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REPORTS OF CASES

DECIDED BETWEEN

MAY 17, 1978 and DECEMBER 19, 1978

IN THE

Supreme Court of Nebraska

JANUARY TERM 1978 and SEPTEMBER TERM 1978

VOLUME CCI

MARVIN L. GREEN

OFFICIAL REPORTER

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BY MARVIN L. GREEN, REPORTER OF THE SUPREME COURT

For the benefit of the State of Nebraska

SUPREME COURT

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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1978

DARRELL YERG, APPELLEE, V. MARVIN M. HUNT, APPELLANT.

265 N. W. 2d 854

Filed May 17, 1978. No. 41494.

Equity: Injunctions: Highways. A property owner whose land abuts a public road which is the means used for access to his property may enjoin the obstruction of the road by an adjoining property owner.

Appeal from the District Court for Dawson County: HUGH STUART, Judge. Affirmed as modified.

David B. Smith for Smith & Smith, for appellant.

Pierson, Ackerman, Fitchett & Akin and E. Bruce Smith, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

BOSLAUGH, J.

The plaintiff, Darrell Yerg, brought this action to recover damages and to enjoin the defendant, Marvin M. Hunt, from obstructing public access to the plaintiff's property by way of an easement along the east edge of the defendant's property. The trial court found that the east 30 feet of the defendant's property was a part of a public road and that the defendant had been unreasonably interfering with the passage of traffic over the road. The defendant was

enjoined from obstructing or interfering with the passage of traffic across that part of the easement lying east of an existing line of utility poles and awarded nominal damages. The defendant has appealed.

The plaintiff and his wife are the owners of Lot 1 in West Acres Second Subdivision of a part of the northeast quarter of Section 7, Township 9 North, Range 21 West of the 6th P.M., in Dawson County, Nebraska. The defendant and his wife own Lots 1 and 6 in West Acres First Subdivision of a part of the same quarter section. The defendant's land lies directly north of the plaintiff's land and both tracts were originally part of a larger tract owned by Vaughn Rhone. The land is outside the city limits of Lexington, Nebraska, but within the zoning jurisdiction of the city.

The deed from Rhone to the defendant and his wife, dated May 15, 1975, reserved a roadway easement across the east 30 feet of the land conveyed for the purposes of ingress and egress. The deed expressly provided that the "easement shall run with the land of the parties and shall be binding on and shall inure to the benefit of the parties hereto, their heirs, successors, or assigns."

In the deed from Rhone to the defendant and his wife the land was described by metes and bounds. The plat of West Acres First Subdivision was approved by the City of Lexington on October 28, 1975. In this plat the defendant joined in a dedication of "the street, roadway easement, and the utility easement * * * therein to the use and benefit of the public * * *." The plat shows a roadway easement 30 feet wide lying along the east edge of the property.

The plat of West Acres Second Subdivision was approved by the City of Lexington on December 9, 1975. This plat shows a roadway easement 30 feet wide along the east edge of the property which amounts to a continuation of the easement across

West Acres First Subdivision. The plat contains a dedication by Rhone and his wife of the roadway easement to the use and benefit of the public.

Lot 1 in West Acres Second Subdivision was conveyed to the plaintiff and his wife by Rhone and his wife on January 27, 1976.

The record fully sustains the finding of the trial court that the east 30 feet of West Acres First Subdivision was a public road. It is unnecessary to consider further the plaintiff's contention that he also had a private easement across the east 30 feet of West Acres First Subdivision.

The defendant contends that the plaintiff was not entitled to injunctive relief. In Burkhardt v. Cihlar, 149 Neb. 712, 32 N. W. 2d 197, this court recognized that where a road has been worked or traveled, a property owner may obtain injunctive relief to prevent the obstruction of the road. Ordinarily, an abutting property owner may maintain an action to remove an obstruction which has been placed in a street in the immediate vicinity of his property. Michelsen v. Dwyer, 158 Neb. 427, 63 N. W. 2d 513. The evidence shows that the easement in question in this case has been used by the plaintiff and others as the means of access to the public road which runs along the north edge of the defendant's property. Under the facts and circumstances of this case the plaintiff had a sufficient interest to maintain the action.

With respect to the defendant's contention that there had been no acceptance of the dedication, the record shows that the plaintiff and all others who had occasion to travel to and from the property south of the defendant's land had used the road without restriction. The city had also erected utility poles on a line approximately 4 or 5 feet east of the west boundary of the easement. In Village of Maxwell v. Booth, 161 Neb. 300, 73 N. W. 2d 177, the use of a street for a telephone line was held to be an acceptance of the dedication for a public use.

The evidence showed that the defendant had obstructed the easement from time to time by parking vehicles and other equipment on it in such a way that it interfered with the plaintiff's use of the easement to reach his property. The District Court enjoined the defendant from obstructing the easement east of the existing line of utility poles. We believe the injunction should be modified to restrict the defendant from obstructing the east 20 feet of the easement by parking vehicles thereon or otherwise interfering with the passage of traffic across the east 20 feet of the easement. As so modified the judgment is affirmed.

AFFIRMED AS MODIFIED.

CHARLIE CIZEK, APPELLANT, V. RICHARD L. CIZEK ET AL., APPELLEES.

266 N. W. 2d 68

Filed May 17, 1978. No. 41501.

1. **Demurrer: Pleadings.** A general demurrer tests the substantive legal rights of the parties upon admitted facts, including proper and reasonable inferences of law and fact which may be drawn from facts which are well pleaded.
2. **Deeds: Mortgages.** A deed, in terms conveying a title in fee simple, is not to be held a mortgage, unless given to secure payment of a debt or loan. If personal liability to pay the debt is extinguished and it is optional with the grantor to rescue the property by payment, or relinquish it by nonpayment, it is an absolute sale with privilege of repurchase, and not a mortgage.
3. **Mortgages: Property.** A safe, and perhaps the most satisfactory, test in all cases, where it is contended that an absolute conveyance of real estate is in actuality a mortgage, is whether the relation of the parties to each other as debtor and creditor continues. If it does, the transaction will be treated as a mortgage, otherwise not.
4. **Equity: Courts: Laches.** Independent of any limitation prescribed for the guidance of courts of law, equity may, in the exercise of its own inherent powers, refuse relief where it is sought after undue and unexplained delay, and when injustice would be done, in the particular case, by granting the relief asked. Courts

of equity have inherent power to refuse relief after undue and inexcusable delay independent of the statute of limitations.

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

Marc J. Weinpel of Peetz, Peetz & Weinpel, for appellant.

Donald J. Tedesco, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

WHITE, C. J.

Plaintiff brought this action in equity seeking to have a deed declared a mortgage and set aside, and for an accounting. Defendants filed a demurrer which was sustained. Plaintiff was allowed additional time to amend his petition, and did so. Defendants renewed their demurrer to plaintiff's amended petition, and it was again sustained. Plaintiff was allowed additional time to further amend his petition, but elected to stand on his petition. Defendants filed a motion to dismiss which was sustained. Plaintiff's motion for a new trial was overruled and he now appeals. We affirm the judgment of the District Court.

The sole issue on appeal is the correctness of the District Court in sustaining defendants' demurrer. "A general demurrer tests the substantive legal rights of the parties upon admitted facts, including proper and reasonable inferences of law and fact which may be drawn from facts which are well pleaded. * * * If the petition states facts which entitle the plaintiff to relief, whether legal or equitable, it is not demurrable upon the ground that it does not state facts sufficient to constitute a cause of action." Pfeifer v. Ableidinger, 166 Neb. 464, 89 N. W. 2d 568 (1958). On reviewing the sustaining of a demurrer, this court must treat as undisputed the facts as al-

leged in the petition. Swassing v. Baum, 195 Neb. 651, 240 N. W. 2d 24 (1976).

Plaintiff's pleadings disclose the following transaction. On March 26, 1957, plaintiff and his mother, Anna Cizek, entered into an agreement with Joe Cizek, plaintiff's brother and the father of the defendants. This agreement recited the following facts at its onset. Plaintiff and Anna Cizek were the equitable owners of certain land located in Cheyenne County, Nebraska; an outstanding mortgage in the sum of $8,000 with delinquent interest existed on this real estate at the time of the agreement; plaintiff was indebted in the sum of $40 per month for child support pursuant to a court decree which becomes a lien against this real estate as it accrues; and that Anna Cizek was 77 years old, without any independent income, and plaintiff was financially unable to maintain and carry on any farming operations.

The terms of this agreement were as follows: Plaintiff and Anna Cizek agreed to give to Joe Cizek a warranty deed for the subject real estate, subject to liens of record. Joe Cizek agreed and promised to: Pay all delinquent items on the mortgage and on child support at the time of transfer of the deed, pay Anna Cizek $25 per month, and to keep up all future payments on the mortgage, taxes, and other liens against the land.

Joe Cizek was to have full control over the operation of the farm land. Plaintiff and Anna Cizek were to have full control, possession, and the right to live in the farm buildings on the subject real estate. The contract was to last for a period of 10 years or until Anna's death, whichever was longer. Plaintiff and/or Anna Cizek were given the option at any time during the contract to reimburse Joe Cizek for amounts paid by him pursuant to the agreement, plus interest at 6 percent per annum, with credits for amounts equal to one-third of the crop raised on the subject land and any other income derived from the

land exclusive of two-thirds of the growing crops. Joe Cizek was required to keep an account of all income realized from the subject real estate.

The agreement concluded: "This contract is binding on the heirs, executors, assigns and successors of the respective parties hereto and subject only to the option herein granted by the said Joe Cizek to the parties of the second part, the party of the first part, Joe Cizek, shall have exclusive control and a vested fee title in said premises subject only to the option as herein above set forth."

A copy of the deed, in addition to a copy of the agreement, was attached to plaintiff's petition. The deed, dated March 25, 1957, is absolute on its face, with no restrictions or qualifications and subject to no encumbrances other than "outstanding oil and gas lease and liens of record." Anna Cizek died on or about October 8, 1969. Joe Cizek died on or about August 7, 1972. A copy of the final decree in the estate of Joe Cizek was attached to plaintiff's petition. This document indicates that the subject real estate was included as an asset in his estate and that it was taken into consideration in the distribution of his estate between his various heirs.

In his petition plaintiff contends that the deed was not meant to be an absolute conveyance but that in reality it was in effect a mortgage meant to secure a loan from Joe Cizek to plaintiff. Plaintiff alleges that the amounts to be credited by Joe Cizek [crop share, etc.] to the plaintiff greatly exceed any amounts expended by Joe Cizek pursuant to the agreement. Plaintiff seeks an accounting to determine by how much, if any, these amounts exceed those expended by Joe Cizek and to have any excess paid to him. He further seeks to have the deed canceled or, in the alternative, that he be permitted to tender an amount equal to the sums expended by Joe Cizek pursuant to the agreement in return for a cancellation of the deed.

In Winkelmann v. Luebbe, 151 Neb. 543, 38 N. W. 2d 334 (1949), we stated: "A deed, in terms conveying a title in fee simple, is not to be held a mortgage, unless given to secure payment of a debt or loan. If personal liability to pay the debt is extinguished and it is optional with the grantor to rescue the property by payment, or relinquish it by nonpayment, it is an absolute sale with privilege of repurchase and not a mortgage."

In Dingwerth v. Assendrop, 155 Neb. 343, 51 N. W. 2d 756 (1952), this court held: " 'If a deed is in fact intended as a mortgage and only given as a security for a debt such an agreement is enforceable and may be established by parol evidence but it must be established by evidence that is clear, satisfactory and convincing.' "

In Arla Cattle Co. v. Knight, 174 Neb. 360, 118 N. W. 2d 1 (1962), it is stated: " 'A safe and perhaps the most satisfactory test, in all such cases [where it is contended that an absolute conveyance of real estate is in actuality a mortgage], is whether the relation of the parties to each other as debtor and creditor continues. If it does, the transaction will be treated as a mortgage, otherwise not * * *.' "

The District Court correctly concluded that plaintiff's petition failed to state a cause of action. Prior to the conveyance of the subject real estate to Joe Cizek, plaintiff was not indebted in any manner to Joe Cizek. Plaintiff was, however, indebted to various third parties and was not in a position to meet these obligations. Plaintiff's mother, Anna Cizek, was unable to provide for her support nor was plaintiff able to provide therefor. In return for the conveyance, Joe Cizek agreed to provide for the future support of Anna Cizek, pay plaintiff's present indebtedness, and pay for certain future indebtedness as it accrued. Plaintiff and his mother were permitted to live on this land. Their agreement specifically, clearly, and unequivocally provided that the

conveyance to Joe Cizek was to be absolute, subject only to the option of obtaining the property back by reimbursing Joe Cizek for the amounts expended by him pursuant to the agreement with interest. This option was expressly limited in duration to the lifetime of the contract, which was expressly stated as 10 years or until the death of Anna Cizek, whichever was longer. The agreement was entered into on March 26, 1957. Anna Cizek died on October 8, 1969. There was no allegation that plaintiff ever exercised or attempted to exercise this option during the requisite period. There was no allegation that plaintiff ever asked for the return of this property. Plaintiff is contending, in effect, that at such time when the amounts to be credited against the amounts paid out by Joe Cizek exceed the latter, the option somehow exercised itself.

The District Court concluded that, in any event, plaintiff's petition disclosed laches on its face. The action was filed on June 23, 1976. Plaintiff argues that since the statute of limitations, as provided in section 25-202, R. R. S. 1943, has not run, his petition cannot be guilty of laches on its face.

In Kozina v. J. B. Watkins Lumber Co., 146 Neb. 594, 20 N. W. 2d 606 (1945), we stated that it is now well settled that, independent of any limitation prescribed for the guidance of courts of law, equity may, in the exercise of its own inherent powers, refuse relief where it is sought after undue and unexplained delay, and when injustice would be done, in the particular case, by granting the relief asked. Courts of equity have inherent power to refuse relief after undue and inexcusable delay independent of the statute of limitations.

In his petition plaintiff sought an accounting of the amounts expended by Joe Cizek pursuant to the agreement and of the income received from the real estate, a portion of which was to be credits on plaintiff's behalf against amounts paid out by Joe Cizek

under the terms of the agreement. The petition discloses that the person who would be central to such an accounting, Joe Cizek, died on August 7, 1972. It would clearly be difficult, if not impossible, to obtain an accurate accounting without the assistance of Joe Cizek. Two of the three parties to the agreement, Anna and Joe Cizek, are deceased. No claim for an accounting was filed in the estate. The subject real estate was permitted to be included as an asset in the estate of Joe Cizek, without any claim or contest by plaintiff, and it was taken into consideration when making a distribution of his estate amongst his heirs. The District Court did not err in finding laches under the circumstances.

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

AFFIRMED.

SANITARY AND IMPROVEMENT DISTRICT # 222 OF DOUGLAS COUNTY, NEBRASKA, APPELLANT, V. METROPOLITAN LIFE INSURANCE COMPANY, A CORPORATION, ET AL., APPELLEES.

266 N. W. 2d 73

Filed May 17, 1978. No. 41512.

1. **Legislature.** It is presumed that the Legislature has full knowledge and information of the subject matter of a statute, as well as the relevant facts relating to prior law and existing pertinent legislation, and has acted with respect thereto.
2. **Statutes.** The rule of in pari materia construction of statutes does not permit the use of a previous statute to control by way of former policy, plain language of a subsequent statute, or to add a restriction not included in or expressly excluded from the later statute.
3. _____. Where a statute is unambiguous, there is no need for construction.
4. **Statutes: Liens: Foreclosure: Political Subdivisions.** Section 77-1917.01, R. R. S. 1943, provides the subdivisions of government named therein an independent and complete remedy for the foreclosure of special assessment liens and is in addition to any other remedies provided by law for the collection of special assessments.

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

Walsh, Walentine & Miles, for appellant.

John R. Barton of Crossman, Barton & Norris and August P. Ross of Ross & Mason, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

CLINTON, J.

This appeal presents the single issue of whether or not a special assessment must be 2 years delinquent before a city, village, or sanitary and improvement district may proceed to foreclose liens as authorized by section 77-1917.01, R. R. S. 1943. The defendants-appellees, who are parties having an interest in the real property which is the subject of the action, assert that section 77-1901, R. R. S. 1943, which provides that after a parcel of real estate has been offered for sale for 2 consecutive years the county board shall make an order directing foreclosure, is, by virtue of the provisions of section 77-1858, R. R. S. 1943, at least so far as the 2-year period is concerned, incorporated into or is a condition precedent to foreclosure under the provisions of section 77-1917.01, R. R. S. 1943. Section 77-1858, R. R. S. 1943, among other things, says: " . . . all provisions of said revenue law now in force with reference to the collection of taxes shall apply with equal force to all taxes and special assessments levied by said county, municipality, drainage district, or other political subdivision of the state." The trial court sustained demurrers to the petition and dismissed the action. We reverse and remand for further proceedings.

Section 77-1917.01, R. R. S. 1943, insofar as pertinent, provides as follows: "All cities, villages and sanitary and improvement districts in Nebraska shall have a lien upon real estate within their bound-

aries for all special assessments due thereon to the municipal corporation or district, which lien shall be inferior only to general taxes levied by the state and its political subdivisions. When such special assessments have become delinquent, without the real property against which they are assessed being first offered at tax sale by the tax sale certificate method or otherwise, the municipal corporation or district involved may itself as party plaintiff proceed in the district court of the county in which the real estate is situated to foreclose, in its own name, the lien for such delinquent special assessments in the same manner and with like effect as in the foreclosure of a real estate mortgage, except as otherwise specifically provided by sections 77-1903 to 77-1917, which shall govern when applicable. . . . The remedy granted in this section to cities, villages and sanitary and improvement districts for the collection of delinquent special assessments shall be cumulative and in addition to other existing methods."

Section 77-1901, R. R. S. 1943, provides: "Counties shall have a lien upon real estate within their boundaries for all taxes due thereon to the state, any governmental subdivision of the state, any municipal corporation and any drainage or irrigation district. After any parcel of real estate has been offered for sale for two consecutive years and not sold for want of bidders, the county board shall make and enter an order directing the county attorney to foreclose the lien for all taxes then delinquent, in the same manner and with like effect as in the foreclosure of real estate mortgages, except as otherwise specifically provided by sections 77-1903 to 77-1917."

Section 77-1858, R. R. S. 1943, provides: "Whereever power is now given by the revenue laws of this state to the county treasurer of any county in this state to sell real estate, on which the taxes shall not have been paid as provided by law, it shall include the power to sell said real estate for all the taxes

and special assessments levied or hereafter levied by any county, municipality, drainage district, or other political subdivision of the state, and all provisions of said revenue law now in force with reference to the collection of taxes shall apply with equal force to all taxes and special assessments levied by said county, municipality, drainage district, or other political subdivision of the state."

The position of the defendants must be rejected for a number of reasons. First, section 77-1917.01, R. R. S. 1943, was enacted in 1961, becoming effective on May 18, 1961. See Laws 1961, c. 387, §§ 1 and 2, pp. 1182, 1183. That statute is an independent act, affording a remedy which did not previously exist, i.e., a direct foreclosure proceeding by the levying municipality or district against the real estate which is subject to the special assessment lien. Previous to enactment of section 77-1917.01, R. R. S. 1943, cities, etc., were limited in the means by which they could collect delinquent assessments. They could not themselves bring an action for sale of the property. State ex rel. Ransom v. Irey, 42 Neb. 186, 60 N. W. 601. County treasurers could, but were not required to, include the special assessments in a tax sale and the governmental subdivisions in that case could become the purchasers at the county treasurer's tax sale, or could purchase from the county any tax sale certificate held by it and could then foreclose all liens. § 77-1810, R. R. S. 1943; Drainage District No. 1 v. Kirkpatrick-Pettis Co., 140 Neb. 530, 300 N. W. 582. They could, under some circumstances, exercise a right of redemption in a proceeding brought for the foreclosure of general taxes. Dent v. City of North Platte, 148 Neb. 718, 28 N. W. 2d 562.

It is evident that before section 77-1917.01, R. R. S. 1943, became law, the city or other subdivisions of government had no control in the enforcement of their liens for special assessments. The subdivisions, therefore, were at the mercy of the county

boards and the county attorneys in the matter of collecting delinquent special assessments. It is a notorious fact that in many cases counties were not, in fact, carrying out their statutory duties. The subdivisions needed an independent remedy in order that they might meet the obligations for the payment of the bonds issued to pay for the various improvements. Such bonds would come due in a schedule established by the municipality at the time of issuance. See, sections 16-652, 16-653, 17-515, and 17-516, R. R. S. 1943, and 31-753 and 31-755, R. S. Supp., 1976, and the numerous other statutes which authorize the issuance of bonds to pay for the improvements and set the limits governing the due dates thereof. Under the circumstances outlined, the ability of the obligor to meet bond payment schedules could depend upon the action or inaction of the responsible county officials.

It is presumed that the Legislature has full knowledge and information of the subject matter of the statute, as well as the relevant facts relating to prior law and existing pertinent legislation, and has acted with respect thereto. City of Grand Island v. Ehlers, 180 Neb. 331, 142 N. W. 2d 770; Wilkinson v. Lord, 85 Neb. 136, 122 N. W. 699.

Second, the substance of section 77-1917.01, R. R. S. 1943, and the time of its enactment are inconsistent with the theory of the defendants that the previously quoted provisions of section 77-1858, R. R. S. 1943, incorporate the 2-year delinquency provision of section 77-1901, R. R. S. 1943, into section 77-1917.01, R. R. S. 1943. Section 77-1858, R. R. S. 1943, was enacted at least as early as 1915. See Laws 1915, c. 228, § 1, p. 531. It incorporated, so far as pertinent, "all provisions of said revenue law now in force." This provision could incorporate section 77-1901, R. R. S. 1943, or its similar predecessors then in force, into then existing statutes. It could not, however, have the effect of incorporating section 77-1901, R.

R. S. 1943, into section 77-1917.01, R. R. S. 1943, which did not become law until 1961.

The rule of in pari materia construction of statutes does not permit the use of a previous statute to control by way of former policy, plain language of a subsequent statute, or to add a restriction not included in or expressly excluded from the later statute. People ex rel. Pellow v. Byrne, 272 Mich. 284, 261 N. W. 326.

The subject matter of section 77-1858, R. R. S. 1943, is the authorization to the county treasurer to include special assessments in the sale of real estate at tax sale for general taxes. This statute is obviously inconsistent with section 77-1917.01, R. R. S. 1943, which pertains to the foreclosure of delinquent special assessments by the subdivision as plaintiff "without the real property against which they are assessed being first offered at tax sale by the tax sale certificate method or otherwise."

Third, the provisions of section 77-1917.01, R. R. S. 1943, are clear and unambiguous. That statute affords the subdivisions of government an additional remedy previously not available. Its express words exclude incorporation of section 77-1901, R. R. S. 1943, for section 77-1917.01, R. R. S. 1943, contains no limitation "except as otherwise specifically provided by sections 77-1903 to 77-1917, which shall govern when applicable." This is certainly as clear as if section 77-1917.01, R. R. S. 1943, expressly excluded section 77-1901, R. R. S. 1943, by section number. Where a statute is unambiguous, there is no need for construction. Chase v. Board of Trustees of Nebraska State Colleges, 194 Neb. 688, 235 N. W. 2d 223.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

MS. ANNIE SNYGG, APPELLANT, V. CITY OF SCOTTSBLUFF POLICE DEPARTMENT, APPELLEE.

266 N. W. 2d 76

Filed May 17, 1978. No. 41524.

1. **Trial: Appeal and Error.** The District Court is required to review the entire record, weigh the evidence, and determine what is the preponderance of the evidence.
2. **Administrative Law: Appeal and Error.** Upon appeal to the District Court from an order of the Nebraska Equal Opportunity Commission the review is by trial de novo on the record.
3. **Administrative Law: Discrimination.** The Nebraska Equal Opportunity Commission in deciding questions of discrimination does not exercise legislative power.
4. **Administrative Law: Judgment: Appeal and Error.** Upon appeal to this court from a judgment of the District Court in an appeal from the Nebraska Equal Opportunity Commission the judgment of the District Court will be affirmed if it is supported by substantial evidence.

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

J. L. Zimmerman of Atkins, Ferguson, Hahn, Zimmerman & Hansen, for appellant.

Loren G. Olsson, for appellee.

Paul L. Douglas, Attorney General, and Judy K. Hoffman, for amicus curiae.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

BOSLAUGH, J.

This is an appeal in a proceeding in which Ms. Annie Snygg, the complainant, filed a complaint with the Nebraska Equal Opportunity Commission in which she alleged she had been discriminated against by the respondent, City of Scottsbluff, in that she was denied employment as a police patrolman because of her sex. The complaint alleged discrimination in employment policies and practices in violation of section 48-1104, R. R. S. 1943.

Pursuant to an order of the commission an evidentiary hearing was held by an examiner who found that the complainant had been discriminated against because of her sex and recommended that she be awarded back pay in the amount of $4,368. The commission adopted the findings and recommendation of the examiner and ordered the respondent to pay $4,368 to the complainant together with attorney's fees in the amount of $1,088.81.

The respondent appealed to the District Court which found that the findings and order of the commission were arbitrary and not supported by a preponderance of the evidence. The order of the commission was reversed and the complaint dismissed. The complainant has appealed to this court.

The assignments of error all relate to the finding of the District Court that the findings and order of the commission were arbitrary and not supported by a preponderance of the evidence. An appeal to the District Court from an order of the commission is governed by section 48-1120, R. R. S. 1943. This section provides that the determination by the District Court shall extend to all questions of law and fact presented by the entire record, and an order of the commission shall not be vacated, modified, or set aside unless the findings of the commission in support of the order are unreasonable or arbitrary or "are not supported by a preponderance of the evidence." The District Court is required to review the entire record, weigh the evidence, and determine what is the preponderance of the evidence. Duffy v. Physicians Mut. Ins. Co., 191 Neb. 233, 214 N. W. 2d 471. The review in the District Court amounts to a trial de novo upon the record.

The Attorney General as amicus curiae suggests that such a provision is unconstitutional under Scott v. State ex rel. Board of Nursing, 196 Neb. 681, 244 N. W. 2d 683, and similar cases. The Scott case is not applicable here because the Equal Opportunity Com-

mission exercises quasi-judicial power as distinguished from legislative power. The Equal Opportunity Commission performs no licensing function but merely determines rights of the parties under the Nebraska Fair Employment Practice Act. In this situation a provision for a de novo review is valid.

The question presented by this appeal is whether the District Court in making an independent evaluation of the evidence could find that the complainant had not proved that she had been discriminated against because of her sex. Stated another way, the judgment must be affirmed unless the evidence was such that it compelled a finding that the complainant had been discriminated against because of her sex.

The record shows the respondent followed the following procedure when a vacancy occurred in the police department. The city manager, who was the appointing authority, would request the civil service commission to certify an eligible list. An appointment to fill the vacancy would then be made from the list certified to the city manager by the civil service commission.

The names which were certified to the city manager on each occasion were taken from another "eligible list" which was compiled by the civil service commission after a competitive examination had been given to applicants. The names on this eligible list consisted of applicants who had passed both a written and an oral examination administered by the civil service commission. Names on this list remained eligible for certification for 1 year from the date the list was established.

The complainant applied for the position of police patrolman on September 15, 1971. A written examination was held on September 18, 1971, and an oral examination on September 27, 1971. At the oral examination the then chief of police, Chief Teal, told

the complainant that he felt there was no place in the Scottsbluff police department for a woman at that time, but asked the complainant to take a position as dispatcher. She accepted a temporary appointment as dispatcher in November 1971. She was still a clerk-dispatcher at the time of her resignation on October 31, 1974. The record does not show the date on which she received a permanent appointment to the position of dispatcher.

James Eckert succeeded Teal as chief of police in Scottsbluff in October 1973.

On October 20, 1973, another examination for the position of police patrolman was held. The complainant took this examination and placed 6th in the group of 16 applicants who took the examination. The 6 high names with their respective scores were McCormick, 98, Rader, 97, Becker, 87, Settles, 85, Braun, 82, and Snygg, 81. All except Braun and Snygg received a veteran's preference of 10 percent. From these six names an eligible list which consisted of Rader, Becker, and Settles was certified to the city manager on November 8, 1973. The city manager appointed Rader who had placed second in the examination.

Another vacancy occurred in July 1974, and an eligible list containing the names of Becker, Settles, and Braun was certified. From this list the city manager appointed Settles.

Effective October 1, 1974, the city received a grant from the Nebraska Commission on Law Enforcement and Criminal Justice to be used to establish two additional positions of patrol officer. Since there would be two appointments to be made the civil service commission was required to certify a list of four names. On the list of the six high names from the October 20, 1973, examination, only the complainant remained as an eligible person who was interested in the position.

An examination was held on October 5, 1974, from

which the civil service commission compiled a new eligible list of eight names. The complainant did not take this examination but she remained eligible on the basis of her score on the October 20, 1973, examination.

To fill the two new positions the civil service commission certified a list of four names which included the complainant. The 4 names and their scores were as follows: Griggs, 99.7; Betancur, 98.7; Boehler, 96.0; Snygg, 81.0. All these scores except the complainant's included a veteran's preference of 10 percent. The record indicates Boehler became disqualified.

The chief of police recommended the appointment of Griggs and Betancur primarily on the basis of their prior experience and training. When the complainant learned of the recommendation from Chief Eckert she resigned from the department the following day.

The evidence which has been summarized was sufficient for the trial court to find that the complainant had not been appointed to the position of police patrolman, not because she was a woman, but because in each instance there had been better qualified applicants available who were eligible for the position.

There is additional evidence, much of which is in dispute, from which varying inferences might be drawn. For example, there was evidence that in a conversation with Officer Lieurance, Chief Eckert had stated that he "would never hire the obese bitch." Eckert testified that he did not recall the conversation and to the best of his knowledge had not made a statement anything like that. The chief did say that he felt the complainant was obese and he was not "extremely optimistic about her chances of a physical." Lieurance testified that Chief Eckert had said that women were useful in a police department; that Eckert had worked with them sat-

isfactorily in St. Louis; and that a lot of outstanding police officers were women.

It is unnecessary to discuss the other evidence because there was nothing in the record which would compel a finding by the District Court that the complainant had been discriminated against because of her sex.

The findings and judgment of the District Court are supported by substantial evidence and must be affirmed.

AFFIRMED.

BARBARA SMITH, ALSO KNOWN AS BARBARA HARRISON, APPELLANT, V. DELBERT D. SMITH, APPELLEE.

265 N. W. 2d 855

Filed May 17, 1978. No. 41527.

1. **Courts: Divorce: Infants: Child Support.** Where a divorce decree provides for the payment of stipulated sums monthly for the support of a minor child or children, contingent only upon a subsequent order of the court, such payments become vested in the payee as they accrue. The courts are without authority to reduce the amounts of such accrued payments.
2. **Equity: Time.** Where the obligation is clear and its essential character has not been changed by lapse of time, equity will enforce a claim of long standing as readily as one of recent origin, especially between the immediate parties to the litigation.
3. **Equity: Laches.** The defense of laches prevails only when it has become inequitable to enforce the claimant's right, and it is not available to one who has caused or contributed to the cause of delay or to one who has had it within his power to terminate the action.
4. **Courts: Child Support: Estoppel.** This court does not have authority to reduce past-due installments of child support. This is not to say, however, that it may not find in a proper case that a party has equitably estopped herself from collecting installments accruing after some affirmative action which would ordinarily terminate future installments.
5. **Adoption: Child Support.** The 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.
6. **Estoppel: Equity: Public Policy.** Equitable estoppel is based

upon grounds of public policy and good faith and is interposed to prevent injustice and inequitable consequences. Ordinarily, there must be a reliance in good faith upon statements or conduct of the party to be estopped and a change of position by the party claiming the estoppel to his injury, detriment, or prejudice.

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

Russell S. Daub, for appellant.

James M. Davis of Dolan, Dinsmore & Davis, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

SPENCER, J.

The appellant, Barbara Smith Harrison, appellee Delbert D. Smith's divorced wife, appeals from an order enjoining her from taking any action to enforce her claim for child support and ordering her to pay appellee the sum of $1,101.31, which she had received from him as the result of garnishment orders. We reverse.

Appellant and appellee were divorced on May 23, 1952. No application was ever made to modify the divorce decree until the present action. The decree provided as follows: "The court further finds that as a result of said marriage one child has been born, namely, Susan Lynn Smith, now age fifteen (15) months, and that plaintiff is a fit and proper person to have the exclusive care, custody and control of said minor child, subject to visitation by the defendant at reasonable intervals.

"The court further finds that the defendant should pay to the plaintiff, or as she may direct, for the support and maintenance of said minor child at the rate of Five Dollars ($5.00) per each week for a period of six (6) months from the date of this decree, and thereafter at the rate of Ten Dollars ($10.00) per each week until said minor child becomes of legal

age or is emancipated by marriage or until the further order of this court."

Delbert's child support payments were made for approximately 9 months through his mother. At the direction of Barbara, they were paid to a babysitter. During this period of 9 months, Delbert made no attempt to see his daughter. At the time of the last payment, the babysitter advised Delbert's mother that the child was no longer with her and she did not know where the mother and child were living. The record is undisputed that Barbara lived in the Omaha area for approximately 5 years after the decree was entered. In 1957 she moved to Illinois, but returned to Omaha in 1959 where she lived until 1961. From 1961 until 1969, she lived out of the state. The minor child of the parties, Susan Lynn Smith, was married August 16, 1968.

Barbara testified she asked Delbert for money a couple of times and Delbert told her she had two choices: She could either take Susan and support her and take care of her because he never wanted to see her again, or he would take Susan away and she would never see her again. This happened after the divorce became final. One of these occasions occurred in a Brandeis store in Omaha. Delbert denies ever being asked for money.

Barbara further testified before she moved to Illinois she attempted to locate Delbert but could not do so. She called his father and he told her he had no idea where Delbert was. The testimony is undisputed that during a portion of this time Delbert had an unlisted telephone number.

Delbert made no attempt to locate Barbara or his daughter from the time of the divorce until the present action, although he knew where his former wife's sister could be reached in Omaha. Delbert admits he made no attempt to communicate with his daughter after 1952. He testified he had a telephone conversation with Barbara about 4 years after the

divorce, but she did not tell him at that time where she was living or make any demand on him for child support. The next time he heard from his wife was in 1963. At that time he took his daughter out to dinner. This was the only time he saw her after the divorce became final.

Defendant's motion to modify the decree prayed that the court modify the decree retroactively by terminating the child support payments which were due under the terms of said decree from the time when plaintiff denied defendant his right to reasonable visitation, from the time plaintiff removed said minor child from the state, or from the time said minor child was adopted by William R. Harrison, whichever was "soonest," and for all other relief the court deemed equitable.

The record does not indicate that Barbara denied Delbert any right of visitation except as that may be inferred from the fact that she did remove the child from the jurisdiction. This was done sometime in late 1957.

The record reflects that the adoption proceedings were never finalized. It does indicate, however, that on the 6th day of September 1957, the District Court gave its permission to Barbara Kathleen Harrison and William R. Harrison, her husband, for the adoption of Susan Lynn Smith. The consent recited that both Barbara and Delbert, the parents of said child, had given their written consent to said adoption. Barbara testified that because of the subsequent removal of the Harrisons from Nebraska, the adoption was never completed.

The trial court herein ordered Barbara to pay Delbert the sum of $1,101.31, which was the amount received by her as the result of garnishment orders during 1976. The court further directed the clerk of the District Court to pay all funds in his possession, being the proceeds of an additional garnishment, to Delbert. The court then permanently enjoined Bar-

bara from taking any action to enforce her claim for child support against the defendant, his wages, or his property, both real and personal. It further decreed that each party was to pay his own attorney and any costs incurred in the action. The court stated it entered this order in the exercise of its general powers of equity and, in reaching this decision, the court considered the particular equitable principles of "laches" and the "clean hands doctrine."

The rule is well established in this jurisdiction: "Where a divorce decree provides for the payment of stipulated sums monthly for the support of a minor child or children, contingent only upon a subsequent order of the court, such payments become vested in the payee as they accrue. The courts are without authority to reduce the amounts of such accrued payments." Ruehle v. Ruehle, 169 Neb. 23, 97 N. W. 2d 868 (1959).

The record is undisputed that the defendant, Delbert, made no attempt to see his daughter subsequent to the divorce. Whatever payments were made on the judgment, and there is no proof of exactly how much was paid, were paid through his mother. Delbert testified this was done for approximately 9 months. There is no statute of limitations involved. Under section 42-371, R. S. Supp., 1976, liens for child support are enforceable for a period of 10 years after the child becomes of age. Nor does it appear that plaintiff's claim is barred by laches. Laches does not result from the mere lapse of time but from the fact that during the lapse of time changed circumstances inequitably work to the disadvantage or prejudice of another if the claim is allowed to be enforced. Campbell v. Kirby, 195 Neb. 610, 239 N. W. 2d 792 (1976).

"Where the obligation is clear and its essential character has not been changed by lapse of time, equity will enforce a claim of long standing as

readily as one of recent origin, especially between the immediate parties to the litigation." Lammers v. Lammers, 193 Neb. 836, 229 N. W. 2d 555 (1975).

"The defense of laches prevails only when it has become inequitable to enforce the claimant's right, and it is not available to one who has caused or contributed to the cause of delay or to one who has had it within his power to terminate the action." Finnern v. Bruner, 167 Neb. 281, 92 N. W. 2d 785 (1958).

The defense of laches is not available to defendant. He is not without fault herein. It is evident he had very little interest in visitations with his daughter. From the time of the divorce he made no effort to see her until the decree became final and the occasion when this was done is not described in the record. Any payments made were made through his mother. The child and her mother remained in the jurisdiction at least into September of 1957. Defendant, who was a civilian employee of the police department, made no attempt to locate them, although he readily could have done so. Further, if defendant was worrying about visitations, it would have been an easy matter for him to have applied to the District Court for relief.

A different question is presented, however, by the order of the District Court consenting to the adoption of Susan Lynn, the minor child, by William R. Harrison, the then husband of Barbara Smith Harrison. While the record indicates the adoption was not completed, it was pending in the county court of Douglas County at the time the District Court gave its consent. Shortly thereafter, Susan Lynn Smith left the jurisdiction with her mother and her mother's husband, William R. Harrison, who is since deceased.

Delbert had given written consent to the adoption. He had every reason to believe it would be completed and that William R. Harrison, his former wife's then husband, would assume custody and support of Susan Lynn. Delbert should have followed

through to be certain the adoption proceedings were finalized, or should have had an order entered terminating all future child support payments from and after the consent to the adoption. He did not do so but assumed it had been done and pleaded the adoption as a defense herein.

We are met with the rule this court is without authority to reduce the amounts of accrued child support payments. We continue to adhere to that rule unless equitable estoppel is present. Here we find that Barbara, by securing the written consent of Delbert to the adoption of Susan Lynn by her then husband, William R. Harrison, has equitably estopped herself, with the result that she has waived her right to further child support payments from and after the time the adoption should have been completed.

William R. Harrison was in the military service. He left the Omaha area when he was transferred to another base in the latter part of 1957. The record does not indicate that any allowance was received by him for the child from the federal government, because that matter was not covered in any way in the hearing. It is reasonable to assume, however, that this was the purpose of the adoption proceedings, and this result may have been achieved by the consent of the District Court to an adoption.

William R. Harrison died in 1959, at which time Barbara returned to the Omaha area with Susan. While Barbara was married to Harrison, Susan did use the Harrison name. In all equity and fairness, Delbert should have been relieved from child support payments from the time that an adoption proceeding could have been finalized. For the purpose of this decision, we assume that could have been accomplished during the remaining part of 1957, and determine that all child support payments should have terminated as of January 1, 1958.

The application of a doctrine of equitable estoppel

herein may seem to be a departure from the rule heretofore enunciated in Ruehle v. Ruehle, *supra*. That, however, is not the case. The divorce court, upon the petition of the mother and her then husband, gave its consent to the adoption. It made a specific finding that the father of the child had given his written consent to the adoption by the then husband of the mother. A further order should have been entered terminating future installments of child support. While the adoption proceedings pending in the county court were not thereafter completed, Delbert was not aware this had not been done. He had every reason to expect they would be completed in a normal manner and that he would have no further responsibility for the support of his child.

This court does not have authority to reduce past-due installments of child support. This is not to say, however, that it may not find in a proper case that a party has equitably estopped herself from collecting installments accruing after some affirmative action which would ordinarily terminate future installments. The 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.

The courts of other jurisdictions are not in agreement as to whether a consent to an adoption will terminate future child support installments if the adoption is not completed. We believe strong equitable considerations support those cases holding it should do so. See, Rodgers v. Rodgers, 505 S. W. 2d 138 (Mo. App., 1974); Anderson v. Anderson, 63 Ill. App. 2d 358, 211 N. E. 2d 492 (1965); Larsen v. Larsen, 9 Utah 2d 160, 340 P. 2d 421 (1959). See, also, Schofield v. Schofield, 260 Iowa 565, 149 N. W. 2d 810 (1967).

We said in Breslow v. City of Ralston, 197 Neb. 346, 249 N. W. 2d 205 (1977): "Equitable estoppel is

based upon grounds of public policy and good faith and is interposed to prevent injustice and inequitable consequences. Ordinarily, there must be a reliance in good faith upon statements or conduct of the party to be estopped and a change of position by the party claiming the estoppel to his injury, detriment, or prejudice."

"A party is held to a representation made or a position assumed, where otherwise inequitable consequences would result to another who, having the right to do so under all the circumstances of the case, has, in good faith relied thereon." Pester v. American Family Mut. Ins. Co., 186 Neb. 793, 186 N. W. 2d 711 (1971).

We reverse the judgment of the trial court in all particulars. We have some difficulty in understanding why this unpaid child support judgment was not called to the defendant's attention long before the present action. We make this observation because the record indicates defendant acquired real property during this period. The abstract of the property, if one were brought down to date, should have indicated the existence of the judgment lien.

In any event, we find that plaintiff, Barbara Smith Harrison, has a valid and subsisting judgment lien from and after May 23, 1952, but we terminate her right to collect child support payments from and after January 1, 1958. We remand this cause with directions to determine the amount due Barbara Smith Harrison on said judgment, with interest at the legal rate on the unpaid installments as each accrued, from and after May 23, 1952, until paid. We further direct that no credits be allowed to Delbert Smith for any payments made unless and until the exact amount of said payments are proved. The amount realized by the plaintiff through garnishment proceedings should be applied on said judgment.

The judgment is reversed and the cause is re-

manded to the District Court for further proceedings in accordance with this opinion. All costs are taxed to the defendant.

REVERSED AND REMANDED.

V.P.O., INC., A CORPORATION, APPELLANT, V. GEORGE A. MONEY, APPELLEE.

266 N. W. 2d 79

Filed May 17, 1978. No. 41531.

1. **Agency: Contracts.** If a contract is made with a known agent acting within the scope of his authority for a disclosed principal, the contract is that of the principal alone and the agent cannot be held liable thereon.
2. **Trial: Judgments.** The judgment of a trial court in an action at law where a jury has been waived has the effect of a verdict of a jury and will not be set aside on appeal unless clearly wrong.
3. **Trial: Judgments: Evidence.** In determining the sufficiency of the evidence to sustain a judgment, the evidence must be considered most favorably to the successful party and every controverted fact must be resolved in that party's favor. If there is a conflict in the evidence, this court will presume that the controverted facts were decided by the trial court in favor of the successful party and the findings will not be disturbed on appeal unless clearly wrong.

Appeal from the District Court for Douglas County: RUDOLPH TESAR, Judge. Affirmed.

Tyler B. Gaines of Gaines, Otis, Mullen & Carta, for appellant.

Jack W. Marer and Diane C. Sonderegger of Marer, Venteicher, Strasheim, Seidler, Laughlin, Lazer & Murray, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

WHITE, C. J.

Plaintiff, a Nebraska corporation, brought this action against the defendant, an individual, to recover the purchase price of 45 drums of N-propyl alcohol

allegedly purchased by him from the plaintiff. The defendant answered with essentially a general denial. This action was consolidated for trial with another action by the plaintiff against a corporation, with which the defendant is affiliated, Economy Products, Inc., for the purchase price of certain mixing equipment. Both actions were tried to the court without a jury.

On May 5, 1977, the District Court entered its judgment and findings as follows: " * * * the Court now finds in favor of the defendant and against the plaintiff on plaintiff's amended petition. The Court further finds that there was a sale of alcohol, but that the purchaser of same was Economy Products, Inc. and not the defendant.

"It is therefore ordered, adjudged and decreed that judgment is hereby entered in favor of the defendant, George A. Money, and against the plaintiff * * *."

Plaintiff filed an "Alternative Motion to Correct Judgment or for New Trial" which was overruled, and now appeals. We affirm the judgment of the District Court.

Plaintiff reads the decree as containing inconsistent findings. As we interpret it, however, the decree, while perhaps not drafted in the most exact terminology, is entirely harmonious.

In its second amended petition, plaintiff sought recovery from the defendant, as an individual, for the price of 45 drums of N-propyl alcohol allegedly purchased from it by the defendant. Defendant answered with a general denial. The record discloses that the defendant raised two basic defenses to plaintiff's claim at trial: First, that the transaction involved was not an absolute sale but rather a conditional sale, and that the conditions which would have entitled plaintiff to payment never occurred; and second, that at all times relevant the defendant, in his business dealings with the plaintiff, was acting

as the representative or agent of various corporations and not as an individual. As we read the decree of the District Court, dated May 5, 1977, the District Court, in essence, found that there was an absolute sale of the alcohol, but that the defendant (who was sued as an individual) was not liable for the purchase price because at all times relevant he was acting as agent for a disclosed principal, Economy Products, Inc. "If a contract is made with a known agent acting within the scope of his authority for a disclosed principal, the contract is that of the principal alone and the agent cannot be held liable thereon." Fisher v. Beebe & Runyan Furniture Co., 200 Neb. 349, 263 N. W. 2d 826 (1978). Consequently, the District Court dismissed plaintiff's petition against the defendant.

The judgment of a trial court in an action at law where a jury has been waived has the effect of a verdict of a jury and will not be set aside on appeal unless clearly wrong. Crane Co. v. Roberts Supply Co., 196 Neb. 67, 241 N. W. 2d 516 (1976). In determining the sufficiency of the evidence to sustain a judgment, the evidence must be considered most favorably to the successful party and every controverted fact must be resolved in that party's favor. If there is a conflict in the evidence, this court will presume that the controverted facts were decided by the trial court in favor of the successful party and the findings will not be disturbed on appeal unless clearly wrong. Henkle & Joyce Hardware Co. v. Maco, Inc., 195 Neb. 565, 239 N. W. 2d 772 (1976).

Neither party contests, on appeal, the correctness of the District Court's finding that a sale of the alcohol did in fact occur. There is ample evidence in the record to sustain this finding, and we shall, therefore, not review in this opinion this evidence in detail. The gravamen of plaintiff's appeal is whether or not there is sufficient evidence to support the Dis-

trict Court's finding that the defendant was not personally liable on the sale of alcohol.

Willis Winstrom, president of the plaintiff, testified that he had done business with George Money and Economy Products, Inc., prior to the transaction in question and that he knew the name through trade channels. He stated that plaintiff first started doing business with George Money, or Economy Products, Inc., in 1966 or 1967. He testified he was sure that this account was carried on their books as "Economy Products," and that this is the way they were billed and how invoices were made out.

Winstrom further testified that during the summer of 1974, when this transaction took place, he had no personal knowledge whether Economy Products was incorporated or not. He testified that, "I looked at George Money as George Money." It was his understanding that Economy Products, Inc., was just a trade name, a company name. He admitted on cross-examination that he knew George Money was connected with Economy Products, Inc., but stated that he was of the opinion that George Money was doing business as Economy Products and never inquired as to its corporate status.

Plaintiff originally filed this action against George Money doing business as Economy Products. When it was subsequently learned that Economy Products was incorporated the action was continued against George Money, individually. Winstrom testified that during a conversation in his office on August 24, 1974, essential to this transaction, he did not recall Money every mentioning the names of Economy Products or Shepard Laboratories. The record shows that after the alcohol was received by plaintiff, it was shipped by plaintiff, via a commercial truck company, to premises which were rented and occupied by Economy Products.

George Money testified that he started working for Economy Products around 1962 and that it was a

corporation then. He stated that Economy Products was incorporated in the State of Iowa and that in the latter part of 1973 it was admitted to do business in the State of Nebraska. Money testified that he became the principal stockholder in Economy Products around 1969 and at the relevant times was and currently is president of Economy Products. In addition to being Economy's president, Money stated that he is its general manager and in charge of all its business operations and its properties, owned or leased. At the relevant times to this transaction, Economy Products owned 51 percent of a business enterprise known as Shepard Laboratories. Money was then the president of Shepard Laboratories.

Money testified that he started doing business with the plaintiff in 1966. He stated that he paid all his bills with plaintiff as Economy Products with Economy Products' checks.

Money specifically testified that in all his dealings with the plaintiff he was dealing on behalf of Economy Products, Inc. He stated that he was dealing for Economy Products and not for George Money personally. He testified that in his conversations with representatives of the plaintiff he never said that he would personally purchase the alcohol. He stated that, but for his stock in Economy Products, Inc., he has no other business and that he would have no use for this personally, nor was he personally engaged in any business that would have any use for the alcohol.

The following from the deposition of George Money was read into evidence.

"Q. Did you indicate to them that you were acting for Shepard, or were you acting for Shepard?

"A. Well, I assumed they understood that. I don't recall making any specific statements about it."

Exhibit 3 is an invoice from plaintiff dated August 30, 1974, for the alcohol. It indicates: "SOLD TO:

Economy Products, Mr. George Money, 1521 North 11th Street, Omaha, Nebraska. SHIP TO: Same." Exhibit 4 is a letter from Willis Winstrom, dated March 21, 1975, concerning payment for the alcohol. It is addressed to: "Mr. George Money, Economy Products Company *Inc.*" (Emphasis supplied.) Exhibit 5 is a letter from plaintiff's attorney, dated June 13, 1975, concerning payment for the alcohol. It is addressed to: "Economy Products. Attn: Mr. George Money." Exhibit 7 is a memo from George Money, dated September 2, 1975, to plaintiff, seeking to return the alcohol. It bears the letterhead of "Economy Products Company, *Inc.*" (Emphasis supplied.)

There is sufficient evidence to support the District Court's finding that the defendant did not individually purchase the alcohol, but that he did so as agent and representative of a disclosed principal, Economy Products, Inc.

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

AFFIRMED.

J. PAUL MCINTOSH ET AL., APPELLEES AND CROSS-APPELLANTS, V. OTTO J. BORCHERS ET AL., APPELLANTS AND CROSS-APPELLEES.

266 N. W. 2d 200

Filed May 24, 1978. No. 41399.

1. **Vendor and Purchaser: Contracts: Property.** Where a vendee, under, and in reliance upon, an unacknowledged contract to purchase a homestead makes valuable improvements thereon and the vendor fails or refuses to carry out the contract, the vendee may recover for such improvements to the extent they enhance the value of the property.
2. **Trial: Judgments.** When the evidence is conflicting, the verdict of a jury will not be set aside on appeal unless it is clearly wrong.

Appeal from the District Court for Madison County: EUGENE C. MCFADDEN, Judge. Affirmed.

Vincent J. Kirby, for appellants.

William E. Holland of Kutak Rock Cohen Campbell Garfinkle & Woodward, for appellees.

Heard before SPENCER, MCCOWN, CLINTON, and BRODKEY, JJ., and COADY, District Judge.

COADY, District Judge.

This argument first came to the attention of this court in McIntosh v. Borchers, 196 Neb. 109, 241 N. W. 2d 534 (1976), when it was held that an unacknowledged contract for the sale of certain real estate was invalid and unenforceable under section 40-104, R. R. S. 1943. The cause was remanded for further proceedings on plaintiffs' claims for restitution and damages. That opinion sets out the facts in detail.

Plaintiffs, being husband and wife, attempted to purchase an 160-acre farm which was the homestead of the defendants who were also husband and wife. The written contract was dated January 26, 1974, and the plaintiffs took possession on or about March 1, 1974. Some of the ground was fertilized, planted to corn, and tilled and harvested in the fall. During that summer, plaintiffs attempted to improve the farm by removing fences, removing trees and brush, leveling land, laying a natural gasline, finding and digging an irrigation well, and installing a center pivot irrigation system. In December of that year, they again fertilized. Before February 12, 1975, the parties became aware of the homestead laws. At that time, the defendants sold the same farm and homestead to Freudenburg and Reeves, also defendants herein and hereinafter referred to as the "other defendants" in this opinion. This second contract was acknowledged and the other defendants farmed the place in 1975. Plaintiffs sold that part of the center pivot system which was not considered real estate to the other defendants in that same year.

The matter of restitution and damages went to trial by jury. At the same time, the trial judge directed that plaintiffs were entitled to a refund of the payments made under the terms of the 1974 contract. The trial court also dismissed Freudenburg and Reeves as parties to the law suit. Upon inspection of the verdict form returned by the jury and the written instructions given, we can state that the jury awarded plaintiffs $8,140 for return of payments made, awarded plaintiffs $25,000 for the enhancement of defendants' farm because of improvements made, and awarded defendants $11,000 as the 1975 crop year rental.

The defendants have appealed from that part of the jury verdict finding for the plaintiffs in the sum of $25,000. The plaintiffs have cross-appealed from that portion awarding $11,000 to defendants and the trial court's decision to dismiss Freudenburg and Reeves from and out of the law suit.

The defendants insist that plaintiffs are not entitled to restitution or damages and have taken the position that plaintiffs cannot claim the benefits of the Occupying Claimants Act, section 76-301, R. R. S. 1943. We do not decide whether that act applies to this case because the case was tried and submitted to the jury on another theory. In no way would the Occupying Claimants Act improve upon or affect the jury's decision.

In a similar case, this court has already held that there is a right to recover for improvements to the extent that they enhance the value of the property at the time possession is surrendered even when the plaintiff has no right to claim the benefits of the Occupying Claimants Act. Wlaschin v. Affleck, 167 Neb. 403, 93 N. W. 2d 186 (1958). Causes of action relying on principles of unjust enrichment and quasi-contract do exist in this state. Ladenburger v. Platte Valley Bank of North Bend, 180 Neb. 167, 141 N. W. 2d 766 (1966); Bush v. Kramer, 185 Neb. 1, 173

N. W. 2d 367 (1969); Clark & Enersen, Hamersky, S., B. & T., Inc. v. Schimmel Hotels Corp., 194 Neb. 810, 235 N. W. 2d 870 (1975).

Without a finding that the other defendants, Freudenburg and Reeves, benefited from the improvements placed by plaintiffs on the property and because it was neither alleged nor proved that the other defendants committed or participated in any fraud, misrepresentation, or other wrongful conduct, an action against the other defendants does not lie on a theory of restitution and unjust enrichment. Haggard Drilling, Inc. v. Greene, 195 Neb. 136, 236 N. W. 2d 841 (1975). Because plaintiffs have never requested the initiation of procedures set forth in the Occupying Claimants Act and, in particular, section 76-303, R. R. S. 1943, we again decline to consider that act or order a new trial so that a lien might be placed upon the premises.

Having disposed of the confusion raised by the above-mentioned issues or suggestions, the contentions remaining are rather routine. Each of the following paragraphs will discuss a single issue.

Defendants insist that the court should have required the jury to find that the plaintiffs made the improvements in good faith. Upon inspection of the record, we find no evidence of bad faith on the part of plaintiffs in any way. All the parties herein were equally aware or unaware of the law.

Defendants contend that the court should have defined the word improvements as meaning lasting and permanent. They also object to the receipt in evidence of the cost of applied fertilizer over rather general objections. We assume such costs were offered to prove necessary and reasonable rental expense and costs of operations. The defendants did not submit a specific instruction in regard to the relationship of applied fertilizer and improvements.

Defendants argue that the evidence received did not and could not justify a verdict for $25,000 en-

hanced value. The court instructed the jury that plaintiffs had to prove that the improvements contributed by plaintiffs increased the fair and reasonable market value of defendants' land and the amount of the increase, if any. Mr. Borchers, seller-defendant herein, testified that the improvements decreased the overall value of the land. A realtor testified that the value was increased by more than $300 an acre. There was other evidence within those limits.

In the same vein, plaintiffs complain that the evidence will not support the jury's verdict of $11,000 as the 1975 rental value. While we agree that the rental award is at the very most upper limit of the evidence, we will not interfere with the verdict of the jury in this case. In Kennedy v. Department of Roads & Irrigation, 150 Neb. 727, 35 N. W. 2d 781 (1949), and in many other cases, we have held that when the evidence is conflicting, the verdict of a jury will not be set aside unless it is clearly wrong.

AFFIRMED.

ENZO FLORIDIA, APPELLEE, V. JAMES FARLEE ET AL., APPELLANTS.

266 N. W. 2d 204

Filed May 24, 1978. No. 41467.

Trial: Courts: Judgments. Where the facts adduced to sustain an issue are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the question as a matter of law rather than to submit it to a jury for determination.

Appeal from the District Court for Douglas County: JOHN C. BURKE, Judge. Affirmed.

Stephen A. Davis and Patrick B. Donahue of Cassem, Tierney, Adams & Gotch, for appellants.

Ronald H. Stave and Joseph S. Daly of Emil F. Sodoro Law Offices, for appellee.

Heard before WHITE, C. J., BOSLAUGH, CLINTON, and WHITE, JJ., and COLWELL, District Judge.

COLWELL, District Judge.

Defendants appeal from a jury verdict and judgment against them awarding $50,000 damages to plaintiff for personal injuries and related damages received in an intersection two-car accident. Plaintiff, age 15 years, was a passenger in a car driven by David Skutnik which collided with a car owned by defendant James Farlee, and driven by his son, J. John Farlee, age 18 years, who will hereafter be called Farlee. At the close of the evidence upon plaintiff's motion, the trial court found the negligence of Farlee was the proximate cause of the accident. The issue of plaintiff's injuries and damages was submitted to the jury. The only issue on appeal here is defendants' claim that it was error for the court to direct on the issue of liability. We affirm.

Plaintiff's specific allegations of negligence were lookout, speed, control, failure to accord right-of-way, and violation of statutes. Defendants by their separate answers denied negligence. There was no issue of either contributory negligence, intervening cause, or that driver Skutnik was negligent. The parties stipulated that the defendants' car was being used for a family purpose.

The accident occurred on August 4, 1972, about 4 o'clock p.m. at the intersection of 108th Street and West Center Road, Omaha, Douglas County, Nebraska. The street surface was dry and visibility was clear. West Center Road is a four-lane east-west street, with a dividing median, having turning lanes for traffic turning left from each direction. At the time of, and just prior to, the collision the traffic light for eastbound and westbound traffic at the intersection was green.

Prior to impact, Farlee was proceeding west on West Center Road. He had stopped for about 1 min-

ute in the left turning lane waiting for traffic to clear and to complete a left-hand turn south onto 108th Street. In the outside eastbound lane of West Center Road, about one car length west of the edge of the intersection, there was a stalled car with several cars stopped back of it, extending back more than a block. One of these cars was the Skutnik car. While Farlee was stopped and waiting to make a left-hand turn, he looked west as far as 120th Street and saw no approaching eastbound cars in the inside lane of West Center Road. Skutnik pulled out of the stalled lane of cars into the eastbound, inside lane of West Center Road and proceeded east into the intersection. Plaintiff estimated Skutnik's speed at 30 to 40 miles per hour just prior to the time Skutnik applied his brakes, leaving tire skid marks measuring 56½ feet to point of impact in the intersection. Farlee looked west before starting his left-hand turn and never saw the Skutnik car. After traveling a few feet into the intersection at about 5 miles per hour, Farlee heard the screeching of tires and was stopping, or had stopped his car, just prior to impact. The front ends of the two cars were in collision, with more damage to the right front of the Farlee car and to the left front of the Skutnik car.

Negligence is doing something which an ordinarily prudent person would not have done under similar circumstances, or failing to do something which an ordinarily prudent person would have done under similar circumstances. Burhoop v. Brackhan, 164 Neb. 382, 82 N. W. 2d 557. In order to constitute actionable negligence there must be a duty or obligation which the defendant is under to protect the plaintiff from injury; a failure to discharge that duty, and damages resulting therefrom. Wilbur v. Schweitzer Excavating Co., 181 Neb. 317, 148 N. W. 2d 192. The defendants owe the same duty of care to plaintiff as a passenger in an approaching car as they owe to the driver of that car. Miller v. Abel

Constr. Co., 140 Neb. 482, 300 N. W. 405.

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. Hermansen v. Anderson Equipment Co., 174 Neb. 325, 117 N. W. 2d 791.

Section 39-751 (3), R. S. Supp., 1972, provided: "The driver of a vehicle intending to turn to the left within an intersection or into an alley, private road, or driveway, shall yield the right-of-way to any vehicle approaching from the opposite direction which is within the intersection or so close thereto as to constitute an immediate hazard." That section is now 39-636, R. R. S. 1943. Generally a violation of a statute is only evidence of negligence. Piper v. Hill, 185 Neb. 568, 177 N. W. 2d 509.

Plaintiff had the burden to prove by a preponderance of the evidence that defendants or one of them were negligent, and that their negligence was the proximate cause of the accident and the resulting injuries and damages.

"A motion for a directed verdict must, for the purpose of decision thereon, be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the motion is directed. Such party is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence. Where, however, the facts adduced to sustain an issue are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to decide the question as a matter of law rather than to submit it to a jury for determination." Hoefer v. Marinan, 195 Neb. 477, 238 N. W. 2d 900.

Farlee's testimony, when examined concerning the issues of lookout and yielding the statutory right-of-way, in part, was: "Q. How long did you stop?

A. I would say a minute. * * * Q. Well, did there come a time when you started to turn? A. Yes, I did. Q. Can you tell the jury in which direction you looked before you turned? A. I looked west and then I looked straight and made my turn. * * * Q. Did you see any traffic in lane No. 1? (Inside lane.) A. No, I didn't. * * * Q. You started your turn and then what happened? A. I started my turn and I heard brakes. * * * Q. Did you see the other car before the impact occurred? A. No, I didn't. * * * Q. Well, what did you do when you heard the brakes? A. I almost panicked. The only thing I could do was stop, hoping the car could go around me. Q. So, you applied your brakes. Did you turn your wheel to the right or left? A. Not to my recollection. Q. Did you accelerate? A. No. I was barely going at that; I was just creeping through the intersection. * * * Q. Do you have any idea how fast? A. I would say under five miles an hour. I was just easing through the intersection when I heard the brakes. * * * Q. And there isn't any question, is there, that the actual collision, the impact, occurred in what you described as lane No. 1? That would be the lane nearest the center island. A. That is true. Q. It did happen entirely in lane No. 1, did it not? A. Yes. * * * Q. And you had just barely started your turn, had you not? A. That is right. Q. In fact you hadn't really completed hardly any of your turn when this collision occurred, isn't that a fact? A. That's right. * * * Q. And almost all of the damage to your car was done to the front end? A. That's right. Q. So you really hadn't even got started to turn, had you? A. Just barely, barely started my turn."

Farlee's testimony is clear and unequivocal concerning what he did when making the left-hand turn, and the same has the quality of a judicial admission. See Sacco v. Gau, 188 Neb. 808, 199 N. W. 2d 605.

There is some conflict in the evidence as to the lo-

cation and movement of the Skutnik car after it stopped in the outside lane. Plaintiff testified that the car was stopped 1½ to 2 blocks west of the west edge of the intersection; after the car pulled out into the inside lane, Skutnik drove east between 30 and 40 miles per hour; plaintiff turned toward the rear of the car to control some blowing papers, and as he was turning back toward the front, he heard the tires skidding and momentarily, for the first time, saw the Farlee car stopped partially out into the intersection. David Skutnik did not testify. Richard Rondazzo, a front seat passenger in the Farlee car, testified that while Farlee was stopped in the turning lane he saw no traffic approaching from the west in the inside lane; that there were three or four cars waiting back of the stalled car one of which was the Skutnik car one or two cars back of the stalled car; when Farlee started to make his left-hand turn, the Skutnik car was pulling out of the stalled lane, and he saw only the front of that car; he then turned his attention to the radio controls; and he never saw the Skutnik car again until after impact. Officer Whitted, of the Omaha police department, testified that he made an investigation, including a drawing of the accident scene and location of the point of impact; however, these particulars are not a part of the record. The point of impact, location of cars, and skid marks were not established.

The evidence is clearly without dispute that from the time Farlee started to make his left turn to the time of impact, the Skutnik car was approaching in his clear view near the west edge of the intersection within the limit of danger and it did constitute an immediate hazard to Farlee; the Skutnik car was in a favored position and Farlee had the duty to yield the right-of-way; Farlee also had the duty to look and see the Skutnik car which was in plain view; and Farlee failed in these duties.

Having considered all the facts and circumstances

and resolved every controverted fact and inference in favor of defendants, we are persuaded that in this case reasonable minds can draw but one conclusion — that as a matter of law Farlee was guilty of negligence which was substantial and the proximate cause of the accident. Plaintiff's motion for directed liability was properly granted by the trial court. Sanderson v. Westphalen, 178 Neb. 298, 133 N. W. 2d 16; Whitaker v. Keogh, 144 Neb. 790, 14 N. W. 2d 596; Landmesser v. Ahlberg, 184 Neb. 182, 166 N. W. 2d 124.

AFFIRMED.

JAMES LYDICK, APPELLANT, V. RYLE LEE SMITH, APPELLEE. JEAN S. LYDICK, APPELLANT, V. RYLE LEE SMITH, APPELLEE.

266 N. W. 2d 208

Filed May 24, 1978. Nos. 41472, 41473.

1. **Process: Statutes.** The requirements of section 25-530, R. R. S. 1943, with respect to service of process are to be strictly construed, and strict compliance with those requirements is mandatory and jurisdictional.
2. _____: _____. The mailing of a copy of the summons and petition to the defendant, before the summons is served on the Secretary of State, does not satisfy the requirements of section 25-530, R. R. S. 1943.
3. **Process: Statutes: States.** When service of process is made outside this state by mail, proof of service shall include a receipt signed by the addressee or other evidence of personal delivery to addressee satisfactory to the court. § 25-540, R. R. S. 1943.

Appeals from the District Court for Burt County: WALTER G. HUBER, Judge. Affirmed.

Richard L. Swenson and Terry M. Anderson of Lathrop & Albracht, for appellants.

Ray C. Simmons, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH,

McCOWN, CLINTON, BRODKEY, and WHITE, JJ.

BRODKEY, J.

The issue presented in these motor vehicle negligence actions is whether plaintiffs James and Jean Lydick effectively served process upon defendant Ryle Smith, a resident of Iowa. Plaintiffs attempted to serve process upon the defendant pursuant to section 25-530, R. R. S. 1943, which provides for service upon the Secretary of State of Nebraska and notice of such service to the defendant by mail. The defendant entered special appearances, objecting to the jurisdiction of the District Court over his person on the ground that plaintiffs' attempted service of process pursuant to section 25-530, R. R. S. 1943, was ineffective for several reasons.

Subsequent to the filing of the special appearances, plaintiffs contended that their attempted service was valid under section 25-540, R. R. S. 1943, the "long-arm" statute, as well as valid under section 25-530, R. R. S. 1943. The trial court sustained defendant's objection to jurisdiction over his person, finding that the plaintiffs had not effectively served process upon the defendant pursuant to either section 25-530 or 25-540, R. R. S. 1943. The trial court dismissed plaintiffs' petitions, and they have appealed. We affirm the judgments of the District Court.

The automobile accident out of which these cases arise occurred on December 12, 1972, in Burt County, Nebraska. On November 8, 1976, plaintiffs filed petitions in the District Court, alleging that the accident was proximately caused by the negligence of the defendant, whose legal residence is with his parents in Iowa. On the same day they filed their petitions, plaintiffs by praecipes directed the clerk of the District Court to issue service of summonses upon the defendant by serving the Secretary of State. The clerk issued summonses on November

8th, commanding the sheriff of Lancaster County to notify the defendant by service on the Secretary of State that he had been sued by plaintiffs. The sheriff certified that he had served summonses on the Secretary of State on November 10, 1976. On the same date, November 10th, plaintiffs' attorney filed affidavits in which he stated that he had served the defendant pursuant to section 25-530, R. R. S. 1943, by mailing to him on November 9, 1976, by registered mail, return receipt requested, copies of the summonses and petitions at his last-known address in Iowa.

Affidavits filed in the District Court indicate that the defendant's parents received the copies of the summonses and petitions, although the receipts for the registered mailing were returned unsigned. Affidavits of plaintiffs' attorney indicated that cover letters were also included in the mailing. However, defendant's parents denied receiving cover letters, and no evidence was presented as to the contents thereof. Defendant's parents advised the defendant, who was a student at the University of Nebraska at Lincoln, that he had received correspondence from the plaintiffs concerning the lawsuit.

In addition to the affidavits concerning the validity of service pursuant to section 25-530, R. R. S. 1943, plaintiffs' attorney filed affidavits as proof of service under section 25-540 (2), R. R. S. 1943. These affidavits set forth the same version of attempted service as has been described above.

We first review plaintiffs' contention that service was adequate under section 25-530, R. R. S. 1943. That section provides for service of process upon the Secretary of State as agent for a nonresident who uses or operates a motor vehicle in this state in any action against him arising out of such use or operation. Subsection (7) of section 25-530, R. R. S. 1943, provides that "process thus served * * * on the Secretary of State as agent for a nonresident defendant in

an action for damages resulting from the use or operation of a motor vehicle, and such service shall be sufficient service upon the said nonresident; *Provided, that notice of such service and a copy of the process shall, within ten days after the date of service,* be sent by the plaintiff to the defendant by either registered or certified mail addressed to the defendant's last-known address, and it shall be the duty of the plaintiff to file, with the clerk of the court in which the action is brought, an affidavit that he has complied with such requirement." (Emphasis supplied.)

Defendant's objection to the validity of service under section 25-530 (7), R. R. S. 1943, was that he had received no notice of service upon the Secretary of State because plaintiffs had only mailed him copies of the summonses and petitions *before* service had been made on the Secretary of State. We believe the District Court was correct in concluding that the defendant was not given notice of service upon the Secretary of State.

Plaintiffs did nothing more than mail to the defendant's last-known address copies of the summonses and petitions. On the date these documents were mailed, the Secretary of State had not yet been served with the summonses. Courts in other jurisdictions have held that there has been no compliance with statutory provisions similar to section 25-530, R. R. S. 1943, when the plaintiff mails to the defendant notice of filing a suit, a copy of the process, and a copy of the complaint even 1 day before the summons was served on the Secretary of State. See, Jenkins v. Hill, 240 Ark. 197, 398 S. W. 2d 679 (1966); Johnson v. Brooks, 254 Iowa 278, 117 N. W. 2d 457 (1962); Varra v. Superior Court of Humboldt County, 181 Cal. App. 2d 12, 4 Cal. Rptr. 920 (1960); Bond v. Golden, 273 F. 2d 265 (10th Cir., 1959). The reasoning of such cases is that a plaintiff cannot be held to have given notice of service on the Secretary of

State before the performance of that act. Where the statute clearly requires that notice be given of service upon the Secretary of State, it is not substantial compliance with the statute to give notice of something which has not yet been done. See, State ex rel. Stevens v. Grimm, 192 Wis. 601, 213 N. W. 475 (1927); Conway v. Spence, 119 So. 2d 426 (Fla. App., 1960).

Section 25-530 (7), R. R. S. 1943, clearly requires that the plaintiff give the defendant notice of service upon the Secretary of State. Section 25-530, R. R. S. 1943, is to be strictly construed, and strict compliance with the section is mandatory and jurisdictional. Wilson v. Smith, 193 Neb. 433, 227 N. W. 2d 597 (1975). We conclude, as did the courts in the above-cited cases, that there has been no compliance with the statutory requirement where the plaintiff only mails to the defendant a copy of the summons and petition before the summons is served on the Secretary of State. Plaintiffs failed to comply with the statute in these cases, and therefore the District Court was correct in concluding that the plaintiffs had not effectively served the defendant pursuant to section 25-530, R. R. S. 1943.

Plaintiffs contend, however, that the service was valid pursuant to section 25-540, R. R. S. 1943. Section 25-536, R. R. S. 1943, provides that courts in this state may exercise personal jurisdiction over a person as to a cause of action arising from the person's causing tortious injury by an act or omission in this state. Section 25-537, R. R. S. 1943, provides that when the exercise of personal jurisdiction is authorized by section 25-536, R. R. S. 1943, service of process may be made outside this state. Section 25-540, R. R. S. 1943, provides: "(1) When the law of this state authorizes service outside this state, the service, when reasonably calculated to give actual notice, may be made: * * * (c) By any form of mail addressed to the person to be served and requiring a signed receipt." That section also pro-

vides in subsection (2): "When service is made by mail, proof of service shall include a receipt signed by the addressee or other evidence of personal delivery to the addressee satisfactory to the court."

The trial court concluded that plaintiffs had failed to serve the defendant under section 25-540, R. R. S. 1943, because: (1) The service was not reasonably calculated to give actual notice since it indicated that the summonses were being served upon the Secretary of State; and (2) proof of service did not include receipts signed by the addressee or other evidence of personal delivery to the defendant.

It is apparent from the record that the plaintiffs, in sending to the defendant's last-known address copies of the summonses and petitions, were not attempting to comply with the "actual notice" requirement of section 25-540, R. R. S. 1943, but were attempting to comply with section 25-530, R. R. S. 1943. It was only after the defendant entered his special appearances that the plaintiffs sought to justify the service under section 25-540, R. R. S. 1943. Plaintiffs nevertheless argue that the copies of the summonses and petitions clearly notified the defendant that a lawsuit had been commenced against him, and that therefore defendant had "actual notice."

Even assuming, without deciding, that this is true, we believe that the trial court was correct in concluding that the proof of service under section 25-540, R. R. S. 1943, was inadequate. It is undisputed that the receipts for the registered letters sent to defendant's last-known address were returned unsigned. Plaintiffs made no showing that there had been personal delivery to the defendant, who was a student at the University of Nebraska at Lincoln. Under these circumstances we conclude that the trial court was correct in finding that proof of service was inadequate.

The judgment of the District Court is affirmed.

AFFIRMED.

WILBUR SUHR ET AL., APPELLEES AND CROSS-APPELLANTS, V. CITY OF SEWARD, NEBRASKA, FOR AND ON BEHALF OF THE SEWARD AIRPORT AUTHORITY, APPELLANT AND CROSS-APPELLEE.

266 N. W. 2d 190

Filed May 24, 1978. No. 41519.

1. **Condemnation: Eminent Domain: Damages.** The burden is upon the condemner to allege and prove that before commencing condemnation proceedings a good faith attempt was made to agree with the owner of the land as to the damages the owner was entitled to receive. This requirement is in the nature of a condition precedent to the right to condemn. The requirement is satisfied by proof of an offer made in good faith with a reasonable effort to induce the owner to accept it.
2. **Condemnation: Eminent Domain: Damages: Trial.** If there is an issue between the parties as to whether good faith negotiations took place before condemnation proceedings were begun, the issue should be tried to the court and determined as a preliminary matter before proceeding to trial on the matter of damages.
3. **Attorney's Fees.** Attorney's fees and expenses may be recovered only where authorized by statute or a uniform course of procedure.

Appeal from the District Court for Seward County: ORVILLE L. COADY, Judge. Reversed and remanded.

Thomas E. Johnson and Kirk S. Blecha of Baird, Holm, McEachen, Pedersen, Hamann & Haggart, for appellant.

Blevens, Blevens & Jacobs, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, BRODKEY, and WHITE, JJ.

BOSLAUGH, J.

The plaintiffs are the owners of the west half of Section 32, Township 11 North, Range 3 East of the 6th P.M., in Seward County, Nebraska. This proceeding was commenced in 1974 by the defendant, City of Seward, to condemn a clear zone easement over a 2.32 acre tract in the southeast corner of the plaintiffs' property for airport purposes. The appraisers appointed by the county court awarded

damages in the amount of $696. From this award the plaintiffs appealed to the District Court.

In their petition on appeal the plaintiffs alleged that there had not been good faith negotiations between the parties as required by sections 76-702 and 76-704, R. R. S. 1943. This issue was tried to a jury which returned a verdict for the plaintiffs. The trial court then dismissed the action. The defendant has appealed and the plaintiffs have cross-appealed.

The burden is upon the condemner to allege and prove that before commencing condemnation proceedings a good faith attempt was made to agree with the owner of the land as to the damages the owner was entitled to receive. Higgins v. Loup River P. P. Dist., 159 Neb. 549, 68 N. W. 2d 170. This requirement is in the nature of a condition precedent to the right to condemn. Dzur v. Northern Indiana Public Service Co., 257 Ind. 674, 278 N. E. 2d 563; Board of County Commissioners v. Highland Mobile Home Park, Inc. (Colo. App.), 543 P. 2d 103. The requirement is satisfied by proof of an offer made in good faith with a reasonable effort to induce the owner to accept it.

If there is an issue between the parties as to whether good faith negotiations took place before condemnation proceedings were begun, the issue should be tried to the court and determined as a preliminary matter before proceeding to trial on the matter of damages. See, Lieberman v. Chicago & S. S. R. T. R. R. Co., 141 Ill. 140, 30 N. E. 544; State v. Bair, 83 Idaho 475, 365 P. 2d 216; Dzur v. Northern Indiana Public Service Co., *supra;* City of Reidsville v. Slade, 224 N. C. 48, 29 S. E. 2d 215; Charles v. Big Sandy & C. R. R. Co., 142 Va. 512, 129 S. E. 384; Board of County Commissioners v. Highland Mobile Home Park, Inc., *supra.*

The record in this case shows that the defendant employed two appraisers who estimated the plaintiffs' damages at $1,200 and $1,600. The defendant

then employed a review appraiser, who was an employee of the Nebraska Department of Roads. This appraiser believed that the other appraisals were too high and estimated the damages at $500. The defendant then employed a negotiator, Randy Needham, who was also an employee of the Department of Roads. Needham contacted Mr. Suhr and presented a written offer of $500 for the easement. Suhr made a statement to the effect the offer was inadequate. Needham asked Suhr to consider the offer which had been made and stated that any counteroffer Suhr might wish to make would be considered.

After the initial contact, Needham called Suhr one or more times and asked whether the plaintiffs had arrived at a decision regarding the defendant's offer. Suhr stated that the plaintiffs had not reached a decision. The plaintiffs made no counteroffer and raised no question concerning the easement or its legal description.

The plaintiffs then consulted a lawyer who wrote to the defendant on August 23, 1974, stating that the airport project was in violation of the Seward County zoning ordinance and that the plaintiffs "cannot and will not negotiate" until the ordinance and comprehensive development plan was amended. This contention was determined adversely to the plaintiffs in Seward County Board of Commissioners v. City of Seward, 196 Neb. 266, 242 N. W. 2d 849.

The letter of August 23, 1974, to the defendant excused the defendant from any further attempt to negotiate with the plaintiffs. See, Wolfe v. State, 179 Neb. 189, 137 N. W. 2d 721; State v. Bair, *supra;* Stanpark Realty Corp. v. City of Norfolk, 199 Va. 716, 101 S. E. 2d 527; Town of Darien v. Kavookjian, 151 Conn. 659, 202 A. 2d 147; County Board of School Trustees of Du Page County v. Boram, 26 Ill. 2d 167, 186 N. E. 2d 275; Red Springs City Board of Education v. McMillan, 250 N. C. 485, 108 S. E. 2d 895.

The only remaining question is whether the offer

which the defendant made was so inadequate that it would support a finding that it had not been made in good faith. In their amended petition on appeal the plaintiffs alleged that their damages amounted to $120,000. However, the expert witnesses called by the plaintiffs at the trial testified the damages were only $13,006 and $13,762.

In determining the question of whether a good faith offer was made, the nature of the easement sought and the use of the land are important factors. The land was agricultural in nature and was being used for row crops at the date of the taking, September 27, 1974. The valuation made by the plaintiffs' experts was based in part upon the possibility that the land might be used for commercial or residential purposes at some time in the future. This was a factor which was somewhat speculative or conjectural in nature.

The easement sought prohibited the erection of buildings or structures and the growth of trees or other objects upon the land but specifically permitted the use of the land for crop farming and the presence of farm machinery and equipment upon the land temporarily as would be necessary to carry out farming tasks. Thus, the easement would not substantially interfere with the use of the land for row crop farming.

While it is true that the defendant had obtained preliminary appraisals of $1,200 and $1,600, the appraiser who had submitted the preliminary appraisal in the amount of $1,200 testified at the trial that he had concluded that this figure was erroneous and that in his opinion the damages amounted to only $100.

The defendant also produced the testimony of one of the appraisers appointed by the county court who testified that the damages amounted to $696.

The defendant was not bound by the preliminary appraisals and was entitled to seek the opinion of an

experienced review appraiser which it did. The defendant did not act in bad faith by relying upon the advice of the review appraiser. The award made by the appraisers appointed by the county court is further evidence that the offer made by defendant was not made in bad faith.

There was an error in the description of the easement taken which was not discovered until after the plaintiffs had notified the defendant that they would not negotiate. A plat accompanied the description of the easement and it is clear that the error in the description did not prejudice the plaintiffs in any way.

As we view the record it will not sustain a finding that the defendant failed to negotiate in good faith with the plaintiffs before the condemnation proceeding was commenced. The trial court should have sustained the defendant's motion and resolved this issue in favor of the defendant as a matter of law. The judgment must, therefore, be reversed and the cause remanded for further proceedings.

In their cross-appeal the plaintiffs contend that the trial court should have awarded them attorney's fees and expert witness' fees. Attorney's fees and expenses may be recovered only where authorized by statute or a uniform course of procedure. State ex rel. Ebke v. Board of Educational Lands & Funds, 159 Neb. 79, 65 N. W. 2d 392.

None of the conditions specified in section 76-720, R. R. S. 1943, were satisfied and the plaintiffs had no right to recover attorney's fees and expert witness' fees in the District Court. The cross-appeal is without merit.

The judgment of the District Court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

BETTY LYNN PFEIFFER, APPELLEE, V. KENNETH L. PFEIFFER, APPELLANT.

266 N. W. 2d 82

Filed May 24, 1978. No. 41528.

1. **Child Support: Minors: Statutes.** When dissolution of a marriage or legal separation is decreed, the court may include such orders in relation to any minor children and their maintenance as shall be justified. Subsequent changes may be made by the court when required after notice and hearing. § 42-364, R. S. Supp., 1976.
2. **Words and Phrases: Child Support: Minors.** The term "when required" is broad and indefinite, but does not contemplate modification at the whim of either a party or the court. A judgment for child support may be modified only upon a showing of facts or circumstances which have occurred since the judgment was entered.

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

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

Phillip T. Morgan of Morgan & Morgan, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, and BRODKEY, JJ.

CLINTON, J.

This is an action by petitioner wife against the respondent husband to modify the award made at the time of dissolution by increasing the amount of support for the five children of the parties. After notice and hearing, the trial court increased the amount the respondent was required to pay for child support. The respondent appeals and asserts that the evidence shows no facts and circumstances occurring since the original award which justify an increase and, until such change is shown, the matter is res judicata. We affirm.

The marriage of the parties was dissolved on March 28, 1975, and custody of the five children, whose birth dates are 10-2-60, 10-20-63, 7-29-65, 1-18-69, and 9-2-70, was awarded to the petitioner. The de-

cree approved a property settlement agreement entered into between the parties, as well as the provision made therein for child support. The latter provision was as follows: "Respondent shall pay to the Clerk of the District Court of Merrick County, Nebraska, beginning March 1, 1975, the sum of $500 per month for the support of the five minor children until any one of said minors shall reach the age of 19, marry, become emancipated, or become self-supporting. So long as there are only four minor children in the custody of the petitioner, the respondent shall pay the sum of $400 per month for the support of said minor children. So long as there are only three minor children in the custody of the petitioner, the respondent shall pay the sum of $350 per month for the support of said minor children. So long as there are only two minor children in the custody of the petitioner, the respondent shall pay the sum of $300 per month for the support of said minor children. So long as there is only one minor child in the custody of the petitioner, the respondent shall pay the sum of $300 per month for the support of said minor child."

The court, on the current application, modified the award to provide for the payment of "child support of $250.00 per month for each of the five children until such time as the child reaches the age of 18 years."

The marriage dissolution act of 1972, Laws 1972, L. B. 820, expressly recognizes that agreements of the parties for child support are subject to modification. § 42-366 (7), R. R. S. 1943. Provisions for child support made other than by agreement are also subject to modification. Section 42-364, R. S. Supp., 1976, provides in part: "When dissolution of a marriage or legal separation is decreed, the court may include such orders in relation to any minor children and their maintenance as shall be justified, ... Subsequent changes may be made by the court when required after notice and hearing."

In Gray v. Gray, 192 Neb. 392, 220 N. W. 2d 542, we noted the differences between the present statute on child support and its predecessor statute, to wit, section 42-312, R. R. S. 1943, and with reference to the term in the present statute "when required," said: "The term is broad and indefinite but does not contemplate modification at the whim of either a party or the court. 'A judgment for child support may be modified only upon a showing of facts or circumstances which have occurred since the judgment was entered. The judgment is res judicata as to all matters existing at the time it was rendered. * * * A proceeding to modify a judgment for child support is not a retrial of the original case or a review of the equities of the original decree.' . . . (Citing cases.) The change in the statute does not alter these basic principles."

The following changes of circumstances are shown by the record. For the years immediately preceding the dissolution the respondent's adjusted gross income was as follows: 1971, $6,635.87; 1972, $13,191; and 1973, $27,512. Respondent's adjusted gross income for 1974 was $23,906. For the year 1975 his adjusted gross income increased to $65,886, and in 1976 to $66,198. The petitioner introduced evidence to show that the cost of supporting the children at the time of hearing was approximately $1,400 per month. It is to be observed that that amount is greatly in excess of the $500 approved by the court 26 months earlier. We are permitted to judicially notice that under present economic conditions $100 per month is far less than the actual cost of caring for a child in an acceptable manner. Benton v. Benton, 187 Neb. 205, 188 N. W. 2d 685. It is also to be noted that as the ages of the children increase, the expense of care is generally greater. The rising costs of supporting children, together with the great increase in the respondent's income, are sufficiently substantial changes of circum-

stances to justify the court order modifying the amount of child support. Rubottom v. Rubottom, 185 Neb. 39, 173 N. W. 2d 447.

The plaintiff is awarded the sum of $500 for the services of her attorney in this court.

AFFIRMED.

JACQUELINE A. CORELL, APPELLANT, V. LOREN S. CORELL, JR., APPELLEE.

266 N. W. 2d 84

Filed May 24, 1978. No. 41545.

New Trial: Appeal and Error: Time. Where a motion for new trial is not filed within the time prescribed by law, the time for appeal runs from the rendition of the judgment.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Appeal dismissed.

Jacqueline A. Corell, pro se.

Hosford & Hosford, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

PER CURIAM.

This is an appeal from an order dismissing an application for modification of the decree in a proceeding for dissolution of a marriage. The parties were married in 1957. The marriage was dissolved in 1975. The trial court took custody of the children of the parties, awarding possession of the oldest child, Lorene, to the petitioner and possession of the two younger children, Linda and Judith, to the respondent.

On January 17, 1977, the petitioner filed an application for modification of the decree in regard to the possession and care of Linda, who was then 15 years of age. The petitioner requested that the possession

and care of Linda be awarded to the parties during alternate months and alleged that Linda had "advised the petitioner that she would prefer to live with petitioner one month, and respondent during alternate months." On the same date the petitioner filed an application to require the respondent to pay for an appendectomy that Lorene had required in October 1976, and an application to obtain the title to an automobile, the possession of which had been awarded to the petitioner in the decree.

The petitioner was represented by counsel in the original proceedings and was represented by counsel until April 5, 1977, the day of the hearing on the application. On that day the petitioner appeared in open court and stated that she wished to proceed pro se. Her counsel then moved for leave to withdraw and the hearing proceeded with the petitioner appearing pro se.

The petitioner offered her own testimony, most of which was irrelevant and was excluded upon objection by the respondent. The petitioner also offered two exhibits to which objections were sustained. No evidence was offered in regard to the applications concerning the medical expenses of Lorene or the title to the automobile.

At the conclusion of the petitioner's evidence the respondent moved to dismiss the application concerning the medical expenses. The petitioner then asked permission to call her daughter Lorene as a witness. The trial court refused the petitioner permission to withdraw her rest but continued the matter until May 23, 1977. The trial court advised the petitioner that she had not made a prima facie case but that the applications would not be dismissed at that time. The trial court further advised the petitioner that if she appeared with counsel on May 23 he would allow her to withdraw her rest and introduce additional evidence, but if she appeared pro se at that time the applications would be dismissed and

she would not be allowed to introduce additional evidence.

On May 23, 1977, the petitioner again appeared without counsel. The trial court advised the petitioner that the applications would be dismissed. The petitioner then moved for a continuance until she could obtain counsel. The continuance was refused and the applications were dismissed. Before dismissing the applications the trial court interviewed Linda and Judith in chambers. The interviews were not recorded.

The petitioner filed a motion for new trial on June 14, 1977, which was not within the time required by section 25-1143, R. R. S. 1943. This motion was overruled on July 1, 1977. The notice of appeal was filed on July 1, 1977. Since the motion for new trial was filed out of time, the time for appeal commenced to run from the rendition of the judgment on May 23, 1977. See, § 25-1912, R. R. S. 1943; Ehlers v. Neal, 148 Neb. 697, 28 N. W. 2d 558.

The petitioner's brief filed in this court alleges that the trial court denied the petitioner the right to represent herself; that the evidentiary rulings made by the trial court were erroneous; and that the dismissal of the applications was premature.

We have examined the record and there is no merit in any of these contentions. Ordinarily, the judgment would be affirmed. However, the record shows the appeal was not perfected within the time required by law and this court acquired no jurisdiction. The appeal must therefore be dismissed.

APPEAL DISMISSED.

DOUGLAS WYCOFF, APPELLANT, V. JOSEPH C. VITEK, DIRECTOR OF CORRECTIONS, ET AL., APPELLEES.

266 N. W. 2d 211
Filed May 24, 1978. No. 41577.

Criminal Law: Probation and Parole: Statutes. The good time reductions provided in section 83-1,107, R. R. S. 1943, are used to determine eligibility for release on parole or supervision and are subject to forfeiture.

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

T. Clement Gaughan, Lancaster County Public Defender, and Richard L. Goos, for appellant.

Paul L. Douglas, Attorney General, and Paul W. Snyder, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

WHITE, C. J.

Plaintiff brought an action for a declaratory judgment. Defendants' motion for summary judgment was sustained and plaintiff appeals. We affirm the judgment of the District Court.

In his petition plaintiff alleged the following: Plaintiff is an inmate in the Nebraska Penal and Correctional Complex. The defendant Vitek is the duly appointed Director of Corrections of the State of Nebraska and the defendant Parratt is the warden of the Nebraska Penal and Correctional Complex. On February 14, 1977, plaintiff was found to be in possession of and concealing a dangerous weapon, a knife. Plaintiff was cited for a violation of the rules and regulations of the Nebraska Penal and Correctional Complex, specifically official memorandum 804.001, page 7, part 3, which provides:

"Possession or manufacture of any kind of dangerous and/or lethal weapons.

"PENALTY — (a) Loss of all good time.

(b) Confinement in Adjustment Center.

"DURATION — (a) Good time will be non-restorable.

(b) Confinement in Adjustment Center of not less than one (1) month nor more than three (3) years.

"REASON — Due to increase and severity of assaults and stabbings in correctional facilities."

On February 28, 1977, a hearing was held before the adjustment committee, which forfeited 1 year and 3 months of plaintiff's good behavior good time and 3 months and 17 days of plaintiff's meritorious good time. The adjustment committee specified that the good time thus forfeited would be nonrestorable.

