a store in Stanton, Nebraska, as well as in Beatrice and Albion, at which latter two locations it possesses retail beer licenses. Its application for a beer license in Stanton, the subject of this appeal, was denied because of Neb. Rev.

Stat. §§ 53-124.01 et seq. (Reissue 1984), which prohibit a person from acquiring a beneficial interest in more than a total of two alcoholic beverage retail licenses. However, excepted from that prohibition are licenses

> (1) issued to any city of the primary or metropolitan class to be used in city-owned facilities open to the public; (2) issued to a person for use in connection with the operation of a hotel containing at least twenty-five sleeping rooms; (3) issued to a person for use in connection with the operation of a bowling establishment containing at least twelve bowling lanes; (4) restricted to on premise sale of beer only in a restaurant; or (5) issued to a person for use in connection with the operation of a restaurant having food sales of at least sixty per cent of its total gross sales, except that any license issued under this subdivision shall restrict consumption of alcoholic liquors to on the premises only.

§ 53-124.03.

In its assignments of error Casey's raises several constitutional questions. Because it is dispositive of this appeal, we need discuss only the claim that the legislative section, as well as the corresponding ordinance of the city of Stanton, denies to Casey's equal protection as provided for in the fourteenth amendment of the U.S. Constitution and article I, § 1, of the Nebraska Constitution.

Casey's points to the various legislative exemptions obtained by various special interest groups and claims that the legislation creates a discriminatory classification which is unjustified and arbitrary.

A legislative classification must operate uniformly on all within a class which is reasonable. Exemptions are allowed where they are made applicable to all persons of the same class similarly situated. *State ex rel. Meyer v. Knutson*, 178 Neb. 375, 133 N.W.2d 577 (1965).

The commission urges that the classifications in §§ 53-124.02 and 53-124.03 are valid based on substantial differences as enunciated in *Safeway Stores, Inc. v. Nebraska Liquor Control Commission*, 179 Neb. 817, 140 N.W.2d 668 (1966). There, the court upheld as constitutional the 1963

version of § 53-124.03 which granted exemptions to the two-license limit to hotels having more than 25 sleeping rooms. The court found there was a substantial difference between such hotels and chain supermarkets seeking the same exemption.

> The primary issue is whether or not justification exists for exempting hotels with more than 25 sleeping rooms from the limitation of two licenses per person, contained in the act. The hotel is associated with the traveling public seeking a place where it might find lodging, food, and refreshment. The sale of alcoholic beverages is traditionally a part of the hotel business. The cocktail, the drink during the meal, the after-dinner drink, and the nightcap in the room are matters which the Legislature may consider, none of which are ordinarily associated with the chain-store operator. The chain-store operator with his ability to purchase in quantity and undersell the individual small liquor store retail operator can well produce conditions against the public interest in his competition with the small-store operator. Protection of the small package liquor licensee against the competition of multiple licensed operators is in the public interest. *It is the province of the Legislature in mitigating the evils of competition between small retail operators and chain stores to so regulate in the public interest. The uncontrolled tendency toward monopoly, or at least the tendency to concentrate liquor licenses in the hands of a few, is a proper subject of legislation.* The hotel has such differences in the operation of its business from that of the chain store that the basis exists for its exclusion from the limitation of two licenses per person. The exemption of present holders of multiple licenses from the limitation of the number of licenses in the hands of a single entity is also a reasonable one which the Legislature in its wisdom may grant or refuse.

(Emphasis supplied.) *Id.* at 822, 140 N.W.2d at 672.

The court found a valid public purpose in curbing a threatened monopoly of the liquor business by chain stores as tending to promote the state policy favoring trade stability and

temperance. *Safeway Stores, supra; Grand Union Co. v. Sills*, 43 N.J. 390, 204 A.2d 853 (1964). As the classification was neither irrational nor invidiously discriminatory, there was no equal protection violation.

Since the holding in *Safeway Stores, supra*, there have been several additional exemptions added to § 53-124.03: for restaurants serving beer only (1973), cities of the primary or metropolitan class (1975), bowling alleys with at least 12 lanes (1978), and restaurants having food sales of at least 60 percent of their gross sales (1979). In light of these further exemptions, and recent case law in related areas, the thinking in *Safeway Stores* is no longer persuasive.

A regulation valid when made may become arbitrary by reason of later events. *Abie State Bank v. Bryan*, 282 U.S. 765, 51 S. Ct. 252, 75 L. Ed. 690 (1931); *Hubbell Bank v. Bryan*, 124 Neb. 51, 245 N.W. 20 (1932); *State v. Nevins*, 611 P.2d 251 (Okla. Crim. 1980).

The present exemptions allow large chain hotels and restaurants to hold more than two liquor licenses, as well as cities and bowling alleys. These numerous exemptions render obsolete the original argument of limiting liquor licenses to protect local Nebraska operations. See Miscellaneous Subjects Committee Hearing, L.B. 58, 86th Leg., 1st Sess. (Jan. 18, 1979).

Also, the number of exemptions flies in the face of the policy that by limiting the number of licenses temperance is fostered. As pointed out by Senator Koch in the 1979 committee hearing to exempt restaurants, "it is difficult to see . . . a direct relationship between who actually has an interest in a liquor license and the volume of its consumption." Miscellaneous Subjects Committee Hearing, *supra* at 1.

There is no rationale for treating a chain restaurant, such as Pizza Hut, any differently from a chain of convenience stores, such as Casey's. At either one a person may purchase food as well as alcohol, and both would require proof of legal age in order to purchase alcoholic beverages. The only distinction is that the alcoholic beverages purchased at the convenience store will be drunk off the premises. This difference, however, presents no distinctive corollary to furthering temperance, as

an individual may drink as much in a private restaurant as he may at home or elsewhere.

Further, the lifting of the two-license limit does not open wide the door to a flood of liquor licenses. Every applicant must still file an application, establish capability for handling such responsibility, and meet with liquor control approval before a license is granted. See Miscellaneous Subjects Committee Hearing, *supra* at 5 and 14-15. Section 53-132(2)(d) demonstrates that the issuance of the license is required by the present or future public convenience and necessity.

Finally, the original policy of favoring local businesses to avoid chain store monopoly of the liquor industry flies in the face of recent case law denouncing legislative attempts to destroy lawful competition. *Finocchiaro, Inc. v. Nebraska Liq. Cont. Comm.*, 217 Neb. 487, 351 N.W.2d 701 (1984); cf. *Halbert v. Nebraska Liquor Control Commission*, 206 Neb. 687, 294 N.W.2d 864 (1980). "The Legislature, under the guise of regulation, may not indulge in . . . the destruction of lawful competition." *Finocchiaro* at 491, 351 N.W.2d at 704; *Terry Carpenter, Inc. v. Nebraska Liquor Control Com.*, 175 Neb. 26, 120 N.W.2d 374 (1963); *Nelsen v. Tilley*, 137 Neb. 327, 289 N.W. 388 (1939); *Lincoln Dairy Co. v. Finigan*, 170 Neb. 777, 104 N.W.2d 227 (1960); Miscellaneous Subjects Committee Hearing, *supra* at 15.

It is the obligation of the judiciary to declare a statute invalid where it arbitrarily and unreasonably violates the Constitution. *State, ex rel. Ralston, v. Turner*, 141 Neb. 556, 4 N.W.2d 302 (1942).

Here, as the classifications in §§ 53-124.02 and 53-124.03 and Stanton city ordinance No. 362 treat classes similarly situated differently without substantial justification, the statutes violate equal protection under the fourteenth amendment of the U.S. Constitution and article I, § 1, of the Nebraska Constitution.

The actions of the commission and the district court in denying the application were based on the prohibition contained in §§ 53-124.02 and 53-124.03, which we have now declared to be unconstitutional. Therefore, the judgment of the district court is reversed, and the cause is remanded with

directions to remand the cause to the Nebraska Liquor Control Commission for a redetermination of the license application, without regard to the offending legislation.

To the extent that *Safeway Stores, Inc. v. Nebraska Liquor Control Commission*, 179 Neb. 817, 140 N.W.2d 668 (1966), is in conflict with this opinion, it is overruled.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. CURTIS D. MORROW, APPELLANT.
369 N.W.2d 89

Filed June 14, 1985. No. 84-572.

Criminal Law: Sentences. Where it is apparent that the lesser sentence imposed upon a codefendant is erroneous, the sentencing court is not required to reduce all more severe though properly imposed sentences just to obtain uniformity.

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

J. William Gallup, and, on brief, Anthony S. Troia, for appellant.

Paul L. Douglas, Attorney General, and Jill Gradwohl, for appellee.

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

PER CURIAM.

A Douglas County jury found Curtis D. Morrow guilty of two counts of unlawful delivery of a controlled substance in violation of Neb. Rev. Stat. § 28-416(1)(a) (Cum. Supp. 1984). The district court sentenced Morrow to a term of imprisonment for 1 to 2 years on count I for delivery of marijuana and 1½ to 3 years on count II for delivery of cocaine. The sentences ran concurrently.

In the presence of an informant for the Nebraska State

Patrol on January 14, 1984, Morrow, with Michael Harlow, agreed to travel to Florida, procure cocaine, and bring the cocaine to Omaha in exchange for a payment of $10,000 promised by the informant. Harlow and Morrow would equally share the $10,000, a split "down the middle." The informant also expressed his desire for cocaine and marijuana for his personal use. Harlow and Morrow arranged to deliver some cocaine and marijuana to the informant at their meeting the next day, January 15, at a restaurant. At that January 15 meeting, the informant appeared with an undercover officer of the Nebraska State Patrol. Harlow passed some marijuana under the table to the officer. A few minutes later, Morrow gave Harlow the keys to Morrow's car so that Harlow could leave and return with cocaine for delivery to the informant and undercover officer. The informant, undercover officer, and Morrow remained and awaited Harlow's return. After Harlow's return with the cocaine, Harlow and the undercover officer went to the men's room, where Harlow delivered the cocaine to the officer. The undercover officer then arrested Harlow and Morrow. In separate proceedings Morrow and Harlow were charged with delivering controlled substances—marijuana and cocaine.

Delivery of marijuana is a Class III felony and upon conviction is punishable by imprisonment for a term not less than 1 year nor more than 20 years, by a fine not exceeding $25,000, or by both such imprisonment and fine. See Neb. Rev. Stat. §§ 28-416(1)(a) and (2)(b) (Cum. Supp. 1984) and 28-105 (Reissue 1979). Delivery of cocaine is a Class II felony and upon conviction is punishable by imprisonment for a term not less than 1 year nor more than 50 years. See §§ 28-416(1)(a) and (2)(a) (Cum. Supp. 1984) and 28-105 (Reissue 1979).

Morrow was convicted, in a jury trial, on April 6. On April 19 Harlow, pursuant to a plea agreement for dismissal of the marijuana charge, entered a plea of guilty to the cocaine charge. Harlow entered his guilty plea before a judge other than the one who presided at Morrow's trial.

After a presentence report, on July 13 the judge who presided in Morrow's trial sentenced Morrow to concurrent sentences, namely, a term of 1 to 2 years for the marijuana

conviction and 1½ to 3 years for the cocaine conviction. On July 20, 1 week after Morrow was sentenced, another judge sentenced Harlow to probation for a term of 2 years.

Morrow appeals, arguing that (1) there was insufficient evidence to sustain the convictions and (2) the district court abused its discretion in sentencing him.

Morrow argues that his presence at the discussions and delivery of the controlled substances is not sufficient evidence to sustain the convictions. We have stated: " 'Mere presence, acquiescence, or silence, in the absence of a duty to act, is not enough, however reprehensible it may be, to constitute one an accomplice. The knowledge that a crime is being or is about to be committed cannot be said to constitute one an accomplice . . . .' " *Wilson v. State*, 170 Neb. 494, 510, 103 N.W.2d 258, 269 (1960). However, a reading of the record demonstrates that Morrow's involvement went beyond mere presence and passivity.

A person who aids, abets, procures, or causes another to commit any offense may be prosecuted or punished as if he were the principal offender. Neb. Rev. Stat. § 28-206 (Reissue 1979). This court has, on several occasions, defined "aiding and abetting" as follows:

> "Aiding and abetting involves some participation in the criminal act and must be evidenced by some word, act, or deed. No particular acts are necessary; nor is it necessary that any physical part in the commission of the crime is taken or that there was an express agreement therefor. Mere encouragement or assistance is sufficient."

State v. Thielen, 216 Neb. 119, 125, 342 N.W.2d 186, 191 (1983).

Morrow actively participated in the conversations and conduct leading to consummation of the crimes. After the agreement to deliver the marijuana and cocaine, Morrow gave his car keys to Harlow so that Harlow could pick up the cocaine. There was sufficient evidence, direct and circumstantial, to sustain the convictions. Therefore, Morrow's first assignment of error has no merit. Morrow's conviction is affirmed.

In his second assignment of error Morrow alleges that the

trial court abused its discretion in sentencing, in view of the different sentences imposed on Harlow and Morrow.

It is clear beyond question that if we disregard the sentence imposed upon Harlow, the sentence imposed upon Morrow is not excessive. It was the near minimum which could be imposed for the crimes committed. An examination of the reports of this court would disclose that a sentence of 1 to 2 years for delivery of marijuana and a concurrent sentence of 1 1/2 to 3 years for delivery of cocaine would be wholly consistent with sentences regularly imposed upon others committing similar crimes. Additionally, Morrow's past record would support the sentence imposed. The presentence report disclosed that he had been confined at the Youth Development Center-Kearney in 1973 for a violation of probation after adjudication in juvenile court for wrongful use of a motorcycle, and was also convicted of robbery in 1975 and sentenced to imprisonment. Morrow's robbery conviction was later set aside in federal court, and Morrow was never retried on the robbery charge. See *Morrow v. Parratt*, 574 F.2d 411 (8th Cir. 1978). Morrow's record also shows several traffic offenses, including "driving while intoxicated" in 1974.

We have regularly and consistently held that absent an abuse of discretion, a sentence imposed within the statutory limits will not be disturbed on appeal. See *State v. McKichan*, 219 Neb. 560, 364 N.W.2d 47 (1985). Further, the granting of probation as opposed to incarceration is a matter left to the sound discretion of the trial court and absent a showing of an abuse of discretion will not be disturbed on appeal. See *State v. Jallen*, 218 Neb. 882, 359 N.W.2d 816 (1984). There is nothing contained within Morrow's records which would support a claim of abuse of discretion.

The question which we must then address is whether a sentence which in itself is not the result of an abuse of discretion may nevertheless entitle the defendant to relief because of a sentence imposed by another judge on a codefendant.

In support of Morrow's position seeking a reduction in his sentence, our attention is directed to *State v. Shonkwiler*, 187 Neb. 747, 194 N.W.2d 172 (1972), and *State v. Nix*, 215 Neb. 410, 338 N.W.2d 782 (1983).

While it is true that language may be found in *Shonkwiler* which would give comfort to Morrow in this case, it is further true that an examination of the facts in *Shonkwiler* makes it clear that it has no application to the instant case. In *Shonkwiler* the evidence established that both defendants pled guilty and were sentenced by the same judge at the same time. The only apparent reason for the disparity in sentence was the fact that Shonkwiler expressed to the probation officer and to the court his belief that the Vietnam war was immoral and stated he would refuse to bear arms in Vietnam. The trial court interpreted his comments as a statement that he would not obey the laws of the United States, referred to him as an outlaw, and refused to entertain any additional testimony as to the nature and extent of his conscientious objections. We correctly held that such factors were not proper to be considered by the trial court, and we modified the sentence. Under the facts in *Shonkwiler* we would have reduced the sentence even if there had been no codefendant. We have no similar facts in the instant case.

State v. Nix, supra, presents a more difficult problem. In *Nix* we held at 411, 338 N.W.2d at 783, as we had previously held,

> "where two or more defendants are convicted for the same offense and different penalties are inflicted, and it appears from the evidence that the defendant receiving the least punishment is at least equally guilty, it may be necessary for this court to examine the evidence to determine whether there were justifiable reasons for the distinctions and whether the higher sentence should be reduced."

That is a correct statement of the law; and where two or more defendants are convicted for the same offense and different penalties are inflicted, it is appropriate for the court to *examine* the evidence to determine whether there are justifiable reasons for the differences. In *Nix, supra*, we reduced the sentence even though Nix's sentence was appropriate and the codefendant's inappropriate under all of the facts. On further reflection we believe that we simply misapplied the rule in *Nix*, and given an opportunity to review the matter again would hold to the contrary, as we do in this case.

What we are here presented with is a situation in which

Morrow received an appropriate sentence for the crime while the codefendant, Harlow, sentenced by another judge at another time, received what was obviously an extremely lenient sentence.

In effect, the argument that is presented to us by Morrow is to the effect that if one sentencing judge imposes a more lenient sentence, though a more severe sentence could have been justified, another sentencing judge may not impose any more severe sentence even though the latter sentence is in all respects correct. We do not believe that to be the law, and obviously was not the view of the Legislature when it recently adopted Neb. Rev. Stat. § 29-2320 (Cum. Supp. 1984), which provides:

> Whenever a defendant is found guilty of a felony, following a trial or the entry of a plea of guilty or tendering a plea of nolo contendere, the county attorney charged with the prosecution of such defendant may appeal the sentence imposed to the Supreme Court if such attorney reasonably believes, based on all of the facts and circumstances of the particular case, that the sentence is excessively lenient.

The problem here is not that Morrow's sentence should be reduced but, rather, that the county attorney should have appealed Harlow's sentence because it was too lenient. At best, it is Harlow's sentence which is wrong and not Morrow's.

While it is obvious that every effort should be made to avoid disparity in sentencing, it would be to make mockery of the law to suggest that the way one error is cured is by committing a second error. Where it is apparent that the lesser sentence imposed upon a codefendant is erroneous, the sentencing court is not required to reduce all more severe though properly imposed sentences just to obtain uniformity.

AFFIRMED.

SHANAHAN, J., dissenting.

The majority opinion is replete with rationalization in disposition of Morrow's sentence and fails to address the fundamental problem in the sentencing process, namely, because judges vary, sentences vary. See M. Frankel, Criminal Sentences: Law Without Order 21 (1973).

To place matters in proper perspective, in *Morrow v. Parratt*,

574 F.2d 411 (8th Cir. 1978), the federal court found Morrow's conviction was constitutionally defective, set aside that conviction, and ordered the State to retry Morrow, which the State declined to do. Consequently, the backgrounds for Morrow and his companion in crime, Harlow, have no appreciable differences and are so strikingly similar as to be indistinguishable.

As early as 1905 this court recognized that fundamental fairness requires parity in sentencing codefendants equally culpable in the commission of the same crime, and held in *Keeler v. State*, 73 Neb. 441, 103 N.W. 64 (1905):

> When two or more defendants are tried together for the same offense, and different penalties are inflicted, and it appears from the evidence that the defendant receiving the least punishment is at least equally guilty, it may become necessary for this court to determine from the evidence, as an original question, whether the punishment of the defendants or some of them should be reduced.

(Syllabus of the court.)

This court has been given authority to modify an excessive sentence and impose the sentence warranted under the circumstances. See Neb. Rev. Stat. § 29-2308 (Cum. Supp. 1984).

In *State v. Shonkwiler*, 187 Neb. 747, 751, 194 N.W.2d 172, 174 (1972), this court stated: "The law still continues to strive for even-handed justice."

More recently, in an attempt to achieve equality in sentencing codefendants, this court required a district court to "set forth its reasons for differing dispositions" regarding dissimilar sentences of codefendants. *State v. Javins*, 199 Neb. 38, 41, 255 N.W.2d 872, 874 (1977).

To avoid a "substantial miscarriage of justice" involving different sentences imposed on codefendants, in *State v. Komor*, 213 Neb. 376, 329 N.W.2d 120 (1983), this court modified a sentence of imprisonment imposed on one defendant, ordered probation in accordance with the sentence imposed on a codefendant, and noted: "Anything other than that would constitute an impermissible disparity of sentences for identical offenses." *Id.* at 378, 329 N.W.2d at 122.

Although seals of other states may not bear "EQUALITY BEFORE THE LAW," as inscribed on the Great Seal of the State of Nebraska, nevertheless courts of other jurisdictions have justifiably taken pride in their respective systems of criminal justice which strive for equality before the law through a system wherein codefendants, with similar backgrounds and equally guilty in the commission of a crime, are treated and punished the same. See, *Troyer v. State*, 614 P.2d 313 (Alaska 1980); *Demps v. State*, 395 So. 2d 501 (Fla. 1981); *People v. Bell*, 95 Ill. App. 3d 803, 420 N.E.2d 497 (1981); *Com. v. McQuaid*, 273 Pa. Super. 600, 417 A.2d 1210 (1980); *Cox v. State*, 491 P.2d 357 (Okla. Crim. 1971). Thus, other courts, in attempting to avoid disparate sentences of codefendants convicted of the same crime, have applied legal logic consistent with common sense—identical facts result in identical consequences.

As Professor Jack M. Kress expressed: "Justice demands, however, that two individuals convicted of the same offense, with similar backgrounds and criminal histories, should receive sentences that are roughly the same." J. Kress, Prescription For Justice 20 (1980). As further noted by Professor Kress, disparity in sentences will "lead the public to lose confidence in the fair and impartial administration of the criminal justice system." *Id.*

Concerning unexplained and unjustifiable variations in sentences, Judge Marvin E. Frankel has observed: "The crazy quilt of disparities—the wide differences in treatment of defendants whose situations and crimes look similar and whose divergent sentences are unaccounted for—stirs doubts as to whether the guarantee of the 'equal protection of the laws' is being fulfilled." Frankel, *supra* at 103.

There is an axiom, "Things equal to the same thing are equal to each other." As illustrated by the majority's opinion, that Euclidean axiom is restricted to geometry and has no value for determining the measurement, properties, or relationship of a sentencing process in reference to a system of criminal justice. In view of the newly fashioned rule enthusiastically embraced by the majority, absence of equality in sentencing codefendants results in disappointment exceeded by a greater disappointment

that the law no longer strives for "even-handed justice" in the sentencing process and further exceeded by the greatest disappointment that the law now treats equals unequally.

Under the circumstances Morrow's sentence is excessive. This court should have modified Morrow's sentence to probation, the sentence imposed on Morrow's equally culpable codefendant. It is inequitable that Morrow receive a sentence greater than the sentence imposed on Harlow for the same crime. Morrow should pay for his crime, not for the imperfections of our sentencing process.

ROGER RUTT, APPELLANT, V. MIDWEST REFUSE SERVICE AND LIBERTY MUTUAL INSURANCE COMPANY, APPELLEES.

369 N.W.2d 93

Filed June 14, 1985. No. 84-702.

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

Law Offices of Cobb, Hallinan & Lefler, P.C., for appellant.

Jay L. Welch of Rickerson & Welch, for appellees.

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

PER CURIAM.

This is an appeal by Roger Rutt from a decision of a three-judge panel of the Nebraska Workmen's Compensation Court. After rehearing, the court found that Rutt's temporary total disability had terminated and that Rutt had sustained a 20-percent loss of earning power. The court awarded Rutt $30 per week for 249 weeks from January 11, 1983. See Neb. Rev. Stat. § 48-121(1) and (2) (Reissue 1984).

This case involves only a question of fact about the extent of Rutt's disability and primarily an issue of Rutt's credibility on the question of his ability to return to work after the subject accident.

Under Nebraska law it is settled that findings of fact by the Workmen's Compensation Court on rehearing have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong. See, Neb. Rev. Stat. § 48-185 (Reissue 1984); *Zaleski v. Farmland Foods*, 219 Neb. 157, 361 N.W.2d 523 (1985); *Mulder v. Minnesota Mining & Mfg. Co.*, 219 Neb. 241, 361 N.W.2d 572 (1985); *Scott v. State*, 218 Neb. 195, 352 N.W.2d 890 (1984); *Tranmer v. Mass Merchandisers*, 218 Neb. 151, 352 N.W.2d 610 (1984).

Upon a review of the record we cannot state that the findings of the Workmen's Compensation Court on rehearing are clearly wrong. Being bound by the findings of fact made by the Nebraska Workmen's Compensation Court, we affirm Rutt's award.

AFFIRMED.

IN RE INTEREST OF V.T. AND L.T., CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. B.T., APPELLANT.
369 N.W.2d 94

Filed June 14, 1985. No. 84-743.

1. **Juvenile Courts: Appeal and Error.** In a juvenile case an adjudication order is an appealable order.
2. _____: _____. The standard of review in a juvenile proceeding is de novo upon the record.

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

B.T., pro se.

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

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

PER CURIAM.

B.T., the natural father of the children in interest, appeals from a dispositional order of the separate juvenile court of Douglas County, dated September 7, 1984. The juvenile court order provided that V.T., age 11, and L.T., age 9, continue in foster care and that the parents receive specified counseling and cooperate with social workers. The order did not address any termination of parental rights. The order also provided for a court check in 60 days and a review in 6 months. In his appeal, in which he is pro se, B.T. alleges "there is no evidence to support any findings of the court." We affirm that order.

On May 11, 1984, a petition was filed in the juvenile court alleging that V.T. and L.T. were juveniles within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 1982). The petition was amended to allege that B.T. had been physically, verbally, and emotionally abusive to the children and their natural mother, that he had fondled himself, while he was clothed, in the presence of the children, and that the children refused to return to the parental home due to their fear of further abuse at the hands of B.T.

An adjudication hearing was held on July 10, 1984. At this hearing B.T. refused court-appointed counsel and undertook to represent himself. B.T. was present at the beginning of the hearing but did not return for the conclusion of the hearing after a lunch recess. The children testified as to their father's violent behavior, their fear of him, and the inability of their mother to protect herself or the children from him. On the same day, the court found that V.T. and L.T. were juveniles within the meaning of § 43-247(3)(a), as to B.T. through his own fault and habits, and as to the mother through no fault or habit of her own.

A dispositional hearing was held on September 6, 1984. B.T. did not appear at this hearing. After this hearing the court entered the order mentioned above, and B.T. appealed.

We first note that B.T. has appealed from the dispositional order and not from the adjudication order. It is settled that an adjudication order is an appealable order. *In re Interest of Aufenkamp*, 214 Neb. 297, 333 N.W.2d 681 (1983); *Krell v. Sanders*, 168 Neb. 458, 96 N.W.2d 218 (1959). In the absence of

an appeal from the adjudication order, this court is concerned only with the dispositional order of September 7, 1984.

B.T.'s only assignment of error deals with sufficiency of the evidence. There was an abundance of evidence in the record to support the allegations of the petition and to support the findings of the court in its adjudication order. It is clear that B.T.'s violent behavior placed the children in a potentially dangerous situation. The dispositional order removed the children from that situation and provided a procedure attempting to stabilize the parent-children relationship by placing the children in a foster home, requiring both parents to involve themselves in domestic violence counseling, and requiring B.T. to seek psychological and psychiatric treatment.

The juvenile court has broad discretion as to the disposition of children who are found to be neglected under § 43-247(3)(a). Our review, de novo on the record, satisfies us that there was no abuse of that discretion in this case. The judgment of the juvenile court is affirmed.

AFFIRMED.

WHITE, J., participating on briefs.

ALBERTA RAE FOWLER, APPELLEE, V. LEO JAMES FOWLER, APPELLANT.

369 N.W.2d 96

Filed June 14, 1985. No. 84-815.

Appeal from the District Court for Box Butte County: ROBERT R. MORAN, Judge. Affirmed.

Laurice M. Margheim, for appellant.

Cynthia Peters of McGinley, Lane, Mueller, O'Donnell & Merritt, P.C., for appellee.

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

PER CURIAM.

The instant appeal involves a domestic relations matter.

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

AFFIRMED.

JIM TOBIN ET AL., APPELLANTS, V. FLYNN & LARSEN IMPLEMENT CO., A NEBRASKA CORPORATION, APPELLEE.

369 N.W.2d 96

Filed June 14, 1985. No. 85-047.

1. **Election of Remedies.** A party may not plead alternative theories of recovery which are inconsistent in the sense that he or she cannot logically choose one theory without renouncing the other; he or she must elect between them.
2. **Contracts: Election of Remedies.** A party cannot proceed on a theory of recovery which is premised upon the existence of a contract and at the same time proceed alternatively on a theory which is premised on the lack of a contract.
3. **Contracts: Fraud: Election of Remedies.** One who has been induced to enter into an agreement by virtue of a material misrepresentation may either affirm the agreement and sue for damages or disaffirm the agreement and sue to be reinstated to his or her position as it existed before entry into the contract.
4. **Election of Remedies.** A party must proceed on alternative, consistent theories at the same time or forever forgo one theory or the other.
5. **Actions: Pleadings.** A prayer for equitable relief has no place or role in a law action.
6. **Fraud: Proof: Case Disapproved.** Fraud must be proved in an action at law by a preponderance of the evidence. Language in cases such as *Erftmier v. Eickhoff*, 210 Neb. 726, 316 N.W.2d 754 (1982), *Page v. Andreasen*, 200 Neb. 641, 264 N.W.2d 682 (1978), *Kernan v. Modern Woodmen of America*, 120 Neb. 333, 232 N.W. 590 (1930), and *Hampton v. Webster*, 56 Neb. 628, 77 N.W. 50 (1898), that fraud in a law action must be proved by clear and satisfactory evidence, is disapproved.
7. _____ : _____ : _____. Fraud in an equity case must be proved by "clear and convincing" or "clear and satisfactory" evidence. Language in cases such as *Saffer v. Saffer*, 133 Neb. 528, 274 N.W. 479 (1937), that fraud in an equity action must be proved by a preponderance of the evidence, is disapproved.
8. **Evidence: Proof: Words and Phrases.** "Clear and satisfactory" evidence is the same as "clear and convincing" evidence, which is that amount of evidence

which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.

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

Clarence E. Mock of Johnson and Mock, for appellants.

Neil W. Schilke of Sidner, Svoboda, Schilke, Wiseman, Thomsen & Holtorf, for appellee.

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

CAPORALE, J.

Appellants, Jim and Susan Tobin, husband and wife, sued appellee, Flynn & Larsen Implement Co., a Nebraska corporation, for damages, alleging three alternative theories of recovery: (1) breach of express warranty, (2) breach of implied warranty, and (3) fraud. The trial court sustained the motion of Flynn & Larsen, requiring the Tobins to elect to proceed either on their breach of warranty theories or on the fraud theory. In accordance with that ruling the Tobins elected to proceed to trial on the fraud theory. The jury returned a verdict in favor of Flynn & Larsen, and judgment was entered dismissing the action. The Tobins assign as errors (1) the requirement that they elect to proceed either on their fraud theory or their warranty theories, (2) the instruction to the jury that the fraud must be proved by "clear and satisfactory evidence," and (3) the definition of such standard of proof as demanding "a closer scrutiny of the evidence than in an ordinary controversy." We reverse and remand for further proceedings.

It is true that where a party pleads alternative theories of recovery which are inconsistent in the sense that he or she cannot logically choose one without renouncing the other, he or she must elect between them. *Kenyon & Larsen v. Deyle*, 205 Neb. 209, 286 N.W.2d 759 (1980). For example, a party cannot proceed on a theory of recovery which is premised upon the existence of a contract and at the same time proceed alternatively on a theory which is premised on the lack of a contract. Consequently, one who has been induced to enter into

an agreement by virtue of a material misrepresentation, that is to say, by virtue of fraud, may either affirm the agreement and sue for damages or disaffirm the agreement and sue to be reinstated to his or her position as it existed before entry into the contract. *Christopher v. Evans*, 219 Neb. 51, 361 N.W.2d 193 (1985). This is so because one remedy, damages, depends upon the existence of a contract, and the other, rescission, depends upon the concept that because of the fraud no contract came into existence. See, 1 S. Williston, A Treatise on the Law of Contracts § 15 (3d ed. 1957); 1 A. Corbin, Corbin on Contracts § 7 (1963).

On the other hand, for example, one may at the same time proceed on both the theories of contract and quantum meruit, for in either instance the action is premised on the existence of a contract, either express or implied. Indeed, in such an instance one must proceed on those two alternative, consistent theories at the same time or forever forgo one theory or the other. *Vantage Enterprises, Inc. v. Caldwell,* 196 Neb. 671, 244 N.W.2d 678 (1976).

With that background we are prepared to analyze the Tobins' petition. The first alternative theory of recovery alleges that Flynn & Larsen made certain express warranties, the second alleges that the transaction itself implied certain warranties, and the final theory alleges that Flynn & Larsen made certain material misrepresentations upon which the Tobins relied, as a consequence of all of which they were damaged. The petition seeks a monetary recovery for that damage.

As we have seen from the foregoing discussion of the applicable law, there is nothing inconsistent in seeking to recover damages arising by virtue of having been induced to enter into a contract by fraud and seeking to recover damages because express and implied warranties were allegedly breached. All three theories rest upon the premise that a contract came into being which resulted in damages.

The situation would be otherwise had the Tobins sought to rescind the contract based on fraud or alternatively to recover damages for the breach of warranties, for a contract cannot at one and the same time and under the same facts both exist and not exist.

It must be observed that the Tobins created some confusion as to what they were seeking by including in their prayer for relief the gratuitous phrase "and any further relief the Court deems just under the circumstances." We have stated before that a prayer for equitable relief has no place or role in a law action. *Doak v. Milbauer*, 216 Neb. 331, 343 N.W.2d 751 (1984). The inclusion of a phrase sounding in equitable relief where it does not belong not only may indicate that the pleader is uncertain of his ground but may succeed in confounding a court. In this case, however, each theory of recovery alleged recognizes the existence of a contract. The petition merely seeks a single recovery under one or more consistent, alternative theories.

Accordingly, the trial court erred in compelling the Tobins to elect among the various theories of recovery they pled.

Because the cause is remanded for a new trial and the question of the appropriate standard of proof will likely arise again, we address the second assignment of error.

We have historically held that in a law action fraud must be proved by a preponderance of the evidence. *Murphy Finance Co. v. Fredericks*, 177 Neb. 1, 127 N.W.2d 924 (1964); *Mayer v. Homestead Fire Ins. Co.*, 150 Neb. 556, 35 N.W.2d 413 (1948); *Falkner v. Sacks Bros.*, 149 Neb. 121, 30 N.W.2d 572 (1948); *Campbell v. C & C Motor Co.*, 146 Neb. 721, 21 N.W.2d 427 (1946); *Bauer v. Wood*, 144 Neb. 14, 12 N.W.2d 118 (1943); *Ralston Purina Co. v. Iiams*, 143 Neb. 588, 10 N.W.2d 452 (1943); *Ralston Purina Co. v. Cox*, 141 Neb. 432, 3 N.W.2d 748 (1942); *Giles & Son v. Horner*, 97 Neb. 162, 149 N.W. 333 (1914); *Patrick v. Leach*, 8 Neb. 530, 1 N.W. 853 (1879).

It appears that in equity cases we have fairly consistently required proof of fraud to be either by "clear and convincing" or "clear and satisfactory" evidence. *McGinty v. McGinty*, 195 Neb. 281, 237 N.W.2d 855 (1976); *LaPuzza v. Prom Town House Motor Inn, Inc.*, 191 Neb. 687, 217 N.W.2d 472 (1974); *Russo v. Williams*, 160 Neb. 564, 71 N.W.2d 131 (1955); *Burnham v. Bennison*, 126 Neb. 312, 253 N.W. 88 (1934). But see *Saffer v. Saffer*, 133 Neb. 528, 274 N.W. 479 (1937), applying the preponderance of the evidence standard to a quiet title action. For a discussion of the difference between proving

fraud in equity as distinguished from fraud at law, see *Peters v. Woodman Accident & Life Co.*, 170 Neb. 861, 104 N.W.2d 490 (1960).

Regrettably, some of our opinions have overlooked the distinction between cases brought at law and those brought in equity and, consequently, have inadvertently stated that fraud in actions at law must be proved by "clear and satisfactory" evidence. *Erftmier v. Eickhoff*, 210 Neb. 726, 316 N.W.2d 754 (1982); *Page v. Andreasen*, 200 Neb. 641, 264 N.W.2d 682 (1978); *Kernan v. Modern Woodmen of America*, 120 Neb. 333, 232 N.W. 590 (1930); *Hampton v. Webster*, 56 Neb. 628, 77 N.W. 50 (1898).

We now remove this conflict by disapproving the earlier language which imposes the clear and satisfactory standard to the proof of fraud in suits at law and adhere to the rule that in such actions fraud must be proved by a preponderance of the evidence. This is not to imply, as disclosed by the case cited in the following paragraph, that proof by clear and satisfactory or clear and convincing evidence is never appropriate in any kind of a law action.

Having so resolved the second issue, we need not concern ourselves with the third and final issue, except perhaps to note that in *Castellano v. Bitkower*, 216 Neb. 806, 346 N.W.2d 249 (1984), we held that "clear and satisfactory" evidence is the same as "clear and convincing" evidence, defined as that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved. *Castellano* was an action at law which correctly required that the right to recover on a lost instrument be proved by clear and convincing evidence.

The judgment of the district court is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

BOSLAUGH, J., concurs in the result.

DONALD JOSEPH TEJRAL, APPELLANT, V. DEBRA ANN TEJRAL, APPELLEE.

369 N.W.2d 359

Filed June 21, 1985. No. 84-505.

Divorce: Service of Process: Notice. Where a party in a dissolution of marriage case is served personally with a summons and a copy of the petition in the case, and that party chooses not to file any pleading nor to enter an appearance in the case, and has not otherwise requested notice of hearing, notice of a default hearing need not be given to such party.

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

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

Ronald S. Depue of McDermott, Depue & Zitterkopf, for appellee.

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

GRANT, J.

Petitioner-appellant husband appeals from an order of the district court granting the motion of respondent-appellee wife to vacate a default judgment entered in a dissolution of marriage case between the parties. The default judgment dissolved the marriage of the parties, granted custody of the parties' two children to petitioner, and divided the property and debts of the parties. For the reasons hereinafter set out we reverse.

On February 1, 1984, the husband filed his petition seeking a dissolution of the parties' marriage, custody of the parties' two children, and an equitable division of the parties' property and debts. The wife was served personally with a summons, together with a copy of the petition, on February 2, 1984. The wife did not file any motion or answer to the petition and did not enter any appearance in the action. On April 26, 1984, the husband, with his attorney and two witnesses, appeared before the district court for Hall County, Nebraska. A hearing was held and a decree of dissolution of the marriage was signed on

April 27 by the district judge. The wife did not appear at this hearing, nor did she receive any notice of the hearing.

On May 18, 1984, respondent filed her motion to vacate the decree of dissolution of April 27 "for the reason that irregularities occurred in obtaining the Decree of Dissolution in that Respondent was not legally notified of the time and place of hearing." On June 4, 1984, a hearing was held on the respondent's motion. The parties stipulated that "[r]espondent did not receive notice of the final hearing for dissolution, which was held on April 26, 1984." No further evidence was adduced. The court then signed its order granting respondent's motion to vacate the judgment and decree of April 27, 1984.

Petitioner timely appealed to this court, alleging as error that the district court abused its discretion in granting respondent's motion. This court has clearly stated that motions to set aside decrees of dissolution are within the scope of Neb. Rev. Stat. § 42-372 (Reissue 1984), which provides that, in the absence of an appeal, the trial court may at any time within 6 months vacate or modify the decree. We have also held, as stated in *Puetz v. Puetz*, 211 Neb. 674, 676-77, 319 N.W.2d 761, 763 (1982), that "control of a divorce decree during the 6-month period pending finality is within the sound judicial discretion of the trial court and that the actions of said court may not be reversed in the absence of an abuse of that discretion." See, also, *Howard v. Howard*, 207 Neb. 468, 299 N.W.2d 422 (1980); *Miller v. Miller*, 190 Neb. 816, 212 N.W.2d 646 (1973). Disposition of this case then depends on determination of the question whether the trial court abused its discretion in vacating the court's earlier dissolution of the parties' marriage on the basis presented to the trial court.

At the default hearing of April 26, 1984, two disinterested witnesses testified that each of them knew both of the parties, although they knew the husband better, and that each of them had children of her own; and each testified that the husband had a great deal to do with raising the children and was a good father to the children. The trial court did not question either of these witnesses.

Petitioner then testified that he was the manager of an ambulance service in Grand Island, after having retired as a

police officer in Spencer, Nebraska, where he had been shot while so serving. Petitioner described the assets of the parties, which consisted primarily of an $8,000 mobile home subject to a mortgage of $7,665. He also described respondent's conduct toward the parties' children, which he described as "irresponsible," and described specific instances of neglect endangering the children. Petitioner described his role as "I have always been concerned. I have every — ever since day one. I have been the one to change the diapers, feed them, get up in the middle of the night with them." Petitioner also testified that he and his wife discussed the dissolution case "routinely everyday" and that she acknowledged she knew the action was pending. Petitioner further testified that his wife had told him she was not going to give him a divorce and that "if she can't have the children, nobody will." Petitioner also testified that he had advised respondent "to seek legal advice, her family has, her parents have, my boss and his wife has, her friends have, and she's neglected to do so."

The trial court questioned the petitioner concerning efforts at reconciliation, petitioner's employment, and respondent's past employment. The court then found the marriage irretrievably broken; dissolved the marriage; awarded custody of the children to petitioner, subject to respondent's rights of reasonable visitation; and awarded the mobile home, subject to encumbrances, to petitioner. The court also awarded an automobile valued at $1,000 to respondent, as well as a judgment of $1,200 in lieu of alimony.

It is important to note that respondent's sole attack on this decree is that the decree was entered without notice to her. Respondent does not allege that she was misled in any way by petitioner at any phase of these proceedings. She does not allege that she was overreached by either the court or petitioner in any respect, nor does she allege that the court's decree was unfair or inequitable.

On the other hand, petitioner has complied fully with the provisions as to service of process set out in Neb. Rev. Stat. § 42-355 (Reissue 1984) in that respondent was served personally with a summons which notified her that she was required to file a response within 30 days or that judgment

"may be entered for relief demanded in the petition." She was served at the same time with a copy of the petition which sought a dissolution of her marriage and the custody of the parties' children. She chose to do nothing. In that situation it was an abuse of the trial court's discretion to set aside the court's earlier decree entered in accord with the applicable statutes of Nebraska. Neither those statutes nor the applicable court rules of the Eleventh Judicial District of Nebraska required notice of the final hearing to be given where a respondent had not responded to the petition within 30 days nor entered her appearance in the case before the hearing. In this case 83 days had intervened between service of the summons and the date of hearing. To adopt appellee's position would mean that service is required twice in every case before a default judgment could be entered. A party's voluntary inaction and inattention should not be permitted to paralyze the ordinary and orderly functioning of the legal process.

We hold that where a party in a dissolution of marriage case is served personally with a summons and a copy of the petition in the case, and that party chooses not to file any pleading nor to enter an appearance in the case, and has not otherwise requested notice of hearing, notice of a default hearing need not be given to such party. We further hold that it is an abuse of the trial court's discretion under § 42-372 to set aside a dissolution decree, properly entered, on the sole basis that notice of hearing was not sent to the party in default of filing any pleading or entering an appearance in the case.

The cause is reversed and remanded with directions to the trial court to reinstate the decree of April 27, 1984. Costs are taxed to appellee.

REVERSED AND REMANDED WITH DIRECTIONS.

KRIVOSHA, C.J., dissenting.

I must respectfully dissent. I do so on the very narrow ground that I believe it error to declare as a matter of law that "it is an abuse of the trial court's discretion under [Neb. Rev. Stat.] § 42-372 [(Reissue 1984)] to set aside a dissolution decree, properly entered, on the sole basis that notice of hearing was not sent to the party in default of filing any pleading or entering an appearance in the case." The use of the term "discretion"

implies that a hard-and-fast rule cannot be invoked. See *Pettegrew v. Pettegrew*, 128 Neb. 783, 260 N.W. 287 (1935). To therefore suggest that while the rule cannot be hard and fast, the evidence of its abuse can be, is not itself a good rule for this court to adopt. I believe that to be true, particularly in view of the fact that we have said that "[i]n this jurisdiction the law is established that courts of general jurisdiction possess inherent power to vacate or modify their own judgments *at any time* during the term at which they were pronounced." (Emphasis supplied.) *Gasper v. Mazur*, 155 Neb. 856, 859, 54 N.W.2d 66, 68 (1952). See, also, *Meier v. Nelsen*, 156 Neb. 666, 57 N.W.2d 273 (1953); *Lyman v. Dunn*, 125 Neb. 770, 252 N.W. 197 (1934); *Bradley v. Slater*, 58 Neb. 554, 78 N.W. 1069 (1899).

Appellate courts generally consider an abuse of discretion to occur when the act of the trial court was clearly untenable or unreasonable, if its action clearly amounts to a denial of justice, or if clearly against justice or conscience, reason and evidence. See *Pettegrew v. Pettegrew, supra*. See, also, *Mabry v. Mudd*, 132 Neb. 610, 272 N.W. 574 (1937). That is a matter of fact to be decided in each case, on a case-by-case basis.

As we observed recently in *Guggenmos v. Guggenmos*, 218 Neb. 746, 748, 359 N.W.2d 87, 90 (1984):

> A review to determine whether an abuse of discretion has taken place is much narrower. Although an abuse of discretion does not imply an improper motive, willful purpose, or intentional wrong, it does require the reasons or rulings of the trial judge to be clearly untenable and to deprive a party of a substantial right such as to amount to a denial of justice.

While I do not, by dissenting, in any manner condone the practice followed by the appellee in this case, and do not mean by dissenting to suggest that I approve of a party's failing to file an appropriate pleading and then seeking to have a judgment set aside, I do, however, mean to imply that that is a matter within the sound discretion of the trial court. Had the trial court in the instant case refused to set aside the judgment, I would have likewise supported that view. I simply believe that establishing a flat rule to dictate when and how a trial judge should exercise his or her discretion is inappropriate. For that

reason I would have affirmed the action of the trial judge in setting aside the default judgment and permitting the case to be heard on the merits.

VRANA PAVING COMPANY, A CORPORATION, APPELLEE, V. CITY OF OMAHA, NEBRASKA, APPELLANT.

369 N.W.2d 613

Filed June 28, 1985. No. 83-694.

1. **Ordinances: Judicial Notice: Appeal and Error.** The Supreme Court will not take judicial notice of municipal ordinances not properly made a part of the record.
2. **Courts.** Courts of this state do not render advisory opinions, but simply decide cases and controversies.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Reversed and remanded with directions to dismiss.

Herbert M. Fitle, Omaha City Attorney, and Robert J. Hamer, for appellant.

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

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

PER CURIAM.

The appellee, Vrana Paving Company, instituted this action in the district court for Douglas County, Nebraska, pursuant to the provisions of the Nebraska Uniform Declaratory Judgments Act, Neb. Rev. Stat. §§ 25-21,149 et seq. (Reissue 1979). By its petition Vrana sought a declaration that chapter 55 of the Omaha Municipal Code was unconstitutional and void if applied to prohibit it from operating a portable concrete mixing plant used in its street paving projects. Additionally, Vrana sought an injunction against the city from enforcing the provisions of chapter 55 against it.

Following trial, the district court for Douglas County found that the application of the ordinances to prohibit Vrana's use of premises for temporary operation of its batch plant was not a proper exercise of the city's police powers, bearing no substantial relation to and not reasonably necessary for the public health, welfare, safety, or morals. The court further found that the operation of the batch plant was not of a permanent character and that the intent of chapter 55 of the Omaha Municipal Code was to prevent a permanent use of premises not zoned for such use, not to prevent a temporary or occasional use necessary for the conduct of an otherwise lawful activity. The court therefore enjoined the city from enforcing the ordinances in connection with the temporary operation of the batch plant, provided that the plant was used for production of concrete for use within 1 mile of its location and would not remain in its location for more than 180 days.

The city has now appealed, alleging that the district court

> erred in finding that application of the City of Omaha's zoning ordinances to the use of Vrana's portable plant for a period of 180 days or less was unconstitutional in not being a proper exercise of the police power and bearing no substantial relation to, and not reasonbly [sic] necessary for, the public health, safety, morals, or welfare.

The city further argues that the district court erred in not finding that Vrana's plant, a portable, temporary enterprise, must conform to zoning district regulations or be limited to the parcel of property on which its product is ultimately placed, and further erred in not finding that the allowance of such use without regard to other nearby uses would constitute an arbitrary and invalid portable or floating spot zone. Furthermore, the city maintains that the district court erred in finding that the zoning ordinances of the City of Omaha, chapter 55 of the Omaha Municipal Code, were not intended to apply to certain temporary uses such as Vrana's plant.

Before attempting to consider the assignments of error raised by the city, we believe a more basic issue must be addressed. Vrana sought to have the district court declare that chapter 55, *in its entirety*, as applied to its temporary use and operation of a batch plant in connection with its paving and construction

activities and as applied to the real estate upon which said plant is located, was unconstitutional and "in violation of Sections 1 and 2 of the Constitution of the State of Nebraska as well as Article XIV of the Constitution of the United States . . . ." The district court did not determine that chapter 55 was unconstitutional in its entirety. Rather, it found "that Chapter 55 of the Omaha Municipal Code cannot be constitutionally applied to prohibit Vrana's use of premises for the temporary operation of its portable batch plant . . . ." The district court then enjoined the city from enforcing the provisions of chapter 55 against Vrana's temporary operation of a portable batch plant, so long as the batch plant was not more than 1 mile from where the concrete was to be used and did not remain in that location for more than 180 consecutive calendar days.

The difficulty with all of this is that the parties did not introduce into evidence all of chapter 55 of the Omaha Municipal Code, and neither the district court on trial of the matter nor this court on appeal has before it chapter 55 in its entirety. All that was offered in evidence at the trial was a portion of chapter 55, consisting of "ARTICLE I. DEFINITIONS," "ARTICLE II. DISTRICT REGULATIONS," and articles XXVII through XXXI, XXXX[XL], XXXXI[XLI], and a part of XXXXII[XLII]. Articles XXVII through XXX cover various industrial districts in which operation of the batch plant would apparently be permitted. Those portions of chapter 55 covering residential or commercial zones were not offered. We therefore have no way of knowing what, if any, conditions are imposed upon Vrana when attempting to place its portable batch plant on land zoned residential or commercial.

This court has repeatedly held that we will not take judicial notice of municipal ordinances not properly made a part of the record. See, *Smith v. City of Omaha, ante* p. 217, 369 N.W.2d 67 (1985); *State v. Austin,* 219 Neb. 420, 363 N.W.2d 397 (1985); *State v. Hatfield,* 218 Neb. 470, 356 N.W.2d 872 (1984). The reason for the rule in this case is obvious. Without knowing what the rights or duties of a citizen are as provided in chapter 55 of the Omaha Municipal Code, we are unable to determine whether Vrana's constitutional rights are being violated.

We do not believe that the district court could properly determine what the intent of chapter 55 of the Omaha Municipal Code is when it did not have before it all of chapter 55, including those sections pertaining to the residential and commercial areas where Vrana wished to place its batch plant, in apparent violation of the Omaha city ordinances.

Courts of this state do not render advisory opinions, but simply decide cases and controversies. See, *Ellis v. County of Scotts Bluff*, 210 Neb. 495, 315 N.W.2d 451 (1982); *State ex rel. Nebraska Nurses Assn. v. State Board of Nursing*, 205 Neb. 792, 290 N.W.2d 453 (1980). Without the benefit of the ordinance, neither the district court nor this court is in a position to declare the rights of the parties under the ordinance, as requested by Vrana, any more than a court could declare the rights of parties to a contract without benefit of the contract. The decision of the district court is reversed and the cause remanded with directions to dismiss Vrana's petition.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

JERRY OHLER, APPELLANT, V. BEVERLY OHLER, APPELLEE.

369 N.W.2d 615

Filed June 28, 1985. No. 84-180.

1. **Modification of Decree: Child Support.** A court may modify child support becoming due in the future because of a material change in circumstances, of a nature requiring modifications in the best interests of the children, occurring after the entry of the dissolution decree.
2. **Modification of Decree: Child Support: Words and Phrases.** A "material change in circumstances" involves an alteration and passage from one condition to another and requires consideration of a variety of factors or circumstances, including the obligated parent's financial means, the needs of the child or children for whom the support is to be paid, the good or bad faith motive of the obligated parent in sustaining a reduction of means, and the permanence of the change.
3. **Modification of Decree: Child Support: Alimony: Good Cause: Words and Phrases.** A "material change in circumstances" in modification of child support cases is analogous to the "good cause" required to support a modification of

alimony.

4. **Divorce: Equity.** Dissolution of marriage cases are equitable in nature.
5. **Equity.** One who comes into equity must come with clean hands.
6. _____. Equity will refuse to aid a litigant who violates a statute directly connected with the matter in litigation.
7. **Modification of Decree: Child Support.** Incarceration resulting in the reduction or elimination of income or assets does not constitute such a material change in circumstances as to warrant the temporary termination of a child support obligation.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Affirmed.

Berry, Anderson, Creager & Wittstruck, for appellant.

Patricia J. Jacobs, for appellee.

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

CAPORALE, J.

The applicant, Jerry Ohler, seeks to modify the decree dissolving his marriage so as to suspend his obligation to make child support payments. His application alleges a material change in circumstances in that he has been sentenced to imprisonment for a period of 15 years and is "now totally devoid of any funds, savings, stocks, bonds or any other liquidable [sic] or salable assets either real or personal; that he is unemployed, has no wages or other earnings currently available to him and has no income from any source currently available to him." The trial court determined that the application did not state a cause of action, sustained a general demurrer thereto, and dismissed the cause. We affirm.

Neb. Rev. Stat. § 42-364 (Reissue 1984) provides that when dissolving a marriage a court may include orders for the maintenance of a child "as shall be justified" and that "[s]ubsequent changes may be made by the court after hearing . . ."

We have held that a court may modify child support becoming due in the future because of a material change in circumstances, of a nature requiring modifications in the best interests of the child or children for whose benefit the support was ordered, occurring after the entry of the dissolution decree.

Tworek v. Tworek, 218 Neb. 808, 359 N.W.2d 764 (1984); *Morisch v. Morisch*, 218 Neb. 412, 355 N.W.2d 784 (1984); *Harb v. Harb*, 209 Neb. 875, 312 N.W.2d 279 (1981). A "material change in circumstances" has been said to elude precise and concise definition, but, rather, involves an alteration and passage from one condition to another and requires consideration of a variety of factors or circumstances, including the obligated parent's financial means, the needs of the child or children for whom the support is to be paid, the good or bad faith motive of the obligated parent in sustaining a reduction of means, and the permanence of the change. *Morisch v. Morisch, supra.* A material change in circumstances in this context is analogous to the "good cause" required to support a modification of alimony. *Morisch v. Morisch, supra.*

In that latter connection we have recently held in *Cooper v. Cooper*, 219 Neb. 64, 361 N.W.2d 202 (1985), that the combined effects of the obligated party's lower income from a voluntary but good faith change in employment and the benefited party's newfound capacity to work warranted a reduction in the amount of alimony previously ordered.

There is no question but that incarceration constitutes an alteration and passage from one condition to another. The issue is whether the altered condition is such as to warrant a suspension, that is to say a temporary termination, of one's child support obligation.

The suggestion that we have already resolved the matter in *Sodders v. Sodders*, 210 Neb. 276, 313 N.W.2d 927 (1981), is incorrect. Although *Sodders* refused to modify an incarcerated party's obligation to pay child support, there existed a trust fund upon which the incarcerated parent could draw to meet his obligation. In contrast, the allegation in the present case is in effect that there exists no "currently available" income or assets of any kind or nature whatsoever with which to make the payments. Thus, the question of whether incarceration which results in rendering the obligated parent without financial means constitutes a material change in circumstances such as to warrant a temporary termination of child support payments during the continuation of that condition is one of first impression for this court.

We have neither been directed to, nor does our research disclose, any substantial body of law on the subject. In two cases from other jurisdictions, wherein, like *Sodders*, an asset was available to the prisoner, relief was denied. The Iowa Supreme Court in *In re Marriage of Vetternack*, 334 N.W.2d 761 (Iowa 1983), said:

> We agree with the trial court that the petitioner's equity in the house should be charged for the support payments he is unable to meet during the period of his incarceration. The crucial thing is that, during petitioner's incarceration, it will continue to be necessary to care, feed, and provide for his children. He remains responsible for those expenses. It would not be equitable for his equity in the home to remain set off to him while his children were being supported by others.

Id. at 763. *Noddin v. Noddin*, 123 N.H. 73, 76, 455 A.2d 1051, 1053 (1983), reasoned as follows:

> Although unemployment or diminution of earnings is a common ground for modification, a petition for modification will be denied if the change in financial condition is due to fault or voluntary wastage or dissipation of one's talents and assets. . . .
>
> In the case at hand, the defendant was engaged in criminal activity at his own peril, and his reduced financial ability was due to his own fault. His child support and alimony obligations should not be reduced where his own conduct has resulted in his loss of high-earning employment and he has at least one valuable asset, while his former spouse and his child must make sacrifices. Modification of support decrees is an exercise of the court's equity powers. Equitable relief will be denied if one comes to the court with unclean hands. . . .

Edmonds and Edmonds, 53 Or. App. 539, 633 P.2d 4 (1981), is more directly in point. It holds that an incarcerated and obligated parent with no income should not be required to pay child support until he is capable of gainful employment. In so holding, the court of appeals quoted from *Tice v. Tice*, 207 Or. 247, 295 P.2d 866 (1956), a child support modification case not involving an incarcerated, obligated parent, the concept that

" '[n]o court is justified in ordering a man to do the impossible.' " 53 Or. App. at ____, 633 P.2d at 5. The *Edmonds* court rejected application of the clean hands maxim referred to in *Noddin*.

We, however, are not persuaded by the reasoning of the Court of Appeals for the State of Oregon. Nebraska dissolution of marriage cases are equitable in nature. *Petersen v. Petersen*, 208 Neb. 1, 301 N.W.2d 592 (1981); *Holmes v. Holmes*, 152 Neb. 556, 41 N.W.2d 919 (1950). We have held that equity, under the general maxim that one who seeks equity must come with clean hands, will refuse its aid to a litigant who violates a statute directly connected with the matter in litigation. *Christensen v. Christensen*, 144 Neb. 763, 14 N.W.2d 613 (1944) (holding that one who entered into marriage with full knowledge he suffered from a venereal disease was barred from seeking an annulment).

Incarceration of the applicant necessarily means that he was found to have violated a criminal statute. It seems to us that where one seeks relief from the obligation to pay child support on the basis that he or she is incarcerated, the violation of the statute which resulted in the incarceration is directly connected with the matter of child support. Under those circumstances equity should not and will not act to give relief.

Moreover, although *Noddin, supra*, is, as noted earlier, factually distinguishable from the present case, its suggestion that one's child support obligations should not be modified where the means with which to pay were reduced or eliminated by criminal activity strikes us as sound. Incarceration is certainly a foreseeable result of criminal activity; we find no sound reason to relieve one of a child support obligation by virtue of the fact that he or she engaged in criminal conduct. There is no reason those who have had to step in and assume the applicant's obligation should not be reimbursed by the applicant should his future position enable him to so do.

Further, we do not see how the best interests of the children for whom the support was ordered would be served by temporarily terminating the applicant's child support obligation.

This holding is in no sense inconsistent with *Cooper v.*

Cooper, 219 Neb. 64, 361 N.W.2d 202 (1985), for in *Cooper* no criminal activity was involved; rather, the reduced means with which to pay alimony resulted from a good faith change in occupation for sound and legitimate reasons.

The order of dismissal was correct and is affirmed.

AFFIRMED.

KRIVOSHA, C.J., dissenting.

I regret that I must respectfully dissent from the majority opinion in this case. I believe that by declaring, as a matter of law, that incarceration resulting in the reduction or elimination of income or assets does not constitute such a material change of circumstances as to warrant the temporary termination of a child support obligation, the court has created many more problems than those which it believes it has solved. Unlike the majority, I am persuaded by the reasoning of the Court of Appeals for the State of Oregon in the case of *Edmonds and Edmonds*, 53 Or. App. 539, 633 P.2d 4 (1981), and the Oregon Supreme Court in the case of *Tice v. Tice*, 207 Or. 247, 295 P.2d 866 (1956).

We obviously recognize that the child support judgment will not be paid during the time that the parent is incarcerated, and therefore the judgment will simply accrue with interest. Such a situation provides little or no benefit to anyone. The children do not receive the benefit of the proceeds during the time they require the funds, and the parent is simply confronted with a large, nondischargeable judgment upon release from prison, at a time when the prospect of paying a large judgment with interest is extremely unlikely. At current interest rates the judgment will double every 6 or 7 years. How this can be in the children's best interest is difficult for me to imagine.

I am further persuaded by the reasoning of the Oregon court which concludes that a court should not be permitted to impose a judgment and itself make the payment of that judgment impossible. We would not permit such a result to exist in any other situation.

In dissenting I do not for a moment ignore the fact that the parent against whom the judgment runs has been convicted of violating a law and has brought the problem into being by reason of his own act. Nevertheless, the violation of the

criminal law was a matter which the State addressed, and for which the individual is now paying the penalty. To impose an additional penalty is not appropriate.

