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REPORTS OF CASES

DECIDED BETWEEN

JULY 30, 1980 and JANUARY 30, 1981

IN THE

Supreme Court of Nebraska

JANUARY TERM 1980
SEPTEMBER TERM 1980
JANUARY TERM 1981

VOLUME CCVII

JILL NAGY

OFFICIAL REPORTER

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OMAHA, NEBRASKA

1981

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By Jill Nagy, Reporter of the Supreme Court

For the benefit of the State of Nebraska

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September 1980 and January 1981 Terms

No. 42332: **Schnabel v. Berns.** Dismissed as premature.

No. 42961: **In re Application of City of Grand Island v. Stelk.** Appellant's motion for dismissal sustained; dismissed at appellant's cost.

No. 42977: **In re Interest of Atkisson. State v. Atkisson.** Dismissed as moot.

No. 43067: **Erickson v. Midwestern Homes, Inc.** Stipulation for dismissal allowed; dismissed with prejudice; each party to pay own costs.

No. 43069: **Omaha Sokolice Gymnastic Unit v. State.** Affirmed by order of the court.

Nos. 43129 and 43130: **NBC Trust & Savings Assn. v. Gil Grady & Associates.** Stipulation for dismissal allowed; dismissed at appellant's costs.

No. 43139: **Broderson v. Broderson.** Stipulation for dismissal allowed; each party to pay own costs.

No. 43152: **State v. Taylor.** Affirmed under Rule 20-A(8); counsel's motion to withdraw sustained.

No. 43163: **State v. Poe.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed.

No. 43167. **Bishop Clarkson Memorial Hospital v. Wagman.** Appellant's motion for dismissal sustained; dismissed at appellant's cost.

No. 43199: **Olney v. Olney.** Dismissed for failure to file briefs.

No. 43234: **State v. Tibbs.** Affirmed under Rule 20-A(8); counsel's motion to withdraw sustained.

No. 43236: **State v. Wilson.** Affirmed under Rule 20-A(8); counsel's motion to withdraw sustained.

No. 43266: **In re Application of Miller. Miller v. City Cab & Transit Co.** Appellant's motion for dismissal sustained; dismissed at appellant's cost.

No. 43273: **State v. Mister.** Affirmed under Rule 20-A(8); counsel's motion to withdraw sustained.

No. 43299: **State v. Gibson.** Affirmed under Rule 20.

No. 43329: **Smith v. Wahlstrom.** Appellant's motion for dismissal sustained; dismissed at appellant's cost.

No. 43332: **McCurry v. YMCA.** Appellant's motion for dismissal sustained; dismissed without prejudice.

No. 43338. **Hinkle v. Community Hospital Assn.** Stipulation for dismissal allowed; dismissed at appellant's cost.

No. 43369: **State v. Carter.** Affirmed under Rule 20-A(8); motion of court-appointed counsel for leave to withdraw.

No. 43377: **State ex rel NSBA v. Moylan.** Voluntary surrender of license accepted; order of disbarment entered.

No. 43387: **State v. Jones.** Affirmed under Rule 20.

No. 43409: **Johnson v. Johnson.** Appellant's motion for dismissal sustained; dismissed at appellant's costs.

No. 43417: **State v. Thompson.** Affirmed under Rule 20-A(8); counsel's motion to withdraw sustained.

No. 43420: **State v. Lewis.** Affirmed under Rule 20-A(8); counsel's motion to withdraw sustained.

No. 43421: **Husker Hog & Cattle Co. v. Hilgenkamp.** Stipulation for dismissal allowed; dismissed at appellant's costs.

No. 43422: **Hoegermeyer v. Husker Hog & Cattle Co.** Stipulation for dismissal allowed; dismissed at appellant's costs.

No. 43423: **State v. Ringle.** Affirmed under Rule 20.

No. 43431: **State v. Buckman.** Affirmed under Rule 20.

No. 43437: **State v. Moss.** Dismissed for failure to file briefs.

No. 43470: **First National Bank in Chicago Heights v. Hall.** Affirmed under Rule 20-A(2); appellees' motion for summary affirmance sustained.

No. 43473: **State v. Morris.** Affirmed under Rule 20-A(8); motion of court-appointed counsel for leave to withdraw appearance sustained.

No. 43474: **Ruby v. Ruby.** Appellee's motion for dismissal sustained; dismissed at appellant's cost.

No. 43482: **State v. Cousins.** Affirmed under Rule 20.

No. 43485: **State v. Pfeifer.** Stipulation for dismissal allowed; dismissed at appellant's costs.

No. 43486: **State v. Phelps.** Stipulation for dismissal allowed; dismissed at appellant's costs.

No. 43487: **State v. Fimple.** Stipulation for dismissal allowed; dismissed at appellant's costs.

No. 43493: **State v. Strunk.** Affirmed under Rule 20-A(8); counsel's motion to withdraw sustained.

No. 43494: **State v. Johnson.** Affirmed under Rule 20-A(8); counsel's motion to withdraw sustained.

No. 43503: **State v. Ybarra.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed.

No. 43508: **Nebraska Corporation v. Bankers Union Life Insurance Co.** Affirmed as modified by report and order of the court.

No. 43516: **State v. Guest.** Affirmed under Rule 20-A(8); counsel's motion to withdraw sustained.

No. 43519: **DeMott v. Western Nebraska Enterprises, Inc.** Appellant's motion for dismissal sustained; dismissed at appellant's cost.

No. 43525: **Burbank v. Rogers.** Appellant's motion for dismissal sustained; each party to pay own costs.

No. 43535: **Dowd v. Byron Reed Co.** Appellants' motion for dismissal sustained; dismissed with prejudice at appellants' costs.

No. 43536: **State v. Burgess.** Appellant's motion for dismissal sustained; dismissed at appellant's costs.

No. 43539: **State v. Thomas.** Affirmed under Rule 20.

No. 43540: **State v. Meegan.** Affirmed under Rule 20.

No. 43543: **State v. Pillard.** Affirmed under Rule 20.

No. 43551: **Deemer v. Deemer.** Dismissed for failure to file briefs; counsel's motion to withdraw sustained.

No. 43564: **State v. Taylor.** Affirmed under Rule 20.

No. 43567: **Riley v. Riley.** Stipulation for dismissal allowed; dismissed at appellant's cost.

No. 43569: **State v. Grant.** Affirmed under Rule 20.

No. 43570: **State v. Schwisow.** Affirmed under Rule 20.

No. 43577: **State v. Landers.** Appellant's motion for dismissal sustained; dismissed without prejudice.

No. 43578: **State v. Brown.** Affirmed under Rule 20.

No. 43583: **State v. Seerley.** Affirmed under Rule 20.

No. 43584: **State v. Uhrich.** Affirmed under Rule 20.

No. 43585: **State v. Leander.** Affirmed under Rule 20.

No. 43587: **Morton v. Nebraska Liquor Control Commission.** Stipulation for dismissal allowed; dismissed at appellant's cost.

No. 43591: **State v. Jesberg.** Affirmed under Rule 20.

No. 43598: **State v. Conley.** Affirmed under Rule 20-A(8); counsel's motion to withdraw sustained.

Nos. 43608 & 43610: **State v. Hirsch.** Affirmed under Rule 20.

No. 43617: **State v. Clear.** Affirmed under Rule 20-A(8); counsel's motion to withdraw sustained.

No. 43619: **State v. Coleman.** Affirmed under Rule 20-A(8); counsel's motion to withdraw sustained.

No. 43622: **State v. Schoenrock.** Affirmed under Rule 20.

No. 43623: **State v. Lyons.** Dismissed for failure to file briefs.

No. 43624: **State v. Harris.** Affirmed under Rule 20.

No. 43626: **State v. Meyer.** Affirmed under Rule 20.

No. 43651: **State v. Caynor.** Affirmed under Rule 20-A(8); counsel's motion to withdraw sustained.

No. 43653: **State v. Glasenapp.** Affirmed under Rule 20-A(8); counsel's motion to withdraw sustained.

No. 43656: **State v. Tackett.** Affirmed under Rule 20-A(8); motion of court-appointed counsel for leave to withdraw appearance sustained.

No. 43661: **State v. Brick.** Affirmed under Rule 20-A(8); counsel's motion to withdraw sustained.

No. 43662: **State v. Bean.** Affirmed under Rule 20.

No. 43669: **State v. Petersen.** Affirmed under Rule 20.

No. 43671: **State v. Magub.** Affirmed under Rule 20.

No. 43673: **State v. Keller.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed.

Nos. 43674 and 43675: **State v. Williams.** Dismissed for failure to file briefs.

No. 43683: **State v. Sturm.** Dismissed under Rule 20-A(1); appellee's motion for summary dismissal sustained.

No. 43686: **In re Estate of Fly. Eisenhauer v. State Farm Mutual Auto Insurance Co.** Stipulation for dismissal allowed; dismissed with prejudice at appellants' costs.

No. 43687: **In re Estate of Fly. Eisenhauer v. State Farm Mutual Auto Insurance Co.** Stipulation for dismissal allowed; dismissed with prejudice at appellants' costs.

No. 43688: **U.S. National Bank of Omaha v. Marina Development Corp.** Stipulation for dismissal allowed; dismissed with prejudice and at appellant's cost.

No. 43700: **State v. Webb.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed.

No. 43701: **Anderson v. Straub.** Stipulation for dismissal allowed; dismissed at appellants' cost.

No. 43702: **State v. Morris.** Affirmed under Rule 20.

No. 43711: **Muff v. Rankin.** Appellees' motion for dis-

missal under Rule 20-A(1) sustained; dismissed at appellant's cost.

No. 43718: **State v. Garcia.** Dismissed for failure to file briefs.

No. 43726: **Krivan v. Krivan.** Appellant's motion for dismissal sustained; dismissed at appellant's costs.

No. 43727: **Bartels v. Bartels.** Motion of appellant for dismissal of appeal sustained; appeal dismissed with prejudice at costs of appellant.

No. 43728: **Taylor v. Taylor.** Stipulation for dismissal allowed; dismissed at appellant's costs.

No. 43731: **State v. Fox.** Appellant's motion for dismissal sustained.

No. 43736: **Courtesy Leasing, Inc. v. Bosselman.** Appellant's motion for dismissal sustained; dismissed at appellant's costs.

No. 43745: **Mankin v. Alexander.** Stipulation for dismissal allowed; dismissed at appellant's costs.

No. 43747: **Grosch Irrigation Co. v. Brush & Co.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 43759: **State v. Toles.** Affirmed under Rule 20-A(8); counsel's motion to withdraw sustained.

No. 43766-67-68: **State v. Williams.** Affirmed under Rule 20.

No. 43774: **State v. McCoy.** Dismissed for failure to file briefs.

No. 43785: **Olson v. Olson.** Stipulation for dismissal of appeal allowed; appeal dismissed at appellant's cost.

No. 43788: **Irions v. Balcor Realty Investor, Ltd.** Stipulation for dismissal allowed; dismissed; each party to pay own costs.

No. 43790: **Gross-Rhode v. Coca Cola Bottling Co. of Omaha.** Stipulation for dismissal of appeal allowed; appeal dismissed with prejudice at costs of appellant.

No. 43795: **State v. Sears.** Affirmed under Rule 20.

No. 43800: **State v. Drennan.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed.

No. 43810: **State v. Schommer.** Affirmed under Rule 20.

No. 43813: **Wilson v. Wilson.** Appellant's motion for dismissal sustained; dismissed at appellant's costs.

No. 43822: **In re Interest of Morey. State v. Morey.** Motion of appellant for dismissal of appeal sustained; appeal dismissed.

No. 43832: **Berry v. Berry.** Appellant's motion for dismissal sustained; dismissed with prejudice at appellant's costs.

Nos. 43848-49: **State v. Drennan.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed.

No. 43856: **State ex rel. Riley v. Omega Research Corporation.** Affirmed under Rule 20-A(1); appellee's motion for summary dismissal sustained; dismissed at appellant's costs.

No. 43859: **Schumacher v. Michan.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 43871: **State v. Kubo.** Appellee's motion for summary dismissal sustained; dismissed at appellant's costs.

No. 43872: **Richmond v. Richmond.** Stipulation for dismissal of appeal allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 43878: **Interstate Electric Supply Co. v. Galloway Electric Co.** Stipulation for dismissal of appeal allowed; appeal dismissed with prejudice; each party to pay own costs.

No. 43893: **State v. Bruha.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 43901: **Ball Real Estate Co. of Kearney v. Morris.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellants.

No. 43921: **Watts v. Mason.** Stipulation for dismissal allowed; dismissed at appellant's costs.

No. 43936: **State v. Williams.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1980

JAMES T. CURFMAN, APPELLANT, V. WANDA G. CURFMAN, APPELLEE.

295 N.W.2d 299

Filed August 8, 1980. No. 42938.

1. **Divorce: Child Custody.** In determining the question of who should have care and custody of minor children upon the dissolution of a marriage, the paramount consideration is the best interests and welfare of the children.
2. ____: ____. In any custody determination, the discretion of the trial court in such a situation is necessarily subjective and must be founded to a significant extent upon its observation of the parties and the review of all the minute details that affect the general welfare and the best interests of the children. It also must necessarily be prospective in nature.
3. **Equity: Appeal and Error.** Equity cases are heard de novo in this court; however, 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.
4. **Divorce: Child Custody: Appeal and Error.** A custody order of the trial 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 Buffalo County: DEWAYNE WOLF, Judge. Affirmed.

Gregg C. Harris for Munro & Munro, P.C., for appellant.

Charles W. Hastings for Dunmire & Blessing for appellee.

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

CLINTON, J.

This is an appeal in an action for dissolution of marriage in which the only error assigned is that the court

erred in awarding custody of Shane, the only child of the parties, to Wanda Curfman, respondent, the appellee here. It is asserted that in so doing, the court disregarded certain provisions of Neb. Rev. Stat. § 42-364 (Reissue 1978) which prescribe the considerations to be used in determining custody. We affirm.

A brief marital history and outline of the litigation will be useful. James Curfman and Wanda were married November 28, 1970. Shane was the only child born to the union and, at the time of the order from which the appeal was taken, he was 8 years of age. The action for dissolution was filed on June 7, 1978. Shortly thereafter, temporary custody was awarded to Wanda who, at that time, was living temporarily with her parents in Belleville, Kansas. On November 8, 1978, the court found the marriage was irretrievably broken and entered an order of dissolution. At that time, it terminated the temporary custody arrangement, took legal custody in the court, and placed physical custody in James who was then and is now a resident of the city of Kearney. At the same time, it ordered that the county division of welfare make periodic inspections and reports relating to the fitness of the parties for custody. During both periods of custody, there was considerable conflict between the parties in connection with visitation rights.

On August 8, 1979, after further hearing at which both parties presented evidence, the court found that the best interests of the child would be served if he were placed with Wanda and entered an order awarding custody to her. The order also prescribed visitation rights of James including physical possession for 6 consecutive weeks during the summer vacation; 1 week, including Christmas day, during the Christmas vacation period in each even-numbered year; and 1 weekend each month. The order also provided the details for transportation between the homes of the parties.

During the approximately 9-month period in which James had physical custody, Wanda had remarried and was residing in Sedgwick, Kansas. Her husband had

custody of a young boy born of his earlier marriage. James had not remarried, but was dating a divorcee who had custody of three children of her prior marriage.

The social welfare study submitted by the county division of welfare found that James would be an able and suitable parent. It made no findings with reference to Wanda.

Both parties presented evidence which reflected unfavorably on the other. Some of that evidence was in sharp conflict. However, the record does quite clearly support the conclusion that during the pendency of the proceedings and before her second marriage, Wanda engaged in illicit sexual relations with her husband-to-be.

James argues that the court, in making its determination, disregarded the following provisions of § 42-364(1): "In determining with which of the parents the children, or any of them, shall remain, the court shall consider the best interests of the children, which shall include, but not be limited to:

"(a) The relationship of the children to each parent prior to the commencement of the action or any subsequent hearing;

"(b) The desires and wishes of the children if of an age of comprehension regardless of their chronological age, when such desires and wishes are based on sound reasoning; and

"(c) The general health, welfare, and social behavior of the children."

The difficulty with James' argument in support of this claim is that he takes a view of the evidence which resolves all disputed matters in his own favor. We see no purpose in dissecting the evidence in detail. The evidence shows that the relationship between Shane and each of his parents is good. He told the welfare agency he could not choose between them. Both parents appear to love Shane and want to do for him the best they are able.

The following rules are applicable to our review here: "In determining the question of who should have the care

and custody of minor children upon the dissolution of a marriage, the paramount consideration is the best interests and welfare of the children.

"In any custody determination, the discretion of the trial court in such a situation is necessarily subjective and must be founded to a significant extent upon its observation of the parties and the review of all the minute details that affect the general welfare and the best interests of the children. It also must necessarily be prospective in nature.

"Equity cases are heard de novo in this court; however, 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.

"A custody order of the trial court will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence." *Duff v. Duff*, 203 Neb. 767, 280 N.W.2d 69 (1979) (syllabus of the court).

Having carefully reviewed the evidence, we are unable to conclude that the order of the trial court is clearly an abuse of discretion or clearly against the weight of the evidence.

The parties will bear their own costs incurred in this court, including attorney fees.

AFFIRMED.

VIRGINIA C. EULER, APPELLANT, V.
ARTHUR C. EULER, APPELLEE.
295 N.W.2d 397

Filed August 8, 1980. No. 42936.

1. **Divorce: Alimony.** Except as otherwise agreed by the parties in writing or by order of the court, alimony orders shall terminate upon the death of either party or the remarriage of the recipient. Neb. Rev. Stat. § 42-365 (Reissue 1978).
2. **Divorce: Modification of Decree.** Except for terms concerning the custody or support of minor children, the decree in an action for dissolution of marriage may expressly preclude or limit modification of the terms set forth in the decree. Neb. Rev. Stat. § 42-366 (Reissue 1978).

3. **Divorce: Alimony.** Provisions for the payment of alimony contained in a property settlement agreement entered into between the parties, and approved by the court and incorporated into the decree of dissolution of marriage, may be terminated under Neb. Rev. Stat. §42-365 (Reissue 1978), where neither the property settlement agreement nor the decree provide for termination of alimony upon the occurrence of a specified event, or provide that the agreement shall not be subject to amendment or revision.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Affirmed as modified.

Dale D. Kuhlmann of Kuhlmann & Gergen for appellant.

Jon S. Okun and Richard Calkins of Eisenstatt, Higgins, Kinnamon & Okun, P.C., for appellee.

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

BRODKEY, J.

Virginia C. Euler (Virginia), who was the petitioner below in an action brought by her for dissolution of her marriage to the respondent, Arthur C. Euler (Arthur), in 1974, appeals to this court from an order entered by the District Court for Douglas County, Nebraska, on May 21, 1979, terminating the obligation of Arthur to pay alimony to Virginia as provided in the decree of dissolution of marriage dated August 9, 1974.

There is no dispute as to the facts in this case. The decree entered August 9, 1974, dissolved the marriage of the parties, awarded custody of the minor child of the parties to Virginia, and, pursuant to a property settlement agreement between the parties dated July 30, 1974, provided for payment of child support for the minor child, alimony for Virginia, and also for attorney fees for Virginia's counsel. The trial court found that the terms of the property settlement agreement were "proper and reasonable in all respects." That agreement, so far as it provided for the payment of alimony to Virginia, provided as follows:

"10. That in addition to the specific items of property

transferred or to be transferred to VIRGINIA C. EULER in connection with this Property Settlement Agreement, ARTHUR C. EULER agrees to pay to VIRGINIA C. EULER the sum of Twenty-seven Thousand Two Hundred Twenty-Five Dollars ($27,225.00) as alimony payable Two Hundred Twenty-Five Dollars ($225.00) per month, said payments to begin on the 1st day of the first month following the month in which the Decree of Dissolution of Marriage is entered and decreed by the Court, said payments to continue thereafter for a period of One Hundred Twenty-one (121) months, or a total of ten (10) years and one (1) month, and each successive monthly installment after the first installment shall be made on the 1st day of each month thereafter until fully paid and satisfied; and that all payments shall be made through the Office of the Clerk of the District Court of Douglas County, Nebraska, and that said payments are made in discharge of a legal obligation because of the marital and family relationship incurred by ARTHUR C. EULER incident to the dissolution of marriage proceedings in the District Court of Douglas County, Nebraska entitled 'VIRGINIA C. EULER vs. ARTHUR C. EULER, DOC. 673, No. 301.'"

The trial court incorporated the agreement for payment of alimony into paragraph 5 of the decree in the following language: "5. That the Respondent shall pay to the Petitioner through the Office of the Clerk of the District Court of Douglas County, Nebraska, the sum of Twenty-seven Thousand Two Hundred Twenty-five Dollars ($27,225.00), payable Two Hundred Twenty-five Dollars ($225.00) per month for a period of One Hundred Twenty-one (121) months as alimony, the first such payment to be made on the 1st day of the month following the date of the entry of this Decree and each successive monthly payment to be made on the 1st day of each month thereafter until all payments required hereunder have been made."

It appears from the record thatVirginia remarried on December 26, 1978, and that thereafter, on April 24,

1979, Arthur filed a motion in the proceedings for an order "terminating alimony payments as of the 26th day of December, 1978, at which time the petitioner remarried."

After reviewing the evidence, the trial court entered an order on May 21, 1979, modifying the decree of dissolution by terminating alimony payments as of the date of filing the motion to modify the decree. In so ruling, the trial court found that the award "does not constitute alimony in gross and is terminable by this court upon the death of either party or the remarriage of the recipient. The parties hereto did not agree in writing to the contrary and such alimony award was not designated as 'alimony in gross' so as to take the award of alimony out of the general provision of the statute terminating alimony upon death of either party or remarriage of the recipient. While such alimony may very well have constituted alimony in gross prior to the enactment of Section 42-365, R.S. Supp. 1972, the impact of that section of the statute is to impose or require restrictive language in an alimony award to constitute an award of alimony as in gross and not, therefore, modifiable, which provision is lacking here. The presence of the words 'until all payments required hereunder have been made' does not supply the restrictive omission."

The issue presented in this appeal is whether, because of the marriage of Virginia, the alimony provision contained in the decree was terminated under Neb. Rev. Stat. § 42-365 (Reissue 1978), which provides, in pertinent part: "Except as otherwise agreed by the parties in writing or by order of the court, alimony orders shall terminate upon the death of either party or the remarriage of the recipient."

In her brief and argument on appeal, Virginia contends that the award of alimony contained in the original decree was an award of "alimony in gross," which cannot be modified, and she cites in support of her contention earlier Nebraska cases so holding. This, however, is no longer true under the new marriage dissolution

statutes adopted in Nebraska in 1972. We recently had occasion to discuss the issue in *Van Pelt v. Van Pelt*, 206 Neb. 350, 355, 292 N.W.2d 917, 920 (1980), wherein we stated:

"Under a prior statute, this court held that an unqualified allowance of alimony in gross, whether payable immediately in full or periodically in installments, and whether intended solely as a property settlement or as an allowance for support, or both, is such a definite and final adjustment of mutual rights and obligations between husband and wife as to be capable of a present vesting and to constitute an absolute judgment. *Karrer v. Karrer*, 190 Neb. 610, 211 N.W.2d 116 (1973). Under the terms of Neb. Rev. Stat. §§ 42-365 and 42-366 (Reissue 1978), we believe that rule must be extended to those cases in which the decree expressly precludes modification."

In support of her position that the provision for alimony in the original decree was not modifiable, Virginia relies strongly upon our decision in *Watters v. Foreman*, 204 Neb. 670, 284 N.W.2d 850 (1979), where we were also faced with the situation where the recipient of an alimony award remarried. The issue presented to us in that case was whether the remarriage terminated the alimony obligation. In finding that the remarriage did not operate to terminate the alimony, we stated: "Where the parties by their agreement in writing, or the court by its decree, provide that a specific amount of alimony shall be paid for a specific period of time, and shall terminate only upon the occurring of a specific event set out in the agreement or decree and otherwise shall not be subject to amendment or revision, the payment of such alimony shall terminate only upon the happening of the event set out in the agreement or decree. Under such circumstances the remarriage of a party receiving alimony shall not cause the alimony to terminate, absent a specific provision in the agreement or decree to such effect, and the use of the word 'remarriage' is not necessary."

We believe that *Watters* is factually distinguishable from the instant case. The decree in *Watters* provided that the alimony award should not be modified or amended *except in the event of the recipient's death.* In the case before us, no such provision is included in either the property settlement agreement or in the decree itself. Neither the property settlement nor the decree provides for the termination of alimony upon the occurrence of a specified event set out in the agreement, nor does either state that the agreement shall not be subject to amendment or revision. Section 42-365 clearly states that alimony payments will terminate by operation of law when a decree is silent on the effect of death or remarriage. We, therefore, hold that the trial court was correct in finding that the alimony award in question should be terminated. However, we are of the opinion that the order should have terminated the alimony award as of the date of Virginia's remarriage on December 26, 1978, and we, therefore, modify the order of the District Court to that extent.

One further contention deserves comment. Virginia has contended that section 42-365 is not applicable where the parties have entered into property settlement agreements under Neb. Rev. Stat. § 42-366 (Reissue 1978). However, § 42-366(7) provides: "Except for terms concerning the custody or support of minor children, the decree may expressly preclude or limit modification of terms set forth in the decree." In the instant case, there were no provisions expressly precluding or limiting modification of the terms of the decree. We believe that the provisions of § 42-366(7) can and should be read in conjunction with the provisions of § 42-365, with effect being given to each statute. Under the rule that the court must construe statutes pertaining to the same subject matter together as if they were one law, and effect should be given to every provision if possible, *State ex rel. Meyer v. County of Banner,* 196 Neb. 565, 244 N.W.2d 179 (1966), we conclude that dissolution decrees may be modified with reference to alimony by the plain lan-

guage of the statutes even if they are based on property settlement agreements, so long as the parties or the court have not provided otherwise in writing.

In view of what we have stated above, the order and judgment of the District Court terminating alimony must be affirmed, as modified above.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V.
KENNETH T. BISHOP, APPELLANT.
STATE OF NEBRASKA, APPELLEE, V.
LARRY E. DAVIS, APPELLANT.
STATE OF NEBRASKA, APPELLEE, V.
DARRELL R. YATES, APPELLANT.
295 N.W.2d 698

Filed August 8, 1980. Nos. 43035, 43036, and 43037.

1. **Criminal Trials: Defense Counsel: Conflict of Interest.** If a conflict of interest arises in the representation of more than one defendant in a criminal trial, the mere existence of such conflict raises a presumption of prejudice and reversal is automatic.
2. ____: ____: ____. A defendant in a criminal case is denied effective assistance of counsel whenever a trial court improperly requires joint representation over timely objections which are supported by representations which focus explicitly on the probable risk of a conflict of interest.
3. ____: ____: ____. Permitting or requiring a single attorney to represent codefendants in a criminal trial is not per se violative of the right of effective assistance of counsel.
4. ____: ____: ____. The *possibility* of conflict arising because of multiple representation by an attorney is insufficient to impugn a criminal conviction. In order to demonstrate a violation of his sixth amendment rights, a defendant must establish that an *actual* conflict of interest adversely affected his lawyer's performance.
5. **Post Conviction Relief: Burden of Proof: Appeal and Error.** The defendant has the burden of establishing a basis for relief in a post conviction proceeding, and the findings of the District Court in denying such relief will not be disturbed on appeal unless they are clearly erroneous.

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

John P. Grant for appellant Bishop.

Larry E. Davis, pro se.

James R. Sacoman of Seminara, Caniglia, Turco, McCarthy & Sacoman for appellant Yates.

Paul L. Douglas, Attorney General, and Jerold V. Fennell for appellee.

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

HASTINGS, J.

Defendants appeal the order of the District Court for Douglas County, Nebraska, which denied each of their motions for post conviction relief. We affirm.

In connection with armed robberies occurring at two different locations in Omaha on December 15, 1975, each defendant was charged with five counts of robbery and five counts of the use of a firearm in the commission of a felony. Additionally, the defendant Yates was charged with one count of shooting with intent to kill, wound, or maim. All three cases were consolidated for trial and one attorney from the Douglas County public defender's office was appointed to represent all three defendants.

Subsequent to the filing of the information, the attorney representing the defendants filed motions for severance of the defendants and for separate trials on the counts referring to incidents occurring at different locations. The transcript indicates that all motions were heard and overruled and that the three cases were ordered consolidated for trial. There is no record of the details of the hearing itself. The cases proceeded to trial to a jury on March 3, 1976, and testimony was adduced by the State through March 4, 1976. On March 5, 1976, the defendants' attorney advised the court that a plea bargain had been made, and thereafter all three defendants pleaded guilty to two counts of robbery and one count of the use of a firearm in the commission of a felony. The remaining counts were dismissed. Each defendant received a sentence of 5 to 8 years on the two robbery counts, to run concurrently, and a sentence of 3 to 5 years on the remaining count, to run consecutively to the sentences for robbery.

Each defendant filed, pro se, an identical motion for new trial, alleging insufficiency of the evidence, incompetency of counsel, and excessiveness of sentence, all of which were overruled. Only Yates appealed and his case was affirmed by this court on December 9, 1976, under Neb. Ct. R. 20-A. On December 27, 1978, identical motions to vacate judgment were filed by all of the defendants, pursuant to Neb. Rev. Stat. § 29-3001 (Reissue 1979). The basis of their claim for post conviction relief was the alleged denial of assistance of counsel as guaranteed by the sixth amendment to the United States Constitution. After an evidentiary hearing, the District Court denied the relief sought.

The evidence at the post conviction hearing consisted of the testimony of the three defendants, that of the assistant public defender who had represented them at the trial, and the complete record of the prior proceedings up to and including the sentencing hearing.

In explaining the circumstances which prompted him to reopen negotiations for a plea bargain after 2 days of trial, the assistant public defender said: "I thought the evidence was overwhelming. I thought we were being buried. I couldn't see any daylight." Therefore, he did undertake to negotiate a plea bargain with the prosecuting attorney and "pressured" his clients into entering the pleas of guilty, believing that this was in their best interest rather than be convicted on all counts against them, a fate he then believed to be inevitable.

"Q. And for what reason did you pressure them to plead guilty?

"A. Well, from the beginning they were consistently demanding of me that they have a trial. And there were various discussions from the beginning until the end of plea bargain arrangements, negotiated settlements, and none of them were acceptable to the defendants. So at the point in time where the trial was nearly completed; that is to say, that the State's case was nearly finished, I was convinced that there were going to be convictions all the way around."

In reply to a question as to the nature and circumstances of the pressure that was applied, the defense attorney stated: "One of my three clients was not going to plead guilty to anything, and the Court would not allow us to strike separate plea bargains, nor would the State's attorney go along with that. All three were required to enter into the same plea bargain or else there was to be no plea bargain. In other words, the one holdout had to join the other two, or else we would not be able to negotiate a settlement to the lawsuit. Therefore, there was pressure brought to bear on that one man, and it was brought to bear by me and it was also brought to bear by my other two clients."

At another point in his testimony, when asked if he felt there had been pressure applied to the defendants to enter their pleas, the deputy public defender replied: "Absolutely. I don't think a criminal defendant ever entered a plea of guilty without some kind of pressure on him."

When asked if he felt that the defendants were subjected to duress, he replied that there was pressure, and then the following exchange took place between him and the attorney representing the defendant Davis:

"Q. Do you feel that there was a fear in them at all at the time that they entered the plea, other than the fear of going to the penitentiary?

"A. No, we were all afraid that we were going to be convicted on all counts. That is a definite pressure. If there is — if there was any duress, I am not aware of it. Definitely pressure. No to the duress would be my answer."

Each of the defendants testified at the post conviction hearing that they had verbal struggles and physical struggles among themselves during the pendency of the trial. Bishop testified: "We have asked for severance, particularly not wanting to go to trial with Yates, because of the fact — or the allegations, you know, that Yates supposedly had robbed this place, and if it was so that it was that he did rob this place, myself and Davis

didn't want to be burdened with a robbery that he supposedly had committed, if he had committed it. We felt to ourselves that it would have been in our best interests to get the trial separated."

Yates testified similarly: "I didn't have nothing in common with the fellows that evening, and I felt that I should — I should have had my own counsel, you know. At the time of court he couldn't concentrate on my best interest, you know, my counsel was weak at that time, which I tried to get him to get me another counsel or postpone court several times because I felt that at that time my defense was weak. And he was — it was very obvious to him, because I told him several times. Which he brought it up, but nobody wouldn't see it."

Davis testified that he and Bishop were together in an apartment at the time of arrest and that they had simply been put together with Yates at the police station. He stated that the three had some light physical struggles because: "That we didn't have nothing against Yates to say that he done it or didn't do it, and we didn't want to be going to court with him."

All three defendants testified that they had always wanted a complete jury trial, and the only reason they finally agreed to plead guilty to reduced counts was because "all during trial our attorney was constantly telling us it would be in our best interest to try to make a plea bargain, because there is no way that I can win this trial for you." According to Bishop: "What I understood about it, and what our attorney told us, that it is to the point right now where guilt or innocence doesn't make any difference, the main thing to do right now is try to make a plea for as least time as possible, because you are going to get convicted. He said there is nothing I can do, I couldn't even properly represent you, so your best bet now is to make a deal, that is the best I can do for you. He said if you don't make a deal, then you are going to get fifty, sixty years, et cetera. So we were left hanging like that. Then with that impression, which he said he could possibly get three-year sentences for us, I made the deal."

Further testimony of the assistant public defender relates to the matter of accepting the plea bargain, as follows: "I think they were becoming as receptive as I was to the plea bargain offer because they, too, were impressed with the testimony of the State's witnesses. . . . All four of us are at the same spot looking at the same evidence, and I think they realized that we needed to take another look at this. They were helpful, they were listening. They were not volunteering. I was in the position of having to convince them about a negotiated settlement."

The primary contention of all three defendants upon appeal is that their constitutionally-protected rights to effective assistance of counsel were denied when their court-appointed attorney was directed to contemporaneously represent the interests of all three codefendants. The contention is that the joint representation, with its conflicts of interest, resulted in inadequate representation for each man.

According to their testimony, they were each under the impression that a motion for appointment of separate counsel had been submitted and denied by the trial court. The record, however, reveals only the filing of motions to sever and for separate trials, as previously indicated. Unfortunately, there is nothing in the record from which we can determine just what was said at the hearings on those motions. There is simply a hint of the general discussion found in a colloquy between the court and the assistant public defender at the post conviction hearing:

"The Court: . . . [I]n connection with the motions to sever the cases and give individual trials, you recall those motions, I think they were all heard on one day. The Court's decision was based on the question of lack of prejudice, you couldn't prove that they would be prejudiced by being joined together; that's correct, isn't it?

"A. Yes.

"The Court: In other words, these defendants had told you all the time, as I understood it, if I remember cor-

rectly, that they were not guilty, and so there wouldn't be any conflict as far as the guilt is concerned; am I correct in my assumption?

"A. Yes."

This court stated in *State v. Stevenson & Jackson*, 200 Neb. 624, 264 N.W.2d 848 (1978), that if a conflict of interest arises in the representation of more than one defendant, the mere existence of such conflict raises a presumption of prejudice and reversal is automatic. In that case, one attorney represented two codefendants in a joint trial. The confession of each defendant was introduced into evidence and each confession implicated the other codefendant. We held that a conflict of interest on behalf of the attorney arose. In the instant case, no facts such as those appear in the record.

Relied upon to some extent in *Stevenson & Jackson, supra*, was *Glasser v. United States*, 315 U.S. 60 (1942), in which the United States Supreme Court stated: "'[A]ssistance of counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests." *Id.* at 70. In *Glasser*, the lawyer representing codefendants failed to cross-examine two witnesses. An inference could be drawn that such decision to forego cross-examination was influenced by a desire to protect one of the codefendants to the prejudice of the other. Additionally, there was certain testimony received without objection which conceivably could have been favorable to one codefendant and prejudicial to the other. No similar fact situation existed here.

The United States Supreme Court further has held that a defendant is denied effective assistance of counsel whenever a trial court improperly requires joint representation over timely objections which are supported by representations which focus explicitly on the probable risk of a conflict of interest. *Holloway v. Arkansas*, 435 U.S. 475 (1978). That case also held that permitting or requiring a single attorney to represent

codefendants is not per se violative of the right to effective assistance of counsel, but the Court refused to adopt a rule requiring a defendant to show that a conflict of interest prejudiced him in some specific fashion. However, in *Holloway*, during pretrial proceedings, the attorney representing the codefendants advised the trial judge of the possibility of conflict, which was amplified by his assertion that "'one or two of the defendants may testify and, if they do, then I will not be able to cross-examine them because I have received confidential information from them.'" The trial judge responded, "'I don't know why you wouldn't.'" *Id.* at 478. When that exact situation arose during trial, the attorney observed to the court that he was in a position where he was unable to cross-examine the one defendant on behalf of the others. To this, the trial judge replied: "'You have no right to cross-examine your own witness.'" *Id.* at 479. In the instant case, no such situation was presented to the trial judge, nor did it develop during trial.

The most recent pronouncement on this point by the United States Supreme Court is in *Cuyler v. Sullivan*, 100 S. Ct. 1708 (1980). In that case, the same two lawyers represented the defendant and two others, who, however, were tried at separate trials. The defendant Sullivan was the first to be tried, and the defense rested at the close of the prosecution's case and the defendant was convicted. The two lawyers gave conflicting accounts of the decision to rest Sullivan's case. One lawyer said that he had encouraged the defendant to testify because the prosecution had presented a very weak case. His cocounsel remembered that it was his desire that no defense be presented because it would only be exposing the defense witnesses for the other two trials. After reviewing the opinions from *Glasser v. United States*, *supra*, and *Holloway v. Arkansas*, *supra*, the Court said: "The Court of Appeals granted Sullivan relief because he had shown that the multiple representation in this case involved a possible conflict of interest. We hold that the possibility of conflict is insufficient to impugn a crimi-

nal conviction. In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler* at 1719.

In summary, the complaints made by the defendants as to conflict of interest are the same as are advanced against consolidation of cases for trial, i.e., guilt by association, or exerted pressure by counsel and codefendants to accept an "all or none" plea bargain. There is no indication, nor complaint made, that the defendants' single counsel was hampered at sentencing in presenting the defendants in their most favorable light.

At the time of accepting the pleas of guilty, Judge Tesar fully, meticulously, and scrupulously protected their rights by full inquiry into all of the required areas of accepting a guilty plea. He ascertained that the defendants knew with what they were charged; that they were entitled to continue with the jury trial; and that they understood the burden of proof, presumption of innocence, right of compulsory process, right of cross-examination, right against self-incrimination, and the necessity of a unanimous verdict. He fully explained the consequences of their guilty plea, i.e., the possible sentences. The trial judge was assured by the defendants that no force, threats, or coercion had been practiced against them to produce the guilty pleas, and on several occasions impressed upon them that a plea of guilty was an admission of guilt and that he would not accept the pleas if they were not guilty of the charges. The defendants all assured the court that, in their opinion, they had had good advice and effective counsel.

It is quite apparent that the defendants pleaded guilty not because their attorney probably could not get them acquitted due to any conflict of interest, but because of the overwhelming weight of the evidence presented by the State. Perhaps this is best demonstrated by the statement of the assistant public defender, who, in order to furnish the basis of the pleas to the court, stated as follows: "I urged my three clients to stick with the plea of

not guilty because I felt that there were inherent weaknesses in the eyewitness identification testimony of the State's witnesses, but after now having seen most of the State's evidence, including all of the circumstantial evidence, it is now clear to my clients that the circumstantial evidence is, at least, adequate to convict them on all of the counts. That's why we are changing our minds."

Immediately following that statement, the trial judge said to one of the defendants, "That's what I was driving at. In other words, you are telling me that the three offenses that you are pleading guilty to you committed, is that correct . . . ?" That question was addressed to each defendant separately and drew an affirmative reply from each.

Finally, the following testimony was given by the assistant public defender during the post conviction proceeding:

"Q. But let's go back, and you say that if you had two other lawyers that things could be different and that you could have represented either Mr. Bishop or Yates or Davis, assuming you would have had your pick. Tell me, sir—

"A. They would have had their pick.

"Q. All right, they would have had their pick, fine, it makes no difference. Tell me, do you think as you are sitting there in that witness chair at this time if there were two other lawyers and the evidence came in like it did on that day, on March 3, 4, and 5 of 1976, do you think that those two other lawyers could have changed this case in any way? In other words, do you think a plea bargain still would have been struck?

"A. I don't think anything would have been any different."

The defendant has the burden of establishing a basis for relief in a post conviction proceeding, and the findings of the District Court in denying such relief will not be disturbed on appeal unless they are clearly erroneous. *State v. Halsey*, 195 Neb. 432, 238 N.W.2d 249 (1976). The defendants have failed to carry their burden

to establish that an actual conflict of interest adversely affected their lawyer's performance in these cases.

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

AFFIRMED.

KRIVOSHA, C.J., dissenting.

I must respectfully dissent from the majority's opinion in this case. I believe that it is, indeed, a better practice to permit each defendant separate counsel, when requested, and whereas in this case it appears that separate counsel was requested and denied, the relief requested here should be granted. As we noted in *State v. Stevenson & Jackson*, 200 Neb. 624, 264 N.W.2d 848 (1978), if a conflict of interest arises in the representation of more than one defendant, the mere existence of such conflict raises a presumption of prejudice and reversal is automatic. I believe here that where not only do the parties allege, but their court-appointed counsel also admits, that there was some conflict and that pressure was brought to bear on the three defendants to enter pleas of guilty, there is sufficient evidence of a conflict of interest. For that reason, I would have granted the relief requested and ordered new trials in these cases.

MCCOWN and WHITE, JJ., join in this dissent.

CLINTON, J., concurring.

I concur in the judgment. The record affirmatively shows that each of the defendants entered a plea of guilty which was intelligently and voluntarily made and it is not contended otherwise. These pleas of guilty waive any constitutional claims re prior ineffective assistance of counsel. A plea of guilty or nolo contendere waives every defense to the charge, procedural, statutory, or constitutional, other than that the information does not state a crime. *State v. Country*, 202 Neb. 509, 276 N.W.2d 110 (1979); *State v. Abramson*, 197 Neb. 135, 247 N.W.2d 59 (1976); *State v. Turner*, 186 Neb. 424, 183 N.W.2d 763 (1971).

STATE OF NEBRASKA EX REL. MAURICE S. REDMOND, COUNTY ATTORNEY OF DAKOTA COUNTY, NEBRASKA, APPELLEE, V. RODNEY R. SMITH ET AL., APPELLANTS.

295 N.W.2d 297

Filed August 8, 1980. No. 42875.

1. **Legislature: Vacancies in Office.** A newly created office which is not filled by the legislative act creating it, and for which no provision is made by the act to fill it, becomes vacant on the instant of its creation and remains so until it is filled by an incumbent.
2. ____: ____. Absent constitutional direction, vacancies in office are filled in the manner provided by the Legislature.

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

Smith, Smith & Boyd for appellants.

Maurice S. Redmond for appellee.

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

WHITE, J.

This is a quo warranto action instituted by the relator county attorney of Dakota County, Nebraska, seeking to oust the respondents, Rodney R. Smith and Robert P. Garvey, from the offices of county commissioner of Dakota County. The cause was tried on a stipulated set of facts. The District Court for Dakota County, Nebraska, found for the relator and ousted the respondents from the offices of county commissioner as having been illegally appointed. We reverse and dismiss.

On November 7, 1978, the electors of Dakota County, Nebraska, chose by majority vote to increase the number of Dakota County commissioners from three to five. The election returns were canvassed and certified to by the county clerk on November 9, 1978, pursuant to Neb. Rev. Stat. § 23-151 (Reissue 1977). Neb. Rev. Stat. § 32-1040 (Reissue 1978) provides, in part, as follows: "Vacancies in office shall be filled in the following manner: . . . in county and precinct offices including county supervisors, by the county board; and in the membership of such board,

except county supervisors, by the county clerk, county attorney, and county treasurer; . . . . Unless otherwise provided by law, all vacancies shall be filled within sixty days after the vacancy occurs, unless good cause is shown that this requirement imposes an undue burden." Pursuant to that section, the incumbent county attorney, clerk, and treasurer met on December 1, 1978, and appointed the respondents, the defendants, to the newly created positions of commissioners of Dakota County. The county attorney, treasurer, and clerk who appointed the respondents had been defeated at the previous election.

The District Court based its decision that the appointments were invalid on its determination that there was no vacancy in the offices at the time of the appointments since Neb. Const. art. XVII, § 5, provides: "Unless otherwise provided by this Constitution or by law the terms of all elected officers shall begin on the first Thursday after the first Tuesday in January next succeeding their election." After assuming the office of newly elected county attorney on January 4, 1979, the relator filed this action.

Several assignments of error are made by the respondents and will be discussed together: Whether the trial court erred in holding that there was no vacancy in the offices of county commissioner immediately following the election in the general canvass of the votes, and that such a vacancy arose only at the start of the term of office in which regularly elected county officials normally would take office.

The arguments of the relator, which were persuasive to the District Court, are difficult to follow but seem to be that since art. XVII, § 5, fixes a term of office and all terms of office must begin the first Thursday after the first Tuesday in January next succeeding the election, no vacancy existed in the newly created offices in spite of the general rule stated in *Garrotto v. McManus*, 185 Neb. 644, 177 N.W.2d 570 (1970), in which we held: " 'A newly created office which is not filled by the legislative act

creating it, and for which no provision is made by the act for filling it, becomes vacant on the instant of its creation, and remains so until it is filled by an incumbent; ***.' 67 C.J.S., Officers, § 50, p. 210 [1950]. See, also, *Reed v. McKeldin*, 207 Md. 553, 115 A.2d 281." *Id.* at 648, 177 N.W.2d at 574. The relator also argues that somehow public policy of the State would be thwarted by allowing incumbent officers who were defeated at a general election to appoint officers whose terms would exceed their own.

Logically, relator would require us to hold that in a newly created elective office, the framers of the Constitution intended that the office, after having been created, must remain vacant until it is filled at a general election. We do not now so hold.

We are aware that art. XVII, § 5, of our Constitution requires that the Legislature shall provide for the election of county officials, and the respondents (or those whom relator would appoint) are not elected. To reconcile the various sections of the Constitution and statutes, we need only determine that no section prohibits the filling of newly created vacancies in county offices, the same to serve only until their successors are elected and qualified, thereby fulfilling the requirement of Neb. Const. art. XVII, § 4.

The officers filling the vacancies here obviously were appointed and are not covered by the terms of art. XVII, § 5, until the next full term begins after a general election.

Neither are we persuaded by the dubious public policy arguments where, as here, the Constitution does not provide for filling vacancies in offices created by it; they must be filled in a manner provided by the Legislature for filling vacancies in general. *State v. Furse*, 89 Neb. 652, 131 N.W. 1030 (1911). Neb. Rev. Stat. § 23-149 (Reissue 1977), in pertinent part, provides: "If a majority of votes cast at said election favor such proposition for five commissioners, thereafter said county shall have five commissioners. . . . " The plain meaning of the

language would suggest that immediately after the election, or at least the canvass, when the official vote was announced, there was a vacancy in the office of two county commissioners and, pursuant to § 32-1040, the incumbent officers had the authority and did properly fill the offices. It is a common experience in government that appointments are made by officials whose terms will be of shorter duration than the persons they appoint to office. Other than the vague assertion that somehow the will of the people will be thwarted, we are unable to discover any authority for the proposition advanced by the relator. We hold, therefore, that vacancies were created in the offices of Dakota County commissioner as of the date the offices were created by the voters of Dakota County, that the statutes provided the authority for the incumbent county attorney, clerk, and treasurer to appoint the officers, and that the Constitution offers no impediment to their immediate appointment. Art XVII, § 5, applies by its terms to officers elected at a general election and not officers appointed to fill vacancies. The alternative is that all offices must remain vacant until filled by a person elected at a general election. This would be contrary to our consistent holdings that the Legislature has power under the Constitution to provide for the filling of vacancies in office.

The cause is reversed and dismissed.

REVERSED AND DISMISSED.

LENARD SUHR, APPELLANT, V.
CITY OF SCRIBNER, APPELLEE.
295 N.W.2d 302

Filed August 8, 1980. No. 42939.

1. **Causes of Action.** A cause of action consists of a primary right possessed by the plaintiff and a corresponding duty devolving upon the defendant, combined with a "delict" or wrong done by the defendant.
2. **Res Judicata.** A former verdict and judgment are conclusive only as to the facts directly in issue and do not extend to facts which may be in controversy, but which rest on evidence and are merely collateral.

3. ____. The test as to whether the former judgment is a bar to a later judgment generally is whether or not the same evidence will sustain both the present and the former action.
4. **Joinder of Actions.** In the absence of objection by the opposing party, there is nothing in the law that requires a party to join in one suit several distinct causes of action.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Reversed and remanded.

Richard L. Kuhlman for appellant.

Hurt & Gallant for appellee.

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

HASTINGS, J.

Plaintiff filed this action against the city of Scribner seeking damages for what he termed the unlawful termination by the defendant of a contract employing plaintiff to operate a city dump. The defendant filed a motion to dismiss the plaintiff's petition, claiming that *Suhr v. City of Scribner*, 202 Neb. 364, 275 N.W.2d 596 (1979) *(Suhr No. 1)*, was res judicata as to the present action. The District Court agreed and sustained the motion. The plaintiff has appealed, asserting that the subject of this lawsuit is not the same cause of action as was litigated in *Suhr No. 1*. We agree and reverse and remand.

In the first proceeding, the plaintiff filed a petition alleging the execution of a "lease and contract" by the two parties whereby the defendant employed the plaintiff to operate the city dump and leased certain lands to him in connection therewith. A copy of the alleged contract was marked as an exhibit and incorporated by reference into the petition. The jury found in favor of the plaintiff and awarded him damages in the sum of $19,980. We set aside that verdict, and found that the only cause of action pleaded by the plaintiff was one for wrongful eviction; and that there was no evidence of either special or general damages suffered

by reason thereof, but remanded the case with directions to enter judgment for nominal damages in the amount of $10 for the undisputedly wrongful eviction of the plaintiff.

The following language from our opinion in *Suhr No. 1* should bring the present appeal into perspective: "There is neither pleading nor evidence of the terms and conditions of the employment contract or the oral lease or any breach thereof by appellant [defendant]. It does not appear that appellant gave bond for the temporary restraining order or that its action was filed maliciously. In rudimentary form, these were separate causes of action and should have been separately stated and numbered. § 25-805, R. R. S. 1943. The appellee [plaintiff], however, failed as to each to allege a duty on the part of appellant, a breach thereof, and the causation of damage. . . . [T]he court was correct in not submitting such issues of liability. [Citations omitted.] Issues of special damages arising from these extraneous causes of action also became immaterial . . . ." *Id.* at 366, 275 N.W.2d at 598.

We established as the law of the case in *Suhr No. 1* that the present action pertaining to the alleged employment contract is a separate and distinct cause of action from the one involving the lease of land. Reference to several of our earlier opinions will clarify our disposition of this appeal.

In *City of Alliance v. Cover-Jones Motor Co.*, 154 Neb. 900, 50 N.W.2d 349 (1951), the plaintiff had filed a petition seeking to annex to it certain of the defendants' lands and to cause to be dedicated to the use of the public as streets a portion of the defendants' real estate. A motion to require the plaintiff to separately state and number its causes of action went unheeded and the trial court, on further motion by the defendants, ordered the petition dismissed *without prejudice*. In affirming that action, we defined a cause of action generally as consisting of a primary right possessed by the plaintiff and a corresponding duty devolving upon the defendant combined with a "delict" or wrong done by the de-

fendant. In finding that two causes of action were alleged, we said: "We think it patent that plaintiff is undertaking to assert a right of annexation and, in essence, a right of appropriation of private property for public use, and that each right so asserted is a primary right." *Id.* at 906, 50 N.W.2d at 352.

In *Schuyler Nat'l Bank v. Bollong*, 24 Neb. 821, 40 N.W. 411 (1888), we ruled that the trial court erred in overruling the defendant's motion to require the plaintiff to separately state and number his various causes of action. In doing so, we said: "A plaintiff cannot jumble his causes of action together, and in answer to an erroneous overruling of a motion to separately state and number, say that no injury has resulted from such ruling.

. . . .

"Each cause of action set out in a petition must show that the defendant is liable to the plaintiff upon the matter stated in that count, and *where objection is made* the plaintiff should be required to file a petition in due form." *Id.* at 823, 40 N.W. at 412 (emphasis supplied).

Having concluded that the present cause of action is separate and distinct from that presented in *Suhr No. 1*, we would not now be warranted in finding that it is barred because of res judicata.

"A former verdict and judgment are conclusive only as to the facts directly in issue, and do not extend to facts which may be in controversy, but which rest on evidence and are merely collateral. It must appear that the matter set up as a bar was in issue in the former case. The test as to whether the former judgment is a bar generally is, whether or not the same evidence will sustain both the present and the former action." *Gayer v. Parker & Son*, 24 Neb. 643, 644, 39 N.W. 845, 846 (1888), cited with approval in *Boomer v. Olsen*, 143 Neb. 579, 10 N.W.2d 507 (1943). See, also, *Vantage Enterprises, Inc. v. Caldwell*, 196 Neb. 671, 244 N.W.2d 678 (1976), and *Midwest Franchise Corp. v. Wakin*, 201 Neb. 450, 268 N.W.2d 737 (1978), wherein similar language appears. "[Where] different proof is required, a judgment in one of them [the former action] is no bar to the other [the present

action]." *Vantage Enterprises, Inc. v. Caldwell, supra* at 676, 244 N.W.2d at 681.

We are satisfied that different proof was required to prove the existence of the written lease alleged in *Suhr No. 1* than to establish the employment contract asserted in the present action.

Although a "plaintiff may unite several causes of action in the same petition," Neb. Rev. Stat. § 25-701 (Reissue 1979), and the "defendant may . . . require him to show cause why the same shall not be consolidated," Neb. Rev. Stat. § 25-703 (Reissue 1979), absent those circumstances, there is nothing in the law "that requires a party to join in one suit several distinct causes of action." *Peters v. Meyer*, 131 Neb. 847, 848, 270 N.W. 312, 313 (1936). The cause of action involved in this appeal is not the same as that alleged in *Suhr No. 1* and the doctrine of res judicata is not applicable.

The judgment of the District Court in sustaining the defendant's motion to dismiss is reversed and the cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

BOSLAUGH and BRODKEY, JJ., concur in result.

TERRA WESTERN CORPORATION, A CORPORATION, APPELLANT, V. BERRY AND COMPANY, A CORPORATION, ET AL., APPELLEES.

295 N.W.2d 693

Filed August 8, 1980. No. 42915.

1. **Uniform Commercial Code: Insurance: Words and Phrases.** Under the provisions of Neb. U.C.C. § 9-306 (Cum. Supp. 1978), the term "proceeds" includes insurance proceeds representing destroyed collateral.
2. **Conversion: Words and Phrases.** Conversion is an unauthorized assumption and exercise of the right of ownership over goods or chattels belonging to another to the alteration of their condition or the exclusion of the owner's rights. Conversion may also be defined as any distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein.

3. **Insurance: Mortgages: Conversion.** Although a mortgagor has, in the security instrument, contracted with the mortgagee to insure for the latter's benefit and insurance is procured, if the policy contains no loss payable clause covering the lienholder, an insurer who, acting in good faith and without actual knowledge of the mortgagee's interest, pays the insured for a loss, is not liable to the mortgagee for conversion of proceeds.
4. **Uniform Commercial Code: Insurance: Mortgages.** The provisions of Neb. U.C.C. § 9-306 (Cum. Supp. 1978) including insurance proceeds representing destroyed collateral within the statutory definition of "proceeds," does not serve the function of giving the insurer notice of a mortgagee's equitable interest in the insurance policy and is not a substitute for either a loss payable clause or actual notice to the insurer of the equitable interest of the mortgagee.

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

Forrest F. Peetz of Peetz and Peetz for appellant.

Jewell, Otte, Gatz, Collins & Domina for appellees.

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

CLINTON, J.

This is an action by the plaintiff, Terra Western Corporation (Terra), against the defendants, Berry and Company (Berry), a corporation, and Alliance Insurance Companies (Alliance), a corporation, founded on the theory that Alliance converted funds of Terra when Alliance, as insurer of a 1977 corn crop on which Terra held a perfected security interest, paid directly to Robert Temme (Temme), the insured, the amount of a claim arising from destruction of the crop by hail. The defendants filed a demurrer to Terra's amended petition, asserting that it stated no cause of action. The trial court sustained the demurrer. Terra elected to stand upon the petition and the petition was dismissed. Terra then appealed to this court. The question here is, Did the petition state a cause of action for conversion? We find it did not and affirm the action of the District Court.

The material allegations of the petition, other than those pertaining to identification of the parties, are the following: On May 3, 1977, to secure a promissory note

for $35,000, Temme, as mortgagor, executed and delivered to Farmers Agricultural Credit Corporation, a note covering "All crops" on certain tracts of land in Holt County, Nebraska. A copy of the security agreement and financing statement were attached to the petition and incorporated therein. The note, financing statement, and security agreement were later assigned to Terra. The agreement provided, among other things, that the debtor would keep the property insured for the benefit of the secured party and deposit the policy with the insured party. It also provided that "all proceeds of the sale, exchange or other disposition of any of said collateral" be covered by the lien. The security agreement also contained a provision for acceleration of the debt on default and upon various other contingencies, none of which are made applicable by any allegation of the petition. The due date of the promissory note was February 1, 1978.

The petition alleged that the financing statement was duly recorded. There are data set forth in the petition with reference to recordation. Prior to June 1977, Berry sold and delivered to Temme a policy of insurance, insuring Temme against loss or damage to the crop by hail. The policy was issued by Alliance. In July 1977, the crop was damaged by hail and Temme submitted a claim under the policy. Alliance paid the claim, in the amount of $62,250, directly to Temme.

The petition further alleges that, because the security agreement covered "proceeds," the payment by Alliance to Temme "constituted an unauthorized exercise of dominion over those proceeds to the exclusion of . . . [Terra's] right, thereby wrongfully converting and disposing of a portion of said 1977 corn crop to their own use to . . . [Terra's] damage in the sum of $29,232.60, plus accrued interest . . . ." The petition prayed for damages in the sum of $29,232.60 and accrued interest.

The petition did not allege that the policy of insurance contained a loss payable clause in favor of the mortgagee, or that Berry or Alliance had any actual notice of Terra's

lien on the crop, or that Alliance made payment to Temme with notice of his contractual agreement to insure the crop for the benefit of the mortgagee.

To sustain its position, Terra relies primarily upon a 1977 amendment of Neb. U.C.C. § 9-306 (Cum. Supp. 1978) defining the term "Proceeds" to include "insurance proceeds representing destroyed collateral." The essence of the argument is that the inclusion of insurance proceeds in the definition places upon an insurer of property the duty of examining the lien records before making payment to an insured. As supporting case authority, Terra cites *First Nat. Bank v. Merchant's Mut. Ins. Co.*, 89 Misc. 2d 771, 392 N.Y.S.2d 836 (1977).