It is plaintiff's position that the above-quoted regulation, promulgated by the Division of Corrections and the Nebraska Penal and Correctional Complex is contrary to law, specifically section 83-1,107 (2) and section 83-1,107.01 (2), R. R. S. 1943. He contends that it was improper for the adjustment committee to label the good time which he forfeited nonrestorable, and seeks to have this forfeited good time declared restorable.

Section 83-1,107 (1), R. R. S. 1943, provides that a committed offender's term shall be reduced at a prescribed rate for good behavior. Section 83-1,107.01 (1), R. R. S. 1943, provides that an offender shall receive further good time at a prescribed rate for the faithful performance of his assigned duties.

Section 83-1,107 (2), R. R. S. 1943, states: "While the offender is in the custody of the Department of Correctional Services, reductions of such terms may be forfeited, withheld and restored by the chief executive officer of the facility, with the approval of the director after the offender has been consulted regarding the charges of misconduct." Section 83-

1,107.01 (2), R. R. S. 1943, reads essentially the same.

These statutes give the chief executive officer discretionary power to provide for the forfeiture or withholding of good time. Good time reductions are subject to forfeiture. Brown v. Sigler, 186 Neb. 800, 186 N. W. 2d 735 (1971). The statutes further permit the chief executive officer, in his discretion, to provide for the restoration of good time which has been forfeited or withheld. Nothing in the statutes compel the chief executive officer to provide for the restoration of all good time which is forfeited or withheld.

The chief executive officer has exercised, in this instance, the discretionary power permitted him under these statutes and has promulgated official memorandum 804.001 to the effect that under certain circumstances good time will be forfeited and will not be restorable. There is no merit to plaintiff's contention.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DENNIS KORF, APPELLANT.

266 N. W. 2d 86

Filed May 24, 1978. Nos. 41829, 41830.

1. **Trespass: Evidence.** Nonconsent to enter the premises as an element of trespass may be proved by direct testimony or circumstantial evidence.
2. **Judicial Notice: Ordinances: Records.** Generally, this court will not take judicial notice of a municipal ordinance which does not appear in the record on appeal.

Appeals from the District Court for Douglas County: RUDOLPH TESAR, Judge. Affirmed.

Paul E. Watts, Gerald E. Moran, Robert C. Sigler, and Julianne M. Dunn, for appellant.

Herbert M. Fitle, Omaha City Attorney, Gary P. Bucchino, and Richard J. Jones, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

BOSLAUGH, J.

The defendant was charged in the Omaha municipal court in separate complaints with trespassing and prowling or loitering. He was convicted and sentenced to 45 days imprisonment in the Douglas County jail on each count, the sentences to run concurrently. Upon appeal to the District Court the convictions were affirmed but the sentence on the trespassing charge was reduced to 30 days imprisonment and the sentence on the loitering charge was reduced to 10 days imprisonment. The defendant has now appealed to this court where the cases were consolidated for briefing and argument. The assignments of error relate to the sufficiency of the evidence to support the judgments.

The record shows that Pam Hawkins left her place of employment in downtown Omaha at about 1:45 a.m., on April 14, 1977. While she was driving home she noticed that she was being followed by a driver in a Pontiac station wagon. The station wagon followed her from about Farnam Street and the Interstate to a residence at 621 Beverly Drive which was the home of her boyfriend, Bernard McCoy. She entered the house, awakened Bernard, and then called the police. Together they watched the defendant walk around the house; look in the windows; drive his car into the driveway; enter the garage; and then drive away. They followed the defendant to get his license number and were following the defendant when he was apprehended by the police.

Bernard McCoy testified that the property at 621

Beverly Drive was owned by his mother and that neither he nor anyone, to his knowledge, had given the defendant permission to enter the garage. This evidence was sufficient to make a prima facie case that the defendant was not "invited, licensed or privileged" to be upon the property. Nonconsent may be proved by direct testimony or circumstantial evidence. See State v. Simons, 187 Neb. 761, 193 N. W. 2d 756.

The complaint on the loitering charge alleged that the defendant "did unlawfully loiter or prowl in a place, at a time or in a manner not usual for law abiding individuals under circumstances that warranted alarm for the safety of persons or property in the vicinity." The evidence which has been summarized was clearly sufficient to sustain a finding of guilty of this charge.

The defendant contends that the State failed to prove compliance with other sections of the ordinance which require a police officer, prior to making an arrest for loitering or prowling, to request the person suspected to identify himself and explain his presence and conduct. The sections referred to are set out in the defendant's brief but do not appear any place in the record.

As a general rule, this court will not take judicial notice of a municipal ordinance which does not appear in the record on appeal. State v. Sator, 194 Neb. 120, 230 N. W. 2d 224; 5 Am. Jur. 2d, Appeal and Error, § 741, p. 186. Although the existence of a valid ordinance creating the offense charged will be presumed if the ordinance is not properly set forth in the record, we will not take judicial notice of other provisions of the ordinance unless it is apparent from the record that the District Court took notice of such provisions.

A requirement that an officer, prior to making an arrest, give a suspected person an opportunity to dispel the alarm does not establish an additional ele-

ment of the offense but is defensive in nature. It may prevent a conviction if the police do not comply with the requirement or if it appears at the trial that the explanation given, if believed by the officers at the time, would have dispelled the alarm.

Such a requirement is not applicable if flight by the person, or other circumstances, makes it impracticable. In this case the defendant left the property before he was apprehended. Under such circumstances the requirement is not applicable.

The evidence was sufficient to sustain findings of guilty and the judgments are affirmed.

AFFIRMED.

BYRON REED COMPANY, INC., A CORPORATION, APPELLANT, V. MAJERS MARKET RESEARCH COMPANY, INC., A CORPORATION, ET AL., APPELLEES.

266 N. W. 2d 213

Filed May 31, 1978. No. 41402.

Property: Brokers: Fees. Where a real estate broker, while his brokerage contract is in full force and effect, obtains a purchaser for real estate and no sale is made during the existence of the agreement but sale is made thereafter by the owner to the person produced by the agent, on substantially the terms that had been offered through the agent's efforts, the broker is entitled to a commission for making the sale.

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

A. J. Whalen, for appellant.

James T. Gleason of Collins & Gleason, for appellees.

Heard before WHITE, C. J., BOSLAUGH, and WHITE, JJ., and WARREN and KORTUM, District Judges.

KORTUM, District Judge.

Byron Reed Company, Inc., plaintiff and appel-

lant, brought this action in the municipal court of the City of Omaha seeking to recover a real estate commission for selling certain property owned by defendants William and Maria Harless. After trial the municipal court entered a judgment for the plaintiff and against both defendants, the Harlesses and Majers Market Research Company, Inc. On appeal to the District Court after trial de novo on the record, the District Court reversed the judgment of the lower court and entered a judgment for the defendants.

On December 1, 1973, the defendants William and Maria Harless entered into a real estate listing contract with the plaintiff. The contract gave the plaintiff the exclusive right to sell the Harless home until April 1, 1974, and provided for the payment of a 7 percent selling commission. The listing contract further provided that if, within 6 months after the expiration of the listing, a sale of the premises was made to anyone due to plaintiff's efforts or advertising, then the commission would likewise be due.

On March 13, 1974, the plaintiff obtained a written offer from Jack and Louise Koberg to purchase the property. This offer was submitted to one defendant, Harless, who informed the plaintiff that the matter was out of his hands; that plaintiff was to contact Majers Market Research Company, Inc., who had written authority to set the selling price for Harless. Mr. Harless was an employee of defendant Majers and Harless had been guaranteed an agreeable price for his home. Defendant Majers rejected the offer and plaintiff thereupon returned the offer and deposit to the Kobergs.

After the expiration of the listing agreement, defendant Majers spent $3,978.16 in cleaning up and improving the property for sale. After April 1, 1974, the Byron Reed sign was taken off the property and a sign stating "for sale by owner" was put up. This sign carried the telephone number of the defendant, Majers.

In April 1974, the Kobergs noticed the change in signs on the property and contacted Majers. They were shown through the house by Mr. Scribante, president of Majers. Mr. Koberg testified that on that showing in April he told Scribante he had previously made an offer for the house in March through the plaintiff, Byron Reed Company, Inc.

By deed of May 1, 1974, the Harlesses sold the house to the Kobergs. The purchase price was lower than the original listing price of Byron Reed Company, Inc., and some $2,000 higher than the offer made by Koberg through Byron Reed Company, Inc., in March.

The defendants contend that the action deals with two different premises, although they acknowledge that the legal description is the same. This contention is based on the fact that after the expiration of the listing agreement, but before the 6-month period thereafter had passed, the defendants expended considerable time and money cleaning and restoring the property in question.

The cases cited by defendants do not support this contention. We do not think the evidence supports such a position. The cleanup work, no doubt, made the premises more saleable. However, to change the very definition of the subject matter of the contract, much more is needed than simply cleaning and restoring the premises.

Defendants further contend that the price difference between the original listing agreement and what the premises actually sold for changes the terms of the contract sufficiently to defeat plaintiff's claim. The original listing price was $50,950. This was later reduced to $48,950 by agreement among all the defendants and was communicated to the plaintiff. The plaintiff obtained a written offer from the Kobergs of $45,000 on March 13, 1974. On May 1, 1974, the property was sold to the Kobergs for $47,700. We think the facts differ from those in the

case of Huston Co. v. Mooney, 190 Neb. 242, 207 N. W. 2d 525, cited by the defendants. In that case the contract called for the purchase price to be paid in cash or upon other terms acceptable to the seller. The prospective buyer made an offer to purchase the property with a $1,000 downpayment on January 1st and the balance to be spread out over an approximately 18-month period. The evidence was conflicting as to whether or not the seller was agreeable to such terms. The property was sold 3 months after the expiration of the listing agreement for $20,000 cash, plus abstracting costs, to the same party with whom the plaintiff had been negotiating. The trial court specifically found that the plaintiff had at no time found a buyer for $20,000 cash, as set forth in the original listing agreement, and that the plaintiff had failed to procure a purchaser within the terms of the agreement. The District Court held for the seller and the judgment was affirmed by this court. Huston Co. v. Mooney, *supra.*

The Huston case is distinguishable on its facts and is not controlling in the matter.

The plaintiff contends that the District Court erred in reversing the judgment of the municipal court and that the judgment is contrary to law and the evidence.

The chief thrust of plaintiff's appeal is that the contract is valid, that there was a sale within the time span of the listing agreement on substantially the same terms as in the listing agreement, and that such sale was made because of the advertising and efforts of the plaintiff in the original listing.

The basic validity of such terminology in a real estate listing contract has been recently stated by this court in the case of Dial Realty, Inc. v. Cudahy Co., 198 Neb. 641, 254 N. W. 2d 421. Although primarily directed at determining whether a sale had occurred and what the price was, the court at page 643 stated: "However, even if the defendant had not admitted

its liability, under the plain and unambiguous terms of the listing agreement, the defendant was clearly liable to the plaintiff. By the following terms of the listing agreement, the defendant obligated itself to pay the plaintiff the stated commission: 'If a sale is made, or a purchaser found, who is ready, willing and able to purchase the property before the expiration of this listing, by you, myself, or any other person, at the above price and terms or for any other price and terms I may agree to accept, or if this agreement is revoked or violated by me * * *.' "

We think that language is applicable here and that the listing agreement is valid even though the sale, in this instance, occurred after expiration of the listing period, but within the 6-months extension of time thereafter.

The major determination to be made, however, is whether the terms of the ultimate sale are substantially the same as in the listing agreement and whether such sale occurred as a result of the efforts or advertising of the plaintiff under the listing.

There appears to be no dispute that the property was ultimately sold to the Kobergs, the same persons who had inspected the premises with a representative of the plaintiff. It is also undisputed that the Kobergs had made an offer in writing to purchase the property while the listing agreement was in effect.

We think the facts established clearly that the sale of the premises was primarily due to the efforts of the plaintiff in advertising and showing the property to the Kobergs. We find the sale was made on substantially the same terms as had been offered through the efforts of the plaintiff.

Where a real estate broker, while his brokerage contract is in full force and effect, obtains a purchaser for real estate and no sale is made during the existence of the agreement but sale is made thereafter by the owner to the person produced by the

agent, on substantially the terms that had been offered through the agent's efforts, the broker is entitled to a commission for making the sale. Peters v. Dreger, 146 Neb. 670, 21 N. W. 2d 436.

For these reasons we find that the District Court erred in reversing the judgment of the municipal court.

The judgment of the District Court is reversed and the judgment of the municipal court of the City of Omaha, in favor of the plaintiff and against the defendants, is reinstated.

REVERSED.

O'NEILL PRODUCTION CREDIT ASSOCIATION, APPELLEE, V. PUTNAM RANCHES, INC., APPELLANT, IMPLEADED WITH PRUDENTIAL INSURANCE COMPANY OF AMERICA ET AL., APPELLEES.

266 N. W. 2d 242

Filed May 31, 1978. No. 41446.

Property: Mortgages: Contracts: Statutes. In an action to foreclose a real estate mortgage, a counterclaim or set-off which alleges that the plaintiff breached the underlying agreement in relation to which the mortgage was executed, by failing and refusing to advance part of the funds promised under the agreement, is a claim arising out of the contract or transaction forming the foundation of the plaintiff's claim within the meaning of section 25-813, R. R. S. 1943.

Appeal from the District Court for Holt County: HENRY F. REIMER, Judge. Judgment vacated. Cause remanded for further proceedings.

Marti, Dalton, Bruckner, O'Gara & Keating, for appellant.

Edward Hannon and Deutsch, Jewell, Otte, Gatz, Collins & Domina, for appellee O'Neill Production Credit Assn.

Heard before SPENCER, MCCOWN, CLINTON, and BRODKEY, JJ., and COADY, District Judge.

MCCOWN, J.

This is an action by plaintiff, O'Neill Production Credit Association, against the defendant, Putnam Ranches, Inc., for foreclosure of two real estate mortgages and a security interest in personal property. The District Court found that the defendant was indebted to the plaintiff in the sum of $2,634,000.69, plus interest, and ordered foreclosure. The defendant has appealed.

The defendant is a corporation engaged in farming and ranching operations in Nebraska and South Dakota. For several years plaintiff and defendant had made arrangements in advance to take care of the defendant's financial requirements for the coming year. Late in the calendar year the defendant prepared a projection of the following year's cash requirements. A loan application was then prepared by the plaintiff credit association and submitted to the Federal Intermediate Credit Bank for its approval. Plaintiff was required to obtain permission from FICB for any loan in excess of 35 percent of plaintiff's capital. The loan to the defendant was in excess each year and the loan application was therefore subject to approval by FICB each year.

On January 7, 1974, the president of plaintiff, working from information supplied by the defendant, prepared a loan application for submission to FICB, seeking approval of a loan of $4,105,000 to defendant. The application showed the purpose of the loan to be renewal of outstanding loans of $2,754,521.78, interest of $187,000, livestock of $500,000, operating expense of $503,478.22, and capital irrigation expense of $160,000, comprising the total commitment amount of $4,105,000.

The loan application was dated January 7, 1974, and the amount of indebtedness to be renewed was

shown as $2,754,521.78, the amount due on the 1973 loan on January 7, 1974. Plaintiff's president submitted a copy of the loan application to the FICB without presenting it to or having it signed by any officer of the defendant. FICB approval ordinarily required from 3 to 8 weeks.

During the period of time between January 7, 1974, and February 28, 1974, while awaiting FICB approval, plaintiff continued to advance funds to the defendant from time to time. Advances were charged against undisbursed commitments of $110,389.83 under the 1973 loan until that commitment was exhausted, and thereafter plaintiff advanced funds in exchange for demand promissory notes executed by the defendant. Four demand notes were executed in the total sum of $247,000. Plaintiff advanced the total sum of $345,424.07 to defendant between January 7, 1974, and February 28, 1974. During the same period of time the defendant made repayments on its indebtedness in the total amount of $324,496.56.

In late February 1974, FICB approved the loan. On February 28, 1974, the loan application dated January 7, 1974, was signed on behalf of the defendant. On February 28, 1974, the defendant also executed the promissory note for $4,105,000. The note was dated January 7, 1974, and was payable on or before January 5, 1975. It provided for interest at 8.80 percent per annum, with provisions for adjustment of the interest rate on a monthly basis dependent on the interest rate for funds from the FICB.

The plaintiff already held a $1 million real estate mortgage executed by the defendant in 1970 to secure existing and future indebtedness to the plaintiff. On February 28, 1974, the defendant executed an additional $1 million real estate mortgage and a collateral note and agreement as security for the indebtedness represented by the promissory note for $4,105,000 dated January 7, 1974. On February 28,

1974, the defendant also executed a security agreement and financing statement covering the personal property. These are the mortgages which plaintiff seeks to foreclose in this action.

The loan summary and collateral record of the plaintiff reflecting defendant's indebtedness shows a renewal loan of $2,775,449.33, and undisbursed commitments of $1,329,550.67 on February 28, 1974. On March 1, 1974, the plaintiff reduced the undisbursed commitment amount on its loan summary and collateral record by $324,496.56. The reason noted for cancellation of the commitment was the amount of repayments between the date of the loan application, January 7, 1974, and the date of execution of the renewal note on February 28, 1974.

After February 28, 1974, the plaintiff advanced funds to the defendant from time to time. Total sums advanced by plaintiff to defendant from March 1, 1974, to January 5, 1975, amounted to $941,689.93. Amounts advanced from January 7, 1974, to January 5, 1975, were $1,303,866.69. On January 5, 1975, the loan summary and collateral record shows defendant's total indebtedness to be $2,676,690.81. Plaintiff and defendant apparently proceeded on an ad hoc basis during 1975, during which time plaintiff made advances on several occasions and various repayments were credited. On October 17, 1975, plaintiff filed this action to foreclose its mortgages and security interest. At that time the unpaid balance of defendant's indebtedness was $2,634,000.69, plus interest. The District Court found generally in favor of the plaintiff and entered judgment in that amount, plus interest, and ordered foreclosure.

The principal assignments of error on appeal center around the contention that the District Court erroneously struck defendant's counterclaim and set-off which alleged that the plaintiff had fraudulently induced defendant to execute the promissory note and other loan documents by agreeing to loan

and advance funds to the defendant in the calendar year 1974 in the total amount of $4,105,000. The counterclaim and set-off also alleged that the plaintiff did not intend to advance such total funds, and, in fact, failed and refused to advance the total sum of $4,105,000; that by reason of plaintiff's failure to advance the full amount of said funds the defendant was unable to produce certain crops for the year 1975, and was unable to consummate certain cattle transactions which would have realized profits; and that because of plaintiff's failure to advance the full amount of the agreed funds, the defendant was required to sell livestock at a time when the market was depressed, and suffered losses.

The District Court struck those portions of defendant's answer which constituted these counterclaims and set-offs. The court also refused to permit defendant to introduce evidence in support of its allegations and offers of proof as to these matters which were rejected. The court stated that its action was taken upon the ground that the allegations raised collateral issues not allowable as counterclaims or set-offs in a mortgage foreclosure action, and that any issues of fraud were barred in this action under The Tilden Bank v. Retzlaff, 188 Neb. 834, 199 N. W. 2d 734. That case held that a claim for damages for tort cannot be used as a set-off against an action on a contract, nor in a suit on promissory notes secured by real estate mortgages. The rule is not applicable here.

In our view the reference to fraud or misrepresentation in the pleadings may have been inappropriate, but the essential issue involved is one of interpretation of the agreements, instruments, and actions of the parties with respect to the basic underlying agreements here. The counterclaim and set-off alleges that the plaintiff agreed to advance funds to the defendant in the total sum of $4,105,000 during the calendar year 1974; that the plaintiff failed to ad-

vance the full amount of said funds; and that the defendant was damaged by the breach.

The dispute as to the interpretation of the agreements arises in connection with the period between January 7, 1974, and February 28, 1974. Under the defendant's interpretation of the agreements between the parties, the sums advanced on demand notes or against undisbursed commitments on prior loans were not a part of the $4,105,000 transaction because they were made before the note or loan application was signed by defendant. Under the plaintiff's interpretation of the evidence, loan advancements and repayments between January 7, 1974, and February 28, 1974, were only temporary arrangements while awaiting approval, and were all a part of the loans and agreements of the $4,105,000 transaction. The plaintiff's position is that it advanced the defendant the full amount of the $4,105,000 under the correct interpretation of the agreements.

Section 25-813, R. R. S. 1943, provides in part: "The counterclaim * * * must be one in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action, and arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, or connected with the subject of the action." While this state has not directly considered the question, it is generally recognized that in an action to foreclose a mortgage the defendant may counterclaim or set-off a claim or demand against the plaintiff which is connected with the mortgage transaction and affects the consideration thereof. See, 59 C. J. S., Mortgages, § 619, p. 1086; Owen v. Mecham, 9 Ariz. App. 529, 454 P. 2d 577; Palermo Constr. Co., Inc. v. Lebleu, 272 So. 2d 729 (La. App.).

In Leisure Technology-N.E., Inc. v. Klingbeil Holding Co., 137 N. J. Super. 353, 349 A. 2d 96, the court determined that a counterclaim based on allegations of a breach of the underlying agreement in

relation to which a mortgage had been executed was properly considered in an equitable action for foreclosure of the mortgage. The court said: "Here the thrust of the counterclaim is the assertion that plaintiff had breached the underlying agreement in relation to which the mortgage was executed and interfered with defendants' rights under that agreement. In the usually understood sense of the word, these claims were germane to the foreclosure action."

Case law in this state has recognized the proposition that a mortgage depends for its validity upon the validity of the debt which it secures, and that a lack of consideration is a defense to a foreclosure action. See, Caldwell v. Wells, 174 Neb. 288, 117 N. W. 2d 486; Norton v. Dosek, 161 Neb. 554, 74 N. W. 2d 56; Elm Creek State Bank v. Johnson, 195 Neb. 131, 236 N. W. 2d 838.

In an action to foreclose a real estate mortgage, a counterclaim or set-off which alleges that the plaintiff breached the underlying agreement in relation to which the mortgage was executed, by failing and refusing to advance part of the funds promised under the agreement, is a claim arising out of the contract or transaction forming the foundation of the plaintiff's claim within the meaning of section 25-813, R. R. S. 1943.

In this case there is a mixed question of fact and law as to which version or interpretation of the loan and mortgage agreements and facts is correct. The evidence may or may not be conflicting when it is heard. Nevertheless, the defendant is entitled to an opportunity to prove its allegations. Whether defendant's evidence is sufficient to establish its claims is a question for determination by the fact finder in the trial court, not by this court.

The defendant also contends that the assignment of various life insurance policies given as additional security by certain individual defendants was in-

valid because of a lack of consideration. Section 9-204, U. C. C., makes it clear that consideration may consist of future advances, even if the lender was already under a contractual obligation to make such future advances. It is also undisputed in this case that the plaintiff made substantial advances of funds to the defendant after the execution of the insurance assignments. The fact that the advancements were made to the defendant corporation rather than to the individual assignors is immaterial. See Grady v. Denbeck, 197 Neb. 795, 251 N. W. 2d 164.

Defendant's remaining assignments of error are without merit. The judgment of the District Court is vacated, and the cause is remanded to the District Court for further proceedings in accordance with this opinion.

JUDGMENT VACATED. CAUSE REMANDED FOR FURTHER PROCEEDINGS.

CLINTON, J., concurring in result.

DONALD W. TYLER, APPELLEE, V. OLSON BROS. MFG. CO., INC., APPELLANT, IMPLEADED WITH FRANK SVOBODA ET AL., APPELLEES.

266 N. W. 2d 216

Filed May 31, 1978. No. 41530.

Trial: Evidence: Damages. The general rule is that damages must be proved with as much certainty as the case permits and cannot be left to conjecture, guess, or speculation. Generally, the evidence must be sufficient to enable the court or jury to determine the amount of damages with reasonable certainty.

Appeal from the District Court for Holt County: HENRY F. REIMER, Judge. Affirmed.

Duane L. Stromer, for appellant.

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

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

BOSLAUGH, J.

This case arises out of a controversy concerning the sale of a center pivot irrigation system to the plaintiff, Donald W. Tyler. In 1969 the plaintiff contacted the defendant, Frank Svoboda, concerning the purchase of an irrigation system manufactured by the defendant, Olson Bros. Mfg. Co., Inc. On December 4, 1969, the defendant signed a written "Conditional Sales Agreement" for the purchase of a 9 tower "Hyd.-Prop." Olson Irrigation System. The contract was in the form of an offer to sell made by Olson Bros. Mfg. Co., Inc., which was accepted by the plaintiff. The contract expressly provided, "MAKE ALL CHECKS PAYABLE TO: OLSON BROS. MFG. CO., INC." The contract recited that Olson was represented by Svoboda Sales, Inc., and the agreement was executed with Frank Svoboda as the representative of the seller.

The contract contained an item of $600 for "assembly" and described where and how it was to be installed. The plaintiff paid the full amount of the purchase price, $12,969.01, to Svoboda Sales Co. on December 23, 1969. The irrigation system was delivered to the plaintiff's property sometime before January 1, 1970, and was erected by Svoboda or his employees during the month of January.

The plaintiff first attempted to operate the system sometime between May 1 and May 20, 1970. The plaintiff immediately had trouble with the system. There were breaks and leaks in the oil lines; a plastic tube going to the end gun shut-off melted in two; the water pipe sagged badly in two places; and the system would operate for only a short time and then shut off. The plaintiff testified that he complained to both Svoboda and Olson Bros. and that workmen came out to his farm several times and attempted to

repair the system but were not successful. The field where the system had been installed was planted to potatoes and the crop needed water badly during this time. The situation became so critical that the plaintiff hired a neighbor lady to watch the field and to call him when the system stopped irrigating. The system continued to stop at irregular intervals until the plaintiff himself modified a part of the hydraulic system on or about June 23, 1970.

This action was commenced on December 4, 1970, to recover damages in the amount of $5,976 which the plaintiff alleged he had sustained as a result of defects in the system. The original petition named Olson Bros. Mfg. Co., Svoboda Sales, Inc., and Frank Svoboda as defendants. An amended petition filed in 1974 omitted Svoboda Sales, Inc., as a defendant and substituted, as a defendant in its place, Frank Svoboda doing business as Svoboda Sales Co.

A jury was waived and the action was tried to the court. At the close of the defendant's evidence the action was dismissed as to all defendants except Olson Bros. The trial court found that Svoboda was an agent of Olson Bros.; that the contract for the purchase of the system was between the plaintiff and Olson Bros.; that the system was defective; that the plaintiff had notified Olson Bros. of the defects through its agent Svoboda; and that the plaintiff had been damaged in the amount of $4,002.50. The defendant Olson Bros. has appealed. There is no cross-appeal. There are no issues in this court as to the defendants Frank Svoboda and Frank Svoboda doing business as Svoboda Sales Co. and the appeal has been dismissed as to them.

The principal issues which must be considered and determined in this court relate to the sufficiency of the evidence to sustain the findings of the trial court. Much of the evidence was in conflict and presented issues of fact which were resolved against the defendant Olson Bros.

On the matter of agency the contract, on its face, purported to be a contract between the plaintiff and Olson Bros. The record contains a franchise agreement between Olson Bros. and Svoboda Sales Inc. that was in force in 1969 and a distributorship agreement with Svoboda Sales Company, a corporation, dated January 6, 1968. Carroll Olson, the vice-president of Olson Bros. and one of its major stockholders, testified that the printed form on which the contract with the plaintiff was prepared had been furnished by Olson Bros. or had been prepared by Svoboda "representing us." The executed form was considered to be a purchase order and was the document from which the system sold to the plaintiff was manufactured and delivered. This evidence was sufficient to sustain a finding that as between the plaintiff and Olson Bros., Svoboda was an agent of Olson Bros.

The plaintiff's evidence in regard to the defects in the system has been summarized. Olson Bros. took the position that most of the defects resulted from improper installation and adjustment of the system but there was evidence that some of the defects may have been due to improper design or construction. Since the installation was a part of the contract and had been performed by Svoboda as an agent of Olson Bros. the evidence was sufficient to sustain the finding against Olson Bros. as to the defects in the system.

With respect to damages, the plaintiff was awarded damages for crop damage, the expense of remedying the sag in the water pipe, and the expense involved in discovering and remedying defects in the system.

The general rule is that damages must be proved with as much certainty as the case permits and cannot be left to conjecture, guess, or speculation. Generally, the evidence must be sufficient to enable the court or jury to determine the amount of damages

with reasonable certainty. Crowder v. Allied Investment Co., 190 Neb. 487, 209 N. W. 2d 141.

The award for crop damage was based upon expert testimony as to the reduction in yield sustained by the plaintiff because of inability to irrigate in May and June of 1970 because of defects in the irrigation system. The plaintiff's evidence was that the crop was dry during May and June and suffered from a lack of water; that the yield from this field was 200 bags per acre as compared to the average yield of 250 bags per acre from all his fields; that the maturity of the crop and its harvest was delayed because of the lack of irrigation water in May and June; and that there was a reduction in price for the crop because of the later harvest.

The plaintiff's evidence was reasonably certain and was as specific as could be produced under the circumstances. Evidence offered by the defendant as to the average yield per acre in the county during 1970 was irrelevant and was properly rejected.

The trial court based its award for damages for the expense of remedying the sagging water pipe upon the cost of an additional tower, but limited it to the amount requested in the amended petition. The evidence will sustain an inference that if the extra length of the span between the pivot and the first tower, and the extra length of the span beyond the last tower were eliminated and an additional span and tower were added to the system, the overall length of the pipe could remain the same and the sag could be corrected. There might be other ways to correct the sag but the evidence presented a question of fact and the evidence supports the finding made.

The award of damages for the cost of discovering and remedying defects in the system consisted of $45 paid by the plaintiff to the neighbor lady who watched the system for the plaintiff during the time that it stopped at frequent intervals. This item

amounts to an expense incurred by the plaintiff in attempting to mitigate the damages and prevented the crop loss from being a greater amount.

There being no error in the record, the judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. SANFORD W. MCCONNELL, APPELLANT.

266 N. W. 2d 219

Filed May 31, 1978. No. 41535.

1. **Constitutional Law: Appeal and Error.** For a question of constitutionality of a statute to be considered in this court it must be properly raised in the trial court. If it is not raised in the trial court, it will be considered as waived in this court.
2. **Criminal Law: Statutes: Public Policy.** Penal statutes should be construed so as to give effect to the plain meaning of the words employed, and where of doubtful meaning, or application, the court should adopt the sense that best harmonizes with the context and the apparent policy and objects of the Legislature.
3. **Statutes: Words and Phrases.** In section 52-123, R. R. S. 1943, the words "with the intent thereby to deprive or defraud," should read as though it read "with the fraudulent intent thereby to deprive."

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

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

Paul L. Douglas, Attorney General, and Paul W. Snyder, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

SPENCER, J.

Defendant, Sanford W. McConnell, who is a building contractor, appeals his conviction under section 52-123, R. R. S. 1943, for failure to apply money re-

ceived in payment of lawful claims of laborers or materialmen. Defendant assigns as error the unconstitutionality of the statute, and that he was found guilty without proof of fraud. We reverse.

In a proposal dated May 29, 1974, Urban Builders, Inc., agreed to furnish labor and materials to construct a kitchen addition to a house owned by Dominic Romeo for a total price of $9,150. Payment terms were "10% upon acceptance of proposal, 40% upon start, balance due at completion." The proposal was signed by Sanford W. McConnell, who was the president of Urban Builders, Inc.

The proposal was delivered to the home of Romeo by John Boles, an employee of Urban Builders, Inc. He had estimated the job and was the supervisor of the project. The document does not bear the signature of Mr. Romeo for acceptance of the proposal. It does, however, contain a notation made by Boles, as follows: "$915.00 paid in cash as down payment." This notation is signed by J. Boles, as an acknowledgment that he received it.

The cash was delivered to Richard Slezak, who was the treasurer and accountant for Urban Builders, Inc. It was deposited in the corporation's operating fund. He drew the checks on the operating fund. These checks had another signature as well as his own. The money was used to pay a telephone bill, Boles' wages, and 1 week's salary for Slezak. The money was disbursed within 7 days after receipt. To his knowledge, no invoice or statement of work was ever presented by the subcontractor for the Romeo job.

Work was begun June 21, 1974, when Stier & Sons Construction, Inc., performed excavation work and laid the foundation. It ended June 28, 1974. Romeo's architect testified this work was satisfactory and complete except for a few things which had to wait until the carpenters began work. A mechan-

ic's lien in the amount of $1,953 for this work was filed September 19, 1974.

When no further work was forthcoming, Romeo and his architect went to defendant's office for a meeting. Romeo testified defendant told him the company was having financial problems and the job had been underbid. After consulting with the architect, Romeo agreed to an increase in the contract price to get the job done. An agreement to this effect was executed July 8, 1974. This agreement, so far as material herein, reads as follows: "Mr. Romeo has agreed to raise the contract price from $8,650.00 to $10,050 plus $500.00 contingency providing that Jim Windorski is the carpenter on the project to include rough and finish and to commence work on Friday, July 12 but not later than Monday, July 15th. A written schedule is to be delivered by July 18th 1974. Work is to be completed within 45 days. Payment is to be made directly to the carpenters and Urban Builders Inc. is to pay masonry contractor.

"All other work as per contract." This proposal is signed by Sanford W. McConnell, and like the other one bears no signature or acceptance by Romeo.

Work did not resume after the execution of this agreement. Romeo did not make any further payments. He testified his reason for not paying the 40 percent of the contract price called for in the original agreement was that defendant refused to provide a performance bond which Mr. Boles had promised at the time of contracting.

The architect, Norman Reece, was present when both of the agreements were executed. He believed that on each occasion there had been two documents and Romeo had signed the one retained by defendant. He testified Boles had stated at the time of contracting that there would be no problem in obtaining a performance bond and it "would be returned within several days, as soon as they had time to get

it." Reece further testified when the contract was modified, they were promised that a performance bond would be provided the following day. After the second agreement was signed, he was unable to contact defendant because the telephone had been disconnected. He called Boles at home several times and was repeatedly assured that a performance bond would be issued. He could not recall why work did not resume by July 15, 1974. He felt the carpenter he had recommended was working on another job at that time.

Defendant testified he was informed by Boles that a performance bond had been requested. He told Romeo at the meeting in his office that he had been negotiating with the bonding company but that no performance bond could be provided. Romeo agreed to waive any performance bond requirement. Defendant testified he also informed Romeo at this meeting that the carpenter selected for the job had raised his price but that another carpenter could be used. Romeo stated he wanted the carpenter, a Mr. Windorski, to perform the carpentry work and was willing to pay more money.

As to the reason work was not resumed after June 28, 1974, defendant testified: "At the time we met in the office, I told them that the carpenter was involved with another job and I told them I thought at the time that he would be out there within a week. Evidently it took him longer to get out on the job but I have no control to go out there and physically to force him to leave the one job to start the other. In the mean time, our phone was shut off. Mr. Reece talked to John Boles and he said because of the fact that our phone was shut off that we were terminated on the job. This was related to me by Mr. Boles."

Defendant also testified it is a common practice in the construction industry to "front load" a job by paying overhead expenses from the downpayment. He intended to pay Stier & Sons Construction, Inc.,

when he received the payment of 40 percent of the contract price from Romeo. Defendant requested payment of this amount at the meeting in his office. He testified: "I asked him (Mr. Romeo) the day he came into the office and I told him that we could not provide the performance bond. He said at that time he was keeping all copies of the contract. I had not had a copy of the contract myself. And he said that when Windorski got on the job that he would fund additional money."

Section 52-123, R. R. S. 1943, provides: "It shall be unlawful for any person, firm, or corporation who has taken a contract for the erection, improvement, repair, or removal of any house, mill, manufactory, or building of any kind for another, and has received payment in whole or in part upon such contract, to fail to apply the money so received, or so much thereof as may be necessary for that purpose, in payment of the lawful claims of such laborers or materialmen as could otherwise have a right to file a laborers' or materialmen's lien against such house or other structure, *with the intent thereby to deprive or defraud the owner or person so paying the person, firm or corporation receiving payment, of his funds without discharging the liens,* unless such person, firm, or corporation, taking such contract, shall have received and delivered to the owner of the property the written waiver of lien from all persons who otherwise would have a right to file a lien thereon. In any prosecution under sections 52-123 and 52-124 of the person, firm, or corporation so receiving payment, when it shall be shown in evidence that any lien for labor or materials existed in favor of any laborer or materialman and that such lien has been filed within the time and at the place as provided by law for the filing of such liens and that such person, firm, or corporation charged has received payment without discharging the lien to the extent of the funds received by him, the fact of acceptance of

such payment without having discharged the lien within ten days after receipt of such payment shall be prima facie evidence of intent to deprive or defraud on the part of the person, firm, or corporation so receiving payment." (Italics supplied.)

Defendant did not raise the constitutional issue in the trial court. It is raised for the first time on appeal. For a question of constitutionality of a statute to be considered in this court it must be properly raised in the trial court. If it is not raised in the trial court, it will be considered as waived in this court. State v. Jacobsen, 194 Neb. 105, 230 N. W. 2d 219 (1975).

We agree with the defendant. The evidence presented would indicate the trial court found the defendant guilty without proof of fraud. The following extracts from the comments of the court point up the basis for his decision: "I am not at all persuaded that the failure to pay the 40 percent is the reason it didn't start. On the $915.00, I am going to tell you that I think that under the statute and the law this was really trust funds. Those monies are to be devoted exclusively to this job. If there is overhead that you paid and telephone bills and everything that comes out of his profit if he has it, * * *. The only other thing that really bothers me is the question of intent to defraud. Now it is in the alternative with the intent to deprive or defraud the owner —. Now, that is the only thing that bothers me. I really feel that within the statute and within the evidence here and everything, the $915.00 is earmarked for this job. If he diverted it to some other use, he did it at his own risk * * * I am inclining (sic) to believe that an intent to deprive exists regardless of how well motivated he is when he diverts one person's money for another person — for another purpose."

In State ex rel. Norton v. Janing, 182 Neb. 539, 156 N. W. 2d 9 (1968), this court found the previous statute on this subject to be unconstitutional in that it

failed to require a finding of fraud and permitted a prosecution for a criminal offense for the failure to pay a contractual obligation without proof of fraud. We there stated: "It is impossible to frame a valid statute punishing by imprisonment the exercise of the right to religious liberty, or the right to petition for the redress of grievances, or the right to be exempt from imprisonment for debt except in cases of fraud. These are all constitutional rights, which cannot be abridged under the guise of legislation against crime. The exercise of them cannot be crime."

The statute involved in State ex rel. Norton v. Janing, *supra*, was repealed as unconstitutional and replaced by section 52-123, R. R. S. 1943, in 1969. The pertinent portion added is the following: "with the intent thereby to deprive or defraud the owner or person so paying the person, firm or corporation receiving payment, of his funds without discharging the liens." It is evident that this language was added to comply with our holding that it was only in cases of fraud where the statute could be upheld.

While, as the trial court noted, the language in section 52-123, R. R. S. 1943, is "with the intent thereby to deprive or defraud," it cannot be construed in the alternative as was done by the trial court.

As stated in State v. Holtan, 197 Neb. 544, 250 N. W. 2d 876 (1977): " 'Penal statutes should be construed so as to give effect to the plain meaning of the words employed, and where of doubtful meaning, or application, the court should adopt the sense that best harmonizes with the context and the apparent policy and objects of the Legislature.' State v. Reich, 186 Neb. 289, 183 N. W. 2d 223."

Properly construed, "with the intent thereby to deprive or defraud" should read as though it read "with the fraudulent intent thereby to deprive * * *." Unless so construed, it is still subject to the vice pointed out in State ex rel. Norton v. Janing, *supra*.

The test is one of bad faith. Unless it is so construed, the enactment of the new statute did not accomplish its purpose.

On the trial court's reference to trust funds, State ex rel. Norton v. Janing, *supra*, held: "We point out that section 52-119, R. R. S. 1943 (now section 52-123, R. R. S. 1943), does not make the general contractor an agent or trustee for laborers or materialmen in receiving payments from the property owner, nor does it make the amounts so received a trust fund * * *."

Without attempting to analyze the pros and cons of the fact that the owner himself did not live up to the contract, or discussing other issues involved, it is sufficient to say that the prosecution failed to sustain its burden of proving a crime. It failed to introduce evidence in regard to an essential element of the crime, the intent of the defendant to defraud. The judgment herein is reversed and the cause is remanded with directions for its dismissal.

REVERSED AND REMANDED.

THOMAS C. POLLEY ET AL., APPELLANTS, V. HAL G. SHOEMAKER ET AL., APPELLEES.

266 N. W. 2d 222

Filed May 31, 1978. No. 41547.

1. **Landlord and Tenant: Leases.** Landlords are not entitled to recover leased premises by resort to self-help, but must use the legal means provided for that purpose.
2. **Property: Conversion: Words and Phrases.** Conversion is any distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein.
3. _____: _____: _____. To constitute conversion there must be an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that it justifies the forced judicial sale to the defendant, which is the distinguishing feature of the action.

Appeal from the District Court for Douglas County: JOHN C. BURKE, Judge. Affirmed.

Frank Meares, for appellants.

Wallace Hopkins and James E. McCarthy of Marks, Clare, Hopkins & Rauth, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

BRODKEY, J.

This is an action brought by Thomas C. and Alice Polley, against Hal G. and Carol J. Shoemaker to recover damages for the alleged conversion of personal property and the breach of the right to peaceable and quiet enjoyment of leased premises. At the close of plaintiffs' evidence, the District Court sustained defendants' motion for a directed verdict, and dismissed plaintiffs' petition. Plaintiffs have appealed, contending that the trial court erred in sustaining defendants' motion for a directed verdict and in rejecting plaintiffs' offer of proof concerning damages for conversion of property. We affirm the judgment of the District Court.

On May 1, 1975, plaintiffs leased business property on Farnam Street, Omaha, Nebraska, from a realty company for a term of 3 years. Plaintiffs used the premises for the operation of a restaurant and lounge, and had been continuously leasing the property since 1949. On April 12, 1976, a fire severely damaged the leased premises, making them unfit for continued operation of plaintiffs' restaurant and lounge. Plaintiffs discontinued paying rent after the fire, as permitted by their lease, but did not abandon their leasehold.

The owner of the building then sold it to the defendants, and assigned plaintiffs' lease to the defendants on May 13, 1976. The original owner, at the request of plaintiffs, served them with a notice to vacate their leasehold on or before November 1, 1976.

The evidence and plaintiffs' testimony indicate that the notice was received by plaintiffs on April 30, 1976. The notice to vacate was in accordance with a provision of the lease which provided that the lessor had the right to terminate the lease upon 6 months notice if he intended to sell the building.

Relations between plaintiffs and the defendants were not entirely harmonious subsequent to the fire. On two occasions in June 1976, plaintiffs were requested to remove spoiled food from the restaurant because it was causing a health hazard. Plaintiffs apparently removed some of their property from the premises, but most of it, mainly trade fixtures, remained after the fire. In August, the parties entered into an agreement with respect to the lounge portion of the premises, and defendants paid plaintiffs $1,500 to vacate the lounge portion before the leasehold expired on November 1, 1976. No agreement was made with respect to the restaurant portion of the premises. Plaintiffs did vacate the lounge and defendants began to renovate it.

On October 6, 1976, plaintiffs were advised that defendants had changed the locks on all doors to the premises. In a letter to plaintiffs, defendants stated: "In an effort to preserve the building and to prevent further waste and deterioration, the locks on all doors to the premises are being changed. You may have access to the building during the daylight hours only and any further removal of property must be done under supervision of the new owner, * * *." The letter also advised the plaintiffs to return an item of property removed from the building, and to cease any unauthorized removal of property from the premises. The defendants refused to give the plaintiffs keys for the new locks. Plaintiffs filed this action 2 days later, alleging that the defendants had converted their personal property by changing the locks, and had breached their right to quiet enjoyment of their leasehold.

The evidence at trial indicated that plaintiffs did not return to the premises after October 6, 1976, nor did they make any attempt to remove their property from the building. There was no evidence that defendants denied plaintiffs access to the building during daylight hours, and plaintiffs admitted that they were never told they could not take their property. On December 10, 1976, defendants wrote the plaintiffs, stating that they were "once more requesting" that plaintiffs remove the fixtures from the restaurant, and that the fixtures would be removed and placed in storage if the plaintiffs did not respond. Plaintiffs did not reply, and apparently the fixtures were placed in storage on January 1, 1977. By that time, plaintiffs had opened another restaurant in a new location.

We first discuss plaintiffs' claim that they are entitled to damages for breach of a covenant of quiet enjoyment of the leased premises. The evidence presented in this case was clearly sufficient to permit a finding of unlawful interference with the peaceful use of the premises since defendants admitted changing the locks on the building before the lease expired and refusing to give plaintiffs a key. See Bass v. Boetel & Co., 191 Neb. 733, 217 N. W. 2d 804 (1974). In Bass we unequivocally stated that landlords are not entitled to recover leased premises by resort to self-help, but must use the legal means provided for that purpose. Although the "lockout" in this case was only partial, it nevertheless constituted an infringement of plaintiffs' right to peaceful and quiet enjoyment of the leased premises.

Although the evidence presented by plaintiffs was sufficient to permit a finding of breach of a covenant of quiet enjoyment, they did not produce competent evidence which would sustain an award of damages therefor. The partial lockout occurred approximately 3 weeks before the lease expired. At that time, it was apparent that plaintiffs would not re-

open their business at the location for the remainder of the lease. Plaintiffs admitted that the premises were of no significant use to them after the fire and after it became apparent that the lease would be terminated. Plaintiffs did not demonstrate any monetary loss due to the partial lockout, nor any compensable injury. Therefore, the District Court properly directed a verdict in favor of the defendants on this cause of action since plaintiffs failed in their proof of damages.

Plaintiffs' second cause of action was based upon a conversion of the trade fixtures and property left in the restaurant. The general definition of "conversion," long accepted in this and other jurisdictions, is that conversion is any distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein. See Jessen v. Blackard, 159 Neb. 103, 65 N. W. 2d 345 (1954). The "tort of conversion has been confined to those major interferences with the chattel, or with the plaintiff's rights in it, which are so serious, and so important, as to justify the forced judicial sale to the defendant which is the distinguishing feature of the action." Prosser, Law of Torts, § 15, at pp. 80, 81 (4th Ed., 1972). In Restatement, Torts 2d, § 222A, 431, it is stated: "(1) Conversion is an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel." Therefore it can be seen that not all exercise of dominion over or interferences with the use of chattels constitute conversion.

Plaintiffs rely on Bass v. Boetel & Co., *supra*, in support of their claim that the evidence in this case would support a finding of conversion. In Bass a tenant defaulted on rental payments, and the landlord *completely* dispossessed the tenant from the premises by changing the locks on the building. The

tenant's property was removed from the premises, and some of the property was delivered to a creditor of the tenant. The remainder of the property was placed in storage. The facts in Bass indicate that although the tenant was given an inventory list of the stored property, he was not given the opportunity to take possession of it. In that case, the landlord was apparently asserting a claim to the property on the ground that the tenant's rental payments were due and owing, as the lease in question provided for a lien on the tenant's property for unpaid rent in favor of the landlord.

In Bass we concluded that the seizure and detention of the tenants' property was unlawful, and that a person allegedly having a lien upon the property of another must enforce that lien by taking proper legal action rather than employing self-help. Although this court concluded that there had been a conversion, the cause was remanded for further proceedings on the issue of damages.

The facts in the instant case are significantly different from those in Bass. Defendants in this case were not asserting any interest in the plaintiffs' property when they denied plaintiffs access to the building during nighttime hours. At no time did they prohibit plaintiffs from removing the property, and plaintiffs admittedly made no request or attempt to take possession of the property. Moreover, defendants did not remove the property during the term of the lease.

After the lease expired, defendants requested in writing that plaintiffs remove the property. Plaintiffs made no attempt to do so. Two months after the lease expired, the property was stored by the defendants, but again there is no evidence that defendants were asserting a right in the property, or that plaintiffs were denied access to it. In fact, the record demonstrates that defendants desired the plaintiffs to take possession of their property.

On these facts, we believe the trial court was correct in concluding that the evidence would not support a finding of conversion. Defendants' interference with plaintiffs' property was not an intentional exercise of dominion or control over it which so seriously interfered with plaintiffs' rights to control it that the defendants may justly be required to pay plaintiffs the full value of the chattel. Other courts, on facts analogous to those in this case, have reached the same conclusion. See, Jordan v. Talbot, 55 Cal. 2d 597, 12 Cal. Rptr. 488, 361 P. 2d 20 (1961); Zaslow v. Kroenert, 29 Cal. 2d 541, 176 P. 2d 1 (1946); Fox v. American Propane, Inc., 508 S. W. 2d 426 (Tex. Civ. App., 1974).

We emphasize, however, that the general rule set forth in Bass remains viable. Where a landlord completely dispossesses a tenant of leased premises and denies the tenant access to his property, asserting an interest in that property, an action for conversion will lie.

In view of our conclusion that the trial court did not err in its decision that the evidence did not support a finding of conversion, we need not discuss plaintiffs' assignment that the trial court erred in refusing their offer of proof concerning the value of the property allegedly converted.

The judgment of the District Court is affirmed.

AFFIRMED.

MARIAN ABRAMSON, APPELLANT, V. FRANK W. BEMIS, AS ASSESSOR OF DOUGLAS COUNTY, NEBRASKA, ET AL., APPELLEES.

266 N. W. 2d 226

Filed May 31, 1978. No. 41562.

1. **Motions, Rules, and Orders: Statutes.** Dissolution of a restraining order is not a final order within the meaning of section 25-1902, R. R. S. 1943.

2. **Trial: Evidence: Appeal and Error.** In the absence of a bill of exceptions, it will be presumed that issues of fact presented by the pleadings were established by the evidence, that they were correctly decided, and in such situations the only issue that will be considered on appeal to this court is sufficiency of the pleadings to support the judgment.

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

David L. Herzog, for appellant.

Donald L. Knowles, Douglas County Attorney, H. L. Wendt, and John Q. Powers, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

CLINTON, J.

This is an action by a taxpayer and owner of real estate in Douglas County, Nebraska, against Frank W. Bemis, the assessor of Douglas County, and the county commissioners of Douglas County, who are the board of equalization. The purpose of the action was to enjoin the implementation of certain valuation increases of real property in precinct No. 40, in which the plaintiff's property is located. Pending trial on the merits, the court entered a "restraining order" barring implementation of the valuation increases.

On June 1, 1977, the court granted a motion of the defendants to dismiss the action because of alleged mootness. The transcript indicates that the board of equalization "rolled back" the valuations complained of. There was no hearing on the merits of the petition.

The only bill of exceptions before us is that containing the evidence presented in connection with the granting of the "restraining order." Whatever evidence, if any, was introduced to support the mootness claim is not before us.

Both parties in their briefs argue the merits of the alleged cause of action and procedural issues. At least two reasons exist which prevent this court from considering the issues raised and argued. The dismissal had the effect of dissolving the restraining order. Dissolution of a restraining order is not a final order within the meaning of section 25-1902, R. R. S. 1943. Manning v. Connell, 47 Neb. 83, 66 N. W. 17; Young v. City of Albion, 77 Neb. 678, 110 N. W. 706.

The trial court has not passed on the merits of the cause so we cannot do so on appeal. The only final orders in this case are the dismissal for mootness and the overruling of the motion for new trial. In the absence of a bill of exceptions, we must assume that a factual foundation exists which supports the dismissal for mootness. In the absence of a bill of exceptions, it will be presumed that issues of fact presented by the pleadings were established by the evidence, that they were correctly decided, and in such situations the only issue that will be considered on appeal to this court is sufficiency of the pleadings to support the judgment. Goger v. Voecks, 156 Neb. 696, 57 N. W. 2d 621.

AFFIRMED.

RALPH LEE ERAVI, APPELLANT, V. CHARLES BOHNERT, APPELLEE.

266 N. W. 2d 228

Filed May 31, 1978. No. 41568.

1. **Parent and Child: Infants: Minors.** The primary consideration in matters involving child custody, whether arising as a part of the proceedings for dissolution of marriage or otherwise, is that the award of custody should be determined in accordance with the test of what is in the best interests of the minor child.
2. _____: _____: _____. Generally speaking, it is in the best interests of the child that he should be in the care of his natural parent.
3. _____: _____: _____. Courts cannot deprive a parent of the

custody of a child merely because the parent has limited resources or financial problems, or is not socially acceptable, nor because the parent's life style is different or unusual. Neither can a court deprive a parent of the custody of a child merely because the court reasonably believes that some other person could better provide for the child.

Appeal from the District Court for Lancaster County: WILLIAM C. HASTINGS, Judge. Reversed and remanded with directions.

Joseph J. Cariotto, for appellant.

Richard L. Schmeling, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, BRODKEY, and WHITE, JJ., and KUNS, Retired District Judge.

WHITE, C. J.

This is a habeas corpus custody controversy between Ralph Lee Eravi, the father of Philip Michael Eravi, age 6, and Charles Bohnert, the brother of Philip's deceased mother, with whom Philip Michael is now living. The District Court, after an evidentiary hearing, placed the custody of Philip Michael in the respondent, Charles Bohnert. We reverse the District Court's decision and direct that the custody of Philip Michael be granted to his father, Ralph Eravi, the petitioner.

Philip Michael was 6 years old at the time of the trial. Although there is some dispute between the parties as to the amount of visitation which the father has had with Philip, and a controversy about his failure to adequately pay child support from February 1973, until September 1974, the essential facts relevant to the determination of this controversy are undisputed. Ralph and Phyllis Jean, the mother, were divorced on July 27, 1972. The mother died suddenly on August 1, 1976. The divorce decree, entered in Moberly, Missouri, awarded custody of the child to Phyllis Jean and ordered

Ralph to pay $10 per week child support. Phyllis Jean and Philip moved to Garnett, Kansas, where Phyllis secured employment and maintained a close relationship with her mother, Mrs. Hartman. Prior to August 9, 1974, Ralph's employment record was uncertain, if not erratic, and his primary occupation was that of a musician. In order to find regular employment, he migrated to California and since August 9, 1974, has been a line driver with Yellow Freight Systems, Barstow, California, and makes between $1,800 and $2,000 per month. He lives in a modern three-bedroom house, remarried on November 14, 1974, the new marriage is stable, his wife is also employed, and they support her 14-year-old son from a previous marriage. His wife can accommodate her working hours so that she would be home when the child comes from school. Although his job requires him to be on call for trucking assignments, he would, on the average, be home 2 or 3 days a week.

There is considerable evidence in the record as to the visitations by Ralph to his son in Kansas, and the contention that he has not established a proper father-and-son relationship with Philip Michael. It is clear that the nature of his job and the distance to his wife's residence prevented an ideal development of the relationship between the father and the son. He has visited his son more than twice, once for a period of 5 days, and has sent him presents each Christmas, and remembered him on his birthdays and at Eastertime. It appears that since August 1974, when he obtained regular employment, he has complied substantially with the support order for his son. The checks in evidence show that instead of paying only the $10 per week, as directed by the court, he raised the payments on his own accord to $50 per month and was catching up substantially upon his previous default in 1973 and 1974. Ralph was on a midsummer visit to the Middlewest in 1976

and, on calling to Phyllis to make arrangements for visiting his son, found out that she had suddenly died. He immediately proceeded to Garnett, Kansas, claimed custody of Philip Michael, and found that Philip Michael had been temporarily sent to Charles Bohnert's residence in Lincoln, Nebraska. He immediately proceeded to Lincoln, Nebraska, contacted the Bohnerts, and requested the custody of Philip Michael. On refusal, he employed counsel and immediately brought this habeas corpus action to recover the custody of his child.

The problem in this case is a rather usual one. After the death of the mother, Philip Michael was sent to his uncle's home. A natural and reciprocal attachment formed. It was, however, of short duration at the time of the trial in October 1976. We are dealing here with a boy of 6 years of age. The personal character and the custodial capacity of the respondent Bohnert, the uncle, and his wife, are undisputed. They have a fine home, a cultured background, and one child of their own. They have the willingness and the disposition to take care of Ralph Eravi's child.

Ralph Eravi, the father, was a complete stranger to the Bohnerts when he appeared in Lincoln to claim custody of his child. Predictively they were skeptical as to the father's background, and their primary concern was the best interests of Philip Michael. But more significantly, they simply felt that they could not deliver Philip Michael to the father unless there was competent proof which satisfied them that he was a fit and proper person and would properly perform the duties of a father toward Philip Michael. On cross-examination, the respondent, Charles Bohnert, testified as follows:

"Q. Well, Mr. Bohnert, it is your position then that that child is better off with you than with his father?

"A. My position is that if it comes down to an

equal home with me or the same, a good home with his father, and if the boy would want to live with his father then I feel that his father would probably be the best one for him if it came down to a choice to having an equal home with him having the same thing what I can provide for him. Whatever is best for the boy is what I am concerned with.

"Q. But you do not want the father to have an opportunity to have his own child; isn't that correct?

"A. That is not what I am saying. * * *

"A. *Well, yes, but am I supposed to turn — let him take the boy home with him without knowing anything about his home or anything?*

"Q. I didn't ask you that question, sir.

"A. Well, all right. Well, under the circumstances we made the decision to keep him at my house." (Emphasis supplied.)

Joyce Bohnert, Charles' wife, testified as follows:

"Q. Do you know whether your husband or anyone in his family has ever asked Mr. Eravi whether he wanted the child?

"A. No.

"Q. Is it your position that the father should be consulted in this matter?

"A. *I think that is what we are doing now.* I don't know exactly what you want me to answer.

"Q. In other words, what you are saying to this Court is that you could *not* make a decision as to whether the father should have the child, that you should *have to come to court* to determine that; is that right?

"A. That's right." (Emphasis supplied.)

It is quite clear from the testimony of the respondent and his wife, that they felt unsure of the reliability of Ralph Eravi to care for Philip Michael. At the same time they clearly recognized his right to the custody of his own child, providing his character and capacity for the job were demonstrated. They knew that Ralph lived in California, and they had no

means at their command or no knowledge upon which to base an informed judgment.

The trial court conducted an exhaustive investigation of both parties. The investigation of Ralph Eravi's home and family situation was conducted through the juvenile court of Lancaster County, Nebraska. In the record is a comprehensive report furnished by the welfare department of the County of San Bernardino, California. This investigation, briefly summarized, is that Ralph Eravi is a 40-year-old man, 6'2" tall, weighing 185 pounds, and in good general health. He is the third of seven children. He completed the 10th grade in school, quit at 16 years of age to go to work, and was in the service of the United States Navy for 4 years from 1955 to 1959. He is employed as a line driver earning $2,000 per month, has been so employed for 2 years and 4 months, his runs are from 8 to 32 hours in length, and he works approximately 55 hours per week. He is off for 8 to 36 hours after a particular run. On psychological testing the conclusion is, "His test reflects he is a well adjusted individual * * *." Nothing in the testing or interview reveals any emotional problems. The conclusion is, "He appears to be a well adjusted person." The results of this examination are the same with reference to his present wife. Psychological testing indicates that both husband and wife see themselves as well-adjusted persons, and the summary states, "The Taylor-Johnson test taken by Mrs. Eravi on herself indicates a well adjusted individual * * *." Nothing in the interviews or the testing indicates any problem in the marriage or the emotional well-being of Esther Eravi. The relationship between Billie Gilmer, the son by a former marriage of Mrs. Eravi, is excellent. The report states: "Billie Gilmer says Mr. Eravi is the greatest. This was said outside the presence of his mother and stepfather and would indicate he has very strong feelings of closeness towards Ralph

Eravi." The conclusion of this report is self-explanatory. It states: "All of the enclosed social data and witnesses' references would indicate this is a very fine family with a good reputation in the community. I can highly recommend this family to the Court as a proper placement for Philip Michael Eravi."

The primary consideration in matters involving child custody, whether arising as a part of the proceedings for dissolution of marriage or otherwise, is that the award of custody should be determined in accordance with the test of what is in the best interests of the minor child. Liebsack v. Liebsack, 199 Neb. 266, 258 N. W. 2d 130 (1977); Bigley v. Tibbs, 193 Neb. 4, 225 N. W. 2d 27 (1975); Kaufmann v. Kaufmann, 140 Neb. 299, 299 N. W. 617 (1941).

Although the facts in this case, as we have noted, are essentially undisputed, counsel, in the briefs, have engaged in a spirited and rather exhaustive argument on the assumption that there is polarized and irreconcilable conflict between the primary custodial right of the natural parent and the primary test of the best interests of the child. It would serve no purpose to review our past cases or attempt to fine hone a reconciliation of the different statements made in our opinions, when applied to the particular facts of those cases. It is true that the language in some of our opinions, when stated out of context of the particular case, would seem to require a choice between a polarized concept of absolute custodial possessory rights versus the overall best interests of the child. We have sought to resolve this apparent conflict by our recent pronouncement in Bigley v. Tibbs, *supra*, that the best interests of the child is the overriding and sole consideration in custodial disputes. In that case we specifically overruled any statements to the contrary in Raymond v. Cotner, 175 Neb. 158, 120 N. W. 2d 892 (1963), and our previous opinions. We have never stated, and do not

state now, that an important and significant consideration in the determination of the best interests of the child is the natural relationship and attachment between a parent and a child. Generally speaking, it is in the best interests of the child that he should be in the care of his natural parent. Terry v. Johnson, 73 Neb. 653, 103 N. W. 319 (1905). The ultimate decision must rest upon a careful evaluation of all the circumstances, considering the natural relationship of the parents to the child, in order to arrive at a conclusion which is in the best interests of the child.

The District Court, in an exhaustive and well-reasoned opinion, compared the two prospective homes and, considering the temporary attachment of Philip Michael to the Bohnerts immediately after the death of Philip's mother, came to the conclusion that the balance tipped in favor of Bohnert. There is evidence to support this conclusion. But as we see this case, it presents a question of law as to who has the superior right to the custody of a child of tender years, the father of the child or his uncle, each of whom is shown to be a proper and capable party for the exercise of such a duty. Assuming that the balance tips slightly in favor of Bohnert, from the economic, social, and cultural standpoint and the temporary attachment of the child, we feel that the long-range best interests of the child rest in placing his custody with his natural father, who also has a fine home and a comparable excellent environment in a moral, social, and economic sense for the proper rearing of his own child. The case presented to us is much stronger for giving importance to the parental relationship than the recent one of State v. Worrell, 198 Neb. 507, 253 N. W. 2d 843 (1977), wherein we said as follows: "Courts cannot deprive a parent of the custody of a child merely because the parent has limited resources or financial problems, or is not socially acceptable, nor because the parent's life style is different or unusual. Neither can a court deprive

a parent of the custody of a child merely because the court reasonably believes that some other person could better provide for the child."

We further observe that the temporary attachment to the Bohnerts' home arose, not out of any failure or neglect on the part of the father, but out of the exigency of the circumstances immediately following the sudden death of the mother and the need for emergency care of this child. There is also evidence in the record that Philip Michael is concerned about his future relationship with his father, if he stays with the Bohnerts. Undoubtedly there will be some trauma, which may not be avoided, in the breaking of the relationship between Philip Michael and the Bohnerts. But the risk of this minimal trauma cannot be equally measured against the importance of developing the momentum of a natural relationship of this boy with his father for the rest of both their lives.

We, therefore, come to the conclusion, and we are required to do so, independent of the trial judge's decision, that the custody of Philip Michael should be awarded to the father, and that the writ should issue. Considering all the circumstances in this case, including the reasoned and responsible position which Bohnert took, we hold that each party should pay his own costs in this court.

REVERSED AND REMANDED WITH DIRECTIONS.

CHARLES I. SCUDDER, APPELLEE AND CROSS-APPELLANT, V. LYDIA (HALVA) HAUG, APPELLANT AND CROSS-APPELLEE.

266 N. W. 2d 232

Filed May 31, 1978. No. 41612.

1. **Attorney and Client.** A client has the power to discharge his or her attorney without cause at any time, but remains liable for the reasonable value of the services rendered.

2. **Trial: Evidence: Appeal and Error.** A party may not properly assign as error on appeal the admission of evidence where no objection was made thereto at trial.
3. **Trial: Appeal and Error: New Trial.** Alleged errors of the trial court in an action at law, not referred to in a motion for new trial, will not be considered in this court on appeal.
4. **Trial: Witnesses: Evidence: Statutes.** A trial court may, on its own motion, call witnesses and interrogate witnesses pursuant to section 27-614, R. R. S. 1943.
5. **Trial: Appeal and Error.** In a law action tried to the court without a jury, the findings of the trial court have the effect of a jury verdict, and will not be disturbed on appeal unless clearly wrong.
6. **Trial: Evidence: Witnesses.** It is the duty of the trier of fact to weigh the evidence and the credibility of the witnesses.
7. **Rules of Supreme Court: Appeal and Error.** On appeal this court considers only alleged errors which are assigned and discussed in the appellant's brief.

Appeal from the District Court for Douglas County: RUDOLPH TESAR, Judge. Affirmed.

Lydia (Halva) Haug, pro se.

Charles I. Scudder, pro se.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

PER CURIAM.

Charles I. Scudder, plaintiff and appellee herein, filed this action against Lydia Haug, defendant and appellant herein, to recover the sum of $824.71 for legal services rendered to her. The defendant entered what was in effect a general denial, and filed a cross-petition, which was subsequently dismissed. See Scudder v. Haug, 197 Neb. 638, 250 N. W. 2d 611 (1977). After protracted pretrial proceedings, the case was set for trial on June 13, 1977. The defendant failed to appear for trial, and was found to be in default. After an evidentiary hearing on the merits of plaintiff's claim, the trial court found that he should be awarded $465 plus $12.75 in court costs. Defendant has appealed, contending that plaintiff was entitled to no recovery. Plaintiff has cross-appealed, contending that the trial court erred in fail-

ing to award him the full $824.71, prayed for. We affirm the judgment of the trial court.

At the trial the plaintiff testified that the defendant had engaged him to represent her in a domestic relations case for a fee of $35 per hour. Plaintiff produced time sheets indicating that from December 24, 1974, to February 18, 1975, he had rendered services to the defendant entitling him to $824.71 under a fee arrangement of $35 per hour. The time sheets reflected that the defendant had made an initial payment of $35 to the plaintiff. The plaintiff testified that he had been discharged by the defendant on February 18, 1975. Finally, plaintiff presented evidence that the fee of $824.71 was fair and reasonable for the services he had performed.

The defendant failed to appear at trial, and obviously did not present any evidence. The trial court, however, on its own motion and without objection by the plaintiff, introduced in evidence two mailgrams sent by the defendant to the plaintiff. The first, mailed on February 18, 1975, advised the plaintiff that he was discharged, but the defendant stated therein: "I will honor my agreement with you as far as the $500.00 fee is concerned." When questioned by the court about this mailgram at trial, the plaintiff stated that there was a misunderstanding on the part of the defendant, and that there was never an arrangement that he would charge her a flat fee of $500. The second mailgram, dated March 24, 1975, also referred to "the $500" to which the plaintiff was entitled. Plaintiff stated that he had had no discussions with the defendant between the mailing of the two mailgrams other than to advise her that there was no $500 fee arrangement.

The trial court found that there was a misunderstanding between the parties as to the fee to be charged to the defendant. The court concluded that the plaintiff was entitled to only $500, and noted that the "failure of the plaintiff to answer the Mailgrams

sent to the plaintiff, acknowledging that a flat fee was to be paid, bears much weight in this decision." The court awarded the plaintiff $500 plus court costs, less the $35 defendant had initially paid the plaintiff.

Plaintiff filed a motion for new trial, alleging that the judgment was contrary to law and not sustained by sufficient evidence because he had proved by a preponderance of the evidence that he was entitled to $824.71, and because the mailgrams were not sufficient to rebut his showing. In his motion for new trial, plaintiff did not allege that the trial court erred in receiving the mailgrams in evidence, or that he was entitled to a new trial on the ground of newly discovered evidence. The defendant also moved for new trial.

At the hearing on the motions for new trial, the plaintiff offered as newly discovered evidence a letter he had written to the defendant on February 21, 1975. In the letter he advised the defendant that his fee until the time of his discharge was $841.04, and that he would send her a final accounting. The court refused to accept the letter as newly discovered evidence. Both motions for new trial were overruled.

In her brief on appeal, defendant does not set forth any arguments which effectively demonstrate error on the part of the trial court. The only contention she discusses is that the trial court was biased and prejudiced against her, and that the trial judge should have recused himself from the case. We find nothing in the record that supports this contention, and it is without merit.

A client has the power to discharge his or her attorney without cause at any time, but remains liable for the reasonable value of the services rendered. Baker v. Zikas, 176 Neb. 290, 125 N. W. 2d 715 (1964). The defendant failed to appear for trial without good cause, and the evidence clearly establishes that plaintiff was entitled to the amount awarded by the

trial court for services he rendered to the defendant before he was discharged. Therefore the trial court was correct in entering judgment in favor of the plaintiff.

In his brief on cross-appeal, plaintiff contends that the District Court erred in (1) receiving into evidence, on its own motion, the two mailgrams without giving him prior notice of its intention to do so; (2) refusing to receive in evidence the letter offered by him at the hearing on the motion for new trial; and (3) improperly evaluating the evidentiary weight to be given to the mailgrams, failing to give normal probative weight and value to his evidence, and failing to decide the case on the preponderance of the evidence.

Neither plaintiff nor his counsel objected to the admission of the mailgrams into evidence at trial. Plaintiff also did not raise this issue in his motion for new trial. The well-established rule is that a party may not properly assign as error on appeal the admission of evidence where no objection was made thereto at trial. See, Breiner v. Olson, 195 Neb. 120, 237 N. W. 2d 118 (1975); Anderl v. Willsey, 193 Neb. 698, 229 N. W. 2d 46 (1975). It is also the rule that alleged errors of the trial court in an action at law, not referred to in a motion for new trial, will not be considered in this court on appeal. Torstenson v. Melcher, 195 Neb. 764, 241 N. W. 2d 103 (1976). Under these rules it is apparent that the plaintiff failed to properly preserve the issue concerning the admission of the mailgrams into evidence for appellate review.

Plaintiff nevertheless urges this court to consider the issue on the ground that it was "plain error" of which we may take notice despite the fact that it was not brought to the attention of the trial court. See § 27-103, R. R. S. 1943. Although there may be some question as to the correctness or propriety of the trial court's action, we do not believe that it was

such that this court should take notice of it as plain error.

We have stated that it is not the prerogative of the trial court to make an independent investigation of the issues between the parties when there is no provision of law providing for such an investigation, and that a trial judge should not engage in conduct which amounts to acting as counsel for one of the parties. Franks v. Franks, 181 Neb. 710, 150 N. W. 2d 252 (1967); Caldwell v. Wells, 174 Neb. 288, 117 N. W. 2d 486 (1962); 75 Am. Jur. 2d, Trial, § 87 at p. 191. A trial court may, however, on its own motion call witnesses and interrogate witnesses. See § 27-614, R. R. S. 1943. This discretionary power permits the trial court to bring out the true facts of the case, although the court must act impartially and not prejudice a party. 75 Am. Jur. 2d, Trial, § 88 at pp. 192, 193.

In the present case the mailgrams had been the subject of pretrial discovery, and the trial court obtained them from the plaintiff at the time of trial. Since the mailgrams were not the product of an independent investigation on the part of the trial court, this case is not analogous to Franks v. Franks, *supra*; or Caldwell v. Wells, *supra*. Further, it does not appear that the trial court was acting impartially in favor of the defendant, but rather that it was concerned with bringing out all relevant facts. Since the mailgrams were in the possession of the plaintiff, it cannot be argued that he was "surprised" by their contents, nor was plaintiff denied the opportunity to rebut their contents at trial. The action of the trial court was, in some respects, analogous to a judge asking questions of a witness or calling a witness on its own motion and asking questions.

Under these circumstances, we conclude that the admission of the mailgrams into evidence did not constitute plain error of which we should take notice

despite plaintiff's failure to properly preserve the issue for appellate review.

The second issue raised by the plaintiff is whether the judgment is supported by sufficient evidence. He contends that the trial court failed to give sufficient weight to his evidence, improperly evaluated the evidentiary weight to be given to the mailgrams, and failed to decide the case on the basis of the preponderance of the evidence.

Although the defendant did not appear at trial, plaintiff had the burden to prove up on his case. Where a defendant has filed an answer, the fact that he or she does not appear for trial does not entitle the plaintiff to a judgment without proof of the facts constituting his cause of action, unless the facts admitted by the defendant in the answer make out a prima facie case in plaintiff's favor. See First Nat. Bank of Sutton v. Sutton Mercantile Co., 77 Neb. 596, 110 N. W. 306 (1906). In a law action 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. Katleman v. U. S. Communities, Inc., 197 Neb. 443, 249 N. W. 2d 898 (1977). Therefore the issue presented is whether the findings of the trial court were clearly wrong.

There can be no question that the plaintiff viewed the fee arrangement as one for $35 an hour, as is evidenced by his testimony and time sheets. The mailgrams, however, indicate that the defendant considered the agreement to be that she was to pay the plaintiff a flat sum of $500 for the services he rendered. Since there was no written contract executed by the parties, there was clearly a question of fact as to whether there was a meeting of the minds about the fee to be charged.

It was the duty of the trial court, as trier of fact, to weigh the evidence and the credibility of the witnesses. Brewer v. Case, 192 Neb. 538, 222 N. W. 2d 823 (1974). In a law action tried to the court without

a jury, it is not within the province of this court to weigh the evidence or resolve conflicts in the evidence. Snay v. Snarr, 195 Neb. 375, 238 N. W. 2d 234 (1976). To justify this court interfering with the findings of the trier of fact, the preponderance of the evidence must be so clearly and obviously contrary to the findings that it is the duty of this court to correct the mistake. Dort v. Swift & Co., 193 Neb. 606, 228 N. W. 2d 588 (1975).

In the present case we cannot say that the preponderance of the evidence was clearly and obviously contrary to the findings of the trial court. Although the evidence was clear that the plaintiff viewed the fee arrangement as one for $35 per hour, the same is not true with respect to whether there was a meeting of the minds concerning the fee. The fact that plaintiff testified the defendant's mailgrams were the result of a misunderstanding on her part did not require that the trial court conclude the parties had in fact agreed to a fee arrangement of $35 per hour.

Plaintiff further contends that the trial court erred in refusing his offer of rebuttal evidence to counter the contents of the mailgrams. Plaintiff argues that it was error for the trial court not to receive the letter he offered, at the hearing on the motions for new trial, as newly discovered evidence. The court clearly did not err in this regard. The plaintiff made no showing that the letter was, in fact, newly discovered evidence, and did not comply with section 25-1144, R. R. S. 1943, which requires that a party moving for a new trial on the ground of newly discovered evidence file an affidavit. The trial court did not, at the time of trial, deny the plaintiff an opportunity to rebut the contents of the mailgrams, and at trial plaintiff made no request for additional time to rebut them.

In the "conclusion" paragraphs of plaintiff's brief he requests an award of prejudgment interest and an attorney's fee. The only statutory authority for

such an award in a case like the present one is section 25-1801, R. R. S. 1943. That section provides that a plaintiff who successfully prosecutes a claim for $2,000 or less for services rendered and other types of claims, shall, in addition, be entitled to an attorney's fee in an amount specified in that statute if he has presented a demand for payment of the claim ninety days prior to the institution of the suit, *and if he has employed an attorney.* That section also provides that the plaintiff shall be entitled to recover interest at the rate of 6 percent per annum from the date of presentation of the demand. While the record shows plaintiff employed an attorney in the trial court, he appeared pro se on this appeal.

Although plaintiff may have been entitled to recover interest and an attorney's fee in the trial court under section 25-1801, R. R. S. 1943, the record reveals he has failed to comply with Rules 8a1(3) and 8a2 (3) of the Revised Rules of the Supreme Court, 1977, by failing to assign as error and discuss in his brief as cross-appellant that the trial court erred in failing to award interest and an attorney's fee to him. It is the rule that this court considers on appeal only alleged errors which are assigned and discussed in appellant's brief. See State v. American Theatre Corp., 196 Neb. 461, 244 N. W. 2d 56 (1976). Moreover, since the plaintiff did not employ counsel on appeal, under section 25-1801, R. R. S. 1943, he is not entitled to an award of attorney's fees in this court.

We affirm the judgment of the District Court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LAVELL FLYE, APPELLANT.

266 N. W. 2d 237

Filed May 31, 1978. No. 41760.

1. **Criminal Law: Post Conviction.** Under the Post Conviction Act,

the sentencing court has discretion to adopt reasonable procedures for determining what the motion and the files and records show, and whether any substantial issues are raised, before granting a full evidentiary hearing.

2. _____: _____. Where no controverted material issues of fact are presented, the facts as shown by the record are undisputed, the taking of oral testimony on the motion could not add to or detract from the information shown by the court's files and records, and the court is satisfied that the prisoner is entitled to no relief, no hearing is required under the provisions of the Post Conviction Act.
3. **Criminal Law: Post Conviction: Burden of Proof.** In a post conviction proceeding the files and records of the case must affirmatively establish that the prisoner is entitled to no relief or an evidentiary hearing must be granted.
4. _____: _____: _____. In a post conviction case the burden is upon the petitioner to show a basis for relief.
5. _____: _____: _____. Bald assertions of insanity, unsubstantiated by a recital of credible facts and unsupported by the record, are wholly insufficient and justify the summary dismissal of a post conviction proceeding.

Appeal from the District Court for Box Butte County: ALFRED J. KORTUM, Judge. Affirmed.

Leo M. Bayer, for appellant.

Paul L. Douglas, Attorney General, and Gary B. Schneider, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

MCCOWN, J.

The defendant filed a motion for post conviction relief and a motion for appointment of counsel in the District Court for Box Butte County. Without granting an evidentiary hearing the District Court overruled both motions. Following the overruling of a motion for new trial, the District Court appointed counsel for the defendant on appeal and this appeal followed.

On July 13, 1976, the defendant was arraigned and pleaded guilty to a charge of stabbing with intent to kill. On July 15, 1976, defendant was sentenced to 12 to 15 years imprisonment. On a direct appeal to this

court the defendant contended that the District Court erred in failing to order a new presentence investigation report, and that the sentence was excessive. The conviction and sentence were affirmed by this court on March 30, 1977. State v. Flye, 198 Neb. 171, 252 N. W. 2d 141.

On July 5, 1977, the defendant commenced this post conviction proceeding. His motion for post conviction relief, filed pro se, alleged in relevant part that the trial court, in July 1976, abused its discretion in failing to order a hearing to determine defendant's mental competency. He also alleged that his court-appointed counsel was incompetent because he failed to request a hearing on defendant's mental competency and permitted the defendant to plead guilty.

The record establishes that at the defendant's arraignment on July 13, 1976, the trial court fully complied with all requirements set out in State v. Turner, 186 Neb. 424, 183 N. W. 2d 763. The factual basis for the plea was that defendant stabbed his stepfather in the back because he had refused to advance the defendant $10.

The record also reflects that at the sentencing hearing the District Court, on its own motion, entered into evidence copies of reports by the Panhandle Mental Health Center and the Lincoln Regional Center made in the spring of the preceding year in connection with a previous charge against the defendant for assaulting an officer. None of the reports contained a diagnosis of any psychosis or insanity in a legal sense. The reports instead indicated mild mental retardation, poor judgment, and habitual excessive drinking. Pursuant to a plea bargain, the defendant pleaded guilty to a reduced charge of assault and battery in the 1975 case and was placed on 30 days probation.

In November 1975, the defendant pleaded guilty to a charge of enticing a child from her parents, and on

January 27, 1976, he was sentenced to 1 year probation, including 60 days in the county jail. He was on probation at the time of the charge here.

At the sentencing hearing in the case now before us the District Court reviewed the previous and current presentence investigation reports and the reports and information referred to above, and imposed the sentence of 12 to 15 years imprisonment.

When the defendant filed his motion for post conviction relief, the District Court entered an order requiring the State to file its response within 7 days and provided in the order that the matter would be submitted to the court on July 26, 1977. The State filed its response on July 19, 1977, a copy of which was served on the defendant. On July 26, 1977, the court entered the files and records in the case into evidence and overruled defendant's motion to vacate and set aside his conviction and sentence, and the motion for appointment of counsel. The journal entry states no ground or reason.

The defendant's contention is that the order of July 26, 1977, overruling defendant's motion for post conviction relief was entered after an evidentiary hearing, and that the defendant had no notice of the hearing and had no opportunity to be present. Defendant's assumption that it was an evidentiary hearing gains some support from the journal entry which noted that the files and records were "received into evidence" and fails to note any specific reason for overruling the motion for post conviction relief. Nevertheless, it is clear that no evidentiary hearing was granted or held in this case, and that the only ground upon which the defendant's motion could be overruled was based on the files and records of the case.

As early as State v. Woods, 180 Neb. 282, 142 N. W. 2d 339, we held that under the Post Conviction Act, the sentencing court has discretion to adopt reasonable procedures for determining what the motion

and the files and records show, and whether any substantial issues are raised, before granting a full evidentiary hearing. Where no controverted material issues of fact are presented, the facts as shown by the record are undisputed, the taking of oral testimony on the motion could not add to or detract from the information shown by the court's files and records, and the court is satisfied that the prisoner is entitled to no relief, no hearing is required under the provisions of the Post Conviction Act.

It would have been preferable that the journal entry affirmatively show that the motion and the files and records of the case show that the defendant was entitled to no relief. Nevertheless, the journal entry specifically shows that the court considered only the motion and the files and records of the case. In a post conviction proceeding the files and records of the case must affirmatively establish that the prisoner is entitled to no relief or an evidentiary hearing must be granted. State v. Svoboda, 199 Neb. 452, 259 N. W. 2d 609. In the case at bar the only grounds for overruling the defendant's motion without an evidentiary hearing must rest upon whether the files and records of the case affirmatively establish that the defendant was entitled to no relief. In a post conviction case the burden is upon the petitioner to show a basis for relief. State v. Robinson, 194 Neb. 111, 230 N. W. 2d 222. The files and records in this case show that the defendant failed to establish any basis for post conviction relief.

In State v. Virgilito, 187 Neb. 328, 190 N. W. 2d 781, we held that bald assertions of insanity, unsubstantiated by a recital of credible facts and unsupported by the record, are wholly insufficient and justify the summary dismissal of a post conviction proceeding. In the case now before us the record fails to establish a basis for a claim of insanity, and affirmatively establishes that the defendant is entitled to no relief.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. HENRY F. STEED, JR., APPELLANT.

266 N. W. 2d 240

Filed May 31, 1978. No. 41805.

1. **Criminal Law: New Trial: Appeal and Error.** When an alleged error was not raised in a motion for a new trial, the defendant is now precluded from raising the alleged error on appeal to this court.
2. **Criminal Law: Sentences.** 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.
3. **Courts: Sentences.** The sentencing judge is not bound by the recommendation of the probation officer in determining the sentence to be imposed.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Affirmed.

Anthony S. Troia, for appellant.

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

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

WHITE, C. THOMAS, J.

The defendant was charged with two counts of uttering a forged instrument. The defendant waived a jury trial. The District Court for Douglas County found the defendant guilty of one count of forgery and dismissed the second count. Defendant was sentenced to the Nebraska Penal and Correctional Complex for a period of not less than 5 years nor more than 10 years, and ordered to pay a fine of $10.

In his first assignment of error, the defendant challenges the sufficiency of the evidence to sustain his conviction. Defendant failed to raise this issue in a motion for a new trial. Since this alleged error was not raised in a motion for a new trial, the defendant is now precluded from raising the alleged error on appeal to this court. See State v. Price, 198 Neb. 229, 252 N. W. 2d 165. We have nevertheless considered the entire record. The evidence overwhelmingly supports the court's decision.

In his second assignment of error, the defendant contends his sentence was excessive. To support his contention, the defendant points to a report of one probation officer who recommended that the defendant be fined in lieu of incarceration. At the time of his conviction for forgery, the defendant was on federal probation and has a long history of criminal activity.

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. See State v. Stroud, 200 Neb. 27, 261 N. W. 2d 777. Section 28-601, R. R. S. 1943, provides for the imposition of a sentence of from 1 to 20 years and a fine up to $500 for uttering a forged instrument. Here, the sentence of the defendant was within the permissible limits. The sentencing judge is not bound by the recommendation of the probation officer in determining the sentence to be imposed. See State v. Holzapfel, 192 Neb. 672, 223 N. W. 2d 670. The sentence reflects the trial judge's consideration of the defendant's prior criminal record.

Having found there is clearly no abuse of discretion, the judgment of the District Court is affirmed.

AFFIRMED.

NEBRASKA LEAGUE OF SAVINGS AND LOAN ASSOCIATIONS ET AL., APPELLANTS, V. DON J. MATHES, AS THE STATE INVESTMENT OFFICER OF THE STATE OF NEBRASKA, ET AL., APPELLEES.

266 N. W. 2d 720

Filed June 7, 1978. No. 41427.

Constitutional Law: Savings and Loan Associations: Political Subdivisions. Article XI, section 1, Constitution of Nebraska, prohibits the deposit of funds by subdivisions of the State of Nebraska in mutual savings and loan associations, whether federal or state chartered, except those funds authorized under Article XV, section 17 (2), Constitution of Nebraska.

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

William Jay Riley of Fitzgerald, Brown, Leahy, Strom, Schorr & Barmettler, for appellants.

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

William B. Brandt of Brandt & Horan, for amicus curiae.

Heard before SPENCER, BOSLAUGH, MCCOWN, CLINTON, and WHITE, JJ., and FAHRNBRUCH and VAN PELT, District Judges.

MCCOWN, J.

This is a declaratory judgment action in which the plaintiff associations, both federal and state chartered, seek a declaratory judgment as to whether Article XI, section 1, Constitution of Nebraska, prohibits the deposit of funds by subdivisions of the State of Nebraska in savings and loan associations, except as authorized by Article XV, section 17 (2), Constitution of Nebraska. The District Court for Lancaster County found that Article XI, section 1, of the Constitution of the State of Nebraska, prohibits the depositing by subdivisions of the State of Nebraska of funds in such associations, except under Arti-

cle XV, section 17 (2); and that Article XI, section 1, of the Constitution of Nebraska, does not violate the Constitution of the United States. Plaintiffs have appealed.

The case was tried upon a stipulation of fact and law. The plaintiff, Nebraska League of Savings and Loan Associations, represents all savings and loan associations in the State of Nebraska, both federal and state chartered. Plaintiff, Commercial Federal Savings and Loan Association, is a federally chartered savings and loan association, and the plaintiff, Nebraska State Savings and Loan Association, is a state chartered building and loan association. All of such savings and loan associations operate under the authority of federal or state statutes. The federal savings and loan associations are regulated by the Federal Home Loan Bank Board, and they are empowered to raise capital in the form of savings deposits, shares, or other accounts, as are authorized by their charter or by regulations of the Federal Home Loan Bank Board. They may issue passbooks, certificates of deposit, or other evidence of savings accounts as are authorized. The state chartered building and loan associations operate under sections 8-301 to 8-355, R. R. S. 1943, and supplements thereto.

The great majority of the federal associations in Nebraska are subject to provisions that deposits in such an association create a creditor-debtor relationship between the depositor and the federal association, and upon liquidation of such federal association, depositor creditors have the same priority as general creditors of the association. The remaining federal associations and the state associations do not place depositors in the same classification as general creditors. Depositors in all the associations, state or federal, however, are entitled to share in any surplus assets remaining upon liquidation.

All accounts in the federal savings and loan asso-

ciations and 12 of the 17 state associations are insured by the Federal Savings and Loan Insurance Corporation. Deposits in those associations by state subdivisions would be insured to the extent of $100,000.

A deposit in a savings and loan association is not a contribution to permanent capital. The accounts are subject to withdrawal on notice as required by the various bylaws. None of the associations, state or federal, issue any stock which can be negotiated as an ordinary stock certificate, and depositors have no interests in the association which can be negotiated or assigned as an ordinary stock certificate. The depositor of an account in all the associations, both federal and state, becomes a member of the association, has the right to vote for the officers thereof, and has the right to share in the assets of the association upon liquidation.

The critical question on this appeal is whether a subdivision of the state which deposits funds in an account in a savings and loan association owns an interest in the association which is prohibited by Article XI, section 1, of the Nebraska Constitution. Article XI, section 1, of the Nebraska Constitution, provides: "No city, county, town, precinct, municipality, or other sub-division of the state, shall ever become a subscriber to the capital stock, or owner of such stock, or any portion or interest therein of any railroad, or private corporation, or association." That section of the Constitution was adopted in 1875 and has remained unchanged since that date. Approximately 40 states have similar constitutional provisions. In general, such provisions were designed to prevent the use of public funds to aid in the construction of railways, canals, and similar undertakings. The intent was to keep states and political subdivisions out of private business. See Thaanum v. Bynum Irr. Dist., 72 Mont. 221, 232 P. 528.

All the savings and loan associations involved

here, whether state or federal, are corporations. Although the laws of many states permit both "stock" and "mutual" savings and loan corporations, savings and loan, or building and loan, corporations in Nebraska are "mutual" rather than "stock" corporations. While there is some attempt to argue that corporations engaged in the savings and loan business are quasi-public in nature, there can be no doubt that they are all privately organized, privately managed, and privately operated. They are not instrumentalities of government, but are operated for the benefit of their members, whether borrowers or depositors. Mutuality is the basic and essential principle of a savings and loan association. See Saunders v. State Savings & Loan Assn., 121 Neb. 473, 237 N. W. 572. Savings and loan associations, both federal and state chartered, are private corporations and associations within the meaning of the constitutional provision.

A deposit in a mutual savings and loan association creates interests distinctly different than the interests created by a deposit in a bank. A depositor in a bank becomes a creditor of the bank. The right to interest on a savings account represents payment by the bank for the use of the money, and a depositor has no ownership interest of any sort in the bank, nor any legal right to control it. A deposit in a mutual savings and loan association, on the other hand, constitutes the acquisition of an ownership interest and a right to share in the control and the profits or losses on liquidation of the mutual savings and loan association.

Two states have passed upon the issues involved here with opposite results. In State ex rel. Graham v. City of Olympia, 80 Wash. 2d 672, 497 P. 2d 924, the Supreme Court of Washington interpreted a constitutional provision which provided that no county, city, or other municipal corporation shall "become directly or indirectly the owner of any stock in or

bonds of any association, company or corporation." The Washington statutes provided for substantially similar rights to depositors in mutual associations as are provided under Nebraska statutes. The Washington court determined that the deposit of public funds by the defendant city did not constitute a purchase of stock in a private corporation in violation of the Washington Constitution. The majority opinion concluded that although a depositor in a savings and loan association acquires a proprietary interest in the association, the depositor does not make a permanent contribution to capital because the deposit is withdrawable and the interest held is not assignable. The court also relied upon the conclusion that voting and other membership privileges accompanying a deposit in a savings and loan association were purely incidental to the purpose for the transaction. The court therefore held that a shareholder of a savings and loan association was not a stockholder in the same sense as a stockholder of an ordinary corporation. The dissenting judges pointed out that under Washington statutes the deposit of funds in a savings and loan association has the same basic incidents of ownership as the ownership of capital stock in other private corporations.

The case of Michigan Savings & Loan League v. Municipal Finance Commission, 347 Mich. 311, 79 N. W. 2d 590, reaches the opposite result. The constitutional provision there provided: "The State shall not subscribe to, nor be interested in the stock of any company, association or corporation." A Michigan statute specifically authorized investment in savings and loan associations by school districts, which are state agencies. The Michigan court held that the constitutional provision prohibited investment in the stock of corporations, and that the intention was to place investments in the stock of all corporations, associations, and companies in the same category. The court held that school districts could not invest

funds in state or federal savings and loan associations, and that the statute permitting such investment was invalid. Statutory language in Michigan similar to the Nebraska statutes referred to "depositors" as "shareholders" and to "accounts" as "share accounts." The Michigan court distinguished deposits in banks from deposits in savings and loan associations because ownership interests were inseparable from the deposit of funds in a mutual savings and loan association.