One need only consider the situation of two inmates in a penal institution, one of whom is divorced, the other who is not, both of whom are responsible in the law for the support of their children. The parent who is not divorced will likely not be required to provide support for his children, though apparently, under the provisions of Neb. Rev. Stat. §§ 43-512.01 et seq. (Reissue 1984), a support order could be obtained. Upon release from prison that parent, though legally responsible for the support of his or her children, will not be confronted with this large, unpaid judgment. The second inmate who, by reason of the fact he or she is divorced and a child support judgment entered, will, however, leave the penitentiary with this large judgment owing. This does not strike me as being equitable or appropriate. Certainly the pressures of paying a child support judgment, in many cases where the children have long since grown, do little, if anything, to assist in rehabilitating the prisoner.

The majority opinion notes that the dilemma which Ohler finds himself in at the moment is one of his own doing. The fact, however, that a nonsupporting parent has intentionally committed an act which prevents that parent from providing support has never been a reason for us to deny a reduction or temporary cessation in child support payments where it was clear the nonsupporting parent could not pay. A parent who is seriously injured by reason of intentionally operating a motorcycle in a race would, in all likelihood, be relieved of the obligation to pay child support even though the injury was a result of the nonsupporting parent's intentional act. In *Cooper v. Cooper*, 219 Neb. 64, 361 N.W.2d 202 (1985), we permitted a physician to reduce the amount of his child support payments because of a reduction in income, even though the reduction in income was brought about by the intentional desire of the parent to change his occupation. We have never previously held that the fact that a parent voluntarily changes his or her occupation, thereby reducing his or her income, may not be considered by a court as a material change of circumstances.

The fact that a parent is incarcerated should likewise not, in and of itself, preclude a district court from considering whether the facts justify a reduction in child support. Certainly, if the evidence reflects that the incarcerated parent has any assets, those assets should first be made available for the support of the child. But where, as here, it is made clear that at the present time the incarcerated parent has no assets and can do nothing about paying the child support judgment, the district court should, at a minimum, be permitted to consider that fact and not be automatically barred as we have now held. I would have reversed.

NORMAN E. HEIMBOUCH, APPELLEE AND CROSS-APPELLANT, V. VICTORIO INSURANCE SERVICE, INC., APPELLANT AND CROSS-APPELLEE.

369 N.W.2d 620

Filed June 28, 1985. No. 84-432.

1. **Contracts.** A written contract which is couched in clear and unambiguous language is not subject to a construction other and different from that which flows from the language used.
2. **Declaratory Judgments.** A declaratory judgment 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.
3. **Declaratory Judgments: Contracts.** In a declaratory judgment action on a contract, the court may not only construe the contract but it is authorized to enter judgment for the amount due thereunder in the light of the interpretation made.
4. **Declaratory Judgments: Contracts: Jurisdiction.** The district court clearly has power to retain jurisdiction and grant further relief where it has entered a declaratory judgment declaring the rights of the parties under a contract.
5. **Employer and Employee: Wages.** The Nebraska Wage Payment and Collection Act applies only to actions to recover wages due an employee for labor or services performed for an employer.

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

Robert W. Mullin of Van Steenberg, Brower, Chaloupka, Mullin & Holyoke, for appellant.

John F. Simmons of Wright, Simmons & Selzer, for appellee.

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

BOSLAUGH, J.

This is a declaratory judgment action brought by the plaintiff, Norman E. Heimbouch, to determine his rights under a written contract with the defendant, Victorio Insurance Service, Inc. The contract was entitled:

VICTORIO INSURANCE SERVICE, INC.

AGENCY—SALESPERSON CONTRACT
INDEPENDENT CONTRACTOR

The defendant operated an insurance agency and business in Scottsbluff, Nebraska. Under the terms of the contract the plaintiff generally agreed to work as an independent contractor insurance salesman for the defendant, in return for 55 percent of the commissions. The defendant agreed to furnish office space and clerical service.

Article XI of the agreement contained provisions in regard to its termination. Paragraph D of that article included a covenant not to compete, which provided:

> Upon termination of this agreement, Salesperson shall not at any time within three (3) years from the closing hereof, directly or indirectly, solely or jointly, with or as an agent for any other person, firm or company, sell, canvass, solicit, service or accept any property or casualty insurance business or request any such persons to withdraw, curtail or cancel their business with Agency, or in any other manner enter into competition with Agency for insurance business within a twenty-five (25) mile radius of Scottsbluff, Nebraska. Salesperson agrees that the insurance files, documents and information sold hereunder are confidential and are of a proprietary and trade secret nature, and that disclosure or use by them or either of them of any such files, documents or information could irreparably damage Agency's business and the value of the business and assets hereunder, and Salesperson, therefore, agrees that it will not divulge to

> anyone but Agency, at any time, any information contained in any of said customer files or documents, unless such divulgence is necessary to effectuate and enforce this agreement in a court of law or equity. Salesperson further agrees that in the event of their failure to perform the aforesaid promises and agreements, Agency shall have the right to an injunction to restrain Salesperson from further violations of this agreement, as well as the right to damages for the breach of the promises and agreements herein contained.

Pursuant to article XIII, paragraph C, of the agreement, the agreement was personal and nonassignable.

The agreement further provided for the payment of "Termination Compensation," which the parties have agreed amounts to $28,636.71. Twenty-five percent of that amount was to be paid within 90 days following termination; the balance payable in five equal annual installments of principal plus interest accumulating at the rate of 6 percent per annum.

While the agreement was still in effect, the defendant commenced negotiations for the sale of the agency to J. G. Elliott Company. Prior to the sale, the president of the defendant Victorio, Robert A. Stapp, contacted the plaintiff and offered to alter the terms of the termination compensation to the plaintiff's benefit in exchange for an agreement by the plaintiff not to compete with J. G. Elliott for 3 years. The plaintiff declined to accept the offer. On March 31, 1983, Victorio was sold to J. G. Elliott Company. Thereafter, Stapp notified the plaintiff in a hand-delivered letter dated April 1, 1983, that the parties' agreement would be terminated in 30 days.

The plaintiff subsequently purchased his own insurance agency and commenced this action in which he prayed, as is relevant here, first, for a declaratory judgment that he may continue in the insurance business in Scottsbluff without being in violation of the parties' contract and, second, for a judgment for that portion of termination pay alleged to be due August 29, 1983, for a declaratory judgment that the balance is due as per the parties' contract, and for attorney fees and payments to be made pursuant to the Nebraska Wage Payment and Collection

Act, Neb. Rev. Stat. §§ 48-1228 et seq. (Reissue 1984).

Victorio counterclaimed that the plaintiff had breached the contract and that it had been damaged thereby.

After a bench trial the trial court granted the plaintiff a declaratory judgment in accordance with his first prayer. Regarding the termination compensation, the trial court granted a judgment for the amount currently payable and granted a declaratory judgment with specific findings as to the amounts Victorio remained obligated to pay. This amount was offset by the amount of the judgment granted on Victorio's counterclaim. The trial court also found that the Nebraska Wage and Payment Collection Act was not applicable.

Since this was essentially a law action, the applicable standard of review is that the findings of the trial court have the effect of the verdict of a jury and will not be set aside unless clearly wrong. *Havelock Bank v. Western Surety Co.*, 217 Neb. 560, 352 N.W.2d 855 (1984).

The first issue concerns the proper interpretation of the covenant not to compete and its relationship to the provisions regarding termination compensation. The defendant contends that the plaintiff is not entitled to termination compensation because the consideration for that part of the agreement failed. This argument assumes that the covenant not to compete imposed two requirements on the plaintiff: a duty not to compete with Victorio, and an agreement to sell "the insurance business he had generated to Victorio." Brief for Appellant at 12. The defendant argues that although the covenant not to compete contained in article XI, paragraph D, may have been moot after Victorio was sold, in the sense that Victorio no longer existed to compete against, it did not eliminate the obligation not to compete if the plaintiff wanted termination compensation. In its brief at 16 the defendant states the obligation as such:

> He had a contractual obligation not to interfere with the valuable business asset, i.e., the present customers, and he had the opportunity to agree to extend the non-competition to Victorio's successor. He could have had the termination pay if he had done exactly what the contract required. Because of the sale, he could not be

forced to comply and he chose not to comply.

Apparently, the defendant attaches special significance to the word "sold" which appears in the second sentence of article XI, paragraph D: "Salesperson agrees that the insurance files, documents and information *sold* hereunder are confidential . . . ." (Emphasis supplied.) Based on this singular use of the word, the defendant argues that the consideration for 85 percent of the termination pay the plaintiff was to receive was his "sale" of the insurance business he had generated to defendant. The real problem, as conceded by Victorio in its brief to this court, is: "The contract is relatively clear, but it does not address the issue of termination pay in the event the agency is sold." Brief for Appellant at 10.

"A written contract which is couched in clear and unambiguous language is not subject to a construction other and different from that which flows from the language used." *Moreland v. Transit Auth. of Omaha*, 217 Neb. 775, 779, 352 N.W.2d 556, 559 (1984). Guided by this rule, the defendant's interpretation of the contract must be rejected. The relevant contract clauses plainly provide that should the agreement be terminated, the plaintiff would not compete with *Victorio*, and the plaintiff would receive termination compensation as set forth in the agreement.

In its second assignment of error the defendant contends that the trial court erred in entering a present judgment for future installment payments of termination compensation. Pursuant to Neb. Rev. Stat. §§ 25-21,149 et seq. (Reissue 1979), an action for declaratory judgment 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. *Russell v. First York Sav. Co.*, 218 Neb. 112, 352 N.W.2d 871 (1984). Furthermore, this court has said: " 'In a declaratory judgment action on a contract, the court may not only construe the contract but it is authorized to enter judgment for the amount due thereunder in the light of the interpretation made.' " *Dixon v. O'Connor*, 180 Neb. 427, 433, 143 N.W.2d 364, 368 (1966); *Richardson v. Waterite Co.*, 169 Neb. 263, 99 N.W.2d 265 (1959).

In the case at bar the district court properly entered a

judgment for the amount of principal and interest due at the time of trial. See *Richardson, supra*. Although the trial court specifically found when and in what amounts the remaining payments were payable, no judgment was entered in that regard. Rather, the court said: "Plaintiff is granted a declaratory judgment that the defendant is obligated to pay to the plaintiff the sum of $17,182.02 in annual installments of principal and interest in accordance with the parties' contract."

This case is distinguishable from *First Nat. Bank v. Omaha Nat. Bank*, 191 Neb. 249, 214 N.W.2d 483 (1974), cited by the defendant. In *First Nat. Bank* the judgment ordered that certain unmatured installments of rent, taxes, and insurance were to be paid as they fell due, that the court would retain jurisdiction, and that the judgment " 'shall mature and become effective as to each unmatured installment . . . on the day after said installment or payments are due and execution may then issue . . . .' " *Id.* at 251, 214 N.W.2d at 485. We vacated that part of the judgment relating to future installments and the issuance of execution as to any unmatured installments of rent, taxes, and insurance. We stated, however: "The District Court clearly has power to retain jurisdiction and grant further relief where it has entered a declaratory judgment declaring the right of the parties under a contract." *Id.* at 252, 214 N.W.2d at 485. The specific findings concerning future amounts payable made in the case at bar were not determined from such indefinite and variable subject matter, nor was any provision made regarding the entry of judgment and the issuance of execution.

The last issue which must be determined is plaintiff's cross-appeal in which he contends that the district court erred in finding that the Nebraska Wage Payment and Collection Act, §§ 48-1228 et seq., was not applicable.

In *Rudolf v. Tombstone Pizza Corp.*, 214 Neb. 276, 281, 333 N.W.2d 673, 676 (1983), this court explained:

> Section 48-1231 of the act permits an "employee" to whom "wages" are owed to sue the "employer" for payment. By statutory definition an employee is "any individual permitted to work by an employer." An employer is anyone "employing any person as an

> employee." The act applies if an individual in the employ of another has a right to "wages" as defined in the statute.

The trial court found that the act did not apply to the plaintiff's claim for termination compensation or past due commissions. In reviewing that finding it is first noted that § 48-1229(3) of the act provides: "(3) Wages shall mean compensation for labor or services rendered by an employee, including fringe benefits, when previously agreed to and conditions stipulated have been met by the employee, whether the amount is determined on a time, task, fee, commission, or other basis."

Although the defendant admitted in its answer that the plaintiff had earned commissions totaling $959.35, that amount had been paid into court pending resolution of the suit. The defendant recovered a judgment for $1,557.74 on its counterclaim, which alleged the plaintiff had breached the contract. Section 48-1230 of the act provides in part:

> An employer may deduct, withhold, or divert a portion of an employee's wages only when the employer is required to or may do so by state or federal law or by order of a court of competent jurisdiction *or the employer has a written agreement with the employee to deduct, withhold, or divert.*

In this regard article X of the agreement provided that "if either party shall be in default of or breach any of the terms or conditions of this contract," then:

> There is hereby granted to the defaulted party a contractual lien upon any sums due or owing to the other or which may be collected by the defaulted party and, subsequently, be due or owing to the other party to cover the items described in this Article. If said sum shall not be liquidated in amount, then and in that event the defaulted party is authorized to retain said sums until said claim, demand or cause of action shall be consummated.

In light of the provisions of the statute and the terms of the agreement, there was nothing due the plaintiff for past due commissions.

The termination compensation due the plaintiff under the agreement was not compensation for labor or services rendered

to the defendant, but was in the nature of a severance payment or liquidated damages which became due upon termination of the agreement. The finding of the district court that the act was not applicable was correct.

The judgment of the district court is affirmed.

AFFIRMED.

BURTON E. NIXON AND JAYNE B. NIXON, APPELLEES, V. DANIEL J. HARKINS AND JODY K. HARKINS, APPELLANTS.

369 N.W.2d 625

Filed June 28, 1985. No. 84-441.

1. **Equity: Contracts: Specific Performance.** A suit for the specific performance of a contract is equitable in nature.
2. **Equity: Appeal and Error.** The Nebraska Supreme Court reviews equity matters de novo on the record and reaches an independent conclusion without reference to the trial court's findings, subject to the rules that (1) when the evidence on material questions of fact is in irreconcilable conflict, the Nebraska Supreme Court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the opposite, and (2) the Nebraska Supreme Court is required, where the trial court has viewed the premises, to consider any competent, relevant facts revealed by the view and findings made by the court, provided the record contains competent evidence to support the findings.
3. **Evidence: Appeal and Error.** Where the review is de novo, the Nebraska Supreme Court will disregard incompetent, irrelevant, and immaterial evidence admitted over proper objection.
4. **Pretrial Conferences: Appeal and Error.** The trial court has a broad discretion in regard to the amendment of a pretrial order, and its ruling with respect thereto will not be disturbed absent an abuse of that discretion.
5. **Witnesses: Appeal and Error.** The extent, scope, and course of cross-examination rest within the discretion of the trial court, and the ruling of the trial court with respect thereto will not be disturbed in the absence of an abuse of that discretion.
6. **Trial: Witnesses: Evidence: Depositions.** Where a party clearly changes his deposition testimony at trial on a point vital to the case in order to meet the exigencies of the trial and no rational or sufficient explanation of the change exists, his trial testimony stands discredited as a matter of law, and he is bound by the admissions made at the deposition.

7. **Evidence.** Evidence is relevant if it has any tendency to make the existence of any fact of consequence to the determination of the action more probable or less probable than it would be without the evidence, or the evidence tends to establish a fact from which the existence or nonexistence of a fact in issue can be directly inferred.
8. **Prejudgment Interest: Claims.** Prejudgment interest is not recoverable on an unliquidated claim.
9. _____: _____. A claim is unliquidated where a reasonable controversy exists either as to the right to recover or as to the amount of such recovery.
10. _____: _____. A claim is liquidated where the evidence, if believed, makes it possible to compute the amount due with exactness without reliance upon opinion or discretion.

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

Richard E. Mueting of Mueting, DeLay & Stoffer, for appellants.

David A. Domina of Domina & Gerrard, P.C., for appellees.

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

CAPORALE, J.

Burton E. Nixon and Daniel J. Harkins owned certain improved real property as tenants in common, each of their wives, respectively Jayne B. and Jody K., having a marital interest therein. The Nixons brought suit to partition the property. The Harkinses counterclaimed, seeking specific performance of a contract permitting them to pay the debt arising under a promissory note to the Nixons by assignment of the Harkinses' interest in the property to the Nixons, any difference between the value of the property and the debt to be adjusted in cash. By agreement of the parties the Nixons' suit was dismissed. A bench trial was then had on the Harkinses' counterclaim pursuant to a stipulation which delineated the amount owed to the Nixons on the promissory note and certain mutual obligations of the parties with respect to the property, and further specified that the only issue for the court to resolve was the fair market value of the property, the Harkinses having conveyed their interest in the property to the Nixons. The trial

court determined the fair market value of the property to be $110,000 and, after adjusting for the mutual obligations of the parties and the debt owed by the Harkinses to the Nixons, entered judgment in favor of the Nixons for $6,363.26, plus prejudgment interest. The Harkinses appeal, assigning as errors, in summary, (1) the receipt of certain evidence, (2) the limitation of cross-examination of a witness, (3) the striking of certain evidence, (4) the finding as to the fair market value of the property, and (5) the allowance of prejudgment interest. We reverse and remand for the entry of judgment in favor of the Harkinses in the sum of $15,636.74 against the Nixons.

Since the issue arises in a suit for the specific performance of a contract, the proceeding is equitable in nature. See *Matthews v. Matthews*, 215 Neb. 744, 341 N.W.2d 584 (1983). Consequently, we are required to review the matter de novo on the record and reach an independent conclusion without reference to the trial court's findings, subject to the rules that (1) when the evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the opposite, and (2) this court is required, where the trial court has viewed the premises, to consider any competent, relevant facts revealed by the view and findings made by the court, provided the record contains competent evidence to support the findings. Neb. Rev. Stat. § 25-1925 (Reissue 1979); *Cline v. Franklin Pork, Inc.*, 219 Neb. 234, 361 N.W.2d 566 (1985); *Burgess v. Omahawks Radio Control Org.*, 219 Neb. 100, 362 N.W.2d 27 (1985).

It is also the rule that where the review is de novo, this court will disregard incompetent, irrelevant, and immaterial evidence admitted over proper objection. *In re Interest of S.S.L.*, 219 Neb. 911, 367 N.W.2d 710 (1985); *Stecker v. Stecker*, 197 Neb. 164, 247 N.W.2d 622 (1976).

Obviously, in order for us to determine what competent evidence is before us, we must first resolve the issues presented as to the correctness of the trial court's evidentiary rulings.

The Harkinses' complaints as to the receipt of evidence rest upon the admission of the testimony and report of Patrick

Morrissey, a licensed real estate appraiser, and the testimony presented by the plaintiff-appellee Burton E. Nixon, individually hereinafter referred to as Nixon.

The Harkinses argue Morrissey should not have been allowed to present evidence because he was not named as a witness, nor was his report listed as an exhibit as required by the pretrial order, which read in part: "Either party may call such additional witnesses as they [sic] desire at the time of trial provided the name and address of such witness is provided to opposing counsel at least ten days prior to the April 9, 1984 Trial Term." The order contains similar language concerning exhibits.

Morrissey testified as the last witness called by the Nixons on the first day of trial, April 24, 1984, and opined that the market value of the property was $100,000. The only objection made to the receipt into evidence of a report Morrissey had prepared concerning his appraisal was that it had not been listed as aforesaid. The trial court has a broad discretion in regard to the amendment of a pretrial order, and its ruling with respect thereto will not be disturbed absent an abuse of that discretion. See, *Peterson v. North American Plant Breeders*, 218 Neb. 258, 354 N.W.2d 625 (1984); *Mousel v. ten Bensel*, 195 Neb. 456, 238 N.W.2d 632 (1976).

Harkinses' counsel was aware by April 2, 1984, that Morrissey was to be a witness. Additionally, Harkinses' counsel was given a copy of the Morrissey report on the very same day Nixons' counsel received it, April 20, 1984. No showing was made that the Harkinses' preparation for trial was hampered by that timing, and no request was made for a continuance of the trial on that ground. Under the circumstances it cannot be said the trial court erred in receiving the evidence presented by and through Morrissey, notwithstanding the language of the pretrial order.

The Harkinses also contend that their right to cross-examine Morrissey was restricted unduly. The applicable rule is that the extent, scope, and course of cross-examination rest within the discretion of the trial court, and, as such, the ruling of the trial court will not be disturbed in the absence of an abuse of that discretion. *Beranek v. Petracek*, 184 Neb. 516, 169 N.W.2d 275

(1969); *DeVore v. Board of Equalization*, 144 Neb. 351, 13 N.W.2d 451 (1944).

The trial judge attempted to recess the trial at 5:30 p.m. while Harkinses' counsel was cross-examining the witness. However, as Mr. Morrissey was scheduled to be out of town on the following day, the judge ruled that cross-examination could continue for another 15 minutes. The claim that the cross-examination was unduly restricted vanishes into a nonissue, for, so far as the record reveals, the time limit imposed had no effect upon the trial as counsel completed his cross-examination before that time limit expired. Moreover, no request was made that the witness be compelled to return on the next day or for a continuance of the trial.

The evidence adduced through the witness Morrissey is properly before us.

Next, the Harkinses assign as error the admission of Nixon's trial testimony, as an owner licensed as a real estate broker and an experienced contractor, that the fair market value of the property was $100,000 to $120,000, in the face of his earlier deposition testimony that the fair market value was $120,000 to $140,000. The contention is that under the holding of *Momsen v. Nebraska Methodist Hospital*, 210 Neb. 45, 313 N.W.2d 208 (1981), Nixon was bound to the opinion given in the deposition. *Momsen* holds that where a party clearly changes his deposition testimony at trial on a point vital to the case in order to meet the exigencies of the trial and no rational or sufficient explanation of the change exists, his trial testimony stands discredited as a matter of law, and he is bound by the admissions made at the deposition. At the time the deposition was taken, it was thought that the tenant of the building was considering buying the property for $120,000 to $140,000, and in that connection Nixon agreed with defendant-appellant Donald J. Harkins, individually hereinafter referred to as Harkins, to sell at that figure. At trial, however, Nixon stated the tenant was willing to pay $120,000 to $130,000. Although it appears a variation of $10,000 does not impress Nixon a great deal, he, unlike the situation in *Momsen*, was testifying as to a matter of opinion rather than a past factual occurrence and was not asked to explain why his opinion changed.

Under the circumstances his testimony is not discredited as a matter of law, and neither is Nixon bound by his earlier opinion. The question for this court, as it was for the trial court, is the weight to which the testimony is entitled.

Having disposed of the first two errors assigned by the Harkinses, we reach the third assignment, which is based upon the striking of the evidence of Paul R. Blaser.

Blaser, a licensed real estate appraiser who also teaches real estate courses at a community college, was called by the Harkinses and testified that the property was within the "range of value" of $170,000 to $174,000. Blaser insisted, however, that he had no opinion as to the property's fair market value and that the range of value was something different, which does not take into account all the factors which fair market value contemplates. He testified that he had not made an appraisal and was not rendering an opinion as an appraiser. Although the record does not establish what the range of value constitutes, the record does establish that it is something other than fair market value.

Neb. Rev. Stat. § 27-402 (Reissue 1979) in effect provides that all relevant evidence, unless subject to constitutional, statutory, or other exclusion, is admissible. The question therefore is whether, in view of that provision, Blaser's opinion as to the range of value was relevant to the issue before the court. Evidence is relevant if it has any tendency to make the existence of any fact of consequence to the determination of the action more probable or less probable than it would be without the evidence, or if it tends to establish a fact from which the existence or nonexistence of a fact in issue can be directly inferred. Neb. Rev. Stat. § 27-401 (Reissue 1979); *Langfeld v. Department of Roads*, 213 Neb. 15, 328 N.W.2d 452 (1982).

The Harkinses appear to argue that since some factors involved in determining the range of value are involved in determining fair market value, the evidence was relevant in that fair market value might be inferred from the facts used in arriving at the range of value. The fact remains, however, that fair market value is something different than the range of value. Therefore, the fact that there exists a commonality of certain factors in the two measures is of no consequence, for the proof

of one would neither establish nor directly infer the other.

Consequently, the trial court properly excluded the Blaser evidence, and it is not before this court.

We are now ready to consider and weigh the evidence properly before us.

Nixon stated that in reaching his opinion he took into consideration, among other things, the fact that the building had a condensation problem, the source of which was in contention. One view was that the cause was inherent in the structure; the other view was that the problem resulted from the tenants' operations. Nixon described the structure as built of mismatched and in part used metal panels and as having a dock which, because of its slope and nearness to the street, made loading and unloading difficult.

Harkins, who had some education in appraising real estate and was an experienced builder of both residential and commercial structures, opined that the fair market value of the building was between $170,000 and $174,000.

Morrissey, having first inspected the property, used the three commonly accepted approaches to valuing property, the income approach, the cost approach, and the market, or comparable sales, approach. It developed, however, that of the three transactions he used in making his comparable sales study, one transaction was still pending under a written contract and the other two were merely sales listings.

Both Nixon and Harkins referred, without objection, to an appraisal made by Stuart Hales approximately 3 years prior to the trial in connection with a loan transaction at which the fair market value of the property was said to be $140,000. Based on that appraisal, a mortgage loan of $90,000 was negotiated; however, Nixon testified that the land and building together cost less than that sum. Morrissey testified the Hale appraisal was not useful for the present purpose, both because it was too old and because it had been made for loan purposes. Apparently, in Morrissey's mind fair market value shifts depending upon the purpose for which the figure is to be used.

Nixon had hired Ransom Roman, a licensed real estate appraiser, to make an appraisal of the property approximately 6 months after the property had been conveyed to the Nixons. He

was called as a witness by the Harkinses and testified that, in his opinion, using two of the commonly accepted approaches, as there were no comparable sales, the property had a fair market value of $154,400. He had earlier stated the fair market value to be $175,000, but explained that in rendering that opinion he had relied on rental figures provided by Nixon which proved to be wrong. He too had inspected the property.

The trial judge viewed the premises at the request of the Nixons; however, the record does not disclose what the view revealed.

From our de novo review in accordance with the rules set forth earlier in this opinion, we conclude that the fair market value of the property is $154,000. Accordingly, we reverse the judgment entered in favor of the Nixons against the Harkinses and remand the cause with the direction that judgment in the amount of $15,636.74 be entered in favor of the Harkinses against the Nixons.

There can be, of course, no prejudgment interest. The well-established rule of this jurisdiction has been that prejudgment interest is not recoverable on an unliquidated claim. A claim is unliquidated where a reasonable controversy exists either as to the right to recover or as to the amount of such recovery. *Guardian State Bank & Trust Co. v. Jacobson, ante* p. 235, 369 N.W.2d 80 (1985); *Jeffres v. Countryside Homes, ante* p. 26, 367 N.W.2d 728 (1985). Stated another way, a claim is liquidated where the evidence, if believed, makes it possible to compute the amount due with exactness without reliance upon opinion or discretion. In such an instance prejudgment interest is recoverable. *Buckingham v. Wray*, 219 Neb. 807, 366 N.W.2d 753 (1985).

In the present case, as tried, there was no dispute but that the Harkinses could pay their debt to the Nixons by applying thereto their equitable interest in the property. Neither was there any dispute as to the amount owed by the Harkinses to the Nixons, nor was there any dispute with respect to the mutual obligations of the parties resulting from the mortgage and taxes levied against the property. There did exist, however, a dispute as to the fair market value of the property. Resolution of that value was required before the amount of the Harkinses' net

equity could be determined and offset against their indebtedness. As we have seen, fixing the fair market value of the property establishes whether the Harkinses owe the Nixons or the Nixons owe the Harkinses, and determines the amount of money which is to change hands. Under these circumstances it cannot be said the claim was liquidated.

REVERSED AND REMANDED WITH DIRECTION.

OMAHA WORLD-HERALD COMPANY, A CORPORATION, APPELLEE, V. DON NIELSEN, APPELLANT.

369 N.W.2d 631

Filed June 28, 1985. No. 84-537.

1. **Trial: Records: Rules of Evidence.** Neb. Rev. Stat. § 27-1002 (Reissue 1979) states the best evidence rule as currently applied in Nebraska: the original is required unless an exception applies.
2. _____: _____: _____. Neb. Rev. Stat. § 27-1003 (Reissue 1979) permits a duplicate to be admitted unless its authenticity is questioned or its admission would be unfair to the opposing party.
3. **Trial: Records: Hearsay: Rules of Evidence.** To fall within the "business records" exception, a threefold test must be met. First, the recorded activity must occur within the ordinary course of business. Second, the record must have been produced at or near the time of the transaction in question. Third, the record must be authenticated by a custodian or other qualified witness.
4. _____: _____: _____: _____. A trial court has broad discretion to rule on the foundational requirements of hearsay evidence under Neb. Rev. Stat. § 27-803(5) (Reissue 1979).
5. _____: _____: _____: _____. Under Neb. Rev. Stat. § 27-803(5) (Reissue 1979), questions as to the authenticity or credibility of evidence go to the weight of the evidence.
6. **Judgments: Appeal and Error.** The findings of fact of a trial court where a jury trial is waived will not be set aside unless clearly wrong.
7. **Appeal and Error.** On appeal, controverted facts will be viewed in the light most favorable to the successful party and that party will be given the benefit of every inference available from the record.
8. **Uniform Commercial Code: Sales: Contracts.** Under Nebraska law the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless it is in writing. Neb. U.C.C. § 2-201(1) (Reissue 1980).
9. _____: _____: _____. Modifications of contracts for the sale of goods for the price of $500 or more must generally be in writing.

10. **Uniform Commercial Code: Sales: Contracts: Statute of Frauds.** A distributorship agreement for the sale of newspapers for a price greater than $500 was within the statute of frauds.

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

Lavern R. Holdeman of Nelson, Morris & Holdeman, for appellant.

Thomas C. Sattler of Knudsen, Berkheimer, Richardson & Endacott, for appellee.

BOSLAUGH, CAPORALE, SHANAHAN, and GRANT, JJ., and BRODKEY, J., Retired.

BRODKEY, J., Retired.

The Omaha World-Herald Company, appellee herein, brought suit against Don Nielsen, appellant herein, to recover money due and owing as the result of a distributorship agreement. The suit consisted of three causes of action. The first cause of action sought to recover the balance due for newspapers sold and delivered to appellant. The second cause of action sought to recover the cost of insurance premiums paid by appellee on behalf of appellant. The third cause of action sought the balance due on accounts receivable. Appellant generally denied all the allegations raised by appellee and counterclaimed for the return of a security deposit.

The parties waived a jury trial, and the matter came to trial before the Honorable Dale E. Fahrnbruch in the district court for Lancaster County, Nebraska, on November 21, 1983. The court found for the appellee, dismissed the counterclaim of the appellant for lack of evidence, and awarded appellee the full amount of its claims. This appeal followed, in which several issues are raised. First, that the trial court erred in admitting certain business records introduced by the appellee. Second, that the deposition of appellant, read into evidence at trial, established that appellant did not owe the amounts in controversy, and thus the verdict was against the weight of evidence and should be reversed. Third, that the distributorship agreement had been orally modified by the parties to eliminate appellant's liability, which fact had been proved at trial, and the

verdict against appellant was thus clearly erroneous. Fourth, that the oral modification was not within the statute of frauds because it involved a mixed contract for the sale of goods and services and was not a contract primarily for the sale of goods. We discuss these issues seriatim.

The first issue concerns the admission of certain business records. Appellant objects to the admission of this evidence on the grounds of lack of foundation and failure to produce necessary underlying documentation. It is contended that the admission of this evidence was prejudicial to appellant and, as such, the verdict rendered should be reversed. In support of this argument appellant asserts that the law requires the best evidence available—in this case, the actual invoices and credit memos prepared during the course of the business relationship between the parties. Appellant relies on *Bitler v. Terri Lee, Inc.*, 163 Neb. 833, 81 N.W.2d 318 (1957), and *Chicago & N. W. Ry. Co. v. City of Norfolk*, 157 Neb. 594, 60 N.W.2d 662 (1953), in support of this contention.

The cases do not support appellant's reasoning. In *Bitler* the court stated that the best evidence would allow the court to fix damages with "reasonable certainty and exactness." 163 Neb. at 851, 81 N.W.2d at 328. The court allowed information contained in books which had been kept in the ordinary course of business to be admitted into evidence. The sponsoring witness was an accountant who had periodically inspected the books, done accounting and auditing of the books, prepared various financial statements, and made various computations from the books. Thus, the business records were admitted without the introduction of all supporting documentation and without a witness with firsthand knowledge of every transaction.

Chicago & N. W. Ry. Co., supra, appears to state the old best evidence rule. Upon a closer examination, however, the case stands for a more narrow proposition. The court stated that evidence adduced at trial must be competent and relevant. It must be the best evidence which most naturally and satisfactorily proves the facts. The court then affirmed the admission of a formula used by the railroad to apportion costs to reach an average cost per mile and rejected a challenge that

would have required the railroad to match each individual cost and revenue. Thus, the court affirmed the introduction of business records without requiring an indepth documentation of the information contained in the records.

Further, Neb. Rev. Stat. § 27-1002 (Reissue 1979) states the best evidence rule as currently recognized in Nebraska. It requires the production of an original document unless the situation qualifies as an exception to the general rule. One such exception is Neb. Rev. Stat. § 27-1003 (Reissue 1979) which will allow a duplicate to be admitted unless there is a genuine issue of fact raised as to the authenticity of the original or to admit the duplicate would be unfair to the opposing party. Here, appellant does not dispute the authenticity of the document nor contend that its introduction was unfair. Instead, appellant contends that the introduction was improper because the invoices were not substantiated by underlying documentation. As noted in *Bitler* and *Chicago & N. W. Ry. Co., supra*, both of which were decided before the adoption of the new Nebraska Evidence Rules, it is not necessary to establish every transaction in order to introduce business records.

It is well settled in Nebraska that business records may be admitted into evidence upon meeting certain criteria. The criteria were first established under the common law and then expanded upon under the Uniform Business Records as Evidence Act. Neb. Rev. Stat. §§ 25-12,108 to 25-12,111 (Reissue 1956) (repealed, 1975 Neb. Laws, L.B. 279, § 75). In *Transport Indemnity Company v. Seib*, 178 Neb. 253, 132 N.W.2d 871 (1965), this court noted that the act was designed to permit systematically recorded business records to be admitted without requiring the testimony of each individual who made the entries. To qualify for admission the records must be identified and sufficient foundation established to show the records were prepared in the ordinary course of business. Further, the individual claim files and reports were not required to authenticate the bookkeeping records.

Transport Indemnity was cited by a federal court to support the admission of an annual statistical record. *United States v. Russo*, 480 F.2d 1228 (6th Cir. 1973). An objection to the report was entered because the report had been produced 11 months

after the close of the fiscal year. The court rejected that challenge because the information had been placed in the computer at a reasonable time after the transactions in question and the report introduced at trial was taken only from that evidence. The court also rejected the assertion that the report was an inadmissible summary, because the information had been stored in the computer in a predetermined way which enabled various kinds of reports to be made from it. The court also rejected a foundational challenge aimed at the sponsoring witness. Rather than require firsthand knowledge of the data placed in the computer, the court found it sufficient that the witness was familiar with the input of information into the machine and its general accuracy. The court noted that such a witness was capable of being cross-examined by the opposing counsel as to the procedure and accuracy of the billing procedure.

The admission of business records is controlled by the "business records" exception to the hearsay rule as adopted in the Nebraska Evidence Rules in 1975. This court had an opportunity to address this issue in *Chalupa v. Hartford Fire Ins. Co.*, 217 Neb. 662, 350 N.W.2d 541 (1984), wherein a threefold test was set out. First, the recorded activity must occur within the ordinary course of business. Second, the record must have been produced at or near the time of the transaction in question. Third, the record must be authenticated by a custodian or other qualified witness. Further, the trial court has broad discretion to determine the foundational requirements of such evidence.

Consequently, the testimony adduced at trial was not inadmissible for lack of supporting data as long as the three foundational requirements were met. First, the invoices reflected information recorded at or near the time the transactions occurred between the parties. Second, the information contained on the invoices was recorded information which represented the normal course of business between the parties. Third, the record was authenticated by a witness who was familiar with the business procedure and who could have been cross-examined as to the system's accuracy. Even if the admission had been an error, it would not change the

result.

Under the Nebraska version of the business records exception, questions as to the authenticity or credibility of the evidence or the testimony would go to the weight of the evidence. The trial court is given great discretion in this area. Neb. Rev. Stat. § 27-803(5) (Reissue 1979). The decision of a trial court as to the weight of evidence and its findings of fact when sitting as the trier of fact will not be set aside unless clearly wrong. *Nerud v. Haybuster Mfg.*, 215 Neb. 604, 340 N.W.2d 369 (1983). For the reasons stated earlier the trial court was not clearly wrong in admitting the invoices over objection and will not be reversed for so doing.

The second issue raised by appellant concerns the deposition read into evidence at trial. Appellant contends that the testimony thus stands as uncontroverted that Nielsen did not owe the balances alleged by appellee. In support of this contention appellant cites *Hyde v. Cleveland*, 203 Neb. 420, 279 N.W.2d 105 (1979), and *Luikart v. Korbmaker*, 128 Neb. 199, 258 N.W. 263 (1935). These cases do not offer support for appellant because they stand for a narrow view of the law as pertains to the introduction into evidence of the admissions and statements against interest of a party to the action when used against that party. In *Hyde* the trial court had refused to allow the admissions and declarations of the defendant into evidence. This was viewed as error because the plaintiff had been denied the opportunity to impeach the credibility of the defendant when such credibility was a material issue in the case. Similarly, *Luikart* involved the admission of a party opponent, which had erroneously been excluded. Further, the testimony of appellant does not stand unrebutted. Appellee produced evidence and testimony which tended to indicate that money was due and owing and that appellant was aware of the debt. It was an issue of fact, decided by the trier of fact, which is not clearly wrong; thus, it will not be disturbed. *Nerud, supra.*

Further, it is well settled in Nebraska law that the findings of the court where a jury is waived have the effect of a jury verdict. On appeal, controverted facts will be viewed in the light most favorable to the successful party. That party will be given the benefit of every inference available from the record. *Morfeld v.*

Bernstrauch, 216 Neb. 234, 343 N.W.2d 880 (1984). In the case at bar the trial court was in the best position to hear the evidence and perceive the witnesses. Upon a consideration of the facts in the light most favorable to appellee, the trial court's findings are supported by the evidence and are affirmed.

The final issues concern an alleged oral modification of the distributorship agreement. Appellant contends that such a modification was proved at trial and that the statute of frauds was no defense because the contract was a mixed contract for goods and services. Alternatively, even if the contract was within the statute, because appellant fully performed the contract, the modification was valid under Neb. U.C.C. § 2-201(3)(c) (Reissue 1980). Full performance, it is urged, consisted of turning over the business to the World-Herald.

By way of defense appellee points to the record wherein appellant referred to the transaction in a variety of ways, including "turned over" and "sold." Appellee further notes that only occasional references in the deposition were used to support the existence of such an agreement. Appellee also disagrees with a characterization of the agreement as anything but a sale of goods. In support of this contention appellee points to the distributorship agreement, which seems to contemplate the outright sale of newspapers as its primary focus. Further, appellee denies that the termination of the distributorship constituted full performance of a modification.

Under Nebraska law a sale of goods for the price of $500 or more is not enforceable by way of action or defense unless it is in writing. § 2-201(1). An exception to this rule is contained in § 2-201(3), which is applicable when goods for which payment has been received are accepted. If an existing contract is modified, such modifications must also fall within the statute or an exception. Neb. U.C.C. § 2-209 (Reissue 1980). Appellant argues that the distributorship agreement was primarily for the services of delivering newspapers and that the payment received by Nielsen was in the nature of a commission. As such, the case is similar to *Glover Sch. & Office Equipment v. Dave Hall*, 372 A.2d 221 (Del. Super. 1977). In *Glover* the court determined that a contract for the sale and installation of school equipment was a mixed contract and was primarily for

the sale of services; thus, it was not within the statute. The court set out several factors to test a contract such as this. The factors included the negotiation of the contract, its formation, and its contemplated performance. Further, the cause of action raised at trial would be considered and in some cases would be dispositive of the classification of the contract. See, also, *Mennonite Deaconess Home & Hosp. v. Gates Eng'g Co.*, 219 Neb. 303, 363 N.W.2d 155 (1985).

Upon applying this test to the contract before the court, it would appear that the contract was primarily for the sale of goods. The negotiations between the parties centered on the price of the newspapers rather than the type of service to be performed. The contract was formed in terms of "purchaser" and "seller." The parties apparently contemplated that appellant would buy papers at wholesale and resell them. Appellant also paid for the papers outright and was responsible for collecting all amounts due from the customers, which tends to negate any inference that appellant received a commission.

Appellant cites *Buttorff v. United Electronic Laboratories, Inc.*, 459 S.W.2d 581 (Ky. App. 1970), in which the court found a contract was for services, due in part to the fact that the company retained control of the product and billing procedure at all times. The case at bar is distinguished from *Buttorff* in that appellee did not retain control over the papers or the billing process. Instead, appellant bought the papers outright and resold them at a profit. The delivery of papers was an important incident of the contract, but was a benefit to both parties; indeed, it was the reason for the agreement, in a broad sense. As regards the individual customers, however, appellant provided the services, collected subscriptions, and received payment. The distributorship agreement provided the terms for the sale of papers to appellant, who then resold the papers at a profit. While such a sale did provide a service to appellee, its primary function was to allow the parties to buy and sell papers at an agreed price.

Consequently, the alleged modification was within the statute of frauds because it concerned the sale of goods at a value greater than $500. Similarly, it is no defense to claim, in this case, that full performance on the part of appellant took

the oral modification out of the statute. First, no evidence was adduced at trial to support a finding of an oral modification, except the testimony of Nielsen himself. Even his testimony was not clear on this modification and its terms. The oral modification was denied by appellee; thus, an issue of fact was presented to the trier of fact. The court ruled in favor of appellee. As noted earlier, the findings of fact by the court, where a jury is waived, have the effect of a jury verdict and will not be reversed unless clearly wrong. *Nerud v. Haybuster Mfg.*, 215 Neb. 604, 340 N.W.2d 369 (1983). It is readily apparent from the record that sufficient evidence was presented from which a reasonable person could reach a decision as to the existence of an oral modification; thus, the verdict will not be disturbed.

In summary, the trial court did not err in admitting the business records of appellee into evidence. Such admission is authorized by § 27-803(5) when sufficient foundation is laid to meet the threefold test as set out above. In this case sufficient foundation was laid and the evidence properly admitted. Secondly, the trial court had sufficient evidence from which to find that an alleged oral modification had not changed the rights of the parties. Even if the oral modification had been proved, the statute of frauds was properly raised as a defense because the original agreement was primarily for the sale of goods. Finally, appellant failed to prove that the termination of the agreement constituted full performance of the alleged oral modification so as to take the modification out of the statute. The verdict of the trial court is affirmed.

AFFIRMED.

CHERYL D. ERSTROM, APPELLEE, V. LYLE G. ERSTROM, APPELLANT.

369 N.W.2d 637

Filed June 28, 1985. No. 84-590.

Property Division: Attorney Fees: Appeal and Error. The division of property and the awarding of attorney fees in marriage dissolution cases are matters initially entrusted to the sound discretion of the trial judge, which matters, on appeal, will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion.

Appeal from the District Court for Custer County: RONALD D. OLBERDING, Judge. Affirmed.

Tedd C. Huston, P.C., for appellant.

Steve Windrum, P.C., for appellee.

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

PER CURIAM.

This is an appeal from the decision of the district court in a dissolution action assigning a debt to appellant husband. The parties have otherwise agreed as to division of property, custody of the parties' child, and amount of child support.

The parties were married on September 15, 1962. One child was born of the marriage and was 16 years of age as of the date of submission to this court. The marriage was not financially successful. In the brief record that was presented to this court, there is a description by appellee wife of the amount of property available to her as a result of the even division. Her property's estimated value was $1,500, with no other assets except the remainder interest in some real estate, after a life estate in her mother, as the result of a gift or devise from a grandfather. The property is not described nor valued.

The bone of contention in this dispute is in the balance due on a note to one Charles or Mildred Pitkin of approximately $19,000, the result of an ill-fated cattle venture. The cause of the loss is also not described in the record presented to us, nor does the court give any reason for its assignment of the entire balance of the debt to the husband.

At the date of hearing in the district court, the appellant was employed by an oil-drilling company, earning a wage of approximately $5 per hour. He agreed to pay $100 per month child support to appellee. He had no other outstanding debts save the cattle debt. At the time of the hearing the appellee was employed at a rest home and a snack bar with a take-home pay of approximately $500 per month.

We said in *Guggenmos v. Guggenmos*, 218 Neb. 746, 748-49, 359 N.W.2d 87, 90 (1984):

> [T]he division of property and the awarding of attorney fees in marriage dissolution cases are matters initially entrusted to the sound discretion of the trial judge, which matters, on appeal, will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion. In our de novo review, where the evidence is in conflict, we will give weight to the fact that the trial judge observed and heard the witnesses and accepted one version of the facts rather than another.

We are unable, on a de novo review of the record in this case, to say that the trial judge abused his discretion. Undoubtedly the trial judge was aware from the evidence that the assets in this relatively long-term marriage were sparse, and this is reflected by the rather modest amount of child support. He undoubtedly took into account that because of this modest allowance of child support, the appellant was relatively more able to adequately service the debt, though admittedly it will be quite difficult.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMES RAY BROWN, APPELLANT.

369 N.W.2d 639

Filed June 28, 1985. No. 84-853.

1. **Post Conviction: Proof: Appeal and Error.** The person seeking post conviction relief has the burden of establishing a basis for relief, and the findings of the district court will not be disturbed on appeal unless they are clearly wrong.
2. **Criminal Law: Effectiveness of Counsel.** In order to show ineffectiveness of counsel, it must be shown that trial counsel failed to perform at least as well as a lawyer with ordinary training and skill in the criminal law in the area and that such lawyer failed to conscientiously protect the interests of the client.
3. _____: _____. A decision to call, or not call, a particular witness, made by counsel as a matter of trial strategy, even if that choice may prove to be ineffective, does not without more sustain a finding of ineffectiveness of counsel.
4. **Post Conviction: Appeal and Error.** A motion or application for post conviction relief cannot be used to secure a further review of issues already litigated on direct appeal.

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

Clifford C. Ruder of Stehlik, Smith, Trustin, Schweer & Ruder, for appellant.

Robert M. Spire, Attorney General, and Terry R. Schaaf, for appellee.

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

HASTINGS, J.

James Ray Brown has appealed from an order of the district court which denied his application for post conviction relief. His direct appeal, in which he raised the sole issue of sufficiency of the evidence to support his conviction, is found in *State v. Brown*, 213 Neb. 68, 327 N.W.2d 107 (1982). He raises again as an assignment of error the sufficiency of the evidence, which we will mention only in passing. His other assignment of error relates to the claimed ineffective assistance of trial counsel.

The basis for his assertion as to counsel is that a certain witness, Kevin Dent, was not called to testify as part of the case for the defense. Dent's testimony, according to his deposition

offered at the post conviction hearing, would have supported defendant's rather incredible claim that the victim of this shooting, after having taken five shots at close range while brandishing an opened knife, calmly lay down on the street, raised back up, picked up the knife, which had fallen to the ground, closed it, tried to return it to his pocket, and died.

This was the explanation Brown gave at his trial. As stated in our opinion on direct appeal, that story was supported in substance by the testimony of Alfonzo Ray Hunter, Roosevelt Kirk, and Mar Haman. Actually, Hunter testified almost identically to the facts related by Brown, including the part about raising up, closing the knife, and lying back down to die. Kirk and Haman corroborated the defendant's story to the extent that the victim had an open knife which he held in a menacing manner, but neither of them ever saw him raise up and close the knife. However, all three stories supported defendant's claim of self-defense, which was submitted to the jury and rejected.

Defendant's trial attorney was called as a witness in this post conviction proceeding. He testified that his office, the office of public defender, had interviewed Dent. When asked what Dent would have testified to had he been called at the trial, the attorney replied:

> Well, I don't know exactly what it would have been. . . . When we went over and talked to him, at least our investigator went over and talked to him, and we were told by him that he really didn't want anything to do with that. It seemed to me he was awaiting sentence on some other charge, and that we better not call him, that he wasn't going to help us at all, and I know that Mr. Chadwell had some conversations with him with regards to the knife and whether or not he saw the knife, but other than that, I don't remember anything exactly as to what he was going to say, but I do know that I felt that, after discussing with my investigator, that I thought it might be a very bad idea to call Mr. Dent. I did discuss that matter with James Brown also.

On cross-examination by the State, the attorney stated that it was his decision not to call Dent as a witness. He felt there was

no question but that his testimony would hurt the defendant's case. When asked to explain his position, he said:

> Well, he was — again, he was a convicted felon and he was in jail on other charges and he would be subject to the argument that Mr. Dent was merely somebody that Mr. Brown found in the jail that was a friend of his, coming over to testify. I knew that I had "Fast Black," "Killer," and "Bonaparte" [apparently Hunter, Kirk, and Haman] coming in that were going to testify in complete substantiation of Jim Brown's story, and I felt that Mr. Dent was warning us that he was not going to help us. I thought his testimony would be untrustworthy, and I also felt that he might dump us right on the spot.

There was no failure to investigate the facts, as was present in *State v. Lang*, 202 Neb. 9, 272 N.W.2d 775 (1978), and the rule of that case is not applicable. Defendant must look elsewhere to find support for his claim of ineffectiveness of counsel.

The person seeking post conviction relief has the burden of establishing a basis for relief, and the findings of the district court will not be disturbed on appeal unless they are clearly wrong. *State v. Pearson, ante* p. 183, 368 N.W.2d 804 (1985). Such person, to show ineffectiveness of counsel, must show that trial counsel failed to perform at least as well as a lawyer with ordinary training and skill in the criminal law in the area and that such lawyer failed to conscientiously protect the interests of his client. *State v. Pearson, supra.*

A decision to call, or not call, a particular witness, made by counsel as a matter of trial strategy, even if that choice may prove to be ineffective, does not without more sustain a finding of ineffectiveness of counsel. *State v. Poe*, 214 Neb. 540, 334 N.W.2d 642 (1983).

Certainly, counsel's decision should not be judged on the basis of hindsight. Even if it were, we believe counsel made a wise decision not to risk the uncertainty of Dent's testimony, accompanied by the prejudicial effect of his prior felony conviction, simply to produce evidence tending to support a rather tenuous position taken by the defendant himself.

The evidence was cumulative in nature in that practically the same facts had been testified to by three other witnesses. As

stated in *State v. Heathman*, 216 Neb. 609, 611, 344 N.W.2d 670, 672 (1984): "Trial counsel was evidently convinced that the testimony was not helpful, and the trial court agreed with his judgment." We agree with the trial court in this instance.

As stated earlier, we do not consider the issue of the sufficiency of the evidence to support the conviction, because a motion or application for post conviction relief cannot be used to secure a further review of issues already litigated on direct appeal. *State v. Hochstein,* 216 Neb. 515, 344 N.W.2d 469 (1984). See, also, *State v. Boyer, post* p. 312, 369 N.W.2d 644 (1985).

There is no merit to defendant's claim for post conviction relief, and the judgment of the district court in denying the same is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DUANE W. SANDERS, APPELLANT.

369 N.W.2d 641

Filed June 28, 1985. No. 84-878.

1. **Rules of the Supreme Court: Appeal and Error.** The disposition of a direct appeal pursuant to Neb. Ct. R. 3B (rev. 1983) is a disposition on the merits.
2. **Rules of the Supreme Court: Post Conviction: Appeal and Error.** Any matter which can be determined from the record on direct appeal is considered by the Nebraska Supreme Court when granting relief pursuant to Neb. Ct. R. 3B (rev. 1983) and is not available for further relief pursuant to the Nebraska Post Conviction Act, Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1979).

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Affirmed.

Clifford C. Ruder of Stehlik, Smith, Trustin, Schweer & Ruder, for appellant.

Robert M. Spire, Attorney General, and Lynne R. Fritz, for appellee.

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

PER CURIAM.

Duane W. Sanders appeals from a judgment entered by the district court for Douglas County, Nebraska, denying his request for post conviction relief pursuant to Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1979). This is Sanders' second appearance in this court on this matter. In his direct appeal we affirmed his conviction pursuant to Neb. Ct. R. 3B (rev. 1983) (formerly rule 1e(1) (1977)). See *State v. Sanders*, 209 Neb. xx-xxi (case No. 44019, Sept. 9, 1981). The disposition of a direct appeal pursuant to rule 3B is a disposition on the merits. See rule 3B(4). See, also, *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967). In granting relief pursuant to rule 3B, this court examines the entire record, not only to resolve those matters which are specifically called to the court's attention by court-appointed counsel but also to determine whether any possible errors exist. Therefore, any matter which can be determined from the record on direct appeal is considered by the Supreme Court when granting relief pursuant to rule 3B and is not available for further relief pursuant to the Nebraska Post Conviction Act. See, *State v. Weiland*, 190 Neb. 111, 206 N.W.2d 336 (1973); *State v. Losieau*, 182 Neb. 367, 154 N.W.2d 762 (1967). The judgment of the district court denying post conviction relief to Sanders is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MARK HOEKSTRA, APPELLANT.
369 N.W.2d 643

Filed June 28, 1985. No. 84-927.

Appeal from the District Court for Lancaster County: ROBERT R. CAMP, Judge. Affirmed.

Dana M. London, for appellant.

Robert M. Spire, Attorney General, and Jill Gradwohl, for appellee.

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

PER CURIAM.

Mark Hoekstra appeals the judgment of the district court for Lancaster County, Nebraska, affirming Hoekstra's municipal court conviction of operating a motor vehicle while under the influence of alcoholic liquor, first offense, and refusing to submit to a chemical test, first offense. See Neb. Rev. Stat. §§ 39-669.07 and 39-669.08 (Reissue 1984). Upon Hoekstra's conviction the municipal court sentenced Hoekstra to 1 year's probation; suspended his operator's license for 60 days; restricted postsuspension operator's privileges for 4 months by limiting Hoekstra's driving to travel to and from work and probation activities; and ordered Hoekstra to attend alcohol education classes, abstain from alcohol, and pay a fine of $200 with court costs.

After perfecting his appeal to this court, Hoekstra filed his brief but failed to specify any assignment of error. Hoekstra and the State, on March 5, 1985, jointly stipulated that Hoekstra be given leave to add assignments of error omitted from his brief. On March 22, 1985, this court disallowed that joint stipulation.

Neb. Rev. Stat. § 25-1919 (Reissue 1979) provides that the appellant's brief in any action before this court "shall set out particularly each error asserted and intended to be urged for the reversal, vacation or modification of the judgment, decree or final order alleged to be erroneous . . . ." Further, § 25-1919 authorizes the Supreme Court to promulgate general rules providing for briefs filed in cases appealed to this court. Pursuant to such authorization this court has adopted Neb. Ct. R. 9D(1)d (rev. 1983), which requires that an appellant's brief shall contain assignments of error which are

> [a] separate, concise statement of each error a party contends was made by the trial court, together with the issues pertaining to the assignments of error. 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. . . .

In *Farmers Co-op Grain Co. v. Leuenberger*, 217 Neb. 288, 348 N.W.2d 135 (1984), we held that in the absence of an assigned error, the judgment of the district court will be affirmed.

Hoekstra has not alleged any assignment of error in his brief filed with this court. The disposition made in *Farmers Co-op Grain Co. v. Leuenberger, supra*, a civil case, is equally appropriate under the circumstances regarding Hoekstra's appeal. The record does not disclose any plain error prejudicial to Hoekstra. Therefore, Hoekstra's appeal presents no error for review by this court. In the absence of any error presented for review, we must and do affirm the judgment of the district court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL G. TOTH, APPELLANT.
369 N.W.2d 644

Filed June 28, 1985. No. 84-775.

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

Joseph P. McCluskey of Brogan & McCluskey, for appellant.

A. Eugene Crump, Deputy Attorney General, and Timothy E. Divis, for appellee.

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

PER CURIAM.

Michael G. Toth appeals the judgment of the district court for York County, Nebraska, affirming Toth's conviction in a bench trial for theft by shoplifting property having a value greater than $100 but less than $300. See Neb. Rev. Stat. §§ 28-511.01 and 28-518 (Cum. Supp. 1984).

Toth's brief filed with this court fails to specify any

assignment of error to be reviewed. The record does not disclose any plain error prejudicial to Toth. In the absence of any error presented for review, we must and do affirm the judgment of the district court. See *State v. Hoekstra, ante* p. 309, 369 N.W.2d 643 (1985).

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM R. BOYER, APPELLANT.

369 N.W.2d 644

Filed June 28, 1985. No. 84-946.

1. **Post Conviction: Appeal and Error.** Post conviction relief may not be used for the purpose of securing another review of issues which were raised on direct appeal.
2. **Criminal Law: Sentences: Homicide.** Imprisonment for life is the minimum penalty for first degree murder.

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

William R. Boyer, pro se.

Robert M. Spire, Attorney General, and Terry R. Schaaf, for appellee.

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

CAPORALE, J.

Defendant, William R. Boyer, appeals from the denial of relief sought under the Nebraska Post Conviction Act, Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1979). He asserts as errors the trial court's failure to find (1) that the evidence does not support a finding of guilt for first degree murder and (2) that the sentence is excessive. We affirm.

Following a jury trial, Boyer was adjudged guilty of the first degree murder of his mother under the circumstances set forth in *State v. Boyer*, 211 Neb. 139, 318 N.W.2d 60 (1982), and was sentenced to imprisonment for life. This court affirmed the

judgment and sentence of the trial court. He has since filed two motions for post conviction relief, both of which were dismissed by the district court and both of which constitute the subject of this appeal. Boyer argues the evidence establishes he was guilty only of manslaughter, not first degree murder, and that his sentence is excessive for the crime he committed.

One of the errors assigned in his direct appeal was that the evidence was insufficient to allow submission of the question of guilt to the jury. We held the evidence was such that the jury "could conclude the defendant was lying in wait and therefore planned to kill his mother," and was sufficient to support the conviction. *Id.* at 148, 318 N.W.2d at 65. Consequently, Boyer is forever barred from presenting an encore performance of the song that the evidence does not support a finding that he committed murder in the first degree.

As has been stated before, " '[t]here must be an end to litigation. A defendant will not be permitted to rephrase issues previously raised . . . for the purpose of securing another review on appeal.' " *State v. Casper*, 219 Neb. 641, 643, 365 N.W.2d 451, 453 (1985), quoting *State v. Hochstein,* 216 Neb. 515, 344 N.W.2d 469 (1984). See, also, *State v. Brown, ante* p. 305, 369 N.W.2d 639 (1985).

Since imprisonment for life is the minimum penalty for first degree murder, Neb. Rev. Stat. §§ 28-105 and 28-303 (Reissue 1979), the foregoing disposition of Boyer's first assignment of error determines as well that his second assignment of error is without merit.

Each of the judgments of the district court is affirmed.

AFFIRMED.

FRANCES MCKINNON, APPELLANT, V. TED BAKER, PERSONAL REPRESENTATIVE OF THE ESTATE OF ANNA LUELLA VAN PELT, DECEASED, ET AL., APPELLEES.

370 N.W.2d 492

Filed July 5, 1985. No. 84-083.

1. **Wills.** The execution of reciprocal or mutual wills, without more, does not bar their subsequent modification or revocation.
2. **Wills: Contracts.** A contract between a husband and wife to make reciprocal or mutual wills is valid and enforceable.
3. **Contracts.** Introductory recitals in a contract are generally not a part of the operative contract. If the contract proper is ambiguous, such recitals may be of value in construing the same; but if the contract provisions are clear and unambiguous, the recitals have no effect or application.

Appeal from the District Court for Kimball County: JOHN D. KNAPP, Judge. Affirmed.

Brian Cook of O'Brien, Huenergardt & Cook, for appellant.

George P. Burke of Van Steenberg, Myers & Burke, for appellees.

KRIVOSHA, C.J., WHITE, and GRANT, JJ., and BRODKEY, J., Retired, and RIST, D.J.

RIST, D.J.

This is an action in which Frances McKinnon, plaintiff-appellant, sought performance of a contract respecting reciprocal wills between Lester M. Van Pelt and Anna Luella Van Pelt and the imposition of a constructive trust thereunder upon certain real estate devised by Anna. The defendants are the personal representatives of Anna's estate and the residuary beneficiaries under her last will and testament. The trial court dismissed plaintiff's petition and quieted title to the interest in real estate here involved in the personal representatives of Anna's estate. Plaintiff has appealed, claiming in substance that the trial court failed to properly determine the meaning and effect of the contract involved.

Lester and Anna were married in 1938, it being a subsequent marriage for each. Each had children by a prior marriage. The plaintiff is a daughter of Lester by a prior marriage.

In 1952, subsequent to their marriage, Lester and Anna acquired as tenants in common a residential property which they occupied as their home and described as Lot 4, Rodman Court Addition to the City of Kimball, Kimball County, Nebraska.

In 1957 Lester and Anna entered into a written contract regarding the disposition of their property, including particularly the making of what were described in the contract as reciprocal wills. The 1957 will of Lester executed pursuant to the contract provided in substance that at his death the residence property here involved should go to Anna for life, remainder to the plaintiff; and if Anna predeceased him, plaintiff was to receive such property. Anna's will executed pursuant to the contract provided that if Lester predeceased her, said property was to go to the plaintiff.