It is clear that, by reason of the 1977 amendment, insurance proceeds received by the insured are proceeds subject to the lien of a security instrument covering collateral which is the subject of a covered loss. That, however, does not answer the question of whether an insurer commits the tort of conversion when it pays the insurance proceeds directly to the insured.

The problem is put into perspective if we first discuss some fundamentals. First: What are the elements of a cause of action for the tort of conversion of personal property? Conversion is an unauthorized assumption and exercise of the right of ownership over goods or chattels belonging to another to the alteration of their condition or the exclusion of the owner's rights. 89 C.J.S. *Trover & Conversion* § 1 (1955). This court has defined conversion as any distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein. *Polley v. Shoemaker*, 201 Neb. 91, 266 N.W.2d 222 (1978); *Jessen v. Blackard*, 159 Neb. 103, 65 N.W.2d 345 (1954). In the latter case, we also noted that the plaintiff must have the actual custody of the property or some species of property right, general or special, with an immediate right to possession. At 89 C.J.S. *Trover & Conversion* § 3 (1955), it is noted that the essence of conversion is not acquisition by the wrongdoer, but the act of depriving the owner wrongfully of the property.

Second: In the absence of some controlling statutory provision, what are the obligations of an insurer to a lienholder and what are the rights of a lienholder in the proceeds of an insurance policy covering personal property which is destroyed? These duties and rights vary, depending upon the factual situation. The mortgagee, as well as the owner-mortgagor, both have insurable interests in the property. However, the contract of insurance is personal and does not run with the property. If one or the other takes out insurance solely in his own interest, the benefit does not inure to the other. *Wriedt v. Beckenhauer*, 183 Neb. 311, 159 N.W.2d 822 (1968); Annot., 9 A.L.R.2d 299 § 2 (1950). Even though the mortgagor has, in the security instrument, contracted with the mortgagee to insure for the latter's benefit, if the insurance policy contains no loss payable clause covering the lienholder, where the insurer, acting in good faith and without actual knowledge of the mortgagee's interest, pays the insured, it is not liable to the mortgagee. See, Annot., 21 A.L.R. 1464 (1922); *Burns v. Collins*, 64 Me. 215 (1876); *Suttles v. Vickery*, 179 Ga. 751, 177 S.E. 714 (1934); 5A J. Appleman, Insurance Law and Practice 174 (1970 ed.).

Where the mortgagor has contracted with the mortgagee to insure the property for the mortgagee's benefit but fails to have a loss payable clause included in the policy covering the mortgagee's interest, the mortgagee has an equitable lien on the proceeds of the insurance policy. If the insurer has actual notice of the lien and the contractual provision before it pays the insured, it is liable to the mortgagee for his interest. *Gibbes Machinery Co. v. Niagara Fire Ins. Co.*, 119 S.C. 1, 111 S.E. 805 (1921); *N. W. F. & M. Ins. Co. v. N. Y. Life Ins. Co.*, 238 Ky. 229, 37 S.W.2d 67 (1931). Even if the insurer has no notice of the contractual provision, the mortgagee may, before payment is made, bring an equitable action to impress his lien on the proceeds. *Nelson v. Nelson Neal Lumber Co.*, 171 Wash. 55, 17 P.2d 626 (1932). See, also, Annot., 92 A.L.R. 559 (1934). In a few states, there

are special statutory provisions which control. See Annot., 9 A.L.R.2d, *supra* at 304. Thus, it appears that, absent a governing statute, an insurer without notice of the mortgagee's equitable interest who pays the owner-mortgagor, is not liable to the mortgagee.

The question before us is whether the 1977 amendment to § 9-306 was intended to change the applicable rules and, in effect, treat the insurer as one exercising dominion over the mortgaged property, rather than merely making the insurance proceeds paid to the insured subject to a mortgage or other security interest which covers proceeds of the insured collateral.

Section 9-306 reads, in part:

"(1) 'Proceeds' includes whatever *is received*, including insurance proceeds representing destroyed collateral, when collateral or proceeds is sold, exchanged, collected or otherwise disposed of ....

"(2) Except where this article otherwise provides, a security interest continues in collateral notwithstanding sale, exchange or other disposition thereof by the debtor unless his action was authorized by the secured party in the security agreement or otherwise, and also *continues in any identifiable proceeds* including collections *received* by the debtor.

"(3) The security interest *in proceeds* is a *continuously perfected security interest* if the interest in the original collateral was perfected but it ceases to be a perfected security interest and becomes unperfected ten days *after receipt of the proceeds by the debtor* unless

"(a) a filed financing statement covering the original collateral also covers proceeds; ...." (Emphasis supplied.)

We conclude from an examination of the statute that the purpose of the amendment was the second alternative stated in subsection (2), i.e., the lien attaches to the proceeds in the hands of the mortgagor and his transferees. An examination of the language of the statute shows that proceeds of an insurance policy covering destroyed property or other proceeds do not become

"proceeds" within the meaning of the code until the money "is received." Patently, this means received by the owner. The insurer does not receive the proceeds; it pays them. This is made clear by the language of subsection (1) referring to acts by the mortgagor: "when collateral or proceeds is sold, exchanged, collected or otherwise disposed of." These refer to acts of the mortgagor. This conclusion is further reinforced by the language of subsection (2) which refers to "sale, exchange or other disposition thereof by the debtor." All this language makes it plain that the mortgagee's lien extends to proceeds received by the debtor. It patently does not apply to an insurer who, in good faith and without actual notice or legal obligation arising from a loss payable clause, fulfills its contractual obligation to pay the owner.

First Nat. Bank v. Merchant's Mut. Ins. Co., *supra*, relied upon by Terra, was later overruled by the court of last resort of the State of New York. *First National Bank of Highland v. Merchant's Mutual Insurance Company*, 49 N.Y.2d 725, 426 N.Y.S.2d 267, 402 N.E.2d 1168 (1980). It is fair to note that the N.Y. U.C.C. § 9-306 did not, at the time the action arose, include within the term "proceeds," money paid by an insurer of property and that the reversal was founded upon the exception then listed at U.C.C. § 9-104(g), to wit, "to a transfer of an interest or claim in or under any policy of insurance," making the U.C.C. inapplicable. Subsection (g) of N.Y. U.C.C. § 9-104 was amended when, in 1977, insurance proceeds were included in the statutory term "proceeds" in § 9-306. For the reasons noted, we do not believe the amendment of the statute would change the result even in New York. Hence, the case cited by Terra is not an applicable precedent.

The petition did not state a cause of action for conversion because it did not allege ultimate facts which would show that Alliance exercised a distinct act of unauthorized dominion over "proceeds," as well as because the petition did not allege facts which gave Terra a property interest, general or special, in the funds before they were

received by Temme. It also fails to allege facts which state a cause of action under a theory other than conversion.

AFFIRMED.

ROBERT M. WEBER AND ETHELYN GAIL WEBER, APPELLEES AND CROSS-APPELLANTS, V. J. SIG SWENSON ET AL., APPELLANTS AND CROSS-APPELLEES.

295 N.W.2d 688

Filed August 8, 1980. No. 42888.

1. **Judgments: Appeal and Error.** The judgment of the trial court in an action at law where a jury has been waived has the effect of a verdict of a jury and it will not be set aside on appeal unless clearly wrong.
2. ____: ____. On 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.
3. **Foreclosure: Acceleration of Debt.** Foreclosure is not available where there has been no default on the part of the mortgagor. The right to accelerate maturity of indebtedness is limited to the grounds set forth in the instrument and if the maker is not in default so as to give rise to the right of acceleration, the maturity of the note cannot be accelerated.

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

Richard C. Swenson for appellants.

Harry R. Meister of Winner, Nichols and Meister for appellees.

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

MCCOWN, J.

The plaintiffs filed an action for foreclosure of a real estate note and mortgage executed pursuant to a contract for the sale and development of land. The defendants filed a cross-claim for damages for breach of the contract. The District Court for Scotts Bluff County,

Nebraska, dismissed plaintiffs' foreclosure action and also dismissed the defendants' cross-claim for damages. The defendants have appealed and the plaintiffs have cross-appealed.

On July 12, 1976, after extensive negotiations in which the parties were both represented by attorneys, a contract of sale was entered into under which the defendants Swenson agreed to purchase and the plaintiffs Weber agreed to sell approximately 160 acres of farmland adjacent to the city of Gering, Nebraska, for $400,000. The land was to be developed by Swensons and the Webers were to cooperate in the development.

The purchase price was payable $5,000 down on execution of the contract, $25,000 30 days after execution, and $20,000 120 days after execution. The Webers were to execute a warranty deed to the entire tract to the Swensons, and the Swensons were to execute a note and real estate mortgage for the $350,000 balance of the purchase price, with interest at 8 percent per annum. The balance of the purchase price was payable by annual principal payments of at least $35,000 per year, plus the interest accrued on the principal payment amount. The first annual payment was due January 10, 1978, and thereafter on the same date each year, with the entire balance due and payable December 31, 1986.

Upon payment of the initial $50,000, 15 acres to be selected by Swensons were to be released from the mortgage by Webers. Thereafter, 1 acre was to be released for each $3,125 principal paid, plus interest accrued on that amount to the date of release. Any platted lots were to be released for a proportionate share of the acre release price. Swensons agreed to make minimum release payments of not less than $35,000 per year, together with interest payable thereon, not later than January 10 of each succeeding year beginning with 1978.

The agreement provided that the total amount received by Webers in 1976 could not exceed 29 percent of the total purchase price. Release payments made in subsequent years were to be credited to minimum principal payments due January 10 of the following year, and if the

release payments made by Swensons in any calendar year were beyond the necessary principal payments of $35,000 for any 1 year, plus interest, such payments were to be credited to the succeeding year's minimum requirements, and if the entire purchase price was not paid by December 31, 1986, the remaining balance would be due and payable on that date. All unpaid principal balances on the note and mortgage were to bear interest at the rate of 8 percent per annum.

On July 12, 1976, J. Sig Swenson executed a promissory note for $350,000 payable to the Webers, with interest at the rate of 8 percent per annum from date until paid. The note provided: "Principal and interest payable in accordance with the agreement dated July 12, 1976, a copy of which is attached hereto marked Exhibit 'A' and by this reference made a part of this note."

A form of mortgage was prepared but apparently not executed or delivered. The mortgage was also dated July 12, 1976, and provided that the mortgage principal of $350,000 was payable according to the tenor and effect of the mortgagors' written promissory note bearing even date.

Initially, the parties worked harmoniously in obtaining necessary zoning, platting, annexation, and necessary utilities districts, and on August 26, 1976, the city of Gering, Nebraska, created a paving district, water district, and sanitary sewer district on portions of the land.

The Swensons, however, were unable to pay the $25,000 payment due on August 12, 1976, and extensive negotiations took place which culminated in a supplemental agreement executed on October 1, 1976. Except for changes in dates of the original $50,000 downpayments, the supplemental agreement made no changes in the payment of principal or interest, nor in the general provisions for release payments. The supplemental agreement, however, did amend paragraph 11 of the original contract of July 12, 1976. The original agreement provided that Swensons would not encumber the

tract with any utilities, paving, and other special assessments without first obtaining approval of the project engineer. The supplemental agreement substituted for that provision the following language:

"Swenson agrees that he will not install or cause to be installed any utilities, paving and other special assessments, including but not limited to water, sewer, gas curb and gutter and paving designed to serve in excess of eleven unreleased acres; and that all utilities installed shall serve tracts, parcels, or lots contiguous to D street or to the tracts, parcels or lots previously released to Swenson. Swenson agrees to pay the minimum release payments of not less than $35,000 on this unreleased acreage not later than six (6) months after the date that the special assessments are levied against the real estate if this six (6) months occurs before the regular yearly minimum release price comes due under paragraph 1.4 of the Agreement of July 12, 1976."

On October 1, 1976, the Swensons also executed a real estate mortgage on all the property for the sum of $350,000 "to secure the payment of the promissory note of this date made by the mortgagor for $350,000 payable according to the tenor and effect of the mortgagors' written promissory note bearing even date with these presents." There is no evidence of any promissory note except the one dated July 12, 1976.

The mortgage also provided: "In case of default in the payment of the principal sum or any installment thereof or of any interest thereon when the same shall become due or in case of the non-payment of any taxes or assessments or of the failure to maintain insurance as herein provided, mortgagee may at the option of mortgagee, without notice, at any time during the continuance of such default or breach, declare the whole debt secured by this mortgage to be immediately due and payable and may foreclose this mortgage for the satisfaction thereof." No other default in performance under the contract of July 12, 1976, constituted a default under the mortgage.

Paragraph 13 of the contract of July 12, 1976, provided: "In the event of the failure of Swenson to perform any

of the terms and conditions of this agreement on his part to perform, Webers shall have the option to declare the agreement null and void and to retain the $5,000 or $30,000 if previously paid by Swenson before default, or to pursue any and all remedies available at law or equity." The supplemental agreement of October 1 made no changes in those provisions.

During 1977, release payments on several lots were made by the Swensons and releases executed by the Webers. There was, however, a disagreement between the parties with respect to the sale by the Swensons of a part of the tract to John Stuart, subject to the Weber mortgage. The Webers asserted that the sale was in violation of a nonassignment clause and that they were entitled to release payments for the land sold to Stuart. Webers also complained that the estimated total acreage to be served by utilities would exceed the 11 unreleased acres provided in the supplemental agreement. There were also some disputes with respect to rentals due under the farming lease of the undeveloped portion of the real estate and the accounting under it.

On May 9, 1977, the city of Gering levied special assessments for water and sewer districts against some of the platted portions of the property, and on August 8, 1977, special assessments for paving were levied. There is evidence that the special assessments were levied against more than 11 unreleased acres, in violation of the provisions of the supplemental contract, but there is also evidence by the project engineer that the acreage served by the utilities was less than that when alleys and streets were excluded.

In October 1977, Swenson and Weber had an extensive discussion of their differences about the contract matters and Weber advised Swenson that the $35,000 minimum release payment would be due on November 9, 1977, 6 months after the first levy of the special assessments on May 9, 1977.

On November 14, 1977, Webers notified the Swensons in writing that they were in default and that the Webers

were declaring the entire amount of principal and interest due and payable at once for failure to pay principal, interest, taxes, and assessments when due. On November 17, 1977, Swenson tendered a check in the amount of $28,808.32 for the release of 32 lots. The Webers refused the tender and on November 23, 1977, filed their petition praying for foreclosure of the mortgage. In December 1977, Swenson again tendered the $28,808.32 check, together with an additional $20,237.20 for release of 22 additional lots. The Webers also refused this tender.

Swensons' answer denied that there was any default and alleged that, if there had been a default, the default had been waived by the Webers. The Swensons also filed a cross-claim against the Webers alleging that the Webers had slandered the reputation of Swensons and their credit standing, had refused to release portions of the real estate from the mortgage, and had refused to accept tenders of payment. It was alleged that such conduct made it impossible for the Swensons to meet their obligations under the contract and constituted an anticipatory breach of the contract. As a result, the Swensons alleged that they had had to purchase additional land for development at a price in excess of the contract price of the Weber land and had lost profits they could reasonably have anticipated under the Weber contract, and prayed for damages. The two actions, one for foreclosure and one for breach of contract, were consolidated by agreement between the parties with the consent of the court.

The actions here were tried in the District Court for Scotts Bluff County in February 1979. On May 8, 1979, the District Court made findings of fact and conclusions of law and entered judgment finding generally for the defendants upon the plaintiffs' petition for mortgage foreclosure, and for the plaintiffs on the defendants' cross-claim for breach of contract, and dismissed plaintiffs' petition and also dismissed defendants' cross-claim. Both the plaintiffs and the defendants filed motions for new trial which were overruled. The defendants Swen-

son have appealed and the plaintiffs, Webers, have cross-appealed.

The record discloses that, on May 22, 1979, following entry of judgment in this case, Webers made demand in writing upon Swensons to make principal and interest payments current by May 29, 1979, or Webers would again declare a default. No payments were made, and on May 30, 1979, Webers declared the entire amount of principal and interest on the note and mortgage due and payable at once. On July 8, 1979, a new foreclosure action was filed by Webers against the Swensons. That foreclosure action is pending in the District Court for Scotts Bluff County.

The appellants Swenson contend that the trial court erred in dismissing their cross-claim for breach of contract. Their position is that the Webers' declaration of default and acceleration of payment in November 1977, and refusal of tenders of payment thereafter, was an anticipatory breach of contract which made it impossible for the Swensons to perform their contractual obligations thereafter.

The District Court found that there was a total failure of proof on the issue of damage to reputation and insufficient proof of lost profits and general damages. The trial court found that the Swensons had not met the burden of proving that the actions of the Webers constituted an actionable breach of contract or proximately caused the damages and loss of profits claimed.

The cross-claim for breach of contract is an action at law, and the findings and judgment of the District Court rested upon factual determinations and findings based upon conflicting evidence. The judgment of the trial court in an action at law where a jury has been waived has the effect of a verdict of a jury and it will not be set aside on appeal unless clearly wrong. *Fabricators, Inc. v. Farmers Elevator, Inc.*, 203 Neb. 150, 277 N.W.2d 676 (1979). If the Swensons' cross-claim is treated as a matter in equity simply because of its consolidation with the foreclosure case, the result in this case remains the same.

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. *Gasper v. Moss*, 204 Neb. 24, 281 N.W.2d 213 (1979). Whichever rule is applicable, there was ample evidence to support the judgment of the trial court, and the dismissal of the cross-claim was correct.

The cross-appellants, Webers, contend that the levy of special assessments on May 9, 1977, and the Swensons' failure to make release payments of $35,000 within 6 months thereafter constituted a default under the provisions of the note and mortgage and entitled Webers to declare the entire balance of principal and interest due and payable at once and to foreclose the mortgage. They contend that the court erred in determining that there was a waiver of the supplemental contract provision against special assessments on unreleased acreage of more than 11 acres and in finding that there was no default in payment of principal and interest on the note secured by the mortgage.

The District Court found that the Webers' action here was not a forfeiture or rescission of the contract but to foreclose the real estate mortgage given to secure the note of July 12, 1976. The trial court specifically determined that there must be a breach of a condition of the mortgage involving either a failure to pay principal, interest, taxes, or assessments, or to maintain insurance in order to entitle the Webers to accelerate the entire balance due and foreclose the mortgage.

It should be noted that the note of July 12, 1976, provided that principal and interest on the note were payable in accordance with the agreement dated July 12, 1976, a copy of which was attached to and made a part of the note. The evidence does not show any amendment or changes in the note. Neither does the evidence show that the attached contract was ever altered.

The District Court found that there was a default by

Swensons under the supplemental contract with respect to allowing special assessments on more than 11 unreleased acres, but that the Webers had waived compliance with that requirement by participating in establishing the utility districts, their configuration and size, and permitting the utilities to be installed after advance notice by the Swensons in December 1976 as to the extent and nature of the installations to be made.

The District Court also found that the provision of the supplemental contract of October 1, 1976, requiring minimum release payments on unreleased acreage not later than 6 months after the date that the special assessments are levied, if the expiration of the 6-month period occurs before the regular yearly minimum release price becomes due, was inserted at the request of the Webers and should be construed most strongly against them. The court found that the entire scheme of the agreement was to make lots salable, and that the special assessments language was plural rather than singular. The court, therefore, found that a single assessment would not start the running of the 6-month period, and that the 6-month period would not begin to run until the assessments and levies for improvements sufficient to make the lots salable had been made. The District Court, therefore, concluded that the 6-month period did not commence to run on May 9, 1977, when the first assessment was levied, but commenced to run on August 8, 1977, when the final assessment was levied. The court then found that there was no default in November 1977 when this foreclosure action was filed.

Foreclosure is not available where there has been no default on the part of the mortgagor. 55 Am. Jur. 2d *Mortgages* § 554 (1971). The right to accelerate maturity of indebtedness is limited to the grounds set forth in the instrument, and if the maker is not in default so as to give rise to the right of acceleration, the maturity of the note cannot be accelerated. A right to accelerate, in order to be effective, should be clear and unequivocal, and if there is a reasonable doubt as to the meaning of the terms em-

ployed, preference should be given to the construction which will avoid the forfeiture and prevent acceleration of maturity. 10 C.J.S. *Bills and Notes* § 251 (1938).

There is serious question as to whether the added release payment provisions of the supplemental contract were applicable to the note of July 12, 1976. Even if those provisions were applicable, however, the trial court found that there was no default at the time the foreclosure action here was filed in November 1977, and there was ample evidence to support that finding. In addition, the matters involved in the cross-appeal appear to be moot in view of the fact that a new foreclosure action for subsequent defaults is now pending in the District Court for Scotts Bluff County.

The remaining assignments of error of the appellants and cross-appellants are without merit. The judgment of the District Court is affirmed.

AFFIRMED.

BOSLAUGH, J., concurs in result.

NATIONAL BANK OF COMMERCE TRUST AND SAVINGS ASSOCIATION, LINCOLN, NEBRASKA, ET AL., APPELLEES AND CROSS-APPELLANTS, V. PAUL RHODES, APPELLANT AND CROSS-APPELLEE.

295 N.W.2d 711

Filed August 15, 1980. No. 42935.

1. **Action to Quiet Title: Equity.** An action to quiet title to real estate is a suit in equity which is tried to the court without a jury.
2. **Acknowledgments.** An acknowledgment before an interested party is void.
3. **Acknowledgments: Attorneys.** Although lawyers may take acknowledgments in connection with their professional activities under Neb. Rev. Stat. § 64-211 (Reissue 1976), an officer who is an interested party is not authorized to take an acknowledgment.
4. **Appeal and Error.** Cases are heard and determined in this court upon the theory upon which they were tried in the District Court.
5. **Estoppel.** A litigant who knowingly and deliberately assumes a particular

position in a judicial proceeding is generally estopped to take a position inconsistent therewith to the prejudice of an adverse party.

6. **Costs of Litigation.** In the absence of a statute or a uniform course of procedure, a party may not recover the costs and expenses incident to litigation.

Appeal from the District Court for Nemaha County: WILLIAM F. COLWELL, Judge. Affirmed.

Paul Rhodes, pro se.

Fredric H. Kauffman of Cline, Williams, Wright, Johnson & Oldfather for appellee National Bank of Commerce.

George Gus Rhodes for appellee Augustine Rhodes.

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

PER CURIAM.

This was an action in equity to quiet title to land in Nemaha County, Nebraska, and Perkins County, Nebraska, as against Paul Rhodes. The petition prayed that certain purported conveyances, which also included land in Fremont County, Wyoming, be declared void and the court find that title to the property was vested in the plaintiff bank in trust. Since the action was a suit in equity, it was for trial to the court without a jury. Neb. Rev. Stat. § 25-21,120 (Reissue 1979).

The property in question had been conveyed to the plaintiff bank, in trust, in 1975, by Guy W. Rhodes, now deceased, and Augusta M. Stocker, the owners of record at that time. Augusta M. Stocker is the daughter and sole heir of Gussie R. Stocker, deceased, who was a sister of Guy W. Rhodes.

Guy W. Rhodes, Gussie R. Stocker, and Augusta M. Stocker were committed to the Lincoln State Hospital in December 1955. Petitions were then filed for the appointment of a guardian for them. A controversy arose as to who should be appointed as guardian, Paul Rhodes seeking the appointment of George Rhodes, his father, a cousin of the wards, as guardian. On March 8, 1956, Guy

W. Rhodes and Gussie R. Stocker were paroled to the care of Paul Rhodes who took them to Bridgeport, Nebraska. On March 10, 1956, Guy W. Rhodes and Gussie R. Stocker each executed a document authorizing Paul Rhodes to represent them in the guardianship proceedings. Through habeas corpus proceedings commenced on March 15, 1956, Guy W. Rhodes and Gussie R. Stocker were released from the custody of Paul Rhodes on June 5, 1956. The guardianship proceedings were terminated and the guardian ordered to account.

Augusta M. Stocker was released from the state hospital on June 11, 1956. She then went to Denver, Colorado, and did not return to Nebraska until some time after July 16, 1956. The guardianship proceeding concerning Augusta M. Stocker was terminated on August 7, 1956, and the guardian ordered to account.

On February 20, 1957, Paul Rhodes commenced actions against Guy W. Rhodes, Gussie R. Stocker, and Augusta M. Stocker for attorney fees and expenses alleged to be due him. These actions resulted in judgments in favor of Paul Rhodes totaling $12,750 which were paid and satisfied on April 28, 1958.

Gussie R. Stocker died on July 2, 1973. Guy W. Rhodes died on May 12, 1978. After the death of Guy W. Rhodes, Paul Rhodes recorded the deeds which are in dispute in this action.

Exhibit 1 purports to be a warranty deed from Guy W. Rhodes to Augustine Rhodes, the wife of Paul Rhodes, executed on March 10, 1956. Exhibit 2 purports to be a warranty deed executed on the same date from Gussie R. Stocker to Augustine Rhodes. Both deeds reserved a life estate in the lands conveyed to the grantor.

These deeds were not in a customary form but were constructed by attaching a page containing the signatures of the grantors to a page containing the description of the lands conveyed. The evidence establishes without question that the second page of each of the deeds was originally part of separate instruments signed by Guy W. Rhodes and Gussie R. Stocker on

March 10, 1956, authorizing Paul Rhodes to represent them in the guardianship proceedings. At the time the instruments were signed, Guy W. Rhodes and Gussie R. Stocker had just been released from the Lincoln State Hospital and were in the custody of Paul Rhodes. It is clear there was no intention to convey any real estate by the instruments authorizing Paul Rhodes to represent Guy W. Rhodes and Gussie R. Stocker in the guardianship proceedings.

Exhibit 3 is a warranty deed purporting to have been executed by G. W. Rhodes, Gussie Stocker, and Augusta Stocker on July 16, 1956, conveying the same property to Augustine Rhodes. Like the March 10, 1956, deeds, exhibit 3 consists of two pages. The description of the property and the granting clauses appear on the first page with only the signatures and the acknowledgment on the second page. The evidence shows that the two pages were not typed at the same time, the signature page appearing to be much older. The origin of the second page is not shown in the record but it is clear that it was originally the lower portion of some other document, the top portion having been removed. The acknowledgment of the deed was before the appellant who, under the circumstances in this case, was an interested party. An acknowledgment before an interested party is void. See Neb. Rev. Stat. § 76-235 (Reissue 1976); *Banking House of A. Castetter v. Stewart*, 70 Neb. 815, 98 N.W. 34 (1904); *Horbach v. Tyrrell*, 48 Neb. 514, 67 N.W. 485 (1896). Neb. Rev. Stat § 64-211 (Reissue 1976), which permits lawyers to take acknowledgments in connection with their "professional activities," did not repeal the provisions of § 76-235 relating to conveyances in which the officer receives an interest in the property.

Exhibit 4 is a warranty deed purporting to have been executed by Augusta M. Stocker on March 21, 1957, conveying the property to Augustine Rhodes. The acknowledgment on this deed was also before Paul Rhodes.

Exhibits 5 and 6 are quitclaim deeds purporting to have been executed by Augustine Rhodes on January 10, 1973, and November 18, 1977, conveying the property to Paul Rhodes.

The trial court found that the deeds described as exhibits 1, 2, 3, and 4 were void; that these deeds were not the voluntary act of the grantors; that there was no delivery of the deeds and there was no consideration for them; that exhibits 1, 2, and 3 were fabrications; there was strong evidence that exhibit 4 was a forgery; and that in 1956 and 1957 Paul Rhodes had a confidential relationship with the grantors and exerted undue influence upon them.

With respect to exhibits 5 and 6, the trial court found the deeds were void because the grantors had no interest in the property described in the deeds. Title to the property described in the petition was quieted in the plaintiff bank in trust. Paul Rhodes is the sole appellant.

We think the evidence as a whole sustains a finding that all six deeds were void. Exhibits 1, 2, and 3 are obvious fabrications. Augusta M. Stocker denied that she signed exhibit 4 and the testimony of the plaintiff's expert witnesses supported this conclusion. The deed purports to have been executed at a time when the grantor had no interest in most of the property described in the deed, and at a time when she was being sued by the appellant for attorney fees.

Augustine Rhodes, the grantee in exhibits 1, 2, 3, and 4, claims no interest in the property and denies that the deeds were ever delivered to her or accepted by her. She admits signing exhibit 6 but testified she did not own the property and the deed was intended only as a release of any interest she might have had in property the appellant had received from his relatives. She denies that she executed exhibit 5.

The appellant argues that the real estate tax transfer statement which was filed at the time exhibit 3 was recorded in Nemaha County, Nebraska, indicates Augustine Rhodes accepted delivery of the deed and intended it to be effective. Augustine Rhodes denies that

she executed or filed any real estate tax transfer statement in connection with the disputed deeds and the signature that now appears on the copies of the statement which are in evidence does not appear to be her signature. One of the plaintiff's expert witnesses testified the signature was not genuine. Both the county clerk and the deputy county clerk of Nemaha County were present when Paul Rhodes filed exhibit 3 in Nemaha County. They testified that Paul Rhodes signed the tax transfer statement in their presence.

The appellant contends that the deeds were valid because they were ratified later by the grantors. The record does not support this contention. In an effort to bolster the March 10, 1956, deeds, the appellant produced an affidavit of Odaville Yates, the notary public before whom the attorney authorization instruments were acknowledged. However, a subsequent sworn statement of Yates produced by the plaintiff established that the affidavit was incorrect.

Similarly, the appellant produced an affidavit denominated "proof of acknowledgment" executed on September 24, 1976, by Eugene Hanway, an alleged witness to the July 16, 1956, deed. Hanway testified by deposition and his testimony shows his affidavit was not based upon personal recollection but was based only upon his examination in 1976 of the 1956 deed.

The appellant further contends the trial court erred in failing to find that the action was barred by the statute of limitations. The appellant argues that the cause of action accrued at the time the deeds were executed and the action was barred at the time it was commenced. The answer to this contention lies in the fact the evidence shows the deeds in question, exhibits 1, 2, 3, and 4, were fabrications. There were no deeds executed in 1956 and 1957 and there was nothing to put the plaintiff on notice of any claim based upon these deeds until they were recorded commencing in 1978. As soon as the deeds were placed on record, the plaintiff commenced an investigation to ascertain the facts and then commenced this action.

At the trial, the appellant, Paul Rhodes, testified that he personally saw the grantors deliver the deeds, exhibits 1, 2, and 3, to Augustine Rhodes by handing them to her. In his motion for new trial the appellant alleged as newly discovered evidence a power of attorney granted to him by his wife, Augustine Rhodes, in July 1955. The appellant now attempts to claim the deeds were delivered to him as agent for Augustine Rhodes.

A power of attorney which the appellant had received 25 years before would not be newly discovered evidence. And since the case was tried on the theory that the deeds had been delivered to Augustine Rhodes in person by the grantors, the appellant will not now be allowed to develop a new theory of the facts contrary to that urged and testified to by him at the trial. Cases are heard and determined in this court upon the theory upon which they were tried in the District Court.

A litigant who knowingly and deliberately assumes a particular position in a judicial proceeding is generally estopped to take a position inconsistent therewith to the prejudice of an adverse party. *Ainsworth Irr. Dist. v. Bejot*, 170 Neb. 257, 102 N.W.2d 416 (1960).

The prayer of the petition also sought recovery of all costs and expenses incurred by the plaintiff in maintaining the action. The trial court denied any monetary recovery to the plaintiff other than costs including an expert witness fee in the amount of $1,000. By cross-appeal, the plaintiff contends it should be allowed to recover costs and expenses in the amount of $83,160.14 against the appellant.

In the absence of a statute or a uniform course of procedure, a party may not recover the costs and expenses incident to litigation. See *Toop v. Palmer*, 108 Neb. 850, 189 N.W. 394 (1922). Although strong equities exist in favor of the plaintiff in this case, we believe the decision of the District Court as to this issue was correct.

It is unnecessary to consider the other contentions of the appellant.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. C. MICHAEL ANDERSON, APPELLANT.
STATE OF NEBRASKA, APPELLEE, V. PETER HOCHSTEIN, APPELLANT.

296 N.W.2d 440

Filed August 15, 1980. Nos. 42301, 42302.

1. **Wiretaps: Witnesses: Evidence.** If it appears from the evidence that the identity of the witness was obtained from a legal source, the fact that the identity of the witness was also improperly acquired by illegal wiretapping does not render the witness' testimony inadmissible.
2. ____: ____: ____. The use of an intercepted telephone message to induce witnesses to testify in a criminal prosecution, even though it may constitute a violation of a statute forbidding the use of intercepted communications, does not render such testimony inadmissible against a person not a party to the message where no use is made at the trial either of the message itself or of any information contained therein.
3. **Trials: Joinder of Actions: Appeal and Error.** The ruling of a trial court upon a motion for consolidation of prosecutions properly joinable will not be disturbed in the absence of an abuse of discretion.
4. **Trials: Joinder of Actions: Burden of Proof.** It is the duty of one challenging a joint trial to demonstrate how and in what manner he is prejudiced.
5. **Juries.** One who cannot subordinate his personal views to what he perceives to be his duty to abide by his oath as a juror and to obey the laws of the state must be excused for cause.
6. **Polygraph Tests: Prejudicial Error.** The mere mention of the word "polygraph," absent more, does not constitute prejudicial error.
7. **Prosecutor Misconduct: Appeal and Error.** A party may not raise alleged misconduct of adverse counsel on appeal where, despite knowledge of the alleged misconduct, the party claiming the misconduct failed to request a mistrial and instead agreed to take the chances of a favorable verdict.
8. **Venue: Juries: Appeal and Error.** A motion for change of venue or to sequester the jury is directed to the sound discretion of the trial court and, in the absence of an abuse of discretion, its ruling will not be disturbed on appeal.
9. **Criminal Defendants: Prejudicial Error.** An accused has the right to be present at all stages of the trial when his absence might frustrate the fairness of the proceedings.
10. **Motions to Suppress: Appeal and Error.** The procedure for appealing from an order entered under either the provisions of Neb. Rev. Stat. § 29-824 (Reissue 1979) or Neb. Rev. Stat. § 86-705(12) (Reissue 1976), shall be in accordance with § 29-824 and shall be heard by a single judge sitting at chambers, provided, however, that upon ultimate appeal to the full Nebraska Supreme Court, the defendant may challenge the

correctness of the order by the single judge by preserving the question in the motion for new trial, as prescribed in § 29-824.

11. **Death Penalty: Constitutional Law.** The death penalty, when properly imposed by a state, does not violate either the eighth or fourteenth amendments of the United States Constitution or Neb. Const. art. 1, § 9.
12. **Death Penalty: Constitutional Law: Juries.** Jury sentencing in a capital case is not constitutionally required.

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

David S. Lathrop, Terry M. Anderson, and John E. North, Jr., of Lathrop, Albracht & Swenson for appellant Anderson.

J. Joseph McQuillan of Walsh, Walentine & Miles and Michael J. Lehan of Kelley & Kelley for appellant Hochstein.

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

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, BRODKEY, and WHITE, JJ., and COLWELL and FAHRNBRUCH, District Judges.

KRIVOSHA, C.J.

The instant appeals, though involving two separate cases, result from a consolidated trial arising out of a common crime and involve essentially identical issues. For that reason, we have elected to, likewise, consolidate the two cases for purposes of our decision.

On July 1, 1977, appellants, Peter Hochstein (Hochstein) and C. Michael Anderson (Anderson), were separately charged by information in the county court of Douglas County, Nebraska, with first degree murder in the death of Ronald J. Abboud (Abboud). Hochstein and Anderson were bound over to the District Court for Douglas County, Nebraska, which, after consolidating the matters, heard and ruled on numerous pretrial motions, some of which are involved in this appeal. After trial, both appellants were found guilty as charged and sentenced by a three-judge panel to be executed.

Hochstein and Anderson both appeal from the conviction and sentence, assigning a number of errors which we shall individually discuss hereafter. We have, however, carefully and meticulously reviewed this matter and conclude that it is, in all respects, correct. We, therefore, affirm both the conviction and the sentence.

The body of Abboud was discovered on November 2, 1975, along a creek bank in a rural area west of Omaha, Nebraska. Abboud had been reported missing and had last been seen on October 29, 1975. The investigation, including the autopsy conducted on the body of Abboud, disclosed that Abboud had been shot in the head, back, and neck with a .22 caliber pistol. Soon after the body was found, the investigation led police to suspect both Hochstein and Anderson as being involved in the killing. Anderson had been employed by Abboud's company, Commercial Realty, for several years and Hochstein was a close friend of Andersons. Despite the suspicions, however, the authorities had been unable to effect an arrest of any suspect by June of 1976.

At that time, the Abboud family hired a private detective by the name of Dennis Whelan (Whelan). Whelan was specifically instructed by the Abboud family that he was to establish the guilt or innocence of Anderson and Hochstein. Likewise, at the time of the hiring by the Abboud family, Whelan was further made aware of a Lon Reams (Reams) who was known to have a business and social relationship with Anderson.

An examination of the police reports prepared up to the time of Whelan's hiring by the Abboud family disclosed that the police considered Reams as a possible witness to an incriminating statement made by Anderson concerning Abboud. Likewise, in a report dated November 10, 1975, it is shown that Reams was interviewed by the police and his name was again mentioned in a report dated May 20, 1976, as a business partner of Anderson's. Further, a report of June 29, 1976, discloses that the police, while searching for Anderson at his place of business, spoke briefly with Reams.

Whelan proceeded to investigate the murder through the means of interviews, visual surveillance, record checking, and the reading of police reports which had been provided to him by an unknown source.

Beginning on November 12, 1976, Whelan began installing and monitoring electronic surveillance devices in the apartments of Anderson and Hochstein. This continued until April 21, 1977.

In December of 1976, Whelan learned that a woman he knew, Mila Dickman (Dickman), was employed by Bruce Miller and Anderson and that she was closely associated with Reams. Whelan interviewed her and told her of his suspicions that Reams, Anderson, and Hochstein were the persons who had killed Abboud. Dickman agreed to aid Whelan by passing on any information that she might learn concerning the three. Whelan and Dickman subsequently met on frequent occasions and Dickman told Whelan that Reams felt that he was being edged out of his association with Anderson and Hochstein.

On April 15, 1977, Whelan met with Samuel Cooper (Cooper) of the Douglas county attorney's office. At this meeting, which lasted approximately 3 hours, Whelan informed Cooper of his own investigation, including the illegal wiretaps, and played portions of at least one of the taped conversations for Cooper. He also told Cooper that he felt Reams was directly involved in the Abboud homicide, along with Anderson and Hochstein. Cooper later testified at a hearing on a motion to suppress that Whelan's information concerning Reams gave him nothing more than he already had.

During their meeting on April 15, 1977, Whelan was specifically instructed by Cooper that he was to terminate his illegal wiretapping. Cooper furthermore implied to Whelan that, if Reams would talk to Cooper, that Cooper would consider granting Reams immunity from prosecution.

On June 7, 1977, Reams was interviewed by Cooper and Douglas County Attorney Donald Knowles. Reams denied having any knowledge of or involvement in the

Abboud murder. Whelan was again contacted by Cooper and asked to do whatever he could to assure Reams that, if he was not directly involved in the murder, but had knowledge of it, he would be treated fairly by the county attorney's office.

On June 13, 1977, Whelan talked to Reams in the presence of Dickman and advised Reams to tell the county attorney what he knew about the murder. Whelan told Reams that he had "conversations" which indicated Anderson and Hochstein were planning to do away with Reams. Whelan later testified that he tried to play on Reams' paranoia and that he told him "the case was made and that his only chance . . . was to make a deal . . . . I tried to bluff him, I tried to scare him." The record does not disclose that any such conversation between Hochstein and Anderson actually occurred, but rather established that Whelan did not hear and record such conversations between Hochstein and Anderson and, in fact, was bluffing Reams. Reams told Whelan that he would think it over and contact an attorney.

On June 15, 1977, Reams and Whelan met again and Reams told Whelan that he had contacted an attorney and asked him to get in touch with Cooper. Also on June 15, 1977, when Whelan and Reams met again, Reams admitted that he was involved in the murder. That afternoon, he and his attorney met with Cooper and Reams gave a complete statement about the murder, naming Hochstein and Anderson as the persons responsible and acknowledging the part he, himself, had played in the murder. Reams' testimony at the trial was central in obtaining the guilty verdicts.

Reams' testimony at trial disclosed that he and Anderson had met early in 1975. In May of that year, Anderson began to tell Reams of his negative feelings toward his employer, Abboud, and he began to speak more often about his dislike for Abboud due to Abboud's alleged unfair business dealings and intimated that he would like to do something about it.

About a week before the murder, Anderson first revealed an intention to take some action toward

Abboud. Anderson, Hochstein, and Reams had gathered at Reams' house to drink beer and the conversation turned to Abboud. The three began discussing the possible means of eliminating Abboud, going from hiring local or outside "hit men," to the use of a knife, to the use of explosives. Again, just a few days later, the three met at Reams' house and began to seriously plan out the murder. Hochstein, after fixing a malfunctioning Ruger pistol belonging to Reams, suggested that he might "do it," meaning murder Abboud, because he needed money. He mentioned a price of $1,500 which Anderson agreed upon as fair. The parties then planned out how Hochstein could get Abboud off alone. They decided that Hochstein should play the part of a prospective purchaser of real estate to whom Abboud would be asked to show some property listed with his company. Hochstein was to use the name "Jim Parker" in his dealings with Abboud. Anderson knew of a piece of agricultural property listed with Commercial Realty located at about 168th and Q Streets which might be "a good spot." They all then got into Hochstein's car and drove out to the property in question. Although they remained in the car, Anderson described the lay of the land for them. Hochstein kept the Ruger pistol after this meeting.

Reams further testified that the "hit date" was originally scheduled to be Tuesday, October 28, 1975. The previous day, Anderson and Reams had gone to the bank to borrow the $1,500 necessary to pay Hochstein. The money was given to Hochstein that afternoon.

The plan was for Hochstein to arrange an appointment with Abboud to see the real estate listed by Commercial Realty. Once they were alone on the property, the murder was to take place. Hochstein was then to call Reams who, in turn, would call and inform Anderson. Then Reams was to go and pick up Hochstein. Hochstein arranged the appointment with Abboud for Tuesday afternoon, October 28, 1975. However, Reams later received a telephone call from Hochstein,

presumably from Abboud's car telephone, identifying himself as "Jim Parker." Hochstein informed Reams that he was with a few gentlemen. Later that day, he again called, this time from the Smuggler's Inn, a restaurant, where he had been left by Abboud. Reams picked up Anderson and went to pick up Hochstein, who told him that he hadn't been able to carry out the plan because there had been two other people in the car. However, Hochstein was going to call Abboud to set up another meeting for the next day.

The next morning, October 29, 1975, Hochstein again called Abboud and set up an appointment. The next contact Reams had with Hochstein was a telephone call at about 4 or 4:30 that afternoon. Hochstein simply said, "It's done," and told Reams to pick him up at Westroads, a shopping center located in Omaha. Reams called Anderson and then went out to pick up Hochstein. The body of Abboud was found 4 days later.

After Hochstein and Anderson were bound over to the District Court for Douglas County, Nebraska, they moved to suppress all evidence obtained as a result of the illegal electronic surveillance undertaken by Whelan. After a hearing on the matter, the Honorable John T. Grant ordered the suppression of a substantial portion of the State's evidence, including the testimony of Lon Reams.

Pursuant to the provisions of Neb. Rev. Stat. § 29-824 (Reissue 1979), the State appealed the decision to a single judge of the Nebraska Supreme Court who, on April 12, 1978, rendered a judgment and opinion affirming the District Court's order except as to the testimony of Lon Reams. As to the Reams' testimony, the single judge held that the evidence was admissible.

Thereafter, the case proceeded to trial, after which the jury returned a verdict of guilty of murder in the first degree against each appellant. A three-judge panel was appointed as prescribed by statute and, after hearing, the panel entered its order of sentence imposing the death penalty upon each appellant. It is from these

verdicts and sentences that the appellants appeal, claiming a number of errors.

The first, and perhaps the most serious, assignment of error raised by appellants has to do with the testimony of Lon Reams. Specifically, the appellants maintain that it was error not to suppress the testimony of Reams. However, our examination of the evidence and the law in that regard leads us to the conclusion that it was not error to permit Reams to testify. We reach our decision both because his identity was not made known by reason of an illegal wiretap and because his decision to testify was voluntary, thereby attenuating the taint, if any, of the illegal wiretap.

Appellants maintain that Reams' testimony was, indeed, the "fruit of the poisonous tree" obtained by Whelan and, as such, should not have been permitted. Their argument is based upon the provisions of Neb. Rev. Stat. §86-712 (Reissue 1976) which is essentially identical to Title 18 U.S.C. §2515 (1976) and reads, in part, as follows: "No part of the contents of any intercepted wire or oral communication and no evidence derived therefrom may be received in evidence in any trial . . . if the disclosure of that information would be in violation of Chapter 86, article 7."

It is argued to us that the provisions of the above-cited statute should apply without regard to whether the illegal interception is made by a private citizen or a government agent. There appear to be no cases directly addressing the question of what happens when the wiretap is conducted by a private citizen, as opposed to a government agent. However, the facts of this case do not require us to decide that issue at this time. Regardless of who instituted the illegal wiretaps in the instant case, the only questions under either the cited act or the fourth amendment necessary for our decision are (1) Was the existence of Reams as a potential witness known by means other than the illegal wiretap? and (2) Did Reams voluntarily agree to testify? If the answer to either of those questions is in the affirmative, then all of the

argument concerning the meaning and effect of § 86-712 is of no moment.

In all of the cases cited to us by appellants in which the live witness' testimony was suppressed, the existence of the witness was first brought to the government's attention by reason of the illegal wiretap or search. The evidence in each of those cases clearly points out that, but for the illegal activity conducted by the government, the existence of the witness would never have been known to the government. *United States v. Tane*, 329 F.2d 848 (2d Cir. 1964); *United States v. Huss*, 482 F.2d 38 (2d Cir. 1973); *Commonwealth v. Cephas*, 447 Pa. 500, 291 A.2d 106 (1972); *United States v. Cruz*, 581 F.2d 535 (5th Cir. 1978). The prohibition against using the live witness is not, however, based upon a "per se" rule. If it appears from the evidence that the identity of the witness was obtained from a legal source, the fact that the identity of the witness was also improperly acquired by illegal wiretapping does not render the witness' testimony inadmissible. In *Nardone v. United States*, 308 U.S. 338, 341 (1939), the United States Supreme Court, in reviewing the prohibition against using improperly obtained testimony under § 605 of the Federal Communications Act of 1934, 47 U.S.C. § 605 (1934), speaking through Mr. Justice Frankfurter, said:

"Here, as in the *Silverthorne* case, the facts improperly obtained do not 'become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it' simply because it is used derivatively. [Citation omitted.]

"In practice this generalized statement may conceal concrete complexities. Sophisticated argument may prove a causal connection between information obtained through illicit wire-tapping and the Government's proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint. A sensible way of dealing with such a situation — fair to the

intendment of § 605, but fair also to the purposes of the criminal law — ought to be within the reach of experienced trial judges. The burden is, of course, on the accused in the first instance to prove to the trial court's satisfaction that the wire-tapping was unlawfully employed. Once that is established — as was plainly done here — the trial judge must give opportunity, however closely confined, to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree. This leaves ample opportunity to the Government to convince the trial court that its proof had an independent origin."

In the *Tane* case, relied upon by appellants, unlike the instant case, the identity of the witness was derived from the wiretap. The witness was unwilling to testify or even admit to making any unlawful payments until possession of tapes of a certain conversation was revealed by the assistant district attorney. In the instant case, Reams' identity was not derived from any wiretap and his willingness to testify, as will be discussed in a moment, was not dependent upon any wiretap which implicated Reams in the crime.

Appellants have further cited to us the case of *United States v. Marder*, 474 F.2d 1192 (5th Cir. 1973), in support of their position that Reams' testimony should have been suppressed as a fruit of the poisonous tree. The *Marder* decision, however, stands for a contrary rule. The court in *Marder* said:

"We do not adopt a per se rule which would *ipso facto* preclude the utilization of all testimony of a witness identified as a consequence of an illegal search. Many extenuating circumstances may affect the appropriateness of the introduction of such testimony, which would not pertain to an inanimate object seized by an illegal search.

. . . .

". . . Several factors should be considered in deciding whether the attenuation rule is applicable to 'live testimony.' The unpredictability of the human will,

which is necessarily involved in the use of a witness to prove essential elements of a crime, forecloses the adoption of any rigid rules. 'Thus, each case must be examined on an ad hoc basis, considering the particular facts presented, rather than on any sweeping general concept of "live testimony" as such.' [Citation omitted.]" *Id.* at 1196. See, also, *United States v. Holsey*, 437 F.2d 250 (10th Cir. 1970); *Smith v. United States*, 324 F.2d 879 (D.C. Cir. 1963).

The record clearly establishes that the witness Reams was not unknown to either Whelan or the State prior to the illegal wiretaps. When Whelan was first hired by the Abboud family, he was specially advised that Reams may be a suspect or at least a party with information. The police, though perhaps not as vigorously as they might, had pursued Reams and made inquiry concerning his having heard Anderson make some threatening statements concerning Abboud. Whelan arranged a contact with Mila Dickman who, in turn, kept Whelan advised about the fact that Reams was getting nervous and felt he was being "edged out" of his association with Anderson and Hochstein. There is no evidence in the record to support the position that, but for the illegal wiretap, either the existence of Reams or the fact that he might testify would have been unknown.

The record establishes the fact that nothing heard during the illegal wiretap led the State to Reams. Exhibit 43 best illustrates this fact. Exhibit 43 is a report made by Whelan to the Abboud family and reads, in part:

"Monday, 6-13-77

"Talked with Cooper, aware of Lon's whereabouts. Cooper still thinks Lon was not involved but knows what happened. We decided that Mila and I should talk with Lon and make a deal.

". . . Lon had been at her home all week-end and was acting very nervous, upset over something. Plan decided on: Mila is to talk with Reams this afternoon and tell him of her involvement with me and that the case is coming down with Reams as a conspirator; he will be charged

with murder. Also, it is now known that Anderson, Pete and Leo are going to kill Lon. Mila also believed this and was placed in the middle. Both had to make a decision — Reams arrested or Reams killed. Mila agreed to talk with Lon and go for the confession. She agreed to give Lon enough information so that he would believe that he had no out and that Cooper had enough for the arrest." Of course, none of the "facts" to be related to Reams were true and were not obtained as a result of any illegal wiretap.

We, therefore, conclude that the identity of Reams was made known to the State by independent means and was not the sole result of an illegal wiretap. It was, therefore, not the fruit of a poisonous tree and it was not error for the court to permit Reams' live testimony to be admitted into evidence.

Having, therefore, answered the first question posed at the outset of this discussion in the affirmative, we now turn to the second question. That is, regardless of the illegal wiretaps, did Reams voluntarily come forward and offer to testify so as to attenuate any taint, if such a taint existed? Again, we believe that this question must be answered in the affirmative.

When Reams was first contacted by the county attorney's office, he denied any knowledge of the crimes and refused to talk to Cooper.

It was only after Whelan told him that his life was in danger and that he should cooperate in return for immunity, that he sought out counsel. After he consulted with counsel of his choice, he apparently came to the conclusion that he was being offered a chance of a lifetime and came forward and offered to testify in return for the promise of immunity. To be sure, Whelan had no evidence that Reams was to be killed and was lying to Reams. In his testimony, Whelan stated as follows:

"Q. Did you obtain any information with respect to Mr. Reams?

"A. I don't think so, no.

"Q. Did you reveal any of the conversations off that wire tap to Mr. Reams?

"A. No, sir.

"Q. Did you ever at any time play any of the conversations to Mr. Reams?

"A. Never.

"Q. And you testified that you implied to Mila and to Lon Reams that he was in danger?

"A. I implied that, yes, to Lon and Mila.

"Q. In danger from what?

"A. In danger from his associates.

"Q. Did you have any factual basis for that?

"A. No, sir. All I was trying to do was play on his own paranoia at the time. . . .I would have to say that alot of it was made up. I was bluffing him. . . .

"Q. Now, you testified that I [Cooper] didn't authorize you to grant immunity to anybody. That is correct, isn't it?

"A. That is correct.

"Q. But it was also clear from our conversation that that was the intent if Mr. Reams was to come forward, wasn't it?

"A. That was what I drew from it.

"Q. And that's basically what you told Mr. Reams, wasn't it?

"A. I told him that I thought he should get a lawyer and, through the lawyer, make a deal for immunity."

Reams could easily have asked to hear the alleged tapes. Such a request would have quickly disclosed that the tapes did not exist. Apparently, neither the threats nor the tapes were a moving factor in Reams' decision to testify. On advice of counsel, the offer of immunity undoubtedly did more than anything else to cause Reams to come forward. Reams had every opportunity to reflect on the entire matter and to consult with his attorney before voluntarily offering to testify.

The fact that Whelan may have overheard a conversation between Hochstein and Anderson in which Reams was mentioned did not affect the State's right to use the

information against Reams. In *Goldstein v. United States*, 316 U.S. 114 (1942), it was held that the use of an intercepted telephone message to induce witnesses to testify in a criminal prosecution, even though it may constitute a violation of the provisions of § 605 of the Federal Communications Act, 47 U.S.C. § 605 (1976), forbidding the use of intercepted communications, does not render such testimony inadmissible against a person not a party to the message where no use is made at the trial either of the message itself or of any information contained therein. Likewise, in the case of *United States v. Scotten*, 428 F. Supp. 256 (D. Nev. 1976), the United States District Court for the District of Nevada held that, although evidence seized at an illegal search of a warehouse had been suppressed as to the defendant because of his proprietary interest in the premises, testimony of an unindicted coconspirator who became a government witness would not be suppressed with respect to the defendant although the seized evidence which was useable against the defendant was a substantial factor leading to the decision of the unindicted coconspirator to cooperate with the government. The court found that the decision of the witness to turn state's evidence was an independent act of free will which was not affected or obtained in any respect by wrongful exploitation of evidence seized or obtained in violation of his right of privacy.

Reams had much to gain by agreeing to testify in return for the offer of immunity. To suggest that his offer to testify was not voluntary under the facts is to attempt to ignore the facts as detailed earlier in this opinion. It was, indeed, voluntary and most beneficial to Reams. We are, therefore, unable to agree with appellants that Reams' live, in-court, testimony should have been suppressed. It was clearly voluntary and properly admissible, though admittedly damaging to the appellants.

Having so disposed of that issue, we shall now proceed to examine the remainder of the issues raised by

appellants. Appellant Hochstein claims that the trial court erred in failing to grant his oral motion for severance. The cases against Hochstein and Anderson, filed separately, were ordered consolidated by the trial court on September 12, 1977. We have frequently held that the ruling of a trial court upon a motion for consolidation of prosecutions properly joinable will not be disturbed in the absence of an abuse of discretion. *State v. Bazer*, 189 Neb. 711, 204 N.W.2d 799 (1973). The same rule applies with regard to a motion to sever. See *State v. Cook*, 182 Neb. 684, 157 N.W.2d 151 (1968). Furthermore, we have held that it is the duty of one challenging a joint trial to demonstrate how and in what manner he was prejudiced. See Neb. Rev. Stat. § 29-2002(4) (Reissue 1979) and *State v. Rice*, 188 Neb. 728, 199 N.W.2d 480 (1972). Hochstein made no such showing at the time of the oral motion and an examination of the record fails to disclose any such prejudice. We find no evidence that the trial court abused its discretion in granting the State's motion for consolidation and denying Hochstein's motion to sever. The assignment of error is overruled.

Appellants next contend that the trial court erred in not granting appellants' request for a mistrial based upon the prosecution's "death qualifying" the jury panel. Unfortunately, the examination of the jury panel was not recorded. However, the court reconstructed what took place immediately after the incident in question during an in camera discussion. It appears that the jury panel was advised that the death penalty was a possible sentence which could be imposed for the crimes charged in the instant cases. Thereafter, a panel member was asked if she believed in the death penalty. She replied that she did not and further advised that her view opposing the death penalty might color her judgment in reaching a verdict of guilty or not guilty. The court proceeded then to further question the panel member and determined that her feelings about the death penalty would, indeed, influence her determination of the factual

question of guilt or innocence. She was, therefore, excused from the panel. Appellants argue that this exclusion amounted to "death qualifying" the jury, contrary to the mandate of the United States Supreme Court in the case of *Witherspoon v. Illinois*, 391 U.S. 510 (1968). We believe, however, that appellants have misconstrued the holding in *Witherspoon*. The *Witherspoon* case held that "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty . . . ." *Id.* at 522. In so holding, however, the Court, in *Witherspoon*, specifically stated that the issue decided did not concern the exclusion of prospective jurors who stated that their reservations about capital punishment would prevent them from making an impartial decision as to the defendant's guilt. The exclusion of the panel member in the instant case was not based upon the panel member's refusal to impose the death penalty, but upon her admission that, because she objected to the death penalty, she could not fairly and impartially determine the guilt or innocence of the appellants, even though she would not be called upon to impose the sentence. In *State v. Kirby*, 185 Neb. 240, 175 N.W.2d 87 (1970), we held that one who cannot subordinate his personal views to what he perceives to be his duty to abide by his oath as a juror and to obey the laws of the state must be excused for cause. The trial court correctly perceived that to be the case and properly excused the juror. Such assignment of error must be overruled.

Appellants next contend that the trial court erred in overruling their motion for mistrial after Reams mentioned the word "polygraph" during redirect examination. Counsel for both Anderson and Hochstein immediately objected and, during an in camera hearing, moved for a mistrial on the basis that the witness Reams had mentioned the word "polygraph" in the presence of the jury. The testimony did not indicate whether Reams had ever taken a polygraph test or, if so, what results were obtained.

The trial court overruled the motion for mistrial but, before proceeding further with the trial, instructed the jury, in part, as follows: "The jury is instructed to pay no attention to either the question or the answer as the matters made reference to have no place in a court of law. There is no factual matter at all in this case in any regard to the subject of polygraph. There will be no further reference to that subject in the trial." While it is true that the results of a polygraph test are not admissible in evidence, *State v. Temple*, 192 Neb. 442, 222 N.W.2d 356 (1974), in the instant case, there was no testimony concerning the results of a polygraph test. The mere mention of the word "polygraph," absent more, does not constitute prejudicial error. Appellants have failed to disclose how or in what manner the use of the word "polygraph" was prejudicial under the circumstances and we are unable to see how the appellants could have been prejudiced by the mention of the word "polygraph." The assigned error must be overruled.