The section of the Michigan Constitution challenged in the Municipal Finance Commission case was later amended to provide an exception for funds accumulated to provide retirement or pension benefits for public officials and employees. In 1977, a three-judge federal district court refused to reinterpret the constitutional provision referred to in the Municipal Finance Commission case, and held that the constitutional provision, as amended, prohibits depositing state funds, other than the excepted pension and endowment funds, in any institution such as a savings and loan association in which the State would thereby acquire an ownership interest. That court also sustained the constitutional provision against an equal protection challenge under the United States Constitution grounded on a difference in treatment of banks and savings and loan associations. First Federal Savings & Loan Assn. of Detroit v. Michigan Municipal Finance Commission, No. 5-71249 (D. Mich., Oct. 3, 1977).

Nebraska also added a constitutional amendment in 1966 providing for investment of retirement and pension funds. Article XV, section 17, Constitution of Nebraska, provides: "Notwithstanding section 3 of Article XIII or any other provision in the Constitution:

"(1) The Legislature may provide for the investment of any state funds, including retirement or pension funds of state employees and Nebraska

school employees in such manner and in such investments as it may by statute provide; and

"(2) The Legislature may authorize the investment of retirement or pension funds of cities, villages, school districts, public power districts, and other governmental or political subdivisions in such manner and in such investments as the governing body of such city, village, school district, public power district and other governmental or political subdivision may determine but subject to such limitations as the Legislature may by statute provide."

Section 77-2341, R. R. S. 1943, authorizes political subdivisions of Nebraska to invest surplus funds in any securities which are authorized by law for investment of the educational funds of the state. Under sections 72-202 and 72-1246 (9), R. R. S. 1943, the investments authorized by section 77-2341, R. R. S. 1943, include accounts in state or federal savings and loan associations in the State of Nebraska to the extent that such accounts are insured by the Federal Savings and Loan Insurance Corporation.

The District Court did not specifically decide the validity of section 77-2341, R. R. S. 1943, but ruled that Article XI, section 1, of the Nebraska Constitution, prohibits the depositing by subdivisions of the State of Nebraska of funds in savings and loan associations, except funds authorized under Article XV, section 17 (2), of the Constitution.

Essentially, the plaintiffs' position here is that unless a deposit of funds in a savings and loan association becomes a part of the permanent capital of the association, and is represented by a stock certificate, the depositor does not become an owner of an interest in a private corporation prohibited by Article XI, section 1. We disagree.

There could be little question that the constitutional prohibition would apply to the acquisition of any ownership interest in the capital stock of a savings and loan association if a "stock" corporation rather

than a "mutual" corporation were permited under the laws of this state. The essential distinction between the two forms of corporate operation in the area involved here is that in the "stock" association, the ownership and control of the capital and assets of the association is in the stockholders, while in the "mutual" association, the ownership and control of the capital and assets of the association is in the hands of the depositors.

The historical background warrants the conclusion that the constitutional provision was directed against the acquisition by a subdivision of the state of any ownership or proprietary interest in a private corporation or association. A multitude of cases hold that the owner of an account in a mutual savings and loan association has a proprietary interest therein. See, Tcherepnin v. Knight, 389 U. S. 332, 88 S. Ct. 548, 19 L. Ed. 2d 564; Wisconsin Bankers Assn. v. Robertson, 190 F. Supp. 90, 294 F. 2d 714, cert. den., 368 U. S. 938, 82 S. Ct. 381, 7 L. Ed. 2d 338.

In Family Savings & Loan Assn. v. Stewart, 232 Md. 424, 194 A. 2d 118, the court said: "Every member or shareholder is entitled to the same rights and privileges, and must bear the same burdens as every other member or shareholder holding the same class of investment security. The shareholders have the same rights as stockholders in ordinary corporations for profit, except in so far as they may be enlarged or restricted by special legislation, the Statute under which the corporation is incorporated, its charter or its by-laws. * * * In other words, the members or shareholders own the association and are entitled to conduct its affairs through their officers and Board of Directors."

In historical context the language used in the constitutional provision impels the conclusion that it was intended to prohibit any state subdivision from acquiring any proprietary or ownership interest in any private corporation or association, whether that

interest was represented by a stock certificate or by some other form of representation of ownership. The constitutionally prohibited acquisition of any interest applies to any interest in private associations, which ordinarily issue no capital stock, to the same extent as it does to corporations which issue capital stock. Article XI, section 1, Constitution of Nebraska, prohibits the deposit of funds by subdivisions of the State of Nebraska in mutual savings and loan associations, whether federal or state chartered, except those funds authorized under Article XV, section 17 (2), Constitution of Nebraska.

The plaintiffs also contend that such an interpretation constitutes an unreasonable classification as between banks and savings and loan associations in violation of the Fourteenth Amendment to the Constitution of the United States. It is necessary only to point out that Article XI, section 1, Constitution of Nebraska, makes no distinction whatever between banks, savings and loan associations, or other private corporations. It makes no attempt to regulate savings and loan associations or banks but only regulates subdivisions of the State of Nebraska. Article XI, section 1, Constitution of Nebraska, does not violate the Constitution of the United States.

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

AFFIRMED.

LLOYD R. KITRELL ET AL., APPELLANTS, V. BOARD OF ADJUSTMENT OF THE CITY OF HASTINGS, NEBRASKA, ET AL., APPELLEES.

266 N. W. 2d 724

Filed June 7, 1978. No. 41532.

1. **Property: Zoning: Ordinances.** A private tennis court is an eligible accessory use in a one-family residential district under the provisions of the zoning ordinance of the City of Hastings.

2. **Property: Zoning: Ordinances: Words and Phrases.** A tennis court and appurtenances as an accessory use is a "structure" within the meaning of the zoning ordinance of the City of Hastings and is an exception to the "backyard" provisions of the ordinance, but is subject to the pertinent height restrictions of the ordinance.
3. **Property: Zoning: Ordinances.** In the law of zoning, although a use may in a nontechnical sense not be an accessory use where not customary, it is nevertheless an accessory use where defined by the ordinance to be such.
4. **Zoning: Ordinances: Appeal and Error.** A decision of the proper official or board in interpreting and applying a zoning ordinance will not be disturbed on appeal to this court unless it is illegal or from the standpoint of fact is not supported by the evidence, is arbitrary, unreasonable, or clearly wrong.

Appeal from the District Court for Adams County: NORRIS CHADDERDON, Judge. Affirmed as modified.

William G. Cambridge, for appellants.

Michael E. Sullivan of Helmann & Sullivan, for appellees Sherman et al.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

CLINTON, J.

The issues on this appeal are determined by construction of various provisions of the zoning ordinance of the City of Hastings, Nebraska. The appellees, Sherman, applied to the City of Hastings for a building permit to construct a paved tennis court and appurtenances in the backyard of their residence located in a single-family residential area of Hastings. The building inspector of the city issued the building permit. The appellants, Kitrell et al., whose residences are on lots contiguous to that of the appellees, appealed to the board of adjustment pursuant to provisions of section 19-907, R. R. S. 1943, and the pertinent parts of the zoning ordinance, objecting to the issuance of the building permit on various grounds. The board of adjustment dismissed the appeal and appellants then appealed to the District Court under the provisions of section 19-

912, R. R. S. 1943. The District Court affirmed the action of the board of adjustment and appellants then appealed to this court.

The proposed tennis court and its appurtenances are to consist of a hard-surface court, 120 feet by 46 feet in dimension, net posts and anchors, a 10-foot high chain link backstop at the ends and along the east side, and lights for night play mounted on two utility poles on the east side of the court. The dimensions of appellees' lot are as follows: 104.04 feet on the street or front line, 164.08 feet on the rear lot line, and sides of 145 feet and 156.93 feet. The rear lot line of the lots of two of the appellants abut the rear lot line of the appellees' property. The lot of the third appellant corners that of the appellees.

The assignments of error raise the following issues: (1) Is the proposed tennis court under the provisions of the ordinance an eligible accessory use to the main use as a residence? (2) Are the backstops "fences" within the ordinance definition of that term, thus requiring a separate permit, and if they are fences, are the specifications in violation of the ordinance? (3) Are the tennis court and its appurtenances structures within the meaning of that term in the ordinance and, if so, did the specifications violate the terms of the ordinance in any way?

The provisions of the zoning ordinance (paraphrased except where otherwise indicated by quotation marks) which must be considered in connection with the first issue are the following:

Section 40-26: In one-family residential districts, permitted use includes the following: "(a) Dwellings, one family. . . .

"(i) Accessory uses, . . . customarily incident to the above uses and located on the same lot therewith, not involving the conduct of a business or industry."

Section 40-6 provides for the erection of buildings and structures and uses "clearly incidental to, and

customarily and commonly associated with the main permitted use of the premises." Such incidental uses are to be "maintained and conducted as to not produce noise, vibration, concussion, dust, dirt, fly ash, odor, noxious gases, heat or glare which is injurious, damaging, unhealthful or disturbing to adjacent property, or the users thereof, ..." The latter provision is a general one pertaining to incidental use in various types of zoning districts, including industrial districts. With reference to one and two-family residential districts, 40-6 (b) (6) specifically permits: "Such additional uses as private swimming pools, gardens, customary pets, television and radio receiving antennae not exceeding sixty feet in height, . . . play equipment, . . . and other similar uses. Any accessory use other than a residential building or garage, which exceeds ten feet in height shall be located a distance inside the property line at least equal to one third its height. . . .

"The determination of the eligibility of a proposed use as an accessory use shall be made by the building inspector, an appeal can be made from his decision" to the board of adjustment.

The appellants first argue that a tennis court is not a customary use in a one-family residential district and is on that account not an eligible accessory use. The record establishes that there are three private tennis courts in the City of Hastings. One is part of an apartment complex; the second is located on the grounds of a monastery; and the third, on the grounds of a private college.

Whether a use is customary is not to be determined merely by a mathematical count. State v. Smiley, 182 Neb. 211, 153 N. W. 2d 906. Numbers are merely a factor which may be considered. More important is the fact of whether the accessory use is a recognized incidental use. Obviously, most residential lots are not sufficiently large to accommodate a tennis court, hence such use is not customary

in any significant numerical sense. The lot of the appellees is suitable, and the record establishes that it was selected as a home site with a view to the construction of a tennis court as an incidental use. More important perhaps is the fact that the ordinance explicitly recognizes as accessory uses "swimming pools . . . and other similar uses." It would be impossible to say that a swimming pool is, under the ordinance, not an accessory use merely because no swimming pools in fact existed. A tennis court on premises adequate to accommodate such a facility is a "similar use" under the provisions of the ordinance. Although a use may in a nontechnical sense not be an accessory use where not customary, it is nevertheless an accessory use where defined by the ordinance to be such. See City of Sheridan v. Keen, 34 Colo. App. 228, 524 P. 2d 1390, where it is said: "Although . . . the use may be 'incidental' within the non-technical meaning of that word, it cannot be an incidental use in legal terms if the governing body has expressly prohibited it (by zoning ordinance)." It would seem to follow that where the use is expressly permitted, the fact that it is not customary does not deprive it of its status as an accessory use. There is a dearth of authority on the matter and we find only one case on point. A tennis court was held to be an accessory use in Hardy v. Calhoun, 383 S. W.2d 652 (Tex. Civ. App.); Annotation, 32 A. L. R. 3d 424 at p. 435.

The appellants contend that the building inspector and the District Court erred in not determining that the use as a tennis court was an impermissible use under section 40-6 because it would "produce noise, . . . concussion, . . . heat or glare, . . . disturbing to adjacent property, ..." We certainly cannot say that as a matter of law the determination was in error or clearly wrong as a matter of fact. The ordinary noise and other possible factors of annoyance arising from use of a tennis court are not likely to be

greater than those from other permitted or specified recreational uses such as a swimming pool.

The building inspector was correct in determining that a tennis court was an eligible accessory use under the provisions of the Hastings ordinance. A decision of the proper official or board in interpreting and applying a zoning ordinance will not be disturbed on appeal to this court unless it is illegal or from the standpoint of fact is not supported by the evidence, is arbitrary, unreasonable, or clearly wrong. Weber v. City of Grand Island, 165 Neb. 827, 87 N. W. 2d 575.

The sections of the ordinance which must be considered in connection with the second issue are the following: Section 40-11 defines the term "fence" in the following language. "(1) Fence or Screen Wall. Any vertical structure, other than a building or plant material, which is for the purpose of obstructing visual observation, or for the purpose of obstructing pedestrian, automotive or animal movement, or for the purpose of beautification, and which is attached to the ground or to a building, but excluding retaining walls." The section then classifies fences in three categories in accordance with the degree of perforation. It likewise lays down certain general requirements for fences in eight categories. The first seven categories all refer to fences on lot lines and regulate height and perforation according to position on lot lines. Fences as so defined and regulated cannot be constructed without the filing of an application containing certain descriptive material and the issuance of a building permit. In this case, no building permit was issued for the backstop and no application containing the requisite information was filed.

Appellants contend that the backstops are fences and since they exceed fence construction height requirements, and since no permit has been issued, they would violate the ordinance.

It is to be noted that "fence or screen wall" is defined in the ordinance in terms of purpose, i.e., "for the purpose of obstructing visual observation, or for the purpose of obstructing pedestrian, automotive or animal movement, or for the purpose of beautification." The record establishes clearly that the backstop is an integral and usual part of tennis court construction and has none of the purposes mentioned. Its purpose is to retain errant balls and thus facilitate their retrieval and prevent balls from going upon adjacent premises. The backstops are not located on property lines but about 10 feet therefrom.

This court was confronted with a similar question in Shamberg v. City of Lincoln, 174 Neb. 146, 116 N. W. 2d 18. In that case the Lincoln ordinances did not regulate construction of tennis courts but did regulate fences. The ordinance, however, did not give any special definition of fences and the city sought to prosecute Shamberg because his tennis court backstop exceeded the height limitations for fences. We said there: "What then is the plain and ordinary meaning of the word 'fence' as used in the ordinance?

"The word is defined in 36A C.J.S., Fences, § 1, p. 258: 'A fence is an inclosing structure, composed of any material which will present a sufficient obstruction, about a field or other space intended to prevent intrusion from without or straying from within.'

"It is hardly to be said that a tennis ball is something 'straying from within' although the purpose of the backstops and sidestops is to keep a tennis ball within the playing area. Substantially the same definition is found in 22 Am. Jur., Fences, § 2, p. 513, and in Webster's Unabridged Dictionary (2d Ed.), p. 674.

"How did the city in the ordinance construe the term so far as tennis court 'backstops' are concerned? In section 209 of ordinance No. 5636 of the City of Lincoln, it provided that a building was 'any

structure,' etc. In section 246, it provided that a structure included 'backstops for tennis courts,' and in the same area here involved, it provided that no building should exceed 35 feet in height. Obviously, the city in enacting the ordinance did not consider a tennis court backstop to be a fence within the meaning of the ordinance but a structure subject to the code height for a building." We granted an injunction enjoining the prosecution.

The record here establishes that appellees propose to place on the backstops movable cloth, somewhat translucent, windscreens. The record also establishes that the building inspector was unaware that this item was to be included in the construction. He has not passed on that item, so we do not. The building inspector was correct in determining that the backstops were not fences within the meaning of the ordinance.

The appellants next argue that the tennis court is a "structure" within the terms of the ordinance, and, as a structure, the tennis court and its appurtenances violate the "height" of structures and "yard" restrictions of the zoning ordinance.

Section 40-1 defines a structure as follows: "Anything constructed or erected, which requires location on the ground, or attached to something having a location on the ground; including, but not limited to signs, and excepting utility poles, fences and retaining walls."

Section 40-27 defines height and area regulations as follows: "In District R-1 the height of buildings, the minimum dimensions of lots and yards and the minimum lot area per family permitted on any lot, shall be as follows:

"(a) Height. Buildings or structures shall not exceed thirty-five feet, and shall not exceed two and one-half stories in height. . . .

"(d) Rear yards. The depth of the rear yard shall be at least twenty percent of the depth of the

lot, but such depth need not be more than thirty feet."

Section 40-4 provides that except as hereinafter provided: "(a) No building or structure shall be erected, constructed, reconstructed, moved or altered, nor shall any building, structure or land be used for any purpose other than is permitted in the district in which such building, structure or land is situated.

"(b) No building or structure shall be erected, constructed, reconstructed, moved or altered to exceed the height or area limit or the yard or parking requirement herein established for the district in which such building or structure is located."

Section 40-1 defines yard as follows: "Yard. An open space at grade between a building and the adjoining lot lines, unoccupied and unobstructed by any portion of a structure from the ground upward, *except as otherwise provided.*" (Emphasis supplied.)

It seems clear to us that from a reading of the various interrelated provisions of the zoning ordinance, the following is clear. Accessory uses are clearly exceptions to the "yard" and "height" requirements of the ordinance. A yard is to be unobstructed "except as otherwise provided." "Swimming pools . . . and other similar use" are literally structures within the meaning of the term "structure" as defined in the ordinance, but obviously come within its "otherwise provided" provision, for if they did not, there could be no accessory uses and these are clearly provided for. So far as height requirements are concerned, the ordinance has a special provision relating to accessory use which we quoted during our discussion of the first issue, viz: "Any accessory use other than a residential building or garage, which exceeds ten feet in height shall be located inside the property line (a distance) at least equal to one-third its height." From the record it

appears that since the poles and lights may be in violation of this requirement, the height of these appurtenances, if they are to be constructed, must be reduced in height to conform.

AFFIRMED AS MODIFIED.

FRED W. MUSTION, APPELLEE, V. REX EALY, DOING BUSINESS AS EALY SPRAYING SERVICE, APPELLANT.

266 N. W. 2d 730

Filed June 7, 1978. No. 41538.

1. **Aviation: Negligence: Damages.** A person operating an airplane for spraying crops must use due care to perform such operations under such conditions and in such manner as not to cause injury to others. A person who negligently sprays a liquid or powder containing a dangerous proportion of poison in such a manner as to endanger the animals of another person in the immediate vicinity may be held liable for damage resulting therefrom.
2. **Trial: Evidence: Verdicts.** In a law action 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 testing the sufficiency of the evidence to support a verdict, it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in his favor, and he should have the benefit of every inference that can reasonably be drawn therefrom.
3. **Trial: Evidence: Witnesses.** It is not the province of this court to weigh the evidence or the credibility of witnesses, or resolve conflicts in the evidence; those functions are for the trier of fact.
4. **Trial: Evidence: Verdicts.** It is the duty of the trial court to decide a question as a matter of law and direct a verdict only where the facts adduced to sustain a finding are such that but one conclusion can be drawn therefrom when related to the applicable law.
5. **Trial: Evidence: Burden of Proof.** A party who relies on circumstantial evidence for proof of causation need not exclude any other possible causes, but the evidence must be sufficient to fairly and reasonably justify the conclusion that a cause of action has been proved.
6. **Trial: Evidence: Witnesses.** Evidence relating to an illustrative experiment is admissible if a competent person conducted the experiment, and apparatus of suitable kind and condition was utilized, and the experiment was conducted fairly and honestly. The

trial court has a wide discretion in determining whether evidence relating to illustrative experiments should be received, and a judgment will not be reversed because of the admission or rejection of such evidence unless there has been a clear abuse of discretion.

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

Maupin, Dent, Kay, Satterfield, Girard & Scritsmier, for appellant.

Eldridge Michael Freeman, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

BRODKEY, J.

Plaintiff, Fred W. Mustion, commenced this action against Rex Ealy to recover a money judgment for damages allegedly caused by the defendant's negligent spraying of a poisonous chemical on plaintiff's land. The defendant denied the allegations of the petition, and the case proceeded to trial in the county court of Red Willow County. Defendant's motions for a directed verdict were overruled by the trial court, which found in favor of the plaintiff and awarded him a money judgment of $3,100. Defendant appealed to the District Court, which also found in favor of the plaintiff and affirmed the judgment of the county court. Defendant has now appealed to this court, contending that the lower courts erred in (1) overruling his motion for a directed verdict; (2) finding in favor of the plaintiff when the evidence was not sufficient to sustain the judgment; (3) admitting into evidence testimony concerning an experiment and allowing improper rebuttal testimony; and (4) computing damages. We affirm the judgment of the District Court.

Plaintiff is a farmer who resides near McCook, Nebraska, where defendant operates an airplane crop-spraying service. On the morning of May 15, 1975, plaintiff and his son observed a spray plane fly-

ing over their pasture, where they kept 24 cows and 24 calves and maintained water tanks. On that date, the defendant was spraying the crops of plaintiff's neighbor. Two days later, all plaintiff's cows, and one calf, became severely ill.

A veterinarian who was called to treat the animals first diagnosed the sickness as grass tetanoi, although some of the symptoms he observed in the cows were abnormal for that sickness. Treatment for grass tetanoi was ineffective. Six of the cows died, and two of them became disabled and refused to claim their calves. Plaintiff was required to purchase substitute milk for the calves, as well as additional feeds and grains for the sick animals.

After the sickness in the animals occurred, the plaintiff examined the two water tanks in the cow pasture, and smelled the distinctive odor of Thimet, a chemical compound used for rootworm control, with which the plaintiff was familiar. Plaintiff also observed a film on the surface of the water which appeared to be a diesel mixture, sometimes used in crop spraying because it drifts down well and does not evaporate. Plaintiff's observations led him to the conclusion that his cows may be suffering from Thimet poisoning.

Samples were taken from the water tanks, the alfalfa in the adjacent field of plaintiff's neighbor, and from the soil in the neighbor's cornfield. An autopsy was performed by a veterinarian on one of the deceased cows. Tests showed that both the soil and alfalfa samples contained traces of Thimet. A concentration of three parts per million of Thimet was found in one of the water tanks, and .5 parts per million of Thimet was found in the rumen contents of the deceased cow. Although the amount of Thimet found in the rumen contents at the time of the autopsy was not sufficient to cause poisoning, there was testimony that Thimet deteriorates rapidly in toxicity and that the amount of Thimet previously in-

gested by the cow before the tests may have been sufficient to be toxic.

The veterinarian testified that in his opinion the deaths and sickness of the cows were caused by Thimet poisoning. He based this opinion on his observations of the cows' symptoms, their rapid recovery when removed from the water tanks and pasture, and the presence of Thimet in the water tanks and the rumen contents. He testified that if the cows were exposed to water containing six parts per million of Thimet, normal consumption of ten gallons per day for two days would produce the effects of poisoning in the cows. The veterinarian was of the view that the water had six parts per million of Thimet in it on May 15, 1975, since it contained three parts per million a week later, and the "half-life" of Thimet in normal drinking water with a pH of 7 at 68 degrees Fahrenheit would be approximately 7 days.

Although the defendant admitted spraying the crops of plaintiff's neighbor on May 15, 1975, he denied spraying with Thimet. Defendant and the pilot of the plane testified that Aatrex Atrazine, a nontoxic chemical used for weed control, was used to spray, and that Thimet was never used. There is evidence in the record that it is illegal to apply Thimet from spray planes in Nebraska. Defendant stated that he had once possessed two bags of Thimet, that he had used one for experimental purposes before the relevant time period in question, and that he had destroyed the remaining bag when he learned that he had been accused of spraying Thimet. Evidence was presented concerning the safeguards employed to avoid spraying on areas other than the target areas, and the pilot testified that he "could not recall" flying over plaintiff's pasture. The plaintiff's neighbor testified that he had never applied Thimet to his land.

An expert witness, testifying on behalf of the defendant, disagreed with the veterinarian's conclu-

sion that plaintiff's cows had suffered from Thimet poisoning. He was of the opinion that there was not enough scientific data available to make an accurate diagnosis of toxic poisoning, and he also questioned the veterinarian's view that the water tanks probably contained 6 parts per million of Thimet on May 15, 1975. The expert acknowledged, however, that some of the symptoms displayed by the cows, such as diarrhea, were not usual symptoms of grass poisoning.

Finally, plaintiff produced evidence of the value of the cows that had died, the loss in value of the disabled cows, the increased feed expenses due to the sickness, and the cost of hiring the veterinarian to treat the cows.

There can be no question that a person operating an airplane for spraying crops must use due care to perform such operations under such conditions and in such manner as not to cause injury to others. A person who negligently sprays a liquid or powder containing a dangerous proportion of poison in such a manner as to endanger the animals of another person in the immediate vicinity may be held liable for damage resulting therefrom. See, Annotation, Liability for Injury Caused by Spraying or Dusting of Crops, 37 A. L. R. 3d 833; 8 Am. Jur. 2d, Aviation, § 101, p. 730; Rose v. Buffalo Air Service, 170 Neb. 806, 104 N. W. 2d 431 (1960).

The first question presented in this case is whether the evidence was sufficient to permit a finding that the defendant negligently sprayed Thimet on plaintiff's land. We note at the outset the rules applicable to our review of questions concerning the sufficiency of the evidence. In a law action 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. Dial Realty, Inc. v. Cudahy Co., 198 Neb. 641, 254 N. W. 2d 421 (1977). In testing the sufficiency of the evidence to

support a verdict, it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in his favor, and he should have the benefit of every inference that can reasonably be drawn therefrom. C I T Financial Services of Kansas v. Egging Co., 198 Neb. 514, 253 N. W. 2d 840 (1977). It is also the rule that it is not the province of this court to weigh and resolve conflicts in the evidence or weigh the credibility of witnesses; those functions are for the trier of fact. Merten v. Pedersen, 199 Neb. 34, 255 N. W. 2d 869 (1977). Finally, it is the duty of the court to decide a question as a matter of law and direct a verdict only where the facts adduced to sustain an issue are such that but one conclusion can be drawn therefrom when related to the applicable law. See Branch v. Wilkinson, 198 Neb. 649, 256 N. W. 2d 307 (1977).

Defendant contends that the evidence was insufficient to show that he had sprayed Thimet on plaintiff's land and therefore a verdict should have been directed in his favor. Defendant and his pilot unequivocally denied spraying Thimet on the day in question, and plaintiff's neighbor stated that he had never used Thimet on his land. Nevertheless, the uncontroverted evidence is that Thimet was found in plaintiff's water tanks, and in the soil and alfalfa samples taken from the adjacent fields of plaintiff's neighbor. The Thimet was found in these places shortly after the defendant sprayed the neighbor's crops and shortly after the spray plane was seen over plaintiff's pasture. As noted by the District Court, it is pertinent that Thimet was discovered in both the water tanks and in the alfalfa and soil samples. This fact indicates that the Thimet most likely came from an aircraft, for if it had washed on the land from another farm, it would not be in the water tank, and if it had somehow gotten into the water, it would not be on the land.

Although the proof of defendant's negligently

spraying Thimet on plaintiff's land was circumstantial, such evidence may properly be used to establish a cause of action. A party who relies on circumstantial evidence for proof of causation need not exclude any other possible causes, although the evidence must be sufficient to fairly and reasonably justify the conclusion that a cause of action has been proved. Conjecture, speculation, or choice of quantitative possibilities are, of course, not proof. There must be something more which would lead a reasoning mind to one conclusion rather than to the other. See, Pendleton Woolen Mills v. Vending Associates, Inc., 195 Neb. 46, 237 N. W. 2d 99 (1975); Wilgro, Inc. v. Vowers & Burback, 190 Neb. 369, 208 N. W. 2d 698 (1973); J. R. Watkins Co. v. Wiley, 184 Neb. 144, 165 N. W. 2d 585 (1969).

In the present case we cannot say that the finding of the District Court was clearly wrong. The evidence presented, although circumstantial, was sufficient to fairly and reasonably justify the conclusion that the defendant had sprayed Thimet on plaintiff's land. Therefore, the defendant, contrary to his contention, was not entitled to a directed verdict on the ground that the plaintiff had failed to prove that he had sprayed Thimet, and the court was correct in overruling his motion therefor.

Defendant also contends that the evidence was insufficient to permit a finding that the cows suffered from Thimet poisoning. He relies heavily on the conclusions of his expert witness previously referred to, and argues that the opinion testimony of the veterinarian was based on speculation and conjecture.

Under the principles concerning the issue of sufficiency of evidence discussed above, we believe this contention is without merit. The veterinarian's opinion that the cows suffered from Thimet poisoning was based on his observation of the cows, his treatment of them, the presence of Thimet in the water tanks and the rumen contents of the deceased

cow, his understanding of the concentration of Thimet which would be toxic, and his calculation that the cows were exposed to a toxic dose of Thimet. The fact that defendant's expert witness was of a different opinion is not decisive. This court will not set aside a verdict where there is conflicting evidence unless the verdict is clearly wrong. Merten v. Pedersen, *supra*. In the present case we believe that the evidence was sufficient to fairly and reasonably justify the conclusion that the cows suffered from Thimet poisoning rather than grass poisoning or any other sickness.

Defendant next argues that the trial court erred in receiving into evidence testimony concerning an experiment which showed the pH level of water in plaintiff's stock tanks in June 1975, and in permitting the plaintiff to adduce rebuttal evidence which he contends should have been made a part of plaintiff's case-in-chief.

Evidence relating to an illustrative experiment is admissible if a competent person conducted the experiment, and apparatus of suitable kind and condition was utilized, and the experiment was conducted fairly and honestly. Shover v. General Motors Corp., 198 Neb. 470, 253 N. W. 2d 299 (1977). See, also, Herman v. Midland Ag Service, Inc., 200 Neb. 356, 264 N. W. 2d 161 (1978). The trial court has a wide discretion in determining whether evidence relating to illustrative experiments should be received, and a judgment will not be reversed on account of the admission or rejection of such evidence unless there has been a clear abuse of discretion. Hawkins Constr. Co. v. Matthews Co., Inc., 190 Neb. 546, 209 N. W. 2d 643 (1973); Shover v. General Motors Corp., *supra*.

The results of the experiment were admitted in evidence in this case only for the purpose of showing the pH level of the water in plaintiff's tanks under conditions similar to those on May 15, 1975. We can-

not say that the trial court abused its discretion in admitting this evidence to the extent that its admission calls for reversal. The test results were of general relevance to issues raised in the action, and offered for a limited purpose.

We also find no error with respect to defendant's claim concerning improper rebuttal evidence. On rebuttal, plaintiff elicited testimony from his neighbor concerning the fact that the neighbor claimed he had never used Thimet on his land. Even assuming that such evidence would have been proper upon plaintiff's case-in-chief or should have been introduced at that time, it is within the sound discretion of the trial court to allow such evidence to be admitted on rebuttal. Cromer v. Farmland Service Coop, Inc., 198 Neb. 355, 252 N. W. 2d 635 (1977). The trial court clearly did not abuse its discretion in this case.

Defendant also argues that the county court improperly relied on the doctrine of res ipsa loquitur. The record does not support this contention. In any event the District Court, in reviewing the case, specifically stated that res ipsa loquitur had not been pleaded and therefore would not be considered.

Defendant's final contention is that plaintiff did not properly prove damages with respect to the loss or disability of his cows. As did the District Court, we find this contention to be without merit. There was evidence of the value of a healthy cow at the time of the poisoning which caused the death of six cows, as well as evidence of the diminished value of the two disabled cows. There was also evidence of the loss of value in the orphan calves. Having reviewed the record, we conclude that the evidence supports the award of $3,100.

We conclude that the District Court was not clearly wrong in deciding that the plaintiff had met his burden of proof with respect to the issues of negligence, proximate cause, and damages; and that no

reversible errors occurred with respect to the admission of evidence. We, therefore, affirm the judgment of the District Court.

AFFIRMED.

JOHN M. DUNLAP, APPELLANT, V. RANDY L. COLEMAN, APPELLEE.

266 N. W. 2d 527

Filed June 7, 1978. No. 41540.

Pedestrians: Motor Vehicles: Negligence. It is the pedestrian's duty as an ordinarily cautious and prudent person, to look to the right and to the left in crossing an intersection to observe cars coming from either direction. However, he has a right to assume that vehicles approaching from the rear will exercise ordinary care in keeping a lookout for him and there is no duty imposed upon him to maintain a lookout to the rear to avoid a charge of negligence.

Appeal from the District Court for Lancaster County: SAMUEL VAN PELT, Judge. Reversed and remanded.

Norman Krivosha of Ginsburg, Rosenberg, Ginsburg & Krivosha, for appellant.

M. J. Bruckner of Marti, Dalton, Bruckner, O'Gara & Keating, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

SPENCER, J.

This is an action to recover damages for personal injuries sustained in an automobile-pedestrian accident. Plaintiff, John M. Dunlap, appeals from a jury verdict in favor of the defendant driver, Randy L. Coleman. We capsulize plaintiff's 11 assignments of error as follows. The trial court erred in: (1) Failing to direct on the issue of liability; (2) erroneously instructing the jury to determine whether defendant's negligence proximately contributed to

plaintiff's injuries; and (3) improperly instructing the jury on the duties of a pedestrian and failing to give instructions concerning the duties of a motorist. We reverse.

The accident occurred at the intersection of 16th and K Streets in Lincoln, Nebraska, at approximately 9 p.m. on April 15, 1972. Sixteenth Street is a one-way street going south. K Street is a one-way street going east. Plaintiff was struck by defendant's vehicle while crossing K Street in a cross-walk from the northeast side to the southeast side of the intersection. Defendant had been driving south on 16th Street and was turning from the second lane left onto K Street when he hit the plaintiff. It was the right front of the car which struck plaintiff.

Dunlap testified he had attended a function at Pershing Auditorium with his wife and daughter on the evening of the accident. It was raining when they prepared to leave so he decided to walk to the car and return with it to the Auditorium to pick up his family. The car was parked on the south side of K Street about one-third of a block east of 16th Street. Plaintiff, who was wearing a dark rain coat, walked south from the Auditorium down the sidewalk on the west side of 16th Street. Upon reaching K Street he crossed 16th Street, proceeding from the northwest corner of the intersection to the northeast corner. Plaintiff did not recall seeing any traffic on 16th Street at this time.

Dunlap waited for the traffic signal to change before attempting to cross K Street. The light turned green. He looked to his right and to his left before he proceeded into the crosswalk. He did not look behind him to the north, the direction from which the Coleman car was coming. Plaintiff walked 10 feet into the crosswalk where he was struck by defendant's vehicle. Plaintiff did not see the vehicle before the impact, which is not unusual because it was behind him even at the time of the impact.

Coleman testified he was driving south on 16th Street at a speed of 25 to 30 miles per hour. He had the headlights on and the windshield wipers were operating. He was traveling in the second lane from the east, which at the K Street intersection is an optional left-hand turn lane. The first lane is a mandatory turn lane. He signaled his intention to turn and slowed his vehicle to 10 to 15 miles per hour. He started to turn into the lane second from the north on K Street when he suddenly saw plaintiff on the hood of his car. He traveled another 15 feet after hitting plaintiff. He did not see plaintiff before hitting him. The point of contact between plaintiff and the vehicle was the right portion of the hood.

Defendant argues this is a case of first impression because this court has never considered or passed on the duty of a pedestrian crossing at an intersection of two one-way streets. He argues that because our law imposes on a pedestrian in a place of safety the duty to look in the direction from which danger can be anticipated, and a further duty not to move from a place of safety into that of danger, a pedestrian is required not only to look to the left and to the right but also to his rear at the intersection of two one-way streets. He further contends if plaintiff had looked to the rear he would have seen or should have seen defendant's car. It was on this premise the trial court refused to direct liability against the defendant although defendant admitted he was guilty of negligence which was a proximate cause of the accident.

Defendant's theory of defense was that plaintiff was guilty of contributory negligence which was also a proximate cause. At the close of plaintiff's case plaintiff moved for a directed verdict on the issue of liability. He again renewed his motion at the close of the defendant's case and all the evidence.

In instruction No. 2 the jury was informed plaintiff had alleged in his amended petition that defendant

was negligent in failing to maintain a proper lookout; in operating his vehicle at a rate of speed greater than was reasonable under the circumstances then existing; in failing to keep his vehicle under reasonable control; and in failing to yield the right-of-way to plaintiff. The jury was also told defendant admitted "he was negligent in one or more of the particulars alleged by plaintiff." The jury was then instructed that plaintiff was required to prove "the negligence of the defendant was the proximate cause or a proximately-contributing cause of the collision."

Defendant in his amended answer states: "1. Admits that an accident occurred at or about the time and place set forth in plaintiff's petition and admits that defendant was guilty of negligence that was a proximate cause of the accident, but alleges that the plaintiff was guilty of contributory negligence which also was a proximate cause of the accident, which negligence was more than slight as a matter of law in the following particulars:

"a. In failing to keep a proper lookout;

"b. In proceeding from a place of safety to a place of danger."

The trial court instructed on these defenses. It was prejudicial error to do so.

Our law has not been refined to apply a different pedestrian rule on one-way streets. Our rule has long been that it is the pedestrian's duty as an ordinarily cautious and prudent person, to look to the right and to the left in crossing an intersection to observe cars coming from either direction. However, he has a right to assume that vehicles approaching from the rear will exercise ordinary care in keeping a lookout for him, and there is no duty imposed upon him to maintain a lookout to the rear to avoid a charge of negligence. See, Halliday v. Raymond, 147 Neb. 179, 22 N. W. 2d 614 (1946); Johnson v. Griepenstroh, 150 Neb. 126, 33 N. W. 2d 549 (1948).

In looking to the left or right he would see any car from the rear which had approached so close as to come into his peripheral vision. It would only be when the car from the rear had approached so close to the intersection that it actually entered his peripheral vision that a question could arise.

In the present case the plaintiff had looked to the right and to the left and had proceeded 10 feet into the intersection in the crosswalk when he was struck by the right portion of the car. This would mean defendant turned in behind plaintiff from the second turning lane. Plaintiff was to the east of defendant when defendant's vehicle reached the intersection, and was directly in front of him as he attempted to turn into the second lane from the north on K Street. Defendant should have observed plaintiff and stopped his car.

Plaintiff had the right-of-way which the defendant failed to respect. There is nothing the plaintiff should have done that he failed to do. The instruction on contributory negligence was clearly erroneous. The negligence of the defendant in failing to yield the right-of-way was the sole proximate cause of the plaintiff's injuries. Plaintiff was entitled to a directed verdict on liability and his motion to that effect should have been sustained.

The judgment of the District Court is reversed and the cause is remanded for trial on the issue of damages.

REVERSED AND REMANDED.

BOSLAUGH and WHITE, C. THOMAS, JJ., concur in result.

STEVEN H. HUNTER, APPELLEE, V. ANNE MARIE SORENSEN ET AL., APPELLANTS.

266 N. W. 2d 529

Filed June 7, 1978. No. 41551.

1. **Verdicts: New Trial.** Ordinarily, a verdict may and should be set aside and a new trial granted where it is self-contradictory, inconsistent, or incongruous and such relief should, as a rule, be granted where more than one verdict is returned in the same action and they are inconsistent and irreconcilable.
2. **Verdicts: New Trial: Damages.** When the amount of damages allowed by a jury is clearly inadequate under the evidence in the case, it is error for the trial court to refuse to set aside such verdict.
3. **Verdicts.** A verdict will not be vacated on appeal on the ground of irregularity if a construction is possible which will make it effective rather than void.

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

Michael G. Helms for Schmid, Ford, Mooney, Frederick & Caporale, for appellants.

James W. Knowles of Knowles & Edmunds, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

WHITE, C. J.

This is an action by plaintiff to recover damages arising from an automobile accident allegedly the result of negligence by the defendant, Anne Marie Sorensen, and imputed to the defendant, Reuben S. Sorensen, under the family purpose doctrine. Trial was to a jury. At the conclusion of all evidence the District Court, on plaintiff's motion, instructed the jury that the accident was proximately caused by the negligence of the defendants and directed it to return a verdict in favor of the plaintiff in the amount of $358.28 for his property damage. Thus, the only issue submitted to the jury was a determi-

nation of damages resulting from plaintiff's alleged injuries. The jury returned a verdict awarding plaintiff damages of $933.28. The District Court accepted the verdict and entered judgment thereon for the plaintiff together with costs of the action. Plaintiff filed a motion for a new trial which was granted by the District Court. Defendants appeal. We reverse the judgment of the District Court.

The District Court made the following notation concerning plaintiff's motion for a new trial: "The Court, being fully advised in the premises, finds the verdict returned by the jury is inconsistent, irregular, and contrary to the law as given to the jury in oral and written instructions. The Court further finds the verdict should be set aside, and the plaintiff should be entitled to a new trial on the limited issues of damages."

We have held that a trial judge may set aside a verdict whenever it is inconsistent. Olson v. Shellington, 162 Neb. 325, 75 N. W. 2d 709 (1956). In 66 C. J. S., New Trial, § 66, p. 197, it is stated: "Ordinarily, a verdict may and should be set aside and a new trial granted where it is self-contradictory, inconsistent, or incongruous, and such relief should, as a rule, be granted where more than one verdict are returned in the same action and they are inconsistent and irreconcilable."

In C. Aultman & Co. v. Reams, 9 Neb. 487, 4 N. W. 81 (1880), we held: "It is the duty of the jury to find a verdict according to the law as given in the instructions of the court. When they clearly violate this duty, the court should set aside their verdict." In Schumacher v. Lang, 160 Neb. 43, 68 N. W. 2d 892 (1955), we stated: "When the amount of damages allowed by a jury is clearly inadequate under the evidence in the case, it is error for the trial court to refuse to set aside such verdict."

The jury was instructed as follows concerning damages:

"In determining the Plaintiff Steven Hunter's damages, in addition to property damages, *if any you so find,* you must fix the amount of money which will fairly and reasonably compensate him for any of the following elements *he has proven by a preponderance of the evidence to have proximately resulted from the accident* in question:

"(1) The nature and extent of his injury or injuries;

"(2) The disability experienced to date, and reasonably certain to be experienced in the future;

"(3) The pain and suffering, mental or physical, experienced to date, and reasonably certain to be experienced in the future;

"(4) The reasonable expense of necessary medical care, treatment and services incurred to date; and

"(5) The value of working time, wages or profits, lost to date due to his inability or his diminished ability to work.

"Whether any of the above elements of damage has been proven by a preponderance of the evidence is for you to decide. You are not permitted to award or withhold damages by way of punishment or through sympathy." (Emphasis supplied.)

The evidence was as follows: At the time of trial, plaintiff was 26 years old and employed as an insurance sales agent. The accident occurred on the morning of December 19, 1975. Plaintiff's left knee hit the steering column during the course of the accident. He testified that the only symptom after the collision was that his knee felt bruised. He proceeded to work following the accident but by midafternoon decided to call it a day because of swelling in his knee. Plaintiff testified that during the next 2 weeks his knee seemed to "pop out of joint" three times. He testified that problems with his knee caused him to cancel appointments with prospective customers for the next 2 weeks and that he limited

himself to things which could be done in the office. On cross-examination he stated that he did paper work, which was part of his responsibility, during this period and admitted that it would have had to be done at one time or another. He estimated that he lost about $1,000 during the 2-week period after the accident "as a result of not working."

Plaintiff suffered an injury to the knee involved here in 1969 during a college football practice which required surgery for torn cartilage and ligaments. After this operation plaintiff stated that he strained his knee approximately three times and sought medical treatment on each occasion. In 1972, while stationed at Okinawa plaintiff again injured his knee while playing softball and had what is known as a "five-in-one" operation performed on it. Plaintiff injured or strained his knee again in 1974. Plaintiff testified that prior to the accident he had become accustomed to having to catch himself because of his knee going out. In the 9 months preceding the accident, plaintiff stated that he played some golf in the summertime and racquetball approximately three times per week.

On January 16, 1976, plaintiff was examined by Dr. Ries. Plaintiff stated he did not seek medical treatment earlier because he did not believe that his injury was serious enough to warrant it. Dr. Ries testified that plaintiff complained of pain and swelling of his knee and low back pain. Dr. Ries' examination revealed a full range of motion in plaintiff's back and knees and was negative in regards to a possible tear of the meniscus, cartilage damage, nerve involvement, slipped disc problems, and injury or trauma to the bones. There was no swelling of the knee at the time of examination. Dr. Ries' diagnosis was that plaintiff had a sprain of the left knee, a strain of the lumbar spine, and a contusion of the quadriceps muscle. He advised a program of physical therapy.

During April and May 1976, plaintiff stated that he played racquetball about five times but discontinued playing thereafter, not so much because of pain or discomfort from the knee, "but mainly because of the fact that no one was there to play with." He also played some golf during the summer of 1976. Plaintiff returned to Dr. Ries on July 9, 1976, for a further examination. Plaintiff told him that he did not seek therapy for his knee but did exercises instead at his home. Plaintiff stated that he no longer experienced pain or discomfort in the knee; it didn't give out on him any more; and that his back quit hurting. Dr. Ries stated that at this time he was of the opinion that the injury plaintiff sustained from this accident would have no permanent effect.

Around January 1977, plaintiff began playing basketball at the YMCA approximately three times per week. Plaintiff returned to Dr. Ries' office on March 29, 1977, and was examined by Dr. Mercier, a partner of Dr. Ries. Plaintiff stated that he had had swelling and pain in his knee for the past 3 or 4 months since he started playing basketball. An examination revealed some fluid in the knee. Internal rotation of the foot caused some pain. There was a possible tear of the lateral meniscus. Plaintiff was advised that he should not be playing basketball and told to rest his knee for a couple of weeks. Dr. Ries testified that prior to the accident plaintiff had a 20 percent permanent impairment of his leg, and that the accident caused him an additional 5 percent impairment. He stated that he believed plaintiff would have future problems with his knee. Plaintiff's bill for medical services by Drs. Ries and Mercier totaled $53.

Dr. Ries stated that ligaments and cartilage in the knee are generally torn by twisting-type motions such as those associated with activities such as basketball and racquetball and that it would be very unlikely to tear ligaments from a direct blow.

On April 13, 1977, plaintiff was examined by Dr. Gross who gave his opinion that plaintiff suffered a bruise to his left knee as a result of the accident, but suffered no injuries to the ligaments or meniscus as a result of the accident. Dr. Gross did observe some degenerative changes and arthritic conditions in plaintiff's knee but stated that they were the result of plaintiff's athletic injuries and surgeries.

The jury was given a verdict form to use which included this statement: "We the Jury duly impaneled and sworn in the above entitled cause do find for the plaintiff and against the defendant and assess the plaintiff's damages at _____." In returning its verdict the jury did not fill in the blank space, but instead indicated the following in the lower left-hand corner of the form:

"Auto damage	$358.28	
"Lost time	500.00	
"Medical Expenses & times & Mileage		$75.00
"Future	0."	

The sole question on appeal is whether this verdict was irregular, inconsistent, inadequate, contrary to law, or otherwise defective. Plaintiff argues that it is because it awarded plaintiff nothing for his injuries, disability, or pain and suffering, while awarding him damages for lost time and medical expenses.

"A verdict will not be vacated on the ground of irregularity if a construction is possible which will make it effective rather than void." Abrams v. Lange, 158 Neb. 512, 63 N. W. 2d 781 (1954).

We find nothing irregular or inconsistent with this verdict. The evidence on the cause, nature, and extent of plaintiff's injury was conflicting. The jury could have reasonably concluded that plaintiff suffered only a bruise to his knee as a result of the accident on December 19, 1975, and that this accident caused him no permanent injury or disability. The jury could reasonably have concluded that plaintiff

experienced no pain and suffering, or if he did, that it was de minimis. The jury could reasonably have concluded that the injuries which plaintiff subsequently complained of were not caused by the accident of December 19, 1975, but were instead caused by strain to his knee, weakened by past injuries and surgery, from his various athletic activities. The jury could have concluded that the amounts awarded for lost time and medical expenses were sufficient compensation for whatever damages may have been suffered. See, Jahnke v. Smith, 56 Wis. 2d 642, 203 N. W. 2d 67 (1973); Randles v. Lowry, 4 Cal. App. 3d 68, 84 Cal. Rptr. 321 (1970).

Under the circumstances and evidence of this case, it was not improper for the jury to award plaintiff damages for lost time and medical expenses, but no damages for his injury, disability, or pain and suffering. In light of the evidence, it can not be said that the jury's award was inadequate. It was error for the District Court to sustain plaintiff's motion for a new trial and to grant him a new trial on the issue of damages.

The judgment of the District Court is reversed and the cause is remanded with directions to reinstate the verdict of the jury and enter judgment for plaintiff thereon.

REVERSED AND REMANDED WITH DIRECTIONS.

GEORGE N. SILENCE ET AL., APPELLANTS, IMPLEADED WITH JOHNNY'S AMERICAN INN, INC., APPELLEE, V. JOURNAL STAR PRINTING COMPANY ET AL., APPELLEES.

266 N. W. 2d 533

Filed June 7, 1978. No. 41556.

1. **Libel and Slander.** The publication complained of in an action for libel must be libelous. In the first instance it is a question of law

for the court as to whether a particular publication was libelous.

2. _____. In determining whether the language of a publication was libelous, the statement is to be interpreted in its ordinary and popular sense.

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

D. C. Bradford, III, and John B. Ashford of Bradford & Coenen, for appellants.

Alan E. Peterson of Cline, Williams, Wright, Johnson & Oldfather, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

BOSLAUGH, J.

The plaintiffs George N. Silence and David J. Vivian appeal from an order sustaining the defendants' motion for summary judgment as to two causes of action in a suit for libel. The plaintiffs were the owners and operators of a restaurant known as "Here's Johnny's" in Lincoln, Nebraska. Early in the evening of May 19, 1971, Jeannie Sousek and Al E. Benes drank some coffee at the plaintiffs' restaurant. Several hours later they became ill. According to a news story published in the Lincoln Evening Journal on May 20, 1971, they were treated at a hospital for having consumed a weak solution of methamphetamine or "speed." A similar news story was published in the Lincoln Star on May 21, 1971, and a longer story in the Sunday Journal and Star on May 23, 1971. The plaintiffs alleged five causes of action against the defendants based upon the publication of the three news stories.

The evidence at the hearing on the motion shows that the information upon which the original stories were based was obtained from a police report and a telephone interview between a newspaper reporter and Dr. Robert L. Heines who had treated Sousek and Benes. The news stories related that, according

to the police, Dr. Heines had told the police that the coffee contained a weak solution of methamphetamine or "speed." The plaintiffs alleged that the statement attributed to Dr. Heines was false. The first three causes of action are based upon the news stories published in the Lincoln Evening Journal on May 20, 1971, in the Lincoln Star on May 21, 1971, and in the Sunday Journal and Star on May 23, 1971, which stated that the police said Dr. Heines had said that the coffee had contained a weak solution of methamphetamine or "speed." The motion for summary judgment was overruled as to the first three causes of action.

The fourth cause of action was based upon a statement contained in the news story published in the Sunday Journal and Star that the two police officers, Franklin and Underhill, who had been sent to the restaurant at 12:18 a.m., on May 20, 1971, had reported "that the coffee had already been dumped by the time Miss Sousek contacted Thompson so no sample was obtained for laboratory testing." Thompson was the manager of the restaurant.

The plaintiffs alleged that by stating that the coffee containing "speed" was "dumped," the defendants meant and would be understood by their subscribers and others to mean that plaintiffs sought to destroy evidence.

The fifth cause of action was also based upon a statement contained in the news story published in the Sunday Journal and Star. The story concluded with the following item relating to an incident that had occurred in Omaha, Nebraska:

"LSD in Chocolate

"An incident involving an Omaha girl who allegedly ate an LSD-laced piece of chocolate candy last week raised the question of whether the act of one person in knowingly drugging another, unsuspecting person is punishable under Nebraska law.

"The girl, Marilyn Cleveland, said she found a

piece of chocolate candy in her purse May 11, ate it, developed a severe reaction and was hospitalized for 3½ days.

"Although the incident was not officially reported to Omaha police, Deputy Douglas County Attorney Francis Pane said that if a person were charged with drugging someone without his knowledge, he could be punished under the state's drug laws. According to Pane, the person would be guilty of the 'unlawful sale, delivery or other disposition of a depressant or stimulant drug.'

"Conviction for a first offense, according to the state statute, 28-489, would mean a fine from $500 to $3,000, or imprisonment for from two to five years, or both."

The plaintiffs alleged that by heading that part of the article "LSD in Chocolate" and placing it in the story in the manner in which it was done, the defendants meant and would be understood by their subscribers and others to mean that the plaintiffs offered for sale to the public chocolates containing a dangerous drug.

With respect to the fourth cause of action the trial court found the statement that the police officers reported that "the coffee had already been dumped by the time Miss Sousek contacted Thompson" was not libelous, and the plaintiffs' contention that the use of the word "dumped" implied an attempt to cover a criminal act or destroy evidence was illogical and not supported by the publication.

As to the fifth cause of action the trial court found the statements concerning the Omaha incident involving chocolate candy containing LSD was not libelous. The court noted that the girl involved in the incident was from Omaha and the story contained a reference to the Omaha police department and the deputy Douglas County attorney. The trial court concluded that it was clear from the story that

the incident took place in Omaha and not at the plaintiffs' restaurant.

The trial court found there was no evidence as to falsity, malice, reckless disregard for the truth, or lack of reasonable care and diligence to ascertain the truth in regard to the matters alleged in the fourth and fifth causes of action.

It is fundamental that the publication complained of in an action for libel be libelous. In the first instance it is a question of law for the court as to whether a particular publication was libelous. National Automobile Assn. v. Strunk, 122 Neb. 890, 240 N. W. 294; Rhodes v. Star Herald Printing Co., 173 Neb. 496, 113 N. W. 2d 658; Treutler v. Meredith Corp., 455 F. 2d 255; Restatement, Torts 2d, § 614, p. 311.

In determining whether the language of a publication was libelous the statement is to be interpreted in its ordinary and popular sense. Tennyson v. Werthman, 167 Neb. 208, 92 N. W. 2d 559. The court will not put a forced construction on words which may fairly be deemed harmless. World Publishing Co. v. Mullen, 43 Neb. 126, 61 N. W. 108.

We think the trial court's interpretation of the publication alleged in the fourth and fifth causes of action was correct. In view of the interval that occurred between the time the coffee was consumed and the illness occurred it was not unusual that the restaurant had emptied the containers. The use of the word "dumped" under these circumstances did not imply any misconduct on the part of the restaurant personnel.

The story concerning the chocolate candy incident in Omaha is equally clear. A fair reading of the story shows that there was no connection, express or implied, between the plaintiffs' restaurant and the candy.

Since the publication complained of was not libelous it is unnecessary to the decision in this case to

consider the contentions of the parties as to whether the plaintiffs were "public figures."

The judgments are affirmed.

AFFIRMED.

SPENCER, J., concurring.

I concur in the opinion of the court that summary judgment was properly entered on plaintiffs' fourth and fifth causes of action. I note, however, that in the order overruling the motion for summary judgment as to the first three causes of action and sustaining it as to the last two, the trial court specifically held that the plaintiffs-appellants, who were doing business as Johnny's American Inn, Inc., were public figures. He further held that as public figures they were bound by the rule enunciated in New York Times Co. v. Sullivan, 376 U. S. 254, 84 S. Ct. 710, 11 L. Ed 2d 686 (1964).

In my judgment the trial court is wrong in holding that appellants are public figures. If the operators of a restaurant are public figures, the operator of any other service business would be. The Supreme Court, in Gertz v. Robert Welch, Inc., 418 U. S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974), and Time, Inc. v. Firestone, 424 U. S. 448, 96 S. Ct. 958, 47 L. Ed. 2d 154 (1976), narrowed the rule as to public figures. In Gertz, it defined public figures as those who occupy positions of such persuasive power and influence that they are deemed public figures for all purposes or those who have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.

I write this concurrence because the real point at issue in the balance of this case is whether or not the appellants are public figures. If they are not, the libel rules enunciated in Gertz and Firestone, rather than the New York Times v. Sullivan rule, should control.

WHITE, C. J., BRODKEY, and WHITE, C. THOMAS, JJ., join in this concurrence.

NATIONAL BANK OF COMMERCE TRUST AND SAVINGS ASSOCIATION, LINCOLN, NEBRASKA, APPELLANT, V. JOEL M. KATLEMAN ET AL., APPELLEES.

266 N. W. 2d 736

Filed June 14, 1978. No. 41513.

1. **Guaranty: Contracts.** The debtor is not a party to the guaranty, and the guarantor is not a party to the principal obligation. The undertaking of the former is independent of the promise of the latter and the responsibilities which are imposed by the contract of guaranty differ from those created by the contract to which the guaranty is collateral.
2. **Trial: Witnesses.** Admissibility of expert testimony depends on whether specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. It is for the trial court to make the initial decision on whether the testimony will assist the trier of fact. The soundness of its determination depends upon the qualifications of the witness, the nature of the issue on which the opinion is sought, the foundation laid, and the particular facts of the case.
3. **Trial: Evidence.** When part of an act, declaration, conversation, or writing is given into evidence by one party, the whole on the same subject may be inquired into by the other.
4. **Instructions: Appeal and Error.** Ordinarily, the failure to object to instructions after they have been submitted to counsel for review will preclude raising an objection on appeal.
5. **Appeal and Error.** Plain error in the record, indicative of a probable miscarriage of justice, may be considered by this court, even if not assigned as error.
6. **Judgments: Appeal and Error.** A jury verdict based on conflicting evidence should not be set aside on appeal unless clearly wrong.
7. **Guaranty: Contracts.** A guarantor is not liable on his own contract when the creditor has violated his own obligations and deprived the guarantor of the means of preventing the loss protected by the guaranty.

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

Knudsen, Berkheimer, Endacott & Beam, for appellant.

McGrath, North, O'Malley, Kratz, Dwyer, O'Leary & Martin, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

WHITE, C. THOMAS, J.

The plaintiff-creditor brought this action to enforce payment by the defendants-guarantors of an $85,000 guaranty agreement. The jury returned a verdict for the defendants and the plaintiff appeals. We affirm.

The $85,000 guaranty agreement signed by the defendants Joel M. and Virginia Katleman was one of six such agreements guaranteeing a loan of $500,000 extended by the plaintiff-bank to Boetel & Co. and Boetel Properties, Inc. (hereinafter referred to as Boetel). The other five guaranty agreements were signed by persons not parties to this lawsuit. Boetel is involved in real estate development and the sale of limited-partnership interests in completed apartment projects. Boetel wished to issue limited-partnership interests in larger denominations. Boetel needed to secure additional capital in order to comply with regulations of the Securities and Exchange Commission.

A loan was arranged from the plaintiff. Incidental thereto, an agreement with Dial Development, Inc. (hereinafter referred to as Dial), was contemplated. The agreement with Dial called for Dial to transfer to Boetel the title to three properties in Omaha, known as Autumn Heights, Lake Forest, and Winchester Heights; in return, Dial would receive 40 percent of the shares of Boetel stock. The Boetel-Dial plan was presented to the plaintiff during the loan negotiations and is reflected in the loan documents.

Jack Karnes, the president of Dial, secured guarantors of the loan. Karnes approached the defendant Joel M. Katleman in January of 1974. Katleman signed a commitment letter and guaranty agreement drafted by the plaintiff.

The commitment letter, dated January 25, 1974, recited a repayment plan contemplating certain percentages of the proceeds from sales of syndications and real property to Boetel and a guaranty of the loan by the guarantors. In addition, the letter contained the following provision: "To guarantee performance under the various pledges described herein, secure the agreed upon source of repayment and to provide control of certain assets of the borrowing companies second mortgages on respective properties shall be executed and filed as follows:

"1. A second mortgage on Georgetown, * * * to be filed on or before closing * * *.

"2. A second mortgage on Winchester * * * to be perfected and filed as soon as title is received but in no event later than 6 months of the date hereof * * *.

"3. A second mortgage on Autumn Heights * * * as soon as title is perfected within approximately 2 months. * * *

"4. Second Mortgage on Lake Forest III, to be perfected and filed * * * within approximately 2 months of the date hereof. * * *

"5. A second mortgage on Briarhurst I, * * * which mortgage should be filed of record on or before the date of closing * * *." This provision includes mortgages on two properties owned by Boetel, Georgetown and Briarhurst, in addition to those expected to be transferred from Dial.

The defendant Joel M. Katleman is an experienced real estate developer. Virginia Katleman, Joel M. Katleman's wife, is a party by virtue of her signature on the commitment letter. She signed only at the request of her husband and because of her trust in his judgment, and not because of any familiarity with the conditions of the agreement. Hereinafter, any reference to "the defendant" will be a reference to Joel M. Katleman.

The defendant testified that he signed the guaranty because he felt that second mortgages on the

properties listed would provide more than adequate security for the loan. The defendant's opinion was based on his experience that first mortgage lenders would loan 50 percent to 75 percent of the appraised value on such land projects as those listed in the letter. Along with the commitment letter, Karnes provided the defendant with appraisals of the subject properties. Using a figure of 25 percent equity, the defendant estimated the second position equity in the properties to be in excess of $1,000,000.

The loan agreement, dated January 29, 1974, between Boetel and the plaintiff referred to the mortgages, listed as "second mortgages" in the commitment letter, as "mortgages." The plaintiff says the designation of the mortgages as "second mortgages" in the commitment letter was meant to read "secondary mortgages." A secondary mortgage is a broader term than second mortgage in that a secondary mortgage may mean a lien which is second, third, fourth, or even fifth in priority. The plaintiff contends that the mortgages mentioned in the commitment letter and loan agreement were merely control mortgages and never meant to be collateral for the loan. The purpose of a control mortgage would be to ensure the plaintiff of notification of a sale of real estate by Boetel and enable plaintiff to claim its share of the proceeds provided for by the repayment plan. The defendant did not see the loan agreement until the time of trial and was never informed that the agreement's mortgage clause contained different language than that of the commitment letter.

The only mortgage the plaintiff obtained in compliance with the terms of the commitment letter was a second mortgage on the Briarhurst property. Plaintiff did not have a second mortgage on the Georgetown property at the time of closing the loan, but did subsequently acquire such a mortgage. The plaintiff has failed to obtain valid mortgages on the

remaining three properties due to the failure of Dial to consummate its agreement with Boetel and transfer title to the properties to Boetel. The defendant contended that this failure to secure the collateral mortgages as stated in the terms of the commitment letter excused his performance under the guaranty agreement. The jury agreed.

We will deal first with the plaintiff's assignment of error relating to which documents control the defendant's liability, since we feel this goes to the central issue of the case. This issue is whether the loan agreement is an essential part of the guaranty and whether a guarantor is bound by an agreement to which he is not a party and which he has not seen. The trial court instructed the jury that the contract between the plaintiff and the defendant consisted only of the loan commitment letter and the guaranty. The plaintiff contends that it was prejudicial error for the court to exclude the loan agreement in the instruction on what constituted the contract between the parties.

In support of its contention, the plaintiff cites the general rule that other writings which are referred to in a written contract may be incorporated by reference as a part of the contract and, therefore, may properly be considered in the construction of the contract. The plaintiff urges that the loan agreement was incorporated through certain statements by the defendant contained in the pleadings and/or by language contained in the guaranty agreement. In his answer, the defendant admitted that Boetel signed promissory notes promising to repay to plaintiff loans totaling $500,000 and that the loans were subject to a loan agreement. The defendant also stated in his answer that the plaintiff did not perform certain agreements set out in the loan agreement and the commitment letter and that the agreements operate to protect the defendant. The first statement merely admits what is undisputed - that

Boetel owes plaintiff $500,000 and such indebtedness is evidenced by a loan agreement. The reference to the loan agreement in the second statement does not constitute an admission by the defendant that he is bound by the loan agreement and does not operate to incorporate it into the contract.

The plaintiff also urges that the guaranty agreement signed by the defendant referring to the promissory notes, which refer to the loan agreement, incorporates the loan agreement into the contract. Like the above statements in defendant's answer, to which the plaintiff directed our attention, this contention concerning the guaranty agreement is too tenuous a ground to support even the suggestion of incorporation by reference.

The evidence fully supports the instruction that the contract at issue is composed of the commitment letter and the guaranty agreement. These are the only two documents signed by the defendant. The first time the defendant saw the loan agreement was at trial. The plaintiff argues that the exclusion of the loan agreement from the contract prejudices it because the loan agreement refers to the mortgages to be secured by the borrower to the bank as "mortgages" rather than "second mortgages." The plaintiff contends that the term "second mortgage" in the commitment letter was a mistake. The difference between a "second" mortgage and a "secondary" mortgage is highly significant. In addition, we note the defendant was never notified by the plaintiff that the terms of the commitment letter were different than the terms of the loan agreement.

The debtor is not a party to the guaranty, and the guarantor is not a party to the principal obligation. The undertaking of the former is independent of the promise of the latter and the responsibilities which are imposed by the contract of guaranty differ from those created by the contract to which the guaranty is collateral. See In re Estate of Williams, 148 Neb.

208, 26 N. W. 2d 847. Here, the commitment letter and the guaranty were signed contemporaneously by the defendant and he was aware only of the provisions of those documents. They, and they alone, comprise the defendant's agreement with the plaintiff.

A second error assigned by the plaintiff relates to the testimony of J. Neil Hammitt, an expert witness called by the defendant. Hammitt is currently a loan officer with a financial institution in St. Louis, Missouri, and formerly was associated with the Omaha office of Banko Mortgage Company of Minneapolis, Minnesota. He testified that he was familiar with commercial and mortgage lending and banking practices in general in the Omaha area in 1974. Hammitt testified regarding methods that might have been utilized by the plaintiff to make certain the mortgages referred to in the commitment letter were obtained. These two methods were, one, the use of a title binder to assure that the second mortgages were obtained or, two, the establishment of an escrow account to support the equity position of the collateral to be obtained. The plaintiff alleges that the admission of such testimony was error because it involved the interpretation of the contract between the parties, which is an improper subject for expert testimony.

The testimony of Hammitt recited standard banking practices and explained various terms, but did not interpret the contract at issue. Admissibility of expert testimony depends on whether specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. It is for the trial court to make the initial decision on whether the testimony will assist the trier of fact. The soundness of its determination depends upon the qualifications of the witness, the nature of the issue on which the opinion is sought, the foundation laid, and the particular facts of the case. See Rawlings v. Ander-

sen, 195 Neb. 686, 240 N. W. 2d 568. The trial court did not abuse its discretion in allowing the expert testimony. See § 27-702, R. R. S. 1943.

Lyle E. Davis, a loan officer of and witness for plaintiff-bank, testified to standard banking practices in relation to certain loan transactions. Davis justified the plaintiff's handling of the loan in light of banking practices for a commercial loan as opposed to a real estate mortgage loan. The court characterized Davis as an expert and admitted parts of his testimony on that basis. The defendant was entitled to call Hammitt, whose testimony rebutted that of Davis.

The plaintiff argues, as its third assignment of error, the prejudicial effect of the admission into evidence of circumstances surrounding the $40,000 settlement by one of the other guarantors of the Boetel notes. In the setting of and under the circumstances of this case, the assignment of error is without merit. Lyle E. Davis was asked by the plaintiff on direct examination whether the bank had received payments on the loan. Davis replied that he had received some money from one guarantor. He was then asked: "What was the amount received from one guarantor?" Davis responded: "$40,000." On cross-examination, defense counsel pursued the matter to show that the guarantor was an attorney who had drawn a number of the closing documents and was not a stranger to the loan transaction. In this manner, defense counsel sought to distinguish his client's position from that of a guarantor whose settlement may have been interpreted as an admission of liability.

Section 27-106 (1), R. R. S. 1943, provides: "When part of an act, declaration, conversation or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other * * *." The plaintiff invited the testimony and cannot be now heard to complain that its invitation was accepted.

The plaintiff's final assignment of error involves two jury instructions. There was no objection to these instructions at the time of submission. Ordinarily, the failure to object to instructions after they have been submitted to counsel for review will preclude raising an objection on appeal. See Flinn Paving Co., Inc. v. Sanitary & Improvement Dist. No. 227, 198 Neb. 542, 254 N. W. 2d 78. The plaintiff concedes this point and urges that this court examine its assignment of error under the rule that plain error in the record, indicative of a probable miscarriage of justice, may be considered. See McCready v. Al Eighmy Dodge, 197 Neb. 684, 250 N. W. 2d 640. However, a review of the challenged instructions reveals neither plain error nor a probable miscarriage of justice.

The plaintiff contends that there was no evidence to support instruction No. 3. Instruction No. 3 dealt with acts the defendant alleged were willfully or negligently performed by plaintiff and thereby deprived defendant of the benefits of his security and means of payment. Specifically, plaintiff objects to the inclusion as one of these acts: "3. Plaintiff's failure to obtain the certificate of deposit in the amount of $150,000.00 and plaintiff's actions in disbursing money from the certificate of deposit for purposes other than as security for the loan, as required by commitment letter and loan agreement; * * *." While the plaintiff maintained at trial that it was bound to disburse the certificate of deposit to Boetel even after default, the assignment of the certificate gave the bank the "right to apply the principal evidenced by such Certificate to the indebtedness of Boetel and Co. and Boetel Properties, Inc." There was evidence by both plaintiff and defendant on the issue and it was a proper subject for jury instruction. Another part of instruction No. 3, to which the plaintiff now objects, was proper. The plaintiff contends that the failure of the bank to obtain Boe-

tel's financial statement should not have been submitted. The commitment letter in evidence provided that the financial statements of Boetel were required; defendant was entitled to rely on the letter. The evidence warranted the instruction.

Instruction No. 9 partially involved the proceeds from the sale of a section of Georgetown property. The defendant alleged that the plaintiff was bound under the repayment plan outlined in the commitment letter to obtain those proceeds and apply them to the principal of the loan. The plaintiff stated that it had an agreement with Boetel that the section of Georgetown at issue be excluded from the proceeds clause. The defendant denies knowledge of the agreement. The issue was properly for the jury.

The jury obviously concluded that the plaintiff failed to acquire or protect the security for the loan. That finding is supported by the evidence. A jury verdict based on conflicting evidence should not be set aside on appeal unless clearly wrong. First Mid America, Inc. v. Palmer, 197 Neb. 224, 248 N. W. 2d 30. This finding constitutes a defense to the obligation of the defendant since a guarantor is not liable on his own contract where the creditor has violated his own obligations and deprived the guarantor of the means of preventing the loss protected by the guaranty. See, First Nat. Bank v. Wheatley, 92 Neb. 807, 139 N. W. 673; Custom Leasing, Inc. v. Carlson Stapler & Shippers Supply, Inc., 195 Neb. 292, 237 N. W. 2d 645.

The decision of the District Court is affirmed.

AFFIRMED.

RAYMOND GEIGER, APPELLEE, V. WILLIAM SWEENEY, APPELLEE, V. MODERN FARM SYSTEMS, INC., A CORPORATION, THIRD-PARTY DEFENDANT, APPELLANT, MONARCH INDUSTRIES, INC., A CORPORATION, THIRD-PARTY DEFENDANT, APPELLEE.

266 N. W. 2d 895

Filed June 14, 1978. No. 41555.

1. **Uniform Commercial Code: Burden of Proof.** A plaintiff in a merchantability lawsuit must prove that the defendant deviated from the standard of merchantability and that this deviation caused the plaintiff's injury both proximately and in fact.
2. **Uniform Commercial Code: Statutes: Words and Phrases.** Under section 2-314, U. C. C., a plaintiff must prove (1) that a merchant sold goods, (2) which were "not merchantable" at the time of sale, and (3) injury and damages to the plaintiff or his property (4) caused proximately and in fact by the defective nature of the goods, and (5) notice to the seller of injury.
3. **Warranty: Proximate Cause: Damages.** In an action based on breach of warranty, it is necessary to show not only the existence of the warranty but the fact that the warranty was broken and that the breach of the warranty was the proximate cause of the loss sustained.
4. **Proximate Cause: Appeal and Error.** The failure to give a definition of proximate cause herein was prejudicial error.
5. **Juries: Proximate Cause: Words and Phrases.** Proximate cause is a legal concept with a particular meaning in the law. It does not fall in that class of words or phrases where the meaning is commonly known and understood by the lay public. The purpose of the definition of the term is to keep jurors within correct legal bounds.
6. **Trial: Juries: Instructions.** It is the duty of the trial court to instruct the jury upon the law of the case made applicable by the pleadings and the evidence.
7. _____: _____: _____. It is one of the many functions of the trial court to present to the jury as clear and intelligent an understanding of the material issues presented by the pleadings and the evidence as lies within its power.

Appeal from the District Court for Dawson County: KEITH WINDRUM, Judge. Reversed and remanded.

David B. Smith for Smith & Smith, for appellant.

John Wightman for Wightman & Fallesen, for appellee Geiger.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

SPENCER, J.

This is an action based upon breach of an implied warranty of merchantability to recover damages for the destruction of a grain bin which was blown from its foundation by severe winds. The defendant seller filed a third-party complaint against the bin manufacturer and against the company which erected the bin. By stipulation and agreement the seller remained a party to the lawsuit only as a nominal defendant. From a jury verdict in favor of plaintiff and against the seller and the manufacturer, Modern Farm Systems, Inc. (hereinafter referred to as MFS), MFS appeals.

Defendant MFS sets out three numbered assignments of error. The first two are as follows: "1. A. The District Court erred in failing to instruct the jury that the Plaintiff had the burden of proof that the alleged breach of implied warranty was the proximate cause of Plaintiff's damages.

"B. The District Court erred in failing to instruct the jury on the definition of proximate cause, which was a material issue in the case.

"2. The District Court erred in instructing the jury by refusing the Defendant's instruction as to Act of God and in giving the Court's instruction as to Act of God."

For the reasons stated hereafter, we reverse.

The grain bin in question was manufactured by MFS. It was purchased by plaintiff from William Sweeney, who at the time was a dealer for MFS bins in Cozad, Nebraska. The contract price included the cost of erecting the bin, which was performed by Monarch Industries, Inc.

Monarch Industries, Inc., laid the concrete foundation for the bin in late summer or early fall of 1973. The bin itself was delivered to plaintiff's farm

and installed by Monarch Industries, Inc., in late October or early November of 1973. Plaintiff filled the bin half full of grain in November 1973. He completely emptied it in April 1974. While in this emptied condition, on May 9, 1974, the bin was lifted from its foundation during a storm and blown approximately 95 yards across a field. Plaintiff's expert measured the distance the bin traveled, and testified it had gone 140 feet through the air before hitting the ground and continuing to roll. The bin measured 36 feet in diameter, its height was approximately 21 feet to the eaves, and it weighed about 6 tons.

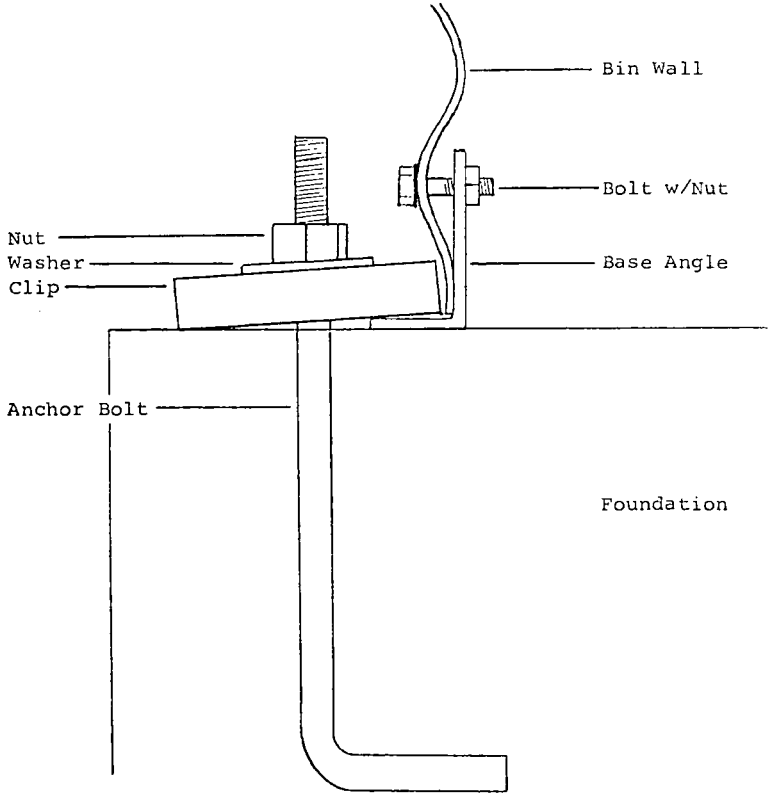
According to plaintiff's theory of the case, the grain bin contained a design defect in that the method used to anchor the bin to the foundation was insufficient to withstand strong winds. MFS defended on the ground that the bin's destruction was the result of an Act of God.

The first step in constructing a grain bin of this type is to pour a circular foundation. The construction manual furnished by MFS directs that the foundation for a 36-foot diameter bin should be 36 feet 9 inches in diameter. Thirty anchor bolts are set in the wet concrete around the perimeter of the foundation. The manual specifies that the anchor bolts should be 45½ inches apart and form a circle with a 36-foot 1¼ inch diameter. Thirty-one anchor bolts were actually used in the construction of plaintiff's bin.

The bin is assembled from the top down. The top row of curved, corrugated bin wall sheets is bolted together to form a ring. The roof sections are assembled and fastened to the top ring of the bin wall. The structure is then raised by a series of jacks and the next row of bin wall sheets is attached. This process continues until all the bin wall rings have been connected. At this point a base angle ring is attached to the bottom of the bin wall. The base

angle ring consists of several pieces of curved angle iron fitted together, with the flange pointing toward the outside of the ring. The manual instructs that base sealer should be applied to the bottom of the base angle while the bin is still suspended. It appears in this case that the mastic was applied after the bin was lowered and in position.

The bin is lowered inside the circle created by the anchor bolts. Clips are secured to each of the anchor bolts with a nut and washer, and are then clamped to the protruding lip of the base angle. The following drawing represents a cross-section of the anchor assemblage.



The clip is made of 10-gauge steel, and is approximately 4 inches long. It is flanged on two sides, so that viewed from the end it has an inverted U-shape. An elongated hole has been punched in the top for placement over the anchor bolt. The advantage of this type of anchor system over a direct bolt system, whereby a piece of metal is bolted directly to the bin wall and the anchor bolt, is that no alignment of holes is required. The distance between the bin wall and the anchor bolt can also vary since the clip can be slid back and forth. Properly installed, the clip should be as far forward as possible.

The disadvantage testified to at trial is that the clip tends to become loose. This may be caused by the base angle moving away from the clip because of wind or metal contraction. Alternatively, the base angle may move toward the clip because of wind or expansion caused by heat or the weight of grain stored inside the bin, wedging the clip loose.

Gerald Schmidt, vice president of Monarch Industries, Inc., testified that in his opinion the clip system was defective because the wind could blow the bin loose from the clips. He knew of at least 25 bins where clips had become detached. He did state that even with a direct bolt system the bolts should be checked and retightened twice a year, especially if the bin is left in an unloaded condition. However, he knew of only 3 of 2,000 to 3,000 of defendant's bins, besides plaintiff's, which had been destroyed. All three had been destroyed by tornadoes. Several other companies used the clip-type tie-down method used by MFS.

Plaintiff's expert, Marvin Laughlin of the Omaha Testing Lab, expressed the opinion that if there were a defect in design, it was that the bin was susceptible to improper installation. He conducted an inspection of the site on June 14, 1974, 5 weeks after the damage occurred. All the clips remained bolted to the foundation. A diagram showing the degree to

which the clips were bent and photographs showing the condition of the clips were received in evidence. This evidence demonstrates that the clips holding down the northeast side of the bin, the direction from which the wind came, received little if any damage. Most of the clips and anchor bolts around the remainder of the foundation were bent. This led plaintiff's expert to believe the force of the wind had pushed the bin horizontally out from under the clips on the northeast side. This eliminated the verticle hold-down force on that side and the bin was lifted from its foundation.

Laughlin also examined the position of the clips to see if they were properly installed. He determined that two of the clips on the northeast side, which he numbered 12 and 13, provided only minimal contact with the base angle. Clip No. 12 had been installed at a steeper angle than usual as its outside edge was imbedded in the concrete. In addition, the clip only overlapped about 50 percent of the base angle. Clip No. 13 only overlapped about 10 percent of the base angle. Laughlin determined that these clips had not moved, and made his measurements from the mastic which remained adhered to the foundation. He also found grain imbedded in the mastic in the area of clips Nos. 12 and 13, leading him to conclude there had been a gap underneath the base angle on the northeast side of the bin.

Gerald Schmidt disagreed with the assessment that clip No. 13 had not moved since it was installed. He pointed out that the photograph of the clip, exhibit 40, showed the tar had been stretched and the nut was not flush with the washer, indicating the clip had been pushed outward since it was installed. No verdict was returned against the installer so the jury verdict must be based on defective design.

No evidence was presented as to the wind velocity which would be required to lift a 6-ton bin from its foundation and carry it the distance testified to by

plaintiff's expert. MFS contends the wind must have been of tornadic force. It called as a witness Stella Etherton, who lived about a quarter of a mile from the grain bin. She testified there was a thunderstorm on the evening of May 9, 1974. It suddenly became very quiet and then "everything cut loose." The house shook and she could hear debris hitting the house. The noise and the wind stopped as quickly as it had started. The next morning she discovered a tree about 2 feet in diameter had been uprooted and carried 200 feet from the back of her house into the front yard. The roof of the grain bin was almost directly in front of her home. The grain bin was further north. It was squeezed so that it resembled a squeezed pop can. William Sweeney, who lived about 4 miles northwest of the grain bin, had an old cattle shed blown over the same evening. A 300-gallon fuel barrel on a metal stand was also toppled over near the grain bin. The fuel barrel belonged to plaintiff. He testified it was nearly empty.

The plaintiff made an inspection of the bin after it was completed. He did not observe anything incorrect about the construction. He noted that the bin "just looked like a grain bin." Plaintiff later observed the grain bin on at least five more occasions by walking around it. He had experienced no problems with it previous to its destruction.

This action was brought for the violation of an implied warranty of merchantability which is covered in section 2-314, U. C. C. Plaintiff relies specifically on paragraphs (a) and (c) of subsection (2), therein, which provide: "(2) Goods to be merchantable must be at least such as (a) pass without objection in the trade under the contract description; * * * (c) are fit for the ordinary purposes for which such goods are used; * * *."

At the instruction conference defendant MFS attempted to introduce the element of foreseeability into the instructions. Defendant argues that fore-

seeability forms an integral part of a definition of proximate cause, and is related to the definition of "proximate cause," and the definition of "merchantability." The latter definition was set out in instruction No. 11, but no definition of proximate cause was given.

The concept of merchantability must by definition include an element of foreseeability, for the reason that a merchant is required to know what will "(a) pass without objection in the trade" and must also know "(c) * * * the ordinary purposes for which such goods are used." Without the benefit of a definition of proximate cause of damage, which necessarily includes an element of foreseeability, the jury is left in the dark on a working knowledge of the elements necessary to determine liability.

White & Summers, in Handbook of the Law Under the Uniform Commercial Code, Hornbook Series (1972), § 9-6, p. 286, states: "A plaintiff in a merchantability lawsuit must prove that the defendant deviated from the standard of merchantability and that this deviation caused the plaintiff's injury both proximately and in fact. These necessities of proof make the merchantability case a first cousin to a negligence lawsuit. Under 2-314, a plaintiff must prove (1) that a merchant sold goods, (2) which were 'not merchantable' at the time of sale, and (3) injury and damages to the plaintiff or his property (4) caused proximately and in fact by the defective nature of the goods, and (5) notice to the seller of injury."

Comment 13 to section 2-314, U. C. C., states: "In an action based on breach of warranty, it is of course necessary to show not only the existence of the warranty but the fact that the warranty was broken and that the breach of the warranty was the proximate cause of the loss sustained."

The trial court gave the standard instruction on the burden of proof on an Act of God. It was as fol-

lows: "In connection with the assertion of all defendants that the sole proximate cause of the plaintiff's injuries, if any, was an Act of God, the burden is upon the defendants to prove by a preponderance of the evidence that the Act of God alleged was the sole proximate cause of the damage to the grain bin. If the defendants have failed to establish this proposition by a preponderance of the evidence, then you should disregard that defense in reaching your decision in this case.

"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."

We agree with the defendant, the District Court erred in failing to instruct the jury that plaintiff had the burden of proof that the alleged breach of implied warranty was the proximate cause of plaintiff's damages. The instruction given by the court on this point is as follows: "* * * the burden is upon the plaintiff to prove by a preponderance of the evidence, each and all of the following propositions * * * 4. That said defendant breached the implied warranty in that said bin collapsed and was destroyed by wind not too uncommon in the area. 5. That the breach of implied warranty caused the collapse of the bin and plaintiff suffered damages as the result thereof." It is only by inference that the jurors would know they must find that plaintiff's damage was caused proximately and in fact by the defective condition of the bin.

The trial court in its burden of proof instruction for MFS stated that MFS alleged the sole and proximate cause of plaintiff's injuries, if any, was an Act of God and that it had the burden to prove that assertion by a preponderance of the evidence.

As defendant alleges in its assignment of error, the trial court failed to give an instruction defining

proximate cause. One was required in this case. The failure to give it was prejudicial error.

We said in Danielsen v. Eickhoff, 159 Neb. 374, 66 N. W. 2d 913 (1954): "Proximate cause is a legal concept with a particular meaning in the law. It does not fall in that class of words or phrases where the meaning is commonly known and understood by the lay public. The purpose of the definition of the term is to keep jurors within correct legal bounds." We there held it was prejudicial error to use the term "proximate cause" without defining it. That case is controlling herein.

In Wagner v. Watson Bros. Transfer Co., 128 Neb. 535, 259 N. W. 373 (1935), we stated: "This court has held on numerous occasions that it becomes the duty of the trial court to instruct the jury upon the law of the case when made applicable by the pleadings and the evidence * * *. Clearly, it is one of the many functions of the trial court to present to the jury as clear and intelligent an understanding of the material issues presented by the pleadings and the evidence as lies within its power. The trial court, not having defined proximate cause, deprived the jury of an opportunity of considering that doctrine as one of the material issues of fact."

In instruction No. 4 on the third-party petition of Sweeney against MFS, the court instructed the jury that defendant Sweeney was required to prove "4. That said defendant, Modern Farm Systems, Inc. breached the implied warranty, in that said bin was improperly designed, which said design caused the bin to be blown away in a wind not uncommon in the area." Counsel for MFS at the instruction conference objected to the wording "be blown away in a wind not uncommon in the area" as confusing, in view of the Act of God instruction, because tornadoes are common in Nebraska. The use of the words in context could lead the jury to consider a grain bin which could not withstand a tornado to be

unmerchantable. Defendant's counsel suggested the words "which could be guarded against" be added to paragraph 4 of the instruction. This was not done, but he did not pursue it further.

Counsel for MFS submitted an Act of God instruction which would have amended the last sentence of the instruction given to read "An Act of God is such an unusual and extraordinary manifestation of the forces of nature that it could not under normal conditions have been anticipated or expected or guarded against or resisted, and no ordinary and reasonable amount of care would have prevented the damage."

Under the instructions given, the jury could have found that if MFS breached its warranty of merchantability the plaintiff could recover, although a tornado would have caused the same damage if there had not been a breach of warranty.

In view of the decision we have reached, it is unnecessary to consider other assignments of error. The defendant, Monarch Industries, Inc., was released as a defendant by the judgment of the jury. Neither of the parties has cross-appealed as to that portion of the judgment. The judgment as to the defendants William Sweeney and Modern Farm Systems, Inc., is reversed and the cause is remanded for a new trial as to them.

REVERSED AND REMANDED.

JOSEPH B. JANSEN, GUARDIAN OF ROMAN JANSEN, INCOMPETENT, APPELLANT, V. DEPARTMENT OF PUBLIC WELFARE OF THE STATE OF NEBRASKA ET AL., APPELLEES.

266 N. W. 2d 742

Filed June 14, 1978. No. 41558.

1. **Public Welfare.** In determining the eligibility of a party to receive Assistance to the Aged, Blind or Disabled benefits, it is the present availability of another source of funds which is determinative.

2. **Public Welfare: Guardian and Ward.** Where a ward is receiving public assistance, the Department of Public Welfare, if its practice permits, may enter a conditional order to require the guardians to exhaust their remedies so long as it does not deny assistance to the ward pending such determination.
3. **Public Welfare: Guardian and Ward: Trusts.** In determining the eligibility of a potential trust beneficiary for public assistance, the interest of a beneficiary in a discretionary trust is not an available resource pending exhaustion of judicial remedies to determine whether such trustee is in fact abusing his discretion.

Appeal from the District Court for Cedar County: FRANCIS J. KNEIFL, Judge. Reversed.

Paul A. Rauth and James E. McCarthy of Marks, Clare, Hopkins & Rauth, for appellant.

Paul L. Douglas, Attorney General, and Royce N. Harper, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

WHITE, C. THOMAS, J.

Plaintiff, as guardian of Roman Jansen, appealed the judgment of the District Court for Cedar County affirming rulings of the Department of Public Welfare discontinuing A. A. B. D. (Assistance to the Aged, Blind or Disabled) for his ward. We reverse the judgment of the District Court.

The question before us is whether the interest of the ward and recipient Roman Jansen in a certain trust fund is an available resource as defined by the Nebraska Department of Public Welfare State Plan and Manual, Part IX, § 3421. The A. A. B. D. program is designed to provide financial assistance as needed to persons who are blind, aged, or disabled. The program is administered by the states which are given broad discretion determining both standards of need and the level of benefits. The term " 'available resources' is defined to include every type of property or interest in property that the indi-

vidual owns and may convert into cash, * * *." State Plan and Manual, Part IX, § 3421.

The inter vivos trust involved was created on the 24th day of February 1966, by Henry A. Jansen, the father of Roman Jansen. The Omaha National Bank, Omaha, Nebraska, was named trustee. Certain assets were immediately transferred to the trust; at the death of Henry A. Jansen in 1966 further assets were added to the trust. At the time of the hearing, the trust had assets of approximately $18,500. The pertinent part of the trust, as it affects the recipient, Roman Jansen, is contained in section VI 3 (a): "Until such time as both Roman Jansen, a son of the Grantor, and Hildegarde Jansen, a daughter of the Grantor, shall be deceased, the Trustee shall from time to time pay to or for the benefit of any one or more of the living members of a class composed of the issue of the Grantor, for their care, support and maintenance, so much of the income and principal of the trust, as the Trustee in its *sole discretion,* shall deem advisable, for their care, support and maintenance. Such distributions need not be made equally to all members of the class. In making such distributions, the Trustee shall be guided by the knowledge that the Grantor feels that his two children, named above, may require assistance to a greater degree during their lifetimes than other children of the Grantor not named herein. Trustee is hereby requested, in making determinations as to such distributions as are herein provided for, to discuss the needs of various members of the class to whom distributions can be made, with the adult members of that class. Final decision on any distribution shall be that of the Trustee." (Emphasis supplied.)

It is undisputed that the trustee has not made any payments to the guardian of Roman Jansen or for his benefit. At the time of the hearing and for some time prior thereto, the trustee was expending the

sum of $100 per month for the benefit of Hildegarde Jansen. It is also conceded that a brother, Joseph Jansen, the guardian and plaintiff herein, had made no demand on the trustee for any payment from the trust fund.

At the time of the administrative hearing, the vice president and trust officer concerned with this particular trust testified that he had conferred with the adult members of the class of beneficiaries, that they had determined at this time that no payment would be made for the benefit of Roman Jansen, and that he felt it would be an abuse of discretion to do so. Significantly, the availability of public assistance entered into the determination.