Lester died in 1977, and his 1957 will was probated. Anna died in 1981 but had, in 1978 and subsequent to Lester's death, executed a new will leaving the residue of her estate, including the interest in real estate here involved, to her great-grandchildren. This will was admitted to probate. It is as a result of this latter will that plaintiff sought to have the 1957 agreement of the parties enforced in favor of the disposition to her as contained in Anna's 1957 will, and the imposition of a constructive trust upon this interest in real estate to effect the same.

The 1957 contract between Lester and Anna and its meaning and effect are the principal issues before us. The contract began with a number of recitals, those material to this case being:

> Whereas, both parties, at this time, desire to execute reciprocal wills devising and bequeathing their respective separate property upon their respective deaths free from any claim of the other except as shall be provided in said wills; and
>
> Whereas, both parties have mutually agreed and do now agree that the distribution of their respective property shall be made in accordance *with the terms of this agreement and said reciprocal wills.*

(Emphasis supplied.)

Paragraph 12 of the contract proper provided:

> Each party shall contemporaneously with the execution of this agreement, execute his and her Last Will and Testament, a copy of which is hereto attached marked Exhibits A and B, respectively. It is mutually agreed *that so long as the other shall live*, neither of us will revoke nor destroy either of said wills or make any other will or codicil without the full consent and agreement of the other.

(Emphasis supplied.) The 1957 wills executed by both Lester and Anna were those, copies of which were attached to the contract.

The trial court held that paragraph 12 of the contract was unambiguous and permitted Anna to modify her will after Lester's death and that the recitals could not be used to vary this contract provision. Plaintiff asserts this is in error; that the recitals must be treated as an integral part of the contract; that the reference to reciprocal wills in the recital portion of the contract carries with it a connotation that a contract for such wills is enforceable; that such wills may not be varied unless by consent of the parties; that a reading of the contract as a whole, including the recitals, shows an intention of the parties that the wills provided for in the contract could not be varied without mutual consent; and that paragraph 12 is merely to tie up loose ends which might otherwise exist and defeat the intention of the parties.

Before dealing with plaintiff's position, we wish first to dispose of an argument of defendants that the contract here involved is an invalid postnuptial contract. It is not. It is a proper contract to make reciprocal or mutual wills, and such contracts are valid in Nebraska. *Brown v. Webster*, 90 Neb. 591, 134 N.W. 185 (1912); *Wyrick v. Wyrick*, 162 Neb. 105, 75 N.W.2d 376 (1956); *Eagan v. Hall*, 159 Neb. 537, 68 N.W.2d 147 (1955). The issue before us is what the contract means.

We cannot agree with plaintiff's characterization of the contract as being one providing for irrevocable reciprocal wills. While one may question the use of the word *reciprocal* as being an accurate description of the wills provided in the contract, it being more likely that they are *mutual* wills as that term is usually defined, the fact is that the parties could and did contract for the making of the wills attached to the contract.

The problem initially is what effect, if any, the recitals of the contract have upon the contract provisions proper, and in particular paragraph 12.

We conclude first that contract recitals have a limited value in the construction of a contract. They are generally background statements and do not ordinarily form any part of the real agreement. If the agreement proper is ambiguous, then the recitals may be of value in construing the same. Otherwise, the language of the contract is controlling. As stated in 17 Am. Jur. 2d *Contracts* § 268 at 676 (1964), "[I]f the recitals are ambiguous and the operative part is clear, the operative part must prevail. If both the recitals and the operative part are clear, but they are inconsistent with each other, the operative part must control." See, also, 17A C.J.S. *Contracts* § 314 (1963). This court has followed this rule as to unambiguous contract clauses in similar situations. See *Strickland v. Omaha Nat. Bank*, 181 Neb. 478, 149 N.W.2d 344 (1967).

We find the language of paragraph 12 to be unambiguous as to when the wills described therein could not be revoked or modified. The language that "so long as the other shall live, neither of us will revoke or destroy either of said wills or make any other will or codicil without . . . consent" is clear and requires no explanation by reference to any recitals. The limit on nonconsensual changes ended at the death of one of the parties. Anna had a right to modify her will after Lester's death. It may further be said that execution of reciprocal or mutual wills, without more, can be no bar to their modification or revocation even when both parties are aware of the terms of each will. *Kimmel v. Roberts*, 179 Neb. 8, 136 N.W.2d 208 (1965). It requires a contractual agreement to prohibit such changes. Here, there is a contract, but the contractual limitation on change is limited to the joint lives of the testators. After that, no change limitation exists.

We, therefore, find that the trial court was correct in its decision that Anna had the right to modify her will and in dismissing plaintiff's petition. The action of the trial court is affirmed.

AFFIRMED.

WHITE, J., dissenting.

It is a fundamental tenet of contract law that a contract must be read as a whole. In construing a written contract for the purpose of ascertaining the intention of the parties, the instrument must be considered as a whole, the words given their ordinary and popularly accepted meaning, and the intent of the parties must be derived from the four corners of the instrument. *Long v. Magnolia Petroleum Co.*, 166 Neb. 410, 89 N.W.2d 245 (1958); *Westbrook v. Masonic Manor,* 185 Neb. 660, 178 N.W.2d 280 (1970). Also, the interpretation given to a contract by the parties themselves while engaged in the performance of it is one of the best indications of true intent and should be given great, if not controlling, influence. *Lauritzen v. Davis*, 214 Neb. 547, 335 N.W.2d 520 (1983).

From the terms of the agreement in this case, it is clear that the intent of the parties was to execute reciprocal wills contemporaneously with the execution of the agreement. The parties agreed that their property would be distributed by the terms of these reciprocal wills and the agreement. As the agreement provides, "both parties have mutually agreed and do now agree that the distribution of their respective property shall be made in accordance with the terms of this agreement and said reciprocal wills." As I read the instrument, this clause must be interpreted as a central part of the agreement. Paragraph 12 merely supplies additional terms. The respective 1957 wills and the agreement clearly show that the parties intended that the house owned by Mr. and Mrs. Van Pelt as tenants in common would ultimately pass to Frances McKinnon in fee simple. Mrs. Van Pelt breached this agreement in 1976 and 1978 by revoking her 1957 will and devising her interest in the house first to her grandchildren and then to her great-grandchildren.

I would reverse.

KEARNEY CONVENTION CENTER, A NEBRASKA CORPORATION, APPELLANT, V. ANDERSON-DIVAN-COTTRELL INSURANCE, INC., A NEBRASKA CORPORATION, ET AL., APPELLEES.

370 N.W.2d 86

Filed July 5, 1985. No. 84-186.

1. **Trial: Jury Instructions: Damages: Appeal and Error.** Where the law provides a definite measure of damages, the court should instruct the jury specifically how the damages should be assessed. An instruction stating a general principle in the measurement of damages, broader than is applicable to the case presented and not qualified by other instructions, is erroneous.
2. **Insurance: Brokers: Damages.** Where an insurance broker has negligently failed to obtain adequate insurance coverage for an insured, insured's measure of damages for loss caused thereby is the amount of actual loss as would have been covered by adequate insurance less any amount paid by insurance effectuated by the broker.
3. **Damages: Verdicts: Motions for New Trial: Appeal and Error.** Where the amount of damages allowed by a jury is clearly inadequate under the evidence in the case, it is error to refuse to set aside such verdict.
4. **Judgments: Appeal and Error.** Where error exists as to only one issue and the judgment is in other respects free from error, the reviewing court may, when remanding the cause for new trial, limit the new trial to the issue affected.

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

Sidwell & Shofstall, for appellant.

Wagoner & Wagoner, for appellees.

KRIVOSHA, C.J., WHITE, and GRANT, JJ., and BRODKEY, J., Retired, and RIST, D.J.

RIST, D.J.

This is an action by plaintiff-appellant against defendants, who are insurance brokers, for negligently failing to obtain business interruption insurance with appropriate policy limits to adequately protect plaintiff. The case was tried to a jury, which returned a verdict for plaintiff in the sum of $42,971, for which amount the trial court entered judgment. Plaintiff appeals, assigning as error that the trial court failed to instruct on the proper measure of damages and failed to sustain plaintiff's motion for judgment notwithstanding the verdict or,

alternatively, for a new trial on the issue of damages.

Plaintiff is a corporation operating a motel complex in the city of Kearney, Nebraska. For a number of years prior to January 16, 1981, plaintiff purchased its various policies of insurance from defendants, including business interruption insurance. Beginning in 1978, the policy provided for such business interruption insurance in the amount of $700,000 on an 80-percent coinsurance basis based upon the gross earnings of the plaintiff. The policy provided in part that the company shall not be liable for a greater proportion of any loss than the limit of liability bears to the amount produced by multiplying the coinsurance percentage of 80 percent by the gross earnings that would have been earned (had no loss occurred) during the 12 months immediately following the date of damage to or destruction of the motel. In other words, the limit of liability ($700,000) must at least equal 80 percent of one year's gross earnings of the plaintiff in order for plaintiff to recover the full amount of loss within the policy limits without penalty or reduction.

On January 16, 1981, a fire occurred in the motel which resulted in the motel business being out of operation in whole or in part until June 4, 1981. The insurance company computed the total business interruption loss of gross earnings to be $333,396 but determined that plaintiff was underinsured and not within the 80-percent coinsurance requirement, to the extent that the policy would provide coverage for only 36 percent of the loss, and therefore paid only $119,472 of such loss. Plaintiff then brought this action alleging that defendants, as insurance brokers, were negligent in (1) failing to use reasonable care to obtain adequate business interruption insurance for plaintiff, (2) failing to use reasonable care in obtaining the necessary financial information from plaintiff, and (3) failing to use reasonable care to advise plaintiff that the policy amount of insurance would reimburse only a fraction of any loss. Plaintiff sought to recover its loss resulting from such negligence. The verdict was for plaintiff, as above indicated.

We note that the trial court submitted to the jury the allegations of negligence set out above, that the defendants in their answer made no allegations of contributory negligence,

and that no such issue was submitted to the jury. There were no objections by defendants to the instructions setting forth the allegations of negligence above noted.

The evidence of actual gross earnings lost was determined by expert testimony using business records of the plaintiff and projections based upon such records. Plaintiff's expert was the adjuster for the insurance company having the business interruption insurance. He calculated the actual loss of gross earnings to be $333,396; that as a result of plaintiff's failure to meet the coinsurance requirement as previously set out, the carrier paid $119,472 of such loss, leaving an uninsured loss of $213,924. Defendants' expert differed on certain items to be considered in the computation of the actual gross earnings loss and determined such loss to be $256,768. He subtracted the amount of insurance paid ($119,472) and arrived at an uninsured loss of $137,296.

The manner of computing the failure to meet the coinsurance requirement was not challenged, nor was there any challenge to the accuracy of the data used. Defendants' defense was, in essence, that plaintiff had failed to give them sufficient data, as defendants had requested, to make an adequate determination of proper coverage and that they had advised plaintiff of the basis of the coinsurance requirement and the need for adequate compliance. Plaintiff, through its officers, testified it offered defendants all the information requested of it by defendants and that defendants assured plaintiff it had adequate business interruption coverage. This evidence went essentially to the issue of liability, and the jury by its verdict determined that defendants had breached their duty to the plaintiff.

As previously noted, plaintiff's assignments of error relate to the amount of damages awarded by the jury. There is no cross-appeal by defendants on any issue.

With respect to plaintiff's first assignment of error, that the trial court erroneously instructed on damages, the record reflects the jury was instructed in instruction No. 4 that the measure of damages was "the amount of monies which will fairly and reasonably compensate the Plaintiff for its damage proved by a preponderance of the evidence to have proximately resulted from the negligence of the Defendants." No objection

was made to this instruction, but plaintiff submitted a requested instruction further defining the measure of damages to be "the amount that plaintiff would have been paid under the policy had the insurance been properly obtained by the insurance agent." This requested instruction was refused by the trial court.

We hold first that while the general instruction on damages as contained in instruction No. 4 was a proper general instruction, there is in a case such as this a definite measure of damages to be considered by a jury, and the trial court did not instruct upon it. Where the law provides a definite measure of damages, the court is required to specifically instruct the jury on such measure. It is only where there is no definite measure of damages that a general instruction on compensatory damages is sufficient. *White v. Longo*, 190 Neb. 703, 212 N.W.2d 84 (1973); *Hickman-Williams Agency v. Haney*, 152 Neb. 219, 40 N.W.2d 813 (1950). While this court has not specifically passed on this point, there is ample authority from other jurisdictions that where some portion of the insurance was effectuated, although less than the broker had a duty to obtain, the measure of damages is the actual loss sustained which should have been insured less such insurance recovery as was in fact paid. *Eddy v. Republic Nat. Life Ins. Co.*, 290 N.W.2d 174 (Iowa 1980); *Klonis for use of Con. Am. Ins. v. Armstrong*, 436 So. 2d 213 (Fla. App. 1983); *White v. Calley*, 67 N.M. 343, 355 P.2d 280 (1960); *Cusimano v. St. Paul Fire & Marine Ins. Co.*, 405 So. 2d 1382 (La. App. 1981). The trial court's failure to so instruct requires us in part to reverse the verdict and to set aside the amount of the judgment herein.

We further hold that the requested instruction of the plaintiff was incorrect on the facts in this case. Such instruction would be proper in a case where the insurance broker failed to obtain any coverage on the loss involved. It would not be proper where there was not a total lack of coverage, given the rule that we have set forth above. The trial court correctly refused to give such instruction.

We further find that the verdict rendered of $42,971 is clearly and substantially less than a jury should have awarded on the evidence received and under the measure of damages set out in

this opinion, given the fact that defendants' liability was established and that there were no issues of contributory negligence. This may have resulted from the lack of a more precise instruction on the measure of such damages, but in any event there was no basis warranting such amount, it being substantially less than the evidence reflects.

Plaintiff's other assignment is that the court incorrectly failed to sustain its motion for judgment notwithstanding the verdict or, alternatively, for a motion for a new trial on the issue of damages. On the record, the trial court could not properly grant a judgment notwithstanding the verdict, since it was clearly a case for the jury on the issue of damages and there is no rule in this state permitting an additur. But plaintiff's motion for new trial on the issue of damages should have been sustained.

It is clear that the issue of liability which has been determined in favor of plaintiff in this case is not involved in the determination of damages, and it is therefore proper to remand the cause for retrial on the issue of damages only. *Harper v. Young*, 139 Neb. 624, 298 N.W. 342 (1941).

We, therefore, remand the cause for a new trial on the issue of damages.

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

JOSEPH KOPFMAN, APPELLANT, V. FREEDOM DRILLING CO., INC., AND MORRIS HOWARD, APPELLEES.

370 N.W.2d 89

Filed July 5, 1985. No. 84-263.

1. **Workmen's Compensation: Employer and Employee.** Transportation rendered to an employee by an employer either incident to the employment contract or because of the custom of the employee's job operates to bring the employee within the scope of his employment during the time of the transportation.
2. _____: _____. Acts reasonably necessary or incident to the performance of the work, including such matters of personal convenience and comfort, not in conflict with specific instructions, as an employee may normally be expected to

indulge in, under the conditions of his work, are regarded as being within the scope of the employment.

3. **Workmen's Compensation.** Violation of statute or commission of crime does not affect a workmen's compensation claim when the illegal feature of the conduct was not the causative factor in producing the injury.

Appeal from the District Court for Kimball County: JOHN D. KNAPP, Judge. Affirmed.

T. Edward Icenogle, Richard L. Shearer, Thomas J. Overton, and Randall M. Livingston, for appellant.

Francis L. Winner of Winner, Nichols, Douglas, and Kelly, for appellee Freedom Drilling Co.

David C. Nuttleman of Holtorf, Kovarik, Nuttleman, Ellison, Mathis & Javoronok, P.C., for appellee Howard.

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

GRANT, J.

Plaintiff-appellant, Joseph Kopfman, appeals from an order of the district court for Kimball County granting summary judgment to defendants-appellees, Freedom Drilling Co., Inc., and Morris Howard. The district court found that Kopfman's action in negligence was barred by the exclusive remedy provision of the workmen's compensation statutes. We affirm.

Defendant Morris Howard was employed by defendant Freedom Drilling Co., Inc., a Wyoming corporation, as a driller, working on Freedom's oil rigs in Kimball County, Nebraska. Kopfman was hired by Freedom, acting through Howard, to work as a "roughneck" or floor hand on the same rigs. Howard's duties included supplying a drilling crew to work the rigs during Howard's duty time from 7 a.m. to 3 p.m. Howard, a resident of Sterling, Colorado, assembled his crew, including Kopfman, from the Sterling area. Freedom paid Howard, at a per mile rate, to travel in Howard's car from Sterling to the rig site in Kimball County, Nebraska. While none of the crew members were required to accept transportation, Howard did furnish transportation to the rig site for his crew of four or five persons, and all members, including Kopfman, accepted. None of the crew were paid by Freedom for time

spent traveling, nor did the crew members pay for the transportation.

On July 19, 1981, at about 6 a.m., the crew was traveling to the rig site in Howard's 1979 Chevrolet Blazer, with Howard driving. Howard had modified the Blazer himself to run on propane fuel rather than gasoline and had installed a propane fuel tank immediately behind the rear passenger seats. Howard left the direct route to Freedom's oil rigs, while en route from Sterling to Kimball County on July 19, and drove about one-quarter of a mile to a well site where he stopped to fill his vehicle tank with propane. There was no evidence the well site was owned or operated by Freedom. Howard had no authority from anyone to take the propane. Howard's actions were, therefore, stealing. During the refueling process, propane gas escaped into the passenger compartment. One of the passengers lit a cigarette and an explosion occurred within the Blazer. Appellant received burns over 25 percent of his body in the ensuing flash fire.

Appellant brought suit against Howard and Freedom, alleging the negligence of both defendants and the doctrine of respondeat superior as to Freedom with regard to Howard's actions. Howard and Freedom each moved for summary judgment on the grounds that Howard and Kopfman were both in the scope of their employment with Freedom and that the action was therefore barred by exclusivity provisions of the workmen's compensation statutes. Kopfman admitted that Howard was within the scope of Howard's employment with Freedom while Howard himself was traveling to the jobsite, but alleges that Howard departed from the scope of his employment when he deviated from his route to steal propane. Kopfman also argues that he was at no time within the scope of his employment with Freedom while traveling to the jobsite. The district court granted appellees' motions and entered judgment in their favor.

Appellant first argues that the trial court erred in granting appellees' motions for summary judgment. He suggests that there were three genuine issues of material fact: whether appellant ever entered the scope of his employment, whether Howard's deviation from his normal route to refuel his vehicle

removed him from the scope of his employment, and whether Howard's act of stealing the propane for his vehicle amounted to misfeasance or positive wrong, causing appellant's injuries. Appellant, however, misconstrues the distinction between questions of fact and law. The underlying facts and inferences in this situation are viewed in the light most favorable to appellant to establish the factual basis to which the court must apply the applicable law. Those facts in this case are undisputed. The three issues set out by Kopfman are not questions of fact decided by the trial court but, rather, are matters of law which the court properly determined in view of the undisputed facts. The trial court correctly disposed of the matter on appellees' motions for summary judgment.

Kopfman contends that he had never entered the scope of his employment and that therefore the workmen's compensation statutes cannot bar his action. It is Kopfman's position that since he was not compensated for his travel time, the transportation was not part of the employment contract. "The general rule is that an injury sustained by an employee while going to and from his work does not arise out of and in the course of his employment." *Butt v. City Wide Rock Exc. Co.*, 204 Neb. 126, 127, 281 N.W.2d 406, 407 (1979). There are, however, exceptions to that rule. In *Schademann v. Casey*, 194 Neb. 149, 156-57, 231 N.W.2d 116, 122 (1975), we said:

> We conclude that where incident to the employment contract, whether express, implied, or by custom, it is understood by the employer and employee that the employer will transport the employee to or from the place where the work is to be done, and the employer does so provide that transportation in a vehicle under the employer's control, an injury during that journey arises out of and in the course of employment.

"When drilling sites are at locations remote from population centers, transportation is commonly provided by the employer for the mutual benefit of all parties." *Christian v. Nicor Drilling Co.*, 653 P.2d 185, 186 (Okla. 1982). In this case it is undisputed that defendant Howard received remuneration from Freedom for traveling to the jobsite. It is also undisputed that Howard picked up appellant every working day to transport appellant to

the job, that appellant understood he was to be picked up, and that appellant accepted transportation every day to the remote well site. In that situation we conclude that transportation furnished to an employee by an employer either incident to the employment contract or because of the custom of the job the employee had with the employer operates to bring the employee within the scope of his employment for workmen's compensation purposes during the time of the transportation. Appellant must be considered to have entered the scope of his employment when he began his free transportation, furnished by Freedom, to the jobsite.

In similar situations involving injuries to members of oil drilling crews while en route to or from work, several states have arrived at the same result. *Christian v. Nicor Drilling Co., supra*; *Liberty Mut. Ins. Co. v. Chesnut*, 539 S.W.2d 924 (Tenn. App. 1976); *Jensen v. Manning & Brown*, 63 Wyo. 88, 178 P.2d 897 (1947); *Messenger v. Sage Drilling Co.*, 9 Kan. App. 2d 435, 680 P.2d 556 (1984).

Since appellant was in the scope of his employment, any action against Freedom outside of the remedies afforded employees by the Nebraska Workmen's Compensation Act would be barred by Neb. Rev. Stat. § 48-111 (Reissue 1984). Therefore, the judgment in favor of Freedom on Kopfman's direct suit against Freedom must be affirmed.

Whether the judgment in favor of Howard can stand depends on our resolution of appellant's final assignment of error. Appellant suggests that Howard's deviation from his normal route to work to refuel his vehicle removed him from the scope of his employment. If it did, Howard would no longer enjoy the status of coemployee and would thus be unprotected by § 48-111. If it did not, appellant's claim against Howard would be barred by that provision.

Neither party denies that, but for the deviation to refuel, Howard's travel to and from work was within the scope of Howard's employment. Freedom, by paying Howard to travel to the jobsite, expanded the scope of Howard's employment. As stated in *Schademann v. Casey, supra* at 155, 231 N.W.2d at 121:

"All acts reasonably necessary or incident to the

> performance of the work, including such matters of personal convenience and comfort, not in conflict with specific instructions, as an employee may normally be expected to indulge in, under the conditions of his work, are regarded as being within the scope or sphere of the employment."

Where an employer expands the employment to include the employee's traveling, an employer must contemplate that the employee will have to refuel his vehicle. Therefore, a refueling stop cannot be considered a deviation from the course of employment.

This issue then becomes whether Howard's stealing the propane, as opposed to buying it, removed him from the scope of his employment. On this point we agree with the statement set out in 1A A. Larson, The Law of Workmen's Compensation § 35.20 at 6-102 (1985): "Violation of statute or commission of crime does not affect a compensation claim when the illegal feature of the conduct was not the causative factor in producing the injury." See, also, *Texas Employers' Ins. Ass'n v. Peppers*, 133 S.W.2d 165 (Tex. Civ. App. 1939); *Anderson v Cohen Iron Works*, 38 N.Y.2d 511, 344 N.E.2d 389, 381 N.Y.S.2d 457 (1976). The stealing of the gas was not the causative factor of appellant's injuries in this case. Had Howard paid for the gas, the flash fire still would have occurred. Howard was within the course of his employment at the time of the accident which injured Kopfman. Kopfman's claim against Howard is therefore barred by § 48-111.

AFFIRMED.

CHRIS M. MAYER, APPELLANT, V. RALPH HOWARD, DOING BUSINESS AS SCRIBNER RACEWAYS, APPELLEE.

370 N.W.2d 93

Filed July 5, 1985. No. 84-275.

1. **Summary Judgment.** Where no genuine issue as to any material fact or as to the ultimate inferences to be drawn therefrom exists and the moving party is entitled to judgment as a matter of law, summary judgment should be granted.

2. **Releases: Negligence: Estoppel.** A party who has the capacity and opportunity to read a release of claims for personal injuries but fails to do so is estopped by his own negligence from claiming that the release is not binding on him.
3. **Contracts: Public Policy.** Courts should be cautious in holding contracts void on the ground that the contract is contrary to public policy.
4. _____: _____. To be void as against public policy, a contract should be quite clearly repugnant to the public conscience.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Affirmed.

Richard J. Rensch of Hansen, Engles & Locher, P.C., for appellant.

John C. Brownrigg of Erickson & Sederstrom, P.C., for appellee.

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

PER CURIAM.

Chris M. Mayer appeals from a judgment entered by the district court for Douglas County, Nebraska, granting summary judgment in favor of the appellee, Ralph Howard, doing business as Scribner Raceways. We affirm.

Mayer filed suit against Howard, alleging that he sustained injuries due to the negligent design, construction, or maintenance of the racetrack owned and operated by Howard. The evidence disclosed that on September 13, 1981, Mayer took a 750 cc. motorcycle to Scribner Raceways in order to participate in an elapsed time trial drag race. Mayer had frequently raced automobiles but had never before raced a motorcycle. Upon entering the premises Mayer filled out a card supplying information about himself and his cycle. The reverse side of the card, which required his signature, read in part as follows:

RELEASE OF LIABILITY

This release limits your right to recovery of damages in case of accident. Read it before signing.

In applying to enter this race I promise that I will inspect the track prior to running on it, *will assure myself that the track and adjacent areas are properly designed and*

maintained, and further agree that I will not participate in this race until I have completed an inspection which satisfies me that these areas are safe for race purposes. I will further note existing weather conditions and do agree that I voluntarily assume all risks arising from conditions related to use of the track areas by myself or others.

I do agree to hold harmless and indemnify the owners and possessors of this track for any loss, cost, expense, damage or injury arising from my participation in this event.

(Emphasis supplied.)

Mayer signed a second document, which read in part as follows:

IN CONSIDERATION of being permitted to enter for any purpose any RESTRICTED AREA (herein defined as including but not limited to the racing surface, pit areas, infield, burn out area, approach area, shut down area, and all walkways, concessions and other areas appurtenant to any area where any activity related to the event shall take place), or being permitted to compete, officiate, observe, work for, or for any purpose participate in any way in the event, EACH OF THE UNDERSIGNED, for himself, his personal representatives, heirs, and next of kin, acknowledges, agrees and represents that he has, or will immediately upon entering any of such restricted areas, and will continuously thereafter, inspect such restricted areas and all portions thereof which he enters and with which he comes in contact, and he does further warrant that his entry upon such restricted area or areas and his participation, if any, in the event constitutes an acknowledgement that he has inspected such restricted area and that he finds and accepts the same as being safe and reasonably suited for the purposes of his use, and he further agrees and warrants that if, at any time, he is in or about restricted areas and he feels anything to be unsafe, he will immediately advise the officials of such and will leave the restricted areas:

1. HEREBY RELEASES, WAIVES, DISCHARGES

AND COVENANTS NOT TO SUE the promoter, participants, racing association, sanctioning organization or any subdivision thereof, track operator, track owner, officials, car owners, drivers, pit crews, any persons in any restricted area, promoters, sponsors, advertisers, owners and lessees of premises used to conduct the event and each of them, their officers and employees, all for the purposes herein referred to as "releasees", from all liability to the undersigned, his personal representatives, assigns, heirs, and next of kin for any and all loss or damage, and any claim or demands therefor on account of injury to the person or property or resulting in death of the undersigned, whether caused by the negligence of the releasees or otherwise while the undersigned is in or upon the restricted area, and/or, competing, officiating in, observing, working for, or for any purpose participating in the event;

. . . .

EACH OF THE UNDERSIGNED expressly acknowledges and agrees that the activities of the event are very dangerous and involve the risk of serious injury and/or death and/or property damage. EACH OF THE UNDERSIGNED further expressly agrees that the foregoing release, waiver, and indemnity agreement is intended to be as broad and inclusive as is permitted by the law of the Province or State in which the event is conducted and that if any portion thereof is held invalid, it is agreed that the balance shall, notwithstanding, continue in full legal force and effect.

THE UNDERSIGNED HAS READ AND VOLUNTARILY SIGNS THE RELEASE AND WAIVER OF LIABILITY AND INDEMNITY AGREEMENT, and further agrees that no oral representations, statements or inducements apart from the foregoing written agreement have been made.

(Emphasis supplied.)

After signing the various documents Mayer proceeded to race his motorcycle on the first and only practice run of the day. He accelerated his motorcycle to speeds in excess of 100 m.p.h.

until he crossed the one-quarter-mile marker, after which time he decelerated by disengaging the throttle. Upon doing so, Mayer's motorcycle became airborne, causing Mayer to crash and incur the injuries complained of in his petition. He maintains that the reason his motorcycle became airborne was that the racing strip was latently and defectively designed.

Mayer, in essence, alleges two errors committed by the district court. One, that there are genuine material issues of fact, thereby precluding the district court from granting summary judgment. And, two, that the releases did not relieve the owner of the track of liability for latent defects in the design of the track. In connection with the second assignment Mayer maintains that, in any event, the releases were contrary to public policy under the facts of this case.

In the instant case the question of whether the district court should have granted summary judgment depends, to a great extent, on whether as a matter of law Howard could not be liable to Mayer for latent defects in the design of the track, if any existed, under the facts of this case.

We have frequently held that where no genuine issue as to any material fact or as to the ultimate inferences to be drawn therefrom exists and the moving party is entitled to judgment as a matter of law, summary judgment should be granted. See, Neb. Rev. Stat. § 25-1332 (Reissue 1979); *Moore v. American Charter Fed. Sav. & Loan Assn.*, 219 Neb. 793, 366 N.W.2d 436 (1985); *Witherspoon v. Sides Constr. Co.*, 219 Neb. 117, 362 N.W.2d 35 (1985). On a motion for summary judgment, the court is required to view the evidence and all reasonable inferences therefrom in the light most favorable to the party against whom it is directed, and any reasonable doubt touching the existence of a genuine issue of material fact must be resolved against the moving party. See, *Wood v. Farwell Irr. Dist.*, 217 Neb. 511, 349 N.W.2d 633 (1984); *De Los Santos v. Great Western Sugar Co.*, 217 Neb. 282, 348 N.W.2d 842 (1984). If, in fact, the language of the documents is sufficient and the documents executed by Mayer are not contrary to public policy, then there does not appear to be any genuine issue as to any material fact, and the district court was correct in granting Howard's motion for summary judgment. To resolve the first

question, therefore, we must turn to a resolution of the second issue.

While Mayer characterizes the documents he signed as "releases," in fact they were much more. Although cast in the form of releases, the documents signed by Mayer were in fact an express assumption of the risk, and were intended to call Mayer's attention to the dangers inherent in racing automobiles and motorcycles and the need for Mayer to satisfy himself that he knew what he was doing and that the track and surrounding area were as safe as Mayer desired before attempting to engage in racing the motorcycle at high speeds. In effect, the documents were intended to make sure that Mayer knew and comprehended the dangers to which he was voluntarily exposing himself before Howard would permit him to operate a motorcycle on the track.

Mayer does not deny that he signed the documents, although he argues that he did not read them, contrary to the statements contained in the documents themselves. That he did not read them when he had an opportunity to do so is of no legal consequence. We have regularly held, both with regard to documents generally and releases particularly, that the failure to read a document before signing, when afforded the opportunity to do so, does not invalidate the document. In *Day v. Kolar*, 216 Neb. 47, 49, 341 N.W.2d 598, 599 (1983), we said: "In the absence of fraud one who signs an instrument without reading it, when he can read and has the opportunity, cannot avoid the effect of his signature merely because he was not informed of the contents of the document." And, earlier, in *Swartz v. Topping*, 191 Neb. 41, 44, 213 N.W.2d 718, 721 (1974), we said: "The rule is well established that a party who has the capacity and opportunity to read a release of claims for personal injuries but fails to do so is estopped by his own negligence from claiming that the release is not binding on him."

Mayer's principal argument is that the defect which resulted in his injury was the negligent design of the track, a fact which he maintains he could not have determined even by inspection. Therefore, he argues, the signing of the documents did not relieve Howard of liability for the defective design.

As we have already indicated, we do not believe that the language of the documents is as narrow or as limited as Mayer argues. One of the documents specifically represents that Mayer

> will inspect the track prior to running on it, will assure [himself] that the track and adjacent areas are properly *designed and maintained*, and further agree that [he] will not participate in this race until [he has] completed an inspection which satisfies [him] that these areas are safe for race purposes.

(Emphasis supplied.) By executing this document Mayer specifically represented that he would satisfy himself as to the safety of the track, not only by inspection, but would further assure himself that the track and the adjacent areas were properly designed and maintained and that he would not participate in the race until he had so satisfied himself. While the allegedly negligent design may not have been apparent to the naked eye, Mayer did not limit the document to that which he could see. He agreed to take whatever steps were necessary to assure and satisfy himself that the design of the track was proper, and further agreed that he would not race until he had satisfied himself that the track was safe. Additionally, Mayer specifically agreed to hold Howard harmless for any loss arising from his participation in the race, regardless of the cost. It is difficult to imagine how a more encompassing document, under the facts, could be prepared.

Further, in the second document signed by Mayer, he once again acknowledged that he would inspect the area and satisfy himself that the track was safe. By signing the second document Mayer acknowledged that the activities of the event are "very dangerous and involve the risk of serious injury and/or death and/or property damage." To suggest that Mayer was only agreeing to assume the risk for those defects which he could detect in a casual examination or inspection of the track or that the documents were not intended to cover the very situation involved in this case is to simply fail to recognize the plain language of the documents. Unless the documents are contrary to public policy and therefore invalid, they exculpated Howard from any liability in this case.

We have previously held that courts should be cautious in holding contracts void on the ground that the contract is contrary to public policy. See *Beaver Lake Assn. v. Beaver Lake Corp.*, 200 Neb. 685, 264 N.W.2d 871 (1978). To be void as against public policy, a contract should be quite clearly repugnant to the public conscience. See *Brisbin v. E. L. Oliver Lodge No. 335*, 134 Neb. 517, 279 N.W. 277 (1938). Therefore, one of the questions we must first decide is whether a document which relieves the owner of a racetrack from liability to one of the racers is repugnant to the public conscience.

Although we have never had occasion to pass upon the validity of documents such as are involved in this case, we have earlier held in the case of *Hollamon v. Eagle Raceway, Inc.*, 187 Neb. 221, 188 N.W.2d 710 (1971), that even without a release, one who engages in racing activities assumes the risk of such activities and is precluded from recovering for any injury resulting therefrom. In *Hollamon, supra* at 223-24, 188 N.W.2d at 711, we said:

> We find that [Hollamon], by participating in the racing program May 1, 1965, as a stock car owner, and entering the pit area as a participant in the racing program, brought himself within the ambit of the maxim "volente non fit injuria," which means where one, knowing and comprehending the danger, voluntarily exposes himself to it, although not negligent in so doing, he is deemed to have assumed the risk and is precluded from a recovery for an injury resulting therefrom.

We went on to say at 225, 188 N.W.2d at 712, "One who participates in the sport of stock car racing assumes the ordinary risks of that sport." It seems to us that the same rule should apply whether the vehicle being raced is a stock car or a motorcycle.

Mayer argues that he did not know or comprehend the danger of a defective design of the track. Without deciding whether there was a latent defect, but assuming for the sake of argument that such a defect did exist, we believe Mayer cannot claim he did not know or comprehend the dangers of a latent defect in the design of the track. That was exactly what he agreed to check out before racing. In agreeing to satisfy himself

that the track was properly designed, constructed, and maintained, and further acknowledging that he understood that racing a motorcycle at a speed of 100 m.p.h. was dangerous, Mayer assumed the risk for any injury which might reasonably flow as a result of his falling off the motorcycle, including any latent defect in the design of the track. See *Winterstein v. Wilcom*, 16 Md. App. 130, 293 A.2d 821 (1972).

Because the documents signed by Mayer simply brought to his attention these matters which Howard believed to be necessary to make an informed decision to race, and which if known and understood by Mayer constituted an assumption of risk on his part, the documents could not be contrary to public policy, and in fact reflected the public policy. Mayer was not entitled to recover from Howard for injuries sustained by Mayer when he assumed the risk for such injuries. See, *Schlessman v. Henson*, 83 Ill. 2d 82, 413 N.E.2d 1252 (1980); *LaFrenz, Adm. v. Lake Co. Fair Bd. et al.*, 172 Ind. App. 389, 360 N.E.2d 605 (1977).

For that reason there is no genuine issue as to any material fact. The district court was correct in granting summary judgment. The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROY JAMES PREDMORE, APPELLANT.

370 N.W.2d 99

Filed July 5, 1985. No. 84-296.

1. **Pleas: Constitutional Law: Waiver.** For a plea of guilty to be voluntary, the record must affirmatively show the defendant was apprised of his constitutional rights against self-incrimination, to trial by jury, and to confrontation, and waived them.
2. _____: _____: _____. A waiver of one's constitutional rights cannot be presumed from a silent record.
3. **Pleas: Constitutional Law.** While an item-by-item recitation of constitutional rights is not required, the record must show that the court examined the defendant personally to ensure that the defendant knows his rights and understands the consequences of a guilty plea.

4. **Criminal Law: Pleas: Constitutional Law.** In order to make an intelligent and voluntary plea where there has been a group arraignment, the defendant must have been present when the court advised those charged of their constitutional rights. The record must disclose that defendant was present at that time.
5. _____: _____: _____. The proper procedure for a group arraignment is to call each person being arraigned before the bench, identify him, and advise him that the remarks of the court apply to each person individually.
6. **Pleas: Constitutional Law: Waiver.** A written petition to enter a plea of guilty is not a substitute for the requirement that the trial court address each defendant personally and ascertain that the defendant understands his rights and is making a voluntary and intelligent waiver of them.

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

P. Stephen Potter, Dawson County Public Defender, for appellant.

Robert M. Spire, Attorney General, and Lynne R. Fritz, for appellee.

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

PER CURIAM.

The defendant, Roy James Predmore, upon a plea of guilty, was convicted of breaking and entering and was sentenced to imprisonment for 1 to 3 years with credit for 73 days' incarceration. He has appealed and contends that the record fails to show that his plea was voluntarily and intelligently made.

The record shows that the defendant was charged with two burglaries in separate informations. Pursuant to a plea bargain, the other charge was dismissed in return for the defendant's plea of guilty in this case.

Prior to the arraignment, the defendant and his counsel, the public defender, executed a written petition to enter a plea of guilty. It recited that the defendant was represented by counsel; that he had read the information; and that he understood the nature of the charge and the possible penalties. The petition also explained all of the defendant's constitutional rights in detail and stated that he understood a guilty plea waived all of these rights except representation by counsel. It further

provided that the defendant understood the court was not bound by the plea agreement and that no threats, coercion, or promises had been made to him to induce the plea of guilty.

In paragraph 11 the petition stated that the defendant wished to plead guilty. In paragraph 12 the petition stated: "I offer my plea(s) freely, voluntarily[,] knowingly and intelligently and of my own accord and believe that the plea(s) is . . . supported by the facts and my conduct." The petition was signed by the defendant, and he initialed each paragraph.

The trial court examined the defendant regarding the petition, and the defendant stated that he had read it, knew what was in it, and had signed it.

In addressing the defendant the trial court did not recite to the defendant each of his rights, but relied upon the recitation of constitutional rights which had been made to another defendant, Harry J. Stickleman, who had been arraigned immediately before the defendant. The court had told Stickleman:

> Q. If you plead guilty you admit the truth of the charge, and the only thing left for the Court to do is to fix your punishment. In addition to that, you waive your constitutional rights, of which there are several, the principal constitutional right that you would waive would be a right to trial by jury, but included in that are [sic] the right to be presumed innocent until proven guilty beyond a reasonable doubt by sworn testimony to the satisfaction of all of the 12 jurors that would try it. You have a right to confront your accusers, and to cross examine your accusers; to present evidence in your own behalf, and to require the Court to issue process for the attendance of witnesses. You have a right to testify yourself, or you have a right to remain silent. In the event that you choose to remain silent that may not be used as an argument tending to prove your guilt. You waive all of these rights if you enter a plea of guilty. . . .

When arraigning the defendant, the trial court discussed the terms of the plea agreement with the defendant, questioned him personally about the validity of the plea petition, and had the county attorney read the statutory provisions regarding the

penalty for burglary. The court also explained the elements of the crime, told the defendant that pleading guilty admitted the truth of the charge and that the only question left was that of punishment.

> Q. [By the court] . . . You waive your constitutional rights. I just explained those constitutional rights to Mr. Stickleman in the case ahead of yours. Did you hear that explanation?
>
> A. Yes, Your Honor.
>
> Q. Do you want me to explain that again, or can we skip that part?
>
> A. No. Skip it, Your Honor.

The defendant then entered his plea of guilty, and the trial court established a factual basis for the plea by questioning the defendant. The trial court then accepted the plea. No objection to this procedure was made at the arraignment or in the defendant's motion for a new trial.

The defendant now contends that the failure of the trial court to inform him separately and in detail of his constitutional rights in open court rendered his plea involuntary.

In *State v. Tweedy*, 209 Neb. 649, 309 N.W.2d 94 (1981), we held that for a plea of guilty to be voluntary, the record must affirmatively show the defendant was apprised of his constitutional rights against self-incrimination, to trial by jury, and to confrontation, and waived them. *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). Waiver cannot be presumed from a silent record.

While an item-by-item recitation of constitutional rights is not required, *Tweedy, supra*, and *State v. Turner*, 186 Neb. 424, 183 N.W.2d 763 (1971), the record must show that the court examined the defendant personally to ensure that the defendant knows his rights and understands the consequences of a guilty plea. *Turner, supra*; *State v. Ziemba*, 216 Neb. 612, 346 N.W.2d 208 (1984). A written petition to enter a plea of guilty is not a substitute for the requirement that the trial court address each defendant personally and ascertain that the defendant understands his rights and is making a voluntary and intelligent waiver of them.

In the present case there was substantial compliance with this

requirement. The plea petition, the recitation of rights in the prior arraignment, and the trial court's inquiry of the defendant affirmatively demonstrate that the defendant knew his rights and voluntarily waived them by pleading guilty.

In the plea petition paragraph 6 stated the defendant's constitutional rights, (1) to a speedy trial, (2) to confront and cross-examine witnesses, (3) to present a defense, (4) to the assistance of counsel, (5) against self-incrimination, (6) to the presumption of innocence, and (7) to a unanimous verdict based on a finding of guilt beyond a reasonable doubt.

Paragraph 7 stated that a plea of guilty waived all of these rights except representation by counsel. Both paragraphs were initialed by the defendant and the petition itself signed in two places by the defendant.

The defendant admitted hearing the recitation of rights that had been made to the defendant Stickleman and voluntarily waived repetition. The explanation made to Stickleman was adequate.

Finally, the court inquired of the defendant and the defendant stated that he had read the plea petition and understood it. He understood pleading guilty admitted all the elements of the crime. He had discussed the charge with his attorney and was pleading guilty because the facts alleged were true.

The situation here was analogous to a group arraignment. The proper procedure for a group arraignment is to call each person being arraigned before the bench, identify him, and advise him that the remarks of the court apply to each person individually. In *Ziemba, supra* at 621, 346 N.W.2d at 214, we said, "In order to make an intelligent and voluntary plea where there has been a group arraignment, the defendant must have been present when the court advised those charged of their constitutional rights. The record must disclose that defendant was present at that time. See *State v. Smith* [213 Neb. 446, 329 N.W.2d 564 (1983)]." The procedure which was followed in the present case should be avoided.

Here, the record shows that the defendant heard the prior recitation of constitutional rights. While it is preferable to address and advise each defendant separately, the failure to

repeat the advice separately in this case did not render the plea involuntary, because the record as a whole shows that the defendant understood his rights.

The facts in this case are somewhat similar to *Williams; Williams v. State*, 263 Ind. 165, 325 N.E.2d 827 (1975), in which the Indiana court dealt with the voluntariness of a guilty plea where defense counsel, but not the trial court, had advised the defendant of his constitutional rights.

The court said:

> Of course, there can be no doubt that the trial judge should as a matter of practice inform the defendant of the rights enumerated in *Boykin*, regardless of other evidence showing that defendant was advised of his rights. . . .
>
> . . . .
>
> . . . A defendant's guilty plea is not tainted merely because the trial court fails to repeat defendant's rights for him, so long as the *record of the guilty plea proceeding* contains evidence from which the trial court may validly conclude that defendant was meaningfully informed of the specific rights enumerated in *Boykin*. Nothing we have said, however, may be interpreted as relieving the trial court of its absolute duty to decide, on the basis of evidence in the record before it, whether a defendant's plea is made voluntarily and understandingly.

(Emphasis in original.) *Id.* at 175-76, 325 N.E.2d at 832-33.

The record fails to show that there was prejudice to any substantial right of the defendant in this case. The judgment is, therefore, affirmed.

AFFIRMED.

WHITE, J., dissenting.

The preferred procedure in taking a plea of guilty is a dialogue between court and defendant in which the rights waived by a plea of guilty are detailed and the court satisfies itself that the rights are understood and voluntarily waived by the defendant. *State v. Tweedy*, 209 Neb. 649, 309 N.W.2d 94 (1981).

Admittedly, we have permitted exceptions to the dialogue, such as the use of a presentence report to establish a factual basis, *State v. Daniels*, 190 Neb. 602, 211 N.W.2d 127 (1973),

and a remand to the trial court for a hearing to ascertain whether independent knowledge of the range of penalties existed in the defendant where the trial judge neglected to inform the defendant in taking a plea, *State v. Curnyn*, 202 Neb. 135, 274 N.W.2d 157 (1979).

In this case no explanation of the rights waived by a plea of guilty was addressed to the defendant. Instead, the majority adopts what I suspect will be known as the Stickleman rule: "If the defendant was in the courtroom while Stickleman's rights were articulated and he heard them, close enough!"

I fail to see how a trial judge can be said to have satisfied himself of a knowing and intelligent waiver in these circumstances.

I respectfully dissent.

SHANAHAN, J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL L. LEE, APPELLANT.
369 N.W.2d 645

Filed July 5, 1985. No. 84-297.

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

P. Stephen Potter, Dawson County Public Defender, for appellant.

Robert M. Spire, Attorney General, and Lynne R. Fritz, for appellee.

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

PER CURIAM.

The defendant, Michael L. Lee, pursuant to a plea bargain, entered pleas of guilty to a charge of operating a motor vehicle

on the streets or highways of this state while his operator's license was permanently revoked, in violation of Neb. Rev. Stat. § 39-669.07 (Reissue 1984), a Class IV felony, and to a charge of unauthorized use of a propelled vehicle in violation of Neb. Rev. Stat. § 28-516 (Reissue 1979), a Class III misdemeanor. Pursuant to the plea bargain, a charge of escaping from custody against defendant was dismissed, and it was agreed by the county attorney that a habitual criminal charge, which could have been filed, would not be filed against defendant.

Defendant was sentenced to concurrent sentences of 1 to 3 years and 30 days in the penal complex. Defendant appeals, contending that the record fails to show that his plea was voluntarily and intelligently made. We affirm the conviction and sentence of defendant.

The facts set out in the case of *State v. Predmore, ante* p. 336, 370 N.W.2d 99 (1985), in connection with Predmore's arraignment, are substantially the same as those in defendant's arraignment. Defendant Lee also executed a written petition to enter a plea of guilty and was personally addressed at length by the court. As in the *Predmore* case, *supra*, the trial court did not recite to the defendant each of his constitutional rights but relied upon the recitation of rights to another defendant, the same Harry J. Stickleman named in *State v. Predmore, supra*. Defendant Lee told the court that it was not necessary to repeat those rights and that he understood them. The trial court did explain each of the specific charges to defendant and the penalties, and obtained a factual basis for each plea.

In this case we adopt the holding and statements set out by this court in *State v. Predmore, supra*. The record in this case fails to show that there was any prejudice to defendant Lee. The judgment is affirmed.

AFFIRMED.

WHITE, J., dissents.

ARLAN SCHMIDT, APPELLEE, V. J. C. ROBINSON SEED COMPANY, APPELLANT.

370 N.W.2d 103

Filed July 5, 1985. No. 84-358.

1. **Trial: Witnesses: Appeal and Error.** The credibility of witnesses and weight to be given their testimony are solely for the consideration of the jury, and unless clearly wrong, a verdict by the jury based on conflicting evidence will not be set aside.
2. _____: _____: _____. The trial court is given discretion in determining whether or not a witness has qualifications to state his opinion, and such discretion will not ordinarily be disturbed on appeal unless there is an abuse of that discretion.
3. **Contracts: Words and Phrases.** A condition precedent is a condition which must be performed before the parties' agreement becomes a binding contract or a condition which must be fulfilled before a duty to perform an existing contract arises.
4. _____: _____. A condition subsequent is one that may occur, and if it does, it permits a party to avoid the obligations of a contract.
5. **Contracts: Releases: Proof.** In the case of a condition subsequent, the happening of which is to defeat the cause of action and terminate liability under the contract, the burden of proof rests on the party claiming the condition to establish facts entitling that party to a release of his obligations under the contract.
6. **Contracts: Intent.** A contract will be construed against the party preparing it when there is a question as to its meaning.

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

Lyle E. Strom and Gerald L. Friedrichsen of Fitzgerald, Brown, Leahy, Strom, Schorr & Barmettler, for appellant.

William J. Riedmann and Charles A. Nye of Garvey, Nye, Crawford, Moylan & Riedmann, for appellee.

BOSLAUGH, CAPORALE, SHANAHAN, and GRANT, JJ., and BRODKEY, J., Retired.

GRANT, J.

This is an appeal from a jury verdict for the plaintiff-appellee, Arlan Schmidt, in the amount of $62,924.60. Following the jury verdict, the defendant-appellant, J. C. Robinson Seed Company (hereinafter Robinson), filed a motion for a judgment notwithstanding the verdict or, in the

alternative, for a new trial. Defendant's motion was denied and it timely appealed, alleging the trial court erred in:

> 1. . . . instructing the jury that it could consider whether the defendant acted reasonably in releasing the acreage under the terms of the contract.
>
> 2. . . . instructing the jury that defendant had the burden of proving it did not breach the contract.
>
> 3. . . . admitting the opinion testimony of plaintiff's witnesses concerning the effect of shattercane on the seed crop.
>
> 4. . . . concluding there was sufficient evidence to raise a question of fact for the jury's determination.

For the reasons set out below we affirm the decision of the trial court.

This action arises out of a cancellation of a contract between the defendant and plaintiff. Schmidt, a tenant farmer, agreed to raise a crop of seed corn for Robinson subject to certain managerial specifications and supervision of Robinson. Robinson agreed to pay Schmidt a set price, under the contract, on the harvesting of the crop.

The contract between the parties contained several provisions which allowed the defendant to cancel the contract, including the following:

> 4. Release of Acreage. The Company shall have the right to release all or any part of the seed acreage and all or any part of the crop therefrom prior to delivery if one of the following conditions are met:
>
> . . . .
>
> b. In the Company's sole judgment, volunteer corn within or without the seed acreage is excessive and notice thereof is given to Grower within a reasonable time after the first cultivation or prior thereto;
>
> c. At any time prior to delivery, the Company, in its reasonable judgment, determines that Grower has not followed all Company recommendations and directions as to proper and timely planting, cultivation, fertilization, use of herbicides and pesticides and harvesting or where there has not been proper and timely irrigation;
>
> . . . .

e. In the Company's sole reasonable judgment, the prospects for the seed crop are not satisfactory and the Company gives written or oral notice thereof to Grower on or before June 5th of the crop year. The Company shall have the sole right to decide that a stand is good enough to leave for seed production, in which case, such stand, unless thereafter released by the Company, shall be carried through to harvest and Grower shall perform all things required of him in this agreement to produce the best seed crop possible under the circumstances;

f. At any time prior to delivery the Company determines that the seed crop has been subjected to fire, flooding, ponding, insect damage, shattercane or hail damage to such an extent that the crop is killed or been so affected that it should not be used as seed.

In the event of a release of crop or acreage no further services will be performed by the Company on released acreage or released crop, and no payment or compensation of any kind will be made to Grower for such released acreage or crop except as provided in paragraphs 3e, 3f, 3g and 3i. The Company shall retain a lien on the seed crop for advances to producer and for amounts, if any, expended by the Company in performing any operation which is the obligation of Grower prusuant [sic] to paragraph 2j.

Schmidt prepared the ground, planted the seed corn crop, fertilized, and cultivated it according to the direction of Robinson. Robinson's production manager, Glenn Barth, made frequent checks of the field, as was his job, and made three notations about the field up until July 10, 1980, the day it was released. Barth noted, on June 5, 1980, "Some cane [shattercane] coming in 1106 fertile female, Schmidt, but should control with cultivation." On June 24, 1980, Barth noted, "1278 [referring to an adjacent field of a different hybrid] and 1106, Schmidt, stand uneven in places, some severe areas of shattercane, told grower to disk up bad area." Barth testified that the reference to the shattercane showed more concern with the 1278 field and that the area disked was in 1278. Barth also testified that no complaints were made to the

plaintiff about the field or his work until cancellation of the contract.

Robinson claims that the company validly released Schmidt's acreage under paragraph 4f of the contract because it was subject to shattercane to such an extent that the crop should not be used as seed.

There was a great deal of disagreement and conflicting testimony over whether the crop was usable. Robinson argued that the shattercane, which in appearance and size is similar to corn, so infested the fertile female corn in the field that it made effective detasseling unfeasible, thus making the seed impure and unusable as seed corn. Witnesses for both Schmidt and Robinson testified that a field of seed corn contains rows of fertile female corn and rows of fertile male corn, the purpose being to produce a hybrid seed from the female and male. The female grows with a tassel on top containing pollen, which will fertilize the plant through its ears. To produce the hybrid seed described, the tassels of the female are cut or pulled so that their pollen cannot get to the awaiting ears, and the pollen of the nearby fertile male, which also has tassels, fertilizes the detasseled female through its ears. A fertile female plant which fertilizes itself (its own pollen through its own ears) produces inbred corn, and not the desirable hybrid, which, when planted, grows stronger and healthier. Robinson's production manager testified that the company's own standard for detasseling was that no more than one-half of one percent of the female tassels could be left or the amount of inbreeding would be too high to produce seed of the necessary purity for resale.

Schmidt produced evidence to show that the cost of detasseling because of shattercane and unevenness of rows, the unavailability of certain equipment, the unwillingness to salvage part of the crop, and the poor judgment of Robinson's management were the bases of Robinson's decision to cancel.

On appeal we note that the credibility of witnesses and weight to be given their testimony are solely for the consideration of the jury, and unless clearly wrong, a verdict by the jury based on conflicting evidence will not be set aside. *May v. Marijo Corp.*, 207 Neb. 422, 299 N.W.2d 433 (1980).

We consider the appellee's third assignment of error first. Did

the trial court err in admitting the opinion testimony of Schmidt's witnesses concerning the effect of shattercane on the seed crop? The trial court is given large discretion in determining whether or not a witness' qualification to state an opinion has been established, and such discretion will not ordinarily be disturbed on appeal unless there is an abuse of that discretion. *Northern Nat. Gas Co. v. Beech Aircraft Corp.*, 202 Neb. 300, 275 N.W.2d 77 (1979). In this case both of Schmidt's witnesses, Paul Jensen (a farm manager for Schmidt's lessor, and Schmidt's father-in-law) and Jerry McIntosh (a farmer of adjacent land), were asked if, in their opinion, the seed corn could have been detasseled. Both witnesses testified, over Robinson's objection, that they felt the corn could be detasseled. This testimony was based on extensive observations of the field in 1980 and their personal farming experience, which included raising seed corn crops. Both witnesses had dealt with shattercane, and although Mr. Jensen's competence was attacked by Robinson because he had not personally detasseled seed corn, Robinson's production manager testified that they themselves "managed" the detasseling and hired out teachers, who in turn hired schoolchildren to pull the tassels. It was in the court's discretion to determine if Mr. Jensen did not have to personally detassel a row to have an intelligent opinion about whether the crop could be detasseled. The witnesses' testimony was appropriate under Neb. Rev. Stat. § 27-701 (Reissue 1979):

> Rule 701. Opinion testimony by lay witnesses. If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

Robinson presented evidence to rebut the opinions of these witnesses by testimony that, according to Robinson's standards, the corn could not be detasseled sufficiently to produce the necessary purity for sale. The jury had an adequate opportunity to hear and weigh all the testimony concerning the necessary production standards of the defendant and weigh the

opinions of the lay witnesses in light of that testimony. The opinions of both witnesses were rationally based on their perceptions and helpful to a determination of the fact in issue. The trial court did not abuse its discretion in permitting Schmidt's witnesses to testify on this issue.

Robinson admits that its fourth assignment of error—that the trial court should have dismissed the case against it for insufficient evidence—depends on the exclusion of the opinion evidence of Jensen and McIntosh. Since we have determined that evidence was properly admitted, Robinson's fourth assignment of error is without merit.

Robinson's second assignment of error is that the court improperly placed the burden of proving a breach of the contract on Robinson. Both parties agree that the burden of proving conditions precedent in this contract is upon Schmidt, under Neb. Rev. Stat. § 25-836 (Reissue 1979), since Schmidt is trying to enforce the contract. The parties disagree on whether paragraph 4f of the contract, establishing a right of Robinson to release the acreage, is a condition precedent or a condition subsequent. In *O'Brien v. Fricke*, 148 Neb. 369, 27 N.W.2d 403 (1947), we defined a "condition precedent" as a condition which must be performed before the parties' agreement becomes a binding contract, or a condition which must be fulfilled before a duty to perform an existing contract arises. The release of the acreage pursuant to paragraph 4f was not something which had to be performed before the contract became binding or before an existing duty on the part of the defendant was created, but the provisions of Schmidt's actions in planting, fertilizing, etc., were conditions precedent. Those actions fulfilled Schmidt's first delegations under the contract and created a duty on the part of Robinson to perform. Robinson's part of the contract paragraph 4f described a condition subsequent—"one that may occur and if it does" would permit Robinson to avoid its obligation. See Restatement (Second) of Contracts §§ 224, comment *e.*, and 230, comment *a.* (1981). In the case of a condition subsequent, the happening of which defeats the cause of action and thus relieves the party from liability under the contract, the burden of proof rests on the party who asserts the condition. 17A

C.J.S. *Contracts* § 589 (1963); *Fitzmaurice v. Van Vlaanderen Mach. Co.*, 110 N.J. Super. 159, 264 A.2d 740 (1970), *aff'd* 57 N.J. 447, 273 A.2d 561 (1971); *Foutch v. Foutch*, 2 Wash. App. 407, 469 P.2d 223 (1970).

Robinson presented no evidence of nonperformance of a condition precedent, and acknowledged performance by Schmidt in all respects. The burden of proof of conditions precedent was properly on Schmidt, and Schmidt adduced sufficient evidence to satisfy that burden.

Paragraph 4f of the contract allowed Robinson to release certain acres on the occurrence of certain conditions in the seed corn fields. Infestation of the field with shattercane to such an extent as to make the crop unusable is a condition subsequent, and the burden of proving facts sufficient to justify the release of Robinson's obligation was properly placed on Robinson. The trial court did not err in this respect.

Finally, we turn to Robinson's first assignment of error, that the court erred in instructing the jury it could consider whether Robinson acted reasonably in releasing the acreage under the contract.

Instruction No. 6 stated in part:

> The determination by the company that the said crop has been subjected to shattercane to such an extent that the crop is so affected that it should not be used as seed is a determination that must be made *honestly, reasonably, in good faith, and not arbitrarily or capriciously*. To be made honestly, reasonably and in good faith it must take into consideration all the facts, circumstances and conditions that would justify such a determination. This would include but not necessarily be confined to the condition of the shattercane at the time the determination was made.
>
> Therefore, in determining whether defendant's release of the acreage constituted a breach of the contract, the question that you must determine is not whether or not the said crop was subjected to shattercane to such an extent that the crop was so affected that it should not be used as seed. Rather, *you must decide whether the company's determination that that was the fact was a determination that was made honestly, reasonably, in good faith and not*

arbitrarily or capriciously.

(Emphasis supplied.) Paragraph 4f of the contract stated:

> 4. Release of Acreage. The Company shall have the right to release all or any part of the seed acreage and all or any part of the crop therefrom prior to delivery if one of the following conditions are met:
>
> . . . .
>
> f. At any time prior to delivery *the Company determines* that the seed crop has been subjected to . . . shattercane . . . to such an extent that the crop is killed or been so affected that it should not be used as seed.

(Emphasis supplied.) Robinson agrees that the case law in Nebraska interjects the standard that the determination must be made "honestly, in good faith, not arbitrarily or capriciously," but submits that the addition of "reasonably" into the standard is prejudicial to Robinson, in that under the contract it should have been able to have made an honest decision that was not reasonable without incurring liability. Although Robinson's argument has some appeal, after an extensive review of the contract we have found that there is some ambiguity concerning whether a reasonableness standard should be imposed on Robinson in its release of the acreage. We note that in paragraph 3a(ii) the contract provides for exclusion of payment where:

> (ii) Each acre or part thereof which has been subjected to fire, flooding, ponding, insect damage or shattercane to such an extent that the crop is killed or been so affected that it should not be used as seed. The Company shall determine in its sole reasonable discretion whether the crop has been so affected from such causes.