Anderson and Hochstein next maintain that the trial court erred in failing to grant their request for a mistrial based upon the State's alleged improper highlighting of appellants' failure to testify. Both appellants maintain that the State made certain remarks during the voir dire examination which, when taken together with a later newspaper article, denied to the appellants a fair trial. The record discloses, however, that neither appellant objected to remarks made by the prosecution at the time they were made, nor did either defendant move for a mistrial based upon those remarks. We have frequently held that a party may not raise alleged misconduct of adverse counsel on appeal where, despite knowledge of the alleged misconduct, the party claiming the misconduct failed to request a mistrial and instead agreed to take the chances of a favorable verdict. *Vacanti v. Montes*, 180 Neb. 232, 142 N.W.2d 318 (1966). In addition, however, an examination of the alleged statements fails to disclose how or in what manner they were prejudicial or improper. With regard to the matter of the

newspaper article, likewise, the claim is without merit. An article which appeared in the Omaha World Herald the morning before the case was submitted to the jury for its consideration read, in part, as follows: "By pleading innocent, Hochstein and Anderson have denied involvement in the crime, but their failure to testify meant jurors never heard either deny the charges." Appellants' claim in this regard fails on at least two grounds. In the first instance, there is no evidence in the record to indicate that the jury failed to follow the admonition given by the trial court not to read newspaper accounts and, in fact, read the article, but, more importantly, there is nothing in the statement itself which could, in any manner, be said to have prejudiced the appellants. The article recited the truth simply and factually. There is no evidence of prejudice. The assignment is overruled.

Hochstein and Anderson next maintain the trial court committed error in failing, on the court's own motion, to change the venue of the trial and to order the jury sequestered during trial. The record discloses that appellants requested neither action from the court. As with the earlier errors assigned, appellants have failed to disclose how or in what manner they were prejudiced by reason of the trial court's failure to change the location of the trial or sequester the jury on its own motion. We have previously held that a motion for change of venue or to sequester the jury is directed to the sound discretion of the trial court and, in the absence of an abuse of discretion, its ruling will not be disturbed on appeal. *State v. Simpson*, 200 Neb. 823, 265 N.W.2d 681 (1978); *State v. Williams*, 205 Neb. 56, 287 N.W.2d 18 (1979). There is no evidence that the failure of the court to act on its own motion, if such a duty even existed, was an abuse of discretion. The assignment of error must be overruled.

Anderson and Hochstein next contend that the trial court failed to assure them the right to a fair trial because two pretrial hearings were held in their absence. The first hearing concerned a motion by Anderson to

dismiss. While the record shows that Anderson was not present at this hearing, he was represented by counsel. Further, the record reveals no request by Anderson's counsel that Anderson be present or any objection to proceeding without Anderson's being present. With regard to the second hearing, it appears it was upon a motion made by Anderson's counsel as to whether an evidentiary hearing should be held to consider the admissibility of allegedly tainted evidence. At neither of these hearings was evidence adduced. They were held simply to give Anderson's and Hochstein's attorneys an opportunity to argue the law to the court. The general rule is that an accused has the right to be present at all stages of the trial when his absence might frustrate the fairness of the proceedings. *State v. Bear Runner*, 198 Neb. 368, 252 N.W.2d 638 (1977); *Faretta v. California*, 422 U.S. 806 (1975). We fail to see how Anderson's or Hochstein's absence at a time when their attorneys were arguing matters of law to the court could frustrate the fairness of the proceedings. Likewise, neither appellant is able to point out to us how his absence frustrated the fairness of the proceedings. We have earlier held that a defendant has no constitutional right to be present at the hearing on a motion for a new trial. *State v. Wells*, 197 Neb. 584, 249 N.W.2d 904 (1977). We fail to see how the appellants' absence from these two hearings should be treated any differently. The assignment of error must be overruled.

Appellants' next assignment of error is that the trial court erred in failing to give appellants' requested instruction concerning "reasonable doubt." The record reflects that the trial court, over objection by appellants, instructed the jury on "reasonable doubt" by following the pattern jury instruction NJI 14.08. Appellants maintain that the instruction as approved in NJI is confusing, contradictory, and a misstatement of the traditional understanding of "reasonable doubt." Our examination of the instruction fails to reveal that it does not properly reflect the rule in Nebraska concerning

reasonable doubt. The NJI on "reasonable doubt" has been frequently approved by this court. *State v. Rice, supra; Haswell v. State,* 167 Neb. 169, 92 N.W.2d 161 (1958). Moreover, when all of the instructions given by the court are taken together, they are not, in any manner, misleading and they adequately cover the issues raised. There is, therefore, no prejudicial error. *State v. Bear Runner, supra; State v. Pratt,* 197 Neb. 390, 249 N.W.2d 500 (1977).

Appellants further assign as error the manner in which the State appealed the trial court's suppression of certain of the evidence prior to trial. In essence, appellants argue that it was error to permit the interlocutory appeal to be heard by a single judge as provided for in § 29-824 and that, instead, the appeal was required, under the law, to be heard by the entire court sitting en banc. Section 29-824 specifically provides, in part, as follows: "*In addition to any other right to appeal,* the state shall have the right to appeal from an order granting a motion ... to suppress evidence in the manner herein provided." (Emphasis supplied.) The manner provided for in the quoted section is review by a single judge of the Nebraska Supreme Court at chambers. The appellants maintain that, under the provisions of Neb. Rev. Stat. § 86-705(12) (Reissue 1976), the State was required to appeal to the entire court and we should now remand the matter for a full court hearing. There are, however, several defects in that argument. In the first place, we have now reviewed the entire matter while sitting en banc. No purpose could be served in ordering a new trial so that the State could again appeal to this court en banc. We have disposed of the entire matter at this time. Furthermore, § 86-705(12) reads, in part, as follows: "*In addition to any other right to appeal,* the Attorney General ... shall have the right to appeal from an order granting a motion to suppress made under subsection (11) of this section ...." (Emphasis supplied.) Section 86-705(12) makes it clear that the right to appeal at the specific time is not exclusive, but is in addition to any

other right of appeal. Section 29-824 and related applicable sections leave no question that they are all a part of "search and seizure" and quite clearly authorize the State to appeal to a single judge of the Nebraska Supreme Court prior to trial in order to permit the question of the suppression of evidence to be tested quickly before trial. The entire court is afforded a subsequent opportunity to review the issue when the appeal on the merits is brought to the entire court. There is nothing vague or unclear about such a procedure.

No procedure for the manner of appeal is prescribed in § 86-705(12). We see little reason why an interlocutory appeal concerning the suppression of evidence should be heard by a single judge of this court sitting at chambers if brought pursuant to § 29-824, but by the entire court sitting en banc if brought under the provisions of § 86-205(12). We, therefore, hold that the procedure for appealing from the provisions of either § 29-824 or § 86-705(12) shall be in accordance with § 29-824 and such appeal shall be heard by a single judge sitting at chambers, provided, however, that upon ultimate appeal to the Nebraska Supreme Court, the defendant may again challenge the correctness of the order by a single judge of the Supreme Court by preserving the question in the motion for new trial as prescribed in § 29-824. We, therefore, overrule the appellants' assignment of error in that regard.

Appellants' last claim goes to the imposition of the death penalty and is presented to us in several parts, some of which have already been answered by this court. The first claim is that the Nebraska death penalty constitutes cruel and unusual punishment, violating the eighth and fourteenth amendments to the United States Constitution and Neb. Const. art. 1, § 9. We may dispose of that claim based upon several recent decisions by both this court and the Supreme Court of the United States. Each has held that the death penalty, when properly imposed by a state, does not violate either the eighth or fourteenth amendment of the United States Constitu-

tion or Neb. Const. art. 1, § 9. See, *State v. Stewart*, 197 Neb. 497, 250 N.W.2d 849 (1977); *State v. Rust*, 197 Neb. 528, 250 N.W.2d 867 (1977); *State v. Holtan*, 197 Neb. 544, 250 N.W.2d 876 (1977); *State v. Williams*, 205 Neb. 56, 287 N.W.2d 18 (1979); *State v. Otey*, 205 Neb. 90, 287 N.W.2d 36 (1979); *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976).

Appellants further maintain that the Nebraska death penalty, imposed by the court rather than a jury, violates the sixth and fourteenth amendments of the United States Constitution and Neb. Const. art. 1, § 11, in that it denies the accused the right to trial by jury and the right to confront his accuser. As we noted in *State v. Simants*, 197 Neb. 549, 558, 250 N.W.2d 881, 887 (1977): "The United States Supreme Court, in Proffitt v. Florida, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976), has held that jury sentencing in a capital case is not constitutionally required."

Likewise, the United States Supreme Court, in *Gregg v. Georgia, supra*, addressed the question of evidentiary formalism under the bifurcated system of capital sentencing. It is clear from the *Gregg* decision that the sentencing phase of the process is separate and apart from the trial phase and the traditional rules of evidence may be relaxed following conviction so that the sentencing authority can receive all information pertinent to the imposition of sentence. We are unable to find any requirement in the law that a sentencing court may consider only information adduced at trial when exercising discretion in imposing sentence. Likewise, we find no constitutional requirement to permit one convicted the right to confront all who might give information to be used by the sentencing court. Such a requirement goes far beyond any constitutional mandate.

Appellants further maintain that the Nebraska death penalty statutes constitute cruel and unusual punishment because the standards for establishing aggravat-

ing and mitigating circumstances are vague and indefinite.

While one may argue that whenever guidelines are established for a court to use in making decisions, the standards will be in general terms, it appears that the United States Supreme Court, in the *Gregg* case, has approved such guidelines saying, "While such standards are by necessity somewhat general, they do provide guidance to the sentencing authority and thereby reduce the likelihood that it will impose a sentence that fairly can be called capricious or arbitrary." *Id.* at 193-95. We have previously approved the standards set out in our statute on aggravating and mitigating standards. See *State v. Rust, supra.*

Appellants next maintain that the statutes authorizing the imposition of the death penalty in a case of this nature, violate the eighth and fourteenth amendments of the United States Constitution and Neb. Const. art. 1, § 9, because they limit the mitigating factors which may be considered by the sentencing body. We have already and recently disposed of that argument in *State v. Holtan, supra,* when we held that our statute prescribing consideration of aggravating and mitigating circumstances was to be interpreted so as to permit consideration by the court of all aggravating and mitigating circumstances and not just those set forth in the statute, saying specifically: "To the extent that there may be any question we now hold that the trial court shall, in addition to considering the aggravating and mitigating circumstances set forth in section 29-2523, R. R. S. 1943, likewise consider any matter relevant to the imposition of the sentence and receive any such evidence which the court deems to have probative value as to the character of the defendant and shall consider them as a mitigating factor though not specifically a mitigating *circumstance* as set forth in section 29-2523." *Id.* at 318-19, 287 N.W.2d at 674 (emphasis in original).

Lastly, appellants maintain that the death penalty was improperly imposed in this case because of a

misapplication of the aggravating and mitigating circumstances. To the contrary, when this case is compared to the other 32 cases noted by this court in *State v. Williams, supra*, and examined in light of Neb. Rev. Stat. § 29-2523 (Reissue 1979), it clearly speaks in favor of imposing the death penalty. While the author of this opinion has heretofore disagreed with imposing the death penalty in certain of the cases reviewed by this court, finding that they were not sufficiently different from those cases in which the death penalty had not been imposed, the author has no such difficulty in this case. The appellants' absolute and total disregard for the value of human life as displayed by the evidence in this case makes it separate and different from any other case previously considered by this court. Both Anderson and Hochstein, though they had ample time in which to "cool down" and reflect upon what they were planning to do, proceeded without the slightest regard for the fact that they were taking a human life. Hochstein's willingness to kill another for $1,500 displays how little he valued another's life. The evidence in this case of the careful, deliberate premeditation and malice aforethought makes this type of crime exactly the type contemplated by the "aggravating and mitigating circumstances" standards of our statutes.

For Hochstein and Anderson, the killing of Abboud was a business transaction and a most aggravating circumstance within the meaning of § 29-2523. The death penalty for them is an occupational hazard. If ever a situation exists in which the imposition of a death penalty is appropriate, it is clearly in the case of "killers for hire." A careful review of the entire record in light of both § 29-2523 and the previous decisions of this court discloses that there are no mitigating factors in this case which would justify not imposing the most severe penalty for the most heinous crime — the absolute and willful killing of a human for money. We believe the imposition of the death penalty in this case is amply justified. Having, therefore, found no errors requiring a

new trial, we affirm the conviction and the sentence of death imposed.

AFFIRMED.

CLINTON and HASTINGS, JJ., not participating.

WILLARD W. WHITE, APPELLEE AND CROSS-APPELLANT, V. WESTERN COMMODITIES, INC., APPELLEE AND CROSS-APPELLANT, AND CURTIS, INC., APPELLANT AND CROSS-APPELLEE.

295 N.W.2d 704

Filed August 15, 1980. No. 42903.

1. **Workmen's Compensation: Appeal and Error.** In reviewing the judgment of the compensation court, we are bound by the findings of fact made by that court after rehearing to the extent that the same have support in the evidence. Findings of fact made by the Workmen's Compensation Court after rehearing have the effect of a jury verdict and may not be set aside on appeal unless clearly wrong.
2. **Workmen's Compensation.** In the absence of any showing that there was any joint arrangement as to salary, wages, hours of employment, or term of service, there cannot be any joint employment.
3. **Workmen's Compensation: Burden of Proof.** The burden of proof is upon the plaintiff to show by a preponderance of the evidence that the injury sustained was caused by, or related to, the accident and was not the result of the normal progression of the plaintiff's pre-existing condition which would have been sustained in the absence of the accident.

Appeal from the Nebraska Workmen's Compensation Court. Affirmed in part, and in part reversed.

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

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

Dennis M. Coll for Raymond, Olsen & Coll, P.C., for appellee White.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, BRODKEY, and WHITE, JJ., and COLWELL, District Judge.

COLWELL, District Judge.

This is an appeal from an award made by the Workmen's Compensation Court in favor of Willard W. White, plaintiff, against Western Commodities, Inc. (Western), and Curtis, Inc. (Curtis), defendants. Defendant Curtis appeals; plaintiff and defendant Western cross-appeal. We affirm in part and reverse in part.

Plaintiff filed his petition with the Nebraska Workmen's Compensation Court on November 22, 1977, alleging a compensable injury from a fall on January 8, 1977, in Salina, Kansas, in the course of his employment as a truckdriver for Western. Western answered by general denial and, thereafter, with the consent of plaintiff, filed a third-party petition alleging that Curtis was either plaintiff's employer, or a joint employer of plaintiff with Western. Curtis answered denying that plaintiff was an employee. All issues were joined and hearing was had before a single judge of the Workmen's Compensation Court, who made an award in favor of plaintiff against both defendants as joint employers. Plaintiff refused the award and was granted a rehearing before a three-judge panel of the Workmen's Compensation Court. At trial the three-judge panel found that on January 8, 1977, plaintiff was jointly employed as a truckdriver by Curtis and Western when he suffered injuries to his back as a result of an accident arising out of and in the course of his employment by defendants when he slipped and fell from the truck-tractor frame; that as a result of that accident and injury the plaintiff incurred hospital and medical expenses and was temporarily totally disabled for a period of 62 3/7 weeks from January 8, 1977, to March 21, 1978, and, thereafter, suffered 10 percent permanent partial disability to his body as a whole. The panel found that at the time of the accident and injury the plaintiff was earning an average weekly wage of $250.36, entitling him to benefits of $100 per week for 62 3/7 weeks for temporary total disability and, thereafter, in addition thereto, the sum of $16.69 per week for 237 4/7 weeks for 10 percent permanent partial disability to the body as a whole. The panel also awarded plaintiff $400 com-

pensation for waiting time pursuant to Neb. Rev. Stat. § 48-125 (Reissue 1978), an attorney fee in the sum of $150, and an opportunity to avail himself of rehabilitation benefits pursuant to Neb. Rev. Stat. § 48-162.01 (Reissue 1978). The panel denied plaintiff's claim for expenses incurred while receiving treatments in a Veterans Administration hospital in the sum of $4,000, citing *Spiker v. John Day Co.*, 201 Neb. 503, 270 N.W.2d 300 (1978).

Curtis appeals from the award, assigning as error the failure to find that: (1) Curtis was not a joint employer; (2) The panel had no jurisdiction to determine the joint employer status of defendants; (3) Plaintiff was not injured in the scope of his employment with Curtis; and (4) Plaintiff was not entitled to workmen's compensation benefits.

Western cross-appeals, claiming as error: (1) The finding that plaintiff was a joint employee of Curtis and Western; (2) The failure to find that plaintiff was an employee solely of Curtis; (3) The failure to find that if plaintiff was entitled to any workmen's compensation benefits, those benefits were the sole obligation of Curtis; (4) The finding that there was no basis for reasonable controversy as to the first 8 weeks of plaintiff's disability and in awarding a waiting time penalty and attorney fees; and (5) The finding that plaintiff was entitled to vocational rehabilitation services.

Plaintiff cross-appeals, claiming that he should have been allowed the Veterans Administration hospital expenses.

"The findings of fact made by the Nebraska Workmen's Compensation Court after rehearing shall have the same force and effect as a jury verdict in a civil case." Neb. Rev. Stat. § 48-185 (Reissue 1978). "In reviewing the judgment of the compensation court, we are bound by the findings of fact made by that court after rehearing to the extent that the same have support in the evidence. Findings of fact made by the Workmen's Compensation Court after rehearing have the effect of a

jury verdict and we may not set them aside on appeal unless clearly wrong." *Wolfe v. American Community Stores*, 205 Neb. 763, 764, 290 N.W.2d 195, 197 (1980). See, also, *Hyatt v. Kay Windsor, Inc.*, 198 Neb. 580, 254 N.W.2d 92 (1977).

Plaintiff, now age 54, is an over-the-road truckdriver with more than 25 years experience, earning upwards to $200 per week. In 1945, he received a medical discharge from the U.S. Navy for a training injury described as a herniated intervertebral disc and received disability ratings ranging from 10 percent to 40 percent until 1953 when they were discontinued. Early in 1976, he became employed as a truckdriver by Platt Grain Co., Inc., Scottsbluff, Nebraska (Platt Grain), which was managed and operated by Bruce Platt (Platt). In 1976, Platt Grain was financially troubled and dissolved by law. In 1976, Platt formed Western which then carried on the former business of Platt Grain, and plaintiff became an employee of Western. At all times herein plaintiff claimed to be an employee of Western.

In December 1976, Platt negotiated leases of four truck-tractors to Curtis by separate written leases for 30-day renewable periods. The lease of the truck-tractor involved here shows Platt Grain Co., Inc., as lessor. Platt never divulged to Curtis that Platt Grain had been dissolved and that Western was its successor. The lease was signed in the Curtis home office in Denver, Colorado, and Platt was accompanied there by the plaintiff, who was interviewed by Curtis officers, completed an employment-type application form, and successfully completed a driver's examination required by Curtis.

The lease is on a printed form provided by Curtis. Most of the covenants therein relate to the duties and responsibilities of the lessor (Western). Also of significance is the following from the lease: "9. *It is the expressed intent of the parties that this agreement shall not create an Employer-Employee relationship, and the Lessor, his operators, drivers and employees shall be deemed to be*

Independent Contractors during the entire term of this lease.

"10. *Lessor shall carry a policy of Workman's Compensation and Employers' Liability insurance on himself, his operators, drivers and employees and said Lessor shall pay the premiums on said Policies.*

. . . .

"13. Lessor shall be responsible for the payment of all . . . fees that may be assessed on the Lessor's personnel, equipment or the operation thereof.

"14. Lessor shall be responsible for the withholding of and the payment of all taxes, including, but not limited to, withholding taxes, social security taxes, unemployment insurance tax, . . . against the Lessor, his operators, drivers or employees . . . .

. . . .

"18. Lessor may, on behalf of Curtis, *hire or employ properly licensed operators or drivers,* to operate the above described equipment. All operators and drivers are subject to approval by Curtis . . . .

. . . .

"21. The lessor, his operators, drivers and employees, with respect to the movement of traffic on this equipment, shall at all times be subject to the control, management, direction and orders of Curtis." (Emphasis supplied.)

On January 3, 1977, plaintiff left Scottsbluff, Nebraska, driving the leased truck-tractor hauling a Curtis-owned trailer with cargo to Jackson, Mississippi, where he received instructions from Platt to pick up a backhaul load of fresh chickens for delivery to Billings, Montana. On the backhaul trip plaintiff stopped at a Salina, Kansas, truck stop on January 8, 1977, during a snowstorm; the temperature was below zero. Mechanical trouble developed with the truck-tractor brakes and with the refrigeration unit (reefer) on the front of the trailer. While standing on the truck-tractor frame changing the filters on the reefer, plaintiff slipped and fell to the ground, where he laid for about 30 minutes.

Plaintiff claims that he injured his shoulder and back and that he suffered frostbite to his face. Fellow truckers helped him to his truck cab. He notified Platt of the accident and his injury and stayed 2 days in Salina, Kansas, in the truck cab. He then drove to his home in Minatare, Nebraska, where Platt picked up the truck-tractor and the trailer. Plaintiff has never driven a truck since.

There is no merit to the claim by Curtis that the Workmen's Compensation Court had no jurisdiction to consider the joint employer issue presented by the pleadings. Such an issue is proper under Neb. Rev. Stat. §§ 48-129 and 168 (Reissue 1978) and the objection was not timely raised by Curtis until its appeal to this court.

We first consider the question of the identity of plaintiff's employer for workmen's compensation purposes, and whether or not defendants were joint employers.

As a general rule the right of control is a key consideration in determining whether the relationship of employee and employer exists. See *Gardner v. Kothe*, 172 Neb. 364, 109 N.W.2d 405 (1961).

In addition to the lease terms, there was other evidence of control: (1) Duties of White. On a trip White was required to contact Curtis on a daily basis to advise as to (a) His location; (b) The nature of the cargo; and (c) The temperature of the trailer. White maintained a log in the manner required by Curtis; Curtis advanced money to White for truck and trailer expenses and traveling expenses, which was later deducted in settlement with Platt; White contacted Platt every 2 days; in the event of a truck breakdown Platt was contacted; in the event of a breakdown of the trailer Curtis was notified; where a backhaul was arranged by Curtis, White would secure authorization from Platt; and Platt could refuse a Curtis load if not satisfactory with him. (2) Wage arrangement. White was originally employed by Western at the agreed rate of 10½ cents per mile; Western always paid White's wages and provided Social Security, unemployment, and workmen's compensation insurance; Western provided W-2 forms; Western was always claimed by White as his

employer. (3) Hiring and replacement of driver. If Curtis was dissatisfied with White, or any other driver furnished with a truck, Curtis could discontinue the services of such driver and advise Platt, who would provide a replacement. Curtis could not discharge any driver who was an employee of Western. Platt could assign White to other duties and provide another driver for the leased truck, if such driver was qualified and acceptable to Curtis. Curtis could not hire a driver for a Western truck. Platt hired all drivers.

In its award the panel followed the modern rule stated in 1C Larson, Workmen's Compensation Law § 48.40 (1980): "Joint employment occurs when a single employee, *under contract with two employers*, and under the simultaneous control of both, simultaneously performs services for both employers, and when the service for each employer is the same as, or is closely related to, that for the other. In such a case, both employers are liable for workmen's compensation." (Emphasis supplied.) Larson explains: "Joint employment is possible, and indeed fairly common, because there is nothing unusual about the coinciding of both control by two employers and the advancement of the interests of two employers in a single piece of work. . . . [T]he lessor may be accomplishing his business purpose of furnishing equipment and labor at a profit, while the lessee is at the same moment accomplishing his business purpose of transporting goods . . . and the lessor may retain enough control to safeguard his interest in the valuable equipment, while the lessee may assume enough control to get his work done efficiently." A footnote to the foregoing rule cautions that Nebraska statutory provisions on joint employment should be considered.

Section 48-129 provides, in part: "In case any employee for whose injury or death compensation is payable under this act, shall, at the time of the injury, *be employed and paid jointly by two or more employers* . . . such employers shall contribute to the payment of such compensation in proportion to their several wage liabilities to such em-

ployee.... *Provided, however*, nothing in this section shall prevent employers from making any arrangement between themselves for a different distribution of the ultimate burden of compensation." (Emphasis supplied.)

"In the absence of any showing that there was any joint arrangement as to salary, wages, hours of employment, or term of service, there cannot be any joint employment...." *Henning v. City of Hebron*, 186 Neb. 381, 384, 183 N.W.2d 756, 759 (1971).

Neb. Rev. Stat. § 48-115(2) (Reissue 1978) defines an employee as "Every person in the service of an employer who is engaged in any trade, occupation, [or] business... under any contract of hire, expressed or implied, oral or written...."

There is a rationale here with the line of cases involving "special employees," where the rule is: "[T]here must be some consensual relationship between the loaned employee and the employer whose services he enters, sufficient to create a new employer-employee relationship. Where an employee enters the service of another at the command and pursuant to the direction of the master, no new relationship is created." *Shamburg v. Shamburg*, 153 Neb. 495, 502, 45 N.W.2d 446, 451 (1950).

Defendants here dealt at arms length in their lease agreement, including the provision that Western (lessor) was to be the employer of truckdrivers for workmen's compensation purposes. The evidence supports that agreement and there is no showing of prejudice to plaintiff who was not privy thereto; in fact, that was the desire and understanding of plaintiff. Such agreement should be accorded considerable weight in determining the issue of employment as contemplated in § 48-129.

The record here shows that there was no contract of employment between plaintiff and Curtis, either express or implied; that plaintiff was not paid jointly by defendants; and that defendants did not have an agreement as to plaintiff's salary and wages. On the contrary, plaintiff met his burden of proof that on January 8, 1977, Western had the right of control and plaintiff was its employee.

The finding of the panel that defendants were joint employers of plaintiff was clearly wrong.

We next consider whether plaintiff incurred a compensable injury and the extent and cause thereof. Plaintiff is the only person who personally appeared and testified.

Plaintiff said that he has had pain in his back, left leg, and shoulder from the time that he fell from the truck-tractor; that prior to January 8, 1977, his service-connected injury occasionally caused him some pain when he overexerted himself in his work, but that he put up with the pain and continued to work regularly until his injury on January 8, 1977, which aggravated his condition so that he could not drive a truck. Following plaintiff's return to Minatare, Nebraska, he remained at home applying home remedies until January 26, 1977, when he saw Dr. Joe T. Hanna, M.D., who referred him to the Veterans Administration hospital at Cheyenne, Wyoming. Thereafter followed a series of treatments and confinements in Veterans Administration hospitals at Cheyenne, Wyoming, and Hot Springs, South Dakota, beginning with Dr. S. E. Dahlstrom, M.D., who noted a history of "low back syndrome and discogenic disease since 1945, gradually becoming more disabling." During the next 6½ months he was examined and treated by more than six VA doctors whose records show that plaintiff was 5 feet 10 inches tall and weighed 250 pounds; his complaints were chronic low back pain beginning with his 1945 service injury; tenderness in the lumbosacral region; no deformities; back pain probably due to obesity; and atrophy of left leg noticed soon after the service injury. The diagnosis was lumbosacral sprain. No surgery was recommended. On June 22, 1977, Dr. Dahlstrom noted that plaintiff could return to work in 3 or 4 weeks.

Plaintiff was confined at the Cheyenne VA hospital from August 8 to October 17, 1977, under the care of Dr. E. W. Rideout, Jr., M.D., who continues outpatient care. It was at this time that the medical records first

have reference, in plaintiff's personal history, to the January 8, 1977, accident, although plaintiff testified that he had furnished this information to Dr. A. J. Grant, M.D., in March 1977. Also, during this time, plaintiff's service disability was reinstated to 40 percent. Dr. Rideout's diagnosis was that plaintiff had chronic lumbosacral sprain. When plaintiff was discharged on October 17, 1977, he was ordered not to return to work.

Relating to March 1978, Dr. Rideout, by deposition, said: "The last time I saw Mr. White, and I have no reason to believe that things are any different right at this instant, he was at least temporarily totally disabled as far as occupation that he is capable of doing, that is, truck driving and manual labor and so forth." He also gave his opinion that he did not know how long that condition would last. His deposition continues: "Q. And based upon that history given by Mr. White to you, do you have an opinion as to the injury that caused Mr. White's discomfort that you first saw him in August of 1977? ... A. I think Mr. White had a preexisting back condition from his service, with which he had worked almost continuously until January 8th, 1977, at which time he fell from his truck, was injured, and has been unable to work since that time."

Subsequently, on January 18, 1979, Dr. Rideout also related that he had examined plaintiff on June 30 and October 30, 1978, and he gave this opinion as to plaintiff's ability to work: "My opinion was that that man wasn't able to work." and "Q. At that time, doctor, you said that he was not able to return to work at that time. Now, based upon your medical experience, is that inability to go back to work a service connected injury in 1945 or an injury that occurred in January of 1977? ... THE WITNESS: I can't separate the two."

Dr. Edward J. Salmeri, M.D., Veterans Administration hospital, Cheyenne, Wyoming, examined plaintiff at the hospital between August 9 and 14, 1978, and it was his opinion that when plaintiff was discharged from the hospital he could work.

Dr. Emil J. Massa, M.D., an orthopedic surgeon, Denver, Colorado, testified by deposition for Western that he examined plaintiff on March 21, 1978, and concluded that there were no objective findings, but that plaintiff had sustained a lumbosacral sprain as a result of the January 8, 1977, incident. Further, it was his opinion that plaintiff had reached maximum medical recovery from the sprain, that plaintiff had no disability attributable from that sprain, that plaintiff could return to work as a truckdriver, and no further orthopedic therapy or treatment was indicated.

The burden of proof is on the plaintiff to show by a preponderance of the evidence that the injury sustained was caused by, or related to, the accident and was not the result of the normal progression of the plaintiff's preexisting condition which would have been sustained in the absence of the accident. *Taylor v. Benton*, 205 Neb. 203, 286 N.W.2d 755 (1980). See, also, *Breed v. Interstate Glass Co.*, 188 Neb. 284, 196 N.W.2d 169 (1972). Plaintiff's burden of proof is enhanced by reason of his prior injury. *Brokaw v. Robinson*, 183 Neb. 760, 164 N.W.2d 461 (1969).

"The requirement that objective symptoms of an injury be produced 'at the time' of the accident is satisfied if the symptoms manifest themselves according to the natural course of such matters without any independent intervening cause being shown.... There is no statutory requirement that the symptoms be observed by others or that the existence of the symptoms be proved by independent testimony." *Salinas v. Cyprus Industrial Minerals Co.*, 197 Neb. 198, 202, 247 N.W.2d 451, 453 (1976).

Western strongly urges that the findings of the three-judge panel on causation, injury, and extent of the injury were based upon speculation, arguing that there were no objective symptoms of injury; that the injury, if any, was the result of plaintiff's prior service-connected injury; great conflict in the hospital and medical records; the lack of credibility of medical opinions; and

inconsistent opinions by medical experts. While the proof of these issues is in conflict and not clear-cut, there is evidence in the record that preponderates in favor of plaintiff, supporting the award, *Welke v. City of Ainsworth*, 179 Neb. 496, 138 N.W.2d 808 (1965), and we cannot say that such findings were clearly wrong. Further, those findings are in keeping with *Bekelski v. Neal Co.*, 141 Neb. 657, 4 N.W.2d 741 (1942). "The primary purpose of the workmen's compensation act is to insure an employee against accidental injury arising out of and in the course of his employment. To accomplish this purpose the act should be liberally construed, not to find that liability exists without the required quantum of proof, but to include within the protection of the act by liberal interpretation all injuries arising out of and in the course of the employment which the act does not clearly exclude. A strict interpretation should not be resorted to in order to accomplish such exclusion." *Id.* at 659, 4 N.W.2d at 743.

We have considered the other assigned errors and find that they are without merit in that those findings of the panel have support in the evidence.

The third-party petition should be dismissed and Curtis discharged as a party defendant. The award and allowances otherwise made by the three-judge panel are affirmed.

Plaintiff is allowed $750 for the services of his attorney in this court.

AFFIRMED IN PART, AND IN PART REVERSED.

MORRIS ANDERSON, DOING BUSINESS AS ANDERSON HEATING AND PLUMBING, APPELLEE, IMPLEADED WITH BCDJ INVESTMENTS, INC., FORMERLY HILLCREST MOBILE HOMES, INC., ET AL., APPELLANTS, V. GAYLE A. WAGNER ET AL., APPELLEES.

296 N.W.2d 455

Filed August 15, 1980. No. 42789.

1. **Federal Acts: State Courts.** In the administration and interpretation of federal legislative acts, pertinent opinions of the federal courts are binding upon the state courts.
2. **Consumer Credit: Contracts.** Under the federal Truth in Lending Act, the possibility of a mechanic's lien can be a security interest retained or to be acquired which must be disclosed to the obligor by his creditor in a home improvement contract.
3. ____: ____. In order for a materialman to become a "consumer creditor" of the homeowner under the federal Truth in Lending Act, there must be a credit agreement existing between the two parties.
4. **Consumer Credit.** The disclosure requirements of the Truth in Lending Act are imposed only upon creditors, or those who regularly extend or arrange for the extension of credit for which the payment of a finance charge is required.

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

David T. Schroeder for appellants.

Schneider & Nisley for appellee Wagner.

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

HASTINGS, J.

This is an appeal from an order of the District Court for Keith County, Nebraska, which sustained the defendants Wagners' motion for summary judgment and dismissed the petitions to foreclose mechanic's liens of the various plaintiffs.

On July 24, 1975, the Wagners contracted with a builder by the name of Ed Roggasch to custom build a house for their use as a home. The various plaintiffs furnished, at Roggasch's request, materials or labor delivered to the job site for use in the construction

process. The plaintiffs were not paid in full by the contractor, Roggasch, so they filed mechanic's liens and brought this action against the Wagners to foreclose those liens. In January of 1977, the defendants Wagners filed an answer in the nature of a general denial, as well as separate cross-petitions, alleging defective workmanship and breach of warranty by the plaintiffs. Later, in February of 1978, the Wagners filed an amended answer, containing an assertion that each of the mechanic's liens was the result of a consumer credit transaction within the meaning of 15 U.S.C. §§ 1601 et seq. (1976, Supp. II 1978), popularly known as the federal Truth in Lending Act, and Regulation Z, 12 C.F.R. Part 226 (1980), promulgated by the Board of Governors of the Federal Reserve System in accordance with 15 U.S.C. § 1604. It was their specific claim that such transactions resulted in the acquisition or retention by the plaintiffs of a security interest in the Wagners' home, in which event the Act required notice to the Wagners of their right to rescind, which was not given, causing the liens to become void.

The record on appeal consists of a very short bill of exceptions containing some oral stipulations identifying and consenting to receipt into evidence of various exhibits. The exhibits consist of the building contract between the Wagners and Roggasch, a copy of Regulation Z, answers of the plaintiffs to certain interrogatories propounded by the Wagners, and the entire trial court file, which appears as a 390-page transcript. A large portion of that transcript is wholly unnecessary for the purpose of this appeal.

The basic contract executed by Roggasch and the Wagners is not remarkable in any of its particulars. Roggasch agreed to build a house according to certain specifications and to furnish all materials and perform all work necessary to accomplish the same. The total price which the Wagners were obligated to pay was $37,500, payable in three 30 percent progress payments, and a final 10 percent payment on completion of the

project. There was no provision in the contract requiring the payment of interest by the Wagners. For the purpose of this appeal, it can be assumed that the various plaintiffs furnished materials or labor to the project for which they have not been paid in full. The plaintiffs concede that they did not furnish any notice to the Wagners of any right to rescind, as required by the Act and Regulation Z, pertaining to any covered transactions. However, it is the plaintiffs' contention that they were not creditors of the Wagners within the meaning of the Act and that, therefore, its requirements did not apply.

The plaintiffs' petition does allege that the labor and materials were "furnished and delivered at the specific instance and request of Edwin Roggasch, a general contractor, who was acting on and in behalf of the defendants." However, this allegation was met with a general denial contained in the Wagners' pleadings. Additionally, the plaintiffs, in their answers to the Wagners' interrogatories, deny that any of them had any contact or agreement whatsoever with the Wagners to furnish materials or labor, but assert that all agreements were made with Roggasch; that he is the one for whom any credit was agreed to or, in fact, provided. There is no evidence that any of the plaintiffs were charging interest on any credit extended other than a prayer for interest at the legal rate from the time of filing their mechanic's liens.

The applicable federal statute, 15 U.S.C. § 1635 (1976), provides, in part, as follows: "(a) . . . [I]n the case of any consumer credit transaction in which a security interest, including any such interest arising by operation of law, is or will be retained or acquired in any real property which is used or is expected to be used as the residence of the person to whom credit is extended, the obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the disclosures . . . whichever is later . . . . The creditor shall clearly . . .

disclose . . . to any obligor . . . the rights of the obligor under this section. . . .

"(b) When an obligor exercises his right to rescind under subsection (a) of this section, he is not liable for any finance or other charge, and any security interest given by the obligor . . . becomes void upon such a rescission."

Several other portions of the Act should be helpful in the resolution of the issues in this case. Section 1601 (1976) contains the Congressional declaration of purpose and provides, in part, as follows: "The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit. . . . It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit . . . ."

Appropriate definitions contained in § 1602 (1976) are as follows:

"(e) The term 'credit' means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment.

"(f) The term 'creditor' refers only to creditors who regularly extend, or arrange for the extension of, credit . . . for which the payment of a finance charge is or may be required, whether in connection with loans, sales of property or services, or otherwise.

. . . .

"(h) The adjective 'consumer,' used with reference to a credit transaction, characterizes the transaction as one in which the party to whom credit is offered or extended is a natural person, and the money, property, or services which are the subject of the transaction are primarily for personal, family, household, or agricultural purposes."

Utilizing the plain meaning of the language employed in the statutory sections set forth above, several conclusions would appear to be inescapable. In the first

place, the creditor's duty to disclose relates to his obligor only. Secondly, a creditor, within the meaning of the Act, is limited to a creditor who regularly extends or arranges for the extension of credit for which a finance charge is required. Thirdly, the person to whom credit is extended must be a consumer, i.e., the money, property, or services which are the subject of the transaction are primarily for the obligor's personal or household use. Finally, the entire purpose of the Act is to assure a meaningful disclosure of credit terms so that the consumer can compare the various credit terms available and eliminate the uninformed use of credit. Looking at the fact situation in this case, the creditors' (plaintiffs') obligor was Roggasch, not the Wagners. There is nothing to indicate that the plaintiffs are creditors who regularly extend credit for which a finance charge is required. The person to whom credit was extended by the plaintiffs was Roggasch, the contractor, who is not the one who contemplated use of the materials or services for his personal or household use. Lastly, inasmuch as there is no evidence of finance charges having been made, there would seem to be no "credit terms" to be compared with "various credit terms available" within the meaning of the purposes of the Act. Basic though these assertions may be, nevertheless we are obligated to examine any existing federal court cases because, in the administration and interpretation of federal legislative acts, pertinent opinions of the federal courts are binding upon the state courts. *Bocian v. Union P. R. Co.*, 137 Neb. 318, 289 N.W. 372 (1939).

In further explaining the declared purpose of the Truth in Lending Act, contained in 15 U.S.C. §§ 1601 et seq., the Court of Appeals in *N. C. Freed Co., Inc. v. Board of Governors of Fed. Res. Sys.*, 473 F.2d 1210, 1214 (2d Cir. 1973), stated that the Act was remedial in nature, "designed to remedy what Congressional hearings revealed to be unscrupulous and predatory creditor practices throughout the nation." No such practices appear to be present in this case.

Freed was a declaratory judgment and injunction action brought by two corporations engaged in the home improvement industry. The plaintiffs challenged the authority of the Federal Reserve Board in promulgating 12 C.F.R. § 226.9(a), which expanded the then-applicable language of 15 U.S.C. § 1635(a) (1970) to require notice of rescission in credit transactions from "wherein a security interest is retained or acquired" to "where a security interest is or will be retained or acquired." The basic issue was whether the possibility of mechanic's liens was a security interest. The court found that it was the intention of Congress in requiring notice to protect the consumer from all types of security interests, including mechanic's liens. It held, therefore, that the Federal Reserve Board acted within its authority in initiating the cited regulation. In explaining its holding, the court employed language which, on the surface, at least, seems to lend support to the Wagners' position: "One 'economic reality' of the home improvement industry is that, in work such as that performed by the appellees, second mortgages and statutory liens are used extensively to secure payment of home improvement contracts that are ordinarily 'insecure' business ventures. . . .

"The typical home improvement contract is procured, usually under pressure conditions, by a prime contractor . . . who frequently possesses little or no capital of its own; the actual work is often done by various subcontractors. . . . Thus, if the homeowner should default in payment to the prime contractor, the latter could levy on the home to obtain payment . . . . But even though the prime contractor may waive its liens in the contract, it usually cannot waive statutory liens arising in favor of subcontractors, so that if the prime contractor fails to pay its subcontractors the latter can also levy on the home to collect payment. Conceivably, then, . . . even if the homeowner has already paid the prime contractor, in order to protect his home from subcontractor statutory liens, he may also have to pay the subcontractors, thus paying twice for the same work." *Freed* at 1214-15.

However, in *Freed* there was no issue as to any obligation of a potential lienholder simply because of his status as a materialman. Rather, the emphasis was upon the duty of a party-creditor to the contract itself. In fact, the court quoted with approval the following language from *Gardner & North R. and S. Corp. v. Board of Gov's. Fed. Res. Sys.*, 464 F.2d 838 (D.C. Cir. 1972): "'We think it a reasonable construction of the statute that Congress intended to require disclosure of all the *consequences flowing from the signing of a home improvement contract*, including not only the consequences spelled out in the contract, but also those necessarily inherent therein.'" *Freed* at 1216 (emphasis supplied).

The holding in *Gardner* was identical to that of *Freed*, i.e., that the possibility of a mechanic's lien required disclosure by the contractor-creditor to the homeowner as a security interest retained or to be acquired. The language was also similar: "In general the purpose of the Consumer Credit Protection Act was *'to assure a meaningful disclosure of credit terms,'* to consumers. 15 U.S.C. § 1601. The *specific purpose* of section 125(a), 15 U.S.C. § 1635(a), *was to protect homeowners from* the *unscrupulous* business tactics of certain *home improvement contractors*. The need for such protection was emphasized in testimony before congressional committees concerning *'second mortgage' racketeers* who encumbered their customers' houses to secure payment for unneeded or shoddy work. There was also reference to the liens of artisans, materialmen and others arising by operation of law which could subject a consumer's property to loss by foreclosure. . . .

"A contract to *renovate, remodel* or *repair* a house imports that work will be done by mechanics and artisans and that materials will be furnished in connection with that work. Implicit in the contract, therefore, is a provision that a lien will attach to secure payment for the work and materials. In other words, *the statutory provision for mechanic's* and materialmen's *liens must be taken as a part of the contract*. . . .

"We think it a reasonable construction of the statute that Congress intended to require disclosure of all the *consequences flowing from the signing of a home improvement contract,* including not only the consequences spelled out in the contract, but also those necessarily inherent therein." *Gardner* at 841-42 (emphasis supplied).

We believe that the language from the foregoing cases demonstrates that although the possibility of mechanic's and materialman's liens are "security interests," nevertheless the duty to disclose the existence of the same arises at the time of signing the improvement contract, not from time to time as deliveries of goods and services are made to the building site. Prior to such delivery, the identity of possible lienholders may not be known to anyone, and we suggest that absent a credit agreement between them and the homeowner, they do not become a "consumer creditor" under the Act.

Illustrative of that last statement is the case of *Gerasta v. Hibernia Nat. Bank*, 411 F. Supp. 176 (E.D. La. 1975), *supp. op.*, 411 F. Supp.194 (E.D. La. 1976). In that case the plaintiffs, Gerastas, signed a contract with one of the defendants, U. S. Building Materials Co., Inc., to renovate certain residential property of the Gerastas. The signed contract contained, among other provisions, permission for the U. S. Building Materials Co. to attempt to obtain a loan for the owners through a reliable source. This was done. A representative of the contractor completed the loan application to be submitted to the defendant bank, although the Hibernia National Bank actually prepared the loan papers which were signed by the Gerastas. The court held that U. S. Building Materials was neither a creditor nor an arranger of credit and, therefore, not subject to the Act's provisions relating to disclosure. Certain of the language of the court is instructive: "The provisions of the Act apply to and our jurisdiction depends upon an extension of credit, wherein the underlying transaction qualifies as a consumer credit transaction and not one for 'busi-

ness or commercial purposes.' . . . 'Consumer credit' is defined as 'credit offered or extended to a natural person, in which the money, property, or service . . . is primarily for personal . . . purposes and for which either a finance charge is or may be imposed or which pursuant to an agreement, is or may be payable in more than four installments.' . . .

"In determining whether a particular transaction is exempt, 'the purpose of the transaction or extension of credit is controlling' and not the property which is the subject of the security interest involved. . . .

"The disclosure requirements, however, are imposed only on 'creditors,' or those who 'regularly extend, or arrange for the extension of credit for which the payment of a finance charge is required, whether in connection with loans, sales of property or services, or otherwise.' . . .

"By contract, however, Building Materials requires the property owner to allow the work to be completed, at least in part, by subcontractors. If Building Materials, as the prime contractor, fails to pay its subcontractors . . . or materialmen, the latter could also levy on the property . . . regardless of the fact that the owner may have satisfied his obligation to the prime contractor. . . . We find, therefore, that the possibility of a materialman's lien should have been disclosed [by Hibernia National Bank] to the plaintiffs." *Gerasta* at 185, 187-88.

In spite of the language employed in the above cases, the opinions have concluded that the obligation of one to give notice of the right to rescind depends upon one's status as a *creditor* of the obligor or owner, and not upon one's position as a potential lienholder.

Apparently the latest case in this area is *Rudisell, et al. v. Fifth Third Bank*, No. 77-3206 (6th Cir. May 20, 1980). In that case, the Rudisells had contracted for the installation of aluminum siding with Aluminum Wholesale Distributors, Inc. (AWD), and at the request of the Rudisells, AWD went to the defendant bank, which

agreed to extend the necessary credit. AWD returned to the Rudisells with the loan papers for signature. AWD completed the work and assigned the note to the defendant bank and received payment. The Rudisells became dissatisfied with the work and notified Fifth Third that they rescinded their contract. The Rudisells claimed that because AWD, as contractor, had a right to a mechanic's lien, which is a security interest which was never disclosed by Fifth Third, they had a continuing right to rescind. The court said that "[a]n unrecorded mechanic's lien is not outside the definition of a security interest solely because it was not created by the financing documents." *Id.* at 8-9. The court went on to hold that both AWD and Fifth Third were creditors of the Rudisells, so that the "mechanic's lien which would arise by operation of law is one in favor of a creditor" and the Fifth Third having failed to disclose this possibility, the right to rescind remained extant. *Id.* at 17. However, the following language of the court is pertinent to a decision in the present case: "Had appellee [Fifth Third] loaned the money directly to appellants [Rudisells], and appellants then used the money for a cash sale from A.W.D., clearly A.W.D. would not have arranged or extended credit and would not have been a creditor. As Fifth Third Bank would have been the only creditor, a mechanic's lien, which would run in favor of A.W.D. and not Fifth Third, would not have run in favor of a *creditor*. . . .

"Although merely helping the debtor fill out the forms may not be enough to make one an arranger of credit under TILA [citations omitted], A.W.D. did more. It agreed to allow appellants to defer payment. Thus, A.W.D. was a creditor and the mechanic's lien which would arise by operation of law is one in favor of a creditor." *Rudisell* at 16-17.

We believe the plaintiffs in the present case fall in the same category as AWD in the hypothetical example set forth above, and the liens which they held did not run in favor of a creditor.

It is true all possible security interests which are retained or could be acquired in a consumer's residence must be clearly explained by the creditor. In *Supply Co. v. Binder*, 60 Ohio App. 2d 91, 395 N.E.2d 907 (1978), the Binders had contracted with T.F.F. Construction Company for the construction of a garage. As part of the contract, T.F.F. gave the Binders notice of the right to rescind under the Act. The Binders executed a note in satisfaction of their contractual obligation to T.F.F. which, in turn, assigned the same to Cardinal Federal Savings and Loan. T.F.F. failed to pay the plaintiff, one of the materialmen, who filed a lien against the Binders' home. After this suit was filed by the materialman Collingwood, the Binders settled the lien and cross-complained against Cardinal. The Ohio court held that although the contractor, T.F.F., had given adequate notice of the right to rescind, its notice was insufficient disclosure to the Binders of the possibility of mechanic's liens. As a result, both T.F.F. and Cardinal, as the assignees of the note, were held liable to reimburse the Binders for their payments to the materialmen. The court said: "[A] separate disclosure statement should have been issued to the Binders to the effect that a mechanic's lien was a possibility and that it might result in the Binders becoming obligated to subcontractors or materialmen who are not paid by their contractor. In this way, consumers would be alerted to scrutinize the reliability and reputability of the contractor and rescind those contracts which they may have impetuously signed." *Id.* at 911. This case indicates that the responsibility under the Act rests with the creditor — the prime contractor and its financial backer — and not with the materialman.

The Wagners cite another Ohio case, *Hobbs Lumber Co. v. Shidell*, 42 Ohio Misc. 21, 326 N.E.2d 706 (1974), as supporting their contention that materialmen must comply with the provisions of the Act. It is true that the finding of the court was "that the liens of Arrow and Hobbs [materialmen] are invalid, null and void for

failure of said lienholders to comply with the federal Truth-in-Lending Act." *Id.* at 26, 236 N.E.2d at 709. However, two comments are appropriate regarding that case. First of all, the facts do not disclose whether or not the lienholders had dealt directly with the owners, which, if they had, would make them creditors within the Act, and under obligation to comply with its provisions. On the other hand, if the facts were such that they had dealt only with the general contractor of the owners, then they were not creditors. In that event, the authorities cited by the Ohio court — 15 U.S.C. §§ 1601 et seq., *Gardner*, *Freed*, and the Ohio case of *Hank's Inc., v. Fisher*, 38 Ohio App. 2d 1, 310 N.E.2d 259 (1973) — depend upon the status of the lienholders as creditors to have the Act apply.

The Wagners set out in their brief a 1969 Federal Reserve Board letter, which suggests that even though the materialman had no contract or dealing with the owners, nevertheless, if the contractor fails to give notice of the possibility of a materialman's lien, the security interest of both the materialman and the contractor will be voided. The apparent suggestion of the author of that letter to the materialman, in order to avoid that predicament, is that upon receiving an order for a delivery of ready mixed concrete, or whatever, he should obtain proof positive that the contractor has given the proper notice, or he himself must do so, and then he must wait 3 days before making the delivery. Two answers to that advice readily appear. In the first place, the board's letters are not binding on the court. *Rudisell, supra*, and *Eby v. REB Realty, Inc.*, 495 F.2d 646 (9th Cir. 1974). Secondly, "Unnecessary confusion would arise [in the homebuilding industry] if we were to interpret 15 U.S.C. § 1635 in this manner." *Mid America Homes, Inc. v. Horn*, ____ Ind. App. ____, 377 N.E.2d 657, 661 (1978). In that case, the Horns contracted with Jamco Builders to build a house for them, to be used as their residence. Jamco ordered and received from Mid America a "'house and trim package.'" Jamco failed to pay Mid

America, and the latter filed this action to foreclose its mechanic's lien. The Horns raised the same defense as did the Wagners here. The Indiana court said: "In the instant case, the credit was not extended to consumers (the Horns), but instead to Jamco, a commercial entity. Although the property to which the lien attached was a private residence, the purpose of the transaction was to secure materials so that Jamco could construct a house. Only Jamco, after evaluating the terms of credit, could have selected its creditor. The Horns never acquired the right to rescind the credit transaction because they were not parties to the transaction. . . .

"We hold that the Truth in Lending Act requires disclosure under 15 U.S.C. § 1635 only in instances in which the potential lien holder deals directly with the homeowner." *Mid America Homes, Inc.*, at 660-61. In so holding, the Indiana court, in a footnote, stated that they declined to follow *Hobbs Lumber Company v. Shidell, supra.* We agree.

We will make a final note in reference to a federal regulation which may or may not apply to the fact situation in the instant case. We have previously set forth 15 U.S.C. § 1635 and the federal cases which construe it to require a creditor to disclose the possibility of statutory mechanic's liens arising against the subject property to the consumer receiving credit. The following states the exemption from that section: "(e) This section does not apply to the creation or retention of a first lien against a dwelling to finance the acquisition of that dwelling or to a consumer credit transaction in which an agency of a state is the creditor." 15 U.S.C. § 1635(e).

The applicable regulation is as follows:

"(g) *Exceptions to general rule.* This section does not apply to:

"(1) The creation, retention, or assumption of a first lien or equivalent security interest to finance the acquisition of a dwelling in which the customer resides or expects to reside.

"(2) A security interest which is a first lien retained or *acquired by a creditor in connection with the financing of the initial construction* of the residence of the customer, or in connection with a loan committed prior to completion of the construction of that residence to satisfy that construction loan and provide permanent financing of that residence, whether or not the customer previously owned the land on which that residence is to be constructed." 12 C.F.R. § 226.9(g) (emphasis supplied).

It is not clear whether this language would specifically exempt a creditor retaining or acquiring a security interest anytime it arises in connection with the initial construction of a dwelling, and whether a statutory lien comes within the meaning of "security interest" in this context. However, it is our opinion that the Truth in Lending Act was not intended by Congress to become so involved in the building industry nor with state lien laws. "Congress intended to require disclosure of all the consequences flowing from the signing of a *home improvement contract . . . .* " *Gardner, supra* at 842 (emphasis supplied).

It is possible that, through its regulations, the Federal Reserve Board intended to exempt the construction of a new home and acquisition of a dwelling, and make the disclosure requirements applicable only to credit transactions in the home improvement industry rather than the home construction industry. It would be difficult to imagine that Congress would intentionally exempt a lending institution charging a high rate of interest from the Act's requirements but not exempt a contractor or subcontractor which allowed the consumer to extend payments over a period of time without charging interest, where both instances deal with construction of a new home.

However, we need not indulge in such speculation, nor need we decide the issue, since we have already determined that plaintiffs are not creditors within the meaning of the Truth in Lending Act, and therefore had no duty to make any disclosures pursuant to the Act.

The judgment of the trial court in sustaining the Wagners' motion for summary judgment is reversed, and the cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

DOROTHY A. BARBER, APPELLEE AND CROSS-APPELLEE, V. CHARLES A. BARBER, APPELLANT AND CROSS-APPELLEE. SARAH JANE CUNNINGHAM, INTERVENOR-APPELLEE AND CROSS-APPELLANT.

296 N.W.2d 463

Filed August 22, 1980. No. 42912.

1. **Divorce: Attorney Fees.** The general rule is that the allowance of attorney fees and suit money is ordinarily regarded to be for the wife and should be made to her, and not to the parties who perform services for her, or to whom she becomes indebted in connection with the litigation.
2. **Attorney Fees.** It is also generally held that unless the statute specifically provides that attorney fees allowable thereunder go to the attorney, they are an allowance to the party and not to the attorney.
3. **Divorce: Intervention.** As a general rule, intervention is not permitted in a divorce suit for the purpose of opposing a divorce, but intervention may be allowed where it is necessary to secure justice for third persons whose property interests may be adversely affected.
4. **Attorney Fees: Attorney's Liens.** An attorney has a lien for a general balance of compensation upon any papers of his client which have come into his possession in the course of his professional employment; and upon money in his hands belonging to his client, and in the hands of the adverse party in an action or proceeding in which the attorney was employed, from the time of giving notice of the lien to that party. Neb. Rev. Stat. § 7-108 (Reissue 1977).
5. **Attorney Fees: Attorney's Liens: Notice.** The statutory and common law lien upon money in the hands of the adverse party in an action or proceeding in which the attorney was employed is a charging or specific lien, and is not perfected until notice has been given to the party in possession of the fund. Any notice of the existence of the claim, and that it will be asserted, is sufficient. The statute does not require that the notice shall be in any specific form, or that it shall be given in any particular way.
6. **Equity: Attorney's Liens: Intervention.** In equity actions, it is generally held that the proper method to enforce an attorney's lien

is to file a petition in intervention in the original action.

7. **Attorney and Client: Attorney's Liens.** An agreement between an attorney and client that the attorney shall have a lien on the judgment is decisive as to the existence of the lien and its amount, and constitutes a valid equitable assignment of the judgment pro tanto which attaches to the judgment as soon as it is entered.
8. **Equity: Judgments.** Where a court of equity has properly acquired jurisdiction in a suit for equitable relief, it may make complete adjudication of all matters properly presented and involved in the case and grant relief, legal or equitable, as may be required and thus avoid unnecessary litigation.
9. **Attorney's Liens: Equity.** When a charging lien is created by an agreement, an action to establish and enforce it is within the equity jurisdiction of the court.
10. **Presumptions: Evidence.** A presumption arises that the trial court, in trying a case without a jury, will consider only such evidence as is competent and relevant and this court will not reverse a case so tried because evidence was erroneously admitted where there is other material, competent, and relevant evidence sufficient to sustain the trial court's judgment.
11. **Attorney Fees.** The award of attorney fees 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.
12. **Divorce: Appeal and Error.** While an action for dissolution of marriage is heard de novo in this court, this court will give weight to the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the opposite.

Appeal from the District Court for Red Willow County: DEWAYNE WOLF, Judge. Affirmed as modified.

Sinor & Blount for appellant.

Sarah Jane Cunningham of Cunningham Law Office, P.C., for intervenor-appellee.

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

BRODKEY, J.

This case involves an appeal by Charles A. Barber (Charles), the respondent below, and a cross-appeal by

Sarah Jane Cunningham (Cunningham), attorney and member of the Nebraska State Bar Association, from a judgment entered by the District Court for Red Willow County, Nebraska, upon her amended petition of intervention filed in the original dissolution of marriage action between Charles and the petitioner below, Dorothy A. Barber (Dorothy), to recover attorney fees awarded in the decree of dissolution of the marriage between Dorothy and Charles. On May 21, 1979, the court entered judgment in favor of Cunningham and against both Charles and Dorothy for the amount of $8,745.77 and the present appeals are from that judgment. We affirm as modified.

The evidence is uncontroverted that in early October 1975, Dorothy retained Cunningham to represent her in her dissolution action against Charles. The evidence is somewhat conflicting as to the exact nature of the agreement between them with reference to the payment of attorney fees. Cunningham testified that their agreement was as follows: "I told Mrs. Barber that we would require a $250 retainer fee out of which we would pay the filing fee of the Court which was $50; that in dissolution actions the Court normally awarded a fee for the petitioner's attorney particularly if the petitioner was the wife and that out-of-pocket expenses would be over and above that; that if the allowance awarded by the Court was sufficient for the time and effort expended by myself that that would satisfy her obligation to me. If not, she would be billed for the additional on an hourly basis. . . . Yes, our hourly rate at that time was $45 an hour." Dorothy's version of what transpired was as follows: "Well, I recall that there was a retainer fee of — I paid $250 that day. I understand that $50 of that was to go to the court for the filing and other than that I really don't recall what the fee was other than when I walked out of the office I felt assured that whatever the fees would be assessed to me as for my lawyer fees would be taken care of by [Charles]."