Without securing an order from a court having appropriate jurisdiction of the subject matter, the ward Roman Jansen cannot compel the trustee to make payment from the trust fund. In Godden v. Department of Public Welfare, 193 Neb. 269, 226 N. W. 2d 627, this court reversed the judgment of the District Court sustaining a decision of the Department of Public Welfare which determined that the proceeds of an undistributed lump-sum-death-benefit payment were available resources within the meaning of the minor wards' eligibility for public assistance. Godden involved Aid to Dependent Children benefits rather than A. A. B. D. benefits, as here, but the definition of "available resources" is substantially the same in both programs. In that case, the county court, having jurisdiction of the fund, had refused to make allocation for the immediate care of the wards. The Department of Public Welfare had concluded that the failure of the county court to make allowances was arbitrary and capricious and, therefore, the proceeds of the lump-sum settlement were available resources disqualifying the minor wards from public assistance. We said: "Regardless of how arbitrary the order of the county judge may be, it is binding on all parties affected until it is

judicially reversed or modified. This action is not a proper proceeding to accomplish that purpose. It is not within the power of the Department of Public Welfare to second-guess a judicial officer or to ignore his order. Until the order of the county judge, arbitrary or otherwise, is reversed or modified, the money held in trust is unavailable to the wards. It is the present availability of the funds which is determinative herein. Until the guardians take steps to acquire possession by a further application to the county court, and an appeal if the order is adverse to them, the funds are not available to them."

It is sufficient to say the trustee was not a party to this action. This is not the proceeding in which to review his discretion or abuse of discretion in denying to the ward the trust funds. That may be done by an appropriate proceeding. It is further interesting to note that the Department of Public Welfare did not avail itself of the procedure suggested in Godden v. Department of Public Welfare, *supra*: "We do not question the right of the Department of Public Welfare, if its practice permits, to enter a conditional order to require the guardians to exhaust their remedies so long as it does not deny assistance to the wards pending such determination. This was the procedure followed in Fitzpatrick v. Illinois Department of Public Aid (1972), 52 Ill. 2d 218, 287 N. E. 2d 666."

We therefore hold that in determining the eligibility of a potential trust beneficiary for public assistance, the interest of a beneficiary in a discretionary trust is not an available resource pending exhaustion of judicial remedies to determine whether such trustee is in fact abusing his discretion.

REVERSED.

CAROLYN J. SANDBERG, ADMINISTRATRIX OF THE ESTATE OF DEAN M. SANDBERG, DECEASED, APPELLANT, V. JOAN HELEN HOOGENSEN, EXECUTRIX OF THE ESTATE OF DEVERN HOOGENSEN, DECEASED, APPELLEE.

266 N. W. 2d 745

Filed June 14, 1978. No. 41570.

1. **Blood, Breath, and Urine Tests: Evidence.** The percentage of alcohol content of body fluids is relevant in a civil case when accompanied by expert opinion evidence of the effect thereof.
2. **Blood, Breath, and Urine Tests: Motor Vehicles: Intoxication.** The result of the blood test of the passenger was relevant to prove his intoxication. Intoxication would diminish his appreciation of danger and render him more likely to take greater risks than usual.
3. **Negligence: Motor Vehicles: Intoxication.** A guest may be guilty of contributory negligence or assumption of risk by riding or continuing to ride with a driver who he knows, or in the exercise of ordinary care and diligence, should know, is so intoxicated that he is unable to operate the vehicle with proper prudence or skill.
4. **Negligence: Proximate Cause.** The defense of assumption of risk is not inconsistent with the defense of contributory negligence. It is essential to the defense of contributory negligence that negligence of the plaintiff be a proximate cause or a proximately contributing cause of the injury while assumption of risk is a defense when one voluntarily exposes himself to the injury, although it plays no part in causing the injury.
5. **Negligence: Words and Phrases: Motor Vehicles.** The term "gross negligence" has different meanings under the automobile guest statute and the comparative negligence statute.

Appeal from the District Court for Douglas County: RUDOLPH TESAR, Judge. Affirmed.

Warren C. Schrempp and Thomas G. McQuade of Schrempp & McQuade, for appellant.

Erickson, Sederstrom, Johnson & Fortune, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

SPENCER, J.

Plaintiff, administratrix in this wrongful death action, appeals from a jury verdict for the defendant

executrix. Plaintiff alleges error in the submission of an instruction on assumption of risk, in the giving of instructions Nos. 8 and 11, and in admitting evidence concerning the blood alcohol content of plaintiff's decedent. We affirm.

Plaintiff's decedent, Dean M. Sandberg, was killed on August 14, 1973, while riding as a guest passenger in an automobile operated by defendant's decedent, DeVern Hoogensen. Hoogensen died in the same accident, a one-car collision which occurred at 156th Street and West Dodge Road in Douglas County, at approximately 2 o'clock in the morning. The two men, who were close friends, had been drinking together for several hours before the accident. The evidence indicates it was customary for them to frequent two bars once or twice a week.

At the time of the accident the car was traveling westbound on West Dodge Road. Measurements taken at the accident scene showed the vehicle left 291 feet of skid marks before leaving the west side of 156th Street and crossing a ditch. The car traveled approximately 37 feet through the air. It continued for an additional 80 or 90 feet, knocking over a billboard and finally coming to rest on its top. Plaintiff's expert in accident reconstruction testified the car would have been traveling between 95 and 105 miles per hour before the brakes were applied. He placed the speed at the time the vehicle left the west edge of 156th Street at 69 miles per hour. Defendant's expert testified the vehicle would have been traveling at 45 miles per hour before crossing the ditch. If all the brakes were working properly, the initial speed of the vehicle would have been between 82 and 96 miles per hour. If only two of the wheels locked (an assumption based on the fact only two sets of skid marks were reported), the initial speed would have been between 66 and 75 miles per hour.

An autopsy was ordered on both of the men and tests were conducted for alcohol content. The testi-

mony indicated the blood alcohol content of Hoogensen, which was taken 4 hours after the accident, was 0.217 percent. The physician who analyzed the blood sample testified Hoogensen would have been "markedly" intoxicated, and his ability to operate a motor vehicle would have been "impaired considerably." Over objection, he was also permitted to testify that the blood alcohol content of Sandberg was 0.248 percent and the alcohol content of his urine was 0.35 percent. He testified Sandberg would also have been "markedly" intoxicated and his appreciation of risk would have been impaired.

The men met at 5:30 p.m. on August 13, 1973, at the Vagabond Lounge located at 5818 Ames Avenue in Omaha. They remained at the bar until 9 p.m. The owner of the establishment testified Sandberg had "maybe five, six to eight or so" drinks, and Hoogensen drank "probably six to eight, or nine." He described both men as being mildly intoxicated. They apparently left the Vagabond Lounge in separate vehicles.

The men met later at the Chalet Lounge, 108th and Center Streets. The owner testified both men arrived at approximately 9 p.m. and were still there when he left at midnight. He thought both men were "probably intoxicated." They were not stumbling or falling down, but they were intoxicated.

Mrs. Hoogensen arrived at the Chalet Lounge at about 11 p.m. She testified she had three or four drinks with her husband. She stated Mr. Sandberg did not arrive at the bar until 15 or 20 minutes after she had been there. Both men appeared intoxicated. She left at 12:15 a.m. when her daughter Andrea came into the bar. Andrea testified she had also come into the bar at 10 p.m. and visited with her father.

Debra Burkholder testified she was at the Chalet Lounge on that evening with four other girls, including another of Hoogensen's daughters. They

arrived about 8 or 8:30 p.m., and Hoogensen and Sandberg came in at about the same time. The men were still there when the girls left at about 12:30 a.m. Both men had 8 to 10 drinks. The girls were concerned about the men driving, but they refused to leave with them. Hoogensen's daughter tried to get her father to come over to the Burkholder home for coffee but he refused. He said he wanted to stay out and have a good time. Debra next saw the men out in front of her house located in the 1900 block on South 93rd Street. Something had been dragging under the car, and they had gotten out of the vehicle. She thought the men were singing. They threw some articles in the street and drove off.

Al Hoag was also drinking with the two men at the Chalet Lounge from 11 or 11:30 p.m. until the bar closed at 1 a.m. He believed they each had about six drinks during that time. The three men left the bar together, intending to go to a party. Hoag decided to follow in his own car to insure he would have a means of getting home. After a few blocks, the muffler on the Hoogensen car began dragging on the street and they stopped to fix it. Hoag got lost while following the Hoogensen automobile, and he was unable to locate the two men.

Daniel Peters, a neighbor of Mrs. Burkholder, testified two cars stopped in front of his house between 12 and 3 a.m. After turning on his spotlight he observed "three people outside the car in varying positions. One under the car, one leaning inside the car. * * * They were quite noisy." After wrestling with the pipe, they left it in the street. After they left, Mr. Peters found the pipe and some papers left there, which papers were made out to "Hoogie." He described the actions of the men as "noisy, loud, boisterous, not at all quiet."

The trial judge determined as a matter of law defendant's decedent was grossly negligent in the operation of his automobile. Over plaintiff's objections,

the jury was instructed on the defenses of contributory negligence and assumption of risk.

Plaintiff states she objected "vehemently" and now complains "bitterly" of the introduction into evidence by the trial court of a blood test taken of her decedent, who was the passenger in the car. She argues this evidence was irrelevant, or, if relevant, it should have been excluded as unfairly prejudicial or as tending to mislead or confuse the jury.

This issue was considered by the Virginia Supreme Court in Major v. Hoppe, 209 Va. 193, 163 S. E. 2d 164 (1968). It was there determined such evidence is relevant to the question of contributory negligence by the guest passenger. The doctor testified the passenger's body contained 0.16 percent of ethyl alcohol by weight, and that this blood alcohol level would impair the ordinary individual's judgment and motor activity. The Virginia court held it could be considered on the issue of contributory negligence. The fact that the passenger's ability to use due care for her own safety may have been influenced by the voluntary consumption of alcohol was held not to excuse her from its consequences. The court held the testimony tended to show the degree of the passenger's ability to assess the danger if she observed it, and her ability to give timely warning if there was an opportunity to do so, and was admissible for that purpose.

In Downing v. Marlia, 82 Nev. 294, 417 P. 2d 150 (1966), the plaintiff and the defendant met in a bar and drank for 6 hours. Evidence was introduced that the blood alcohol content of plaintiff, the guest passenger, was .206 percent 2 hours after the accident. The Nevada court stated: "We find no error in the introduction into evidence of plaintiff's blood alcohol content. It was relevant to the defense contention that plaintiff was jointly drinking with defendant, and therefore had actual knowledge of the latter's intoxication and so assumed the risk."

Rone v. Miller, 257 Ark. 791, 520 S. W. 2d 268 (1975), involved a wrongful death action in which both the driver and the guest passenger were killed. The defendant appealed from a judgment in favor of the plaintiff, contending the trial court erred in refusing to admit evidence concerning the intoxication of plaintiff's decedent. Defendant made an offer of proof that a witness would testify he observed plaintiff's decedent drinking, and that blood tests showed an alcohol content of 0.15 percent. The Arkansas court held exclusion of this evidence was erroneous.

This court has held that the percentage of alcohol content of body fluids is relevant in a civil case when accompanied by expert opinion evidence of the effect thereof. Raskey v. Hulewicz, 185 Neb. 608, 177 N. W. 2d 744 (1970). Here, the medical examiner who conducted the test expressed the opinion that plaintiff's decedent was markedly intoxicated and that his appreciation of a risk would be impaired.

The coroner, who was called by County Hospital at 3 a.m., on August 14, 1973, called a medical examiner 4 hours later to do an autopsy. He instructed the medical examiner to do a blood and alcohol screen also. At that time he did not know which of the decedents was the driver of the car.

Section 23-1820, R. R. S. 1943, provides, so far as material herein: "In each county there is hereby created the office of coroner's physician, who shall be appointed by the coroner of said county * * *. Such physician shall certify the cause of death in every case of death in such county not certified by an attending physician and shall perform or cause to be performed an autopsy when requested by the coroner."

The result of the blood test of the passenger was relevant to prove his intoxication. Intoxication would diminish his appreciation of danger and render him more likely to take greater risks than usual.

The tests were made at the direction of the coroner, pursuant to law.

Plaintiff, in her original brief, argues that an instruction on assumption of risk should be given only where there is evidence in the record that shows a complaining party knew of and comprehended the danger and voluntarily exposed himself to it. Blum v. Brichacek, 191 Neb. 457, 215 N. W. 2d 888 (1974). The point she is raising is that the record must affirmatively show that plaintiff's decedent actually knew of the danger in order to be bound by assumption of risk. In other words, it is her contention the record must show her decedent knew that Hoogensen was too drunk to drive when they left the tavern.

This court has held on several occasions that a guest may be guilty of contributory negligence or assumption of risk by riding or continuing to ride with a driver who he knows, or in the exercise of ordinary care and diligence, should know, is so intoxicated that he is unable to operate the vehicle with proper prudence or skill. Schaffer v. Bolz, 181 Neb. 509, 149 N. W. 2d 334 (1967); Raskey v. Hulewicz, 185 Neb. 608, 177 N. W. 2d 744 (1970).

In her reply brief, plaintiff calls our attention to several states with comparative negligence statutes which have abolished assumption of risk as a separate defense, and included it only as a facet of contributory negligence. She then revisits Landrum v. Roddy, 143 Neb. 934, 12 N. W. 2d 82 (1943), where this court held in actions based on negligence the defense of assumption of risk under the maxim "volenti non fit injuria" (he who consents cannot receive any injury) is not inconsistent with the defense of contributory negligence.

The opinion in Landrum v. Roddy, *supra*, contains an extensive discussion on assumption of risk, contributory negligence, the automobile guest statute, and the comparative negligence statute. Three

questions were raised concerning the doctrine of assumption of risk: "First, is the principle of the assumption of risk available in a tort action based on negligence? Second, if available, is it consistent with the defense of contributory negligence? Third, if consistent with contributory negligence, do the facts here present a question of contributory negligence, assumption of risk, or both?" The first two questions were answered in the affirmative.

On the first question the court stated: "From a survey of the many cases on the subject it now seems well established that one who voluntarily assumed the risk of injury from a known danger is barred from a recovery in a negligence case within the maxim of 'volenti non fit injuria.' * * * This principle operates in a rather strictly limited field. A person in entering upon an undertaking, may be fully aware of the danger and may use all the care that it is possible to use; in fact, the very danger involved may make him more careful than usual. Certainly in such a case it cannot be said that he is guilty of contributory negligence. However, there is a question involved of whether or not he has voluntarily assumed the risk of the danger. Since the application of the maxim is extending beyond contractual relations the doctrine of assumption of risk, its application must be strictly limited to the terms thereof. Within the limits of its terms the maxim of 'volenti non fit injuria' is applicable to negligence actions in this jurisdiction."

The court answered the second question by stating: "Assumption of risk under the maxim 'volenti non fit injuria' involves a choice made more or less deliberately and negatives liability without reference to the fact that the plaintiff may have acted with due care, whereas, the defense of contributory negligence implies the failure of the plaintiff to exercise due care. It may be said that contributory negligence involves the notion of some fault or breach of

duty on the part of the one charged therewith, or a failure to use such care for his safety as an ordinary prudent person would have used under the same or similar circumstances. On the other hand, under the assumption of risk, even though the risk be obvious, the person may be free from any suggestion of fault or negligence on his part. While under a certain set of facts the two may be difficult to distinguish and sometimes seem to overlap, yet when carefully considered they can be distinguished and are distinct and separate and not inconsistent."

The third question, whether the facts presented a question of "contributory negligence, assumption of risk, or both," received the following answer: "While situations may arise where the conduct of the guest is such that none of his acts may fall within the category of negligence but where he had full knowledge and voluntarily accepted the risk of those things which caused the accident out of which he was injured and the question be one of assumption of risk, however, generally the question of whether or not the conduct of the guest while riding in the car of his host would preclude him from recovering damage if his host is guilty of gross negligence in causing the same is one of contributory negligence."

The court in Landrum v. Roddy, *supra*, did not determine that an instruction on assumption of risk should be given. However, in subsequent cases involving similar factual situations, this court has repeatedly held it is proper to instruct on both contributory negligence and assumption of risk, often citing Landrum v. Roddy, *supra*, for this proposition. See, Circo v. Sisson, 193 Neb. 704, 229 N. W. 2d 50 (1975); Raskey v. Hulewicz, 185 Neb. 608, 177 N. W. 2d 744 (1970); Schaffer v. Bolz, 181 Neb. 609, 149 N. W. 2d 334 (1967); Kaufman v. Tripple, 180 Neb. 593, 144 N. W. 2d 201 (1966); O'Brien v. Anderson, 177 Neb. 635, 130 N. W. 2d 560 (1964); Hess v. Holdsworth, 176 Neb. 774, 127 N. W. 2d 487 (1964).

This case is controlled by the following rule enunciated in Kaufman v. Tripple, *supra*: "The defense of assumption of risk is not inconsistent with the defense of contributory negligence. It is essential to the defense of contributory negligence that negligence of the plaintiff be a proximate cause or a proximately contributory cause of the injury while assumption of risk is a defense when one voluntarily exposes himself to the injury, although it plays no part in causing the injury." Under the facts of this case, the jury could find that Sandberg knew or should have known that Hoogensen's state of intoxication was such that it would be dangerous to ride with him. The tail pipe incident suggests a high degree of intoxication on the part of both decedents. It was shortly thereafter that the fatal accident occurred. There was no error in the submission of assumption of risk to the jury.

Plaintiff objects to instruction No. 8, but at the conference on instructions did not specifically raise the point she now raises. The instruction included the language: "If the defendant has established by a preponderance of the evidence that the negligence of the plaintiff's decedent was the sole proximate cause of his death, then your verdict will be for the defendant." We have difficulty understanding how plaintiff could have been prejudiced by this part of the instruction. It is putting a greater burden on the defendant than is required. Defendant's burden was to establish that the negligence of plaintiff's decedent was the proximate cause or a proximately contributing cause of the death of plaintiff's decedent.

Plaintiff assigns as error the giving of instruction No. 11, the standard comparative negligence instruction. The jury was instructed plaintiff could not recover if "the negligence of the defendant, when compared with that of the plaintiff, was less than gross." She contends this instruction conflicts with instruction No. 7, in which the court instructed the jury that

defendant's decedent was grossly negligent as a matter of law. While this point is assigned as error, it is not argued in plaintiff's brief. We suggest, however, that plaintiff fails to recognize the term "gross negligence" has different meanings under the automobile guest statute and the comparative negligence statute. See Brackman v. Brackman, 169 Neb. 650, 100 N. W. 2d 774 (1960). This distinction was called to the attention of the jury by instruction No. 12 and the jury could not have been misled.

While no one can know exactly what transpired on the last ride of the two decedents, the issues raised presented questions for the jury. Those issues were properly submitted. The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DONALD P. STEINMARK, APPELLANT.

266 N. W. 2d 751

Filed June 14, 1978. No. 41671.

1. **Witnesses: Evidence.** The scope of the cross-examination of a witness is largely within the discretion of the trial court.
2. **Statutes: Witnesses: Evidence.** It is within the discretion of the trial court to admit character evidence to support the credibility of a witness whose credibility has been attacked by opinion or reputation evidence or otherwise. § 27-608 (1), R. R. S. 1943.
3. **Witnesses: Juries.** A juror may testify as to whether extraneous prejudicial information was improperly brought to the jury's attention during deliberations.
4. **Witnesses: Juries: Judgments.** A juror may not testify as to the effect of any matter or statement upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or concerning his mental processes in connection therewith.
5. **Juries: Trial: Hearings.** When an allegation of jury misconduct is made and is supported by a showing which tends to prove that serious misconduct occurred, the trial court should conduct an evidentiary hearing to determine whether the alleged misconduct actually occurred.

6. _____: _____: _____. If misconduct occurred, the trial court must then determine whether it was prejudicial to the extent the defendant was denied a fair trial. If the trial court determines that the misconduct did not occur, or that it was not prejudicial, adequate findings should be made so that the determination may be reviewed.

7. _____: _____: _____. The determination as to whether misconduct was prejudicial to the extent that the defendant was denied a fair trial is a question for the trial court which is to be resolved upon the basis of an independent evaluation of all the circumstances in the case.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Order vacated and cause remanded for further proceedings.

Kirk E. Naylor, Jr., of Naylor & Keefe, for appellant.

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

Heard before SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ., and HASTINGS, District Judge.

BOSLAUGH, J.

In 1975 the defendant was convicted of unlawful delivery of amphetamines and unlawful delivery of marijuana on separate occasions. The judgments were affirmed by this court in State v. Steinmark, 195 Neb. 545, 239 N. W. 2d 495. In 1977 the United States District Court for the District of Nebraska ordered the defendant be discharged unless retried within 90 days. See Steinmark v. Parratt, 427 F. Supp. 931.

Upon retrial the defendant was again convicted of both counts. The defendant has appealed and contends that the trial court erred in two evidentiary rulings and that the judgments should be reversed because of misconduct of the jury.

The facts were summarized in the opinion on the previous appeal, State v. Steinmark, *supra*. It is un-

necessary to summarize the evidence again because the defendant makes no contention that the evidence was insufficient to support the judgment.

Each offense consisted of a sale to Dennis Landrie, a cooperating individual or undercover agent employed by the Nebraska State Patrol. During the cross-examination of Landrie, defense counsel asked Landrie if he had a telephone conversation with the county attorney on August 28 or 29 of 1975 regarding the diverting of buy money. An objection that the matter was too remote in time was sustained. Defense counsel then made an offer of proof to the effect that Landrie had been told that "even if" he had used state funds for his own purposes he wouldn't have to worry about it. An objection to the offer of proof was sustained on the ground that the evidence offered did not relate to any statement by the witness and the conversation took place long after Landrie had made his reports concerning the transactions with the defendant.

Any conversation which took place in August of 1975 occurred after the first trial and before it became probable that there would be a second trial. The evidence offered had little relevance or materiality to the credibility of Landrie so far as his testimony in this case was concerned. The ruling made was within the discretion of the trial court.

On rebuttal, the State called three members of the Nebraska State Patrol who had worked with Landrie. Over objection these witnesses were permitted to testify as to their opinions as to the reputation of Landrie for truth and veracity. The defendant contends that this evidence was not admissible because the defense had presented no opinion evidence as to the reputation of Landrie for truth and veracity.

Section 27-608 (1), R. R. S. 1943, provides as follows: "(1) The credibility of a witness may be attacked or supported by evidence in the form of reputation or opinion, but subject to these limitations:

(a) The evidence may refer only to character for truthfulness or untruthfulness, and (b) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise."

The principle evidence against the defendant was the testimony of Landrie. The defense attacked the credibility of Landrie by an extensive cross-examination and through the testimony of other witnesses who contradicted parts of Landrie's testimony. This evidence satisfied the statutory requirement that the character of the witness for truthfulness had been attacked "otherwise" and opinion evidence to support the credibility of the witness was admissible.

The motion for new trial filed by the defendant alleged there had been misconduct by the jury in that the jury considered the fact the defendant had been previously convicted of the same offenses and had served approximately 1 year in prison; that the jury considered the evidence tags attached to certain exhibits as evidence of guilt; and that the jurors concluded they could not consider as evidence some of the evidence offered by the defendant which tended to contradict the testimony of Landrie. At the hearing on the motion, an affidavit by one of the jurors was received in evidence. The affidavit stated that during the deliberations of the jury one of the jurors had said that the "defendant, Donald Steinmark, had been previously convicted"; that one of the jurors told the affiant that the defendant had already served a year in prison; that one of the jurors had said that this juror had heard "that Jessie's Bar was a place in Kearney, Nebraska, where illegal drugs were readily available for purchase"; and that several jurors had said the fact the defendant's name appeared upon the evidence tags was evidence that the drugs contained within the exhibits had been obtained from the defendant. The State offered no evi-

dence at the hearing, and the motion for new trial was overruled.

Section 27-606 (2), R. R. S. 1943, provides as follows: "(2) Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him indicating an effect of this kind be received for these purposes."

Under this statute a juror may testify as to whether "extraneous prejudicial information was improperly brought to the jury's attention." No evidence may be received as to the effect of any statement upon a juror's mind, its influence one way or another, or the mental processes of a juror in connection therewith.

The affidavit which was received in evidence in this case related three items of extraneous prejudicial information which may have been improperly brought to the jury's attention. The fact that the defendant had been convicted before, had served a year in prison, and the reputation of Jessie's Bar where the defendant worked were all facts which should not have been brought to the jury's attention during deliberations.

The procedure to be followed in determining whether a defendant has been deprived of a fair trial by misconduct of the jury is set out in United States v. McKinney, 429 F. 2d 1019. When an allegation of misconduct is made, and is supported by a showing

which tends to prove that serious misconduct occurred, the trial court should conduct an evidentiary hearing to determine whether the alleged misconduct actually occurred. If it occurred, the trial court must then determine whether it was prejudicial to the extent the defendant was denied a fair trial. If the trial court determines that the misconduct did not occur, or that it was not prejudicial, adequate findings should be made so that the determination may be reviewed.

The matter of whether the misconduct occurred is largely a question of fact and the jurors may be questioned as to what happened during their deliberations. The determination as to whether the misconduct was prejudicial to the extent that the defendant was denied a fair trial is a question for the trial court which is to be resolved upon the basis of an independent evaluation of all the circumstances in the case.

The record indicates that the issue of the alleged misconduct of the jury and its effect upon the verdict in this case was resolved in a summary manner. While we are not prepared to say, upon the basis of the present record, that the defendant is entitled to a new trial, we believe the cause should be remanded for a further hearing upon the matter of misconduct of the jury as alleged in the motion for new trial. We therefore vacate the order of the District Court overruling the defendant's motion for new trial and remand the cause for further proceedings in accordance with this opinion.

We express no opinion concerning the matters alleged in the affidavit received at the hearing on the motion for new trial other than it was a sufficient showing in support of the allegations of misconduct to require an evidentiary hearing to determine whether misconduct occurred and whether it was prejudicial to the extent the defendant was denied a fair trial.

The State argues that the jurors could have inferred from the evidence received during the trial that the defendant had been previously convicted and had served time. While this is a possibility it is a matter which can be resolved upon the remand. The record does not contain the voir dire of the jury and it is possible that previous knowledge of the case was eliminated as a source of prejudice during the selection of the jury.

The order of the District Court overruling the defendant's motion for a new trial is vacated and the cause remanded for further proceedings in accordance with this opinion.

ORDER VACATED AND CAUSE REMANDED FOR FURTHER PROCEEDINGS.

WHITE, C. J., took no part in the consideration or decision in this case.

MCCOWN, J., concurring in result.

The facts establishing juror misconduct sufficient to require a new trial are set out in detail in affidavit form. Those facts are subscribed and sworn to under oath and they stand unchallenged by the State. In my opinion the motion for new trial should be granted on this record.

STATE OF NEBRASKA, APPELLEE, V. ARTHUR GUY EAGLE THUNDER, APPELLANT.

266 N. W. 2d 755

Filed June 14, 1978. No. 41759.

1. **Criminal Law: Statutes.** As a general rule, statutes will not be understood as effecting any change in the common law beyond what is clearly indicated.
2. **Criminal Law: Self-Defense: Statutes.** There is nothing in the justification for use of force act which appears designed to change the ancient common law rule that in order to justify the defense of self-defense, the belief of the actor that the use of force is necessary must be reasonable and in good faith.

Appeal from the District Court for Box Butte County: ROBERT R. MORAN, Judge. Affirmed.

Herbert M. Sampson, III, Box Butte County Public Defender, for appellant.

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

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

CLINTON, J.

Defendant Arthur Guy Eagle Thunder was charged with three counts of assault with intent to inflict great bodily injury. Upon trial by jury, defendant was convicted on all three counts and sentenced to a term of 5 to 8 years imprisonment on each count, said sentences to run concurrently. On appeal defendant assigns numerous errors but argues only one, namely the failure of the trial court to instruct the jury on the defense of justification. Under the rules of this court, only errors assigned and discussed in the brief will be considered.

Defendant was a stranger in town, passing through Alliance on his way home to the Pine Ridge Reservation in South Dakota. On his first night in Alliance, he was arrested for intoxication and placed in jail. Upon his release a few days later, he bought a pint of wine. That evening defendant drank the wine with some acquaintances and continued to drink some wine at the Lager Inn, while waiting for a ride back to the reservation. The Lager Inn was the place in Alliance where Indians met to find rides to various points.

Defendant testified that about 9 or 10 p.m. that evening at the inn, Chuck Howard and a woman named Sara Lou tried to pick a fight. Leroy Bear Robe was also present and, according to defendant, pulled a chain out and threatened him with it. Defendant testified that Chuck Howard hit him in the

temple with his fist. While Mr. Howard admits that the fight occurred, he denies, as does Mr. Bear Robe, that the chain was used to threaten defendant.

The next morning defendant started drinking with the same group of people. According to defendant, Sara Lou started another fight at the Lager Inn. Defendant testified that he told them he wanted no trouble and pushed them away. Chuck Howard came at defendant and Sara Lou swung a wine bottle at defendant but missed. Defendant then testified that a Mexican "started after me . . . . I ran towards him and at that time he pulled that knife out." According to defendant, after a Mr. Flood hollered at the group to leave defendant alone, they backed away and defendant left.

Defendant testified that he returned to the Lager Inn about an hour later. He sat next to Mr. Bear Robe and Edison Richards and started to talk. According to defendant, Mr. Bear Robe asked if he wanted more trouble, defendant said no and then Mr. Howard, Sara Lou, and Lee Martinez returned with their fists up. Defendant testified that they swung at him but he slipped away across the street and down an alley.

Defendant admitted that when he entered the alley no one was chasing him. Defendant testified that he picked up a pipe from the alley, was still kind of drunk, and hid behind some parked cars across from where the group of people were assembled. According to defendant, a truck came down the street and as soon as it had passed, he jumped out and began hitting the group with the pipe including Edison Richards who had not been a party to the previous incidents. The victims incurred multiple injuries. Defendant estimated that about 5 or 10 minutes had passed between the last altercation and his return with the pipe. While stating that no one was chasing him when he entered the alley, defendant testified

that he believed that force was necessary to protect himself against death or bodily harm.

Defendant assigns as error the trial court's refusal to instruct the jury on defendant's theory of justification. The applicable justification statute reads as follows: ". . . the use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion." § 28-836 (1), R. R. S. 1943.

It is the contention of the defendant that his testimony he believed force was necessary to protect himself from death or bodily harm was alone sufficient to require the court to instruct the jury on justification, i.e., he asserts that his own purely subjective belief, without regard to the factual circumstances, required the giving of the requested instruction.

The Nebraska justification for use of force act is with slight modification taken from The Model Penal Code (A.L.I.). See Commentary to NJI No. 14.33 (1975 Pocket Part). The present act was adopted following the declaration of unconstitutionality of the previous statutory change in the common law defense of self-defense. State v. Goodseal, 186 Neb. 359, 183 N. W. 2d 258. The new act became effective March 1, 1972. Although the Model Penal Code provision omits the term "reasonableness," the explanation given by the authors shows they feared that if the term were included, convictions for mere negligence might result. There is no reason to believe they intended that the defense of justification would be good no matter what the circumstances of which accused had knowledge or even if his belief in the necessity of using force was wholly unreasonable.

Part III of NJI No. 14.33 contains the requirement of reasonable belief. Since the act was adopted, we

have given both administrative and tacit judicial approval to that pattern instruction. See State v. Ralls, 192 Neb. 621, 223 N. W. 2d 432.

The common law of Nebraska has always required that there be reasonable ground for the belief of the necessity of the use of force. See, Housh v. State, 43 Neb. 163, 61 N. W. 571; Barr v. State, 45 Neb. 458, 63 N. W. 856; State v. Goodseal, *supra*.

As a general rule, statutes will not be understood as effecting any change in the common law beyond what is clearly indicated. See Davis v. Walker, 170 Neb. 891, 104 N. W. 2d 479. There is nothing in the justification for use of force act which appears designed to change the ancient common law rule that in order to justify the defense of self-defense the belief that the use of force is necessary must be reasonable and in good faith.

We have carefully reviewed the record and find that the evidence does not justify the submission of the instruction. The only evidence adduced in support of the claim of self-defense was the testimony of the defendant. The evidence reads as follows: "Q. And at that time did you believe that that force was necessary to protect yourself against death or bodily harm from those people? A. Yes, sir. Q. And why did you think that? A. Cause they jumped me three times before and I was afraid for myself because I was jumped before. Not by the same people, but I got ganged up on before, last May and last year and I got my teeth knocked out and a hole knocked through my lip or my chin, so I was afraid I might get the same beating again. Q. So, that's the reason why when they jumped you — A. When they jumped me three times, I didn't know what to do but to try to protect myself."

The record reveals no factual dispute regarding defendant's assault on the group. By defendant's own admission, when he left the group and headed down the alley, no one was chasing him. After pick-

ing up the pipe in the alley, defendant stated that he "ducked" behind some parked cars so that nobody could see him and sneaked toward the group. After a truck that was coming down the street had passed, defendant stated that he "opened up" and began hitting the group with the pipe. Five to ten minutes had passed since the defendant had left the group and returned with the pipe to assault them. Clearly, defendant was the aggressor in this instance and therefore the trial court was correct in refusing to instruct the jury on the defendant's theory of justification.

AFFIRMED.

CAROL VAN CLEAVE, APPELLEE, V. LHYNN VAN CLEAVE, APPELLANT.

266 N. W. 2d 900

Filed June 21, 1978. No. 41455.

1. **Divorce: Alimony: Property: Parent and Child.** An award of child support, the fixing of alimony, and the distribution of property rest in the sound discretion of the District Court, and, in the absence of an abuse of discretion, will not be disturbed on appeal.
2. _____: _____: _____: _____. Alimony, support, and property settlement issues must be considered together to determine whether the trial court abused its discretion.

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

John McArthur, for appellant.

Gary L. Giese, for appellee.

Heard before WHITE, C. J., MCCOWN, CLINTON, and BRODKEY, JJ., and HENDRIX, District Judge.

HENDRIX, District Judge.

This is an action for dissolution of marriage brought by the petitioner, Carol Van Cleave, against the respondent, Lhynn Van Cleave. The District

Court for Buffalo County, Nebraska, ordered the dissolution, child custody in the petitioner, child visitation for the respondent, child support by the respondent, division of property, and permanent alimony for the petitioner. The respondent has appealed to this court objecting to the division of the property, the child support award, and the permanent alimony award. We affirm.

Prior to the separation of the parties they lived at Odessa, Nebraska. At the time of trial, April 1, 1977, the respondent was still living in the family home at Odessa, while the petitioner was living at Indianola, Nebraska. The petitioner testified that she moved to Indianola because she could not live in the same town as her husband, and that her parents resided at Indianola. The two children, ages 6 and 7, were living with the petitioner. The petitioner, age 33, was employed as a janitor at the Republican Valley school earning $300 a month for a 30-hour work week. She was looking for a better paying job, but has no immediate prospects of obtaining one. While she had attended secretarial school for 1 year, any skills from that training had been lost by passage of time. She was qualified for factory or restaurant work. She had purchased a trailer in which she and the children lived. The amount owed her father for the downpayment plus the encumbrance on the trailer just about equaled its value. She had possession of a 1967 Rambler worth about $100. No value was placed upon any other property she may have had in the trailer.

The respondent, age 31, was a hydraulic foreman with the Nebraska Public Power District. His gross salary in 1976 was $5.87 an hour and totaled $12,789.60 for the year. At trial his salary had risen to $6.34 an hour. At trial time he was also receiving $331 a month from the Veterans Administration for on-the-job training. The respondent would be eligible for the training until November of 1977, but the training

would be terminated in August of 1977 if there were not enough veterans participating. The respondent was in possession of the bulk of the property of the parties. This included the home valued by petitioner at $9,000 and by respondent at $6,000, an interest in a tract of land adjoining the home and of little net value, the furniture in the home of the value of $2,175, and a 1969 Chevelle valued by the petitioner at $600 and by respondent at $400. The respondent had built up a retirement fund with his employer and it was valued at $1,000.

The debts owed by the parties upon separation were substantial when compared to the assets of the parties. There were some differences in the evidence as to the names of the creditors and the amounts owed to them, but the District Court order for payment of $7,503.39 is not challenged by the parties.

The District Court assigned to petitioner the 1967 Rambler, and the trailer house and furnishings therein. The court assigned to respondent the home, the tract of land, all the furniture in the home, the 1969 Chevelle, and the retirement fund. The respondent was ordered to pay the $7,503.39 in debts. The court ordered the respondent to pay a charge of $2,000 payable with 8 percent interest within 3 years, ordered child support in the sum of $150 per month per child, and ordered alimony in the sum of $125 per month for 36 months.

The $2,000 charge was evidently levied to equalize the property assignments. While the evidence on value is conflicting, the District Court could very well have found under the evidence that the sum of $2,000 would be about one-half the value of the property assigned to respondent less debts, whereas the value of the property assigned to the petitioner was negligible. This court will not disturb a division of property made by the trial court unless it is patently unfair. Edwards v. Edwards, 199 Neb. 581, 260 N.

W. 2d 319. The division is not patently unfair.

The allowance of $150 per month per child is a substantial sum under the circumstances here, and would obligate the respondent to the payment of $300 per month. However, with the increase in wages in effect at the time of trial, it would appear that the respondent would be making about $13,187.20 per year. It would further appear that he has job security. The petitioner, on the other hand, is making $3,600 per year with no real assurance of making more. The judgment of the trial court fixing the amount of child support will not be disturbed on appeal absent an abuse of discretion. Hupke v. Hupke, 195 Neb. 363, 238 N. W. 2d 229. There was no abuse of discretion in this case.

The alimony allowance is $4,500 payable $125 per month for 3 years. The amount and duration of the payments reasonably provide for petitioner's adjustment. This determination rests upon the sound discretion of the District Court, and, in the absence of an abuse of discretion, will not be disturbed on appeal. Hansen v. Hansen, 199 Neb. 462, 259 N. W. 2d 912. However, alimony, support, and property settlement issues must be considered together to determine whether a court has abused its discretion. Olson v. Olson, 195 Neb. 8, 236 N. W. 2d 618. The crucial question in this case is whether the respondent can reasonably be expected to pay all the amounts required. It appears that he can. The assets could provide for the charge and the debts, leaving $425 per month to be paid. The difficult period for the respondent is between the termination of the Veterans Administration payments and the termination of the alimony payments. During this time respondent would have his gross salary of about $1,098.91 per month. This should enable him to pay $425 per month and still provide for his own living expenses. Thereafter, his payments would be reduced to $300

per month for child support, and he should then be in a favorable financial position.

While each case presents its own peculiar facts, this case has many facts similar to Theye v. Theye, 200 Neb. 206, 263 N. W. 2d 92. The orders made by the District Court in the instant case conform generally to the holdings of that case.

The petitioner is allowed the sum of $250 for the services of her attorney in this court.

AFFIRMED.

STEPHANIE ELIZABETH GREENBERG, BY AND THROUGH STEPHEN GREENBERG, HER FATHER AND NEXT FRIEND, APPELLANT, V. BISHOP CLARKSON MEMORIAL HOSPITAL, A CORPORATION, ET AL., APPELLEES.

266 N. W. 2d 902

Filed June 21, 1978. No. 41477.

1. **Trial: Pleadings: Evidence.** The court, in furtherance of justice, may amend any pleading, when the amendment does not change substantially the claim or defense, by conforming the pleadings to the facts proved. The decision to allow or deny the proposed amendment rests in the sound discretion of the trial court.
2. **Trial: Juries: Instructions.** It is ordinarily not appropriate that the trial court submit to the jury the allegations of plaintiff's petition in haec verba. The trial court has the duty to properly analyze, summarize, and submit to the jury the substance of the allegations of negligence in tort petitions.
3. **Instructions: Juries.** An inadvertent grammatical error in an instruction is harmless error if it is clear from the instruction itself and the other instructions given that the jury was not confused or misled by the error.
4. _____: _____. Abstract statements of law applicable in cases in which the evidence fails to establish a prima facie case for submission to a jury are ordinarily inappropriate as instructions to a jury in a case in which a prima facie case has been established.

Appeal from the District Court for Douglas County: PATRICK W. LYNCH, Judge. Affirmed in part, and in part reversed and remanded.

Martin A. Cannon and Mary Veed of Matthews, Kelley, Cannon & Carpenter, for appellant.

John R. Douglas of Cassem, Tierney, Adams & Gotch, for appellee Bishop Clarkson Memorial Hospital.

Ronald H. Stave and David A. Johnson of Emil F. Sodoro Law Offices, for appellee Wax.

Heard before SPENCER, MCCOWN, and BRODKEY, JJ., and REAGAN, District Judge, and KUNS, Retired District Judge.

MCCOWN, J.

This is an action for medical malpractice. The action is brought by an infant, through her father and next friend, against the hospital where she was born and the doctor who attended her after birth, alleging that the malpractice of the defendants caused permanent blindness. After trial, the jury found for the defendants and judgment was entered on the verdict. Plaintiff has appealed.

The plaintiff, Stephanie Greenberg, was born approximately 3 months prematurely on May 15, 1972, at Bishop Clarkson Memorial Hospital in Omaha, Nebraska. At birth she weighed 1 pound 13 ounces. The defendant, Dr. James I. Wax, was not the attending physician at birth, but was called and came to the hospital and was in charge of her treatment thereafter.

The evidence established certain facts without dispute. The survival rate among premature infants weighing less than 2 pounds is very small. Premature babies as small as the plaintiff are quite commonly afflicted with respiratory problems generally classified as respiratory distress syndrome, and the administration of supplemental oxygen is necessary for preservation of life in many of these cases. The baby here had one form of respiratory distress prob-

lem. There were multiple occasions when the child's breathing stopped.

The medical evidence is also undisputed that another condition quite commonly develops among premature babies involving the growth of fiber tissue behind the lens of the eye. That condition is retrolental fibroplasia, and the baby here, by the time she was 4 months old, had retrolental fibroplasia in both eyes and she is permanently blind.

The medical testimony is in conflict as to when oxygen should be used, the amount and length of time for which it is necessary, the method by which oxygen levels in the baby's blood should be measured and tested, and the exact cause and effect relationship between the administration of high levels of oxygen for various periods of time and the occurrence of retrolental fibroplasia.

The testimony is also conflicting as to whether the methods and treatment used by the defendant doctor were or were not in accordance with those ordinarily and generally used under like circumstances by pediatricians engaged in his specialty in Omaha or similar communities.

The testimony of plaintiff's doctors was that the administration of oxygen was maintained at excessively high levels for too long a period of time; that high levels of oxygen were not proper as preventive measures against future respiratory distress syndrome, but only for treatment of actual attacks and for short periods of time; the absorption of oxygen into the blood was not properly monitored, measured, or tested; the tests actually made by the defendant doctor, if properly interpreted, would have dictated an immediate reduction in the level of oxygen; and the administration of oxygen at excessively high levels in the first few days of the baby's life was the direct and proximate cause of her blindness. Plaintiff's expert witnesses also testified that the methods used and the treatment given by the de-

fendant doctor were not in accordance with generally accepted standards of medical practice in Omaha or similar communities.

The testimony of the defendants' witnesses was that the administration of supplemental oxygen was essential to save the life of the baby; and that the amounts of oxygen administered, the methods of monitoring and testing oxygen levels in the blood, and the treatment given were all in accordance with the accepted standards of practice in the community. The defendants' evidence also disputed the plaintiff's evidence as to the cause and effect relationship between the administration of supplemental oxygen and retrolental fibroplasia. Defendants also introduced expert testimony that the baby here had a congenital defect, present at birth and unrelated to oxygen therapy, which was responsible for her blindness rather than the retrolental fibroplasia later found present.

At the close of the evidence the District Court overruled motions of all parties for directed verdicts, and the cause was submitted to the jury. The jury returned a 10 to 2 verdict in favor of the defendant hospital and the defendant doctor. Judgment was entered on the verdict and the plaintiff has appealed.

The plaintiff alleges that the District Court erred in refusing to allow plaintiff to amend her petition after the parties had rested, to allege that the defendant hospital was negligent in maintaining an inadequate number of nurses in the special nursery. Plaintiff's pleadings alleged 15 specific acts of negligence against the defendant hospital. Interrogatories were taken, and the case was tried on the basis of the specific acts of negligence alleged.

The case was tried over a period of almost 3 weeks and the parties rested on Friday, December 17, 1976. On December 20, 1976, plaintiff moved to amend her petition. The defendants objected on the ground

that it was the first time any allegation had been made that the nursing staff was inadequate in number, and that the defendants had not prepared nor offered any evidence on that issue. The District Court denied plaintiff's motion.

Section 25-852, R. R. S. 1943, provides that the court, in furtherance of justice, may amend any pleading, when the amendment does not change substantially the claim or defense, by conforming the pleadings or proceeding to the facts proved. Such an amendment may be made even after the evidence has been closed in an appropriate case. Swartz v. Peterson, 199 Neb. 171, 256 N. W. 2d 681.

The decision to allow or deny the proposed amendment rests in the sound discretion of the trial court. State Securities Co. v. Corkle, 191 Neb. 578, 216 N. W. 2d 879.

The defendants had no opportunity to defend against an allegation of inadequate staffing. In addition to that fact, the testimony failed to establish a standard as to the number of nurses required to staff a special nursery of the kind involved here. There is no evidence as to what other hospitals did with respect to the number of staff, nor any criteria for determining staffing numbers. The evidence failed to support the proposed amendment. The District Court properly exercised its discretion and concluded that the facts did not justify the amendment, and overruled plaintiff's motion.

The plaintiff next contends that the court erred in failing to instruct the jury as to each of the specific acts of negligence charged against the defendant hospital and the defendant doctor in plaintiff's pleadings and, instead, improperly summarized those allegations in instruction No. 2. In essence, plaintiff contends that the allegations of negligence pleaded should have been submitted to the jury as pleaded, and that the summarization was unfair.

This court answered a similar contention in Mar-

quardt v. Nehawka Farmers Coop. Co., 186 Neb. 494, 184 N. W. 2d 617. We said: "As we examine this record, the substance of this contention is that the trial court should have submitted to the jury the allegations of the plaintiff's petition in haec verba. This court has consistently condemned such a practice and has placed the duty upon the trial court to properly analyze, summarize, and submit the substance of the numerous allegations of negligence in tort petitions."

The allegations of negligence set out by the court in instruction No. 2 summarized the allegations of plaintiff's petition. Instruction No. 2 included allegations that the defendant doctor had ordered too high a concentration of oxygen for too long a period of time, and had failed to make timely and appropriate examinations and tests while the plaintiff was being administered a high level of oxygen. Instruction No. 2 properly analyzed and summarized plaintiff's allegations, and fairly presented them to the jury. There is no merit in plaintiff's contention as to instruction No. 2.

Plaintiff also contends that the trial court committed prejudicial error in instruction No. 14 by stating that the standard of care applicable to the defendant doctor was that ordinarily possessed by doctors "in the community or similar community where he practices." The contention is that the phrase "where he practices" was improperly placed and was, therefore, misleading and prejudicially erroneous.

The plaintiff is correct that the phrase is grammatically misplaced, but it is unrealistic to argue that the inadvertent error in that one instruction might have confused or misled the jury. The other instructions refer to medically acceptable standards "in this or a similar community" in six separate specific instructions, including separate instructions with respect to burden of proof, both as to hospitals

and doctors. Only instruction No. 14 contained the misplaced additional phrase. There is no indication in the record that the jury could have been confused or misled by the misplaced phrase. The meaning of an instruction and not its phraseology is the important consideration. Where the meaning of an instruction is reasonably clear, it is not prejudicially erroneous. An inadvertent grammatical error in an instruction is harmless error if it is clear from the instruction itself and the other instructions given that the jury was not confused or misled by the error. Leonhardt v. Harimon, 185 Neb. 224, 174 N. W. 2d 926. Instruction No. 14 was reasonably clear, and the grammatical error was harmless and not prejudicial.

Finally, plaintiff contends that instruction No. 16 was prejudicially erroneous. Instruction No. 16 was requested by the defendant, Dr. Wax. The complete instruction is: "The testimony of other physicians that they would have followed a different course of treatment than that followed by the defendant, Dr. James Wax, or a disagreement of doctors of equal skill and learning as to what the treatment should have been, does not establish negligence. It is not enough merely to present the testimony of a doctor who would have acted differently, or who is willing to express the opinion that treatment should have been performed differently."

Instruction No. 16 is taken directly from Kortus v. Jensen, 195 Neb. 261, 237 N. W. 2d 845. In the context of the Kortus case the statement of law was correct, but in the context of the present case it is inapplicable and misleading. In the Kortus case there was a directed verdict in favor of the defendant doctor which this court affirmed because the evidence failed to establish the generally accepted and recognized standard of medical care and skill in the particular community, and failed to show that the defendant doctor negligently departed from that stand-

ard, other than to show that his technique differed from that of plaintiff's doctor. The abstract statement of law was correct in the context of the Kortus case, but it is inaccurate, misleading, and erroneous as a jury instruction in this case. It is apparent that statements of law applicable in a case in which the evidence fails to establish a prima facie case for submission to a jury are ordinarily inappropriate as instructions in a case in which a prima facie case has been established and the issues are to be submitted to a jury. The statements of law contained in instruction No. 16 are not applicable where there is ample medical testimony as to the acceptable medical standard in the community, and are incomplete in any event.

The District Court had instructed the jury as to the duty of the defendants to use reasonable care and the standard of reasonable care in Omaha or similar communities, as well as instructing upon the burden of proof resting on the plaintiff. Those instructions were followed by instruction No. 16. The plaintiff's evidence of negligence was largely the testimony of doctors that they would have acted differently than the defendant doctor, or that the treatment by the defendant doctor should have been performed differently. Instruction No. 16, in practical effect, permitted the jury to infer that such testimony did not establish negligence and was not enough to establish the plaintiff's case. Instruction No. 16 was erroneous under the facts of this case. It was prejudicial to the plaintiff only as to her cause of action against the defendant doctor, however, and, by its own terms, did not apply to any negligence of the hospital.

The primary response to plaintiff's attack on instruction No. 16 is the contention that plaintiff cannot complain of that particular error because her motion for new trial failed to specify the number of the instruction but asserted, among other grounds,

that the court "erred severally in overruling each of plaintiff's objections to the instructions given." The defendants rely on a former rule that if a motion for new trial attacks instructions as a group, the assignment of error would not be considered if any one of the instructions in the group was properly given.

The record establishes that at the instruction conference the plaintiff objected extensively to the giving of instruction No. 16, and also presented a requested instruction, which was refused, which might have counterbalanced instruction No. 16. The motion for new trial was argued on two occasions and briefed. There is no contention that the issues included in the giving of instruction No. 16 were not presented and argued on the motion for new trial.

The rule relied on by defendants was discarded in Klause v. Nebraska State Board of Agriculture, 150 Neb. 466, 35 N. W. 2d 104. In that case we held that where a motion for a new trial assigned error to a group of instructions, it will be deemed to have assigned error separately as to each instruction contained within the specified group. While it would have been preferable to refer to the instructions more specifically in the motion for new trial, we believe the reference to the instructions to which plaintiff had objected at trial was a sufficient assignment of error under the facts of this case.

For the reasons stated, the judgment in favor of the defendant Bishop Clarkson Memorial Hospital was correct and is affirmed. The judgment as to the defendant James I. Wax is reversed and the cause is remanded for further proceedings.

AFFIRMED IN PART, AND IN
PART REVERSED AND REMANDED.

ROLAND F. WAITE, APPELLEE, V. RON SALESTROM ET AL., APPELLANTS, IMPLEADED WITH OZARK SKYRISE, LTD., APPELLEE.

266 N. W. 2d 908

Filed June 21, 1978. No. 41549.

1. **Equity: Evidence: Witnesses.** While this court tries equity cases de novo, when evidence on a material question of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite.
2. **Equity: Contracts: Reformation.** Equity will decree reformation of a contract for a mistake only if the mistake is mutual.
3. **Contracts: Reformation: Intent.** The right of reformation presupposes that the instrument does not express the true intent of the parties and the purpose of reformation is to make an erroneous instrument express the real agreement. If the parties have not come to a complete mutual understanding of all the essential terms of the bargain, there is no standard to which the writing can be conformed.
4. **Equity: Contracts: Reformation: Fraud.** Equity may also grant reformation to conform to the antecedent agreement of the parties where there is mistake on one side and fraud or inequitable conduct on the other.
5. **Contracts: Reformation: Evidence.** To warrant reformation of a written instrument, the evidence must be clear, convincing, and satisfactory. A mere preponderance of the evidence is not sufficient.
6. **Contracts: Reformation.** Mere carelessness is not necessarily a defense to an action for reformation.
7. **Equity: Contracts: Reformation.** A failure to disclose a change made in a written instrument, which change modifies the prior agreement, may be such inequitable conduct as will, together with mistake on the part of the other party, justify reformation.
8. **Judgments.** The setting aside of a default judgment of one co-obligor does not ipso facto set aside the judgment against the other where the obligations are joint and several.

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

David J. Lanphier and McGill, Koley, Parsonage & Ryan, for appellants Salestrom.

Abrahams, Kaslow & Cassman, for appellee Waite.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

CLINTON, J.

This action was begun in the District Court by Roland F. Waite, appellee here, for reformation of and recovery of a money judgment upon a promissory note of which he was the holder and payee, and of which the defendants, Ron Salestrom, Philip Gardner, and their spouses were the makers. The purpose of the reformation was to strike from the note the following words: "without recourse except to the property covered by the T.D. Signed as General Partners for Ozark Skyrise, Ltd." The defendants defaulted and the court granted the requested reformation and rendered a money judgment for the principal amount of the note in the sum of $100,000, plus accumulated interest. The default judgment against Gardner and spouse was, on a motion, set aside and, after trial upon an amended petition naming only the Gardners as parties defendant, the court entered judgment granting the same relief as in the judgment which had been set aside.

The Gardners appeal to this court and make and argue various assignments of error which we summarize as follows: (1) Reformation should be denied because the plaintiff was guilty of overreaching in the antecedent real estate transaction for which the note was given. (2) The note was not subject to reformation because there was no mutual mistake and no antecedent contract between the parties to the note on which the minds of the parties had met and therefore no contract to be rectified. (3) The evidence is insufficient to support the judgment of reformation.

The defendants Salestrom did not at any time move to set aside the default judgment as to them, but did, after the trial of the cause against the Gardners and on the same day on which the Gardners

filed their motion for new trial, file a motion for judgment notwithstanding the verdict. Their motion was overruled and they filed notice of appeal. As to this appeal, Waite has filed a motion to dismiss because the judgment against Salestrom had become final and the notice of appeal was untimely, therefore this court has no jurisdiction. We reserved ruling on that motion pending oral arguments in this court. Salestroms here contend that the setting aside of the default judgment against Gardners ipso facto resulted in setting aside the judgment against them and they further contend that the contentions made by Gardners are good defenses as to the judgment against them.

It is necessary to state some background facts. About September 1974, the plaintiff, who was the owner of 23 acres of land near the Lake of the Ozarks in the State of Missouri, granted, for the sum of $5,000, to the defendant Salestrom, an option for a period of 67 days from September 25, 1974, to purchase the 23 acres for the sum of $300,000 payable: $5,000 by application of the option payment; $45,000 December 16, 1974; $100,000 March 1, 1975; and $150,000 January 2, 1976. In order to finance the purchase of the property and its proposed development as a condominium hotel with recreational facilities, Salestrom and Gardner formed a limited partnership under the laws of Nebraska known as Ozark Skyrise, Ltd., in which the two were the only general partners. Salestrom and Gardner exercised the option and made the December 16th payment of $45,000, took title in their individual names as joint tenants and executed and delivered to Waite a promissory note for the balance owing of $250,000 payable as provided in the option agreement, and secured the note by a first deed of trust to Waite. The note was executed by each as "Trustee and Individually."

The option agreement provided that Waite would

"subordinate land to lender when 50% of price is paid, plus $45,000."

The $100,000 installment came due and was unpaid. Salestrom and Gardner arranged to borrow the sum of $150,000 from Paul Myers and Henry Robertson. Waite, by letter to the latter parties, agreed to subordinate the remaining $100,000 balance to the lien of these proposed lenders.

The necessary instruments were prepared to accomplish the transaction in a somewhat different manner than the option and the letter contemplated. Instead of a subordination agreement, it was agreed that Waite would release his first deed of trust; that Salestrom and Gardner would execute to Myers and Robertson a first deed of trust, together with a note for $150,000. The proceeds of this loan would be paid to Waite. Gardner and Salestrom would execute a second deed of trust to Waite, together with a new note for $100,000 evidencing the balance owing him.

The instruments to accomplish the above purposes were prepared by a firm of attorneys in Missouri who considered that they were representing all parties. The proposed note to Waite from Salestrom and Gardner was in a usual form and contained no unusual provisions and indicated that it was secured by "D/T on lands in 16-39-16." A copy of this note was, previous to its execution, examined by Waite's Omaha attorney and approved. Salestrom then took the original of the instruments, including the notes in which Myers and Robertson were payees, the related deed of trust, and the note to Waite with the related second deed of trust, to California to cause them to be executed by Gardner and his spouse. Before the Gardners executed the note, they, on the advice of a California lawyer, caused to be typed in the lower left hand of the Waite note the words, "without recourse except to the property covered by the T.D." Gardner understood that by so doing he was relieving himself of any personal liability. Sales-

trom and his spouse executed the note after the change was made. Gardner acknowledges that he did not notify Waite of the change. He contemplated that if the change was not satisfactory, Waite would see it and object and then the matter could be resolved. There is a direct conflict in the testimony as to whether Salestrom informed Waite of the modification.

In any event, on a day in May of 1975, Salestrom took the instruments to the office of the attorney in Camdenton, Missouri. The attorney, Waite, Salestrom, and a real estate broker, who was not an interested party, were present. There Waite executed a release of the first deed of trust and received payment of $150,000. Details of evidence relative to the closing will be discussed later when we consider the second and third assignments of error.

Gardners first contend that reformation, being a discretionary remedy, should be denied because the sale by Waite to Salestrom and Gardner was tainted by overreaching in that Waite paid only $60,000 for the property in 1971 and represented that he had paid $220,000 for it. The price paid by Waite is not disputed. The court found that there was no overreaching by Waite in the sale or the subsequent financing. That finding is clearly supported by the evidence. Gardner and Salestrom were experienced dealers in real estate. They had adequate opportunity to and did examine and investigate the land before the option was exercised. Whether Waite misrepresented the sales price to a third party who was arranging the loan from Myers and Robertson is a subject of sharp dispute. In any event, this occurred long after the sales. It is not contended that he made any representation directly to Gardner and Salestrom. They made no complaint of this kind until after suit was filed. The evidence indicates that the price paid by Salestrom and Gardner was appropriate and reasonable for the type of development

they proposed, namely, a six to seven million dollar Sheraton condominium hotel. The evidence indicates that a primary reason for failure of the project was the miscalculations made by Salestrom and Gardner on the feasibility of the sewage disposal facilities which they contemplated.

While this court tries equity cases de novo, when evidence on a material question of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite. Lortscher v. Winchell, 178 Neb. 302, 133 N. W. 2d 448. The evidence supports the finding of the District Judge that there was no overreaching in the sale by Waite to Salestrom and Gardner.

We now turn to the question of whether there was an antecedent agreement to which reformation of the note should be made to conform. Equity will decree reformation of a contract for a mistake only if the mistake is mutual. Lortscher v. Winchell, *supra*. The right of reformation presupposes that the instrument does not express the true intent of the parties and the purpose of reformation is to make an erroneous instrument express the real agreement. If the parties have not come to a complete mutual understanding of all the essential terms of the bargain, there is no standard to which the writing can be conformed. Westhaven Properties, Inc. v. Pahl, 183 Neb. 355, 160 N. W. 2d 168. Equity may also grant reformation to conform to the antecedent agreement of the parties where there is mistake on one side and fraud or inequitable conduct on the other. Neary v. General American Life Ins. Co., 140 Neb. 756, 1 N. W. 2d 908; Shurtleff v. Albert Pick & Co., 103 Neb. 414, 172 N. W. 46; Hugo v. Erickson, 110 Neb. 602, 194 N. W. 723. To warrant reformation of a written instrument, the evidence must be clear, con-

vincing, and satisfactory. A mere preponderance of the evidence is not sufficient. Westhaven Properties, Inc. v. Pahl, *supra;* Neary v. General American Life Ins. Co., *supra;* Lortscher v. Winchell, *supra.*

We now examine the evidence in the light of these principles. Gardner was personally liable on the original note. Of this there is no doubt, despite his claim that he understood under California law he was not personally liable on a purchase money mortgage. The original contract contemplated subordination of the trust deed of Waite to a new lender when $195,000 of the purchase price had been paid. The effect of that event would be that Gardner would still remain personally liable. In that case, only Waite's security would take a second position. While the agreement was later modified as to form, i.e., new notes and new trust deeds with changed positions would be given, its substance and effect was still the same as originally contemplated. Gardner does not assert that he ever had any agreement with Waite that he would be released from personal liability. He recognized otherwise for he testified: "I felt that when Waite saw the note he would contact me." It is not without significance that Gardner and Salestrom were not in a position to demand any changes in the original agreement. They were in default. They needed the Myers and Robertson money if they were to maintain their equity and have any chance of developing the property.

The remaining questions are, does the evidence satisfactorily show that there was a mistake on Waite's part, and inequitable conduct on the part of Gardner? We take these questions in order.

Waite testified that he attended the closing in Camdenton, Missouri, only to sign the deed of release of the first trust deed and that he did this because he was going to be in the area anyway. The new note (a copy of the original as first drafted) had

been examined and approved by his Omaha attorney. He had no reason to believe any change would be made before it was executed by the promissors. He testified that at the closing he did not examine the note or deed of trust. Waite saw and signed only the deed of release. The attorney who earlier prepared the instrument testified that he examined the various instruments to be sure they were signed and that the notarizations were properly completed. He did not note the change in the note made by Gardner, nor call it to Waite's attention. These were examined by and left with the attorney for recording. He later caused the Waite trust deed to be recorded and the original note to be stamped for identification as required by Missouri law. These instruments were later mailed to Waite and he placed them in his safe deposit box. When Salestrom and Gardner failed to make the $100,000 payment when due, Waite removed the instruments from safekeeping and then for the first time noticed the change. This action was then begun.

Salestrom, in his testimony, implied that he showed the changed note to Waite at some uncertain time and place before closing. This was denied by Waite. Salestrom's testimony is vague and lacking in credibility. His testimony was impeached by prior contradictory statements. He admits that he probably did not want to tell the Missouri attorney about the alteration in the note. He does not claim that there was any agreement for release from personal liability. It is worthy of mentioning that the executed copies of the note which were attached to the recorded trust deed did not bear the alterations made by Gardner and which were stricken by the court's reformation.

Waite may have been careless in not personally checking the instruments for change. Mere carelessness, however, is not necessarily a defense to an action for reformation. Lippire v. Eckel, 178 Neb. 643,

134 N. W. 2d 802; Story v. Gammell, 68 Neb. 709, 94 N. W. 982.

Was Gardner guilty of inequitable conduct? The trial court found that under the circumstances of the case since Gardner made material changes in the note after it was delivered to him, he had a duty to speak to bring the changes to the attention of the plaintiff or his counsel. Gardner did not send the note to either Waite or Waite's attorney. He entrusted it to Salestrom, his general partner. Gardner had no reason to know whether Waite would be present at the closing. Waite testified he had not planned to be present, but was in the area anyway so attended for the purpose of signing the release rather than handling that part of the transaction by mail.

A failure to disclose a change made in a written instrument, which change modifies the prior agreement, may be such inequitable conduct as will, together with mistake on the part of the other party, justify reformation. Cases in point are: Hugo v. Erickson, *supra;* Kaufmann v. Woodard, 24 Wash. 2d 264, 163 P. 2d 606; Guastella v. Wardell (Miss.), 198 So. 2d 227; National Savings & Loan Assn. v. Cook, 183 Ark. 503, 36 S. W. 2d 671; Tokio Marine & Fire Ins. Co. v. National Union Fire Ins. Co., 91 F. 2d 964. The evidence and the law fully justified the court's finding that Gardner's conduct was, under the circumstances, inequitable.

We note in passing that had the note transaction been an original transaction so that the alteration might have been considered a counteroffer by Gardner, the situation would, of course, have been quite different and different principles might be applicable, but that is not this case where an antecedent agreement was being implemented.

We note one further matter. Mrs. Gardner was not a party to the original agreement and had not signed the $250,000 note. As to her, there was no

previous agreement to which reformation could be made to conform. As to her, the court erred in granting reformation and the judgment against her is set aside.

The remaining matter for consideration is the appellee's motion to dismiss the appeal of the Salestroms. The latter did not move at any time to set aside the judgment. They filed no pleading asserting a meritorious defense. Salestrom testified at trial as a witness for Gardner. It is evident that he had no defense on the merits separate from that of Gardner. Under the provisions of section 3-118(e), U. C. C., the liability of the makers of the note is joint and several. Sturgis, Cornish & Burn Co. v. Miller, 79 Neb. 404, 112 N. W. 595, upon which Salestroms rely for the proposition that the setting aside of the judgment against Gardner ipso facto set aside the judgment against them, is not in point. The cited case involved a judgment against principal and surety and the judgment against the principal was set aside. Liability of the surety, of course, depended upon the liability of the principal. That is not this case where the liability is joint and several. The judgments were not an entirety. The judgment against Salestrom had become final. There was no timely appeal. The motion to dismiss the appeal of Salestroms is granted.

AFFIRMED AS MODIFIED.

THE DANISH VENNERFORNING AND OLD PEOPLES HOME, A NEBRASKA CORPORATION, APPELLEE, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLANT.

266 N. W. 2d 914

Filed June 21, 1978. No. 41715.

Eminent Domain: Property: Damages: Time. When property has been taken or damaged for a public use, the owner is entitled to re-

cover as compensation the difference between the value of such property immediately before and immediately after the completion of the improvement from which the injury results.

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

Paul L. Douglas, Attorney General, Warren D. Lichty, Jr., and John E. Brown, for appellant.

Harry H. Foulks and James B. Miller of Farnham & Moylan, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

WHITE, C. THOMAS, J.

This is an appeal from an award of damages by the District Court for the impairment of the access rights of the plaintiff-appellee by the defendant-appellant. This case has been before this court previously. See Danish Vennerforning & Old Peoples Home v. State, 191 Neb. 774, 217 N. W. 2d 819. On that occasion we vacated an order of the District Court which directed the State to remove an access road it had constructed to plaintiff's park and to build an access road at a designated location. We remanded the cause to the District Court for determination of damages resulting from defendant's taking or damaging of access rights. This is an appeal from an award to plaintiff on remand of $62,060. We reverse.

In the process of relocating a street, the defendant destroyed the access road leading to plaintiff's park. The defendant built a new access road which the plaintiff contends substantially impairs its right to access. In the prior opinion, this court noted that while the defendant did not acquire any access rights of the plaintiff under its petition for condemnation, the defendant had the authority to condemn the access rights and thought it had done so. We found possession of the access rights to be necessary

and proper for the public use and confirmed the taking. We remanded the cause to the District Court solely to determine the amount of damages which resulted from the State's taking or damaging of access rights.

On remand, the District Court held that the defendant's taking of the original access rights were unlawful, quieted title to those rights in the defendant, and determined that the quieting of title would diminish the market value of plaintiff's property in the sum of $62,060. The damages were assessed as of the date of trial, April 19, 1977.

The determination of damages being the sole issue on remand, it was improper for the District Court to make any finding regarding the legality of the defendant's original taking of the access rights. In assessing damages, it was error for the trial court to determine damages as of the date of trial rather than the date of taking. When property has been taken or damaged for a public use, the owner is entitled to recover as compensation the difference between the value of such property immediately before and immediately after the completion of the improvement from which the injury results. See, Chicago, R. I. & P. Ry. Co. v. O'Neill, 58 Neb. 239, 78 N. W. 521; Deitloff v. City of Norfolk, 183 Neb. 648, 163 N. W. 2d 586.

The judgment is reversed and the cause is remanded to the District Court for a determination of damages as of the date of taking.

REVERSED AND REMANDED.

RICK L. KUDERA, APPELLANT, V. MINNESOTA MINING AND MANUFACTURING COMPANY, ALSO KNOWN AS 3M COMPANY, APPELLEE.

266 N. W. 2d 915

Filed June 21, 1978. No. 41728.

Workmen's Compensation: Appeal and Error. In an appeal from

the Workmen's Compensation Court, the Supreme Court is not free to weigh the facts anew. The standard of review accords to the findings of the compensation court the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong.

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

Hutton & Garden, for appellant.

Deutsch, Jewell, Otte, Gatz, Collins & Domina, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

WHITE, C. THOMAS, J.

This is a workmen's compensation case. At the first hearing, the plaintiff was found to have suffered an injury to the muscles of his right shoulder while pulling scrap plastic from a pile preparatory to inserting it into a grinding machine. The judge ordered the medical expenses paid, but found that the plaintiff had suffered no disability. The plaintiff appealed to the full tribunal. The decision of the one-judge court was affirmed by a majority of the three-judge panel, Judge Buchholz dissenting. We affirm.

The plaintiff suffered an injury on April 28, 1976, for which he was treated. The plaintiff's employment was terminated shortly thereafter. The parties dispute the reasons. Plaintiff asserts that he was unable to perform the work required of him, by reason of severe pain. The defendant asserts that the plaintiff was fired for repeated tardiness.

The plaintiff's evidence is that since the accident he has suffered continual and unremitting pain, and that he has been disabled since the injury. Plaintiff was first treated by Dr. Joseph David, Jr., on April 28, 1976. Dr. David testified that he found no evidence of injury on X-rays, but that the muscles around the shoulder were extremely tender. The

plaintiff was told to rest the shoulder and was given pain pills. He again saw the plaintiff on September 3, 1976. The plaintiff complained of continued tenderness in the muscles. A drug to reduce tenderness was given to plaintiff. On October 12, 1976, no improvement being shown, the plaintiff was referred to Dr. Charles E. Henkel, an orthopedist. At that time, Dr. David felt that the plaintiff could not return to work. Dr. Henkel did not testify.

Dr. Thomas L. Workman, a chiropractor, testified that he first saw the plaintiff on May 13, 1977, for an unrelated low back injury. At the request of plaintiff, he examined his shoulder. The plaintiff recited the injury of April 28, 1976, and a history of intense pain since that time. Dr. Workman testified that no objective findings were discovered but that plaintiff was "totally disabled." The plaintiff was depressed by his inability to work and was referred to Dr. Daryl Stephenson, a psychiatrist in Yankton, South Dakota. Dr. Stephenson did not make a physical examination, but took the plaintiff's history on July 19, 1977. In his opinion, based on reasonable psychiatric certainty, the plaintiff suffered a disability and has not been able to work since that time.

The defendant produced the evidence of Dr. Joseph F. Gross, M. D., an orthopedic surgeon, who testified that he examined the plaintiff on June 3, 1977. Essentially the physical examination was negative. Dr. Gross described at length a test for "scapulohumeral rhythm." The test involves the full range of movement of the shoulder, and is described by Dr. Gross as "a very accurate test." The completion of the movements is apparently indicative of a lack of pain in the shoulder area. Dr. Gross testified as follows: "Q What were your findings in that regard with Mr. Kudera? A He had a normal scapulohumeral rhythm on both sides. Q Did you find any reason why Mr. Kudera could not carry on his usual employment? A *No, sir.* * * *

Q In short, you could find nothing wrong with him, is that right, at the time you saw him. A That is right." (Emphasis supplied.)

This court is not free in workmen's compensation cases to weigh the facts anew. Our standard of review accords to the findings of the compensation court the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong. See, § 48-185, R. S. Supp., 1976; Hyatt v. Kay Windsor, Inc., 198 Neb. 580, 254 N. W. 2d 92.

The presence or absence of pain where no physical cause can be discovered is obviously a factual question. Whether this court would agree with the dissent, that the physical pain was present, and is disabling, were we free to review the evidence de novo, is speculative. Strong evidence indicates the pain is real, but substantial evidence supports the compensation court's decision. We are bound by that factual decision, since it is not clearly wrong.

AFFIRMED.

JOSE CAMARILLO, APPELLEE, V. IOWA BEEF PROCESSORS, INC., APPELLANT.

266 N. W. 2d 917

Filed June 21, 1978. No. 41763.

1. **Workmen's Compensation: Burden of Proof.** An award of workmen's compensation benefits cannot be based alone on speculation and conjecture and if an inference favorable to the claimant can only be reached on the basis thereof, then he cannot recover.
2. _____: _____. An award for permanent disability cannot be based on mere possibilities.

Appeal from the Nebraska Workmen's Compensation Court. Reversed and remanded with directions.

Smith, Smith & Boyd, for appellant.

Roman de la Campa, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

WHITE, C. THOMAS, J.

This is an appeal from a decision of a three-judge panel of the Workmen's Compensation Court. It affirmed in part and modified in part a decision of the one-judge court. On September 30, 1975, the plaintiff Jose Camarillo was an employee of the defendant-appellant Iowa Beef Processors, Inc. The plaintiff was engaged in pulling tenderloins at the defendant's plant at Dakota City, Nebraska. The job involved the use of a hook in the left hand and a knife in the right hand, pulling the tenderloin and cutting it from the carcass. Plaintiff testified that he had worked for more than a year at this job. He pulled approximately 600 to 700 tenderloins a day. The plaintiff describes his injury as follows: "I get the last piece of meat, so you have to be done with the last piece so you can go out to break. And then I get one that was real heavy and halfway froze, and I get close to pull with my hand, and I get close with that, and when I pull you have to open so it don't cut the meat * * *.

"So I went to break and when I came back I just started feeling, oh, like a sharp pain there, and I told the foreman if I can go to see the nurse. He told me no, because he don't have nobody to relieve me 'til — Well, sometime that day he let me go. So I went to see the nurse and she say, 'Well, you better see the doctor.' "

The plaintiff was examined by Dr. E. M. Mumford. The doctor's diagnosis was a "Mild carpal tunnel syndrome, perhaps also ulnar nerve compression, secondary to synovitis which indirectly was due to aggravation of pre-existing old avulsion fracture of the tip of the ulna associated with some distal ulnar radial sprain." The plaintiff continued to be treated by Dr. Mumford until October 1976. In Jan-

uary 1977, Dr. Mumford made the following notation on a statement for services: "PROGRESS REPORT: Released to return to work. No Restrictions. Need not return unless having trouble." On May 19, 1976, Dr. Mumford reported: "This patient has no permanent partial disability as a result of the sprain of his radius and ulna, however, he does have a congenital wrist which could continue to cause him symptoms."

The plaintiff, who testified that he had worked continually except for short periods of time for layoffs and a short period of disability after the initial incident, consulted Dr. John J. Dougherty, an orthopedist. Dr. Dougherty first saw the plaintiff on November 11, 1976. He testified that the plaintiff stated that he had injured his left wrist in September of 1975 while pulling meat. The plaintiff was complaining of pain in his wrist, especially if he twisted it. The X-rays disclosed that the tip of the ulnar styloid was loose and a small piece of bone was discoverable in the fracture. After the application of first a splint, and then a cast, provided no apparent relief, surgery was recommended. Subsequently a surgical process was undertaken by Dr. Dougherty which removed the broken piece of bone from the wrist. Dr. Dougherty testified that in his opinion the fracture of the bone fragment was an old injury, at least 2 years old at the time of his first examination of the plaintiff in November 1976. He further testified that the plaintiff had a permanent partial disability of the wrist of 10 percent. Based on this evidence, Dr. Dougherty further testified in response to the question of the plaintiff's counsel: "I have only one final question, Doctor. You mentioned that the cause of the sickness of Mr. Camarillo could either be the congenital condition of his wrist or an accident; Is that correct? A. Yes. Q. Do you think it could be a possible combination of both? A. Oh, I think that's a possibility, yes." Dr. Dougherty fur-

ther testified on cross-examination: "Q. So if you were gripping something like a meat hook with a hand and pulling on it, is it likely that you would cause a break or a fracture of that type? A. Well, I'd guess I'd have to answer not likely."

The single judge found that the plaintiff had suffered an accidental injury on September 30, 1975, and was entitled to compensation for a period of 7 3/7 weeks for temporary total disability which had previously been paid by the defendant and was entitled to be paid for all medical services of Dr. E. M. Mumford. The single judge further found that the evidence was insufficient to sustain a finding that the accident aggravated plaintiff's congenital condition to the point of disability and need for surgical treatment. The judge's decision was based on the principle that "this court may not engage in speculation or conjecture as to the precipitating cause of the plaintiff's surgery."

On appeal, the majority of the three-man court found that: "In spite of Dr. Dougherty's testimony, the evidence was uncontradicted that the plaintiff prior to September 30, 1975, used his left wrist extensively in his work operations and had no difficulty with it whatsoever. Subsequent to the incident on September 30, 1975, when, according to the plaintiff's testimony, he felt a sharp pain in his left wrist while pulling beef tenderloins, plaintiff experienced continuous pain in his left wrist, which ultimately required the surgery performed by Dr. Dougherty and produced a 10 per cent permanent partial disability of the left arm." Judgment was entered accordingly.

In his dissent, Judge Novicoff stated that when the plaintiff returned to work on December 1, 1975: "* * * there is no evidence that any disability in the plaintiff's left wrist was due to, caused, or aggravated by the sprain he suffered on or about September 30, 1975. To the contrary, all of the evidence in-

dicates that the plaintiff's problems with his left wrist were due to a ganglion cyst not associated with a sprain and/or a loose piece of bone which probably occurred nine months prior to the September 30, 1975, incident, and/or a congenital condition in the plaintiff's wrist. There is no evidence whatsoever that any of these conditions were caused or aggravated by the September 30, 1975, incident." We agree with the dissent and reverse the judgment and remand the cause to the compensation court for reinstatement of the judgment of the one-judge court.

The entire evidence on which the plaintiff seeks to rely is that of the testimony of Dr. John J. Dougherty. In Welke v. City of Ainsworth, 179 Neb. 496, 138 N. W. 2d 808, this court held that an award of workmen's compensation benefits cannot be based alone on speculation and conjecture, and, if an inference favorable to the claimant can only be reached on the basis thereof, then he cannot recover. At issue in that case was the causation of a herniated disk which was alleged to have been caused by a scuffle between the plaintiff, a police officer of the City of Ainsworth, and a person whom he was arresting some 8 months prior to the first discovery of the herniated disk. The opinion of Dr. Shiffermiller, the physician who originally treated the plaintiff-officer, was found by the court to be sufficient to justify a finding for the plaintiff. The testimony of the doctor stated that in his "opinion * * * disability was probably due to a scuffle." After reviewing the definition of "probable," a majority of this court found the proof sufficient to sustain the findings of the compensation court. Judge Carter dissented, saying: "The issues of this case have been decided many times by this court, making it unnecessary to cite cases other than our own. As the cases cited show, our interpretation on the use of possibility, probability, and speculation as evidence is of long

standing and has met with apparent legislative approval."

The evidence in this case on behalf of the plaintiff does not even meet the standard of "probability" in Welke v. City of Ainsworth, *supra*. An award for permanent disability cannot be based on mere possibilities. Hamilton v. Huebner, 146 Neb. 320, 19 N. W. 2d 552, 163 A. L. R. 1.

The judgment of the three-man compensation court is reversed and the cause remanded with directions to reinstate the decision of the one-judge compensation court.

REVERSED AND REMANDED WITH DIRECTIONS.

AMELIA M. JOHNSON OBAN, APPELLANT, V. KEITH E. BOSSARD, APPELLEE.

267 N. W. 2d 507

Filed June 28, 1978. No. 41418.

1. **Negligence: Verdicts.** A motion for a directed verdict of liability encompasses not only the negligence of the defendant as a matter of law, but also the causal connection between such negligence and the accident in question.
2. **Evidence: Verdicts.** In considering a motion for a directed verdict, all controverted evidence and legitimate inferences therefrom are resolved in favor of the party against whom the motion is directed.
3. **Motor Vehicles: Proximate Cause.** The doctrine of sudden emergency applies only when an individual, first becoming aware of the emergency, is faced with a rapid choice of courses and selects one which deliberate judgment shows as negligent.
4. **Trial: Instructions: Appeal and Error.** If a trial court gives an erroneous instruction, or erroneously gives an instruction, the record must establish such an error did not affect the result of the trial unfavorably to the party affected by such instruction.

Appeal from the District Court for Antelope County: MERRITT C. WARREN, Judge. Reversed and remanded.

Patrick L. Cooney of McCormack, Cooney & Mooney, and Robert I. Eberly, for appellant.

Kirk S. Blecha of Baird, Holm, McEachen, Pedersen, Hamann & Haggart, for appellee.

Heard before WHITE, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ., and HASTINGS, District Judge.

PER CURIAM.

This case involves an action for personal injuries sustained in the crash of a private plane on August 30, 1972. Plaintiff Oban was a passenger in the four passenger Cessna 182 aircraft owned and piloted by the defendant Bossard. The flight originated in Neligh, Nebraska, with the ultimate destination Las Vegas, Nevada. The crash occurred in the Rocky Mountains near Eldora, Colorado. At the close of all the evidence, plaintiff moved for a directed verdict of liability, which motion was denied. The jury was instructed and, after deliberating, returned a verdict for the defendant. After plaintiff's motion for new trial was denied, this appeal followed. There are two assignments of error which have been properly raised, preserved and argued in this appeal: (1) Whether the trial court erred in denying the motion for a directed verdict; and (2) whether the trial court erred in instructing the jury on the doctrine of sudden emergency. Of course included within the latter is whether such error, if existing, was prejudicial or harmless.

The defendant Bossard was a licensed private and commercial pilot. He obtained his private license in about 1967 and his commercial license in 1970. A minimum of 40 hours flight-time is required before an individual may be tested for a private license, and defendant indicated he had about 160 hours of flight-time when he obtained his commercial license. Some instrument flying is required before a com-

mercial license is issued, and such a license authorizes a pilot to carry passengers for hire.

Defendant had prepared flight plans for three different routes. On the morning of August 30, 1972, defendant checked with the Grand Island flight service about weather conditions, selected this particular route, and activated his flight plan around 6 a.m. The plan called for a refueling stop in Grand Junction, Colorado, but this was changed en route to Kremmling, Colorado, some 90 miles east, because the defendant felt his fuel supply might be marginal if extended to Grand Junction. Defendant had flown over mountains on four or five previous occasions, but never this particular route. The route had been selected by the defendant because of favorable weather conditions, but it was described by plaintiff's experts as the most difficult and dangerous of the routes available. Defendant was flying a VFR (visual flight rules) flight plan as opposed to an IFR (instrument flight rules) flight plan.

Defendant testified he was flying a Victor 8 airway from Denver to Kremmling, a heading of about 260 degrees. He had aboard the aircraft as navigational aids an IFR chart and a Cheyenne sectional map. The IFR chart indicated a safe minimum altitude for this airway of 16,000 feet, and 14,900 feet was the minimum altitude at which radio communications were certain. The sectional map showed the highest terrain feature on the V-8 airway at 12,700 feet. Defendant testified at the time of the crash he was somewhat north of the airway, and the highest terrain feature in the vicinity was at 11,500 feet. FAA regulations require a 500-foot elevation over the surface of uncongested areas except when landing or taking off. Defendant had flown by Denver at an altitude of 8,500 feet and then began to climb to cross the mountains. Defendant testified and admitted in a deposition that about 10 minutes before the crash he was "struggling for altitude" between 11,000 and

12,000 feet, and that he caught an updraft and felt he "had it made." Defendant was unsure of his altitude immediately before the crash, but felt it was 12,500 or 13,000 feet. A few seconds before the actual impact, the aircraft experienced a downdraft. Both the defendant, himself, and the plaintiff's experts testified downdrafts should be expected on the easterly slopes of these mountains, for the reason prevailing westerly winds spill over the mountains much as water spills over a dam. Defendant testified he had experienced downdrafts before, but none as strong and violent as this one. The crash occurred approximately 30 to 40 miles west, and north, of Denver.

The experts called by the plaintiff testified as to various precautions and standards reasonable and prudent pilots would employ in mountain flying. Some of these included approaching a mountain range at a 45 degree angle so a turn of less than 180 degrees is required to abort the attempt, to maintain a crossing elevation of 2,000 feet over the highest terrain feature as a cushion against possible downdrafts, and to reach the crossing altitude 30 miles away so there is sufficient time and distance to abort the attempt if the altitude cannot be reached. Although certain characteristics of the defendant's aircraft are not in evidence, such as rate of climb, airspeed, etc., both of plaintiff's experts testified that defendant was taxing the capabilities of this particular type of aircraft in flying this route, and that neither one of them would have attempted it. Both experts testified in their opinion the crash was caused by pilot error. Defendant called no expert witnesses.

We recognize that jurors are not required to take the opinions of experts as binding. But where practices and procedures used by pilots in the exercise of ordinary care are not within the general knowledge of jurors, expert testimony is generally needed.

Plaintiff provided such testimony as to both negligence and causal connection, and the defendant offered no rebuttal as to the practices and procedures. It is abundantly clear that the defendant was negligent in the operation of the aircraft as a matter of law because he proceeded ahead, relying upon updrafts to get his plane over the heights ahead and not upon the capabilities of his airplane. Furthermore, he did this in an area where he knew downdrafts could be expected and after he had adequate factual warning of the danger by reason of the previous struggle to gain altitude at a time when the plane was not yet high enough to clear the mountains ahead. It does not follow, however, that plaintiff was entitled to a directed verdict of liability. Such a motion encompasses both aspects of negligence and causal connection. Although the question of causal connection, or proximate cause, is very close, it would appear that the testimony of the defendant as to the severity of the downdraft, if believed by the jury, could result in a conclusion that the downdraft was the *sole* proximate cause of the accident. In addressing the motion and the trial court's ruling, all controverted evidence and legitimate inferences therefrom are resolved in favor of the defendant. Jensen v. Shadegg, 198 Neb. 139, 251 N. W. 2d 880; Waegli v. Caterpillar Tractor Co., 197 Neb. 824, 251 N. W. 2d 370; Middleton v. Nichols, 178 Neb. 282, 132 N. W. 2d 882. It would appear plaintiff's motion for a directed verdict was properly denied because the causal connection between the defendant's negligence and the crash was not established as a matter of law.

A more difficult question is presented by plaintiff's second assignment of error — that the trial court erred in instructing the jury on the doctrine of sudden emergency. NJI No. 3.09. No claim is made and no evidence was introduced to show the defendant negligent in the operation of the aircraft *after* he

encountered the final downdraft. More simply stated, the only issue on liability is whether the downdraft was the *sole* proximate cause of the crash, or whether the negligence of the defendant was *a* proximate, or proximately contributing, cause of the crash. The doctrine of sudden emergency applies only when an individual, first becoming aware of an emergency and faced with a rapid choice of alternative courses, selects a course which mature judgment and deliberation would show to be erroneous or negligent. Kraft v. Fundum, 175 Neb. 821, 124 N. W. 2d 225, citing Feck's Adm'r v. Bell Line, Inc., 284 Ky. 288, 144 S. W. 2d 483; 65 C. J. S., Negligence, § 17, p. 603. Bedke v. Kucera, 200 Neb. 380, 263 N. W. 2d 830, decided this term, is distinguishable on its facts. In that case, the allegations and evidence dealt with negligent acts, both before and after the alleged emergency.

The doctrine of sudden emergency was not applicable to this case and it was error to instruct upon it because the evidence supports only the conclusion that defendant brought the emergency upon himself or he did not use due care to avoid that emergency. Coyle v. Stopak, 165 Neb. 594, 86 N. W. 2d 758. The giving of an erroneous instruction, however, is not necessarily prejudicial. Leonhardt v. Harimon, 185 Neb. 224, 174 N. W. 2d 926. Unless it appears from the record that an incorrect instruction did not affect the result of the trial unfavorably to the party affected by it, the giving of the instruction must be considered prejudicial error. Raile v. Toews, 165 Neb. 184, 84 N. W. 2d 199; Van Wye v. Wagner, 163 Neb. 205, 79 N. W. 2d 281; Long v. Whalen, 160 Neb. 813, 71 N. W. 2d 496. The apposite statement of this rule is that it is error without prejudice to instruct on questions not raised by pleadings or applicable evidence when the instruction does not have a tendency to mislead the jury. Bailey v. Spindler, 161 Neb. 563, 74 N. W. 2d 344. Although a close reading

and a technical application of the sudden emergency instruction would show it applied only to actions of the defendant *after* the downdraft had been encountered, one cannot overlook that the very purpose of such an instruction is to lower the standard of care for an allegedly negligent defendant, i.e., identical actions being negligent at one time and not at another. Under these circumstances we cannot say the record shows such an instruction did not affect the result of the trial. Therefore, the judgment must be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

SIMON J. ALBRACHT, APPELLEE, V. PRUDENTIAL INSURANCE COMPANY OF AMERICA, A CORPORATION, APPELLEE, IMPLEADED WITH MAX L. POFAHL, ADMINISTRATOR OF THE ESTATE OF MARY J. NEUDECK, DECEASED, APPELLANT, IMPLEADED WITH JAMES L. SANDERSON, ADMINISTRATOR OF THE ESTATE OF SUSAN A. SANDERSON, DECEASED, ET AL., APPELLEES.

267 N. W. 2d 511

Filed June 28, 1978. No. 41488.

1. **Contracts: Frauds, Statute of.** Generally, the statute of frauds does not apply to a contract which has been fully performed by one party.
2. **Equity: Frauds, Statute of.** Equity will not allow the statute of frauds to be used as an instrument of fraud.
3. **Contracts: Assignments: Equity: Liens.** Where section 44-371, R. R. S. 1943, is not applicable, an oral assignment or pledge of a life insurance policy by the named beneficiary, after the death of the insured, to secure a debt or obligation of the beneficiary, accompanied by delivery of the policy, constitutes a pledge entitling the pledgee to an equitable lien upon the proceeds of the policy.

Appeal from the District Court for Douglas County: RUDOLPH TESAR, Judge. Affirmed.

Hutton & Garden, for appellant.

Terry Anderson of Lathrop & Albracht, for appellee Albracht.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

MCCOWN, J.

The plaintiff brought this action against the defendant insurance company to recover proceeds due under a life insurance policy which had been delivered and orally assigned to the plaintiff by the named beneficiary. The defendant insurance company paid the proceeds of the insurance policy into court and interpleaded the administrator of the estate of the named beneficiary, who was substituted as a defendant. The District Court determined that plaintiff had an equitable lien on the proceeds of the insurance policy in the sum of $8,492.97, plus accrued interest, and that the defendant administrator was entitled to the remainder of the policy proceeds over and above the amount of plaintiff's lien. The defendant administrator has appealed.

The facts in this case are undisputed. On March 19, 1968, Larry L. Neudeck obtained a life insurance policy from Prudential Insurance Company in the face amount of $11,020. The named beneficiary was Mary J. Neudeck, his wife. On July 6, 1973, Larry L. Neudeck died from gunshot wounds. An information charging Mary J. Neudeck with the murder of her husband was filed on July 11, 1973, and she was bound over for trial after preliminary hearing. The plaintiff was retained by Mary J. Neudeck to represent her in the criminal trial. Both the plaintiff and the defendant administrator testified that it was agreed between the plaintiff and Mary J. Neudeck that the plaintiff would receive a fee of $7,500, plus expenses, if the murder case went to trial, and Mary J. Neudeck delivered the insurance policy to the plaintiff. It was their agreement that the plaintiff would be entitled to the proceeds of the policy to the

extent of plaintiff's fee, with the balance to be paid to Mary J. Neudeck. The agreement was made and the policy delivered to plaintiff on or about July 14, 1973.

After Mary J. Neudeck filed a proof of death statement with the defendant insurance company, plaintiff delivered the policy to the company. The company admitted liability but declined to pay the proceeds until the outcome of the criminal proceedings determined who was entitled to them.

On March 14, 1974, Mary J. Neudeck was acquitted following a jury trial. On March 27, 1974, Mary J. Neudeck was killed in an automobile accident. On April 3, 1974, Prudential issued its check for the proceeds due payable jointly to Mary J. Neudeck and plaintiff's law firm, without knowledge of Mary J. Neudeck's death. The check was returned by plaintiff. The defendant, Max Pofahl, was thereafter appointed administrator of Mary J. Neudeck's estate.

This action was instituted by plaintiff against Prudential Insurance Company to recover the proceeds of the insurance policy. Prudential paid the proceeds of $13,563.36 into court and interpleaded the defendant administrator and others. Prudential was dismissed and discharged from liability and the administrator substituted as a defendant.