Paragraph 3a(ii) is directed to Robinson's right to refuse payment for acreage affected by shattercane, as determined in Robinson's "sole reasonable discretion." Paragraph 4f is directed to Robinson's right to release acreage affected by shattercane, based on Robinson's determination. Both paragraphs address the same problem—the effect of shattercane on the seed corn field. The contract is ambiguous in that refusal of payment is to be based on Robinson's reasonable discretion while release of acreage is to be based on Robinson's

unfettered determination. We note also that the concept of reasonableness is reflected in paragraphs 4b, c, d, and e. To the extent this contract is ambiguous, in that it is not clear whether a reasonableness standard was intended to apply in the release of acreage under 4f, we apply the rule stated in *Sacher v. Taco Grande of Iowa, Inc.*, 210 Neb. 122, 125-26, 313 N.W.2d 257, 259 (1981), "[A] contract will be construed most strongly against the party preparing it when there is a question as to its meaning." This contract, prepared by the defendant, is construed to include a reasonableness standard for release under paragraph 4f. Instruction No. 6 given by the court reflected that construction and was appropriate.

Having reviewed all the assigned errors of Robinson, we find none of them warrant setting aside the verdict of the jury, and we affirm.

AFFIRMED.

KAROL KAY LIEN, APPELLEE, V. DENNIS LARRY LIEN, APPELLANT.
369 N.W.2d 646

Filed July 5, 1985. No. 84-363.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Affirmed.

James C. Cripe, for appellant.

Larry F. Fugit, for appellee.

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

PER CURIAM.

This appeal involves a domestic relations matter in which the appellant questions the division of property and the amount of alimony and child support awarded to the appellee.

Upon de novo review we conclude that the record fails to show an abuse of discretion with respect to any of those issues.

The judgment is therefore affirmed.

Each party shall pay his and her own costs and attorney fees in this court.

AFFIRMED.

IN RE APPLICATION OF AMSBERRY, INC., VALENTINE, NEBRASKA. AMSBERRY, INC., APPELLANT, V. WHEELER TRANSPORT SERVICE, INC., ET AL., APPELLEES, JOHNSTON'S FUEL LINERS, INC., ET AL., INTERVENORS-APPELLEES.

370 N.W.2d 109

Filed July 5, 1985. No. 84-374.

1. **Public Service Commission: Appeal and Error.** In reviewing the record of proceedings in terms of evidence before the Public Service Commission, the Supreme Court examines the record to determine whether there is evidence to sustain the commission's findings and action.
2. **Motor Carriers: Proof.** The burden is on the applicant for a certificate of public convenience and necessity to show that the proposed service is required by public convenience and necessity.

Appeal from the Nebraska Public Service Commission. Affirmed.

Jack L. Shultz of Nelson & Harding, for appellant.

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

BOSLAUGH, SHANAHAN, and GRANT, JJ., and BRODKEY, J., Retired, and COLWELL, D.J., Retired.

PER CURIAM.

Amsberry, Inc. (Amsberry), applied for a certificate of public convenience and necessity for intrastate transportation of petroleum products in bulk between points in Lincoln County, Nebraska, and six other counties—Cherry, Grant, Hooker, Thomas, McPherson, and Logan. From denial of a commission certificate, Amsberry appeals.

Protestants and intervenors concerning Amsberry's application are holders of commission certificates to operate in the area sought to be served by Amsberry, and include Wheeler Transport Service, Inc. (Wheeler); Wynne Transport Service, Inc. (Wynne); Central Transportation Company (Central); Herman Bros., Inc.; Hall H. Edwards; Canada Transport, Inc. (Canada); and Johnston's Fuel Liners, Inc. (JFL).

Milton Amsberry, president of Amsberry, Inc., started in the trucking business in 1973 as a driver for JFL, operating out of Chadron, Nebraska. In 1974 JFL transferred Amsberry to Valentine, Nebraska. While living in Valentine as a JFL driver in 1980, Amsberry formed a business corporation for trucking which purchased motor carrier equipment (a tractor and two trailers) and leased that equipment to JFL on a yearly basis. The Amsberry-JFL lease specified rental paid to Amsberry at 85 percent of gross revenue realized from each shipment of petroleum products transported intrastate under JFL's commission certificate. JFL retained the remainder of gross revenue generated under the lease, approximately $2,500 per month, to pay its expenses. The lease arrangement between a certificate holder and an owner-operator is common practice in the trucking industry. Pursuant to the Amsberry-JFL lease, Amsberry controlled operations originating from Valentine, controlled dispatch, and was responsible for customer contact regarding shipping instructions.

On February 15, 1983, Amsberry filed an application with the Public Service Commission (PSC) requesting issuance of a certificate of public convenience and necessity. On August 9, 1983, the commission denied Amsberry's application but, on Amsberry's motion for rehearing, granted Amsberry's application on October 25. The protestants and intervenors filed a motion for rehearing concerning the PSC order granting authority to Amsberry.

When the PSC granted Amsberry's application in October 1983, the PSC order included a provision that Amsberry could not conduct operations until a commission certificate of public convenience and necessity was issued to Amsberry. Amsberry purchased PSC license plates, filed proof of insurance with the commission, purchased a tariff book, and painted the

corporation's name on its truck. PSC personnel told Amsberry to "get on the ball," because the commission expected Amsberry to use the authority granted. Without a commission certificate Amsberry hauled the first load of bulk petroleum products. Between November 11, 1983, and February 14, 1984, Amsberry hauled 95 loads of petroleum products into the area of proposed service and received revenue of $30,100.50 for such transportation.

At the PSC rehearing on February 23, 1984, requested by protestants and intervenors, Amsberry presented five witnesses in support of its application. All Amsberry witnesses were distributors engaged in the sale of petroleum products; four in Valentine (Cherry County) and one in Thedford (Thomas County). Shipment of petroleum products into the six-county area sought to be served by Amsberry originated in North Platte, Nebraska. With the exception of the witness from Thedford, all witnesses testifying on behalf of Amsberry had been served by JFL as a result of the owner-operator lease between JFL and Amsberry. The Thedford witness had been served by Wynne. Distributors from Valentine testified that they had received Amsberry's personal attention in delivering petroleum products and believed it to be a desirable situation that transportation revenue received by a local motor carrier would remain in the community. Witnesses also testified that a local transporter was beneficial to a distributor for deliveries on short notice to take advantage of price fluctuations. During the 3 months of operation without a commission certificate, Amsberry hauled shipments to witnesses testifying in support of the application. Two distributors indicated they would not tender business to JFL if Amsberry's application were denied. No witness for Amsberry testified about any material problem or dissatisfaction with the service rendered by any protestant or intervenor. Forty to fifty percent of JFL's operations in Nebraska are conducted under owner-operator leases. JFL has no terminal facilities, employees, or resident sales representatives in Nebraska.

Representatives of the protestants or intervenors testified in opposition to Amsberry's application.

The manager of operations for JFL testified that his

company had equipment located in Valentine, Sidney, and North Platte, and generally competed with Wynne and Wheeler within the area of proposed service by Amsberry. Owner-operator leases are widely used by common carriers to reduce expenditures for new or additional equipment; for example, propane tank trailers during winter demands. From January 1 to November 30, 1983, JFL's gross revenue from Nebraska intrastate business was $495,300.81, of which Amsberry produced 16.77 percent, or $83,059.88. Such revenue would be lost to JFL, if a certificate were granted to Amsberry, because the customers previously served by JFL or any other protestant or intervenor would continue business with Amsberry.

A representative of Wheeler testified that the present amount of business in the area sought to be served by Amsberry did not demand Wheeler's capacity in personnel or equipment and that Wheeler would have been able to transport the shipments hauled by Amsberry from November 1983 to February 1984.

The general manager for Wynne testified that his company had transportation units available in North Platte, Sidney, Cozad, and Gothenburg and acknowledged his company's deliveries to the distributor at Thedford. Wynne was able to handle any additional business in the area, if tendered.

Central's general manager testified about his company's equipment located in North Platte and shipments delivered to some of the witnesses testifying for Amsberry. Central expressed concern about future losses due to Amsberry's activities, if continued.

On April 10, 1984, and based upon the evidence produced at the rehearing, the PSC found Amsberry to be "fit, willing and able to conform to the statutes and rules of the Commission," but also found the intrastate service proposed by Amsberry "is not nor will be required by the present or future public convenience and necessity." Among specific findings reflected in its order, the PSC stated:

> The evidence fails to demonstrate that a need exists for additional service. . . . None of the shippers gave any evidence that the service of the protestants and intervenors was in any way unsatisfactory, or that such service could

not meet their respective needs. Most of the witnesses candidly indicated that one of the major reasons for their support was the fact they wanted to help the Valentine economy, and wanted the money derived from Amsberry's operation to remain in the Valentine area.

As assignments of error, Amsberry complains that the PSC (1) incorrectly found no present or future public convenience and necessity for issuance of a commission certificate to Amsberry and (2) disregarded Amsberry's past operations conducted from November 1983 to February 1984 under "color of right" in determining whether there was a public convenience and necessity for issuance of a commission certificate.

In reviewing the record of proceedings in terms of evidence before the PSC, the Supreme Court examines the record to determine whether there is evidence to sustain the commission's findings and action. *In re Application of Greyhound Lines, Inc.*, 209 Neb. 430, 308 N.W.2d 336 (1981); *In re Application of Crusader Coach Lines*, 213 Neb. 53, 327 N.W.2d 98 (1982).

The burden is on the applicant for a certificate of public convenience and necessity to show that the proposed service is required by public convenience and necessity. *Parsons v. Nebraska State Railway Commission*, 181 Neb. 185, 147 N.W.2d 521 (1966); *In re Application of Crusader Coach Lines, supra*.

Whether there is public convenience and necessity for issuance of a commission certificate depends on answers to three questions:

> "[W]hether the operation will serve a useful purpose responsive to a public demand or need; whether this purpose can or will be served as well by existing carriers; and whether it can be served by [the] applicant in a specified manner without endangering or impairing the operations of existing carriers contrary to public interest."

Black Hills Stage Lines, Inc. v. Greyhound Corp., 174 Neb. 425, 429, 118 N.W.2d 498, 500 (1962).

> The question of the adequacy of service of existing carriers is implicit in the issue of whether or not convenience and necessity demand the service of an additional carrier in the field. Obviously the existence of an adequate and

> satisfactory service by motor carriers already in the area is complete negation of a public need and demand for added service by another carrier.

In re Application of Canada, 154 Neb. 256, 261, 47 N.W.2d 507, 510 (1951); *Schmunk v. West Nebraska Express*, 159 Neb. 134, 65 N.W.2d 386 (1954).

Although witnesses called by Amsberry testified about a general desire to have a local motor carrier based in Valentine, there was no evidence that the present service by the protestants is inadequate. Existence of adequate and satisfactory service, as by the protestants in this case, negates any public need for the additional, proposed service. See *In re Application of Canada, supra*. Further, Amsberry's transportation activities diverted revenue from JFL, an existing carrier holding a commission certificate and conducting operations in the area as a result of the owner-operator lease between Amsberry and JFL. Even if JFL were not involved in transportation of bulk products within the area sought to be served by Amsberry, there was evidence before the commission that other motor carriers, holding commission certificates to conduct operations within the area, had ability to meet the needs and demands of distributors in the area sought by Amsberry.

> Whether we agree or disagree with the decision of the commission, however, is immaterial. It is not the province of this court to weigh or resolve conflicts in the evidence, or the credibility of witnesses. The Supreme Court does not act as an appellate public service commission but will sustain the action of the commission if there is evidence in the record to support it.
>
> The issue of public convenience and necessity is ordinarily one of fact and where there is evidence in the record to sustain the Public Service Commission's order, this court cannot say that it is unreasonable and arbitrary. The determination of what is consistent with the public interest, or public convenience and necessity, is one that is peculiarly for the determination of the Public Service Commission.

In re Application of Schroetlin, 210 Neb. 508, 512, 315 N.W.2d 630, 633 (1982).

Amsberry contends its activities from November 1983 to February 1984 should have been considered by the commission as evidence of public convenience and necessity. In *Preisendorf Transp., Inc. v. Herman Bros., Inc.*, 169 Neb. 693, 100 N.W.2d 865 (1960), this court recognized an applicant's operating under "color of authority" as evidence of public convenience and necessity. See, also, *Andrews Van Lines, Inc. v. Nielsen & Petersen, Inc.*, 180 Neb. 764, 145 N.W.2d 584 (1966); *Neylon v. Petersen & Petersen, Inc.*, 183 Neb. 813, 164 N.W.2d 452 (1969); *Canada v. Peake, Inc.*, 184 Neb. 52, 165 N.W.2d 587 (1969). However, the common element in those cases was an applicant's operations for an appreciable time; for example, 10 years (*Preisendorf*), 10 years (*Neylon*), 28 years (*Andrews*), and over 30 years (*Canada*). An apparent evidentiary rationale for "color of authority" is public reliance on an applicant's service and expectation of continued service. We suggest no "bright line" regarding the duration of operation under "color of authority." However, under the circumstances presented in this case, the 3 months of transportation activity by Amsberry is insufficient to apply "color of authority" as evidence of public convenience and necessity.

We conclude that the evidence presented to the commission sustains the findings and action of the Public Service Commission. The order of the commission is not arbitrary or capricious and is affirmed.

AFFIRMED.

KATHLEEN KIRK, APPELLANT, V. GINA C. DUNNING, DIRECTOR, NEBRASKA DEPARTMENT OF SOCIAL SERVICES, AND THE NEBRASKA DEPARTMENT OF SOCIAL SERVICES, APPELLEES.

370 N.W.2d 113

Filed July 5, 1985. No. 84-440.

Social Security: Medical Assistance. The State of Nebraska may not categorically refuse to provide periodontal treatment to a medicaid patient if such treatment is required.

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

Juan A. Gonzalez and Rita Melgares, for appellant.

Paul L. Douglas, Attorney General, and Royce N. Harper, for appellees.

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

KRIVOSHA, C.J.

Kathleen Kirk appeals from a judgment entered by the district court for Sarpy County, Nebraska, affirming an earlier decision by the Nebraska Department of Social Services (formerly Department of Public Welfare). The decision by the Nebraska Department of Social Services denied Ms. Kirk medicaid payment under the Nebraska Medical Assistance Program (NMAP) for requested periodontal treatment. The basis for denial apparently was a state regulation which prohibits payment for *all* periodontal treatment, regardless of need. The single issue presented to us is whether the State of Nebraska may, by regulation, categorically deny periodontal treatment to all persons entitled to medical assistance, regardless of the need for such treatment and without any reasons given for such absolute prohibition. The district court concluded that the state could promulgate such a regulation. We believe that under the evidence presented in the record the district court was in error in this regard, and for that reason we reverse and remand.

In 42 U.S.C. § 1302 (1982), it is required that the Secretary of Health and Human Services promulgate rules necessary to the efficient administration of the Social Security Act. As a result of the adoption of § 1302, various regulations were promulgated, including Title 42, Public Health, Chapter IV—Health Care Financing Administration. See 42 C.F.R. §§ 400.200 et seq. (1984). Pursuant to the provisions of § 440.230 of those regulations, it was provided in part:

> (a) The [state] plan must specify the amount, duration, and scope of each service that it provides for—
>
> (1) The categorically needy; and

(2) Each covered group of medically needy.

(b) Each service must be sufficient in amount, duration, and scope to reasonably achieve its purpose.

Pursuant to the federal regulations, the State of Nebraska adopted state regulations which would make the state eligible to receive federal payment. Nebraska DPW Program Manual tit. 471, §§ 6-000 et seq. (rev. Nov. 24, 1982) deals with dental services. Specifically, § 6-002 defines covered services. This section reads:

> Dental services are defined as any diagnostic, preventive, or corrective procedures administered by or under the supervision of a licensed dentist. The dentist shall maintain a high standard of quality in his/her services. The dentist shall provide services to NMAP clients within the reasonable limits of those services which are customarily available and provided to most persons in the community within the limitations of NMAP.

Section 6-003 then provides for noncovered services and reads as follows: "The following dental services are not provided by NMAP: 1. Any procedure which is wholly or mainly for cosmetic purposes; and 2. Periodontal treatment." No explanation is given as to why periodontal treatment is categorically excluded or why it is not by definition a part of covered services under § 6-002.

The state, in support of the agency's action, argues that this court should not substitute its judgment for that of an administrative agency and that the agency action must be upheld if a reasonable basis exists for its decision. See, *In re Appeal of Levos*, 214 Neb. 507, 335 N.W.2d 262 (1983); *School Dist. of Omaha v. State Board of Education*, 187 Neb. 76, 187 N.W.2d 592 (1971). While we would agree with these statements in the abstract, we are unable to see how they apply in the instant case. No basis for the prohibition, reasonable or unreasonable, is given for the categorical denial of periodontal care.

To complicate the matter, the state further argues that while periodontal treatment as so described is not covered, in fact the regulations do provide a broad scope of dental treatment, including care of infection and prophylaxis, which includes care

of the gums or periodontal-type treatment, though not called by that name. We are simply unable to understand why the services may be provided so long as they are provided under another name.

Additionally, § 6-008 of the state's program manual provides in part: "The intention of the Nebraska Department of Public Welfare is to maintain the dental structures in reasonable condition until the client becomes self-supporting." The state's dental consultant testified that Ms. Kirk was in need of other dental services which she was clearly entitled to receive pursuant to state regulation but that the services could not be provided and would not be approved unless and until the prohibited periodontal work was done. The consultant further testified that because of the regulations, he could not approve the periodontal work and therefore none of the needed dental work would be paid. This presents the medicaid recipient with a true Catch-22 situation.

Our attention is directed to the case of *Anderson v Dir DSS*, 101 Mich. App. 488, 300 N.W.2d 921 (1980), wherein the Court of Appeals for the State of Michigan upheld a similar limitation in the Michigan medicaid plan. In doing so, however, the Michigan court pointed out that the record contained sufficient evidence to establish that a root canal, not permitted under medicaid, costs $450, that an extraction, a covered procedure under the Michigan medicaid plan, costs $18, and that this financial consideration was the main rationale for the disallowance of the root canal work. Furthermore, the evidence in the Michigan case established that the removal of a single tooth, as there required, would not cause any health or chewing problems for the medicaid recipient.

Neither the evidence in this case nor the regulations promulgated by the Department of Social Services would support a similar result in the instant case. There was no evidence as to the difference in cost between the type of periodontal treatment which would be approved and that which was categorically prohibited. Furthermore, as we have just noted, the evidence was that unless Ms. Kirk's periodontal condition was brought under control, she would suffer irreparable harm and damage to her mouth and jaw to such an

extent that dentures could not be affixed in her mouth.

Title 42 C.F.R. § 440.230(d) provides that "[t]he agency may place appropriate limits on a service based on such criteria as medical necessity or on utilization control procedures." The record in this case simply does not support any contention that the limitation involved is based upon medical necessity or utilization control procedures. Nor does the record support a finding that the coverage limitations set out in § 6-002 apply. There was no evidence that periodontal services are not customarily available and provided to most persons in the community. Other than the blanket prohibition on payment for periodontal treatment, we are directed to no limitations of NMAP applicable to this case. While the state may limit services which are beyond its fiscal ability to provide, if not otherwise required by federal statutes or regulations, it may not, without some reasonable explanation, categorically refuse to provide necessary dental care which is clearly covered by § 6-002. None was given, and we are unaware of any facts of which we should take judicial notice. The reason for refusing to provide dental services which are solely cosmetic is obvious on its face. The same cannot be said with regard to periodontal services. It appears that prohibiting periodontal care without regard to need and without any evidence that providing such services would create a severe fiscal problem is a denial of such service in violation of 42 C.F.R. § 440.230(b), which requires that the dental service provided be "sufficient in amount, duration, and scope to reasonably achieve its purpose."

We therefore hold that the State of Nebraska may not categorically refuse to provide periodontal treatment if the same is necessary and apparently regularly provided within the community. To be sure, an individual is not entitled to periodontal treatment if a diagnosis of the individual's condition does not justify such treatment or the state simply cannot afford such treatment. Where such treatment is required, however, the treatment must be provided.

In the instant case all of the parties concede that Ms. Kirk suffers from periodontal disease and is in need of treatment. For that reason, therefore, the decision of the district court affirming the Nebraska Department of Social Services is

reversed and remanded with directions to instruct the Nebraska Department of Social Services to provide the necessary periodontal treatment for Ms. Kirk.

REVERSED AND REMANDED WITH DIRECTIONS.

HAVELOCK BANK OF LINCOLN, A CORPORATION, APPELLEE, V. FRANK T. MCARTHUR AND MARILYN J. MCARTHUR, APPELLANTS.

370 N.W.2d 116

Filed July 5, 1985. No. 84-468.

1. **Uniform Commercial Code: Security Interests: Notice.** Compliance with the notice provisions of the Uniform Commercial Code, particularly Neb. U.C.C. § 9-504(3) (Reissue 1980), is a condition precedent to the right of a creditor to recover a deficiency judgment.
2. _____: _____: _____. The failure to give the requisite notice is an absolute bar to recovery.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Reversed and remanded with directions to dismiss.

Vincent M. Powers, for appellants.

Michael R. Johnson and Dana Baker of Barney, Carter & Johnson, P.C., for appellee.

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

KRIVOSHA, C.J.

The instant appeal presents to this court the question of whether a notice sent by a secured creditor to a debtor was sufficient to satisfy the requirements of Neb. U.C.C. § 9-504(3) (Reissue 1980) and thereby entitle the creditor to obtain a deficiency judgment against the debtor. The district court for Lancaster County, Nebraska, held that the notice was sufficient and entered a deficiency judgment for the Havelock Bank of Lincoln (Havelock) and against the appellants, Frank T.

McArthur and Marilyn J. McArthur (McArthurs). We believe that the notice was not sufficient, and for that reason we reverse and dismiss.

Havelock entered into a loan agreement with the McArthurs on June 17, 1981. In connection with that agreement the McArthurs signed and delivered to Havelock their promissory note dated June 17, 1981, in the principal amount of $120,328.07, payable in full on December 14, 1981. The note was secured by a 1972 International cab and chassis, a 1975 Ford pickup truck, and various items of farm equipment and cattle.

Payment was not made on December 14, 1981, as required by the note, and on February 1, 1982, Havelock wrote to the McArthurs, advising them that Havelock would be taking possession of the personal property in which it had a security interest, including the cattle. The notice provided in part: "It is the banks [sic] intention to sell these cattle in a commercially reasonable manner within ten days and apply the proceeds, less any expenses, to your loan here at the bank." While the letter of February 1, 1982, advised the McArthurs that Havelock would proceed to take action and dispose of the cattle, that letter contained neither the time nor the place of the sale and was not sufficient to satisfy the requirements of § 9-504.

Section 9-504(3) provides in part:

> Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor, if he has not signed after default a statement renouncing or modifying his right to notification of sale.

Not only did the letter of February 1, 1982, fail to disclose to

the McArthurs either the time or the place of the public sale but, in fact, the sale was not held within 10 days, as suggested by the letter. Instead, on February 12, 1982, Havelock again wrote to the McArthurs, advising them:

> On Thursday, February 18, 1982 at 12 p.m. various head of cattle, that were used to secure your commercial loan here at the bank, will go on sale at the Wahoo Sale Barn in Wahoo, Nebraska. I am not taking the entire lot of cattle for sale but will be taking *a few*, and will give you this chance to attend that sale to bid for yourself, if you so desire. At the end of the sale I will contact you as to what was sold and how much we received, less any expenses. If you have any questions, please contact me here at the bank.

(Emphasis supplied.)

Had Havelock in fact sold all of the cattle on February 18, 1982, which secured the loan, the notice of February 12 may have been sufficient. The difficulty, however, is that, as the letter of February 12 indicated, not all of the collateral was sold. This, therefore, imposed a further obligation on Havelock to advise the McArthurs when the balance of the cattle would be sold.

The reason for requiring creditors to give notice was clearly set out by us in *DeLay First Nat. Bank & Trust Co. v. Jacobson Appliance Co.*, 196 Neb. 398, 403, 243 N.W.2d 745, 748 (1976), when we said:

> Obviously, [the notice provision] is intended for the benefit and protection of the debtor. If he is given notice, he will have at least an opportunity to protect his interests by redemption, finding prospective purchasers for the property, or otherwise. Even if it might be determined he could not have protected his interest, the law requires he be given the opportunity.

By advising the McArthurs that certain of the cattle would be sold on February 18, but not advising them as to when the balance would be sold, Havelock certainly did not give the McArthurs an opportunity with regard to the balance of the cattle to protect their interests by redemption, finding prospective purchasers for the property, or otherwise.

On June 21, 1982, Havelock again wrote the McArthurs, advising them that certain other collateral had been sold and the proceeds applied against the loan, still leaving an unpaid balance. The letter then stated: "This leaves some cattle that need to be taken to market and I will be notifying you as soon as that is done." On August 19, 1982, Havelock once again wrote to the McArthurs and advised them that on July 9 (actually July 8), 1982, 36 cattle were taken to the Wahoo livestock market and sold. Advising the McArthurs after the fact that the cattle had been taken to market certainly did not afford them any opportunity to exercise the rights which § 9-504(3) is intended to protect.

Everyone agrees that no notice was ever given the McArthurs of the July 8 sale. The question, then, is whether the failure to notify the McArthurs of the sale on July 8 precludes Havelock from obtaining a deficiency judgment. Havelock argues that because proper notice of the first sale was given the McArthurs and, further, they were advised that more sales would be held in the future, the requirements of § 9-504(3) regarding notice were satisfied. We believe that there are no exceptions to the rule requiring the creditor to give notice of every sale to the debtor if the creditor desires a deficiency judgment. Obviously, advising the debtor that numerous pieces will be sold individually on a given date at a given place, or even thereafter from day to day until all are sold, would be sufficient. But advising the debtor as to the time and place of the first sale without giving notice of the time and place of subsequent sales would defeat the whole purpose of requiring the creditor to give the debtor notice.

As we noted in *Bank of Gering v. Glover*, 192 Neb. 575, 579-80, 223 N.W.2d 56, 59 (1974):

> The creditor is given several options in disposing of collateral and very minimal formal requirements. The burden on the secured creditor is to comply with the law. The act is framed in his interest. It is not onerous to require him to give notice of the time and place of sale. In some instances it will be to the creditor's advantage to do so. On the other hand, to permit him to proceed otherwise does place an onerous burden on the debtor. It prevents the debtor from taking steps to protect his interests at the sale.

In a long line of cases beginning with *Bank of Gering v. Glover, supra*, we have repeatedly held that compliance with the notice provisions of the Uniform Commercial Code, particularly § 9-504(3), is a condition precedent to the right of a creditor to recover a deficiency judgment. See, also, *DeLay First Nat. Bank & Trust Co. v. Jacobson Appliance Co., supra*; *First Nat. Bank & Trust Co. v. Hughes*, 214 Neb. 42, 332 N.W.2d 674 (1983); *First Nat. Bank & Trust Co. v. Hermann*, 205 Neb. 169, 286 N.W.2d 750 (1980). The failure to give the requisite notice is an absolute bar to recovery. See, *State Bank of Litchfield v. Lucas*, 210 Neb. 400, 315 N.W.2d 238 (1982); *DeLay, supra*; *Citizens State Bank v. Sparks*, 202 Neb. 661, 276 N.W.2d 661 (1979). As we noted in *DeLay, supra* at 409, 243 N.W.2d at 751:

> The right to a deficiency judgment depends on compliance with the statutory requirements. We now hold that if a creditor wishes a deficiency judgment he must comply with the law in *each* transaction. While this rule may seem harsh, we are persuaded by the fact that the burden is on the secured creditor to comply with the law. The act is framed in his interest. It is not onerous to require him to observe the provisions of the law.

(Emphasis supplied.)

Havelock, having failed to give the McArthurs sufficient notice under § 9-504(3), is not entitled to a deficiency judgment. For that reason, therefore, the judgment of the district court is reversed and the cause remanded with directions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

IN RE INTEREST OF V.B. AND Z.B., CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. R.B. AND H.B., APPELLANTS.

370 N.W.2d 119

Filed July 5, 1985. No. 84-472.

1. **Parental Rights: Proof: Res Judicata: Collateral Estoppel.** In determining whether a change of circumstances exists so as to modify a juvenile court's previous order to a decision terminating parental rights, the court can use the time period prior to the previous order in conjunction with the time period after the previous order to determine whether there is a requisite change of circumstances since the original disposition order. When a second termination proceeding is not itself barred, the proof is not limited by res judicata or collateral estoppel principles to facts or evidence which was not considered in, or which came into being after, the first proceeding.
2. **Parental Rights: Appeal and Error.** The standard of review in appeals from a court's order terminating parental rights is de novo on the record.
3. **Parental Rights.** An order terminating parental rights must be based upon clear and convincing evidence and should only be issued as a last resort and when no reasonable alternative exists.
4. **Parental Rights: Appeal and Error.** In reviewing termination of parental rights cases de novo on the record, this court must give great weight to the findings of the juvenile court in all cases where there is a dispute in the evidence, since the trial court heard and observed the witnesses.
5. **Parental Rights.** There is no requirement for a court to implement a rehabilitation plan for the parents of a child found to be dependent and neglected.
6. _____. The termination of parental rights must be given serious consideration, and, if possible, the parents should be given the opportunity to correct their behavior. A child must not be made to await uncertain parental maturity.

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

Paul M. Conley, for appellant H.B.

Roberta S. Stick, for appellant R.B.

Michael G. Heavican, Lancaster County Attorney, and Mary L. Thramer, for appellee.

James M. Gordon, guardian ad litem.

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

WHITE, J.

This is an appeal from an order of the separate juvenile court of Lancaster County, Nebraska, finding that Z.B., born August 10, 1973, and V.B., born October 9, 1974, are children who lack proper parental care due to the faults and habits of their parents, as defined by Neb. Rev. Stat. § 43-202(2) (Reissue 1978), now replaced by Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1984), and terminating the parental rights of R.B. and H.B. as to their two children.

The initial petition was filed on July 18, 1979, and alleged that the two children were without proper care due to the faults and habits of their parents. The juvenile court found that there was no food in the house and that gas utility service had been turned off, even though the parents had sufficient funds. The residence had a strong odor, and animal feces were observed. The children had been physically abused and were only bathed once a month. The court ordered that the children be placed in temporary foster care. Since this initial order, seven review hearings have been held. At the conclusion of each hearing the court has ordered that the children continue in foster care.

Neither parent has provided proper parental care to the children. Since July 1979, the mother, R.B., has been arrested or sentenced on charges of burglary, drug possession, child abuse, trespassing, receiving stolen property, and prostitution. She has attempted suicide, undergone psychiatric counseling, and taken medications for psychological disorders. She has abused her children and failed to adequately feed or bathe them.

The father, H.B., initially attempted to comply with the court's order by attending parenting classes and finding a suitable apartment. However, a short time later, the father lost his job for sexual harassment of a female employee, lost his Social Security disability income, and left the state. He lived in Missouri and Florida from 1981 to 1983, working odd jobs and sleeping in ditches and city missions. While in Missouri, the father was arrested for endangering the health and welfare of a minor. Additionally, H.B. has been diagnosed as a schizophrenic.

On January 10, 1983, a supplemental petition was filed to

terminate parental rights. Following a hearing on March 15 and 16, 1983, the juvenile court found that only the father's rights could be terminated. The court declined to terminate either parent's rights until both parents' rights could be terminated.

On March 13, 1984, a second supplemental petition was filed requesting termination of parental rights. Following a hearing on April 18-20, 1984, the court issued an order terminating the parental rights of both parents. The court stated in its order that sufficient grounds existed to terminate parental rights because both parents had substantially, intentionally, and repeatedly neglected the children and had failed to make reasonable efforts under the direction of the court to correct the conditions leading to the determination of neglect. The statutory authority for this action is found in Neb. Rev. Stat. § 43-292 (Reissue 1984), which states in part:

> The court may terminate all parental rights between the parents or the mother of a juvenile born out of wedlock and such juvenile when the court finds such action to be in the best interests of the juvenile and it appears by the evidence that one or more of the following conditions exist:
>
> . . . .
>
> (2) The parents have substantially and continuously or repeatedly neglected the juvenile and refused to give the juvenile necessary parental care and protection;
>
> . . . .
>
> (6) Following a determination that the juvenile is one as described in subdivision (3)(a) of section 43-247, reasonable efforts, under the direction of the court, have failed to correct the conditions leading to the determination.

The parents appeal from the court's order.

The appellants argue that the doctrine of res judicata bars consideration in the present case of evidence adduced at the prior contested hearing in March 1983 in which the parental rights were not terminated. We do not agree that the only relevant time period in this case is from the date of the court's previous order. With respect to custody orders we stated in *Marez v. Marez*, 217 Neb. 615, 620, 350 N.W.2d 531, 534

(1984):

> A custodial order is conclusive as to all matters prior to its promulgation. But the doctrine of res judicata cannot settle a question of a child's welfare for all time to come; it cannot prevent a court at a subsequent time from determining what is best for the children at that time. The usual way of expressing this rule is to say that "circumstances have changed" when the order is no longer in the children's interest.

The reasoning in *Marez* also applies to parental termination cases.

In determining whether a change of circumstances exists so as to modify a juvenile court's previous order to a decision terminating parental rights, the court can use the time period prior to the previous order in conjunction with the time period after the previous order to determine whether there is a requisite change of circumstances since the original disposition order. *In re G. V. and R. P.*, 136 Vt. 499, 394 A.2d 1126 (1978). When a second termination proceeding is not itself barred, the proof is not limited by res judicata or collateral estoppel principles to facts or evidence which was not considered in, or which came into being after, the first proceeding. *Matter of Newman*, 49 Or. App. 221, 619 P.2d 901 (1980). The court would have been barred in the instant case from using evidence prior to the March 1983 order as the sole basis for terminating parental rights. However, the court correctly used evidence from the time period prior to the March 1983 order in conjunction with evidence from the time period after the March 1983 order in determining that there was the requisite change of circumstances or stagnation of conditions to terminate parental rights of the appellants.

The standard of review in appeals from a court's order terminating parental rights is de novo on the record. An order terminating parental rights must be based upon clear and convincing evidence and should only be issued as a last resort and when no reasonable alternative exists. In reviewing termination of parental rights cases de novo on the record, this court must give great weight to the findings of the juvenile court in all cases where there is a dispute in the evidence, since the trial

court heard and observed the witnesses. *In re Interest of L.J., J.J., and J.N.J., ante* p. 102, 368 N.W.2d 474 (1985).

The question of whether the parents have rehabilitated themselves is central to this case. The juvenile court ordered the parents to correct the conditions of neglect, but did not provide them with a rehabilitation plan. We have held that there is no requirement for a court to implement a rehabilitation plan for the parents of a child found to be dependent and neglected. *In re Interest of L.J., J.J., and J.N.J., supra.* In reviewing the evidence after the March 1983 hearing, we must conclude that the parents' behavior has deteriorated.

The mother continues a life of criminal behavior. On November 9, 1983, she was caught stealing goods from a Sears store. In 1984 she was arrested for prostitution. She still refuses to accept any responsibility for her children's emotional and behavioral problems.

Dr. Ann Taylor, a psychiatrist, examined R.B. and the children and testified that the children did not want to return to their mother because they feared that she would not feed them or care for them. Dr. Taylor stated that V.B.'s behavioral problems were a result of being exposed to seductive sexual activity at a very early age. This overstimulation resulted in her masturbating with objects and doing harmful things to herself. When V.B. saw her mother, she would feel scared, upset, and nervous. Dr. Taylor testified that V.B.'s masturbation was related to thinking about her mother and the sexual activities she was exposed to.

Z.B. also continues to have behavioral problems. He stomped a puppy to death. Dr. Taylor testified that Z.B. was also subject to overstimulation at an early age and this has caused many of his problems. Z.B. and V.B. have been observed attempting to have sex together. Dr. Taylor stated that R.B. is unlikely to change her behavior or become rehabilitated, since she refuses to accept responsibility for her children's behavioral problems. Dr. Taylor concluded that R.B. was not capable of providing the stability that the children need, and recommended that it would be in the best interests of the children to terminate parental rights with regard to the mother.

Dr. Mary Munger, a clinical psychologist, evaluated H.B. in

February of 1984. H.B. admitted that the children had been exposed to sexual activity. He refused to accept responsibility for the children's behavioral problems and felt that the children were depressed because they were living in a foster home. Dr. Munger stated that H.B. could not carry on a conversation without sexual preoccupations and that this behavior could be harmful to V.B. and Z.B., who are having problems with sexual overstimulation. In recommending termination of the father's parental rights, Dr. Munger concluded that he should not be allowed to see the children and was not capable of being a parent.

Both parents have failed to improve their behavior or the conditions under which the children would live. Neither parent has a plan to improve his or her ability to be a parent. In view of the record in this case, and in accordance with the allegations in the second supplemental petition and § 43-292(6), we find that the parents have failed to correct the conditions leading to the determination that the juveniles lack the proper parental care by reason of the fault or habits of the parents. We agree with the trial court that parental rights of the parents should be terminated.

These children need stability and permanence in their lives. Since 1979, the children have lived in four foster homes. It is regrettable that the children in this case have had to endure such instability throughout these proceedings. The termination of parental rights must be given serious consideration, and, if possible, the parents should be given the opportunity to correct their behavior. However, we disapprove of the length of time involved in this case. A child must not be made to await uncertain parental maturity. *In re Interest of L.J., J.J., and J.N.J., ante* p. 102, 368 N.W.2d 474 (1985).

We affirm the decision of the separate juvenile court to terminate the parental rights of the appellants.

AFFIRMED.

ELSIE SHERMAN ET AL., APPELLEES, V. ELMER SCHULZ ET AL., APPELLANTS, CALVIN KROPATSCH, APPELLEE.

370 N.W.2d 123

Filed July 5, 1985. No. 84-522.

1. **Judicial Sales: Partition.** A judicial sale in a partition action is not binding until the entire transaction has been approved by the court.
2. **Judicial Sales: Appeal and Error.** It is the general rule that the confirmation of judicial sales rests largely within the sound discretion of the trial court; consequently, the determination of the trial court will not be disturbed on review except for an abuse of such discretion. The trial court may not, however, exercise its discretion arbitrarily; its determination is to be one which is sound and equitable in view of all the circumstances and in the interest of fairness and prudence, and with a regard for the rights of all concerned and the stability of judicial sales.

Appeal from the District Court for Polk County: WILLIAM H. NORTON, Judge. Reversed and remanded with directions.

Robert L. Mills of Mills Law Offices, and John M. McHenry of McHenry & Watson, for appellants.

Raymond E. Baker of Baker & Beck, P.C., for appellee Neujar.

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

PER CURIAM.

Louise Lucas died intestate seized of approximately 200 acres of northern Polk County land. Elsie Sherman, one of decedent's heirs, filed this action to partition the land, naming the remaining heirs, Elmer Schulz, Alma Schulz, Lillian Wieseman, Margaret Craig, and others, as defendants. After a determination that Elmer Schulz and Alma Schulz each owned an undivided one-fourth interest in the land and that Elsie Sherman, Lillian Wieseman, and Margaret Craig each owned an undivided one-sixth interest, the land was ordered sold at public auction. The highest bid at the auction, $95,000, was made by Gayle Neujahr. Thereafter, all of the heirs objected to confirmation of the sale on the ground the land was sold for less than its fair value. The defendant heirs, that is, the heirs other than the plaintiff Elsie Sherman, made a $150,000 offer. The

trial court nonetheless confirmed the sale to Neujahr and ordered execution of a deed conveying the land to him. The assignments of error urged by the defendant heirs, the appellants herein, challenge the correctness of the trial court's decree. We reverse and remand with directions.

After one of various notices of the sale was first published, Duane Tonniges, who was Elmer Schulz' neighbor, asked whether Schulz planned to bid at the auction, since the land to be sold bordered Schulz' farm. Tonniges and his father had decided, apparently as a neighborly gesture, not to bid on the property if Schulz was going to bid. According to Tonniges, Schulz replied that he personally did not want the property but that a lawyer from Lincoln would represent him at the sale. Schulz also stated that other members of the family were interested in keeping the property in the family. Although Schulz remembered Tonniges' inquiry about the property, he could not remember the details of the conversation. Schulz did not personally attend the sale or bid "because one of the other heirs was intended to do the bidding." Schulz also had a conversation with the successful bidder's father. The elder Neujahr testified that Schulz said he would have a representative at the sale "so it doesn't go too cheap," but Schulz did not remember making such a statement. There was present at the auction, however, an attorney from Lincoln who had a presale discussion with the referee and who bid on behalf of William Francis Craig, the husband of one of the heirs and, for that reason, a named defendant in the suit. This attorney also later filed on behalf of the defendant heirs the objection to confirmation of the sale, as discussed in the first paragraph of this opinion. (The plaintiff-appellee heir filed an objection pro se.) The referee had also received inquiries prior to the auction from Tonniges, the elder Neujahr, Schulz, and the tenant.

The auction, which was well advertised and attended by 35 to 40 persons, was conducted as scheduled. The two bidders at the sale in addition to the Lincoln attorney were Neujahr and the Cyza brothers. Neujahr and Tonniges apparently had an arrangement whereby Neujahr was to bid and the two would divide the property between themselves if the bid were successful. The Cyza brothers made one bid. The attorney and

Neujahr each bid four times.

At the hearing on the heirs' objections, a licensed real estate appraiser testified that in his opinion the land in question, which consists of approximately 44 acres of irrigated ground, 90 acres of dry ground, and 67 acres of pasture ground, has a value of $161,000. It was his view that the buildings on the land had no value. In reaching his opinion the appraiser relied on 12 sales of lands, most of which were within 10 miles to the north of the subject land. It was his thinking that the same pool of buyers would be interested in the subject land as were interested in the lands he used for making the comparison, notwithstanding that a river separated the subject property from the comparison lands. This was so because the subject land and the comparison lands were of the same soil type. Although he testified that the top value for irrigated ground in the comparison sales was $1,100 an acre, he assigned a value of $1,400 an acre to the irrigated ground on the subject land. He also testified the facts that the subject land was not divided into tracts and that the heirs told potential buyers they were going to bid, together with the practice at the referee's sale of writing bidders' names on a board, all served to discourage potential buyers.

It is beyond question that a judicial sale in a partition action is not binding until the entire transaction has been approved by the court. See *Michelson v. Wagner*, 170 Neb. 28, 101 N.W.2d 498 (1960).

While partition actions in and of themselves are equitable in nature and therefore reviewable by this court de novo on the record, it is the general rule that the confirmation of judicial sales rests largely within the sound discretion of the trial court. *Kleeb v. Kleeb*, 210 Neb. 637, 316 N.W.2d 583 (1982). Consequently, the determination of the trial court will not be disturbed on review except for an abuse of such discretion. The trial court may not, however, exercise its discretion arbitrarily, and its determination is to be one which is sound and equitable in view of all the circumstances and in the interest of fairness and prudence, and with a regard for the rights of all concerned and the stability of judicial sales. *Nebraska State Bank & Trust Co. v. Wright*, 213 Neb. 822, 331 N.W.2d 535 (1983); *Kleeb v.*

Kleeb, supra.

In *Hull v. Hull*, 183 Neb. 773, 164 N.W.2d 455 (1969), Myrtle Hull, an incompetent, owned an undivided one-third interest in certain property. Her son and guardian, Roy, represented her in the action for its partition. Roy and his brothers, Ross and Herbert, each owned an undivided two-ninths interest in the property. The referee, after a 2-hour sale at which 17 separate bids were received, accepted a final bid of $45,500 by L.W. and J.W. Weber. Thereafter, Roy and Herbert filed objections to the confirmation and offered to bid the sum of $46,800. Objections to the confirmation were also filed on behalf of Myrtle and Ross. All the objections were based on the allegation that the property had sold for an inadequate price. There was testimony at the hearing on the objections that the value of the property ranged from $36,000 to $45,000 and that $45,500 was an adequate, fair, and top price for the property. At the hearing Roy offered a 5-percent increase in the earlier offer on behalf of his brother Herbert. While it was noted, in holding that the trial court abused its discretion in refusing to confirm the sale, that Herbert and Roy were parties to the partition action and that Roy was present at the sale even though he did not bid, it was also observed that the successful bid was adequate and reasonable.

Rupe v. Oldenburg, 184 Neb. 229, 166 N.W.2d 417 (1969), affirmed the trial court's refusal to confirm a sale in the face of a later offer which was 10 percent higher than the highest bid. In *Knouse v. Knouse*, 157 Neb. 748, 61 N.W.2d 388 (1953), a 5.4-percent higher, later offer was found sufficient to support the trial court's decision to set aside the referee's sale. In *Siekert v. Soester*, 144 Neb. 321, 13 N.W.2d 139 (1944), a 7.8-percent higher, later offer was held to support the trial court's refusal to confirm a sale.

We conclude from the foregoing analysis of our past decisions that the trial court abused its discretion in this case by rejecting the later offer of the defendant heirs. In reaching that conclusion we are not as persuaded by the percentage difference between the highest bid at the referee's sale and the higher, later offer as we are by the fact that the price obtained at the referee's sale is grossly inadequate. In *Hull v. Hull, supra*, there was

evidence that notwithstanding the higher, later offer, the referee's sale resulted in an adequate and reasonable price for the land. The evidence in the present case, however, is that the successful bid is but 59 percent of the value of the land. Admittedly, the accuracy of the opinion as to the land's value is questioned, but there is no evidence that $95,000 is a fair and adequate price.

Accordingly, we reverse the decree of the trial court and remand the proceeding with the directions that the trial court set aside the referee's sale, accept the offer of the defendant heirs, and order conveyance of the land to them.

However, since the objections of the heirs and the offer of the defendant heirs came late, we tax all costs of sale and litigation of whatsoever nature or character in all courts to all of the heirs. We also award Gayle Neujahr a fee of $5,000 to apply toward the services of his attorney in all courts. The heirs shall be directed to prorate the costs and attorney fee in proportion to their respective ownership interests in the subject land.

REVERSED AND REMANDED WITH DIRECTIONS.

CAPORALE, J., dissenting.

I dissent. As the majority opinion notes, involved in this case is a balancing of two sometimes conflicting policies. On the one hand, courts, when selling land, strive to obtain the best price possible. On the other hand, the rights of the high bidder and the stability of judicial sales must be protected. See, *Nebraska State Bank & Trust Co. v. Wright*, 213 Neb. 822, 331 N.W.2d 535 (1983); *Kleeb v. Kleeb*, 210 Neb. 637, 316 N.W.2d 583 (1982). In my view the trial court correctly exercised its discretion in striking that balance; consequently, I would affirm.

While the majority chooses to focus on the disparity between the highest bid at the referee's sale and the fair value of the land, I would focus on the conduct of the heirs.

The heirs all knew of the sale, the sale was well advertised and attended, and I cannot help but infer from the evidence that the Lincoln attorney attending the sale was bidding in the interest of the heirs. Given that situation, the heirs ought to be made to live with whatever mistake they may have made by not bidding higher at the referee's sale, not for the purpose of punishing

them, but to preserve the integrity and stability of judicial sales and to protect the rights of the highest bidder at such sales.

The view taken by the majority, I fear, destroys the stability and integrity of judicial sales and reduces them to a process whereby one merely bids on property, rather than preserving them as a mechanism to purchase property. Bidding at future judicial sales may well be chilled because a knowledgeable potential bidder will be aware that he may wait until after the sale and then jump in to take the property if he deems the high bidder made a good buy, but let the high bid stand if hindsight persuades him the purchase was not so advantageous. *Michelson v. Wagner*, 170 Neb. 28, 101 N.W.2d 498 (1960); *Glaser v. Weinberger*, 188 Neb. 205, 196 N.W.2d 113 (1972).

To quote from *Hull v. Hull*, 183 Neb. 773, 777, 164 N.W.2d 455, 458 (1969): "It has been generally understood by the profession and enforced by the courts that for obvious reasons one who has been a bidder at the sale by himself or by an agent will not, as a general rule, be permitted to put in an upset bid."

My understanding of *Kleeb v. Kleeb, supra*, is that it was in part on that basis that this court affirmed confirmation of a judicial sale notwithstanding the existence of an almost 5-percent higher, later offer. As the *Kleeb* court stated:

> An upset bid following a judicial sale and before a final confirmation should be considered only when it affords convincing proof that the property was sold at an inadequate price and that a just regard for the rights of all concerned and the stability of judicial sales permits its acceptance. . . . While it is true that the District Court strives to obtain the best price possible for the property it sells at public sale, it must also give consideration to the rights of the purchaser and the stability of judicial sales, particularly where the sale was free of fraud and an adequate price has been realized.

Id. at 644-45, 316 N.W.2d at 588.

I am not unmindful of the rule that judicial partition sales are not final in the absence of confirmation, *Michelson v. Wagner, supra*; neither do I forget, however, that ordinarily courts will confirm a sale which has been regularly held and fairly conducted. *Michelson v. Wagner, supra*; *County of Lancaster*

v. Schwarz, 152 Neb. 15, 39 N.W.2d 921 (1949). There is no evidence the referee's sale was not fairly conducted. I do not consider writing a bidder's name where all can see it to be unfair; sooner or later the successful bidder's identity must become known.

In my view the highest amount bid at the referee's sale was fair and reasonable in view of the circumstances of this case, irrespective of the fact that it is significantly less than the value of the land.

GRANT, J., joins in this dissent.

ROBERT Z. FLANSBURGH ET AL., APPELLEES, V. JOHN G. COFFEY AND ROBERT HARDIN, APPELLANTS.

370 N.W.2d 127

Filed July 5, 1985. No. 84-594.

1. **Equity: Appeal and Error.** The Nebraska Supreme Court reviews matters in equity de novo on the record and reaches an independent conclusion without reference to the trial court's findings, subject to the rule that when the evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the opposite.
2. **Agriculture: Property.** The Nebraska Right to Farm Act, Neb. Rev. Stat. §§ 2-4401 through 2-4404 (Reissue 1983), applies only where there has been a change in land use or occupancy of land in and about the locality of such farm or farm operation, not where the change has taken place on the farm itself.
3. **Nuisances.** The right to have the air floating over one's premises free from noxious and unnatural impurities is a right as absolute as the right to the soil itself.
4. _____. Ordinarily, a legitimate business enterprise is not a nuisance per se, but may become a nuisance in fact by reason of the conditions implicit in and unavoidably resulting from its operation or because of the manner of its operation.
5. **Nuisances: Property.** The fact that a residence is in a rural area requires an expectation that the residence will be subjected to normal rural conditions, but not to such excessive abuse as to destroy the ability to live and enjoy the home, or such as to reduce the value of the residential property.
6. **Nuisances.** To justify the abatement of a claimed nuisance, the annoyance must

be such as to cause actual physical discomfort to one of ordinary sensibilities.

7. **Nuisances: Presumptions.** In the absence of evidence to the contrary, there is a presumption that a plaintiff in an action for the abatement of a nuisance has ordinary sensibilities.
8. **Appeal and Error.** Ordinarily, this court will consider only those assignments of error which are discussed in appellant's brief.

Appeal from the District Court for Gage County: WILLIAM B. RIST, Judge. Affirmed.

Donald H. Bowman of Peterson, Bowman & Johanns, for appellants.

Michael E. Willet of Everson, Noble, Wullschleger, Sutter, Sharp, Korslund & Willet, for appellees.

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

CAPORALE, J.

The appellees, Robert Z. Flansburgh and his wife, Evelyn M. Flansburgh, sued to recover damages and to enjoin the appellants, John G. Coffey and his son-in-law, Robert Hardin, from conducting a hog raising and feeding operation, claiming the operation to be a nuisance. The trial court decreed that Coffey and Hardin pay the Flansburghs $2,000 in damages and that they be permanently enjoined from "conducting and carrying on a hog raising and feeding operation . . . in the metal pole building and hog confinement building . . . or to accumulate animal manure therein." The issues raised by the five assignments of error discussed by Coffey and Hardin in this appeal are whether the trial court erred in (1) determining that the Nebraska Right to Farm Act, Neb. Rev.Stat. §§ 2-4401 through 2-4404 (Reissue 1983), has no application; (2) determining that the operation constituted a nuisance; and (3) granting too broad an injunction. We affirm.

We note first of all that this action is one in equity. As such, we review the matter de novo on the record and reach an independent conclusion without reference to the trial court's findings, subject to the rule that when the evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that

the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the opposite. Neb. Rev. Stat. § 25-1925 (Reissue 1979); *Nixon v. Harkins, ante* p. 286, 369 N.W.2d 625 (1985); *Cline v. Franklin Pork, Inc.*, 219 Neb. 234, 361 N.W.2d 566 (1985); *Burgess v. Omahawks Radio Control Org.*, 219 Neb. 100, 362 N.W.2d 27 (1985).

Our review of the evidence in accordance with that rule reveals that since 1961 Coffey has been the owner of approximately 156 acres of rural land in Gage County, Nebraska. In 1968 Coffey conveyed approximately 1.67 acres thereof to the Flansburghs to be used for residential purposes. The Flansburghs have been improving their property and have extensively remodeled the house located on it.

Hogs were raised on the land by Coffey's tenant prior to the 1968 sale. Between 1968 and 1975, when Hardin began to farm Coffey's land, no hogs were raised thereon. A few hogs were raised on the Coffey land after 1975.

In 1981 a metal pole building was built on the Coffey land, situated some 50 feet from the Flansburghs' property. In November of 1982 Hardin finished construction of a hog confinement building on Coffey's property. The confinement building is located to the east of the Flansburghs', approximately 72 feet from their property line and approximately 133 feet from their house, a location selected because Coffey wanted to keep as much area as possible to farm and garden.

The confinement building is made of concrete and is approximately 34 to 36 feet wide and 78 feet long. The floor slopes to the south, where there is a pit 8 feet wide and 8 to 10 feet deep running along the full length of the building. The waste produced by the pigs is worked into the pit by them through a slatted cover. The waste is then treated chemically to reduce it into liquid form. When the pit fills, the waste is pumped and spread as fertilizer on the fields which abut the Flansburghs' property, an unpleasant event which takes place approximately three times a year.

The confinement building is designed to handle 400 hogs. The average number of hogs raised in the building in the year

and a half preceding trial was 300.

The operation produces strong odors which cause the Flansburghs' eyes to water and render it difficult for them to breathe. The Flansburghs also find it troublesome to remain out-of-doors or to open the windows of their home. As a consequence, the Flansburghs operate their air-conditioner almost constantly from April to September. Mrs. Flansburgh experiences headaches and stomach upsets because of the smells. They can no longer have backyard cookouts, and their grandchildren cannot play outside.

In addition, since the hogs were placed in the confinement building, the Flansburghs have been beset with an excess of flies. The flies are present even in the winter months. Mrs. Flansburgh washes the windows inside her house twice a month to remove the flyspecks, and the dead flies can be scooped up by the handful in the house. The Flansburghs also reported seeing rats on their property after the confinement facility was in operation, which they control with rat poison administered once every 2 weeks. Since the hog confinement building was put in operation, there has also been an increase in the starling population on the Flansburghs' land.

Coffey and Hardin first argue that the Nebraska Right to Farm Act, which became effective July 17, 1982, prevents the operation in question from being a nuisance. Section 2-4403 provides:

> A farm or farm operation shall not be found to be a public or private nuisance if the farm or farm operation existed before a change in the land use or occupancy of land in and about the locality of such farm or farm operation and before such change in land use or occupancy of land the farm or farm operation would not have been a nuisance.

Section 2-4402(1) defines the terms "farm or farm operation" as meaning "any tract of land over ten acres in area used for or devoted to the commercial production of farm products." A farm product is defined in § 2-4402(2) as including "animals useful to man and includes but is not limited to . . . livestock, including breeding and grazing, fruits, vegetables, flowers, seeds, grasses, trees, fish, apiaries, equine

and other similar products . . . ."

It is obvious on the face of the act that it does not apply to the situation before us. The act applies where there has been "a change in the land use or occupancy of land *in and about the locality of such farm or farm operation* . . . ." (Emphasis supplied.) § 2-4403; *Cline v. Franklin Pork, Inc.*, 219 Neb. 234, 361 N.W.2d 566 (1985). There is no evidence that there was any change in the use or occupancy of the land in and about the locality of the Coffey-Hardin operation. On the contrary, the evidence is that Coffey sold a portion of his land for residential purposes to the Flansburghs in 1968 and that the Flansburghs have been using the land they purchased as a residence since that date. The change has taken place on the Coffey land.

There being no merit to the first issue raised by the assignments of error, we proceed to the second issue, whether the evidence establishes the Coffey-Hardin operation to be a nuisance.

The rules applicable to the resolution of this issue have been most recently stated in *Cline v. Franklin Pork, Inc., supra*, and are set out below.

The right to have the air floating over one's premises free from noxious and unnatural impurities is a right as absolute as the right to the soil itself. Ordinarily, a legitimate business enterprise is not a nuisance per se, but may become a nuisance in fact by reason of the conditions implicit in and unavoidably resulting from its operation or because of the manner of its operation. The fact that a residence is in a rural area requires an expectation that the residence will be subjected to normal rural conditions, but not to such excessive abuse as to destroy the ability to live and enjoy the home, or such as to reduce the value of the residential property. To justify the abatement of a claimed nuisance, the annoyance must be such as to cause actual physical discomfort to one of ordinary sensibilities. In the absence of evidence to the contrary, there is a presumption that a plaintiff in an action for the abatement of a nuisance has ordinary sensibilities.

There is no question but that under the evidence detailed earlier the hog confinement operation conducted by Coffey and Hardin in the pole building and hog confinement building

constitutes a nuisance. The odors produced and the rats and flies attracted by the operation are more than offensive. It is true that there are activities on the Flansburghs' land which in and of themselves produce some odors and attract some flies, but the evidence clearly establishes that the repugnant nature of the present odors and the offensive magnitude of the present rat and fly infestations are caused by the hog confinement operation.

The last issue deals with the scope of the injunction, Coffey and Hardin claiming that it prevents the raising of any hogs and is therefore too broad. Such is simply not the case. The injunction prevents only the raising and feeding of hogs in the metal pole and confinement buildings, or the accumulation of animal manure therein. The evidence clearly supports that decree.

We are not unmindful that the first assignment of error as phrased declares that the evidence is insufficient to support "injunctive relief and damages." However, none of the arguments presented in the brief submitted by Coffey and Hardin deal with the $2,000 awarded to the Flansburghs for their "discomfort and the loss of reasonable enjoyment of their home premises." The rule has long been that ordinarily this court will consider only those assignments of error which are discussed in appellant's brief. *State v. Toth, ante* p. 311, 369 N.W.2d 644 (1985); *State v. Hoekstra, ante* p. 309, 369 N.W.2d 643 (1985); *Scoular-Bishop Grain Co. v. Bassett Grain*, 218 Neb. 280, 352 N.W.2d 904 (1984); Neb. Ct. R. 9D(1)d (rev. 1983). We therefore do not concern ourselves with the damage award.

AFFIRMED.

PHYLLIS HALLETT, APPELLANT, V. GEORGE A. HORMEL AND COMPANY, A CORPORATION, APPELLEE.
370 N.W.2d 132

Filed July 5, 1985. No. 84-620.

Causes of Action: Employer and Employee. If an injured employee does not have an independent cause of action, the injured employee's spouse cannot maintain an independent cause of action against the injured employee's employer.

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

Ronald L. Brown of Brown Law Offices, P.C., for appellant.

Michael A. Nelsen and Kathleen C. Smith of Schmid, Ford, Mooney & Frederick, for appellee.

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

PER CURIAM.

Plaintiff-appellant, Phyllis Hallett, filed a petition against defendant-appellee, George A. Hormel and Company, a corporation (hereinafter Hormel), seeking damages for loss of services and consortium of her husband, Danny Hallett, allegedly resulting from the negligence of coemployees of Danny Hallett while Hallett and the coemployees were acting within the scope of their employment with Hormel.

Hormel demurred to plaintiff's petition on the ground it did not state a cause of action. The demurrer was sustained, and plaintiff's petition was dismissed. Plaintiff timely appealed. We affirm.

The issue presented is whether the spouse of an employee injured within the scope of his employment may maintain a separate action against the employer. We held in *Johnston v. State*, 219 Neb. 457, 364 N.W.2d 1 (1985), that if an injured employee does not have an independent cause of action, the injured employee's spouse cannot maintain an independent cause of action against the injured employee's employer. In this case plaintiff's petition clearly set out facts showing that plaintiff's husband was injured while he was acting within the scope of his employment and while his coemployees were acting

within the scope of their employment.

We are urged to change the result we reached in *Johnston, supra*. Upon reexamination of the issue we do not choose to do so. The trial court correctly sustained the employer's demurrer and dismissed plaintiff's petition.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GARY A. WOOD, APPELLANT.
370 N.W.2d 133

Filed July 5, 1985. No. 84-652.

1. **Criminal Law: Appeal and Error.** In a criminal case tried to the court without a jury, the findings of the court have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong.
2. **Convictions: Appeal and Error.** It is the province of the Supreme Court, on appeal from a conviction, to refrain from resolving conflicts in the evidence and to sustain the judgment of conviction if, taking the view most favorable to the State, there is sufficient evidence to support the conviction.