There is also evidence in the record indicating that Dorothy and Cunningham entered into this arrange-

ment because Dorothy did not have the necessary funds to pay Cunningham for her services. The trial court found that the contract for compensation between Dorothy and Cunningham provided for attorney fees in "such amount as may be allowed by the District Court in the dissolution action but not less than $45 per hour." In its memorandum opinion entered on June 14, 1977, the district judge who tried the original dissolution action stated: "Costs will be taxed to the husband including an allowance of $9,000.00 *to apply on attorney fees for the wife.*" (Emphasis supplied.) However, the entry on the trial docket states: "Costs of this action are taxed to the respondent, including a fee of $9,000.00 for petitioner's attorney." The modified decree entered on March 14, 1978, provides, among other things: "All other terms of the original Decree entered June 14, 1977 as modified on November 4, 1977, shall remain and be in full force and effect." Finally, the final decree in the dissolution action, as contained in the journal entry for all the hearings, and executed by the court on September 21, 1977, specifically provides: "Costs of this action are taxed to the respondent, including a fee of $9,000 for petitioner's attorney." The court also found that the journal entry should conform to the docket notes entered by the court on the respective dates of entry, "they representing the actual order of the court . . . ."

Before discussing the legal ramifications involved in the foregoing award of attorney fees, attention must be called to certain other pertinent facts revealed in the record which must be considered in the disposition of this appeal. Under date of May 15, 1978, Dorothy executed a "Release" to Charles reading as follows: "In consideration of One Dollar and other valuable consideration paid to me by Charles A. Barber, receipt whereof is hereby acknowledged, I, Dorothy A. Barber, do hereby release and discharge Charles A. Barber from all claims, liens, and judgments *issued for attorney fees* in the above entitled action, in all respects, as

though the judgment had not been rendered." (Emphasis supplied.) This release was filed in the District Court for Red Willow County on May 31, 1978. On the same date the release was executed, to wit, May 15, 1978, Charles and Dorothy entered into a written agreement between themselves, reading as follows:

"AGREEMENT

"Agreement made this 15th day of May, 1978, between Charles A. Barber and Dorothy A. Barber.

"In consideration of One Dollar and other valuable consideration, receipt of which is hereby acknowledged, Charles A. Barber hereby agrees to pay any and all attorney fees presently due and owing Cunningham Law Office, P.C. by Dorothy A. Barber arising from the divorce of Charles A. Barber and Dorothy A. Barber from the District Court of Red Willow County, Nebraska, Case No. 10,890, and to pay any and all attorney's fees arising from any subsequent litigation between the parties and Cunningham Law Office, P.C.

/s/ Charles A. Barber
CHARLES A. BARBER
s/s Dorothy A. Barber
DOROTHY A. BARBER"

The agreement was separately acknowledged and notarized on May 15, 1978, and May 31, 1978, respectively, by Charles and Dorothy. The parties had also previously stipulated at or about the above date that certain parcels of real estate owned by them would not be subject to any lien or encumbrances arising by reason of the lawsuit, and agreed that the real estate is free and clear of any liens, costs, encumbrances, judgment, or any other order of the court which might restrict the right of Charles to convey the property, giving the purchaser a free and clear title thereto.

In any event, immediately upon learning of the release of attorney fees executed by Dorothy and of the agreement between Charles and Dorothy for the assumption of the payment of attorney fees, Cunningham, on or about June 20, 1978, applied to the District Court

for leave to intervene in the action and was granted leave to file a petition in intervention; thereafter, on September 15, 1978, with permission of the court, Cunningham filed an amended petition of intervention. In her amended petition, she sets forth seven separate causes of action or theories of recovery of attorney fees, ranging from a request for a judgment for such fees to specific claims of a judgment lien for such fees and a request for an attorney's lien upon Charles' property, both by virtue of statute and by agreement, and also on the theory of a third-party beneficiary contract based upon the agreement between Charles and Dorothy that Charles would assume the payment of Cunningham's attorney fees. She also charged collusion and fraud on the part of Charles and Dorothy.

Following a trial on the amended petition of intervention filed by Cunningham, held before a different district judge than the one who originally heard the dissolution action, the court, as previously stated, entered judgment in favor of the intervenor Cunningham "against the petitioner Dorothy A. Barber and the respondent Charles A. Barber jointly and severally in the sum of $8,745.77, such amount to bear interest from this date at 8% per annum and for the costs of this action, if any, since intervention." In its judgment entry, the court, in so doing, made certain findings of fact which we believe are material and supported by the evidence, including a finding that the contract terms of employment were "such amount as may be allowed by the District Court in the dissolution action but not less than $45 per hour"; that the district judge had assessed the costs of action to the respondent "including a fee of $9,000 for petitioner's attorney"; that subsequent to the decree of dissolution, petitioner had employed attorney Harold Kay to represent her, and on September 19, 1977, both the intervenor and Harold Kay represented the petitioner before the District Court; that on November 4, 1977, the court overruled the motion for new trial but made some corrections in

the values used in the distribution of the property; that no appeal was taken from the decree of dissolution or from the order overruling the motion for a new trial, but by stipulation, on December 1, 1977, the petitioner and respondent agreed to amend the distribution and acknowledged that performance would constitute satisfaction of the decree of dissolution and the court entered a modified decree in conformity with that stipulation; that "neither the stipulations nor the modified decree changed the amount of the liability for attorney's fees"; that on May 3, 1978, the petitioner and respondent by stipulation released certain real estate and lots from liens of the judgment; that on May 31, 1978, the petitioner filed a release discharging the respondent from all claims, liens, and judgments issued from attorney fees in the action; that "On June 5, 1978, the intervenor filed notice of attorneys' lien" and has received the sum of $304.23 from the petitioner toward attorney fees and costs; that "the evidence does not disclose nor is it sufficient to establish the number of hours actually consumed or charged by the intervenor for services rendered to the petitioner"; and that the intervenor is entitled to recover from the petitioner the sum of $9,000 as agreed compensation for her services with credit for the $304.23 previously made to intervenor, but is not entitled to recover the additional services performed subsequent to the entrance of the first decree without a showing of the total hours devoted thereto. The trial court also specifically found that: "The original $9,000 judgment in favor of the petitioner and against the respondent has been satisfied and released. The release was obtained and filed without the payment of the specific $9,000 attorneys' fees awarded. However, in the absence of a showing of both fraud and damage, the release should not be set aside." And, finally, the court specifically found: "The respondent has legally assumed the responsibility for paying any attorneys' fees due from the petitioner to respondent by an agreement filed herein," and: "There has been

no showing that there would be any difficulty in collecting a judgment in favor of the intervenor and against the petitioner and respondent jointly and severally. In the absence of such showing, there is no need to re-establish the original lien or assert an attorneys' lien, as a judgment rendered at this time should be sufficiently collectible." In its decree, the court also dismissed certain causes of action contained in Cunningham's amended petition of intervention.

With the above facts as background, we now examine certain legal questions which arise therefrom.

We first briefly consider appellant's contention that the agreement between Dorothy and Cunningham for representation in the divorce action was a contingent fee contract, and thus void as against public policy. We find no merit in that contention. Had the agreement been that the attorney was to receive a percentage of the alimony awarded or property recovered in the action, such an agreement, by previous decision, would have been invalid and unenforceable. The agreement in question, however, stands in a different light. In effect, it was an agreement that Cunningham would charge $45 per hour for her services, with the further restriction, however, that if the court awarded her what she deemed a fair and reasonable fee, she would accept the court's award in full satisfaction of her services. In Black's Law Dictionary 553 (5th ed. 1979), the term "Contingent fees" is defined as: "Arrangement between attorney and client whereby attorney agrees to represent client with compensation to be a percentage of the amount recovered; e.g. 25% if case is settled, 30% if case goes to trial. Frequently used in personal injury actions. Such fees are often regulated by court rule or statute depending on the type of action and amount of recovery." The agreement between Cunningham and Dorothy was clearly not a "contingent fee" contract under the foregoing definition.

In the case before us, we are initially confronted with the problem of the ownership of the award of

attorney fees made by the trial court. Authorities are concededly divided on the answer to this question, but the general rule seems to be, as set out in 27A C.J.S. *Divorce* § 216 (1959): "The allowance of counsel fees and suit money is ordinarily regarded to be for the wife and should be made to her, and not to the parties who perform services for her, or to whom she becomes indebted in connection with the litigation. Accordingly, attorney's fees are for the benefit of the wife, and her attorney has no separate equity therein notwithstanding a statute provides that the court may order the payment of such fees directly to the attorney." Likewise, in 27B C.J.S. *Divorce* § 255 (1959), it is stated: "Attorneys' fees. An attorney for whose benefit an order has been made directing the payment of attorney's fee in connection with a divorce action has sufficient interest in the matter to seek the enforcement of such order; but it has been held that even when an award of attorney's fees is made, the attorney does not acquire a vested interest in the judgment." In 20 Am. Jur. 2d *Costs* § 3 (1965), the rule is stated: "Unless the statute specifically provides that an attorney's fee allowable thereunder goes to the attorney, however, the rule is that it is an allowance to the party and not to the attorney." And in 24 Am. Jur. 2d *Divorce and Separation* § 581 (1966), it is stated: "It is generally held that orders providing for payment directly to the attorney are void. According to other authority, however, an order that payment be made to the attorney should be treated as one for payment to the wife, and an alternative provision making the sums awarded payable to plaintiff or her attorney has been held not to render the order void." In *Howard v. Howard*, 300 S.W. 2d 853 (Mo. App. 1957), it was held that an allowance for attorney fees cannot be made to the attorney for the reason that the attorney is not a party to the action. What is the rule in Nebraska? It appears that the former rule in Nebraska, as reflected in the case of *Solomon v. A. W. Farney, Inc.*, 136 Neb. 338, 286 N.W.

254 (1939), was that, while attorney fees are allowed and awarded to the client, they actually belong to the attorney. However, in 1947, in the case of *County of Sarpy v. Gasper*, 149 Neb. 51, 30 N.W.2d 67 (1947), the statements contained in *Solomon* were disapproved, the court stating: "In this state attorney's fees are allowed only in such cases as are provided for by statute. [Citation omitted.] When they are allowed they can be awarded only as provided by statute; in this case that is to the plaintiff, Sarpy County. The statements in the case of Solomon v. A. W. Farney, Inc., 136 Neb. 338, 286 N. W. 254, 'While attorney fees are allowed and awarded to the client, they actually belong to the attorney' and 'The conclusion is, therefore, that the sum of $350 originally allowed by court orders as attorneys' fees for plaintiff's attorneys, and as such taxed as costs, was at all times the property of the latter,' are disapproved, and to that extent the holding in Solomon v. A. W. Farney, Inc., *supra*, is overruled." *Id.* at 54, 30 N.W.2d at 68-69. So far as we are able to ascertain, the rule as announced in the above case has not been changed and is still the existing rule of law in the State of Nebraska. We, therefore, conclude that in the instant case, the court's award for attorney fees for petitioner's attorney was the property of and made for the benefit of the wife and was not the property of the attorney. It would seem, therefore, that since Dorothy was the owner of the judgment or order for the payment of money under Neb. Rev. Stat. § 42-371 (Reissue 1978), she would, prima facie at least, have the right under that section to execute a partial or total release of judgment, generally or on specific property, at least in the absence of evidence of fraud or collusion to deprive the attorney of her ability to collect attorney fees.

This, however, does not mean that an attorney rendering services for the wife in a divorce proceeding is not entitled to recover compensation for his services, either by virtue of a judgment entered in his favor by a court, or by the imposition of an attorney's lien, either

statutory or a charging lien arising out of a contract.

In his appeal to this court, Charles has alleged as his principal contention that the District Court committed error in allowing Cunningham to intervene in the dissolution proceedings, and strenuously argues in his brief that an attorney does not have a right to intervene in a dissolution of marriage action after judgment for the purpose of collecting attorney fees. It is true that in *Harris v. Harris*, 151 Neb. 191, 36 N.W.2d 849 (1949), this court stated that, ordinarily, there is no right of intervention by third parties in an action for divorce. However, in that same case, we also stated: "In a divorce action however where intervention becomes necessary to secure justice or to protect rights intervention becomes proper. [Citations omitted.]" *Id.* at 194, 36 N.W.2d at 850. Likewise, in *Kula v. Kula*, 181 Neb. 531, 149 N.W.2d 430 (1967), we held that, as a general rule, intervention is not permitted in a divorce suit for the purpose of opposing a divorce, but intervention may be allowed where it is necessary to secure justice for third persons whose property interests may be adversely affected. We conclude that under the facts of the case before us intervention was properly allowed.

Neb. Rev. Stat. § 7-108 (Reissue 1977) provides: "An attorney has a lien for a general balance of compensation upon any papers of his client which have come into his possession in the course of his professional employment; and upon money in his hands belonging to his client, *and in the hands of the adverse party in an action or proceeding in which the attorney was employed from the time of giving notice of the lien to that party.*" (Emphasis supplied.)

In *Cones v. Brooks*, 60 Neb. 698, 700, 84 N.W. 85, 86 (1900), in which a statute substantially similar in wording to § 7-108 was examined, we stated: "The statutory and common law lien upon money in the hands of the adverse party in an action or proceeding in which the attorney was employed is a charging or specific lien,

and is not perfected until notice has been given to the party in possession of the fund. Such notice is necessary to prevent a *bona fide* settlement of the controversy by the litigants and payment by the debtor to the creditor in ignorance of the attorney's rights. [Citation omitted.] The notice need not be in writing or placed among the files of the case. Any notice of the existence of the claim, and that it will be asserted, is sufficient. [Citations omitted.] The statute does not require that the notice shall be in any specific form, or that it shall be given in any particular way; and we have no right to add anything to the law by construction."

An important case in this connection is *Tuttle v. Wyman*, 149 Neb. 769, 32 N.W.2d 742 (1948), in which we held that the intervenor had a charging lien not only by statute but by agreement on any judgment recovered, which he had the right to enforce in the original action, paramount to the rights of the parties to the suit, and we stated: "We turn then to the question of the method of enforcement. In that regard, this court has consistently affirmed that the proper method to enforce an attorney's lien is to file a petition in intervention in the original action. [Citations omitted.]" *Id.* at 782, 32 N.W.2d at 750. We also stated in that case: "Plaintiff and defendants had full notice and knowledge at all times that intervener claimed a lien, and the amount thereof. *But, in any event, the petition in intervention duly filed before dismissal and satisfaction, was of itself sufficient notice.*" *Id.* at 779, 32 N.W.2d at 748-49 (emphasis supplied). In *Tuttle*, we also stated: "'An agreement between an attorney and client that the attorney shall have a lien on the judgment is decisive as to the existence of the lien and its amount, and constitutes a valid equitable assignment of the judgment pro tanto which attaches to the judgment as soon as it is entered.' [Citation omitted.] 'Moreover, a charging lien may rise out of an agreement between a client and his attorney that he is to receive a portion of the judgment

recovered or of the proceeds thereof, provided it appears to be the intention of the parties that such judgment or proceeds is to be looked to for security.' [Citations omitted.]" *Id.* at 780-81, 32 N.W.2d at 749.

It is clear from the record, as previously mentioned, that it was contemplated and intended that the fees for the legal services by Cunningham to Dorothy would come in large part, if not entirely, from the award of attorney fees entered by the court in the dissolution decree. The record is quite clear that Charles had knowledge of Cunningham's claim for recovery of attorney fees at least as early as the entry of the original decree of June 14, 1977, and until the date Cunningham filed her motion to intervene. That being so, it would seem clear that Cunningham had both an attorney's lien under the Nebraska attorney's lien statute and also a charging lien on any judgment recovered, by virtue of her agreement with Dorothy, and that Cunningham had the right to enforce such lien in the original dissolution action. We have held that a divorce case is pending until all matters involved therein or incidental thereto are determined and satisfied. *Miller v. Miller*, 160 Neb. 766, 71 N.W.2d 478 (1955); *Kiddle v. Kiddle*, 90 Neb. 248, 133 N.W. 181 (1911). In her amended petition in intervention, Cunningham claimed not only a judgment for the attorney fees, but also a judgment lien on the real estate owned by Charles in the county, and also both a statutory attorney's lien and a charging lien created by agreement. In addition, the equities of the situation were, we believe, enhanced by the agreement between Charles and Dorothy whereby Charles agreed to pay the Cunningham attorney fees, which, we believe, amounted to a third-party beneficiary contract of the creditor beneficiary type, for the benefit of Cunningham. See, *Fowler v. Doran*, 123 Neb. 37, 241 N.W. 759 (1932); *Lundt v. Parsons Constr. Co.*, 181 Neb. 609, 150 N.W.2d 108 (1967); Restatement of Contracts § 133(1)(b) (1932). We conclude that the trial court acted properly in permitting Cunningham to intervene

in the dissolution action to protect her rights to an attorney fee under the various remedies available to her, as set out in her amended petition of intervention. See, *Tuttle v. Wyman, supra; Jones v. Duff Grain Co.*, 69 Neb. 91, 95 N.W. 1 (1903); *Neighbors & Danielson v. West Nebraska Methodist Hospital*, 162 Neb. 816, 77 N.W.2d 667 (1956).

It is the general rule that if a court of equity has properly acquired jurisdiction in a suit for equitable relief, it may make complete adjudication of all matters properly presented and involved in the case and grant relief, legal or equitable, as may be required and thus avoid unnecessary litigation. *Kuhlman v. Cargile*, 200 Neb. 150, 262 N.W.2d 454 (1978); *Hull v. Bahensky*, 196 Neb. 648, 244 N.W.2d 293 (1976). This rule would seem to be particularly applicable under the facts of this case.

Charles next contends that it was error for the District Court to deny his request for a jury trial. Specifically, Charles contends that the petition of intervention was an action for the recovery of money which shall be tried by a jury unless a jury trial is waived. See Neb. Rev. Stat. § 25-1104 (Reissue 1979). The same issue was presented in *Neighbors & Danielson, supra.* After recognizing that ordinarily the value of an attorney's services would be a question for the jury, the court stated: "However, as here, when a charging lien is created by agreement, an action to establish and enforce it is within the equity jurisdiction of the court. As stated in 5 Am. Jur., Attorneys at Law, § 244, p. 408: 'In the absence of statutes giving jurisdiction to courts of law, the proper method — or, at least, one method — for enforcing an attorney's charging lien is by a resort to equity; such a lien is equitable in its nature.' Then it goes on to state: 'In some instances, a formal suit should be instituted; in others, an application to the court rendering the judgment for the proper order is sufficient.'" *Id.* at 819-20, 77 N.W.2d at 670.

Charles also contends that the compensation con-

tract for services between Dorothy and Cunningham was ambiguous, and that compensation should have been determined on the basis of the time spent in connection with the litigation billed out at the hourly rate of $45 per hour. We might have agreed with this argument if, in fact, the contract was ambiguous in its terms. However, we believe the record fully establishes that both Dorothy and Cunningham understood that the amount of compensation to the attorney, upon completion of the proceedings, would be that amount awarded by the trial court, but not less than $45 per hour. While the amount of compensation to be paid was unknown at the time Dorothy retained Cunningham, it does not necessarily follow that the contract was ambiguous. It would have been no less ambiguous had they agreed specifically that the compensation should be based on the time spent at the specified hourly rate, as it could not have been determined in advance how much time would be devoted to the litigation, or what the total fee to be paid would amount to.

Charles likewise contends that the trial court erred in allowing evidence with reference to the fair and reasonable value of Cunningham's services rendered in the dissolution action. It must be remembered that this case was tried to the court and not to a jury. We have often stated that a presumption arises that the trial court, in trying a case without a jury, will consider only such evidence as is competent and relevant and this court will not reverse a case so tried because evidence was erroneously admitted where there is other material, competent, and relevant evidence sufficient to sustain the trial court's judgment. See, *Murdoch v. Murdoch*, 200 Neb. 429, 264 N.W.2d 183 (1978); *Stecker v. Stecker*, 197 Neb. 164, 247 N.W.2d 622 (1976). We also reject this assignment of error.

This leads us to what is perhaps the principal contention voiced by Charles in his brief on appeal: that the amount awarded by the court was excessive. The marital estate involved in this dissolution proceeding

was of considerable magnitude. The evidence in the record indicates a gross value of the estate of approximately $2.7 million and a net value in excess of liens and indebtedness of over $1 million. A great amount of research was required in preparation for the filing of the lawsuit and the trial thereof, as well as in researching the tax consequences to an estate of that size. The original petition for dissolution of the marriage was filed by Cunningham in October 1975; and, according to the record, attorney Harold Kay was first contacted by Dorothy on June 20, 1977. Even after the employment of Kay, the record reveals that Cunningham continued as cocounsel with Kay, and continued to work on the case. In fact, the court's docket entry of September 19, 1977, states: "Petitioner represented by Sarah Jane Cunningham and Harold Kay." There can be no doubt that Cunningham devoted a great amount of time and effort in connection with the litigation involved in this appeal.

Although it is true, as found by the trial judge, that there is no evidence in the record as to the total amount of hours devoted by Cunningham to this case, we do not believe that the lack of such a record is in any way conclusive or forecloses Cunningham from recovering the attorney fees awarded her by the court for her services. There are many elements taken into consideration by a court in setting the amount of an award for attorney fees in dissolution actions. In *Weber v. Weber*, 200 Neb. 659, 671, 265 N.W.2d 436, 443 (1978), we stated: "The award of attorney's fees 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. [Citations omitted.]" See, also, *Campbell v. Campbell*, 202 Neb. 575, 276 N.W.2d 220 (1979). Similar criteria are

set out in the Code of Professional Responsibility, DR 2-106. In view of the size of the marital estate involved, the complexity of the litigation, the time devoted to it, and the results obtained, we are unable to find under the guidelines cited above that the award of $9,000 as attorney fees to Cunningham constituted an abuse of discretion. This is especially true in view of our well-established rule that, while an action for dissolution of marriage is heard de novo in this court, this court will give weight to the fact that the trial court observed the witnesses and their manner of testifying and accepted one version of the facts rather than the opposite. *Olson v. Olson*, 195 Neb. 8, 236 N.W.2d 618 (1975). See, also, *Edmunds v. Edwards*, 205 Neb. 255, 287 N.W.2d 420 (1980).

We have also examined the assignments of error set out by Cunningham in her cross-appeal and have concluded that no abuse of discretion on the part of the trial court occurred, as contended by her, and that such assignments are without merit.

We note that the trial court in its decree declined to reestablish a lien in favor of Cunningham for the reason that there would appear to be no problem in collecting the judgment it awarded her for attorney fees. We are of the opinion that, under the evidence in this case, Cunningham was undoubtedly entitled to a lien on property owned by Dorothy and Charles as security for payment of the judgment, and that the sufficiency of the property of the judgment debtor to satisfy such judgment should not be grounds for removing such lien. We, therefore, affirm the action of the trial court awarding Cunningham a judgment for attorney fees, and in addition, find Cunningham was entitled to an attorney's lien as of the date of the judgment to secure the payment of the judgment, and we modify the judgment of the trial court to grant Cunningham such lien.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. DELBERT G. LEISY, APPELLANT.

295 N.W.2d 715

Filed August 22, 1980. No. 43057.

1. **Guilty Pleas.** A defendant in a criminal prosecution has no absolute right to have his plea of guilty or nolo contendere accepted even if the plea is voluntarily and intelligently entered.
2. ——. A plea of nolo contendere or guilty, voluntarily and intelligently made, may be accepted even though a defendant professes his innocence, provided there is a factual basis for a finding of guilty.
3. **Plea Bargains: Appeal and Error.** The trial court is afforded a large measure of discretion in deciding whether to accept plea bargain arrangements and the Supreme Court upon appeal will reverse the trial court's determination only in case of a clear abuse of judicial discretion.
4. **Criminal Convictions: Appeal and Error.** In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact, and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
5. **Jury Instructions: Circumstantial Evidence.** Pattern jury instruction NJI 14.50 correctly states the law in defining and applying direct and circumstantial evidence.
6. **Hearsay.** An out-of-court statement of a witness unavailable under the situations defined by Neb. Rev. Stat. § 27-804(1) (c) and (e) (Reissue 1979), is admissible under § 27-804(2)(e) only upon a finding by the trial court that the pertinent provisions of the latter section have been complied with, including notice to the adverse party of intention to use the out-of-court statement.
7. ——. Admissions by a party opponent are not hearsay and, if material, are competent evidence.

Appeal from the District Court for Box Butte County: ROBERT R. MORAN, Judge. Affirmed.

Laurice M. Margheim of Bayer and Margheim for appellant.

Paul L. Douglas, Attorney General, and Patrick T. O'Brien for appellee.

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

CLINTON, J.

Defendant Leisy was charged in the District Court for Box Butte County, Nebraska, with two counts of second degree assault and one count of using a firearm in the commission of a felony. A plea bargain was arranged between the prosecution and the defense which involved the entry of a plea of nolo contendere to the first assault count and the dismissal of the two other charges. After the defendant had been arraigned, informed of his constitutional rights, the effect of a plea of guilty, the possible penalties on the charge, and after inquiry by the court as to the factual basis for the plea, the District Court refused to accept the plea and directed that the case be tried. The defendant was found guilty by a jury and sentenced to a term of 1 year on one of the assault counts and 1 year probation on each of the other two charges.

The defendant then appealed to this court and here assigned and argued the following alleged errors: (1) The district judge abused his discretion in rejecting the plea agreement and refusing to accept the nolo contendere plea; (2) The trial judge deprived the defendant of effective assistance of counsel by refusal to hear argument of counsel in support of the plea agreement; (3) The evidence was insufficient to prove the defendant guilty beyond a reasonable doubt; (4) The instruction on circumstantial evidence was incomplete and erroneous; (5) The defendant was deprived of a fair trial because of the use of perjured testimony by the prosecution and because of inducements given a prosecution witness who was a participant in the crime; (6) The court erred in admitting out-of-court statements made by the defendant because they were exculpatory and hearsay; and (7) The court erred in rejecting the defendant's offer of out-of-court statements of an unavailable witness.

We treat the assignments in the order listed.

The argument that the trial judge abused his judicial discretion in refusing to accept the plea of nolo con-

tendere rests upon these bases: (1) Where both the prosecutor and defense agree that the plea bargain is beneficial, the judge ought to accept it, and for him not to do so is an intrusion on the prosecutorial function; (2) The offer of the plea was clearly voluntarily and intelligently made and the defendant ought not to be put to the added risk and expense of trial; and (3) It is basically unfair to the defendant to permit an accomplice to go free when, had the plea been accepted, both could have been prosecuted.

During the plea agreement discussions before the court and in the course of the evidentiary hearing thereon, the defendant three times asserted his innocence by asserting claims of self-defense. The defendant was 23 years of age and had no prior felony record.

The primary reasons given by the court for rejection of the plea, as we deduce them from the court's comments, were: (1) The assertion of innocence; (2) The defendant's relative youth and inexperience in criminal matters; (3) The acts charged involved violent confrontations between Caucasians and Indians and the facts should be publicly aired; and (4) If the State's version of the crime charged was correct, then a charge greater than that actually filed, to wit, attempted murder in the second degree, Neb. Rev. Stat. §§ 28-201 and 304 (Reissue 1979), would have been justified.

In support of his premise of abuse of judicial discretion, defendant cites: *United States v. Gaskins*, 485 F.2d 1046 (D.C. Cir. 1973); *United States v. Ammidown*, 497 F.2d 615 (D.C. Cir. 1973); *Griffin v. United States*, 405 F.2d 1378 (D.C. Cir. 1968); *United States v. Maggio*, 514 F.2d 80 (5th Cir. 1975); *United States v. Martinez*, 486 F.2d 15 (5th Cir. 1973).

This court and others have recognized that a defendant has no absolute right to have his plea of guilty or nolo contendere accepted even if the plea is voluntarily and intelligently made. *State v. Stewart*, 197 Neb. 497, 250 N.W.2d 849 (1977); *Santobello v. New*

York, 404 U.S. 257 (1971); *United States v. Bednarski*, 445 F.2d 364 (1st Cir. 1971); *United States v. Martinez*, *supra*. A plea of nolo contendere or guilty, voluntarily and intelligently made, may be accepted even though a defendant professes his innocence, provided there is a factual basis for a finding of guilty. *North Carolina v. Alford*, 400 U.S. 25 (1970).

The defense has cited only three cases (and no others have been found) in which an appellate court has reversed a conviction after trial and verdict of guilty because of refusal of the trial court to accept a plea of guilty. *United States v. Ammidown*, *supra*; *Griffin v. United States*, *supra*; *United States v. Gaskins*, *supra*. (All three cases were decided by the U. S. Court of Appeals, District of Columbia Circuit.) In *Ammidown*, the defendant was charged with murder in the first degree and, pursuant to a plea agreement, he tendered a plea of guilty to murder in the second degree. The crime involved the hired killing of the defendant's wife. The purpose of the bargain was to secure the testimony of Ammidown in order to convict the hired assassin. The trial court rejected the plea because, it held, the public interest required the higher charge. The Court of Appeals held that this constituted an undue interference with the prosecutorial function. That court said: "Where vigorous prosecution of one case threatens to undermine successful prosecution of another, it has traditionally been the prosecutor who determines which case will be pressed to conclusion, and his decision has been given great deference by the courts." *Ammidown*, *supra* at 621. The following principles have been drawn from that case: "There is a presumption that the determination of the United States attorney with respect to allowing defendant to plead guilty to a lesser included offense is to be followed in the overwhelming number of cases." *Id.* at 616. "When asked to approve guilty plea to lesser included offense judge is free to condemn prosecutor's agreement as a trespass on judicial authority only in a blatant and extreme case,

and in ordinary circumstances change in grading of an offense presents no question of the kind of action that is reserved for the judiciary. Fed. Rules Crim. Prac. rule 11, 18 U.S.C.A." *Id.* at 617.

Earlier, in *Griffin v. United States, supra,* that same court held that a guilty plea to a reduced charge should not be rejected without good reason. In that case, the trial court had refused to accept the plea because the defendant related conflicting versions of the crime, one version indicating that the homicide may have been justified by self-defense. In *United States v. Gaskins, supra,* the trial court rejected the tendered plea because the defendant equivocated as to his guilt.

In *State v. Stewart, supra,* we discussed *Ammidown* and declined to precisely define limits of the lower court's discretion in rejecting a proper plea under a plea bargain and held that, under the facts of that case, there was no abuse of discretion. The facts in the case before us make it clearly distinguishable from those upon which the defendant relies. In this case, the defendant's protestations of innocence were absolute and not equivocal. The plea bargain was not being entered into by the prosecutor for the purpose of securing the conviction of one who had actually committed the crime as in *Ammidown.* Here the one being prosecuted was believed to be the actual perpetrator of the offense and the accomplice was being used as a witness to help gain the conviction. We hold that the trial court did not abuse its discretion in this instance. In *State v. Stewart, supra,* we held, at 497, 250 N.W.2d at 852: "The trial court is afforded a large measure of discretion in deciding whether or not to accept plea bargain arrangements." (Syllabus of the court.)

We do not regard the fact that defendant had to incur additional expense of litigation a matter of sufficient weight to tip the scales. A further reason the defendant's contention cannot be upheld is that there is no evidence that he suffered any prejudice as the result of the rejection of his plea. The maximum penalty for the

two assault charges was 5 years. He could have received a total of 5 years under the plea bargain agreement. In fact, he received a 1-year sentence to be followed by 2 years of probation. There is no reason to believe the court would have given a lesser sentence had the plea been accepted.

The defendant's contention that the trial court deprived the defendant of effective assistance of counsel because it refused to hear arguments of counsel in support of the plea agreement is completely without foundation in the record. The court did initially say that it did not want to hear argument. However, it did, in fact, hear argument and, furthermore, held a special hearing in which the defendant testified to the facts which he believed supported acceptance of the plea.

The defendant's claim that the evidence was insufficient to support the verdict is, likewise, groundless. We will briefly summarize the conclusions which the jury could reach from the evidence and then identify some of the corroborating evidence. The jury could have found that Leisy and a friend, Liberg, the person who testified for the State after dismissal of the charges against him, spent the evening of May 14, 1979, at the Tamarack bar in the city of Alliance, leaving about 1:15 a.m. on May 15. Leisy, after leaving the bar, apparently was told that some Indian men were going about Alliance harassing and assaulting whites. Leisy, with Liberg driving a pickup truck of which Leisy had the use, proceeded to the area of 9th and Emerson Streets in the city of Alliance for the announced purpose of helping his white friends. When they neared the area, Leisy took a .20-gauge shotgun from behind the seat of the pickup and loaded it. There was a crowd of 10 to 20 people in the street, some of whom were Indian. The pickup was forced to stop when one of the group of Indians blocked its passage by moving in front of the pickup. Members of the crowd then began pounding on the pickup and forcibly removed and damaged the

tailgate. One of the group smashed the rear window of the pickup with an ax handle. Leisy pointed the gun upward out the window of the pickup and fired it once in the air. Leisy and Liberg were then able to move on with the pickup.

Meanwhile, Craig Bishop, a white who lived at 9th and Emerson Streets, attracted by the noise of the disturbance, emerged from his home where a party was in progress. His purpose was to act as a peacemaker. Bishop; Creig Wilkins, one of the persons attending the party; Darrell White Crane, an Indian; and three others gathered in a group on 9th Street and were conversing peaceably.

In the meantime, Leisy and Liberg, after driving some distance away, reversed their path and, seemingly bent on revenge for the damage done to the truck, drove back through the intersection of 9th and Emerson at a rather fast rate of speed. As the vehicle passed through the intersection, Leisy fired two shots at the group of six. Bishop, White Crane, and Wilkins suffered pellet wounds.

Leisy, at the trial, testifying in his own defense, described the first confrontation in which his truck was damaged. He admitted firing a shot in the air on that occasion. He claimed to believe that the rear window of the pickup had been broken by a blast from a shotgun fired at the occupants. He denied having driven back through the intersection and having fired the shots which wounded the three persons. He claimed to have no recollection of such an incident and maintained that he simply was not capable of shooting at anyone.

Some of the evidence supporting the State's version of the incident was the following. Liberg was a reluctant witness. The substance of his testimony was that he was driving the pickup and that Leisy was on the passenger side. He saw Leisy pick up the shotgun shells, yellow in color. He described the initial confrontation. He stated that they then drove away and returned, traveling at a high rate of speed. At that time, Leisy had the shotgun

in his hand with the muzzle pointing out the window. As the pickup passed through the intersection, Liberg heard two shots fired from a shotgun. They came directly from his right immediately outside the window of the pickup. He did not actually see Leisy pointing the gun or pulling the trigger. The inference is that he was not looking at Leisy, but looking directly ahead. He would not testify that Leisy had actually fired the shots. However, the inference that Leisy fired the shots is clear.

The victims of the shooting testified to their impression that the shot (they remembered only one) came from the pickup. Two other witnesses, who resided near the intersection and who had observed the first disturbance, testified to their impressions that the shots were fired from the passing pickup.

The morning following the incident, after the defendant had been questioned by investigating officers, he went to Liberg's home and asked him to tell the same story that he had given the investigators. Essentially, that was to admit the first confrontation and firing the shot in the air and to deny the later shooting.

A .20-gauge pump action shotgun was found in Leisy's possession. Testimony by a firearms identification expert indicated that three yellow .20-gauge shotgun shell casings, two of which had been found at the intersection of 9th and Emerson Streets and the third a block away, had been fired and ejected from Leisy's shotgun.

Two voluntary statements by Leisy, given to the investigating officers, were received in evidence. These contained admissions against interest and their equivocal nature tended to cast doubt upon Leisy's veracity.

The applicable principle is: "In determining the sufficiency of the evidence to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine

the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact, and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it." *State v. Carter*, 205 Neb. 407, 288 N.W.2d 35 (1980) (syllabus of the court).

The defendant complains that the court erred in refusing his requested instruction relative to circumstantial evidence. The court followed pattern instruction NJI 14.50 and instructed as follows:

"Evidence is either direct or circumstantial.

"Evidence is direct when a witness testifies from his own personal knowledge concerning a material element of the crime charged. Evidence is circumstantial when it relates to the existence or nonexistence of facts from which a material element of the crime charged may be inferred and when that inference usually and reasonably follows according to the common experience of mankind.

"Whenever circumstantial evidence is relied upon to establish any material element of a crime, it is necessary that the facts essential to the conclusion sought must be proved by competent evidence beyond a reasonable doubt, and when taken together, must be of such character as to be consistent with each other and with the conclusion sought to be established thereby and inconsistent with any reasonable hypothesis of innocence.

"Therefore, notwithstanding that some of the evidence may be circumstantial, if you are satisfied beyond a reasonable doubt from all the evidence that the evidence cannot be accounted for upon any reasonable theory consistent with the innocence of defendant and that it permits of no reasonable conclusion other than that of the guilt of the defendant, then you should so find. If you do have such a reasonable doubt, you must find him not guilty."

The requested instruction was identical to the pattern instruction except that it added to the third paragraph

the sentence: "Any fact or circumstance reasonably susceptible of two interpretations must be resolved most favorably to the Defendant."

It is true that some of the cases discussing the circumstantial evidence rule contain the sentence which the defendant requested be added to the instruction. However, that sentence cannot be taken out of the context of the cases. An examination of the opinions in which the statement is used, e.g., *State v. Faircloth*, 181 Neb. 333, 148 N.W.2d 187 (1967), and *State v. Doyle*, 205 Neb. 234, 287 N.W.2d 59 (1980), indicates that the reference to "any fact or circumstance" is intended to describe a "material element" necessary to proof of the particular crime, e.g., intent, knowledge, possession, or an ultimate fact, and not to each part of a collection of circumstances or separate facts which, taken together, tend to prove the "material element."

In this case, the facts relied upon by the State to show that the defendant did the shooting are partly circumstantial and partly direct. Liberg's testimony was direct evidence, as was the evidence connecting the expended shell casings with the defendant. Merely because no eyewitness or expert could testify that the pellets which struck the victims came from Leisy's gun does not require a finding the Leisy did not fire the weapon. We illustrate further: If the defendant had been charged with different crimes of which wounding was a material element, the facts and circumstances would permit the fact that the pellets came from the gun to be arrived at inferentially.

The defendant's contention that the conviction was procured by the prosecution's knowing use of perjured testimony of Liberg is not warranted by the record. It is apparent from Liberg's interrogation by one of the investigating officers that Liberg did not want to tell what he knew about Leisy's part in the shooting. Liberg had served a term in the penitentiary because someone had "told" on him. He did not want to be an informant. He was motivated to become a reluctant witness in order

to save himself from a possible second term in the penitentiary. He was not asked to lie by anyone associated with the prosecution. He was asked to tell the truth. The claim that perjury was solicited is unjustified and should not have been made in the brief.

The facts concerning Liberg's background, motivation, credibility, and inconsistent statements were all before the jury. It was for them to determine the truth. The verdict indicates that they accepted his trial testimony. The clear import of his testimony is that, had he been willing, he could have truthfully testified that Leisy fired the shotgun twice as they drove through the intersection the second time.

Among the witnesses for whom subpoenas were issued by the defense was a woman who, with her family, resided near 9th and Emerson. Her husband was called by the defendant and did testify. During the examination of the husband, the defense began to lay a foundation to show that the wife was so emotionally upset by having been a witness to the affair that she was incapable of testifying. Objection to this foundation testimony was made by the prosecution. The court, in response to the objection, stated: "Well, would you stipulate that she's unavailable for the purposes of testifying? That's the purpose of his inquiry I think," to which the prosecutor replied: "Sure."

The defense did not call the wife to testify although she had responded to the subpoena and was present in the courtroom. Instead, they called one of the investigating officers who had questioned her and, through him, sought to introduce her testimony as follows: "She said that she saw a gray pickup drive by, that she saw the passenger point the gun out the window and saw the gun fire. She further advised that she saw a young Indian male standing on the green portion of the lawn — of the Schafer lawn and that this man had a gun and this gun was pointed in the northwest and this man fired the gun. This young man then got over in front of the headlights of the vehicle, reloaded the gun in front

of the headlights. Shortly thereafter the police officers arrived at the scene and she did not see the man or the gun after that." Upon objection by the prosecution, the court refused to admit this testimony.

The defendant contends that the statement was admissible under the provisions of Neb. Rev. Stat. § 27-804(2)(e) (Reissue 1979) which would admit: "A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (i) the statement is offered as evidence of a material fact, (ii) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, and (iii) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. A statement may not be admitted under this exception unless the proponent of it makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant." An unavailable witness is defined by Neb. Rev. Stat. § 27-804 (Reissue 1979), in part, as follows: "(1) Unavailability as a witness includes situations in which the declarant: . . . (c) Testifies to lack of memory of the subject matter of his statement; or . . . (e) Is absent from the hearing and the proponent of his statement has been unable to procure his attendance by process or other reasonable means."

The ruling of the court in rejecting the offer was correct for several reasons. The proponent did not make known to the adverse party the proposal to use the hearsay testimony. The giving of such notice is one of the requirements necessary to make such evidence admissible. The prosecutor did know of Mrs. Schafer's statement and, because of her emotional condition, had agreed not to call her. He did not know, however, that

the defense proposed to use her out-of-court statement. The defendant argues that, under these circumstances, the giving of the notice was unnecessary. Two opinions of the Second Circuit U.S. Court of Appeals have held that the pretrial notice requirement is to be rigidly enforced. *United States v. Oates*, 560 F.2d 45 (2d Cir. 1977); *United States v. Ruffin*, 575 F.2d 346 (2d Cir. 1978). Some courts have held otherwise. *Furtado v. Bishop*, 604 F.2d 80 (1st Cir. 1979). We hold that the notice requirement is mandatory. For purposes of this opinion only, we assume that the stipulation determined the question of the witness' unavailability.

The court's ruling was not erroneous for other reasons. The husband, as well as another witness, testified to essentially the same facts as those contained in the statement. Furthermore, the State's own evidence indicated that someone in the crowd had a gun other than the shotgun that did the wounding. The State offered and there was received in evidence a .22-caliber rifle which was found hidden near the scene the morning following the shooting.

The defendant's final contention is that the court erred in admitting out-of-court statements made by the defendant. These were objected to on the ground they were hearsay and also because they were exculpatory in nature. The statements in question contain various admissions, namely, that the defendant was at the scene about the time of the incident, that he was a passenger in the pickup truck, that he had a shotgun in the pickup, that he loaded and fired it once, that his motivation for going to the area was to help his friends who were being harassed by Indians, and that he intensely disliked Indian people. Admissions by a party opponent are not hearsay and, if material, are competent evidence. Neb. Rev. Stat. § 27-801(4)(b) (Reissue 1979).

AFFIRMED.

KRIVOSHA, C.J., and BRODKEY, J., concur in result.

BOSLAUGH, J., dissenting in part.

I concur in the judgment of the court but do not join in that part of the opinion that suggests the circumstantial evidence rule applies only to "material facts" when used in the sense of ultimate facts. It should be self-evident that the rule is applicable to any fact or circumstance relied upon to sustain a finding of guilty.

The rule that any fact or circumstance reasonably susceptible of two interpretations must be resolved most favorably to the defendant is a correct statement of law and has reference to the inferences to be drawn from a fact or circumstance proved. If a proven fact goes no further than to give equal support to two inconsistent inferences, then an inference favorable to the party with the burden of proof can not be drawn from that fact or circumstance by the trier of fact.

UNITED STATES NATIONAL BANK OF OMAHA V. MAX E. RUPE ET AL., APPELLANTS. BOB & BOOTS, INC., A NEBRASKA CORPORATION, INTERVENOR-APPELLEE.

296 N.W.2d 474

Filed September 5, 1980. No. 42481.

1. **Conveyances to Defraud Creditors: Debtors and Creditors.** The uniform construction of Neb. Rev. Stat. § 36-401 (Reissue 1978), concerning conveyances to defraud creditors, has been that such a conveyance is good as between the parties and is void only as to such creditors as attack it.
2. ____: ____. A conveyance without or for inadequate consideration, made with the intent to delay or defraud creditors, is fraudulent.
3. ____: ____. A voluntary conveyance by one spouse to the other is presumptively fraudulent as to existing creditors unless the good faith of the transaction is established by a preponderance of the evidence.
4. ____: ____. A creditor whose debt did not exist at the date of the voluntary conveyance by the debtor cannot have the conveyance declared fraudulent unless he pleads and proves that the conveyance was made to defraud subsequent creditors whose debts were in contemplation at the time.

5. **Corporations.** A corporation is a legal entity complete and separate from its shareholders and officers.
6. ——. Generally, the shareholders of a corporation are not liable for its debts or other obligations.
7. —— In equity, the corporate entity may be disregarded and held to be the mere alter ego of a shareholder or shareholders in various circumstances where necessary to prevent fraud or other injustice. Some of the factors which are relevant in determining to disregard the corporate entity are: (1) Grossly inadequate capitalization; (2) Insolvency of the debtor corporation at the time the debt is incurred; (3) Diversion by the shareholder or shareholders of corporate funds or assets to their own or other improper uses; and (4) The fact that the corporation is a mere facade for the personal dealings of the shareholder and that the operations of the corporation are carried on by the shareholder in disregard of the corporate entity.
8. **Res Judicata.** Res judicata is an affirmative defense which must ordinarily be pleaded to be available.

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

Robert M. Zuber of Zuber & Ginsburg for appellants.

Kutak Rock & Huie for intervenor-appellee.

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

PER CURIAM.

This is a creditor's action by the plaintiff bank to set aside an allegedly fraudulent conveyance made on May 21, 1976, by the defendant Max E. Rupe to the defendant Shirley A. Rupe, his wife, of an undivided one-half interest in a parcel of real estate, the Rupe residence. The bank, among other things, asked that a lien be impressed upon the interest which it claimed had been fraudulently conveyed. Bob & Boots, Inc., another creditor of Max E. Rupe, was permitted to intervene and it asked for similar relief. The bank and the intervenor each received the relief prayed for and the Rupes have appealed. While this appeal was pending, Shirley A. Rupe paid the bank's claim and took an assignment of its lien. Upon motion, the bank was dismissed as a party to the appeal. At this time, the

remaining parties in interest are the intervenor and the defendants Rupe.

The Rupes make the following assignments of error: (1) The District Court erred in declaring the deed of conveyance a nullity rather than merely voidable to the extent of the prejudice to the creditors; (2) The evidence is insufficient to support the findings of the trial court; (3) The petition in intervention did not state a cause of action and the evidence did not support the judgment because the intervenor was not a creditor at the time of the conveyance and it neither pleaded nor proved an intent to defraud subsequent creditors; and (4) The trial court erred in determining that the Updike Oil Company, a corporation, was the alter ego of the defendant Max E. Rupe and that Max was liable for the debts of the corporation to the intervenor. We modify and affirm as modified.

In order to understand the assigned errors and the contentions of the parties with reference to these assignments, it is necessary to outline some of the basic facts.

Max was the sole stockholder of the Updike Oil Company, which he acquired in 1972. Between the dates of March 19, 1974, and April 16, 1976, the intervenor sold Updike merchandise on open account. On April 16, 1976, $4,114.35 was unpaid and delinquent on that account. On May 21, 1976, Max, by quitclaim deed, conveyed to Shirley the one-half interest in the real estate involved. On April 29, 1977, the intervenor obtained judgment against Updike in an action brought against both Updike and Max. By stipulation, that action was, as to Max, dismissed with prejudice. On May 13, 1977, in consideration of a promise to withhold execution against Updike, Max made a personal guarantee of payment of the Updike debt. Thereafter, the intervenor brought action against Max on the guarantee and on September 2, 1977, obtained judgment against him for $3,600. The intervenor asks to have a lien for the present unpaid balance of that sum impressed upon the one-half interest in the property con-

veyed by quitclaim deed on May 21, 1976. Such further recitals of the evidence will be made as are necessary as we make our determinations in connection with each of the errors assigned.

Neb. Rev. Stat. § 36-401 (Reissue 1978) provides: "Every conveyance or assignment, in writing or otherwise, of any estate or interest in lands, or in goods or things in action, or of any rents or profits issuing therefrom, and every charge upon lands, goods or things in action, or upon the rents and profits thereof, made with the intent to hinder, delay or defraud creditors or persons, of their lawful rights, damages, forfeitures, debts or demands, and every bond or other evidence of debt given, suit commenced, or decree or judgment suffered, with the like intent as against the persons so hindered, delayed or defrauded, shall be void."

This court has held that a voluntary conveyance is good as between the parties to the instrument and void only as to the creditor or creditors who attack it. *Filley v. Mancuso*, 142 Neb. 106, 5 N.W.2d 91 (1942); *Martin v. Shears*, 78 Neb. 404, 110 N.W. 1010 (1907). The court erred, therefore, in annulling the deed rather than merely making the property subject to a lien of the defrauded creditors. That part of the decree which sets aside and annuls the deed which appears in deed record book 1544 at pages 605-06 in the office of the Register of Deeds of Douglas County, Nebraska, is therefore reversed.

The second, third, and fourth assignments of error are necessarily interwoven and will be discussed together. It will be useful to first state some of the governing principles of law. A conveyance without or for inadequate consideration, made with the intent to delay or defraud creditors, is fraudulent. *Smith v. Ely*, 164 Neb. 636, 83 N.W.2d 55 (1957). A conveyance of the interest of one spouse to the other is presumptively fraudulent as to existing creditors unless the good faith of the transaction is established by a preponderance of the evidence. *First Nat. Bank in Kearney v.*

Bunn, 195 Neb. 829, 241 N.W.2d 127 (1976). A creditor whose debt did not exist at the date of the voluntary conveyance by the debtor cannot have the conveyance declared fraudulent unless he pleads and proves that the conveyance was made to defraud subsequent creditors whose debts were in contemplation at the time. *First Nat. Bank in Kearney v. Bunn, supra; Ayers v. Wolcott*, 66 Neb. 712, 92 N.W. 1036 (1902).

A corporation is a legal entity complete and separate from its shareholders and officers. *Solheim v. Hastings Housing Co.*, 151 Neb. 264, 37 N.W.2d 212 (1949). Generally, the shareholders of a corporation are not liable for its debts or other obligations. *Globe Publishing Co. v. State Bank of Nebraska*, 41 Neb. 175, 59 N.W. 683 (1894). In equity, the corporate entity may be disregarded and held to be the mere alter ego of a shareholder or shareholders in various circumstances where necessary to prevent fraud or other injustice. *State ex rel. Sorensen v. Weston Bank*, 125 Neb. 612, 251 N.W. 164 (1933); *Massachusetts Bonding & Ins. Co. v. Master Laboratories*, 143 Neb. 617, 10 N.W.2d 501 (1943); *Delchamps, Inc. v. Borkin*, 429 F.2d 417 (5th Cir. 1970); *Briggs Transp. Co. v. Starr Sales Co.*, 262 N.W.2d 805 (Iowa 1978); *Mobridge Community Industries v. Toure*, 273 N.W.2d 128 (S.D. 1978); *Fowler v. Elm Creek State Bank*, 198 Neb. 631, 254 N.W.2d 415 (1977).

Some of the factors which are relevant in determining to disregard the corporate entity are: (1) Grossly inadequate capitalization; (2) Insolvency of the debtor corporation at the time the debt is incurred; (3) Diversion by the shareholder or shareholders of corporate funds or assets to their own or other improper uses; and (4) The fact that the corporation is a mere facade for the personal dealings of the shareholder and that the operations of the corporation are carried on by the shareholder in disregard of the corporate entity.

We will not, for the most part, discuss specific details of the evidence, but rather set forth the inferences which the court was entitled to make from that evidence.

The Rupes contend that the conveyance was for a valuable consideration: cancellation of promissory notes owed by Max to Shirley. Max testified that, beginning in 1960 or 1961, he and his wife were making joint investments and that Shirley never received any of the profits in cash but, instead, annually received from him promissory notes for her share, and that Shirley permitted Max to reinvest all the profits. No records of any kind supported the alleged transactions, other than the promissory notes themselves. The court could conclude, and apparently did, either that the transactions alleged to underlie the notes did not take place, or that the notes themselves were fictitious. Shirley did not testify. Evidence was introduced to show that she avoided service of a subpoena which would have required her to appear. The court could conclude from the evidence that no consideration supported the notes.

The evidence, therefore, supports a finding that the conveyance by Max to Shirley was without consideration and, therefore, presumptively fraudulent if, at the time the conveyance was made, the intervenor was an existing creditor of Max. The Rupes contend the intervenor was not a creditor of Max at the time the deed was executed and delivered on May 21, 1976, because Max's obligation to the intervenor rose out of the guarantee of May 13, 1977, and the intervenor was, therefore, a subsequent creditor and the presumption of fraud does not apply. It is at this point that the alter ego contention operates. Intervenor argues that the evidence establishes that when it extended credit on the open accounts to Updike, the facts then existing showed that, at that time, Updike was Max's alter ego and that he was liable for its debts.

The evidence does support the conclusion that, during the period the debt was incurred, Updike was Max's alter ego. We briefly discuss that evidence.

When Max acquired Updike it was grossly undercapitalized. Thereafter, the corporation operated

almost wholly upon money which Max loaned to it from money he had borrowed. A balance sheet furnished to the bank as of September 30, 1973, listed stockholder's equity of $56,238 of which only $100 consisted of capital stock. These loans from Max to the corporation were omitted from its financial statements; thus, the statements showed an inflated net worth. Other evidence indicated that Max had ownership of or interests in other corporations and that he either diverted assets from Updike to these other corporations or permitted Updike to extend credit in the amount of $100,000 to these entities in his own personal interest. In October 1975, the bank discovered Rupe had taken the capital stock of Overland Armored Express as security for an account receivable due Updike in the amount of $125,000. He permitted obligations incurred by one corporation to be paid by another. In short, he operated without regard to the fact of the separate corporate entities. Other evidence indicated that Updike was in financial difficulty and unable to meet its financial obligations. Evidence also showed that Max himself was in great financial distress and that he was no longer in a position to obtain the financing he needed to continue to operate Updike. The foregoing evidence is sufficient to support a finding that Updike was the alter ego of Max. The disregard of the corporate entity is justified.

If, when the Updike debt was incurred, Updike was merely Max's alter ego, it is immaterial that Max, at a later date after the fraudulent conveyance, executed a guarantee of an indebtedness which, in legal contemplation, was already his. We so hold. The Rupes, however, say that the alter ego issue was finally determined against the intervenor in the action by the intervenor against Updike which resulted in Max being dismissed from that suit with prejudice. We need not, however, consider the merits of that contention in this creditor's action. In its petition in this case, the intervenor pleaded and relied upon the alter ego premise.

The Rupes' answer was a general denial. Res judicata is an affirmative defense which must ordinarily be pleaded to be available. *Tedco Development Corp. v. Overland Hills, Inc.*, 205 Neb. 194, 287 N.W.2d 49 (1980).

AFFIRMED AS MODIFIED.

BRODKEY, J., concurs in result.

KRIVOSHA, C.J., dissenting.

I must respectfully dissent from the majority in this case. While the result which the majority seeks to attain may be appropriate, the legal basis upon which it is obtained is, in my view, not sound and will only cause us to have to make a host of distinctions in future cases. In my view, the majority opinion has established a rule that a subsequent creditor may have a conveyance made by a guarantor set aside as a fraudulent conveyance even though the conveyance was made prior to the execution of the guarantee. I do not believe that even the majority intends for that to be the rule of law; yet, I believe that is, in essence, what does result from the majority opinion.

As the majority opinion notes, suit against Max Rupe (Max) individually was dismissed *with prejudice* in *Bob & Boots, Inc. v. Overland Armored Express et al.*, Doc. 247, No. 315 (Omaha Mun. Ct., May 16, 1977). At that point in time, Max was no longer personally indebted to Bob and Boots (B & B), if ever he was personally liable.

It was not until May 13, 1977, in consideration of B & B's promise to withhold execution of its judgment against the corporation, that Max personally signed the guarantee involved in this case. The suit in the instant case is not on the judgment obtained against the corporation but, rather, upon the judgment obtained on the guarantee signed by Max on May 13, 1977, almost a full year after the conveyance by Max to his wife on May 21, 1976.

The majority holds that the corporation was indebted to B & B on May 21, 1976, and that the corporation was,

in fact, Max's alter ego and that, therefore, there was the requisite relationship of debtor and creditor existing between Max and B & B on May 21, 1976, when the conveyance was made. This permits the court to set the conveyance aside as a fraudulent conveyance. The difficulty with that reasoning is that the execution which brings about this action was not on the judgment obtained against the corporation or the debt existing between the corporation and B & B on May 21, 1976. The execution is upon a judgment arising out of a guarantee which did not exist before May 13, 1977. Piercing the corporate veil produces no legal basis for setting aside the conveyance when the judgment involved in this action is not the judgment against the corporation but rather the judgment against Max personally by reason of the guarantee. Attempting to simply mix them all together does not serve any benefit except to add confusion to the state of the law.

The relationship of debtor-creditor upon which B & B bases its attempt to have the conveyance set aside did not come into existence until the guarantee was executed. That was long after the conveyance. The majority simply disregards the dismissal with prejudice as though it never existed.

In *First National Bank in Kearney v. Bunn*, 195 Neb. 829, 832, 241 N.W.2d 127, 129 (1976), we said, "A different standard is applied to creditors whose debts are in existence at the time of conveyance, as opposed to subsequent creditors. A creditor whose debts did not exist at the date of a voluntary conveyance by the debtor cannot attack such conveyance for fraud unless he pleads and proves that the same was made to defraud subsequent creditors whose debts were in contemplation at the time." Likewise, in *Tanner v. Frink*, 103 Neb. 817, 174 N.W. 417 (1919), we said, "The question of fraudulent intent is to be considered as of the time when the conveyance is made and with reference to the particular conveyance alleged to have been fraudulent as against creditors." (Syllabus of the court.) Finally,

in *DeForge v. Patrick*, 162 Neb. 568, 575, 76 N.W.2d 733, 738 (1956), we said, "The rule seems to be well settled that, to set aside a conveyance on the ground that it is fraudulent as to subsequent creditors, such creditors must allege and prove that such conveyance was made with intent to defraud subsequent creditors and in contemplation of such future indebtedness." Likewise, see, *Jayne v. Hymer*, 66 Neb. 785, 92 N.W. 1019 (1902). The record in this case conclusively establishes that B & B neither pleaded nor proved that the conveyance made on May 21, 1976, was made for the purpose of defrauding B & B in connection with a guarantee obtained on May 13, 1977.

To be sure, B & B may have been entitled to collect on its judgment against the corporation and, in so doing, raise the issue of alter ego. The dismissal with prejudice against Max personally undoubtedly would have presented some problems in that regard. But B & B elected not to pursue its judgment against the corporation, just as it elected to dismiss with prejudice its earlier action against Max personally. The net effect of this case is to say that a guarantor who has made a conveyance prior to the execution of the guarantee may have that conveyance set aside if judgment is subsequently obtained on the guarantee even though there is no pleading and no proof that such conveyance was fraudulent as to the guarantee. I do not believe that is the law nor do I believe that the majority wishes it to be the law.

The majority further disregards the dismissal with prejudice by maintaining that res judicata is an affirmative defense which must ordinarily be pleaded to be available. While that is, indeed, a correct rule of law generally, in this case it has no application. The evidence of that dismissal was before the court. It is in the record without objection as to its admission. Evidence which is part of the record, though not pleaded, may be considered by an appellate court. See 5 C.J.S. *Appeal and Error* § 1480(b) (1958). For these reasons, I must respectfully dissent from the majority.

JOLENE L. NIELSEN, APPELLANT, V. MICHIAL D. NIELSEN, APPELLEE.