The making of the oral assignment, the delivery of the policy to the plaintiff, and the performance of the professional services by plaintiff in accordance with the agreement are not disputed. The sole issue in this case is whether the oral assignment was ineffective under the provisions of section 44-371, R. R. S. 1943. The District Court determined that the plaintiff had an equitable lien on the proceeds of the insurance policy in the sum of $8,492.97, plus interest, and that the defendant administrator of the estate of Mary J. Neudeck, deceased, was entitled to the remainder of the policy proceeds over and above that amount. The defendant administrator has appealed.

Section 44-371, R. R. S. 1943, provides in relevant part: "All money, * * * and every benefit accruing * * * under any policy * * * of life insurance payable to a beneficiary other than the estate of the insured, * * * shall be exempt from attachment, garnishment, or other legal or equitable process, and from all claims of creditors of the insured, and of the beneficiary if related to the insured by blood or marriage, in the absence of a written agreement or assignment to the contrary."

The statute itself constitutes the sole citation of agreement and assignment here were not in writing, any claim or lien based upon the oral agreement or assignment is wholly void and unenforceable. We disagree.

The statute itself constitutes the sole citation of authority upon which defendant relies. It should be noted that the statute is not a true exemption statute, but is an application of the statute of frauds.

Whatever may have been the policy or intent of the Legislature, the specific language of the statute extends the protection and benefits of the statute as to creditors' claims in cases such as this only to persons related to the insured or the beneficiary by blood or marriage. In the case now before us the record establishes that the only persons who would benefit here if the statute is held to be applicable and plaintiff's claim is denied are not related by blood or marriage to either the insured or the beneficiary but, instead, are judgment or other creditors of the estate of the beneficiary, Mary J. Neudeck. The statute is not applicable under such circumstances.

This court has consistently followed the general rule that equity will not allow the statute of frauds to be used as an instrument of fraud. See, Farmland Service Coop, Inc. v. Klein, 196 Neb. 538, 244 N. W. 2d 86; Hecht v. Marsh, 105 Neb. 502, 181 N. W. 135. In the latter case we approved the rule that equity

will not allow the statute of frauds to be used as an instrument of fraud, and will decree specific performance or hold the maker of a parol contract estopped from denying it when the other party, by virtue of it, and under and in pursuance of it, has so far acted that it would be aiding in a fraud to permit the contract to be repudiated.

This court has also consistently followed the general rule that the statute of frauds does not apply to a contract which has been fully performed by one party. See, Ridenour v. Kuker, 185 Neb. 321, 175 N. W. 2d 287; Montgomery v. Quantum Labs, Inc., 198 Neb. 160, 251 N. W. 2d 892.

In Dvorak v. Kucera, 130 Neb. 341, 264 N. W. 737, this court awarded the proceeds of a life insurance policy to a wife who had possession of the policy which named the husband's estate as beneficiary, and recognized the general rule that a policy of insurance may be given as security for a debt without a formal assignment. This court held that an oral assignment or pledge of a life insurance policy as security for a debt of the assured is valid between the parties, notwithstanding a provision in the policy that no assignment shall be valid unless in writing and filed with the insurer. We also held that the delivery of a life insurance policy to secure a debt of the assured, whether assigned or not, constitutes a pledge entitling the pledgee to an equitable lien upon the proceeds.

Brown v. Ehlers, 130 Neb. 918, 267 N. W. 156, involved the oral assignment of insurance policies which named no beneficiary. This court held that the oral assignment, accompanied by delivery of the policies, was sufficient to give the plaintiff an equitable interest in the proceeds. In doing so, the court cited Dvorak v. Kucera, *supra*, and prior cases holding that partial performance of a contract takes it out of the statute of frauds, and that an insurance policy may be validly assigned by transfer.

Where section 44-371, R. R. S. 1943, is not applicable, the cases confirm the proposition that an oral assignment or pledge of a life insurance policy by the named beneficiary, after the death of the insured, to secure a debt or obligation of the beneficiary, accompanied by delivery of the policy, constitutes a pledge entitling the pledgee to an equitable lien upon the proceeds of the policy. In the case now before us the evidence of both parties establishes that plaintiff agreed to perform professional services for Mary J. Neudeck for an agreed fee, and that Mary J. Neudeck orally assigned and also delivered the policy of insurance as security for payment of that fee. Plaintiff was to be entitled to the proceeds of the policy to the extent of his fee and the balance was to be paid to Mary J. Neudeck. The evidence also establishes that the agreement was fully performed by the plaintiff. Under these circumstances this case falls outside the ambit of section 44-371, R. R. S. 1943, and the trial court was correct in determining that the plaintiff had an equitable lien on the proceeds of the insurance policy for the agreed value of his services.

In view of the disposition made, it is unnecessary to consider the additional grounds alternatively urged by the plaintiff.

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

AFFIRMED.

CLINTON, J., concurring in the result.

I concur in the result although I do not agree with the rationale of the opinion. I believe that section 44-371, R. R. S. 1943, is a true exemption statute and not merely a statute of frauds. It is my opinion that section 44-371, R. R. S. 1943, is not applicable for the reason the record establishes that the real contest in this case is between two different sets of creditors of the beneficiary of the policy, i. e., the plaintiff, who, for value given, took an oral assignment and physi-

cal delivery of the policy, and between creditors of the beneficiary's estate to whom there may be some liability on account of a subsequent tort of the beneficiary occurring after the assignment to the plaintiff. In these circumstances I believe that, as between the two sets of creditors, the oral assignment is valid and section 44-371, R. R. S. 1943, has no applicability. If the ultimate beneficiaries of the estate were the decedent's heirs or legatees, I would hold that the statute is applicable.

SPENCER, J., joins in this concurrence.

EVELYNE E. SWEARINGEN, APPELLANT, V. JAMES W. SWEARINGEN, APPELLEE.

267 N. W. 2d 514

Filed June 28, 1978. No. 41534.

1. **Equity: Appeal and Error: Witnesses: Evidence.** While equity cases are heard de novo in this court, in determining the weight to be given the evidence this court will consider the fact that the trial court observed the witnesses and their manner of testifying.
2. **Custody: Infants: Parent and Child.** A decree fixing custody of a minor child will not be modified unless there has been a change of circumstances indicating that the person having custody is unfit for that purpose or that the best interests of the child require such action.
3. **Courts: Custody: Infants: Appeal and Error.** While the discretion of the trial court on granting or changing custody of minor children is subject to review, the determination of the court will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Affirmed.

John C. Brownrigg of Eisenstatt, Higgins, Kinnamon, Okun & Stern, for appellant.

Richard J. Dinsmore of Dolan & Dinsmore, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

SPENCER, J.

This case involves the custody of an 11-year-old girl. The mother-appellant, Evelyne E. Swearingen, had been granted custody of the child approximately 14 months before the filing of the motion herein. This present proceeding was initiated by motion of the mother seeking permission to move the child to Michigan. The District Court changed the custody. It retained the legal custody of the child in the court but placed possession with the father-appellee, James W. Swearingen, for a period not to exceed 1 year. It further provided at the expiration of a year, or before, the court would review the matter for the purpose of determining whether full custody should be given to the father. The mother appeals. We affirm.

Jann Marie Swearingen was born December 17, 1966. Her parents were divorced April 21, 1975, and she was placed in her mother's custody. The appellant had three other children from a previous marriage — two boys and a girl. The boys were 14 and 16, and the girl 18 at the time of the trial.

The marriage of the parties had been a stormy one. Appellee was an appliance salesman and appellant an elementary school teacher. At the time of trial she had taught for 9 years for the Papillion school district. Appellee had become a very heavy drinker, consuming 24 or more beers a day. For a period of time he was taking several times the normal dosage of Sominex, an over-the-counter sleeping pill. At his wife's insistence, in an effort to save the marriage, he sought psychiatric help. The medical testimony indicated that Sominex contained a drug called scopolamine, which is also called "twilight sleep." The taking of Sominex with alcohol could cause a person to forget what he did under its influence.

While the divorce was pending, appellant made the acquaintance of a Mr. Gaubatz, who was an insurance agent from Michigan visiting in Omaha. After he returned to Michigan, they corresponded and she subsequently made trips to Michigan to seek employment preparatory to moving to Detroit. After her divorce became final, they contemplated marriage. A month after the divorce decree was signed, appellee filed a motion for custody of the child, claiming it was his information appellant was planning to move the child from the jurisdiction of the court to Detroit, Michigan. No action was taken on this motion. The present action is the result of appellant's motion.

By September of 1975, appellant had sold the family home in Omaha and moved to an apartment. She established a guardianship for her oldest daughter with a Mrs. Kush so her daughter could finish her senior year in the Millard high school without payment of out-of-district tuition.

In October 1975, Mr. Gaubatz moved to Omaha. He was separated from his wife and later was divorced. Mr. Gaubatz had a separate residence, but on two different occasions, totaling approximately 1½ weeks, he did stay in appellant's apartment.

On June 3, 1976, Judge O'Brien denied appellant's application for permission to move Jann Marie to Michigan. He placed the custody of the child in the court, with possession in Mr. Swearingen until further order of the court.

Twenty days following the entry of Judge O'Brien's order, appellant, through new counsel, filed a motion to reconsider, alleging: (1) The order entered was not in the best interests of Jann Marie Swearingen, and (2) the appellee was not a fit and proper person to have either custody or possession of the minor child. In Judge O'Brien's absence, Judge Caniglia heard the motion on an emergency basis, but limited the introduction of testimony to that of

the appellant. After hearing the testimony of appellant, Judge Caniglia ruled the custody and possession of the minor child should remain in the District Court pending a final hearing.

The matter came on for hearing on March 14, 1977, before the Honorable James Murphy. Additional testimony was elicited from the witnesses and the court reviewed all the testimony from the two previous hearings. Judge Murphy specifically found appellee was a fit and proper person to have the possession of Jann Marie Swearingen, but retained custody of the minor child in the court for a period not to exceed 1 year.

It will serve no useful purpose to review in detail the evidence adduced at the several hearings. Suffice it to say that appellee had been involved in some sexual deviate conduct before his stepchildren, which he testified was the result of drink and drugs. The evidence would also indicate the appellant had been less than a satisfactory mother for over a period of a year previous to the hearing. There was testimony her children from the previous marriage were out of hand because of lack of supervision. There was evidence they had been involved in drinking and smoking marijuana. The police were called to the home on one occasion while the mother was in Detroit. Jann Marie was left in the care of her brothers while the mother was gone from the home. On some occasions when she was unsupervised she called a neighbor or her father. On these occasions she would be crying. The oldest boy left the appellant's home because of conflicts with his mother. At the time of the hearing he was living with his natural father.

The medical and the psychiatric testimony indicated that appellee had apparently solved his problem. Jann Marie, with whom appellee had a good relationship, expressed a strong desire to live with her father rather than her mother. The trial judge

visited with the child in the presence of counsel and a social worker who had been in contact with her. Testimony was adduced that both parties were fit and proper persons to have her custody and control. There was also testimony to the contrary. These were disputed fact questions resolved by the trial court. The court found there had been a change in circumstances since the divorce decree sufficient to justify a change of custody, and specifically found Mr. Swearingen to be a fit and proper person to have the possession of Jann Marie until further order of the court.

Appellant assigns as error the finding that the best interests of Jann Marie would be served by awarding her possession to her father; the finding that the father was a fit and proper person to have her possession; and the finding that there had been such a change of circumstances as to warrant the removal of Jann Marie's custody from appellant, Mrs. Swearingen.

While equity cases are heard de novo in this court, in determining the weight to be given the evidence this court will consider the fact that the trial court observed the witnesses and their manner of testifying. Bailey v. Mahr, 199 Neb. 29, 255 N. W. 2d 866 (1977).

We do not agree with appellant that the evidence is not sufficient to find such a change in circumstances as to warrant the removal of the custody and the possession of Jann Marie from Mrs. Swearingen, or to award such possession to Mr. Swearingen. On the record, it would have been possible for the trial court to have found that neither of the parties was entitled to possession of the child. Rather than making so final a determination, obviously considering the best interests of the child, the court retained custody in itself and placed the possession of the child with her father. It would seem this solution offered the most stability for the present. While

there are features of the case which are disturbing, the trial court is in the best position to determine what is for the best interests of Jann Marie, which is the criterion that must be the polestar herein.

"A decree fixing custody of a minor child will not be modified unless there has been a change of circumstances indicating that the person having custody is unfit for that purpose *or* that the best interests of the child require such action." Bartley v. Bartley, 197 Neb. 246, 248 N. W. 2d 39 (1976). (Emphasis supplied.)

While the discretion of the trial court on granting or changing custody of minor children is subject to review, the determination of the court will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence. Allen v. Allen, 198 Neb. 544, 253 N. W. 2d 853 (1977).

Everyone who testified about the attitude of the child indicated her strong feeling for her father. On the record before us, we believe the solution reached by the trial court is a proper one. The order made is in the best interests of Jann Marie. The judgment is affirmed. Costs herein are assessed against the party incurring the same.

AFFIRMED.

DANIEL L. SHULL, APPELLANT, V. DAIN, KALMAN & QUAIL, INC., A CORPORATION, APPELLEE.

267 N. W. 2d 517

Filed June 28, 1978. No. 41569.

Contracts: Usury: States. The validity of a contract will be sustained against the charge of usury if it provides for a rate of interest that is permissible in a state to which the contract has a substantial relationship and is not greatly in excess of the general usury law of the state of the otherwise applicable law.

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

Robert B. Creager for Berry & Anderson, for appellant.

Knudsen, Berkheimer, Endacott & Beam, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

MCCOWN, J.

This is a declaratory judgment action to determine the usury limit applicable to funds advanced by defendant to plaintiff under the provisions of a stock margin contract. The District Court determined that the usury law of Minnesota was applicable to the margin contract and had been applied, and dismissed plaintiff's petition. Plaintiff has appealed.

The case was tried on a stipulation of facts. The plaintiff, Daniel L. Shull, is a resident of Lincoln, Nebraska, and was a customer of the defendant beginning in 1968. The defendant, Dain, Kalman & Quail, Inc., is a Delaware corporation engaged in the securities business, with home offices in Minneapolis, Minnesota, and an office in Lincoln, Nebraska.

On March 13, 1972, the plaintiff executed the margin contract in Lincoln, Nebraska, and it was forwarded to defendant's principal place of business in Minneapolis, Minnesota, for approval, where it was accepted by an officer of the defendant. The relevant contract provisions involved here are: "8. The undersigned agrees to pay interest upon all debit balances at such rate or rates as you may from time to time determine to be fair and reasonable and to pay such other charges as you may make to cover your facilities and extra services. * * *

"15. Interest is charged to your margin account at a specified rate as shown on your monthly state-

ment. This rate may be changed from time to time with fluctuating money market rates or for other reasons."

Following the execution of the margin contract the defendant mailed a letter to plaintiff explaining the interest charges on the margin account. That letter stated: "The annual rate of interest charged on the average debit balance of your margin accounts with Dain, Kalman & Quail, Incorporated will be computed, in accordance with rules of the New York Stock Exchange, at a rate which is at least ½ of 1% above the call money rate from time to time in effect. We may, however, charge at a higher rate depending upon such factors as the size of your average debit balance and the activity in your account; provided, that in no event will the rate of interest charged exceed that allowed by applicable interest statutes. The rate applicable to your account is subject to change without notice based upon changes in the call money rate. If the interest rate is changed for any other reason, we will give at least 30 days' prior written notice."

Beginning in March 1972, and continuing until approximately 1975, the plaintiff entered into various security transactions with the defendant on margin. Monthly account statements, each of which showed the interest rate charged for the accounting period, were sent to plaintiff by defendant from Minneapolis.

The amount of money loaned to the plaintiff by the defendant was provided by the defendant from funds owned or borrowed by the defendant in Minnesota. The securities purchased on margin by plaintiff which secured the loan were held and sequestered either in defendant's Minnesota or New York City office in "street name" or in the name of the defendant or other nominees for the purpose of immediate transfer. Orders by plaintiff for the purchase and sale of securities were given to defendant's branch office in Lincoln, Nebraska, and were transmitted to

and recorded in the Minneapolis office of the defendant, and executed in New York City. Reports of execution of orders were mailed from the Minneapolis office of the defendant to the plaintiff. Confirmation of securities transactions were computed and originated in Minnesota. When plaintiff paid any money to the defendant for securities purchased, or for margin calls, the funds were paid in Lincoln, Nebraska, deposited locally, and then forwarded to Minneapolis, Minnesota, by the defendant's branch office in Lincoln.

At all times relevant here the maximum rate of interest permitted by Nebraska law on margin transactions was 9 percent. Under Minnesota law the maximum permissible interest rate was 10 percent until August 1, 1973, and after March 1, 1974. From August 1, 1973, until March 1, 1974, the maximum rate of interest in Minnesota was 8 percent. At the inception of the margin contract here in March 1972, the interest rate was 5.75 percent and it rose in gradual steps to 8 percent approximately 1 year later. Until August 1, 1973, the interest charged was always less than 9 percent, except for a few days in July of 1973. From August 1, 1973, until March 1, 1974, the interest rate charged was 8 percent, and from approximately April 1974, until the conclusion of the transactions, the interest charged was 10 percent. From August 1, 1973, until the conclusion of the dealings of the parties the interest rate was generally at the maximum level allowed by Minnesota law. For approximately half of that time the interest charge was 1 percent less than the Nebraska maximum, and for approximately half of the time the interest rate was 1 percent more than the Nebraska maximum. The total amount of interest on the entire transaction was $11,588.89, and the total amount of interest charged in excess of 9 percent was $3610.15.

Following trial the District Court found that the

"last act" necessary to make the margin agreement binding was the approval by the defendant, which took place in the State of Minnesota, and that the usury law of Minnesota must therefore be applied to the margin agreement. The District Court dismissed plaintiff's petition and this appeal followed.

The sole issue on this appeal is whether the usury law of the State of Nebraska or the usury law of the State of Minnesota applied to the margin contract involved here. There was no specific provision in the contract as to which law was to be applied.

At various times, and under varying circumstances, this court has applied the "last act" test; Dunlop Tire & Rubber Corp. v. Ryan, 171 Neb. 820, 108 N. W. 2d 84; a place of execution and place of performance rule; Kinney Loan & Finance Co. v. Sumner, 159 Neb. 57, 65 N. W. 2d 240; and very recently has held that where a contract specifies that the law of a particular state is to be applied and that state bears some relationship to the transaction, the contract will be enforced, if it is enforceable, under that state's law. See Exchange Bank & Trust Co. v. Tamerius, 200 Neb. 807, 265 N. W. 2d 847.

Under the general principles followed by this court, issues of validity were determined under the laws of the jurisdiction in which the contract took effect. This court has had no hesitation in applying usury laws of other states, even though they exceed the interest levels allowable under the laws of this state. The general choice of law rules applicable here are set out in Restatement, Conflict of Laws 2d, section 188, page 575. That section first provides that the rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under general choice of law principles. The section also provides that in the absence of an effective choice of law by the parties, the con-

tacts to be taken into account in applying general choice of law principles to determine the law applicable include: "(a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicil, residence, nationality, place of incorporation and place of business of the parties. These contacts are to be evaluated according to their relative importance with respect to the particular issue."

As is true in the case at bar, it is often difficult to determine the actual effective location of many of the contacts to be taken into account, as well as difficult to determine which of two different states has "the most significant relationship to the transaction and the parties." One difficulty with relying on such general rules as the criteria for determining the governing law is that the place of performance or execution is often arbitrarily and randomly selected. The choice of law is thus left to happenstance rather than to a rational decision by the parties or by a court which attempts to protect the justified expectations of the parties, as well as the relative interests and policies of the interested states.

Such considerations lead to the conclusion that the more specific application of the rule of Restatement, Conflict of Laws 2d, section 203, page 649, is appropriate. That rule is: "The validity of a contract will be sustained against the charge of usury if it provides for a rate of interest that is permissible in a state to which the contract has a substantial relationship and is not greatly in excess of the rate permitted by the general usury law of the state of the otherwise applicable law under the rule of § 188."

The rationale of the rule of section 203 is stated in Comment b to that section: "A prime objective of both choice of law and of contract law is to protect the justified expectations of the parties. Subject only to rare exceptions, the parties will expect on

entering a contract that the provisions of the contract will be binding upon them. For this reason, the courts will not apply an invalidating rule to strike down the contract unless the value of protecting the justified expectations of the parties is outweighed in the particular case by the interest of the state with the invalidating rule in having this rule applied. Usury is a field where this policy of validation is particularly apparent."

In the case now before us the maximum permissible interest rates of the two states vary only slightly. For a portion of the time involved, the maximum allowable rate in Minnesota was 1 percent lower than in Nebraska and for a portion of the time involved, it was 1 percent higher. There is no doubt that the parties here expected the provisions of the contract to be binding upon them and the record does not reflect any dispute or controversy as to whether the rates were fair or computed in accordance with the provisions of the contract. The only controversy is as to which usury limit was applicable.

Under current Nebraska law the maximum general interest rate is now 11 percent per annum, and it is now lawful to contract for and receive on a margin contract any rate of interest the parties may expressly agree upon. §§ 45-101.03 and 45-101.04(6), R. S. Supp., 1976. Neither of these statutes were in effect at the time of the matters involved here. Nevertheless they point up the fact that under circumstances such as those present here, courts deem it more important to sustain the validity of a contract and thus to protect the expectations of the parties than to apply the usury law of any particular state.

Recent cases from other jurisdictions reach the same results under similar circumstances for somewhat differing reasons. See, U. S. Manganese Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 576 F. 2d 153 (8th Cir., May 24, 1978); Gamer v. duPont

Glore Forgan, Inc., 65 Cal. App. 3d 280, 135 Cal. Rptr. 230 (1976).

The stipulated facts of the present case establish that the margin contract involved here had a substantial relationship to both Minnesota and Nebraska, and that the interest rate permitted by the general usury laws of either state is not greatly in excess of the rate permitted by the other state. Depending upon the point of view as to the relative importance of the various acts or contacts involved, and as to the interpretation of the evidence, either Minnesota or Nebraska might be found to have the most significant relationship to the transaction and the parties. The rule adopted here applies if the rate of interest charged under the margin contract involved was permissible in either Minnesota or Nebraska. It was permissible in Minnesota and the District Court held that the law of Minnesota applied. The result reached by the District Court was correct.

The judgment is affirmed.

AFFIRMED.

ALICIA M. NICKEL, APPELLEE AND CROSS-APPELLANT, V. MACK F. NICKEL, APPELLANT AND CROSS-APPELLEE.

267 N. W. 2d 190

Filed June 28, 1978. No. 41581.

1. **Divorce: Witnesses: Evidence.** In an action for divorce, if the evidence is principally oral and is in irreconcilable conflict, and the determination of the issues depends to a reasonable extent upon the reliability of the respective witnesses, the conclusion of the trial court as to such reliability will be carefully regarded by the Supreme Court on review.
2. **Divorce: Alimony: Interest.** The trial court has the inherent power in adjusting the rights of the parties to provide that a money allowance to be paid in installments shall not draw interest until a certain date.
3. **Divorce: Alimony: Property.** A division of property which is not patently unfair will not ordinarily be disturbed by this court on appeal.

Appeal from the District Court for Kearney County: NORRIS CHADDERDON, Judge. Affirmed.

Ross, Schroeder & Fritzler, for appellant.

Parker & Grossart, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

SPENCER, J.

In this dissolution of marriage action the only issue raised on appeal is the trial court's division of the property. Respondent-appellant appeals from that portion of the decree ordering him to pay petitioner-appellee the sum of $48,000 in 180 equal monthly installments. Petitioner cross-appeals, attacking the provision that the judgment would not draw interest except on past-due installments. We affirm.

The parties were married December 18, 1969. They have one child, born June 24, 1970. They separated on May 21, 1976. Petition for dissolution of the marriage was filed July 13, 1976.

At the time of the marriage respondent operated a farm in equal partnership with a brother. Petitioner testified she had a savings account of $2,400 which she contributed to the marriage. Respondent brought into the marriage a pickup truck and a one-half interest in a boat, in addition to the one-half interest in the farming partnership.

Exhibit 7, a financial statement prepared for a bank, indicates the net worth of the partnership as of February 24, 1970, was $58,345. Included in the partnership property at the time of marriage were 240 acres of land. One quarter section had been purchased from respondent's father in December 1966. An 80-acre tract was purchased from the father in July 1967. The 1970 value placed upon the 240 acres in the financial statement is $37,000.

The brothers acquired another quarter section of

land in February 1970. A three-fourths interest in this property was purchased from aunts and uncles for $36,000. The remaining one-fourth interest was a gift from their father. The appraised value of the three parcels of land at the time of the trial was $389,200. Other partnership assets as of May 24, 1977, were shown to be $175,800. Liabilities at that time were $311,465. The net worth of the partnership at the time of trial, on these figures, would be $252,735. Defendant's one-half interest would be $126,367.

There was conflicting evidence as to values and liabilities. We can only surmise, from the conflicting evidence, what factors the trial court may have considered in making the property adjustments. No purpose will be served by delineating the various claims and disagreements. For the purposes of this opinion, we are satisfied that the result reached by the trial court is equitable to the parties.

As we said in Reisig v. Reisig, 191 Neb. 612, 216 N. W. 2d 731 (1974): "In an action for divorce, if the evidence is principally oral and is in irreconcilable conflict and the determination of the issues depends to a reasonable extent upon the reliability of the respective witnesses, the conclusions of the trial court as to such reliability will be carefully regarded by the Supreme Court on review."

The marriage was terminated after 6½ years. The respondent's interest or equity in the partnership during that period, due primarily to inflation, increased approximately $97,000. The trial court dissolved the marriage, granted custody of the minor child to the petitioner, and awarded her child support of $175 a month until the child reaches majority or becomes self-supporting. The court further awarded the parties the property they then had in their possession and decreed petitioner should receive $48,000 as her share of the other property, payable in 180 equal monthly installments of $266.66

each without interest, with each installment, however, to draw interest if not paid when due.

Respondent valued the property in his possession at $4,860, less $1,742 still owing on a boat. He placed a value of $3,365 upon the property in the hands of the petitioner. Petitioner's estimate would increase the value of personal property in respondent's possession by $1,400 and decrease the value of her property by about $250.

Petitioner is satisfied with the division of the property. Her cross-appeal is directed to the provision in the decree which provides no interest shall be paid on the $48,000. It is true, as argued by petitioner, that section 45-103, R. R. S. 1943, provides for interest at the rate of 8 percent per annum on all decrees and money judgments. However, the trial court has the inherent power in adjusting the rights of the parties to provide that a money allowance in a marriage dissolution, to be paid in installments, shall not draw interest until a certain date.

Respondent's sole income is derived from one-half interest in a farming partnership, with partnership liabilities of some $311,000 on assets of approximately $565,000. It is apparent the trial court considered the impracticality of forcing a sale of partnership assets to provide for a property division in cash. The court obviously believed it necessary not to disturb the farm partnership property to allow respondent the opportunity to make the monthly payments required. Respondent is required to pay petitioner $441.66 monthly. To add in excess of $3,000 interest annually could create an intolerable burden. We are not inclined to second guess the trial court, particularly where resolution of conflicts in the evidence depend primarily on oral evidence. A division of property which is not patently unfair will not ordinarily be disturbed by this court on appeal. Van Bloom v. Van Bloom, 196 Neb. 792, 246 N. W. 2d 588 (1976).

We affirm the judgment of the trial court. Costs are taxed to respondent, including an attorney's fee of $500 for the services of petitioner's attorney in this court.

AFFIRMED.

MOODY'S INC., A NEBRASKA CORPORATION, LESSEE, APPELLANT, V. STATE OF NEBRASKA, DEPARTMENT OF ROADS, APPELLEE.

267 N. W. 2d 192

Filed June 28, 1978. No. 41593.

Eminent Domain: Condemnation. If there is an issue between the parties as to whether good faith negotiations took place before condemnation proceedings were begun, the issue should be tried to the court and determined as a preliminary matter before proceeding to trial on the matter of damages.

Appeal from the District Court for Dakota County: FRANCIS J. KNEIFL, Judge. Affirmed.

Smith, Smith & Boyd, for appellant.

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

Heard before WHITE, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ., and HASTINGS, District Judge.

WHITE, C. J.

The sole question presented in this appeal is whether the parties are entitled to a jury trial on the issue of whether the State condemner made a good faith offer of settlement under the statutory requirement in condemnation actions.

The briefs in this case were filed and the case was at issue before this court on November 10, 1977. Our decision in Suhr v. City of Seward, 201 Neb. 51, 266 N. W. 2d 190, was filed on May 24, 1978, and is dispositive of the issue raised by the appellant-condem-

nee. In Suhr v. City of Seward, *supra*, the precise question presented was disposed of by this court, as follows: "The burden is upon the condemner to allege and prove that before commencing condemnation proceedings a good faith attempt was made to agree with the owner of the land as to the damages the owner was entitled to receive. Higgins v. Loup River P. P. Dist., 159 Neb. 549, 68 N. W. 2d 170. This requirement is in the nature of a condition precedent to the right to condemn. Dzur v. Northern Indiana Public Service Co., 257 Ind. 674, 278 N. E. 2d 563; Board of County Commissioners v. Highland Mobile Home Park, Inc. (Colo. App.), 543 P. 2d 103. The requirement is satisfied by proof of an offer made in good faith with a reasonable effort to induce the owner to accept it.

"If there is an issue between the parties as to whether good faith negotiations took place before condemnation proceedings were begun, the issue should be tried to the court and determined as a preliminary matter before proceeding to trial on the matter of damages. See, Lieberman v. Chicago & S. S. R. T. R. R. Co., 141 Ill. 140, 30 N. E. 544; State v. Bair, 83 Idaho, 475, 365 P. 2d 216; Dzur v. Northern Indiana Public Service Co., supra; City of Reidsville v. Slade, 224 N. C. 48, 29 S. E. 2d 215; Charles v. Big Sandy & C. R. R. Co., 142 Va. 512, 129 S. E. 384; Board of County Commissioners v. Highland Mobile Home Park, Inc., supra."

We adhere to the decision and holding in the above case. The appeal is without merit, and the judgment of the District Court is affirmed.

AFFIRMED.

ARLENE J. AHLMAN, APPELLANT, V. NATHAN W. AHLMAN, APPELLEE.

267 N. W. 2d 521

Filed June 28, 1978. No. 41603.

1. **Custody: Infants: Parent and Child.** A decree fixing custody of minor children will not be modified unless there has been a change of circumstances indicating that the person having custody is unfit for that purpose or that the best interests of the children require such action.
2. **Custody: Infants: Appeal and Error.** In cases involving child custody, the determination of the trial court will not ordinarily be disturbed unless there was a clear abuse of discretion on its part or its findings are clearly against the weight of the evidence.
3. **Custody: Infants: Sexual Misconduct.** Sexual misconduct is a factor which, although not necessarily determinative, may properly be considered in determining what is in the best interests of the children.

Appeal from the District Court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed.

Baylor, Evnen, Baylor, Curtiss & Grimit, for appellant.

Ronald Rosenberg, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, BRODKEY, and WHITE, JJ.

BRODKEY, J.

The issue presented in this case is whether the District Court erred in modifying a divorce decree by changing the custody of two minor children from their natural mother, Arlene J. Ahlman Adams, to their natural father, Nathan W. Ahlman, on the ground that there had been a change of circumstances since the two parents were divorced, and that it was in the best interests of the children to be placed in the custody of the father. Arlene Adams has appealed to this court, contending that the judgment of the trial court is contrary to law and not sustained by sufficient evidence, and that the court erred in changing the custody of the children when

Arlene was not found to be an unfit parent or to have forfeited her right to custody. We affirm the judgment of the District Court.

The parties were married in 1969. Their son Christopher was born in September of that year, and their daughter Annicia was born in May 1971. On November 7, 1974, the parties were divorced, and custody of the children was awarded to Arlene pursuant to an agreement of the parties. Nathan was granted reasonable rights of visitation.

On October 15, 1976, Nathan filed an application for modification of the divorce decree to change the custody of the children from Arlene to himself. He alleged, in relevant part, that Arlene had failed to provide a fit and proper home for the children, that she had failed to provide proper medical and dental care for the children, and that she had exposed the children to an immoral and improper atmosphere by living with a man not her husband. Arlene denied these allegations, and requested the trial court to increase child support payments required of Nathan under the divorce decree.

The evidence adduced at the hearing in the District Court may be summarized as follows. Arlene resided in Waverly, Nebraska, after the divorce, and began living with Gregory Adams in May 1975. In October 1975, she bore their illegitimate child, and subsequently they and the three children moved to Ceresco, Nebraska. In 1976, they moved to Lincoln, where they have continued to reside in a two-bedroom apartment. In April 1977, after Nathan filed this action and approximately 1 week before the hearing in the trial court, Greg and Arlene were married. Nathan began living with a woman in November 1975, and married her in May 1976. Nathan and his present wife have no children, and reside in a house in Lincoln. Arlene and Nathan are employed, and each earns approximately $10,000 annually. Their respective spouses are also employed.

The record indicates that the children have a good relationship with both Arlene and Nathan and their spouses. The children have attended school regularly, and their teachers testified that they are progressing well in school, wearing clothing similar to that of their classmates, and are in good health. The children have never been physically abused. Arlene's home has been well-kept, and the children have received an adequate diet.

The children have had few health problems since the divorce. In October 1976, however, Annicia complained of a toothache caused by a cavity and decay in a tooth. Although Arlene made an appointment for Annicia at a dental clinic operated by the University of Nebraska, more than 5 months elapsed before the child received treatment. Arlene made no effort to take the child to a private dentist, notwithstanding it appears she had the financial ability to do so. Apparently neither child had had regular dental checkups or innoculations while in the custody of Arlene, but it appears their innoculations were updated in the fall of 1976 in accordance with a school requirement. In February 1977, the school nurse advised Arlene that Christopher was in need of eyeglasses, and Arlene made an appointment for Christopher for April 1977.

Nathan has regularly visited the children since they have been in Lincoln, and has provided religious education for them by accompanying them to church and Sunday school. He also enrolled them for swimming lessons. Arlene and Greg have taken the children camping and fishing.

Nathan and his present wife testified that the clothing of the children is sometimes ill-fitted and torn, and that they have cleaned and repaired the children's clothing when the children visit them. Nathan introduced in evidence a worn pair of Christopher's tennis shoes with holes therein, and oversized stockings worn by Annicia.

The evidence also indicated that Arlene has occasionally smoked marijuana in her home, and that the children were present on these occasions a "couple times." Arlene testified that her friends, one of whom was a minor, had smoked the marijuana in her home, but stated that the friends provided the marijuana and that she did not keep that controlled substance in the apartment.

The trial court concluded that there had been a change of circumstances since the divorce and that it was in the best interests of the children to be placed in the custody of Nathan. The court relied on the following findings in reaching its conclusions: Arlene had exposed the children to an immoral and improper atmosphere by cohabiting with Greg and bearing an illegitimate child, and had married Greg for the reason of Nathan's application to modify custody rights; Arlene had used marijuana in her home when the children were present and permitted a minor to use that substance in her home; Arlene had failed to provide religious training for the children and failed to properly provide for their medical and dental care; Greg had an unstable employment record and had not contributed to the stability and fitness of Arlene's home; Nathan had provided religious training for the children and is able to provide proper medical and dental care; Arlene is "less fit" to have custody of the children than is Nathan; and Nathan's home is a more stable, fit, and secure home for the children than is Arlene's home.

Arlene first contends that in order to transfer custody of minor children from the custodial parent to the noncustodial parent, the former must be shown to be unfit or to have forfeited his or her right to custody. Arlene relies on the general statement in Miller v. Miller, 196 Neb. 146, 241 N. W. 2d 666 (1976), that ordinarily courts may not properly deprive a parent of the custody of a minor child unless it is shown that such parent is unfit to perform the duties

imposed by the relation or has forfeited that right. In that same case, however, it is stated that a decree awarding custody of minor children and fixing child-support payments is not subject to modification in the absence of a material change in circumstances of a nature requiring modification in the best interests of the children, occurring subsequently to the entry of the decree. The correct rule is as stated in other cases, that a "decree fixing custody of minor children will not be modified unless there has been a change of circumstance indicating that a person having custody is unfit for that purpose *or* that the best interests of the child require such action." Bartley v. Bartley, 197 Neb. 246, 248 N. W. 2d 39 (1976). (Emphasis supplied.) See, also, Conger v. Conger, 194 Neb. 771, 235 N. W. 2d 634 (1975); Carper v. Rokus, 194 Neb. 113, 230 N. W. 2d 468 (1975). Arlene's contention that the trial court was required to find her unfit to have custody of the children before it transferred custody to Nathan is without merit.

Arlene's next contention is that the evidence was insufficient to warrant a change of custody from herself to Nathan. In cases involving child custody, the findings of the trial court will not ordinarily be disturbed on appeal unless there has been an abuse of discretion on the part of the trial court, or the findings of the court are clearly against the weight of the evidence. Conger v. Conger, *supra*; Schuller v. Schuller, 191 Neb. 266, 214 N. W. 2d 617 (1974). "The discretion of the trial court on granting or changing the custody of minor children is subject to review. However, the determination of the court will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence." Allen v. Allen, 198 Neb. 544, 253 N. W. 2d 853 (1977). See, also, Schinkel v. Schinkel, 199 Neb. 1, 255 N. W. 2d 851 (1977).

This case is admittedly one in which both parties are able to set forth persuasive arguments in sup-

port of their respective positions. In many respects, Arlene has been a good mother and has provided a suitable home for the children. She has, however, adopted a life style which has included lengthy cohabitation with a man not then her husband, the bearing of his illegitimate child, and the illegal use of a controlled substance in the presence of the children. She also has not provided for various needs of the children as well as she should have.

Although any one of the factors relied on by the trial court, standing alone, might not be sufficient to warrant a change in custody, viewed together we believe that they support the conclusion of the trial court. Sexual misconduct is a factor which, although not necessarily determinative, may properly be considered in determining what is in the best interests of a child. See, Bartley v. Bartley, *supra*; Lockard v. Lockard, 193 Neb. 400, 227 N. W. 2d 581 (1975). Exposure to children of the illegal use of a controlled substance is obviously not in their best interests, and the trial court properly considered that factor in this case. Arlene's failure to give prompt attention to Annicia's dental problem, previously referred to, is also a factor relevant to whether custody should be modified.

In addition to the objective considerations referred to above, it is apparent that a case of this type requires a judgment, inevitably subjective in part, concerning the comparative fitness, security, and stability of the home of each parent. In this case the trial court, having observed the witnesses as well as having considered all the evidence, concluded that Nathan's home was more fit, secure, and stable than was Arlene's. This conclusion, we believe, is supported by the evidence.

After carefully reviewing the record, we conclude that the trial court did not err in changing the custody of the children from Arlene to Nathan. We cannot conclude from the evidence that the trial court

abused its discretion in its resolution of the sensitive and difficult question before it of what was in the best interests of the children. Its judgment is clearly not against the weight of the evidence. Therefore the judgment of the District Court must be affirmed.

AFFIRMED.

CLINTON, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL PRIM, APPELLANT.

267 N. W. 2d 193

Filed June 28, 1978. No. 41621.

1. **Criminal Law: Confessions: Evidence.** In a criminal trial a confession of guilt is not competent as evidence unless first shown to have been voluntarily made.
2. **Criminal Law: Confessions: Appeal and Error.** A finding of a trial court that statements or confessions were intelligently and voluntarily made will not be set aside on appeal unless the finding is clearly erroneous.
3. **Criminal Law: Constitutional Law: Confessions: Due Process.** The evidentiary use of a defendant's incriminating statements violates due process if it is shown that the statements obtained are not the product of a rational intellect and a free will. The determination of the issue necessitates consideration of the totality of the circumstances surrounding the giving of the statement or confession.
4. **Criminal Law: Intoxication: Intent.** Voluntary intoxication is no justification or excuse for crime unless it is so excessive that the person is wholly deprived of reason so as to prevent the requisite criminal intent.

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

Thomas M. Kenney, Douglas County Public Defender, and Bennett G. Hornstein, for appellant.

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

Heard before WHITE, C. J., BOSLAUGH, MCCOWN,

CLINTON, BRODKEY, and WHITE, JJ., and HASTINGS, District Judge.

CLINTON, J.

Defendant Michael Prim was charged with first degree murder, having shot and killed Harry John Dieter during the commission of a robbery at the victim's gas station in Omaha on February 9, 1977. Upon trial by jury, the defendant was convicted and sentenced to life imprisonment. On this appeal defendant assigns two errors: (1) That the trial court erred in failing to suppress the defendant's confessions, which are claimed to have not been voluntarily and intelligently made; and (2) that the court erred in failing to give NJI No. 14.31, submitting to the jury the question of whether, by reason of being under the influence of drugs at the time of the offense charged, he was incapable of having criminal intent, i.e., in this case to rob or kill. We affirm.

Before trial the defendant offered a motion requesting that the court suppress the confessions and incriminating statements which the defendant made to interrogating officers of the homicide unit of the Omaha police division. The defendant argues that these statements were involuntarily made because at the time he was suffering from withdrawal symptoms as a heroin addict and from lack of sleep, and that the statements were induced in part by police deception.

In a criminal trial a confession of guilt is not competent as evidence unless first shown to have been voluntarily made. State v. Longmore, 178 Neb. 509, 134 N. W. 2d 66.

After the pretrial suppression hearings, the trial court found that the confessions were voluntarily and intelligently made and overruled the motion to suppress, and the confessions were admitted at trial. A finding of the trial court that statements or confessions were intelligently and voluntarily made will

not be set aside on appeal unless the finding is clearly erroneous. State v. Medina, 189 Neb. 765, 204 N. W. 2d 785; State v. Van Ackeren, 194 Neb. 650, 235 N. W. 2d 210; State v. McDonald, 195 Neb. 625, 240 N. W. 2d 8.

The evidentiary use of a defendant's incriminating statements violates due process if it is shown that the statements obtained are not the product of a rational intellect and a free will. The determination of the issue necessitates consideration of the totality of the circumstances surrounding the giving of the statement or confession. State v. Russell, 194 Neb. 64, 230 N. W. 2d 196; Frazier v. Cupp, 394 U. S. 731, 89 S. Ct. 1420, 22 L. Ed. 2d 684.

The evidence presented at the suppression hearing presents the following picture. The day following the robbery and slaying the defendant induced his brother, Reginald T. Prim, and an acquaintance to drive him to Colorado Springs, Colorado, on the pretense that he had to leave Omaha because he was in danger of being killed because he had defrauded a drug dealer. They drove all night to reach Colorado Springs, arriving there early in the morning. Shortly after their arrival, their Colorado host called the defendant's grandmother in Omaha to report their safe arrival. Through this conversation the host and the defendant's brother, Reginald, were first made aware that the defendant and Reginald were wanted for the homicide. The brother proclaimed his innocence. The defendant admitted his guilt. He was then advised by his host and his brother to return to Omaha and surrender to the police. The defendant, however, was apprehensive that he might be stopped on the return trip and perhaps shot by law officers in the process of being apprehended.

Arrangements were then made by telephone with an assistant chief of the Omaha police division, who was not involved in the investigation, so that the parties could return without fear of apprehension before arriv-

ing, that is, they were assured that no all-points bulletin had been issued for them. It was agreed that upon their return they would contact the assistant chief and surrender to him. The defendant and his companions immediately started the return trip, driving all day and reaching Omaha about 10 p.m., on February 11, 1977. Defendant did not participate in the driving in either direction. Upon their arrival, defendant's brother called the assistant chief and informed him of their whereabouts. The assistant chief and another officer then went to that location and made the arrest.

During the return trip to Omaha, the brothers concocted a version of the robbery which made the defendant seem less culpable, i.e., he had only been the driver of the robbery car and the actual killing had been done by a fictitious friend without the defendant's foreknowledge and that that friend had fled the state.

Through the testimony of the defendant's brother, there was evidence that the defendant was a heroin addict; that he may have had a fix before leaving Colorado; and that after arriving in Omaha the defendant consumed part of a pint of gin and smoked some marijuana, all of which did "nothing for him." The brother testified that he believed at the time of the arrest the defendant was having withdrawal symptoms and stated that he so informed the arresting officers. This the arresting officers denied. These officers noted nothing unusual about the defendant. They did not interrogate him, but turned him over to officers of the homicide unit.

Before interrogating the defendant the officers of the homicide unit gave the defendant the warnings required by Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, and the defendant waived his rights not to make a statement and to the presence of a lawyer during the questioning. It is not disputed that the warnings were given and the defendant gave affirmative answers to the questions and waivers.

At this time, about 10:50 p.m., on February 11, 1977, the defendant was questioned for about 20 minutes and told the false version of the slaying and robbery which had been agreed upon. Immediately after this interrogation the officers questioned Reginald and then again interviewed the defendant for about 30 minutes. This was about 12:30 a.m., on February 12, 1977. Defendant related essentially the same story he had given earlier. The officers testified that during none of these interviews did the defendant make any complaints of illness or ask for medical attention. His conversation was rational and he appeared to know what he was doing. After this the officers and the defendant went to the scene of the crime where he gave them additional information. At about 4:35 a.m., in the presence of the friend who had accompanied the brothers to Colorado, defendant was again interrogated. The friend told the defendant to tell the truth. The defendant then told him to leave the room. The officers then told the defendant that his brother had confessed and when he stated that he did not believe them, they played a portion of the taped statement taken from the brother which seemed to admit involvement in the robbery and which implicated the defendant in the crime. The brother, in fact, had not admitted any participation. The defendant then agreed to give a statement.

At 4:57 a.m., the defendant was readvised of his Miranda rights and waived them. He then gave a tape-recorded confession of his direct involvement in the crime. Following this confession the defendant was booked for first degree murder and responded negatively when asked if he was sick, injured, or under doctor's care or medication.

The principal interrogating officer testified that, in his opinion, when the tape was played the defendant was having mild withdrawal symptoms, sniffing, and

complaining of being cold although the room was warm.

On February 14, 1977, the gun had been found. The defendant, after again receiving Miranda warnings and answering the questions affirmatively, identified the gun as the weapon used to commit the robbery and murder. The evidence indicates that the weapon belonged to Reginald and that the defendant had taken it without Reginald's knowledge or permission.

A psychiatrist, experienced in the treatment of drug addiction, was called by the State as an expert witness. After being informed in a hypothetical question of the circumstances surrounding the confession of February 12, he gave his opinion that the defendant was having Stage 1 withdrawal symptoms (there being three stages, 0, 1, and 2), that such symptoms appeared to be mild and were not medically serious, and that in his opinion the defendant's confession was free and voluntary.

The defendant did not testify. The arresting and interrogating officers did not at any time note any sign of defendant's intoxication from the claimed consumption of gin and the smoking of marijuana. There was no evidence that any threats were made, or inducements offered, to gain the confessions.

Considering the totality of the circumstances, we cannot say that the findings of the trial judge that the confessions were freely, intelligently, and voluntarily made were clearly erroneous.

In his second assignment of error, the defendant claims that the court erred in failing to instruct the jury on the defense of drug intoxication. The defendant did not request such instruction. However, it is the duty of the court, upon request of the accused, to instruct the jury upon any valid defense which the evidence supports. State v. Stewart, 197 Neb. 497, 250 N. W. 2d 849. The court, however, is not required to give instructions where there is not

sufficient evidence to prove the facts claimed. Voluntary intoxication is no justification or excuse for crime unless it is so excessive that the person is wholly deprived of reason so as to prevent the requisite criminal intent. See NJI No. 14.31 and authorities there cited. The only mention of defendant's alleged drug intoxication at the time of the murder-robbery was Officer O'Donnell's testimony on cross-examination wherein he said: "Michael at no time complained of any symptoms for heroin, but he did state during the statement that he was high on heroin when he did the murder-robbery." The record is devoid of any evidence which would support a claim of intoxication to the degree that the defendant was wholly deprived of reason so that he was deprived of the capability of intent to rob. Absent such evidence, the record did not justify the submission of an instruction on the defense of drug intoxication. No specific intent to kill, of course, was required as that element is supplied by statutory definition.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. THEODORE BLYTHMAN, APPELLANT.

267 N. W. 2d 525

Filed June 28, 1978. No. 41817.

1. **Criminal Law: Sexual Sociopaths: Hearings: Appeal and Error.** Under the Sexual Sociopath Act, after original commitment, all orders determining the current treatability status of a sexual sociopath, entered after hearing or after summary review shall be considered final orders for purposes of appeal.
2. _____: _____: _____: _____. Under the Sexual Sociopath Act, after original commitment, all orders determining the current status of a defendant as a sexual sociopath, entered after hearing or after summary review, shall be considered final orders for purposes of appeal.
3. **Criminal Law: Sexual Sociopaths: Hearings.** Under the Sexual Sociopath Act, a motion for a hearing to determine whether the

defendant is no longer a sexual sociopath must allege facts which, if true, raise a reasonable doubt as to whether or not the defendant is still a sexual sociopath. A conclusory allegation that a defendant is no longer a sexual sociopath, unsupported by facts, is insufficient.

4. **Criminal Law: Sexual Sociopaths: Hearings: Evidence: Proof.** Under the Sexual Sociopath Act, at a hearing to determine whether the defendant is no longer a sexual sociopath, the defendant has the burden of going forward with the evidence and establishing a prima facie basis for relief. Once that burden has been met by the defendant, the burden to prove beyond a reasonable doubt that the defendant remains a sexual sociopath shifts to the State and remains on the State thereafter.
5. **Criminal Law: Sexual Sociopaths: Hearings: Evidence.** Under the Sexual Sociopath Act, the District Court may adopt any reasonable procedures to consolidate proceedings or hearings on the issue of whether or not the defendant is a sexual sociopath and on whether or not the defendant can benefit by treatment. Such issues should be treated in one proceeding where practicable.

Appeal from the District Court for Lincoln County: KEITH WINDRUM, Judge. Reversed and remanded for further proceedings.

Keith Bystrom and Scott P. Helvie, Lincoln County Public Defenders, for appellant.

Paul L. Douglas, Attorney General, and Judy K. Hoffman, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

MCCOWN, J.

The defendant, Theodore Blythman, sought a hearing in the District Court for Lincoln County, Nebraska, to determine whether or not he was still a sexual sociopath, and whether he remains untreatable. The District Court overruled the defendant's motion for a hearing on those issues, and this appeal followed.

Some factual background is necessary. The defendant was born on March 3, 1950. He was first referred to a psychiatrist while he was in grade school. In 1963 he was convicted on a juvenile

charge for stabbing a girl at school and committed to the Boys Training School in Kearney. He remained at Kearney until 1964, when, at age 14, following an examination by the Nebraska Psychiatric Institute, he was transferred to the Lincoln Regional Center, an institution for the custody and treatment of mentally ill persons. The defendant received electro-shock therapy treatments, was placed on a behavioral modification program, and remained in the Lincoln Regional Center for a period of approximately 8 years, until he was discharged in August 1972. He was rehospitalized at the Hastings Regional Center from February through July 1973.

In March, 1974, the defendant was charged with fondling a girl under the age of 16 in violation of section 28-929 (2), R. R. S. 1943. The defendant pleaded guilty to the fondling charge in exchange for the dismissal of a charge of assault on an 8-year-old girl, which occurred on May 29, 1974.

The State then moved to proceed under the sexual sociopath statutes and two doctors were appointed by the District Court to examine the defendant. The doctors' reports reviewed the defendant's mental history and disclosed that his full scale I.Q. was 73. The psychiatrists' reports indicated reluctance to conclude that the defendant was a sexual sociopath. Dr. Najam concluded that defendant was a complex case of mental retardation, emotional deprivation, psychosis, and a mixture of sexually and aggressively deviant impulses. Although probable cause to believe that defendant was a sexual sociopath was present, in Dr. Najam's opinion the degree and complexity was of such nature that it was difficult to take a stand on any one position for legal purposes.

Dr. Wisman questioned whether defendant truly fell into the category of a sexual sociopath, but he had no question that defendant required continued commitment and supervision.

On the basis of these reports a hearing was held on

December 10, 1974. At the hearing Dr. Wisman reviewed his report and concluded that the defendant was a sexual sociopath. Dr. Najam had modified his opinion somewhat. He had placed the defendant on medication on October 25, 1974, and since that date defendant's condition had improved. Dr. Najam felt that because of the medication the defendant's psychosis was under control, but he conceded that there was a possibility, even under medication, that defendant might commit subsequent deviant acts.

At the conclusion of the hearing the District Court found the defendant to be a sexual sociopath and committed him to the Lincoln Regional Center for a period of not to exceed 90 days for observation and evaluation. On April 10, 1975, the matter came on before the District Court, jury trial having been waived. The report of Dr. Coates, a psychiatrist at the Lincoln Regional Center, concluded that the defendant was a sexual sociopath, and that he would not benefit by treatment at that facility. Dr. Anthony, a psychiatrist at the Lincoln Regional Center, testified that he had examined and observed the defendant; that he was a sexual sociopath; and that he would not benefit from further treatment.

On April 14, 1975, the District Court found beyond a reasonable doubt, from the evidence offered at the hearing, that the defendant was a sexual sociopath, and that he could not be benefited by treatment, and committed him to the Nebraska Penal and Correctional Complex for an indefinite period "until the courts have determined on appeal or review that he is not a sexual sociopath." No appeal was taken from that order.

On May 25, 1976, the defendant filed a motion for annual evaluation. The defendant's motion was sustained but the record does not reflect the results of the examination ordered.

On October 7, 1977, the defendant filed a motion

for a hearing to determine whether or not the defendant remained a sexual sociopath, and whether or not the defendant could be benefited by treatment. The motion alleged that Dr. A. T. Llana, a psychiatrist at the Nebraska Penal and Correctional Complex, had completed a psychological evaluation of the defendant and, in Dr. Llana's opinion, the defendant did not fit the category of a sexual sociopath, but was mentally ill, and was amenable to treatment, and that nothing further could be gained from placement in the Nebraska Penal and Correctional Complex. On the same date the defendant filed a motion for appointment of an independent psychiatric expert to conduct a psychiatric evaluation.

On October 31, 1977, the District Court heard defendant's motions. Reports of the Lincoln Regional Center and of Dr. Llana were received by the court. Following arguments of counsel, the District Court overruled defendant's motion for a hearing to determine whether or not the defendant remained a sexual sociopath, and whether or not the defendant could be benefited by treatment. No action was taken on defendant's motion for the appointment of an independent expert in view of the court's action on the motion for hearing. This appeal followed.

Upon the oral argument here the State concedes error in view of State v. Little, 199 Neb. 772, 261 N. W. 2d 847, decided January 18, 1978, and requests that we amplify the procedural requirements to be followed for annual evaluations and review of treatability, as well as the requirements for hearings on motions to determine whether a defendant is no longer a sexual sociopath, under the provisions of section 29-2906 (2), R. R. S. 1943.

It is important to note that hearings on the issue of whether or not the defendant is a sexual sociopath and hearings on the issue of whether or not the defendant can or cannot benefit by treatment involve

separate and distinct issues and rest on separate and distinct authorizations, although they may be considered together. A review of treatability may be initiated by the District Court under the annual evaluation procedures required by State v. Little, *supra*, without any motion for hearing, or it may be initiated in connection with a motion for a hearing made by a defendant under section 29-2906 (2), R. R. S. 1943.

We consider first the annual evaluation and review of treatability status of sexual sociopaths held in the Nebraska Penal and Correctional Complex as untreatable. Under the requirements of State v. Little, *supra*, the District Court is free to adopt procedures consistent with due process. Due process necessitates that the District Court, in initiating an annual evaluation and review of each sexual sociopath housed in the penal complex, should enter an order to the Nebraska Penal and Correctional Complex ordering that a psychiatric examination and evaluation of the untreatable sexual sociopath be made within a specified time, and that a written report thereof be delivered to the District Court. A copy of the order directing such examination and evaluation should be sent by regular United States mail to the untreatable sexual sociopath at the penal complex.

If the written reports of the psychiatric examination confirm that the sexual sociopath is, in the opinion of the reporting doctors, still untreatable, and the reports and any written response, if any, from the sexual sociopath show no facts which, if believed, would raise a reasonable doubt as to whether the treatable status of the sexual sociopath has changed, the District Court may summarily enter an order based on the psychiatric reports that the sexual sociopath remains untreatable and is to be retained in the penal complex. The essential findings of the written reports should be incorporated into the

order and the written reports made a part of the proceedings for purpose of review. A copy of the order should be mailed to the sexual sociopath.

If the written reports of an annual psychiatric examination and evaluation, or any response or showing by the sexual sociopath, show facts which, if true, raise a reasonable doubt as to whether the treatability status of the sexual sociopath is changed, then the District Court should promptly set the matter for hearing, and appoint counsel for the sexual sociopath if he cannot provide his own counsel, and upon application, designate a psychiatrist to make an evaluation on behalf of the sexual sociopath. The psychiatrist so designated shall be one who has not examined or evaluated the sexual sociopath within the 2 years immediately preceding the designation, and, if necessary, may be a private psychiatrist.

At the conclusion of the hearing on treatability, the court shall either find that the sexual sociopath remains untreatable and remand his custody to the Nebraska Penal and Correctional Complex until the next annual review, or find that he is now treatable, in which case the court shall direct that he be transferred from the Nebraska Penal and Correctional Complex to the appropriate regional center.

All orders determining the treatability status of a sexual sociopath entered after hearing or after summary review shall be considered final orders for purposes of appeal. A copy of such orders shall be mailed to the sexual sociopath.

We turn now to the consideration of the due process procedures required in connection with motions to determine whether the defendant is no longer a sexual sociopath, made under the provisions of section 29-2906 (2), R. R. S. 1943. In State v. Irwin, 191 Neb. 169, 214 N. W. 2d 595, this court said: "The question of whether he remains a sexual sociopath is subject to review at yearly intervals either on mo-

tion of the defendant or on the court's own motion. * * * This review under the provisions of the Act is subject to the same due process safeguards which pertain to the initial commitment."

A motion for a hearing to determine whether the defendant is no longer a sexual sociopath must allege facts which, if true, raise a reasonable doubt as to whether or not the defendant is still a sexual sociopath. A conclusory allegation that defendant is no longer a sexual sociopath, unsupported by facts, is insufficient. Upon the filing of a motion for hearing the District Court shall review the motion and the files and records of the defendant. If the motion and the files and records of the defendant show no facts which, if true, would raise a reasonable doubt as to whether the defendant is no longer a sexual sociopath, the District Court may summarily enter an order that the defendant remains a sexual sociopath and is to be retained in the appropriate facility. The court's findings should be incorporated into the order and a copy of the order mailed to the defendant.

If the motion for a hearing to determine whether the defendant is no longer a sexual sociopath alleges, or the files and records of the defendant show, facts which, if proved, raise a reasonable doubt as to whether or not the defendant is still a sexual sociopath, then the District Court should promptly set the matter for hearing and appoint counsel for the defendant if he cannot provide his own counsel, and upon application, designate a psychiatrist to make examination on behalf of the defendant. The psychiatrist so designated shall be one who has not examined or evaluated the defendant within the 2 years immediately preceding the designation, and, if necessary may be a private psychiatrist.

At the conclusion of the hearing a finding shall be made either that the defendant remains a sexual sociopath, in which case his custody shall be re-

manded to the appropriate facility, or that he is no longer a sexual sociopath, in which case the court shall proceed in accordance with the Sexual Sociopath Act. All orders determining the current status of a defendant as a sexual sociopath, whether entered after hearing or after summary review, shall be considered final orders for purposes of appeal. A copy of any such order shall be mailed to the defendant.

At a hearing to determine whether the defendant is no longer a sexual sociopath the defendant has the burden of going forward with the evidence and establishing a prima facie basis for relief. Due process, however, requires that once that burden has been met by the defendant, the burden to prove beyond a reasonable doubt that the defendant remains a sexual sociopath shifts to the State and remains on the State thereafter. See, In re Andrews, (Mass.), 334 N. E. 2d 15; State ex rel. Terry v. Schubert, 74 Wis. 2d 487, 247 N. W. 2d 109, and, on rehearing, modified at 84 Wis. 2d 693, 267 N. W. 2d 380.

The District Court may adopt any reasonable procedures to consolidate proceedings or hearings on the issue of whether or not the defendant is a sexual sociopath and on whether or not the defendant can benefit by treatment. Such issues should be treated in one proceeding where practicable.

In the case now before us, defendant's motion for a hearing to determine whether or not he remained a sexual sociopath and whether or not he could be benefited by treatment was supported by the report of a psychiatrist. That psychiatrist was of the opinion that the defendant was not a sexual sociopath but was mentally ill, and a suitable candidate for mental commitment. The psychiatrist was also of the opinion that the defendant was amenable to treatment for the mental illness although further confinement was required.

The definitions of "sexual offense" and "sexual sociopath" are set out in section 29-2901, R. R. S. 1943. The first sentence of the psychiatrist's diagnosis and recommendations stated: "This patient does not fit the category of a sexual sociopath definition since he does not derive sexual excitement during and after the commission of the offense nor was his behavior or action motivated by sexual excitement." The State takes the position that the psychiatrist's report is an attempt to reopen the original determination of April 14, 1975, that the defendant was a sexual sociopath. We disagree.

Obviously a motion for a hearing as to whether a defendant is no longer a sexual sociopath is concerned only with the current condition of the defendant. The fact that some of the reasons which may support a psychiatrist's opinion as to present condition might also have been applicable earlier is irrelevant. The original finding that a defendant was then a sexual sociopath is final until changed, and the only issue in any subsequent hearing is whether a defendant is currently a sexual sociopath. The same is true on the issue of treatability.

In this case the facts alleged in the motion, if true, raise a reasonable doubt as to whether or not the defendant is still a sexual sociopath and as to whether or not his condition is now treatable. On both issues the motion establishes probable cause to hold a hearing within the meaning of the Sexual Sociopath Act. On the facts here the District Court should have granted a hearing on both the issue of whether or not the defendant is now a sexual sociopath and whether or not he is now treatable. The judgment is reversed and the cause is remanded to the District Court for further proceedings in accordance with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

BOSLAUGH, J., concurs in the result.

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, LOCAL 2088, APPELLEE, V. COUNTY OF DOUGLAS, NEBRASKA, DIVISION OF PUBLIC WELFARE, ET AL., APPELLEES, IMPLEADED WITH STATE OF NEBRASKA, DEPARTMENT OF PUBLIC WELFARE, ET AL., APPELLANTS. AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, APPELLEE, V. COUNTY OF LANCASTER, NEBRASKA, DIVISION OF PUBLIC WELFARE, ET AL., APPELLEES, IMPLEADED WITH STATE OF NEBRASKA, DEPARTMENT OF PUBLIC WELFARE, ET AL., APPELLANTS.

267 N. W. 2d 736

Filed July 5, 1978. Nos. 41516, 41517.

1. **Court of Industrial Relations: Labor and Labor Relations.** In determining what is an appropriate employee unit for the purposes of collective bargaining, consideration may be given to the mutuality of interest in wages, hours, and working conditions; the duties and skills of the employees; the extent of union organization among the employees; and the desires of the employees.
2. **Legislature: Labor and Labor Relations.** It is the intent of the Legislature, and the policy of this court, that undue fragmentation of bargaining units within the public sector is to be avoided.
3. **Court of Industrial Relations: Labor and Labor Relations: Statutes.** The considerations set forth in section 48-838 (2), R. S. Supp., 1976, in regard to collective bargaining units of employees, are not exclusive; and the Court of Industrial Relations may consider additional relevant factors in determining what bargaining unit of employees is appropriate.
4. **Court of Industrial Relations: Appeal and Error: Evidence.** Review by this court of orders and decisions of the Court of Industrial Relations is restricted to considering whether the order of that court is supported by substantial evidence justifying the order made, whether it acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or unreasonable.

Appeal from the Nebraska Court of Industrial Relations. Affirmed.

Paul L. Douglas, Attorney General, and John R. Thompson, for appellants.

John B. Ashford of Bradford & Coenen, for appellee American Fed. of S., C. & M. Emp. AFL-CIO.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

MCCOWN, J.

The American Federation of State, County and Municipal Employees, AFL-CIO Local No. 2088, hereafter called the union, brought two actions, one against Douglas County and one against Lancaster County, seeking to have the union declared the exclusive bargaining agent for the employees of the respective county welfare departments. The two actions were consolidated for trial in the Court of Industrial Relations. The State Department of Public Welfare was made a party in each case in compliance with American Fed. S., C., & M. Emp., AFL-CIO v. County of Lancaster, 196 Neb. 89, 241 N. W. 2d 523. In view of the pleadings, the Court of Industrial Relations ordered all 93 counties of the state made parties in both actions. Issues were raised as to the constitutionality of the statutes establishing the Court of Industrial Relations and its jurisdiction as applied to the State Department of Public Welfare. At oral argument in this court the State conceded that the issue of constitutionality of the statutes as applied to the State Department of Public Welfare was foreclosed by the decision of this court in American Fed. of S., C. & M. Emp. v. State, 200 Neb. 171, 263 N. W. 2d 643. The issues on this appeal are therefore limited to those involving the determination of the appropriate bargaining unit for county-level welfare employees jointly employed by the State Department of Public Welfare and the respective County Boards of Public Welfare.

The Court of Industrial Relations determined that the appropriate bargaining unit consisted of a single county-level unit in each county, excluding certain supervisory employees. The court found that there had been a proper showing of interest in only four counties, Douglas, Lancaster, Sarpy, and Scotts

Bluff, and ordered an election to be held in each of those counties. None of those four counties have appealed. The State Department of Public Welfare and the county divisions of public welfare for 41 of the 93 counties have appealed.

Some preliminary explanatory facts are advisable. The union was voluntarily recognized by Douglas County in 1973. A collective bargaining agreement was entered into by the union and Douglas County which remained in effect until July 1, 1976. On May 5, 1976, this court determined that county-level welfare employees were jointly employed by the State Department of Public Welfare and the respective counties. See American Fed. S., C., & M. Emp., AFL-CIO v. County of Lancaster, *supra*. Douglas County refused to renegotiate its contract without the State's participation, and Lancaster County and the State Department of Public Welfare refused to recognize the union. The two actions against Douglas County and Lancaster County were subsequently instituted by the union. The State Department of Public Welfare was a named defendant in each case. The divisions of public welfare of all 91 remaining counties of Nebraska were then joined as parties defendant by order of the Court of Industrial Relations. The cases were then consolidated for purposes of trial and appeal.

The facts here are virtually undisputed. The State Department of Public Welfare and the respective county divisions of public welfare of this state are engaged in a cooperative effort to provide welfare services. The welfare services include the administration of federally funded programs, such as aid to the blind and disabled, families with dependent children, and to the aged. The record also reflects that some counties have additional welfare programs which have been initiated and are operated independently by the counties.

The State Department of Public Welfare has ap-

proximately 500 employees working in the central office of the State Public Welfare Department, the Nebraska Center for Children and Youth, and the six regional offices throughout the state. These offices are all separate from the various county welfare offices. With some exceptions, the state employees in these offices supervise the administration of the welfare programs and train county employees. Neither the State nor the union now contend that these state-level employees should be made a part of the bargaining unit of any county-level unit.

There are slightly more than 1,300 county division welfare employees jointly employed by the state and the respective counties who are engaged in providing welfare services at the county level. These employees are subject to the state merit system. The state has established a system of job classifications for welfare workers. A series of 11 pay steps have also been established. Each county selects a series of any six consecutive steps for its welfare employees' compensation plan. The counties can, and in many cases do, choose to pay higher wages than those authorized by the state plan, but if they do, they are not reimbursed by the state for that additional compensation.

The job classification plan on the state level divides the counties into four classes based upon population and caseload. Douglas County is the only county in Class I, Lancaster County is the only county in Class II, and the remaining counties are in Classes III and IV. Some job classifications are only used in Classes I and II and do not apply to Classes III and IV. There are also job classifications on the state level which are not found on the county level.

Each individual county exercises independent control over most aspects of the county division of welfare operations. Although all the county-level welfare employees are subject to the state merit sys-

tem, each individual county has its own grievance procedures. Not all grievances an employee might have are subject to the state system. Evaluations of employee job performance are made at the county level by the supervisor or county director. County officials make the decision as to whether an employee should be promoted or whether a probationary employee should be retained. So long as a previously funded position is available, the state does not have the authority to pass on promotions. Similarly, a lateral movement within the county department does not require state approval.

The State Department of Public Welfare cannot order the transfer of an employee from one county to another, nor order any county division director to accept any employee from the state or from any other county, and there is little or no interchange of employees from county to county.

Conditions of employment for welfare employees can and do differ from county to county. Each individual county establishes its own annual and sick leave policies, office hours, pay periods, and schedule of holidays observed. Each county establishes its own rules for vehicle use, office attire, and office closings.

On the basis of the foregoing evidence the Court of Industrial Relations determined that the "working" level for county division welfare employees is basically in the 93 individual county divisions of public welfare, rather than in the State Department of Public Welfare, and that the state agency is primarily a supervisory agency, monitoring the administration of the several welfare programs. The court concluded that a single statewide unit would be inappropriate. The court then established separate county-level bargaining units as the appropriate bargaining units, and ordered an election to be held in each of four counties, Douglas, Lancaster, Sarpy, and Scotts Bluff, the only counties in which there had been a

sufficient showing of union interest.

The issue on this appeal is whether the appropriate bargaining unit for county-level welfare employees, jointly employed by the state and the respective counties, should be a single statewide unit or should be a single county-level unit in each county.

In City of Grand Island v. American Federation of S. C. & M. Employees, 186 Neb. 711, 185 N. W. 2d 860, this court determined that decisions under the National Labor Relations Act with respect to appropriate bargaining units were helpful but not controlling upon the court. In that case this court specifically held: "In determining what is an appropriate employee unit for the purpose of collective bargaining, consideration may be given to the mutuality of interest in wages, hours, and working conditions; the duties and skills of the employees; the extent of union organization among the employees; and the desires of the employees."

In Cornell University, 183 NLRB 329 (1970), the National Labor Relations Board said: "In determining whether a particular group of employees constitutes an appropriate unit for bargaining where an employer operates a number of facilities, the Board considers such factors as prior bargaining history, centralization of management particularly in regard to labor relations, extent of employee interchange, degree of interdependence or autonomy of the plants, differences or similarities of skills or functions of the employees, and geographical location of the facilities in relation to each other." This court quoted and adopted that language in American Assn. of University Professors v. Board of Regents, 198 Neb. 243, 253 N. W. 2d 1, and said: "It has long been held that a basic inquiry in unit determinations is whether a community of interest exists among the employees which is sufficiently strong to warrant their inclusion in a single unit."

The State contends that the establishment of sepa-

rate county-level units rather than a single statewide unit constitutes a fragmentation of bargaining units in violation of section 48-838 (2), R. S. Supp., 1976. Clearly it is the intent of the Legislature, and the policy of this court, that *undue* fragmentation of bargaining units within the public sector is to be avoided. The considerations set forth in section 48-838 (2), R. S. Supp., 1976, in regard to collective bargaining units of employees, are not exclusive; and the Court of Industrial Relations may consider additional relevant factors in determining what bargaining unit of employees is appropriate. See American Assn. of University Professors v. Board of Regents, *supra*.

The evidence in the case now before us fully supports the finding of the Court of Industrial Relations that a single statewide bargaining unit of county-level welfare employees would be inappropriate, and that there is little or no community of interest among the county-level welfare employees in the 93 separate counties sufficiently strong to warrant their inclusion in such a single unit. Prior union bargaining history has been established only at the county unit level, and whether successful or not, in only a very few counties. There is no prior statewide bargaining history for county-level welfare employees. There is little or no interchange of employees between counties or between the state and a county. Each county operates its welfare program independently of the program of any other county, and, except for the coordinating supervision of the State Department of Public Welfare, each county is virtually autonomous.

Urban and rural differences between individual counties are obvious and are pointed up by the differences in numbers of employees, differences in job classifications and functions, and the overlapping of functions and classifications in many rural areas. The evidence is persuasive that the "working" level for county-level welfare employees rests basically in

the division of public welfare of each county. More than half of the counties in the State of Nebraska have announced policies against a single statewide unit and those counties are not appellants in this action.

Review by this court of orders and decisions of the Court of Industrial Relations is restricted to considering whether the order of that court is supported by substantial evidence justifying the order made, whether it acted within the scope of its statutory authority, and whether its action was arbitrary, capricious, or unreasonable. American Assn. of University Professors v. Board of Regents, *supra;* House Officers Assn. v. University of Nebraska Medical Center, 198 Neb. 697, 255 N. W. 2d 258.

The decision and orders of the Court of Industrial Relations in these cases are supported by substantial evidence justifying the orders made, and its action was not arbitrary, capricious, or unreasonable. The judgment is affirmed.

AFFIRMED.

SPENCER, J., dissenting.

I respectfully dissent from the majority opinion herein because I believe that sections 48-801 et seq., R. R. S. 1943, are unconstitutional for the reasons I set out in full in my dissent in American Fed. of S., C. & M. Emp. v. State, 200 Neb. 171 at p. 180, 263 N. W. 2d 643 at p. 648 (1978).

I further dissent because of the undue fragmentation permitted by the majority opinion. There is no merit in the contention that there are real differences among the employees of the several county divisions of public welfare as to pay and other working conditions. The rules and regulations of the State Department of Public Welfare and the statutes of Nebraska require that all of the county divisions of public welfare employees be under the merit system and subject to the rules and regulations of the state. While such rules and regulations permit the county

divisions of public welfare to exercise discretion in certain areas, such as the adoption of pay scales within given ranges, the establishing of office hours within certain limits, and certain fringe benefit plans, all such variations are, however, within the ambit of the rules themselves. In addition, all the welfare functions performed by the employees at the county level are essentially the same from one county to the next.

NEBRASKA CITY EDUCATION ASSOCIATION, AN UNINCORPORATED ASSOCIATION, APPELLEE, V. SCHOOL DISTRICT OF NEBRASKA CITY, IN THE COUNTY OF OTOE, IN THE STATE OF NEBRASKA, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLANT.

267 N. W. 2d 530

Filed July 5, 1978. No. 41583.

1. **Court of Industrial Relations: Administrative Law: Statutes.** In establishing wage rates, the provisions of section 48-818, R. R. S. 1943, in relevant part, provide that the Court of Industrial Relations shall establish rates of pay and conditions of employment which are comparable to the prevalent wage rates paid and conditions of employment maintained for the same or similar work of workers exhibiting like or similar skills under the same or similar working conditions. The definition of "comparable" as set forth in section 48-818, R. R. S. 1943, is controlling.
2. **Statutes: Ordinances.** Where a statute or ordinance enumerates the things upon which it is to operate, or forbids certain things, it is to be construed as excluding from its effect all those not expressly mentioned, unless the legislative body has plainly indicated a contrary purpose or intention.

Appeal from the Nebraska Court of Industrial Relations. Affirmed.

Hoch & Steinheider, for appellant.

Theodore L. Kessner of Crosby, Guenzel, Davis, Kessner & Kuester, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, BRODKEY, and WHITE, JJ.

WHITE, C. J.

Appellee Nebraska City Education Association filed a petition on September 9, 1976, with the Court of Industrial Relations, requesting that the court resolve an industrial dispute and establish wages and other terms of employment. A hearing was held on November 29, 1976, and an order entered by the court on July 1, 1977. Defendant School District of Nebraska City appeals from that order. We affirm the order of the Court of Industrial Relations.

In its order the Court of Industrial Relations set a base salary level of $8,325 and determined other benefits. In arriving at these determinations, the court used an array of school districts which it deemed comparable to appellant. In ascertaining the comparable school districts, the court looked to enrollment, athletic relationship, geographic proximity, general cooperation, and community of interest.

At the hearing, the school district presented testimony from a member of the board of education and from the superintendent of the school district concerning the tax consequences of the proposed salary increases. Also introduced into evidence by appellant was exhibit 12, a compilation of financial information from appellant and seven other school districts which it deemed comparable, showing valuation per pupil for 1975-76, and the general levy for 1975-76. Appellant contends that the Court of Industrial Relations erred in refusing to consider evidence of the appellant's ability to finance the teacher pay package.

Concerning this evidence, the Court of Industrial Relations, in its order, stated: "As has been previously stated by this Court, Fremont Educ. Assoc. v. School Dist., 1 CIR 50-1, 14 (1972), a school district's 'ability to pay' is of vital concern, but this Court is not the proper forum under present law to consider that factor. Thus we feel compelled to reject de-

fendant's contention that such be considered. Rather we follow the holding in Nehawka Educ. Assoc. v. School Dist., 2 CIR 65-1 (1973), that, '[C]onsiderations as to the results that this Court's decision may have on the tax valuation and the mill levy are beyond the statutory authority of this Court.' "

Section 48-818, R. R. S. 1943, in relevant part provides: "* * * the Court of Industrial Relations *shall* establish rates of pay and conditions of employment which are *comparable* to the *prevalent wage rates paid* and *conditions of employment maintained for the same or similar work of workers exhibiting like or similar skills under the same or similar working conditions.* In establishing wage rates the court shall take into consideration the overall compensation presently received by the employees, having regard not only to wages for time actually worked but also to wages for time not worked, including vacations, holidays, and other excused time, and all benefits received, including insurance and pensions, and the continuity and stability of employment enjoyed by the employees." (Emphasis supplied.)

In Crete Education Assn. v. School Dist. of Crete, 193 Neb. 245, 226 N. W. 2d 752 (1975), we stated: "* * * section 48-818, R. R. S. 1943, further refines the definition of 'comparable' and specifies certain items to be considered in determining comparability under that section. The definition as set forth in the above section is, of course, controlling." In Bank of Gering v. Glover, 192 Neb. 575, 223 N. W. 2d 56 (1974), we observed that "unless the context indicates otherwise, the use of the word 'shall' purports a mandatory obligation."

Appellant's contention is without merit. Section 48-818, R. R. S. 1943, states specifically those factors which the Court of Industrial Relations shall look to when establishing wage rates and conditions of employment in disputes before it. Section 48-818, R. R. S. 1943, makes no mention of or reference to the

school district's "ability to pay."

The maxim "expressio unius est exclusio alterius" is applicable here. "* * * where a statute or ordinance enumerates the things upon which it is to operate, or forbids certain things, it is to be construed as excluding from its effect all those not expressly mentioned, unless the legislative body has plainly indicated a contrary purpose or intention." Starman v. Shirley, 162 Neb. 613, 76 N. W. 2d 749 (1956). See, also, Harrington v. Grieser, 154 Neb. 685, 48 N. W. 2d 753 (1951); Ledwith v. Bankers Life Ins. Co., 156 Neb. 107, 54 N. W. 2d 409 (1952). Had the Legislature wanted the Court of Industrial Relations to consider factors such as "ability to pay," when setting wage rates and conditions of employment it would have specifically provided therefor. We cannot rewrite the statute under the guise of interpretation. As we observed in School Dist. of Seward Education Assn. v. School Dist. of Seward, 188 Neb. 772, 199 N. W. 2d 752 (1972), " '* * * defendant is making his contentions in the wrong forum. They might appropriately be addressed to the Nebraska Legislature * * *.' "

The order of the Court of Industrial Relations is correct and is affirmed.

AFFIRMED.

CLINTON, J., participating on briefs.

SPENCER, J., dissenting.

I am in total disagreement with the holding that a school district's ability to pay is not an issue which can be raised before the Court of Industrial Relations. In my judgment the school district's ability to pay is of vital concern and its consideration of the issue is inherent in the act itself.

It is apparent to me that to pass constitutional muster the act must be so construed. The power to tax is the power to destroy. The Court of Industrial Relations by this decision is given the power to require taxation beyond the ability of the district to

pay. It can even ignore maximum levy limits if any such exist. We have held the Legislature may destroy a school district. We now hold the Court of Industrial Relations has that legislative authority.

To brush off the contention that because section 48-818, R. R. S. 1943, makes no mention or reference to the school district's ability to pay, indicates that the Legislature did not intend the Court of Industrial Relations to consider it as a factor, is in my judgment a "copout."

Section 48-818, R. R. S. 1943, says nothing about enrollment, athletic relationship, community of interest, geographic location, or general cooperation, or other considerations which have been adopted by the Court of Industrial Relations as guidelines. Certainly, ability to pay is a much more important criteria than those now being considered by the Court of Industrial Relations.

In spite of the thrust of the majority opinion to the contrary, I believe this court has heretofore recognized the obligation of the Court of Industrial Relations to consider ability to pay. In Lincoln Fire Fighters Assn. v. City of Lincoln, 198 Neb. 174, 252 N. W. 2d 607 (1977), we said: "We hold that in determining prevalent wage rates for comparable services in reasonably similar labor markets, the Court of Industrial Relations is required to weigh, compare, and adjust for any economic dissimilarities shown to exist which have a bearing on prevalent wage rates."

It is time we recognize that sweeping with a broad brush, as we have been doing in these cases, is not only permitting the Court of Industrial Relations to legislate, but also permitting it to become the court of last resort in these cases. This case should be remanded to the Court of Industrial Relations for reconsideration in light of our holding in Lincoln Fire Fighters Assn. v. City of Lincoln, *supra.*

STATE OF NEBRASKA, APPELLEE, V. JOHN F. KRETCHMAR, APPELLANT.

267 N. W. 2d 740

Filed July 5, 1978. No. 41730.

1. **Motor Vehicles: Stop and Check: Arrest: Licenses and Permits.** A routine license check and its concomitant temporary delay of a driver does not constitute an arrest in a legal sense where there is nothing arbitrary or harassing present.
2. **Motor Vehicles: Stop and Check: Statutes: Licenses and Permits: Police Officers and Sheriffs.** The fact that a law enforcement officer may entertain a suspicion that a certain motor vehicle may be stolen does not vitiate the lawfulness of a random spot check of the vehicle registration and operator's license of the driver pursuant to section 60-435, R. R. S. 1943. There is a direct relationship between the stop and the purposes authorized by the statute.
3. **Motor Vehicles: Probable Cause: Arrest: Police Officers and Sheriffs.** When the officer became aware that the car contained marijuana he had probable cause to arrest the defendant and to search the vehicle.

Appeal from the District Court for YORK COUNTY: WILLIAM H. NORTON, Judge. Affirmed.

John P. McCluskey, Julius Lucius Echeles, and Laurence J. Bolon, for appellant.

Paul L. Douglas, Attorney General, and Chauncey C. Sheldon, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

SPENCER, J.

Defendant appeals his convictions for possession of marijuana weighing more than 1 pound; possession of marijuana with intent to manufacture, distribute, deliver, or dispense; and possession of cocaine. He was sentenced to probation for a period of 2 years with the last 90 days to be spent in county jail, and fined $2,000. He assigns as error the overruling of his motion to suppress evidence seized from his vehicle, and the consideration of his failure

to explain his possession in determining he possessed it with intent to deliver.

The facts are not in dispute. An officer of the Nebraska State Patrol, while traveling west on Interstate 80 in York County, observed defendant driving a late-model automobile in the eastbound lane. His initial reaction was that the driver might be an illegal alien and that the car possibly had been stolen. He decided to check its registration. He turned his patrol car around on the median and pursued the vehicle. When he pulled alongside the vehicle, still believing the car might be stolen, he turned on the red lights on the patrol car and pulled the defendant, John F. Kretchmar, over to the side of the road.

After stopping at the side of the road, defendant walked back toward the patrol car. The officer met defendant between the two vehicles and asked to see his operator's license. Defendant appeared nervous and had difficulty locating the license in his billfold. He eventually produced the license and the officer then requested to see the vehicle registration. Defendant stated the car was rented and he had the rental papers in the vehicle.

The officer followed defendant to the car and stood by the open door on the driver's side while defendant retrieved the papers from the glove compartment. The officer detected the odor of marijuana. He looked inside the vehicle and observed what appeared to be a tire covered by a blanket behind the driver's seat on the floor, and on the rear seat there were suitcases, clothing, and a cooler.

After examining the rental papers the officer performed an equipment check on the vehicle. He then informed the defendant he smelled marijuana and desired to search the trunk. Defendant refused to consent to the search. The trooper took the keys from defendant's hand and proceeded to unlock the trunk. Defendant grabbed the trooper's hand in an attempt to prevent him from opening the trunk. The

trunk was opened and the trooper observed it was filled with what he believed to be marijuana in brick form. Defendant, who was placed under arrest, was transported to the York County sheriff's office.

Defendant's vehicle was also towed to the sheriff's office where the trooper removed a suitcase belonging to the defendant. Inside he found a leather or vinyl pouch with a metal container enclosed. The contents of the container were later analyzed as cocaine. An inventory search of the vehicle also revealed cocaine in a pocket of a jacket lying on the front seat. Removed from the trunk were 238 kilos of marijuana weighing approximately 460 pounds.

The stop in this case resulted from an intuitive feeling on the part of the trooper that the driver of the vehicle did not fit the late model vehicle he was driving, and that a check should be made to ascertain whether or not the vehicle might possibly have been stolen. The officer testified he stopped the car for the express purpose "of checking him out, getting his driver's license and registration."

Section 60-435, R. R. S. 1943, permits an officer in uniform to require the driver of an automobile to stop and exhibit his driver's license and the registration card issued for the vehicle. The stop was within the ambit of that statute, which has been upheld in State v. Holmberg, 194 Neb. 337, 231 N. W. 2d 672 (1975), and State v. Shepardson, 194 Neb. 673, 235 N. W. 2d 218 (1975).

In Holmberg we said: "A routine license check and its concomitant temporary delay of a driver does not constitute an arrest in a legal sense where there is nothing arbitrary or harassing present."

Subsequent to the stop, by the use of his senses the trooper became aware of the presence of marijuana. A trained officer should have no difficulty in smelling 460 pounds of marijuana. At that time, under our law, the officer had probable cause to search the

automobile for marijuana without the necessity of relying on consent.

Defendant seeks to distinguish Holmberg and Shepardson on the theory that section 60-435, R. R. S. 1943, permits the stop of a moving vehicle only for the limited purpose of enforcing the traffic safety laws. Section 60-435, R. R. S. 1943, reads, so far as material here: "The superintendent and all members of the Nebraska State Patrol and all other peace officers mentioned in section 39-6,192 shall have the power (1) of peace officers for the purpose of enforcing the provisions of this act and for the purpose of enforcing any other law regulating the operation of vehicles or the use of the highways; * * *." We would consider the stop herein to be within the ambit of this provision.

The stopping of Kretchmar for the purpose of checking his driver's license and the certificate of registration for the car he was driving, if it may be construed to be a seizure, was not in any sense an unreasonable one. It did not violate any right given Kretchmar by the Fourth Amendment to the federal Constitution. Lipton v. United States (9th Cir., 1965), 348 F. 2d 591; State v. Holmberg, 194 Neb. 337, 231 N. W. 2d 672 (1975).

The fact that a law enforcement officer may entertain a suspicion that a certain motor vehicle may be stolen does not vitiate the lawfulness of a random spot check of the vehicle registration and operator's license of the driver pursuant to section 60-435, R. R. S. 1943. There is a direct relationship between the stop and the purposes authorized by the statute. The fact that the officer may have a suspicion the vehicle is stolen does not disqualify him from conducting an otherwise lawful section 60-435, R. R. S. 1943, check.

When the officer became aware that the car contained marijuana he had probable cause to arrest the defendant and to search the vehicle. Chambers

v. Maroney, 399 U. S. 42, 90 S. Ct. 1975, 26 L. Ed. 2d 419 (1970). In that case, the occupants of the car were arrested and the car was driven to the police station where it was searched. The United States Supreme Court said: "On the facts before us, the blue station wagon could have been searched on the spot when it was stopped since there was probable cause to search and it was a fleeting target for a search. The probable-cause factor still obtained at the station house and so did the mobility of the car unless the Fourth Amendment permits a warrantless seizure of the car and the denial of its use to anyone until a warrant is secured. In that event there is little to choose in terms of practical consequences between an immediate search without a warrant and the car's immobilization until a warrant is obtained." The United States Supreme Court held, for constitutional purposes, it saw no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment.

The instant case is readily distinguishable from State v. Colgrove, 198 Neb. 319, 253 N. W. 2d 20 (1977). There, this court held the car was stopped to serve warrants, not for the purpose of checking the operator's license and car registration. As soon as the car was stopped, the officers realized that the two individuals they were seeking were not in the vehicle. In the present case, the car was stopped for the specific purpose of checking the operator's license and the car registration.

This case is similar to State v. Shepardson, 194 Neb. 673, 235 N. W. 2d 218 (1975). There, the officer decided to make a spot check for proper vehicle and registration papers because the defendant did not seem to fit the vehicle and the thought occurred to

him that the vehicle might be stolen. On the question at issue herein, this case is controlled by Shepardson.

This case was tried to the court without a jury. Preliminary to the imposition of sentence, the court summarized the evidence in a general way and at one point stated: "No evidence was offered by the defendant that he did not know of the existence of the marijuana or the cocaine nor was any explanation offered as a reason for the quantity." The court then proceeded to make certain findings of fact, the final one of which was: "Four, that the failure of the defendant to otherwise explain his possession of this large quantity of marijuana, which was processed and packaged in a form customarily used for distribution, supports a conclusion and finding beyond a reasonable doubt of the possession with intent to distribute."

Defendant argues that the aforementioned comments by the trial court constitute a violation of the fundamental principles that a defendant is entitled to a presumption of innocence and his failure to testify shall not create any presumption against him. The fallacy in defendant's assignment of error lies in the fact that he apparently misconceives the meaning of the trial court's remarks.

The court was not commenting as such on the failure of the defendant to testify. The court was simply commenting on the complete lack of any evidence of an exculpatory nature — whether through testimony of the defendant or otherwise — to mitigate against the natural and logical evidentiary presumption that the defendant was in possession of marijuana with intent to distribute. The comment was on the lack of evidence, not the lack of defendant presenting himself as a witness.

There is nothing in the remarks from the bench which justifies a conclusion that the trial judge considered the failure of the defendant to testify as in it-

self constituting or taking the place of evidence of guilt. It is obvious that the undisputed and unrebutted evidence of guilt on the issue of intent was so overwhelming as to be totally inconsistent with any other finding.

There is no merit to defendant's assignments of errors. The judgment should be and hereby is affirmed.

AFFIRMED.

WHITE, C. THOMAS, J., dissenting.

The United States Supreme Court has held the word automobile is not a talisman in whose presence the Fourth Amendment fades away and disappears. See, Coolidge v. New Hampshire, 403 U. S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564. In United States v. Brignoni-Ponce, 422 U. S. 873, 95 S. Ct. 2574, 45 L. Ed. 2d 607, the Supreme Court held the stop of an automobile for even a brief period of time constitutes a "seizure" within the meaning of the Fourth Amendment. The court went on to criticize random stops by the Border Patrol not based on a reasonable suspicion. While the Supreme Court has not ruled on the specific issue of whether random stops by state patrolmen to check documents are constitutionally valid, the principles enunciated in Brignoni-Ponce clearly suggest that they are not. The majority persists in ignoring the language of the Supreme Court and the weight of authority by relying on State v. Holmberg, 194 Neb. 337, 231 N. W. 2d 672.

It is not necessary to again detail the authority contrary to the majority position except to mention cases decided since Holmberg whose language we feel is germane to the issue. Authority contrary to the majority's opinion existing prior to Holmberg was set out in the dissent of McCown, J., in State v. Holmberg, *supra*.