Appeal from the District Court for Lincoln County: JOHN P. MURPHY, Judge. Affirmed.

P. Stephen Potter, for appellant.

A. Eugene Crump, Deputy Attorney General, and Lynne R. Fritz, for appellee.

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

SHANAHAN, J.

Gary A. Wood appeals his conviction and sentence after a bench trial in the district court for Lincoln County on the charge of first degree sexual assault on a child under 16 years of age in violation of Neb. Rev. Stat. § 28-319(1)(c) (Reissue 1979). The district court sentenced Wood to a term of imprisonment not less than 1½ nor more than 3 years. We affirm.

On September 16, 1983, Wood's wife, 9-year-old daughter,

and 12-year-old son met with a detective of the North Platte Police Department concerning a complaint about Wood's sexual contact with his daughter on September 9 and 10. Based on the information given to the detective, the State filed formal charges against Wood. The information filed against Wood on December 20 alleged in two counts that Wood had committed crimes of first degree sexual assault, that is, "on or about" September 9 and 10, 1983, Wood had subjected a child under 16 years of age to sexual penetration.

At trial Wood's daughter, the victim, testified concerning numerous incidents of Wood's "teaching her about sex." These incidents involved Wood's digital penetration of the victim's vagina, and fellatio. Sexual activity between Wood and his daughter occurred during Mrs. Wood's absence from the home and after Wood had directed his son to go outside or clean up his room. On one occasion in the family home, the victim's brother observed sexual activity between Wood and the victim. Another time, in Wood's truck, Wood digitally penetrated the victim's vagina while her brother was in the truck's sleeper. After each sexual act with the victim, Wood always warned his daughter that she should never tell anyone about the sexual activity. On still another occasion Mrs. Wood returned home and discovered Wood and the victim in the bathroom with the door locked. Because she was frightened, the victim denied any sexual activity with Wood in the bathroom.

Approximately 1 week after her last sexual contact with Wood, the victim made an unsolicited report to her mother about sexual incidents involving Wood. The victim testified that the last occasion when Wood "taught her about sex" was Saturday, September 10, while her mother was at the store in the afternoon. The victim also testified that the last sexual contact with Wood occurred on the day when relatives visited at the Wood house and attended a family barbecue.

Without objection, the victim's brother testified that on two occasions he saw his father's hand between the victim's legs while "her pants were down," once while the brother was in the living room of the family home and once while he was in the sleeper of his father's truck. Wood's son also testified his father frequently told him to clean his room while his mother was

absent from their home.

Wood's wife testified that late on a Monday evening in September during a conversation in the victim's bedroom, the victim complained about sexual contact with her father. The victim's brother entered the bedroom during the discussion between the victim and her mother and stated that he was aware of the sexual activity involving his sister and Wood. The next day Mrs. Wood spoke with her physician, who told her to contact a lawyer and law enforcement personnel. On Wednesday Mrs. Wood spoke with her attorney, who arranged a meeting with police and the county attorney.

Wood's wife further testified that the weekend before the conversation with her daughter the Wood family did not entertain company or have a barbecue at their home. Mrs. Wood testified that on Saturday afternoon, September 10, she had been shopping for about an hour during the afternoon, leaving Wood with the children (the victim and her brother).

Wood's parents testified they were at their son's home visiting during the afternoon of September 3, a Saturday, and Sunday, September 4, Wood and his family visited the home of Wood's parents. Wood's relatives testified they arrived at Wood's house around 1:30 on Saturday afternoon, September 10, remained for a barbecue in celebration of Wood's birthday, and departed at approximately 6:30 p.m. Finally, Wood took the stand and denied he sexually assaulted his daughter.

The district court found Wood guilty of one count of first degree sexual assault. From his conviction and sentence Wood appeals and argues (1) there was insufficient evidence to convict Wood of a sexual assault on his daughter and (2) the sentence imposed is excessive because the district court refused to place Wood on probation.

Wood contends that the evidence is insufficient to support his conviction for first degree sexual assault on his daughter.

> The general rule is that testimony of the victim of a sexual assault must be corroborated as to material facts and circumstances which tend to support the victim's testimony and from which, together with the victim's testimony as to the principal fact, an inference of guilt may be drawn. Corroboration of the principal act

constituting the offense is not required.

State v. Craig, 219 Neb. 70, 79, 361 N.W.2d 206, 214 (1985).

> "In a criminal case tried to the court without a jury, the findings of the court have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong . . . ." . . . In a bench trial of a criminal case, the court, as the "trier of fact," is the sole judge of the credibility of witnesses and the weight to be given to their testimony. Among the factors entering into the trial court's resolution of any conflicts of evidence are such items as the respective interests of the parties in the litigation; the demeanor of witnesses, including the defendant, while testifying before the court; the apparent fairness exhibited by the witnesses; the extent to which the testimony of the various witnesses is corroborated; and the reasonableness or unreasonableness of statements of the witnesses. . . . In any bench trial it is the role of the judge, as the trier of fact, to resolve conflicts in the evidence, pass on the credibility of the witnesses, determine the plausibility of explanations, and weigh the evidence. . . . It is the province of the Supreme Court, on appeal from a conviction, to refrain from resolving conflicts in the evidence and to sustain the judgment of conviction if, taking the view most favorable to the State, there is sufficient evidence to support the conviction.

State v. Craig, supra at 80, 361 N.W.2d at 214.

The record is replete with direct and corroborating evidence establishing Wood's sexual assault on the victim.

Wood also argues that the evidence is insufficient to establish that the sexual assault occurred on September 10, 1983, as alleged in the information. The record contains considerable evidence contrary to Wood's contention. Moreover, where time is not an ingredient of the crime, a variance between the information and the proof is not fatal if the date proved is within the statute of limitations. *State v. Piskorski*, 218 Neb. 543, 357 N.W.2d 206 (1984).

> We also think it is clear that, as a general proposition, an indictment or complaint should be as specific as possible with respect to time. However, it is not always possible to

> know with certainty when an offense or offenses occurred. This is especially true in cases like this where there is a minor victim who does not complain to the authorities immediately.

State v. Waukazo, 269 N.W.2d 373, 375 (Minn. 1978).

The evidence is sufficient for a finding that Wood's sexual assault on the victim occurred as alleged in the information filed in the proceedings against Wood.

In his final assignment of error, Wood argues that the sentence imposed is excessive because the district court refused to sentence Wood to probation. The offense of first degree sexual assault is a Class II felony punishable by imprisonment for not less than 1 year nor more than 50 years. Neb. Rev. Stat. §§ 28-319 and 28-105 (Reissue 1979). An order denying probation and a sentence within the statutorily prescribed limits will not be disturbed on appeal unless there has been an abuse of discretion on the part of the sentencing judge. *State v. Gillette*, 218 Neb. 672, 357 N.W.2d 472 (1984). We find no abuse of discretion in the district court's sentence imposed on Wood.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMES H. JOHNSON, APPELLANT.

370 N.W.2d 136

Filed July 5, 1985. No. 84-677.

1. **Trial: Witnesses: Rules of Evidence: Hearsay.** What was previously characterized as hearsay available for the purpose of impeachment only has now become substantive evidence of fact contained in the statement, provided the requirements prescribed by Rule 801(4)(a) of the Nebraska Evidence Rules (Neb. Rev. Stat. § 27-801(4)(a) (Reissue 1979)) are satisfied.
2. **Rules of Evidence: Actions: Words and Phrases.** A "proceeding" contemplated by Rule 801(4)(a)(i) of the Nebraska Evidence Rules (Neb. Rev. Stat. § 27-801(4)(a)(i) (Reissue 1979)) is a formal action before a judicial tribunal, as well as an action before a quasi-judicial officer or board, invoked to enforce or protect a right.
3. **Impeachment: Prior Statements: Witnesses: Perjury.** If an attack on a witness' credibility through use of an inconsistent statement is accompanied by, or

interpretable as, a charge of a plan or contrivance to give false testimony, proof of a prior consistent statement before the plan or contrivance was formed tends strongly to disprove that the testimony was the result of contrivance.

4. **Impeachment: Prior Statements: Evidence: Witnesses.** If the witness being impeached admits to the prior inconsistent statement, then he has been impeached and further extrinsic evidence is neither necessary nor generally allowed.

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

Dennis R. Keefe, Lancaster County Public Defender, and Sean J. Brennan, for appellant.

Paul L. Douglas, Attorney General, and L. Jay Bartel, for appellee.

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

SHANAHAN, J.

James H. Johnson appeals his conviction, resulting from a jury trial, for first degree sexual assault on a person less than 16 years of age. See Neb. Rev. Stat. § 28-319(1)(c) (Reissue 1979). We affirm.

The victim, an 11-year-old boy at the time of the sexual assault, lived with his mother and Johnson in a house in Lincoln, Nebraska. The victim's mother and Johnson had planned to marry. Sometime between the dates of August 29 and October 20, 1983, Johnson penetrated the victim's body during anal intercourse. However, the victim did not immediately report this sexual assault because he was afraid Johnson would hurt him.

Some weeks after the assault, at the victim's home on the evening of October 20, 1983, the victim's mother discovered Johnson lying on the living room couch with his penis exposed, while the victim was present. Later that evening, the mother asked the victim if Johnson "was doing anything." The victim then informed his mother of Johnson's earlier sexual assault. After this conversation the mother and son attempted to leave the house, but Johnson "got angry . . . grabbed [the mother] by the shoulders and pushed her into the bedroom and pushed her

down on the bed." While that was occurring, the son called the police. When the police arrived, the mother told a policeman, Officer Domangue, that Johnson had "raped" her son. The police arrested Johnson. Detective Sorensen was assigned to the case and later on the night of October 20 interviewed the mother and her son. During this interview, the mother stated she had seen Johnson exposing his genitals to the victim earlier that evening.

On November 28, 1983, the mother received a letter from Johnson, who was in jail awaiting trial. In that letter Johnson denied any sexual assault on the victim and stated that if the sexual assault charge went to trial, the "truth" would come out and the boy would be "taken away" from his mother. In response to Johnson's letter, and fearing loss of her son, the mother instructed the victim to lie about the sexual assault by Johnson. The following week the mother visited Johnson in jail. Johnson directed the mother to telephone and inform his attorney that the victim son had lied about Johnson's sexual assault on the victim. A few days later, pursuant to Johnson's direction, the mother telephoned and informed Johnson's attorney that the victim had just said that he fabricated the entire account of the sexual assault by Johnson. The mother was not aware that this telephone conversation was tape recorded by Johnson's attorney.

After the tape-recorded telephone conversation, the mother and son went to the office of Johnson's attorney to answer questions about the assault. In addition to the mother, victim, and Johnson's attorney, a court reporter was present in the attorney's office, administered an oath to the mother and her son, and recorded questions and answers during the interview in the attorney's office. During the interview, the victim stated that Johnson had not sexually assaulted him and that the entire account was a lie to prevent his mother's marrying Johnson. Also, during the interview, the victim's mother stated that she had lied about seeing Johnson with his genitals exposed in the presence of her son on October 20, 1983.

At trial the victim testified that Johnson sexually assaulted him. Johnson's attorney questioned the victim and his mother about their statements made before trial, namely, the sworn

statements at the attorney's office and the mother's tape-recorded telephone conference with Johnson's attorney.

Concerning the victim's sworn statement at the attorney's office, on cross-examination the victim admitted that he had given the sworn statement, namely, the victim had lied about the assault on him by Johnson. On redirect examination the victim explained that his statement about the fabricated assault was made in response to his mother's instruction to lie about the assault.

Defense counsel extensively cross-examined the victim's mother about her statement given at the office of Johnson's attorney. In his questions asked on cross-examination of the mother, counsel on more than one occasion emphasized existence of an oath regarding the statement given at the attorney's office; for example, "[d]uring this sworn statement . . .," "under oath," and the "same oath . . . that you took today when you took the witness stand . . . ." During cross-examination, the mother admitted giving her sworn statement at the attorney's office, namely, she had not seen Johnson with his genitals exposed in the presence of her son. When asked on cross-examination about her telephone conversation with Johnson's attorney, the mother acknowledged that in such telephone conversation she had told Johnson's attorney that the victim said he had lied about occurrence of the assault.

When Johnson sought to introduce a transcript of the sworn statement (interview) given by the victim, the court ruled that the victim's sworn statement was hearsay and sustained the State's objection. Upon objection by the State to the introduction of the tape-recorded telephone conversation between Johnson's attorney and the victim's mother, the court, explaining that the mother had not denied the telephone conversation or its contents, sustained the State's objection.

On redirect examination the mother explained that, motivated by fear of losing her son, she had made untrue statements during the interview under oath in defense counsel's office.

After the victim and his mother had testified, the State called Detective Sorensen, who, over Johnson's objection, testified

that the mother, on the evening of October 20, told Sorensen she had seen Johnson in her home earlier that evening with his genitals exposed in the presence of her son.

After the State's rest, Johnson recalled the victim and asked whether on the night of October 20, 1983, the victim had told Officer Domangue that "Johnson did not sexually assault" the victim. The victim denied such statement to the officer. Johnson then called Officer Domangue, but on objection by the State, the court would not allow Officer Domangue to answer questions concerning the victim's October 20 conversation with the officer. Johnson's offer of proof indicated that if Officer Domangue had been allowed to testify, the officer "would have testified that [the victim], in response to the question by the officer [whether Johnson sexually assaulted the victim] said no, he tried to . . . but I wouldn't let him, I ran away."

In his assignments of error Johnson complains about the trial court's rulings on admission and exclusion of evidence and focuses primarily on the character of prior statements, inconsistent and consistent, as substantive evidence pursuant to Rule 801(4)(a) of the Nebraska Evidence Rules, Neb. Rev. Stat. § 27-801(4)(a) (Reissue 1979).

First, Johnson claims the statement of the victim during the interview at the office of Johnson's attorney was admissible as substantive evidence under Rule 801(4)(a)(i), which in part provides:

> (4) A statement is not hearsay if:
>
> (a) The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (i) inconsistent with his testimony and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition . . . .

Second, Johnson contends the mother's statement on the night of Johnson's arrest—that she saw Johnson exposing himself to her son earlier that evening—is inadmissible as a prior consistent statement under Rule 801(4)(a)(ii):

> (4) A statement is not hearsay if:
>
> (a) The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement,

> and the statement is . . . (ii) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive . . . .

Third, Johnson argues the inconsistent statements at the attorney's office were admissible to impeach the credibility of the witnesses under Rule 613 (Neb. Rev. Stat. § 27-613 (Reissue 1979)).

Fourth, Johnson asserts that the mother's recorded telephone call to Johnson's attorney was admissible to impeach the mother.

Fifth, Johnson claims the victim's statement to Officer Domangue—that Johnson attempted, but did not complete, a sexual assault on the victim—was admissible to impeach the victim.

In *State v. Jackson*, 217 Neb. 363, 348 N.W.2d 876 (1984), this court held that, as a result of Rule 801(4)(a)(i) of the Nebraska Evidence Rules, what was previously characterized as hearsay available for the purpose of impeachment only has now become substantive evidence of fact contained in the statement, provided the requirements prescribed by Rule 801(4)(a)(i) are satisfied.

Consequently, the first question is whether the sworn statement given by the victim at the office of Johnson's attorney was "given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition." It is Johnson's position that the interview at his attorney's office qualifies as a "proceeding" within the contemplation of Rule 801(4)(a)(i).

Rule 801(4)(a)(i) of the Nebraska Evidence Rules is patterned on Fed. R. Evid. 801(d)(1)(A). Accordingly, we examine judicial construction of the federal counterpart to Rule 801(4)(a)(i) of the Nebraska Evidence Rules.

In suggesting that the interview of the victim at the attorney's office was a "proceeding," Johnson relies on *United States v. Castro-Ayon*, 537 F.2d 1055 (9th Cir. 1976), in which a sworn interrogation conducted by an agent of the border patrol of the Immigration and Naturalization Service qualified as an "other proceeding" within the meaning of Fed. R. Evid. 801(d)(1)(A).

United States v. Castro-Ayon, supra, is apparently unique—and likely to remain so—if subsequent decisions by other federal courts are any indication. For example, in *United States v. Livingston*, 661 F.2d 239 (D.C. Cir. 1981), the court concluded that a witness' sworn statement to a postal inspector at the witness' home does not come within the ambit of "other proceedings." A sworn statement made to an FBI agent was not admissible as substantive evidence under Fed. R. Evid. 801(d)(1)(A). *United States v. Ragghianti*, 560 F.2d 1376 (9th Cir. 1977). A sworn statement given to federal agents investigating a firebombing "was not made at a trial, hearing, or other proceeding . . . [and] would fail to qualify as substantive evidence under Rule 801." *Martin v. United States*, 528 F.2d 1157, 1161 (4th Cir. 1975).

A "proceeding" contemplated by Rule 801(4)(a)(i) is a formal action before a judicial tribunal, as well as an action before a quasi-judicial officer or board, invoked to enforce or protect a right. See, *State ex rel. Johnson v. Ind. School Dist. No. 810*, 260 Minn. 237, 109 N.W.2d 596 (1961); *Matter of Queens-Nassau Transit Lines v. Maltbie*, 183 Misc. 924, 51 N.Y.S.2d 841 (1944). In the case before us the interview in the office of Johnson's attorney was a unilateral investigation concerning a claim or accusation against the attorney's client and lacked prescription of any procedure for conducting the inquiry. Although such interrogation was related to a criminal charge pending before a court, the statement occurred in a setting and atmosphere lacking the degree of formality and reliability envisioned by Rule 801(4)(a)(i) of the Nebraska Evidence Rules, namely, the orderly conduct of activity before a judicial or quasi-judicial officer or board. Cf. *United States v. Dunn*, 577 F.2d 119 (10th Cir. 1978) (a sworn statement taken at an office of defense counsel would not sustain a conviction under 18 U.S.C. § 1623 (1976) for making a false declaration in a proceeding "before or ancillary to any court or grand jury"). See 4 D. Louisell & C. Mueller, Federal Evidence § 419 (1980). If the position suggested by Johnson were adopted, every unilateral or ex parte statement made under notarial oath would qualify as substantive evidence under Rule 80l(4)(a)(i). The very function of the adversary process would be in

jeopardy. We conclude that the prior inconsistent statement of the victim was not made in a "proceeding" within the meaning of Rule 801 of the Nebraska Evidence Rules and, therefore, was not admissible as substantive evidence authorized under Rule 801(4)(a)(i). In view of our determination that the statement sought to be introduced as substantive evidence was not given at a "proceeding," we need not examine the other prerequisites for admissibility of a statement as substantive evidence under Rule 801(4)(a)(i).

Next, Johnson argues that it was prejudicial error to allow Officer Sorensen to testify about the mother's prior statement on the evening of Johnson's arrest—the mother's statement that she saw Johnson's genitals exposed in the presence of the victim. In *State v. Packett*, 206 Neb. 548, 555, 294 N.W.2d 605, 609 (1980), this court noted that, traditionally, prior consistent statements were not admissible as substantive evidence, but recognized the change effected in the traditional rule by enactment of Rule 801(4)(a)(ii), and stated:

> The rules are: Prior consistent statements are not admissible as substantive corroborative evidence. 31A C.J.S. *Evidence* § 216 (1964); *Anderson v. Evans*, 168 Neb. 373, 96 N.W.2d 44 (1959). The exception to the rule mentioned in that case appears to have been changed by the enactment of Neb. Rev. Stat. § 27-801(4)(a)(ii) (Reissue 1975), which states that a prior consistent statement is not hearsay if the declarant testifies at trial and is subject to cross-examination concerning the statement, "and the statement is . . . (ii) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive . . . ."

By defense counsel's repeated reference to the mother's statement made under oath at the office of Johnson's attorney, defense counsel had sown the sinister seed of innuendo that the mother at trial consciously changed her account of the incident in question, that is, the mother's previous statement had been solemnized by an oath, her promise to tell the truth, but, notwithstanding similar attendant solemnity at trial, the mother's testimony was purposely and diametrically opposed to

her sworn statement given at the attorney's office. In short, the implication was inescapable: deliberate falsehood was the only explanation for the difference between the mother's testimony and her out-of-court statement.

Although decided before adoption of the Federal Rules of Evidence, *Hanger v. United States*, 398 F.2d 91, 105 (8th Cir. 1968), contains pertinent language:

> [W]e think that in the situation where a key witness admittedly changes his story or his recital of important relevant events and admits that his former statements in regard to the proceedings in question were a fabrication, that he should be allowed to not only testify as to what he now swears is a true recital of the events, but to also testify as to the reasons for his fabrication and the reasons why he decided to change his story; and all of the incidents and factors that shed light upon his credibility, both pro and con, are admitted, subject to the Court's discretion, and left to the jury for its evaluation and determination. Naturally, a person who has made admittedly inconsistent statements stands impeached, but the court and the jury are still charged with the responsibility of ascertaining which evidence is to be credited and only by a full exposure of the relevant and pertinent facts in this difficult situation can the jury make an intelligent and reasonable attempt to ascertain the truth. . . . It is not a swearing match as to what was said but presents the crucial issue of which statements constitute a correct recital of the events under consideration. In this posture relevant evidence, particularly evidence which is subject to cross-examination, should in the discretion of the trial court be submitted to the jury for its evaluation.

See, also, Graham, *Prior Consistent Statements: Rule 801(d)(1)(B) of the Federal Rules of Evidence, Critique and Proposal*, 30 Hastings L.J. 575 (1979).

If an attack on a witness' credibility through use of an inconsistent statement is accompanied by, or interpretable as, a charge of a plan or contrivance to give false testimony, proof of a prior consistent statement before the plan or contrivance was formed tends "strongly to disprove that the testimony was the

result of contrivance. . . . It is for the judge to decide whether the impeachment amounts to a charge of contrivance, and ordinarily this is the most obvious implication." See McCormick on Evidence § 49 at 119-20 (E. Cleary 3d ed. 1984).

The mother's prior consistent statement made to Officer Domangue contains evidence relevant to the charge against Johnson. See Rule 401 of the Nebraska Evidence Rules (Neb. Rev. Stat. § 27-401 (Reissue 1979)). Subject to the balance found in Rule 403 of the Nebraska Evidence Rules (Neb. Rev. Stat. § 27-403 (Reissue 1979)), admission of the mother's prior consistent statement was a matter within the discretion of the trial court. We find no abuse of discretion by the trial court in admitting the mother's prior consistent statement as substantive proof of the charge against Johnson. Cf., *State v. Brown*, 190 Neb. 96, 206 N.W.2d 331 (1973); *State v. Searles*, 214 Neb. 849, 336 N.W.2d 571 (1983).

We now consider Johnson's contentions regarding other evidence excluded at trial. Extrinsic evidence of a prior inconsistent statement may be admitted under Rule 613(2) (Neb. Rev. Stat. § 27-613(2) (Reissue 1979)) of the Nebraska Evidence Rules if the declarant is given an opportunity to explain or deny the statement and the opposing party is afforded the opportunity to interrogate the declarant. Depending on counsel's strategy, the inconsistent statement can be introduced prior to giving the declarant an opportunity or chance to explain. See *State v. Price*, 202 Neb. 308, 275 N.W.2d 82 (1979). However, if counsel chooses to question the declarant concerning the inconsistent statement before introducing the extrinsic evidence of the inconsistent statement, and if the declarant admits making the inconsistent statement, counsel may not introduce extrinsic evidence of the inconsistent statement. See, *State v. Packett*, 206 Neb. 548, 294 N.W.2d 605 (1980); *State v. Drew,* 216 Neb. 685, 344 N.W.2d 923 (1984). See, also, 3 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 613[04] (1982). "If the witness being impeached admits to the prior inconsistent statement, then he has been impeached and further extrinsic evidence is neither necessary nor generally allowed." Fenner, *Competency and Examination of Witnesses Under Article VI of the Federal Rules of Evidence and the*

Nebraska Evidence Rules, 9 Creighton L. Rev. 559, 600 (1976). When the witnesses admitted giving prior sworn statements contradicting their testimony at trial, each witness' admission at trial was a self-impeachment so that further extrinsic evidence, namely, the sworn statements (interviews), was unnecessary for impeachment. Impeachment had already been achieved out of the mouth of each witness sought to be impeached by a prior inconsistent statement. The tape-recorded telephone conversation between the mother and Johnson's attorney was, likewise, inadmissible for impeachment. The mother had categorically admitted she had lied during the telephone conversation with Johnson's attorney. Therefore, there was no need for extrinsic evidence to impeach the mother. The district court was correct in refusing to admit the sworn statements (interviews) and tape-recorded telephone conversation for the purpose of impeachment.

Regarding the trial court's refusal to allow Officer Domangue to testify concerning his conversation with the victim on the evening of Johnson's arrest, the victim's statement to Officer Domangue was inconsistent with the victim's testimony at trial. The victim testified that Johnson had assaulted him, while, according to offer of proof regarding the excluded testimony of Officer Domangue, the victim negated any sexual assault and, consequently, any sexual penetration. The victim's prior inconsistent statement was admissible, extrinsic evidence bearing upon the witness' credibility. The excluded evidence from Domangue would have been admissible only for the purpose of impeachment. However, the victim's credibility had already been attacked extensively during Johnson's cross-examination of the victim. Rule 103(1) (Neb. Rev. Stat. § 27-103(1) (Reissue 1979)) of the Nebraska Evidence Rules provides: "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected . . . ." Evidence in the nature of impeachment sought to be introduced through Officer Domangue was clearly cumulative. We conclude that the exclusion of Officer Domangue's testimony was harmless error. See *State v. Smith*, 218 Neb. 201, 352 N.W.2d 620 (1984).

AFFIRMED.

FREDDIE LEE HARE, APPELLEE AND CROSS-APPELLANT, V. WATTS TRUCKING SERVICE, APPELLANT AND CROSS-APPELLEE.

370 N.W.2d 143

Filed July 5, 1985. No. 84-708.

1. **Workmen's Compensation: Evidence.** The object of the evidentiary standard in medical disputes in workmen's compensation cases is the elicitation of substantial evidence leading to the direct conclusion of an employment-related disability.
2. **Expert Witnesses.** The value of an expert's opinion is no stronger than the facts upon which it is based.
3. **Workmen's Compensation: Appeal and Error.** If the judgment of the compensation court determining a disability is supported by competent evidence in the record, that conclusion is binding upon us. We are not free to substitute our judgment for that of the compensation court.

Appeal from the Nebraska Workmen's Compensation Court. Affirmed in part, and in part reversed and remanded for further proceedings.

Joni R. Kerr of Kennedy, Holland, DeLacy & Svoboda, for appellant.

David T. Siegel of Weinberg & Weinberg, P.C., for appellee.

BOSLAUGH, WHITE, and HASTINGS, JJ., and BRODKEY, J., Retired, and FAHRNBRUCH, D.J.

WHITE, J.

This is an appeal by Watts Trucking Service of an award from the determination by the three-judge panel of the Workmen's Compensation Court that appellee Hare suffered injuries to his right hand, back, and right knee arising out of and in the course of his employment as an employee of Watts Trucking Service as a garbage collector on August 30, 1982. The court awarded certain medical and hospital expenses totaling $551.75 to Hare and determined that Hare was temporarily totally disabled for a period of 2 5/7 weeks and thereafter sustained a 10-percent permanent partial disability to his body as a whole and a 10-percent loss of the use of his right leg. The court further determined that Watts was entitled to credit for certain payments made to the hospital and the doctor, in the sum of $166.75, and for compensation benefits paid Hare.

Watts urges as error the Workmen's Compensation Court's determination that Hare suffered a permanent partial disability to the leg and body as a whole and the compensation court's determination awarding payment of Dr. Maurice F. Quinlan's bill totaling $445. Hare cross-appeals and urges as error the finding that the permanent partial disability to Hare's right leg and body as a whole was limited to 10 percent instead of the 40 percent testified to by his expert witness. Hare further alleges as error the failure of the compensation court to award plaintiff vocational rehabilitation services and the failure to award Hare future medical and hospital services likely to be incurred as the result of the injury of August 30, 1982. We affirm in part and reverse in part and remand for further proceedings.

The parties stipulated that Hare was injured in an accident on August 30, 1982, arising out of and in the course of his employment and that the accident was promptly reported. The difficulty arises over the nature of the complaints made by Hare at the first visit to the emergency room at the Immanuel Medical Center and later in his followup visits to Dr. Quinlan. During the visit to the emergency room, Hare was treated for a broken finger in his right hand and made no complaint of an injury to his knee or back, nor did Hare apparently recite, on his first visit to Dr. Quinlan, that his knee and back were injured. Dr. Quinlan testified that in subsequent visits Hare did inform Dr. Quinlan of the complaints about his knee and back, which Hare stated resulted from the accident of August 30, 1982.

Hare was in the process of lifting a garbage can when his leg slipped on an object not identified. Hare fell, striking his hand on a garbage can rim as he fell, breaking the finger. It was at this same time, Hare maintained before the compensation court, that he injured his leg and back. Hare testified that he did not mention the back and leg at the time of the first visit because he was fearful that Watts would discharge him. He testified that other employees who had received injuries arising out of and in the course of employment were subsequently discharged by Watts. Hare was quite concerned about keeping his job. Dr. Quinlan also testified that Hare told him that the reason he did not immediately complain about the injury to the back and leg was his fear of his loss of employment. The compensation court

chose to believe Hare as to the reason for the late reporting of the leg and back injury, and that finding of fact is binding on us. Neb. Rev. Stat. § 48-185 (Reissue 1984); *Mulder v. Minnesota Mining & Mfg. Co.*, 219 Neb. 241, 361 N.W.2d 572 (1985).

The principal issue raised by appellant's first assignment of error relates to the testimony of Dr. Quinlan with respect to his determination of causation. The record shows that Hare attended the University of Nebraska at Lincoln, where he was engaged in intercollegiate basketball competition. There he was injured and subsequently submitted to surgery to his right knee. The evidence further disclosed that while working as a construction laborer in Colorado, Hare was severely injured in a construction accident when he was pulled into a conveyor system. In the accident Hare apparently suffered fractures of the left shoulder and lumbar spine.

Watts argued in its brief:

> [Appellant] also failed to sustain his burden of proving by competent medical testimony, that there was a causal connection between the accident and alleged disability. . . .
>
> Dr. Quinlan testified that it was "likely" that Hare's pre-existing problems with his knee was [sic] exacerbated by the fall. Dr. Quinlan further testified that it was "very likely" that Hare's pre-existing back and shoulder problems were exacerbated by the fall, although musculoskeletal complaints were frequently seen in people of the [appellant's] age group "just due to getting older."

Brief for Appellant at 23-24. Appellant maintains that this testimony was legally insufficient because it was not stated with reasonable certainty or reasonable probability. *Halbert v. Champion International*, 215 Neb. 200, 337 N.W.2d 764 (1983).

Appellant misapprehends the holding in *Halbert*. As we noted in *Halbert*, however, the object of the evidentiary standard was the elicitation of "substantial evidence" leading to the direct conclusion of an employment-related disability. *Saxton v. Sinclair Refining Co.*, 125 Neb. 468, 250 N.W. 655 (1933). We also cited with approval in *Halbert, Lane v. State Farm Mut. Automobile Ins. Co.*, 209 Neb. 396, 308 N.W.2d 503 (1981), which quoted *Marion v. American Smelting & Refining Co.*, 192 Neb. 457, 222 N.W.2d 366 (1974). In *Welke v.*

City of Ainsworth, 179 Neb. 496, 502, 138 N.W.2d 808, 812 (1965), we defined "probably" as " '[r]easonably; credibly; presumably. In all probability; very likely . . . .' " We suggested that on many occasions in the past we had said an award of compensation in a workmen's compensation case may not be based on possibility, probability, or speculative evidence, and suggested that review of those cases indicated that the decision would have been the same in every instance if we had merely said the award may not be made on possibilities or speculative evidence.

The testimony of Dr. Quinlan was direct and responsive when asked whether or not the plaintiff's complaint of back and knee injuries was caused by the accident of August 30, 1982. He answered yes. The answer, although not cast in the preferred formula that the law seems to favor and without exploring the reasons why that answer was adopted, satisfies the earlier and compelling test of substantial evidence leading to a direct conclusion of an employment-related disability. The assignment of error is without merit.

As to the second assignment of error, we have determined that appellant was charged for items not related to the injury. An employer is liable only for those reasonable medical expenses incurred as a result of a compensable accident. Neb. Rev. Stat. § 48-120 (Reissue 1984). Expenses not shown by the evidence to have been incurred as a result of a compensable accident are not allowable as charges against the employer. *Harrington v. Missouri Valley Constr. Co.*, 182 Neb. 434, 155 N.W.2d 355 (1967). 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. *Starr v. Swift & Co.*, 218 Neb. 223, 353 N.W.2d 1 (1984).

However, where there is not sufficient competent evidence to support an award, this court must modify, reverse, or set aside the award. § 48-185; *Niesen v. Logan County Co-op Oil Assn.*, 215 Neb. 587, 340 N.W.2d 146 (1983). The compensation court's award of $445 in payment of Dr. Quinlan's bill is wrong. The statement from Dr. Quinlan contained several items that were not related to the injury. On January 31, 1983, Hare was seen by Dr. Quinlan for flu and tendinitis of the right arm and

was charged $106. Hare's petition did not allege an injury to the right arm. On May 9, 1983, Hare was charged $15 for a premarital blood test. On January 3, 1984, Hare was charged $50 for a consultation with Dr. Quinlan concerning items not related to his injury. Deducting these items from Dr. Quinlan's bill results in a balance of $274, minus the amount already credited, to be paid by the appellee. Since the employer, Watts Trucking Service, received a reduction of the award of the compensation court, the employee's attorney fees in this court will not be taxed as costs against the employer. Neb. Rev. Stat. § 48-125 (Reissue 1984).

As to the cross-appeal, a more difficult situation presents itself. Dr. Quinlan testified that the degree of total permanent partial disability incurred by Hare was 40 percent of his body as a whole. The compensation court held, in effect, that Dr. Quinlan failed to account satisfactorily for the preexisting injuries received in the Colorado accident, the medical records of which were received into evidence by the compensation court. We are unable to discover a case that is precisely on point where the medical evidence is undisputed. However, as a general rule, the Nebraska Workmen's Compensation Court is not required to take the opinion of an expert as binding upon it. *Mulder v. Minnesota Mining & Mfg. Co.*, 219 Neb. 241, 361 N.W.2d 572 (1985); *Hamer v. Henry*, 215 Neb. 805, 341 N.W.2d 322 (1983); *Novotny v. Electric Hose & Rubber Co.*, 214 Neb. 216, 333 N.W.2d 406 (1983). Nor is the value of an expert's opinion stronger than the facts upon which it is based. *Davis v. Western Electric*, 210 Neb. 771, 317 N.W.2d 68 (1982).

Dr. Quinlan evaluated Hare's back injury as resulting in a 40-percent disability to the body as a whole. The probative value of this opinion was apparently diminished in the judgment of the compensation court due to Dr. Quinlan's lack of knowledge of the extent of Hare's previous back injury. As the judgment of the compensation court determining that the disability of 10 percent is supported by competent evidence in the record, that conclusion is binding upon us and we are not free to substitute our judgment for that of the compensation court. § 48-185; *Mulder, supra*; *Paris v. J. A. Baldwin Mfg. Co.*, 216 Neb. 151, 342 N.W.2d 198 (1984).

As to the issue of whether Hare was entitled to vocational rehabilitation, that issue was not determined by the compensation court. As we are an appellate court, we are not free to substitute our judgment for that of the compensation court, but simply review the decision for error. We cannot decide the matter here. The matter must be remanded to the compensation court for determination. We decline to accept as conclusive, as Watts would have us do, that the possession of a college diploma necessarily means that Hare is equipped to engage in a vocation other than one involving heavy labor, which Dr. Quinlan testifies that, from whatever cause, Hare is no longer able to perform.

The appellee also claimed future medical expenses in his cross-appeal. Since there was no evidence presented as to future medical expenses as a result of the accident on August 30, 1982, we cannot award such expenses. Until the employee receives an increase in the award of the compensation court, no attorney fees are allowed. § 48-125.

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

KATHRYN A. NORMAN, APPELLANT, V. RONALD E. SORENSEN, COMMISSIONER OF LABOR, STATE OF NEBRASKA, AND PAMIDA, INC., APPELLEES.

370 N.W.2d 147

Filed July 5, 1985. No. 84-711.

1. **Employment Security Law: Appeal and Error.** Appeals under the Nebraska Employment Security Law are reviewed de novo on the record in the Supreme Court.
2. **Employment Security Law: Proof: Good Cause.** In voluntary termination cases under the Nebraska Employment Security Law, the burden of proof is on the employee to prove that the employee's leaving was for good cause.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Affirmed.

Gary L. Fischer, for appellant.

Paul D. Kratz, for appellee Sorensen.

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

GRANT, J.

Kathryn A. Norman appeals from an order of the district court for Douglas County affirming a decision of the Nebraska Appeal Tribunal. The tribunal had affirmed a deputy's assessment of a 7-week disqualification from unemployment benefits, based upon a finding that Norman had left work voluntarily and without good cause. We affirm the order of the district court.

We first note that this court reviews appeals under the Nebraska Employment Security Law de novo on the record and that it is the duty of the Supreme Court to retry the issues of fact and reach independent conclusions. *Taylor v. Collateral Control Corp.*, 218 Neb. 432, 355 N.W.2d 788 (1984); *School Dist. No. 21 v. Ochoa*, 216 Neb. 191, 342 N.W.2d 665 (1984). Having reviewed the record de novo, we find the following facts.

Norman was employed by Pamida, Inc., as an administrative traffic clerk performing administrative and clerical duties beginning March 1983, when Pamida purchased a company then employing Norman in the same position. Effective August 29, 1983, Norman was transferred to a position in the company's warehouse due to a realignment of positions in her old department and Norman's lack of seniority. Her new duties included lifting large boxes onto a conveyor belt, removing merchandise from the boxes, ticketing the merchandise, and repacking it. Norman first discovered the physical demands of the new position when she reported for her first day at that position. She immediately informed her supervisors of her displeasure with the change and was told that they would check to see if there was some mistake. In the meantime, she was to work the new job.

Norman did not work on August 30 and 31. However, she did notify her supervisor on August 31 that she was incapable of

doing heavy lifting due to back problems, and provided medical evidence to that effect. As a result, Pamida altered her duties to eliminate the requirement of lifting boxes onto the conveyor. Also, Norman was advised that she could apply for clerical positions as they became available and was referred to the Pamida personnel department.

Norman next reported for work on September 1, 1983. During the day, she hyperventilated, became dizzy, and was taken to the hospital by her employer. She worked again on September 6, 1983, after the Labor Day weekend, and again hyperventilated, passed out, and was taken to the hospital. Norman had, on at least one occasion, experienced similar hyperventilation and dizziness while performing clerical duties for Pamida.

Sometime prior to her resignation, Norman had filled out an application for a secretarial position which had opened up. On September 7 she was told by the personnel department to come in and speak with them about the opening. Rather than follow up on that job vacancy, Norman resigned the next day.

Norman first suggests that the district court erred in finding that she left her employment voluntarily and without good cause. She asserts that her health problems forced her to resign and that her employer did not make reasonable accommodations to her health problems. Pamida and Norman submitted evidence on this disputed fact question. We agree with the district court in its statement that "[e]ven though petitioner's [Norman's] duties were changed, her salary remained the same, the employer immediately remedied any physical problems regarding the new position and, the employer was making an effort to transfer petitioner Norman back into another clerical position."

"In voluntary termination cases the burden of proof is on the employee to prove that the leaving was for good cause." *McClemens v. United Parcel Serv.*, 218 Neb. 689, 691, 358 N.W.2d 748, 750 (1984). Norman did not meet her burden. It is clear that she considered the lateral transfer to the warehouse position to be a demotion and attempted to show that the motive for the transfer was other than a business judgment.

On her first day on the job, Norman immediately stated that,

due to back problems, she could not do heavy lifting. Upon receiving of medical evidence to that effect, the company eliminated the lifting requirement. After her dizzy spells and hyperventilation, the company attempted to find her a clerical vacancy by contacting the personnel department. Instead of meeting with personnel workers of the company to discuss this vacancy, Norman chose to resign. This court believes, as did the appeal tribunal and the district court, that Pamida was attempting to transfer Norman back to a clerical position when she voluntarily left her employment. Clearly, the company was making reasonable accommodations for Norman's health.

It should also be noted that there is no evidence in the record directly linking Norman's hyperventilation problems with the warehouse position. Norman's admission that she experienced similar hyperventilation problems while performing clerical duties belies such a causal connection.

Norman also assigns as error the trial court's failure to apply Neb. Rev. Stat. § 48-628 (Cum. Supp. 1982). That section states in pertinent part:

> An individual shall be disqualified for benefits:
>
> . . . .
>
> (c) For any week of unemployment in which he or she has failed, without good cause, either to apply for available, suitable work when so directed by the employment office or the commissioner or to accept suitable work when offered him or her, or to return to his or her customary self-employment, if any, and the commissioner so finds, and for not less than seven weeks nor more than ten weeks which immediately follow such week, as determined by the commissioner, and his or her total benefit amount to which he or she is then entitled shall be reduced by an amount equal to the number of weeks for which he or she has been disqualified by the commissioner.

Norman suggests that, because Pamida so changed her duties, this was a case of refusal of unsuitable work. Such a characterization of this case is not correct. Norman was employed and left without good cause. Pamida's actions were clearly within the perimeters of § 48-628(a). Such actions were

not an offering of unsuitable work within the meaning of § 48-628(c), which simply states an additional reason for disqualification from benefits when an unemployed person refuses an offer of "suitable" work and chooses to remain unemployed.

The order of the district court is affirmed.

AFFIRMED.

UNITED LABORATORIES, INC., A DELAWARE CORPORATION, APPELLANT, V. RONALD E. SORENSEN, COMMISSIONER OF LABOR, AND JAMES P. BREEDEN, APPELLEES.

369 N.W.2d 647

Filed July 5, 1985. No. 84-725.

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

John D. Hartigan, Jr., of Kennedy, Holland, DeLacy & Svoboda, and Paul G. Simon and Dennis Pence of Keck, Mahin & Cate, for appellant.

Jerry D. Slominski, for appellee Sorensen.

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

PER CURIAM.

This is an appeal in a contribution case from a determination made by the Nebraska Department of Labor, finding that James P. Breeden was an employee of the appellant, United Laboratories, Inc., and not an independent contractor, and therefore appellant was liable for contributions to the state Unemployment Compensation Fund. United Laboratories appealed the decision of the Department of Labor to the district court for Douglas County, Nebraska, which thereafter dismissed the appeal on the basis that the appeal should have been filed in the district court for Lancaster County, Nebraska,

pursuant to Neb. Rev. Stat. § 48-650 (Reissue 1984). It is from that order of dismissal that United Laboratories now appeals. The decision in this case is controlled by our earlier decisions in *Whitehouse Energy Savers v. Hanlon*, 214 Neb. 572, 334 N.W.2d 802 (1983), *Northern Messenger v. Sorensen*, 218 Neb. 846, 359 N.W.2d 787 (1984), and *State v. Saville*, 219 Neb. 81, 361 N.W.2d 215 (1985). The decision of the district court in dismissing the appeal is affirmed.

AFFIRMED.

GRANT, J., concurring.

I agree with the opinion of the majority, but my concurrence is based on my conclusions as to certain actions of the Commissioner of Labor. In my judgment the commissioner's action in, in effect, appointing the Nebraska Appeal Tribunal to hold the hearing required by Neb. Rev. Stat. § 48-650 (Reissue 1984) and to render the commissioner's order on redetermination as required by that statute has created additional confusion in an already confusing area of the law.

Neb. Rev. Stat. § 48-633 (Reissue 1984) establishes "impartial appeal tribunals" which are to "hear and decide disputed claims." Claims are defined in Neb. Rev. Stat. § 48-629 (Reissue 1984) as "claims for benefits." Benefits are the subject of Neb. Rev. Stat. §§ 48-623 through 48-647 (Reissue 1984). In *Whitehouse Energy Savers v. Hanlon*, 214 Neb. 572, 334 N.W.2d 802 (1983), we stated that appeals in connection with claims for benefits are to be taken to the district court of the county of the claimant's last employment or residence, or any district court upon which the parties agree. See § 48-638.

There appears to be little problem with that side of the procedure. The problems arise in the cases involving contribution liability. Appeals involving the contribution liability of the employer are taken to the district court for Lancaster County, under § 48-650. It is clear from a reading of that section that the appeal is not from an "appeal tribunal," however, but, rather, the appeal is from the commissioner's "denial of his [the employer's] application" or the commissioner's redetermination. In this case the appeal tribunal was performing that function on behalf of the

commissioner, apparently on assignment of the commissioner. Since the determination of the appeal tribunal in cases under § 48-650 is, in reality, a determination of the commissioner, the commissioner would have no right to appeal an adverse finding. See *Karnes v. Wilkinson Mfg.*, *ante* p. 150, 368 N.W.2d 788 (1985).

With that in mind I would also express disapproval of the commissioner's practice of using the Nebraska Appeal Tribunal to make his determinations as to the issues on contribution under § 48-650. Such a practice can only mislead parties to the proceedings and add confusion to an already complex situation. Further, it is questionable if the statutes permit such a use of the tribunal. Nevertheless, I concur, because in my judgment in this case the findings of the appeal tribunal are simply those of the commissioner on his redetermination of a contribution issue under § 48-650. In that situation, appeal must be taken to the district court for Lancaster County.

PATTI A. KORBELIK, APPELLANT, V. GARY L. KORBELIK, APPELLEE.

369 N.W.2d 648

Filed July 5, 1985. No. 84-738.

Appeal from the District Court for Fillmore County: ORVILLE L. COADY, Judge. Affirmed.

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

Joseph H. Murray of Germer, Koenig, Murray, Johnson & Daley, for appellee.

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

PER CURIAM.

The appellant, Patti A. Korbelik, applied to the district court

for Fillmore County, Nebraska, for an order modifying a decree of dissolution of marriage insofar as the decree awarded the custody of two of the parties' three minor children to the appellee, Gary L. Korbelik. Following a trial to the district court, the application was denied. We have reviewed the record de novo and determine that the order of the district court denying the application was not in error. The judgment is therefore affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. SHEDRICK WILLIAMS, APPELLANT.
370 N.W.2d 150

Filed July 5, 1985. No. 84-816.

Appeal from the District Court for Douglas County: PAUL J. HICKMAN, Judge. Remanded with directions.

Thomas M. Kenney, Douglas County Public Defender, and Bennett G. Hornstein, for appellant.

A. Eugene Crump, Deputy Attorney General, and Charles E. Lowe, for appellee.

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

PER CURIAM.

In this appeal from his conviction following his plea of guilty to the offense of forgery of an instrument having a face value of $300 or more, the defendant assigns as a single error the failure of the trial court to inform him, prior to taking the plea, of the maximum and minimum penalties possible upon conviction. The State concedes that the record does not reflect that the defendant was so informed.

In *State v. Turner*, 186 Neb. 424, 425-26, 183 N.W.2d 763, 765 (1971), we stated: "Before accepting a guilty plea a judge is

expected to sufficiently examine the defendant to determine whether he understands the nature of the charge, the possible penalty, and the effect of his plea."

Under similar facts, since *State v. Curnyn*, 202 Neb. 135, 274 N.W.2d 157 (1979), we have adopted the following procedure:

> We therefore remand this case to the sentencing court. In such court, defendant is granted the right to apply to that court for leave to withdraw his plea of guilty. Should defendant fail to exercise that right to seek withdrawal of his plea within 10 days of the issuance of the mandate in this case, then the sentence heretofore entered by the sentencing court shall stand.
>
> If the defendant elects to withdraw his plea, the trial court shall hold an evidentiary hearing to determine whether the defendant was, in fact, aware of the possible penalties for the offense in question at the time he entered his plea. If the court finds that defendant was not aware of the penal consequences of the plea, the judgment of conviction shall be deemed vacated and he shall be permitted to plead again. If the court determines that defendant was aware of the penalties and consequences of the plea, the judgment and sentence shall stand.

State v. Fischer, 218 Neb. 678, 679, 357 N.W.2d 477, 478 (1984); *State v. Schaeffer*, 218 Neb. 786, 359 N.W.2d 106 (1984); *State v. McMahon*, 213 Neb. 897, 331 N.W.2d 818 (1983).

The cause is remanded to the district court for proceedings in conformity with this opinion.

REMANDED WITH DIRECTIONS.

SHARON JEANNINE REISER, APPELLANT, V. MARVIN REISER, APPELLEE.

369 N.W.2d 648

Filed July 5, 1985. No. 84-924.

Appeal from the District Court for Boyd County: EDWARD E. HANNON, Judge. Affirmed.

Tad D. Eickman, for appellant.

James G. Egley of Moyer, Moyer, Egley & Fullner, for appellee.

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

PER CURIAM.

Sharon Jeannine Reiser appeals from an order entered by the district court for Boyd County, Nebraska, finding that while the appellant was not in contempt of court for failing to permit the appellee, Marvin Reiser, to visit with the children of the parties, the previous order entered by the district court was indefinite as to when visitation should occur and for that reason should be amended to specify when and under what conditions visitation with the appellee should occur. The district court further found that the appellant, though not in contempt of court, was not entitled to the recovery of any attorney fees. We have now reviewed the record de novo and find that the decision of the district court is in all respects correct. The judgment is affirmed.

AFFIRMED.

IN RE INTEREST OF W.C.O., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. W.D.O., APPELLANT.

370 N.W.2d 151

Filed July 5, 1985. No. 84-941.

1. **Parental Rights: Juvenile Courts: Jurisdiction.** A child must in fact be dependent and neglected at the time proceedings are instituted to have it declared a neglected and dependent child, or it should be in danger of so becoming in the near future.
2. _____: _____: _____. The jurisdiction of the State arises out of the power that every sovereignty possesses as parens patriae to every child within its borders to determine the status and custody that will best meet its needs and wants.

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

Dennis R. Keefe, Lancaster County Public Defender, and Robert G. Hays, for appellant.

Michael G. Heavican, Lancaster County Attorney, and Jan W. Sharp, for appellee.

Margene M. Timm, guardian ad litem.

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

PER CURIAM.

The natural father of the child involved in this case appeals from an order entered by the separate juvenile court of Lancaster County, Nebraska, on November 14, 1984, in which the court found that W.C.O. was a child lacking proper parental care by reason of the faults and habits of his father, pursuant to Neb. Rev. Stat. § 43-247 (Cum. Supp. 1982), and from the order of disposition dated December 4, 1984, placing custody of the minor child with the natural mother. We affirm.

On September 28, 1984, a petition was filed in the separate juvenile court of Lancaster County, Nebraska, pursuant to § 43-247(3)(a), charging that by reason of the faults and habits of his father, W.C.O. was a minor child subject to the jurisdiction of the separate juvenile court.

On November 13, 1984, an adjudication hearing was held by the separate juvenile court of Lancaster County, Nebraska, at which time evidence was adduced. The evidence disclosed that on September 5, 1984, W.C.O.'s father was at home alone with W.C.O. and two boys for whom W.C.O's mother was babysitting. W.C.O. was 17 months old at this time. While the mother was gone from the home, the father committed an act of fellatio on one of the children, a boy 4 years old. As a result of the incident, the father was charged with first degree sexual assault. Although the father denied that any such incident had occurred, there was testimony from two of the arresting officers that the father had confessed to them that the act had been committed. The separate juvenile court found that it did have jurisdiction over the minor child by reason of the child being a juvenile who lacked proper parental care by reason of the fault and habits of his parent, as provided in § 43-247(3)(a).

Final disposition was continued until December 4, 1984.

On December 4, 1984, a dispositional hearing was held, at which time the minor child, W.C.O., was placed in the custody of his mother. His father was ordered not to be alone with the child at any time. At the dispositional hearing a report prepared by Child Protective Services was offered into evidence. The report found that W.C.O. was at risk unless the father successfully completed a counseling program, and therefore recommended that the minor child remain in the custody of his mother and that his father obtain psychological evaluation by a therapist qualified and experienced in working with sexual abuse offenders.

The father appeals to this court, essentially alleging that the separate juvenile court erred in finding that the minor child was a child lacking in proper parental care by reason of the fault or habits of his father, because there was no evidence that the minor child was either aware of or affected by his father's alleged inappropriate sexual contact with another child. We believe that the appellant misconceives the purpose and effect of the Nebraska Juvenile Code, Neb. Rev. Stat. §§ 43-245 to 43-2,129 (Cum. Supp. 1982). Under the provisions of § 43-247 the juvenile court has jurisdiction of any juvenile "who lacks proper parental care by reason of the fault or habits of his parent." The question that we must therefore address is whether a child lacks proper parental care by reason of the fault or habits of his parent if his parent has committed a sexually abusive act upon another minor child. The danger of permitting such a father to remain in a position where he may be alone with his own minor child should be obvious. It is not the intent or purpose of the juvenile code to require the separate juvenile court to wait until disaster has befallen a minor child before the court may acquire jurisdiction. If it is reasonable to assume that injury will occur absent action by the court, then the court may assume jurisdiction and act accordingly. In *Jones v. State*, 175 Neb. 711, 717, 123 N.W.2d 633, 637 (1963), we said: " 'A child must in fact be dependent and neglected at the time proceedings are instituted to have it declared a neglected and dependent child, *or it should be in danger of so becoming in the near future.*' " (Emphasis supplied.) Furthermore, in *Stewart v.*

McCauley, 178 Neb. 412, 415, 133 N.W.2d 921, 924 (1965), we noted: "The jurisdiction of the state arises out of the power that every sovereignty possesses as parens patriae to every child within its borders to determine the status and custody that will best meet its needs and wants . . . ." We went on to say in *Stewart* at 418, 133 N.W.2d at 925:

> The juvenile court is a product of the solicitude of the law for the welfare of infants. Its powers and duties are described more or less in detail in our statutes, and because of their humanitarian and beneficient [sic] purpose, they should be liberally construed to the end that their manifest purpose may be effectuated to the fullest extent compatible with their terms.

The report filed by Child Protective Services at the dispositional hearing merely supports the juvenile court's conclusion. The report makes clear that in the opinion of the agency the father poses a risk to the minor child and should not be permitted to be alone with the minor child unless and until psychological evaluation has been conducted and the treatment prescribed taken. While the State did not produce any evidence regarding the risk to the minor child at the adjudication hearing, the court could consider the fact that the father committed a sexual act upon a 4-year-old child and therefore was likely to commit a similar act upon his own minor child. As we noted in *Mullikin v. Lutkehuse*, 182 Neb. 132, 135, 153 N.W.2d 361, 364 (1967):

> Under the evidence in this case, the fitness of the mother and grandmother is of such a nature as to require the removal of the child from their care and custody for the best interests of the child. The environment in which this little girl would be raised would be such as to risk the serious effects of an unmoral climate. The placing of the child where her surroundings, teaching, and care would be conducive to proper training, including the establishment of adequate physical, mental, and moral standards, is, as the trial court found, to the best interests of the child.

Even if the evidence adduced at the adjudication hearing was insufficient to establish that the child was in physical danger from the father by reason of the father's fault or habits, it was

more than sufficient to establish that unless this problem was cured the child was likely to be raised in an immoral atmosphere in which, at a minimum, the child would be taught that such acts as performed by the father were not either immoral or illegal. The juvenile court was correct in assuming jurisdiction over the child and entering the temporary order. The judgment is affirmed.

AFFIRMED.

KRIVOSHA, C.J., dissenting.

I must respectfully dissent from the majority opinion in this case. I do so reluctantly because I recognize that we are dealing with the welfare of a young child. Nevertheless, I believe that courts must be bound by their own rules and cannot choose to ignore those rules even where by doing so the court may be accomplishing some good.

With the exception of limited jurisdiction granted to the Supreme Court by the Constitution of the State of Nebraska, see Neb. Const. art. V, § 2, and the chancery and common-law jurisdiction granted to the district courts by the Nebraska Constitution, see Neb. Const. art. V, § 9, all courts in Nebraska are limited in their jurisdiction to those matters given to them by the Legislature. Without that authority the courts are not free to act. The juvenile court is even more limited in its jurisdiction, relying, as the court did in this case, upon the occurrence of an event or the creation of a situation as described in Neb. Rev. Stat. § 43-247 (Cum. Supp. 1982). As noted in 20 Am. Jur. 2d *Courts* § 91 at 451 (1965): "A court possesses only such jurisdictional powers as are directly, or indirectly, expressly or by implication, conferred upon it by the constitution or legislation of the sovereignty on behalf of which it functions . . . ." The Legislature, within constitutional limitations, can fix and circumscribe the jurisdiction of the various courts of this state, and where the Legislature has not granted such authority, the courts are not free to act. See, *Bullington v. Angel*, 220 N.C. 18, 16 S.E.2d 411 (1941); *Coonradt et al. v. Sailors*, 186 Tenn. 294, 209 S.W.2d 859 (1948).

In the instant case the juvenile court took jurisdiction over the minor child by reason of § 43-247(3)(a), which required the court to find that the minor child lacked "proper parental care

by reason of the fault or habits of his . . . parent." An examination of the testimony offered at the adjudication hearing simply does not support the claim that the minor child lacked proper parental care by reason of the fault or habits of his parent. All that the evidence introduced at the adjudication hearing established was that on one isolated occasion, the father committed an act which is a violation of state law. To be sure, the act was depraved and without excuse. It was clearly an act for which the father should be prosecuted and punished. But the fact that the father has committed a criminal act does not establish that the child is without proper parental care, absent further evidence. There could have been evidence introduced at the adjudication hearing, as there was at the dispositional hearing, to support the claim that because the father had committed this depraved act upon another minor child, there was a likelihood that the father would commit a similar act upon his own minor child. With that evidence there would have been no difficulty in the juvenile court's acquiring jurisdiction. The difficulty, however, is that the State, for whatever reason, chose not to introduce such evidence and, instead, apparently relied upon the separate juvenile court's taking judicial notice of a fact which was not a matter of common knowledge. The evidence indicated that the minor child was in no manner affected. While the State would argue that it naturally follows that if a parent commits an act of fellatio on another minor child, he will commit such an act on his own minor child, there simply is no evidence to support that claim. One may just as effectively argue that a parent may treat his own children better than he treats the children of others.

The majority has cited the case of *Stewart v. McCauley*, 178 Neb. 412, 133 N.W.2d 921 (1965), in support of its position. In that very same case, Justice Carter, writing in dissent, made an interesting observation. He said at 422, 133 N.W.2d at 927, " 'Where a right has been created by statute which did not exist at the common law, the legislature may impose restrictions thereon, and the conditions so imposed qualify and are an integral part of the act and must be fully complied with in the manner therein prescribed,' " citing *Duhrkopf v. Bennett*, 108 Neb. 142, 187 N.W. 813 (1922). He further noted at 423-24, 133

N.W.2d at 928:

> The court may not exercise its powers over a ward of the court until such time as the ward has been brought within its jurisdiction and its power to adjudicate properly invoked. Where an action grounded on statute is not in compliance with its terms, the power of the court to adjudicate does not exist and the action is for dismissal.

I am inclined to agree with Justice Carter. The State may well have been able to produce the necessary evidence. But when it fails to do so, the court should not fill the holes. If we are indeed to remain a country of laws and not a country of unbridled authority, then the State must be compelled in each instance to meet its burden or the citizen must be free of governmental restraint, no matter how compelling the reasons to do otherwise. The record in this case was simply insufficient at the adjudicative hearing, and the motion to dismiss made at the close of that hearing should have been granted. I would have reversed.

IN RE INTEREST OF H.W., ALLEGED TO BE A MENTALLY ILL DANGEROUS PERSON.
STATE OF NEBRASKA, APPELLEE, V. H.W., APPELLANT.

370 N.W.2d 155

Filed July 5, 1985. No. 85-094.

1. **Mental Health: Pleadings.** Fulfilling the requirement of Neb. Rev. Stat. § 83-1025 (Reissue 1981) of the Nebraska Mental Health Commitment Act, Neb. Rev. Stat. §§ 83-1001 et seq. (Reissue 1981), that the petition for commitment shall include a description of the behavior constituting the basis for commitment does not require the naming of witnesses or the recitation of testimony.
2. **Mental Health: Proof.** For commitment under the Nebraska Mental Health Commitment Act, Neb. Rev. Stat. §§ 83-1001 et seq. (Reissue 1981), the burden is on the petitioner to establish by clear and convincing evidence both mental illness and dangerousness of the committee.
3. **Mental Health: Appeal and Error.** Although the district court is required to review the determination of the mental health board de novo on the record, this

court will not interfere on appeal with the final order made by the district court unless we can say as a matter of law that it is not supported by clear and convincing evidence.

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

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

Barry Waid, Deputy Scotts Bluff County Attorney, for appellee.

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

PER CURIAM.

This is an appeal from the judgment of the district court which affirmed the order of the Scotts Bluff County Mental Health Board finding the appellant, H.W., to be a mentally ill dangerous person within the meaning of Neb. Rev. Stat. § 83-1009 (Reissue 1981). We affirm.

Appellant assigns as errors, first, that the board erred in allowing testimony of witnesses as to matters not contained in the affidavit attached to the petition for commitment and, second, that there was not clear and convincing proof that H.W. was a mentally ill dangerous person.