296 N.W.2d 483

Filed September 5, 1980. No. 42958.

1. **Child Custody: Habeas Corpus: Parental Rights.** Where the custody of a minor child is involved in a habeas corpus action, the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of a fit, proper, and suitable parent.
2. **Child Custody: Parental Rights.** The courts may not properly deprive a parent of the custody of a minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship or has forfeited that right.
3. _____: _____. The right of a parent to the custody of his minor child is not lightly to be set aside in favor of more distant relatives or unrelated parties, and the courts may not deprive a parent of such custody unless he is shown to be unfit or to have forfeited his superior right to such custody.
4. _____: _____. The statements in *Eravi v. Bohnert*, 201 Neb. 99, 266 N.W.2d 228 (1978), and *Bigley v. Tibbs*, 193 Neb. 4, 225 N.W.2d 27 (1975), insofar as they intimate that the natural right of a parent is of no significance in determining child custody in controversies between a natural parent and other relatives or strangers, are disapproved.

Appeal from the District Court for Hall County: JOSEPH D. MARTIN, Judge. Affirmed in part and remanded for further proceedings.

Philip T. Morgan of Morgan & Morgan for appellant.

Ralph A. Bradley of Wagoner & Wagoner for appellee.

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

CLINTON, J.

The petitioner, Jolene L. Nielsen, appeals in this action for dissolution of marriage in which the only issue is the custody of Ryan, the only child of the parties, now 4 years of age. The parents were married in 1975, when Jolene was apparently 16 years of age. She was 20 at the time of trial in June 1979. The respondent was

22 at the time of the trial. The respondent, in his answer, asked that custody of Ryan be placed either in him or in his father and stepmother, Dennis and Connie Nielsen, whom we will hereafter refer to as "grandparents" or by their first names, as is required. However, at the time of trial, the respondent, whom we will hereafter refer to as "Mike," abandoned the request that he have custody and asked that custody be placed in the grandparents. At the end of the trial on June 18, 1979, the court announced: "Temporary physical custody of the minor child is placed in the paternal grandparents, Mr. and Mrs. Dennis Nielsen. Petitioner to have reasonable rights of visitation. Question of permanent custody is taken under advisement pending the Court's investigation, which will be completed within the next two weeks and by the Welfare Department."

On August 2, 1979, the court made the following finding: "[T]he Court being advised in the premises and in receipt of said home studies of Jolene L. Nielsen and Mr. and Mrs. Dennis Nielsen of Grand Island, Nebraska, finds that it is in the best interest of said minor child that his physical custody and control be placed in Mr. and Mrs. Dennis Nielsen of Grand Island, Nebraska, his grandparents, subject to reasonable visitation by both Petitioner and Respondent, and the Court shall retain the legal custody and control of said minor child," and entered an order in accordance with that finding. No order for child support was made because Dennis had indicated at trial his willingness to assume that obligation.

The only specific finding of the District Court bearing on the issue before us was that "the best interest" of the child required the custody order which it made. The court made no finding with reference to the fitness or unfitness of Jolene or Mike. It made no finding that Jolene had abandoned the child. Indeed, the record, as we will point out, is so barren of matters that are normally deemed significant in determining the matter

at issue that this may be the reason the court retained legal custody in itself and chose to maintain the status quo as far as physical custody was concerned. The "home studies" referred to in the court's order were apparently never received in evidence and are not included in the record, and, as far as we can tell, the contents were never made known to Jolene.

The parties separated on November 5, 1978. The only evidence the record contains with reference to the period from the date of marriage to the time of separation is that Jolene and Mike lived in a house purchased by Dennis and rented to them for $150 per month.

The record shows little as to occurrences covering the period from the date of separation until about February 19, 1979, when the grandparents came into possession of the child. The petition was filed on December 6, 1978. On December 13, 1978, Jolene was awarded temporary custody and, on December 22, Mike was ordered to pay child support of $30 per week. The record shows that up to the time of trial he had paid a total of $120. Exactly when these payments were made is not shown except that he did not make any payments after February 19, 1979. Following the separation, Jolene lived with her parents. She apparently was employed at a Hinky Dinky store for a time, but was unemployed for a 30-day period. At the time of trial, she had obtained employment with a construction firm and was earning take-home pay of $190 per week.

Jolene's explanation as to the circumstances under which Ryan was left by her with the grandparents on February 19, 1979, was that she was unemployed and looking for a job. She was going to Denver in connection with a possible audition as a singer and she asked the grandparents if they would take care of Ryan. They agreed. No audition took place and she was in Denver for only a short time. Thereafter, she visited Ryan on a few occasions and also took him to her parents' home a few times for a total of about 10 days. She came to the grandparents' home to get him on Easter Sunday

and the grandparents refused to let her have him because she had not called until 7:30 Easter morning and they had already made plans which involved Ryan.

Mike lived with his father and stepmother for a short time after the separation. At the time of trial, he was employed and living in Aurora and apparently had been all during the 4 months his parents had physical possession of Ryan before trial. He paid nothing to them for child support.

The record contains no information critical in any way of the grandparents. Dennis is 43 years old; Connie is 34. They own a suitable home. Dennis is regularly employed, both as an employee of a packing company and also as the operator of a trucking business which he owns. He has an adequate income. Connie does not work outside the home. They are willing and desirous of assuming custody of Ryan without financial help from either of the parties. Dennis has raised three boys, all now adults. There are no children by the present marriage which is of 9 years' duration. Connie has epilepsy, but there is no evidence as to its effect, if any, on her ability to care for Ryan.

The parties, in their briefs, join issue on the standards which are to be applied in determining whether custody is to be placed in a natural parent or with a person not the parent. Jolene emphasizes her natural right as a parent and the absence of any evidence of any unfitness on her part. She testified to her own fitness and was not contradicted. She indicated that it would be necessary for her to have $200 per month child support as that amount would be necessary to pay for child care. The record contains no specific information as to the manner in which Ryan would be cared for while Jolene works. Mike, acting apparently on behalf of his parents, emphasizes the "best interests of the child."

Neb. Rev. Stat. § 42-364 (Reissue 1978) authorizes the court, in cases of marriage dissolution or legal separation, to make "such orders in relation to any

minor children and their maintenance as shall be justified, including placing the minor children in the custody of the court or third parties, or terminating parental rights pursuant to subdivision (4) of this section if the welfare of the children so requires. Custody and visitation of minor children shall be determined on the basis of their best interests. Subsequent changes may be made by the court after hearing on such notice as prescribed by the court." The same statute prescribes some of the matters which should be taken into consideration in determining custody between competing parents. In contests between a parent and a third party, it lays down no criteria other than the "best interests" test. We must, therefore, look to our own decisions for guidelines, bearing in mind that such decisions cannot be based merely upon some abstract formulae. We now examine our decisions involving competing claims between a parent and other relatives, usually grandparents. Ordinarily, this court has not had difficulty in determining what the result should be. There has, however, been considerable conflict in the statement of the underlying principle and an examination of the cases indicates that the conflict is rather persistent.

We begin with *Raymond v. Cotner*, 175 Neb. 158, 120 N.W.2d 892 (1963). That was an action of habeas corpus, brought by the father against the maternal grandparents. In that case, the parents were divorced in 1952 when the child was about 15 months of age. The mother, after the divorce, made her home with her parents, the Cotners. The father regularly paid child support but did not visit the child because the mother objected. The evidence indicated that he was a fit and proper parent. He had remarried and had children by the second marriage. Nine years after the divorce, the mother died. The father immediately came to take his daughter to his own home. The grandparents refused to yield custody and this action was filed. The grandparents were aged 69 and 67, owned a satisfactory farm home, and were good and reputable people.

This court, in a 4 to 3 decision, determined that the father should have custody and held:

"Where the custody of a minor child is involved in a habeas corpus action the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of a fit, proper, and suitable parent.

"The courts may not properly deprive a parent of the custody of a minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship, or has forfeited that right.

"The right of a parent to the custody of his minor child is not lightly to be set aside in favor of more distant relatives or unrelated parties, and the courts may not deprive a parent of such custody unless he is shown to be unfit or to have forfeited his superior right to such custody." (Syllabus of the court.)

Bigley v. Tibbs, 193 Neb. 4, 225 N.W.2d 27 (1975), was another habeas action. It involved conflicting claims of the mother and a sister of the deceased husband. In that case, the husband had custody pursuant to a decree of divorce after the mother had abandoned the family. Two years before the habeas action was filed, the father died. The father, during his last illness, placed custody with his sister. The record indicated that, for many years during the marriage, the mother had neglected the children and the family. This court held (one judge concurring in the result only) that the best interests of the child required that custody be placed in the aunt. It seems clear enough that the finding was justified both on the basis of forfeiture and of unfitness. However, the court overruled in part *Raymond v. Cotner*, *supra*, rather gratuitously, it seems to the writer of this opinion, since such overruling was unnecessary, saying: "To the extent that Raymond v. Cotner, *supra*, does not hold that the first and primary consideration in any case involving the custody of a child is the best interests of the child, it is overruled." *Bigley* at 8, 225 N.W.2d at 29.

In *Eravi v. Bohnert*, 201 Neb. 99, 266 N.W.2d 228 (1978), the parties were divorced in 1972 and the mother was given custody of the two children. She died in 1976. The child, who was less than 6 years of age, was sent by relatives to live with his uncle in the city of Lincoln, Nebraska. At that time, the father, who had remarried, lived in California and was working as a truckdriver. He promptly sought custody of the child and brought an action of habeas corpus. The trial court awarded custody to the uncle. We reversed and granted custody to the father. The child, a boy, was 6 years of age at the time of trial and had been in the physical custody of the uncle for only a brief period of time. Before the death of the mother, the father had, despite the distance between the homes of the parties, visited the child on more than two occasions, once for a 5-day period, sent him gifts at appropriate times of the year, and paid child support as ordered, although he at one time had been delinquent because of employment problems. This delinquency, however, had been made up before the mother's death. The father had a stable household, a good home, was regularly employed with a good income, and was of good character. The uncle litigated the matter, in part at least, because he did not know the father and was unfamiliar with his character and circumstances.

In *Eravi*, this court reiterated what had been said in *Bigley v. Tibbs*, *supra*, to wit, that the best interests of the child is the sole and overriding consideration in custody disputes and said that the natural right of a parent to the custody of a child is not a significant consideration in determining the child's best interest, although, "Generally speaking, it is in the best interests of the child that he should be in the care of his natural parent." *Eravi* at 106, 266 N.W.2d at 231. We also pointed out in that case that a court cannot deprive a parent of the custody of a child merely because the court believes someone else could better provide for the child or because the parent has limited financial resources.

The most recent case in this series is *Haynes v. Haynes*, 205 Neb. 35, 286 N.W.2d 108 (1979). In that case, the mother was awarded custody of the two minor female children. The mother and the children lived next door to the maternal grandmother of the children for a period of 3 years. When the mother died, the children moved in with the grandmother and lived there until the time of trial. Three months after the mother's death, the father sought custody of the children. The grandmother then also filed an application seeking legal custody of the children. At trial, the evidence showed that both parties were fit and proper persons to have custody of the children. The trial judge interviewed the children in chambers to determine their desires as to where they wanted to live. The girls, at the time of trial, were 10 and 12 years of age. The evidence showed that, although the father lived in the same city with the mother and the children, his contact with the children after the divorce was minimal and that, although he was regularly employed, he was 42 weeks delinquent in child support payments. The trial court granted custody to the grandmother. This court, in a 5 to 2 decision, affirmed the action of the trial court. In so doing, we said:

"While it is true that a parent has a natural right to the custody of his child, the court is not bound as a matter of law to restore a child to a parent under any and all circumstances. The welfare of a child of tender years is paramount to the wishes of the parent where it has formed a natural attachment for persons who have long been in the relation of parents with the parents' approval and consent. Williams v. Williams, 161 Neb. 686, 74 N. W. 2d 543." *Haynes, supra* at 39, 286 N.W.2d at 110. The dissents in the above case were based upon the failure of the majority to make appropriate findings of fact, as well as a disagreement with the statement of underlying principles.

We disapprove the statements in *Eravi v. Bohnert, supra*, and *Bigley v. Tibbs, supra*, insofar as they inti-

mate that the natural right of a parent is of no significance in determining child custody in controversies as between the natural parent and other relatives or strangers.

We hold that the guiding principles are:

Where the custody of a minor child is involved in a habeas corpus action, the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of a fit, proper, and suitable parent.

The courts may not properly deprive a parent of the custody of a minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship, or has forfeited that right.

The right of a parent to the custody of his minor child is not lightly to be set aside in favor of more distant relatives or unrelated parties, and the courts may not deprive a parent of such custody unless he is shown to be unfit or to have forfeited his superior right to such custody.

We now turn to the facts in the case before us. The record contains no evidence that Jolene is an unfit mother. The evidence is totally insufficient to indicate that she forfeited her rights or abandoned her child by placing physical custody in the grandparents for the brief period of time here involved and under the circumstances.

We recognize that the parties to this action and their counsel have failed in their duties to present pertinent evidence pertaining to the issues, particularly with reference to fitness of the mother and the best interests of the child. We also note the failure to include the "home studies" in the record and to give the parties an opportunity to respond thereto and to subject the preparers to cross-examination. We affirm the action of the trial court insofar as it retained legal custody of the child. We remand for further hearing. We direct that the court appoint a guardian ad litem for Ryan.

Mike is directed to pay Jolene the sum of $500 for

services of her attorney in this court. Costs of the action are charged to Mike.

AFFIRMED IN PART AND REMANDED FOR FURTHER PROCEEDINGS.

KRIVOSHA, C.J., concurring in part, and in part dissenting.

While I generally concur with the result reached by the majority in the instant case, I must dissent from that portion of the opinion which holds that a court may not properly deprive a parent of the custody of a minor child "unless it is *affirmatively shown* that such parent is unfit to perform the duties imposed by the relationship, or has forfeited that right," *ante* p. 149, __ N.W.2d __ (emphasis added), and from that portion of the opinion which recites that "the right of a parent to the custody of his minor child is not lightly to be set aside in favor of more distant relatives or unrelated parties, and the courts may not deprive a parent of such custody unless he is *shown to be unfit* or to have forfeited his superior right to such custody," *Id.* at 149, __ N.W.2d at __ (emphasis added). I do wholeheartedly concur with the majority in that portion of the opinion which recites that "[w]here the custody of a minor child is involved in a habeas corpus action, the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of a fit, proper, and suitable parent," *Id.* at 149, __ N.W.2d at __. I believe that that the last-cited principle is, indeed, the law in Nebraska and that the requirement that, before custody may be changed, the court must make an affirmative finding that a parent is unfit to perform the duties imposed by the relationship or has forfeited that right is neither a correct rule of law nor a sound rule of law.

I believe that we do a grave injustice to a parent when we require a court to make an affirmative finding of "unfitness" before custody may be changed because of the best interests of the child. While it is true that in a very technical sense the word "unfit"

may be broad enough to encompass both personal and situational deficiencies, the overwhelming impression left by the cases is that a finding of "unfitness" implies that the parent is morally corrupt or emotionally unstable.

While one may find early decisions of this court in which there is a requirement that an affirmative finding of unfitness be made (see, for example, *Clarke v. Lyon*, 82 Neb. 625, 118 N.W. 472 (1908)), we had and, I think, properly so, abandoned that strict requirement and, instead, spoke about the "best interests of the child" as the paramount consideration. In *Bigley v. Tibbs*, 193 Neb. 4, 8, 225 N.W.2d 27, 29 (1975), which the majority now disapproves, in part, we properly said "to the extent that Raymond v. Cotner, *supra*, [175 Neb. 158, 120 N.W.2d 892 (1963)] does not hold that the *first and primary* consideration in any case involving the custody of a child is the best interests of the child, it is overruled." (Emphasis supplied.)

To be sure, a parent may be afflicted with a terminal disease which prevents the parent from providing the child with the child's best interests. Shall we, therefore, require the court to make an affirmative finding that a terminally ill parent is "unfit" when, in fact, all we really mean to say is that it is in the best interests of the child that the custody be changed? In my view, we have imposed an unnecessary affirmative finding in these cases.

A review of the many cases decided by this court makes it quite clear that there is no clear and concise definition of "best interests of the child" and that each of the cases must depend upon its own particular facts at a particular time. To now, in effect, disregard that view and require an affirmative finding of unfitness is neither necessary nor proper. To be sure, superior rights of a fit, proper, and suitable parent should receive great consideration. Yet, there may be instances where permitting a child to remain with a fit, proper, and suitable parent may not be in the child's best interests

and we should not so tie the hands of the courts who must hear the evidence and decide each individual case, one by one. I, therefore, respectfully dissent from that portion of the opinion which now requires that a court must make an affirmative finding of unfitness before it may deprive a parent of the custody of a minor child, regardless of the child's best interests. I would continue to follow the rules which we have established in the *Bigley v. Tibbs* case and those which we have decided since that time. See, *State v. Loomis*, 195 Neb. 552, 239 N.W.2d 266 (1976); *Contreras v. Alsidez*, 200 Neb. 773, 265 N.W.2d 452 (1978); *Haynes v. Haynes*, 205 Neb. 35, 286 N.W.2d 108 (1979).

HASTINGS, J., concurring.

I agree with the result reached by the majority opinion and the statement that "Where the custody of a minor child is involved in a habeas corpus action, the custody of the child is to be determined by the best interests of the child, with due regard for the superior rights of a fit, proper, and suitable parent." *Ante* at 149, ___N.W.2d at ___. However, I am opposed to turning the judicial clock back to 1963 and endorsing the holding of *Raymond v. Cotner*, 175 Neb. 158, 120 N.W.2d 892 (1963), which prohibits a court from depriving a parent of the custody of a minor child unless there is an affirmative showing of unfitness on the parent's part or he or she is shown to have forfeited such parental rights.

BOSLAUGH, J., joins in this concurrence.

ST. PAUL FIRE AND MARINE INSURANCE COMPANY, APPELLEE, V. TRUESDELL DISTRIBUTING CORPORATION, A CORPORATION, ET AL., APPELLANTS.

296 N.W.2d 479

Filed September 5, 1980. No. 42784.

1. **Equity: Appeal and Error.** Although Neb. Rev. Stat. § 25-1925 (Reissue 1979) requires the Supreme Court to try issues de novo on appeal from judgments in an action in equity, this court will consider the fact that the trial court had the opportunity to examine the physical evidence and observe the witnesses and their manner of testifying where the evidence on material issues is conflicting.
2. **Insurance: Subrogation: Attorney Fees.** An insurer who is a subrogee and does not come into the action but accepts the avails of the litigation is liable for a proportionate share of the expenses of the litigation, including attorney fees.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed as modified.

D. C. Bradford of Bradford & Coenen for appellants.

Lee H. Hamann and Ronald H. Stave of Law Offices of Emil F. Sodoro, P.C., for appellee.

Heard before BOSLAUGH and MCCOWN, JJ., and COLWELL, KNEIFL, and WHITEHEAD, District Judges.

PER CURIAM.

This is an action for an accounting brought by the plaintiff, St. Paul Fire and Marine Insurance Company, a corporation, hereinafter referred to as plaintiff, against Truesdell Distributing Corporation; Truesdell Distributing Corporation, doing business as A.B.T. Advertising; and A. Bruce Truesdell, hereinafter referred to as defendants. The trial court entered judgment for the plaintiff and against the defendants in the sum of $15,400.65, and the defendants appealed.

The facts of this case are as follows: The defendants, prior to 1971, employed Robert E. Schafer and, during the course of his employment, Schafer, in collusion with

his wife, embezzled over $150,000 from the defendants. As part of their scheme, they solicited the services of an employee of the Center Bank of Omaha, Nebraska, and by forging signatures and presenting them to the bank, they were able to accomplish the embezzlement. The plaintiff was the bonding company for the Center Bank's employee. As soon as the defendants learned of the embezzlement, two actions were commenced, one against the Center Bank and one against the Schafers, to recover the money wrongfully taken from the defendants.

The action against the Center Bank was settled by the agreement between the parties which formed the basis of this action. The action against the Schafers resulted in a judgment against them in the approximate amount of $185,000. The judgment against the Schafers was registered in Hall County, Nebraska, and became a lien against the residence of the Schafers and the assets of a tavern owned and operated by them. Through negotiations with the Schafers and creditors of the Schafers, both secured and nonsecured, defendants obtained title to the residence and the tavern. Defendants were also able to recover $7,500 from a debtor of the Schafers.

As part of the settlement between the Center Bank and the defendants, an assignment was executed to the plaintiff, to wit:

"We, the undersigned, Truesdell Distributing Corporation, a Nebraska Corporation, Truesdell Distributing Corporation, doing business under the trade name and style of A.B.T. Advertising, and A. Bruce Truesdell, for good and valuable consideration, the receipt of which is hereby acknowledged by the undersigned assignors, hereby assign, transfer, set over, convey, bargain and sell unto the St. Paul Fire and Marine Insurance Company, its successors and assigns, all claims of the undersigned, and each of them, against Robert E. Schafer to the extent and limit of the sum of Twenty-One Thousand Eight Hundred Seventy-Eight

and 22/100 Dollars ($21,878.22.)

"This assignment is limited to the extent that one-third (1/3) of any recoveries made against the said Robert E. Schafer shall become the sole and separate property of the St. Paul Fire and Marine Insurance Company, its successors and assigns, until the aforedescribed amount is recovered by said assignee, its successors and assigns, it being understood by the parties hereto that various actions and lawsuits either are or will be commenced against the said Robert E. Schafer by, for, and on behalf of the undersigned, and that of all sums recovered by the undersigned against the said Robert E. Schafer one-third (1/3) of said sums, to the extent of the aforedescribed amount, shall be held in trust by the undersigned for and on behalf of the assignee herein, its successors and assigns."

The defendants acquired the tavern and the house from the Schafers in 1972 and continued the operation of the tavern until 1974, when it was sold. The defendants did not dispose of the residence until 1976. The record is not in dispute that the defendants at no time consulted the plaintiff as to any of their dealings concerning the residence or tavern.

In January of 1975, plaintiff brought an action in the District Court for Douglas County, Nebraska, for an accounting for their one-third share of the proceeds recovered by the defendants from the Schafers as per the assignment. The defendants, in the trial court, prayed that their expenses and losses in the operation of the tavern and their retention of the residence, as well as attorney fees paid by them in the amount of $16,708.50, be deducted in arriving at the net value of the recovery.

The trial court found the value of the property at the time of the sale to be, to wit: residence, $7,624; tavern, $31,077.95; and the debt, $7,500, for a total of $46,201.95. One-third, as per the assignment to the plaintiff, equaled $15,400.65. The trial court rendered judgment for the plaintiff in the sum of $15,400.65.

The defendants' appeal involves two issues: (1) Whether the trial court erred in arriving at the net value by refusing to deduct the losses and expenses incurred by the defendants during their operation of the tavern and retention of the residence; and (2) Whether the trial court erred in failing to deduct attorney fees in the amount of $16,708.50 in arriving at the net value of the recovery.

The provisions of Neb. Rev. Stat. § 25-1925 (Reissue 1979) govern this appeal and the matter is tried de novo in the Supreme Court. This court, under the provisions of § 25-1925, is bound to retry the issues of fact preserved in the bill of exceptions and reach independent conclusions thereon without reference to the conclusions reached by the trial court.

The rule in this state is that, where evidence on material issues is conflicting and this court is trying the issues de novo, we will consider the fact that the trial court had the opportunity to examine the physical evidence, observe the manner and demeanor of the witnesses testifying, and must have accepted one version of the facts rather than the opposite. *Thomas v. Flynn*, 169 Neb. 458, 100 N.W.2d 37 (1959); *Winkle v. Mitera*, 195 Neb. 821, 241 N.W.2d 329 (1976).

The evidence contained in the record as to the value of the tavern and residence at the time of acquisition by the defendants is in hopeless conflict and, from the record alone, the value is impossible of determination. The trial court determined the value of the realty to be that value at the time of sale. Applying the foregoing rule, we find the decision of the trial court was correct.

One of the main issues in this case is the failure of the trial court to give the defendants credit for the expenses that were incurred from the time of acquisition until sale.

The assignment executed on November 10, 1971, by the defendants to the plaintiff specifically requires the defendants to hold in trust for the benefit of the plaintiff one-third of all recoveries made by the de-

fendants. A trust relationship, by reason of the instrument, was created between the plaintiff and defendants as to all recoveries made by the defendants against the Schafers.

The record is not in dispute that the defendants never consulted the plaintiff about their acquisition, management, or disposition of the residence or the tavern they acquired from the Schafers. The defendants treated the property as their own, taking a yearly deduction on their state and federal income tax returns for the expenses and losses incurred. Defendants now assert that they should be entitled to a credit for expenses and losses incurred on the residence and tavern.

The evidence substantiates that it was the defendants' own choice to hold the assets and gamble on their value in the future. The defendants did not consult with the plaintiff concerning their choice, and the defendants did not advise the plaintiff as to their activities concerning the assets. It has long been the rule in this state that the trustee has a duty to fully inform the beneficiary of all material facts so that the beneficiary can protect his own interests where necessary. *Johnson v. Richards*, 155 Neb. 552, 52 N.W.2d 737 (1952). The claim of the defendants for the losses and expenses is without merit.

The second issue complained of by the defendants is the failure of the trial court to deduct the $16,708.50 attorney fees paid by defendants in arriving at the net value of the recovery from the Schafers.

The plaintiff here was an insurer who had paid a part of the loss and was entitled to share in any recovery obtained from the wrongdoer. The assignment gave the plaintiff the right to receive one-third of any recovery against Schafer and further provided that it was "understood by the parties hereto that various actions and lawsuits either are or will be commenced against the said Robert E. Schafer."

The general rule is that an insurer who is a subrogee and does not come into the action but accepts the avails

of the litigation is liable for a proportionate share of the expenses of the litigation, including attorney fees. *Krause v. State Farm Mut. Auto. Ins. Co.*, 184 Neb. 588, 169 N.W.2d 601 (1969). This rule is applicable to the plaintiff in this case.

We think a reasonable attorney fee in this case would be one-third of the recovery, which is slightly less than the amount the defendants claim was paid by them. We modify the judgment of the District Court to allow the defendants a credit of $5,133.55 for attorney fees, reducing the judgment to $10,267.10. As so modified, the judgment is affirmed.

AFFIRMED AS MODIFIED.

STATE SECURITY SAVINGS CO., A CORPORATION, APPELLANT, V. FLORIAN PELSTER AND JOY PELSTER, HUSBAND AND WIFE, APPELLEES.

296 N.W.2d 702

Filed September 12, 1980. No. 42766.

1. **Evidence: Judicial Notice.** A trial court in a proceeding between the same parties is entitled to take judicial notice of a security agreement attached to a previously dismissed petition between the same parties in the same court.
2. **Secured Transactions: Acceleration Clauses.** An acceleration provision in a security agreement securing a promissory note enters into and becomes a part of the note so that the maturity of the note is advanced in the same manner as the maturity of the security agreement.
3. ____: ____. Where the acceleration of the maturity of a security agreement and note is made optional with the holder of the security agreement, some affirmative action must be taken by the holder evidencing his election to take advantage of the acceleration provision, and until such action, the acceleration provision has no operation.
4. ____: ____. The exercise of the option to accelerate the maturity of a debt provided for in an acceleration clause must be made in a clear and unequivocal manner.
5. **Secured Transactions: Acceleration Clauses: Notice.** The option to implement an acceleration clause is effectively exercised by manifesting the fact in such a manner as to apprise the mortgagor of the mortgagee's intention.

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

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

Vince Kirby for appellees.

Heard before MCCOWN and WHITE, JJ., and COLWELL, KORTUM, and GRANT, District Judges.

GRANT, District Judge.

This is an action to collect on an installment note in the amount of $90,691.86 executed by defendants Pelster in favor of plaintiff, State Security Savings Co., on November 19, 1969. Pursuant to the note, 83 monthly payments of $1,601.61 were to be made beginning December 19, 1969. Defendants made regular interest payments and some principal payments up to May 1971, but were continually behind on the payment of principal. On May 6, 1971, defendants made a single payment of $39,121.01 which brought the loan current and prepaid it through January 1973.

In February 1972, plaintiff learned that defendants were selling some secured livestock and not applying the proceeds to payment on the note. An officer of plaintiff went to defendants, took all the remaining cattle, sold them in February and March of 1972, and applied the proceeds to the note.

The trial court found that plaintiff had accelerated the note by its actions in February and March of 1972 of seizing and selling all the secured cattle remaining in defendants' possession, and that, since the instant suit was not filed until January 31, 1978, it was barred by the statute of limitations. Plaintiff appeals, alleging that the instant action was one solely on the promissory note, which by its terms provided for acceleration only in the event of default in payments; that the note was not in default at the time of the seizure and sale of the remaining cattle in February and March of 1972 and, therefore, could not be accelerated; and that the statute

of limitations had not run since it applies to each installment.

The trial court took judicial notice of a security agreement between the parties executed the same day as the promissory note and securing that note. The security agreement was attached, as an exhibit, to a petition filed by plaintiff in a separate subsequent action in the same court against defendants. At the request of defendants, and without objection by plaintiff, the trial court took judicial notice "of the entire file in Case No. 9065 in the District Court of Antelope County, Nebraska, which was filed February 19, 1974, and dismissed by Order of this Court and this judge on March 6, 1975." The terms of the security agreement provided plaintiff with additional grounds for acceleration, including the sale or encumbrance of any of the collateral by defendants or a determination by plaintiff that it deemed itself insecure. The trial court found that the promissory note and security agreement were executed contemporaneously and should be construed together; that plaintiff had deemed itself to be insecure on February 15, 1972, and, by its actions, had declared the entire indebtedness due; that plaintiff's cause of action accrued on or before March 22, 1972, when the seized collateral was sold; and that plaintiff's instant action was barred by the 5-year statute of limitations. We affirm.

The question presented by plaintiff with regard to the judicial notice taken by the trial court is basic to its appeal. Plaintiff, in its first assignment of error, succinctly states its position: "The court erred in basing its order upon a security agreement which was not introduced into evidence at trial but which was attached to the petition of a related case of which judicial notice was taken."

The standard controlling judicial notice is set out in Neb. Rev. Stat. § 27-201 (Reissue 1979), which provides, in part: "(2) A judicially noticed fact must be one not subject to reasonable dispute in that it is either (a) gen-

erally known within the territorial jurisdiction of the trial court or (b) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

Subsection 2(b) is obviously the section applied by the trial court in this case. We hold that, under the facts of this case, the trial court may take judicial notice of a specific document attached to a petition filed by the same plaintiff against the same defendants in a separate action concerning the same general subject matter in the same court.

First of all, as stated in *Witzenburg v. State*, 140 Neb. 171, 178, 299 N.W. 533, 537 (1941): "The general rule is that, while a court will take judicial notice of its own records, it will not in one case take judicial notice of the record in another case. *Fassler v. Streit*, 92 Neb. 786, 139 N.W. 628. However, 'There may be cases so closely interwoven, or so clearly interdependent, as to invoke a rule of judicial notice in one suit of the proceedings in another suit.'" The instant case is one on the promissory note between the parties and the judicially noticed case was an action for conversion of security based on the same promissory note and the concurrently executed security agreement which secured the note. The two cases are interwoven and interdependent.

Secondly, the security agreement is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." The promissory note and the security agreement were both executed on November 19, 1969. Copies of both were attached to a petition filed in the same court on February 19, 1974, by the same plaintiff against the same defendants. The 1974 petition, filed by the same reputable attorneys representing plaintiff in the instant action, alleged the execution of the note and security agreement by defendants; alleged that the security agreement was executed to secure payment of the note; and alleged that the security agreement was in full force and effect on the date of the filing of the petition. Clearly,

to be the basis of a lawsuit in 1974, the security agreement had to be operative between the parties in 1974. The agreement was operative when executed in 1969, and it had to be operative in February of 1972. The judicially noticed fact — the security agreement — is capable of accurate and ready determination by resorting to a source — a formal petition with attachments — whose accuracy cannot reasonably be questioned. The same plaintiff and the same attorneys give us no reason why that judicially noticed fact is not a fact operative between the parties.

It should be noted that plaintiff, if it did have objection to the judicial notice taken, had procedural remedies available to it of which it did not avail itself. Neb. Rev. Stat. § 27-201(5) (Reissue 1979) provides that, "A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken." Further, if as mentioned in plaintiff's brief, plaintiff was surprised "that the court took such notice for the purpose of receiving the security agreement as evidence and applying its provisions to the facts at hand," plaintiff's motion for new trial could have been based on Neb. Rev. Stat. § 25-1142(3) (Reissue 1979). That specific section provides that a new trial shall be granted "for any of the following causes, . . . (3) accident or surprise, which ordinary prudence could not have guarded against; . . . ." Such a cause must, of course, be sustained by affidavits, as required by Neb. Rev. Stat. § 25-1144 (Reissue 1979). We find that the accuracy and reliability of the security agreement cannot reasonably be questioned under the facts of this case.

In support of our holdings, we note examples of a court taking judicial notice of a specific document in another case.

In *City of Los Angeles v. Waller*, 90 Cal. App. 3d 766, 154 Cal. Rptr. 12, 17 (1979), where the trial court

took judicial notice of an appraisal report in another case, the appellate court stated: "The trial court's remarks during the argument of the motion for new trial indicate that he accepted the exhibit as being accurate and true, the genuineness of the report not really being contested by plaintiff — only the use made of the report in the Warnack action. Under these circumstances, we conclude that the trial judge properly took judicial notice of Mason's Warnack appraisal report as being a genuine document."

In the case of *In Re Southern Land Title Corporation*, 301 F. Supp. 379 (E.D. La. 1968), a reorganization petition was filed by Southern Land Title Corp. before one judge in a district and that case was dismissed. Later, creditors filed an involuntary petition for reorganization, and in determining the status of one creditor, a different judge in the same district took judicial notice of the schedules, stating on page 400: "Finally, the schedules form part of the record in the case before Judge Mitchell, and even if the schedules had not been introduced into evidence, we could take judicial notice of the contents of that record for evidentiary purposes . . . ."

Plaintiff next contends that the trial court erred in finding that the note between the parties had been accelerated before the filing of this case. In this connection, the court found that the note and security agreement were executed contemporaneously and were to be construed together, and that by the terms of the security agreement, plaintiff had the right to declare all obligations secured due and payable immediately whenever it deemed itself insecure. In so finding, the trial court correctly applied Nebraska law. In *Linder v. Terre Haute Brewing Co.*, 139 Neb. 636, 638, 298 N.W. 545, 546-47 (1941), this court held:

"It is also contended that the acceleration provision in the mortgage is insufficient to accelerate the note when the lien of the mortgage has been waived. This court has passed on this question in *Munch v. Central*

West Public Service Co., 128 Neb. 645, 259 N. W. 736, as follows: 'This court has adopted the same view. In *Grand Island Savings & Loan Ass'n v. Moore*, 40 Neb. 686, this court said: "A note and a mortgage securing it, made contemporaneously, are to be construed together. Therefore, where a note is payable on or before a date named and the mortgage contains a provision that in certain contingencies, prior to that date, the mortgagee may elect to declare the whole amount due, *held*, that such provision in the mortgage authorizes the mortgagee upon the happening of such contingencies to proceed not only to foreclose the mortgage but also to enforce the personal liability upon the note." ...'"

This leaves only the question of whether plaintiff did, in fact, accelerate the note by its actions in February and March 1972. The law is clear on this issue. As stated in *United Benefit Life Ins. Co. v. Holman*, 177 Neb. 682, 684, 130 N.W.2d 593, 595 (1964), "We think the true and correct rule is stated in 36 Am. Jur., Mortgages, § 393, p. 884, as follows: '* * * that where the acceleration of the maturity of a mortgage debt on default is made optional with the mortgagee, some affirmative action must be taken by him evidencing his election to take advantage of the accelerating provision, and that until such action has been taken, the provision has no operation. The exercise of the option should be made in a manner clear and unequivocal, so as to leave no doubt as to the mortgagee's intention. The option is effectively exercised by manifesting the fact in such manner as to apprise the mortgagor.'"

The trial court found that defendants were in default in payments of principal continuously from the first payment date of December 19, 1969, up until a lump sum payment of $39,121.01 on May 6, 1971; that plaintiff deemed itself insecure on February 15, 1972; and that plaintiff exercised its option under the security agreement to declare the entire indebtedness immediately due by orally demanding possession of all re-

maining security or payment of the entire balance due, by taking possession of all the remaining security, by demanding, in writing, payment of the entire debt within 5 days as an alternative to sale of the cattle, and by the sale of all the cattle constituting the remaining collateral and the application of the proceeds to the debt obligation.

All these findings of fact are amply supported by the record. As to the finding that plaintiff deemed itself insecure, the evidence presented by plaintiff shows that there was a continuous default in principal payments until May 6, 1971, when the proceeds of the sale of defendants' pastureland in the amount of $39,121.01 were applied to the principal. In addition, plaintiff's officer testified that, in February of 1972, "we just plain told him [defendant Florian Pelster] that we were going to take the cattle, because there weren't enough cattle there that we felt that we were secured ...."

Defendant Florian Pelster testified that an agent of plaintiff told him that plaintiff wanted its money or it would take the cows, and that plaintiff did, in fact, take all the remaining collateral. Plaintiff itself offered as evidence a letter dated February 16, 1972, from plaintiff to defendants, which letter includes the sentences, "I also wish to notify you that within the next five days, you have the right to redeem the cattle by paying off the balance of your account in the amount of $46,091.51. Being the principal balance still owed as of February 14, 1972."

There was no further communication between the parties with the exception of one letter received by defendants about a month after the sale of the last of the collateral. Defendant Florian Pelster testified that this letter merely stated the balance due, and that defendants were never notified concerning any further defaults in installment payments. This testimony was not denied by plaintiff, and the totality of the evidence shows that the plaintiff did take affirmative action

evidencing its election to accelerate the debt; that there was no doubt as to plaintiff's intention; and that the fact of the acceleration was manifested in such a way as to apprise defendants of the acceleration.

In summary, there is ample evidence to sustain the fact finding that plaintiff did accelerate the total amount due from defendants and that such total remaining balance became due and owing on or before March 22, 1972, which was the date of the last sale of collateral pursuant to the taking of the collateral in February.

This action was filed on January 31, 1978. We, therefore, affirm the trial court's order that this action is barred by the terms of Neb. Rev. Stat. § 25-205 (Reissue 1979) providing for a 5-year statute of limitations.

AFFIRMED.

COLWELL, District Judge, concurs in result.

JOHN P. SULLIVAN AND MILRAE SULLIVAN, HUSBAND AND WIFE, APPELLANTS, V. ARTHUR C. HOFFMAN, APPELLEE.

296 N.W.2d 707

Filed September 12, 1980. No. 42804.

1. **Water Law: Surface Waters.** Surface waters comprehend waters from rains, springs, or melting snows which lie or flow on the surface of the earth but which do not form part of a watercourse or lake.
2. ____: ____. Surface waters cease to be such when they empty into and become part of a natural stream or lake, but they do not lose their character as such by reason of their flowing from the land on which they first make their appearance onto lower land in obedience to the law of gravity, or by flowing into a natural basin from which they normally disappear through evaporation or percolation.
3. ____: ____. The owner of a lake wherein the surface water from the surrounding land accumulates, and from which it has no means of escape except by evaporation or percolation, cannot lawfully, by means of a ditch or dike, discharge such water upon the land of his neighbor without his consent, to his injury.
4. **Equity: Appeal and Error.** Actions in equity, on appeal to this court, are triable de novo subject, however, to the condition that when the

evidence on material questions of fact is in irreconcilable conflict this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite.

5. ____: ____. It is the duty of this court on review of the findings made by the trial court, when it has made an inspection of the premises and has given consideration to the competent and relevant facts revealed thereby, to give weight thereto.
6. **Water Law: Surface Waters.** Surface waters are waters which appear upon the surface of the ground in a diffused state, with no permanent source of supply or regular course, which ordinarily result from rainfall or melting snow.
7. ____: ____. Diffused surface waters, which ordinarily result from rainfall and melting snow and having no permanent source of supply or regular course, may be dammed, diverted, or otherwise repelled by an adjoining landowner without liability, if it is necessary and done without negligence.
8. **Motions for New Trial.** Evidence of facts occurring after a trial ordinarily cannot be made the basis for a motion for a new trial on the ground of newly discovered evidence.
9. ____. A new trial will not be granted on the ground of newly discovered evidence where it appears that such evidence was not available at the time of the trial, but rather the result of changed conditions since.
10. ____. In any but an extraordinary case in which an utter failure of justice will unequivocally result, evidence of facts occurring after the trial will not support a motion for a new trial as newly discovered evidence.

Appeal from the District Court for Hall County: JOSEPH D. MARTIN, Judge. Affirmed.

E. Merle McDermott for appellants.

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

Heard before BOSLAUGH, BRODKEY, and HASTINGS, JJ., and BUCKLEY and WINDRUM, District Judges.

BUCKLEY, District Judge.

This is an action between adjoining farmland owners in Hall County, Nebraska, wherein the plaintiffs, John P. Sullivan and Milrae Sullivan, seek to enjoin the defendant, Arthur C. Hoffman, from maintaining a

dike near the boundary of their adjoining property, which dike plaintiffs claim prevents the natural flow of water from running off plaintiffs' property and into a lagoon or pond on defendant's property.

The defendant cross-petitioned, contending that the plaintiffs, by leveling and diking their land, have diverted the natural flow of water from a basin on their own land onto defendant's land, and seeking an injunction against plaintiffs from any such further diversion. After trial, which included an inspection of the property by the trial judge, the District Court for Hall County, Nebraska, dismissed both plaintiffs' petition and defendant's cross-petition. Plaintiffs' motion for new trial was overruled, from which they appeal. Defendant did not file a motion for new trial and has not cross-appealed.

Since 1970, plaintiffs owned an 80-acre tract, described as the east half of the southeast quarter of Section 16, Township 9 North, Range 9 West of the 6th P.M. On March 1, 1978, 9 days before their petition was filed, plaintiffs purchased the northeast quarter of the same section, which they had previously leased and farmed for about 5 years. The 80-acre tract purchased in 1970 is referred to as Tract 1 and is bordered on the north by the 160-acre tract purchased in 1978, which is referred to as Tract 2.

The defendant owns 280 acres described as all of the north half of Section 15, Township 9 North, Range 9 West of the 6th P.M., except the northwest quarter of the northwest quarter of Section 15. Those 40 acres, known as the Beukenhorst Tract, lie at the northwest corner of the defendant's land.

Section 15 lies directly east of Section 16. Thus, defendant's land is east of and adjacent to plaintiffs' Tract 2. The Beukenhorst Tract is also adjacent to plaintiffs' Tract 2, at its north end. A county road, running north and south, separates the parties' land as well as plaintiffs' Tract 2 and the Beukenhorst Tract.

The county road contains two culverts. One is located

about 150 feet north of the north-south boundary of defendant's land and the Beukenhorst Tract. It lies between plaintiffs' Tract 2 and the Beukenhorst Tract, and has been there longer than any witness could recall. In fact, it is referred to by some, significantly as will be seen later, as the original culvert. The second culvert lies about a quarter mile south, or just to the north of the north-south boundary of plaintiffs' Tracts 1 and 2, and the south boundary of defendant's land. It thus lies between plaintiffs' Tract 2 and the defendant's tract. The record is silent as to when this south culvert was installed.

The terrain in the area is generally flat. It is all irrigated. There is, however, a sufficient change in elevation so that water generally flows from the south to the northeast corner of Tract 1, from the west to the east across Tract 2, and from the east to the west across defendant's tract. There is generally a low area on both sides of the road around the south culvert.

The plaintiffs testified that the water from winter thaws and heavy rains flowed naturally to the area of the south culvert, then through the culvert and into a lagoon on defendant's land, and that the defendant blocked this flow by erecting a dike along the west boundary of his land, very close to the road and the culvert. This, in turn, caused the flow of water to back up and flood a large area of plaintiffs' land.

Plaintiffs rely upon *Block v. Franzen*, 163 Neb. 270, 79 N.W.2d 446 (1956), a case involving a similar situation. There, the parties owned adjoining farms, wherein a large, landlocked pond lay across the common boundary, partly on each piece of land. The defendants built a dike along their side of the common boundary so as to prevent water flowing into the pond on plaintiffs' land from reaching the area of the pond on defendants' land. Plaintiffs sought an injunction to compel removal of the dike. There, a material question of fact, as it is here, was whether the pond was a permanent lake. In that regard, we said, "In Lackaff v.

Bogue, 158 Neb. 174, 62 N. W. 2d 889, it was stated: 'Surface waters comprehend waters from rains, springs, or melting snows which lie or flow on the surface of the earth but which do not form part of a watercourse or lake.' ... '"Surface waters cease to be such when they empty into and become part of a natural stream or lake, but they do not lose their character as such by reason of their flowing from the land on which they first make their appearance onto lower land in obedience to the law of gravity, or by flowing into a natural basin from which they normally disappear through evaporation or percolation, ***."'" *Block v. Franzen* at 277-78, 79 N.W.2d at 450.

There, we affirmed the injunction granted by the trial court for the reason that "Here the waters in the pond clearly come within the classification of permanent waters in a lake. The rules as to the right to defend against surface waters do not apply." *Block v. Franzen* at 278, 79 N.W.2d at 451. We went on to apply the rule that: "The owner of a lake wherein the surface water from the surrounding land accumulates, and from which it has no means of escape except by evaporation or percolation, cannot lawfully, by means of a ditch or dike, discharge such water upon the land of his neighbor without his consent, to his injury." *Block v. Franzen* (syllabus of the court).

Therefore, we must first determine whether the lagoon or pond plaintiffs describe on defendant's tract was such a body of water as to prevent defendant from diverting the natural accumulation of surface water into it.

The evidence varies considerably as to the amount of water that ponded on defendant's land. The defendant testified that from the time he purchased the land in 1957, he farmed crops every year and in only one year, 1967, a particularly wet year, did he lose some crops to water. Plaintiff John Sullivan testified that the spring thaws and heavy rains created a pond of 50 to 60 acres in the area near the south culvert, and

that this was an annual occurrence. However, there is no direct testimony, or even the inference, that whatever water ponded on defendant's tract remained there throughout the entire year. To the contrary, the evidence indicates that, at worst, the water stood only from spring until fall. Plaintiffs put in evidence two photographs of the area involved. One was taken in the fall of 1977, shortly after the defendant built the dike. There not only is no water, but the ground appears to be dry. The other picture was taken in the spring of 1978. It shows the last of the winter's snow, and the ground is generally wet. It also shows water standing in the ditch alongside the county road and between the road and the dike, but this water *does not extend to the dike.* Defendant introduced a picture of the property taken in May 1978, some time after plaintiffs' picture. The picture shows the ground to be wet between the dike and the road but no water is standing, even in the ditch next to the road.

The trial judge made a visual inspection of the area approximately the last week of March 1979. What he observed is not reflected in the record. This is a case that makes the following rules particularly appropriate: "[A]ctions in equity, on appeal to this court, are triable de novo . . . subject, however, to the condition that when the evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite." *Tilden v. Beckmann,* 203 Neb. 293, 297-98, 278 N.W.2d 581, 584-85 (1979). "It is the duty of this court, on review of the findings made by a trial court when it has made an inspection of the premises and has given consideration to the competent and relevant facts revealed thereby, to give weight thereto." *Rolfsmeyer v. Seward County,* 182 Neb. 348, 355, 154 N.W.2d 752, 757 (1967).

We are convinced that whatever ponding occurs on

defendant's land is, at most, seasonal and, even if it is considered a basin wherein waters flow, such water normally disappears through evaporation or percolation. Thus, there is no permanent pond or lake.

We also determine that the waters involved are surface waters. "Surface waters are waters which appear upon the surface of the ground in a diffused state, with no permanent source of supply or regular course, which ordinarily result from rainfall or melting snow." *Kuta v. Flynn*, 182 Neb. 479, 481, 155 N.W.2d 795, 797 (1968); *Rolfsmeyer v. Seward County* at 350, 154 N.W.2d at 754.

There is no question but that these are waters from rains and melting snow. The law in Nebraska is that "[d]iffused surface waters, which ordinarily result from rainfall and melting snow and having no permanent source of supply or regular course, may be dammed, diverted, or otherwise repelled by an adjoining landowner without liability, if it is necessary and done without negligence." *Kuta v. Flynn* (syllabus of the court).

It is obvious the waters have no permanent source of supply. They also have no regular course. As the lands in the area were turned to irrigation, numerous and substantial changes were made to divert and contain surface waters to maximize the use of the land for growing crops. Plaintiffs' 80-acre tract (Tract 1) long ago had an irregular natural drainage south to north which took the waters on into their 160-acre tract (Tract 2) and into a natural basin in the area of the north culvert, on both sides of the road. Eventually, dikes were built along the road on both the Beukenhorst Tract and on plaintiffs' Tract 2 and considerable leveling was done. Also, a large dike was built east and west along the boundary between plaintiffs' Tracts 1 and 2. These combined changes stopped the previous course of the waters to the basin at the north culvert. Now plaintiffs collect the surface waters on their north tract in an irrigation pit built there in 1966. They could

also empty the flow of surface water on their south tract through a culvert in the dike separating their two tracts into the same irrigation pit, but they have elected not to do this but instead to allow these waters to accumulate in the low area around the south culvert. We find that these waters are diffuse surface waters and do not drain into a permanent pond or lake. We, therefore, conclude that, to whatever extent defendant's dike may repel these waters, the defendant is well within his rights to maintain it.

Plaintiffs finally assign as error the refusal of the trial court to consider newly discovered evidence as a ground for their motion for new trial. The evidence consisted of four photographs, one taken on March 26, 1979, and three taken in May 1979, all being evidence obtained after trial of the case. The photograph taken in late March shows a small break in defendant's dike and a considerable amount of water accumulated to the east of the dike on defendant's land.

"[E]vidence of facts happening after trial ordinarily cannot be considered as newly discovered evidence on which to justify the granting of a new trial." *Wagner v. Loup River Public Power District*, 150 Neb. 7, 12, 33 N.W.2d 300, 303 (1948). "A new trial will not be granted on the ground of newly discovered evidence where it appears that such evidence was not available at the time of the trial, but rather the result of changed conditions since." *Id.* at 11, 33 N.W.2d at 303. "In any but a very extraordinary case in which an utter failure of justice will unequivocally result, a verdict on the evidence at the trial will not be set aside and a new trial granted on the basis of evidence of facts occurring subsequent to such trial." *Id.* at 12, 33 N.W.2d at 304.

We find no merit to this assignment. There is nothing extraordinary about the case or this evidence. At trial, there was evidence that waters had accumulated on defendant's land in previous years from rains and spring thawing of snow. The key issue is whether such accumulations of water were diffuse surface waters

flowing into a permanent pond or lake. We have held they are not, notwithstanding that such accumulations may occur in any given spring of a year. Therefore, this evidence does not help plaintiffs. Moreover, we note that plaintiffs themselves in their motion for new trial state that "such evidence was available to the Judge at the time he viewed the scene ...." What the trial judge observed is a matter of evidence whether or not his findings thereof are recorded. If the condition in the picture taken March 26, 1979, was there when the trial judge viewed the area, then such evidence is cumulative, at best, and the trial court was well within its discretion in refusing to receive the photographs.

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

AFFIRMED.

IRENE LOVELACE AND CLIFFORD LOVELACE, WIFE AND HUSBAND, APPELLEES, V. RAYMOND T. STERN, APPELLANT.

297 N.W.2d 160

Filed October 3, 1980. No. 42800.

1. **Contracts: Interest Rates.** A written instrument which provides for payment of interest on an unpaid balance, but without specifying the rate, carries interest at the legal rate prescribed by law.
2. **Parol Evidence Rule.** A written instrument is open to explanation by parol evidence when its terms are susceptible to two constructions, or where the language employed is vague or ambiguous.
3. ——. A provision of the contract is ambiguous when, considered with other pertinent provisions as a whole, it is capable of being understood in more senses than one.
4. **Equity: Appeal and Error.** Actions in equity, on appeal to this court, are triable de novo subject, however, to the condition that when the evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testify-

ing and must have accepted one version of the facts rather than the opposite.

5. **Contracts: Intent of Parties.** The interpretation given a contract by the parties themselves, while engaged in their performance of it, is one of the best indications of their true intent.

Appeal from the District Court for Merrick County: JOHN C. WHITEHEAD, Judge. Reversed and remanded with directions.

R. Steven Geshell of Robak and Geshell for appellant.

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

Heard before BOSLAUGH, BRODKEY, and HASTINGS, JJ., and BUCKLEY and WINDRUM, District Judges.

BUCKLEY, District Judge.

This action arises from a 1966 contract for the sale of certain real estate in Merrick County, Nebraska, by Irene Lovelace and her husband, Clifford Lovelace, to Irene's nephew, Raymond T. Stern. The written contract provided for a total purchase price of $48,000 payable by annual payments of $4,000 until paid.

Stern made 12 annual $4,000 payments and contended that he had paid the purchase price in full. He refused to make further payments. The Lovelaces contended that interest accrued on the unpaid balance of the purchase price and that, therefore, the purchase price was not fully paid, and proceeded to bring this action to regain possession and title to the property or, in the alternative, for a judgment for the unpaid balance of the purchase price. Defendant Stern counterclaimed for title to be quieted in his name.

The sole question presented is whether the written contract required interest to be paid on the unpaid balance of the purchase price. The trial court found for the plaintiffs, entered judgment for the amount of the unpaid purchase price, namely, $27,833.71, and dismissed defendant's counterclaim.

The agreement in question was executed on January

4, 1966. However, the same parties only months before, namely on September 14, 1965, had executed an agreement for the sale of the same property, utilizing a preprinted form entitled "Agreement for Warranty Deed." This agreement did not specify a total purchase price but provided that "The second parties [Stern] shall pay to the first parties [Lovelace], the sum of $4,000.00 per year during the life of Irene Johnson Lovelace. Second parties will pay the sum of $2,000.00 January 1, 1966 and $2,000.00 July 1, 1966 and $4,000.00 on January 1, 1967 and each January 1st thereafter during the lifetime of the said Irene Johnson Lovelace."

The new agreement, the one in question, utilized the same preprinted form as the earlier one. After the usual recitation as to the parties and a typed-in description of the premises being sold, the agreement then recited (typing indicated by italics): "And the said party of the second part covenants and agrees to pay to said party of the first part, the sum of *Forty Eight Thousand Dollars ($48,000.00)* DOLLARS in the manner following: *Two Thousand Dollars (2,000.00* Dollars, cash in hand paid, the receipt whereof is hereby acknowledged, and the balance *$2,000.00 July 1, 1966, $4,000.00, January 1, 1967 and each January 1st thereafter until paid.*" Then, continuing in the large blank space provided for payment provisions, there is typed: "*First parties agree to pay the first half of the 1965 real estate taxes and second party shall pay the second half and all future real estate taxes.*"

Following this provision, and considerably below it, the preprinted form resumed as follows: "with interest at the rate of _____ per cent per annum, payable _____ annually on the whole sum remaining from time to time unpaid, and to pay all taxes, assessments or impositions that may be legally levied or imposed upon said land, subsequent to the year _____."

The agreement provided that, when the purchase price was paid, the plaintiffs would convey the property by warranty deed to the defendant. However, for

reasons unknown, such a warranty deed was executed, delivered, and recorded on January 4, 1966, simultaneously with the execution of the agreement to sell. The deed did not mention the agreement to sell and recited a consideration of $48,000, "in hand paid."

The interest clause in the contract did not provide for any specific rate of interest to be paid. It is true, as plaintiffs contend, that as a general rule, a written instrument which provides for payment of interest on an unpaid balance, but without specifying the rate, carries interest at the legal rate prescribed by law. See, *Hornstein v. Cifuno*, 86 Neb. 103, 125 N.W. 136 (1910); *Praest v. Quesner*, 113 Neb. 485, 203 N.W. 549 (1925); *Bank v. Roberts*, 168 N.C. 473, 84 S.E. 706 (1915). In each of these cases, it was clear from the terms of the instrument that interest was to be paid but the specific rate of interest was omitted. However, where the terms of the agreement do not clearly indicate that interest is to be paid, then parol evidence may be considered to first determine, as a finding of fact, whether the parties intended that interest be paid, before the general rule would apply.

A written instrument is open to explanation by parol evidence when its terms are susceptible to two constructions, or where the language employed is vague or ambiguous. *Olds v. Jamison*, 195 Neb. 388, 238 N.W.2d 459 (1976). A provision of a contract is ambiguous when, considered with other pertinent provisions as a whole, it is capable of being understood in more senses than one. *Frank McGill, Inc. v. Nucor Corp.*, 195 Neb. 448, 238 N.W.2d 894 (1976).

Examining the agreement in question, we see that the preprinted form that was used obviously was designed to provide a blank space for the insertion of the payment provisions for the balance of the total purchase price, to be followed immediately thereafter with a designated rate of interest. The blank space was not designed to include the provisions for the payment of taxes inserted by the parties inasmuch as there is

already a preprinted provision for the payment of taxes by the purchaser. The inserted tax provision is in conflict with the preprinted tax provision, and its position in the agreement, namely, between the payment provisions and the preprinted interest clause, makes it unclear whether the interest clause would pertain to the unpaid balance of the purchase price, or any unpaid taxes, or both. We, therefore, conclude that the provisions involved and their relative positions in the agreement are vague, and as such, are capable of being understood in more senses than one and are susceptible to more than one construction. The contract is ambiguous and parol evidence was properly admitted by the trial court and should be considered by this court.

This action was instituted as an equity action and prayed for equitable relief, as did also the counterclaim. "Actions in equity, on appeal to this court, are triable de novo in conformity with section 25-1925, R. S. 1943, subject, however, to the condition that when the evidence on material questions of fact is in irreconcilable conflict this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite." *Sopcich v. Tangeman*, 153 Neb. 506, 510-11, 45 N.W.2d 478, 481-82 (1951). See, also, *Tilden v. Beckmann*, 203 Neb. 293, 278 N.W.2d 581 (1979). Giving such deference to the trial court, nonetheless, after considering all the evidence, we are convinced that the parties did not intend that any interest be paid on the unpaid balance of the purchase price, and, accordingly, we must reverse.

The attorney handling the two agreements had no independent recollection of anything whatsoever. Clifford Lovelace testified that no discussion was had regarding interest when the agreement in question was executed. Irene Lovelace could recall nothing regarding interest. The defendant testified that when the agreement in question was signed, Irene stated that no interest was to be charged on the sale.

The earlier agreement between the parties becomes very significant. There the agreement simply provided that the defendant would pay to Irene, his aunt, $4,000 per year during her life. The same preprinted form was utilized and the same payment of tax provision was inserted, followed again by the preprinted interest clause with no interest inserted. It is obvious that such a payment provision would not draw interest inasmuch as there could be no unpaid balance upon which interest could accrue (unless the required payments became delinquent, a matter the parties would be presumed not to contemplate).