It is to be noted that even authority relied on by the majority in Holmberg is now doubtful. In Holmberg, the majority discussed two cases from the

Eighth Circuit Court of Appeals to support its position, United States v. Turner (8th Cir., 1971), 442 F. 2d 1146, and Rodgers v. United States (8th Cir., 1966), 362 F. 2d 358. Language found in United States v. Harris (8th Cir., 1975), 528 F. 2d 1327, plainly makes adherence to a rule allowing random stops of automobiles in the Eighth Circuit questionable. After stating that detention of an automobile by police is a seizure for Fourth Amendment purposes, the court in Harris said: "It is well settled in justifying such an intrusion, a police officer '* * * *must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.*' " (Emphasis supplied.) Another case utilized by the majority in Holmberg, Lipton v. United States (9th Cir., 1965), 348 F. 2d 591, was limited by the holding in United States v. Carrizoza-Gaxiola (9th Cir., 1975), 523 F. 2d 239. Carrizoza-Gaxiola held that a warrantless stop which was part of an effort to detect stolen vehicles cannot be justified under the guise of a check for compliance with state licensing and registration requirements.

In two recent cases, courts considered the Holmberg rule and rejected it. See, United States v. Montgomery (D. C., 1977), 561 F. 2d 875; State v. Prouse (Del., 1978), 382 A. 2d 1359. In State v. Prouse, *supra,* the Delaware Supreme Court, in holding random stops inherently arbitrary, reasoned: "However, the factor which in our opinion makes random stops, absent justifying facts, unreasonable is the inherent arbitrariness of the procedure. The flaw in the process is that absolute discretion and authority is conferred upon the police to detain whomever they desire for whatever reason on the pretense of a documents check stop. Thus an officer prejudiced against any visibly identifiable group could stop a disproportionate number of persons in the group. No discrimination has been

shown in the stop under examination here, but the evil of the possibility of discriminatory stops does exist. If we were to accept the State's position, discriminatory stopping procedures could be practiced with little or no chance for judicial review."

Citing Terry v. Ohio, 392 U. S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889, the Eighth Circuit Court of Appeals in United States v. Harris, *supra,* held that a reasonable suspicion standard was to be applied in random automobile stops.

The majority here would equate intuition with reasonable suspicion. Intuition is not reasonable suspicion, but rather selective suspicion. Selective suspicion, without more, is merely a mask for personal prejudices. The following testimony of the officer illustrates the inherently arbitrary nature of random stops: "Q. Tell me what specific facts led you to believe that the motor vehicle was stolen?

"A. The reason — there were no specific facts. I did not have a report saying that this vehicle was stolen. I did not know that this vehicle was stolen. I just felt that the driver of the vehicle did not fit the vehicle and I had an inkling, call it what you want, but I felt at the time that the vehicle could possibly be stolen.

"Q. All right. Tell me what facts gave you the feeling that —.

"A. Okay, I will do the best I can.

"Q. Well, I hope so.

"A. When I first observed the vehicle eastbound I saw that the driver at this time looked to be like a Mexican male driving a newer model Chevrolet and in my line of work people, or a car, if it is going to be stolen for various reasons a lot of times it is a newer model car, rather than an older model car, whether it be for profit, if you are going to steal a car, a lot of people will steal it so that they can make some money off it, or if they are going to steal a car they are going to take a car that is reliable, that gets

them out of wherever they have been and will get them out of — to where they want to go, so the fact that it was a newer model car initially aroused my interest, along with the fact that Mr. Kretchmar at that time appeared to be a Mexican male. I thought that if he was a Mexican male, if he was possibly an illegal alien from Mexico, that there was a good chance that he had a car that would not belong to him, but there was no way I could tell whether this vehicle was his without stopping him and checking him out, getting his driver's license and registration. * * *

"Q. (By Mr. Bolan) Based on that information and based on what those observations were at that time you stopped the motor vehicle; is that correct?

"A. Yes."

The language of the Fourth Amendment is clear and unmistakable: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, * * *." Fourth Amendment to the Constitution of the United States. Under the majority's holding, a motorist using the roads of this state is without a constitutional guarantee against unreasonable seizure. In reality, the selective enforcement of the law sanctioned here allows the guarantee to adhere to some and not to others. The "others" are those of a specific ethnic type who may be driving a later model car, as here. What characteristics might be a catalyst to an officer's intuition are open to speculation. The majority clearly says there are no Fourth Amendment rights to be free of arbitrary stops on a highway. I disagree.

McCOWN, J., joins in this dissent.

CLINTON, J., dissenting.

In State v. Holmberg, 194 Neb. 337, 231 N. W. 2d 672, we said: "We are not unmindful of the possibility of abuse of the statute as we interpret it. We have no hesitancy in saying that if the facts should

disclose that the stop is a mere pretext for other reasons, it would be held to be arbitrary and unreasonable and violative of the Fourth Amendment. We hasten to state, specifically and emphatically, that a spot check is not to be used as a pretext to search for evidence of some possible crime unrelated to the requirements of section 60-435, R. R. S. 1943." I joined in the majority opinion in that case upon the premise that we meant what we said in the above statement. Apparently all who joined in that opinion did not.

The record here discloses as is demonstrated in the dissent of White, C. Thomas, J., that the officer stopped the car of the defendant on a mere hunch and without any rational cause for suspicion. It was not a bona fide stop to accomplish the purposes authorized by section 60-435, R. R. S. 1943.

The reasons for my views were elaborated in the majority opinion in State v. Colgrove, 198 Neb. 319, at p. 324, 253 N. W. 2d 20 (1977), and I will not repeat them here.

WHITE, C. J., responding to dissents.

The majority opinion is criticized as ignoring the language of the United States Supreme Court in United States v. Brignoni-Ponce, 422 U. S. 873, 95 S. Ct. 2574, 45 L. Ed. 2d 607 (1975). It is stated that the principles enunciated in that decision clearly suggest the constitutional invalidity of random stops by state patrolmen to check documents. A careful examination of the language employed by the Supreme Court will reveal that no such inference can be drawn.

Brignoni-Ponce involved the activities of the United States Border Patrol, and the only issue presented for decision was whether "a roving patrol may stop a vehicle in an area near the border and question its occupants when the only ground for suspicion is that the occupants appear to be of Mexican ancestry." In holding such stops are prohibited by the Fourth Amendment, the court stated: "We are

unwilling to let the Border Patrol dispense entirely with the requirement that officers must have a reasonable suspicion to justify roving-patrol stops. *In the context of border area stops,* the reasonableness requirement of the Fourth Amendment demands something more than the broad and unlimited discretion sought by the Government. Roads near the border carry not only aliens seeking to enter the country illegally, but a large volume of legitimate traffic as well. * * *

"We are not convinced that the legitimate needs of law enforcement require this degree of interference with lawful traffic. * * * a requirement of reasonable suspicion for stops allows the Government adequate means of guarding the public interest and also protects residents of the border areas from indiscriminate official interference. Under the circumstances, and even though the intrusion incident to a stop is modest, we conclude that it is not 'reasonable' under the Fourth Amendment to make such stops on a random basis." (Emphasis supplied.)

In a footnote to the opinion the court stated: "Our decision in this case takes into account the special function of the Border Patrol, the importance of the governmental interests in policing the border area, the character of roving-patrol stops, and the availability of alternatives to random stops unsupported by reasonable suspicion. Border Patrol agents have no part in enforcing laws that regulate highway use, and their activities have nothing to do with an inquiry whether motorists and their vehicles are entitled, by virtue of compliance with laws governing highway usage, to be upon the public highways. *Our decision thus does not imply that state and local enforcement agencies are without power to conduct such limited stops as are necessary to enforce laws regarding drivers' licenses, vehicle registration, truck weights, and similar matters.*" (Emphasis supplied.) This language has been previously

quoted in State v. Holmberg, 194 Neb. 337, 231 N. W. 2d 672 (1975).

In United States v. Martinez-Fuerte, 428 U. S. 543, 96 S. Ct. 3074, 49 L. Ed. 2d 1116 (1976), the Supreme Court considered the propriety of Border Patrol operations using permanent checkpoints where all traffic is momentarily stopped and certain vehicles are selectively referred to a secondary inspection area for questioning of the occupants. The defendants argued "that the routine stopping of vehicles at a checkpoint is invalid because Brignoni-Ponce must be read as proscribing any stops in the absence of reasonable suspicion." The court disagreed, finding no constitutional infirmity in the procedure employed. It stated: "The defendants note correctly that to accomodate public and private interests some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure. See Terry v. Ohio, 392 U. S., at 21, and n. 18. But the Fourth Amendment imposes no irreducible requirement of such suspicion. This is clear from Camara v. Municipal Court, 387 U. S. 523 (1967). * * * In Camara the Court required an 'area' warrant to support the reasonableness of inspecting private residences within a particular area for building code violations, but recognized that 'specific knowledge of the conditions of the particular dwelling' was not required to enter any given residence. 387 U. S., at 538. In so holding, the Court examined the government interests advanced to justify such routine intrusions 'upon the constitutionally protected interests of the private citizen,' id., at 534-535, and concluded that under the circumstances the government interests outweighed those of the private citizen.

"We think the same conclusion is appropriate here, where we deal neither with searches nor with the sanctity of private dwellings, ordinarily afforded the most stringent Fourth Amendment protection. See, e.g., McDonald v. United States, 335 U. S. 451

(1948). As we have noted earlier, one's expectation of privacy in an automobile and of freedom in its operation are significantly different from the traditional expectation of privacy and freedom in one's residence. United States v. Ortiz, 422 U. S., at 896 n. 2; see Cardwell v. Lewis, 417 U. S. 583, 590-591 (1974), (plurality opinion). And the reasonableness of the procedures followed in making these checkpoint stops makes the resulting intrusion on the interests of motorists minimal. On the other hand, the purpose of the stops is legitimate and in the public interest, and the need for this enforcement technique is demonstrated by the records in the cases before us. Accordingly, we hold that the stops and questioning at issue may be made in the absence of any individualized suspicion at reasonably located checkpoints."

In footnote 14 therein the court stated: "Stops for questioning, not dissimilar from those involved here, are used widely at state and local levels to enforce laws regarding drivers' licenses, safety requirements, weight limits, and similar matters. The fact that the purpose of such laws is said to be administrative is of limited relevance in weighing their intrusiveness on one's right to travel; and the logic of the defendants' position, if realistically pursued, might prevent enforcement officials from stopping motorists for questioning on these matters in the absence of reasonable suspicion that a law was being violated. As such laws are not before us, we intimate no view respecting them other than to note that *this practice of stopping automobiles briefly for questioning has a long history evidencing its utility and is accepted by motorists as incident to highway use.*" (Emphasis supplied.)

From Martinez-Fuerte it is clear that the Fourth Amendment "imposes no irreducible requirement" of reasonable suspicion based upon specific and articulable facts before a motor vehicle may be

stopped by officers in the performance of their duties. The test is one of balancing the interests at stake, a task which this court performed in State v. Holmberg, *supra*. The fact that an officer may entertain some suspicions concerning the driver of a vehicle should not invalidate an otherwise legal stop pursuant to section 60-435, R. R. S. 1943.

STATE OF NEBRASKA, APPELLEE, V. OTIS C. JOHNSON, III, APPELLANT.

268 N. W. 2d 85

Filed July 5, 1978. No. 41755.

1. **Criminal Law: Trial: Time: Statutes.** Section 29-1207, R. R. S. 1943, requires that every person charged with a criminal offense be brought to trial within 6 months. In cases commenced and tried in the county court, the 6-month period begins to run on the date the complaint is filed.
2. **Criminal Law: Trial: Time.** The primary burden is upon the State to bring the accused person to trial within the time provided by law. If a defendant is not brought to trial within that time, he is entitled to absolute discharge from the offense alleged in the absence of an express waiver or waiver as provided by statute.
3. **Criminal Law: Trial: Time: Waiver.** The failure of the defendant to object, at the time the trial court enters an order setting the trial at a date after the 6-month period, does not constitute a waiver of his statutory right to a speedy trial.
4. **Criminal Law: Trial: Time: Burden of Proof.** The State has the burden of proving by a substantial preponderance of the evidence that one or more of the excluded periods of time under subsection (4) of section 29-1207, R. R. S. 1943, is applicable if the defendant is not tried within 6 months of the commencement of the criminal action.
5. **Criminal Law: Trial: Time: Continuances: Statutes.** If a trial court relies on subsection (4) (f) of section 29-1207, R. R. S. 1943, in excluding a period of delay from the 6-month computation, a general finding of "good cause" will not suffice, and the trial court must make specific findings as to the good cause or causes which resulted in extensions of time.

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

Donald W. Marshall, Jr., of Marshall & Marshall, and John J. Battershell of Cunningham Law Office, for appellant.

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

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

BRODKEY, J.

The issue presented in this case is whether Otis C. Johnson, III, defendant and appellant herein, was brought to trial within 6 months of the commencement of this criminal action against him as required by section 29-1207, R. R. S. 1943. In a complaint filed in the county court of Red Willow County on August 18, 1976, the defendant was charged with operating a motor vehicle while his operator's license was revoked. On May 6, 1977, the defendant moved for dismissal on the ground that he had not been tried within 6 months of the filing of the complaint. Defendant's motion was overruled after a hearing, and he was tried on May 13, 1977, and found guilty as charged. The District Court affirmed defendant's conviction. He has now appealed to this court, contending that his conviction should be reversed because he was not tried within 6 months of the filing of the complaint. We reverse.

The complaint in this case was filed on August 18, 1976. A continuance was granted at defendant's request from August 26, 1976, to September 2, 1976, to enable him to secure counsel, and on September 2nd the defendant appeared with counsel and pled not guilty. County court records indicate that thereafter trial dates were set for September 22nd and November 4th, but a trial was not held on either of those dates. Neither the county court records, nor the evidence presented at the hearing on defendant's motion to dismiss, disclose the reason for those post-

ponements. There was no evidence that the defendant moved for a continuance during this time period, or that he or his counsel consented to a continuance. The case was eventually set for trial on February 16, 1977.

On February 14, 1977, the defendant's counsel moved for a continuance on the grounds that defendant would be outside the state conducting business on February 16th, and would be unable to appear for trial. This motion was overruled on February 15th, and defendant was ordered to show cause on February 24th why he should not be held in contempt of court. The defendant did not appear at the show cause hearing because he was again outside the state conducting business, and he was held in contempt of court. A warrant was issued for his arrest on March 3, 1977. On March 16th, the defendant appeared in the county court, and county court records indicate that he was ordered to appear for trial on May 13, 1977. Neither the court records nor the evidence presented at the hearing, however, shed any light on the circumstances surrounding the setting of the May 13th trial date. There was no evidence whatsoever that the defendant or his counsel consented to the May 13th trial date, or that the defendant was advised of his right to a speedy trial and waived such right. The evidence at the hearing disclosed that the county court docket was not congested on March 16th; and, in fact, there is evidence that trial dates were being moved up rather than being set back. Moreover, there is no evidence in the record that May 13th was the earliest date possible for defendant's trial.

After the hearing on defendant's motion to dismiss, the trial court made specific findings concerning what time periods should be included in computing whether the defendant had been brought to trial within 6 months of the filing of the complaint. It concluded that the period of time between the filing

of the complaint on August 18, 1976, and February 14, 1977, with the exception of a 7-day continuance granted to the defendant to obtain counsel, should be included in the computation; and that the period between February 14th to March 16th should be excluded because the defendant was outside the jurisdiction and not available for trial during that time period. The trial court also concluded that the period of time after March 16th should be excluded because the trial date of May 13th "was arrived at with the consent of the defendant's counsel." The trial court specifically stated: "I am also going to exclude that period of time from March 16th to the present for purposes of computation, and I do so on the basis of again the defendant's Motion for Continuance by the consent under section 29-1207 4B. I feel that although there was not a formal Motion for a Continuance or an objection to said continuance, I do feel that the trial date that was set on May the * * * 13th was arrived at with the consent of the defendant's counsel and I * * * I'm basing it strictly on the basis — on the fact that I believe the defendant's counsel did consent to the setting of that date."

Section 29-1207, R. R. S. 1943, provides that every person charged with a criminal offense shall be brought to trial within 6 months. In cases commenced and tried in the county court, the 6-month period begins to run on the date the complaint is filed. See, State v. Stevens, 189 Neb. 487, 203 N. W. 2d 499 (1973); State v. Born, 190 Neb. 767, 212 N. W. 2d 581 (1973). Subsection (4) of section 29-1207, R. R. S. 1943, provides that certain periods of time shall be excluded in computing the time for trial. Such periods, as are relevant in this case, include: (1) The period of delay resulting from a continuance granted at the request or with the consent of the defendant or his counsel; (2) the period of delay resulting from the absence or unavailability of the defendant; and (3) other periods of delay not specifically

enumerated, but only if the court finds that they are for good cause.

In State v. Alvarez, 189 Neb. 281, 202 N. W. 2d 604 (1972), this court established several principles relevant to the application of section 29-1207, R. R. S. 1943. First, we held that the "primary burden is upon the State, that is, the prosecutor and the court, to bring the accused person to trial within the time provided by law. * * * If a defendant is not brought to trial within the time provided for and as determined by valid statutory standards, he is, in the absence of an express waiver or a waiver as provided by statute, entitled to his absolute discharge from the offense alleged * * *." Second, we specifically rejected the contention that the failure of the defendant to object at the time the trial court enters an order setting the trial at a date after the 6-month period constitutes a waiver of his rights under the statute. See, also, Barker v. Wingo, 407 U. S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). Third, we held that the State has the burden to prove by a substantial preponderance of the evidence that one or more of the excluded periods of time under subsection (4) of section 29-1207, R. R. S. 1943, is applicable if the defendant is not tried within 6 months of the commencement of the criminal action. Finally, we set down specific guidelines for future cases, stating that when the trial court sets a date for trial outside the 6-month period, the court shall: "(1) Advise the defendant of his statutory right to a speedy trial and the effect of his consent to a period of delay, and * * * (2) Ascertain of record whether the defendant does or does not waive his right to a speedy trial and consent to the trial date set."

The dispute in the present case is whether the time period after March 16, 1977, when defendant appeared in court after his absence from the jurisdiction, should be included in the 6-month computation. Until March 16th, 5 months, 19 days had elapsed

from the filing of the complaint, excluding the time the defendant was absent from the jurisdiction, which was from February 14th to March 16th, and also excluding the time the defendant was granted a continuance to secure counsel, from August 26th to September 2nd. Therefore, if the time after March 16th is not excluded, the State had 11 days after March 16th to try the defendant, which it did not do. If the time after March 16th is excluded, it is apparent that the defendant was tried within 6 months under section 29-1207, R. R. S. 1943.

The trial court concluded that the period after March 16th should be excluded under subsection (4) (b) of section 29-1207, R. R. S. 1943, which provides for excluding the "period of delay resulting from a continuance granted at the request or with the consent of the defendant or his counsel." The trial court apparently viewed the delay after March 16th as the result of an "informal" motion for a continuance on the part of the defendant, and then expanded on this view by stating that it believed that the defendant's counsel had consented to the setting of the trial date on May 13th. The evidence presented at the hearing on defendant's motion to dismiss, however, does not support the conclusion of the trial court. Other than the continuance granted at the outset of the case to permit the defendant time to secure counsel, no continuance was ever granted by the trial court. There is no evidence that the defendant, either formally or informally, moved for a continuance on or after March 16th, nor was there any evidence that the defendant or his counsel consented to the setting of the trial date on May 13th. In fact, the witnesses at the hearing were not even certain when the trial date of May 13th was actually set, and there was no evidence concerning the circumstances of the May 13th trial date.

We conclude that the exclusion of the time period after March 16th cannot be justified by reliance on

subsection (4) (b) of section 29-1207, R. R. S. 1943. The evidence simply does not show that there was a continuance granted on or after that date at the request or with the consent of the defendant or his counsel, or that the defendant or his counsel consented to the trial date of May 13th. Since the burden is upon the State to show by a substantial preponderance of the evidence that one or more of the excluded periods of time under subsection (4) of section 29-1207, R. R. S. 1943, was applicable, and since it failed to meet this burden with respect to subsection (4) (b), the trial court's exclusion of the time period after March 16th under subsection (4) (b) cannot be sustained.

We also find no other provision in subsection (4) of section 29-1207, R. R. S. 1943, which would warrant exclusion of the time period after March 16th from the 6-month computation. Subsection (4) (f) excludes periods of delay not specifically enumerated, but only if the trial court finds that they are for "good cause." In State v. Alvarez, *supra,* this court held that if a trial court relies on subsection (4) (f) in excluding a period of delay from the 6-month computation, a general finding of "good cause" will not suffice, and the trial court must make specific findings as to the good cause or causes which resulted in extensions of time. In the present case the trial court did not purport to rely on subsection (4) (f) in excluding the time period after March 16th, but specifically and solely relied on subsection (4) (b). In any event, the evidence presented by the State does not support a finding that the delay from March 16th until May 13th was the result of good cause. There is no evidence either, that the State could not have tried the defendant within 11 days after March 16th, in which case the defendant unquestionably would have been tried within 6 months of the filing of the complaint, or, that May 13th was the earliest trial date available after March 16th.

For the same reasons, the delay after March 16th until May 13th can not be excluded under subsection (4) (d) of section 29-1207, R. R. S. 1943, which excludes from the computation the period of delay resulting from the absence or unavailability of the defendant.

In summary, the State failed to meet its burden of proof in this case, and the delay after March 16th can not be attributed to the defendant. As the trial judge himself admitted: "* * * I am not going to make any bones about it. I think that the court is at fault for not following the proper procedures * * *."

We conclude that the defendant is entitled to discharge from the offense charged because the State failed to meet its burden of showing that he was brought to trial within 6 months of the filing of the complaint. See, § 29-1208, R. R. S. 1943; State v. Alvarez, *supra*. We emphasize however, that a defendant whose trial is set at the end of the 6-month period, but who fails to appear for that trial, is not necessarily entitled to an immediate trial when he subsequently appears in court. It would appear in many cases that a delay after the defendant's reappearance might be justified for good cause, such as a congested docket in the trial court, or scheduling difficulties on the part of the trial judge or the prosecutor. In such a case, where the trial date must be set outside the 6-month period, the trial court should comply with the mandate of State v. Alvarez, supra, and advise the defendant of his right to a speedy trial and ascertain whether the defendant wishes to waive that right; or otherwise set forth in the record the cause for the delay. We also note that the prosecution may move for a continuance under subsection (4) (c) of section 29-1207, R. R. S. 1943, in such circumstances. If such simple procedures are followed, problems like those in the present case can be avoided in the future.

We reverse the judgment and remand the cause

with directions to vacate the defendant's conviction and discharge him from the offense charged.

REVERSED AND REMANDED.

SPENCER, J., dissenting.

I dissent from the majority opinion herein for two reasons: First, I do not feel that a defendant can deliberately ignore or flout an order of the trial court and then take advantage of his misconduct. Second, the trial date of May 13, 1977, was set by agreement of the defendant's counsel.

On the 24th day of February 1977, the county judge entered an order in a contempt of court hearing for failure to be present in court for a scheduled jury trial on February 16, 1977. The court in that order made fact findings as follows: "* * * 5) On or about the 14th day of February, 1977, defendant's Counsel moved for a continuance of the jury trial date set for the 16th day of February, based upon defendant's absence from the county.

"6) Above said Motion for a Continuance was after hearing, denied by the Court and and (sic) order was entered on the 15th day of February, 1977, to show cause why defendant should not be held in Contempt of Court for failure to be present for the scheduled jury trial date.

"7) Above said Order to Show Cause was set for hearing on the 24th day of February, 1977, and due and proper notice to defendant, his attorney, and the Red Willow County Attorney was mailed on the 15th day of February, 1977.

"8) The defendant failed, neglected and refused to appear in person before the Court on the 24th day of February, 1977, as ordered, but defendant's attorney has filed an application for a continuance of the hearing based upon defendant's absence from the county.

"9) That above said Application for a Continuance is based upon the defendant's absence from the county, which is the main reason for this Court's

original order to show cause why defendant should not be held in contempt and it was not supported by sufficient evidence to substantiate the impossibility of defendant's presence in this Court and said Application for a Continuance should be denied."

Under date of May 9, 1977, the defendant, giving an address as Box 96, Rangely, Colorado 81648, signed a waiver of personal appearance, and requested the court to proceed during every absence of his at all times when he is represented by his attorney. He further agreed to be present in person in court, ready for trial any day and hour which the court may fix in his absence.

Under date of May 13, 1977, the county court entered an order which, so far as material herein, reads as follows: "NOW ON THIS 11th day of May, 1977 this matter came on to be heard on the Motion to Dismiss filed by Defendant herein. Mr. Mike Freeman, County Attorney, Mr. John Battershell, Defense Attorney were present and the Defendant waived his presence by written document filed herein dated May 9, 1977. Both Attorneys in addition to Mary Fahrenbruch, Court Clerk, were sworn and presented evidence.

"BASED UPON said evidence and the record the Court finds that: * * * "(7) On the 24th day of February a hearing was held and the Defendant was found to be in contempt of Court and by consent of the Attorneys a trial date of May 13, 1977 was set for hearing this matter.

"(8) For purposes of computing the time excludable pursuant to 29-1207 the Court finds the following continuances granted at the request of or with the consent of the Defendant or his counsel:

"(A) That period from August 26, 1976 to September 2, 1976.

"(B) That period from February 14, 1977 to the trial date set for May 13, 1977.

"(C) That less than six months has expired since

the date the complaint was filed."

The motion to dismiss was overruled and the defendant, after trial, was found guilty as charged. On appeal to the District Court the motion to dismiss was again overruled, and the judgment of the county court was affirmed. Two courts have made fact findings on the issue of a speedy trial. I am not about to be a party to reversing those findings. In my judgment the suggestion that the defendant should have been tried within 11 days of March 16, 1977, on this record is absurd.

Defendant's counsel argues the court could have worked the case in sooner after the trial date was set when other cases fell out. This argument borders on the ridiculous on this record considering the fact that defendant claimed to be out of the state for so long a period and found it necessary to waive personal appearances for all hearings except the trial.

WHITE, C. J., and BOSLAUGH, J., join in this dissent.

BRODKEY, J., respondente.

I believe that several additional comments are appropriate in view of the strong language contained in the dissenting opinion in this case. Apparently the dissenters are of the view that the time period after March 16, 1977, should be excluded from the computation under either subsection (4) (b), (4) (d), or (4) (f) of section 29-1207, R. R. S. 1943, all of which were discussed in the majority opinion.

It should be noted that the dissent does not refer to the evidence presented at the hearing on defendant's motion to dismiss, but rather quotes extensively from the findings of the judge of the county court who tried the matter. It hardly needs to be said that the issue is not what the trial court found, but whether those findings are supported by any competent evidence. Specifically, the issue is whether the State met its burden of proving by a substantial preponderance of the evidence that one or more of the excluded periods of time under subsection (4) of sec-

tion 29-1207, R. R. S. 1943, is applicable. State v. Alvarez, 189 Neb. 281, 202 N. W. 2d 604 (1972).

There was not one iota of evidence presented at the hearing on the motion to dismiss that the trial date of May 13th was set with the consent of the defendant or his counsel. The trial court, after the hearing, stated as follows: "* * * I do *feel* that the trial date * * * was arrived at with the consent of the defendant's counsel * * *." (Emphasis added.) The fact remains, however, that there was absolutely no evidence presented at the hearing which supports this finding. In fact, the witnesses at the hearing expressed confusion over when the trial date was set, and there was no testimony that the defendant or his counsel consented to the setting of the trial date on May 13th. Under these circumstances, it can hardly be said that the State proved by a substantial preponderance of the evidence that the period after March 16th should have been excluded under subsection (4) (b) of section 29-1207, R. R. S. 1943.

The second criticism of the dissent, that the defendant should not benefit from his willful absence from the jurisdiction, is also groundless. Again, the dissent does not point to any evidence which would warrant the exclusion of the time period after March 16th under either subsection (4) (d) or (4) (f) of section 29-1207, R. R. S. 1943. Furthermore, the trial court did not rely on these subsections for the obvious reason that there was no evidence to support an exclusion of the time period after March 16th under them.

As the majority opinion emphasizes, a defendant whose trial is set at the end of the 6-month period, but who fails to appear for that trial, is not necessarily entitled to an immediate trial or one within the few days remaining in the 6-month period when he subsequently appears in court. In such cases a delay after the defendant's reappearance might be

justified for good cause. See State v. Alvarez, *supra.* Therefore the majority opinion, contrary to the suggestion of the dissent, does not give a defendant license to benefit from misconduct. It simply requires the State to comply with the provisions of section 29-1207, R. R. S. 1943, by bringing the defendant to trial within 6 months unless there is *good cause* for not doing so, or unless one of the other exceptions of the 6-month rule is applicable. The fact that a defendant has failed to appear for trial does not authorize the State to delay the proceedings for any length of time it chooses, and there is no evidence in the present case that the delay from March 16th until May 13th was for good cause as delineated in State v. Alvarez, *supra.*

The Legislature has mandated that delay beyond 6 months be justified under one of the specific statutory exceptions, a fact which the dissenters choose to ignore. In this case the State simply failed to prove that any of the exceptions set forth in section 29-1207, R. R. S. 1943, apply. In this case even the county court acknowledged it had not followed proper procedures. Under section 29-1207, R. R. S. 1943, and State v. Alvarez, *supra,* the defendant is clearly entitled to be discharged.

WHITE, C. J., dissenting separately.

Besides joining in the dissent of Spencer, J., I wish to add the following:

I

Subsection (3) of section 29-1207, R. R. S. 1943, provides: "(3) If such defendant is to be tried again following a mistrial, *an order for a new trial,* or an appeal or collateral attack, such period shall commence to run from the date of the mistrial, *order granting a new trial,* or the mandate on remand." (Emphasis supplied.)

The statute requires the defendant *be brought to trial* (not a completed trial) within 6 months (not counting excludable time). He was "brought to

trial" on February 16, 1977. He failed to appear then or on February 24, 1977, when the trial judge, out of an abundance of consideration and caution, entertained his counsel's motion to continue the case and fix a new trial date. Under either the literal wording or spirit of the statute, this action by the defendant to "cover" his failure to appear, must be within the meaning and intent of the statute. To me, it is clear that, in the words of the statute, "such period [6 months] shall commence to run from the date of the * * * order granting a new trial * * *."

Further, could anyone doubt that this calculated absence and action to delay, to secure a new trial date, was not the result of the absence or unavailability of the defendant? Subsection (4) (d) of section 29-1207, R. R. S. 1943, *excludes* "The period of delay resulting from the absence or unavailability of the defendant."

To me, it is almost incredible in reviewing the record, that this court would permit a defendant to play games with a court's docket and the orderly disposition of cases in this manner. No suggestion or showing of prejudice is offered or argued. The result is a miscarriage and abuse of justice, an obstruction of the orderly administration of justice, and a flagrant abuse of the right of the judge and the public to enforce the law evenhandedly.

II

The right to a speedy trial has its Nebraska origin in Article I, section 11, Nebraska Constitution. As to the posture of legislatively created speedy trial statutes, we have consistently held that the interpretation of this constitutional provision is for this court, and that the guidelines set by such a statute are advisory in nature. In the basic case, Maher v. State, 144 Neb. 463, 13 N. W. 2d 641, we stated as follows: "As stated in Critser v. State, 87 Neb. 727, 127 N. W. 1073: 'There is room for the exercise of sound discretion on the part of the trial court, always bearing

in mind that the right to a speedy trial is the constitutional right of any citizen who is accused of crime.' The legislature of our state has interpreted the Constitution on the matter of a speedy trial by fixing what, in certain cases and under certain conditions, is to be regarded as a maximum time within which a defendant must be tried. *The interpretation of this constitutional provision is for the court,* but since the time fixed by the legislature is not unreasonable, we adopt it as our own. The defendant, having failed to bring himself within the provisions thereof, is not entitled to be discharged under its terms. *But the legislature has not undertaken to fix any minimum time in such matters. What is a fair and reasonable time in each particular case is always in the discretion of the court. No hard and fast rule can be applied in all cases."* (Emphasis supplied.) See, also, Svehla v. State, 168 Neb. 553, 96 N. W. 2d 649; State v. Ogden, 191 Neb. 7, 213 N. W. 2d 349; State v. Stevens, 189 Neb. 487, 203 N. W. 2d 499; State v. Russo, 187 Neb. 348, 190 N. W. 2d 853; State v. Ford, 186 Neb. 109, 180 N. W. 2d 922; State v. Washa, 185 Neb. 639, 177 N. W. 2d 740; State v. Ellis, 184 Neb. 523, 169 N. W. 2d 267; State v. Warner, 181 Neb. 874, 152 N. W. 2d 30; State v. Fromkin, 174 Neb. 849, 120 N. W. 2d 25.

We are reversing, as an abuse of discretion, the judgment of two experienced trial judges in this case. Of particular significance in the record is the showing of extreme judicial indulgence by the court where the defendant absented himself from the state, at the time of trial, and sought sanctuary outside the jurisdiction of the court. There was no prejudice and could be none because he was the one who asked for a continuance.

Under either the statute or our constitutional power to review the circumstances of each particular case (Maher), the judgment finding the defendant guilty should be affirmed. Does a judge enter-

tain and grant a defendant's own motion for a continuance and new trial date at his peril?

SPENCER, J., joins in this dissent.

BRODKEY, J., responding to separate dissent of White, C. J.

In his separate dissent, White, C. J., states: "The statute requires the defendant *be brought to trial* (not a completed trial) within 6 months (not counting excludable time). He was 'brought to trial' on February 16, 1977." This is simply not so, and is an incorrect statement, not supported by fact or law. While it is true that defendant's original trial date was set for February 16, 1977, that trial was continued because of defendant's absence from the state, which period was properly includable under the provisions of the statute in question. A case which is merely brought to point of having been set and then dropped is not "brought to trial." In Tunis v. Superior Court of Los Angeles County, 59 Cal. 2d 465, 30 Cal. Rptr. 135, 380 P. 2d 823 (1963), the court held that an action is not "brought to trial" within the rule requiring action to be brought to trial within 5 years after being filed, until trial is commenced, and the statute is not satisfied by having a trial date set before expiration of such period on a date subsequent thereto. Obviously the swearing of an actual trial jury, or the swearing of witnesses in a trial to the court, are necessary steps in bringing a case to trial, since only at that point does jeopardy attach. See, also, Diverco Constructors, Inc. v. Wilstein, 4 Cal. App. 3d 6, 85 Cal. Rptr. 851 (1970). In the instant case, trial was neither held nor commenced within the 6-month period provided by statute.

It is also significant that neither of the dissenting opinions in this case mentions, comments upon, or attempts to explain away the failure of the trial court to comply with the rules set down by this court in State v. Alvarez, 189 Neb. 281, 202 N. W. 2d 604 (1972), which require the trial court to make specific

findings as to the cause of any extension and the period of extension attributable to such cause, as discussed in the majority opinion. Admittedly, this was not done.

I feel constrained to follow the clear language of section 29-1207, R. R. S. 1943, as written by the Legislature, and State v. Alvarez, *supra,* by the court; and under those authorities the defendant is entitled to have vacated his conviction of the charge of operating a motor vehicle while his operator's license was revoked.

JULIE ANN RENNER STEVENS, SPECIAL ADMINISTRATRIX OF THE ESTATE OF SHANE RENNER, DECEASED, APPELLANT, V. GENE KASIK, APPELLEE.

267 N. W. 2d 533

Filed July 12, 1978. No. 41411.

Trial: Evidence: Verdicts. The party against whom a motion for a directed verdict is directed is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence. It is only when the facts are conceded, undisputed, or are such that reasonable minds can draw but one conclusion therefrom that the trial court must decide the question as a matter of law and not submit it to a jury.

Appeal from the District Court for Madison County: EUGENE C. MCFADDEN, Judge. Reversed and remanded for a new trial.

Hutton & Garden, for appellant.

Deutsch, Jewell, Otte, Gatz, Collins & Domina, for appellee.

Heard before SPENCER, MCCOWN, CLINTON, and BRODKEY, JJ., and COADY, District Judge.

COADY, District Judge.

This is a wrongful death action by the plaintiff mother of a deceased man against a defendant

farmer, wherein the plaintiff alleged that the proximate cause of the death was the negligence of the defendant because defendant failed to warn the deceased of the danger of entering a grain bin alone while grain is being removed. At jury trial and upon the motion of the defendant, the trial judge directed a verdict against the plaintiff and dismissed her case. She has appealed. We reverse and remand for a new trial.

The deceased grew up on a farm near Madison, Nebraska, where he lived, until his parents were divorced in 1968. At the age of 14, he moved with his brother, sisters, and mother to the City of Madison. There he was graduated from high school in 1972.

The deceased had worked for the defendant during the summer of 1971. The defendant could not recall whether the deceased had helped with the loading or unloading of grain bins. After graduation and during the summer of 1972, the deceased worked for an uncle at the uncle's farming operation near Erickson, Nebraska. That fall he went back to Madison to live with his mother. In the spring of 1973, the deceased again worked for the defendant as a farm laborer, being paid by the day. The mother of the deceased stated she knew he had unloaded grain from farm storage facilities.

The defendant was the owner of a farming operation and was approximately 47 years of age in 1973. He had grown up on his father's farm, was graduated from college, and had worked for his father. He began his own farming operation sometime between 1955 and 1960.

On or about August 2, 1973, the defendant began unloading corn from a quonset on his premises. The deceased helped in that chore, together with the defendant's father, son, brother and nephew. At that time, corn was loaded into four trucks and delivered to grain cars at Enola, Nebraska. On Friday or Saturday, the quonset was cleaned out and the

workers moved to a steel drying bin. Approximately 1,000 bushels of corn were taken from that bin and loaded in three trucks. The loaded corn was not delivered to Enola until the following Monday.

The drying bin, mentioned above, was filled with corn in 1972. The bin was about 26½ feet in diameter and stood 18 feet high as measured from the floor to the top of the sidewalls. Its capacity was approximately 9,000 bushels and it contained approximately 8,000 bushels on the day of the accident.

The drying bin was constructed with a slatted or perforated floor so that heated air could rise and dry grain stored therein. In 1972, the corn would have been harvested at a time when the grain contained moisture in the range of 19 to 30 percent. About 1,500 bushels of high moisture corn were placed in the bin on the first day of the harvest and the heating of the corn began the second day. The drying process was continued until the 9,000 bushels were brought down to 15½ percent moisture.

After the three loads were delivered to the railroad cars on the morning of Monday, August 6, 1973, operations were begun to continue unloading the drying bin. The first three loads had been loaded through the use of a permanent auger which took the corn from the center of the floor of the bin. To unload the bin, the workers simply pulled on a rod which was attached to a small sliding door in the center and on the floor of the bin. The corn did drop through the center of the floor into the permanent auger and move through the auger to a waiting truck. But on the morning of August 6, 1973, only a small amount of corn ran through the permanent auger and into the truck. It was later determined that a weld had broken on the slide door and that the movement of the rod did not slide the door.

The defendant first climbed a ladder on the 18-foot sidewall and entered the bin through an opening at the top of the sidewall. Seeing nothing unusual, he

directed the deceased to get a rod with which the grain could be probed, with the idea of moving whatever was clogging the opening left by the supposedly open sliding door. The deceased, the defendant, and the defendant's brother probed and worked inside the bin without success. The probing rod became stuck and was left standing in the center of the bin. At noon, everyone quit working. The permanent auger was turned off and the parties went to their noon meal.

After lunch, it was decided that the workers would take the drying fan off the bin and enter through a tunnel to determine what the problem was. That did not work. It was decided that a portable, gasoline engine-powered auger would be placed next to a door located on the side and near the bottom of the bin. Panels in the door were opened, the grain flowed into a rubber tire on the ground and was augered up and into the trucks. At this point, the evidence becomes unclear and confusing.

Four trucks were still being used on that afternoon. The defendant, his brother, his father, and his son were driving the trucks. The deceased was around to generally assist in the loading and to handle the auger controls which were near the gas engine on the portable auger. There was no reason for the deceased to go into the drying bin and his presence in the bin would not have assisted the loading of the corn in any way on that particular afternoon. The defendant believes that he hauled three loads from the bin to the railroad cars on that afternoon. It took 15 to 20 minutes to load any one of the four trucks with 260 to 320 bushels. The defendant's brother, father, and son did not testify.

The defendant recalled that he saw the deceased climb the ladder on the sidewall and enter the bin at about 4 o'clock, p.m. He also recalled seeing the head and shoulders of the deceased appearing through the opening in the top of the bin as though

the deceased were coming out. The evidence is not good on the exact timing, but shortly thereafter, the defendant delivered his load of corn to the railroad cars without any conversation with the deceased. Some time later, he returned and began loading his truck. At the same time, he noticed that the deceased was not around and he climbed the sidewall and looked into the grain bin. The defendant then testified "I just know I feared," although there was nothing unusual to be seen in the grain bin.

Later that same day inquiries, as to the whereabouts of the deceased were made of his mother and friends. Some searching was done on the defendant's premises. On the following day, official help was requested and a search of the buildings and premises of the defendant was made. After more corn was removed, the body of the deceased was located near the center and floor of the drying bin.

Absolute safety is unattainable and employers are not insurers. The mere happening of an accident does not create a presumption or justify an inference of negligence. Employers are liable for the consequences, not of danger, but of negligence. Halsey v. Merchants Motor Freight, Inc., 160 Neb. 732, 71 N. W. 2d 311 (1955).

A duty rests on an employer to warn his employees of dangers not apparent which may arise in the course of the employment, which the employer knows or ought to know about, and which he has reason to believe the employee does not know and will not discover in time to protect himself. Russo v. Swift & Co., 136 Neb. 406, 286 N. W. 291 (1939); Anstine v. Briggs, 191 Neb. 489, 215 N. W. 2d 878 (1974).

An employee is chargeable with contributory negligence where he fails to take due care to avoid defects and dangers which are so open and obvious that anyone in the exercise of ordinary care and prudence would discover them. Where an employee has knowledge of the dangers to which the service

exposes him or where the defects or dangers are so patent and obvious that in the exercise of ordinary care, in the performance of the services for which he was employed, he should have known of their existence, he assumes the risk of injury incident thereto. Ring v. Kruse, 158 Neb. 1, 62 N. W. 2d 279 (1954).

The party against whom a motion for a directed verdict is directed is entitled to have every controverted fact resolved in his favor and to have the benefit of every inference that can reasonably be deduced from the evidence. It is only when the facts are conceded, undisputed, or are such that reasonable minds can draw but one conclusion therefrom that the trial court must decide the question as a matter of law and not submit it to a jury. Fangmeyer v. Reinwald, 200 Neb. 120, 263 N. W. 2d 428 (1978); Garcia v. Howard, 200 Neb. 57, 262 N. W. 2d 190 (1978).

Upon consideration of this record, we find that reasonable minds might decide that the defendant knew of the danger of suffocation, that the circumstances called the danger to his attention, that it appeared to him the deceased did not know of the danger and was exposing himself to an unapparent danger, and that a reasonable man in like circumstances would have warned the deceased. Under these rules of law, we are not required to find that such findings are likely rather than reasonable. However, reasonable minds are likely to interpret defendant's actual testimony to be an admission of his awareness of the danger.

As to whether the deceased was negligent or did assume the risk of the danger, the answer is less debatable. It should be pointed out that there is no evidence the deceased had ever unloaded a like bin. The quonset was described as flat storage and unlike the drying bin. The mother's mere conclusion that the son had unloaded grain from farm storage facilities is very general and may have been made without factual basis. In any case, we find that the facts

and the favorable inferences springing therefrom require submission to a jury.

REVERSED AND REMANDED FOR A NEW TRIAL.

SHIRLEY CHRISTENSEN, APPELLEE, V. CITY OF TEKAMAH, A MUNICIPAL CORPORATION, ET AL., APPELLANT, IMPLEADED WITH CHICAGO AND NORTHWESTERN TRANSPORTATION COMPANY, A CORPORATION, APPELLEE.

268 N. W. 2d 93

Filed July 12, 1978. No. 41486.

1. **Political Subdivisions: Highways: Torts: Damages.** If any person suffers personal injury or loss of life, or damage to his property by means of insufficiency or want of repair of a highway or bridge or other public thoroughfare, which a political subdivision is liable to keep in repair, the person sustaining the loss or damage, or his personal representative, may recover in an action against the political subdivision.
2. **Political Subdivisions: Highways: Counties: Torts.** The liability of all political subdivisions based on the alleged insufficiency or want of repair of any public thoroughfare is to be determined by the provisions of sections 23-2410 and 23-2411, R. R. S. 1943, and judicial interpretations governing the liability of counties under the statute in effect prior to the enactment of the Political Subdivisions Tort Claims Act.
3. **Political Subdivisions: Highways: Counties.** A county is not an insurer, but must use reasonable and ordinary care in the construction, maintenance, and repair of its highways and bridges so that they will be reasonably safe for a traveler using them while he is in the exercise of reasonable and ordinary caution and prudence.
4. **Political Subdivisions: Highways: Municipal Corporations: Negligence.** The character and extent of unevenness or other inequalities in the surface of a highway, or street, as well as the surrounding circumstances, determine whether such inequalities constitute actionable defects. The test ordinarily is whether the inequalities are of such magnitude or extent as to be likely to cause injury to travelers who are proceeding with due care. The public authority is not liable for a failure to remedy trivial irregularities, slight depressions, or other minor inequalities in the surface of the highway.
5. _____: _____: _____: _____. Holes, ruts, or depressions in the street or sidewalk may give rise to a right of action for injuries

caused thereby if they are of such a nature that danger therefrom might reasonably be anticipated. Slight holes or depressions which are not in the nature of traps, and from which danger could not reasonably be anticipated, are not defects for which an action will lie.

6. **Political Subdivisions: Counties: Negligence: Damages.** In an action to recover damages from a county by virtue of the Political Subdivisions Tort Claims Act, the burden is on the plaintiff to establish negligence of the county and that its negligent act was the proximate cause of the injury to the plaintiff or that it was a cause that proximately contributed to it.
7. **Trial: Witnesses: Evidence.** Expert testimony is permitted even in areas where laymen have competence to determine the facts testified to by the expert where the trial court may feel the opinion would assist them. The trier of fact is not bound by the testimony of an expert witness.
8. **Political Subdivisions: Torts: Appeal and Error.** On appeal of an action under the Political Subdivisions Tort Claims Act, the findings of the trial court will not be disturbed unless clearly wrong.

Appeal from the District Court for Burt County: WALTER G. HUBER, JUDGE. Reversed and dismissed.

Harry L. Welch and Harold W. Kauffman of Gross, Welch, Vinardi, Kauffman & Day, for appellant.

Mark L. Laughlin and John D. Sykora of Marer, Venteicher, Strasheim, Seidler, Laughlin, Lazer & Murray, for appellee Christensen.

Heard before SPENCER, BOSLAUGH, and WHITE, JJ., and RIST and KELLY, LLOYD W., District Judges.

PER CURIAM.

This is an action brought by the plaintiff-appellee for damages sustained as a result of an automobile accident at a railroad crossing in Tekamah. The plaintiff was traveling east on "G" Street in Tekamah when her automobile stopped abruptly on the west edge of a railroad crossing. The lower portion of the frame or bumper of plaintiff's automobile apparently engaged itself with a rail of the Chicago and Northwestern Transportation Company, hereinafter referred to as the "Railroad." The plaintiff brought

action against the Railroad alleging negligence due to the protrusion of the rail and against the City of Tekamah, hereinafter referred to as "City," alleging negligence in the design and maintenance of the street approaching the railroad crossing. Plaintiff alleged two causes of action, one for property damage and personal injury and the other for the loss of consortium.

The action was tried before a jury; however, only the case of the Railroad was submitted to the jury. The Political Subdivisions Tort Claims Act, sections 23-2401 to 23-2420, R. R. S. 1943, provides that the issues as to the City be determined by the court. The jury returned a verdict for the plaintiff against the Railroad on both causes of action in the amount of $3,633. The court entered a judgment for the plaintiff against the City on both causes of action in the amount of $7,295.25. Only the City appeals from the judgment.

"G" Street runs east and west, intersecting 14th Street which runs north and south. Between 14th Street and the street immediately east of it, 13th Street or Main Street, three sets of tracks cross "G" Street. The west rail of the westernmost set of tracks is involved in this case. These rails are elevated above the surface of "G" Street. The public works director of Tekamah and the investigating officer at the accident, witnesses for the plaintiff, testified they estimated the rail elevation was ½ inch above the level of the street. Stanley Bales, a consulting engineer called by the plaintiff, testified the protrusion measured ¾ of an inch.

The distance from the center of 14th Street to the west rail of the track involved is 74 feet. An exhibit prepared by Bales, showing the gradient variance of this 74 feet of "G" Street, was received into evidence. This exhibit and the testimony of Bales show there is a 3.6 percent grade for the 10 feet from the center of 14th Street to the east curb thereof. There

is a 12.11 percent grade for the next 37 feet. The slope decreases slightly for the next 10 feet to a grade of 12 percent, but then increases during the subsequent 10 feet to a grade of 13.2 percent. Seven feet from the rail in issue, where there is a 3 percent grade, the slope levels off. There are no street signs giving notice to a driver of the design of the street.

The accident occurred on October 25, 1974. The weather was clear. The plaintiff was driving a 1975 automobile and there was no evidence that the automobile was not working properly. She admitted she was not using the available seat belts. The speed limit in this area of "G" Street is 25 miles per hour. The plaintiff had never driven this automobile on "G" Street in this area. Plaintiff, who suffered a brain concussion, remembers going down the slope on "G" Street. The automobile came to rest on the tracks. The crossmember of the automobile's frame was scraped from the impact. The frame of the car was bent so that both front wheels were pushed back directly against the tire well. The railroad track which had suffered the impact was scratched about 3 or 4 feet right of the center of "G" Street by plaintiff's automobile.

Ralph Renshaw, who was driving a tractor past the second railroad track approximately 200 feet east of the accident scene and facing "G" Street, witnessed the plaintiff approaching the tracks. He testified that she was traveling 18 to 20 miles per hour and braked from the top of the hill. He thought she braked as she came into the dip and when the automobile went into the dip, "it seemed to raise up on the front end and bottomed completely out on the railroad track. * * * It appeared to me that it stopped abruptly when it bottomed out."

Bales, the consulting engineer, testified that the average American automobile using the tracks would have approximately a 10-foot wheel base. A break in grade 7 feet from the crossing would result

in the rear wheels of the automobile being on a much higher level than the front wheels at the crossing. This would cause the front portion of the automoble overhanging the front wheels to point downward at the track. This is a problem when coupled with the tendency of a driver coming down a steep grade to apply the brakes. The driver brakes the automobile as he or she heads into the more level grade because the rails represent a visible rough spot. Bales testified that in his opinion, as an expert, the street was not maintained in a reasonably safe condition.

The defendant City offered no evidence to refute Bales' testimony. The City argues there was no negligence on its part, and, in the alternative, such negligence, if it existed, would be negated by the plaintiff's contributory negligence. The City asserts the plaintiff failed to have proper control of her vehicle and her failure to use available seat belts aggravated her injuries.

Section 23-2410, R. R. S. 1943, of the Political Subdivisions Tort Claims Act provides: "If any person suffers personal injury or loss of life, or damage to his property by means of insufficiency or want of repair of a highway or bridge or other public thoroughfare, which a political subdivision is liable to keep in repair, the person sustaining the loss or damage, or his personal representative, may recover in an action against the political subdivision, * * *."

The forerunner of section 23-2410, R. R. S. 1943, was section 39-834, R. R. S. 1943, which specifically mentioned counties as the only political subdivisions which could be liable for insufficiency or want of repair of a highway or bridge. Section 23-2410, R. R. S. 1943, adopted in 1969, extends the liability to all political subdivisions. Section 23-2411, R. R. S. 1943, expressly states that all prior case law which evolved from former section 39-834, R. R. S. 1943, shall be applicable in deciding cases governed by

section 23-2410, R. R. S. 1943. "In enacting section 23-2410, it is the intent of the Legislature that the liability of all political subdivisions based on the alleged insufficiency or want of repair of any highway or bridge or other public thoroughfare shall be the same liability that previously has been imposed upon counties pursuant to section 23-2410. The Legislature further declares that judicial interpretations of section 23-2410 governing the liability of counties on January 1, 1970 also shall be controlling on the liability of all political subdivisions for the alleged insufficiency or want of repair of any highway or bridge or other public thoroughfare. Notwithstanding other provisions of this act, sections 23-2410 and 23-2411 shall be the only sections governing determination of liability of political subdivisions for the alleged insufficiency or want of repair of highways, or bridges or other public thoroughfares. As used in sections 23-2410 and 23-2411, public thoroughfares shall include all streets, alleys, and roads designed, intended, and primarily used for the movement of vehicular traffic and dedicated to public use." § 23-2411, R. R. S. 1943.

A review of cases decided under former section 39-834, R. R. S. 1943, where the issue was whether a county was negligent in the design and maintenance of a road, reveals that there has been no finding in any case of negligence on the part of a county. See, Olson v. County of Wayne, 157 Neb. 213, 59 N. W. 2d 400; McKinney v. County of Cass, 180 Neb. 685, 144 N. W. 2d 416; Brooks v. Thayer County, 126 Neb. 610, 254 N. W. 413; Shields v. County of Buffalo, 161 Neb. 34, 71 N. W. 2d 701; Dickenson v. County of Cheyenne, 146 Neb. 36, 18 N. W. 2d 559; Clouse v. County of Dawson, 161 Neb. 544, 74 N. W. 2d 67. This court has held that a county is not an insurer of the safety of travelers on its roads, but must use reasonable and ordinary care in the construction, maintenance, and repair of its highways and bridges so that they

will be reasonably safe for a traveler using them while he is in the exercise of reasonable and ordinary caution and prudence. See Olson v. County of Wayne, *supra*.

The general rule is that the character and extent of unevenness or other inequalities in the surface of a highway or street, as well as the surrounding circumstances, determine whether such inequalities constitute actionable defects. The test ordinarily is whether the inequalities are of such magnitude or extent as to be likely to cause injury to travelers who are proceeding with due care. The public authority is not liable for a failure to remedy trivial irregularities, slight depressions, or other minor inequalities in the surface of the highway. See 39 Am. Jur. 2d, Highways, Streets, and Bridges, § 486, p. 881. Nebraska has followed this rule. In Hupfer v. City of North Platte, 134 Neb. 585, 279 N. W. 168, we said: " 'Holes, ruts, or depressions in the street or sidewalk may give rise to a right of action for injuries caused thereby if they are of such a nature that danger therefrom might reasonably be anticipated. But slight holes or depressions which are not in the nature of traps, and from which danger could not reasonably be anticipated, are not defects for which an action will lie." See, also, Hilker v. N. P. Dodge Building Co., 184 Neb. 495, 168 N. W. 2d 701.

The question we must determine is whether the slope of the street and protrusion of the railroad track are irregularities of such a substantial degree that the city should reasonably have anticipated that they presented a dangerous condition. The evidence shows the rail to project from ½ to ¾ inch above street level. The grade of the street approaching the rail goes from about a 13 percent downgrade to a 3 percent downgrade approximately 7 feet from the rail. The wheelbase of the car is 10 feet; the lowest front portion of the frame is approximately 8 inches above street level. Exhibit No. 6, a photograph

which was taken after the accident and after the plaintiff's automobile had been repaired, shows the plaintiff's automobile sitting at the accident scene. The photograph shows ample clearance by the automobile of the rail notwithstanding the slope involved.

In an action to recover damages from a political subdivision by virtue of the statute, the burden is on the plaintiff to establish negligence of the subdivision and that its negligent act was the proximate cause of the injury to the plaintiff or that it was a cause that proximately contributed to it. See, Olson v. County of Wayne, *supra*; Wittwer v. County of Richardson, 153 Neb. 200, 43 N. W. 2d 505; Bowerman v. Greenberg, 142 Neb. 721, 7 N. W. 2d 711. The only evidence in the record which affords any basis for the negligence of the City is that of the consulting engineer. He expressed the opinion that the change in grade of the street and the condition of the track were not reasonably safe.

The evidence of the engineer is clearly admissible. See § 27-702, R. R. S. 1943. Expert testimony is permitted even in areas where laymen have competence to determine the facts testified to by the expert where a trial court may feel the opinion would assist them. However, the trier of fact is not bound by the testimony of an expert witness. Here, we believe the facts are capable of proper consideration by laymen. The expert's opinion has little weight when measured against the other evidence in this case. The particular evidence we feel to be most relevant is the factual showing that the clearance above the track by the body of the car is considerable, even though the car is on the slope described by the expert.

On appeal of an action under the Political Subdivisions Tort Claims Act, the findings of the trial court will not be disturbed unless clearly wrong. See Naber v. City of Humboldt, 197 Neb. 433, 249 N. W. 2d 726. The decision of the District Court is not supported by the evidence. The evidence shows a slight

protrusion of the railroad track of ½ inch to ¾ inch and a 10 percent variance in the roadway approaching the track. These are minor irregularities and the defendant City could not reasonably anticipate that such conditions could be injurious. To predicate the negligence of a city upon such minor irregularities in roadway conditions would be to make the city of insurer of the safety of travelers on its streets.

The judgment of the District Court against the City is reversed and the cause of action is dismissed.

REVERSED AND DISMISSED.

STUART F. HANSEN ET AL., APPELLANTS, V. CITY OF NORFOLK, NEBRASKA, A MUNICIPAL CORPORATION, APPELLEE.

267 N. W. 2d 537

Filed July 12, 1978. No. 41552.

1. **Municipal Corporations: Counties: Zoning: Ordinances.** Where an industrial area is within the zoning jurisdiction of a city of the first class at the time the area is designated as an industrial area by the county board under the provisions of the Industrial Areas Act, the city thereafter retains its zoning jurisdiction of the area, subject to the reservation for use of the area for industrial purposes as provided by the Industrial Areas Act.
2. **Municipal Corporations: Zoning: Ordinances.** Participation in a hearing before the city council on a proposed amendment to a zoning ordinance constitutes a waiver of any defect in the notice of the hearing.
3. _____: _____: _____. Where a metes and bounds description of an area proposed to be rezoned, taken as a whole, is sufficiently clear to indicate the intended bounds of the area to be zoned, with the courses and distances set out clearly therein, and there is clear indication of the legislative intent that such courses and distances control, conflicting statements therein erroneously fixing particular points or bounds at specified property or street lines will be rejected as inadvertent error.
4. **Municipal Corporations: Ordinances: Evidence.** Municipal corporations are prima facie the judges of the necessity and reasonableness of ordinances, and a legal presumption obtains in their

favor unless the contrary appears on the face of the ordinance or is established by clear and unequivocal evidence.

5. _____: _____: _____. A legal presumption exists in favor of validity and unless the contrary appears upon the face of an ordinance, the burden is upon the party attacking it as invalid to show by clear and unequivocal evidence, that the regulation imposed is so arbitrary, unreasonable, or confiscatory as to amount to depriving such party of property without due process of law.

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

Brogan & Stafford, for appellants.

Deutsch, Jewell, Otte, Gatz, Collins & Domina, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

MCCOWN, J.

The plaintiffs brought this action seeking to have a zoning ordinance of the City of Norfolk, Nebraska, declared void and to enjoin enforcement of the ordinance. The District Court found that the plaintiffs failed to prove facts sufficient to establish the invalidity of the ordinance and dismissed plaintiffs' action.

This proceeding challenges the rezoning by the City of Norfolk, Nebraska, a city of the first class, of a 97.9-acre tract which included a 2.63-acre tract owned by the plaintiffs. The area involved is located less than 1 mile outside the city limits of Norfolk, but within the city's zoning jurisdiction. The entire 97.9-acre area is located in the northwest quarter of Section 15, Township 24 North, Range 1 West of the 6th P.M., Madison County, Nebraska.

In 1959 the area involved here was designated M-2, heavy industrial, by ordinance of the City of Norfolk. On September 17, 1963, the area was designated an industrial area by the county board of Madison County, Nebraska, pursuant to the provisions of sections 19-2501 et seq., R. R. S. 1943. The

2.63 acres now owned by the plaintiffs is known as the Nash Finch property. The brick building on the property varies from one to three stories in height. It was originally used as a sugar beet factory, later as a canning factory, and had been used by the Nash Finch Company as a wholesale grocery warehouse prior to acquisition by the plaintiffs.

On June 18, 1975, plaintiffs entered into a contract with Nash Finch Company to purchase the property. Within a few weeks thereafter plaintiffs were advised by city officials that the property was to be rezoned. The plaintiffs' deed to the property was recorded on August 19, 1975. Plaintiffs were in possession of the building and property from and after August 11, 1975.

The city planning commission, on its own motion proposed a change in zoning from M-2, heavy industrial, to M-1, light industrial, and gave the required statutory notice of the hearing date on the proposed change. Plaintiffs received written notice of the planning commission hearing and plaintiff, Stuart F. Hansen, attended the hearing on August 11, 1975, with his attorney, and objected to the proposed change. On August 26, 1975, the planning commission recommended the proposed change in zoning to the Norfolk city council.

The city council duly published notice of the public hearing on the proposed zoning change for September 15, 1975, and again for a continued hearing on October 6, 1975, and also posted a sign. An objection to the rezoning was filed with the city council by plaintiff, Stuart F. Hansen, and he or his attorney attended both council hearings. On October 6, 1975, the zoning ordinance involved here was duly enacted by the city council of the City of Norfolk.

It was stipulated at the pretrial conference that the amended zoning ordinance was "passed, approved, and published according to law insofar as the formalities of the same are concerned." The

plaintiffs filed this action on November 3, 1975. The case was tried to the court on March 28, 1977, and the court viewed the area with counsel. On May 27, 1977, the District Court found that the plaintiffs had failed to prove facts to establish the invalidity of the ordinance and dismissed plaintiffs' action.

Plaintiffs contend that the creation of an industrial district by Madison County in 1963 removed the jurisdiction of the city to zone the area, and made the city's zoning jurisdiction subordinate to the right of the county. An examination of the cases and the statutes refutes the contention.

Section 19-2505, R. R. S. 1943, provides in relevant part: "During the period any area is designated as an industrial area as provided by sections 19-2501 to 19-2508, the county board * * * shall have exclusive jurisdiction for zoning and otherwise regulating the use of the industrial area * * *; Provided, such authority shall not be granted to the county board if the zoning of such designated area is within the jurisdiction of any city or village."

The interrelated jurisdiction of cities and counties with respect to industrial areas located outside city limits was reviewed by this court in City of Grand Island v. Ehlers, 180 Neb. 331, 142 N. W. 2d 770. In that case this court said: "In the case at bar, the county board of Hall County, Nebraska, had the power and authority to designate industrial areas within 1 mile beyond and adjacent to the corporate boundaries of the City of Grand Island. * * * Which governmental subdivision had jurisdiction for general zoning regulation was to be determined as of the respective dates each of the areas was designated as an industrial area. The city's general zoning jurisdiction then attached upon designation by the county board, subject to the reservation for use of the area for industrial purposes provided by the Industrial Areas Act."

In the case now before us the city assumed gen-

eral zoning jurisdiction in 1959 when it designated the area as M-2, heavy industrial, and the city continued to have general zoning jurisdiction over the area after its designation as an industrial area by the county. The only limitation to that general zoning jurisdiction is that the area must be "reserved for industrial purposes only." The decision of the City of Norfolk to change the zoning of the area from M-2 to M-1 properly reserves the area for industrial purposes only and in no way encroaches upon the authority of the county.

Plaintiffs next contend that the planning commission had no authority to initiate the proposed change on its own motion because the printed instructions for completing an application for rezoning state that an application must be signed by a property owner or its agent. Sections 19-901 et seq., R. R. S. 1943, establish that so long as the statutory procedures prescribed by law are followed the planning commission has power to recommend to the city council the adoption or amendment of zoning regulations on its own motion. The statutory procedures were fully complied with here and plaintiffs' contention is wholly unfounded.

Plaintiffs also contend that the hearing notices and the posted notice were defective and the proceedings were therefore invalid. The plaintiffs at no time have contended that they did not have actual notice of the proceedings. One of the plaintiffs or their counsel attended each of the public hearings, and plaintiffs objected to the proposed action before the planning commission and the city council. There was no prejudice to the plaintiffs resulting from any possible deficiency in the notices. Participation in the hearing waives any defect in the notice. Alexander v. School Dist. No. 17, 197 Neb. 251, 248 N. W. 2d 335. In addition, the plaintiffs stipulated that the ordinance was "passed, approved, and published ac-

cording to law insofar as the formalities of the same are concerned."

The plaintiffs contend also that an inadvertent error in the metes and bounds legal description of the area affected by the ordinance makes the ordinance void. In the notices of hearings, the ordinance, and the documents, the first paragraph of the description of the 97.9-acre tract involved is: "A tract of land in the Northwest Quarter (NW¼) of Section Fifteen (15), Township Twenty-Four (24), North, Range One (1), West of the Sixth Principal Meridian in Madison County, Nebraska, more particularly described as follows: * * *." Then begins a metes and bounds description which commences at the northwest corner of Section 15 and proceeds to the northeast corner and then south on a series of courses and distances "to a point on the south line of said Northwest Quarter (NW¼) of said Section Fifteen (15), said point being 500 feet west of the center of said Section Fifteen (15); thence west along the south line of Section Fifteen (15) a distance of 1540 feet more or less to the westerly right-of-way line of the Chicago and Northwestern Railway; thence Northwesterly along said westerly right-of-way line * * *" to the place of beginning.

It is apparent that after reaching the established point at the southeast corner, the description should have read: "west along the south line" *of the northwest quarter* "of Section Fifteen (15) a distance of 1540 feet more or less * * *." Either the addition of the words italicized or the omission of the reference to the south line of Section 15 would produce an accurate description. The directions and distances included in the metes and bounds description involved here can have no other south boundary line than the south line of the northwest quarter of Section 15. The plat and the map which accompanied the planning commission proceedings clearly show the south line of the area to be rezoned

to be the south line of the northwest quarter of Section 15. No reasonable person could be misled by the description, and the evidence is clear that neither Stuart F. Hansen nor anyone else was misled or confused by it. In fact, the inadvertent error in the legal description was not even discovered by the plaintiffs until the day before trial.

Where there have been minor errors in zoning maps or legal descriptions but the ordinances were reasonably capable of comprehension, other courts have found no difficulty in validating the ordinances or zoning amendments involved. In Miner v. City of Yonkers, 19 Misc. 2d 321, 189 N. Y. Supp. 2d 762, the court dealt with a metes and bounds description in which there were erroneous references to "the northerly side of Bacon Place," but the metes and bounds description properly described the zoning area. The court stated: "Where, as here, the description, taken as a whole, is sufficiently clear to indicate the intended bounds of the subject parcel, with the courses and distances set out correctly therein, and there is clear indication of the legislative intent that such courses and distances control, conflicting statements therein erroneously fixing particular points or bounds at specified property or street lines will be rejected as inadvertent error. Under such circumstances the courses and distances will prevail * * * and, the description being sufficiently definite to indicate the legislative intent, the zoning amendment is valid." See, also, Walker v. Board of County Commissioners, 208 Md. 72, 116 A. 2d 393.

Plaintiffs contend that the zoning amendment here was spot or spite zoning aimed at the plaintiffs alone. There is nothing in the evidence to support that contention. The fact that plaintiffs' property is only 2.63 acres of a total 97.9 acres involved in the rezoning is persuasive evidence that the contention is unfounded. The evidence also establishes that

after a local flood control project had been completed the nature of the area changed dramatically. Almost all the businesses presently located within the area affected by the ordinance fit in the category of light industrial. There can be no dispute about the fact that a zoning ordinance may be amended from time to time as new and changing conditions warrant revision. See Wolf v. City of Omaha, 177 Neb. 545, 129 N. W. 2d 501.

Municipal corporations are prima facie the judges of the necessity and reasonableness of ordinances, and a legal presumption obtains in their favor unless the contrary appears on the face of the ordinance or is established by clear and unequivocal evidence. A legal presumption exists in favor of validity and unless the contrary appears upon the face of an ordinance, the burden is upon the party attacking it as invalid to show by clear and unequivocal evidence that the regulation imposed is so arbitrary, unreasonable, or confiscatory as to amount to depriving such party of property without due process of law. Schaffer v. City of Omaha, 197 Neb. 328, 248 N. W. 2d 764.

Plaintiffs' contention that the zoning ordinance here prevents plaintiffs from continuing any nonconforming use which they might have established before the adoption of the ordinance is wholly erroneous. Both the ordinances of the City of Norfolk and the statutes of this state provide that whenever the use of a building or premises becomes nonconforming through an amendment to a zoning ordinance, such use may be continued. They also provide that in the event a nonconforming use of any building or premises is discontinued or its normal operation stopped for a specified period of time, the use of the same shall thereafter conform to the zoning regulations of the district in which it is located. See, § 19-904.01, R. R. S. 1943; Ordinance No. 1214, City of Norfolk, Nebraska.

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

AFFIRMED.

STATE OF NEBRASKA EX REL. ROBERT L. BOYER ET AL., APPELLEES, V. RICHARD L. GRADY, CITY CLERK FOR THE CITY OF NORTH PLATTE, NEBRASKA, APPELLANT.

269 N. W. 2d 73

Filed July 12, 1978. No. 41557.

1. **Mandamus.** A writ of mandamus will not ordinarily be awarded to compel the performance of an act unless it is one which is actually due from the respondent at the time of the application. A writ in anticipation of default, however, may be granted where the respondent clearly manifests an intention not to perform the act in question and refuses to act because he claims that he is under no duty to act.
2. **Municipal Corporations: Ordinances: Initiative and Referendum.** By the initiative process municipal voters may amend or repeal an ordinance enacted by the legislative body of a municipality where the object of the initiative is to accomplish no more than that which the city council and mayor could do if they so chose.
3. **Municipal Corporations: Ordinances: Taxation.** A municipal ordinance establishing a new scheme of taxation is not an appropriation ordinance.
4. **Municipal Corporations: Ordinances: Taxation: Initiative and Referendum.** Section 77-27,142, R. R. S. 1943, does not limit the power to propose or reject ordinances concerning a municipal sales tax to the legislative body of a municipality, and does not except sales tax ordinances from the usual powers of initiative and referendum.

Appeal from the District Court for Lincoln County: KEITH WINDRUM, Judge. Affirmed.

Maupin, Dent, Kay, Satterfield, Girard & Scritsmier and Dale A. Romatzke, for appellant.

Murphy, Pederson & Piccolo and LeRoy Anderson, for appellees.

Mattson, Ricketts, Davies, Stewart & Calkins and Richard M. Duxbury, for amicus curiae.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

BRODKEY, J.

Relators and appellees, voters and residents of the City of North Platte, Nebraska, filed a petition for mandamus in the District Court for Lincoln County, seeking to require respondent Richard L. Grady, the city clerk of North Platte, to certify signatures on initiative petitions and submit an ordinance proposed in the initiative petitions to the voters of North Platte at a special or general election. Respondent denied that he was required by law to certify the signatures on initiative petitions or submit the proposed ordinance to the voters. Relators moved for summary judgment, which was granted after trial. The District Court ordered the respondent to certify the signatures on the initiative petitions and to submit the proposed ordinance to the voters of North Platte if the number of valid signatures on the petitions was sufficient. Respondent has appealed to this court, contending that the trial court erred in (1) failing to dismiss the action because it was prematurely filed; (2) holding that an existing ordinance could be repealed through the initiative process; (3) holding that section 18-117, R. R. S. 1943, did not apply in this case; and (4) holding that sections 77-27,142 et seq., R. R. S. 1943, did not prevent the use of the initiative process by relators in this case. We affirm the judgment of the District Court.

The facts are not in dispute, and most of the relevant facts are contained in a stipulation entered into by the parties. On June 22, 1976, the city council of North Platte adopted ordinance No. 1890, enacting a 1 percent municipal sales tax. Within 30 days thereafter, referendum petitions were filed by voters, primarily relators, who desired that the ordinance be submitted to the electorate for approval or disapproval. This attempt ultimately was unsuccessful

because of an inadequate number of signatures on the referendum petitions.

On January 28, 1977, relators filed initiative petitions with the respondent, requesting that a proposed ordinance be submitted to the voters of North Platte. The proposed ordinance provided for the repeal of ordinance No. 1890, which would result in abolishment of the 1 percent municipal sales tax. On February 1, 1977, the city council determined that it should not recognize the initiative petitions as legal petitions that required the respondent to call an election. The respondent, who viewed the city council as his superior, then refused to certify the signatures on the petitions or call an election.

Relators instituted this action on February 8, 1977, 11 days after the initiative petitions had been filed with the respondent, by filing a motion for an alternative writ of mandamus, a petition for mandamus, and an affidavit. The trial court ordered that an alternative writ of mandamus should be issued, and that order was apparently served on the respondent on February 10th. On February 28th, the alternative writ of mandamus was actually issued and served upon the respondent. The writ commanded the respondent to certify the signatures on the initiative petitions and call an election if required by law, or to show cause why he refused to do so. Respondent answered on March 15th, denying that he was under a duty to act.

The initiative petitions in question contained the purported signatures of 4,292 voters of North Platte, or approximately 35 percent of the 12,242 registered voters of that city.

Respondent first contends that this action should have been dismissed because it was prematurely filed. In support of his position he relies on section 18-105, R. R. S. 1943, which provides that when an initiative proposal includes a request for a special election and contains the proper number of signa-

tures, the city clerk shall cause the proposal to be submitted to a vote at a special election which "shall be called by him not less than thirty nor more than sixty days from the filing of such proposal." Respondent argues that this statutory provision affords him 30 days from the date of the filing of the initiative petitions in which to call a special election, and that therefore relators filed their petition for mandamus prematurely because it was filed 11 days after the initiative petitions were received by the respondent.

It is a general rule that a writ of mandamus "will not ordinarily be awarded to compel the performance of an act unless it is one which is actually due from the respondent at the time of the application." 52 Am. Jur. 2d, Mandamus, § 90, p. 413. See, also, State ex rel. Sayer v. Junkin, 87 Neb. 801, 128 N. W. 630 (1910). Mandamus in anticipation of default, however, may be granted where "the respondent clearly manifests an intention not to perform the act in question * * *." 52 Am. Jur. 2d, Mandamus, § 90, p. 413. Therefore, even when the respondent's duty to act is not yet technically due, a mandamus action is not considered premature when the respondent has clearly refused to act and refuses to because he claims that he is under no duty to act. See, generally, Folcarelli v. Spencer, 94 R. I. 304, 180 A. 2d 322 (1962); Hazel Park Racing Assn., Inc. v. Inglis, 336 Mich. 508, 58 N. W. 2d 241 (1953); Robinson v. Board of Supervisors of Davis County, 222 Iowa 663, 269 N. W. 921 (1936); Hudson v. Nehill, 25 Misc. 2d 1025, 206 N. Y. Supp. 2d 918 (1960).

In the present case, the record adequately demonstrates that the respondent had no intention of certifying the signatures on the initiative petitions and calling an election, particularly after the city council determined that it should not view the petitions as valid ones which required action by the respondent. It should also be noted that the alterna-

tive writ of mandamus was not actually issued and served upon the respondent until 31 days after the filing of the initiative petitions, at which time the respondent had taken no action. Respondent's argument that he might have changed his mind and acted on the initiative petitions after relators applied for the writ of mandamus, but before 30 days had expired from the time the initiative petitions were filed, and that therefore the action should have been dismissed as premature, is not supported by the record.

Under these particular circumstances, we conclude the exception to the general rule is applicable, and the trial court did not err in refusing to dismiss the action as premature. We recognize, however, that ordinarily a writ of mandamus will not be awarded to compel the performance of an act unless it is actually due from the respondent at the time of the application.

The second issue in this case is whether municipal voters may utilize the initative power to repeal an ordinance passed by the city council of the municipality. Respondent contends that the initiative process cannot be so used when the referendum process is, or was, available for that purpose.

The initiative and referendum powers of municipal voters are established by statute in this state. Section 18-101, R. R. S. 1943, provides: "The right to propose ordinances for the government of any city or other municipal subdivision of the State of Nebraska shall, in addition to being exercised by the mayor and city council of such city or the governing authorities of such other municipal subdivision of this state, be vested in the voters thereof as hereinafter provided." Section 18-102, R. R. S. 1943, requires that an initiative proposal be signed by at least 15 percent of the voters of the city. Ordinarily the proposal is to be submitted to the electorate at the first regular election held after the expiration of

30 days from the filing of the proposal. § 18-104, R. R. S. 1943. If, however, 20 percent of the voters sign the initiative proposal and request a special election, the city clerk shall submit the proposal to the voters at a special election which the clerk shall call not less than 30 nor more than 60 days from the filing of the proposal. §§ 18-103 and 18-105, R. R. S. 1943.

Statutory provisions applicable to cities also provide for referendum petitions as a means of submitting ordinances, passed by the city council, to the voters of the city for approval or disapproval before they become effective. See §§ 18-112 et seq., R. R. S. 1943.

Section 18-101, R. R. S. 1943, contains no express limitations on the power of the initiative reserved to municipal voters, and grants to those voters the same right to propose ordinances as is vested in the mayor and city council. It is the rule that grants of power of municipal corporations concerning the initiative and referendum are to be liberally construed to permit, rather than restrict, the power and to attain, rather than prevent, its object. See 5 McQuillin, Municipal Corporations, § 16.51, p. 203 (3d Ed., 1969). This is analogous to the rule that constitutional provisions, with respect to the powers of initiative and referendum, reserved to the people should be construed to make effective the powers reserved. Klosterman v. Marsh, 180 Neb. 506, 143 N. W. 2d 744 (1966).

This court has never squarely decided whether the initiative power may be utilized to repeal an ordinance passed by the city council of a municipality. In Klosterman v. Marsh, *supra*, however, we stated: "The initiative is in no sense limited as to the time of its exercise. Neither are initiated laws limited to matters on which the Legislature has not acted. By the initiative process, the people may amend or even expressly repeal laws already enacted by the Legislature." See, also, State ex rel. Andersen v. Leahy,

189 Neb. 92, 199 N. W. 2d 713 (1972); 42 Am. Jur. 2d, Initiative and Referendum, § 9, at p. 657.

Courts in other jurisdictions have specifically held that the voters of a municipality can, through the initiative, enact a measure conflicting with or repealing legislation previously passed by the municipal council, so long as the question upon which it enacts such an initiative ordinance is within the power of the municipality to control by legislative process. State ex rel. Sharpe v. Hitt, 155 Ohio St. 529, 99 N. E. 2d 659 (1951); Storegard v. Board of Elections of Cuyahoga County, 22 Ohio Misc. 5, 50 Ohio 2d 240, 255 N. E. 2d 880 (Ct. Com. Pl., 1969). See, also, Smith v. Township of Livingston, 106 N. J. Super. 444, 256 A. 2d 85 (1969), affirmed, 54 N. J. 525, 257 A. 2d 698 (1969). There are, however, cases to the contrary in which courts have held that the initiative power may be used to repeal an existing ordinance only if the repeal is ancillary to the enactment of new legislation, or an ancillary step in proposing a conflicting law or an amendment to a law. See, In re Initiative Petition No. 1 of Midwest City v. Melton, 465 P. 2d 470 (Okla., 1970); Wyatt v. Clark, 299 P. 2d 799 (Okla., 1956).

In essence, respondent argues that the initiative power may not be utilized to repeal an ordinance, and that the referendum is the exclusive process by which voters of a municipality may reject an ordinance passed by the city council. We are not persuaded, however, that the fact that municipal voters may utilize the referendum process to prevent an ordinance passed by the city council from ever becoming effective should preclude them from abolishing an ordinance by repeal through the initiative process. Many ordinances, when first passed by a city council, may not be controversial to the degree that a sufficient number of voters will desire a referendum. With passage of time, however, circumstances may change or voters may simply find an

ordinance undesirable and wish to abolish it, or amend it. We hold that the initiative power, which is to be liberally construed, may be utilized in such cases where the voters attempt to do no more through the initiative process than the city council and mayor could do if they so chose. See, § 18-101, R. R. S. 1943; Klosterman v. Marsh, *supra*; State ex rel. Sharpe v. Hitt, *supra*.

Respondent next contends that referendum and initiative powers have no application to a measure relating to the current support of government departments or to appropriation ordinances. He relies on section 18-117, R. R. S. 1943, which provides that ordinances relating to items of appropriation of money for current expenses of the several departments of the city shall, by a unanimous yea and nay vote of the city council, be deemed to be urgent ordinances to which the *referendum* provisions pertaining to cities shall not apply. That section also provides that the referendum provisions shall not apply to ordinances relating to public ways, public property, utility systems, and other capital projects. Respondent argues that the sales tax ordinance was an "appropriation ordinance," that sales tax revenue was to be used for capital projects, and that therefore the initiative process is not available to relators in this case.

Respondent's arguments are, in some respects, contradictory. On the one hand he argues that the restrictions placed on the referendum power under section 18-117, R. R. S. 1943, should apply in this case, which involves initiative petitions, apparently on the theory that the initiative petitions in this case are really referendum petitions in disguise. On the other hand, he concedes in his brief that a sales tax ordinance, like the one involved in the case, may be subject to attack by referendum.

In any event, even assuming that the provisions of section 18-117, R. R. S. 1943, would apply in this case,

the respondent's position is without merit. First, the record reveals that the sales tax ordinance was not passed by a unanimous vote of the city council. Second, it is clear that an ordinance establishing a new scheme of taxation is not an appropriation ordinance. See Lawrence v. Beermann, 192 Neb. 507, 222 N. W. 2d 809 (1974). Finally, the ordinance was not one relating to capital projects, since it was simply an ordinance establishing a new source of tax revenue.

Respondent's final argument is that only the city council and mayor of North Platte have the power to impose, or decide not to impose, a municipal sales tax under sections 77-27,142 et seq., R. R. S. 1943, commonly known as the Local Option Revenue Act. Section 77-27,142, R. R. S. 1943, provides that any "incorporated municipality by ordinance of its governing body" is authorized to impose a sales and use tax. Respondent contends that "governing body" refers only to the legislative body of a municipality, and that therefore sales tax ordinances are beyond the power of the people to review through the initiative and referendum processes.

This argument is not persuasive. There is no indication that the Legislature intended to grant powers concerning sales tax ordinances solely to city councils and to exclude municipal voters from proposing or rejecting such ordinances through the initiative and referendum processes. Although it is true that during the legislative debate on section 77-27,142, R. R. S. 1943, certain senators referred to city councils enacting a municipal sales tax, these references were not addressed to the issue of whether the initiative or referendum processes could be utilized with respect to sales tax ordinances. We do not read the legislative history of the act as indicating an intention on the part of the Legislature to except sales tax ordinances from the usual powers of initiative and referendum, and it would have been an easy matter

to expressly make such an exception if the Legislature had so intended. Since the powers of the initiative and referendum are to be liberally construed, we do not believe that their use should be limited in the manner suggested by respondent. Under our statutory scheme, there is little doubt that city councils and the electorate are coordinate legislative bodies, and there is no superiority of power between the two. See Klosterman v. Marsh, *supra*.

The judgment of the District Court is affirmed.

AFFIRMED.

CLINTON, J., dissenting.

I respectfully dissent. The effect of the majority opinion is to permit repeal of any existing ordinance by the initiative process rather than by referendum alone. It thus abolishes in many respects the distinctions between initiative and referendum. This has grave consequences which I do not believe the court has taken into consideration.

The fundamental distinction between initiative and referendum goes far beyond the 30-day limitation on referendum, § 18-112, R. R. S. 1943, and postponement of the effective date of the ordinance enacted by the governing body, § 18-116, R. R. S. 1943. If the only difference between the two procedures were the above, the consequences would not be so grave. However, as I will attempt hereafter to demonstrate, the logical and legal consequences of the opinion are that it effectively eliminates all the exemptions from referendum contained in section 18-117, R. R. S. 1943. This could effectively eliminate all municipal government. I will now attempt to demonstrate the above propositions by (1) analysis of the statutes, and by (2) authority on point.

(1) There are no exemptions or exceptions to the initiative power. If, by initiative, the voters can repeal any ordinance at all, rather than just "propose ordinances for the government" of the city, etc., § 18-101, R. R. S. 1943, the exemptions from the refer-

endum power contained in section 18-117, R. R. S. 1943, are of no consequence and are in effect eliminated, because, what cannot be accomplished by referendum, can be by initiative. Such could not have possibly been the legislative intention. Such consequences do violence to the language of the initiative and referendum provisions themselves. If the majority opinion is adhered to, there is no way that the court can logically, or by following any canon of construction, at some later time when it will inevitably be confronted with the problem, read into the initiative provisions the exemptions of the referendum provisions of the statute. The exemptions, by the very words of the statute, section 18-117, R. R. S. 1943, apply only to referendum. We cannot by construction say that section 18-117, R. R. S. 1943, are exemptions from section 18-101, R. R. S. 1943, because this simply is contrary to the plain language of the statute.

The ultimate consequences of the opinion, therefore, are to make all the following which are specifically exempt from referendum, § 18-117, R. R. S. 1943, subject to repeal by initiative:

(1) Urgent ordinances as defined by section 18-117, R. R. S. 1943;

(2) Ordinances in furtherance of or carrying out a policy of the city or relating to projects previously established or approved by an ordinance which itself was subject to sections 18-112 to 18-116 or which may have been approved by the voters at an election;

(3) Ordinances relating to the acquisition, construction, installation, improving and enlarging, including the financing or refinancing of the costs, of public ways, public property, utility systems and other capital projects, including industrial development projects;

(4) Ordinances establishing or changing utility system rates and charges and pay rates and salaries

for city employees other than the mayor and city council; or

(5) Ordinances taking action as to which the statutes applicable thereto provide other means or procedures for voters or persons interested to object to the action taken or proposed.

The likelihood, of course, is that if the problem outlined above arises, the court will do one of two things: (1) Overrule what it has done in this case, or (2) by exercise of raw judicial power read the referendum exemption into the initiative. The first alternative I would obviously advocate; the second could not be done except by complete disregard of the language of the statutes.

Furthermore, I read the language above, "Ordinances . . . an ordinance which itself was subject to sections 18-112 to 18-116" to mean that referendum is a one-shot procedure, i.e., if approved or defeated, you cannot simply turn around and repeat the process. Neither can the council itself, within 1 year from the date of action either by initiative or referendum, modify what the voters have done. § 18-120, R. R. S. 1943. These points give added force to the position that there are real and fundamental differences between the initiative and the referendum.

The exemptions from referendum under section 18-117, R. R. S. 1943, were adopted by the Legislature in 1974. Laws 1974, L. B. 1026, § 1. Previously the only exemption was emergency ordinances. The 1974 amendments were apparently adopted in response to a division opinion of this court, Hoover v. Carpenter, 188 Neb. 405, 197 N. W. 2d 11, Smith, J., in which it was implied that under some circumstances ordinances setting utility rates were subject to referendum. The other exemptions were apparently introduced to remove other areas from tampering by this court. The Legislature, or at least the sponsors of the amendment, whose ideas the Legislature adopted, obviously must have thought that such

items were free from interference by the initiative because that was not available to change existing ordinances. The majority opinion, if adhered to, will change all that.

(2) The constitutional provisions for initiative and referendum pertain only to acts of the Legislature and, of course, have no applicability to the statutes we are discussing. See, Carlberg v. Metcalfe, 120 Neb. 481, 234 N. W. 87; Schroeder v. Zehrung, 108 Neb. 573, 188 N. W. 237. A comparison with the constitutional provisions, Article III, sections 2 and 3, is, I think, instructive, to wit, "The first power reserved by the people is the initiative whereby laws may be enacted and constitutional amendments adopted by the people independently of the Legislature. . . ." Art. III, § 2, Constitution of Nebraska. "The second power reserved is the referendum which may be invoked, by petition, against any act or part of an act of the Legislature, . . ." Art. III, § 3, Constitution of Nebraska. The constitutional provision contains exceptions as to referendum. The constitutional provision for initiative contains no exceptions. The exceptions from referendum are "except those making appropriations for the expense of the state government or a state institution existing at the time of the passage of such act." Art. III, § 3, Constitution of Nebraska. The principle which is announced in the majority opinion has logical applicability to the constitutional provisions. Are we willing to say that by initiative the people may repeal "appropriations for the expense of the state government or a state institution existing at the time of the passage of such act?"

Various courts have considered the reasons for the exceptions and exemptions from referendum. The same reasons apply with equal force to the initiative, yet the initiative contains no such exemptions. This would not be true if the same were equivalent. Subjecting some items to referendum or initiative,

for example, such as appropriations for existing institutions, might cripple or destroy the administration of government affairs to the extent of requiring the legislative, executive, or the judicial branches of the government, or all of them, to cease to function. State ex rel. Bonner v. Dixon, 59 Mont. 58, 195 P. 841; State ex rel. Wegner v. Pyle, 55 S. D. 269, 226 N. W. 280. This court has already had occasion to consider the meaning of exemptions from the referendum contained in the Constitution. Bartling v. Wait, 96 Neb. 532, 148 N. W. 507. We held an appropriation for a "memorial armory" was not an expense of government, but, as an illustration, that the cost of maintaining the National Guard would be as it was a state institution.

I would point out that Klosterman v. Marsh, 180 Neb. 506, 143 N. W. 2d 744, involved only the "referendum" power. Its reference to the "initiative" is pure dictum. When that case pointed out that "either," i.e., the Legislature or the people, may repeal acts of the other, it was referring solely to referendum, that was the only thing that was involved. We repeated the dictum in State ex rel. Andersen v. Leahy, 189 Neb. 92, 199 N. W. 2d 713, but added: "We do not reach that question . . . ." We then decided the case on the basis that the voters cannot enact any ordinance which is beyond the powers of the governing body to enact.

Apparently practically all constitutions and statutes contain exemptions or exceptions in the referendum section and none in the initiative. These exceptions generally pertain to one or more of three categories: (1) Provisions for the support of governmental institutions; (2) tax and appropriation measures; and (3) laws for the protection of the public peace, health, and safety. See Initiative and Referendum, 42 Am. Jur. 2d, §§ 14, 15, 16, pp. 664 to 666.

The reasons for exemptions in one and not in the other are, as the language of the Constitution and

statutes earlier quoted suggest, that initiative and referendum accomplish fundamentally different things.

The essential difference between initiative and referendum is generally recognized by the law review writers, i.e., the initiative is for proposing new legislation, the referendum is for attacking legislation already on the books. 49 Wash. L. Rev. 55 (1973); 54 Cal. L. Rev. 1717 (1966).

It is to be noted that the appellees cite no authorities, save Klosterman, for the proposition that existing ordinances may be repealed by initiative. The opinion in this case cites two Ohio opinions and one from New Jersey: State ex rel. Sharpe v. Hitt, 155 Ohio St. 529, 99 N. E. 2d 659 (1951); Storegard v. Board of Elections of Cuyahoga County, 22 Ohio Misc. 5, 50 Ohio 2d 240, 255 N. E. 2d 880 (1969); and Smith v. Township of Livingston, 106 N. J. Super. 444, 256 A. 2d 85 (1969). Sharpe involved repeal by initiative of a parking meter ordinance previously enacted. I think it is arguable whether the case is on point. The statutory language in that case was: "Section 4227-1, General Code, as amended in 1914, recites in part:

" 'Ordinances and other measures providing for the exercise of any and all powers of government granted by the constitution or now delegated or hereafter delegated to any municipal corporation, by the general assembly, may be proposed by initiative petition. . . .'

"Section 4227-2, General Code, reads in part: 'Any ordinance, or other measure passed by the council of any municipal corporation shall be subject to the referendum except as hereinafter provided. . . .'

"Then Section 4227-3, General Code, describes the ordinances which are not subject to referendum, including 'emergency ordinances' passed by a two-thirds vote of those comprising the legislative body involved and which go into immediate effect."

The specific issue in that case revolved around

the question whether the ordinance was exempt from referendum (and initiative) because it was declared to be an emergency ordinance. The Ohio court, as does this court in the opinion, intermingled the concept of initiative and referendum as if they were one. A previous Ohio case, State ex rel. Smith v. City of Fremont, 116 Ohio St. 469, 157 N. E. 318, had categorically held that initiative is not a substitute for referendum. In Sharpe, the previous case was distinguished, however, I do not think it was in fact distinguishable.