Neb Rev. Stat. § 83-1025 (Reissue 1981) of the Nebraska Mental Health Commitment Act, Neb. Rev. Stat. §§ 83-1001 et seq. (Reissue 1981), provides in part that "[t]he petition [for commitment] shall include a description of the behavior which constitutes the basis for the petitioner's concluding that the individual is a mentally ill dangerous person . . . ."

The petition alleged "That the particular description of the person's behavior which constitutes the basis for the Petitioner's conclusions is contained in the Affidavit attached hereto, and by reference incorporated herein."

The affidavit contains statements that H.W. phoned two different persons and told one of them she was going to kill her husband and threatened "to get" the other one. Appellant complains that not only were those two persons permitted to testify as to those facts but two additional witnesses, who were

not named in the affidavit, were permitted to testify as to similar threats. Although conceding that the names of these witnesses had been disclosed to her before trial, she argues that this violates the rule set forth in *Badran v. Bertrand*, 210 Neb. 747, 316 N.W.2d 763 (1981), that proof must correspond with the allegations in the pleadings.

The simple answer to that argument is that the petition must set forth the facts, or, in this instance, a description of the behavior constituting the basis for commitment, which was done. There is no requirement that the evidence be pleaded.

As to the sufficiency of the evidence, the petitioner has the burden of establishing both mental illness and dangerousness by clear and convincing evidence. Although the district court is required to review the determination of the mental health board de novo on the record, this court will not interfere on appeal with a final order made by the district court in a mental health proceeding unless we can say as a matter of law that it is not supported by clear and convincing evidence. *State v. Mayfield*, 212 Neb. 724, 325 N.W.2d 162 (1982); *Hill v. County Board of Mental Health*, 203 Neb. 610, 279 N.W.2d 838 (1979).

As previously stated, four witnesses testified that H.W. had threatened to kill her husband. The appellant herself admitted to making the threats, although she claimed they were not serious. A psychiatrist testified that, in his opinion, H.W. was mentally ill and dangerous.

The judgment of the district court is fully supported by the evidence, and it is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. JEANETTE J. MANNS, ALSO KNOWN AS JEANETTE GAMBEL, ALSO KNOWN AS JEANETTE WORKMAN, AND JAMES W. MANNS, JR., APPELLEES.

370 N.W.2d 157

Filed July 5, 1985. No. 85-261.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Affirmed in part, and in part reversed.

Stephen E. Sturek, Jr., for appellant.

David S. Lathrop, Jr., of Lathrop, Albracht & Lathrop, for appellees.

KRIVOSHA, C.J.

This appeal is brought before a single judge of the Supreme Court of Nebraska pursuant to the provisions of Neb. Rev. Stat. § 29-824 (Cum. Supp. 1984) for the sole purpose of reviewing whether the action of the district court for Sarpy County, Nebraska, suppressing certain physical evidence and statements was in error. The district court found that the physical evidence was the product of a nonconsensual, illegal search and that the statements thereafter made were the "fruits" of that search. Accordingly, the district court sustained motions to suppress both the evidence and the statements.

The evidence as produced by the State disclosed that on December 4, 1984, Det. Sgt. William Gumm of the Bellevue Police Department received information that the Omaha Police Department believed that stolen property could be found at the residence of the appellees, Jeanette and James Manns. Detective Gumm and four other police officers went to the Manns residence at about 1:15 on the afternoon of December 4, 1984. They did not attempt to obtain a search warrant before going to the Manns residence, though the evidence does not indicate the existence of any exigent circumstances. Gumm testified that the police knew that the house belonged to the Mannses. Eventually, all five officers entered the house through the front door. The door was answered by an individual identified as a friend of the residents. Upon entering the house the officers proceeded to search the main floor. The officers

maintain that they were simply attempting to secure the area. Shortly after the officers entered the home and began their search of the first floor, Mrs. Manns entered. The officers explained that they were investigating the theft of two TVs and two VCRs. According to Gumm, Mrs. Manns advised him that she had recently purchased a TV and VCR from a friend. There is a significant conflict in the evidence regarding what transpired thereafter. Gumm maintains that he merely asked if he could see the items and that Mrs. Manns said he could and escorted him to the basement, where the items were kept. Mrs. Manns, the only other witness to testify at the suppression hearing, said she told Detective Gumm that she had recently purchased a TV and VCR. He then said to her, "Show them to me." Mrs. Manns then went through the kitchen and started down the stairs to the basement and was followed by the officers. In the basement the officers found and seized a TV and a VCR with serial numbers identical to the serial numbers of the items reported as stolen.

Mrs. Manns was asked to come down to the Omaha police headquarters to give a statement. Upon arrival at the police station Mrs. Manns was asked to give a statement, though she was not given any *Miranda* warnings. While she was not advised that she was under arrest, the evidence makes it clear that she was not free to refuse to accompany the officers or free to leave the police station until she had given a statement. She was thereafter released and arrested 9 days later by Bellevue police officers, when she was formally charged with the offense of theft by receiving stolen property over $300 in value but less than $1,000, in violation of Neb. Rev. Stat. §§ 28-517 (Reissue 1979) and 28-518(2) (Cum. Supp. 1984). Upon her arrest and after being advised of her *Miranda* rights, Mrs. Manns gave a written statement to the officers in which she maintained that she had purchased the equipment from a friend. Subsequently, Mr. Manns was arrested and, after being advised of his *Miranda* rights, gave a written statement similar to that given by Mrs. Manns.

The State maintains that the district court erred in suppressing the physical evidence obtained in the search of the Manns residence because the search was with the consent of

Mrs. Manns, and further erred in suppressing the written statements of both Mr. and Mrs. Manns made several weeks later. During the course of argument to the one-judge court, counsel for Mr. Manns conceded that there was no basis for suppressing his statement. That leaves us, then, with the questions of whether the district court erred in suppressing the physical evidence and the subsequent written statement given by Mrs. Manns. I shall address them in that order.

While the right to be free from unreasonable searches and seizures is guaranteed by the fourth amendment of the U.S. Constitution and by Neb. Const. art. I, § 7, that right may be waived voluntarily by the citizen. See, *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973); *State v. Horn*, 218 Neb. 524, 357 N.W.2d 437 (1984). In order, however, for the consent to be effective, it must be a free and unconstrained choice and not the product of a will "overborne." See *State v. Horn, supra*. The determination of whether consent to a search is voluntarily given must be based upon the totality of the circumstances and is a question of fact. See, *State v. Horn, supra*; *State v. Ferrell*, 218 Neb. 463, 356 N.W.2d 868 (1984). Such a determination will not be set aside on appeal unless clearly erroneous, *State v. Ferrell, supra*.

The evidence is clear that the entry into the home was in violation of the Mannses' fourth amendment rights. The friend had no common authority over the premises and could not have given permission. See, *United States v. Matlock*, 415 U.S. 164, 94 S. Ct. 988, 39 L. Ed. 2d 242 (1974); *State v. Billups*, 209 Neb. 737, 311 N.W.2d 512 (1981). Unless it can be said that Mrs. Manns' "consent" was thereafter voluntarily obtained and not coerced, the decision of the district court finding that Mrs. Manns' fourth amendment rights were violated is correct. The district court concluded that when an individual is confronted by five police officers in the process of searching her home and commanded to display equipment, her "consent" is not voluntarily given but, rather, is coerced. Had I been the trier of fact, I might have reached a contrary conclusion under the facts in this case. Mrs. Manns never denied she was in possession of the items and at all times maintained she had purchased them. Granting the officers permission to see the items would be

wholly consistent with the claim that she purchased the items, and therefore it appears reasonable to believe she voluntarily gave consent. The district court, however, found to the contrary. I cannot as a matter of law say that the district court was in error in reaching the conclusion it reached. Being unable to say that it was clearly in error, I am therefore bound to accept the findings of fact made by the district court. To that extent, therefore, the district court's decision suppressing the evidence obtained in the basement of the Mannses' home must be affirmed.

That leaves us, then, with the question concerning the statement made by Mrs. Manns some 2 weeks after the search and her initial oral statement. In *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963), the U.S. Supreme Court held that evidence and witnesses discovered as a result of a search in violation of the fourth amendment must be excluded from evidence as "fruit of the poisonous tree." Recently, in the case of *Oregon v. Elstad*, 470 U.S. ____, 105 S. Ct. 1285, 1291, 84 L. Ed. 2d 222 (1985), the U.S. Supreme Court noted that "[t]he *Wong Sun* doctrine applies as well when the fruit of the fourth amendment violation is a confession." It is clear, however, that not all evidence is "fruit of the poisonous tree" merely because it would not have come to light except for the illegal action of the police. See *Wong Sun v. United States, supra*.

In *Brown v. Illinois*, 422 U.S. 590, 603, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975), the U.S. Supreme Court said:

> The question whether a confession is the product of a free will under *Wong Sun* must be answered on the facts of each case. No single fact is dispositive. The workings of the human mind are too complex, and the possibilities of misconduct too diverse, to permit protection of the Fourth Amendment to turn on such a talismanic test. The *Miranda* warnings are an important factor, to be sure, in determining whether the confession is obtained by exploitation of an illegal arrest. But they are not the only factor to be considered.

In *State v. Smith*, 209 Neb. 505, 308 N.W.2d 820 (1981), this court adopted five factors to be viewed in evaluating what

evidence is "fruit of the poisonous tree." The five factors are:

> (1) The administration of the *Miranda* warnings to the defendant prior to the statement; (2) The temporal proximity of the arrest and the confession; (3) The intervening circumstances between the initial detention and the challenged statements; (4) The purpose and flagrancy of the official misconduct; and (5) The voluntariness of the statement must be established.

Id. at 510, 308 N.W.2d at 823. We then went on to hold that a confession given 27 hours after an illegal arrest and after *Miranda* warnings were read was admissible under the doctrine set out in *Wong Sun*.

An examination of the facts in this case in light of those five elements would seem to indicate that the statements are admissible. Mrs. Manns was properly advised of her rights prior to giving the written statement on December 13, 1984. The search occurred some 9 days prior to her statement, at a time when she was not in custody.

Finally, the evidence discloses that Mrs. Manns executed a "RIGHTS ADVISORY FORM" which affirmatively shows that the statement was voluntarily given. Although the initial search was warrantless, it does not appear that the officers used force, nor did they attempt to enter the house pursuant to any manner of subterfuge or deceit. Therefore, their actions were not the type of "conscious or flagrant misconduct" with which the fourth factor of *State v. Smith, supra*, was concerned. See *Rawlings v. Kentucky*, 448 U.S. 98, 100 S. Ct. 2556, 65 L. Ed. 2d 633 (1980). It would therefore appear that the statement given by Mrs. Manns is not the fruit of an illegal search and not in violation of her fourth amendment rights.

Nor does it appear that an argument could be made that the statement contravened Mrs. Manns' fifth amendment rights. In *Oregon v. Elstad, supra*, 105 S. Ct. at 1298, the U.S. Supreme Court recently held "that a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings." In so holding, the Court in *Elstad, supra*, 105 S. Ct. at 1298, said:

> Far from establishing a rigid rule, we direct courts to avoid

one; there is no warrant for presuming coercive effect where the suspect's initial inculpatory statement, though technically in violation of *Miranda*, was voluntary. The relevant inquiry is whether, in fact, the second statement was also voluntarily made. As in any such inquiry, the finder of fact must examine the surrounding circumstances and the entire course of police conduct with respect to the suspect in evaluating the voluntariness of his statements. The fact that a suspect chooses to speak after being informed of his rights is, of course, highly probative. We find that the dictates of *Miranda* and the goals of the Fifth Amendment proscription against use of compelled testimony are fully satisfied in the circumstances of this case by barring use of the unwarned statement in the case in chief. No further purpose is served by imputing "taint" to subsequent statements obtained pursuant to a voluntary and knowing waiver.

It would therefore seem clear that the statement obtained from Mrs. Manns after she received appropriate *Miranda* warnings should not have been suppressed. The decision of the district court is in part affirmed and in part reversed.

AFFIRMED IN PART, AND IN PART REVERSED.

SARPY COUNTY PUBLIC EMPLOYEES ASSOCIATION, APPELLANT AND CROSS-APPELLEE, V. COUNTY OF SARPY, APPELLEE; CARL HIBBELER, SARPY COUNTY REGISTER OF DEEDS, ET AL., APPELLEES AND CROSS-APPELLANTS.

370 N.W.2d 495

Filed July 12, 1985. No. 84-238.

1. **Counties: Political Subdivisions: Public Officers and Employees.** A county board is without authority, in the absence of a grant, to perform the duties which are part of the official duties of other officials or boards.
2. **Labor and Labor Relations: Public Officers and Employees.** Absent the existence of a labor organization as defined by the provisions of Neb. Rev. Stat. § 48-801(6) (Reissue 1984), the statutes make it relatively clear that in most

instances the elected officials are authorized in the first instance to hire their own employees, set their salaries, and prescribe their terms and conditions of employment.

3. **Counties: Political Subdivisions: Public Officers and Employees.** Although the county board is given the right to approve the salary set by the elected official, the county board may not act arbitrarily or capriciously.
4. **Statutes: Courts: Legislature.** A statute will not be considered repealed by implication unless the repugnancy between the new provision and the former statute is plain and unavoidable. A construction of a statute which, in effect, repeals another statute, will not be adopted unless such construction is made necessary by the evident intent of the Legislature.
5. **Counties: Political Subdivisions: Public Officers and Employees: Labor and Labor Relations.** Except for the county assessor, whose authority regarding the setting of wages, and therefore the terms and conditions of employment, has been transferred to the county board, the elected county official is the proper person to represent the county in connection with negotiations involving employees of the elected official's office and the employees' bargaining representatives pursuant to Neb. Rev. Stat. §§ 48-801 et seq. (Reissue 1984).

Appeal from the Nebraska Commission of Industrial Relations. Reversed and remanded with directions.

Richard J. Dinsmore of Dowd, Fahey, Dinsmore & Hoffman, for appellant.

George C. Rozmarin of Swarr, May, Smith & Andersen, P.C., for appellee Sarpy County.

Allen E. Daubman and Verne Moore, Jr., of McGill, Koley, Parsonage & Lanphier, P.C., for appellees Hibbeler et al.

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

KRIVOSHA, C.J.

This is an appeal from an order entered by the Commission of Industrial Relations (CIR) and appears to be a case of first impression. As presented by the parties, the question, first presented to the CIR, is, "Who among the defendants is the employer of the plaintiff's members?" The defendants are the County of Sarpy and the register of deeds, county clerk, county assessor, county treasurer, clerk of the district court, election commissioner, and county surveyor of Sarpy County, Nebraska. The plaintiff is the Sarpy County Public Employees Association, an organization created under the provisions of

Neb. Rev. Stat. §§ 48-801 et seq. (Reissue 1984). Its members are clerical employees of the various Sarpy County offices.

Following a hearing, the CIR concluded that both the county board of Sarpy County, Nebraska, and the individual, elected officials of each of the offices named herein were the collective, joint employers of the employees described in the plaintiff's bargaining unit and, as such, each of the parties must be a part of the bargaining process. The CIR then remanded the matter for further negotiations between the plaintiff organization and the joint employers. All of the parties, dissatisfied with the decision, argue for reversal in this court. We believe that the decision of the CIR, under the facts and law applicable to this case, was in error, and for that reason we must reverse and remand.

The parties argue that the main issue to be decided by this court is who the "employer" is. We believe that the answer to that question is relatively easy, though not dispositive of the issues presented by this case. Section 48-801(4) clearly and unequivocally defines "employer." It provides: "Employer shall mean the State of Nebraska or any political or governmental subdivision of the State of Nebraska . . . ." Under the provisions of § 48-801(4) it is unquestionable that the County of Sarpy is the employer of plaintiff's members, for it is only the county and neither the county board nor the various county officers which is a political or governmental subdivision of the State of Nebraska. Determining, however, that the County of Sarpy is the employer does little, if anything, to solve the question any more than determining that pursuant to § 48-801(4) the State of Nebraska is an employer in its labor negotiations. The more appropriate question is who or what body is authorized to represent the employer. Neither the State of Nebraska nor the County of Sarpy as a subdivision has a voice. If they are to be heard, they must be heard through some body or individual authorized to speak on their behalf. While, as we have noted, the CIR concluded that that voice should be made up of a body consisting jointly of the county board and the various elected officials, we believe, for reasons hereinafter set out, that each publicly elected official, with the exception of the county assessor, is the person authorized to speak on behalf

of the county with regard to those employees working in that public official's individual office.

Both the labor organization and the county argue that only the county board can speak on behalf of the county and therefore, by implication, is the proper body to represent the county in its labor negotiations. In support of their position they argue that when § 48-801(4) is read together with Neb. Rev. Stat. § 23-103 (Reissue 1983), no other conclusion can be reached. The argument has some initial merit and appeal. As we have noted, § 48-801(4) defines an "employer" for purposes of collective bargaining as "any political or governmental subdivision of the State of Nebraska." Neb. Rev. Stat. § 23-101 (Reissue 1983) provides that each county "shall be a body politic and corporate" and thus is a political or governmental subdivision. Under the provisions of § 23-103 "[t]he powers of the county as a body corporate or politic, shall be exercised by a county board . . . ." Furthermore, absent a specific statute to the contrary, it is the county board which enters into contracts for and on behalf of the county. See, *State ex rel. Johnson v. County of Gage*, 154 Neb. 822, 49 N.W.2d 672 (1951); *Speer v. Kratzenstein*, 143 Neb. 300, 9 N.W.2d 306 (1943), *rev'd on other grounds* 143 Neb. 310, 12 N.W.2d 360.

If this was all of the law on the subject, the answer to the question might easily be resolved as both the county and the employees association contend. Unfortunately, such is not the case, and an examination of all of the applicable statutes as well as our previous decisions makes the resolution of this question extremely complex.

In addition to the provisions of §§ 48-801(4) and 23-103, we are further required to consider Neb. Rev. Stat. § 23-1111 (Reissue 1983), which reads as follows: "The county *officers* in *all* counties shall have the necessary clerks and assistants for such periods and at such *salaries* as *they* may determine with the approval of the county board, whose salaries shall be paid out of the general fund of the county." (Emphasis supplied.)

It has long been the recognized rule in this jurisdiction that a county board is without authority, in the absence of a grant, to perform the duties which are part of the official duties of other officials or boards. See *Speer v. Kratzenstein, supra.*

Therefore, unless the county board is specifically given authority to act for and on behalf of the various elected officials, it is without authority to do so. Therein lies the conflict which we must resolve. We believe that an analysis of the various statutes as previously interpreted by this court compels us to resolve the conflict by holding that the authority in this case lies with the various elected officials except as to the county assessor, who is controlled by a specific statute. See Neb. Rev. Stat. § 77-401.01 (Reissue 1981).

Absent the existence of a labor organization as defined by the provisions of § 48-801(6), the statutes make it relatively clear that in most instances the elected officials are authorized in the first instance to hire their own employees, set their salaries, and prescribe their terms and conditions of employment. See § 23-1111. While § 23-1111 speaks only about salary, it seems obvious that the body or official authorized to set the salary has, by necessary implication, the authority to prescribe the manner in which the work must be done in order to entitle the employee to the salary set by the county official. To hold otherwise, in the absence of a specific statute, would permit the employee to set his or her own terms of employment while requiring the elected official to set the salary. Such a result would be untenable.

Although the county board is given the right to approve the salary set by the elected official, the county board may not act arbitrarily or capriciously. In *Meyer v. Colin*, 204 Neb. 96, 102, 281 N.W.2d 737, 741 (1979), we said: "It is clear that section 23-1111, R.R.S. 1943, requiring the approval of salaries by the County Board, does not allow the Board to arbitrarily reduce the salaries recommended by the elected officer." Further, in *Meyer, supra* at 102, 281 N.W.2d at 741, we said: "The question presented is actually distinct from mere budgeting procedures and relates, instead, to the independence and discretion which are to be afforded an elected officer."

We earlier decided a similar case in *Bass v. County of Saline*, 171 Neb. 538, 106 N.W.2d 860 (1960). In the *Bass* case the evidence disclosed that the appellant was the clerk of the county court of Saline County. The county judge informed the county board that he had fixed the salary of the clerk, beginning in

October of 1959, at $225 per month. In October of 1959 the clerk filed her claim for salary in the amount of $225, but the county board allowed the claim only in the amount of $190 in accordance with a salary schedule established by it on July 1, 1959. In explaining the meaning of the phrase "with the approval of the county board," we said at 541, 106 N.W.2d at 863:

> The primary issue here is the meaning to be given to this limitation. The limitation clearly does not mean that the county board could whimsically or arbitrarily ignore the fixing of the salary of the clerk of the county court by the county judge. To so hold would have the effect of investing the county board with full power to fix salaries of employees in county offices contrary to the expressed intent of the Legislature, and render nugatory the provision of section 23-1111, R.R.S. 1943, granting such authority to county officers.

Therefore, absent a specific statute to the contrary, and absent the provisions of §§ 48-801 et seq., elected officials are free to set the salaries and, by implication, the working conditions for their respective employees, subject only to the approval by the county board, which may not act arbitrarily or capriciously.

The question is whether the adoption of § 48-801(4), when read together with § 23-103, repeals by implication the authority granted public officials by § 23-1111. We think not. To begin with, repeal by implication is not favored.

> A statute will not be considered repealed by implication unless the repugnancy between the new provision and the former statute is plain and unavoidable. A construction of a statute which, in effect, repeals another statute, will not be adopted unless such construction is made necessary by the evident intent of the Legislature.

American Fed. S., C. & M. Emp. v. County of Lancaster, 200 Neb. 301, 303, 263 N.W.2d 471, 473 (1978). See, also, *City of Grand Island v. County of Hall*, 196 Neb. 282, 242 N.W.2d 858 (1976).

Furthermore, we would be required to hold that § 23-1111 was impliedly repealed only in those counties which have

recognized bargaining units and only in those offices in which the employees are represented. Section 23-1111 would still grant the authority to set salaries to the elected officials where the provisions of §§ 48-801 et seq. did not apply. We do not believe that we can create such a confused situation by implication and only in some cases. Rather, we believe we must employ some basic statutory rules of construction to aid us in finding our way through this legislative jungle.

Section 23-103 was first adopted in 1879 and was in effect when § 23-1111 was adopted in 1943. We must therefore presume that the Legislature knew of the existence of § 23-103 and intended § 23-1111 to be an exception to the general rule. By the same token, when §§ 48-801 et seq. were adopted in 1947, the provisions of § 23-1111 were known to the Legislature. Yet, with that knowledge, the Legislature made no attempt to take away from the elected officials their authority to fix salaries given to them under § 23-1111. We therefore believe that the Legislature intended the specific provisions of § 23-1111 to take precedent over the general provisions of § 23-103. Such a conclusion is not so difficult to reach. See *Bass v. County of Saline, supra*.

All that §§ 48-801 et seq. have done is provide that if the employees elect to organize and have someone speak on their behalf, the county official may not exercise his or her authority under § 23-1111 without first consulting the representatives of the bargaining unit. Should the elected official and the labor organization reach an impasse, the matter is submitted to the CIR for resolution. There is nothing about the adoption of §§ 48-801 et seq. which requires the removal of the elected official from the process of setting salaries and conditions of employment. Absent a bargaining unit, the elected official may act unilaterally, so long as his or her actions are reasonable. Where a bargaining unit exists, the official must act in concert with it. This does not in any manner, however, require the presence of the county board any more than the presence of the Legislature is required when the various agencies of state government engage in labor negotiations with bargaining units, even though the Legislature must ultimately approve the agreement to recognize a bargaining unit or approve a budget

sufficient to pay the wages.

Our attention is called to our earlier decisions in *American Fed. S., C., & M. Emp., AFL-CIO v. County of Lancaster*, 196 Neb. 89, 241 N.W.2d 523 (1976) (*American Fed. I*), and *American Fed. S., C. & M. Emp. v. County of Lancaster*, 200 Neb. 301, 263 N.W.2d 471 (1978) (*American Fed. II*). We do not believe that either case controls the result in the case at bar. We do, however, believe that the language of each case is instructive in our resolution of this matter. In *American Fed. I* we determined that the state Department of Public Welfare and the county division of public welfare were joint employers. In doing so we observed, however, at 95-96, 241 N.W.2d at 526-27:

> It appears that under the state merit system, the state department is empowered to control most of the important facets of labor management relations. The state's involvement in the areas traditionally subject to collective bargaining is apparent. *Since the state and the counties are treated as one unit for personnel management purposes by the statute* and applicable regulations, it follows that the two must be considered a functionally integrated unit for the purpose of collective bargaining with the plaintiff.
>
> . . . .
>
> The state practically controls grievance procedures under the state merit system. Salary matters under the state pay plan are effectively under its control. The employees of county public welfare are paid according to the state merit plan, with funds provided by the state. Section 68-708, R.R.S. 1943, mandates compliance with the state merit system on matters relevant to personnel policies. This includes holidays, sick leave, and other fringe benefits.
>
> To hold on this record that county is the sole employer of the employees concerned is to ignore reality. County actually has no effective control over the areas usually embraced in labor agreements. To force it into bargaining as the sole employer will be either a futile or a disastrous act.

(Emphasis supplied.)

The record in the instant case, however, does not evidence an integrated personnel unit. Although the parties stipulated that at varying times and to varying degrees both the county board and the elected officials made decisions involving personnel, no statute or regulation is directed to our attention such as was involved in *American Fed. I.*

We do not believe that the stipulation entered into in the instant case in any manner discloses that the county board exercises exclusive control over the employment conditions of the employees of the various elected officials, and in view of the language of § 23-1111 and our earlier decisions in *Meyer v. Colin*, 204 Neb. 96, 281 N.W.2d 737 (1979), and *Bass v. County of Saline*, 171 Neb. 538, 106 N.W.2d 860 (1960), it could not. There is therefore no basis to hold that our decision in *American Fed. I* requires us to hold that the county board is a joint employer as ordered by the CIR.

The language found in *American Fed. II* is likewise instructive. In that case we said at 304, 263 N.W.2d at 473: "The effect of the civil service act is to transfer the control of county employees from the various independent county officers to the board of county commissioners." That is to say that if a county such as Lancaster is subject to the civil service act, then the act may prescribe who has ultimate control and can affect who speaks on behalf of the county. But where, as here, Sarpy County is not subject to the civil service act, we must conclude that the transfer which occurs in the presence of the civil service act does not occur in its absence. As we have already indicated, a county is a creature of the Legislature and subject to the direction of the Legislature. Where the civil service act applies, one body may be the voice of the county. Where the civil service act does not apply, others may be the voice of the county. And where, as in the case of the county assessor, the statute specifically provides that the county board shall set the salaries for the employees of the county assessor, see § 77-401.01, a third result may occur. These are all, however, subject to statutory direction.

It is further argued to us that should we find that each elected official is a proper party to speak on behalf of the county with regard to his or her individual employees, great fragmentation

will occur. While we have generally said that fragmentation to the extent it can be avoided should be avoided, see *American Assn. of University Professors v. Board of Regents*, 203 Neb. 628, 279 N.W.2d 621 (1979), and *Sheldon Station Employees Assn. v. Nebraska P.P. Dist.*, 202 Neb. 391, 275 N.W.2d 816 (1979), we have never held and could not hold that artificial units must be created solely to reduce the number of appropriate units. We are simply not at liberty to disregard the meaning of the statute in order to more efficiently administer labor negotiations. While that may be a desirable end, it is for the Legislature to make that decision, and not for the courts.

We therefore hold that except for the county assessor, whose authority regarding the setting of wages has been transferred to the Sarpy County board, each of the other elected county officials is the appropriate person to represent the County of Sarpy in negotiating with the plaintiff labor union in connection with the specific employees in each of the respective offices, after it is determined that the plaintiff labor organization represents the particular employee unit in each office. If this is not a desirable result, it is for the Legislature to say otherwise.

REVERSED AND REMANDED WITH DIRECTIONS.

SHANAHAN, J., concurs in the result.

BOSLAUGH, J., dissenting.

I concur in the holding that the County of Sarpy is the employer. In my opinion, however, the county board is the only body authorized to represent the county in the bargaining process. Neb. Rev. Stat. § 23-103 (Reissue 1983); *State ex rel. Johnson v. County of Gage*, 154 Neb. 822, 49 N.W.2d 672 (1951). The county board is the final authority with respect to clerks and assistants to the county officers, subject only to the requirement that the board not exercise its authority arbitrarily. *Meyer v. Colin*, 204 Neb. 96, 281 N.W.2d 737 (1979).

Undue fragmentation is a consideration in determining what is an appropriate bargaining unit. This principle should not be disregarded in resolving the issue presented in this case.

GRANT, J., joins in this dissent.

ELIZABETH KELLY, APPELLANT AND CROSS-APPELLEE, V. DANIEL KELLY, APPELLEE AND CROSS-APPELLANT.
370 N.W.2d 161

Filed July 12, 1985. No. 84-387.

Alimony: Modification of Decree: Appeal and Error. In a proceeding to modify an alimony award, Neb. Rev. Stat. § 42-365 (Reissue 1984), that matter is initially entrusted to the sound discretion of the trial judge, which matter, on appeal, will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Reversed.

Eric W. Kruger of Bradford & Coenen, for appellant.

Michael L. Schleich of Fraser, Stryker, Veach, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellee.

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

WHITE, J.

This is an appeal from the order of the district court for Douglas County terminating alimony payments to appellant wife as of April 1986.

The parties were divorced in December of 1975. At the time the decree was entered, the parties had two minor children who have since reached their majority. The appellee husband was and is an agent with the Federal Bureau of Investigation. At the time of a prior modification hearing in early 1977, he earned approximately $35,000 a year; and at the time of the current hearing for modification, he earned approximately $58,000 a year. At the time of the dissolution, appellant wife was not employed; but at the time of the current hearing on the order for modification, she earned approximately $22,000 a year, including the sum of $5,000 per year as interest from an inheritance received from her deceased father.

As a part of the original decree of divorce, the trial court found:

> That Petitioner is presently unemployed but capable of securing employment. That Petitioner should advise the

> Court at six month intervals as to her employment status and as to the amount of income she has received during that certain six month period. She should advise the Court by filing an affidavit stating the above and foregoing.

Admittedly, in 1976 the appellee husband filed a motion for reduction of the alimony award, and evidence was adduced that the appellant's income was then $11,000. At that time the alimony was reduced from $300 per month to $200 per month. The evidence indicates that appellee continues to contribute to his now emancipated children in the sum of $200 per month each, to aid them in their educational expenses, though not obligated to do so by the original decree.

Pursuant to appellee's second application to modify the decree by revoking alimony, additional evidence was heard by the trial court concerning appellee's approaching retirement. According to appellee's testimony, his retirement pay would be approximately one-half of his gross income at the time of his retirement. Appellee has remarried and is supporting his fifth wife and three minor children. Appellant has a net worth of $97,000, including an inheritance from her father of approximately $50,000. Appellee indicates that his net worth is less than one-half of appellant's and that his expenses were considerably more than that of the appellant, and further argues that she appeared well able to support herself.

The appellee argues here that the court's order terminating the alimony reflected the original concern of the trial judge in granting alimony in the first instance because of the appellant's then status as being unemployed. Appellant argues that the trial court considered the fact of her later employment in the 1977 reduction and took it into account when the judge reduced the alimony from $300 to $200 per month.

"In a proceeding to modify an alimony award, § 42-365, that matter is initially entrusted to the sound discretion of the trial judge, which matter, on appeal, will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion." *Creager v. Creager*, 219 Neb. 760, 763, 366 N.W.2d 414, 416 (1985).

In determining whether there has been a change of circumstance, the fact that income has increased is a

circumstance that may be considered. *Creager, supra.* Also to be considered is appellant's return to full-time employment and increase in income as a result thereof, which factors were within the reasonable contemplation of the parties at the time of the dissolution. *Albers v. Albers*, 213 Neb. 471, 329 N.W.2d 567 (1983). As the return to full-time employment of the appellant was contemplated by the original decree, the resulting increase of income to a full-time employee was necessarily also contemplated.

Employment was considered in 1977 by the trial court in the reduction of alimony from $300 to $200 per month. Since that time, there has been no significant change in circumstances which justified the trial court in ordering the alimony terminated.

Upon our de novo review we find that we disagree with the decision reached by the trial judge and that the trial court abused its discretion in terminating the alimony. The decision is reversed. We therefore need not discuss appellee's cross-appeal requesting immediate termination of alimony payments. Appellant's counsel is awarded a fee of $500 for services in this court.

REVERSED.

JOHN P. REILLY, APPELLANT AND CROSS-APPELLEE, V. FIRST NATIONAL BANK & TRUST CO., BEATRICE, NEBRASKA, APPELLEE AND CROSS-APPELLANT.

370 N.W.2d 163

Filed July 12, 1985. No. 84-424.

1. **Actions: Liens: Equity.** An action to determine the priority of liens is equitable in nature.
2. **Uniform Commercial Code: Contracts.** Under Neb. U.C.C. § 1-102(3) (Reissue 1980) the provisions of the act may be varied by agreement when done so in good faith.
3. **Motions for New Trial.** A motion for a new trial based on newly discovered evidence may be sustained only if the moving party could not, with reasonable diligence, have discovered and produced the evidence at trial.

Appeal from the District Court for Gage County: WILLIAM B. RIST, Judge. Affirmed as modified.

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

James G. Sharp of Everson, Noble, Wullschleger, Sutter, Sharp, Korslund & Willet, for appellee.

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

PER CURIAM.

This was an action by the plaintiff, John P. Reilly, against the defendant, First National Bank & Trust Co., Beatrice, Nebraska, to determine the priority of liens on the proceeds of the 1982 crop raised by Meyer Farms, Inc. The proceeds were deposited in an interest-bearing escrow account pending the determination of this action.

Since the action is equitable in nature, the review in this court is de novo on the record, but we consider that the trial court saw and heard the witnesses and accepted one version of the facts rather than another.

The record shows that the defendant bank was the principal financer of Meyer Farms, Inc., and had made loans to Gerald Meyer, the corporation president, for farming operations since 1975, taking back security interests in the farms' real estate, cattle, and equipment. Promissory notes securing the corporation's indebtedness were renewed from time to time, with additional funds advanced. On March 31, 1982, the note which was due on February 6, 1982, was renewed in the amount of $107,852.79 and became due September 27, 1982. A farm security agreement was executed in conjunction with the renewal, which covered all the Meyer Farms' crops now growing or planted from March 31, 1982. The bank had previously filed a financing statement in 1976 and continuation statement in 1980 covering the farms' assets. The bank, however, refused to advance any new funds for the planting of the 1982 crop.

The plaintiff, who is a brother-in-law of Gerald Meyer, advanced $46,082.11 to Meyer Farms, Inc., for planting and

harvesting the 1982 crop and perfected a security interest in the crop by a filing on September 21, 1982.

Reilly, Meyer, and John Dando, the bank's executive vice president, had met on February 22, 1982, to discuss financing for the 1982 crop. The parties estimated $50,000 was needed for production costs, with a projected yield of $80,000. Both parties contemplated that if Reilly advanced the money for production, there would be sufficient proceeds for Reilly to recover his advances. The bank was to receive the proceeds over and above this amount.

The proceeds from the crop, however, amounted to only $38,548.09. The check for the proceeds of the crop was made out to Meyer Farms, Inc., and the two parties. The bank refused to endorse the check over to the plaintiff and asserted its first priority over the funds.

The plaintiff then brought this action claiming priority to the proceeds under Neb. U.C.C. § 9-312(2) (Reissue 1980), and further claiming the bank was estopped by its representations to the plaintiff from asserting any lien priority.

The trial court found that the bank had priority to the first $20,000 of the proceeds but was estopped to claim priority as to the balance of the proceeds. The plaintiff has appealed and the defendant has cross-appealed.

Both parties have perfected security interests in the proceeds and claim that their lien is prior to the other lien. The interest of the defendant bank was perfected prior to the interest of the plaintiff.

Although the evidence is in conflict, we believe it established that an oral contract existed between the parties. A binding contract requires a meeting of the minds and an intention to contract. *Vandenburg v. Center Township*, 124 Neb. 790, 248 N.W. 310 (1933).

The testimony established that at the February 22, 1982, meeting, both parties were aware of the problems involved in financing Meyer Farms' 1982 crop. The corporation owed the bank more than $100,000, and the bank would not advance funds for 1982 crop production. As such, the bank's lien would prevent any other individual from advancing funds unless the bank would agree to allow a new creditor to recover his

investment from the proceeds of the 1982 crop.

The bank was unwilling to subordinate its lien entirely, but if the interest on the debt to the bank, estimated to be $20,000, could be paid first, then the bank was willing to allow the cost of producing the 1982 crop to be paid from the balance of proceeds of the crop. This, in substance, is what the trial court found to be the agreement between the parties, and we believe the evidence supports such a finding.

The plaintiff claims that under § 9-312(2) his lien is prior to the lien of the bank.

Section 9-312(2) provides:

> A perfected security interest in crops for new value given to enable the debtor to produce the crops during the production season and given not more than three months before the crops become growing crops by planting or otherwise takes priority over an earlier perfected security interest to the extent that such earlier interest secures obligations due more than six months before the crops become growing crops by planting or otherwise, even though the person giving new value had knowledge of the earlier security interest.

Section 9-312(2) does not apply because the plaintiff agreed that the interest due the bank would be paid first. The parties agreed among themselves how the proceeds of the crop would be divided, and each party is estopped to claim otherwise. Under Neb. U.C.C. § 1-102(3) (Reissue 1980), the effect of the provisions of the act as between the parties may be varied by agreement when done so in good faith.

On the motion for new trial the plaintiff attempted to show, by the answers to interrogatories, that the interest due the bank had in fact been paid. The funds used for this purpose had been realized from other collateral which secured the debt. This did not defeat the bank's right to the first $20,000 from the proceeds of the crop pursuant to the agreement. The answers to the interrogatories were available at the time of trial and were not newly discovered evidence.

A motion for a new trial based on newly discovered evidence may be sustained only if the moving party could not, with reasonable diligence, have discovered and produced the

evidence at trial. *Smith v. Erftmier*, 210 Neb. 486, 315 N.W.2d 445 (1982); *Maddox v. First Westroads Bank*, 199 Neb. 81, 256 N.W.2d 647 (1977); Neb. Rev. Stat. § 25-1143 (Reissue 1979).

The defendant's cross-appeal relates to the interest which has accrued while the proceeds were in escrow. We think the accrued interest should be divided in the same proportion as the proceeds from the crop, and the judgment of the district court should be so modified. As modified, it is affirmed.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. CHESTER D. HERT, APPELLANT.
370 N.W.2d 166

Filed July 12, 1985. No. 84-512.

1. **Arrests: Constitutional Law.** Absent exigent circumstances, a nonconsensual, warrantless entry to arrest a person within his or her home is presumptively unreasonable and, therefore, unconstitutional.
2. **Arrests: Proof: Presumptions.** The burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries.
3. **Arrests: Police Officers and Sheriffs.** "Exigent circumstances" are examined in the light of facts known to officers at the time they acted.
4. **Arrests: Police Officers and Sheriffs: Words and Phrases.** Exigent circumstances exist when a law enforcement officer has: (1) Probable cause to believe that a suspect has committed a serious offense; (2) A reasonable belief from a present factual basis that the suspect is in the premises to be entered; and (3) Immediately upon concurrence of elements (1) and (2) (probable cause and reasonable belief), a factual basis to reasonably believe that, during the time which would be necessarily consumed in obtaining an arrest warrant under existing circumstances, there will be danger to the officer or another, evidence will be removed or destroyed, or the suspect will escape.

Appeal from the District Court for Douglas County: PAUL J. HICKMAN, Judge. Afffirmed.

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

Patrick T. O'Brien, Deputy Attorney General, and Leroy W. Sievers, for appellee.

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

SHANAHAN, J.

Chester D. Hert appeals his bench trial convictions of and sentences for first degree false imprisonment, Neb. Rev. Stat. § 28-314(1) (Reissue 1979), and use of a knife to commit a felony, Neb. Rev. Stat. § 28-1205(1) (Reissue 1979). We affirm.

In Omaha during the early morning of Saturday, December 31, 1983, a young couple, Christine and Douglas, were riding in Douglas' car near 24th and Leavenworth Streets where Hert was hitchhiking home. The night was cold, with ice and snow, and the couple offered Hert a ride. As the car headed toward South Omaha, Hert asked to be "left off at 22nd and M Street," his residence and a house which had been converted into apartments. Hert further identified the house by a blue porch light. When Douglas stopped his car in front of the house, Hert placed a hunting knife at Christine's throat and told Christine to come into the apartment with him or else Hert would "kill her." Douglas said he would not allow Christine to leave the automobile and tried to dissuade Hert from abducting Christine. Without indicating a destination, Hert directed Douglas to "just drive" the car. Within a few blocks as Douglas' car passed the south side police station, to attract attention Douglas deliberately drove his car into an unoccupied police cruiser parked in front of the station. After the collision Christine and Douglas immediately slipped out of the car and ran.

While Hert was afoot and chasing the couple, Christine and Douglas hailed a motorist to return them to the police station where the collision had occurred. En route to the police station, Christine and Douglas saw Hert running northeast, the direction of Hert's home in relation to the police station. Upon arrival at the police station, Christine and Douglas related the episode to Officer Thomas R. Hearty, whose cruiser moments earlier had been intentionally rammed. Officer Hearty issued a radio dispatch to any officer on patrol in the vicinity. Officer

Dean Thorsen was on cruiser patrol in the area and received the Hearty radio message, which characterized Hert's encounter with Christine and Douglas as a "robbery" and included information that Hert was "armed with a knife." The transmitted message also included the location of Hert's apartment house, the blue porch light, and a description of a male suspect with "long, blond hair" who was headed northeast from the police station toward 22d and M Streets.

Within a few minutes after receiving the radio message and without any warrant pertaining to Hert, Officer Thorsen arrived at the apartment house with the blue porch light at 22d and M Streets, where he saw a man "cutting across the front yard," and turned the cruiser's spotlight on the individual. The person in the spotlight turned out to be Frank Granados, who lived nearby. In answer to Officer Thorsen's inquiry, Granados said his dogs had barked and, upon looking out of the window of his house, Granados saw a man with long, blond hair crouched near a hedge in Granados' backyard. Granados had pursued that man and chased him into the apartment house "a few seconds" before Officer Thorsen arrived.

Approximately an hour before Officer Thorsen arrived at the apartment house, there had been a "double or triple stabbing at 24th and M Street," which was occupying police. Officer Thorsen called by radio for a "backup," walked toward the front door of the house, opened the screen door, walked onto an enclosed porch, and found the front door standing open. Thorsen did not know the layout of the apartment house. As he entered the hallway of the house, the officer noticed on the carpet "snowy footprints" leading to apartment No. 10. After the officer knocked on a few doors around apartment No. 10, a tenant from one of the other apartments appeared and informed the officer that the apartment caretaker lived upstairs. Officer Thorsen awakened the caretaker, returned to apartment No. 10 with the caretaker, and knocked on the door of apartment No. 10 while announcing "Police officers. Open the door." When there was no response from within, the officer opened the door to apartment No. 10 with the caretaker's passkey, entered the darkened room, and shined a flashlight into the corner, where he discovered Hert, who had "long,

blond, stringy hair," in bed under a sheet and looking up at the officer. Officer Thorsen told Hert to "put his hands in sight," found a wall switch for a light, turned on the light, and arrested Hert. Officer Thorsen "patted down" Hert, who was still in bed beneath a sheet and was dressed only in his "Jockey shorts." The officer could feel that Hert was very cold "to the touch" during the "patting down." At this time a police sergeant came into the room. Response by a sergeant as a backup officer was unusual and explained by the fact that other patrolmen were already occupied during this "very busy" night with the approaching holiday weekend and "bad roads" attributable to the winter weather. Handcuffs were placed on Hert. In a doorless closet in Hert's room, Officer Thorsen found snow-covered "Waffle Stompers" (boots). On the floor in the middle of the room was a pair of cold, wet blue jeans. Beneath the mattress of the bed where Hert had been lying, Officer Thorsen found a hunting knife.

Hert was taken to police headquarters where Christine and Douglas positively identified him as the knife-wielding hitchhiker-assailant. In an interview room at police headquarters, Hert was informed of the *Miranda* "rights" and signed a waiver ("Rights Advisory Form"). Hert admitted he had tried to force Christine at knife point into his apartment and also admitted threatening to kill her, as well as ordering Douglas to drive the car before the collision with the police cruiser.

Hert filed a pretrial motion to suppress "the Defendant's statement and any and all evidence taken from the Defendant's apartment," claiming that any evidence was the "fruit" of an illegal arrest. The district court found that exigent circumstances existed which warranted Officer Thorsen's entry into the apartment house without an arrest warrant for Hert. The district court found Hert's inculpatory statements were voluntary and preceded by proper warnings required by *Miranda*; Hert's boots, having been in "plain view," were admissible evidence; but the knife was inadmissible because it was under a mattress and was not "in plain view." The district court ordered the knife suppressed as evidence.

As his solitary assignment of error, Hert contends that,

because police entered his residence without an arrest warrant, articles obtained at his apartment and introduced into evidence and his inculpatory statement at police headquarters were inadmissible as products of an unlawful arrest.

The fourth amendment to the U.S. Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the person or things to be seized.

See, also, Neb. Const. art. I, § 7.

Absent exigent circumstances, a nonconsensual, warrantless entry to arrest a person within his or her home is presumptively unreasonable and, therefore, unconstitutional. See *Payton v. New York*, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980). "In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Id.* at 590.

"Before agents of the government may invade the sanctity of the home, the burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries." *Welsh v. Wisconsin*, 466 U.S. 740, 750, 104 S. Ct. 2091, 80 L. Ed. 2d 732 (1984).

Consequently, in Hert's case we presume that the officer's nonconsensual and warrantless entry into Hert's home was unreasonable and examine the circumstances to ascertain whether the State has rebutted such presumption and satisfied its burden in demonstrating exigent circumstances justifying the initial entry to arrest Hert.

" '[E]xigent circumstances' means an emergency situation requiring swift action to prevent imminent danger to life or serious damage to property, or to forestall the imminent escape of a suspect or destruction of evidence." *People v. Ramey*, 16 Cal. 3d 263, 276, 545 P.2d 1333, 1341, 127 Cal. Rptr. 629, 637 (1976). See, also, *State v. Page*, 277 N.W.2d 112 (N.D. 1979);

State v. Girard, 276 Or. 511, 555 P.2d 445 (1976).

In the oft-cited *Dorman v. United States*, 435 F.2d 385 (D.C. Cir. 1970), there are six criteria considered in determining whether "exigent circumstances" exist, namely, (1) a grave offense is involved, particularly a crime of violence; (2) the suspect is reasonably believed to be armed; (3) a clear showing of probable cause; (4) a strong reason to believe that the suspect is in the dwelling; (5) the likelihood of escape, if not swiftly apprehended; and (6) a peaceful entry as opposed to a "breaking." See, also, *United States v. Minick*, 455 A.2d 874 (D.C. 1983).

Courts of other states have utilized the *Dorman* criteria or guidelines in determining whether "exigent circumstances" exist. See, *State v. Luloff*, 325 N.W.2d 103 (Iowa 1982); *State v. Page, supra*. However, the *Dorman* criteria are not all-inclusive and are not cardinal maxims to be rigidly applied in each case. *People v. Yates*, 98 Ill. 2d 502, 456 N.E.2d 1369 (1983); *State v. Page, supra; State v. Luloff, supra*. Rather, as expressed in 2 W. LaFave, Search and Seizure § 6.1 at 390 (1978):

> The ultimate purpose of all Fourth Amendment standards is not to keep probative evidence out of criminal trials, but rather to keep police practices within constitutional limits, and this purpose is not served by a rule which cannot be applied correctly with a fair degree of consistency by well-intentioned police officers. It is thus appropriate to ask whether the *Dorman* rule is too sophisticated to be so applied, requiring as it does the making of on-the-spot decisions by a complicated weighing and balancing of a multitude of imprecise factors.

While "exigent circumstances" have multiple characteristics, the guiding principle is reasonableness, and each case must be examined in the light of facts known to officers at the time they acted. *People v. Yates, supra; People v. Ramey, supra*. In determining whether a nonconsensual entry to arrest without a warrant is reasonable and, consequently, constitutionally permissible, fundamental considerations include probable cause to arrest and circumstances preventing an officer from obtaining an arrest warrant as a matter of practicality. See *State v. Page, supra*.

Although mentioning the *Dorman* criteria in reference to "exigent circumstances," the U.S. Supreme Court has not as yet approved the six criteria enunciated in *Dorman*. See, *Payton v. New York,* 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980); *Welsh v. Wisconsin,* 466 U.S. 740, 752, 104 S. Ct. 2091, 80 L. Ed. 2d 732 (1984) ("[w]ithout approving all of the factors included in the standard adopted [in *Dorman*], it is sufficient to note that many other lower courts have also considered the gravity of the offense an important part of their constitutional analysis"). While refraining from adoption of the *Dorman* criteria or guidelines, the U.S. Supreme Court has indicated other factors to be considered in determining whether a warrantless entry into a home is reasonable and constitutionally permissible; for example, *Warden v. Hayden*, 387 U.S. 294, 87 S. Ct. 1642, 18 L. Ed. 2d 782 (1967) (police, having probable cause to believe an armed robber had entered a house, had the "right" to make a warrantless entry to arrest the robber and search for weapons); *United States v. Santana*, 427 U.S. 38, 96 S. Ct. 2406, 49 L. Ed. 2d 300 (1976) ("hot pursuit" justified the warrantless entry into a suspect's house, when police have probable cause to arrest the subject and realistically expect any delay to result in destruction of evidence); and *Welsh v. Wisconsin, supra* (an important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made).

This court has not previously enunciated a standard for determining whether exigent circumstances exist and permit a nonconsensual, warrantless entry to arrest a suspect within his or her home. It is not realistic to expect law enforcement officers to run through the *Dorman* checklist and weigh variable factors in determining whether a warrantless entry is permissible. We conclude and hold that exigent circumstances exist and constitutionally justify a nonconsensual and warrantless entry in a reasonable manner to arrest a person within his or her home when a law enforcement officer has:

(1) Probable cause to believe that a suspect has committed a serious offense;

(2) A reasonable belief from a present factual basis that the suspect is in the premises to be entered; and,

(3) Immediately upon concurrence of elements (1) and (2) (probable cause and reasonable belief), a factual basis to reasonably believe that, during the time which would be necessarily consumed in obtaining an arrest warrant under existing circumstances, there will be danger to the officer or another, evidence will be removed or destroyed, or the suspect will escape. See Harbaugh and Faust, *"Knock on Any Door"—Home Arrests After Payton and Steagald*, 86 Dick. L. Rev. 191 (1982). The aforementioned criteria apply in the case of a law enforcement officer acting alone or law enforcement officers acting collectively in concert. Thus, constitutional guarantees for personal liberty and privacy are balanced against effective, but not unrestrained, law enforcement.

Applying the criteria which we have enumerated, Officer Thorsen was confronted with exigent circumstances making his warrantless entry to arrest Hert constitutionally permissible under the circumstances. The officer used a passkey to enter the apartment. Although Hert did not consent to the officer's entry, Officer Thorsen's entry was achieved in a reasonable manner. Officer Thorsen had probable cause to believe that Hert had committed a felony, in view of the incident characterized in the radio transmission as a "robbery." As a result of facts provided by witnesses, Thorsen reasonably believed that Hert, who had been reported to be armed with a knife, was inside the apartment house. It was a physical impossibility that Officer Thorsen surround the house. Surveillance was equally impractical, if not impossible, due to the depleted supply of officers otherwise occupied in police activities. "[T]he question of whether a stakeout is or is not feasible is itself a complicated one, and is unlikely to be seen by hindsight in precisely the same way it was perceived by the police on the scene." 2 W. LaFave, Search and Seizure § 6.1 at 395 (1978). Given the officer's understandable uncertainty about any restrictive features of the premises, such as existence and location of doors, windows, or other means for departure from the premises, coupled with Hert's probable flight in the event of any further delay, containment of Hert reasonably appeared unlikely. Any further delay in entry may have unnecessarily increased danger either to the officer or

occupants of the apartment house. In the exigencies of the moment, Officer Thorsen was not required to wait outside the house while an armed suspect within was free to plan an escape, actually escaped, or endangered occupants of the apartment house, or while the laws of physics caused evidence to vanish, that is, evanescence of the snow-covered, cold, and wet conditions of clothing worn by Hert as he fled the scene of the collision involving the police cruiser.

We accordingly conclude that there is no constitutional infirmity in Officer Thorsen's arrest of Hert. Evidence obtained by the officer at Hert's apartment and introduced at trial was in plain view when Hert was placed under lawful arrest. Additionally, Hert's inculpatory statements were admissible in view of preinterrogation warnings required by *Miranda* and were not the product of an unlawful arrest, the "fruit of the poisonous tree." Cf. *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). Hert's statement at police headquarters was not an exploitation of an unlawful arrest. Cf. *State v. George*, 210 Neb. 786, 317 N.W.2d 76 (1982) (an unlawful arrest resulting from a warrantless intrusion into a suspect's home without consent and in the absence of exigent circumstances necessitates suppression of an inculpatory statement in temporal proximity and subsequent to the illegal arrest).

The district court correctly admitted evidence at Hert's trial. Hert's conviction and sentence are affirmed.

AFFIRMED.

J. CHUCK GAST, APPELLANT, V. CONTINENTAL CAN COMPANY, APPELLEE.

370 N.W.2d 172

Filed July 12, 1985. No. 84-732.

Workmen's Compensation: Appeal and Error. The Supreme Court is bound by the findings of the compensation court where there is sufficient competent evidence in the record to support the judgment.

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

J. Chuck Gast, pro se.

Scott A. Burcham of Baylor, Evnen, Curtiss, Grimit & Witt, for appellee.

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

PER CURIAM.

This is an appeal from the decision of the Workmen's Compensation Court on rehearing which denied compensation to appellant, J. Chuck Gast. In its order of dismissal the compensation court found that the appellant did not prove by a preponderance of the evidence that he suffered an accident on August 15, 1982, arising out of and in the course of his employment.

The record discloses that appellant, a 35-year-old male, was a quality control inspector at the Continental Can Company on the date of the alleged accident. Prior to that date, appellant, who was very physically active, had suffered at least two separate injuries to the right shoulder in athletic contests, a softball game and a football game. The appellant asserts that on August 15, 1982, while working on the job, he slipped on some grease and injured his right shoulder. It is not disputed that appellant, somewhere in the course of either his athletic or employment career, did indeed suffer a rotator cuff injury to his right shoulder, for which he underwent surgical correction procedures on two separate occasions.

Appellant asserts that shortly after the injury, he reported the accident to the nurse on duty at Continental Can Company

and that while making that report a supervisor came into the nurse's office and urged appellant to file a claim for non-work-related injuries under a group disability program because of the alleged superiority of benefits. The supervisor denies ever making such a statement, and no written record appears of a reported job-related accident until nearly a year later. Appellant did not recite the job-related accident when he was first treated at the Family Practice Clinic in Omaha, Nebraska, on examinations by two separate orthopedic surgeons, or prior to the first surgery.

Thus, the evidence in this case presented a factual dispute, and the compensation court chose to believe one version of the facts rather than the other. There is sufficient evidence which, if believed, would support the version of the facts adopted by the compensation court. This court is bound by such findings unless the factfinding is shown to be clearly wrong. Neb. Rev. Stat. § 48-185 (Reissue 1984); *Mulder v. Minnesota Mining & Mfg. Co.*, 219 Neb. 241, 361 N.W.2d 572 (1985); *Paris v. J. A. Baldwin Mfg. Co.*, 216 Neb. 151, 342 N.W.2d 198 (1984). The judgment of the Workmen's Compensation Court must therefore be affirmed.

AFFIRMED.

WHITE, J., participating on briefs.

RONALD E. SORENSEN, COMMISSIONER OF LABOR, STATE OF NEBRASKA, APPELLANT, V. LARRY A. MEYER AND COMMERCIAL FEDERAL SAVINGS AND LOAN ASSOCIATION, APPELLEES.

370 N.W.2d 173

Filed July 12, 1985. No. 84-779.

1. **Employment Security Law.** The Employment Security Law provides cash benefits to workers who have been employed in covered employment but who become unemployed and are not otherwise disqualified.
2. _____. The Employment Security Law is to be liberally construed in order that its beneficent purpose of paying benefits to involuntarily unemployed workers may be accomplished.

3. **Statutes: Legislature: Intent.** The language of a statute should be considered in determining the intent of the Legislature.
4. **Statutes.** In construing a statute this court will, if possible, try to avoid a construction which leads to absurd, unjust, or unconscionable results.
5. _____. Statutory language should be given its plain and ordinary meaning, and where the words of a statute are plain, direct, and unambiguous, no interpretation is necessary to ascertain their meaning.
6. **Statutes: Legislature: Intent.** It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language; neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute.
7. _____: _____: _____. Since the Legislature is presumed to have intended every provision of a statute to have a meaning, this court will give effect, if possible, to every word, clause, and sentence thereof.
8. _____: _____: _____. In determining legislative intent it is necessary to examine a statute as a whole, in light of its objects and purposes.
9. **Employment Security Law.** The requirement of Neb. Rev. Stat. § 48-628(e) (Reissue 1984), that a lump sum severance allowance be prorated, is intended to prevent a claimant from receiving double payments for the same period of time in the form of unemployment benefits and severance compensation.
10. _____. The provision of Neb. Rev. Stat. § 48-627(e) (Reissue 1984), that a claimant earn a certain amount of wages during any benefit year and during each of two quarters thereof, is intended to prevent a claimant from electing to simply collect unemployment benefits rather than work.
11. _____. A lump sum severance allowance paid to a claimant is not to be prorated to the calendar quarters immediately following the date of payment in order to determine whether the monetary eligibility requirements of Neb. Rev. Stat. § 48-627(e) (Reissue 1984) have been met.

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

Paul D. Kratz, for appellant.

Robert E. Roeder, for appellee Meyer.

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

CAPORALE, J.

The Nebraska Appeal Tribunal ruled that the lump sum severance allowance received by the claimant, Larry A. Meyer, is to be prorated to the calendar quarters immediately following the date of payment in order to determine whether Meyer met the monetary eligibility requirements and thus qualified for weekly benefits under the Nebraska Employment Security

Law. The Commissioner of Labor, Ronald E. Sorensen, appealed to the district court, which affirmed the ruling of the appeal tribunal. In this appeal the commissioner urges that the district court misapprehended the law. We agree with the commissioner and therefore reverse and remand with the direction that the district court reverse the decision of the Nebraska Appeal Tribunal.

A brief overview of the Employment Security Law, Neb. Rev. Stat. §§ 48-601 et seq. (Reissue 1984), is a prerequisite to an understanding of the issue presented by this case.

The Employment Security Law provides cash benefits to workers who have been employed in covered employment but who become unemployed and are not otherwise disqualified. In order to become eligible for such benefits, a claimant must satisfy three basic requirements.

He or she must first satisfy the continuing or weekly eligibility requirements, such as being able to work and being available for employment. §§ 48-627 and 48-628. These continuing eligibility requirements are not at issue in this case.

The second set of requirements are found in § 48-627 and are commonly known as the monetary eligibility requirements. The pertinent portion of that statute reads:

> An unemployed individual shall be eligible to receive benefits with respect to any week, only if the Commissioner of Labor finds:
>
> . . . .
>
> (e) For any benefit year, he or she has, within his or her base period, been paid a total sum of wages for employment by employers equal to not less than six hundred dollars, of which sum at least two hundred dollars shall have been paid in each of two quarters in his or her base period.

The third set of requirements are commonly referred to as the nonmonetary eligibility requirements. They are found in § 48-628 and include disqualifications for periods during which a worker receives remuneration while unemployed, voluntarily leaves employment without good cause, is discharged for misconduct, or refuses suitable employment, among others. The pertinent part of that statutory section provides:

> An individual shall be disqualified for benefits:
>
> . . . .
>
> (e) For any week with respect to which he or she is receiving or has received remuneration in the form of (1) wages in lieu of notice, or a dismissal or separation allowance . . . . Such payments made in lump sums shall be prorated in an amount which is reasonably attributable to such week. If the prorated remuneration is less than the benefits which would otherwise be due, he or she shall be entitled to receive for such week, if otherwise eligible, benefits reduced by the amount of such remuneration.

Section 48-602(3) defines a benefit year as beginning with the week in which the claimant files for unemployment benefits. Section 48-626 limits the weekly benefits payable during any benefit year to a maximum of 26. The last four completed calendar quarters immediately preceding the first day of an individual's benefit year constitute the base period. § 48-602(1). A claimant's eligibility for weekly benefits and the amount of those benefits are determined by the amount of wages paid to the claimant in the highest quarter of the base period. §§ 48-624 through 48-627. No question is presented but that Meyer's lump sum severance allowance constitutes "wages" as that term is defined in § 48-602(15).

With that statutory overview we are ready to turn to the facts of this case.

Meyer was terminated from his employment with Commercial Federal Savings and Loan Association on February 28, 1982. At the time of his termination he was paid $2,929.83 for accrued vacation pay. In addition, at his request that he be paid a lump sum, he was paid, at the same time, a severance allowance of $52,440.