The second agreement is identical to the first, except that the total purchase price became fixed at $48,000. The parties and their lawyer could not recall why the second agreement was substituted for the first except that there is evidence that it was done for tax purposes. The determination of $48,000 as the fixed amount is not difficult to understand when one considers that at the time of the first agreement, Irene Lovelace had a mortality table life expectancy of 12 years, making the total annual payments based on such expectancy $48,000. There was no evidence whatsoever that would suggest that, between the execution of the first and second agreements, the parties decided to impose interest on the unpaid balance.

The defendant's testimony that his aunt stated that no interest was to be paid is indirectly corroborated by her testimony. At the time of trial, she was 77 years old and her testimony clearly shows that she not only had no understanding of why the second agreement was substituted for the first, but had little understanding of why the litigation and trial ensued. She was very fond of her nephew, even at time of trial, wanted him to have the land, and only understood that she was to be paid $4,000 per year so she would have something to live on.

The court may also look on the interpretation placed on the contract during the period of performance. *Knight Bros., Inc. v. State*, 189 Neb. 64, 199 N.W.2d

720 (1972). Defendant made the required annual payments promptly. There is no evidence that, at any time following the execution of the agreement in question, the matter of interest was ever discussed between the parties or otherwise. Defendant made his 12th and last payment on January 2, 1977. The following year, in January 1978, Irene's husband inquired about the missing payment and was advised by defendant that he had completed his required payments on the contract. No claim that there was any balance due because of interest accrued was made at that time, but shortly thereafter defendant received a letter from an attorney plaintiffs had contacted, stating that the contract required interest at 6 percent per annum on the unpaid balance and enclosing a payment schedule which he prepared showing the amount allocated to principal and interest on the payments made and showing a balance due of $26,000. This was the first indication of any claimed payment schedule or any indication of a declining unpaid balance for allocation of principal and interest on the $4,000 annual payments. It is a reasonable conclusion that the plaintiff and her husband were always under the misunderstanding that plaintiff would receive, in effect, a lifetime annuity of $4,000 per year, whether she died a year after the execution of the agreement or 30 years later.

The warranty deed delivered at the time of the agreement to sell, rather than after the total purchase price was paid, acknowledged a total consideration of $48,000, "in hand paid." While that was not the fact then, it suggests the total sum plaintiffs were to receive.

In addition, the fact that in this case the preprinted interest clause is totally out of any grammatical context with the payment provisions, with the space for insertion of the rate of interest left blank, is evidence that the interest clause was not intended to be operative, any more than the preprinted payment of taxes clause immediately thereafter was intended to be operative.

We, therefore, conclude that the parties intended that the defendant pay his aunt a total of $48,000 in

12 annual $4,000 payments, the equivalent of the lifetime annuity provided for in the first agreement, and that, therefore, no interest was to accrue on any unpaid balance. The judgment is reversed with directions to dismiss plaintiffs' petition and to enter judgment for the defendant on his counterclaim.

REVERSED AND REMANDED WITH DIRECTIONS.

WINDRUM, District Judge, concurring.

I concur in the opinion of the Honorable Judge Buckley and adopt his reasoning as expressed therein, with additional comments, except where in conflict herewith.

I have no quarrel with the general principle of law that where interest is provided for but the rate is not mentioned, the legal rate is to be paid. I do believe, however, that where interest is provided for but the rate thereof is "_____," there is a patent ambiguity.

In 1910, in the case entitled *Hornstein v. Cifuno*, 86 Neb. 103, 125 N.W. 136 (1910), the court was called upon to determine whether or not the legal rate of interest was due and payable from the maker of the following note, to wit: "$400. Omaha, Neb., Jan. 4, 1907. One year after date we promise to pay to the order of Liberato Varriano four hundred and no-100 dollars at Omaha, Nebraska. Value received with interest at the rate of _____ per cent. per annum from _____ until paid. . . ." *Id.* at 104, 125 N.W. at 136.

Chief Justice Reese, in writing the opinion, stated that the legal effect of such a note was the same as if there had been a period after the word "interest" and all the rest of the note would be disregarded. Many cases cite this case with approval. I submit that the court changed the agreement of the parties by placing a period after the word "interest" as the note still said "Value received with interest at the rate of _____ per cent. per annum from _____ until paid," no matter what the court said it said. That is entirely different than stating "Value received with interest." The ambiguity lies in that the parties could have intended that the note draw interest at the legal rate or that the

parties could have intended that the note draw interest at the rate of ____ percent, which, in effect, would be no interest.

From the *Hornstein v. Cifuno* case it was an easy step to announce as a principle of law "A promissory note which, by its terms, provides for interest from date, without any specified rate, bears interest at the rate of 7 per cent. per annum from its date." Such was syllabus point no. 2 in *Praest v. Quesner*, 113 Neb. 485, 203 N.W. 549 (1925).

The notes there construed provided for interest at the printed rate of 10 percent. However, the word "ten," indicating the rate of interest, was stricken and nothing was inserted in lieu thereof.

Obviously, the legal rate of interest in 1925, at the time that case was decided, was 7 percent. Suppose that the printed rate in the note had been 7 percent: would the holding have been the same? I do not believe so, as it would have resulted in the anomalous situation of determining that, while the rate of interest was stricken by the parties, the parties intended the note to draw interest at the same rate, notwithstanding that the rate of interest was so stricken by the parties. Such reasoning would be ludicrous. However, the case cited as authority was *Hornstein v. Cifuno, supra.*

I realize that the two cases involved different situations. However, *Praest v. Quesner* is analyzed to point out the fallacious reasoning thereof, which is an extension of the fallacious reasoning in the case of *Hornstein v. Cifuno.*

It is the experience of the writer of this opinion that these problems are generally generated when printed notes are utilized between close members of the family and, oftentimes, there is no interest whatsoever intended. It would seem to the writer of this concurring opinion that it would be a better rule of law that, where a note provides for interest at the rate of "____ percent," it shall be construed as patently ambiguous and parol evidence would be admissible

to determine the intent of the parties. Anyone signing such a note or receiving such a note could expect that a lawsuit would ensue. Both the payee and the maker would be inconvenienced by their carelessness. Under the present rule of law in Nebraska, the payee of the note always recovers interest at the legal rate, regardless of the actual intent of the parties, and the maker has no recourse whatsoever. Such a rule is patently unfair. Why should the law favor one over the other? To do so completely ignores the common experience of mankind.

The legal principles announced in *Hornstein v. Cifuno, supra,* and *Praest v. Quesner, supra,* were erroneous when pronounced and should be overruled. The principles therein announced do not become more valid with age.

BRODKEY, J., dissenting.

I must respectfully dissent from the opinion of the majority of the division in this court. Not only do I feel that it has applied incorrect legal principles concerning Nebraska statutory provisions, but I feel the result is highly inequitable.

I start my discussion with a consideration of the scope of review by this court applicable to this case. This action was initiated as an equity action and prayed for equitable relief, as does also the counterclaim. The rule is well established that: "Actions in equity, on appeal to this court, are triable de novo in conformity with section 25-1925, R. S. 1943, subject, however, to the condition that when the evidence on material questions of fact is in irreconcilable conflict this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and must have accepted one version of the facts rather than the opposite." *Sopcich v. Tangeman,* 153 Neb. 506, 510-11, 45 N.W.2d 478, 481-82 (1951). See, also, *Tilden v. Beckmann,* 203 Neb. 293, 278 N.W.2d 581 (1979).

The record evidences that conflicting testimony was adduced with regard to whether interest was payable under the January 4, 1966, contract. The attorney who drafted both of the agreements, and the deed, had no independent recollection of the transaction. Irene Lovelace testified that at the time the second contract was executed she could not remember any discussion regarding interest or payment in regard to the sale of the land. Clifford Lovelace's testimony is conflicting with regard to whether or not he was present at the execution of the second contract, and he offered no testimony with regard to the payment of interest under the terms of the contract. Only the defendant, Raymond Stern, testified that at the signing of the January 4, 1966, contract, Irene Lovelace stated that no interest was to be charged on the sale of the land. Keeping in mind the aforementioned standard of review, we conclude that the evidence is conflicting, and that the conclusion of the trial court, to wit, that the parties intended that interest should be paid, must be given deference by this court.

Under the facts of this case, I believe that Stern is liable as a matter of law for the payment of interest on the unpaid purchase price. Neb. Rev. Stat. § 45-104 (Reissue 1978) provided, in pertinent part: "On money due on any instrument in writing, . . . interest shall be allowed at the rate of six per cent per annum." It is a general rule that contracting parties are presumed to contract in reference to existing law and that all applicable and valid statutes existing at the time a contract is made, become a part of the contract and must be read into it. *McWilliams v. Griffin*, 132 Neb. 753, 273 N.W. 209 (1937).

This court has also had the opportunity to examine and rule upon a situation very similar to that presented in this action. *Hornstein v. Cifuno*, 86 Neb. 103, 125 N.W. 136 (1910), involved an action which was instituted to foreclose a real estate mortgage given as security for a note wherein the rate of interest to be

charged was left blank. The provision in question read as follows: "Value received with interest at the rate of _____ per cent. per annum from _____ until paid." In finding that the note drew interest at the legal rate from the date of the decree, the court stated: "As is shown by the copy of the note above set out, the blanks for the statement of the rate of interest and the date from which the interest would run were not filled in at the time of the execution of the note, and the legal effect would be the same as if there had been nothing written or printed after the word 'interest', and the reading of the note would be to pay 'interest until paid.' This would cause the debt to draw interest at the legal rate of 7 per cent. per annum from the date of the note. [Citations omitted.]" *Id.* at 104, 125 N.W. at 136. See, also, *Praest v. Quesner*, 113 Neb. 485, 203 N.W. 549 (1925); *Traudt v. Nebraska P. P. Dist.*, 197 Neb. 765, 251 N.W. 2d 148 (1977).

In his concurring opinion, Windrum, District Judge, would have us overrule our previously announced law as set forth in the foregoing cases, which has been the law of this state for over 40 years. I see no reason for doing so and would be opposed to his suggestion that we do so in this case. The rule stated in *Hornstein v. Cifuno, supra*, is clearly the general rule in this country, and should be adhered to. See 45 Am. Jur. 2d *Interest and Usury* § 68 (1969).

The majority opinion argues and would have us conclude that it was not intended that interest be paid by the defendant under the contract dated January 4, 1966. In support of this proposition, the majority argues that a tax provision inserted by the parties is in conflict with the preprinted tax provision and that its position in the contract, between the payment provision and the preprinted interest clause, creates ambiguity so as to open the contract to parol evidence on the issue of whether interest is payable under the contract. I find this argument untenable. The rule is well settled that where part of a contract is written or typed and

part is printed, and the typed parts appear to be inconsistent with the preprinted provisions, the typed provisions prevail. *First Nat. Bank v. Greenlee*, 102 Neb. 180, 166 N.W. 559 (1918). The rationale for this rule is that the typed words are the immediate language and terms selected by the parties themselves for the expression of their meaning. This rule, however, is resorted to only from necessity when the typed clauses and the printed clauses cannot be reconciled. When the typed and printed parts may be reconciled by reasonable construction, that construction must be given effect, because it cannot be assumed that the parties intended to insert ineffective provisions. 17 Am. Jur. 2d *Contracts* § 271 (1964). I am of the opinion that the tax provision inserted by the parties in the January 4, 1966, contract is a clear expression of their respective obligations thereunder, and the terms do not create "irreconcilable" conflict so as to make the contract ambiguous as to the payment of interest. I cannot agree with the argument that the location of the tax provision, or the punctuation used, creates ambiguity within the contract terms. While punctuation in a contract may be resorted to in order to solve an ambiguity, punctuation or the absence thereof, cannot of itself create ambiguity. 17 Am. Jur. 2d *Contracts* § 279 (1964).

We must also bear in mind the general rule that: "Absent any stipulation to the contrary, the purchaser has a right to possession or the rents and profits of the land and the vendor a right to *interest on the unpaid purchase price.* The fruits of possession and the interest are mutually exclusive—*there is no right upon the part of either to have both.*" *Bembridge v. Miller*, 235 Or. 396, 408, 385 P. 2d 172, 178 (1963) (emphasis supplied). See, also, *McCleneghan v. Powell*, 105 Neb. 306, 180 N.W. 576 (1920). The trial court found from the evidence that the parties intended interest to be included in the contract. I agree, and would find that Stern should be obligated to pay interest at the legal rate of 6 percent on the unpaid balance of the contract.

J. PHILLIP MAHONEY, APPELLANT, V. ALVAN MAY, APPELLEE.

297 N.W.2d 157

Filed October 3, 1980. No. 42783.

1. **Trials: Pleadings.** 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. **Jury Instructions: Appeal and Error.** Ordinarily, the failure to object to instructions after they have been submitted to counsel for review will preclude raising an objection on appeal.
3. **Jury Instructions.** 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. **Motions for New Trial: Appeal and Error.** Alleged errors of the trial court in an action at law which are not referred to in a motion for new trial will not be considered on appeal in this court.
5. **Contracts: Parol Evidence Rule.** A written instrument is open to explanation by parol evidence where its terms are susceptible of two constructions or where the language employed is vague or ambiguous.

Appeal from the District Court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed.

Douglas L. Curry of Ginsburg, Rosenberg, Ginsburg, Cathcart, Curry & Gordon for appellant.

John B. McCauley of Law Offices of Kenneth Cobb, P.C., for appellee.

Heard before MCCOWN and WHITE, JJ., and COLWELL, KORTUM, and GRANT, District Judges.

KORTUM, District Judge.

This is an action for money judgment by the plaintiff, J. Phillip Mahoney, against the defendant, Alvan May, for loss of profit on an agreement for sale of real estate.

The jury returned a verdict for the defendant and the plaintiff appeals. We affirm the judgment of the District Court.

Prior to the spring of 1977, May owned an 80-acre parcel of land called Tract II. In March of 1976, May had discussions with a real estate agent, Larry Majewski, about the possibility of a trade of Tract II. Nothing resulted from this discussion.

Approximately a year later, May contacted Majewski. May wanted Majewski to find someone who would buy Tract I, a 157-acre tract owned by the Hornby estate, and exchange it with May for Tract II.

On April 6, 1977, May and Mahoney entered into the following agreement:

"AGREEMENT

"This agreement made between Alvan May and J. Phillip Mahoney on this 6th day of April 1977, for the purpose of exchanging parcels of land.

"Whereas, Alvan May has a parcel of 157 acres purchased known as the SE ¼ of Section 16, Township 10 North, Range 8 East of the 6th P.M., Lancaster County, Nebraska, Tract I and Whereas Alvan May owns the 80 acres known as the W ½ of the SW ¼ of Section 8, Township 8 Range 8, Lancaster County, Nebraska Tract II. And where Alvan May wishes to exchange the properties with J. Phillip Mahoney. J. Phillip Mahoney will purchase Tract I and exchange for Tract II.

"Tract I purchase price is $188,000.00 with $54,520.00 down payment and the balance over 5 years at 7 ½% interest. J. Phillip Mahoney agrees to pay the balance of $17,480.00 plus interest at 7 ½% on the 1st payment due on Tract I.

"This transaction is contingent upon adequate quality and quantity water availability. A test well to be drilled by April 12, 1977 on Tract II, or this agreement is null and void."

On April 13, 1977, the Hornby estate refused to sell Tract I to Mahoney. On April 14, 1977, a buyer accepted an offer by Mahoney to sell Tract II. May refused to sell Tract II to Mahoney since Mahoney had failed to obtain Tract I to complete the trade of land. Mahoney then brought suit for his loss of profit in his proposed sale of Tract II.

Plaintiff first assigns as error the action of the trial court allowing the defendant to file a second amended answer and allowing further amendment of his answer by interlineation during the course of the trial.

Neb. Rev. Stat. §25-852 (Reissue 1979) provides, in substance, that the court may, in furtherance of justice, amend any pleading, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved.

The decision to allow or deny a proposed amendment to the pleadings rests in the sound discretion of the trial court. *Greenberg v. Bishop Clarkson Memorial Hospital*, 201 Neb. 215, 266 N.W.2d 902 (1978); *Swartz v. Peterson*, 199 Neb. 171, 256 N.W.2d 681 (1977).

The amendments allowed by the trial court both related to the defense that the contract was subject to a condition precedent, this condition being the purchase by Mahoney of Tract I to enable the tax-free trade of Tracts I and II between the parties. This specific defense was first raised by the defendant in his original answer. We do not believe that the plaintiff was put at a disadvantage or prejudiced or that the trial court abused its discretion in allowing such amendments.

Plaintiff further assigns as error certain instructions given by the trial court, specifically Nos. 4(a) and 14.

Instruction No. 4(a) dealt with the defense raised by the defendant of the condition precedent claimed to exist in the contract. No objection was made at the time of submission of this instruction by the trial court, although the record clearly indicates the plaintiff was afforded the opportunity to do so.

Instruction No. 14 also deals with conditions precedent. It is as follows:

"You are instructed that in negotiating a contract the parties may impose any condition precedent, a performance of which condition is essential before the parties become bound by the agreement. A promise, or

the making of a contract, may be conditioned upon the act or will of a third person.

"On the other hand, one make a contract which cannot be performed without the consent or cooperation of a third party, and such factor does not relieve the party of liability because of his inability of receiving the required cooperation of a third person. However, if the securing of the act of a third person is a condition precedent to the entire contract then the performance of the condition is essential to the enforcement of the contract." Again, the plaintiff made no objection to instruction No. 14 at the time of submission by the trial court.

Ordinarily, the failure to object to instructions after they have been submitted to counsel for review will preclude raising an objection on appeal. *National Bank of Commerce Trust & Sav. Assn. v. Katleman*, 201 Neb. 165, 266 N.W.2d 736 (1978).

However, in reviewing instruction Nos. 4(a) and 14, we find no plain error or probable miscarriage of justice. Plaintiff complains of the omission of the word "may" in the first line of the second paragraph of instruction No. 14. It is apparent that the word "may" should have been between the words "one" and "make" and had been crossed out by the trial court prior to giving the instruction.

In *Greenberg v. Bishop Clarkson Memorial Hospital, supra*, this court discussed grammatical errors in instructions and held that 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.

Instruction No. 14 was reasonably clear and the grammatical error was harmless and not prejudicial.

There is ample evidence in the record to support the contention of the defendant that the obtaining of Tract I by Mahoney was a condition precedent, and the trial court properly instructed the jury on this issue by the giving of instruction Nos. 4(a) and 14.

Plaintiff further contends that the trial court erred in giving instruction No. 13 to the jury. The basis for the objection by plaintiff's counsel was that the instruction was irrelevant and immaterial to the issues before the court. The alleged error was not raised or referred to in the motion for new trial. It is 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). Additionally, we find no probable miscarriage of justice or plain error in the giving of instruction No. 13 by the trial court which would necessitate a new trial.

Plaintiff's final assignment of error concerns the failure of the trial court to enter a directed verdict for the plaintiff notwithstanding the verdict of the jury. This contention relates itself to the issue of the admissibility of parol evidence to explain the agreement between the parties. A written instrument is open to explanation by parol evidence where its terms are susceptible of two constructions or where the language employed is vague or ambiguous. *Ely Constr. Co. v. S & S Corp.*, 184 Neb. 59, 165 N.W.2d 562 (1969). Parol evidence is generally admissible where it is offered for the purpose of explaining and showing the true nature of the transaction between the parties. *Ranchland Auto, Inc. v. Cleveland*, 188 Neb. 804, 199 N.W.2d 702 (1972). The contract in this case, on its face, is ambiguous as it relates to the ownership of Tract I.

It is clear from the record that May never intended to sell Tract II to Mahoney unless Mahoney first obtained Tract I, and the parties would then exchange the tracts for tax purposes. It is also clear that Mahoney understood and agreed to this arrangement.

We find no error in the record. The judgment of the trial court is correct and is affirmed.

AFFIRMED.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

SEPTEMBER TERM, 1980

MICHAEL G. DEACON, APPELLEE, V.
KRISTENA LEE DEACON, NOW KNOWN AS
KRISTENA LEE KLINE, APPELLANT.
297 N.W.2d 757

Filed October 10, 1980. No. 42775.

1. **Visitation: Courts: Stipulations.** It is the responsibility of the trial court to determine questions of custody and visitation of minor children according to their best interests. This is an independent responsibility and cannot be controlled by the agreement or stipulation of the parties themselves or by third parties.
2. **Visitation: Courts.** It is an abuse of discretion for a trial court to delegate to a psychologist or third party the authority to determine when and if visitation can be had by the noncustodial parent.
3. **Disqualification of Judges.** A party seeking to disqualify a trial judge must show that the motion comes within the provisions of Neb. Rev. Stat. § 24-315 (Reissue 1979).
4. **Divorce: Child Custody; Guardians ad Litem.** The District Court in its discretion may appoint an attorney to protect the interests of any minor child of the parties to an action to dissolve a marriage. The limits of discretion depend on the circumstances.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Reversed and remanded with directions.

Charles I. Scudder for appellant.

Richard M. Fellman for appellee.

Heard before WHITE and MCCOWN, JJ., and COLWELL, STANLEY, and SPRAGUE, District Judges.

STANLEY, District Judge.

The appellant, Kristena Lee Kline, formerly Deacon, has appealed from an order of the trial court on her application for specific visitation privileges with her two minor children.

The appellee had been granted a divorce from the appellant on November 2, 1971, on the ground of extreme cruelty. Two children are the issue of that marriage, Michele Leann, age 5, and Marnie Lynn, age 2, at the time of the divorce. The parties stipulated to the terms of the divorce that awarded custody of the children to the father with extended visitation rights to the mother.

Subsequent to the divorce, a dispute arose as to the frequency and duration of visitation privileges. On November 15, 1977, appellant petitioned the trial court for modification of the decree pertaining to custody. On May 5, 1978, after a hearing on appellant's application for modification, the trial court entered an order retaining the reasonable visitation privileges in the divorce decree, and further found that specific visitation should be allowed every fourth Sunday from noon until 5:30 p.m. away from the homes of the appellant and appellee, subject to the requirement that the minor children should, in every instance, consent to the visitation. Thereafter, the appellant filed an application alleging a change in circumstances of her visitation with her children, and that the court's order was not in the best interests of the children. She further requested the court to appoint a guardian ad litem to represent the interests of the children, and for the court to appoint a psychologist. The court declined to appoint a guardian ad litem but took no action on the request for a psychologist and, upon appellee's answer to the application, a hearing was held. Prior to a ruling by the court, the appellant filed an objection and motion for the court to disqualify itself and to declare a mistrial. The motion was heard on April 5, 1979, and overruled. On April 19, 1979, the court entered an order denying

appellant's request for specific visitation privileges, and ordered the appellant and the children to attend psychological counseling. The psychologist was to be agreed upon by the parties or, in the event they could not agree, the court would appoint one. The court also ordered that the appellee need not attend counseling unless requested to do so by the psychologist. As a part of the order, the court denied each party's application for attorney fees and costs.

Appellant moved for a new trial on the court's ruling. Appellee requested a new trial on the issue of attorney fees. While the motions were pending, the appellant requested the court to appoint a psychologist, and appellee requested child support from the appellant. The trial court overruled the respective motions for a new trial, declined to appoint a psychologist, and deferred the matter of child support. Appellant appeals to this court, assigning as error: (1) The court abused its discretion when it gave a psychologist power to determine the nature and extent of visitation between appellant and her children; (2) The court erred in denying appellant's right to visitation from the evidence submitted; (3) The court erred in refusing to disqualify itself and to declare a mistrial; and (4) The court erred in failing to sustain appellant's motion for appointment of a guardian ad litem.

Appellant claims that the trial judge should have disqualified himself and declared a mistrial. The basis for the request was that appellee's attorney had sent to the court a personal letter received by him from the appellee. The showing made by appellant fails to come within the provisions of Neb. Rev. Stat. § 24-315 (Reissue 1979). Also, in an equity suit, denial by the District Court of disqualification is immaterial on appeal since the case is tried de novo in the reviewing court. *Lippincott v. Lippincott*, 144 Neb. 486, 13 N.W.2d 721 (1944). The discretion of the trial judge in refusing to disqualify himself and to declare a mistrial was not an abuse of discretion.

As to appellant's contention that the trial court should have appointed a guardian ad litem for the minor children, the District Court, in its discretion, may appoint an attorney to protect the interests of any minor children of the parties. Neb. Rev. Stat. § 42-358 (Reissue 1978). The limits on the discretion must evolve case by case. *Pieck v. Pieck*, 190 Neb. 419, 209 N.W.2d 191 (1973). Upon a de novo review of the issue presented to us, we find there was adequate representation by counsel for the parties and an independent investigation by the trial court. These factors, together with the court's continuing jurisdiction over the minor children, adequately protect the children's interests and render unnecessary the extra expense and delay. *Ford v. Ford*, 191 Neb. 548, 216 N.W.2d 176 (1974). There is no error in the trial court's refusal to appoint a guardian ad litem.

In cases involving determination of visitation privileges of a parent with minor children, findings of a trial court, both as to the evaluation of the evidence and as to the matter of visitation privileges, will not be disturbed on appeal unless there is a clear abuse of discretion or the findings are contrary to the evidence. Such findings are subject to review by this court de novo on the record. *Casper v. Casper*, 198 Neb. 615, 254 N.W.2d 407 (1977).

Although the trial court awarded the divorce on the basis of acts which occurred in 1971, it determined custody and visitation as specifically negotiated by the parties. We must, therefore, consider the change in circumstances of the visitation privileges since the divorce.

Appellant claims that shortly after the divorce she began experiencing difficulties in arranging the frequency and duration of her visitation rights in that appellee refused to allow her to have the children for a full day and, after setting up visitation periods, he would abruptly cancel them or fail to have the children available. Also, while denying her extended visitation,

he customarily allowed the children to stay with their paternal grandparents in Michigan for a period of 4 to 6 weeks each summer. Thus, by his actions, appellee always decided if and when the mother would have access to her children. That, by a combination of appellee's actions and the pending court order, she has not had personal visitation with her children since December 1977. All these factors are alleged as being contrary to the visitation provisions of the divorce decree.

Appellant alleges as changes in circumstances that she has remarried and established a suitable home and that she and her husband love the children and can provide for their emotional, physical, and financial needs during visitation periods. Further, as a fit and proper person, she is entitled to reasonable visitation rights as granted in the decree of divorce.

Appellee responds by stating he has had full-time care of the children since the divorce in 1971, and the children today have very little actual relationship with their mother; that the children have frequently indicated a lack of desire to visit with their mother and have relayed their feelings of unhappiness following visitation with the appellant and her husband. He further states that the appellant has lost touch with the children but continues to try to force their affection which results in placing a strain on the children that is dangerous to their welfare. Appellee admits that since December 1977 he has not required the children to visit their mother, but has left that decision up to them.

A psychologist testified that he had known the appellant for several years and on occasion had observed the children with the appellant. As a friend, and not on a professional basis, he viewed the relationship as normal. Based on his knowledge of the sequence of events that have occurred, it was his opinion that the children should be exposed to their mother in her home so that a relationship could be established. A pastor of

the church parish, where the appellee and children attend, stated he was aware of the visitation problem. The children had told him they did not want to visit their mother, and he advised appellee to abide by the children's wishes. A psychologist evaluated both children, Marnie Deacon, at age 10, and Michele Deacon, at age 12. His summary and recommendations were that both children were normal; that their present home was a pleasant and happy place, while appellant's home was an unpleasant place to visit; that he would not recommend forcing the children to visit their mother at this time because it would further alienate them; and that attitudes can be changed and it might be possible to help the children develop better attitudes toward their mother with the eventual outcome of establishing fruitful visitation. In order to accomplish this, the appellant and her husband would have to change their behavior toward the children and that might require counseling on their part.

Appellee asserts that visitation was not terminated by the trial court, but a condition to visitation was ordered for the benefit of the children. He cites a principle that visitation privileges are created to promote the best interests of the child and, for this reason, visitation rights must not be viewed merely as a privilege of a parent, but as a right of the child. He contends that his is an "exceptional case" and, as such, there was sufficient evidence for the trial court to hold that the best interests of the children required prior counseling before visitation could be undertaken. Appellant contends that under the present court order she would be bound to participate in counseling with her children for an indefinite time in the future in an effort to change the attitudes of the children toward her or to change her behavior to satisfy the children. During this time, she would not have personal visitation with her children until the psychologist gave his approval. If no approval were given, there would be no recourse for any further judicial assistance in protecting her

right to visitation since, by the terms of the court order, the psychologist would have the last word on the matter.

The issue that we have to decide is whether it is in the best interests of the children for the court to establish specific visitation rights, if warranted, without the prior approval of a psychologist or third party.

On de novo review, the evidence before the trial court has been carefully examined. Both parties presented evidence which relfected unfavorably on the other. Some of the evidence was in sharp conflict. However, the record does support the conclusion that the minor children have no desire at this time to resume visitation with their mother and that the appellee accedes to the children's wishes and does not enforce visitation. It is also quite evident that the appellant's persistent attempts to have visitation with her children is testimony of her interest in them. Evidently, the trial court, from the record, felt it was in the best interests of the children that counseling be had between the children and appellant as a prerequisite to future visitation.

The main stumbling block appears to be the attitude of the parties. While the children have shown no present desire to visit the appellant, this is not an irreversible situation that could not be corrected by the proper attitude of the parents. The parties apparently have gone through some difficult times and their bitterness toward each other is understandable. However, visitation or the denial thereof should not be made to appease one parent or punish the other. Such right to visitation should be allowed or denied according to what is best for the children.

Neb. Rev. Stat. § 42-364(1) (Reissue 1978) provides, in part, that the court shall consider the desires and wishes of the children, if of an age of comprehension regardless of their chronological age, when such desires and wishes are based on sound reasoning, and the general health, welfare, and social behavior of the children. The evidence shows that the relationship between

the children and their father is good, while their relationship with their mother is somewhat less at the present time. The evidence does not reflect that either parent is unfit to have custody or visitation privileges, considering the age of the children.

The rule is well established that the right of access to one's children should not be denied unless the court is convinced such visitations are detrimental to the best interests of the child. In the absence of extraordinary circumstances, a parent should not be denied the right of visitation. *Syas v. Syas*, 150 Neb. 533, 34 N.W.2d 884 (1948).

At this time, Michele Leann, age 14, and Marnie Lynn, age 11, while certainly not in need of infant care, still need to know the love of both parents.

We are not convinced the best interests of the children are served by letting them grow up under the exclusive influence of their father and his attitude without even a chance to establish a meaningful relationship with their mother.

Appellee's position that visitation rights should be at his discretion, as in his judgment shall be reasonable and proper for the best interests of the children, is erroneous and cannot be sustained. His contention that the children do not desire visitation with their mother does not alter the situation in view of his opportunity to have conditioned the children against seeing their mother.

The finding and order of the trial court that counseling is needed is in accordance with the evidence and is not an abuse of discretion. However, that portion of the trial court's order placing in a psychologist the authority to effectively determine visitation, and to control the extent and time of such visitation, is not the intent of the law and is an unlawful delegation of the trial court's duty. Such delegation could result in the denial of proper visitation rights of the noncustodial parent.

We believe the evidence supports an award by the trial court of visitation privileges to appellant inde-

pendent of a psychologist's consent or approval. The responsibility of the trial court to determine questions of custody and visitation of minor children according to their best interests is an independent responsibility and cannot be controlled by the agreement or stipulation of the parties. *Lautenschlager v. Lautenschlager*, 201 Neb. 741, 272 N.W.2d 40 (1978). The reasoning in that case can be extended to third parties without violating the principle involved.

We conclude the best interests of the children will be served if appellant is given visitation rights in conjunction with appropriate counseling. Appellee is a good father and devoted to the children. We trust he will see the importance of preparing the children properly for the visits, and he, as well as the children, should make an effort toward establishing a meaningful relationship with appellant.

It is only practical to acknowledge that the attitude of the minor children, now young adults, will determine to a large extent whether a meaningful relationship with their mother can be achieved. Regardless of the children's attitude, present or future, the appellant has the right to an opportunity to establish such relationship with her children. For the good of all concerned, every effort should be made to make the visitations as pleasant as possible. All parties stand to gain from a less hostile relationship.

Attorney fees were not awarded by the trial court and we do not disturb the discretion of the trial court in that regard.

We reverse the order of the District Court and remand this matter with directions to award specific visitation privileges to the appellant, with concurrent counseling of all parties.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. LARRY E. PACKETT, APPELLANT.

297 N.W.2d 762

Filed October 10, 1980. No. 42978.

1. **Search and Seizure: Miranda Rights.** The Miranda rules are not applicable to consent searches.
2. ____: ____. There is no requirement that a person asked to consent to a search be advised that he may refuse consent.
3. **Jury Instructions: Lesser-Included Offense.** Where the State offers uncontroverted testimony on an essential element of a crime, mere speculation that the jury may disbelieve the testimony does not entitle the defendant to an instruction on a lesser-included offense.

Appeal from the District Court for Saline County: ORVILLE L. COADY, Judge. Affirmed.

Steven J. Reisdorff and Ted L. Schafer for appellant.

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

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

BOSLAUGH, J.

The defendant was convicted of first degree sexual assault, second degree sexual assault, and kidnapping. He was sentenced to 25 years imprisonment on the first count; imprisonment for 1 year on the second count; and 16 to 33 years imprisonment on the third count. All three sentences run concurrently with any other sentence the defendant is serving. He has appealed and the assignments of error relate to the overruling of his motions to suppress; requiring him to prepare for trial when other charges were pending in another county; failure to instruct as to lesser-included offenses; and alleged excessiveness of the sentences.

The offenses occurred on August 8, 1978, in Saline County, Nebraska. The evidence shows that the defendant, at gunpoint, forced two girls, 12 years of age and 11 years of age, to accompany him in his truck to

a remote area in the country where he sexually assaulted both of them. He accomplished penetration only with the older girl. He then drove back to town and let the girls out of the truck near a park. On October 14, 1978, the defendant was recognized by the older girl while he was attending a farm auction. He was then apprehended. It is unnecessary to set out the evidence in detail because there is no contention that the evidence was insufficient to sustain the verdict.

The motions to suppress related to searches made at the defendant's residence, his identification at a lineup, and identification of his truck after it had been seized.

On October 20, 1978, after the defendant had been identified at the farm auction, a state patrolman went to the defendant's acreage near Beaver Crossing to ascertain if the defendant's truck matched the description the girls had given. While at the defendant's place, the patrolman inspected the truck and photographed it and the defendant, all with the defendant's permission. Information obtained during the patrolman's visit at the defendant's place was used as part of the basis for a search warrant which was issued on October 23, 1978. A search was made at the defendant's place that day and the truck, stock racks for the truck, two pairs of sunglasses, and two hats were seized.

The defendant contends the evidence seized by the patrolman should have been suppressed because the defendant's consent to the limited search on October 20, 1978, was not given voluntarily. The defendant argues the consent was not voluntary because the patrolman did not disclose the true reason why he came to the defendant's place and the defendant was not advised of his right to refuse to consent to the search.

The patrolman testified that he identified himself to the defendant, told the defendant that he was working on some abduction and sexual assault cases in the area, was checking out white pickups in the area, and that the defendant's name had been developed as a suspect. This was an adequate statement to inform the defend-

ant as to the purpose of the patrolman's visit. It is difficult to see how a more explicit statement could have been made when the defendant was advised that he was a suspect in the crimes which were under investigation.

The Miranda rules are not applicable to consent searches. *State v. Clouse*, 195 Neb. 671, 240 N.W.2d 36 (1976). There is no requirement that a person asked to consent to a search be advised that he may refuse consent. *State v. Wood*, 195 Neb. 353, 238 N.W.2d 226 (1976); *State v. Forney*, 181 Neb. 757, 150 N.W.2d 915 (1967).

A lineup was conducted on October 24, 1978, and the defendant was identified by both victims. On the same day the victims inspected the defendant's truck and identified it as the vehicle in which they had been abducted. The defendant claims the lineup was unnecessarily suggestive.

The evidence shows there were four other persons in the lineup who were of approximately the same age and build of the defendant. All participants wore identical T-shirts, sunglasses, and hats. The defendant and one other person had full beards. At the time of the offense the defendant did not have a full beard but was described as having several days' stubble. The victims were separated during the lineup and viewed the lineup separately. On the basis of the totality of the circumstances, the lineup was not unnecessarily suggestive or conducive to mistaken identification.

The defendant contends he did not receive a fair trial because he was forced to prepare for trial and defend similar charges at about the same time in York County, Nebraska. There was no motion for a continuance and, so far as the record discloses, no objection was made in the lower court on this ground at any time. The defendant had a right to a speedy trial and if he wanted to delay the trial, it was incumbent upon him to request a continuance. The failure to request a continuance waived any error in this regard.

The defendant contends that an instruction as to lesser-included offenses should have been given as to the first count because the evidence as to penetration was insufficient. The assignment is without merit. The victim testified directly as to penetration. Her testimony was corroborated by the other girl, the evidence of bleeding and the towel given to her by the defendant which was stained with her blood and later recovered by the police, and the testimony of the physician who examined her. The defense in this case was an alibi and there was no evidence to contradict the evidence of penetration. Under these circumstances, an instruction as to lesser-included offenses was not required. Where the State offers uncontroverted testimony on an essential element of a crime, mere speculation that the jury may disbelieve the testimony does not entitle the defendant to an instruction on a lesser-included offense. *State v. Tamburano*, 201 Neb. 703, 271 N.W.2d 472 (1978).

The sentences which were imposed in this case were severe but not excessive. The offenses involved violence and use of a firearm. The record demonstrates not only physical injury to the older girl, but psychological injury to both victims. The trial court was entitled to consider the fact that the defendant had committed similar offenses in York County, Nebraska, on the same day shortly before he committed the offenses in Saline County involved in this case. See *State v. Packett*, 206 Neb. 548, 294 N.W.2d 605 (1980).

There being no error, the judgment is affirmed.

AFFIRMED.

CLINTON, J., not voting.

HARTFORD ACCIDENT & INDEMNITY COMPANY, APPELLANT, V. JOHN BURMEISTER, DOING BUSINESS AS NEW STAR SILO COMPANY, ET AL, APPELLEES.

297 N.W.2d 401

Filed October 10, 1980. No. 42979.

Appeal from the District Court for Washington County: WALTER G. HUBER, Judge. Reversed and remanded with directions.

R. M. Dustin for appellant.

Wyman E. Nelson of O'Hanlon & O'Hanlon for appellee Burmeister.

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

KRIVOSHA, C.J.

The appellant insurance carrier, Hartford Accident & Indemnity Company (Hartford), appeals from a judgment of the District Court for Washington County, Nebraska, which found that Hartford was obligated under a policy of insurance issued by Hartford to John Burmeister, doing business as New Star Silo Co. (Burmeister). By its order, the court directed Hartford to pay any sum within the policy limits which Burmeister might be required to pay by reason of a suit filed by Harold McGowan and Shirley McGowan against Burmeister for personal injury sustained by Harold McGowan (McGowan) while constructing a residence on which Burmeister had previously performed some work and to defend that suit. Our review of the record in this case, however, convinces us that the policy in question did not provide coverage and, therefore, we must reverse the action of the trial court.

Some time in 1967 or 1968, Burmeister purchased from Hartford a casualty insurance policy which contained a manufacturers' and contractors' liability coverage addendum. The policy was renewed from time to time, including a renewal for the period from Jan-

uary 1, 1976, to January 1, 1979. The policy is of the type generally referred to as a manufacturers' and contractors' liability policy, 1966 revision form. The policy specifically provides that Hartford will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of either bodily injury or property damage to which the insurance applies. The policy contains certain specific exclusions — among them, a disclaimer of liability for property damage to the named insured's products arising out of such products or any part of such products; an exclusion which applies to property damage to work performed by or on behalf of the named insured arising out of the work or any portion thereof or out of materials, parts, or equipment furnished in connection therewith; and an exclusion of liability for bodily injury or property damage included within the "completed operations hazard" or the "products hazard."

Under the terms of the policy, an operation is deemed completed at the *earliest* of the following times: "(1) when all operations to be performed by or on behalf of the *named insured* under the contract have been completed, (2) when all operations to be performed by or on behalf of the *named insured* at the site of the operations have been completed, or (3) when the portion of the work out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project." (Emphasis in original.) The policy specifically provides that "Operations which may require further service or maintenance work, or correction, repair or replacement because of any defect or deficiency, but which are otherwise complete, shall be deemed completed."

The evidence in the case discloses that on or about March 8, 1977, the McGowans contracted with Burmeister to do some concrete work on a subterranean house which McGowan was constructing. Burmeister,

pursuant to the contract, poured the walls, pillars, and roof. The contract between Burmeister and the McGowans provided that the total contract price was to be paid upon completion of the structure and that the contract did not include complete erection of the structure. There were no written specifications, designs, or blueprints involved in the performance of the contract.

The record reflects that, on March 26, 1977, McGowan paid the full contract price of $3,531.50 to Burmeister. Burmeister testified that the total price was paid "when I got through with it." McGowan maintained that he paid Burmeister because Burmeister needed the money right then and because of a friendship between the two rather than because of completion of the contract.

After Burmeister poured the structure, cracks appeared in the exterior side of the roof concrete. The concrete was tested and the cracks reportedly resulted from the concrete having dried too fast. After some excavation was performed, it was disclosed that the interior of the structure likewise contained certain cracks in the ceiling and at locations at the meeting place of the walls and ceiling that did not join. McGowan retained a contractor to erect interior block walls to support the settling roof. Also, a concrete block face was put on as the fourth side of the structure by a masonry contractor. On June 10th or June 17th, 1977, while McGowan was putting dirt on the roof of the structure, the structure collapsed causing both property damage to the structure and personal injury to McGowan. In the interval, after pouring the structure, Burmeister had returned to the job before excavation under the structure and had applied sealer to cracks on the exterior roof. All of the parties agreed that Burmeister was to return again to fill the gaps between the ceiling and the walls, though the evidence indicates a dispute between Burmeister and McGowan as to whether the filling of those gaps was necessary to complete the contract or to correct defects.

Following his injury, the McGowans filed a petition against Burmeister for damages for the contract sum, and consequential damages for structure expenses and loss of rents, and for personal injury. On June 2, 1978, Hartford filed its petition for declaratory judgment as to its liability with regard to the claim set out in the McGowans' petition. On September 12, 1979, the trial court found that under the terms of the policy, Hartford was not obligated to defend or pay damages with regard to any injury to the property itself. The court's journal entry indicates that the court reached its conclusion because of exclusions (n) and (o) of the policy. Those provisions specifically exclude coverage to "*property damage* to the *named insured's products* arising out of such products or any part of such products" or "to *property damage* to work performed by or on behalf of the *named insured* arising out of the work or any portion thereof, or out of materials, parts or equipment furnished in connection therewith." (Emphasis in original.)

The trial court did, however, conclude and declare that Hartford was obligated to defend and pay damages, if any, in connection with the alleged bodily injury.

In reaching its conclusion, the trial court concluded that exclusion (p), the completed operations exclusion, did not apply if the work was turned over to another contractor or subcontractor engaged in performing operations for the principal as a part of the same project. We think that, in this regard, the trial court misconstrued the provisions of the policy and committed error.

The exclusion of paragraph (p) provides that "This insurance does not apply: . . . (p) to *bodily injury* or *property damage* included within the *completed operations hazard* or the *products hazard.*" (Emphasis in original.) That is to say, if it may be found that the bodily injury or property damage occurred from a completed operation, there is no coverage.

To determine whether or not there is a completed

operation, we are required to turn to the definition in the policy. The policy defines completed operations hazard, in part, as follows: "Operations shall be deemed completed *at the earliest of the following times*: (1) when all operations to be performed by or on behalf of the *named insured* under the contract have been completed, (2) when all operations to be performed by or on behalf of the *named insured* at the site of the operations have been completed, or (3) when the portion of the work out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project." (First emphasis supplied; other emphases in original.) As noted earlier, the mere fact that an operation may need further service or maintenance work or require correction, repair, or replacement because of any defect or deficiency, does not preclude the project from being deemed completed if, otherwise, it is completed.

The trial court apparently concluded that, if any one of the three events noted above existed, a completed operation did not exist. The policy, however, clearly provides that an operation is deemed completed, not when all the named events occur, but rather, at the first occurrence of any of the three named events. That is to say, if all the operations to be performed by and on behalf of the named insured under the contract have been completed, either at the insured's place of business or at the site of the operations, the operations shall be deemed completed and the exclusion of paragraph (p) must apply, even though the work is turned over to a contractor or subcontractor on behalf of the principal. Therefore, the only question to be determined here is whether the work to be performed by Burmeister was completed prior to the injury that was incurred by McGowan. We believe that the record compels a finding that the work had been completed and that, therefore, exclusion (p) must apply.

The parties are generally in agreement on most of the facts in this case, though obviously in disagreement as to how they should be viewed. The parties concede that on or about March 8, 1977, the McGowans contracted with Burmeister to do certain concrete work on a subterranean "dugout house" which McGowan was building. There were no written specifications, designs, or blueprints involved in the performance of the contract. The contract simply provided for digging the trenches and for the labor and material in pouring three concrete walls, pillars, and a ceiling on the subterranean home structure, as well as digging a waterline for the structure. The total contract price was to be paid on completion of the structure. Burmeister started the work on March 8, 1977, and completed it on or about March 26, 1977, when McGowan paid him the full contract price of $3,531.50. Burmeister testified that the total price was paid "when I got through with it." McGowan, on the other hand, maintained that he paid Burmeister before the work was completed because Burmeister needed the money and they were friends. There is no evidence to support that view other than McGowan's own assertions.

In the interval between pouring the structure and McGowan's excavation under it, Burmeister had returned to the job and applied sealer to cracks on the exposed exterior roof. Burmeister further testified that when he initially talked to McGowan about the pouring, McGowan told him he did not care about any rough spots or separations between the wall and ceiling because he was going to put a finished ceiling in the house. It was not until the work by Burmeister was done that McGowan said something about the spaces and asked Burmeister to fix them. Burmeister specifically testified that after he had completed the pouring, the only thing that he was going to do in the future after he left the job was to correct the deficiencies. The corrections that were to be made were not in any way structural but were for cosmetic purposes. There can be

little question that the evidence clearly establishes that the work was completed within the definition of "completed operations hazard" when the pouring was finished and payment made. Therefore, coverage was excluded under the specific language of the policy which provided that the insurance did not apply "to *bodily injury* or *property damage* included within the *completed operations hazard* or the *products hazard.*" The fact that it was turned over to someone else is not significant for our purposes; nor do we need to consider the question of whether the principal may also be the contractor. That specific provision has no application if the work has, in fact, been completed as the facts in this case reveal. The clause citing the turning over of the work is applicable only if the work product has not yet been completed but has been put to its intended use. In this case, however, it was completed and, therefore, we need not go further.

We have frequently held that where there is no ambiguity in the language of an insurance policy and the policy specifically excludes completed operations coverage, there is no obligation on the part of the company to defend. See, *Steinheider & Sons, Inc. v. Iowa Kemper Ins. Co.*, 204 Neb. 156, 281 N.W.2d 539 (1979); *Kansas-Nebraska Nat. Gas Co., Inc. v. Hawkeye-Security Ins. Co.*, 195 Neb. 658, 240 N.W.2d 28 (1976). The language of the completed operations hazard is indeed clear and unambiguous. Hartford specifically contracted to be relieved of liability for accidents occurring after completion of the project. The evidence in this case leads to the inescapable conclusion that the work was completed and clearly, therefore, within the exclusion of the policy. The judgment of the trial court, therefore, must be reversed and the cause remanded with directions to enter judgment in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

CLINTON, J., not voting.

STATE OF NEBRASKA, APPELLEE, V. LOREN E. MANGELSEN, APPELLANT.

297 N.W.2d 765

Filed October 10, 1980. No. 43149.

1. **Jury Trials: Misdemeanors.** There is no constitutional right to trial by jury for petty offenses carrying a maximum sentence of 6 months or less.
2. **Criminal Defendants: Right to Counsel.** A defendant in a criminal case, by electing to act as his own counsel, is bound by his own acts and conduct and is held responsible for his own ineptness.
3. **Motor Vehicles: Licenses and Permits: Prior Convictions.** Proof of a prior conviction or convictions is not an essential element of the crime of operating a motor vehicle while an operator's license was suspended or revoked, second offense, but goes only to enhance the punishment for the primary offense charged.

Appeal from the District Court for Merrick County: JOHN C. WHITEHEAD, Judge. Conviction affirmed. Sentence modified.

R. Steven Geshell of Robak and Geshell for appellant.

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

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

MCCOWN, J.

The defendant was charged with the offense of operating a motor vehicle while his operator's license was suspended or revoked, second offense. The county court of Merrick County, Nebraska, found the defendant guilty after trial to the court, and imposed a sentence of 6 months in the county jail and revoked his operator's license for a period of 1 year. Upon appeal to the District Court for Merrick County, Nebraska, the judgment of the county court was affirmed.

On October 15, 1977, at about 4 p.m., the marshal of Silver Creek, Nebraska, observed the defendant driving a pickup truck. The marshal knew the defendant and knew that his operator's license had been revoked. The

marshal followed the truck, stopped it, and placed the defendant under arrest. On October 20, 1977, a complaint was filed in the county court charging defendant with operating a motor vehicle while his operator's license was suspended or revoked, second offense. On October 25, 1977, the defendant was arraigned in the county court and informed by the court of his various constitutional rights, including the right to counsel, but he was not advised of a right to trial by jury. The defendant pleaded not guilty and the case was set for trial on December 20, 1977.

The defendant elected to act as his own counsel at trial and the case was tried to the county judge. The State introduced the evidence of the marshal as to the facts surrounding the arrest of defendant and introduced into evidence exhibit 1, which contained a certified copy of documents pertaining to the driving record and revocation and suspension of the driving privileges of the defendant taken from the files of the Department of Motor Vehicles. The exhibit was offered by the State for the express purpose of showing that, at the time of the offense, defendant's license had been suspended by the Department of Motor Vehicles. Exhibit 1 contained a certified copy of the order of the Department of Motor Vehicles revoking defendant's license for a period of 6 months from April 11, 1977, together with photostatic copies of abstracts of conviction for five speeding and negligent driving violations, which constituted the basis for the revocation. There was also a copy of a notice of suspension of license dated August 18, 1977, for a default in payment for a 1975 accident. The exhibit also contained a computer printout sheet apparently listing defendant's driving record. The last line of that printout listed, under date of June 5, 1977, driving during suspension, filed in the county court at Albion, Nebraska, and a hearing date of September 23, 1977. Disposition is not shown.

The county court found the defendant guilty of oper-

ating a motor vehicle while his operator's license was suspended or revoked, second offense, and sentenced defendant to 6 months in the county jail and revoked his operator's license for a period of 1 year. Upon appeal to the District Court, the judgment of the county court was affirmed and this appeal followed.

The defendant first contends that the trial court's failure to advise him of his right to a jury trial was reversible error. The mandatory maximum penalty for second offense driving under suspension was 6 months' imprisonment in the county jail. There is no constitutional right to trial by jury for petty offenses carrying a maximum sentence of 6 months or less. See, *Codispoti v. Pennsylvania*, 418 U.S. 506, 94 S.Ct. 2687, 41 L.Ed. 2d 912 (1974); *State v. Young*, 194 Neb. 544, 234 N.W.2d 196 (1975).

Nebraska provides a statutory right to jury trial in a criminal case in county or municipal court, with certain exceptions not applicable here, but the statute requires a demand to invoke the right. See Neb. Rev. Stat. § 24-536 (Reissue 1979). No demand was made in this case.

In essence, the defendant contends that when he elects to act as his own counsel, he must be advised by the court of any statutory right he might have with respect to his trial. In substance, the contention is that the trial judge must also act as the defendant's counsel when a defendant appears pro se. We have previously held that a defendant, by electing to act as his own counsel, must be held responsible for the ineptness of counsel, even though that counsel was himself, and that a trial judge cannot effectively discharge the roles of both judge and defense counsel, and that one proceeding pro se is bound by his own acts and conduct. See, *State v. Brashear*, 201 Neb. 582, 270 N.W.2d 924 (1978); *State v. Morford*, 192 Neb. 412, 222 N.W.2d 117 (1974). The defendant failed to invoke his statutory right to jury trial and he had no constitutional right to a jury trial in this case.

The defendant also contends that the evidence failed to establish a prior conviction for the same offense

and that proof of a prior offense was a necessary element of the crime of driving under suspension, second offense, and, therefore, contends that the evidence was insufficient to sustain the conviction. We do not agree with the contention that proof of a prior conviction is an essential element of the crime of operating a motor vehicle while an operator's license was suspended or revoked, regardless of whether the offense charged was a first, second, or subsequent offense. The proof of a prior conviction goes only to enhance the punishment for the primary offense charged. We believe the reasoning with respect to the offense of driving while under the influence of alcohol set out in *Haffke v. State*, 149 Neb. 83, 30 N.W.2d 462 (1948), supports the same conclusion in this case. Proof of prior convictions in such a case authorizes enhanced punishment for the principal offense charged.

A judicial record of this state may be proved by the producing of the original or by a copy thereof certified by the clerk or the person having the legal custody thereof, authenticated by his seal of office, if he have one. See Neb. Rev. Stat. § 25-1285 (Reissue 1979). The provisions of the Habitual Criminal Act, which also deals with enhanced punishment, provide that a duly authenticated copy of the judgment and commitment of a prior offense shall be competent and prima facie evidence of such former judgment and commitment. See Neb. Rev. Stat. § 29-2222 (Reissue 1979).

In the case at bar, no evidence of a prior conviction was offered or received in evidence except a computer printout sheet introduced as a part of exhibit 1, and even the printout sheet did not establish a prior conviction. The State concedes that the evidence was insufficient to establish an essential part of a crime, but argues that because the defendant did not object to the introduction of the evidence, it was sufficient to establish a prior conviction. We disagree.

Not only did the computer printout fail to establish a prior conviction but, in addition, exhibit 1 in toto was

offered in evidence for the limited purpose of showing that, at the time of the offense charged, the defendant's license had been suspended by the Department of Motor Vehicles. That use is authorized by statute and there was no need for any objections.

The evidence failed to establish that the offense for which the defendant was convicted was a second or subsequent offense. That portion of the sentence imposing 6 months' imprisonment was, therefore, unauthorized and excessive. The mandatory sentence of imprisonment for the offense at the time of its commission was imprisonment in the county jail for 30 days. The conviction of the defendant is affirmed. The imprisonment portion of the sentence is reduced to imprisonment in the county jail for 30 days and the cause is remanded for further proceedings and commitment under the appropriate sentence.

CONVICTION AFFIRMED.
SENTENCE MODIFIED.

CLINTON, J., not voting.

LEONARD M. MCDONALD, REVIVED IN THE NAME OF JAMES R. MCDONALD, PERSONAL REPRESENTATIVE OF THE ESTATE OF LEONARD M. MCDONALD, APPELLEE, V. JAMES T. MCDONALD AND MARTHA MCDONALD, APPELLANTS.

298 N.W.2d 136

Filed October 31, 1980. No. 42940.

1. **Undue Influence.** The elements necessary to be established to warrant the rejection of a written instrument on the ground of undue influence are: (1) That the person who executed the instrument was subject to undue influence; (2) That there was opportunity to exercise undue influence; (3) That there was a disposition to exercise undue influence for an improper purpose; and (4) That the result was clearly the effect of such undue influence.
2. ——. The undue influence which will void a gift is an unlawful and fraudulent influence which controls the will of the donor. The affection, confidence, and gratitude of a parent to a child which inspires a gift is a natural and lawful influence and will not render it voidable unless such

influence has been so used as to confuse the judgment and control the will of the donor.

3. ——. The court, in examining the matter of whether a deed is procured by undue influence, is not concerned with the rightness of the conveyance. but only with determining whether it was the voluntary act of the grantor. The fact that the grantor has others who are proper subjects to receive his bounty can be considered by the court only as it bears upon the validity of the conveyance.
4. **Mental Incompetence: Burden of Proof.** In order to set aside an instrument or instruments for want of mental capacity on the part of the person executing such instruments, the burden of proof is upon the party so asserting to establish that the mind of the person executing such instruments was so weak or unbalanced when the instruments were executed that he could not understand and comprehend the purport and effect of what he was doing.
5. **Undue Influence.** Mere suspicion, surmise, or conjecture does not warrant a finding of undue influence, but there must be a solid foundation of established facts on which to rest the inference of its existence. This is particularly true where the parties are well aware of the existence of the contested deed shortly after its execution.
6. ——. The fact that a grantee procured the attorney who prepared the challenged deed does not, standing alone, establish "undue influence."

Appeal from the District Court for Wheeler County: JAMES R. KELLY, Judge. Reversed and remanded with directions.

George H. Moyer, Jr., of Moyer, Moyer & Egley for appellants.

Edward E. Hannon of Cronin, Hannon & Symonds for appellee.

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

KRIVOSHA, C.J.

The appellants, James T. McDonald and Martha McDonald, appeal from a judgment of the District Court for Wheeler County, Nebraska, which found that a certain conveyance made by James' mother, Mary D. McDonald, on December 28, 1974, was procured by undue influence and, accordingly, should be canceled and set aside. We believe that the record

will not support such a conclusion and, therefore, we reverse the decision of the trial court.

The grantor, Mary D. McDonald, and her husband, Charles W. McDonald, were the owners of a certain 80-acre tract of land located 11 miles south and 3/4 mile west of Ewing, Nebraska, and legally described as the west half of the northwest quarter of Section 3, Township 24 North, Range 9 West of the 6th P.M., Wheeler County, Nebraska. Mary McDonald and her husband lived on the 80-acre tract for most of their married life, Mary having acquired the 80-acre tract by inheritance from her father. The McDonalds had two children, Leonard, the appellee, and James, the appellant. The record establishes that James, who is 2 years older than Leonard, was told by his father that upon graduation from grade school, if he would not go on to high school and would stay at home and work with his father, he would have a farm of his own. James accepted the offer and worked with his father until he was 21 when he went into the Army. Upon his discharge in 1946, he returned to Wheeler County and resumed farming with his parents. In 1948, his father began the construction of a house on the 80-acre tract in question. After spending some $5,000 for the construction of the house, the father was unable to complete it and James spent $3,300 of his own money to complete the house which he constructed with a hired man when they were not otherwise engaged in farming operations. James testified that when he finished the house on the 80 acres in question, there was an understanding among him, his father, and his mother that the 80 acres would someday be his. James continued to farm with his father and mother until 1952 when, together with his wife, Martha, he moved to O'Neill. Apparently, James left the farm because he and his father did not get along.

In 1966, Leonard took up residence with his parents on the disputed 80-acre tract, which he farmed until 1975.

On December 27, 1974, while Mary was visiting James, James asked her if she was going to leave the 80 acres to him. Mary mentioned something about a will and James said he would feel better if she made a deed. He then told her he would call his lawyer, William Griffin, if she wanted to do anything and she said alright. The next evening, James took Mary to Griffin's office and left her there. He then went home and Griffin called him when they were finished. James then went back to Griffin's office and picked up Mary. When Mary and James returned to James' home, she gave the deed to James.

Leonard learned of the deed when he and Mary went to Bartlett, Nebraska, to pay taxes in 1975. Leonard told James he was unhappy about the deed and was going to do something about it. He did not, however, do anything about it during Mary's lifetime.