In any event, I think the Sharpe case is distinguishable from what we have at hand. I point out: (1) Broad language of the Ohio statute, (2) the confusion of thought in the opinion, and (3) the ultimate decision really rested upon a determination of whether there was a bona fide emergency and hence, despite the court's discussion of initiative, the court was really deciding the emergency question which was actually a part of the referendum portion of the statute. The other Ohio case cited was that of an intermediate appellate court and was simply an adherence to Sharpe. The New Jersey opinion cited by this court in the opinion is, so far as the point here involved is concerned, mere dictum as is Klosterman. The New Jersey case involved the question whether an amendment of a zoning ordinance could be changed by initiative. It was held it could not be. Our own court held similarly in Kelley v. John, 162 Neb. 319, 75 N. W. 2d 713, stating that an amendment of a zoning ordinance (as distinguished from the original overall zoning ordinance and plan) was an administrative, as distinguished from a legislative, matter and so not subject to initiative or referendum. This court modified Kelley v. John, *supra*, in Hoover v. Carpenter, *supra*, implying apparently that administrative matters are subject to initiative and referendum. I certainly disagree with that implication. Both of the above cases were handed

down before the amendment to the referendum statute which brought about the exemptions in question.

Cases on point and contrary to the opinion are Heider v. Common Council of City of Wauwatosa, 37 Wis. 2d 466, 155 N. W. 2d 17; Landt v. City of Wisconsin Dells, 30 Wis. 2d 470, 141 N. W. 2d 245; Wyatt v. Clark, 299 P. 2d 799 (Okla., 1956); Hughes v. Bryan, 425 P. 2d 952 (Okla., 1967); and In re Initiative Petition No. 1 of Midwest City v. Melton, 465 P. 2d 470 (Okla., 1970).

The language of the Oklahoma Constitution, which reserves initiative and referendum to municipalities as well as the Legislature, is in substance the same as our Constitution and statutes. In Wisconsin the initiative, so far as a municipality is concerned, is by statute and is there called "direct legislation." Both the Wisconsin and the Oklahoma cases clearly point out the fundamental difference between initiative and referendum. In Heider, *supra*, the court said that initiative proceedings cannot be used to repeal existing legislation. Similarly, Landt, *supra*. In Wyatt, *supra*, the court said that the power of referendum does not apply to any law which has already become effective. There the court also said: " 'Initiative' means the power of the people to propose bills and laws, and to enact or reject them at the polls, independent of legislative assembly, whereas 'referendum' is right of the people to have submitted for their approval or rejection an act passed by the legislature."

The Wisconsin legislation is somewhat different than ours. As noted, initiative is referred to as "direct legislation." Thus in Wisconsin there is no longer any general statute of referendum although there are numerous specific statutes subjecting particular matters to referendum. The Wisconsin cases are nonetheless on point as may be noted from the following quotations: "We conclude that when a common council has adopted an ordinance or resolu-

tion dealing with a particular subject, sec. 10.43, Stats., does not authorize the filing of petitions to compel the council to repeal such ordinance or resolution, or, in default of repeal, to submit the ordinance or resolution to popular vote. It is true that in a broad sense a repeal of an existing measure is an act of legislation, just as is the adoption of a new measure upon a subject not previously dealt with. Nevertheless, traditional concepts in the field of direct popular legislation, and the history of sec. 10.43, Stats., and its predecessor statutes, convince us that the two types of legislation are not the same in the context of sec. 10.43, Stats.

"Usually the procedure for consideration by the voters of new legislation is referred to as the initiative, and for review by the voters of existing legislation as the referendum.

" 'Generally speaking, the initiative, in the case of municipal legislation, is initiation of municipal legislation and enactment or rejection thereof by the municipal electorate in event the proposed measure is not enacted by their elected representatives.'

" 'The referendum is essentially a referral to the voters of a municipality for their direct vote on an existing ordinance, or at least one that has been passed by the municipal legislative body and that is or may become law except for the successful intervention of referendum procedure. It usually is utilized, practically speaking, with the object in view of defeating municipal legislation that exists, is in process of being enacted, or has been enacted with its effective date in the future, although it is designed obviously to determine the will of the electorate as to such legislation.'

"The source of present sec. 10.43, Stats., was ch. 513, Laws of 1911, creating 'sections 39 i to 39 l, inclusive, of the statutes, relating to the initiative and referendum on acts of municipal councils and of boards of county supervisors. . . .'

"It is true that to some extent several of the statutes just referred to authorize the use of the initiative procedure under sec. 10.43, Stats., to accomplish what is essentially a repeal. The fact that such express authorizations exist in specific areas, does not convince us that the general authority to initiate repeal measures pursuant to sec. 10.43 is implied within that section. The express provisions for the special cases may as well imply that sec. 10.43 would be inapplicable to repeal proposals in the absence of the express provisions." Landt v. City of Wisconsin Dells, *supra*.

It seems apparent to me that all legislative activity is not subject to popular election. If representative governments are to function, there must be some areas in which representative action will be final. In Nebraska, this includes those which are specifically exempted under the provisions of section 18-117, R. R. S. 1943. The effect of the opinion, if followed in the future, will, for the reasons I have outlined earlier, eliminate those exemptions.

LARRY STRADLEY, APPELLEE, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, ET AL., APPELLANTS.

267 N. W. 2d 541

Filed July 12, 1978. No. 41580.

Administrative Law: Evidence: Appeal and Error. Where it appears in an error proceeding that an administrative agency has acted within its jurisdiction and there is some competent evidence to sustain its findings and order, the order of the administrative agency will be affirmed on appeal.

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

Herbert M. Fitle, Omaha City Attorney and James E. Fellows, for appellants.

Arthur D. O'Leary and John E. North, Jr., of McGrath, North, O'Malley, Kratz, Dwyer, O'Leary & Martin, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

SPENCER, J.

In this action the City of Omaha seeks to set aside the reversal by the District Court of an order of the personnel board of the City of Omaha denying the grievance appeal of Larry Stradley, appellee, a police officer with the Omaha police department. The District Court held the order of the personnel board denying the grievance appeal of officer Stradley was arbitrary, capricious, and unreasonable. We reverse.

The appeal to the personnel board sought to reverse an order approved by the public safety director of the City of Omaha suspending officer Stradley for 28 calendar days from September 3 through September 30, 1976, and discharging him effective October 1, 1976, for violations of Chapter 1, sections 2, 9, and 28 of the Rules and Regulations of the Police Department.

We are specifically concerned herein with sections 9 and 28. They are as follows: Section 9. "Making False, Improper, or Incomplete Reports: Any officer or employee of the Police Division who shall deliberately make a false, incomplete or improper report, or who fails to make a required report, shall be guilty of a violation of this section."

Section 28. "Leaves: Personnel off duty due to illness shall submit proper written report covering such illness upon their return to duty, and may be required to present doctor's statement covering such illness."

The evidence is undisputed that Larry Stradley on six separate occasions from May 27 through August 28, 1976, took sick leave and then submitted a doc-

tor's authorization to return to work which purportedly bore the signature of Doctor Richard Clemmons, but which in fact had been signed with the doctor's name by Stradley. Appellee admits he did not consult the doctor on these occasions. The record is undisputed the doctor had no record of any such calls and that he authorized no one to sign the slips submitted.

Previous to the discharge, the chief of police wrote a detailed letter to Stradley, advising him that the action was taken under the collective bargaining agreement between Police Union Local No. 1 and the City of Omaha, and pursuant to the rules and regulations of the police division, setting out those rules and regulations and advising Stradley in detail of the charges and the results of the investigation made.

At the hearing before the personnel board, Stradley's attorney made the following admission: "I will admit, Mr. Stradley did every single thing he's accused of in those letters." Stradley's defense was that he was suffering severe migraine headaches on the occasions when he took sick leave. He was under the care of Richard Clemmons, M.D., although he had not consulted him on the days for which he submitted reports.

Appellee's testimony indicated he was in a state of depression through this period. He did have accumulated sick leave benefits at the time of his falsification of the doctor slips. He testified it was easier for him to falsify the slips rather than going to the doctor every time he had a migraine headache. Stradley testified he had taken the blank slips which were used from the doctor's office. An investigation at the doctor's office, however, indicated that he may have secured them from Doctor Clemmons' receptionist whose husband had been a close friend of appellee.

Appellee attempted to establish his migraines were brought on because of severe stress. A year

and a half previously he had found his wife after she had taken her own life. Additionally, he had lost an uncle and had also found a good friend, the husband of the receptionist for Doctor Clemmons, dead.

Appellee adduced the testimony of a psychiatrist at the hearing before the personnel board. This doctor testified appellee needed psychiatric treatment. He believed if Stradley could have an extended leave of absence there was a probability he could eventually return to his former effectiveness as a policeman. However, this probability was not certain. The psychiatrist testified officer Stradley was not qualified at that time to be on the police force.

Appellee argues there is no evidence to support the finding by the personnel board of the City of Omaha of any violation of the rules and regulations of the police division serious enough to merit discharge. He contends the findings of the personnel board are not supported by competent evidence. We disagree. The evidence indicates appellee was thoroughly familiar with the rules and that he deliberately falsified the records. While he attempts to justify his actions because of his condition, they cannot be so easily condoned. They were done deliberately. We are not dealing with a single impulsive act done under pressure but several separate acts performed over a period of time. There is absolutely no indication in this record that the administrative body in exercising its judgment acted arbitrarily or from favoritism, ill will, fraud, collusion, or any other such motive.

Our law is well settled. "Where it appears in an error proceeding that an administrative agency has acted within its jurisdiction and there is some competent evidence to sustain its findings and order, the order of the administrative agency will be affirmed." Harnett v. City of Omaha, 188 Neb. 449, 197 N. W. 2d 375 (1972). See, also, Tinsley v. City of Omaha, 190 Neb. 380, 208 N. W. 2d 693 (1973).

There is not a scintilla of evidence to support the action of the trial judge in reversing the finding of the personnel board. The city attorney calls our attention to the fact that in the two cases cited above, Harnett and Tinsley, the same court ignored the law and reversed the decision of the personnel board and we reinstated the decision of the personnel board. We only observe, "error persisted in, does not cease to be error."

The judgment of the District Court is reversed and the cause is remanded with directions to affirm the decision of the personnel board.

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. THOMAS E. FREEMAN, APPELLANT.

267 N. W. 2d 544

Filed July 12, 1978. No. 41618.

1. **Criminal Law: Evidence.** The admission into evidence of gruesome photographs rests in the sound discretion of the trial court, which must determine their relevancy and weigh their probative value against their possible prejudicial effect.
2. **Criminal Law: Homicide: Evidence: Instructions.** It is the duty of the trial court in homicide cases to instruct the jury only on those degrees of homicide which find support in the evidence.
3. **Criminal Law: Sentences.** This court on appeal will not disturb a sentence imposed within the limits prescribed by statute, absent an abuse of discretion on the part of the trial court.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed.

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

Paul L. Douglas, Attorney General, Bernard L. Packett, and Paul E. Hofmeister, for appellee.

Heard before WHITE, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ., and HASTINGS, District Judge.

BRODKEY, J.

Thomas E. Freeman, defendant and appellant herein, was charged with murder in the second degree in violation of section 28-402, R. R. S. 1943. A jury found the defendant guilty as charged, and the defendant was sentenced to life imprisonment in the Nebraska Penal and Correctional Complex. He has appealed from his conviction and sentence, contending that the trial court erred in (1) admitting into evidence an excessive number of photographs of the deceased; (2) failing to instruct the jury on the crime of manslaughter; and (3) imposing a sentence of life imprisonment rather than a sentence for a term of years. We affirm the judgment of the District Court.

On the morning of January 1, 1977, Rachael Pass was found dead in the bedroom of her apartment with multiple stab wounds on her body and throat. Two of her children, who were 6 and 7 years of age, testified they had awakened the previous night when they heard their mother screaming, and they had heard her cry out "Stop, Tommie," at one point. One of the children identified the defendant as being in the apartment at the time, and testified she saw the defendant pass her room to go to the kitchen and he returned carrying a knife.

A search of the defendant's apartment disclosed a shirt, jeans, shoes, and gloves containing bloodstains. The bloodstains matched the deceased's blood grouping and Rh factor. Also hairs similar to the deceased's were found in the gloves. When defendant was arrested one day after the crime, police found a fresh wound or cut on his hand.

The defendant, a boyfriend of the deceased, first told police officers that he had visited her in the early morning hours of January 1st for a short time, but had left. Subsequently he stated he had returned to her apartment, found her dead, panicked and left. Defendant stated the bloodstains on his

clothing must have gotten there when he was checking to see if the deceased was dead. Defendant denied killing the deceased, and presented evidence they had never quarreled or had fights. Defendant stated he had cut his hand on a candle holder in his apartment.

During the course of the trial, the District Court received in evidence six photographs of the deceased. Five of these photographs depicted the 14 stab wounds suffered by the victim, at least four of which could be considered gruesome. Defendant objected to the admission in evidence of the photographs on the grounds they had no probative value and would prejudice the jury. The trial court admitted them on the grounds they were relevant to the issues of intent and malice.

Defendant requested a jury instruction on the crime of manslaughter, contending that the jury could infer from the evidence that the deceased had been killed upon sudden quarrel. The trial court refused to give such an instruction, finding there was not sufficient evidence to justify the giving of a manslaughter instruction.

Defendant's first contention is the trial court erred in admitting in evidence six pictures of the deceased, and the court should have limited the number of photographs to the minimal number necessary to illustrate the nature and extent of the deceased's injuries. Defendant concedes that at least some of the photographs were admissible under our rule that the admission into evidence of gruesome photographs rests in the sound discretion of the trial court, which must determine their relevancy and weigh their probative value against their possible prejudicial effect. See, State v. Partee, 199 Neb. 305, 258 N. W. 2d 634 (1977); State v. Stewart, 197 Neb. 497, 250 N. W. 2d 849 (1977); State v. Robinson, 185 Neb. 64, 173 N. W. 2d 443 (1970). The photographs were relevant in this case to demonstrate

the murder had been done purposely and maliciously.

In State v. Partee, *supra*, the defendant similarly argued the number of photographs introduced in evidence was excessive and had a prejudicial cumulative effect. In that case we noted the number of photographs, in and of itself, is not dispositive, but that all the circumstances of each case must be considered in determining whether the admission in evidence of a significant number of photographs was so prejudicial that it constitutes reversible error. In Partee, and other cases cited therein, a greater number of photographs had been admitted in evidence than were admitted in the present case.

The circumstances of the present case do not disclose the trial court abused its discretion in receiving six photographs into evidence or that their probative value was outweighed by a prejudicial effect. Several photographs were necessary to depict the deceased's multiple wounds, and one of the pictures simply showed the position of her body when discovered. The admission of the photographs into evidence was clearly not reversible error. State v. Partee, *supra*.

Defendant next contends that the trial court erred by refusing to give a manslaughter instruction. Manslaughter is the unlawful killing of another person without malice, either upon a sudden quarrel, or unintentionally, while the slayer is in the commission of some unlawful act. § 28-403, R. R. S. 1943. It is the duty of the trial court, in homicide cases, to instruct only on those degrees of homicide which find support in the evidence. Where the evidence is such that different conclusions may properly be drawn therefrom, as to the degree of the crime, it is the duty of the trial court to instruct the jury on those degrees of homicide which find support in the evidence. See State v. Stewart, *supra*.

In the present case there was no evidence from

which a jury could infer that the murder was upon sudden quarrel or unintentional. The deceased was stabbed 14 times, and there was evidence the defendant had gone to the kitchen to procure a knife and returned to the deceased's bedroom. Contrary to defendant's contention, one cannot "easily surmise" from the evidence that the defendant acted in the heat of passion in a sudden quarrel. Therefore, the trial court did not err in refusing to give a manslaughter instruction. State v. Stewart, *supra*.

Defendant's final contention is the sentence was excessive and the trial court abused its discretion in imposing a sentence of life imprisonment rather than a sentence of imprisonment for a term of years. The well-established rule is this court on appeal will not disturb a sentence imposed within the limits prescribed by statute absent an abuse of discretion on the part of the trial court. State v. Hatridge, 199 Neb. 142, 256 N. W. 2d 327 (1977); State v. Trout, 199 Neb. 236, 257 N. W. 2d 703 (1977). The penalty for murder in the second degree is imprisonment for not less than 10 years or during life. § 28-402, R. R. S. 1943.

Defendant is 24 years of age, has a 10th grade education, and is the father of two illegitimate children. He has no serious criminal record, although he was convicted twice of petit larceny and has a juvenile record including larceny and assault and battery. The probation officer recommended incarceration for the maximum allowable period.

In view of the serious nature of the crime and the apparent deliberateness with which it was carried out, we cannot say that the trial court abused its discretion in this case. Although defendant received the maximum sentence permitted by law, under the circumstances of this case, such a sentence was warranted.

We affirm the judgment of the District Court.

AFFIRMED.

BAKER'S SUPERMARKETS, A CORPORATION, ET AL., APPELLEES, V. LEONARD JOHN, APPELLANT.

267 N. W. 2d 546

Filed July 12, 1978. No. 41645.

Workmen's Compensation: Appeal and Error. Findings of fact made by the Nebraska Workmen's Compensation Court after rehearing will not be set aside on appeal unless clearly wrong.

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

McCormack, Cooney & Mooney, for appellant.

Joe P. Cashen and John K. Green of Kennedy, Holland, DeLacy & Svoboda, for appellees.

Heard before SPENCER, BOSLAUGH, and WHITE, JJ., and RIST and KELLY, LLOYD W., District Judges.

KELLY, LLOYD W., District Judge.

This action was commenced in the Nebraska Workmen's Compensation Court and originally tried before a single member of that court. The evidence showed that the employee was 53 years old at the time of trial. He had an 8th grade education and had farmed for several years. After leaving the farm, the employee went through training as a meat cutter, having gone to a specialized school in Ohio. After completing training, the employee was steadily employed in his trade and at the time he was injured had worked a total of 8 years for his present employer. On January 4, 1973, the employee was earning $5.475 an hour and with overtime was earning approximately $1,000 per month in his employment.

On January 4, 1973, the employee while carrying a hind quarter of beef, slipped on a piece of animal fat, fell backwards, striking his head on a meat cutting block. After the accident happened, the em-

ployee left work, went home and eventually the same day went to Clarkson Hospital where he was X-rayed and then sent home. The following day the employee saw a doctor described as his family doctor. As a result of the injury, the employee complained of blurred vision and pain in his back. He was then off work for a period of 2 weeks, after which time he went back to work but could only remain there a short period of time. The employee then saw a Dr. Gross, an orthopedic surgeon, on January 17, 1973. He complained to the doctor of having severe pain in his back and of dizziness. He tried to resume his employment, but could only remain on the job approximately 2½ hours. He was first given out-patient physical therapy and later hospitalized by Dr. Gross until February 23, 1973. After his release from the hospital, the employee continued to complain of pain in his back and of being dizzy and disoriented, and as a result thereof was again hospitalized in April of 1973. Dr. Gross then referred the employee to a Dr. Herbert R. Crowley, who was a specialist in ear, nose, and throat treatment. Dr. Crowley first saw the employee on April 11, 1973, at which time the employee described the accident occurring on January 4, 1973, and described to the doctor various episodes of dizziness and ataxia. The doctor described ataxia as an "alteration in gait, staggering while walking, and ambulating." On May 7, 1973, the doctor performed an examination known as electronystagmography, hereinafter referred to as ENG test. As a result of the ENG test, the physician concluded the employee had suffered an injury to the labyrinth of the inner ear which affected his balance and caused him to suffer vertigo or dizziness. The physician treated the employee on medication and saw him periodically from June of 1973 up to the time of trial. The condition of vertigo did not improve and the employee continued to fall several times a day. Dr.

Gross, an orthopedic surgeon, rated the employee as suffering 15 percent disability to the body as a whole as a result of the injury to his back. Dr. Crowley rated the employee as suffering 100 percent disability insofar as his ability to perform the job for which he was trained and hired, said disability relating to his condition of vertigo. The only witness appearing for the employer was a Dr. John Goldner. Dr. Goldner is a neurologist. Dr. Goldner did not rate the employee as being disabled because of the injury to his inner ear. A single judge of the Workmen's Compensation Court found the employee to be 100 percent disabled. This award was appealed to the Workmen's Compensation Court en banc. Three members of the court found the employee to be 15 percent disabled to the body as a whole and the employee has appealed to this court. Upon consideration of the facts in this case, we conclude that the judgment of the three judge Workmen's Compensation Court should be reversed and an award entered for the employee finding him to be 100 percent disabled.

Dr. Crowley, professionally board certified as an otolaryngologist, examined and treated the employee in the field of his expertise. Dr. Goldner, the only witness for the employer, admittedly was not testifying in his field of expertise when he stated that he could find nothing abnormal in the ENG test that he examined. Dr. Goldner noted a chronic lumbar strain snydrome, which disability had also been detected by the treating orthopedic surgeon, Dr. Gross, who rated the disability to the back as being 15 percent to the body as a whole. Dr. Goldner could find no disability as a result of the injury to the inner ear. His findings so far as the condition of the inner ear can best be summarized by his own response to a question wherein he stated "I'm not an ENG professionalist either, I'm just a country neurologist * * *." Dr. Goldner stated that

he could not recognize any disability because of the inner ear injury to the labyrinth, and he concluded that the employee was suffering no disability because of this injury.

This court recently held in the case of Hyatt v. Kay Windsor, Inc., 198 Neb. 580, 254 N. W. 2d 92 (1977): "Findings of fact made by the Nebraska Workmen's Compensation Court after rehearing will not be set aside on appeal unless clearly wrong." We believe the judgment entered on rehearing is clearly wrong. It is obvious the single judge of the Workmen's Compensation Court correctly found the employee to be 100 percent disabled based upon the testimony of Dr. Crowley testifying in his field of expertise, and that the three judge Workmen's Compensation Court was incorrect in finding the employee to be only 15 percent disabled to the body as a whole.

The evidence in this case compels a finding for the employee.

We, therefore, find that the employee suffered an injury arising out of, and in the course of his employment, on January 4, 1973; and that the employee has been and still is totally disabled as a result of this injury and is entitled to benefits under the Nebraska Workmen's Compensation Act. The judgment is, therefore, reversed and the cause remanded to the Nebraska Workmen's Compensation Court with directions to enter a judgment in accordance herewith.

REVERSED AND REMANDED.

WHITE, C. THOMAS, J., concurs in the result.

GEORGIA M. RUGE, APPELLANT, V. STATE OF NEBRASKA ET AL., APPELLEES, OMAHA WORLD HERALD COMPANY ET AL., INTERVENERS-APPELLEES.

267 N. W. 2d 748

Filed July 12, 1978. No. 41842.

1. **Constitutional Law: Leases: Appropriation of Public Money.** A lease agreement between the state and a municipal corporation with annual rental periods does not violate Article XIII, section 1, of the Constitution, where the liability of the state is conditioned upon a legislative appropriation having been made before each rental period begins.
2. **Statutes: Appropriation of Public Money.** Section 77-2602, R. R. S. 1943, does not appropriate revenue placed in the Downtown Education Center and Office Rental Fund and revenue placed in that fund may not be expended without a specific legislative appropriation from that fund.
3. **Constitutional Law: Leases.** A provision in a lease to which the state is a party which requires the state upon termination of the lease to pay the costs of reletting the property including the costs of alterations incurred by the owner in placing the property in condition for reletting violates Article XIII, section 1, of the Constitution.

Appeal from the District Court for Douglas County: PATRICK W. LYNCH, Judge. Affirmed as modified.

Russell S. Daub, Wallace M. Rudolph, H. Daniel Smith, and Renne Edmunds, for appellant.

Paul L. Douglas, Attorney General, Terry R. Schaaf, Herbert M. Fitle, Omaha City Attorney, and Patrick W. Kennison, for appellees.

Kutak, Rock & Huie, for interveners-appellees.

Heard before WHITE, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ., and HASTINGS, District Judge.

BOSLAUGH, J.

This is an action for a declaratory judgment brought by a resident taxpayer of the City of Omaha, Nebraska, to determine the validity of a lease agree-

ment between the City of Omaha and the State of Nebraska and certain statutes relating to the lease.

The defendants are the Governor; the Director of the Department of Administrative Services; the State Building Administrator; the mayor and the members of the city council of the City of Omaha; and Downtown Omaha, Inc. The Omaha World-Herald Company; Peter Kiewit; The Kiewit Foundation; The Omaha National Bank; Northern Natural Gas Company; and Northwestern Bell Telephone Company are interveners.

The matter was heard upon motions for summary judgment filed by the plaintiff, the defendants, and the interveners. The trial court found generally for the defendants and interveners on all issues, overruled the plaintiff's motion for a partial summary judgment, and sustained the motions of the defendants and interveners. The plaintiff has appealed.

The evidence is documentary in nature and the case presents primarily questions of law. Although the plaintiff contends there are genuine issues of fact to be resolved, there are no material facts in controversy which would require a remand for trial. The case may be disposed of on the questions of law which the parties have raised.

The controversy arises out of a plan for the financing of the construction of a State Downtown Education Center and Office Building to be located in the downtown area of Omaha, Nebraska. The plan was developed by the State of Nebraska, the City of Omaha, and various other parties. Reduced to its essentials, the plan contemplates the construction of the facility by the city using funds derived from donations and revenue bonds. The state is to lease the property with an option to purchase or renew the lease. The state is to finance its requirements under the plan from the cigarette tax.

In 1976 the Legislature enacted L. B. 1006 which authorized the state to prepare plans and specifica-

tions for the facility and to enter into an agreement with the city concerning the facility. The act also created the Downtown Education Center and Office Rental Fund which is one of the matters in controversy in this case.

A lease agreement dated April 1, 1977, between the state and city has been executed. It is a lengthy document which provides generally that the City of Omaha will build the facility and lease it to the state at no greater cost to the state than the cost thereof to the city. The term of the lease is to commence on November 1, 1979, and end on June 30, 1986. The rental payment is $1,300,000 per year subject to adjustment as otherwise provided in the agreement. The agreement grants the state an option to purchase at any time during the lease at an amount to be determined so that no gain or loss will result to the city. The lease contains an option for the state to renew the lease for successive renewal rental periods until March 31, 2027.

The city has acquired the necessary real estate and has authorized the issuance of the revenue bonds. The revenue bonds have not been sold because of this litigation.

The plaintiff's principal contentions are: (1) The lease between the state and the city is actually a long-term purchase obligation by the state in violation of the constitutional provision limiting indebtedness; (2) the statutes enacted as L. B. 1006 anticipate future legislative funding in violation of the indebtedness limitation; and (3) the statutes violate the constitutional provision against continuing appropriations.

The constitutional provision limiting indebtedness of the state is contained in Article XIII, section 1, Constitution of Nebraska, and provides as follows: "The state may, to meet casual deficits, or failures in the revenue, contract debts never to exceed in the aggregate one hundred thousand dollars, and

no greater indebtedness shall be incurred except for the purpose of repelling invasion, suppressing insurrection, or defending the state in war, and provision shall be made for the payment of the interest annually, as it shall accrue, by a tax levied for the purpose, or from other sources of revenue, which law providing for the payment of such interest by such tax shall be irrepealable until such debt is paid; * * *."

Much of the plaintiff's argument is directed to the fact that the lease agreement between the city and state does not resemble an ordinary commercial lease. Without question the agreement is a device to permit the state to obtain the use of the facility through a system of annual payments. This by itself does not invalidate the agreement. The question is whether the state has assumed a binding obligation which violates the constitutional provision against indebtedness.

The plaintiff's contention that the lease is really a long-term purchase obligation depends entirely upon whether the state is bound to make the required payments over the term of the lease. The fact is that the obligation of the state is conditioned upon an appropriation having been made before each rental period commences. The rental periods are 12 months each, except the first which is 8 months, and commence on July 1st after the first year.

The lease specifically provides that: "It is a condition precedent to the commencement of the term of this Lease Agreement and the incurring of any liability of the Lessee hereunder, that there shall be in effect an Appropriation for the payment of the rentals and other sums to become due and payable hereunder by the Lessee during the Rental Period * * *." The lease further provides: "The continued effectiveness of this Lease Agreement for subsequent Rental Periods is subject to the condition that on the first day of such subsequent Rental Period

there is in effect an Appropriation for the payment of the rentals and other sums to become due and payable hereunder by the Lessee during such subsequent Rental Period, or there are on such first day Other Available Moneys for the payment of such rentals and sums, in which event the Lessee shall be liable hereunder only for the respective Rental Period or Periods for which an Appropriation or Appropriations have been lawfully made, or for which there are such Other Available Moneys." Other available moneys are defined as " * * * any other moneys, alternate to an Appropriation, which may at the time be lawfully applied by the Lessee to the payments of rentals or other sums becoming due and payable by the Lessee under this Lease Agreement, and which are sufficient, and have theretofore been, or are then, lawfully set aside or allocated, for such payment."

The liability of the state is limited to rental periods of 12 months or less, for which there has been an appropriation or other available money. In the event there is none, the lease terminates. Since the liability of the state extends for only 1 year at a time there is no binding obligation beyond the rental period for which an appropriation has been made. The plaintiff's first contention is without merit.

The plaintiff's second contention is directed at section 77-2602, R. R. S. 1943, as amended by L. B. 1006, which provides in part as follows: "Every person, engaged in distributing or selling cigarettes at wholesale in this state, shall pay to the Tax Commissioner of this state a special privilege tax. * * * The proceeds of eight cents of such tax shall be placed in the General Fund and the proceeds of the remaining five cents of such tax shall be distributed in the following order: * * *

"Fourth, there shall be placed in the Downtown Education Center and Office Rental Fund the sum of nine hundred sixty thousand dollars each year for

fiscal years 1976-77 through 1983-84 and two million two hundred eighty thousand dollars each year for fiscal years 1984-85 and 1985-86. Such amounts are hereby appropriated and the unexpended balances existing in such fund at the end of each fiscal year through June 30, 1986, are hereby reappropriated; * * *."

The plaintiff relies upon State ex rel. Meyer v. Steen, 183 Neb. 297, 160 N. W. 2d 164, in which a statute authorizing the pledging of fees to be collected from the sale of permits and licenses in the future was held invalid. We held that statute violated both the debt provision and the provision against continuing appropriations.

The distinction in this case is that section 77-2602, R. R. S. 1943, merely establishes a fund within the treasury which may not be expended without a further appropriation. This distinction was recognized in Rein v. Johnson, 149 Neb. 67, 30 N. W. 2d 548, which involved an appropriation of certain revenue to the State Assistance Fund. In that case we said: "* * * the Legislature never intended that it should operate as an appropriation in the constitutionally prescribed sense. Rather, the word 'appropriated' as used therein was of constitutional necessity as well as legislative intent, used only to indicate that certain public revenue derived or to be derived from certain described tax revenue sources should be paid into the state treasury, there to be administratively credited, assigned, or allocated to the State Assistance Fund for assistance purposes as distinguished from other public funds of a different nomenclature." See, also, Stahmer v. State, 192 Neb. 63, 218 N. W. 2d 893; Lawrence v. Beermann, 192 Neb. 507, 222 N. W. 2d 809.

That this was the legislative intent is further made clear by sections 81-1108.44 and 81-1108.47, R. R. S. 1943, which provide in part:

"The Department of Administrative Services, with the advice of the State Building Advisory Commis-

sion, shall cause plans, working drawings, and specifications to be prepared for building a downtown education center and office building in Omaha * * *. The department * * * may expend for such purpose any funds appropriated by the Legislature for the project. * * * Payments due from the state for any space which it might lease in such building and facilities shall be made from the Downtown Education Center and Office Rental Fund which is hereby created, into which fund shall be deposited such amounts as the Legislature shall provide." § 81-1108.44, R. R. S. 1943.

"The proceeds of the fund created by section 81-1108.44 shall be expended by the Department of Administrative Services, as and when appropriated by the Legislature, for any rental payments to be made by the State of Nebraska to the city of Omaha under the agreement made pursuant to section 81-1108.45 for the use by the state of the building and facilities described in section 81-1108.44." § 81-1108.47, R. R. S. 1943.

The plaintiff's third contention is similar to the one just discussed but is directed at the constitutional provision against continuing appropriations contained in Article III, section 22, which now provides in part: "Each Legislature shall make appropriations for the expenses of the Government."

Prior to the 1972 amendment to Article III, section 22, Constitution, appropriations were expressly limited to the end of the next fiscal quarter succeeding the adjournment of the next regular session of the Legislature. The interveners argue that the elimination of this language from the Constitution now permits the Legislature to exercise its own discretion as to the length of time over which an appropriation may extend.

It is unnecessary in this case to determine the exact meaning of Article III, section 22, Constitution, as amended, because the plaintiff's contentions relate to

the appropriation of future revenue. Both contentions are without merit because, as previously stated, section 77-2602, R. R. S. 1943, does not make an appropriation except in an administrative sense, and funds placed in the Downtown Education Center and Office Rental Fund in the state treasury cannot be expended until there has been a specific legislative appropriation, all as provided by section 81-1108.47, R. R. S. 1943.

In Section 28 of the lease the lessee agrees to pay to the lessor, upon termination of the lease, as liquidated damages for the default by the lessee: "* * * the reasonable costs incurred by Lessor in reletting the Land and the Public Facility and the reasonable costs of alterations incurred by Lessor in reletting the same, or the reasonable costs to Lessor necessary to place the Land and the Public Facility, or either of them, in condition for reletting, which costs shall be paid by Lessee to Lessor upon notice to Lessee that such reletting has been accomplished or such alterations have been completed, as the case may be, and of the amount of the costs thereof." Under this provision the state assumes a liability of an undetermined amount, for which no appropriation has been made, and which will be payable, if at all, at some undetermined time in the future.

One purpose of the constitutional limitation upon state indebtedness is to prevent the anticipation of revenue by the creation of obligations to be paid from revenue received in future fiscal periods. State ex rel. Meyer v. Steen, *supra*. The provision in Section 28 of the lease is a promise to pay which becomes effective upon a termination of the lease and qualifies the earlier provisions which conditioned the liability of the state upon a legislative appropriation having been made at the commencement of each rental period. The amount due the lessee under this provision might well exceed the constitutional limitation upon indebtedness. This kind of an open-

ended promise violates the spirit and purpose of the constitutional limitation against indebtedness, is beyond the power of the state to assume, and is invalid and unenforceable.

We have examined and considered the other contentions of the plaintiff and find them to be without merit.

The judgment of the District Court is modified as to the provision in Section 28 of the lease which requires the state to pay liquidated damages upon termination of the lease. As modified, the judgment is affirmed.

AFFIRMED AS MODIFIED.

WILLIAM G. SIBERT, APPELLANT, V. CITY OF OMAHA, A METROPOLITAN CITY, ET AL., APPELLEES.

267 N. W. 2d 753

Filed July 19, 1978. No. 41542.

Administrative Law: Appeal and Error. 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.

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

Thomas F. Dowd, for appellant.

Herbert M. Fitle, Omaha City Attorney, and James E. Fellows, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

WHITE, C. J.

Plaintiff was employed as a semiskilled laborer with the sewer maintenance division of the public works department of the City of Omaha. On December 17, 1976, plaintiff received notice that his

employment with the city would be terminated, effective December 20, 1976, for the reason that he was unable to perform the duties in his classification and the inability of the city to find any other position which he could perform. Plaintiff appealed to the personnel board of the City of Omaha which upheld his discharge. Appeal was taken to the District Court which affirmed the decision of the personnel board. Plaintiff appeals. We affirm the judgment of the District Court.

"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." Shepherd v. City of Omaha, 194 Neb. 813, 235 N. W. 2d 873 (1975). See, also, Tinsley v. City of Omaha, 190 Neb. 380, 208 N. W. 2d 693 (1973).

The sole question on appeal is whether there was competent evidence before the personnel board to sustain its decision to terminate plaintiff's employment with the city.

Plaintiff began employment with the city on June 6, 1972. Plaintiff testified that from that time up until he was discharged, he received regular and routine merit and promotional increases. During the summer of 1976, plaintiff took an examination for the position of Foreman I, and was advised by the city that he was ranked first on a listing of 20 eligible for promotion to that position. Plaintiff testified that he was never criticized in his ability to perform the duties of his position; that he never received any reprimands; and that he has never been unable to perform the physical tasks of his position.

On October 11, 1976, plaintiff sustained an accident while on the job and felt pain in his back. He was subsequently examined by Dr. Reichstadt who informed him that he had a low back strain. Plaintiff

was released to go back to work and returned to work on October 28, 1976. Subsequently, plaintiff called Mr. Murphy in the personnel department and told him that he was still experiencing some difficulty with his back and was concerned, and requested permission to see an orthopedic specialist to confirm Dr. Reichstadt's diagnosis that he had only a back strain. On November 12, 1976, plaintiff was examined by Dr. Iwersen, who took some X-rays and administered a number of tests. Dr. Iwersen advised plaintiff to get a lower lumbar support, which plaintiff did. In a report dated November 12, 1976, Dr. Iwersen stated: "I have prescribed a lumbo-sacral support for this man and told him to return back to work. However this man has a history of four back injuries, and I am sure he will probably have another back strain sometime while at work. I advised him that he probably should seek easier work if this is going to continue, but he did not feel that this would solve his problem."

In a report dated December 13, 1976, which was obtained as a clarification of the first report, Dr. Iwersen wrote: "It is my opinion that this patient is going to continue with his heavy work, and will probably continue to have back difficulties. From what I understand, he is now doing heavy work, and I feel that even though there would be a reduction in pay that he would be much better off doing lighter work, or else seeking another type of job."

On December 15, 1976, plaintiff experienced pain in his shoulder while at work. He went to the hospital and was examined by Dr. Reichstadt and Dr. Ewing. Dr. Reichstadt released plaintiff and told him to return to work on Monday, December 20, 1976.

The letter from the city, advising plaintiff of his discharge, is dated December 17, 1976. The letter quotes the above-cited portion of Dr. Iwersen's December 13 report and stated: "Upon receiving this

report, it is evident that you are unable to perform the duties in your classification * * *."

James R. Belina, plaintiff's supervisor and one of the signers of this letter, testified that he participated in the discussions which led to plaintiff's termination and that the decision was based upon plaintiff's past record and Dr. Iwersen's report.

Plaintiff acknowledged that prior to October 11, 1976, he had on-the-job injuries related to his back. The record indicates that during the period he was with the city plaintiff had 13 injuries. Not all these injuries were referable to his back. At least three were, however. James R. Belina testified that the efficiency of the department drops when people are absent due to injuries.

Plaintiff testified he feels that he is currently able to perform the duties of his job. He further testified that since he was terminated, he has shoveled snow, played basketball, and jogged without difficulty. A further report from Dr. Iwersen dated December 27, 1976, was solicited by plaintiff, in which Dr. Iwersen stated: "It was only on account of the history of previous back injuries and trouble that I suggested that he try lighter work. I feel that this patient is *probably* capable of returning to his regular job and suggested that he wear this support when he does his regular work." (Emphasis supplied.)

There is ample evidence to support the decision of the city to terminate plaintiff's employment. Plaintiff's position is one which necessitates heavy lifting and other strenuous activity. Plaintiff has suffered repeated back-related injuries during the course of his employment with the city. These injuries caused plaintiff to be absent from work. Plaintiff's supervisor testified that the efficiency of his department is reduced by such absenteeism. Dr. Iwersen concluded that plaintiff would very likely sustain future injuries to his back if he continued in his position. He was advised to seek lighter work. Plaintiff has

shown no inclination to do so, but maintained that despite his past record of injuries and Dr. Iwersen's diagnosis, he has no performance problems in this position. Dr. Iwersen's report of December 27 does not negate his previous long-range diagnosis that plaintiff would continue to sustain back injuries if he remained in this position. The city is not required to maintain the employment, in a given position, of an individual about whom it can be said with reasonable certainty that such individual will likely sustain repeated injury if continued in that position.

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

AFFIRMED.

WHITE, C. THOMAS, J., dissenting.

I do not quarrel with the majority opinion in its recitation of the standard of review in administrative hearings on petition in error in this court. The majority correctly cites the applicable standard. The basis of the termination of plaintiff in the notification given to him by the City of Omaha was the letter of Dr. Iwersen. The effectiveness of this letter as a ground for a termination is certainly modified, if not destroyed, by the further letter of Dr. Iwersen of December 27, 1976: "* * * I feel that this patient is probably capable of returning to his regular job and suggested that he wear this support when he does his regular work."

However, the decision to terminate was not in fact based solely on Dr. Iwersen's first letter. The testimony of James R. Belina, sewer maintenance engineer for the City of Omaha, is illustrative of this point. "Q. Was your recommendation that he be terminated on the basis of the report of Dr. Iwerson of November 12th? A. Partly. What we did was to do his total record along with the letter received from Dr. Iwersen." It is apparent that the personnel board had before it the total record of the employee's injuries, absences, and medical history.

The record was referred to by members of the personnel board in their questioning of the plaintiff, was used as justification for his ultimate discharge, but that previous record was never *specified as a reason for discharge in the original discharge letter, nor ever offered or received in evidence.* We are thus placed in the position where the majority proposes to affirm a decision based on evidence which was never offered or received.

This court's high regard for the findings of administrative agencies, when they are based on some competent evidence, does not require us to affirm the decision of an agency which is at least in part, and to an unknown part, based on evidence which has not been offered or received, yet considered by it, and unavailable for review in this court.

In a case cited by the majority, Shepherd v. City of Omaha, 194 Neb. 813, 235 N. W. 2d 873, we reversed a decision of the District Court affirming a city personnel board's discharging of a policeman for falsifying an employment application. The evidence showed the policeman Shepherd did falsify a report concerning a back injury 2 years *after* he had been employed, but there was no evidence to substantiate a false employment application, the ground for discharge stated in the dismissal letter. This court said: "The city attempted to show this solely by evidence as to the recurrence of the back trouble 2 years after Shepherd entered its employ. * * *

"While grounds may have existed for Shepherd's discharge, the reason given by the city was not one of them."

The reason listed in the termination letter was not established by competent evidence and other evidence used to justify the termination is not properly before us. The judgment of the District Court should be reversed.

McCOWN and CLINTON, JJ., join in this dissent.

CITY OF OMAHA HUMAN RELATIONS DEPARTMENT, FOR AND ON BEHALF OF COMPLAINANT JOHN A. GUY, APPELLANT, V. CITY WIDE ROCK & EXCAVATING COMPANY, APPELLEE.

268 N. W. 2d 98

Filed July 19, 1978. No. 41575.

1. **Ordinances: Appeal and Error.** This court will not take judicial notice of a municipal ordinance which does not appear in the record on appeal.
2. **Administrative Law: Appeal and Error: Evidence.** In an error proceeding, the order of an administrative tribunal must be affirmed if the tribunal has acted within its jurisdiction and there is some competent evidence to sustain its findings.
3. **Stipulations: Parties.** Parties have no right to stipulate as to matters of law and such a stipulation, if made, will be disregarded.
4. **Trial: Appeal and Error.** A party cannot be heard to complain of an error which he was instrumental in bringing about.
5. **Labor and Labor Relations: Ordinances: Municipal Corporations.** The state is vested with the power to, and has, entered the field of labor, and has not delegated to the City of Omaha any power to legislate, by its city council, ordinances relating to labor relations and practices, and civil rights.
6. **Legislature: Ordinances.** When the Legislature has enacted a law affecting municipal affairs, which are also of statewide concern, such law takes precedence over any provisions in a home rule charter and the provisions of the charter must yield.

Appeal from the District Court for Douglas County: JOHN C. BURKE, Judge. Affirmed.

Robert V. Broom, for appellant.

Clayton Byam and William J. Tighe, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

BOSLAUGH, J.

This is an appeal in a proceeding in error to review an order of the fair employment committee of the City of Omaha in a proceeding under the fair employment practices ordinance of the City of Omaha. The proceeding involved a complaint filed by John A. Guy, an employee of the respondent City

Wide Rock & Excavating Company. The complaint alleged that Guy, who was black, had been discriminated against in compensation, terms and conditions of employment, and discharge.

A petition was filed before the committee by the human relations department of the City of Omaha on behalf of the complainant. After an evidentiary hearing the committee found the evidence was insufficient to establish that the respondent was guilty of unfair labor practices. Upon reconsideration the committee reversed its original finding and found that the respondent was guilty of unfair employment practices. The committee ordered the respondent to pay the sum of $890 to the complainant and take affirmative action to increase the representation of minority groups in its employment.

The respondent then filed its petition in error in the District Court. The parties stipulated that the matter be heard de novo on the record and that a transcript of the evidence before the committee would constitute a bill of exceptions.

The District Court found that the committee had failed to make findings of fact as required by the rules of practice and procedure relating to public hearings of the committee and remanded "the appeal" to the committee to make specific findings of fact. The committee then made specific findings of fact in an order which was filed in the District Court.

A further hearing was held and the District Court found that the evidence was insufficient to establish that the respondent was guilty of unfair employment practices; that the employment of the complainant had been terminated because of his inferior work performance; and that the "Complainant's Petition" should be dismissed. From this order the human relations department of the City of Omaha, the original petitioner before the committee, has appealed.

The assignments of error are that the District Court failed to apply the standard of review appli-

cable in an error proceeding and that its finding on the merits was erroneous.

The original proceeding in this case was brought under the terms of a municipal ordinance which does not appear any place in the record. As a general rule this court will not take judicial notice of a municipal ordinance which does not appear in the record on appeal. State v. Korf, *ante* p. 64, 266 N. W. 2d 86. Since this proceeding did not originate in the municipal court it is not clear to us on what basis the District Court may have noticed the ordinance.

The initial pleading which the respondent filed in the District Court was denominated a petition in error. So far as we are able to determine there is no method by which an order of the committee could be reviewed except by a proceeding in error in the District Court. In an error proceeding, the order of an administrative tribunal must be affirmed if the tribunal has acted within its jurisdiction and there is some competent evidence to sustain its findings. Shepherd v. City of Omaha, 194 Neb. 813, 235 N. W. 2d 873.

The parties in this case stipulated that the review should be de novo on the record and it is apparent that the trial court treated the action as if it were an appeal from the committee rather than a proceeding in error.

The general rule is that parties have no right to stipulate as to matters of law and such a stipulation, if made, will be disregarded. North Platte Lodge, B. P. O. E. v. Board of Equalization, 125 Neb. 841, 252 N. W. 313; 73 Am. Jur. 2d, Stipulations, § 5, p. 539. Thus, the parties could not convert an error proceeding into an appeal by stipulation, and their agreement that the matter should be reviewed de novo on the record was not binding on the court.

It is also a general rule that a party cannot be heard to complain of an error which he was instrumental in bringing about. Regier v. Nebraska P. P.

Dist., 189 Neb. 56, 199 N. W. 2d 742. The effect of the stipulation was to waive any error by the trial court in considering the matter de novo upon the record. The petitioner can not now complain that the trial court applied the wrong standard of review.

So far as the merits of the case are concerned the evidence was in conflict. The petitioner produced evidence which, if believed, would tend to support an inference that some discrimination may have occurred. The respondent produced substantial evidence that the complainant's work performance was poor and that his employment was terminated because he was an unsatisfactory employee. The evidence was clearly sufficient to sustain the finding of the District Court based upon a de novo review of the record before the committee.

There is an additional reason why the judgment in this case must be affirmed. In Midwest Employers Council, Inc. v. City of Omaha, 177 Neb. 877, 131 N. W. 2d 609, this court held a fair employment practices ordinance of the City of Omaha invalid. In that case we said: "We hold ordinance No. 22026 of the city of Omaha to be unconstitutional in its entirety for the reason that the state, through the Legislature, did not delegate to the city of Omaha the power to permit its city council to legislate on fair employment practices and civil rights by passing ordinance No. 22026; and for the further reason that the power relating to labor relations and practices, and civil rights, lies in the state, and such matters are of statewide concern and not of local concern nor municipal government concern." The Legislature has since enacted a comprehensive law, the Nebraska Fair Employment Practice Act, sections 48-1101 to 48-1125, R. R. S. 1943, which deals with the same subject matter.

The judgment of the District Court is affirmed.

AFFIRMED.

CLINTON, J., concurs in the result.

CAROL W. BAKER, APPELLEE, V. GEORGE L. BAKER, APPELLANT.

267 N. W. 2d 756

Filed July 19, 1978. No. 41579.

1. **Trial: Parties: Gifts.** A court cannot adjudicate the rights of a transferee of a gift without having the transferee in court since his rights may be adversely affected thereby.
2. **Divorce: Parties: Property.** The determination of one of the parties to a marriage to place property beyond the reach of the other party, and thus forestall a division of the property, does not operate to deprive the District Court of jurisdiction to determine an equitable division of those assets.
3. **Divorce: Property.** Generally, an award from one-third to one-half of the property involved in a marriage of long duration, and where the parties were the parents of all children involved, does not constitute an abuse of discretion.
4. **Divorce: Alimony: Property.** It is well-established that alimony may be awarded in addition to a property settlement.
5. **Divorce: Alimony.** When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, and the ability of the supported party to engage in gainful employment.
6. _____: _____. The ultimate test of alimony provisions in a decree of dissolution is one of reasonableness.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Affirmed as modified.

D. Nick Caporale and Mark L. Goodall of Schmid, Ford, Mooney, Frederick & Caporale, for appellant.

Steven J. Lustgarten of Gitnick & Lustgarten, for appellee.

Heard before WHITE, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ., and FAHRNBRUCH, District Judge.

WHITE, C. THOMAS, J.

This is an appeal by the respondent-husband from the division of property and award of alimony pursuant to a decree for dissolution of marriage.

The parties had been married 21 years at the time the petition for dissolution of marriage was filed. The two children born of the marriage are of legal age. The parties were married while attending college. After marriage, the petitioner-wife, who had completed 1 year of college, discontinued her studies. For the duration of the marriage, the wife's primary duties were those of wife and mother. She has no special skills and was engaged in employment outside the home only during the early years of the marriage and only on a limited basis. She is currently employed as a domestic, cleaning office buildings for 20 hours per week at a pay rate of $3 per hour.

The respondent-husband is a certified public accountant who is a partner in a national accounting firm. His income has steadily and substantially increased since joining the firm. His adjusted gross income for 1974 was $36,818 and for 1975 was $51,400. He estimated his gross earnings for 1976 to be over $60,000.

The District Court awarded the petitioner $900 per month alimony for 121 months, to terminate upon death or remarriage. The alimony award is to be secured by respondent's life insurance policies. The court also awarded attorney's fees to the wife of $3,500.

The parties had approximately $200,000 worth of real and personal property which the court divided equally. In addition, there were a number of negotiable bonds contained in a safe deposit box at a local bank in the names of the parties. The bonds are of a value in excess of their face value of $125,000. The petitioner filed her petition for dissolution on July 1, 1976. Prior to filing the petition, the petitioner inventoried the contents of the safe deposit box. Negotiable bonds which were in the box at the time of inventory were removed by the respondent subsequent to the filing of the petition. The respond-

ent kept the bonds in his desk drawer under his control and later delivered them to White, Weld & Company in the names of the parties' children.

The trial court found the transaction involving the bonds did not constitute a valid gift between the respondent and the children and the intention of the respondent was to prevent the petitioner from receiving her share of the assets. The court held that the bonds remained the marital assets and were subject to equal division between the parties.

Respondent's assignments of error relate to that part of the decree which adjudged that the transfer of the negotiable bonds to a safekeeper for the benefit of the children did not constitute a valid gift, and to the alimony award together with the attendant order requiring that the respondent's life insurance be kept as security for the alimony payments.

Primarily, the respondent challenges the jurisdiction of the court to pass on the validity of the gift from the respondent to the children without the presence of the transferees, i.e., the children, in court. We are inclined to agree. Without discussing whether strict formality attaches to a gift between parent and child and whether acceptance in a given circumstance may be presumed, the fact is that even respondent concedes that a court cannot adjudicate the rights of a transferee of a gift without having the transferee in court since his rights may be adversely affected thereby. See, Atkins v. Atkins, 18 Neb. 474, 25 N. W. 724; Caldwell v. Caldwell, 5 Wis. 2d 146, 92 N. W. 2d 356. While the trial court was in error in directing that the gift be set aside, this does not afford any relief to the respondent. It is undisputed in the record, regardless of whatever intention the respondent may have had, that the negotiable bonds were solely in the exclusive possession of the petitioner and respondent at the time of the filing of the action and were marital assets. The determination of one of the parties to a marriage to place property

beyond the reach of the other party, and thus forestall a division of the property, does not operate to deprive the District Court of jurisdiction to determine an equitable division of those assets.

The respondent does not question the division of the property other than the negotiable bonds, the subject of the gift to the parties' children. Therefore, the court's decree will be modified to provide that the respondent shall be ordered to pay to the petitioner one-half of the $125,000 acknowledged minimum fair value of the bonds or $62,500 in addition to the other property awarded her by the District Court.

Generally, awards from one-third to one-half of the property involved in a marriage of long duration, and where the parties were the parents of all the children involved, will not be changed by this court. The award in this case is one-half of the net assets of the marital estate. We find no abuse of discretion by the trial court. See, Grummert v. Grummert, 195 Neb. 148, 237 N. W. 2d 126; Kula v. Kula, 181 Neb. 531, 149 N. W. 2d 430.

It is well-established that alimony may be awarded in addition to a property settlement. See, § 42-366, R. R. S. 1943; Magruder v. Magruder, 190 Neb. 573, 209 N. W. 2d 585.

Section 42-365, R. S. Supp., 1976, provides that when dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, and the ability of the supported party to engage in gainful employment.

The ultimate test of alimony provisions in a decree of dissolution is one of reasonableness. See, Albrecht v. Albrecht, 190 Neb. 392, 208 N. W. 2d 669; Corn v. Corn, 190 Neb. 383, 208 N. W. 2d 678. It is obvious that the respondent is not yet at the peak of his earning years. He has an income substantially in

excess of $50,000 per year with reasonable expectations that the same shall continue to grow. The petitioner has no formal education beyond 1 year in college and no particular saleable skills or training. The parties have successfully raised a family and, even with the property settlement award, a drastic curtailment in the petitioner's lifestyle is to be expected. The court considered all these matters in making its award and we are not prepared to say that the trial court abused its discretion in so doing; nor are we prepared to state that the trial court abused its discretion in requiring security for the alimony payments.

The petitioner is awarded $1,000 for attorney's fees in this court. The judgment of the trial court is affirmed as modified.

AFFIRMED AS MODIFIED.

JUDY ANN ROEBUCK, APPELLEE, V. GERALD DEAN FRAEDRICH, APPELLANT.

267 N. W. 2d 759

Filed July 19, 1978. No. 41585.

1. **Statutes: Paternity: Infants: Witnesses.** In a proceeding to determine paternity of a child under the provisions of sections 13-101 to 13-112, R. R. S. 1943, the mother is a competent witness on the issue of the child's paternity.
2. **Legislature.** Where general and special acts of the Legislature come in conflict, the special law is not repealed by the general provisions unless by express words or necessary implication.

Appeal from the District Court for Box Butte County: ROBERT R. MORAN, Judge. Affirmed.

Herbert M. Sampson, III, for appellant.

Kenneth W. Payne, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

CLINTON, J.

This is an appeal from a determination made in the District Court for Box Butte County under the provisions of sections 13-101 to 13-112, R. R. S. 1943, of the paternity of a child allegedly born out of wedlock. The jury determined that the defendant was the father of the child and the court made an order for support and for medical and hospital expenses. The father appeals to this court. The sole issue on appeal is whether the plaintiff mother is a competent witness on the issue of the child's parentage.

The issue arises from the agreed circumstance that the plaintiff mother was married to one Gary Roebuck from March 23, 1974, to January 29, 1976. A petition for dissolution of marriage was filed on March 25, 1975. A decree of dissolution was entered on July 29, 1975, which became final on January 29, 1976. The plaintiff testified that the child was conceived as a result of sexual relations between the plaintiff and the defendant in this case during the period February 4, 1975, to March 28, 1975. She testified that during that period of time she was living apart from her husband and did not have sexual relations with him or any other man save the defendant. The child was born December 24, 1975. Thus the child was conceived and was born while the legal relationship of marriage still existed between the plaintiff and Roebuck.

To sustain his position defendant relies upon the holdings of this court in Ford v. Ford, 191 Neb. 548, 216 N. W. 2d 176, and Perkins v. Perkins, 198 Neb. 401, 253 N. W. 2d 42, in which we said legitimacy of children born during wedlock is presumed and this presumption may be rebutted only by clear, satisfactory, and convincing evidence and *the testimony of a husband or wife is not competent evidence on which to support the illegitimacy of a child born during wedlock.*

Both the above-cited cases were actions between

husband and wife for dissolution of marriage and the husband in each case made claim he was not the father of a child for which support was sought. The defendant seeks to apply our declaration on the competency of witnesses in those cases to this paternity action between persons not married to each other.

The plaintiff, in support of her position that she is a competent witness on the issue, relies upon the provisions of section 13-112, R. R. S. 1943, which specifically provides: "The alleged father and the mother shall be competent to testify." She also contends that in any event the holdings of this court in the two cited cases has been changed by statute, viz., section 27-601, R. R. S. 1943, of the Nebraska Rules of Evidence which provides: "Every person is competent to be a witness except as otherwise provided in these rules." The rules do not seem to contain any exception which would apply to this case. Neither does L. B. 279, Laws of 1975, which enacted the Rules of Evidence, purport to repeal or amend section 13-112, R. R. S. 1943.

L. B. 279, Laws of 1975, did repeal our former statute pertaining to competency of witnesses, to wit, section 25-1201, R. R. S. 1943. See comment to Rule 601, Article 6, p. 2, The Nebraska Rules of Evidence, 1975, Nebraska Continuing Legal Education, Inc.

The rule stated in Ford v. Ford, *supra,* and Perkins v. Perkins, *supra,* has its origin in ancient judicially made public policy, Goodright v. Moss, 2 Cowp. 591, 98 Eng. Rep. R. 1257 (1777), and has been to some extent preserved in the marriage dissolution act, section 42-377, R. R. S. 1943, which provides: "Children born to the parties, or to the wife, in a marriage relationship which may be dissolved or annulled pursuant to sections 42-347 to 42-379, shall be legitimate unless otherwise decreed by the court, and in every case the legitimacy of all children conceived before the commencement of the suit shall be presumed until the contrary is shown."

We hold that the provisions of section 13-112, R. R. S. 1943, are applicable and govern this case for that section is part of a special act applicable to the particular problem. The same would appear to be true of section 42-377, R. R. S. 1943. These sections would not appear to be impliedly repealed by section 27-601, R. R. S. 1943, for the reason that where general and special acts come in conflict, the special law will not be repealed by general provisions unless by express words or necessary implication. Jackson v. Board of Supervisors of Washington County, 34 Neb. 680, 52 N. W. 169; Bass v. County of Saline, 171 Neb. 538, 106 N. W. 2d 860. The rule stated in Ford v. Ford, *supra,* and Perkins v. Perkins, *supra,* is applicable only to actions between husband and wife.

AFFIRMED.

GEORGE WASSERBURGER ET AL., APPELLEES, V. BILL B. COFFEE ET AL., APPELLANTS, GERTRUDE QUINTARD ET AL., INTERVENERS-APPELLEES.

267 N. W. 2d 760

Filed July 19, 1978. No. 41588.

1. **Judgments.** When a question in controversy has been once finally decided it becomes the law of the case and is binding on the parties in all subsequent stages of the litigation.
2. **Injunctions: Motions, Rules, and Orders.** When the circumstances and situation of the parties have changed so that it would be just and equitable to vacate or modify a permanent injunction, the court which granted the injunction may vacate or modify it upon motion.
3. **Injunctions: Burden of Proof.** Where a defendant seeks the vacation of a permanent injunction allowed against him after a trial in a civil action, the burden is on him to show that the threatened injury has been certainly overcome, not that it possibly may be.
4. **Equity: Judgments: Appeal and Error.** On an appeal from a judgment in equity when credible evidence on material questions of fact is in conflict, the Supreme Court will consider the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the other.

Appeal from the District Court for Sioux County: ROBERT R. MORAN, Judge. Affirmed.

Van Steenberg, Brower, Chaloupka, Mullin & Holyoke, for appellants.

Nichols, Meister & Winner, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

MCCOWN, J.

The defendants filed an application to vacate or modify a permanent injunction previously entered against them enjoining them from diverting more of the flow of certain streams than would allow a constant flow of water in sufficient quantity for domestic use and the watering of cattle on certain riparian lands of the plaintiffs. The plaintiffs answered praying that defendants' application be denied and that defendants be found to be in contempt for willful failure to comply with the permanent injunction. The District Court denied the defendants' application to vacate the permanent injunction; found that one of the defendants was in contempt of court for willful failure to comply with the provisions of the injunction; and taxed the costs of the action, including an attorney's fee, to that defendant. The defendants have appealed.

The injunction involved here was originally entered by the District Court for Sioux County, Nebraska, in 1965. Except for modifications immaterial here, this court affirmed the action of the District Court in granting the injunction in Wasserburger v. Coffee, 180 Neb. 149, 141 N. W. 2d 738. The factual situation out of which this water rights controversy arises is set out in detail in that opinion. Briefly summarized, the plaintiffs are the owners of lower riparian lands located along the waters of certain creeks and their tributaries which flow generally northerly in Sioux County, Nebraska, meandering

along a course of some 60 miles to the South Dakota border. The defendants are holders of appropriative water rights on the upper portions of the streams who were diverting water for irrigation purposes. The natural flow of the streams is insufficient to meet the appropriative water rights held by the defendants without depriving plaintiffs of water necessary for domestic use and the watering of cattle.

On February 1, 1965, the District Court permanently enjoined the defendants from diverting more of the flow of the streams than would allow to plaintiffs a constant flow of water in sufficient quantity for domestic use and the watering of cattle and other livestock in the numbers normally pastured on plaintiffs' riparian land. Following the mandate of this court, the District Court, on April 24, 1967, identified the riparian lands entitled to the benefits of the 1965 injunction.

On November 30, 1974, the defendants commenced this proceeding to vacate the permanent injunction. Defendants alleged that the construction of various water pipelines since the entry of the injunction had given plaintiffs an additional adequate source of water other than the stream flow, and that this fact changed the balance of the equities and justified the lifting of the injunction.

A water pipeline known as the Montrose Line was completed in 1969. The water line was constructed under a government program, and 75 percent of the cost was paid by the government and 25 percent was paid by the landowners on the line. The line is of plastic pipe of varying dimensions, buried 5 feet beneath the surface. It extends over a 30-mile route, and serves all but one of the plaintiffs.

The defendants' evidence tended to prove that the pipeline was a new and dependable source of adequate water. The pipeline is capable of carrying approximately 30 gallons of water per minute but the two wells which currently supply the line are only

producing 16 gallons a minute. The plaintiffs' evidence tended to show that the pipeline was inadequate and undependable. The lines broke down from time to time because of line breaks or equipment or electrical failure, and even without any line breaks, persons on the end of the line were often without water because of the production limit of the wells. Other pipeline users had similar complaints of outages. The farther plaintiffs were from the beginning of the pipeline, the more frequent and long-lasting were their outages. An expert witness for the plaintiffs testified as to the geological conditions underlying the area and the difficulty of predicting the reliability of the wells feeding the pipelines. He testified that the Montrose Line would be an unreliable source of water.

There was also considerable evidence presented as to the procedure which had been in use for the enforcement of the original injunction. Following the entry of the injunction, by agreement between counsel, the use of water was placed under the supervision of the Department of Water Resources of the State of Nebraska. The procedure used was that whenever a plaintiff downstream riparian owner was out of water, he would call the engineer of the Department of Water Resources in the area, the engineer would verify the fact, and would then send notices to each of the defendant appropriators ordering them to shut down. Orders were usually sent on the day a water shortage was verified but were normally not made effective for a day or two in order to allow time for closing down. Orders to shut down went to all upstream appropriators on the affected streams, even to nondefendants. The evidence indicated that after a close down order became effective it could take from 10 days to 2 weeks for the water to begin flowing again in the streams through plaintiffs' lands. There was also evidence that because the creek bed was clay, each time it dried out it re-

quired a large amount of water to recharge the stream bed before water would flow past and on downstream. Expert testimony was that the procedure used was ineffective, that the most efficient use of the existing water would require a continuous flow in the stream, and that methods were available which would be much more efficient in maintaining a constant flow of the stream.

The evidence also established that several of the defendants had been in violation of closing orders of the Department of Water Resources from time to time, but the degree of regularity and magnitude of the violations was not sufficient for the court to find that the violations constituted a willful failure to comply with the injunction. The evidence, however, established violations of closing orders by the defendant, Bill B. Coffee, on numerous occasions and in substantial amounts over a period of 5 years.

The District Court found the pipelines and wells constructed by the plaintiffs were not sufficiently reliable to guarantee a supply of water for watering the livestock of the plaintiffs on the riparian lands; that with the exception of the arrangements between counsel and the Department of Water Resources, the defendants have not made a good faith effort to comply with the injunction; that the injunction was capable of enforcement; and that a good faith attempt to comply with the injunction by the defendants would be successful. The court also found that the defendant, Bill B. Coffee, had, beyond a reasonable doubt, willfully failed to comply with the injunction with respect to specified violations of closing orders. The District Court therefore denied the application of the defendants for vacation or dissolution of the injunction; found the defendant, Bill B. Coffee, to be in contempt of court for willful failure to comply with the provisions of the injunction; and taxed the costs of the action, including an attorney's fee for the plaintiffs, to Bill B. Coffee.

In cases involving permanent injunctions this court has consistently held that when a question in controversy has been once finally decided it becomes the law of the case and is binding on the parties in all subsequent stages of the litigation. When the circumstances and situation of the parties have changed so that it would be just and equitable to vacate or modify a permanent injunction, the court which granted the injunction may vacate or modify it upon motion. Board of County Commissioners v. Scott, 178 Neb. 53, 131 N. W. 2d 711; Lowe v. Prospect Hill Cemetery Assn., 75 Neb. 85, 106 N. W. 429, affirmed on rehearing, 75 Neb. 100, 108 N. W. 978.

In the Lowe case this court also held that where a defendant seeks the vacation of a permanent injunction allowed after a trial in a civil action, the burden is on him to show that the threatened injury has been certainly overcome, not that it possibly may be.

There is no contention in the case now before us that there has been any material change in the water rights law of Nebraska applicable to this case since the injunction here was entered. Defendants' claim of right to vacation of the permanent injunction rests upon the construction and existence of water pipelines since the entry of the injunction. The defendants clearly have the burden of proving that the pipelines give plaintiffs an additional adequate reliable source of water other than the stream flow, and that such a changed circumstance justifies vacating the injunction.

The trial court specifically found that the pipelines and wells constructed by the plaintiffs are not sufficiently reliable to guarantee a supply of water for watering the livestock of the plaintiffs on the riparian lands. The evidence is persuasive that that factual finding is correct. The evidence is also clear that even with the pipelines in operation, there is still not enough stream water at times to meet the

needs of both plaintiffs and defendants. On an appeal from a judgment in equity when credible evidence on material questions of fact is in conflict, the Supreme Court will consider the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the other. Marfisi v. Spagnola, 197 Neb. 211, 248 N. W. 2d 24.

The defendant Coffee contends that the evidence was insufficient to establish that any violations of closing orders by him were willful. The District Court found that although defendants had not made a good faith effort to comply with the injunction, the agreement for the delivery of water under the supervision of the Department of Water Resources foreclosed any consideration of contempt for acts other than violations of specific closing orders issued by the Department of Water Resources. It is apparent that the direct violation of specific closing orders without reason or explanation was willful. The evidence established eight separate violations of closing orders by the defendant, Bill B. Coffee, in substantial amounts and extending over a period of 5 years. The evidence supports the finding of the District Court.

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

AFFIRMED.

A R L CORPORATION, A NEBRASKA CORPORATION, ALSO KNOWN AS ALEX SPORTING & UNIFORMS, APPELLEE, V. ROBERT HROCH, DOING BUSINESS AS ASSOCIATED WRECKING AND SALVAGE COMPANY, ET AL., APPELLANTS.

268 N. W. 2d 101

Filed July 19, 1978. No. 41591.

1. **Trial: Instructions: Damages.** An issue as to the proper meas-

ure of damages may be raised by objecting to the instructions and tendering a requested instruction.

2. **Contracts: Damages.** Where defects in materials, construction, or workmanship are remediable without materially injuring or reconstructing any substantial portion of the building, the measure of damages is the cost of remedying the defects.

3. _____: _____. Where the defects can not be remedied without reconstruction of or material injury to a substantial portion of the building, the measure of damages is the difference between the value as constructed and the value if built according to the contract.

Appeal from the District Court for Douglas County: JOHN T. GRANT, Judge. Reversed and remanded with directions.

Ronald L. Eggers of Nelson & Eggers, for appellants.

Donald A. Roberts of Collins & Gleason, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, BRODKEY, and WHITE, JJ.

BOSLAUGH, J.

The plaintiff operates a sporting goods store in Omaha, Nebraska. On February 13, 1974, the plaintiff entered into a written contract with the defendant, Robert Hroch, doing business as "Associated Wrecking Company," for the demolition of two buildings on adjacent property on which the plaintiff planned to construct a parking lot. The agreement provided that the defendant would demolish the buildings down to 1 foot below grade, fill the basement with clean bricks, and "fill the premises with new dirt to street level in a manner and grade suitable for the asphalt paving of a parking lot thereon." The contract also required that the defendant fill in the openings in adjoining buildings but there is no dispute concerning these provisions of the contract.

The defendant completed its contract on or about

March 1, 1974. The property was surfaced with asphalt about 6 weeks later. About 1 month later the lot began to settle. This action was commenced on February 26, 1976. The plaintiff alleged that the defendant had breached the contract by "insufficiently filling said lot thereby causing the paving to settle and crack."

The jury returned a verdict for the plaintiff in the amount of $7,000. The defendant has appealed and contends the evidence does not support the verdict; that the trial court erred in receiving certain evidence; and that certain of the instructions were erroneous.

The plaintiff's theory of the case was that the defendant failed to remove all debris from the basement and did not fill the basement area with only clean bricks and new dirt. On January 27, 1977, the plaintiff had a test hole drilled in the lot near the place where the greatest settling had occurred. The engineer who drilled the test hole, Richard L. Donovan, testified that at a depth of 5 feet the drill encountered trash, tin cans, wire, and burnt wood. Another witness called by the plaintiff testified that the lot might continue to settle over a period of years, because of the debris in the basement, and that the only satisfactory repair would be to remove the fill completely and replace it with fill dirt at a cost of $7,500 to $8,000.

Robert Hroch, the president of the defendant, testified that the plaintiff decided to have the basement filled with bricks and dirt, rather than only dirt, because that method was less expensive. Hroch told the president of plaintiff that there would be some settling because the bricks were water-soaked and frozen at the time they were placed in the basement and recommended that the plaintiff surface the lot with crushed rock and wait until September or October before surfacing the lot with asphalt. The defendant produced evidence that satisfactory repairs

could be made by placing additional asphalt on the lot at a cost of approximately $2,200.

The evidence was in conflict and presented questions of fact for the jury as to why the settling had occurred. The evidence was sufficient to sustain a finding that the defendant had not filled the basement with clean bricks and dirt but had left up to 3 feet of debris in the basement which resulted in the settling.

The defendant objected to the testimony of Richard L. Donovan, the engineer who had drilled the test hole, on the ground that the evidence did not relate to any issue under the pleadings. The defendant contended the pleadings limited the issues to a question of whether sufficient dirt had been placed in the basement. The petition, which included the contract by reference, alleged the defendant had breached the contract by "insufficiently filling said lot." Although the petition was not a model of clarity, we think the allegations were sufficient to raise an issue as to whether the defendant had not filled the basement with clean bricks and dirt as required by the contract. The ruling on the objection was not erroneous.

The principal question on the appeal relates to the measure of damages. The plaintiff alleged that it would be required to repair and replace the work done by the defendant. The trial court instructed the jury that the measure of damages was the fair and reasonable cost of remedying the defect or defects. The defendant objected to this instruction and requested that the jury be instructed that the measure of damages was the difference in value between the parking lot as built and if built according to the contract specifications. The objection was overruled and the requested instruction was refused. This was sufficient to raise an issue as to the correct measure of damages. Beveridge v. Miller-Binder, Inc., 177 Neb. 734, 131 N. W. 2d 155.

Where defects in materials, construction, or workmanship are remediable without materially injuring or reconstructing any substantial portion of the building, the measure of damages is the cost of remedying the defects. But where the defects can not be remedied without reconstruction of or material injury to a substantial portion of the building, the measure of damages is the difference between the value as constructed and the value if built according to the contract. Jones v. Elliott, 172 Neb. 96, 108 N. W. 2d 742.

There was evidence in this case that the plaintiff was using the parking lot as constructed although it was defective because there had been some settling. The plaintiff's evidence was that the only satisfactory repair would be to remove the fill completely and replace it with fill dirt at a cost of $7,500 to $8,000. This would result in the destruction of a major part of the work done by the defendant and a reconstruction of its work. The evidence presented a jury question as to which measure of damages should apply.

The trial court erred in determining as a matter of law that the measure of damages was the cost of remedying the defects. The judgment is reversed and the cause remanded for a new trial on the issue of damages only.

REVERSED AND REMANDED WITH DIRECTIONS.

CLINTON, J., participating on briefs.

MARIAN G. PFLASTERER, APPELLEE, V. OMAHA NATIONAL BANK, EXECUTOR OF THE ESTATE OF THEODORE N. GANAROS, DECEASED, ET AL., APPELLEES, IMPLEADED WITH THEODORE N. GANAROS, JR., ET AL., APPELLANTS.

268 N. W. 2d 104

Filed July 19, 1978. No. 41592.

1. **Rules of Court: Hearings: Time.** It is a well-established principle that whether a proceeding be criminal or civil, the procedures and procedural rules to be applied are those which are in effect at the date of the hearing or proceeding and not those in effect when the act or violation is charged to have taken place.
2. **Contracts: Wills: Specific Performance.** Strictly speaking, there cannot be a decree for the specific performance of a contract to make a will, since such an instrument is, by its nature, revocable by the promisor during his life, and cannot be made by him after his death.
3. **Equity: Contracts: Wills: Trusts.** It has long been recognized that courts of equity may grant relief in a form that is usually equivalent to a decree of specific performance of a contract to leave property by will, after the death of the defaulting promisor, by fastening a trust upon his estate in the hands of those taking it with notice of such contract or by devise or descent.
4. **Equity: Jurisdiction.** Jurisdiction in the equity court in such cases does not rest upon any distinction between real estate and personal property, but rather upon the ground of the inadequacy of an action at law.
5. **Equity: Specific Performance.** Equity will grant specific performance of a parol agreement to leave property to another if it is proved by evidence convincing and satisfactory, and if it has been wholly performed by one party and its nonperformance would be a fraud on him.

Appeal from the District Court for Douglas County: JOHN C. BURKE, Judge. Affirmed.

Frank Meares, for appellants.

Robert D. Mullin of Boland, Mullin & Walsh, and Ben F. Shrier, for appellee Pflasterer.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

SPENCER, J.

This is an action for specific performance of an

oral contract to make a will, instituted in the District Court for Douglas County by Marian G. Pflasterer against the executor of the estate of her father, Theodore N. Ganaros, deceased, and the beneficiaries under decedent's probated will. The District Court determined plaintiff was entitled to specific performance and a trust was impressed upon the assets of the estate. Decedent's son and nephew, two of the beneficiaries under the will admitted to probate, appeal from this judgment. We affirm.

Decedent operated a restaurant and tavern in North Omaha for many years until he was forced to close the establishment in 1968, when the state acquired the property by eminent domain. In 1971, he purchased 1½ lots in North Omaha and began construction of a motel, a restaurant and lounge, and a package liquor store. Needing $150,000 to complete the project, decedent, in March 1971, contacted Dale Kruse, senior vice president of the North Side Bank, seeking a 15-year loan. Kruse was aware decedent was in his upper 70's, and informed him he doubted the bank, while interested, would be able to make the requested loan because of his age. Decedent then volunteered the information he intended to draw up a new will and mentioned he was making plaintiff the principal beneficiary. He offered to have plaintiff cosign the required promissory note. This matter was taken up with the loan committee which approved the loan if a cosigner, younger than decedent who would be a primary beneficiary of the estate, could be obtained.

Over objection, plaintiff was permitted to testify that her father approached her in March or early April 1971, and asked her to cosign a note for a loan he needed to complete the construction project. She refused his request on this occasion. Decedent broached the subject again in April, telling plaintiff he would make a will leaving "almost everything" to her if she would cosign the note. He also stated

plaintiff would be shown the will before she signed the note. Plaintiff agreed to be a cosigner in exchange for decedent's promise that he would not change the will at some future date.

On April 21, 1971, decedent executed a new will at the offices of the North Side Bank. This will bequeathed the sum of $1,000 each to three granddaughters, and established a spendthrift trust in the amount of $25,000 for decedent's son. The remainder of the estate was bequeathed to plaintiff, who was also named executrix and trustee.

On this same date, decedent signed an affidavit which had been prepared by the bank's attorney. The affidavit reads, in pertinent part, decedent "has been advised by the bank that due to his advanced age the bank would not consider making the loan except as it was reasonably assured that the person or persons who would be his principal beneficiary or beneficiaries under his estate were co-makers of the promissory note for said loan; that the affiant hereby undertakes to the North Side Bank that he will make no material change in the principal beneficiary or beneficiaries of his estate or reduce the proportionate share of said estate which will accrue to said principal beneficiary or beneficiaries under his last will and testament except as the North Side Bank has agreed to and approved of the same; that the affiant is aware that the representations made in this affidavit to the North Side Bank are material considerations in the granting of said loan and any breach in the representations made by affiant herein to the North Side Bank would constitute a breach in a material consideration given the bank in determining to make said loan."

Decedent directed plaintiff to go to the bank on April 23, 1971, for the purpose of cosigning the note. Prior to signing she carefully read the will and the affidavit. The note, signed by plaintiff and decedent, contains the following provision: "The indebt-

edness evidenced hereby shall become due and payable at once at the option of the payee if any change takes place in the ownership of the real estate hereinabove referred to, except upon the death of the owner of the above real estate; provided however, that if there is any material change in the distribution plan of Theodore N. Ganaros as shown by his present will dated April 21, 1971, then this note may become due and payable at once, at the option of the payee."

In February or March 1974, during a visit by plaintiff at the liquor store, decedent showed her an unsigned will he had recently had prepared. Plaintiff examined the will and determined it did not leave her "almost everything." She became furious and told her father it was a "dirty trick" and to take her name off the note. This conversation was substantiated by a liquor store employee. Plaintiff testified the subject of a new will was never mentioned again, and she did not learn that another will had in fact been executed until after decedent's death in April 1976.

The will admitted to probate was executed by decedent on October 4, 1974. Plaintiff's bequest under this will was reduced to a 30 percent share of a residuary trust, and a like share was given to decedent's son, one of the appellants herein. The other appellant, decedent's nephew, received all the capital stock in decedent's business. The Omaha National Bank was named as executor.

Plaintiff commenced this action in District Court approximately 3 months after her father's death. In its decree the court made the following findings: Plaintiff and decedent entered into a valid oral agreement; plaintiff fully performed her obligations under this agreement and this breach constituted a fraud upon plaintiff; and the will, dated April 21, 1971, relied upon by plaintiff, fixed decedent's obligation under the oral contract. The court held plain-

tiff was entitled to specific performance of the oral contract on the terms set forth in the will executed April 21, 1971. A trust was impressed upon the assets of the estate to give her the benefits of the will of April 21, 1971, and the executor was ordered to make an accounting.

Appellants contend the trial court erred in permitting plaintiff to testify concerning her conversations with decedent. They argue this testimony should have been excluded as incompetent under the dead man's statute, section 25-1202, R. R. S. 1943, notwithstanding the fact the statute was repealed prior to trial by Laws 1975, L.B. 279, § 75, p. 537. It is a well-established principle that whether a proceeding be criminal or civil, the procedures and procedural rules to be applied are those which are in effect at the date of the hearing or proceeding and not those in effect when the act or violation is charged to have taken place. State v. Shiffbauer, 197 Neb. 805, 251 N. W. 2d 359 (1977). It is obvious we are dealing with a procedural rule. There is no merit to appellants' contention.

Appellants inferentially challenge the authority of the District Court to impress a trust upon the assets of the estate after decedent's last will was admitted to probate. This contention was fully answered in Cox v. Johnston, 139 Neb. 223, 296 N. W. 883 (1941), where we stated: "Strictly speaking, there cannot be a decree for the specific performance of a contract to make a will, since such an instrument is, by its nature, revocable by the promisor during his life, and cannot be made by him after his death. It has long been recognized that courts of equity may grant relief in a form that is usually equivalent to a decree of specific performance of a contract to leave property by will, after the death of the defaulting promisor, by fastening a trust upon his estate in the hands of those taking it with notice of such contract or by devise or descent. Jurisdiction in the equity court in

such cases does not rest upon any distinction between real estate and personal property, but rather upon the ground of the inadequacy of an action at law."

Equity will grant specific performance of a parol agreement to leave property to another if it is proved by evidence convincing and satisfactory, and if it has been wholly performed by one party and its nonperformance would be a fraud on him. Dunmire v. Cool, 195 Neb. 247, 237 N. W. 2d 636 (1976).

The evidence in this case establishes beyond any doubt the existence of the oral contract upon the terms testified to by plaintiff. Her testimony is fully corroborated by decedent's written affidavit, the provision in the note, and the testimony of bank officials. Plaintiff is entitled to the specific performance of the contract in accordance with the terms of the will dated April 21, 1971.

The judgment of the District Court is in all respects correct and is affirmed.

AFFIRMED.

RASMUSSEN FARMS, A PARTNERSHIP, APPELLANT, V. ANNA GOVE ET AL., APPELLEES.

267 N. W. 2d 764

Filed July 19, 1978. No. 41597.

1. **Adverse Possession: Property.** One who claims title by adverse possession must prove by a preponderance of the evidence that he has been in actual, continuous, exclusive, notorious, and adverse possession under claim of ownership for a full period of 10 years.
2. **Equity: Witnesses: Evidence: Appeal and Error.** Equity cases are heard de novo by this court. In determining, however, the weight to be given the evidence, this court will consider the fact that the trial court observed the witnesses and their manner of testifying.

Appeal from the District Court for Howard County: DONALD H. WEAVER, Judge. Affirmed.

C. Patrick Shaughnessy, Jr., of Shaughnessy, Shaughnessy & Shaughnessy, for appellant.

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

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

SPENCER, J.

In this action, plaintiff seeks to establish legal title to 1.33 acres of farm land on the easterly boundary of the southeast quarter of Section 18, Township 16 North, Range 11 West of the 6th P.M., in Howard County, Nebraska. Plaintiff-appellant claims its predecessor in interest acquired title to the strip by adverse possession. This claim is denied by the defendants-appellees. The trial court found plaintiff had failed to establish adverse possession, and entered judgment for the defendants. We affirm.

Plaintiff, Rasmussen Farms, is a partnership comprised of Dean, Dennis, and Bob Rasmussen. Since 1965, it has been the record owner of a portion of the southwest quarter of Section 17, Township 16 North, Range 11 West of the 6th P.M., in Howard County. Defendants are the record owners of the east half of the southeast quarter and the south half of the northeast quarter of Section 18, Township 16 North, Range 11 West of the 6th P.M., in Howard County, which includes the disputed strip. This land has been in the defendants' family since 1890.

The properties of the parties abut for a distance of 1,458.6 feet along the section line, running north from the southeast corner of Section 18. The strip of land, 1.33 acres in area, is located to the west of this line in Section 18. This dispute arose when defendants attempted to build a private road upon this strip of land.

Plaintiff's claim to the strip of land is based upon a fence line which it contends was established in

1947, by its predecessor in title, Peter Rasmussen, no relation to the partners. The fence line may be described as consisting of three sections. Beginning in the south end, photographs show there are three old fence posts unconnected by wire. A survey conducted for plaintiff establishes that the corner post is 49 feet north of the southeast corner of Section 18, and 8.3 feet west of the section line. The northernmost post is 173 feet north of the section corner and 13 feet west of the section line. A row of trees begins about 500 feet north of this post and continues for another 500 feet. Some of the trees have barbed wire attached to them. The south end of the row of trees is 45 feet west of the section line and the north end is 69 feet west of the section line. The survey locates another fence post among the trees at a point 1,100 feet north of the section corner and 54.7 feet west of the section line.

A driveway runs along the north end of the trees and leads west to a farm house on defendants' property. It is from this driveway that defendants were attempting to construct a road south along the east side of the trees. To the north of the driveway is an enclosure made by newer fencing materials. The fence on the east side of the enclosure is about 250 feet in length. Its distance west of the section line varies from 60.1 feet on the south to 65 feet on the north. Plaintiff's north property line would intersect this fence at a point 1,458.6 feet north of the section corner and 61.6 feet west of the section line.

It is the contention of the plaintiff that the three old posts, the row of trees, and the fence on the east side of the enclosure form close to a straight line which marks the boundary between the properties. Plaintiff's theory of the case is that its predecessor in title, Peter Rasmussen, acquired the title to the strip of land to the east of the fence line by adverse possession in 1957.

Defendants' evidence would indicate the fence line

relied upon by plaintiff was never intended to divide the properties. Peter Rasmussen purchased the adjoining land in 1930, and removed the roadside fence located on it. In 1947, he caused the section line to be surveyed and again erected a fence directly on the section line. This fence was removed in 1965 by Dean Rasmussen after he had secured permission from David Ender to do so. Plaintiff at that time was a tenant on the defendants' farm and Dean Rasmussen was given permission to remove the fence so he could farm the extra 1.33 acres that lay between the east edge of the trees and the section line.

Defendants' evidence further indicates the fence line which ran through the trees has existed since prior to 1900, when a private road ran along the section line. Another fence stood on the east side of the road until it was removed by Peter Rasmussen previous to the 1947 survey. Peter Rasmussen, with his two brothers, purchased the property now owned by the plaintiff in 1930. He testified there was a north-south fence on the property at the time of purchase, which he relocated further west. He moved the fence again in 1947, after having the section line surveyed. Peter Rasmussen, who was 95, testified that the three fence posts shown in the photographs were part of the fence he erected in 1947. However, he was certain he and a surviving brother erected the fence on the survey line. He did remember there had been an old private road between his property and that of the defendants. He further testified that although the description of the property in the deed to plaintiff did not include the disputed strip of land, his intention was to convey all the property up to the fence line.

From 1954 to 1972, the plaintiff leased the defendants' property, and Dean Rasmussen moved into the Ender home place and physically farmed the Ender land. The plaintiff purchased the adjoining land from Peter Rasmussen in 1965. In 1972, defendants

did not renew the lease with the plaintiff and new tenants moved into the Ender place. Plaintiff continued to farm the disputed 1.33 acres for the next 4 years, until defendants attempted to put in a new road on the west edge of the section line.

Defendants' surveyor testified that the fence through the trees, in his opinion, was not placed according to a survey because it did not have any direction north and south as such. As noted heretofore, Peter Rasmussen testified that after he had the property surveyed in 1947, he put his fence on the survey line. He was asked if the surveyed land kind of split the old road. He answered in the affirmative. He took his fence down, had the land surveyed, and put a new fence in on the survey line.

Bob Rasmussen, who was one of the partners leasing defendants' land from 1954 to 1972, testified there was only one fence dividing the properties. Dean Rasmussen also testified there had been only one fence. Dennis Rasmussen testified that for as long as he could remember, since about 1947, there had only been one fence. The fence they remembered was the one which extended to a large tree located 2,460 feet north of the section corner and 117 feet west of the section line. Wilbur Leth, who picked up silage from plaintiff's property the past 20 years, and Harlan Wells, who hunted on the property for a period of 35 years, both testified they had observed only one fence, the remnants of which are those described by the plaintiff.

Ruth Ender Baker, one of the defendants, had lived on the farm with her parents from 1903 to 1923. She testified there was a fence on both sides of a road which ran along the east side of the trees, and led up to their farm house. David Ender, who was born on the farm in 1912, and lived there until 1923, also testified there was an old road and two fences. The west fence ran through the row of trees. He testified the road was abandoned because it became

impassable when water collected in low spots. Another road was built which ran directly south from the farm house. Defendants' reason for moving the road back to the section line was to permit the installation of an irrigation system on the property.

David Ender further testified that Peter Rasmussen removed the fence which had been on the east side of the old road. The fence, erected in 1947, ran down the center of the old road along what was supposed to be the section line as surveyed. In 1965, he gave permission to Dean Rasmussen to tear down this fence so the land which was between the two fences could be cultivated.

The trial court found Peter Rasmussen and his brother caused the property to be surveyed and staked on the section line in 1947, and that a fence was established on the section line which split the old road and remained in the same location until 1965, when Peter Rasmussen sold the land. The court further found that Peter Rasmussen and his tenant farmed only to the section line fence until 1965; that from 1954 to 1972, Dean Rasmussen, partner in the plaintiff partnership, was a lessee of the Ender property; and that in 1965, Dean Rasmussen recognized the Ender title to the disputed area in that he asked and received permission from David Ender to take down the fence in the road and farm to the trees. The trial court found plaintiff had not established open, notorious, adverse possession to the disputed premises for 10 or more consecutive years.

One who claims title by adverse possession must prove by a preponderance of the evidence that he has been in actual continuous, exclusive, notorious, and adverse possession under claim of ownership for a full period of 10 years. Barnes v. Milligan, 200 Neb. 450, 264 N. W. 2d 186 (1978). We do not believe that plaintiff met this burden.

As is evident from the recitation of testimony,

there is an irreconcilable conflict in the evidence. The decision depends entirely upon which version of the facts is accepted. We said in Bailey v. Mahr, 199 Neb. 29, 255 N. W. 2d 866 (1977): "Equity cases are heard de novo by this court. In determining, however, the weight to be given the evidence, this court will consider the fact that the trial court observed the witnesses and their manner of testifying."

It is evident the trial court accepted the defendants' version of the facts. The trial court is in a much better position than this court, which must rely on a cold record, to resolve a dispute based upon conflicting testimony. The demeanor of the witnesses and the myriad nuances in their manner of testifying may make a decided difference as to what testimony should or should not be accepted by the trier of fact. On the record before us, we cannot say the trial court erred in reaching the conclusion he did on the facts.

Plaintiff leased the Ender property from 1954 to 1972. Dean Rasmussen, one of the plaintiff partners, actually lived on the Ender farm during that period. There is a direct conflict between his testimony and that of David Ender as to the removal of the 1947 fence, which is very material herein.

In our view of the record, plaintiff is claiming the disputed strip strictly as the grantee of Peter Rasmussen, on the theory that his adverse possession had ripened by 1957. The property was conveyed to plaintiff in 1965. The testimony of David Ender about giving permission to Dean Rasmussen is material in that it would indicate plaintiff did not make this same claim in 1965.

In attempting to harmonize the testimony from the cold record, we agree with the trial court, there had been two fences, one east and one west of the old road. The east fence, which the Ender children testified was on their side of the road, was located

wholly on their property. There is no evidence it was ever intended to be a boundary line fence. The trial court could have assumed this fence was in such a deteriorated condition by the early 1950's it could account for the testimony of plaintiff's witnesses that there was only one fence, the one built in 1947 by Peter Rasmussen. It is the location of that fence which is controlling herein.

If we accept the testimony of David Ender, the fence which witnesses for plaintiff remember had to be the section line fence erected in 1947 by Peter Rasmussen. This was the fence Peter Rasmussen testified he erected on the section line. If it was erected on the section line it could not possibly be the one plaintiff is now trying to establish as a boundary line.

We see no reason to disturb the fact findings made by the trial court. The judgment of the trial court is affirmed.

AFFIRMED.

ROY B. FISHER, APPELLANT, V. CHARLES S. STUCKEY ET AL., APPELLEES.

267 N. W. 2d 768

Filed July 19, 1978. No. 41608.