On June 13, 1982, Meyer filed for unemployment benefits. On July 2, 1982, the commissioner determined that Meyer was ineligible for benefits because he did not meet the nonmonetary eligibility requirements of § 48-628(e). The commissioner's rationale for his determination was that the language of § 48-628(e) mandates proration of the allowance into an amount which is comparable to a weekly salary for the purpose of ascertaining whether the nonmonetary eligibility

requirements have been met. Because of the amount of the allowance, Meyer received prorated remuneration over a 1-year period and was therefore treated as employed during that period. The commissioner's determination that Meyer did not meet the nonmonetary eligibility requirements in June of 1982 was not appealed and is not at issue in this proceeding.

Thereafter, Meyer was employed for only 2 months, April and May of 1983. On July 11, 1983, Meyer again sought unemployment benefits effective July 10, 1983. In connection with this claim the commissioner, on July 20, 1983, issued a determination that Meyer had a benefit year beginning July 10, 1983, and ending July 7, 1984, and that Meyer's base period consisted of the third and fourth quarters of 1982 and the first and second quarters of 1983.

The commissioner then ruled that Meyer did not meet the initial monetary eligibility requirements set forth in § 48-627(e). As noted earlier, that statute provides that in order to qualify for weekly benefits, a claimant must have been paid $200 in each of two quarters of the base period and a total of $600 during the entire base period. The commissioner reasoned that since Meyer had elected to receive his severance allowance in a lump sum, he received no wages during the third and fourth quarters of 1982, nor during the first quarter of 1983. In other words, for the purpose of determining whether the monetary eligibility requirements had been met, the commissioner, unlike when determining whether Meyer met the nonmonetary eligibility requirements, refused to prorate the allowance but, rather, treated the allowance as wages paid to Meyer during the calendar quarter in which Meyer actually received the allowance; that is, wages all paid in the first quarter of 1982.

Meyer contends that based on the commissioner's treatment of the allowance in determining whether the nonmonetary requirements of § 48-628 had been met, he should have been considered employed during the previous two quarters for the purpose of determining whether he had met the monetary requirements under § 48-627. More specifically, he argues that to hold that the severance allowance may not be prorated in determining whether he meets the monetary eligibility requirements, but must be prorated in determining whether he

meets the nonmonetary eligibility requirements, would create an absurd, unjust, unreasonable, and unconscionable result. He advocates a broad reading of the law, with primary consideration going to the basic principle that the Employment Security Law is to be liberally construed in order that its beneficent purpose of paying benefits to involuntarily unemployed workers may be accomplished. *McClemens v. United Parcel Serv.*, 218 Neb. 689, 358 N.W.2d 748 (1984). In support of his contention Meyer points out that the statutorily prescribed unemployment insurance taxes were assessed against the severance allowance in accordance with the method by which unemployment benefits are financed under the law. §§ 48-648 and 48-649. Meyer argues it would be inequitable to exact unemployment insurance taxes on his severance allowance and then not pay the corresponding benefits.

The commissioner, on the other hand, argues that whether each of the two types of eligibility requirements has been met is determined by two separate statutes, each using different language so as to impose different standards to meet different underlying policy considerations.

The problem presented is obviously one of statutory construction. In performing that task we are bound by a number of well-established rules.

In construing a statute the language used by the Legislature should be considered to determine its intent. *Mitchell v. County of Douglas*, 213 Neb. 355, 329 N.W.2d 112 (1983); *School Dist. No. 20 v. Commissioner of Labor*, 208 Neb. 663, 305 N.W.2d 367 (1981). This court will, if possible, try to avoid a construction which leads to absurd, unjust, or unconscionable results. *Worley v. City of Omaha*, 217 Neb. 77, 348 N.W.2d 123 (1984); *In re Boundaries of McCook P.P. Dist.*, 217 Neb. 11, 347 N.W.2d 554 (1984).

Statutory language should be given its plain and ordinary meaning, *In re Interest of K.S.*, 216 Neb. 926, 346 N.W.2d 417 (1984), and where the words of a statute are plain, direct, and unambiguous, no interpretation is necessary to ascertain their meaning. *Governors of Ak-Sar-Ben v. Department of Rev.*, 217 Neb. 518, 349 N.W.2d 385 (1984); *Garreans v. City of Omaha*, 216 Neb. 487, 345 N.W.2d 309 (1984). Further, it is not

within the province of a court to read a meaning into a statute that is not warranted by the legislative language; neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute. *State ex rel. Douglas v. Herrington*, 206 Neb. 516, 294 N.W.2d 330 (1980).

We 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. *Iske v. Papio Nat. Resources Dist.*, 218 Neb. 39, 352 N.W.2d 172 (1984).

We also note that in determining the legislative intent, it is necessary to examine the Employment Security Law as a whole, in light of its objects and purposes. *State v. Bargen*, 219 Neb. 416, 363 N.W.2d 393 (1985); *Beatrice Manor v. Department of Health*, 219 Neb. 141, 362 N.W.2d 45 (1985); *Adkisson v. City of Columbus*, 214 Neb. 129, 333 N.W.2d 661 (1983); *PPG Industries Canada Ltd. v. Kreuscher*, 204 Neb. 220, 281 N.W.2d 762 (1979).

To recapitulate, § 48-627(e) sets forth the monetary eligibility requirement that an individual have been "paid a total sum of wages for employment by employers equal to not less than six hundred dollars, of which sum at least two hundred dollars shall have been paid in each of two quarters in his or her base period." The question therefore is whether the word "paid" in the phrases "paid a total sum" and "shall have been paid in each of two quarters" means "actually paid in those periods" or means something else, such as "actually or attributively paid by proration."

The definitions of "paid" in Webster's Third New International Dictionary, Unabridged 1620 (1968), include "receiving pay . . . marked by the reception of pay esp. in an advance lump sum . . . that has been or will be paid for." We note that several courts have held that the term "paid" in unemployment law does not mean wages payable but wages which have actually been paid. *Dessauer v. Ariz. Dept. of Economic Sec.*, 687 P.2d 392 (Ariz. App. 1984); *State, Dept. of Ind. Relations v. Willard*, 379 So. 2d 622 (Ala. App. 1980); *Giammattei v. Egan*, 135 Conn. 666, 68 A.2d 129 (1949). It may be argued, however, that since these cases all dealt with money

earned in one statutory period of employment but not paid until a later period, the reverse of the situation in this case, they have no applicability to the issue before us. What is clear from the dictionary definition and the above-cited cases is that there is no "plain and ordinary" meaning of "paid" as used in § 48-627. We must therefore, in resolving the issue, look to other rules of construction.

The commissioner contends that the policy behind the requirement that a lump sum severance allowance be prorated for the purpose of determining whether the nonmonetary eligibility requirement has been met, § 48-628(e), prevents a claimant from receiving double payments for the same period of time in the form of unemployment benefits and severance compensation. While we have not previously so held, but do so now, other courts have determined that statutes with provisions similar to ours were intended to avoid such double payments. In *West Jordan v. Department of Employment Sec.*, 656 P.2d 411, 414 (Utah 1982), the court stated:

> What this Court said in the context of workmen's compensation benefits is also true of unemployment compensation benefits for employees who have received employer severance payments: "[T]here is no statutory purpose to be served in allowing what is essentially a double recovery for the same injury."

The court went on to hold that an employee was not entitled to receive unemployment benefits for any portion of time which was equivalent to the severance allowance which was included in her final check.

In *Kalen v. Director of the Division of Employment Security*, 334 Mass. 503, 506, 136 N.E.2d 257, 258 (1956), the court, in holding that an employee's severance and vacation allowance was properly credited against unemployment benefits, said:

> The Legislature seems to have reasoned that, inasmuch as unemployment benefits were intended to aid persons who had lost their jobs and could not find work, such benefits ought not to be paid to persons who had received sums of money from their jobs because of severance until after such sums had been applied to fill the gap. The same

reasoning applies to the "vacation allowance" of $249 (also mentioned in the statute) and to the two weeks' pay in lieu of dismissal notice.

The monetary eligibility requirement in § 48-627(e), that a claimant earn a certain amount of wages during any benefit year and during each of two quarters thereof, serves a different policy. It insures that a claimant demonstrates that he or she is willing and trying to work and prevents claimants from electing to simply collect unemployment benefits rather than work.

Considering the Employment Security Law as a whole and giving effect to every word, and lack thereof, in the statutes, we conclude that the commissioner is correct in his interpretation of the law. The silence of § 48-627(e) regarding proration, compared to the mandate of § 48-628(e) that a lump sum severance allowance be prorated, persuades us that the Legislature intended there be no proration for the purpose of determining whether the monetary eligibility requirements have been met, whereas proration is required for the purpose of determining whether the nonmonetary eligibility requirements have been met. Contrary to Meyer's view, the result is neither absurd, unjust, unreasonable, nor unconscionable; the result serves the different policies of the two sections of the Employment Security Law and serves the overall policy of paying benefits to those who are trying to work but cannot through no fault of their own.

Meyer's argument that the payment of unemployment insurance taxes on the lump sum paid him as a severance allowance compels a different result is equally without merit. The tax was collected because the allowance was paid, not because it was or was not to be prorated.

We reverse the judgment of the district court and remand with the direction that the district court reverse the decision of the Nebraska Appeal Tribunal.

REVERSED AND REMANDED WITH DIRECTION.

WHITE, J., participating on briefs.

WHITE, J., dissenting.

It is the position of the Commissioner of Labor that he would like to have it both ways, i.e., to treat the payments as earnings for the purpose of disqualifying the claimant for benefits

immediately after leaving employment and as nonearnings to disqualify him from future benefits. The majority, holding that indeed "consistency is the hobgoblin of small minds," agrees with the commissioner. I do not. Catch-22 has arisen, and the result can only be described as ludicrous.

BOSLAUGH and SHANAHAN, JJ., join in this dissent.

STATE OF NEBRASKA, APPELLEE, V. JEFFREY R. BENZEL, APPELLANT.

370 N.W.2d 501

Filed July 12, 1985. No. 84-827.

1. **Convictions: Appeal and Error.** In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact, and a verdict made by the trier of fact must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
2. **Homicide: Intent.** In a murder case the question of premeditation is for the jury to determine. No particular length of time for premeditation is required, provided that the intent to kill is formed before the act is committed and not simultaneously with the act that caused the death. The time needed for premeditation may be so short as to be instantaneous; the intent to kill may be formed at any moment before the homicide is committed.
3. **Convictions.** A conviction may be sustained if the guilt of the defendant is established beyond a reasonable doubt from all the evidence in the case, including such reasonable inferences as seem justified in the light of the trier of facts' own experience.
4. **Criminal Law: Words and Phrases.** Criminal attempt may be defined in part as intentionally engaging in conduct which, under the circumstances as the actor believes them to be, constitutes a substantial step in a course of conduct intended to culminate in the commission of the crime.
5. **Criminal Law: Weapons.** Even though a gun be unloaded and thereby incapable of causing death or injury, a person may be guilty of attempted murder or assault if the person pulling the trigger believes the gun to be loaded.
6. **Records: Appeal and Error.** It is incumbent upon the defendant on appeal from a criminal conviction to provide a record which demonstrates prejudicial error.

7. **Trial: Records: Evidence: Proof.** No extrinsic authentication is required for admissibility of a copy of an official record certified by its authorized custodian—a court reporter—who has complied with the rules of the Supreme Court as to certification.
8. **Habitual Criminals: Prior Convictions: Appeal and Error.** Any objections to the validity of proceedings in other cases, utilized for enhancement purposes, other than effective assistance of counsel or waiver thereof, must be raised on direct appeal or a separate proceeding to establish the invalidity of the proceedings.
9. **Records: Courts.** Generally, a document from a court may be authenticated by either the clerk or deputy clerk of that court.
10. **Trial: Juries.** A party, in selection of a jury, ordinarily has no right to examine a juror out of the presence of all other jurors, absent a showing of prejudice.
11. **Criminal Law: Trial: Juries: Indictments and Informations.** A defendant is not entitled to additional peremptory challenges because the indictment or information charges separate offenses in separate counts.
12. **Juror Qualifications.** A juror who opposes the death penalty may still be eligible to serve as a juror in a capital case as long as such juror is able to and does swear to decide guilt or innocence on the evidence and law as given in the jury instructions.
13. _____. A juror who has indicated an inability to fairly and impartially determine guilt by refusing to subordinate his or her own personal view and obey the law of the state must be excused for cause.
14. **Trial: Waiver: Appeal and Error.** A failure to make a timely objection to closing arguments is equivalent to failing to make an objection at all and waives any right to complain.
15. **Trial: Prosecuting Attorneys: Juries: Motions for Mistrial.** The general rule is that remarks of the prosecutor in final argument which do not mislead or unduly influence the jury do not rise to a level sufficient to require granting a mistrial.
16. **Trial: Prosecuting Attorneys: Appeal and Error.** Generally speaking, it is not prejudicial error for a prosecutor to make remarks in closing arguments based on deductions and inferences drawn from the evidence.
17. **Criminal Law: Appeal and Error.** In determining whether the rights of a defendant have been prejudiced such that a reversal is required, the claim of prejudice must be evaluated in the context of the entire record.
18. **Appeal and Error.** There is no ground for reversal where the error does not result in some demonstrative prejudice.
19. **Sentences: Appeal and Error.** Where the punishment of an offense created by statute is left to the discretion of the court to be exercised within certain prescribed limits, a sentence imposed within such limits will not be disturbed on appeal unless there appears to be an abuse of discretion.
20. **Sentences.** In an indeterminate sentence the minimum sentence may not exceed one-third the maximum sentence permitted by law.

Appeal from the District Court for Hall County: RICHARD L. DEBACKER, Judge. Judgments on counts I, II, and IV affirmed. Sentence on count III vacated and the cause remanded for resentencing on count III.

Cunningham, Blackburn, VonSeggern, Livingston & Francis, for appellant.

Robert M. Spire, Attorney General, and Lynne R. Fritz, for appellee.

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

HASTINGS, J.

Defendant was convicted by a jury of the first degree murder of Terry Atkinson, use of a firearm to commit a felony, attempted first degree murder of Kim Christensen, and being a felon in possession of a firearm. In a separate proceeding he was found to be a habitual criminal. A three-judge panel sentenced defendant to a term of life imprisonment to be served consecutively to the other three sentences, which were 20 to 60 years, 30 to 60 years, and 10 to 60 years, consecutively. Defendant has appealed, and we affirm except as to count III.

Defendant assigns as errors: (1) The insufficiency of the evidence to support convictions for first degree murder and attempted murder, and for being a habitual criminal; (2) Erroneous rulings by the trial court regarding jury selection; (3) Failure to grant a mistrial because of prosecutorial misconduct; and (4) Errors in sentencing.

There was conflicting testimony at trial surrounding the facts of the case. However, in determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact, and a verdict made by the trier of fact must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Sutton, ante* p. 128, 368 N.W.2d 492 (1985); *State v. Goodon,* 219 Neb. 186, 361 N.W.2d 537 (1985); *State v. Smith,* 219 Neb. 176, 361 N.W.2d 532 (1985).

The evidence reveals the defendant admitted shooting the decedent, Terry Atkinson, with a .357 Magnum on December 12, 1983. According to Lorene Golle, the defendant's girl friend, she, the defendant, and a friend had gone to the

Atkinson-Christensen house on December 9 to purchase drugs. Prior to going, Lorene informed the defendant she had already paid Kim Christensen, the decedent's girl friend, for the drugs the preceding Friday night, December 9, although she admitted in court she actually had not. En route to the house on December 12, the defendant told Lorene, "If I don't get what we came here for, someone's going to get dropped."

When Lorene and the defendant entered the house, Lorene asked to use the bathroom and borrow a brush. Kim showed her to the bathroom and asked what had happened to Lorene, as she appeared to have been beaten around the face. Kim left the bathroom as the defendant approached, wanting to talk to Lorene. The defendant entered, shut the door, and then Kim heard "a racket" in the bathroom, with Lorene shouting and some banging against the walls.

Terry came from the living room and twice told Lorene and the defendant to leave. The defendant grabbed Lorene and started pushing her toward the front door. Before pushing Lorene out, the defendant said he wanted to talk to Kim about being paid for the drugs. After Lorene left, Kim testified the defendant turned, grabbed her, and pointed a gun at her head, which prompted Terry to go to his bedroom where he kept a shotgun. The defendant followed and tried to kick the bedroom door in. When he could not, he returned to the living room, again grabbed Kim and put the gun to her head. He then told her, "Do you want to see something go on here? Do you want to see something happen, huh?" and then, "Better yet," and pointed the gun straight out in the direction of the bedroom, and said, "If your old man comes out and does what I think he's doing, he's going to be a dead man." As the decedent returned from the bedroom, defendant shot him in the mouth, and the victim fell to the floor.

The defendant then stood 5 or 6 feet from Kim, with his legs spread and both hands on the gun straight out "like that," as she crouched by the living room sofa. She heard the gun click and saw it (the cylinder) go around. She heard three more clicks and saw the defendant "looking at the gun like this," and then he ran from the house.

The defendant claims that only after the decedent returned to

the living room with the shotgun leveled at him did he pull his gun and shoot the decedent in self-defense. He insists that the evidence is insufficient to establish premeditation, a necessary element of first degree murder. Neb. Rev. Stat. § 28-303 (Reissue 1979).

The question of premeditation was for the jury to determine. *State v. Jones*, 217 Neb. 435, 350 N.W.2d 11 (1984). No particular length of time for premeditation is required, provided that the intent to kill is formed before the act is committed and not simultaneously with the act that caused the death. *Jones, supra*; *State v. Nokes*, 192 Neb. 844, 224 N.W.2d 776 (1975); *Savary v. State*, 62 Neb. 166, 87 N.W. 34 (1901). The time needed for premeditation may be so short as to be instantaneous; the intent to kill may be formed at any moment before the homicide is committed. *State v. Bautista*, 193 Neb. 476, 227 N.W.2d 835 (1975); *Nokes, supra*.

Here, the defendant's words both to his girl friend and to Kim Christensen before pulling the trigger were sufficient evidence to establish premeditation.

Defendant's claim of self-defense is insufficient to destroy the evidence of premeditation, as it is clear the jury could find defendant had several opportunities to leave the house and avoid any confrontation with the decedent.

With respect to the sufficiency of the evidence to convict of attempted murder, the conviction must be sustained if the defendant's guilt is established beyond a reasonable doubt from all the evidence in the case, including such reasonable inferences as seem justified in the light of the trier of facts' own experience. *State v. Buchanan*, 210 Neb. 20, 312 N.W.2d 684 (1981).

Criminal attempt is defined in part as intentionally engaging in conduct which, under the circumstances as the actor believes them to be, constitutes a substantial step in a course of conduct intended to culminate in his commission of the crime. See Neb. Rev. Stat. § 28-201(1)(b) (Reissue 1979).

Here, the evidence is sufficient to establish the requisite "substantial step." Kim Christensen testified the defendant grabbed her and put a gun to her head. He then changed his mind momentarily, directed the gun at the decedent, and shot

him. The defendant then did not leave the premises but chose to remain, stood in a firing stance, leveled the gun "like this," and Kim heard it click once and then three times and saw the cylinder advance. Her version of the story was corroborated by a neighbor who let her into his house moments later. Kim ran through the snow to the house, clad only in pajamas and with bare feet. In an anxious and frightened voice she recounted the events of the evening and told the neighbor the defendant wanted to kill her.

While Kim did not see the defendant pull the trigger, except for the first time, the circumstantial evidence, when taken as a whole, is sufficient to prove guilt of attempted murder beyond a reasonable doubt. See, *State v. Evans*, 215 Neb. 433, 338 N.W.2d 788 (1983); *State v. Harris*, 218 Neb. 75, 352 N.W.2d 581 (1984).

At oral argument defendant maintained the conviction could not stand because there was no proof the gun was loaded at the time of the alleged attempt. However, a close reading of § 28-201 does not require the gun be loaded, only that the defendant *believe* the gun to be loaded.

In a similar case, *State v. Damms*, 9 Wis. 2d 183, 100 N.W.2d 592 (1960), the Wisconsin Supreme Court upheld the attempted murder conviction of a man who shot at his wife with a gun which proved to be unloaded. The court said the man's belief the gun was loaded, proven beyond a reasonable doubt, was sufficient to uphold the conviction despite the impossibility of completing the intended crime. The court reviewed the applicable case law and stated:

> Sound public policy would seem to support the majority view that impossibility not apparent to the actor should not absolve him from the offense of attempt to commit the crime he intended. An unequivocal act accompanied by intent should be sufficient to constitute a criminal attempt. In so far as the actor knows, he has done everything necessary to insure the commission of the crime intended, and he should not escape punishment because of the fortuitous circumstance that by reason of some fact unknown to him it was impossible to effectuate the intended result.

Id. at 190-91, 100 N.W.2d at 596; *Mullen v. The State*, 45 Ala. 43 (1871). See *State v. Mitchell*, 139 Iowa 455, 116 N.W. 808 (1908).

The court concluded, based on the wording of the attempt statute, that the defendant was guilty of attempted murder. Here, defendant's actions at the time the gun misfired were sufficient evidence that he believed the gun was loaded; the conviction should be upheld.

Furthermore, although there was no direct testimony that the gun was pointed at the victim in the attempted murder charge, she stressed that the defendant was in a firing stance with the gun pointed straight out "like this." The first victim, Atkinson, lay dead on the floor. There was no one else in the house at whom a gun could be pointed. Also, the testimony of the victim that the gun was pointed "like this" suggests a demonstration from which the jury might properly infer that it depicted a pointing at the victim. If this was not correct, it was incumbent upon the defendant to bring out on cross-examination that such was not the fact.

The defendant next challenges the evidence admitted to establish he is a habitual criminal.

At the hearing the State introduced records of two prior felony convictions for which the defendant served sentences of 1 year or more. Neb. Rev. Stat. § 29-2221 (Reissue 1979).

Defendant was first convicted for car theft in 1974 at age 16. He pleaded guilty and was sentenced to 1 year in prison. The documents admitted to establish this prior conviction included posttrial exhibit 17, authenticated copies of the information, journal entry, and order of commitment from Hall County; posttrial exhibit 18, a certified copy of the transcript of the proceedings before the district court; and posttrial exhibit 19, certified records of the Nebraska Penal and Correctional Complex.

Exhibits 17 and 18 established the defendant was represented by counsel at the time he pleaded guilty. His plea was accepted after the information charging him with the crime was read and the court advised him of (1) the penalties, (2) his right to trial by jury, (3) his right to cross-examine witnesses, and (4) the State's burden to prove guilt beyond a reasonable doubt, and a factual

basis for the crime was established. Exhibit 19 established the defendant's period of incarceration and corroborated he pleaded guilty to the theft.

The defendant objects that exhibit 18 is not properly authenticated by the clerk of the court and bears only the certification of the court reporter. However, under Neb. Rev. Stat. § 27-902(4) (Reissue 1979), no extrinsic authentication is required for admissibility of a copy of an official record certified by its authorized custodian who has complied with the rules of the Supreme Court as to certification. Rule 5 of the Revised Rules of the Supreme Court of the State of Nebraska (rev. 1983) requires that a bill of exceptions contain a certificate by the court reporter that it is a true and complete record of the proceedings. Here, such certification existed, and the objection is without merit.

Defendant next objects that the conviction for car theft did not meet the constitutional requirements to establish the plea was voluntarily entered. However, not only do the proceedings meet the requirements set out in *State v. Turner*, 186 Neb. 424, 183 N.W.2d 763 (1971), but any objections to validity, other than effective assistance of counsel or waiver thereof, must be raised by direct appeal or a separate proceeding to establish the invalidity of the proceedings, *State v. Baxter*, 218 Neb. 414, 355 N.W.2d 514 (1984). As the evidence establishes the defendant was represented by counsel, the proffered evidence is sufficient to support a finding of habitual criminal. *State v. Gonzales*, 218 Neb. 43, 352 N.W.2d 571 (1984).

The State also introduced records of a prior conviction from Adams County showing the defendant pleaded guilty to one count of robbery in January 1978, receiving a sentence of 3 to 9 years. Documents include exhibit 16, a copy of the order of commitment from Adams County; exhibit 20, certified records of the Nebraska Penal and Correctional Complex; and exhibit 32, journal entries from Adams County and an authenticated copy of the information.

The defendant objects to exhibit 16 as not duly authenticated by the clerk of the district court. However, the document was authenticated by the deputy clerk; and pursuant to Neb. Rev. Stat. § 25-2219 (Reissue 1979), any duty of a clerk of the district

court may be performed by a deputy. The objection was properly overruled.

Defendant objects to exhibit 32, which contains an apparent inconsistency. The journal entry of the arraignment on January 17, 1978, states that the defendant entered a plea of guilty to count II of the information and that count I was dismissed. The journal entry of the sentencing on January 27, 1978, states that the defendant was sentenced for one count of robbery, as count II of the information was dismissed. However, it is clear from reading all three documents together that the defendant pleaded guilty to count II and was incarcerated therefor. The discrepancy does not destroy the sufficiency of the evidence to establish the defendant was a habitual criminal.

Defendant next challenges the jury selection process and the trial court's ruling on his pretrial motion. In his motion defendant requested (1) the jury panel be sequestered during voir dire, with a maximum of six potential jurors present at any one time, (2) defendant be granted 12 peremptory challenges for count I and 6 peremptory challenges for each remaining count, and (3) on voir dire defense counsel be allowed to inquire of each prospective juror his or her view on the death penalty and whether that view would influence the juror's impartiality. The first part of the motion was denied; on the second, defense was limited to 12 peremptory challenges; and on the third part, defense counsel was granted the same privilege as the State.

The trial court did not err in denying defendant's request to sequester the jury during voir dire. The general rule is that a party, in selection of a jury, ordinarily has no right to examine a juror out of the presence of all other jurors. *State v. Kirby*, 185 Neb. 240, 175 N.W.2d 87 (1970); *State v. Fiegl*, 184 Neb. 704, 171 N.W.2d 643 (1969). The only exception, as suggested in *Kirby, supra*, is a showing that without sequestration the defendant's rights would be prejudiced. See *State v. Ell*, 196 Neb. 800, 246 N.W.2d 594 (1976).

At hearing, the only reason advanced by defense counsel for sequestration was that it would allow the jurors to remain fresh in their answers to counsel's voir dire questions. However, there is no showing on the record that the prospective jurors were "fatigued" or influenced by other jurors' responses. If

anything, they appeared open and responsive to all questions.

Neither did the court err in limiting the number of peremptory challenges for the defense to 12. *State v. Abboud*, 181 Neb. 84, 147 N.W.2d 152 (1966), held a defendant is not entitled to additional peremptory challenges because the indictment charges separate offenses in separate counts. Here, the defendant sought a total of 30 peremptory challenges on 4 counts, but the court limited him to 12 as provided for in any crime punishable by death or life imprisonment. See Neb. Rev. Stat. § 29-2005 (Cum. Supp. 1984).

The defendant next challenges his "denial" to inquire of potential jurors their views on the death penalty. Defendant invokes *Grigsby v. Mabry*, 758 F.2d 226 (8th Cir. 1985), which held the systematic exclusion for cause of all jurors who hold absolute scruples against the death penalty violates the defendant's sixth amendment right to a jury composed of a representative cross-section of the community.

The defendant's position here is difficult to understand, because the motion was not denied. Defendant, in arguing the motion, sought the same privilege of inquiry as the State was allowed. As the excerpt below demonstrates, the defense sought no greater realm of inquiry nor raised any constitutional objections to the proceedings.

> THE COURT: My vague recollection of the cases is that the only question allowed to be asked by the prosecution is the one that I just stated or paraphrased. Whether the conviction is — Whether the feeling about capital punishment is such that it would affect the juror's ability to make a fair and impartial determination of guilt, and once that question is answered, counsel are not allowed to go beyond that. That's as far as they may go.
>
> Is your understanding different?
>
> MR. FRANCIS: That's what we are asking. We are asking to be allowed —
>
> THE COURT: That the State would be — That the State would be allowed to pursue that issue further than that question and its bald answer?
>
> MR. FRANCIS: No. If that's the extent of the inquiry.
>
> I think that we, also, should be entitled to ask that same

question, however.

THE COURT: All right. I agree with you. You may ask that same question, but not others relating to the juror's beliefs about capital punishment.

MR. FRANCIS: Okay.

During questioning, defense did inquire of one juror her feelings about the death penalty, and he never objected to the State's removal for cause of another juror who felt it impossible for her to follow her oath.

The question as permitted by the court is in line with the dictates of *Witherspoon v. Illinois*, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968), *reh'g denied* 393 U.S. 898, 89 S. Ct. 67, 21 L. Ed. 2d 186, which allows all jurors to serve who oppose the death penalty as long as each swears to decide guilt or innocence based on the evidence and law as given to him. This proposition was reiterated in *Adams v. Texas*, 448 U.S. 38, 45, 100 S. Ct. 2521, 65 L. Ed. 2d 581 (1980): "The State may insist . . . that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court." See, *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984); *State v. Lamb*, 213 Neb. 498, 330 N.W.2d 462 (1983). Even *Grigsby, supra*, acknowledges the validity of *Adams, supra*, and *Witherspoon, supra*, that jurors who will not take the oath or decide guilt or innocence on the evidence and law may be excluded.

The recent case of *Wainwright v. Witt*, 469 U.S. ____, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985), reaffirms the position of *Adams, supra.* In light of this case defendant's reliance on *Grigsby* is misplaced.

The defendant also challenges the trial court's refusal to remove juror Anderson for cause. During voir dire, it became clear Ms. Anderson did not want to serve on this jury. When questioned, she asserted serving would cause hardships at work; that she had known the Benzels since high school; and that she had already "kind of" made up her mind about the case from what she had read in newspapers, heard on radio, and seen on television. When asked by defense counsel, she said she would have difficulty taking the oath. However, the court denied the defense's removal for cause after she told the court

she would try to render a decision based on the evidence and law as given. She later told the court she believed in the presumption of innocence until proven guilty beyond a reasonable doubt. She was later excused on one of defense's peremptory challenges.

A juror who has indicated an inability to fairly and impartially determine guilt by refusing to subordinate his own personal views and obey the law of the state must be excused for cause. *Reeves, supra*; Neb. Rev. Stat. § 29-2006 (Reissue 1979). Here, the juror was willing to subordinate her personal views, and therefore removal for cause was committed to the trial court's discretion and subject to reversal only when clearly wrong. *State v. Ellis*, 208 Neb. 379, 303 N.W.2d 741 (1981). As the action of the trial court was not clearly erroneous, this assignment is without merit.

The defendant next claims the district court erred in failing to grant a mistrial based on statements made by the prosecution during closing arguments.

During closing argument, the prosecuting attorney attempted to sum up the evidence presented by Kim Christensen. He said the defendant pointed a gun at Ms. Christensen and pulled the trigger. He then remarked, "I think she's lucky to be alive to tell us that story here today. I think if the defendant would have had his way, she would be dead like Mr. Atkinson is."

Defendant claims not only are the remarks about pointing the gun and pulling the trigger untrue but the prosecutor, by injecting his personal beliefs, inflamed the passions of the jury.

Before discussing the prejudicial aspect of the claim, the court must note the defendant did not object to the remarks at the time they were made nor at any time prior to the jury's being sequestered for deliberation.

The failure to make a timely objection is equivalent to failing to make an objection at all and waives any right to complain. See *State v. Boss*, 195 Neb. 467, 238 N.W.2d 639 (1976).

Further, if the court does consider the objection, the remarks were not unduly prejudicial. Whether prosecutorial misconduct is prejudicial depends largely on the facts of each case. *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984). The impact of

any comment made at trial depends on the atmosphere at trial. The trial judge is in a better position to measure the impact a comment has on a jury, and his decision will not be overturned unless clearly erroneous. *Reeves, supra.*

The general rule is that remarks of the prosecutor in final argument which do not mislead or unduly influence the jury do not rise to a level sufficient to require granting a mistrial. *Reeves, supra*; *Argabright v. State*, 62 Neb. 402, 87 N.W. 146 (1901).

Here, the prosecutor prefaced his remarks by telling the jury what he said was not evidence and that they need not accept his comments if not supported by the evidence. Further, it is not prejudicial for the prosecutor to make remarks based on deductions and inferences drawn from the evidence. *State v. Brooks*, 189 Neb. 592, 204 N.W.2d 86 (1973). See, *State v. Wounded Arrow*, 207 Neb. 544, 300 N.W.2d 19 (1980); *State v. Dandridge*, 209 Neb. 885, 312 N.W.2d 286 (1981). The prosecutor's remarks fall within this exception.

The last assignments concern sentencing and sentencing procedures.

The defendant claims the district court failed to set the date for hearing on the sentence to be imposed on the first degree murder count within 7 days of the guilty verdict, as mandated by Neb. Rev. Stat. § 29-2520 (Reissue 1979).

The defendant was convicted by a jury on July 12, 1984. An order designating a three-judge panel to determine the sentence for first degree murder was entered by the Chief Justice on July 20, 1984. On July 23, 1984, the district court's progression order set September 28, 1984, for a sentencing hearing before the three-judge panel. On August 20, 1984, the defense raised the issue as one of his posttrial motions. At the hearing on those motions on September 7, 1984, the court admitted that the 7-day restriction was not complied with. However, the court denied defendant's motion for a new trial, as it failed to see what prejudice befell the defendant because of the delay. The district court was correct in its assessment.

In determining whether the rights of a defendant have been prejudiced such that a reversal is required, the claim of prejudice must be evaluated in the context of the entire record.

State v. Birge, 215 Neb. 761, 340 N.W.2d 434 (1983).

Here, the defendant was granted a continuance on his posttrial motions until September 7, 1984. The continuance was premised on his request to obtain new counsel. However, the defendant never succeeded, and proceeded with his trial counsel. As a result of the continuance, the sentencing on count I was not handed down until October 29, 1984. The 4-day delay in setting the progression order is insignificant compared to the month's delay in sentencing occasioned by defendant's request for time to obtain new counsel.

Further, the defendant was sentenced to life in prison rather than the more serious penalty of death. As such, it is unclear how a 4-day delay in setting the hearing date amounted to any significant prejudice to the defendant. There is no ground for reversal where the error does not result in some demonstrative prejudice. *State v. Masters*, 216 Neb. 304, 343 N.W.2d 744 (1984).

Finally, defendant challenges the sentences imposed on counts II, III, and IV as excessive because the district court ordered them to be served consecutively.

The rule is that where the punishment of an offense created by statute is left to the discretion of the court to be exercised within certain prescribed limits, a sentence imposed within such limits will not be disturbed on appeal unless there appears to be an abuse of discretion. *State v. Johnson*, 209 Neb. 308, 307 N.W.2d 525 (1981). Further, it is within the discretion of the district court to direct that sentences imposed for separate crimes be served consecutively. *State v. Tweedy*, 196 Neb. 246, 242 N.W.2d 626 (1976).

The crimes committed here were serious. The defendant killed one person and attempted to kill another. The record reveals a history of criminal activity and two prior felony convictions. As the sentences imposed were within statutory limits, they should stand except for that imposed for count III, attempted first degree murder. The sentence of from 30 to 60 years is statutorily excessive.

Neb. Rev. Stat. § 83-1,105(1) (Reissue 1981) provides that in imposing an indeterminate sentence on a defendant, "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 . . . ."

As a habitual criminal, defendant's count III conviction was punishable by a minimum of 10, maximum of 60, years in prison. See § 29-2221. The minimum to be imposed can be no greater than 20 years. Therefore, the cause must be remanded to the district court for resentencing on count III, attempted murder.

With that exception, the judgment of the trial court was correct and is affirmed.

JUDGMENTS ON COUNTS I, II, AND IV AFFIRMED.
SENTENCE ON COUNT III VACATED AND THE CAUSE REMANDED FOR RESENTENCING ON COUNT III.

GRANT, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. DESMOND D. DANIELS, APPELLANT.

370 N.W.2d 179

Filed July 12, 1985. No. 84-922.

1. **Convictions: Appeal and Error.** In the review of the evidence in a criminal case, this court does not weigh the evidence or pass upon the credibility of witnesses, and we will sustain the verdict if, in taking the view of the evidence most favorable to the State, there is sufficient evidence to support it.
2. **Police Officers and Sheriffs: Investigative Stops.** Police officers must have a particularized and objective basis for suspecting the person stopped of criminal activity.
3. **Trial: Evidence: Waiver.** Failure to object to an offer of evidence waives the objection.
4. **Drunk Driving: Witnesses: Testimony.** A nonexpert witness may testify from his observation as to whether or not another is intoxicated, and the weight and sufficiency is for a jury to decide.
5. **Police Officers and Sheriffs: Arrests.** It is an affirmative defense to prosecution under Neb. Rev. Stat. § 28-904 (Cum. Supp. 1984) if the peace officer involved was out of uniform and did not identify himself as a peace officer by showing his credentials to the person whose arrest is attempted.

Appeal from the District Court for Loup County: RONALD D. OLBERDING, Judge. Affirmed.

Curtis A. Sikyta, for appellant.

Robert M. Spire, Attorney General, and Jill Gradwohl, for appellee.

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

WHITE, J.

This is an appeal from the order of the district court affirming the convictions and sentences of appellant for driving while intoxicated, third offense, and resisting arrest, in the county court for Loup County.

Taking a view of the facts most favorable to the State, the cause arose when the village marshal of Taylor observed the appellant's vehicle fail to stop at a stop sign, and negotiate a "wide angle turn." The marshal, who was not in uniform, followed the appellant's vehicle in a pickup truck that was equipped with a red light. The marshal followed appellant's car for approximately 1 1/2 miles to appellant's home west of Taylor, where appellant pulled into a farmyard of the home he occupied. During the time the marshal followed appellant's car, he observed the car drive "to the right, enough to take up the dirt along the shoulder of the road and then curved left to the center and to the right again."

The marshal approached appellant's car as appellant was emerging. The marshal noticed an odor of alcohol about the appellant's person, saw empty beer cans on the driver's side of the vehicle, and observed the appellant's eyes to be bloodshot. Appellant was informed the marshal was a police officer, shown the marshal's badge, and asked to walk to an area near the marshal's car and perform certain physical acts presumably indicative of sobriety or the lack thereof. During the walk, appellant appeared to be "unsure" and "kind of staggery, weavy." The "finger to nose" test was not performed to the "satisfaction" of the marshal, and appellant staggered and stepped to the side in the "heel to toe" test. Finally, appellant was unable to complete recitation of the alphabet, though he successfully recited the letters from A to L and O.

Sometime during the interview, the appellant determined to

discontinue the conversation with the marshal and started walking toward his house. The marshal reached out to grab him, and appellant swung at him. A scuffle ensued, and appellant was subdued and handcuffed with the assistance of the marshal's brother-in-law. Appellant was then taken into custody and transferred to the jail in Broken Bow, Nebraska.

Appellant assigns as error (1) the court's finding that the marshal had probable cause to stop the appellant's car; (2) the court's failure to find that the evidence was insufficient to establish the offenses of driving while intoxicated and resisting arrest; (3) the court's allowing the opinion evidence of the State's witness to be admitted relative to the intoxicated state of appellant; and (4) the court's failure to find that the resistance of appellant was justified.

We affirm. We will discuss the alleged errors together. In the review of the evidence in a criminal case, this court does not weigh the evidence or pass upon the credibility of witnesses, and we will sustain the verdict if, in taking the view of the evidence most favorable to the State, there is sufficient evidence to support it. *State v. Lichti*, 219 Neb. 894, 367 N.W.2d 138 (1985); *State v. Green*, 217 Neb. 70, 348 N.W.2d 429 (1984).

Taking that view, there is evidence that the driving of appellant was erratic and that a stop sign was ignored. Therefore, the marshal had "a particularized and objective basis for suspecting the person stopped of criminal activity." *State v. Ebberson*, 209 Neb. 41, 44-45, 305 N.W.2d 904, 907 (1981). Further, the above-mentioned facts viewed under this standard establish that appellant's erratic driving occurred while under the influence of alcohol.

We note that the appellant failed to timely object to the proffered opinion evidence of his apparent state of intoxication, and thus has waived that objection. *State v. Hogan*, 194 Neb. 207, 231 N.W.2d 135 (1975). We nevertheless observe that the opinions of the various police officers and the marshal's brother-in-law were established to have been based on experience with persons who have consumed intoxicants and experience in observing, on numerous occasions, the effect of consumption of excessive intoxicants. A nonexpert witness may testify from his observation as to whether or not another is

intoxicated, and the weight and sufficiency is for a jury to decide. *State v. Lewis*, 177 Neb. 173, 128 N.W.2d 610 (1964). Had the alleged error been properly preserved, we would not have been inclined to say that the admission of the opinion evidence was erroneous.

Neb. Rev. Stat. § 28-904 (Cum. Supp. 1984) provides in part:

> (1) A person commits the offense of resisting arrest if, while intentionally preventing or attempting to prevent a peace officer, acting under color of his or her official authority, from effecting an arrest of the actor or another, he or she:
>
> (a) Uses or threatens to use physical force or violence against the peace officer or another; or
>
> (b) Uses any other means which creates a substantial risk of causing physical injury to the peace officer or another; or
>
> (c) Employs means requiring substantial force to overcome resistance to effecting the arrest.
>
> (2) It is an affirmative defense to prosecution under this section if the peace officer involved was out of uniform and did not identify himself or herself as a peace officer by showing his or her credentials to the person whose arrest is attempted.

Appellant asserts that since the complaint alleged that the marshal was in uniform and admittedly was not, the complaint must be dismissed.

We merely point out that the failure to be in uniform is an affirmative defense; therefore, the allegation is surplusage. Furthermore, we point out that the defense is effective only if the officer does not show the person arrested his credentials. The marshal testified that his badge was exhibited to appellant, and that evidence cannot be weighed by us.

The judgment of the district court is affirmed.

AFFIRMED.

ALBERT SIMACEK ET AL., APPELLANTS, V. YORK COUNTY RURAL PUBLIC POWER DISTRICT, APPELLEE.

370 N.W.2d 709

Filed July 19, 1985. No. 84-207.

1. **Easements: Proof.** The law treats a claim of prescriptive right with disfavor. Such a claim requires that the elements of such adverse user be clearly, convincingly, and satisfactorily established.
2. _____: _____. A party claiming a prescriptive easement must show that his user was exclusive, adverse, under a claim of right, continuous and uninterrupted, and open and notorious for the full 10-year prescriptive period.
3. **Easements.** A permissive use is not adverse and cannot ripen into an easement.
4. _____. If a use begins as a permissive one, it retains that character until notice that the use is claimed as a matter of right is communicated to the owner of the servient estate.

Appeal from the District Court for Fillmore County: ORVILLE L. COADY, Judge. Reversed and remanded for further proceedings.

Daniel E. Bryan of Heinisch & Bryan Law Office, for appellants.

Gordon B. Fillman of Fillman & Brugh, and John R. Brogan of Brogan & McCluskey, for appellee.

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

BOSLAUGH, J.

The plaintiffs, Albert Simacek, Patty Simacek, and Blanche J. Simacek, are the owners of a quarter section of farmland in Fillmore County, Nebraska. In 1887 Hiram L. Smith, a predecessor in title, conveyed to the Fremont, Elkhorn and Missouri Valley Railroad Company "for the purpose of constructing a Railroad thereon, and for all uses and purposes connected with the construction and use of said Railroad, a strip of land One Hundred feet in width" over and across the land owned by the plaintiffs. The deed provided that in the event the railroad right-of-way was abandoned, it would revert to the grantor, his heirs or assigns.

On April 27, 1967, the Chicago and North Western Railway Company, successor to the Fremont, Elkhorn and Missouri

Valley Railroad Company, issued a written license to the defendant, York County Rural Public Power District, to construct, maintain, and use an electric power transmission line along the right-of-way. The defendant constructed a powerline on the railroad right-of-way in 1967, which is a part of the transmission system of the defendant. The defendant did not obtain the consent of the plaintiffs to construct and operate the line, and the plaintiffs made no protest or objection to such construction and commenced no litigation concerning the line until this lawsuit was filed.

Subsequently, the Chicago and North Western Railway Company conveyed the right-of-way to the Great Plains Railway Company, which abandoned the right-of-way and removed its trackage in May 1976. The defendant has continued to maintain and operate the powerline.

On March 2, 1983, the plaintiffs commenced this action for a declaratory judgment as to the parties' rights with respect to the property, to recover possession of the property, and for an injunction to compel the defendant to remove its transmission line and poles from the property. The defendant cross-petitioned, claiming a prescriptive easement. The trial court found generally for the defendant. The plaintiffs have appealed.

This being an equitable action, we review the record de novo and reach an independent conclusion without reference to the findings of the trial court. *Steinfeldt v. Klusmire*, 218 Neb. 736, 359 N.W.2d 81 (1984).

The issue before the court is whether the defendant acquired a prescriptive easement to maintain the powerline on plaintiffs' property.

The law treats a claim of prescriptive right with disfavor, and, accordingly, such a claim requires that the elements of such adverse user be clearly, convincingly, and satisfactorily established. *Grint v. Hart*, 216 Neb. 406, 343 N.W.2d 921 (1984); *Gerberding v. Schnakenberg*, 216 Neb. 200, 343 N.W.2d 62 (1984). A party claiming a prescriptive easement must show that his user was exclusive, adverse, under a claim of right, continuous and uninterrupted, and open and notorious for the full 10-year prescriptive period. In order for the

defendant to succeed in its claim, the necessary elements must have been clearly, convincingly, and satisfactorily established since March of 1973. The record shows this was not accomplished.

It is well established that a permissive use is not adverse and cannot ripen into an easement. *Fischer v. Grinsbergs*, 198 Neb. 329, 252 N.W.2d 619 (1977). The general rule is that if a use begins as a permissive one, it retains that character until notice that the use is claimed as a matter of right is communicated to the owner of the servient estate. *Gerberding, supra.*

In *Svoboda v. Johnson*, 204 Neb. 57, 64-65, 281 N.W.2d 892, 898 (1979), it was explained:

> The fourth element required to prove a prescriptive easement is that the claimant's use was under a *claim of right*, such that there is no recognition of the right of the owner of the servient tenement to stop the use. In Barnes v. Milligan, 196 Neb. 50, 241 N.W.2d 508 (1976), we quoted from 3 Am. Jur. 2d, Adverse Possession, § 96, p. 177, with reference to the meaning of "claim of right," as follows: " 'Terms such as "claim of right," "claim of title," and "claim of ownership," when used in this connection, mean nothing more than the intention of the disseisor to appropriate and use the land as his own to the exclusion of all others, irrespective of any semblance or shadow of actual title or right. * * * Thus, "claim of right" means no more than "hostile" and if possession is hostile it is "under a claim of right." ' "

See, also, *Weiss v. Meyer*, 208 Neb. 429, 303 N.W.2d 765 (1981).

The record shows that the defendant went into possession with the permission of the railroad company, which had the right to possession of the right-of-way, and did not maintain or use its electric transmission line under a claim of right prior to the railroad's abandonment of the right-of-way. In its answer and cross-petition the defendant alleged:

> That said defendant constructed an electric transmission line in 1967 along and upon approximately seven miles of railroad right of way including the railroad right of way across the Northeast Quarter (NE¼) of Section 20, Township 7 North, Range 2 West, in Fillmore

> County, Nebraska, after first complying with all provisions of Nebraska law, and after entering into an agreement with the Chicago and North Western Railway Company dated April 27, 1967, which authorized the defendant to construct and maintain an electric transmission line upon said railroad right of way . . . .
>
> That the defendant in constructing said electric transmission line relied upon the representations of the Chicago and Northwestern [sic] Railway Co. that it had full legal authority to permit the defendant to construct said electric transmission line; the defendant paid the sum of $10,000.00 to the said Chicago and Northwestern [sic] Railway Co. as consideration for its granting authority and permission to construct and maintain the electric transmission line upon the railroad right of way.

The defendant's use of the property was permissive and not under a claim of right until at least May 1976, when the railroad abandoned the right-of-way.

The defendant argues that the railroad could not grant permission for the construction, maintenance, and use of an electric transmission line upon the right-of-way because such use was not consistent with its easement. Therefore, the defendant concludes, its use of the right-of-way was adverse to the plaintiffs from its inception. The argument ignores the fact that from April of 1967 to May of 1976 the defendant made no claim other than it was upon the right-of-way with permission. As has been stated repeatedly by this court,

> the real purpose of prescribing the manner in which adverse holding will be manifested is to give notice to the real owner that his title or ownership is in danger so that he may within the period of limitations take action to protect his interest. . . . *Purdum v. Sherman*, 163 Neb. 889, 895, 81 N.W.2d 331, 335 (1957).

Pettis v. Lozier, 217 Neb. 191, 196-97, 349 N.W.2d 372, 375-76 (1984).

The record demonstrates that the defendant's possession was held out to be by permission of the railroad, which owned the right-of-way over the land. The statute did not begin to run until the railroad abandoned the right-of-way and the

defendant's license expired. Since this suit was brought within 10 years, the defendant did not acquire an easement by prescription.

This case is similar to *State ex rel. Highway Comm. v. Union Elec. Co.*, 347 Mo. 690, 148 S.W.2d 503 (1941). In *Union Elec.* a railroad had a right-of-way over certain property. Describing the nature of this grant, the court said: " 'A right of way, in its legal and generally accepted meaning in reference to a railroad company's interest in land is a mere easement for railroad purposes in the lands of others.' " *Id.* at 697, 148 S.W.2d at 506. The power company in that case made application to the railroad for permission to place a transmission line on the right-of-way, which permission was granted *by the railroad.*

Answering the power company's contention that it had held the property adversely to the reversioners for the requisite period of time, the court said:

> It is quite clear, we think, that from 1916 to January 18, 1932, when the right of way land here involved was abandoned by the railroad company, defendant's occupancy, at most, was only *permissive* and not *adverse*, and such character of occupancy, however long, will not ripen into a prescriptive easement.

347 Mo. at 698-99, 148 S.W.2d at 507. See, also, *Franke v. Southwestern Bell Telephone Company*, 479 S.W.2d 472 (Mo. 1972), *cert. denied* 409 U.S. 875, 93 S. Ct. 124, 34 L. Ed. 2d 128 (citing and explaining *Union Elec.*).

In *Taylor Investment Co. v. Kansas City Power & Light Co.*, 182 Kan. 511, 521, 322 P.2d 817, 825-26 (1958), the court said:

> On the state of facts here presented we are compelled to hold as a matter of law that the "Transmission Company" was not asserting an adverse claim hostile to the plaintiff or its predecessors in title, but used and occupied the right of way for its transmission line in complete subservience to the exclusive right of the "Railway Company" prior to the abandonment of the railroad. The "Railway Company" reserved the right to demand that the "Transmission Company" at its own expense make such changes in its poles and wire as the railway business required.
>
> We have not overlooked *W. U. Telegraph Co. v. Rich*,

supra, in which this court recognized the possibility of an additional burden on the fee title where a railroad company and a telegraph company jointly constructed a telegraph line on the railroad right of way. It was held that the portion of the business transmitted over the wires by the telegraph company, over and above the railroad uses, gave rise to a new claim for damages caused by the additional burden, if any, cast upon the easement by its use of the telegraph line. We think the case distinguishable because in the instant case the issue is whether the "Transmission Company" was asserting an adverse claim hostile to the plaintiff or its predecessors in title. We think it inconsistent to use and occupy an easement for a transmission line subservient to a railroad having the exclusive use and possession of a right of way and at the same time contend that the use of such line for non-railway purposes was adverse and hostile as to those having a reversionary interest. And this is true whether the railroad held its right of way as a fee simple determinable title or as an easement.

In view of the present state of the record, we determine only that the defendant did not acquire an easement across the plaintiffs' land by prescription.

The judgment of the district court is reversed and the cause remanded for further proceedings in conformity with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

KRIVOSHA, C.J., dissenting.

I regret that I must respectfully dissent from the majority opinion in this case. To begin with, I do not believe that an easement such as that given to the Fremont, Elkhorn and Missouri Valley Railroad Company, see *Lillich v. Lowery*, 211 Neb. 757, 320 N.W.2d 463 (1982), was sufficient or broad enough to authorize the railroad or its successors to grant to York County Rural Public Power District (York PPD) authority to build a high-voltage electric transmission line along the right-of-way. In *Muncie Electric Light Co. v. Joliff*, 59 Ind. App. 349, 109 N.E. 433 (1915), the Indiana court held that

where a railroad company owned only an easement, it could not license third persons to construct other lines on its right-of-way, and persons attempting to do so were merely trespassing.

Further, in *Potomac Edison Co. v. Routzahn*, 192 Md. 449, 65 A.2d 580 (1949), a case very similar to the case at bar was presented to the Maryland court. The owners of certain land argued that the construction of powerlines along a railroad right-of-way by the power company was permissive and therefore could not ripen into adverse possession. In reversing the trial court and in finding that the electric company had acquired a right by adverse possession, the court said at 462, 65 A.2d at 585-86:

> The question is whether or not the power lines were erected with a view to be used by the railway company in the future in its business as a railway or whether such construction was solely for the use of a power company in the pursuit of a different business from railway business and for the profit of both companies. If the power lines were constructed with the latter motive they were not within the grant of the right of way, but if for the former reason they were and no additional servitude was imposed on the land.

The court then concluded that the use of the right-of-way for high-tension transmission lines was not within the grant by deed or merely incidental thereto, and therefore was an open, uninterrupted, adverse use for more than the statutorily prescribed time.

The evidence in this case, limited as it is, makes it clear to me that the construction of the electric power transmission line along the right-of-way was in no manner for the benefit of the Chicago and North Western Railway Company, successor to the Fremont, Elkhorn and Missouri Valley Railroad Company, but, rather, was for the purpose of transmitting electricity for and on behalf of York PPD. On that basis the railroad was without authority to grant permission to York PPD to construct the powerline, no matter what either party thought to the contrary.

I have difficulty understanding how, if the railroad had no authority to grant permission to the power district in the first

place, York PPD's entry upon the right-of-way could be permissive. It seems clear to me that had the owner of the land sought to eject York PPD from the right-of-way at any time before York PPD's presence ripened into a prescriptive right, the owner would have been successful. The fact that a trespasser pays rent to one without authority to subject the land to a burden does not give the trespasser authority to remain on the land, no matter what the trespasser may honestly believe. Nor does the fact that one may believe it has a right to be on property constitute permission of the type to defeat adverse possession. Persons who claim adverse possession generally believe that they have a right in the property, only later to discover they are in error.

When we talk about intent to possess, we do not, I believe, mean in the sense that the possessor must know that his presence is unlawful and for a time precarious but, rather, that he does indeed intend to possess the land and not just unconsciously and quietly wander about.

In *Barnes v. Milligan*, 196 Neb. 50, 54, 241 N.W.2d 508, 511 (1976), quoting from *Purdum v. Sherman*, 163 Neb. 889, 81 N.W.2d 331 (1957), we said:

> "Adverse possession is founded upon the intent with which the occupant has held possession and this intent can best be determined by his acts in relation thereto. * * * The real purpose of prescribing the manner in which an adverse holding will be manifested is to give notice to the real owner that his title or ownership is in danger so that he may within the period of limitation take action to protect his interest. It is the nature of the hostile possession that constitutes the warning, not the intent of the claimant when he takes possession. . . ."

Recognizing that everyone is presumed to know the law, we must likewise recognize that the owner of this land is presumed to know that the railroad company did not have authority to grant permission to the power company and, therefore, could not permit the power company to enter the land permissively. It is hard to imagine what could be more open, adverse, and notorious, and therefore sufficient to give notice to the real owner, than a high-power transmission line strung along high

rise towers. Whatever York PPD may like to think, it was a trespasser from the very moment it entered upon the land because it was dealing with an entity that had no authority to grant permission to it. The fact that it paid the railroad a fee is irrelevant. As we pointed out in *Nebraska State Bank v. Gaddis*, 208 Neb. 136, 140, 302 N.W.2d 686, 689 (1981):

> "The fact that one claiming title by adverse possession never intended to claim more land than is called for in his deed is not a controlling factor. It is the intent with which possession is held rather than an intention to hold in accordance with his deed that is controlling. . . . '. . . In other words, it is the visible and adverse possession, with an intention to possess land occupied under a belief that it is the possessor's own, that constitutes its adverse character, and not the remote view or belief of the possessor.' "

In the instant case, York PPD believed it had a right to construct its line along the railroad right-of-way. In truth and in fact, it did not have that right; and therefore if it exercised that right for more than 10 years, it acquired an easement by adverse possession.

I believe that the district court was correct, and I would have affirmed its decision.

CAPORALE, J., joins in this dissent.

DONOVAN FORD ET AL., APPELLEES, V. DAROLD L. JORDAN AND LOIS E. JORDAN, HUSBAND AND WIFE, APPELLANTS.
DAROLD L. JORDAN AND LOIS E. JORDAN, HUSBAND AND WIFE, APPELLANTS, V. AUGUST ROSS, INDIVIDUALLY AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF HAZEL FORD, DECEASED, APPELLEE.

370 N.W.2d 714

Filed July 19, 1985. Nos. 84-355, 84-356.

1. **Trusts: Equity: Appeal and Error.** A suit to impress a constructive trust is one in equity which this court reviews de novo on the record, giving consideration,

where the evidence is in conflict, to the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the opposite.

2. **Replevin: Actions: Judgments: Appeal and Error.** Replevin is a law action wherein, where tried without a jury, the findings and disposition of the trial court have the effect of a jury verdict and will not be disturbed unless clearly wrong.
3. **Trusts: Property: Equity.** A constructive trust may arise by operation of law where legal title is acquired by virtue of a confidential relationship between the grantor and the grantee and under such circumstances that the grantee ought not, according to the rules of equity and good conscience, hold the benefits. Where such circumstances exist, a court of equity will raise a trust by construction and convert the grantee into a trustee of legal title for the benefit of the grantor.
4. **Trusts: Evidence: Proof.** The burden of proof is upon one seeking to establish the existence of a constructive trust to do so by evidence which is clear, satisfactory, and convincing in character.
5. **Trusts.** The existence of a constructive trust is to be determined by the particular facts, circumstances, and conditions of the individual case.

Appeal from the District Court for Douglas County: THEODORE L. CARLSON, Judge. Reversed and remanded with directions.

William J. Riley and Nick R. Taylor of Fitzgerald, Brown, Leahy, Strom, Schorr & Barmettler, for appellants.

Annette E. Mason, Bruce G. Mason, and Mary Lou Kubichek of Ross & Mason, P.C., for appellees.

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

CAPORALE, J.

The last will of the deceased Hazel Ford named her stepson, Donovan Ford, stepmother, Maude Clifton, and nephew, Jerry T. Clifton, the beneficiaries of her estate. The beneficiaries brought an action to impress a constructive trust on certain personal and real property which Hazel Ford had placed in joint tenancy with Darold L. and Lois E. Jordan, husband and wife, alleging that the Jordans had breached their confidential relationship with Hazel Ford. In turn, the Jordans brought a replevin action against the special administrator of Mrs. Ford's estate, attorney August Ross, alleging that he had taken

possession of personal property belonging to the Jordans. After a jury was waived in the replevin action, both cases were consolidated and tried to the court. The trial court entered judgments impressing a constructive trust on the joint tenancy properties and ordering an accounting and transfer of the legal titles in and to the jointly held properties, in accordance with Mrs. Ford's will. The replevin action was dismissed. The assignments of error discussed in the Jordans' brief argue that the evidence does not support the imposition of a constructive trust on the jointly held properties nor the dismissal of the replevin action. We reverse and remand with the directions that the beneficiaries' action be dismissed and that judgment in the replevin action be entered returning to the Jordans the jointly held personal property.

We must first settle upon the scope of the reviews to be applied in these appeals.

A constructive trust is imposed when one has acquired legal title to property under such circumstances that he or she may not in good conscience retain the beneficial interest in the property. In such a situation, equity converts the legal titleholder into a trustee holding the title for the benefit of those entitled to the ownership thereof. *Lauritzen v. Davis*, 214 Neb. 547, 335 N.W.2d 520 (1983); *Kuhlman v. Cargile*, 200 Neb. 150, 262 N.W.2d 454 (1978). Thus, the beneficiaries' suit is one in equity, which we review de novo on the record, giving consideration, where the evidence is in conflict, to the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the opposite. *Peterson v. Gering Irr. Dist.*, 219 Neb. 275, 363 N.W.2d 141 (1985).

On the other hand, replevin is a law action. Therefore, the cause having been tried without a jury, the findings and disposition of the trial court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Schmode's, Inc. v. Wilkinson*, 219 Neb. 209, 361 N.W.2d 557 (1985).

We now turn our attention to the facts. Mrs. Ford, a resident of Omaha, Nebraska, died on November 20, 1982, at the age of 77, by which time she had accumulated some stocks, tax-exempt bonds, and savings certificates which were kept at

the United States National Bank in a safe-deposit box leased jointly by Mrs. Ford and the Jordans. Mrs. Ford had also acquired a personal residence which was titled in her name jointly with the Jordans. The value of Mrs. Ford's holdings totaled somewhat over $150,000. The parties agree that approximately two-thirds of the total holdings were titled in and to Mrs. Ford jointly with the Jordans, the remainder being subject to the terms of the Ford will.