A fair reading of all the evidence discloses that both James and Leonard exercised influence over their mother. She was inclined to attempt to make either of them satisfied and to avoid conflict with them by doing whatever they requested. Her actions, however, do not appear from the record to be as a result of undue influence as described in the law, but rather by reason of her own personal desire to get along with her sons.

In beginning to review a case involving alleged undue influence, several basic principles must be kept in mind. In the first place, this being an equity action, this court is required to review the record de novo on appeal. *Hein v. M & N Feed Yards, Inc.*, 205 Neb. 691, 289 N.W.2d 756 (1980). Furthermore, in the recent case of *In re Estate of Saathoff*, 206 Neb. 793, 295 N.W.2d 290 (1980), we had occasion to set out the various factors and elements necessary to establish a case of undue influence. We said there: "'The elements necessary to be established to warrant the rejection of a written instrument on the ground of undue influence are: (1) That the person who executed

the instrument was subject to undue influence; (2) that there was opportunity to exercise undue influence; (3) that there was a disposition to exercise undue influence for an improper purpose; and (4) that the result was clearly the effect of such undue influence.' *Dunbier v. Rafert*, 170 Neb. 570, 103 N.W.2d 814 (1960) (syllabus of the court)." *Id.* at 798, 295 N.W.2d at 294.

We made it clear in *Saathoff*, however, that it is not mere influence which makes a conveyance unlawful but *undue* influence as established in the law. In that regard, quoting from *Kolc v. Krystyniak*, 196 Neb. 16, 241 N.W.2d 348 (1976), we said in *Saathoff* at 799, 295 N.W.2d at 295: "'[The] undue influence which will void a . . . (gift) is an unlawful and fraudulent influence which controls the will of the donor. The affection, confidence, and gratitude of a parent to a child which inspires a gift is a natural and lawful influence and will not render it voidable unless such influence has been so used as to confuse the judgment and control the will of the donor.'"

Likewise, in *Saathoff* we said that: "'The court, in examining the matter of whether a deed was procured by undue influence, is not concerned with the rightness of the conveyance, but only with determining whether it was the voluntary act of the grantor. The fact that the grantor has others who are proper subjects to receive his bounty can be considered by the court only as it bears upon the validity of the conveyance.' *Rule v. Roth*, 199 Neb. 746, 751, 261 N.W.2d 370, 373 (1978)." *Id.* at 799, 295 N.W.2d at 295.

Further, we are required to keep in mind that: "'In order to set aside an instrument or instruments . . . for want of mental capacity on the part of the person executing such instruments, the burden of proof is upon the party so asserting to establish that the mind of the person executing such instruments was so weak or unbalanced when the instruments were exe-

cuted that he could not understand and comprehend the purport and effect of what he was doing.'" *Id.* at 799-800, 295 N.W.2d at 295, quoting from *Dunbier v. Rafert*, 170 Neb. 570, 103 N.W.2d 814 (1960).

Finally, we have previously said that mere suspicion, surmise, or conjecture does not warrant a finding of undue influence, but there must be a solid foundation of established facts on which to rest the inference of its existence. This is particularly true where the parties are well aware of the existence of the contested deed shortly after its execution. See *Zych v. Zych*, 183 Neb. 708, 163 N.W.2d 882 (1969).

Our reading of the record fails to convince us that there is sufficient evidence which would clearly and convincingly establish that the grantor was of such mental condition at the time that the deed was executed that the conveyance was as a result of undue influence asserted upon her by her son James.

Testimony of Dr. Richard Fitch establishes that he was Mary's attending physician for several years up until her death. He testified that the only thing he ever noticed concerning Mary's mental state was that her hearing was bad and that sometimes communicating with her was difficult. He said there was only a slight decrease in her mental state from 1972 through 1975, so slight that it was not worthy of noting on her hospital records.

Rachel Vanconete, a niece of Mary's, testified likewise. She said that Mary was aware of the world around her and that Mary had no mental or memory failures. She further testified to a conversation she had with Mary in approximately March of 1977 regarding the disposition of Mary's estate. At that time, Mary told her that James would have the home place (the disputed land involved herein) because he had helped build the house.

Further, a sister of Mary's, Anna Schindler, testified as to a conversation with Mary about the disposition of

her estate. In that conversation, Mary said James was to receive the home place. Mrs. Schindler further testified that Mary's mind had not slipped; that she was capable of conducting her own business; and that she was not easily influenced. The record further establishes the fact that while Mary avoided conflict with her children, she nevertheless maintained an active life and was involved in a host of activities which would refute any claim of mental deficiency on her part sufficient to subject her to undue influence.

The only evidence to support the claim of undue influence is that of Leonard himself in which he testified that Mary was subject to his will and, to a lesser extent, to whatever James suggested. There is, however, no evidence in the record from which one can conclude that the requirements necessary to establish undue influence sufficient to void a deed were presented to the court.

Leonard further argues that we may infer undue influence because the attorney who drew the deed was James' attorney and not Mary's. The Illinois Supreme Court, in the case of *Haslinger v. Gabel*, 344 Ill. 354, 364, 176 N.E. 340, 343 (1931), observed: "The mere fact that the grantee procures an attorney to prepare the deed does not prove that the deed was obtained by improper means." We agree with that view. The record is totally devoid of any evidence to indicate what took place at the attorney's office. In any event, we cannot presume that the attorney aided in unduly influencing Mary.

We must, therefore, conclude that the grantor intended her act, for whatever reason, and we may not, therefore, frustrate that act by our own views. The appellee, having failed to introduce evidence sufficient to meet his burden and sufficient to establish with clear and convincing evidence the existence of undue influence, must fail in his efforts to set aside the deed. Accordingly, we must reverse the decision of the

trial court and direct that the court enter an order finding the deed valid and proper.

REVERSED AND REMANDED WITH DIRECTIONS.

CLINTON, J., not participating.

LYLE GEE AND DARLENE GEE, APPELLEES, V. DINSDALE BROTHERS, INC., A NEBRASKA CORPORATION, APPELLANT.

298 N.W.2d 147

Filed October 31, 1980. No. 42968.

1. **Jury Instructions.** Instructions must be considered together and if, when considered as a whole, they state the law correctly, they are not erroneous.
2. ——. Generally, the trial court is not required to instruct negatively.
3. ——. Where the trial court has instructed the jury affirmatively upon the issues presented by the pleadings and the evidence, it is unnecessary to instruct in a negative form.
4. **Rebuttal Evidence.** The admission of rebuttal testimony is largely within the discretion of the trial court.
5. **Nuisance.** A rural home and a rural family, within reason, are entitled to the same relative protection as others.
6. ——. Even in an industrial or rural area, a business enterprise may not be conducted in such a manner as to materially prejudice a neighbor.

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

Joseph Ginsburg of Ginsburg, Rosenberg, Ginsburg, Cathcart, Curry & Gordon, and Steven M. Curry of Sampson, Curry & Hummel for appellant.

William A. Wieland of Healey, Brown, Wieland & Kluender for appellees.

Heard before BOSLAUGH, MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ.

BOSLAUGH, J.

The plaintiffs, Lyle and Darlene Gee, live on a farm 1 1/4 miles south of Palmer, Nebraska. Their home,

which was completed in the spring of 1963, was faced to the south and east to take advantage of prevailing spring and summer winds. When the plaintiffs built their home, the land across the road to the south and east was used for the production of alfalfa, wheat, and corn.

In the spring of 1965, the defendant, Dinsdale Brothers, Inc., began to construct cattle pens on this property. The feedlot now consists of 15 pens for feeding cattle, a loading pen, and a sick pen area. The pens are of random size but most of them are approximately 250 feet wide and 300 feet deep. Ordinarily, there are 2,500 to 3,500 cattle in the feedlot. The plaintiffs' home is within 1,000 feet of the feedlot.

After making complaints to a number of governmental agencies, the plaintiffs commenced this action. The plaintiffs sought temporary damages to their comfort and enjoyment of their property but did not seek permanent damages resulting from the operation of the feedlot which they alleged constituted a nuisance. Their complaints related to odors, dust, flies, and rodents coming from the feedlot. The jury returned a verdict for the plaintiffs in the amount of $50,000. The defendant appeals.

The principal assignments of error relate to the instructions. The defendant also claims that the trial court erred in admitting rebuttal evidence and that the verdict was excessive.

By instruction No. 6, the trial court advised the jury that, before the plaintiffs could recover, they were required to prove that the defendant's activities "were unreasonable under all of the attendant circumstances." The defendant contends that it was error not to repeat this element of unreasonableness in later instructions which stated that allowing manure, feedlot wastes, and dead animals to accumulate so that odors, dust, flies, and rodents would substantially and materially invade the plaintiffs' property might constitute a nuisance.

It is fundamental that instructions must be considered together and if, when considered as a whole, they state the law correctly, they are not erroneous. *Flanagin v. DePriest*, 182 Neb. 776, 157 N.W.2d 389 (1968). We find no error in the instructions challenged.

The defendant requested a number of instructions, some of which related to matters for which the plaintiffs could not recover. Generally, the trial court is not required to instruct negatively. It is sufficient if the jury is properly instructed as to matters for which the plaintiffs may recover. Where the trial court has instructed the jury affirmatively upon the issues presented by the pleadings and the evidence, it is unnecessary to instruct in a negative form. *High-Plains Cooperative Assn. v. Stevens*, 204 Neb. 664, 284 N.W.2d 846 (1979). There was no error in refusing the instructions requested by the defendant.

On rebuttal, the plaintiffs were allowed to introduce, over objection, the following testimony from the deposition of J. A. Dinsdale, an officer of the defendant corporation:

"Q. At the time, let's say, in '60 or '61, when you put in the windbreak and started building the lots, were you aware that the plaintiffs live across the road?

"A. I don't really care about the place. I never watched anything. They've done — I've never reported them for any irregularities. What happens to them is just fine.

"Q. So I take it as to who lived, that is not a factor?

"A. Not a factor, no. No.

"Q. You put it on your land where you felt it should go with regard to your business operation?

"A. Right."

The defendant contends this was improper rebuttal evidence and should have been excluded.

The deposition testimony had some relevance in that the defendant had attempted to show a compliance with good design requirements for feedlots including location with respect to housing areas. The deposition

testimony tended to rebut this evidence and show that the defendant was not concerned with the use which was being made of property adjacent to the feedlot.

The admission of rebuttal testimony is largely within the discretion of the trial court. *Cromer v. Farmland Service Coop, Inc.*, 198 Neb. 355, 252 N.W.2d 635 (1977). There was no abuse of discretion in the admission of the rebuttal evidence.

The verdict which was returned by the jury in this case was for a substantial amount. On the other hand, the plaintiffs' evidence will sustain a finding of substantial damage. The damage covered the period from April 28, 1972, until the time of trial. The plaintiffs' complaints centered on the odors, dust, flies, and rodents which had invaded their property since 1970.

The evidence shows there was a very severe odor and dust problem from about March until October or November caused by the animal wastes which accumulated in the feedlot. The pens were cleaned but once or twice a year. The rest of the time, the manure was packed into mounds in the pens. Liquid wastes drained into three lagoons or holding ponds where the wastes decomposed. Once each year, the liquid was pumped out of the ponds and the solids were hauled away. Dead stock were removed from the lot, but there was evidence that dead fetuses and calves were left in the pens to decompose.

The odor and the dust forced the plaintiffs to stay inside their house much of the time. After 3 days of a southeast wind, the odor would penetrate the house to the extent the clothes in the closets would have a bad odor. The odor was described as a sour, rotten manure odor.

Mrs. Gee testified that, "The dust blows out of that feedlot, you know, on an average probably three nights, at least three nights out of a week. Generally in the evening, but when it gets real bad it will come all day long. Like after six o'clock at night the kids can't go outside and play basketball, they just can't breathe,

you know, if they go outside and play basketball.

"And you close up the house and you try to keep the dust out, but like there again, the windowsills are always loaded with dust and this type of thing. It's annoying. It's very annoying. You can't plan anything because you don't know which way the wind is going to be blowing. You know, if it is blowing from the southeast the dust and odor are so bad that there's no way." She further stated: "It is heavy enough so that when you breathe your nostrils get to burning and you hurt if you breathe heavy." At times, the wind carries the dust a distance of several miles. One witness related that it was "dusty like a fog" in the area.

Speaking of the increase in flies, Darlene Gee testified: "[S]ince '70 they have been very thick, just thick, thick, thick. Thick on the sides of the house, thick on the sides of the shed, just thick everyplace. On the cars, inside the cars, inside the house." Photographs in the record show the extent of the fly problem around the Gee home. The flies were troublesome from April through November and the Gees employed sprays, traps, and an electric fly killer to attempt to reduce the problem. Despite their efforts, they were forced to continually clean and paint the fly-specked parts of their home.

There was similar evidence concerning the problem with rats.

In *Botsch v. Leigh Land Co.*, 195 Neb. 509, 239 N.W.2d 481 (1976), it was recognized that a rural home and a rural family, within reason, are entitled to the same relative protection as others. In that case, the evidence showed that odors generated by lagoons, together with the manure dust and insects resulting from the failure to remove manure from the feedlot, had rendered the plaintiffs' premises well nigh uninhabitable. We held that, even in an industrial or rural area, a business enterprise could not be conducted in such a manner as to materially prejudice a neighbor.

In this type of case there is no method which permits

a precise determination of the damages. The damages which may be recovered rest largely within the discretion of the jury. Upon the record in this case we are unable to say that the verdict was excessive.

The judgment of the District Court is affirmed.

AFFIRMED.

KRIVOSHA, C.J., and CLINTON, J., not participating.

HAROLD HAHN ET AL., APPELLANTS AND CROSS-APPELLEES, V. INTERNATIONAL MANAGEMENT SERVICES, INC., ET AL., APPELLEES AND CROSS-APPELLANTS.

298 N.W.2d 140

Filed October 31, 1980. No. 42959.

1. **Breach of Contract: Real Estate Contracts: Contracts.** In an action against a vendee to recover the damages resulting from a breach of a contract for the sale of real estate, the measure of damages is the difference between the agreed price and the market value of the property at the time of the breach.
2. **Breach of Contract: Contracts.** A condition is excused if the occurrence of the condition is prevented by the party whose performance is dependent upon the condition.

Appeal from the District Court for Adams County: FRED R. IRONS, Judge. Reversed and remanded with directions.

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

Conway and Connolly for appellees.

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

BOSLAUGH, J.

This was an action for damages on a contract for the sale of real estate. The trial court found that the plaintiffs were entitled to recover damages in the amount of $10,000. The plaintiffs have appealed and the defendants have cross-appealed.

The plaintiffs own an 8-acre tract of land in Adams County, Nebraska, near Hastings. In 1974, Highland Heights Nursing Home, Inc., commenced construction of a 63-bed nursing home upon the property. After construction had begun, the project developed financial difficulties. The contractors involved in the construction of the home filed mechanic's liens which later were foreclosed. At the sale, the property was purchased by Harold Hahn as trustee for the contractors who held liens on the property.

In June 1975, other investors became interested in the project. On July 24, 1975, the defendant International Management Systems, Inc., entered into a contract with the plaintiff Hahn to purchase the property. The controversy arises out of the failure of the defendant buyer to perform the contract.

The contract provided that the buyer, International Management Systems, Inc., agreed to purchase the land "if the agreements described hereafter are executed . . . ." The buyer further agreed to deposit $181,740.70 on or before August 4, 1975, with the City National Bank of Hastings, Nebraska, as escrow agent in full payment for the land. Of this amount, $30,000 was to be held for 4 months to discharge any mechanic's liens that might exist against the property.

The seller trustee agreed to furnish an abstract of title to the property and to convey marketable title to the buyer on August 1, 1975.

At the time the contract was signed, the buyer delivered a check for $151,740.70 to the seller. On July 31, 1975, this check was returned for insufficient funds. On August 2, 1975, the buyer delivered certified checks in the amount of $30,000 and $20,000 to the seller and

an addendum to the contract was executed. The addendum provided that at the option of the seller, the seller could recover $10,000 as liquidated damages if the buyer failed to perform.

When the buyer failed to deposit the balance of funds as provided in the contract, the seller declared a default. This action was commenced October 15, 1975.

The principal issue is whether the buyer was not required to perform because the conditions stated in the contract were not satisfied. Paragraph 8 of the contract provided as follows:

"8. Conditions. Seller agrees that Buyer shall be under no obligation to close hereunder if Buyer is unable to enter into the agreements described below on the terms orally agreed to previously between the Buyer and the parties described below.

"a. Four agreements between the Buyer as builder, and Hahn & Hupf Construction, Inc., ABC Electric of Hastings, Inc., Dial Heating & Air Conditioning, Inc., and James Bamford, as contractors for the finishing of the construction of a 63-bed nursing home on the property for the total payment by Buyer of the sum of Four Hundred Sixty Thousand Six Hundred Eighty and 00/100 Dollars ($460,680.00) to such contractors.

"b. An agreement between the Buyer and Highland Heights Nursing Home, Inc., for the purchase of the stock of the latter by Buyer on terms previously agreed to orally between the attorneys for both such corporations.

"c. An agreement between Buyer and Vera Plum and Marjorie Plum of Hastings, Nebraska, for the employment of Vera Plum and Marjorie Plum as managers of the nursing home to be constructed by Buyer on the property described above upon the completion of such nursing home."

The agreement was that the buyer was under no obligation to "close" if the buyer was "unable" to enter into the agreements described on the *terms orally agreed to previously.* Before signing the contract, the

parties had agreed that the cost of completing the nursing home would be $460,680. After the contract was signed, contracts for completing the construction of the home and to satisfy the other conditions were prepared by the seller but the buyer refused to execute them. There is no evidence that the buyer was unable to enter into the agreements upon the terms previously agreed to.

The conditions set out in paragraph 8 of the contract were intended to insure that the buyer would be able to complete the nursing home for the price that had been quoted by the seller and protect the buyer against increases in the cost of labor and materials. Paragraph 8 was not an escape clause to permit the buyer to perform or not as it might choose. The buyer was required to make a good faith effort to enter into the agreements referred to in paragraph 8. Its failure to do so excused the condition. A condition is excused if the occurrence of the condition is prevented by the party whose performance is dependent upon the condition. See *Schinstock v. Butterfield*, 141 Neb. 877, 5 N.W.2d 86 (1942).

The evidence shows that the buyer was unable to perform because it was unable to obtain financing but that was not a condition of the contract. Since the buyer failed to perform, the plaintiff was entitled to recover damages for the breach.

The trial court awarded damages in the amount of $10,000, perhaps upon a theory that the liquidated damages provision of the addendum was applicable. The liquidated damages provision was optional with the seller and the record shows the seller sought the actual damages resulting from the breach instead of liquidated damages.

The evidence was that the fair market value of the property at the time of the breach was $8,000. The measure of the damage is the loss of the bargain, the difference between the fair market value of the property and the contract price. *Wasson v. Palmer*, 17 Neb. 330, 22 N.W. 773 (1885). This amounts to

$173,740.70.

As between the parties to the action, the certified checks which were delivered to the seller on August 2, 1975, should be applied upon the judgment. The defendant should be required to return the plaintiff's abstract of title.

The judgment of the District Court is reversed and the cause remanded with directions to enter a judgment for the plaintiff in accord with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

CLINTON and HASTINGS, JJ., not participating.

IN RE INTEREST OF VIRGINIA NELL HILL ET AL., CHILDREN UNDER 18 YEARS OF AGE.

STATE OF NEBRASKA, APPELLEE, V. VIRGINIA BOYD, APPELLANT.

298 N.W.2d 143

Filed October 31, 1980. No. 42964.

1. **Appeal and Error: Juvenile Court.** An appeal of a juvenile case is heard in the Supreme Court by trial de novo upon the record.
2. **Parental Rights.** The mere fact that we conclude that adoptive parents with more education and more funds might, indeed, provide the children with a higher and better standard of living is not sufficient grounds to terminate the natural right which exists between a parent and her children.
3. ——— An order terminating parental rights under Neb. Rev. Stat. §43-209 (Reissue 1978) must be supported by clear and convincing evidence.

Appeal from the Separate Juvenile Court of Douglas County: J. PATRICK MULLEN, Associate Judge. Reversed and remanded with instructions.

Bruce G. Mason of Ross & Mason for appellant.

Donald L. Knowles, Douglas County Attorney, and Marjorie A. Records for appellee.

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

KRIVOSHA, C.J.

The appellant, Virginia Boyd, appeals from an order entered by the Separate Juvenile Court of Douglas County, Nebraska, which after finding that the minor children of appellant, to wit: Virginia Nell Hill; Randy Boyd, Jr.; Delano Boyd; Maurice Boyd; and Marlando Boyd, then being children under 18 years of age, came within the meaning of Neb. Rev. Stat. §43-209(2) and (4) (Reissue 1978), terminated all parental rights between the appellant and her minor children. Custody of the minor children was given to the Nebraska Department of Public Welfare for adoptive placement. The parental rights of the two fathers were likewise terminated in this action, but no appeal has been taken from that portion of the order and it is not here involved. We believe that the trial court was in error in terminating all parental rights between the minor children and their mother and, therefore, we reverse and remand the order of the Separate Juvenile Court with directions as more particularly set out herein.

The present matter was one which had been before the Separate Juvenile Court on several earlier occasions. The facts, while painful and regrettable, are perhaps, in today's society, not unique. The appellant is a 33-year-old female possessing a 9th grade education, limited job skills, and even more limited finances. While those characteristics, in and of themselves, do not justify a parent's failure to care for her minor children, they do perhaps place the level of care provided

by her in a more proper light.

The Boyd children were initially placed in foster care in January 1977. That foster care continued pursuant to an order entered by reason of a stipulation between a deputy county attorney for Douglas County and counsel for appellant on May 12, 1977. The stipulation established that appellant had failed to provide for the hygienic needs of her children and failed to instruct them as to good hygienic habits, as a result of which some or all of the children arrived at school in an unwashed condition, their clothing and body smelling strongly of body odor and urine; and that likewise appellant had failed to properly provide adequate clothing in that the children's clothing was observed to be too large and their shoes were worn out.

The evidence discloses, however, that subsequent to that hearing of May 12, 1977, appellant began a process of attempting to rehabilitate herself to the point that she could demonstrate to the juvenile court that she could handle parenting responsibilities. In that regard, two subsequent hearings were held, one on September 2, 1977, and another on December 2, 1977. The evidence which was adduced at these two subsequent hearings indicated that, while appellant may not have possessed all of the parenting qualities one would hope she would have, she did, nevertheless, love her children and was concerned about attempting to improve her condition so that she might improve the care she provided her children. Whatever failings appellant may have displayed with regard to the care of her children, it was clear from the evidence that her failure was due, in large measure, to her lack of knowledge as to how to be a parent and not by reason of any willful disregard. The State's testimony introduced at the hearing on December 2, 1977, made it clear that appellant's threats and hostility to the social workers was always related to her concern for the well-being of her children.

Following a further hearing on January 13, 1978,

the boys were returned to appellant. The daughter remained in a foster home. The evidence discloses that the children and appellant were to live in a new home purchased by appellant's father. Her father and stepmother would also live there and would participate, to some extent, in aiding her in caring for the children and learning parenting skills. At a hearing on April 17, 1978, one of several periodic reviews ordered by the juvenile court, the State's evidence disclosed that appellant was receiving psychiatric therapy, caring for the children, and maintaining a clean home. The court itself commented at the hearing on April 17, 1978, that things were going significantly better than in the past.

At a hearing held on July 12, 1978, another periodic review ordered by the court, the welfare worker reported, "Mrs. Boyd has maintained a clean, adequate home during this period, and each time I have seen the boys, they are clean and well dressed." The report concluded, "Mrs. Boyd has provided an adequate home for her children and she has continued to comply with the court order." As a result of the hearing on July 12, 1978, custody was again continued in appellant.

The evidence then discloses that on October 4th or 5th, 1978, appellant voluntarily requested that her children be returned to foster care. It appears that appellant and a boyfriend who had been living with her had a falling out. As a result of that falling out, he had threatened both her and her children with a knife. Fearing for their safety and being uncertain as to what, in fact, her boyfriend might do, she suggested that the children be placed in foster care for their own safety. She likewise knew enough about her own condition to recognize that she was then under stress and felt that she needed some further and additional psychiatric help at that time and that it would be in the children's best interests if they were then in foster care. She asked that the children be placed in foster care until she had a chance to get herself back together. On October 6, 1978, the court entered an order

granting the county's motion for immediate custody, ordering placement of the children in foster care, where they remained until the order of the court terminating the appellant's parental rights.

Thereafter, on January 26, 1979, the State filed a supplemental petition setting out a number of allegations about appellant and her care of her minor children and seeking an order terminating her parental rights so that the children might be placed for adoption. The record discloses that, to a large extent, the allegations were based upon information obtained by the county from appellant's former boyfriend. The evidence likewise discloses that many of the claims based on information supplied by the boyfriend could not be supported by the evidence and were ultimately dismissed by the court.

To be sure, there is evidence that appellant had been observed in an intoxicated condition. This always appeared to be after her children had been put to bed for the night. Likewise, on one occasion appellant attempted to consume an overdose of prescription pills which had been given to her by a physician. Although appellant's boyfriend had made a number of accusations about the appellant which led to the filing of the supplemental petition, he did concede at the time of the June 4, 1979, hearing that appellant did the household duties while he was living with her, cooked meals, and washed the laundry. On cross-examination, he conceded that appellant played with the boys and that they got along "great." They loved her and she loved them, according to the witness. He likewise conceded that the discipline she administered was normal and that the children were always well fed and had clean clothes every day for school. The evidence was clear that a substantial improvement had been made by appellant since the hearing in September of 1977. The evidence from the record discloses that the difficulties which are involved in this case are between the caseworkers and the appellant and not between

the children and the appellant. While that may, in an appropriate case, be a matter which ultimately denies to the children proper care and justifies terminating parental rights, such does not appear from the evidence to be true in this case.

Following the testimony at the hearing on June 4, 1979, proceedings were held by the court in chambers during which three of the boys were interviewed. All three indicated that they loved their mother and desired to be with her. The trial court concluded, as a result of the hearing of June 4, 1979, that appellant had substantially and continuously or repeatedly neglected her children and refused to give the children the necessary parental care and protection, as required by Neb. Rev. Stat. § 43-209(2), and was, as required and prescribed by Neb. Rev. Stat. § 43-209(4), found to be unfit by reason of debauchery, habitual use of intoxicating liquor or narcotic drugs, or repeated lewd and lascivious behavior, which conduct was seriously detrimental to the health, morals, or well-being of the children.

The evidence in the record, however, does not support such a finding. On July 10, 1979, the court held a further hearing at which no oral testimony was taken but several written reports offered as exhibits were considered. The reports included one by a social worker who noted that appellant had moved in with her mother who lived in a house too small to accommodate the boys. The report further stated that appellant had not had a stable situation at any time since the case *began*, which was directly in conflict with the findings made by the trial court at each of its periodic reviews. A second State exhibit indicated that, in the opinion of a member of the foster care unit, the children required a great deal of discipline. The final exhibit was a report by a social worker who recommended that the parental rights be terminated because of appellant's threatening attitude toward social service workers. The report does not, however, indicate that the children's best interests require the termination.

Cases of this nature are always most difficult to resolve. Everyone wishes to do that which appears to be best for the minor children, yet one cannot be certain what is really best in each situation. It is for that reason that we have established certain basic rules by which we are to be governed in cases of this nature. These rules are intended to recognize the integrity of the family and to bring about parental termination only when that appears to be required and no other reasonable alternative exists.

In *State v. Logan*, 204 Neb. 204, 281 N.W.2d 753 (1979), we noted that an appeal of a juvenile case is heard in the Supreme Court by trial de novo upon the record. We likewise repeated the oft-cited declaration that the integrity of the family unit is one of the fundamental rights guaranteed by the Constitution of the United States, citing *Stanley v. Illinois*, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972). The mere fact that we conclude that adoptive parents with more education and more funds might, indeed, provide the children with a higher and better standard of living is not sufficient grounds to terminate the natural relationship which exists between a parent and her children.

Likewise, in the recent cases of *State v. Souza-Spittler*, 204 Neb. 503, 283 N.W.2d 48 (1979), and *State v. Hamilton*, 204 Neb. 537, 283 N.W.2d 66 (1979), we noted that an order terminating parental rights under Neb. Rev. Stat. §43-209 (Reissue 1978) must be supported by clear and convincing evidence.

Our review of this record fails to satisfy us that the basis upon which the termination was made is, indeed, supported by clear and convincing evidence. The evidence discloses that the appellant has a number of shortcomings as a parent and requires further supervision and training. The evidence does not, however, in any clear or convincing manner, support a finding that appellant has substantially and continuously or repeatedly neglected her children and refused to give the children necessary parental care and protec-

tion, or that she is unfit by reason of debauchery, habitual use of intoxicating liquor or narcotic drugs, or repeated lewd and lascivious behavior, which conduct is found by the court to be seriously detrimental to the health, morals, or well-being of the children, all as found by the court. In the absence of such clear and convincing evidence, the court is without authority to terminate natural parental rights. Certainly the courts are not required to wait until injury has befallen a child. Clear and convincing evidence that the requirements of the statute have been established without evidence of physical harm is, indeed, sufficient in an appropriate case to terminate parental rights. The power to order such termination should, however, be exercised carefully, judiciously, and in a limited manner. There is nothing in the record here to indicate that, under proper supervision provided by the juvenile court, similar to the type of supervision which was provided from January 13, 1978, until October 6, 1978, appellant cannot adequately provide for her children and they, in turn, cannot have their natural mother. Should such continued supervision and time disclose that, indeed, appellant cannot adequately provide for her children and their best interests demand that her parental rights be terminated, there is yet adequate time to do so. It should not be done simply because the social workers have concluded that the natural mother is bothersome or aggressive so long as such action does not result in harm or injury to the well-being of the children or make the mother unfit as a parent. For these reasons, therefore, the order of the Separate Juvenile Court terminating parental relations of the appellant is reversed and the cause is remanded to the Separate Juvenile Court, that court to periodically review the matter to determine whether physical

custody can be restored to the appellant or other further orders regarding the children are required.

REVERSED AND REMANDED WITH INSTRUCTIONS.

CLINTON, J., not participating.

CHERYL A. KRINGEL, APPELLANT, V.
DON W. KRINGEL, APPELLEE.

298 N.W.2d 150

Filed October 31, 1980. No. 42971.

1. **Divorce: Child Custody.** In determining the question of which parent should have care and custody of the minor children upon the dissolution of a marriage, the paramount consideration must be the best interests of the children.
2. **Child Custody: Appeal and Error.** In evaluating the general concept of the best interests and welfare of the children, it is settled and fundamental law that this court will give weight to the fact that the trial judge saw and observed the witnesses and the attitude of the parties at the trial.
3. **Child Custody: Sexual Misconduct.** Sexual misconduct is a factor which, although not necessarily determinative, may be properly considered in determining the best interests of the children.
4. **Child Custody.** When a controversy arises between the natural parents as to the custody of minor children, no presumption shall exist that one parent is more fit to have custody of the children than the other.
5. **Child Custody: Appeal and Error.** The decision of the trial court on the granting or changing of custody of minor children, while subject to review, 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 Lancaster County: DALE E. FAHRNBRUCH, Judge. Affirmed.

Stephen K. Yungblut for appellant.

Jerry L. Snyder for appellee.

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

BRODKEY, J.

Cheryl A. Kringel (Cheryl) appeals from the decree entered by the District Court for Lancaster County, Nebraska, dissolving her marriage to Don W. Kringel (Don), distributing the property of the marriage, and awarding physical custody of the minor children of the marriage to Don. We affirm.

Cheryl and Don were married in Lincoln, Nebraska, on February 5, 1969, and resided in Newport, Rhode Island, where Don was stationed with the U. S. Navy. In November of 1971, Don was honorably discharged from the Navy prior to the birth of the parties' first child, Tara Kringel. Two weeks after Tara's birth, the parties returned to Lincoln, Nebraska, where Don became employed full-time at the University of Nebraska at Lincoln, and Cheryl worked on a part-time basis. The parties' second child, Neil Kringel, was born in February of 1976; and shortly thereafter, the family moved to Lexington, Nebraska, where Don was employed at a Chevrolet dealership.

In March of 1977, Don suffered serious injuries as a result of a motorcycle accident. Cheryl testified that, while her marriage with Don had been a good one, after the accident Don became emotionally withdrawn from the family and that the marital relationship became strained. The parties returned to Lincoln, Nebraska, in June of 1977, where Don obtained employment at another Chevrolet dealership and Cheryl began full-time employment with an insurance company. The relationship of the parties remained strained. Evidence adduced indicates that Cheryl became involved in an adulterous situation which lasted over a 6-week period, during which time she would leave the house and not return until the next day. The tension climaxed in an argument between the parties on December 1, 1978, after which Cheryl left the Kringel house. The parties met several times thereafter to discuss their relationship and decided that it would be best for their minor children to stay with their paternal grandparents in Arkansas on a temporary basis. On Decem-

ber 5, 1978, Tara and Neil were taken from Lincoln to Rogers, Arkansas, to reside with their paternal grandparents.

On December 12, 1978, Cheryl filed a petition seeking the dissolution of her marriage and temporary custody of Tara and Neil. A hearing to determine temporary custody was held on December 18, 1978, at which time the court awarded temporary legal custody to Don with temporary physical custody in the paternal grandparents. The children resided in Arkansas through February of 1979, at which time the paternal grandparents returned to Lincoln, Nebraska, where the children are presently residing with their father and paternal grandparents.

In its final decree of dissolution, entered on August 16, 1979, the court determined that the best interests of the children would be served by placing legal custody of the children in the court, under the supervision of the Juvenile Probation Office of Lancaster County, Nebraska, until further order of the court and that the physical custody of the children should be placed in Don, subject to certain rights of visitation granted to Cheryl. In addition, the court ordered Cheryl to pay child support in the sum of $25 per child per month until the children reach legal age, become free and emancipated, are no longer dependent upon Don for support, or until further order of the court. The sole issue on appeal is whether the trial court properly exercised its discretion in determining that the physical custody of the children with Don was in the best interests of the children.

In determining the question of which parent should have care and custody of the minor children upon the dissolution of a marriage, the paramount consideration must be the best interests of the children. *Curfman v. Curfman*, *ante* p. 1, 295 N.W.2d 299 (1980); *Whitlatch v. Whitlatch*, 206 Neb. 527, 293 N.W.2d 856 (1980); *Sikes v. Sikes*, 205 Neb. 441, 288 N.W.2d 43 (1980). As was noted in *Christensen v. Christensen*, 191 Neb. 355, 215 N.W.2d 111 (1974), the judgment concerning the

best interests of children is quite subjective in nature. This being so, many factors must be considered in light of the circumstances of each particular case. The general considerations of the moral fitness of the parents; the respective environments offered by each parent; the emotional relationships between the children and their parents; and the age, sex, and health of the children are some of the many factors for the court to consider. In evaluating the general concept of the best interests and welfare of the children, it is settled and fundamental law that this court will give weight to the fact that the trial judge saw and observed the witnesses and the attitude of the parties at the trial.

In addition, this court has stated that sexual misconduct is a factor which, although not necessarily determinative, may be properly considered in determining the best interests of the children. *Ahlman v. Ahlman*, 201 Neb. 273, 267 N.W.2d 521 (1978); *Lockard v. Lockard*, 193 Neb. 400, 227 N.W.2d 581 (1975).

We have also stated the general rule to be that, when a controversy arises between the natural parents as to the custody of minor children, no presumption shall exist that one parent is more fit to have custody of the children than the other. *Turner v. Turner*, 205 Neb. 6, 286 N.W.2d 100 (1979). See, also, Neb. Rev. Stat. § 42-364(2) (Reissue 1978).

In the decree entered in this matter, the court found that Don was fully recovered from the depression he had suffered after his accident. This finding was based upon a psychological report and expert testimony taken from a psychologist who examined both Cheryl and Don. The psychologist concluded that, while neither parent was unfit to have custody, Don had stabilized himself as to the marital problems and his future goals, while Cheryl had not become emotionally settled with such problems or her immediate future plans with regard to the children. The evidence reveals that Don presently lives with his parents and children, but they all plan to move into a duplex. The paternal grandparents have indicated their willingness to babysit with their grandchildren and to aid their son should he need help in the future. Cheryl is presently living

with her mother with whom she shares an apartment. However, testimony revealed that her mother is planning to move to Colorado, and Cheryl was uncertain whether she would be able to maintain her present residence. Cheryl also testified that she was considering going to college, but has no definite plans as to her future.

The court specifically found that Don, during the period he has provided temporary care, has taken good care of the children. The living environment, with the aid of the paternal grandparents, was found to be stable and the grandparents indicated their willingness to sit with the children while their father is at work. After interviewing the eldest child, Tara, with the consent of counsel, the court found the children to be happy, healthy, and adjusted to their present home environment. The record is clear that Tara loves both of her parents, but did not want to be forced to decide with which parent to live. An emotional relationship between the children and their parents exists and is evidenced to be a strong one. We believe that the present custody arrangment is furthering the children's relationship with both parents, and that it is in the best interests of the children to be left with Don. We do not believe that thrusting them into a new living environment of uncertain stability would be in their best interests.

The decision of the trial court on the granting or changing of custody of minor children, while subject to review, 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). From the review of the entire record, the trial court gave full and studied consideration to the best interests of Tara and Neil Kringel, and there is no showing that the trial court abused its discretion.

The award of custody of the children to Don is sup-

ported by the weight of the evidence, and we, therefore, affirm the judgment of the trial court.

AFFIRMED.

CLINTON, J., not participating.

MARIAN TORREY, APPELLEE, V.
GLEN W. TORREY, APPELLANT.

298 N.W.2d 154

Filed October 31, 1980. No. 43064.

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

John P. Murphy of Ruff & Murphy for appellant.

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

Heard before KRIVOSHA, C.J., MCCOWN, and WHITE, JJ., and COLWELL and HUBER, District Judges.

PER CURIAM.

On August 3, 1978, the appellant and appellee were divorced by decree of the District Court for Scotts Bluff County, Nebraska. Provisions were made in the decree for both alimony and child support. On August 27, 1979, the appellee filed an application for citation for contempt, alleging that appellant was in arrears on both alimony and child support payments. On August 27, 1979, the Honorable Robert O. Hippe, one of the district judges in and for the 17th Judicial District, signed an order to show cause directing appellant to appear on the 18th day of September, 1979, to show cause why he should not be held in contempt.

On September 18, 1979, hearing was had and, as a result of that hearing, the court found appellant in contempt of court and sentenced appellant to 30 days in the Scotts Bluff County jail, provided, however, that the appellant be permitted to purge himself of contempt by making a $500 additional alimony or child

support payment for September and a like amount for October and November and, in addition thereto, on or before November 30th, have all arrearage of the child support or alimony paid to date and pay the attorney fees ordered on August 3, 1978.

Appellant maintained that, while he may be delinquent in alimony, he was not delinquent in child support and that his failure to pay the alimony was not willful. At the hearing before this court on appeal, we were advised by counsel for the appellant that, while the appeal was pending before this court, appellant voluntarily surrendered himself to the sheriff of Scotts Bluff County, Nebraska, and served the entire 30 days ordered by the court. The sentence, therefore, has been accepted by the appellant and served in full. The matter is obviously now moot and nothing we could do in this case could return to the appellant the time he has already served in full compliance with the court's order if, in fact, he was so entitled. There being no relief which this court can grant appellant, there is nothing which can be appealed. See *School Dist. No. 65 v. McQuiston*, 163 Neb. 246, 79 N.W.2d 413 (1956). It is not within the province of the Supreme Court to determine moot questions. *Kansas-Nebraska Nat. Gas Co., Inc. v. Wiles*, 190 Neb. 795, 212 N.W.2d 633 (1973); *Banning v. Marsh*, 124 Neb. 207, 245 N.W. 775 (1932). The matter now being moot, the appeal must be dismissed. It is so ordered.

APPEAL DISMISSED.

B & C EXCAVATING COMPANY, APPELLANT, V. ROBERT HINER ET AL., APPELLEES.

298 N.W.2d 155

Filed October 31, 1980. No. 43150.

1. **Workmen's Compensation: Appeal and Error.** The findings of fact made by the Workmen's Compensation Court have the effect of a jury verdict and will not be set aside on appeal unless clearly wrong.
2. **Workmen's Compensation.** There must be some consensual relationship between the loaned employee and the employer whose service he enters, sufficient to create a new employer-employee relationship. Where an employee enters the service of another at the command and pursuant to the direction of the master, no new relationship is created.
3. ____ When a general employer lends an employee to a special employer, the special employer becomes liable for workmen's compensation only if (a) The employee has made a contract of hire, express or implied, with the special employer; (b) The work being done is essentially that of the special employer; and (c) The special employer has the right to control the details of the work.

Appeal from the Nebraska Workmen's Compensation Court. Affirmed.

Hansen & Engles for appellant.

Marion J. Yoder for appellee Hiner.

Lyman L. Larsen of Kennedy, Holland, DeLacy & Svoboda for appellee Ideus Construction Co.

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

WHITE, J.

In this appeal from the Workmen's Compensation Court, we are asked to reverse the judgment of that court, holding the appellee Robert Hiner (hereafter Hiner) to be an employee of the B & C Excavating Company (hereafter B & C) and not a loaned employee of the Ideus Construction Company (hereafter Ideus). We affirm.

Once we have examined the record and determined that the findings of fact by the compensation court are not clearly wrong, those findings have the effect

of a jury verdict and are binding on us. Neb. Rev. Stat. § 48-185 (Reissue 1978); *White v. Western Commodities, Inc.*, *ante* p. 75, 295 N.W.2d 704 (1980).

B & C was incorporated in October 1978 by Thomas J. Beekman and Duane Carstens. Prior to the incorporation, Beekman owned an International dump truck which he leased to Ideus. The truck was used to transport bulk materials on Ideus jobs. The terms of the oral lease were that Ideus pay Beekman $21 per hour for the truck and a driver, all insurance and maintenance costs to be paid by Beekman.

The truck was operated by either Thomas Beekman or his brother LaVerne. When LaVerne drove the truck, he was paid 30 percent of the amount paid by Ideus. All parties agreed that LaVerne was an independent contractor.

When Ideus was informed that, after the incorporation, B & C was to be the leasing agent and that Hiner was to operate the truck, Ideus insisted that B & C provide workmen's compensation insurance for Hiner. B & C did so.

From November 2, 1978, until the accident on December 22, 1978, Hiner drove one of two trucks, principally on work for Ideus. He was paid by B & C at an hourly rate and Social Security and income taxes were withheld from his wages by B & C. Both trucks carried a sign "B & C Excavating" on the door. All repair and maintenance was borne by B & C and Hiner.

Ideus' use of B & C trucks and Hiner was on a job-to-job basis. B & C had the right to refuse a job or to take another for others in preference to the Ideus work.

In the day-to-day operations, Hiner reported to Beekman daily or nearly so and received instructions as to where Hiner was to work. The Ideus foreman would instruct Hiner as to what he was to haul and frequently specified the preferred route. The foreman had no power to fire Hiner or discipline him. In case of a dispute, he would report to his superior and recourse would be had to B & C.

The essential work of B & C was the removal and hauling of materials. The work, whether done for its own account or for Ideus, was the same.

It is obvious that Hiner does not meet the test of a loaned employee. In the recent case of *White v. Western Commodities, Inc., supra*, a case in which the dispute was whether the injured person was a joint employee, we said: "Neb. Rev. Stat. §48-115(2) (Reissue 1978) defines an employee as 'Every person in the service of an employer who is engaged in any trade, occupation, [or] business . . . under any contract of hire, expressed or implied, oral or written . . . .'

"There is a rationale here with the line of cases involving 'special employees,' where the rule is: '[T]here must be some consensual relationship between the loaned employee and the employer whose services he enters, sufficient to create a new employer-employee relationship. Where an employee enters the service of another at the command and pursuant to the direction of the master, no new relationship is created.' *Shamburg v. Shamburg*, 153 Neb. 495, 502, 45 N.W.2d 446, 451 (1950).

"Defendants here dealt at arms length in their lease agreement, including the provision that Western (lessor) was to be the employer of truckdrivers for workmen's compensation purposes. The evidence supports that agreement and there is no showing of prejudice to plaintiff who was not privy thereto; in fact, that was the desire and understanding of plaintiff. Such agreement should be accorded considerable weight in determining the issue of employment as contemplated in §48-129." *Id.* at 82, 295 N.W.2d at 709.

1C Larson, Workmen's Compensation Law §48.00 (1980), states the rule as follows: "When a general employer lends an employee to a special employer, the special employer becomes liable for workmen's compensation only if (a) The employee has made a contract of hire, express or implied, with the special employer; (b) the work being done is essentially that

of the special employer; and (c) the special employer has the right to control the details of the work."

The absence of a contract of hire between Ideus and Hiner, the work of B & C being in no way distinguished from Ideus work, the absence of all but minimal control of Hiner by Ideus, the payment of wages by B & C, and the agreement between Ideus and B & C that B & C maintain workmen's compensation insurance on Hiner establish that Hiner remained at all times an employee of B & C and was not a loaned or a special employee of Ideus. The compensation court's judgment is correct and it is affirmed.

Appellee Hiner is allowed $750 for services of his attorney in this court.

AFFIRMED.

CLINTON, J., not participating.

DONNA CROSBY, APPELLEE, V. AMERICAN STORES AND KEMPER INSURANCE COMPANY, APPELLANTS.

298 N.W.2d 157

Filed October 31, 1980. No. 43177.

1. **Workmen's Compensation: Words and Phrases.** The workmen's compensation act defines "accident" as an unexpected or unforeseen injury happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury. Neb. Rev. Stat. §48-151(2) (Reissue 1978).
2. **Workmen's Compensation.** The accident requirement of the act is satisfied if the cause of the injury is of accidental character or the effect is unexpected or unforeseen, and happened suddenly and violently.
3. ____ It is no longer necessary that the injury be caused by a single traumatic event, but the exertion in the employment must contribute in some material and substantial degree to cause the injury.

4. **Workmen's Compensation: Words and Phrases.** The workmen's compensation act defines "occupational disease" as a disease which is due only "to causes and conditions which are characteristic of and peculiar to a particular trade, occupation, process or employment and shall exclude all ordinary diseases of life to which the general public are exposed." Neb. Rev. Stat. § 48-151(3) (Reissue 1978).
5. **Workmen's Compensation.** Generally, the time of accident is sufficiently definite if either the cause is reasonably limited in time or the result materializes at an identifiable point.

Appeal from the Nebraska Workmen's Compensation Court. Affirmed.

Cline, Williams, Wright, Johnson & Oldfather for appellants.

Hal Bauer of Bauer, Galter, Geier, Flowers & Thompson for appellee.

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

BOSLAUGH, J.

This is an appeal in a proceeding under the workmen's compensation act. The plaintiff, Donna Crosby, had been employed by the defendant American Stores at its meatpacking plant in Lincoln, Nebraska, since 1963. Prior to October 1, 1978, she had been employed as an inserter. An inserter removes lunch meat from the line and puts it into slots where it proceeds to an automatic wrapper.

On October 1, 1978, the plaintiff's job was changed to stack and record. This job required the plaintiff to assemble boxes part of the time. At other times the plaintiff would remove boxes filled with meat from the line; close the boxes; and flip them over and then stack them on wooden pallets. This job required the plaintiff to handle the pallets by removing them from stacks and pulling or pushing them into position for loading.

On the stack and record job, the plaintiff used the palms of her hands in dislodging the pallets from the stack, in forming the boxes, and in closing the

boxes. The plaintiff testified that she processed approximately 2,000 boxes per day and, on a typical day, used 15 pallets before the "first break."

After the first day on the stack and record job, the plaintiff's hands were sore and had started to swell. The condition grew worse on succeeding days and after 5 to 10 days the plaintiff went to see the company nurse. The nurse wrapped the plaintiff's right hand with an ace bandage. At night, the plaintiff soaked her hands to relieve the soreness. By December, the pain had become quite severe and she was experiencing numbness. In January, she consulted the company doctor who referred her to a neurologist. Her condition was diagnosed as carpal tunnel syndrome. The neurologist referred her to a surgeon who then operated to relieve the condition. The evidence establishes that the plaintiff's injury was caused by the use of her hands and wrists on the job, especially the striking of the pallets and boxes with the palms of her hands, and arose out of and in the course of her employment by the defendant. The issue is whether the carpal tunnel syndrome was compensable as an accidental injury or as an occupational disease.

At the hearing before a single judge of the compensation court, the plaintiff recovered an award for temporary total disability and medical and hospital expense. The compensation court considered the cumulative trauma doctrine and found that the plaintiff was entitled to recover on the theory of occupational disease.

Upon rehearing, the compensation court, with one judge dissenting, affirmed the award. The court found that the plaintiff had suffered an "accident and injury, as a result of" repeated trauma to her hands.

The defendant has appealed and contends that the compensation court, on rehearing, erred in finding that the plaintiff suffered carpal tunnel syndrome as the result of an accident arising out of her employment by the defendant. The defendant argues that the evi-

dence in this case will not sustain a finding that the injury was caused by either an accident or occupational disease.

The act defines "accident" as an unexpected or unforeseen injury happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury. Neb. Rev. Stat. § 48-151(2) (Reissue 1978). In *Brokaw v. Robinson*, 183 Neb. 760, 164 N.W.2d 461 (1969), we held that the accident requirement of the act was satisfied if the cause of the injury was of accidental character or the effect was unexpected or unforeseen, and happened suddenly and violently. We also said that it was no longer necessary that the injury be caused by a single traumatic event, but the exertion in the employment must contribute in some material and substantial degree to cause the injury.

The act defines occupational disease as a disease which is due only "to causes and conditions which are characteristic of and peculiar to a particular trade, occupation, process or employment and shall exclude all ordinary diseases of life to which the general public are exposed." Neb. Rev. Stat. § 48-151(3) (Reissue 1978).

Part of the difficulty in this case is that the plaintiff's injury has some of the characteristics of both an accidental injury and an occupational disease.

The plaintiff's use of her hands to strike the pallets and boxes caused an injury which produced objective symptoms at the time. Each striking was a sudden and violent event. Although no one blow produced an injury severe enough to be compensable by itself, the cumulative effect of the repeated trauma resulted in an injury which produced disability. Most jurisdictions regard the time of accident as sufficiently definite if either the cause is reasonably limited in time or the result materializes at an identifiable point. 1B Larson, Workmen's Compensation Law § 39.00 (1980). The facts in this case satisfied both tests. The plain-

tiff's difficulty with her hands commenced immediately after she was transferred to stack and record. In that respect, this case may be distinguished from cases involving chronic conditions which develop over a period of many years where the injury cannot be traced to a particular job or activity of the workman.

The plaintiff's injury involved in this case resembles an occupational disease in that it developed over a period of time in a manner in which many diseases develop. There is some evidence that the temperature conditions which prevail in a packing plant contribute to the development of the injury which is found among employees in packing plants. There is other evidence that the injury has many possible causes and may be considered to be an ordinary disease of life.

We think the analysis made by the compensation court, on rehearing, was correct on the facts in this case. The judgment is, therefore, affirmed. The plaintiff is allowed $750 for the services of her attorney in this court.

AFFIRMED.

KRIVOSHA, C.J., concurs in result.

CLINTON, J., not participating.

GUADALUPE M. ALCARAZ, APPELLEE, V. WILSON & COMPANY, INC., APPELLANT.

298 N.W.2d 160

Filed October 31, 1980. No. 43178.

1. **Workmen's Compensation: Appeal and Error.** The finding of facts made by the Nebraska Workmen's Compensation Court after rehearing shall have the same force and effect as a jury verdict in a civil case.
2. ____: ____. In testing the sufficiency of evidence necessary to sustain an award of the Nebraska Workmen's Compensation Court after rehearing, such evidence must be considered most favorably to the successful party; any controverted fact must be resolved in his or her favor; and he or she must receive the benefits of every inference reasonably deducible from it.
3. **Workmen's Compensation: Burden of Proof.** In a workmen's compensation case, the burden is upon the claimant to establish that the accidental injury arose in the course of employment as well as out of the employment.

Appeal from the Nebraska Workmen's Compensation Court. Affirmed.

Louis M. Leahy of Leahy & Bertrand for appellant.

Richard M. Fellman and Alan H. Kirshen of Fellman, Ramsey & Kirshen for appellee.

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

BRODKEY, J.

The defendant below, Wilson & Company, Inc. (Wilson), appeals to this court from an award on rehearing made by the Nebraska Workmen's Compensation Court on December 12, 1979, in favor of the plaintiff and appellee herein, Guadalupe M. Alcaraz, for benefits due under the Nebraska workmen's compensation law as the result of an accident which occured on February 20, 1975. It appears that, on that date, Mrs. Alcaraz was employed in the pork department of the slaughterhouse operated by Wilson when she was thrown by a steer which had broken loose in

the slaughterhouse. Mrs. Alcaraz suffered injuries to her shoulder and spine, described as a contusion and sprain of both the left shoulder and lumbar spine, as well as a compression deformity of the L-1 vertebra, and a herniated disk at the L-4-5 level which required the surgical removal of the disk in August of 1975.

On November 2, 1976, a hearing was held before Judge LeClair of the Workmen's Compensation Court in order to determine the extent of the disability suffered by the appellee. Based upon the medical testimony and exhibits presented by the three treating physicians, the court determined that the appellee sustained a compensable injury and awarded workmen's compensation benefits in the sum of $89 per week. Wilson petitioned for a rehearing before a three-judge panel, and on March 1, 1977, the court affirmed the award of benefits to Mrs. Alcaraz for so long as she remained totally disabled as a result of the accident.

This appeal originates from a motion filed by Wilson on February 21, 1979, seeking to terminate the payments made to the appellee, in which it was alleged that Mrs. Alcaraz no longer suffered temporary total disability. Following a hearing on the motion on May 14, 1979, Judge LeClair found that neither the disability nor earning capacity of the appellee had materially changed since the 1977 award of benefits and ordered that appellant's motion be dismissed. Wilson filed an application for rehearing before a three-judge panel, and on December 12, 1979, the court, in its award on rehearing, affirmed the order of dismissal from which the appellants now appeal to this court.

The present scope of review in this court on appeals from the Workmen's Compensation Court is that findings of fact shall have the same force and effect as a jury verdict in a civil case. "A judgment, order, or award of the Nebraska Workmen's Compensation Court may be modified, reversed, or set aside only upon the grounds that (1) the court acted without

or in excess of its powers, (2) the judgement, order, or award was procured by fraud, (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award, or (4) the findings of fact by the court do not support the order or award." Neb. Rev. Stat. §48-185 (Reissue 1978). See, also, *Scamperino v. Federal Envelope Co.*, 205 Neb. 508, 288 N.W.2d 477 (1980); *Johnson v. Village of Winnebago*, 197 Neb. 845, 251 N.W.2d 176 (1977).

Wilson assigns as error and argues (1) that the decision of the Workmen's Compensation Court is not supported by the evidence, and (2) that the court erred in finding that there had been no change in the disability or earning capacity of the appellee.

In determining the sufficiency of evidence necessary to sustain an award of the Nebraska Workmen's Compensation Court after rehearing, such evidence must be considered most favorably to the successful party; every controverted fact must be resolved in his or her favor; and he or she must receive the benefit of every inference reasonably deducible from it. See, *McCann v. Holy Sepulchre Cemetery Assn.*, 205 Neb. 444, 288 N.W.2d 45 (1980); *Riley v. City of Lincoln*, 204 Neb. 386, 282 N.W.2d 586 (1979). In a workmen's compensation case, the burden is upon the claimant to establish that the accident which allegedly caused the injury arose in the course of employment as well as out of the employment. See *Reis v. Douglas County Hospital*, 193 Neb. 542, 227 N.W.2d 879 (1975).

The evidence in the record sustains the finding of the Workmen's Compensation Court that the appellee, while engaged in the duties of her employment on February 20, 1975, was struck in the back by a steer which had broken loose in the slaughterhouse, and was thrown overhead by the animal, resulting in a fall to the concrete floor. It is clear that the impact from this accident caused the multiple contusions and sprains to both the left shoulder and lumbar spine of

the appellee as well as a compression at the L-1 disk. The record indicates that the appellee received treatment in the hospital and physical therapy as an outpatient for the 5 months following the accident. However, these treatments were unsuccessful in treating her herniated disk at the L-4-5 level and she underwent surgery for the removal of the disk in August of 1975. Although the surgery was successful, the appellee still has a considerable amount of back pain and the medical reports indicate sensory loss and impairment to her left leg and foot. The three physicians who treated the appellee at different times following her injury are all in agreement that she continues to suffer a permanent partial disability, and that she could not return to the type of work which she had previously done at the Wilson slaughterhouse.

Plaintiff is shown by the evidence to be a 64-year-old female of Mexican descent, with a sixth grade education and no other appreciable working skills. The record shows that she is currently living with her husband and grandchildren, and that she worked for Wilson for a period of over 20 years. She was found by Dr. McKinney, on examination subsequent to her surgery, to have "healed satisfactorily, unfortunately she continues to complain of a fair amount of pain, and I would not consider her an excellent result. . . . [S]he showed some diminution of the deep tendon reflexes in the left lower extremity, mild weakness on extension of the left great toe, and hypalgesia . . . ." When asked if Mrs. Alcaraz should be permitted to return to her former work, Dr. McKinney responded "no," and in his report of April 21, 1976, he stated as his prognosis: "I believe that Mrs. Guadalupe Alcaraz suffered a permanent partial disability of 20% as a result of her injury in February 1975. I believe that her prognosis for returning to gainful employment is rather poor since she continues to have a considerable amount of low back pain." The evidence further discloses that

in 1969 Mrs. Alcaraz was involved in an automobile accident in which she suffered injuries to her head and neck. In addition, she underwent a mastectomy in January of 1976 and has received chemotherapy for the cancer. While appellant's counsel questioned whether these factors could have caused the appellee's spinal injuries, all three treating physicians testified that there was no connection between her previous automobile injuries or the cancer, and the injuries she suffered from the accident at the Wilson packing plant.

In this case, we are unable to conclude that the findings of the Workmen's Compensation Court were wrong or not supported by the evidence. The evidence in the record clearly supports the findings of the court, and examining the evidence in the light most favorable to Mrs. Alcaraz, as we are required to do, we are unable to conclude that the Workmen's Compensation Court was in error in finding that there had been no change in the disability, earning capacity, or employability of the appellee. We must, therefore, affirm the order entered by the Workmen's Compensation Court and, pursuant to Neb. Rev. Stat. § 48-125 (Reissue 1978), we allow an additional attorney fee in the sum of $1,500 for the services of the appellee's attorney in this court, to be taxed as costs against the appellant.

AFFIRMED.

CLINTON, J., not participating.

RONALD J. MOHR, APPELLEE, V. SOIL MOVER MANUFACTURING COMPANY AND FEDERATED INSURANCE COMPANY, APPELLANTS.

298 N.W.2d 166

Filed October 31, 1980. No. 43325.