1. **Summary Judgments.** The moving party is not entitled to summary judgment except where there exists no genuine issue as to any material fact in the case and where under the facts he is entitled to judgment as a matter of law.
2. _____. The issue on a motion for summary judgment is whether or not there is a genuine issue as to any material fact, and not how that issue should be determined.
3. **Leases: Landlord and Tenant.** Where lands are leased to a tenant for 1 year for a stipulated rent reserved, and after the expiration of the lease the tenant, without further contract, remains in possession and is recognized as a tenant by the landlord in the receipt of rent for another year, this will create a tenancy from year-to-year.
4. _____: _____. A tenancy can be terminated by agreement of the parties, express or implied, or by notice given, 6 calendar months

ending with the period of the year at which the tenancy commenced.

5. **Leases: Landlord and Tenant: Crops.** Ordinarily a tenant in possession under an oral year-to-year lease, without an agreement concerning way-going crops, is not entitled to such crops if he had notice of the termination date of the lease before he planted the crops.
6. **Pleadings: Customs and Usages: Contracts.** It is ordinarily incumbent upon one who relies on a special custom as a basis of recovery or defense to allege the custom and to plead and prove the other party had knowledge of the custom and contracted with reference thereto.

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

Jess C. Nielsen of Crosby & Nielsen, for appellant.

C. Kenneth Spady and William P. Mueller of McGinley, Lane, Mueller, Shanahan & McQuillan, and Baskins & Rowlands, for appellees.

Heard before WHITE, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ., and FAHRNBRUCH, District Judge.

BRODKEY, J.

The issue presented in this case is whether a tenant was entitled to harvest crops which he planted on leased farm land before his lease expired, but which had not matured on the date the lease expired, at which time possession of the land was given to a successor tenant. Roy B. Fisher, the tenant, filed this action against Charles S. and Frank R. Stuckey, the landlords, and Douglas Welch, the successor tenant, alleging the defendants had deprived him of his interest in a wheat crop he had planted before his lease expired, by destroying the growing crop shortly after his leasehold terminated and Welch had taken possession of the land. Defendants denied Fisher had any interest in the crop. Frank R. Stuckey died while the case was pending in the District Court, and the action against him was revived

against the personal representative of his estate. Defendants moved for summary judgment, which motions were granted by the trial court. Fisher has appealed to this court, contending that the trial court erred in sustaining defendants' motions for summary judgment because there were genuine issues of material fact existing in this case.

The facts relevant to this appeal are as follows. The farm land in question is located in Lincoln County, Nebraska, and was formerly owned by Virginia Lucy Barrett, deceased, an aunt of the Stuckeys. In 1957 Fisher, as tenant, entered into a written, 1-year lease of the land with the estate of Virginia Lucy Barrett, pursuant to which he was entitled to possession from March 1, 1957, until February 28, 1958, and which lease by its own terms expired on the latter date. Fisher agreed to pay as rent one-third of the crops grown on the land plus the sum of $250. Three provisions pertinent to this appeal were contained in the written lease:

"4. * * * any summer fallow of any part of said leased premises shall under no consideration be considered as part performance for the creation of any new lease * * *.

"10. No action of either party hereto shall be considered an extension of this lease, nor will any extension of time be binding upon either party unless made in writing and signed by all of the parties hereto.

"14. Second party [lessee] is to retain possession of ground summer fallowed by him until the crops planted by said second party be harvested."

Although Fisher continued to lease the land from 1957 until March 1, 1973, he executed no written lease other than the one described above. In 1959, Frank and Charles Stuckey took possession of the land, having inherited it from Virginia Lucy Barrett. In his deposition, Charles testified that he was not aware of the written lease until 1972. He also testi-

fied that the Stuckeys had leased the land to Fisher under oral, year-to-year leases, which ran from March 1st to March 1st. Fisher acknowledged he had never executed a written lease with the Stuckeys or extended the 1957 lease in writing. Fisher could not recall discussing the 1957 lease with the Stuckeys.

In February 1972, Charles Stuckey decided to combine the land he leased to Fisher with other land he owned for the purpose of enhancing benefits under ASCS (Agricultural Stabilization and Conservation Service) programs. Charles Stuckey testified he wrote Fisher on February 26, 1972, advising him that he was requesting Douglas Welch, who leased the other land, to consider assuming the responsibility for the combination. He also testified that in early March 1972, he orally advised Fisher that Fisher's tenancy would expire on March 1, 1973, and that Fisher should not summer-fallow and plant crops in the fall of 1972. Subsequently Fisher and Stuckey entered into negotiations concerning use of the leased premises in 1972, but no agreement between them was ever reached.

However, it is undisputed that in August 1972, Stuckey sent Fisher three written notices to terminate Fisher's lease. Fisher acknowledged receiving notices which advised Fisher that his lease would terminate on March 1, 1973; that Fisher would not be permitted to reenter the premises after that date for any reason whatsoever; and that any crops planted before March 1, 1973, but not matured as of that date, would be planted at Fisher's risk and Fisher would not be permitted to reenter the premises to harvest such crops. Fisher received these notices in August 1972, but chose to plant a crop of wheat subsequent to receiving them, knowing that the crop would not mature until June 1973.

On September 6, 1972, Stuckey and Welch executed a 2-year written lease of the land running from March 1, 1973, until March 1, 1975. On March 1,

1973, Welch took possession of the premises. A short time later he destroyed the wheat crop Fisher had planted by tilling the soil and planting milo in its stead. Charles Stuckey testified in his deposition that he was unaware of Welch's plans, and did not learn of the destruction of the wheat crop until after it occurred. Fisher confronted Welch, but was advised that Fisher had no interest in the land or wheat because his lease had expired. This action ensued.

The central issue in this appeal is whether summary judgment was properly granted to the defendants on the facts presented. This necessitates an examination of the rules applicable to summary judgments. It is well-established in this jurisdiction that the moving party is not entitled to summary judgment except where there exists no genuine issue as to any material fact in the case and where under the facts the movant is entitled to judgment as a matter of law. The issue on a motion for summary judgment is whether or not there is a genuine issue as to any material fact, and not how that issue should be determined. In considering such a motion, the trial court must take that view of the evidence most favorable to the party against whom summary judgment is directed, giving to that party the benefit of all favorable inferences that may reasonably be drawn from the evidence. Reeves v. Associates Financial Services Co., Inc., 197 Neb. 107, 247 N. W. 2d 434 (1976); Green v. Village of Terrytown, 189 Neb. 615, 204 N. W. 2d 152 (1973). Summary judgment is not appropriate even where there are no conflicting evidentiary facts if the ultimate inferences to be drawn from those facts are not clear. Barnes v. Milligan, 196 Neb. 50, 241 N. W. 2d 508 (1976). These rules, of course, must be applied to this case.

The principal issues raised in this appeal are (1) the nature of the lease under which the plaintiff was in possession of the premises in question, that is

whether it was a written lease or an oral lease, and the terms thereof; (2) whether proper legal notice was given to terminate such lease; (3) whether the defendants' subsequent lease to the new tenant, Douglas Welch, was subject to the right of the plaintiff to harvest the wheat planted by him; and (4) whether the plaintiff was entitled to rely upon the custom in the community as to leasing, seeding, and harvesting summer-fallowed ground and way-going crops in the absence of a showing in the record that plaintiff pled that issue or introduced any evidence in support thereof. A further issue raised by plaintiff, but not strongly pressed by him, is whether the defendants were guilty of a civil conspiracy against him.

An examination of the record before us convinces us that the trial court was correct in sustaining the motions of the defendants for summary judgment, and we affirm its order to that effect.

The evidence is undisputed that the plaintiff was in continuous possession of the premises in question as a tenant from 1957 until 1973, when the new tenant, Douglas Welch, took possession, and farmed the property during that entire period. The only written lease involved herein was the one under which he originally went into possession in 1957, which lease was executed by the executor of the estate of Virginia Lucy Barrett, who was the aunt of Charles Stuckey and Frank Stuckey, who inherited the land from her. The estate was closed in 1960. As previously stated, the original written lease was for a term of 1 year to commence on March 1, 1957, and end on February 28, 1958. The lease specifically provided that no extension of time would be binding upon either party unless made in writing and signed by all the parties thereto. It also provided that the lessee, Roy B. Fisher, was to retain possession of ground summer-fallowed by him until the crops planted by him were harvested. The evidence is un-

contradicted that there were no extensions of the written lease in writing thereafter, to and including the year 1973. Plaintiff contends that Charles and Frank Stuckey, the only heirs of Virginia Lucy Barrett, by words and actions ratified the original written lease, and that he was a hold-over tenant on the same terms, conditions, and provisions contained in the original written lease, including the provision entitling him to retain possession of ground summerfallowed by him until the crops planted by him were harvested. We find this argument to be without merit, as it ignores the specific provision in the 1957 written lease requiring any extensions thereof be in writing and signed by all the parties. This was not done. We conclude, therefore, that defendants are correct in their contention that plaintiff's possession of the premises subsequent to the 1957 written lease, was as a year-to-year tenant. It has long been the law in this jurisdiction that where lands are leased to a tenant for 1 year for a stipulated rent reserved, and after the expiration of the lease the tenant, without further contract, remains in possession, and is recognized as a tenant by the landlord in the receipt of rent for another year, this will create a tenancy from year-to-year; and in such case the tenancy can only be terminated by an agreement of the parties, express or implied or by notice given, 6 calendar months ending with the period of the year at which the tenancy commenced. Critchfield v. Remaley, 21 Neb. 178, 31 N. W. 687 (1887). See, also, Barnes v. Davitt, 160 Neb. 595, at p. 598, 71 N. W. 2d 107 (1955). In his deposition received in evidence at the hearing on summary judgment, defendant Charles Stuckey testified that Fisher farmed from him under an oral lease, a conventional oral lease. He was asked to state what the terms of that oral lease were and he replied: "Well, that oral lease consisted of the crop shares, a two-thirds to the tenant of the grains, one-third to the landlord, the same proportion of ex-

pense, fertilizer, and cash rent for pasture which was orally negotiated from time to time." Nothing is stated therein with reference to any right of the tenant to enter after the termination of his tenancy and harvest crops previously planted by him.

We now consider the question of whether plaintiff's oral year-to-year lease was properly and legally terminated. Defendant, Charles Stuckey testified that Fisher had both official and unofficial notification of the termination of his current oral lease as of March 1, 1973. He testified that the unofficial notification was by a letter dated February 26, 1972, to the plaintiff and also by subsequent oral conversations. The letter referred to, received in evidence, is subject to interpretation, and it is doubtful whether it, in fact, gave plaintiff notice that his tenancy was to be terminated. The evidence, however, is uncontradicted that plaintiff received three formal legal notices of termination, dated August 8, 1972, August 21, 1972, and August 28, 1972, all of which were within the requisite 6-month period. The last of the three notices referred to made particular reference to the effect that if Fisher planted any crop on the premises which matured after March 1, 1973, he would be planting such crop at his own risk and he would not be permitted to enter the premises for the purpose of harvesting such crop after March 1, 1973. In his deposition, plaintiff, Roy B. Fisher, admitted being told by the defendant he was not to summer-fallow or plant in the fall of 1972. He testified as follows: "Q. Was there anything after receipt of this letter [letter of February 26, 1972] saying that you were not to summer fallow in '72? A. Yes. Q. Was there anything said that you were not to plant during '72?. A. That's right, they said I wasn't to plant. Q. And, you're not to summer fallow; correct? A. Right." It is clear that Fisher received the written notices terminating his tenancy in August 1972, but chose to plant a crop of wheat subsequent to receiv-

ing them, knowing that the crop would not mature until 1973, and also knowing that he had been previously directed and warned not to summer-fallow in 1972.

We believe the facts of this case are analogous to and governed by Peterson v. Vak, 160 Neb. 450, 70 N. W. 2d 436, (1955), as modified, 160 Neb. 708, 71 N. W. 2d 186 (1955), hereinafter referred to as Peterson (1955). See, also, Peterson v. Vak, 169 Neb. 441, 100 N. W. 2d 44 (1959), hereinafter referred to as Peterson (1959). In Peterson (1955), the tenant possessed land by virtue of an oral lease which ran from March 1st to March 1st, and was a tenant from year-to-year from 1918 until March 1, 1952. In August 1951, the landlord served a written notice on the tenant terminating his tenancy as of March 1, 1952. The landlord then entered into a lease with a successor tenant, said lease commencing on March 1, 1952. The tenant disregarded the notice given him in August 1951, and planted wheat in September 1951. In 1952, after his lease had expired, the tenant claimed the right to reenter the land to harvest the wheat. The successor tenant brought an action to bar the tenant from claiming any interest in the wheat.

This court found that the tenant "had an absolute right to till, plant wheat, and use the land until March 1, 1952, but he was charged with knowledge that his status in reference to it would on that date completely and finally terminate and any crop planted that did not mature or was not disposed of by him before that date would be his loss." The court relied on Vance v. Henderson, 141 Neb. 766, 4 N. W. 2d 833 (1942), and Fenster v. Isley, 143 Neb. 888, 11 N. W. 2d 822 (1943), cases with similar facts holding that a tenant from year-to-year is not entitled to reenter the premises after his lease expires to harvest crops planted before his lease expired when he was on notice of the date the tenancy would expire before he planted the crops. The rule in Pe-

terson (1955) was reaffirmed in Peterson (1959). In the present case, the defendants rely on Peterson (1955) as controlling.

Fisher relies on Schuler-Olsen Ranches, Inc. v. Garvin, 197 Neb. 746, 250 N. W. 2d 906 (1977), (hereinafter referred to as Schuler-Olsen). In that case the tenant had a 3-year, written lease which was to terminate on March 1, 1974, and which contained no provision concerning the possession of crops planted during the lease term but not ready for harvest when the lease expired. The tenant planted wheat in the fall of 1973. In October 1973, the landlord contracted to sell the land to a third party, after negotiations to sell the land to the tenant had failed in September 1973. There was evidence that during those negotiations the landlord assured the tenant that the tenant was entitled to his share of the wheat he had planted. When the wheat was ready for harvest in July 1974, a dispute arose between the tenant and the new owner concerning possession of the wheat.

In Schuler-Olsen, in addition to the evidence that the landlord had agreed with the tenant that the tenant was entitled to his share of the wheat, there was evidence that the custom in the area was that a tenant was entitled to harvest wheat which he summer-fallowed and planted, even though the lease would expire before it was ready for harvest. This court concluded that there was sufficient evidence to support the District Court finding that under the lease agreement, and under customary farm practices, the tenant was entitled to his share of the wheat. This court did not cite or discuss either of the Peterson cases in its opinion and did not purport to alter the rule of those two cases.

Fisher argues that this court in effect modified Peterson (1955) when it decided Schuler-Olsen. We do not believe it did in view of the fact that Peterson (1955) involved a written lease and there was no

claim by the tenant that he was entitled to the way-going crops pursuant to an oral agreement of the parties. In Schuler-Olsen the tenant did contend, although the written lease was silent on the issue, that he was entitled to the crops under the lease as well as under custom. Schuler-Olsen merely holds that where the written lease agreement is silent on the issue of way-going crops, a party may be entitled to prove whether the parties nevertheless had an agreement concerning such crops or whether they contracted with a community custom in mind. Peterson (1955) does not reach those issues.

Fisher contends that a trial is necessary to determine whether the parties relied on custom, and whether under custom Fisher is entitled to the way-going crops. "It is ordinarily incumbent upon one who relies on a special custom as a basis of recovery or defense to allege the custom and to plead and prove the other party had knowledge of the custom and contracted with reference thereto." Timmerman v. Hertz, 195 Neb. 237, 238 N. W. 2d 220 (1976). In the present case, Fisher did not allege the custom on which he relies, nor did he plead that the Stuckeys had knowledge of the custom and contracted with reference thereto. In view of this fact, we conclude that Fisher has failed to properly raise the issue of custom in this case, and reject his contention that a trial is necessary to resolve the custom issue.

We have examined the other assignments of error and issues of the plaintiff in this appeal, including his contention as to the existence of a civil conspiracy by the defendants against the plaintiff, and find them to be without merit. We conclude that under the facts of this case, as revealed by the record, and the applicable law, that the trial court was correct in entering summary judgment for the defendants, and that the judgment of the trial court should be, and hereby is affirmed.

AFFIRMED.

BOSLAUGH, J., concurs in the result.

MIDWEST FRANCHISE CORPORATION, A CORPORATION, APPELLANT, V. ROBERT J. WAKIN, APPELLEE.

268 N. W. 2d 737

Filed July 19, 1978. No. 41611.

1. **Judgments: Res Judicata.** A judgment on the merits, rendered in a former suit between the same parties or their privies, on the same cause of action, by a court of competent jurisdiction, operates as a bar not only as to every matter which was offered and received to sustain or defeat the claim, but as to every other matter which might with propriety have been litigated and determined in that action.
2. **Judgments: Res Judicata: Evidence.** A judgment is not pleadable in bar of a second action unless it is founded on the same identical or substantially identical cause of action, and within this rule the commonly applied test of identity is whether the same evidence would sustain both suits.
3. **Res Judicata: Parties: Privity.** In order for a previous action to act as res judicata to a present action, the parties to the present action must be identical to or in privity with the parties in the previous action.
4. **Judgments: Parties: Privity.** Privity depends upon the relation of the parties to the subject matter. Privity implies a relationship by succession or representation between the party to the second action and the party to the prior action in respect to the right adjudicated in the first action.
5. **Judgments: Stockholders: Privity.** As a general rule, a stockholder is so in privity with, and represented by, the corporation that he is bound by a judgment for or against the corporation insofar as it deals in corporate rights and liabilities and affects the stockholders as a body, where it was not obtained by fraud or collusion, but he is not bound with respect to individual rights and liabilities or rights and liabilities which are not common to all the stockholders.

Appeal from the District Court for Douglas County: THEODORE L. RICHLING, Judge. Affirmed.

Frank Meares, for appellant.

David A. Johnson, Ronald H. Stave, and Lee H. Hamann, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

WHITE, C. J.

In this action, plaintiff seeks to recover from the defendant the sum of $20,800. In its amended petition plaintiff alleged the following: That it is a corporation doing business in Nebraska and that defendant is a resident of Douglas County, Nebraska; that plaintiff had filed a previous action in the District Court for Douglas County, Docket 675, No. 287; that the District Court had entered a judgment in that action prohibiting the officers, directors, and shareholders of the M. T. S. Corporation from being directly or indirectly engaged or financially interested in the low-cost steak dinner restaurant business within a radius of 25 miles from the location where the Bonanza Sirloin Pit was established in Council Bluffs, Iowa, and prohibiting the officers, directors, and shareholders, for a period of 2 years from the date of termination of the franchise agreement between plaintiff and M. T. S. Corporation from engaging, directly or indirectly, in the low-cost steak dinner restaurant business anywhere in the United States without the express consent of Bonanza International; that on May 17, 1974, the officers, directors, and shareholders of the M. T. S. Corporation were the defendant Robert J. Wakin; that Robert J. Wakin, being the shareholder, director, and officer of M. T. S. Corporation, had violated the previous judgment of the District Court by engaging in a low-cost steak dinner restaurant business within a radius of 25 miles from the Bonanza Sirloin Pit location in Council Bluffs; and that as a result of defendant's violation of the court's judgment, plaintiff was damaged in the sum of $20,800 in nonpayment of royalties.

Defendant filed a motion to dismiss plaintiff's petition which the District Court sustained. The court specifically found: (1) That the judgment rendered in the action entitled Midwest Franchise Corporation v. M. T. S. Corporation in the District Court for

Douglas County, Docket 675, No. 287, was res judicata to plaintiff's right to bring the present action, (2) that the amendment to judgment dated June 2, 1976 (in the action at Docket 675, No. 287), by which the court declared that the officers, directors, and shareholders of M. T. S. Corporation should not in any capacity, directly or indirectly, be engaged or financially interested in the low-cost steak dinner restaurant business within a radius of 25 miles from the location where Bonanza Sirloin Pit was established in Council Bluffs was null and void because it constituted an injunction which operated retrospectively instead of prospectively; and (3) that the defendant Robert J. Wakin was not bound by the amendment to judgment because he was not a party to the previous action. Plaintiff appeals from the sustaining of defendant's motion to dismiss. We affirm the judgment of the District Court.

Included in the record is a complete copy of the transcript of the proceedings at Docket 675, No. 287. In that action plaintiff sued Robert J. Wakin and M. T. S. Corporation for a declaratory judgment. Attached to its petition was a copy of a Bonanza Sirloin Pit license agreement between plaintiff and M. T. S. Corporation. Plaintiff in its petition stated "that the Court should construe the contract and enter judgment for the amount due for royalties in light of the interpretation made of the contract relative to royalty payments due, the nature and extent and duration thereof." That action was filed on May 15, 1974.

Plaintiff's petition in that action, as originally filed, alleged that Robert J. Wakin was the sole shareholder, principal director, officer, and policymaker of M. T. S. Corporation, and that the corporation was an extension of Robert J. Wakin individually, his alter ego, agent, and servant, and asked that the corporate veil be pierced and that Robert J. Wakin be held individually and jointly lia-

ble with M. T. S. Corporation on the judgment. Defendants filed a motion to make more definite and certain, asking the court to strike plaintiff's allegations that M. T. S. Corporation was the alter ego of Robert J. Wakin and generally to strike all references to Robert J. Wakin individually in the petition. The District Court treated this motion as a demurrer, and, after having examined briefs on the issue submitted by both sides, granted the motion. Plaintiff subsequently filed an amended petition with Robert J. Wakin deleted as a party.

On March 19, 1976, the District Court entered its judgment finding that the effective date of termination of the license agreement was May 17, 1974, and that royalty payments were due the plaintiff for the period February 26, 1974, to July 17, 1975, together with interest, in the sum of $5,496.17. M. T. S. Corporation was enjoined from using any trade names, et cetera, indicative of "Bonanza Sirloin Pit" and was directed to remove a black bull from its building. On June 2, 1976, the court filed its amendment to judgment referred to previously. Plaintiff filed an appeal in this action with this court but appeared and voluntarily dismissed its appeal. The mandate of this court, dismissing the appeal, was entered on August 5, 1976. This action was filed on August 19, 1976.

In Niklaus v. Phoenix Indemnity Co. of New York, 166 Neb. 438, 89 N. W. 2d 258 (1958), we held: " 'All matters in issue in a former action and judicially determined are conclusively put at rest by a judgment therein and may not again be litigated in a subsequent action.' " In 50 C. J. S., Judgments, § 657, p. 102, it is stated: "A judgment on the merits, rendered in a former suit between the same parties or their privies, on the same cause of action, by a court of competent jurisdiction, operates as a bar not only as to every matter which was offered and received to sustain or defeat the claim, but as to every other

matter which might with propriety have been litigated and determined in that action." See, also, Wischmann v. Raikes, 168 Neb. 728, 97 N. W. 2d 551 (1959); Webber v. City of Scottbluff, 155 Neb. 60, 50 N. W. 2d 541 (1951).

"A judgment is not pleadable in bar of a second action unless it is founded on the same identical or substantially identical cause of action, and within this rule the commonly applied test of identity is whether the same evidence would sustain both suits." 50 C. J. S., Judgments, § 648, p. 82. See, also, State ex rel. Weasmer v. Manpower of Omaha, Inc., 163 Neb. 529, 80 N. W. 2d 580 (1957).

In order for a previous action to act as res judicata to a present action, the parties to the present action must be identical to or in privity with the parties in the previous action. In Schurman v. Pegau, 136 Neb. 628, 286 N. W. 921 (1939), we noted: " 'Privity depends upon the relation of the parties to the subject matter, * * *. Privity implies a relationship by succession or representation between the party to the second action and the party to the prior action in respect to the right adjudicated in the first action.' " In 50 C. J. S., Judgments, § 794, p. 331, the authors state: "As a general rule, a stockholder is so in privity with, and represented by, the corporation that he is bound by a judgment for or against the corporation in so far as it deals in corporate rights and liabilities and affects the stockholders as a body, where it was not obtained by fraud or collusion; but he is not bound with respect to individual rights and liabilities or rights and liabilities which are not common to all the stockholders."

Application of the above-cited principles to the facts in this case conclusively demonstrates that the District Court correctly concluded that the previous action, Midwest Franchise Corp. v. M. T. S. Corp., Docket 675, No. 287, was res judicata as to plaintiff's present action.

Defendant, Robert J. Wakin, as a shareholder, officer, and director of M. T. S. Corporation is in privity with that corporation, defendant in the previous action. Plaintiff's present cause of action is based upon the identical factual situation as the previous action; namely, the operation of a low-cost steak dinner restaurant in alleged violation of a franchise agreement between plaintiff and M. T. S. Corporation. In the previous action plaintiff originally named Robert J. Wakin as an individual defendant, but he was dismissed as a party from the action. Plaintiff voluntarily dismissed its appeal in that action.

The District Court also correctly determined that the amendment to judgment dated June 2, 1976, in the previous action was ineffective as to Robert J. Wakin, individually. Wakin was not named as a defendant in plaintiff's amended petition upon which the case was tried and judgment entered, having been dismissed from the action previously.

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

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. BOBBY J. DEDMOND, APPELLANT.

267 N. W. 2d 774

Filed July 19, 1978. No. 41773.

Motor Vehicles: Licenses and Permits: Evidence: Judgments. An authenticated record of a prior judgment ordering the suspension of a motor vehicle operator's license of a defendant with the same name is prima facie sufficient to establish identity in a prosecution for operating a motor vehicle during a period of suspension of an operator's license, in the absence of any contradictory evidence.

Appeal from the District Court for Douglas County: RUDOLPH TESAR, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Daniel K. Powers, for appellant.

Paul L. Douglas, Attorney General, Gary P. Buchino, and Richard M. Jones, for appellee.

Heard before WHITE, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ., and HASTINGS, District Judge.

MCCOWN, J.

The defendant was found guilty in the municipal court of Omaha of operating a motor vehicle during a period in which his operator's license was suspended, second offense. He received the mandatory sentence of 6 months imprisonment in the county jail, and his operator's license was ordered suspended for a period of 2 years. The conviction was affirmed by the District Court for Douglas County on appeal, and the defendant has appealed to this court.

The defendant was arrested on July 29, 1976, in Omaha, Nebraska, and charged with operating a motor vehicle during a period of license suspension, second offense. He was released on his own recognizance, failed to appear for trial on August 24, 1976, and an arrest warrant was issued, but was not executed until August 2, 1977. He was tried in the municipal court in September 1977.

The complaint for the offense of July 29, 1976, named the defendant as Bobby J. Dedmond, and the defendant signed all documents executed by him in that name up to and including his appeal to the District Court. At the trial the prosecution offered into evidence copies of suspension orders of the Department of Motor Vehicles. The court sustained defendant's objections to admission of the documents because they were not signed or certified. Exhibit 3 was then introduced and received in evidence. Exhibit 3 is a duly certified and authenticated copy of a judgment of the municipal court of Omaha. It shows

that Bob J. Dedmond was found guilty of operating a motor vehicle during a period of license suspension, second offense, on October 3, 1975; that he was sentenced to 180 days in the county jail; and that his operator's license was ordered suspended for a period of 2 years from the time of his discharge from custody. It also shows that he was committed to jail until sentence was satisfied.

The sole contention on appeal is that exhibit 3 was insufficient to prove beyond a reasonable doubt that the operator's license of the defendant was suspended on July 29, 1976.

The defendant's contention is virtually foreclosed by the case of State v. Applegarth, 196 Neb. 773, 246 N. W. 2d 216. In that case we held that an authenticated record certifying the suspension of an operator's driving privilege is prima facie sufficient to establish identity for a person with the same name in the absence of any denial or contradictory evidence. Under the circumstances here, it borders on the frivolous to contend that a nickname such as "Bob" and its diminutive "Bobby" constitutes a variance sufficient to raise a reasonable doubt that an individual designated by one of those nicknames is not the same individual as one designated by the other nickname, when both have the identical middle initial and surname. The surname Dedmond is not a usual or common name and there is no indication of any unusual factors on the issue of identity. Neither is there anything to contradict the evidence of identity in exhibit 3.

Technically speaking, the judgment orders the suspension of an operator's license, and the order of suspension is executed by the Director of Motor Vehicles. The defendant asserts that there is no proof that the judgment was not appealed from, or was officially executed and carried out. The action of the Director of Motor Vehicles is a purely ministerial act. See Lutjemeyer v. Dennis, 186 Neb. 46, 180 N.

W. 2d 679. There is also a presumption that officials will carry out their official duties. There is no intimation anywhere in the record that the judgment shown by exhibit 3 was not executed and carried out in accordance with its terms. It is obvious that verification by a witness on the issue of identity is preferable. Careful handling and presentation of the evidence would have avoided the problem here. Nevertheless, the record supports a holding that an authenticated record of a prior judgment ordering the suspension of a motor vehicle operator's license of a defendant with the same name is prima facie sufficient to establish identity in a prosecution for operating a motor vehicle during a period of suspension of an operator's license, in the absence of any contradictory evidence. See State v. Mullis, 81 Wis. 2d 454, 260 N. W. 2d 696.

The judgment of the District Court is affirmed.

AFFIRMED.

FRANK B. LIENEMANN ET AL., APPELLANTS, IMPLEADED WITH GEORGE LIENEMANN, APPELLEE, V. HERMAN LIENEMANN ET AL., APPELLANTS, IMPLEADED WITH ROSE LIENEMANN ET AL., APPELLEES.

268 N. W. 2d 108

Filed July 19, 1978. No. 41851.

1. **Partition: Attorney's Fees: Referee's Fees.** In a partition action, attorney's fees and reasonable referee's fees shall be taxed as costs in the proceedings.
2. **Partition: Attorney's Fees.** Attorneys for the plaintiff in a partition action shall be entitled to all awarded fees where the shares conferred by the judgment, and all encumbrances acted upon by plaintiff, are accurately pleaded in his original petition.
3. _____: _____. Fees shall be divided among the attorneys of record who shall have filed pleadings upon which any of the findings in a judgment of partition are based.
4. **Leases: Leasehold Improvements: Property.** Improvements made while a party is in possession of premises under a lease which does not grant the right of reimbursement are not reimburs-

able to him. The general rule that improvements which become a part of the real estate may not be removed and do not become the property of the lessee is applicable in the absence of agreement, express or implied, or a statute indicating otherwise.

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

Dixon G. Adams, for appellants Frank Lienemann et al.

Jeffrey B. Farnham, for appellants Herman Lienemann et al.

L. J. Tierney and T. J. Stouffer of Cassem, Tierney, Adams, Gotch & Douglas, for appellee George Lienemann.

E. Dean Hascall, referee, pro se.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

WHITE, C. THOMAS, J.

This is the second appearance of this case before this court. In Lienemann v. Lienemann, 197 Neb. 449, 249 N. W. 2d 902, this court held that the District Court for Sarpy County was without jurisdiction after final adjournment of a term to vacate its original order.

The original order determined that a trust had been terminated, directed partition, and appointed a referee. A mandate was issued directing the District Court for Sarpy County to proceed in accordance with the opinion.

A sale previously having been held and confirmed and no objection having been made to the terms of, or the price received at, the sale, there remained a number of matters for the District Court to determine. They are as follows: (1) The application of plaintiff-appellee George Lienemann for reimbursement for improvements allegedly made to the sub-

ject land during the time of his occupancy; (2) the application of the defendant-appellant Herman Lienemann for an accounting of rents allegedly due from the persons who had occupied the premises, Frank and George Lienemann; (3) the application of plaintiff-appellant Frank Lienemann requesting reimbursement for money paid to obtain an abstract of the property; and (4) the applications of the referee for fees and of defendant-appellant Herman Lienemann for attorney's fees in the partition action. We shall discuss the matters in reverse order.

The District Judge, over objection, proceeded to take extended evidence, much of it in response to subpoenas issued on his own motion and subject to examination conducted by the judge himself. With respect to the precise issue previously determined finally in Lienemann v. Lienemann, *supra,* i.e., whether the trust had terminated in 1968, the judge apparently sought to point out to this court the error in its previous determination. Apparently the District Court concluded that the subject of the dissolution of the trust was still an open question. It was not. Objections to all such evidence were proper and should have been sustained.

The Lienemann land was sold at the sale for $740,000. In the proceeding for the allowance of fees, the District Judge allowed the attorney for the plaintiffs $1.01 and the referee, a fee of $30,000. Section 25-21,108, R. R. S. 1943, provides in part: "If, in the proceedings in partition, judgment shall be entered directing partition, * * * the court shall, after partition or after the confirmation of the sale and the conveyance by the referee, determine a reasonable amount of fees to be awarded to the attorneys of record in the proceedings, which amount shall be taxed as costs in the proceedings. * * * The court shall also determine and tax as costs a reasonable fee for the referee." The record discloses that the estimates of the customary fees received by attor-

neys in the judicial district of which Sarpy County is a part, including some allowed by the presiding judge himself, are in the range of 6 percent to 7½ percent of the total sale. Generally, two-thirds of this amount goes to the attorney of record and one-third to the referee. The fee allowed to the referee in this case is approximately 4 percent of the total sale price.

It is obvious from a reading of the record that the trial court was of the opinion that the attorney for the plaintiffs had somehow breached his duty in one or more of the following respects: (1) In failing to conclude that the trust was somehow still in existence and in bringing the partition action in the first place; (2) in failing to advise all the beneficiaries of the trust that there was an alternative to a sale by auction; and (3) in agreeing with the attorney for one of the parties, also an appellant in this case, that he would receive 30 percent of any fee allowed plaintiffs' attorney subject to the approval of the court.

It will be necessary for the resolution of all the issues to have some background. The father of the parties in this case, August Lienemann, was the original owner of the subject land. George Lienemann occupied the farm in March 1950 at his father's request. He occupied the farm continuously from 1950 to April 1976. George and Frank farmed the land as tenants of August Lienemann until the establishment of a trust on March 2, 1963. The trust existed from March 2, 1963, until it terminated by its own terms on March 2, 1968. The land was conveyed to Frank Lienemann as trustee for the use and benefit of himself and his four brothers and a sister. The trust provided that George and Frank were to continue to farm the land on the same basis as previously; George and Frank received three-fifths share of the profits while the remaining two-fifths share went to August, and later to the trust. The partition action was commenced when one of

the Lienemann children, Herman, decided he wanted to sell his share of the land. The remaining children sought to retain the land as a whole. This resulted in a partition action being filed against Herman. The improvements, of a value of $25,000, for which George seeks recovery, were largely, if not exclusively, made during the period of his tenancy as distinguished from his period of ownership. The improvements consisted of the erection of buildings, planting of shelter belts, and extended improvements to the dwelling house on the premises which he occupied for 26 years without charge for rent. The only evidence with respect to compensation therefor was that given by George himself who quotes his father August as saying: "Go ahead if you want to. It will all be yours, anyway, someday." According to the terms of the lease, George was never charged for rent, nor were he and Frank charged for any rent for use of certain pasture land on the premises or for the use of the cornstalks for grazing cattle after harvest. It is not contended that payment for either the use of the premises or of the dwelling house and the farm buildings or for the use of the pasture and cornstalks were ever contemplated in the original occupancy of George and Frank while the land was under their father's ownership, nor is there any evidence of any subsequent agreement in which any such conditions were imposed. It is settled law in Nebraska that improvements made while a party is in possession of premises under a lease which does not grant the right of reimbursement are not reimbursable to him. See, Smith v. Kober, 108 Neb. 768, 189 N. W. 377; Blomquist v. Board of Educational Lands & Funds, 170 Neb. 741, 104 N. W. 2d 264. The general rule that improvements which become a part of the real estate may not be removed and do not become the property of the lessee is applicable in the absence of agreement, express or implied, or a statute indicating

otherwise. See State v. Bardsley, 185 Neb. 629, 177 N. W. 2d 599.

Counsel for the plaintiff-appellee George acknowledges the rule cited above but nevertheless urges us to follow the principle announced in Atkins v. Schmid, 129 S. W. 2d 412 (Tex. Civ. App., 1939). In that case the son entered in possession of a mother's real estate, made valuable improvements thereon, and occupied the same for himself and his family. The Texas court held: "* * * since the mother owned the land throughout, and allowed W. H. Atkins to establish his home thereon, and, at her death, he, having acquired an interest in her estate as a co-tenant in the whole, was, we think, clothed with the right, when the time for partition came, to have allotted to him in the division, the particular portion of the land improved by him and claimed as his home." We decline to do so in this case.

The improvements erected on the premises were primarily for the benefit of the occupants themselves. They were not made under any claim of compensation. Obviously the lease terms were under favorable consideration since the evidence indicated that, as pointed out above, substantial amounts of pasturage were reserved rent-free to the tenants. No rental was charged on the occupancy of the dwelling house or the use of the forage after harvest. We acknowledge that in a particular case equitable principles might require us to make allowances for improvements made by a tenant during the term of his lease in contemplation of his status as a prospective heir when he does not inherit the property and is not compensated in a partition action, viz., the other heirs. This is not such a case.

Defendant-appellant Herman further suggests that the beneficiaries of the trust are entitled to an accounting from the trustee and from the occupiers George and Frank for the reasonable value of the cornstalks, the value of the home and farmstead oc-

cupied, and for the value of pasture for which they were not charged rent as tenants. This contention has no merit. As pointed out above, there was no agreement providing that George and Frank pay such rent. The fact of the nonpayment of rent for the three items mentioned above was well known to each and every one of the beneficiaries of the trust. It was a continuation of a relationship between August and his sons-tenants and, as such, was acceded to by the parties. Each and every year a full and complete accounting of the total rentals was made by the trustee and a distribution made by the trustee to the beneficiaries; the checks were accepted and cashed, and no protests were made with respect to the lease arrangement. The defendant-appellant Herman is in no position to now question the arrangements to which he voluntarily acceded.

The defendant-appellant Herman complains of the allowance by the trial court of a reimbursement to Frank, an appellant, for reimbursement in the amount of $5,000 to an attorney, John Samson. Samson had demanded the sum as a prerequisite to relinquishing the abstract of the land. There was no obligation. Frank did not consult the other parties prior to paying the $5,000. He testified that John Samson had rendered no legal service for him as trustee or in his individual capacity, but that the sole claim for reimbursement was due to services allegedly rendered for August Lienemann. At the time of the payment of the $5,000, August Lienemann was deceased; and his estate had been fully administered and the time for filing claims had presumably expired. The court held that the advance of $5,000 was of substantial value to the partition estate and therefore Frank was entitled to reimbursement. To what extent or how this enhanced the sale is not clear from the testimony. The burden of proving such fact is on the party asserting it, Frank Lienemann. There is no evidence to suggest what the

services were and how they contributed to the value of the estate. We conclude that the court was in error and that the burden of proving the matter had not been met.

Apart from the already disposed of dispute with respect to the termination of the trust, we are unable to conclude on what basis the trial court determined that an adequate fee should not be provided for the plaintiffs' attorney. Substantial offers and counter-offers were made with respect to negotiations for, and purchase of, shares of the various heirs, none of which met with success. The right of plaintiffs-appellants to commence an action in partition is not questioned. They have no complaint. On what basis the trial court concluded that it knew what was in the best interests of all the parties to the partition action rather than the attorney for the plaintiffs and the parties themselves is not clear. No reason exists for the failure to grant an adequate attorney's fee.

We also cannot find any reason to condemn the agreement by Dixon Adams, counsel for the plaintiffs-appellants, and Jeffrey Farnham, counsel for defendant-appellant Herman, concerning a division of a prospective fee in partition when the same appears to have been disclosed fully to the parties and was dependent on court approval. The purpose of the agreement was a compromise so that the plaintiff-appellee George would not require a separate expenditure of fees in order to protect his interests.

The agreement had a statutory basis. Section 25-21,108, R. R. S. 1943, provides for a division of attorney's fees in a partition action: "If the shares confirmed by such judgment and the existence of all encumbrances of which the plaintiff had actual or constructive notice were accurately pleaded in the original petition of the plaintiff, such fees for the attorney shall be awarded entirely to the attorney for the plaintiff; otherwise, the court shall order such fees

for the attorneys to be divided among such of the attorneys of record in the proceedings as shall have filed pleadings upon which any of the findings in the judgment of partition are based." The evidence shows the amended petition formed the basis of the partition order. The amended petition was the result of negotiations between Dixon Adams and Jeffrey Farnham and reflected the decision of all the Lienemann parties to proceed with partition. Jeffrey Farnham in this way made a contribution to the partition order. The agreement was no more than Adams' recognition of Farnham's claim and a stipulation that Adams had no objections to Farnham's receiving 30 percent of court-awarded attorney's fees. The share Farnham would receive remained in the discretion of the trial court.

The evidence further shows that Frank Lienemann's attorney, Dixon Adams, performed all the services for the referee, and the pleadings established the shares. Valuable service was also rendered by Jeffrey Farnham, the attorney for Herman Lienemann, especially with respect to correcting the description of the land and securing adequate surveys by which the amount of the acreage ultimately subject to partition was materially enhanced.

Therefore, the judgment of the District Court is modified as follows: The plaintiffs' attorney Dixon Adams shall receive a fee of $22,500 for his services in the District Court and in this court, and the referee's fee shall be reduced to $11,250. The claim of Frank Lienemann for reimbursement for sums paid to John Samson is denied as is the claim of George Lienemann for reimbursement for improvements made on the premises during his occupancy as a tenant. The request for an accounting by the trustee for allegedly unpaid rent due and owing by Frank and George Lienemann is likewise denied. The judgment is reversed and the cause remanded

with directions to enter orders in conformity herewith.

REVERSED AND REMANDED WITH DIRECTIONS.

WILLIAM H. SMITH ET AL., APPELLEES, V. OTTO A. LUTTMAN ET AL., APPELLANTS.

268 N. W. 2d 431

Filed July 26, 1978. No. 41561.

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

Baker, Tessendorf, Milbourn & Fehringer, for appellants.

Noyes W. Rogers of Walter, Albert, Leininger & Grant, for appellees.

Heard before WHITE, C. J., BOSLAUGH, MCCOWN, CLINTON, and BRODKEY, JJ., and FAHRNBRUCH, District Judge.

The judgment herein is affirmed by a divided court.

AFFIRMED.

LEANNE M. KREMER, APPELLEE, V. SHERYL BLACK, APPELLANT.

268 N. W. 2d 582

Filed July 26, 1978. No. 41573.

1. **Criminal Conversation: Damages.** In the absence of evidence of some special element of damage for which the law provides a specific means of measurement, it is the general rule that in an action for criminal conversation damages are incapable of precise measurement and there is no fixed rule for determining the amount thereof.
2. **Criminal Conversation: Juries.** The jury, in an action for criminal conversation, may consider the actual misconduct of defend-

ant, the social relations of the parties, the existence of or lack of affection between the spouses, the destruction of the plaintiff's home and happiness, and the pecuniary situation of the parties.

3. **Criminal Conversation: Damages: Verdicts: Juries.** In an action for criminal conversation, the courts will seldom interfere with the finding of the jury, for the reason that there is no method of determining exactly the proper pecuniary compensation which should be awarded.

Appeal from the District Court for Douglas County: THEODORE L. RICHLING, Judge. Affirmed.

Donald H. Bowman and Michael O. Johanns of Peterson, Bowman, Larsen & Swanson, for appellant.

Charles I. Scudder, for appellee.

Heard before WHITE, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ., and FAHRNBRUCH, District Judge.

WHITE, C. J.

The plaintiff, Leanne M. Kremer, recovered a judgment in the sum of $10,000 on a cause of action for criminal conversation, and defendant Sheryl Black appeals. Summarized, the defendant contends that the court should judicially abolish the cause of action for criminal conversation; that there was prejudicial error in the admission of testimony as to the financial ability of the defendant; and that the verdict is excessive. We reject the contentions of the defendant and affirm the judgment of the District Court.

Since no question as to the sufficiency of the evidence has been raised, a brief background statement of the essential facts is all that is necessary for a determination of the issues presented. The plaintiff wife met Donald Kremer early in 1975. They were married on February 14, 1976. The evidence shows that the plaintiff and Donald Kremer began having trouble and physically separated about July 21, 1976. The petition for dissolution of the marriage

was instituted by Donald Kremer, plaintiff's husband, on August 16, 1976, and the decree of dissolution was entered in the District Court for Douglas County, Nebraska, on March 1, 1977. The evidence supports the conclusion that during the whole period of the marriage and the courtship in 1975, the plaintiff and Kremer had numerous difficulties and fights, and temporary separations, but would become reconciled and continue their relationship. The defendant's testimony is that she began staying with Kremer in the second week of August 1976, after the physical separation of the parties, but before the petition for dissolution of the marriage had been filed by Kremer. In the period following the separation and the filing of the action for dissolution, the defendant and Kremer lived together. Sexual relationships between them were admitted. There was further testimony as to the financial condition of the plaintiff and plaintiff's former spouse, which will be referred to later in this opinion.

On appeal the defendant assigns as error that the court failed to instruct the jury that the elements of malice, intent, and causation must be proved to allow recovery for criminal conversation. The defendant concedes that these are not elements of the action, and cites no authority to support this precise contention. She concedes that there is a lack of defenses, once sexual intercourse is proven with the extramarital defendant prior to the termination of the marriage. Also conceded is that damages in all cases are presumed and that no fixed rule exists for their measurement. See Breiner v. Olson, 195 Neb. 120, 237 N. W. 2d 118 (1975).

The defendant's argument is, in fact, a spirited attack against the existence of the common law action of criminal conversation, and a plea to this court for the judicial abolition of the action. It is true that 11 states have by statute eliminated criminal conversation as a cause of action. The defendant strongly

argues, on policy grounds, the propriety of permitting such an action where, as here, the plaintiff's own husband is the seducer of the defendant. She urges, and finds support in critical law reviews, it should be a defense that the plaintiff and her spouse were separated at the time the acts complained of occurred. She also argues the reasoning developed at common law behind stripping a defendant of all defenses to an action in criminal conversation, save the plaintiff's consent, no longer, under present social conditions, merits endorsement. The defendant argues that due to the presumption of damages in criminal conversation, and the presence of emotional and moral indignation, the awards of damages tend to be punitive in nature and bear no real relation to pecuniary loss.

The common law is well settled that the sexual relation of marriage is one that must be maintained inviolate for the well-being of society. The law protects the right of one spouse to have exclusive marital intercourse with the other. Whenever a third person commits adultery with either spouse, he or she commits a tortious invasion of the rights of the other spouse, from which a cause of action for criminal conversation arises. See 41 Am. Jur. 2d, Husband and Wife, § 476, p. 402.

The defendant would have us reexamine the different conflicting policy considerations involved, and, in effect, abolish the cause of action for criminal conversation as it presently exists. The answer to that is simply that this court has consistently upheld a spouse' right of recovery for criminal conversation. Two of these cases are quite recent. White v. Longo, 190 Neb. 703, 212 N. W. 2d 84 (1973); Breiner v. Olson, *supra*, (1975); Hansen v. Strohschein, 178 Neb. 367, 133 N. W. 2d 598 (1965); Smith v. Meyers, 52 Neb. 70, 71 N. W. 1006 (1897). See, also, The Case for Retention of Causes of Action for Intentional In-

terference with the Marital Relationship, 48 Notre Dame Lawyer 426 (1972).

The defendant, in effect, asks this court to judicially legislate the cause of action for criminal conversation out of existence. The merit of defendant's argument is a question properly for the Legislature and it is the appropriate forum for a decision to abolish the cause of action. Under the fundamental principle of the division of powers in our government, judicial intrusion and investigation into social policy-making areas is forbidden. The authority that the defendant's research reveals illustrates the problem. Defendant, in effect, calls on this court to define and strike the balance on the volatile moral issues involved. Even a minimum of judicial restraint would indicate that the Legislature is the proper forum for relief, if such is advisable. We reject the contention that the cause of action for criminal conversation should be abolished.

The defendant argues the District Court erred in admitting evidence relating to the financial standing of the plaintiff and her former spouse. The plaintiff offered into evidence exhibit 2, which consists of handwritten notations of deposits in her checking account from January 17, 1975, to August 19, 1976. Additionally, the plaintiff offered into evidence copies of her bank statements covering approximately the same period. The plaintiff also testified as to her income and Donald Kremer's income during the time they lived together. It is noted that there is no contention here there was an attempt to introduce in evidence the assets of or the capacity of the defendant to respond to damages. In the recent case of Breiner v. Olson, *supra*, this court stated as follows: "In the absence of evidence of some special element of damage for which the law provides a specific means of measurement, it is the general rule that in an *action for criminal conversation* damages are incapable of precise measurement and there is

no fixed rule for determining the amount thereof." (Emphasis supplied.) Furthermore, in Breiner v. Olson, *supra*, this court specifically held, in determining the validity of an instruction in a criminal conversation case, that the jury could consider: "* * * the actual misconduct of defendant, the social relations of the parties, the existence of or lack of affection between the spouses, the destruction of plaintiff's home and happiness, *and the pecuniary situation of the parties*; and it has been held that the damages recoverable are fair compensation to plaintiff for the wrong so done him or her * * *." (Emphasis supplied.) There is no merit to this contention.

The third assignment of error is that a new trial should be granted due to the excessiveness of the damages which, it is contended, were clearly awarded due to the passion and prejudice on the part of the jury. The defendant cites only one Nebraska case, Breiner v. Olson, *supra*. In that case, this court made the general statement that a jury verdict in a criminal conversation action should be set aside as excessive only where it clearly appears that the award was the result of passion and prejudice on the part of the jury. We observe in the Breiner case, in which the evidence was substantially similar to the present case, this court sustained a judgment in the sum of $25,000. In that case there was proof of only one act of intercourse, and no direct evidence of pecuniary damage, and, as here, the jury returned a verdict for the defendant in the accompanying action for alienation of affection. In White v. Longo, *supra*, a recent case, this court approved a verdict for $12,500 for criminal conversation. In the latter case, it is significant that the parties were physically separated long before the action was brought.

We point out that in the present case the marriage between the plaintiff and her spouse lasted 13

months. There is testimony to support that it was a good marriage during extended periods of time in this period. They had reconciled their disputes many times before. The plaintiff's spouse moved out of their home and into the home of the defendant at the beginning of August 1976. He did not initiate an action for divorce until August 16, 1976. There is evidence to support the finding that the plaintiff attempted in numerous ways to convince her spouse to return to their family home during this period of time, all to no avail. The evidence does sustain the finding that the act of criminal conversation occurred before the petition for dissolution of the marriage was actually filed. In Hansen v. Strohschein, *supra*, this court held that a verdict of $5,000 was not excessive in a criminal conversation action because it fell within the rule announced in Baltzly v. Gruenig, 127 Neb. 520, 256 N. W. 4 (1934), which stated: "Courts will seldom interfere with the finding of the jury in such actions, for the reason that there is no method of determining exactly the proper pecuniary compensation which should be awarded."

We have examined the contentions of the defendant and find they are without merit. The judgment of the District Court is correct and is affirmed.

AFFIRMED.

McCOWN, J., dissenting.

The majority opinion perpetuates the anachronistic common law cause of action for criminal conversation with all its traditional legal rules and boundaries upon the ground that "this court has consistently upheld a spouse' right of recovery for criminal conversation."

The majority opinion proceeds upon two assumptions. It assumes first that the rules of law relating to a common law cause of action for criminal conversation cannot or should not be altered or modified but, instead, assumes that the common law cause of action for criminal conversation with all its

traditional interpretations must either be completely retained or completely abolished. The second assumption is that only the Legislature can alter, amend, or abolish a common law cause of action for criminal conversation, and that any judicial attempt to alter common law rules which courts have traditionally applied to a cause of action for criminal conversation is a usurpation of legislative authority and a forbidden intrusion into "social policy-making areas."

At the time the common law cause of action for criminal conversation arose, divorce was virtually unknown, and the lack of defenses to the action reflected the then current attitude of society toward adultery and sexual misconduct, as well as the fact that married women had almost no legal rights. Since the passage of married women's property acts in this country the cause of action is now equally available to husbands and wives, but the defenses to a cause of action for criminal conversation, unlike the defenses to other common law causes of action for intentional interference with the marital relationship, remain almost nonexistent. In essence, a common law cause of action for criminal conversation is established by proving sexual intercourse with a married person, and general damages are presumed without proof of actual damage. Once a single act of intercourse with a married person is proved, the only defense at common law is the consent of the aggrieved spouse. It is no defense to an action for criminal conversation that the defendant did not know the other person was married, nor that the married person misrepresented himself or herself to be unmarried.

As late as 1949, the Supreme Court of Pennsylvania said: "A man who has sexual relations with a woman, not his wife, assumes the risk that she is married. Even her misrepresentation that she is single affords the offender no defense to liability for

criminal conversation." Antonelli v. Xenakis, 363 Pa. 375, 69 A. 2d 102.

Virtually all legal writers in the modern era agree that the common law cause of action for criminal conversation has afforded a fertile field for blackmail and extortion by means of manufactured suits, and that even genuine actions are more frequently than not brought with purely mercenary or vindictive motives, and that damages recovered are usually large and punitive. See, Prosser, Law of Torts (4th Ed.), § 124, at p. 887; Criminal Conversation: Civil Action for Adultery, 25 Baylor L. Rev., p. 495; The Case for Retention of Causes of Action for Intentional Interference with the Marital Relationship, 48 Notre Dame Lawyer, p. 426.

As a result of the injustice inherent in the traditional common law action and the consequent abuses, approximately a dozen states have abolished the cause of action for criminal conversation by statute, and Pennsylvania has now abolished the cause of action by judicial decision. See Fadgen v. Lenkner, 469 Pa. 272, 365 A. 2d 147 (1976).

The more persuasive view, however, is that the marital relationship should be protected in those cases of serious and genuine wrong, and that the preferable method of accomplishing that result is by altering the rules governing the common law action for criminal conversation rather than by abolishing the cause of action entirely. See, Prosser, Law of Torts (4th Ed.), § 124, at p. 888; 48 Notre Dame Lawyer, at p. 433.

A cause of action for criminal conversation ought to be treated in the same fashion as the other common law causes of action for intentional interference with the marital relationship. An intention to interfere with a marital relationship should not be presumed where the defendant does not know, or have reason to know, that the other individual is married, or has been actively misled into believing

the other individual was unmarried. Such facts should constitute a complete defense to an action for the intentional tort of criminal conversation.

The other major injustice perpetuated by continuing the traditional cause of action for criminal conversation is in the area of damages. At the time the cause of action for criminal conversation arose, great and substantial damage was presumed to result to any marital relationship without proof of specific damage, no matter what the kind and quality of the marriage may have been. Blackstone reported in 1768 that "damages recovered are usually very large and exemplary." 2 Cooleys, Blackstone Commentaries, at p. 140. The fact that the husband and wife were separated, or that the marital relationship had been completely and permanently breached before the sexual misconduct occurred, was generally immaterial, not only on the issue of defenses but on the issue of damages.

In this century courts in this country have generally permitted the introduction of evidence of complete and permanent separation and evidence of the quality of the particular marital relationship, but have restricted the consideration of such evidence by the jury solely to the issue of damages. At the same time, most courts have held that after a complete and permanent breach of a marital relationship, as by separation, there can be no liability, and hence no damages, for enticement, harboring, or alienation of affections. See Prosser, Law of Torts (4th Ed.), § 124, at p. 878, footnote 15 and cases there cited. Meanwhile juries in criminal conversation cases continue to return very large verdicts reflecting exemplary and punitive awards. It should be the rule that when the conduct which forms the basis for an action for criminal conversation occurs after a permanent separation of the plaintiff and his or her spouse, and a decree of divorce follows, damages for criminal conversation, at most, should be

restricted to nominal damages, in the absence of proof of special damages.

The case at bar is an obvious one for the application of these two rules. The plaintiff and her husband had both been married before. They lived together before this marriage, and there was evidence that both of them had been involved in extra-marital affairs. The marriage was a stormy one at best, and they actually lived together after the marriage for a period of a little more than 5 months. They permanently separated on July 21, 1976. Petition for dissolution of the marriage was filed on August 16, 1976, and the divorce decree was entered on March 1, 1977. There was substantial evidence that the relationship between the defendant and the plaintiff's husband had its inception after the permanent separation of the plaintiff and her husband. The plaintiff's husband was clearly the aggressor, and it is undisputed that he told the defendant his marriage was at an end and definitely over. The jury obviously accepted that version of the facts since it found in favor of the defendant on the cause of action for alienation of affections.

Under the instructions, which followed the old common law rules, the jury was nevertheless allowed to bring in a verdict for general damages of $10,000 with an almost complete lack of evidence in the record as to pain, suffering, injury to health, degradation, or humiliation suffered by the plaintiff. It should also be pointed out that in Nebraska punitive or exemplary damages are not ordinarily allowed.

In addition, the jury was permitted to consider extensive evidence as to the financial standing not only of the plaintiff and the defendant but of the plaintiff's former husband, who was not even a party to the action. The defendant attempted to offer into evidence the decree of divorce. The offer was denied, although the court did allow the parties to

stipulate that a divorce decree was entered on March 1, 1977.

The majority opinion in this case refuses to abrogate or modify the common law cause of action for criminal conversation upon the ground that "this court has consistently upheld a spouse' right of recovery for criminal conversation." The cause of action for criminal conversation was of judicial origin and the rules as to defenses and damages were and are court-made rules. An unjust or irrational principle or rule of law should not be allowed to persist on the hollow ground that changing an antiquated rule is a job for the Legislature. See 16 Kan. L. Rev. 265, at p. 273.

Section 49-101, R. R. S. 1943, provides: "So much of the common law of England as is applicable and not inconsistent with the Constitution of the United States, with the organic law of this state, or with any law passed or to be passed by the Legislature of this state, is adopted and declared to be law within the State of Nebraska."

In State ex rel. Johnson v. Tautges, Rerat & Welch, 146 Neb. 439, 20 N. W. 2d 232, this court held: "The courts have the power to modify the common law, adopting such of its principles as are applicable and rejecting such others as are inapplicable. * * * No rule of the common law could survive the reason on which it was founded. It needed no statute to change it but abrogated itself."

Citation of authority should not be required to establish that the common law cause of action for criminal conversation is of judicial or common law origin, and that this court has power to modify it in the absence of legislative action to the contrary. As this court said in Brown v. City of Omaha, 183 Neb. 430, 160 N. W. 2d 805, a case dealing with governmental immunity from common law tort liability: "Both the Legislature and this court have power to act to change the doctrine and it may well be that

the Legislature will have the ultimate word. This would seem to be a poor reason to avoid the court's obligation to modify the common law to serve the requirements of justice in a modern society. We ought not to thrust upon the Legislature the sole responsibility for injustice on the ground that, 'Thus it was said in the reign of Henry IV,' nor even on the ground that any change would constitute the traditionally condemned heresy of judicial legislation."

The common law cause of action for criminal conversation, under its traditionally accepted rules, is an anachronism in the world of today. It should be modified to protect the sanctity of the genuine home and marital relationship, but its injustices should not be continued for the benefit of mercenary or vindictive spouses simply because our previous decisions have followed the traditional rules for a very long time. Justice should not be so readily sacrificed on the altar of stare decisis.

In the case now before us the verdict of the jury was punitive, and the punishment was directed at the wrong person. Under the suggested modifications of the common law cause of action for criminal conversation, and the circumstances of this case, the judgment should be modified by reducing it to a nominal amount.

WHITE, C. THOMAS, J., joins in this dissent.

GERALD L. MORRIS, APPELLANT AND CROSS-APPELLEE, V. MARGARET A. MORRIS, APPELLEE AND CROSS-APPELLANT.

268 N. W. 2d 431

Filed July 26, 1978. No. 41576.

1. **Divorce: Alimony: Parent and Child.** When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the mar-

riage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party.

2. **Divorce: Alimony.** The fixing of the amount of alimony in each case rests within the sound discretion of the trial court.
3. **Divorce: Property Settlement Agreements: Appeal and Error.** On appeal, a party to a divorce proceeding cannot ordinarily successfully assert error in a property division requested and obtained by him in the trial court.
4. **Divorce: Child Support: Due Process.** Allowances for child support are not final but are subject to modification when required, after notice and hearing.
5. **Divorce: Attorney's Fees.** An award of attorney's fees in a divorce action involves consideration of such factors as the nature of the case, the amount involved in the controversy, the services actually performed, the results obtained, the length of time required for preparation of the case, the skill devoted to preparation and presentation of the case, the novelty and difficulty of the questions raised, and the customary charges of the bar for similar services.

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

Healey, Healey, Brown, Wieland & Glynn and Tye, Worlock, Tye, Jacobsen & Orr, for appellant.

Knapp, State, Yeagley, Mues & Sidwell, for appellee.

Wright & Simmons, for amicus curiae.

Heard before WHITE, C. J., BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ., and FAHRNBRUCH, District Judge.

MCCOWN, J.

This is an action for dissolution of marriage. The District Court found the marriage was irretrievably broken and entered a decree of dissolution. The court granted custody of the four minor children of the parties to the wife, and awarded child support. The court also made a property division, and

awarded alimony to the wife. The husband has appealed.

The parties were married September 2, 1961. At that time the husband was in his sophomore year in medical college. The wife was a college graduate and a qualified medical technologist. After the marriage the wife continued to work as a medical technologist and contributed her earnings and the income from her personally owned securities to the marriage. The husband's father provided a substantial portion of the husband's medical school expense. The husband was graduated from medical college in 1964. Thereafter he completed a 1-year hospital residency and 2 years active duty in the United States Army. During this time the wife continued to work. Her income was used for support, and the bulk of the husband's salary was invested in jointly held savings and securities. Upon completion of his Army duty the husband returned to Omaha and entered a hospital residency in pathology. His residency was completed in 1971, the family moved to Kearney, Nebraska, and the husband entered private practice as a pathologist. His adjusted gross income was $36,137 in the year he began private practice, and increased steadily thereafter. In 1975 his gross income was $72,134, and in 1976, the year preceding trial, his gross income was $80,327.

The wife continued to work until the first child was born on September 1, 1967. After the birth of the first child she resumed working and continued to work until March 3, 1969, when the second child was born. She did not work thereafter. The third child was born September 30, 1970, and the fourth child was born in Kearney on July 21, 1972. In June 1976, the husband moved out of the family home and on August 26, 1976, filed his petition for dissolution of marriage.

On June 14, 1977, the District Court entered its

decree dissolving the marriage and awarding custody of the four minor children to the wife, subject to reasonable visitation rights in the husband. The court awarded the sum of $200 per month child support for each of the children until each child reaches 19 years of age, or until further order of the court. The court also made a property division. The wife was awarded approximately $17,000 of securities and funds owned by her prior to the marriage. The husband was awarded his interest in his individual retirement fund valued at approximately $14,000. The wife was awarded the family home, subject to mortgage indebtedness of approximately $59,000. The home was valued at approximately $125,000 by the husband's appraiser, and at approximately $102,000 by the wife's appraiser, and the equity interest was valued at $43,000 or $65,000, depending upon which appraisal was accepted. The husband was awarded a ranch purchased by the parties on contract on which there was a balance due of over $80,000. The husband's appraisal of the value of the ranch was $111,000, while the wife's was $133,000. The equity interest was valued at $25,000 or $47,000, depending upon which value was accepted. The court also awarded to each party a 1/6th interest in a partnership known as Morris-Rein-Morris Company, which owned and operated apartment properties. The household goods and the remaining personal property were divided between the parties. Additional personal property received by the husband was valued by him at approximately $22,000 and by the wife at approximately $27,000. Additional personal property received by the wife was valued by her at approximately $15,000 and by the husband at approximately $16,000. Each party was directed to pay specified indebtedness.

The District Court also ordered that the husband pay alimony to the wife in the sum of $1,000 per month until the death or remarriage of the wife, but

not to exceed 144 months, and awarded attorney's fees for the wife's attorney in the sum of $500.

The husband has appealed and the wife has cross-appealed.

No issues as to custody or child support are raised by the husband. He assigns two specific alleged errors. He contends first that the court erred in awarding alimony to the wife. The contention is that there is no basis for an alimony award because the wife is a qualified medical technologist, under 40 years of age, and able to return to her professional employment. The contention ignores the interests of the children, and the desire of the wife to continue to care for them properly.

It cannot be realistically doubted that raising four small children is a full-time task. The wife has not been employed outside the household for more than 8 years, and the four children, at the time of the decree here, were 5, 6, 8, and 9 years old. If the alimony payments continue for the full period of 144 months, the youngest child will be approximately 18 years old. The income of the husband is substantial and is likely to continue to rise. It should also be noted that the alimony payments here are deductible by the husband and taxable to the wife.

Section 42-365, R. S. Supp., 1976, provides in part: "When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party." Virtually all

the factors specifically mentioned in the statute are applicable in this case.

The statute imposes the rule of reasonableness and the fixing of the amount of alimony in each case rests within the sound discretion of the trial court. See Mathias v. Mathias, 194 Neb. 598, 234 N. W. 2d 212. There was clearly no abuse of discretion here.

The husband also contends that the District Court erred in awarding each party a 1/6th interest in a partnership in which the remaining partnership interests were owned by the husband's parents and his sister and her husband. The contention is that an award which continues the wife's interest in a partnership with the husband and his family is patently unfair and constitutes an abuse of discretion. No authority is cited in support of the contention and the facts fail to support it.

The parties here acquired their partnership interests in 1973 for an original investment of $4,000. The partnership owns and operates apartment properties in Gering, Nebraska. There is a sharp disagreement as to the value of the 1/6th partnership interest of each party. There is no evidence as to the terms of the partnership agreement or of any of its provisions for dissolution or termination. The husband acknowledged that marital funds were used for the initial investment, and that husband and wife each had an equal interest in the partnership. In any event, the equal division of the partnership interest was requested by the husband in this case, and counsel for both parties suggested to the court that the partnership interest be equally divided. We have held that on appeal a party ordinarily cannot successfully assert error in a judgment that granted him the relief demanded by his pleadings. See Saum v. L. R. Foy Constr. Co., Inc., 190 Neb. 783, 212 N. W. 2d 648. It should certainly be true that on appeal a party to a divorce proceeding cannot ordinar-

ily successfully assert error in a property division requested and obtained by him in the trial court.

We turn now to the cross-appeal of the wife. She contends first that the court erred in failing to require the husband to pay for health, medical, and dental expenses of the children during minority, or, in the alternative, to grant sufficient child support to cover such expenses. There is insufficient evidence as to medical expense to support the contention. In any event, allowances for child support are not final but are subject to modification when required, after notice and hearing. See Francis v. Francis, 195 Neb. 417, 238 N. W. 2d 468.

The wife also contends that the allowance of $500 for the services of her attorney in the trial court is inadequate and does not represent the value of the services of her attorney in this litigation. The record shows that the trial court granted temporary attorney's fees in the sum of $300, and made an additional allowance in the decree in the sum of $500. An award of attorney's fees in a divorce action involves consideration of such factors as the nature of the case, the amount involved in the controversy, the services actually performed, the results obtained, the length of time required for preparation of the case, the skill devoted to preparation and presentation of the case, the novelty and difficulty of the questions raised, and the customary charges of the bar for similar services. Weber v. Weber, 200 Neb. 659, 265 N. W. 2d 436. The case now before us is not an ordinary or typical divorce action. The record establishes that the amount involved, the services performed, the result obtained, the time required, and the customary charges of the bar in similar cases require an additional award. Under the circumstances of this case an additional award of $3,000 is appropriate for legal services rendered in connection with the proceedings in the District Court. We also make an additional award of $1,500

for services rendered by the wife's attorney on appeal.

We therefore modify the award of attorney's fees made by the District Court to $3,500, and award an additional $1,500 for services rendered on appeal. As modified the judgment of the District Court is affirmed.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA EX REL. FRANCIS LOTTMAN, AND FRANCIS LOTTMAN, IN HIS OWN RIGHT, APPELLEE, V. BOARD OF EDUCATION OF SCHOOL DISTRICT NO. 103 (DILLER COMMUNITY SCHOOLS) ET AL., APPELLANTS.

268 N. W. 2d 435

Filed July 26, 1978. No. 41605.

1. **Schools and School Districts: Public Officers and Employees: Recall: Elections.** Any member of a school board or board of education of a Class II, III, or VI school district may be subject to recall for habitual or willful neglect of duty, gross partiality, oppression, extortion, corruption, willful maladministration in office, conviction of a felony, or habitual drunkenness. The procedure to accomplish the removal by recall of any incumbent of such office shall be initiated by the filing of a petition signed by the registered voters of the district equal in number to at least 25 percent of the total number of votes cast for the board member receiving the highest number of votes at the preceding school election.
2. **Public Officers and Employees: Recall: Elections.** The power granted to electors to remove certain public officers is political in its nature and not the exercise of a judicial function.
3. **Schools and School Districts: Public Officers and Employees: Recall: Elections.** A petition to recall school board members which states as a reason for removal one of the grounds listed in section 79-518.04, R. R. S. 1943, is statutorily sufficient to compel a recall election.

Appeal from the District Court for Jefferson County: ORVILLE L. COADY, Judge. Affirmed.

Koenig & Murray, for appellants.

Wood, Wolfe & Hurd, for appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, BRODKEY, and WHITE, JJ.

WHITE, C. THOMAS, J.

This is an appeal from a writ of mandamus issued by the District Court requiring the appellant, Board of Education of School District No. 103, hereinafter referred to as Board of Education, to hold a recall election pursuant to the provisions of section 79-518.04, R. R. S. 1943.

Section 79-518.04, R. R. S. 1943, states: "Any member of a school board or board of education of a Class II, III, or VI school district may be subject to recall for habitual or willful neglect of duty, gross partiality, oppression, extortion, corruption, willful maladministration in office, conviction of a felony, or habitual drunkenness. The procedure to accomplish the removal by recall of any incumbent of such office shall be initiated by the filing of a petition signed by the registered voters of the district equal in number to at least twenty-five per cent of the total number of votes cast for the board member receiving the highest number of votes at the preceding school election."

The relator-appellee is a registered voter in School District No. 103 in Jefferson County, Nebraska, a Class II school district. In May 1977, the relator and other registered voters of the district circulated petitions seeking the recall of the appellants, members of the Board of Education. The form and language of the petitions to recall each of the appellant board members are identical. The petitions for recall stated "willful neglect of duty and willful maladministration in office" by the named members of the Board of Education.

The petitions to recall were filed with the county clerk of Jefferson County who certified that the petitions contained the requisite number of signatures required by section 79-518.04, R. R. S. 1943. The pe-

titions were forwarded to the Board of Education. The Board of Education scheduled a special recall election for July 14, 1977, and published notice, but before that date, the Board of Education rescinded the call for the special election. The resolution stated that the recall petitions circulated were legally insufficient to compel the Board of Education to schedule a recall election.

The appellee filed an action in District Court for a peremptory writ of mandamus. The court granted an alternative writ of mandamus. At the show cause hearing, the appellee called several residents who had signed the petitions. They were questioned about the circumstances of their signing of the petitions, their reasons, and their understanding of the words "willful neglect of duty and willful maladministration in office." The appellants contend that the terms "willful neglect of duty and willful maladministration in office" are too broad and that the petitions must contain more specific grounds to be statutorily sufficient to compel a recall election. The District Court issued a writ of mandamus ordering the recall election to be held. The appellants appeal from that order. We affirm.

The single issue to be resolved is whether the recall petitions sufficiently stated the reason for removal of the appellants, board of education members, under the provisions of section 79-518.04, R. R. S. 1943. This section provides that: "The petition shall name the incumbent and the reason for removal and the candidate proposed for election to succeed him * * *." The reasons stated in the petitions in issue, "willful neglect of duty" and "willful maladministration in office," are grounds set out in section 79-518.04, R. R. S. 1943. We hold that a petition to recall school board members which states as a reason for removal one of the grounds listed in section 79-518.04, R. R. S. 1943, is statutorily sufficient to compel a recall election.

Prior to the enactment of section 79-518.04, R. R. S. 1943, in 1973, no grounds were expressly listed in the recall statute. The predecessor statute to section 79-518.04, R. R. S. 1943, was section 79-705, R. S. Supp., 1972, which provided that members of the board of education of a Class II school district could be removed under the provisions of sections 23-2010 and 23-2011, R. R. S. 1943. Section 23-2010, R. R. S. 1943, as it then existed, provided that a petition for recall must contain "a general statement of the grounds upon which the removal is sought."

A case decided under the recall statute, Comp. St. 1911, c. 14a, art. III, § 36, State ex rel. Topping v. Houston, 94 Neb. 445, 143 N. W. 796, clearly limited the role of judicial involvement in determining issues relating to political processes. State ex rel. Topping v. Houston, *supra*, was an action for a writ of mandamus to require a recall election for the mayor of Nebraska City. At issue was whether the petition stated sufficient grounds upon which removal could be sought. The grounds stated in the petition were: " 'Said Houston, in attempting to discharge the duties and trusts of said office, is grossly extravagant with the public funds of said city; manifestly partial, prejudicial and malevolent in exercising the prerogatives of said office; and because of his nonfeasance and malexecution of the duties of said office; and because of his obvious incompatibility of temperament to discharge the duties of said office economically and to the best interest of the citizens and taxpayers of said city of Nebraska City.' "

The court there held the grounds listed on the petition were a sufficient general statement to satisfy the statutory requirement relating thereto. We believe the language used by this court in Houston is particularly relevant to the present case. The court stated: "The policy of the recall may be wise or it may be vicious in its results. We express no opinion

as to its wisdom with respect to the removal of administrative officers. If the people of the state find, after a trial of the experiment, that the provisions of the statute lead to capable officials being vexed with petitions for their recall, based upon mere insinuations or upon frivolous grounds, or because they are performing their duty and enforcing the law, as they are bound to do by their oath of office, or lead without good and sufficient reason to frequent, costly, and unnecessary elections, they have the power through their legislature to amend the statute so as to protect honest and courageous officials. This may be done by increasing the number of names required to be signed to the election petition or by requiring specific charges of misconduct to be made therein, * * * "

The Legislature has changed the statute on recall elections to include a list of grounds for which a member of a school board may be subject to such an election. State ex rel. Topping v. Houston, *supra*, held that the power granted to electors to remove certain public officers is political in its nature and not the exercise of a judicial function. The exercise of the power of recall is legislative in character. The Legislature has spoken, by incorporation into the statute of a list of grounds for which an elected official may be subject to recall. It is not the function of the courts to impose standards other than those the Legislature dictated. A criminal complaint drawn in the language of the statute is sufficient to properly charge the crime. See, Vaca v. State, 150 Neb. 516, 34 N. W. 2d 873; Puckett v. State, 144 Neb. 876, 15 N. W. 2d 63. A petition for recall cannot be held to require more specificity than a criminal complaint.

We note that the allowance of certain testimony at the show cause hearing was adverse to the principle that the power of recall is political in nature. Persons signing the petitions testified as to the circum-

stances under which they signed the petition and their reasons for doing so. In the absence of any application to remove names, a court should not permit inquiry to be made concerning the degree of understanding and comprehension of a political issue. The reasons why a voter signs a petition or casts his ballot in a certain way are his own and not ordinarily a subject for judicial inquiry.

The petition was statutorily sufficient to compel a recall election. On the Board of Education's refusal to hold such an election, it was proper for the District Court to issue the writ.

AFFIRMED.

STATE OF NEBRASKA, COMMISSIONER OF LABOR FOR THE DEPARTMENT OF LABOR, APPELLANT, V. CITY OF OMAHA, NEBRASKA, A CITY OF THE METROPOLITAN CLASS, ET AL., APPELLEES.

268 N. W. 2d 438

Filed July 26, 1978. No. 41606.

1. **Waiver: Words and Phrases.** A waiver is a voluntary and intentional relinquishment of a known right and may be established by acts and conduct from which an intention to waive may reasonably be inferred.
2. **Mandamus: Appeal and Error.** Mandamus is an action at law. In such an action findings of fact by the trial court upon conflicting evidence will not be disturbed on appeal unless clearly wrong.

Appeal from the District Court for Douglas County: RUDOLPH TESAR, Judge. Affirmed.

Thomas R. Pansing, Jr., of Gaines, Otis, Mullen & Carta, for appellant.

Kent N. Whinnery, for appellees.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

SPENCER, J.

This is an action by the Commissioner of Labor for the Department of Labor on behalf of James L. Bookwalter. The Commissioner seeks a writ of mandamus ordering the City of Omaha to comply with an order of the Department to grant Bookwalter all his rights under section 55-161, R. R. S. 1943. This involved reemploying him, restoring all seniority rights, and allowing him backpay from the time he returned from military service. The trial court denied the writ because Bookwalter had not taken a leave of absence but had resigned to enter military service. We affirm.

The Commissioner charges the city violated section 55-161, R. R. S. 1943, which provides in pertinent part: "All officers and employees * * * of the state, or of any of its agencies or political subdivisions, who leave a position other than temporary to undergo military training with the armed forces of the United States * * * shall be entitled to a leave of absence from such civil employment for the period of such training or service, not to exceed four years * * * without loss of status or efficiency rating, and without loss of pay during the first fifteen work days of such leave of absence. * * * The proper appointing authority may make a temporary appointment to fill any vacancy created by such leave of absence. When such person is separated from such training or service under honorable conditions * * * such employee shall be entitled to return to his former position with such seniority, status, pay, and vacation as he would have had if he had not been absent for such purpose, if he is still qualified to perform the duties of his former position, and if he makes application within thirty days after he is released from such training or service. * * * It shall be the duty of the Commissioner of Labor to enforce the provisions of this section."

Section 55-161.01, R. R. S. 1943, authorizes the Commissioner to investigate complaints and to issue

orders directing the offending party to grant the complainant all his rights under the statute, including the granting of backpay from the date the violation occurred. If the order is not complied with within 10 days, the Commissioner may file suit in the District Court for a writ of mandamus.

The following facts were stipulated at trial: The complainant, James L. Bookwalter, was employed by the City of Omaha from October 16, 1969, to May 11, 1972, in the capacity of an automotive equipment operator one (AEO I). Bookwalter enlisted in the United States Air Force and remained on active duty from May 11, 1972, to October 7, 1974, at which time he was honorably discharged. Bookwalter applied for reemployment with the city on August 20, 1974. The city refused to restore Bookwalter to his former position upon the terms provided by section 55-161, R. R. S. 1943, whereupon Bookwalter filed a complaint with the Commissioner of Labor. On November 14, 1974, the city offered to reemploy Bookwalter in an AEO I position with the police towing unit, but he declined this offer. Bookwalter also failed to apear for an interview on December 13, 1974, for an AEO I position in the weed control division. The Commissioner issued an order pursuant to section 55-161.01, R. R. S. 1943, on December 24, 1974, which the city failed to comply with. Bookwalter attended the University of Nebraska at Omaha as a full-time student from January 20, 1975, until his graduation on May 15, 1976. He was at all times qualified to perform the duties of his former position with the city.

Bookwalter testified he attended college while working for the city and had 50 percent of his tuition paid for by the city. His reason for enlisting in the United States Air Force was to obtain GI benefits to further defray his education costs. He testified he always intended to work for the city of Omaha after completion of his tour of duty. The Air Force re-

cruiters informed him that the law guaranteed he would be reemployed by the city.

Bookwalter went to the personnel department approximately 2 weeks prior to leaving his job. He there visited with personnel department representatives about the alternatives if he left his job. He was told that if he took a leave of absence he would receive $300, but if he resigned he would receive $900, which would be his retirement benefits as well as his vacation pay. He was given the alternative of taking a leave of absence or resigning. He was told that the only way he could get the $900 was to resign.

Bookwalter opted to resign in order to receive the additional $600 from the retirement fund. He executed a handwritten note which read as follows: "Do (sic) to the fact of being called into *Military Service,* I am turning in my resignation effective 11/May/1972." (Emphasis in original.)

On cross-examination Bookwalter was asked: "The City of Omaha did discuss you could either take a leave of absence, or resignation, correct? A. Yes, they did." His explanation was that he needed the $900 and he thought that the law covered it.

The only question on appeal is whether Bookwalter waived his statutory right to reemployment.

"A waiver is a voluntary and intentional relinquishment of a known right and may be established by acts and conduct from which an intention to waive may reasonably be inferred." Pester v. American Family Mut. Ins. Co., 186 Neb. 793, 186 N. W. 2d 711 (1971).

Bookwalter admitted he was advised by the city that he could either take a leave of absence or resign. He was also informed the money in his retirement account would only be paid to him if he tendered his resignation. It strains credulity to believe that Bookwalter, after the explanation by the city, did not comprehend the distinction between taking

a leave of absence, which the city offered to him, or resigning.

"Mandamus is an action at law. In such an action findings of fact by the trial court upon conflicting evidence will not be disturbed on appeal unless clearly wrong." State ex rel. Frasier v. Whaley, 194 Neb. 703, 234 N. W. 2d 909 (1975).

On this record we cannot find that the trial court was in error in finding Bookwalter waived his right to reemployment. The judgment of the District Court is affirmed.

AFFIRMED.

CUSHMAN SALES AND SERVICE OF NEBRASKA, INC., A CORPORATION, APPELLANT, V. KEN MUIRHEAD, DOING BUSINESS AS R & R SERVICE, APPELLEE, B-E DISTRIBUTING CO., A CORPORATION, INTERVENER-APPELLEE.

268 N. W. 2d 440

Filed July 26, 1978. No. 41607.

1. **Uniform Commercial Code: Motor Vehicles: Mortgages: Certificate of Title Act.** Under section 60-110, R. R. S. 1943, the practice of filing and recording chattel mortgages on motor vehicles has been eliminated, and under that section security interests must be noted on the certificate of title itself.
2. **Uniform Commercial Code: Motor Vehicles: Certificate of Title Act: Liens.** There is no legal requirement that a lien be noted on a certificate of title purportedly covering property not subject to the Certificate of Title Act, sections 60-101 to 60-117, R. R. S. 1943, even though a certificate of title for such property has been issued.
3. **Uniform Commercial Code: Certificate of Title Act: Mortgages.** The statutory provisions for recording chattel mortgages in effect prior to the adoption of the Uniform Commercial Code were specifically repealed by that act. See Laws 1963, c. 544, art. 10, § 10-102, p. 1943.
4. **Uniform Commercial Code: Mortgages.** A chattel mortgage may constitute a "financing statement" entitled to be filed under sections 9-105, 9-302, 9-401, 9-402, and 9-403, U. C. C., only if it complies with the formal requisites of a financing statement by showing (1) the signatures and addresses of both parties; and (2) a description of the collateral by type or item.

Appeal from the District Court for Dawson County: KEITH WINDRUM, Judge. Reversed.

Ross, Schroeder & Fritzler, for appellant.

No appearance for appellee.

Luebs, Tracy, Dowding, Beltzer & Leininger, for intervener-appellee.

Heard before WHITE, C. J., SPENCER, BOSLAUGH, MCCOWN, CLINTON, BRODKEY, and WHITE, JJ.

BRODKEY, J.

The issue presented in this case is which of two creditors had a superior lien on a house trailer owned by a debtor. The specific questions raised are (1) whether a creditor, in order to perfect his lien on a trailer, must note the lien on the certificate of title issued for the trailer, even though no certificate of title is required by law; and (2) whether a chattel mortgage filed with a county clerk met the formal requisites of a financing statement under section 9-402, U. C. C.

The facts in this case are undisputed. On May 14, 1976, Cushman Sales and Service of Nebraska, Inc. ("Cushman"), plaintiff and appellant herein, obtained a money judgment in the amount of $5,850.54 against Ken Muirhead in the District Court for Dawson County. In September 1976, Cushman executed on the judgment, and the county sheriff seized a 42-foot house trailer owned by Muirhead. Legal notice was given that the trailer would be sold at public sale on October 26, 1976.

On the date of the sale, B-E Distributing Co. ("B-E"), intervener and appellee herein, filed a petition in intervention in the District Court. The basis of B-E's intervention was that in 1975 Muirhead had delivered to it a chattel mortgage on the trailer house as security for a promissory note; that Muirhead had defaulted on the note and refused to pay

the outstanding balance of $3,705.91; and that B-E had filed the chattel mortgage with the clerk of Dawson County on February 10, 1976. B-E prayed for a judgment against Muirhead in the amount of $3,705.91, and further prayed that the proceeds of the sale of the trailer be paid to it to the extent of such a judgment.

Cushman contested B-E's petition in intervention on the grounds that a certificate of title to the trailer had been issued in March 1971, and that the certificate of title carried no notation of the lien claimed by B-E. Cushman alleged that it had "a lien superior to that of the intervenor" by virtue of its judgment and execution thereon.

The trial court, after an evidentiary hearing, entered judgment in the amount of $3,705.91 in favor of B-E against Muirhead. It then concluded that B-E's interest in the proceeds of the sale of the trailer was superior to that of Cushman by virtue of B-E's chattel mortgage, which had been filed prior to the date Cushman obtained its judgment against Muirhead. The District Court concluded that B-E was not required to note its lien on the certificate of title to the trailer in order to perfect its lien because a certificate of title was not required for the trailer in question.

Cushman filed a motion for new trial, alleging that the decision of the trial court was (1) not sustained by sufficient evidence; and (2) contrary to law. This motion was overruled, and Cushman has appealed to this court. On appeal, Cushman contends that the trial court erred in (1) finding that B-E had perfected its security interest without noting its lien on the certificate of title issued for the trailer; and (2) in finding that B-E had perfected its security interest by filing a chattel mortgage with the clerk of Dawson County. The latter assignment of error is based on the contention that B-E failed to comply with section 9-402, U. C. C., in that it failed to file a

financing statement and its chattel mortgage was defective as a financing statement.

In support of its first argument, Cushman relies on section 60-110, R. R. S. 1943, which is a part of the act dealing with titles to motor vehicles. See §§ 60-101 to 60-117, R. R. S. 1943. Section 60-110, R. R. S. 1943 provides that Article 9 of the Uniform Commercial Code shall never be construed to apply to or to permit or require the deposit, filing, or other record whatsoever of a security agreement, mortgage, trust receipt, conditional sales contract, or similar instrument covering a motor vehicle. The section further provides that if a notation of a security interest has been made by the county clerk on the face of a certificate of title, that interest shall be valid as against the creditors of the debtor, whether armed with process or not. Section 60-110, R. R. S. 1943, eliminated the practice of filing and recording chattel mortgages on motor vehicles, and substituted the recording of security interests upon the certificate of title itself. Universal C. I. T. Credit Corp. v. Vogt, 165 Neb. 611, 86 N. W. 2d 771 (1957). The section provides a simple method of securing an interest in a motor vehicle that will adequately protect lienholders, creditors, and purchasers. See, Platte Valley Bank of North Bend v. Kracl, 185 Neb. 168, 174 N. W. 2d 724 (1970); Securities Credit Corp. v. Pindell, 153 Neb. 298, 44 N. W. 2d 501 (1950).

In the present case it is undisputed that B-E's security interest in the trailer was not recorded on the certificate of title that had been issued for the trailer. The question presented is whether the Certificate of Title Act applies in this case.

Section 60-101, R. R. S. 1943 provides: "Wherever the words this act occur in sections 60-102 to 60-117, they shall be construed as referring exclusively to those sections." Section 60-102, R. R. S. 1943, provides: "The provisions of this act shall apply to motor vehicles, commercial trailers, semitrailers

and cabin trailers *required to be registered under the provisions of sections 60-301 to 60-306,* * * *." (Emphasis supplied.) Under section 60-301, R. S. Supp., 1976: "Motor vehicles shall include all vehicles propelled by any power other than muscular power, * * *." That section also provides that: "Cabin trailer shall mean every vehicle without motive power designed for living quarters and for being drawn by a motor vehicle, and not exceeding eight feet in width, or *forty feet in length,* or thirteen and one half feet in height." (Emphasis supplied.) Section 60-302, R. S. Supp., 1976, provides that no motor vehicle, trailer, semitrailer, or cabin trailer, unless otherwise expressly provided, shall be operated on the highways of this state unless such vehicle is registered in accordance with the provisions of the Motor Vehicle Registration Act.

In the present case the trailer is 42 feet in length. It is apparent that under sections 60-301 and 60-302, R. S. Supp., 1976, such a trailer is not required to be registered. Therefore, under section 60-102, R. R. S. 1943, the Certificate of Title Act does not apply to such a trailer, and no certificate of title is required by law.

B-E's contention in this case is simply that since there was no legal requirement that a certificate of title be issued for the trailer, it was not required to note its lien on the certificate of title which was issued. Cushman contends that regardless of whether a certificate of title is required, once one has been issued, section 60-110, R. R. S. 1943, applies and a creditor must note its lien thereon in order to perfect its security interest. The trial court rejected Cushman's argument, stating: "If the law does not provide for a certificate of title, section 60-110 is not applicable just because in the instant case there happened to be such a certificate. Such a ruling would defy common sense, as it would place a burden upon a prospective purchaser to determine

whether or not certificates of title had been issued although not required." We agree, and find there is no legal requirement, statutory or otherwise, that a lien be noted on a certificate of title, which, although issued, was not required to be issued and covers property not subject to the act.

We add that if any change in the law is required to promote certainty in dealing with motor vehicles and the various types of trailers referred to in section 60-102, R. R. S. 1943, that problem should be addressed to the Legislature rather than to this court.

We now consider Cushman's second assignment of error in its brief on appeal to the effect that the trial court erred in finding that B-E had perfected its security interest by filing its chattel mortgage with the clerk of Dawson County. The chattel mortgage in question was dated December 9, 1975, but was not filed of record until February 10, 1976, and was given by Ken Muirhead to B-E Distributing Company "For the purpose of securing payment of Four Thousand Nine Hundred Forty-one dollars and 36 cents." The property purportedly covered by the mortgage is described as "Cabin on Midway Lake-Lot #2 Described as 40 x 20 with patio, completely furnished: * * *." While there may have been some question appearing from the face of the instrument alone as to whether the description of the collateral was sufficient for the purpose of determining the applicability of the Certificate of Title Act, this problem was resolved by a stipulation between the parties to the effect that the cabin referred to in the chattel mortgage was in fact the property involved in this litigation between the parties to this appeal.

We note at the outset that the statutory provisions for recording conditional sales contracts and chattel mortgages on property, in effect in Nebraska prior to the adoption of the Uniform Commercial Code in 1963, which became operative at midnight on Sep-

tember 1, 1965, specifically repealed the existing sections of the statutes in question. See Laws 1963, c. 544, art. 10, s. 10-102, p. 1943. In lieu thereof, the Uniform Commercial Code substituted provisions requiring the filing of a financing statement in order to perfect security interests in chattels, including chattel mortgages, with certain exceptions not applicable in this case. See §§ 9-105, 9-302, 9-401, 9-402, and 9-403, U. C. C. The record in this case does not reveal that Cushman had any actual notice or knowledge of the existence of B-E's chattel mortgage. Subsection (1) (b) of section 9-301, U. C. C., provides that: "(1) except as otherwise provided in subsection (2) an unperfected security interest is subordinate to the rights of * * * (b) a person who becomes a lien creditor without knowledge of the security interest and before it is perfected." Cushman became a lien creditor when it obtained judgment against Ken Muirhead, and later executed on the trailer. There is no evidence that Cushman had knowledge of B-E's claimed security interest prior to that time. Therefore, if B-E's security interest were unperfected as of that time, Cushman is entitled to priority as to the proceeds of the sale of the collateral. We agree with Cushman's contention that B-E's security interest was unperfected as of that time. A perusal of the chattel mortgage in question clearly indicates that it does not contain an address of the secured party, nor provide a mailing address for the debtor. This court has stated that the "formal requisites of a financing statement are two: (1) The signatures and addresses of both parties; and (2) a description of the collateral by type or item." Mid-America Dairymen, Inc. v. Newman Grove Coop. Creamery Co., Inc., 191 Neb. 74, 214 N. W. 2d 18 (1974).

We conclude, therefore, that since the chattel mortgage in question was defective as a financing statement, B-E's security interest was unperfected under section 9-302, U. C. C.; and therefore Cushman

is entitled to priority as to the proceeds of the sale of the trailer by virtue of section 9-301 (1) (b), U. C. C. It appears that the trial court erred in holding that B-E Distributing Co. had priority as to the proceeds of the sale of the trailer, and therefore the judgment of the District Court must be reversed.

REVERSED.