Mrs. Ford's stepson lived in California until approximately 6 months prior to her death, when he moved back to Omaha to live with his stepmother and help her with her affairs. During the time he lived in California, he and his stepmother kept in frequent contact, and he characterizes himself as Mrs. Ford's "stepson and best friend."

The nephew is a psychiatrist who lived in California at the time of Mrs. Ford's death. He corresponded regularly with his aunt and visited her in Omaha at least once a year. He described his relationship with his aunt as "close and loving," and testified it was an important relationship for him.

Mrs. Ford's stepmother was living in California at the time of her stepdaughter's death and has since died.

The Jordans, also residents of Omaha, had met Mrs. Ford in the 1950s when she was working as a housekeeper for Mr. Jordan's mother. The Jordans saw Mrs. Ford only occasionally until 1976, when their relationship began to grow. As a result, the Jordans helped Mrs. Ford maintain her residence, gave her advice about major expenditures and about her investments, drove her to doctor appointments and to the grocery store, and generally helped her take care of her personal and business affairs.

Mr. Jordan had been a claims representative for the Metropolitan Utilities District for 24 years and had property management experience. Mrs. Jordan had secretarial experience, worked for an insurance adjusting firm for 24 years, had underwriting experience, and had also worked in the insurance and vault departments of a savings and loan institution.

After the death of her brother, Mrs. Ford, being unhappy with the administration of his estate, became concerned about

the handling of her own affairs. The Jordans recommended an attorney to Mrs. Ford, as she was relying on the Jordans for advice and wanted them to become aware of her affairs. She and the Jordans then met with the attorney, who concluded that Mrs. Ford was not an experienced business person and that one of her concerns was how her property would be managed while she was still living, if she were to become unable to do so herself. At that time Mrs. Ford's stock was held solely by her, and some bank accounts were held jointly with some of her relatives. The attorney explained the consequences of joint ownership to Mrs. Ford and convinced himself that she understood the concept. The attorney also explained the operation of a durable power of attorney. He then drew a will and durable power of attorney in accordance with Mrs. Ford's instructions. The will named Mr. Jordan, or if he did not so act, Mrs. Jordan, as personal representative of the estate. The durable power of attorney named Mr. Jordan as attorney in fact. The documents were signed on August 7, 1976.

During 1976, Mrs. Ford added the Jordans' names to her United States National Bank checking account and to her safe-deposit box.

In 1979 Mrs. Ford sent a letter to her stepson, with a copy of her will, and stated in part: "My will is a simple will . . . . [E]verything is divided equally between you, Jerry and Bobby [Maude Clifton] . . . ." Mrs. Ford also expressed concern about the way her affairs would be handled if she were incapacitated, and wrote:

> They [the Jordans] are cosigners on all my banking business. They help me out on all business transactions, and have power of attorney to look after me in case I am not able to look after or take care of my own business or myself. . . . This is the best way to have it, so if anything happens to me, the state can not come in & tie up or freeze everything.

In the period from 1979 to her death, Mrs. Ford carried out, through the Jordans, several transactions which consisted of either transferring title to existing accounts, stocks, and bonds standing in her name alone to joint tenancy with the Jordans or purchasing assets and placing them jointly in her name and that

of the Jordans. Mrs. Ford did not solicit advice independent from that of the Jordans. The stockbroker involved in the transactions was selected by the Jordans and had no contact with Mrs. Ford. The Jordans read and took care of the business mail Mrs. Ford received regarding their joint interests. Mrs. Jordan balanced Mrs. Ford's checkbook each month and kept an extensive record of all of Mrs. Ford's business transactions, which was separate from Mrs. Ford's own records and more complete than the records kept by Mrs. Ford. About half of these transactions were conducted prior to April of 1982, by which time Mrs. Ford's eyesight had failed to the point that, in the opinion of an ophthalmologist, she would not have been able to read legal documents such as joint tenancy agreements or deeds.

On October 19, 1982, Mrs. Ford changed the title to her residence, having a value of about $20,000, from her name only to joint tenancy with the Jordans. Mrs. Ford's stepson testified that Mrs. Ford had previously said that she would like to change the names on the property because she did not want her relatives to have to come from California to sell the house when she died. The stepson further testified that he had a conversation with Mr. Jordan wherein Jordan agreed that the title to the house should be changed to joint tenancy so that no one would have to come back to sell it. Mr. Jordan denied that the conversation took place. Mrs. Jordan, in her deposition, said that Mrs. Ford informed her that she wanted to change the title on the property, so Mrs. Jordan drew the deed, had it executed, and caused Mr. Jordan to record it.

Although Mrs. Ford was described by her nephew as "very spry" in 1976, and by her stepson as independent and stubborn, her health began deteriorating in 1981. Mrs. Ford was hospitalized five times in the period from July 1981 until her death. The medical records show that Mrs. Ford was troubled with severe abdominal pain and bronchitis. She had lost considerable weight, and because of cataracts had gotten to the point by the summer of 1982 that she could read only the large "E" on a standard eye chart. She was scheduled for eye surgery but became ill and died before it could be performed.

A psychiatrist other than her nephew, testifying on the basis

of a review of the medical records, stated that although Mrs. Ford remained competent and able to reason, he would characterize her as a "[f]rail lady; prematurely old for her age; . . . failing as far as general vigor." He concluded that Mrs. Ford was beginning to feel somewhat overwhelmed and lonelier. He further testified that, in his opinion, Mrs. Ford had become more vulnerable and dependent during 1982. In the opinion of a treating physician, Mrs. Ford was suffering from reactive depression.

The beneficiaries make no allegation that the joint tenancy ownerships came about by the practice of any undue influence on the part of the Jordans. Rather, they allege that Mr. Jordan had become a close confidant and advisor to Mrs. Ford, that Mr. Jordan was Mrs. Ford's attorney in fact and that the Jordans were the named personal representatives of Mrs. Ford's estate, by which reasons the Jordans occupied a confidential relationship with Mrs. Ford, and that the joint tenancy ownerships came about as the result of an unspecified abuse of that relationship.

We have said that a constructive trust may arise by operation of law where legal title is acquired by virtue of a confidential relationship between the grantor and the grantee and under such circumstances that the grantee ought not, according to the rules of equity and good conscience, hold the benefits. Where such circumstances exist, a court of equity will raise a trust by construction and convert the grantee into a trustee of legal title for the benefit of the grantor. The burden of proof is upon one seeking to establish the existence of a constructive trust to do so by evidence which is clear, satisfactory, and convincing in character. *Fleury v. Chrisman*, 200 Neb. 584, 264 N.W.2d 839 (1978); *Marco v. Marco*, 196 Neb. 313, 242 N.W.2d 867 (1976); *Lukowski v. Deleski*, 190 Neb. 771, 212 N.W.2d 577 (1973); *Slocum v. Bohuslov*, 164 Neb. 156, 82 N.W.2d 39 (1957). Further, the existence of a constructive trust is to be determined by the particular facts, circumstances, and conditions of the individual case. *Guynan v. Guynan*, 208 Neb. 775, 305 N.W.2d 882 (1981).

Assuming for purposes of our analysis that a confidential relationship existed between Mrs. Ford and the Jordans by

virtue of the continuous trust placed by the former in the skill and integrity of the Jordans, as claimed by the beneficiaries, *First National Bank in Sioux City v. Curran*, 206 N.W.2d 317 (Iowa 1973), the question becomes whether there is "clear, satisfactory, and convincing" evidence that the Jordans abused that relationship such that a constructive trust must be placed on all of the property held jointly by Mrs. Ford and the Jordans. We find there is not.

There is no evidence the Jordans violated any instructions given them by Mrs. Ford. Nonetheless, the beneficiaries ask us to conclude that such confidential relationship as may have existed was abused from the bare facts that the Jordans became the joint tenants of approximately two-thirds of Mrs. Ford's holdings and that Mrs. Ford was physically infirm and feeling dependent, vulnerable, and lonely during the latter part of her life. Such circumstances may certainly raise in reasonable minds a question as to whether the Jordans acted with the utmost good faith toward Mrs. Ford, but they fall short of meeting the quantum of evidence required to prove that the Jordans made dispositions of Mrs. Ford's property other than as the latter wished.

The fact that the attorney employed by Mrs. Ford was recommended to her by the Jordans fades into insignificance in view of the fact that Mrs. Ford drafted a will in favor not of the Jordans but of her relatives. That she understood the consequences of joint tenancy is established by the fact that after the will was executed she made changes in certain joint tenancy ownerships with her relatives. There is no evidence she ever lost that understanding. The execution of a durable power of attorney is consistent with Mrs. Ford's concern about the handling of her business affairs should she become unable to handle them herself.

The joint tenancy ownerships are as consistent with the conclusion that Mrs. Ford wished to reward the Jordans, who had given her day-to-day assistance and attention, rather than relatives who, for the most part, were leading their own lives elsewhere, as with the conclusion that the Jordans used their relationship to thwart Mrs. Ford's desires.

We determine, therefore, that the evidence does not clearly,

satisfactorily, and convincingly establish an abuse by the Jordans of the relationship, however characterized, that existed between them and Mrs. Ford. We determine also that the findings and disposition of the trial court in the replevin action were clearly wrong.

Accordingly, we reverse the judgment in the beneficiaries' suit (84-355) and remand that cause for dismissal. We also reverse the judgment of dismissal in the Jordans' replevin action against the personal representative (84-356) and remand that cause with the direction that judgment be entered consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

WHITE, J., not participating.

GRANT, J., dissenting.

I agree with the court's statements as to the imposition of a constructive trust where "one has acquired legal title to property under such circumstances that he or she may not in good conscience retain the beneficial interest in the property." I also agree with the statement as to the scope of our review as set out in the majority opinion.

I respectfully dissent, however, from the majority's holding that the evidence in this case does not clearly and convincingly establish an abuse by the Jordans of the relationship that existed between them and Mrs. Ford and was cultivated by the Jordans. There is no question that in 1976 when Mrs. Ford met with a capable, impartial attorney (selected, however, by the Jordans) to draw her will, Mrs. Ford understood the nature and consequences of joint tenancy ownership. It should be here noted that on this early occasion the pervasive Jordan effect on Mrs. Ford was already in full bloom, because Mrs. Ford did not meet the attorney alone, but always in the presence of the Jordans. Later, many of Mrs. Ford's stocks and bonds were sold and others bought and placed in joint tenancy with the Jordans through the Jordans' stockbroker, whom Mrs. Ford never met.

On August 7, 1976, a will disposing of Mrs. Ford's estate in such fashion that her assets remained in her family was executed by Mrs. Ford. After that date, in my judgment, there began a systematic conversion of what might be termed as

testamentary assets directed to her family into joint tenancy assets between Mrs. Ford and the Jordans. The evidence shows that as Mrs. Ford aged, her eyesight and her once-clear understanding concerning joint tenancy dimmed, and the joint tenancy transfers to the Jordans increased. I believe the facts recited in the majority opinion fully support the conclusion I reach and that those facts, supplemented by other facts determined by the trial court, furnish more than ample evidentiary support for the trial court's conclusion that the Jordans abused their confidential relationship with Mrs. Ford to such a degree that, as stated in the trial court's written opinion, "equity must act in this case and the Court finds that the assets in question now held by the defendants must be placed in a constructive trust for the benefit and use of the plaintiffs."

As further specific examples of the Jordans' activities in this case, I join with the trial court in noting that during the psychiatric treatments that Mrs. Ford was undergoing in 1981, the medical records show that Mrs. Ford's daughter called the psychiatrist's office, stating that her mother "did not come in for appt because she has financial problems and can't afford any more expense." As noted by the trial court, Mrs. Ford did not have a daughter, and I agree with the trial court's inference that Mrs. Jordan canceled the medical visit. The trial court stated that "[t]his does not show the concern of a mother-daughter relationship testified to by Lois E. Jordan." I further agree.

I also believe it is significant that the Jordans completely disposed of the assets of Mrs. Ford's friend and lodger, Harold Courtier, who died shortly after Mrs. Ford. Mr. Courtier, while not as financially secure as Mrs. Ford, did have some assets and some relatives. Before his death, and while he was in a coma, his automobile was sold, utilizing Mrs. Jordan's signature as Mr. Courtier's, and his assets were distributed by the Jordans to those whom they determined were entitled to those assets—all without the intervention of any probate court. I believe the Courtier situation merely presaged this case.

I would affirm.

BOSLAUGH, J., joins in this dissent.

STATE OF NEBRASKA EX REL. PAUL L. DOUGLAS, ATTORNEY GENERAL, ET AL., APPELLANTS, V. JOHN WIENER ET AL., APPELLEES.

370 N.W.2d 720

Filed July 19, 1985. No. 84-402.

Equity: Injunction. A court of equity may properly afford injunctive relief where there has been a continuing and flagrant course of violations of the law, even though these acts may be subject to criminal sanctions.

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

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

John and Carol L. Wiener, pro se.

BOSLAUGH, WHITE, and HASTINGS, JJ., and BRODKEY, J., Retired, and FAHRNBRUCH, D.J.

FAHRNBRUCH, D.J.

This action was brought by the State of Nebraska on relation of the Attorney General and the Hamilton County attorney to enjoin John and Carol L. Wiener, husband and wife, from operating a private home school in continuing and flagrant violation of the State Department of Education rules and regulations and Nebraska statutes. After a hearing on the State's motion for summary judgment, the trial court dismissed the State's petition with prejudice. Reviewing the case de novo, we reverse the judgment and remand the cause with directions.

The narrow issue dispositive of this appeal is whether injunctive relief is available to prevent the operation of a private school which is in continuing and flagrant violation of State Department of Education rules and regulations and Nebraska statutes, even though the violative acts may be subject to criminal sanctions. Injunctive relief is available. This court so held in *State ex rel. Douglas v. Faith Baptist Church*, 207 Neb. 802, 301 N.W.2d 571 (1981). We reaffirm that holding.

At the relevant times herein the Wieners were teaching their two school-age children in their home. From the pleadings, affidavits, and exhibits at the hearing on the motion for

summary judgment, it was conclusively established that the Wieners were operating the school continually in flagrant violation of then existing State Department of Education rules and regulations and Nebraska statutes. To set forth the specific violations would serve no useful purpose in view of our ultimate decision in this case. Since the time of the trial court's decision, Nebraska statutes have been amended and the State Department of Education's rules and regulations have been revised.

In large part, according to their answer, the Wieners' failure to comply with the State Department of Education rules and regulations and the Nebraska statutes was due to the Wieners' religious belief that they had the unfettered right under the first amendment of the U.S. Constitution to educate their children without state interference. The Wieners further answered that if any violation of law was occurring, the State had an adequate remedy at law through criminal sanctions under the appropriate statutes.

The trial court found that by reason of an adequate remedy at law through criminal sanctions, the State's petition for injunctive relief should be, and was, dismissed with prejudice. In making its ruling the trial court relied upon *In re Interest of K.S.*, 216 Neb. 926, 346 N.W.2d 417 (1984). That reliance was misplaced. *In re Interest of K.S.* was an action against a truant child, and not against the operation of a private home school in continuing and flagrant violation of state regulations and statutes. *In re Interest of K.S.* stands for the proposition that a truant child is subject to the jurisdiction of the juvenile court even though the child's parents have consented to the child's truancy from a school approved by the state. It does not stand for the proposition that the state is not entitled to injunctive relief when there are continuing and flagrant violations of law.

" '[A] court of equity may properly afford injunctive relief where there has been a continuing and flagrant course of violations of the . . . law even though these acts may be subject to criminal prosecution.' " *State ex rel. Douglas v. Faith Baptist Church, supra* at 807, 301 N.W.2d at 575, citing *State ex rel. Meyer v. Weiner*, 190 Neb. 30, 205 N.W.2d 649 (1973).

Because the State, in oral argument in this court, admitted

that the Wieners' school operation is now in compliance with revised State Department of Education rules and regulations and amended Nebraska statutes, it is not necessary for this court to reach the issue as to whether the State's motion for summary judgment should have been granted. The case is moot, since the purpose of an injunction is to prevent continuing unlawful activity.

The judgment of the trial court in dismissing the State's action with prejudice prevents the State from again filing for injunctive relief in the event that the Wieners operate a school in flagrant violation of State Department of Education rules and regulations and Nebraska statutes. Therefore, the judgment of the trial court dismissing the case with prejudice is reversed, and the cause is remanded with instructions to dismiss it as being moot.

REVERSED AND REMANDED WITH DIRECTIONS.

NEBRASKA SCHOOL DISTRICT NO. 148 ET AL., APPELLANTS, V. LINCOLN AIRPORT AUTHORITY ET AL., APPELLEES.

371 N.W.2d 258

Filed July 26, 1985. No. 84-287.

1. **Standing.** Before a person can invoke the jurisdiction of the court, he must have standing to sue, which is having some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy.
2. **Actions: Taxation: Municipal Corporations: Governmental Subdivisions: Injunction.** A resident taxpayer may invoke the interposition of a court of equity to prevent the illegal disposition of money of a municipal or public corporation or the illegal creation of a debt which he, in common with other property holders, may otherwise be compelled to pay.
3. _____: _____: _____: _____: _____. A resident taxpayer, without showing any interest or injury peculiar to himself, may bring an action to enjoin the illegal expenditure of public funds raised for governmental purposes.
4. _____: _____: _____: _____: _____. To plead a resident taxpayer's action the plaintiff must allege a demand made upon the municipal or public corporation and a refusal by the corporation to bring the action itself, or facts which show such a demand would be useless.

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

Beverly Evans Grenier of Steven D. Burns, P.C., for appellants.

Michael R. Johnson of Barney, Carter & Johnson, P.C., William G. Blake, Chief Assistant Lincoln City Attorney, John F. Sheaff, and Gary Dolan, for appellees.

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

GRANT, J.

This is an appeal from the decision of the Lancaster County District Court sustaining the individual demurrers of the defendants to plaintiffs' second amended petition. The defendants-appellees are the Lincoln Airport Authority, a duly constituted airport authority created by the City of Lincoln pursuant to Neb. Rev. Stat. § 3-502 et seq. (Reissue 1983); the individual members of the board of the Lincoln Airport Authority; the City of Lincoln, Lancaster County, Nebraska; Goldie M. England; and First National Bank & Trust Company. Each demurred to the petition filed by the plaintiffs-appellants. The plaintiffs are Nebraska School District No. 148, organized under Neb. Rev. Stat. § 79-426.19 (Reissue 1981) and located in Seward and Lancaster Counties in Nebraska; Al Schulz, a taxpayer of School District No. 148, who owns land in the district; and Billy J. Langan, a resident taxpayer and real estate owner in the City of Lincoln, Lancaster County. The petition sought declaratory and injunctive relief concerning specific real estate acquisitions made by the Lincoln Airport Authority.

The petitioners' second amended petition was filed on January 30, 1984. All defendants demurred on the grounds that the second amended petition failed to state facts sufficient to constitute a cause of action and that there was an improper joinder of causes of action. Defendant First National Bank & Trust Company and defendant Goldie M. England demurred on the additional grounds that there was an improper joinder of parties and that no relief was sought against First National Bank and England. Defendant Lincoln Airport Authority

demurred on the additional ground that the plaintiffs School District No. 148 and Al Schulz lacked standing to bring this action. Other defendants named in the petition did not file a response to petitioners' second amended petition and are not before this court.

The district court, without setting out specific grounds, sustained the demurrers of all the defendants and gave the petitioners 10 days to amend their petition or have the case dismissed for failure to do so. Plaintiffs chose to stand on their second amended petition. The petition was dismissed, and plaintiffs timely appealed to this court.

We affirm the decision of the trial court, finding that plaintiffs School District No. 148 and Schulz lack standing to invoke the jurisdiction of a court and that Billy J. Langan, who has standing to bring a resident taxpayer's action in equity, has failed to plead facts which state a cause of action.

In reviewing a case decided on a demurrer, we consider all proper allegations of fact to be true. *Hall v. Cox Cable of Omaha, Inc.*, 212 Neb. 887, 327 N.W.2d 595 (1982). Therefore, we assume the facts as alleged in "CAUSE OF ACTION I" of the petition to be true. Those facts are that the Lincoln Airport Authority Board acquired property without a present plan or purpose for it to be used by any project conducted or planned by the Lincoln Airport Authority.

The petition states, in pertinent part, that the Lincoln Airport Authority Board, pursuant to a motion and resolution on December 20, 1983, authorized the acquisition of specific property without a present plan or purpose for the property, contrary to § 3-503(4); that the acquisition will increase the tax burden; and that there is no adequate remedy at law for the injury inflicted.

Before any party can invoke the jurisdiction of the court, he must have standing to sue, which is having some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy. *Hall v. Cox Cable of Omaha, Inc., supra.* To establish standing to bring suit it is necessary to show that a party is in danger of sustaining direct injury as a result of anticipated action, and it is not sufficient that one has merely a general interest common to all members

of the public. *First Fed. Sav. & Loan Assn. v. Department of Banking,* 187 Neb. 562, 192 N.W.2d 736 (1971). There is an exception to the general interest prohibition where a resident taxpayer (who has a general interest with other taxpayers) sues to enjoin an illegal act by a municipal body. In *Martin v. City of Lincoln,* 155 Neb. 845, 850, 53 N.W.2d 923, 926 (1952), we noted:

> Another established principle, which is conceded by defendants, is that a resident taxpayer may invoke the interposition of a court of equity to prevent the illegal disposition of money of a municipal corporation or the illegal creation of a debt which he, in common with other property holders, may otherwise be compelled to pay. . . .
>
> Another principle is that a resident taxpayer without showing any interest or injury peculiar to himself may bring an action to enjoin the illegal expenditure of public funds raised for governmental purposes.

The standing of a party to bring an action must be based on a special injury to himself or on his status as a resident taxpayer. Billy J. Langan, a resident taxpayer of the City of Lincoln, under which the Lincoln Airport Authority was formed, has standing to bring an action. His position as a plaintiff was not specifically challenged by the defendants.

The Lincoln Airport Authority's demurrer challenged the standing of School District No. 148 and Schulz, a resident taxpayer and owner of real estate in School District No. 148. Plaintiffs School District No. 148 and Schulz do not have standing as resident taxpayers, since neither is a resident taxpayer of the municipality whose subdivision made the alleged illegal acquisition, and as a result the school district and Schulz are not subject to an increased tax burden or public loss from the expenditure. Neither the school district nor Schulz has a special injury which permits the bringing of an action against the Lincoln Airport Authority. The school district will not lose money as a result of the acquisition. The fact that there is less available land on which to levy the tax does not mean the district gets less money than it budgets, although the district may be faced with a practical problem in that the levy on the remaining property may have to be raised—always a painful

problem for a taxing authority. The district therefore has no requisite injury to give it standing.

Plaintiff Schulz has not pled a special injury different from that of the general public in School District No. 148. As stated above, he does not allege that he is a resident taxpayer of Lincoln, Nebraska. Therefore, Schulz has no standing to challenge the actions of the Lincoln Airport Authority.

Billy J. Langan is the only plaintiff who has standing to invoke the jurisdiction of the court. He has pled no facts which give him standing because of a special injury, but only facts which allow him, as a resident taxpayer, to bring a resident taxpayer's action as a representative of the municipality for an illegal expenditure of public funds or an illegal increase in the burden of taxation.

Since 1901, we have recognized that a taxpayer, for the benefit of a municipal or public corporation, may commence and prosecute to judgment an equitable action to enforce a right of action which the governing body has refused to enforce. *Shepard v. Easterling*, 61 Neb. 882, 86 N.W. 941 (1901), *overruled on other grounds*, *Wilson v. Otoe County*, 71 Neb. 435, 98 N.W. 1050 (1904). See, also, *Fischer v. Marsh*, 113 Neb. 153, 202 N.W. 422 (1925); *Taxpayers' League v. Wightman*, 139 Neb. 212, 296 N.W. 886 (1941).

To plead a resident taxpayer's action the plaintiff must allege a demand made upon the municipal or public corporation and a refusal by the corporation to bring the action itself, or facts which show that such a demand would be useless. *Sesemann v. Howell*, 195 Neb. 798, 241 N.W.2d 119 (1976). A demurrer is not sufficient to show that a demand would be useless. *Lake v. Piper, Jaffray & Hopwood Inc.*, 212 Neb. 570, 324 N.W.2d 660 (1982). Langan has not pled such a demand or facts to show a demand would be useless, and therefore he has not pled facts sufficient to state a cause of action under "CAUSE OF ACTION I."

"CAUSE OF ACTION II" states that "the action of the Defendants effectuates a change in the boundaries of School District #148. The Defendants have not complied with the procedures set forth in Neb. Rev. Stat. §49-402 et seq. to effectuate such boundary change." This bare conclusion does

not withstand a demurrer, as there are no facts pled which show School District No. 148's boundaries were changed. Contrary to the plaintiffs' inference, while sale of real property in a school district to a governmental entity makes the property exempt from taxation, there is nothing in Nebraska law which indicates such property is no longer in a school district.

"CAUSE OF ACTION III" alleges only that "an actual and justiciable controversy exists," and contains no factual allegation other than those incorporated from causes I and II; thus it does not state facts sufficient to constitute a separate cause of action.

School District No. 148 and Schulz have no standing to invoke the jurisdiction of this court, and Langan, who has standing as a resident taxpayer, has not pled facts sufficient to state a cause of action. The demurrers of the various defendants were properly sustained. In view of this disposition of the defendants' demurrers, it is not necessary to address the other grounds on which those demurrers were based. The action of the trial court was correct and is affirmed.

AFFIRMED.

ALLIS-CHALMERS CORPORATION, A FOREIGN CORPORATION, APPELLEE, V. GLEN HAUMONT ET AL., APPELLEES, HERMAN S. FALES ET AL., APPELLANTS.

371 N.W.2d 97

Filed July 26, 1985. No. 84-311.

1. **Uniform Commercial Code: Secured Transactions: Security Interests.** Neb. U.C.C. art. 9 (Reissue 1980), unless otherwise excluded, applies to any transaction (regardless of its form) which is intended to create a security interest in personal property.
2. **Uniform Commercial Code: Security Interests: Notice: Words and Phrases.** A guarantor is entitled to notice as a "debtor" under the definition of such in Neb. U.C.C. § 9-105(1)(d) (Reissue 1980).
3. **Uniform Commercial Code: Security Interests: Notice.** Compliance with the notice provisions of the Uniform Commercial Code is a condition precedent to the right of a creditor to recover a deficiency judgment. The failure to give the

requisite notice is an absolute bar to recovery.

4. **Uniform Commercial Code: Secured Transactions.** The entire disposition of collateral by a secured party must be viewed as one transaction, and every aspect of that transaction must be in accord with the requirements of the Uniform Commercial Code.
5. _____: _____. If a creditor wishes a deficiency judgment, he must comply with the law in each transaction in which collateral is liquidated.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Reversed and remanded with directions to dismiss.

David C. Huston of Tedd C. Huston, P.C., for appellant William E. Shaw.

Kenneth F. George of State, Yeagley & George, for appellants Fales et al.

Daniel M. Placzek of Luebs, Dowding, Beltzer, Leininger, Smith & Busick, for appellee Allis-Chalmers.

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

PER CURIAM.

The plaintiff, Allis-Chalmers Corporation, manufactures farm implements. On December 8, 1977, it entered into a "Dealer Sales and Service Agreement" with M & G Implement, Inc., of Broken Bow, Nebraska. The agreement was executed on behalf of M & G Implement, Inc., by the defendants Glen Haumont, president, Doris J. Haumont, Herman S. Fales, and William E. Shaw. As a part of the transaction, the defendants Haumonts, Fales, William E. Shaw, and Sharon Shaw executed guaranty agreements in which the defendants guaranteed the payment of all obligations of M & G Implement, Inc., to the plaintiff under the dealer agreement.

The plaintiff retained a security interest in all of its products, both new equipment and parts inventory, that were delivered to M & G Implement, Inc., pursuant to the agreement, and further had a security interest in all used equipment received by M & G Implement, Inc., as trade-ins for the plaintiff's products.

On January 19, 1982, the plaintiff discovered that there had

been sales of the plaintiff's products out of trust by M & G Implement, Inc. The dealer had sold equipment in which the plaintiff held a security interest, but the plaintiff had not received the amount due upon the sale of that equipment. The plaintiff requested immediate payment of M & G Implement's indebtedness and, shortly thereafter, demanded possession of the collateral which secured that indebtedness.

By March 25, 1982, the plaintiff had repossessed all of the new and used equipment it claimed a security interest in, except for two items. The plaintiff took back the new equipment and parts at the invoice price, including freight; the used equipment was sold at private sales.

The dealer agreement between M & G Implement, Inc., and the plaintiff was terminated on April 30, 1982.

This action was commenced against the defendant guarantors to recover $123,376.14, the balance alleged to be due the plaintiff from M & G Implement, Inc., under the dealer agreement. The defendants' answers alleged that because the plaintiff had failed to give the defendants notice as required by Neb. U.C.C. § 9-504(3) (Reissue 1980) in disposing of the collateral, the plaintiff was not entitled to a deficiency judgment.

The trial court found that the plaintiff was entitled to judgment against the defendants Herman S. Fales, William E. Shaw, and Sharon Shaw in the amount of $61,039.93, and judgment for an additional $25,015.21 against the defendant William E. Shaw. The defendants Glen Haumont and Doris J. Haumont were excluded from the trial court's determination because of a bankruptcy stay. The defendants Fales and Shaws have appealed.

The principal issue is whether the plaintiff's action for a deficiency judgment was barred by its failure to give notice as required by § 9-504(3).

Article 9 of the Nebraska Uniform Commercial Code, unless otherwise excluded, applies "to any transaction (regardless of its form) which is intended to create a security interest in personal property or fixtures including goods, documents, instruments, general intangibles, chattel paper, or accounts . . . ." Neb. U.C.C. § 9-102(1)(a) (Reissue 1980). Since there was no

applicable exclusion, the plaintiff's disposition of the collateral taken as security for M & G Implement's indebtedness was controlled by § 9-504. Subsection (3) of that section is relevant here. It provides in part:

> Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor, if he has not signed after default a statement renouncing or modifying his right to notification of sale.

In *Borg-Warner v. Watton*, 215 Neb. 318, 338 N.W.2d 612 (1983), this court stated: " 'Each guarantor is entitled to notice as a "debtor" under the definition of such in Neb. U.C.C. § 9-105(1)(d) (Reissue 1980) as one "who owes payment or other performance of the obligation secured . . . ." ' " *Id.* at 323, 338 N.W.2d at 615. This court continued, stating the rule in this jurisdiction " 'that compliance with the notice provisions of the Uniform Commercial Code is a condition precedent to the right of a creditor to recover a deficiency judgment. . . . The failure to give the requisite notice is an absolute bar to recovery.' " (Citations omitted.) *Id.* See, also, *Havelock Bank v. McArthur, ante* p. 364, 370 N.W.2d 116 (1985); *City Bank & Trust Co. v. Van Andel, ante* p. 152, 368 N.W.2d 789 (1985).

This case is further controlled by this court's holding in *DeLay First Nat. Bank & Trust Co. v. Jacobson Appliance Co.*, 196 Neb. 398, 243 N.W.2d 745 (1976). In *DeLay*, as in the case at bar, there was more than one disposition of collateral, only some of which the defendant was properly notified of prior to its occurrence. This court said:

> We believe the intent of the Uniform Commercial Code would appear to mandate that the entire disposition of collateral by the secured party be viewed as one transaction, and that every aspect of that transaction be in accord with the requirements of the Uniform Commercial Code. To adopt any other rule would place upon the court the sometimes impossible and time-consuming task of attempting to determine the amount of recoverable

deficiency as well as the amount of unrecoverable deficiency.

What we said in Bank of Gering v. Glover, *supra*, is pertinent herein: "The creditor is given several options in disposing of collateral and very minimal formal requirements. The burden on the secured creditor is to comply with the law. The act is framed in his interest. It is not onerous to require him to give notice of the time and place of sale. In some instances it will be to the creditor's advantage to do so. On the other hand, to permit him to proceed otherwise does place an onerous burden on the debtor."

We adhere to the position we adopted in Bank of Gering v. Glover, *supra*. The right to a deficiency judgment depends on compliance with the statutory requirements. We now hold that if a creditor wishes a deficiency judgment he must comply with the law in each transaction. While this rule may seem harsh, we are persuaded by the fact that the burden is on the secured creditor to comply with the law. The act is framed in his interest. It is not onerous to require him to observe the provisions of the law.

Id. at 408-09, 243 N.W.2d at 751.

The defendants contend that the plaintiff is barred from recovering a deficiency judgment because it did not comply with the notice provisions of § 9-504(3) in its disposition of the repossessed equipment.

The plaintiff does not deny that it did not give notice to the defendants regarding the new equipment and parts which it took back. It contends that no notice was required as to new equipment and parts because it acted pursuant to Neb. Rev. Stat. §§ 69-1501 et seq. (Reissue 1981). M & G Implement, Inc., was fully reimbursed for all new equipment and parts on hand when the dealer agreement was terminated. As to the new equipment and parts, the plaintiff argues: "There was no deficiency that resulted and, as such, no reason for any notice to Defendants-Appellants that the new items were to be taken back as per section 69-1501." Brief for Appellee at 9.

Although the defendants received credit for the full invoice

price of the new equipment and parts, including freight, this was an "other disposition" under § 9-504, and the plaintiff was required to give the required statutory notice prior to the disposition.

As to the used equipment, letters were sent to the defendants, captioned "* * * NOTICE OF PRIVATE SALE * * *"; two such notices sent to the defendant Herman Fales were returned address unknown; the notice intended for the defendant Sharon Shaw was sent to the address of her former husband, the defendant William E. Shaw, and possibly not forwarded. On this basis the trial court found that only the defendant William E. Shaw was liable for that part of the deficiency attributable to sale of the used equipment.

DeLay First Nat. Bank & Trust Co. v. Jacobson Appliance Co., supra, requires that the creditor "comply with the law in each transaction." This the plaintiff failed to do. As a consequence, the plaintiff cannot recover a deficiency judgment against any of the defendants.

The judgment of the district court is reversed and the cause remanded with directions to dismiss the petition.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

GRANT, J., participating on briefs.

BOSLAUGH, J., dissenting.

In my opinion this case goes too far. What began as a rule to insure that the debtor received full credit for the value of the collateral seized by the creditor has become a means to forfeit the rights of the creditor without regard to prejudice to the debtor or the value of the collateral as compared to the amount of the debt.

Since the debtors received credit for the full invoice price plus freight for the new merchandise and parts which the plaintiff took back, it is difficult to see how there could be any "deficiency" attributable to that part of the transaction. As for the used merchandise, the notice sent by the plaintiff advised the debtors that the items listed would be sold at private sale after the date specified. Such a notice, if properly sent, should be sufficient to comply with the statute as to the items listed.

While there are a number of jurisdictions which impose an

absolute bar to recovery by a secured creditor who fails to give notice pursuant to U.C.C. § 9-504(3) (1984), a much larger number of jurisdictions do not do so. Compare J. White & R. Summers, Handbook of the Law Under the Uniform Commercial Code 1134 n.191 with nn.192-93 (2d ed. 1980). Rather, these states allow the creditor a deficiency judgment subject to a setoff for whatever loss the debtor suffered as a result of the improper sale or, upon a showing that the creditor did not give proper notice, grant the debtor a rebuttable presumption that the collateral was worth the amount of the debt. *Id.* at 1134. These alternatives seem preferable to the rule followed in this case.

Recently, in *First Galesburg Nat'l Bank v. Joannides,* 103 Ill. 2d 294, 469 N.E.2d 180 (1984), the Illinois Supreme Court resolved a conflict within that state's appellate court regarding whether the failure of a secured creditor to give notice to the debtor of the sale of collateral bars the creditor from recovering a deficiency from the debtor. In so doing, the court adopted the "rebuttable-presumption standard," which it found to be "consistent with the conclusion reached in most jurisdictions where the question has been examined." (Citations omitted.) 103 Ill. 2d at 301, 469 N.E.2d at 183. The court reasoned:

> Nowhere in the sections of the Code concerning debtor defaults (Ill. Rev. Stat. 1981, ch. 26, par. 9-501 *et seq.*) (part 5), is it provided that a lack of notice bars a deficiency judgment. Nor is it provided that proper notice is a condition to the bringing of a deficiency action. Too, section 9-507 explicitly states consequences which are to follow a failure to comply with the provisions of part 5 of the Code. In what is relevant here it provides: "(1) If it is established that the secured party is not proceeding in accordance with the provisions of this Part disposition may be ordered or restrained on appropriate terms and conditions. If the disposition has occurred the debtor or any person entitled to notification or whose security interest has been made known to the secured party prior to the disposition has a right to recover from the secured party any loss caused by a failure to comply with the

provisions of this Part." (Ill. Rev. Stat. 1981, ch. 26, par. 9-507.) Section 9-507 thus creates a remedy for "any loss" caused by a "failure to comply with the provisions of [part 5]," which includes, of course, the notice requirement in section 9-504(3). Any loss arising from a lack of notice will give rise to a right to recover for the loss. Section 9-507 does not provide that a failure to comply with part 5 bars the creditor from bringing an action to recover any deficiency. No basis for an "absolute-bar" principle is found anywhere in article 9.

The absolute-bar rule is also contrary to the intendment of article 9 that penal damages or results be avoided and that the aggrieved party be placed in "as good a position as if the other party had fully performed." (Ill. Rev. Stat. 1981, ch. 26, par. 1-106.) The absolute-bar rule, by barring a deficiency action regardless of whether the debtor has suffered damage from the lack of notice, provides a windfall for the debtor and arbitrarily penalizes the creditor.

103 Ill. 2d at 299-300, 469 N.E.2d at 182-83.

PWA FARMS, INC., A NEBRASKA CORPORATION, APPELLEE, V. NORTH PLATTE STATE BANK, A NEBRASKA BANKING CORPORATION, APPELLANT.

371 N.W.2d 102

Filed July 26, 1985. No. 84-477.

1. **Conversion: Property: Words and Phrases.** A conversion is any distinct act of dominion wrongfully asserted over another's property in denial of or inconsistent with that person's rights.
2. **Negotiable Instruments: Conversion.** A negotiable instrument can be the subject of conversion.
3. **Conversion: Property: Damages.** The measure of damages for conversion is the market value of the converted property on the date of conversion.
4. **Banks and Banking: Negotiable Instruments.** It is elementary that when a check is drawn to the order of a bank and the drawer gives no specific instructions as to the disposition of the funds, the bank is not authorized to pay the proceeds of the check to a stranger to the transaction.

5. **Negotiable Instruments: Liability.** No person is liable on an instrument unless his signature appears thereon.
6. **Corporations: Presumptions.** When a corporate officer acts outside the scope of ordinary business, no presumption of authority arises and the other party to the transaction must make an inquiry into the officer's authority.
7. **Principal and Agent.** An agent may not borrow money and bind his principal for its repayment, unless such authority is expressly conferred or is necessarily implied by the authority granted.
8. **Judgments: Appeal and Error.** In a law action tried without a jury, it is not within our province to resolve evidentiary conflicts or to weigh evidence; rather, it is our obligation to review the judgment entered in light of the evidence and to consider the evidence in that light most favorable to the successful party, resolving all conflicts in his favor and granting him the benefit of every inference which is reasonably deducible therefrom.
9. **Trial: Evidence: Appeal and Error.** A party on appeal may not assign the admission of evidence as error where no objection was made thereto in the trial.

Appeal from the District Court for Lincoln County: JOHN P. MURPHY, Judge. Affirmed.

Donald W. Pederson and David W. Pederson of Murphy, Pederson, Piccolo & Pederson, for appellant.

David A. Domina of Domina & Gerrard, P.C., for appellee.

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

WHITE, J.

The defendant, North Platte State Bank, appeals from an order of the district court awarding the plaintiff, PWA Farms, Inc., $15,082.03 for the conversion and wrongful application of the proceeds of a negotiable instrument by the defendant.

The appellee, PWA Farms, Inc., is a Nebraska corporation that was formed in 1977 to acquire a farm in Lincoln County. PWA was owned and operated by Glenn Williams, A.M. Wingate, and Duane Kantor. PWA owned the farm until June 15, 1980, when it was sold on contract to DRW Farms, an Illinois partnership. As part of the purchase price, DRW agreed to pay the outstanding balance of PWA's mortgage to Mutual of New York (MONY). By the terms of the sale DRW acquired all interests in the growing crops, as well as the title to the real estate.

In July of 1980 Williams requested a loan from the North

Platte State Bank for closing expenses on the sale of the farm. On July 23, 1980, a $40,000 loan was made by the bank for these closing expenses, and a promissory note was signed by Williams as "Pres." of PWA. The proceeds of this loan were deposited in the Williams Trucking Company account. This loan was paid off in August 1980. On August 16 or 17, 1980, Williams contacted the bank about a second loan for PWA farm expenses. A promissory note for $17,000 was executed and signed by Williams personally on August 18, 1980. The proceeds were again placed in the Williams Trucking account. No evidence was produced to indicate whether PWA ever received this money.

Pursuant to DRW's agreement to pay the mortgage on the farm, an interest payment attributable to the period of June 15 to December 31, 1980, was due in the amount of $15,082.03. Since the MONY mortgage had a due-on-sale clause, DRW delivered its check to the defendant bank. It was assumed that the bank would apply the proceeds of the check to the MONY mortgage for PWA's benefit, thus concealing from MONY the fact of the sale. This arrangement was never reduced to writing. The bank denies knowledge of any such arrangement.

When the $17,000 note for farm expenses came due, the bank contacted Williams. Williams told the bank that a check would be coming from Chicago to be applied against the note. Later, the bank received a check for $15,082.03 from Chicago, but there were no instructions included with this check. However, a copy of a statement from MONY indicating the payment amount due on the mortgage was included. The check was made payable to North Platte State Bank, issued and mailed by DRW, and was noted "Interest re: PWA Farms." The bank then called Williams concerning the check, and Williams told the bank that the check was to be applied to the $17,000 loan. PWA claims it never received any benefit from Williams' $17,000 loan or the $15,082.03 check.

The claims of DRW were assigned to PWA, and this action resulted. PWA asserted these causes of action against the bank: (1) simple conversion; (2) negligence in discharging the duties of the bank as a collecting bank by misapplying the proceeds of a check; and (3) breach of warranties pursuant to Neb. U.C.C.

§ 4-207 (Reissue 1980). Following a trial to the court, judgment was entered for PWA on the theory of conversion and negligent misapplication of the proceeds of the check.

The defendant claims the district court erred in failing to find (1) that the promissory note for $17,000, negotiated by Williams, was a PWA debt; (2) that PWA received the benefits of the proceeds from the $17,000 loan; (3) that the bank was not negligent in its handling of the DRW check or in the application of the proceeds from that check; (4) that the PWA was estopped from asserting at trial that it never received the benefits of the August 1980 loan, due to its prior inconsistent position; (5) that the testimony of two officers of PWA was insufficient to establish that the corporation did not receive the proceeds of the $17,000 loan; and (6) that the bank owed no duty to inquire of DRW as to the purpose of the check in question.

The district court found that the defendant had converted the proceeds of DRW's check and also had negligently misapplied the proceeds of the check. We agree with the district court.

PWA claimed that North Platte State Bank converted funds of DRW, PWA's assignor, in this case. A bank that commits conversion has violated the Uniform Commercial Code. Neb. U.C.C. § 1-103 (Reissue 1980) states that principles of law and equity shall supplement the provisions of the Uniform Commercial Code. This case can be decided on conversion without addressing any other provisions of the code.

A conversion is any distinct act of dominion wrongfully asserted over another's property in denial of or inconsistent with that person's rights. *Prososki v. Commercial Nat. Bank*, 219 Neb. 607, 365 N.W.2d 427 (1985). The plaintiff in an action for conversion must allege facts showing a right to immediate possession of the property at the time of the conversion. *Prososki v. Commercial Nat. Bank, supra.* A negotiable instrument can be the subject of conversion. *Bryant Heating v. United States Nat. Bank*, 216 Neb. 107, 342 N.W.2d 191 (1983).

PWA does not claim ownership of the check but maintains the action of conversion as the assignee of DRW, the drawer of the check. DRW assigned to PWA all of its claims, actions, or demands against the defendant arising out of defendant's

application of the proceeds of the $15,082.03 check to obligations of Williams. DRW issued the check in question to the defendant as the payee. However, DRW intended to maintain control of the check insofar as it was to be used to make a payment to MONY. DRW was the "owner" of the check and may maintain an action for conversion against the defendant. The defendant was not instructed as to the disposition of the check but should have been on notice that the check should not have been negotiated until further instructions were received from DRW. By applying the proceeds of the check against Glenn Williams' personal loan, the bank was clearly exercising a wrongful act of dominion over the proceeds of DRW's check. It is elementary that when a check is drawn to the order of a bank and the drawer gives no specific instructions as to the disposition of the funds, the bank has no right to pay the proceeds of the check to a stranger to the transaction. The bank wrongfully converted DRW's check.

The district court found that the defendant was negligent in its handling of the check and its misappropriation of the funds of that check. PWA claims that North Platte State Bank failed to secure instructions from DRW for disposition of the proceeds of the check on which the bank was named as payee. The defendant's contention is that a bank is not on notice unless a check payable to it is presented by a third party with instructions to deposit the check in that party's personal account. It also argues that the instructions it received from Glenn Williams were sufficient. We disagree. Williams was not the drawer of the check. The bank should have contacted DRW, the drawer, for instructions. By using a bank's name as the payee of the check, a drawer is intending to place the proceeds in the bank's custody and under its control, and nothing may be inferred from the language of the check. *Sun 'n Sand, Inc. v. United California Bank,* 21 Cal. 3d 671, 582 P.2d 920, 148 Cal. Rptr. 329 (1978). In *Sun 'n Sand, Inc.,* the California Supreme Court dealt with negligence as it related to the actions of a bank when it received altered checks made payable to it from a corporation. The bank received the checks and credited the account of the employee who altered the checks. It is a well-established rule that when a check is drawn to the order of

a bank to which the drawer is not indebted, the bank is authorized to pay the proceeds only to persons specified by the drawer; it takes the risk in treating such check as payable to bearer and is placed on inquiry as to the authority of the drawer's agent to receive payment. *Sun 'n Sand, Inc. v. United California Bank, supra.*

In the instant case the defendant bank affirmatively took the risk when it contacted Williams to inquire as to what to do with the proceeds of the DRW check. The bank could have just as easily contacted DRW for instructions or, in the alternative, returned the check to DRW. Both of these actions would have been reasonable under the circumstances. The bank was put on notice and had a duty to inquire as to what to do with the proceeds of the DRW check. It breached this duty when it negotiated the check without receiving instructions from DRW.

Since DRW's conversion claim was assigned to PWA, the defendant is essentially claiming that the alleged amount converted, $15,082.03, should be set off against the benefit PWA received. The defendant claims that Williams' $17,000 loan was a corporate loan to PWA, that the application of the proceeds of DRW's check to the $17,000 loan benefited PWA, DRW's assignee, and that the amount converted should be set off against the amount of the benefit to PWA. We disagree.

In analyzing defendant's setoff claim, we must determine whether PWA was liable on Williams' $17,000 loan or whether PWA received the benefits of the $17,000 loan. "No person is liable on an instrument unless his signature appears thereon." Neb. U.C.C. § 3-401 (Reissue 1980). Williams signed the $17,000 note in question personally, and the only reference to PWA was an annotation on the note "for the purpose of P.W.A. Farms Expenses." Since Williams signed the note, it appears that he would be personally liable. However, if a corporate officer signs a note, the corporation may be liable on the underlying obligation. In *Val-U Constr. Co. v. Contractors, Inc.*, 213 Neb. 291, 294, 328 N.W.2d 774, 776 (1983), we stated:

> When a corporate officer acts outside the scope of ordinary business, no presumption of authority arises and the other party to the transaction must make an inquiry into the officer's authority. In *Electronic Development*

> *Co. v. Robson*, 148 Neb. 526, 535, 28 N.W.2d 130, 136-37 (1947), this court said: " 'It is true that a corporation can act only by its agents, and the presumption is that an act pertaining to its ordinary business, when performed by its president, secretary or general manager, is legally done and is binding upon the corporation, yet no such presumption prevails, when the act done by such officers does not fall within the scope of the powers conferred upon and usually exercised by them as part of the ordinary business of the corporation.' "

In *Furrer v. Nebraska Building & Investment Co.*, 111 Neb. 423, 425, 196 N.W. 680, 681 (1923), we said, "It is a rule of law, supported by ample authority, that an agent may not borrow money and bind his principal for its repayment, unless such authority is expressly conferred or necessarily implied by the authority granted."

No corporate authority was given for Williams to borrow money for PWA. There is no evidence to show that PWA received any of the proceeds of the $17,000 loan. The officers of PWA testified that they did not receive the benefits of the loan. Furthermore, there was no evidence presented by the defendant that any of Williams' $17,000 loan was used for PWA expenses. The proceeds were deposited in the Williams Trucking account at defendant bank. A check was then drawn on that account and made payable to Williams Management and PWA. This check was deposited in the Williams Management trust account at another bank. The plaintiff, PWA, established a prima facie case of conversion against the defendant, North Platte State Bank. PWA also produced sufficient evidence that it did not authorize Williams to borrow $17,000, that it did not authorize the payment of Williams' loan, and that it did not receive any benefits from the loan. The defendant had the burden of going forward but failed to produce evidence that PWA received any benefit from Williams' $17,000 loan. PWA was not liable on Williams' $17,000 loan and did not receive any proceeds from the loan. Therefore, when the DRW check was applied against the loan, PWA received no benefit.

The measure of damages for conversion is the market value of the converted property on the date of conversion. *Associated*

Bean Growers v. Chester B. Brown Co., 198 Neb. 775, 255 N.W.2d 425 (1977). Since PWA did not receive the benefits of the $15,082.03 check from DRW and DRW received no benefits from its check, PWA and its assignor, DRW, were damaged to the extent of $15,082.03.

The defendant assigns as error that there was insufficient evidence to support the trial court's finding that PWA did not receive the benefit of the proceeds of the DRW check. In *Grubbs v. Kula*, 212 Neb. 735, 325 N.W.2d 835 (1982), we stated:

> In a law action tried without a jury, it is not within our province to resolve evidentiary conflicts or to weigh evidence; rather, it is our obligation to review the judgment entered in light of the evidence and to consider the evidence in that light most favorable to the successful party, resolving all conflicts in his favor and granting him the benefit of every inference which is reasonably deducible therefrom.

(Syllabus of the court.) Viewing the evidence in the instant case in a light most favorable to the plaintiff, we must agree with the district court. The defendant failed to produce sufficient evidence supporting its claim that the plaintiff received the benefit of the check.

The defendant further claims that the plaintiff was estopped from asserting at trial that it never received the benefits of the $17,000 loan, due to its prior inconsistent position. However, the defendant did not object to this evidence at trial. A party on appeal may not assign the admission of evidence as error where no objection was made thereto in the trial. *Breiner v. Olson*, 195 Neb. 120, 237 N.W.2d 118 (1975). Furthermore, we do not find in the record any inconsistencies in plaintiff's case.

The judgment of the trial court is correct and is affirmed.

AFFIRMED.

IN RE ESTATE OF CARL KESTING, DECEASED. LORETTA KESTING, APPELLEE, V. HAROLD G. KESTING, PERSONAL REPRESENTATIVE OF THE ESTATE OF CARL KESTING, DECEASED, APPELLANT.

371 N.W.2d 107

Filed July 26, 1985. No. 84-511.

1. **Records: Appeal and Error.** Where there is no bill of exceptions, the appellate court is limited to a determination of whether the pleadings support the judgment of the trial court.
2. **Decedents' Estates: Property.** In the absence of an allegation that a decedent's property is necessary for purposes of administration, as required by Neb. Rev. Stat. § 30-2470 (Reissue 1979), a personal representative has no authority to take possession or control of a decedent's property.

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

Vince Kirby, for appellant.

David A. Domina of Domina & Gerrard, P.C., for appellee.

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

PER CURIAM.

On November 21, 1974, Carl Kesting executed his will and devised a quarter section of Pierce County real estate to his children, that is, the north half of the quarter section to his daughter, Loretta Kesting, and the south half of the quarter section to his son, Harold G. Kesting. In his will Carl also specified that Loretta and Harold equally share the residue of his estate, and nominated Harold as personal representative.

On January 5, 1982, Carl, by warranty deed, conveyed the entire quarter section to Harold and his wife, LaVetta. Carl died a resident of Madison County on June 25, 1983, and his will was admitted to probate, with "Letters of Personal Representative" issued to Harold on July 19.

In the county court, on August 4, Loretta filed a petition and alleged that Carl's warranty deed of January 5, 1982, was "procured by mistake, misrepresentation, undue influence, and duress" by the grantees, Harold and LaVetta. Loretta

further alleged there was a "conflict of interest" regarding Harold as personal representative and requested appointment of a special administrator "for the limited purpose of taking all necessary action on behalf of the estate, including the filing of a Petition in the appropriate Court to set aside the purported Warranty Deed dated January 5, 1982," in order to collect and include the conveyed real estate as a part of Carl's estate. See Neb. Rev. Stat. § 30-2457(2) (Reissue 1979). Harold's only response to Loretta's petition was a demurrer on the ground "there is no statutory authority for the request" contained in the petition. (The record does not reflect whether the county court overruled Harold's demurrer or whether the court construed the demurrer as an answer traversing the existence of the relief requested.) On August 31 Harold and Loretta stipulated, and the county court ordered, the appointment of a special administrator "for the purpose of investigating, and reporting to the Court, concerning . . . [t]he circumstances surrounding the conveyance by the decedent of certain real estate described in [Carl's will] . . . which Deed is dated on or about January 5, 1982 . . . ."

In his report filed on December 5, the special administrator expressed an opinion that an action to set aside the deed "could not be successfully maintained," to which Loretta filed a written objection on December 7. The special administrator, on December 20, filed a "reply to objections," in which he stated: "The matter does present a fact question, and if the case were filed, the facts raise reasonable questions with respect to the execution and delivery of the deed which would be submitted to the jury," and acknowledged there appeared to be a genuine issue of fact regarding questions raised by Loretta's petition.

A hearing was held before the county court on January 5, 1984, but these proceedings were not recorded and transcribed. Consequently, there is no bill of exceptions for the January 5 proceedings. In its order regarding the January 5 hearing, the county court accepted the special administrator's report and declined to appoint a special administrator as requested by Loretta. Loretta appealed to the district court, which reversed the county court's order of January 5 and remanded the proceedings to the county court with direction to "appoint a

special administrator to institute suit against Harold G. Kesting and his spouse to challenge the Deed [by Carl Kesting] whereby the decedent purported to convey his Pierce County, Nebraska real estate to Harold G. Kesting and his spouse." Harold appeals the district court's order of reversal and remand.

Where there is no bill of exceptions, the appellate court is limited to a determination of whether the pleadings support the judgment of the trial court. See *Lum v. Mattley*, 208 Neb. 789, 305 N.W.2d 878 (1981).

Generally, and in a proper situation, an heir, devisee, or interested person in his or her own right may challenge a deed executed by the decedent defeating descent to the challenger. See *McDonald v. McDonald*, 207 Neb. 217, 298 N.W.2d 136 (1980). Despite this fact, Loretta filed a petition in the county court seeking to have a special administrator appointed to bring an action on behalf of the estate to set aside the conveyance by the decedent.

Neb. Rev. Stat. § 30-2470 (Reissue 1979) provides in part:

> Except as otherwise provided by a decedent's will, every personal representative has a right to, and shall take possession or control of, the decedent's property, except that any real property or tangible personal property may be left with or surrendered to the person presumptively entitled thereto unless or until, in the judgment of the personal representative, possession of the property by him *will be necessary for purposes of administration*. The request by a personal representative for delivery of any property possessed by an heir or devisee is conclusive evidence, in any action against the heir or devisee for possession thereof, that the possession of the property by the personal representative *is necessary for purposes of administration*.

(Emphasis supplied.)

There was no allegation that the real estate conveyed by the decedent, Carl Kesting, was necessary for administration of the estate. In view of the provisions of § 30-2470, as applied to the case before us, possession of a decedent's property was not necessary, as a matter of law, for the purposes of administration. As a result of a similar construction of the

language of § 30-2470, there is "conclusive evidence" that the real estate conveyed by Carl Kesting to Harold Kesting is not necessary for administration of the estate, in that there is no assertion that the personal representative, Harold Kesting, requested delivery of the property now sought by Loretta Kesting.

Loretta Kesting seeks to use the Nebraska Probate Code as a means to finance a lawsuit against Harold Kesting. It seems to us that the probate code should not be construed so as to permit one heir or devisee to finance his or her lawsuit against another heir or devisee out of the funds of the estate, where the property is not needed for "purposes of administration."

We, therefore, reverse the judgment of the district court and remand this matter to the district court with direction that the district court reinstate the judgment of the county court denying appointment of a special administrator.

REVERSED AND REMANDED WITH DIRECTION.

STATE OF NEBRASKA, APPELLEE, V. JOHN R. WHITE, APPELLANT.

371 N.W.2d 262

Filed July 26, 1985. No. 84-823.

1. **Wiretaps.** No order entered under the provisions of Neb. Rev. Stat. § 86-705 (Reissue 1981) to permit the interception of wire communications may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of authorization, nor in any event longer than 30 days.
2. **Wiretaps: Motions to Suppress.** Failure to include minimization language as provided by Neb. Rev. Stat. § 86-705(6) (Reissue 1981) in an order to permit the interception of wire or oral communication when statutory guidelines have been supplied and when there exists a means of measuring compliance with minimization provisions of the statute is not fatal and does not warrant suppression of evidence.
3. **Motions to Suppress.** No evidence may be suppressed because of technical irregularities not affecting the substantial rights of the accused.
4. **Wiretaps.** For the purposes of a wiretap, minimization is to be judged on a case-by-case analysis of the reasonableness of the government's conduct under the facts and circumstances present.

5. _____. Whether government agents acted reasonably in a wiretap case is affected by a number of factors, including the nature and scope of an alleged conspiracy, the government's reasonable expectations of the character of conversations they will be intercepting, and the extent of ongoing judicial supervision over surveillance.
6. **Wiretaps: Motions to Suppress.** Defendants seeking to suppress evidence obtained pursuant to wiretap because of the failure to comply with minimization requirements must do more than identify individual calls which they contend should not have been intercepted; they must establish a pattern of interception of innocent conversations which developed over the period of the wiretap.
7. **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.
8. **Search and Seizure: Motions to Suppress.** One who seeks to suppress evidence seized pursuant to a warrant regular on its face has the burden of establishing that the warrant was invalid.

Appeal from the District Court for Douglas County: PAUL J. HICKMAN, Judge. Affirmed.

James Martin Davis of Dolan, Davis & Gleason, for appellant.

Robert M. Spire, Attorney General, and Lynne R. Fritz, for appellee.

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

PER CURIAM.

John R. White was charged in a five-count information in the district court for Douglas County, Nebraska. The charges were as follows: count I, possession with intent to deliver a controlled substance, marijuana; count II, possession with intent to deliver a controlled substance, cocaine; count III, possession with intent to deliver a controlled substance, hashish; count IV, possession with intent to deliver a controlled substance, methaqualone; and count V, possession of a controlled substance, hashish; all in violation of Neb. Rev. Stat. §§ 28-416(1)(a) and 28-416(3) (Cum. Supp. 1984). Following trial, White was convicted on all five counts and sentenced to imprisonment in the Nebraska Penal and Correctional Complex for a period of not less than 3 nor more than 5 years on each count, the sentences to be served concurrently. He now appeals to this court from that

conviction, maintaining that the conviction should be set aside due to three errors committed during the course of the trial. The three errors alleged by White are: (1) The district court committed error by admitting wiretap evidence when the order authorizing the electronic surveillance did not contain a provision that the authorization to intercept must terminate upon the attainment of the authorized objective, as required by Neb. Rev. Stat. § 86-705(6) (Reissue 1981); (2) The district court committed error by admitting wiretap evidence where the wiretap interception was conducted in such a way as to fail to minimize the interception of communications not subject to the order; and (3) The district court committed error by admitting wiretap evidence where the interim reports filed with the court pursuant to its order intentionally or recklessly misrepresented information concerning the actual status of the wiretap and that erroneous information was contained in the application for an extension of the wiretap.

These three assignments were previously presented to a single judge of this court, pursuant to the provisions of Neb. Rev. Stat. § 29-824 (Reissue 1979), and rejected. See *State v. Whitmore, White, and Henderson*, 215 Neb. 560, 340 N.W.2d 134 (1983). Because the issues raised by White in this appeal, following a trial on the merits, are identical with the issues raised by White before the single judge of this court and because we are in complete accord with the opinion rendered by the single judge, there is little purpose for us to merely repeat *in extenso* the holdings of the single judge. The earlier decision, though a decision by one judge of this court and therefore not binding on the court or eligible to be cited as precedent, is correct in all respects. For that reason we therefore merely adopt by reference the one-judge opinion previously decided and reported at 215 Neb. 560, 340 N.W.2d 134 (1983), as the opinion of the entire court. See, also, *State v. Brennen*, 218 Neb. 454, 356 N.W.2d 861 (1984). On that basis, therefore, the assignments of error raised by White in this appeal must be overruled. The judgment is affirmed.

AFFIRMED.