1. **Workmen's Compensation: Appeal and Error.** Findings of fact made by the Workmen's Compensation Court after rehearing have the effect of the verdict of a jury and will not be set aside unless clearly wrong.
2. ____:____ An award of the compensation court may be reversed or set aside if there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award.

Appeal from the Nebraska Workmen's Compensation Court. Affirmed.

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

Douglas R. Milbourn of Tessendorf, Milbourn, Fehringer & Bothe, P.C., for appellee.

Heard before BOSLAUGH, BRODKEY, and HASTINGS, JJ., and BLUE and CAPORALE, District Judges.

BOSLAUGH, J.

This is an appeal in a proceeding under the workmen's compensation act. The plaintiff, Ronald J. Mohr, was employed as a welder by the defendant Soil Mover Manufacturing. The plaintiff alleged that he had suffered a left inguinal hernia while at work on April 2, 1979.

After a hearing before a single judge of the compensation court, the plaintiff recovered an award for temporary total disability and medical and hospital expenses. Upon rehearing before a three-judge panel of the compensation court the award was affirmed, one judge dissenting. The defendants have appealed.

The issues upon the appeal are essentially questions of fact. The findings of fact made by the Workmen's Compensation Court after rehearing now have the effect of the verdict of a jury and will not be set

aside unless clearly wrong. Neb. Rev. Stat. § 48-185 (Reissue 1978); *Wolfe v. American Community Stores*, 205 Neb. 763, 290 N.W.2d 195 (1980).

The record shows that the plaintiff was 18 years of age. On April 2, 1979, he was engaged in welding reinforcement bars on a scraper bucket. The reinforcement bars are flat stock steel bars, 2 inches wide, and approximately 3 feet long. There are four bars on the bottom of each scraper bucket and each bar weighs about 20 pounds. The plaintiff testified that after lunch he picked up four bars from the floor to place them on the bucket which was lying on the floor upside down. As he was lifting the bars from the floor, he "felt a sharp pain in the groin area." He continued to work but began to feel sick and the pain started to get worse. He worked another hour or hour and a half before he told the foreman that he didn't feel well and was going home. He was examined by a physician that same afternoon and was found to have a large, bulging, tender mass in the left inguinal region which was not easily reduced. The plaintiff was experiencing discomfort and pain and was hospitalized that afternoon. The hernia was repaired surgically 2 days later. The physician testified that, in his opinion, the lifting was the most probable cause of the hernia.

The plaintiff had no previous history of hernia problems and he returned to work following the surgery. There is no evidence that the hernia developed at any time other than when the plaintiff was at work for the defendant on the premises of the defendant.

What conflict there is in the evidence arises from previous statements of the plaintiff. The plaintiff had been interviewed by a representative of the defendant employer's workmen's compensation liability insurance carrier and had said, "Well, maybe it happened when I was changing the wire." The physician testified that the plaintiff had said the pain occurred while he was lifting a roll of wire used in the welding machine.

The plaintiff had made a claim under group health and accident insurance furnished by the employer. The claim forms stated that the hernia was not work-related. The evidence shows, however, that the claim forms had been filled out by persons other than the plaintiff and that this claim was made after the employer's compensation carrier had denied the claim. The plaintiff may have been under the impression at that time that it had been determined that the hernia was not work-related.

Under Neb. Rev. Stat. § 48-185(3) (Reissue 1978), an award of the compensation court may be reversed or set aside if "there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award . . . ." Since the record in this case contains sufficient competent evidence, if believed, to sustain the award, the judgment must be affirmed.

The plaintiff is allowed $1,500 for the services of his attorney in this court.

AFFIRMED.

BRODKEY and HASTINGS, JJ., concur in result.

STATE OF NEBRASKA, APPELLEE, V. LLOYD T. SMITH, APPELLANT.

298 N.W.2d 162

Filed October 31, 1980. No. 43237.

1. **Evidence: Arrests.** The mere fact that there is an illegal arrest does not thereby cause all evidence otherwise lawfully obtained to be inadmissible "per se."
2. **Evidence: Search and Seizure.** The fruit of the poisonous tree doctrine excludes evidence obtained from or as a consequence of lawless official acts, not evidence obtained from an independent source.

3. **Arrests: Evidence.** An illegal arrest of an accused, without more, does not bar the subsequent prosecution of the accused, and the illegality of the accused's detention by police does not deprive the government of the opportunity to prove the accused's guilt through the introduction of evidence wholly untainted by the police misconduct.

Appeal from the District Court for Lincoln County: KEITH WINDRUM, Judge. Affirmed.

David T. Schroeder for appellant.

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

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

KRIVOSHA, C.J.

The appellant, Lloyd T. Smith, appeals from a conviction finding him guilty of five counts of possession of a controlled substance. As a result of the conviction, Smith was sentenced to not less than 20 months nor more than 2 1/2 years on each count, with said sentences to run concurrently. Smith maintains that, because his arrest was illegal and in violation of his rights under the fourth amendment to the United States Constitution, evidence thereafter obtained as a result of a search of his premises made pursuant to an otherwise valid search warrant should have been suppressed, thereby making the conviction impossible. We believe that the appellant has misconstrued the law in this regard and, therefore, we affirm the judgment of the trial court.

The evidence discloses that on February 12, 1979, Lt. Gary W. Hansel, who is a drug investigator for the Nebraska State Patrol, was advised by a Mr. Jack Dunn, a supervisor at United Parcel Service, Omaha, Nebraska, that he, Mr. Dunn, had received information from his Kansas City office that United Parcel Service in Kansas City had a package in their possession which they believed to contain a controlled substance

and which was addressed to the appellant at his residence, Apt. 101, 714 E. Philip Ave., North Platte, Lincoln County, Nebraska. Mr. Dunn further stated to Lt. Hansel that the tape on the package had come loose, revealing the contents. These contents were viewed and inspected by Ronald Miller, who is a police officer and part-time employee of United Parcel Service.

On February 14, 1979, Lt. Hansel spoke personally with Officer Miller. Officer Miller had been employed as a police officer for the police department of Kansas City, Kansas, for 6 years. He had worked as a patrolman for approximately 5 of those years, working regular operations with the traffic bureau. For the year just past, however, he had spent about 70 percent of his time working as an administrative assistant to the operations bureau commander and approximately 30 percent of his time had been committed to regular police duties for the operations bureau. Officer Miller's experience with controlled substances had been those experiences that normally occur to a traffic officer. Furthermore, he had had previous experience with the identification of marijuana, phenocyclidine (PCP), and cocaine and was familiar with the general appearance of controlled substances and the general methods of packaging them.

Officer Miller advised Lt. Hansel that on February 12, 1979, his attention was called to a broken package which had been removed from the sorting process for repair by United Parcel Service. Inside the box, Officer Miller observed two zip-lock plastic bags, one within the other. Inside the inner bag he observed three small glass test tubes which contained a dark brown residue and a brown substance. Also inside the inner bag, he observed a foil packet containing two or three pieces of a brown chocolate-colored substance together with three or four chunks of a brown fibrous material. Upon further inspection and smelling, it was Officer

Miller's opinion that all of the brown substances were marijuana in the form of hashish. Inside the inner plastic bag, Officer Miller found two pieces of folded note paper, each containing what appeared to be a little less than a teaspoonful of a white powder. Officer Miller was of the opinion that the color and outward appearance of the white powder was consistent with cocaine he had previously seen and identified. The contents were thereafter returned to the package and the package was resealed. The package was first shipped to the office of the United Parcel Service at Omaha, Nebraska, and was then shipped to the office of the United Parcel Service at North Platte, Nebraska.

As a result of this information, Lt. Hansel prepared an affidavit containing all the facts recited above, together with other information identifying and establishing the fact that Lloyd Smith did, indeed, reside at 714 E. Philip Ave., North Platte, Nebraska.

At the time of the delivery by United Parcel Service to the Smith residence, and shortly thereafter, the apartment occupied by Smith was under surveillance by Lt. Hansel and Detective Bill Traub of the North Platte police department, as well as Inspector James N. Avary of the Nebraska State Patrol. The apartment building itself contained 12 separate units reached through a central vestibule.

After the delivery of the package by United Parcel Service to the Smith apartment, Lt. Hansel contacted Inspector David A. Elliott of the Nebraska State Patrol and told him that the package was delivered to Smith's apartment and requested that Inspector Elliott contact the county attorney's office and advise that the package had been delivered and signed for and that he was maintaining surveillance. While Lt. Hansel and the other officer maintained the surveillance, the county attorney's office sought and obtained the search warrant based upon the affidavit previously prepared by Lt. Hansel.

While the apartment was under surveillance and before the arrival of the search warrant, a vehicle arrived bearing license plates from an adjoining county. The officers became concerned that the vehicle may have arrived for the purpose of obtaining the controlled substance and, therefore, they decided to secure the Smith apartment unit before the warrant arrived. One of the officers knocked upon the door and identified himself as a police officer. The voice inside instructed them to wait "[j]ust a minute." Lt. Hansel advised the occupant to "[o]pen the door or I will kick it in." The voice from the door said, "Just a minute." Lt. Hansel then kicked the door open. The appellant was about 8 feet inside the door. They approached him and Lt. Hansel identified himself while the other officer made a cursory search of the apartment to make sure no one else was in it. No other search was made of the apartment and no property was seized at that time. Lt. Hansel did, however, advise the appellant that a search warrant for the apartment had been requested and that they were going to simply wait until the search warrant arrived. Lt. Hansel then went to the telephone and called the county attorney's office. He was advised that the search warrant already had been issued and that a deputy was on his way at that time.

After walking down the hall and looking to see if any other subjects were in the apartment, the other officer proceeded to stand by the front entry so that the appellant would be between him and Lt. Hansel at all times.

The warrant arrived approximately 10 or 15 minutes after the officers entered the apartment. The appellant and the premises were then searched for controlled substances; inventoried items were seized; and appellant was arrested and taken to jail.

Appellant maintains that, on the basis of the recent decision of the U.S. Supreme Court in the case of *Payton v. New York*, 445 U.S. 573, 100 S. Ct. 1371,

63 L. Ed. 2d 639 (1980), the arrest was a violation of his fourth amendment constitutional rights and, therefore, the evidence obtained from the apartment should have been suppressed upon motion filed by appellant.

As we indicated earlier, we believe that the appellant misconstrues the holding in *Payton, supra. Payton* does, indeed, stand for the proposition that, absent exigent circumstances or consent, one may not be arrested inside his home without the police first obtaining an arrest warrant, and evidence obtained without a search warrant and as a part of the unlawful arrest must be suppressed upon proper motion. Such, however, are not the facts of this case. Even *Payton* recognizes that illegally arresting an accused does not preclude the government from subsequently trying the accused for the crime charged.

While we do not condone warrantless violent intrusions into one's residence and, as we said in *State v. Patterson*, 192 Neb. 308, 316, 220 N.W.2d 235, 240 (1974), "Search pursuant to warrant is to be much preferred to search without a warrant and ordinarily a warrant should be obtained," we do not believe that the evidence obtained in this case pursuant to a valid search warrant must be suppressed because the arrest may have been illegal. There is no dispute in the evidence that a valid warrant had been sought, obtained, and issued in this case. Had the police officers awaited the arrival of the warrant before attempting to enter the premises, there would be no question as to the admissibility of the evidence obtained. The issue, then, for us to decide in this case is whether, assuming for the sake of argument that the arrest was illegal because it was without warrant and there were not exigent circumstances (a fact which we do not decide), the evidence obtained by a valid warrant was so tainted by the illegal arrest as to be the fruit of the poisonous tree and, therefore, inadmissible.

In *Brown v. Illinois*, 422 U.S. 590, 95 S. Ct. 2254,

45 L. Ed. 2d 416 (1975), the U.S. Supreme Court made it clear that the mere fact that there is an illegal arrest does not thereby cause all evidence otherwise lawfully obtained to be inadmissible "per se." Further, in the case of *Costello v. United States*, 365 U.S. 265, 280, 81 S. Ct. 534, 5 L. Ed. 2d 551 (1961), the U.S. Supreme Court made it clear that, "[T]he 'fruit of the poisonous tree' doctrine excludes evidence obtained from or as a consequence of lawless official acts, not evidence obtained from an 'independent source.'" In the instant case, the controlled substance was obtained, not as a result of the arrest, but rather as a result of a search warrant previously obtained and properly issued. It was clearly obtained from an independent source. The officers found nothing in the premises after their entry which aided them in obtaining the search warrant, nor did they provide anyone with any information concerning their entry which resulted in their obtaining the search warrant. The search warrant had already been issued based upon independent sources and information and was, therefore, unrelated to the warrantless arrest. This important distinction is made clear by the language of the U.S. Supreme Court in the landmark decision of *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1962), wherein the Court pointed out, "Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed." In two recent decisions, the U.S. Supreme Court again reaffirmed the lesson of *Wong Sun, supra*, and declared that an illegal arrest of an accused, without more, does not bar the subsequent prosecution of the accused and the illegality of an accused's detention by police does not deprive the government of the opportunity to prove the accused's guilt through the introduction of evidence

wholly untainted by the police misconduct. See *United States v. Crews*, 445 U.S. 463, 100 S. Ct. 1244, 63 L. Ed. 2d 537 (1980), and *Rawlings v. Kentucky*, ____ U.S. ____, 100 S. Ct. 2556, 65 L. Ed. 2d 633 (1980). It is clear from the evidence in this case that the facts leading to the issuance of the search warrant and the subsequent seizure of the controlled substance were not, in any manner, connected with the police officers' warrantless entry into the premises but, rather, were a result of information provided by United Parcel Service. The evidence, having been obtained from an independent, lawful source, was properly admissible and the trial court did not err in refusing to suppress it. That being the only error raised by the appellant and having been so disposed of, we need proceed no further.

AFFIRMED.

CLINTON, J., not participating.

STATE OF NEBRASKA, APPELLANT, V. RUTH KING, APPELLEE.

298 N.W.2d 168

Filed October 31, 1980. No. 43637.

1. **Search Warrants: Search and Seizure.** When a search is based upon a magistrate's, rather than a police officer's, determination of probable cause, the reviewing courts will accept evidence of a less judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant, and will sustain the judicial determination so long as there was substantial basis for the magistrate to conclude that narcotics were probably present.
2. ____: ____ An informant's detailed eyewitness report of a crime may be self-corroborating: it supplies its own indicia of reliability; and an untested citizen informant who has personally observed the commission of a crime is presumptively reliable.

3. ____:____ The statement of an eyewitness to a crime supplies its own indicia of reliability as a statement of facts rather than conclusions which must be tested to determine their factual basis.
4. ____:____ Information supplied by a citizen who voluntarily comes forward to aid law enforcement officers is presumed to be reliable.
5. **Search and Seizure: Warrantless Searches.** An example of the application of the "plain view" doctrine is the situation in which the police have a warrant to search a given area for specified objects, and in the course of the search, come across some other article of incriminating character.

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

Charles D. Brewster for appellant.

Gary L. Hogg for appellee.

Heard before KRIVOSHA, C.J.

KRIVOSHA, C.J.

This appeal is made to a single judge of the Supreme Court of Nebraska pursuant to the provisions of Neb. Rev. Stat. § 29-824 (Reissue 1979). The appellee, Ruth King, was charged with a violation of Neb. Rev. Stat. § 28-416(3) (Reissue 1979) in that it is alleged she did feloniously, unlawfully, and knowingly or intentionally possess a controlled substance other than marijuana, to wit: phenobarbital. Following the filing of the complaint, the appellee filed a motion to suppress, maintaining that the affidavit upon which the search warrant was issued was defective and insufficient to adequately advise the magistrate of facts sufficient to determine that there was probable cause to issue the warrant. The affidavit presented to the county judge was prepared by a member of the Nebraska State Patrol drug division.

In part, the affiant recited that he "received a message from one Marshall Nelson, Chief of Security at Kearney State College. . . . Chief Nelson advised that three concerned citizens contacted him and advised that within the last five days they had observed small,

round, white pills and a marijuana pipe in a desk in Room 747, Centennial Towers East, Kearney State College, Kearney, Buffalo County, Nebraska. . . . " and that the pills and marijuana pipe belonged to Ruth King. Also, the same individuals advised Chief Nelson that in the closet in Room 747 was located a yellow Antelope Book Store plastic bag containing marijuana. The affidavit then recited that the investigator contacted one of the concerned citizens who advised the investigator exactly where the white pills and the marijuana pipe were located within the room. The individual also advised the investigator that the marijuana in the yellow plastic Antelope Book Store bag was located in the closet. The affidavit further recited that the individual had detected the odor of burning marijuana in the hallways in the vicinity of Room 747 and that the defendant, Ruth King, had indicated to the concerned citizen that she, Ruth King, was drying and "manicuring" marijuana in the clothes dryers that are located in the dormitory at Kearney State College.

Following a hearing in the District Court for Buffalo County, Nebraska, the trial court sustained the motion to suppress. In reaching its conclusion, the trial court advised counsel in open court that in the court's opinion the affidavit for the search warrant did identify the item marijuana. The court said, "But I think maybe as to description, the fact that identifies the drug as marijuana is sufficient to free the affidavit from the question of description of an unlawful drug. The problem that confronts me as I listen to the evidence is different than that. I have no problem with the affidavit with regard to the sufficiency and in the fact that it does describe a controlled substance. And it does describe the controlled substance together with other possible drugs in the possession of the defendant in the certain specific location. The problem that I have is beyond that and I was reading the motion to suppress to see if it goes to that. I have resolved that the mo-

tion to suppress does include the sufficiency of the affidavit to support the search warrant in a general sense. The testimony has been that the information is based upon informants, and not upon the observation of the applicant for a search warrant. . . . I find nothing in the affidavit which would indicate anything to indicate the reliability of the informants upon which the charge is based." The trial court apparently concluded that there was sufficient information in the affidavit to indicate and describe an unlawful drug but that the reliability of the informants was insufficient. We believe, however, that such is not the case under the circumstances and that the order of the trial court sustaining the motion to suppress must be reversed.

In beginning our review, we keep in mind the declaration set forth by the U.S. Supreme Court in *Aguilar v. Texas*, 378 U.S. 108, 111, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964), wherein it is said: "Thus, when a search is based upon a magistrate's, rather than a police officer's, determination of probable cause, the reviewing courts will accept evidence of a less 'judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant,' [citation omitted] and will sustain the judicial determination so long as 'there was substantial basis for [the magistrate] to conclude that narcotics were probably present . . . .' [Citation omitted.]"

In the case of *State v. Payne*, 201 Neb. 665, 670, 271 N.W.2d 350, 352 (1978), we pointed out that: "An informant's detailed eyewitness report of a crime may be self-corroborating; it supplies its own indicia of reliability; and an untested citizen informant who has personally observed the commission of a crime is presumptively reliable." We cited in support of that proposition the cases of *United States v. Simmons*, 444 F. Supp. 500 (E.D. Pa. 1978); *People v. Schulle*, 51 Cal. App. 3d 809, 124 Cal. Rptr. 585 (1975); and

State v. Drake, 224 N.W.2d 476 (Iowa 1974).

In *United States v. Sellaro*, 514 F.2d 114 (8th Cir. 1973), *cert. denied*, 421 U.S. 1013, 95 S. Ct. 2419, 44 L. Ed. 2d 681 (1975), the U.S. Court of Appeals for the Eighth Circuit, in addressing the issue of what is required to establish the reliability of a citizen informant, said: "This Court has held that the statement of an eyewitness to a crime supplies its own indicia of reliability as a statement of facts rather than conclusions which must be tested to determine their factual basis. McCreary v. Sigler, 406 F.2d 1264, 1269 (8th Cir.), cert. denied, 395 U.S. 984, 81 S.Ct. 2149, 23 L.Ed.2d 773 (1969). Accord, United States v. Evans, 447 F.2d 129 (8th Cir. 1971); United States v. Mahler, 442 F.2d 1172 (9th Cir.), cert. denied, 404 U.S. 993, 92 S.Ct. 541, 30 L.Ed.2d 545 (1971)." Additional cases supporting these views are *State v. Perry*, 499 S.W.2d 473 (Mo. 1973); *State v. Lindquist*, 295 Minn. 398, 205 N.W.2d 333 (1973); *State v. Paszek*, 50 Wis. 2d 619, 184 N.W.2d 836 (1971).

It is clear from a reading of the reported cases that the requirements for establishing the reliability of a police informer are not required when dealing with a citizen informer who has witnessed the alleged crime. In *State v. Drake, supra*, the Iowa court said: "When considering the sufficiency of probable cause based on information supplied by an informant, it is important to distinguish the police tipster, who acts for money, leniency, or some other selfish purpose, from the citizen informer, whose only motive is to help law officers in the suppression of crime. . . .

"In the latter the rule of prior reliability is considerably relaxed for several reasons. In the first place the citizen informer has rarely had any earlier experience in reporting suspected criminal activity. Furthermore, unlike the professional informant, he is without motive to exaggerate, falsify or distort the facts to serve his own ends.

"Reliability still must be shown, but it may appear by the very nature of the circumstances under which the incriminating information became known. Any other rule would lead to the totally unacceptable result that public-spirited citizens interested only in law enforcement could seldom furnish information sufficient to establish probable cause." *Id.* at 478.

We believe the reasoning of the Iowa court to be valid and would ourselves adopt such a positon. Likewise, in the case of *State v. Diffenderfer*, 120 Ariz. 404, 406, 586 P.2d 653, 655 (Ariz. App. 1978), it was said: "Information supplied by a citizen who voluntarily comes forward to aid law enforcement officers is presumed to be reliable. *People v. Hill*, 12 Cal.3d 731, 117 Cal.Rptr. 393, 528 P.2d 1 (1974)." We believe that the affidavit in this case sufficiently advised the county judge that the information was based upon the eyewitness observations of three citizen informants who are, therefore, presumed to be reliable.

The other question which apparently did not trouble the trial court, but which perhaps deserves some consideration, is whether there was a sufficient basis upon which the magistrate issuing the warrant could believe that the eyewitnesses knew what they were seeing. To be sure, the information with regard to the "small, round, white pills" was perhaps insufficient. As argued by the appellee, those pills may very well have been prescription drugs or saccharin or anything of the like. In that regard, the information was insufficient. However, with regard to the matter of marijuana and the marijuana pipe, the affidavit was sufficient. The informants recited that they had personally observed the items and unhesitatingly described them as marijuana and a marijuana pipe. Certainly, the better practice would be for the affidavit to recite how and by reason of what circumstances the citizen informant is qualified to identify the observed item as marijuana and we would encourage those preparing

affidavits to do so. The absence of that statement under the circumstances in this case is not, however, fatal.

As we said in *State v. Payne, supra* at 668, 271 N.W.2d at 352, "It has been well established that affidavits for search warrants such as the one involved here must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. Recital of some of the underlying circumstances in the affidavit is essential. Where these circumstances are detailed, where reason for crediting the source of the information is given, and when a magistrate has found probable cause, the court should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense manner."

And in the case of *State v. Drake, supra,* the Iowa court was called upon to consider whether or not statements by an eyewitness that a private apartment contained racks of new clothing all still bearing identification and price tags from local stores, together with a specific description and a number of the garments, raises more than a mere suspicion and justifies issuing a search warrant. In holding that it was sufficient, the Supreme Court of Iowa said: "The presence of such property in a private residence in that quantity and in that condition is so unusual and so incriminating that it not only justifies 'the belief of a man of reasonable caution that an offense has been or is being committed' but makes it difficult to see how such a person could reach any other conclusion." *Id.* at 479.

And in the *Diffenderfer* case, *supra* at 406, 586 P.2d at 655, the Arizona court, speaking of identifying the drug said: "As for her identification of the plants, we agree with the reasoning expressed by the court in *Dishman v. State,* 3 Tenn. Cr. App. 725, 460 S.W.2d 855 (1970): 'To be positive that the material delivered

to the defendant was marijuana, a chemical examination would be required. Many common plants look like it. Before he can obtain a search warrant, however, the agent is not required to have the information the search warrant would disclose. Proof of the probability and not of the crime is all that is required.' 460 S.W.2d at 858. *See also United States v. Shipstead*, 433 F.2d 368 (9th Cir. 1970), holding that a search warrant affidavit need not allege how the informant knew the drug in that case was methamphetamine."

We believe that it is reasonable to assume that one who sees a quantity of dried plant material in a bookstore bag in a closet, who has seen a marijuana pipe in a desk drawer, who is familiar with the odor of burning marijuana, and who has been told by an individual in whose room the bag and the pipe are found that the individual has had contact with marijuana and that, at other times, the individual has been drying and "manicuring" marijuana, might reasonably conclude that the plant which the individual saw and which resembled marijuana was, indeed, marijuana. We believe that to require more of the magistrate would be to require proof of the guilt of the crime rather than probable cause to believe that a warrant should be issued. While the requirements of the fourth amendment to the Constitution of the United States must be zealously guarded, we do not believe that the fourth amendment requires proof beyond a reasonable doubt.

Having validly obtained a search warrant which included the right to search the desk drawer where the marijuana pipe was located, the police were justified in seizing the white pills under the "plain view" doctrine. Specifically addressing the issue, the U.S. Supreme Court in *Coolidge v. New Hampshire*, 403 U.S. 443, 465, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971), said: "An example of the applicability of the 'plain view' doctrine is the situation in which the police have a warrant to search a given area for specified objects,

and in the course of the search come across some other article of incriminating character." In that regard, therefore, we believe that the order of the trial court in suppressing the evidence was in error and the judgment of the trial court must be reversed.

REVERSED.

CHARLES A. BARBER, APPELLANT, V. BONNIE M. RAICHART, APPELLEE.

298 N.W.2d 359

Filed November 7, 1980. No. 43002.

1. **Landlords and Tenants: Breach of Contract: Option to Purchase.** The acceptance of rent after the lessee's breach or default in the terms of the lease generally constitutes a waiver of the default so as to entitle the lessee to enforce an option to purchase.
2. **Landlords and Tenants: Option to Purchase.** Where the option to purchase is duly exercised by an election to purchase, the relation of landlord and tenant ceases and that of vendor and purchaser arises.

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

Keith Sinor for appellant.

James D. Owens of Owens & Owens for appellee.

Heard before BOSLAUGH and WHITE, JJ., and COLWELL, RIST, and HOWARD, District Judges.

HOWARD, District Judge.

Plaintiff appeals from an order dismissing his action in ejectment at the close of his case, the trial judge ruling as a matter of law that plaintiff, by accepting rental payments after notice of forfeiture of the lease for their delinquency, had waived the breach.

The lease was for 1 year, commencing January 15, 1977, and contained an option to purchase to be exercised upon written notice to lessor at least 30 days

before termination. Monthly payments of $250 became delinquent to the extent of $1,000, and on November 11, 1977, appellant delivered a notice to quit to the appellee. On December 9, 1977, appellee mailed to appellant a cashier's check for $1,000, together with notice of exercise of the option. The appellant retained the check and finally deposited it in May 1978. On January 13, 1978, the action in ejectment was filed. Beginning in January of 1978, and at least until the time of trial, appellee sent to appellant, who accepted them, checks at a monthly rate of $310. The option to purchase provided that "[t]he rental payment of $250.00 shall apply to the purchase price of $20,000.00, in the amount that is equal to interest that would have been paid by the said Lessee if they had purchased the building at the signing of the lease," and, also, that the balance of the purchase price should be paid at the monthly rate of $305.70 including interest at 9 percent. The discrepancy between the figures $310 and $305.70 is not accounted for in the record.

It was stipulated in the lease that a default in any of the rentals for a period of more than 30 days "shall stand as a substantial breach of this contract, and the said Lessors shall have the right to immediate possession of the premises." The lease further provided that the "Lessee, upon the exercise of the option contained herein, shall either mortgage the premises back to the Lessors, or at the option of the Lessor the abstract, the warranty deed, and the contract for sale shall be placed in escrow . . ." with the usual instructions.

Appellant argues that at the time he served the notice to quit, the lease had been breached because of default in payment of rent and that the lease thus being terminated, the option to purchase was terminated and that appellee is merely holding over after the expiration of the lease. But it was held in *Einot, Inc. v. Einot Sales Co., Inc.*, 154 Neb. 760, 764, 49 N.W.2d 625, 627 (1951), "[T]hat where a party to a contract, with

knowledge of a breach by the other party, receives money in the performance of the contract, he will be held to have waived such breach." Applying the rule to the landlord-tenant area, where the lessor refuses to allow a lessee to exercise an option to purchase due to lessee's breach of a provision in the lease, this court, in *Randall v. Erdman*, 194 Neb. 390, 231 N.W.2d 689 (1975), approved and enforced the general rule stated in Annot., 53 A.L.R.3d 435 (1973): "Accordingly, the courts have generally held that the acceptance of rent after the lessee's breach or default in the terms of the lease constituted a waiver of the default so as to entitle the lessee to enforce the option to purchase." We conclude that the option was effectively exercised and that, thereupon, the relationship of landlord and tenant ceased and that of vendor and purchaser arose. *Panhandle Rehabilitation Center, Inc. v. Larson*, 205 Neb. 605, 288 N.W.2d 743 (1980); *Mauzy v. Elliott*, 146 Neb. 865, 22 N.W.2d 142 (1946).

Appellant contends, without the citation of any authority, that he did not "accept" the $1,000 cashier's check before filing the action, not having deposited it in his account until May of the following year, and that, accordingly, there was no waiver before the action was filed. While it is a sufficient answer to this contention that the deposit of the check related back to its receipt, it is generally held that the landlord's lengthy retention of a rent check in similar circumstances, even if never cashed or deposited, effects the waiver. *English v. McDowall*, 82 S.C. 282, 64 S.E. 390 (1908); *Plowden v. Hall*, 55 Ga. App. 321, 190 S.E. 37 (1937); *Gay v. American Oil Company*, 115 Ga. App. 18, 153 S.E.2d 612 (1967); *Borst v. Ruff*, 137 Conn. 359, 77 A.2d 343 (1950); *220 West 42 Associates v. Cohen*, 60 Misc. 2d 983, 302 N.Y.S.2d 494 (1969). Moreover, even if the cashier's check is deemed to be accepted only in May 1978, while this action was pending, the acceptance waived the forfeiture under Nebraska law. *Stover v. Hazelbaker*, 42 Neb. 393, 60

N.W. 597 (1894); *Snyder v. Hill*, 153 Neb. 721, 45 N.W.2d 757 (1951).

The judgment of the District Court should be, and is affirmed.

AFFIRMED.

TERRY L. NICKAL, APPELLANT, V. DANIEL L. PHINNEY, APPELLEE.

298 N.W.2d 360

Filed November 7, 1980. No. 43008.

1. **Comparative Negligence: Damages: Juries.** In a case where, under the law and facts, the submission of the issue of contributory negligence and a comparison thereof with negligence of the opposing party to ascertain what damages, if any, shall be allowed, is proper, the determination of the amount of the damages is for the jury.
2. **Expert Witnesses: Evidence.** For a qualified expert to give an estimate of a minimum rate of speed, all necessary factors needed to suggest a reasonably accurate opinion should be supported by the evidence.

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

Dennis M. Coll and John W. Ballew, Jr., of Raymond, Olsen & Coll, P.C., for appellant.

Holtorf, Kovarik, Nuttleman & Ellison, P.C., for appellee.

Heard before BOSLAUGH and WHITE, JJ., and COLWELL, RIST, and HOWARD, District Judges.

HOWARD, District Judge.

Plaintiff appeals from a verdict and judgment in his favor of $12,613.97, assigning as error that the verdict is inadequate and unresponsive and that the trial court erred in allowing expert testimony as to the speed of plaintiff's motorcycle at the time it struck defendant's pickup truck, which was turning left

across plaintiff's path. In issue was the contributory negligence of plaintiff, the submission of which defense to the jury is not complained of.

A neurosurgeon who examined the plaintiff shortly before trial testified that, in his opinion, based upon electroencephalograms, the last of which showed a normal reading, plaintiff had sustained a contusion of the brain, and had a history consistent with posttraumatic seizures, commonly called epilepsy by laymen; that in most patients this disorder can be controlled by medication; that a personality change in plaintiff for such an injury would not be unexpected; and that he believed plaintiff to remain at some risk for later seizures. He had had no seizures for a year before the examination. An orthopedic surgeon who also examined the plaintiff testified that plaintiff's right hand was injured with the result that the long finger is deformed, making it difficult to pick up very small objects and creating a slight difficulty in making a fist. Plaintiff also sustained a fracture of the jaw, not recognized during the original hospitalization. The jaw was realigned by resection on both sides and wired shut for 2 1/2 months. In this connection, there was testimony that plaintiff's jaw was knocked out of line in a fight while it was still wired shut and had to be realigned with a rubber mallet. Injuries to plaintiff's legs left scars on the right thigh and left leg and a long scar in the left groin. In the pelvis, comminuted fractures occurred on the left side, and probably on the right side also, which, though well healed, appear to have distorted the pelvis slightly through narrowing. At the time of the trial, plaintiff was taking medication three times daily and the neurosurgeon testified that he would not recommend decreasing the dosage until after a seizure-free period of 2 years.

Plaintiff testified that, since the accident, he has had difficulty controlling his temper with his wife, though not with his little boy; that he cannot work

with tools and favors his left hand; that he lacks coordination to resume racquetball and handball play; and can lift only half the weight he could before the collision.

At the time of the accident, plaintiff was employed as a truckdriver, earning $4.25 an hour, sometimes working 80 to 110 hours a week. He was unable to return to work for a year. At the time of the trial, he was working for the gas company, earning $6.23 per hour. Medical expenses were claimed in the amount of $12,613.97, which was the amount of the verdict. (Defendant points out that the actual medical expense occasioned by the accident should be somewhat less because medical attention to the jaw after plaintiff's fight was included in the bills.)

It is argued that the verdict, at or near the amount of the medical expenses, is an impossible resolution by the jury if it followed the comparative negligence instruction, and that the verdict is clearly inadequate. The same contentions were made in *Cullinane v. Milder Oil Co.*, 174 Neb. 162, 116 N.W.2d 25 (1962), where this court pointed out that the jury was not obliged to accept the undisputed testimony of the plaintiff or his doctor to the full extent of the damages claimed and that the determination of the amount of the damages after application of the comparative negligence instruction is for the jury. As stated in *Burney v. Ehlers*, 185 Neb. 51, 54, 173 N.W.2d 398, 400 (1970): "A comparison of the negligence of the two parties involved in an accident cannot be easily translated into a mathematical ratio. This court has never adopted a rule that contributory negligence of more than a certain percent will bar recovery as a matter of law. The statute does not contemplate such a rule and we do not believe that the adoption of such a rule would further the administration of justice."

We note the absence of medical testimony that the seizure problem is a permanent one or that, in fact, it will continue for any period of time. We cannot say

that the jury failed to follow the instructions or that the verdict was so inadequate as to require a new trial.

Overruling an objection that the foundation was insufficient and that the question assumed facts not in evidence, the trial court permitted Richard Large, a licensed professional engineer with a degree in mechanical engineering and experience in vehicle accident reconstruction to testify to 50 miles per hour as the minimum speed of the motorcycle at the time of impact. Essentially, the opinion depended upon the force required to impel the pickup into a pivotal motion described by the back wheels as they left slide marks on the pavement. The witness had examined both vehicles while unrepaired, as well as the composition of the pavement. He had been provided with measurements made by the investigating officers, which were shown in the evidence, as well as the photographs. Without objection, he determined the point of the impact, identified the slide marks from photographs, placed the pickup at the point of collision, determined the point of concentration of the greatest force of impact, found the length of both wheel slide marks and the degree of rotation, and demonstrated with a chart in evidence how the pickup moved from the point of impact to its position of rest. From evidence in the record and from his own investigation, he was able to detail the total weight of the pickup and breakdown of the weight of the front and rear axles, the effective wheelbase, the direction of the force of impact into the pickup, the lack of application of brakes to the pickup, the weight of the motorcycle and rider, the surface conditions of the road at the time, the speed of the truck, the coefficient of friction between the tires and pavement, the change of grade, and numerous other items which, with the application of principles of physics and mechanical engineering, would permit a computation.

Appellant complains that the "density" of the slide marks is nowhere shown in the evidence. The photo-

graphs clearly show the nature of the marks, and we agree with the expert's characterization of them as essentially black and essentially continuous from where they start to where the truck came to rest. The expert had examined the paving surface and the truck tires and, in his computation, used a conservative .6 coefficient of friction, although, according to him, the coefficient for the type of surface involved generally ranges upward from .65.

The only other attack made on foundation is the statement in appellant's brief: "The Nebraska Supreme Court has consistently held that skid marks are a necessary factor in an expert's testimony regarding the speed of a vehicle prior to a collision . . . ." This court has not so held. See *Tate v. Borgman*, 167 Neb. 299, 305, 92 N.W.2d 697, 701 (1958), approving this statement in 5 Am. Jur. *Automobiles* § 630 (1936): "Various factors, such as skid marks, distance traveled after impact, *force of impact*, etc. are pertinent in arriving at an estimate of the rate of speed of an automobile." (Emphasis supplied.)

We do not depart from what was said in *Flory v. Holtz*, 176 Neb. 531, 539, 126 N.W.2d 686, 692 (1964): "There is a vast difference between permitting an expert to give an opinion when all of the factors necessary to base an estimate of minimum speed are present and in permitting an estimate of actual speed based on assumptions that have no adequate foundation in the evidence." Here the forces involved are relatively uncomplicated and the necessary factors are not dependent upon assumptions but are present in the evidence.

It follows that the judgment of the District Court must be affirmed.

AFFIRMED.

LUTHER HUMBER, APPELLEE, V. GIBREAL AUTO SALES, INC., APPELLANT.

298 N.W.2d 363

Filed November 7, 1980. No. 43076.

1. **Consideration: Release of Claims.** Although mere inadequacy of consideration alone is generally not a ground upon which a release may be avoided, it is a factor which may be considered with other circumstances.
2. ——:——. Where a release has to be supported by a consideration, total failure of the consideration will enable the releasor to avoid the release.
3. **Consideration: Contracts.** A failure of consideration of such a degree that the remaining consideration may be deemed to be no substantial consideration is an excuse for nonperformance of a promise.

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

Steven M. Watson and Timothy J. Cuddigan of Marks, Clare, Hopkins, Rauth & Cuddigan for appellant.

Martin Wm. Penkwitz of White, Lipp, Simon & Powers and James P. Costello of Costello & Dugan for appellee.

Heard before BOSLAUGH, BRODKEY, and WHITE, JJ., and CASE and GARDEN, District Judges.

BOSLAUGH, J.

This was an action under Neb. Rev. Stat. § 45-344 (Reissue 1978), arising out of the sale of an automobile to the plaintiff by the defendant. The plaintiff alleged that on or about April 10, 1974, he purchased a 1973 Ford Thunderbird automobile from the defendant for an agreed price of $5,000. The plaintiff paid down $1,000 in cash and signed a "lease" agreement providing for payments of $165 per month for 36 months. The plaintiff sought to recover all of the time price differential in excess of the amount allowed by law; the first $1,000 of the time price differential; and the first $4,000 of the principal of the contract.

The defendant alleged that the agreed price for the automobile was $5,900 and that the plaintiff had executed a release of all claims against the defendant on May 30, 1976.

The trial court found generally for the plaintiff; that the contract between the parties was an installment sale and not a lease; that the time price differential of $1,940 exceeded the maximum differential allowed by law which was $964.40; and that the excess was not the result of accident or bona fide error. The plaintiff recovered judgment in the amount of $975.60 as excess time price differential; $964.40 as the authorized portion of the first $1,000 of time price differential; and $4,000 as the first $4,000 principal of the contract. The defendant has appealed.

The record fully sustains the finding of the trial court as to the nature of the contract between the parties. To the extent the evidence was in conflict, it presented questions for the trier of fact. The testimony of the plaintiff was sufficient, if believed, to establish the nature of the contract and the agreed price. The time price differential was established by the "lease" agreement.

The remaining issue relates to the "Receipt and Release" executed by the plaintiff on May 30, 1976.

After this action had been commenced and a summons had been served upon the defendant corporation, Gilbert Gibreal, the owner of the defendant, secured the plaintiff's signature to an instrument purporting to compromise all claims of the plaintiff in this action for the sum of $5. According to the testimony of the plaintiff, the consideration for the release was to be the certificate of title to the 1973 Ford Thunderbird automobile. Gibreal testified that the consideration was $5 which was paid and the certificate of title to a 1963 Fairlane automobile the plaintiff was purchasing from the defendant.

The plaintiff denied signing the release and claimed he had signed some document in which the defendant

agreed to "straighten out" his contract for the purchase of the Thunderbird automobile. The record shows that when Gibreal approached the plaintiff concerning the release agreement Gibreal offered $5 and the title to the 1963 automobile as consideration. The plaintiff was willing to sign the release if the transfer of title to the 1973 Thunderbird was included in the consideration. The plaintiff testified Gibreal agreed to give him the certificate of title to the Thunderbird automobile although the release merely stated "$5 and other consideration."

It is undisputed that the plaintiff never received a certificate of title to the Thunderbird automobile. The defendant claims this was because the plaintiff pledged the Thunderbird automobile as security for a boat leased from the defendant on May 14, 1976. If the plaintiff's testimony is believed, Gibreal agreed on May 30, 1976, to deliver the certificate of title to the Thunderbird free and clear of all liens.

The trial court found that the release was not binding on the plaintiff because the consideration was inadequate and there was failure of consideration. Although mere inadequacy of consideration alone is generally not a ground upon which a release may be avoided, it is a factor which may be considered with other circumstances. *Swartz v. Topping*, 191 Neb. 41, 213 N.W.2d 718 (1974). The $5 paid to the plaintiff and the certificate of title to the 1963 automobile was not substantial consideration for a release of the plaintiff's claim against the defendant.

The defendant's failure to transfer the title to the Thunderbird automobile amounted to a failure of consideration which barred enforcement of the release agreement. "Where a release has to be supported by a consideration, total failure of the consideration will enable the releasor to avoid the release." 66 Am. Jur. 2d *Release* § 13 (1973). "[W]here there is a total failure of consideration and the defendant has derived no benefit from the contract or none beyond the amount

of money which he has already advanced, such total failure of consideration may be shown in bar of the action. . . . A failure of consideration of such a degree that the remaining consideration may be deemed to be no substantial consideration is an excuse for nonperformance of a promise." *Cotner College v. Estate of Hester*, 155 Neb. 279, 288-89, 51 N.W.2d 612, 618 (1952).

The trial court ordered the defendant to deliver the certificate of title to the Thunderbird automobile to the plaintiff. Since there is nothing due the defendant on the contract of sale, and the release was not binding on the plaintiff, the judgment was correct.

There being no error, the judgment is affirmed.

AFFIRMED.

IN RE APPLICATION OF LINCOLN ELECTRIC SYSTEM. LINCOLN ELECTRIC SYSTEM, APPELLEE, V. LOYD C. TERPSMA AND LORENE TERPSMA, APPELLANTS.

298 N.W.2d 366

Filed November 7, 1980. No. 43125.

1. **Administrative Orders: Nebraska Power Review Board: Public Utilities.** The authority of the Nebraska Power Review Board to determine whether construction of a transmission line will serve the public convenience and necessity does not include the power to select the particular route the line must follow.
2. **Nebraska Power Review Board: Public Utilities.** The Nebraska Power Review Board exists to avoid and eliminate conflict and competition among suppliers of electricity, to avoid and eliminate duplication of facilities and resources, and to facilitate the settlement of rate disputes; all to the end of providing Nebraskans with adequate electric service at as low an overall cost as possible.
3. **Administrative Agencies.** An administrative board has no power or authority other than that specifically conferred upon it by statute or by construction necessary to accomplish the purpose of the act.
4. **Administrative Agencies: Public Utilities.** An administrative agency charged with the responsibility of regulating a utility is not the owner of the property of the utility and may not exercise the general power of management incident to ownership.

5. **Administrative Orders: Nebraska Power Review Board: Appeal and Error.** Determination of what is consistent with the public convenience and necessity is a question of fact peculiarly for the determination of the Nebraska Power Review Board. The only questions for this court are whether the Board acted within the scope of its authority and if the order complained of is supported by the evidence and is reasonable and not arbitrarily made.

Appeal from the Nebraska Power Review Board. Affirmed.

Thomas J. Fitchett of Pierson, Ackerman, Fitchett & Akin for appellants.

Charles D. Humble of Ginsburg, Rosenberg, Ginsburg, Cathcart, Curry & Gordon for appellee.

Heard before BOSLAUGH, BRODKEY, and HASTINGS, JJ., and BLUE and CAPORALE, District Judges.

CAPORALE, District Judge.

This is an appeal from an order of the Nebraska Power Review Board (Board) granting an application of the Lincoln Electric System (LES). We affirm.

The appeal asks, as a question of first impression, whether the authority of the Board to find that construction of a transmission line will serve the public convenience and necessity carries with it the power to select the particular route the line must follow. Stated another way, the question is whether the utility which must build the line has the power to select the route, or whether the Board has that power. We hold the utility which builds the line has the power to select the route.

LES applied to the Board for approval of its plan to build a transmission line carrying more than 700 volts along a specified route from an existing LES substation to another existing LES substation.

Norris Public Power District, the only other power district operating in relative proximity to the area crossed by the transmission line, filed a consent and waiver with the Board.

There was evidence that the line was needed to prevent the occurrence of overloads and resultant blackouts for residents of the city of Lincoln. In selecting the proposed line route, LES began by considering 50 possible routes. These were later reduced to 30, then to 11 from which LES chose the one in question. The selection process involved, among other things, various engineering, safety, and budgetary considerations and analyses.

At the public hearing before the Board, the appellants conceded that LES could most economically and feasibly supply the proposed service without unnecessary duplication of facilities but protested that the particular route selected did not serve the public convenience and necessity. Specifically, appellants argue that LES failed to consider fully a previously existing easement which had been created for the construction of a line such as the one in question.

The Board exists to avoid and eliminate conflict and competition among suppliers of electricity, to avoid and eliminate duplication of facilities and resources, and to facilitate the settlement of rate disputes; all to the end of providing Nebraskans with adequate electric service at as low an overall cost as possible. Neb. Rev. Stat. § 70-1001 (Reissue 1976). No transmission line carrying more than 700 volts may be constructed until approval has been obtained from the Board. Neb. Rev. Stat § 70-1012 (Cum. Supp. 1980). Before the Board can approve an application to construct such a line, it must find (among other things not involved here) that the construction sought will serve the public convenience and necessity. Neb. Rev. Stat. § 70-1014 (Reissue 1976).

There is nothing in the pertinent statutes to suggest that the Board, in determining public convenience and necessity, has the power to determine that a transmission line shall be built along a particular route.

We have held previously that an administrative board has no power or authority other than that specifi-

cally conferred upon it by statute or by construction necessary to accomplish the purpose of the act. *Nebraska P. P. Dist. v. Huebner*, 202 Neb. 587, 276 N.W.2d 228 (1979); *City of Auburn v. Eastern Nebraska Public Power Dist.*, 179 Neb. 439, 138 N.W.2d 629 (1965).

Although we have not had prior occasion to pass upon the limitation of the Board's power in the context presented by this appeal, we have had occasions to pass upon analogous questions with respect to the administrative agency whose appeal procedure controls appeals from the Board: the Public Service Commission. Neb. Rev. Stat. § 70-1016 (Reissue 1976).

In *Myers v. Blair Tel. Co.*, 194 Neb. 55, 230 N.W.2d 190 (1975), an action concerning inadequacy of service, we observed that the purpose of the Public Service Commission was to regulate public utilities. Consequently, it had authority to supervise the operation of a utility to the extent of seeing that the utility provided the service for which it exacted payment. Such supervision did not direct how funds of the utility were to be used. In the earlier case of *Skeedee Independent Tel. Co. v. Farm Bureau*, 166 Neb. 49, 87 N.W.2d 715 (1958), an action involving the setting of rates, we held that the Nebraska State Railway Commission, predecessor to the Public Service Commission, could not allow a rate increase marked to meet proposed wage increases only. In doing so, the commission invaded the province of management as, in effect, it directed the payment of a particular wage scale. Our rationale was that the Commission was not the owner of the property of the utility and it was not clothed with the general power of management incident to ownership.

Here, LES will be the owner of the line the Board has approved. The Board found that the line will serve the public convenience and necessity. The Board has discharged its duty and has no authority to select a particular route other than that selected by the utility which the Board supervises, but does not own.

Determination of what is consistent with the public convenience and necessity is a question of fact peculiarly for the determination of the Board. *Hugelman v. A & A Trucking, Inc.*, 198 Neb. 628, 254 N.W.2d 412 (1977). The only questions for this court are whether the Board acted within the scope of its authority and if the order complained of is supported by the evidence and is reasonable and not arbitrarily made. *Groenewold v. Building Movers, Inc.*, 197 Neb. 187, 247 N.W.2d 629 (1976); Neb. Rev. Stat. § 70-1016. The evidence clearly establishes that the line approved by the Board serves the public convenience and necessity. The order of the Nebraska Power Review Board must be affirmed.

AFFIRMED.

GLEN D. SINGLETON, APPELLANT, V.
DALE ADAMS, APPELLEE.

THOMAS W. ANTHONY, APPELLANT, V.
DALE ADAMS, APPELLEE.

298 N.W.2d 369

Filed November 7, 1980. Nos. 43219, 43220.

1. **Extradition.** A demand for extradition which includes a copy of a judgment of conviction or a sentence imposed thereon, together with a statement by the executive authority of the demanding state that the person claimed has broken the terms of his parole, is sufficient.
2. ——. Generally, a claim by a petitioner that the demanding state has violated his constitutional right is a matter to be determined by the courts of the demanding state.

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

Stephen K. Yungblut of Rosenberg & Yungblut for appellants.

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

Heard before BOSLAUGH, MCCOWN, BRODKEY, WHITE, and HASTINGS, JJ., and BURKHARD, District Judge.

BOSLAUGH, J.

The petitioners, Glen D. Singleton and Thomas W. Anthony, were arrested on warrants issued by the Governor of Nebraska pursuant to extradition proceedings from the State of Wisconsin. The petitioners then filed separate petitions for writs of habeas corpus. After an evidentiary hearing, the trial court found that the detention of the petitioners was legal and dismissed the petitions. The petitioners appeal.

The record shows that each of the petitioners was sentenced to imprisonment in Wisconsin for 10 years for robbery on November 23, 1970. Singleton was released on parole on November 25, 1974, and charged with violating his parole on September 27, 1977. Anthony was released on parole on December 7, 1976, and charged with violating his parole on March 8, 1977. Warrants for their arrest were issued in Wisconsin on that date. The petitioners were arrested on the Governor's warrants upon their release from the Nebraska Penal and Correctional Complex on August 14, 1979.

The petitioners allege their detention is unlawful because the Nebraska Governor's warrants and supporting documents do not establish probable cause for their arrest. The petitioners contend the warrants are defective because the circumstances surrounding the alleged violations of parole are not shown in the supporting documents and it does not appear that the Wisconsin warrants for parole violation were issued based upon probable cause.

Under Neb. Rev. Stat. §29-731 (Reissue 1979), a demand for extradition which includes a copy of a judgment of conviction or a sentence imposed thereon, together with a statement by the executive authority of the demanding state that the person claimed has broken the terms of his parole, is sufficient. *Austin v. Brumbaugh*, 186 Neb. 815, 186 N.W.2d 723 (1971).

Generally, a claim by a petitioner that the demanding state has violated his constitutional right is a matter to be determined by the courts of the demanding state. *Wise v. State*, 197 Neb. 831, 251 N.W.2d 373 (1977). See, also, *Ingram v. Dodd*, 243 Ga. 788, 256 S.E.2d 778 (1979); *Morgan v. Miller*, 197 Colo. 341, 593 P.2d 357 (1979).

The judgments of the District Court are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOHN JOSEPH KELLY, APPELLANT.

298 N.W.2d 370

Filed November 7, 1980. No. 43286.

1. **Sentences: Appeal and Error.** A sentence within the statutory limits will not be disturbed on appeal absent abuse of discretion by the trial court.
2. **Motions for New Trial: Appeal and Error.** In a criminal case, a motion for new trial must be filed within 10 days after the verdict is rendered.

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

David L. Herzog and Anthony R. Carr for appellant.

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

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, BRODKEY, WHITE, and HASTINGS, JJ., and BURKHARD, District Judge.

WHITE, J.

Defendant was convicted after a trial to the court of the crime of second degree murder and sentenced to a term of 15 years in the Nebraska Penal and Correctional Complex.

On appeal, defendant assigns two errors: (1) The court erred in failing to suppress the defendant's statement as the fruit of an unlawful arrest; and (2) The sentence is excessive. We shall discuss the second assignment first and will not discuss the first assignment for reasons we will set forth.

The victim was the defendant's mother-in-law. She was found in the basement of a residence in Omaha, Nebraska. Death was caused by severe skull fractures inflicted by a heavy object with some type of projection. The crime was characterized by the trial court as vicious, approaching first degree murder.

The defendant, a 58-year-old man with no criminal record, expressed remorse at the crime and was probably provoked by the demands of the victim. However, in view of the seriousness of the crime, we are unable to say that the sentence was excessive. The penalty authorized by the statute, Neb. Rev. Stat. § 28-304 (Reissue 1979), is not less than 10 years to a maximum of life. A sentence within the statute will not ordinarily be disturbed absent an abuse of discretion. None exists here.

The first assignment will not be considered as defendant neglected to file an appropriate motion for new trial. *State v. Lacy*, 195 Neb. 299, 237 N.W.2d 650 (1976), held that a motion for new trial must be filed within 10 days after the verdict is rendered.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V.
PHILLIP MCNITT, APPELLEE.

298 N.W.2d 465

Filed November 3, 1980. No. 43635.

Appeal from the District Court for Hall County: JOSEPH D. MARTIN, Judge. Affirmed.

Don Walters for appellant.

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

Heard before HASTINGS, J.

HASTINGS, J.

This is an appeal by the State, pursuant to Neb. Rev. Stat. §29-824 (Reissue 1979), from an order of the District Court for Hall County, Nebraska, suppressing certain oral statements made by the defendant to a certain officer of the Grand Island police department. The statements were made in connection with the alleged participation of the defendant in the homicide of Brian Crittenden.

The record shows that on March 25, 1980, at approximately 2:30 a.m., Hall County deputy sheriff Rodger L. Williams and Grand Island police lieutenant Bradley L. Brush, arrested the defendant, pursuant to an arrest warrant, at a residence in the village of Carleton, Nebraska. Williams read the Miranda warnings to the defendant and the defendant said that he understood the warnings and wanted an attorney. He was told by the officer that it would be arranged for him to get an attorney when they got back to Grand Island. During the trip back to Grand Island, where they arrived at approximately 4:30 a.m., some attempt at conversation with the defendant was made by the officers, but "[h]e wouldn't make any sound at all . . . ."

Upon arriving at the Public Safety Center in Grand Island, the defendant was interrogated by Carroll P. Ward, a Grand Island police officer, in the presence of Williams and Brush. Ward read the Miranda warnings to the defendant, who said that he understood them. However, when asked if he was willing to give a statement, the defendant's reply was that he wanted to see an attorney.

No steps were taken to obtain an attorney, but Ward continued to question the defendant. Ward asked him if he had seen the arrest warrant, and when told that he

had not, Ward showed it to defendant and read the warrant to him. Defendant was then asked if he had any questions as to what he was charged with, and defendant replied that he did; he wanted to know what the penalty was for the particular charge, i.e., aiding and abetting the commission of murder. It was then explained to him by the officer that the penalty would be the same as that for first degree murder, life imprisonment or death. Defendant was then told that others had been arrested; that the principal defendant had confessed to doing the shooting; and that person had involved defendant in the crime, as had another witness. The officer then told the defendant that they would be presenting all the evidence to the county attorney's office at 8 o'clock the next morning; that he had exercised his rights; and that "we would be more than willing to advise the County Attorney of that fact," and "if that's what he wanted us to do that was fine with us." Officer Ward then testified further as follows: "I believe I advised Phil that he was in a droit. [sic] He did have a right to exercise his rights, he also had a right to change his mind. And that if he were to change his mind and give us a statement that we would include his story in the presentation to the County Attorney."

Officer Ward also told the defendant that he would have to understand that if he did change his mind and give a statement, and it implicated him in the charge of aiding and abetting, he would have to stand trial, but if he was not involved to that extent, the county attorney might take all the information into consideration and might file a lesser charge. The defendant then said: "All right, I'll tell you what I know about it and what I did."

The State contends that the defendant, after having first declined to waive his rights, within a matter of 10 minutes changed his mind and freely, voluntarily, knowingly, and intelligently waived the presence of an attorney, and in like manner made the incriminating statements.

"Where the government asserts waiver, however, it bears a heavy burden of proving its claim. *Miranda v. Arizona*, ... This burden is not discharged by the mere fact that statements were eventually obtained from an accused. *United States v. Blair*, 470 F.2d 331 (5th Cir. 1972). Nor may the government establish waiver by the mere repetition of *Miranda* warnings. [Citations omitted.]" *United States v. Womack*, 542 F.2d 1047, 1050-51 (1976).

We recently reviewed the standards for the admissibility of incriminating statements in *In re Interest of Durand*, 206 Neb. 415, 293 N.W.2d 383 (1980). Once an individual invokes his right to remain silent, the interrogation must cease, for otherwise the in-custody interrogation setting operates on the individual to overcome free choice in producing a statement. *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). The *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. *Rhode Island v. Innis*, 446 U.S. 291, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980). The continuation of custodial interrogation after a momentary cessation would clearly frustrate the purposes of *Miranda* by allowing repeated rounds of questioning that would undermine the will of the person being questioned. *Michigan v. Mosley*, 423 U.S. 96, 96 S. Ct. 321, 46 L. Ed. 2d 313 (1975).

In *Durand, supra*, we found that the defendant was subjected to the functional equivalent of questioning after he requested an attorney. "The police officer should have known that showing the defendant the police reports was likely to elicit an incriminating response from the defendant. If a suspect is told he has a right to have an attorney present during interrogation and he chooses to cut off questioning until counsel can be obtained, his choice must be 'scrupulously honored' by the police. [Citations omitted.]" *Durand* at 420, 293 N.W.2d at 386-87.

The situation in this case is no different. After the defendant demanded an attorney for the second time,

the officer in no way "scrupulously honored" the defendant's request. Instead, the officer continued to talk to the defendant; to offer to explain the warrant, what the defendant was charged with, and what the possible penalty would be; he told the defendant that others had been arrested who had given statements and who had implicated him; defendant was told with what he would be charged if he did not talk and what he might be charged with if he did give information; and he was also assured that he had a right to change his mind about wanting a lawyer. This certainly was the "functional equivalent" of questioning, and for all intents and purposes, was done in a manner to exert influence upon the defendant to waive certain of his rights.

In order to determine whether or not the statement was voluntary, we must look to the totality of the circumstances in any particular case. *State v. McDonald*, 195 Neb. 625, 240 N.W.2d 8 (1976). It is well settled that the finding of the trial court that statements or confessions were intelligently or voluntarily made will not be set aside on appeal unless the finding is clearly erroneous. *State v. Prim*, 201 Neb. 279, 267 N.W.2d 193 (1978). It follows that the finding by a trial court that a statement is involuntary will be given similar treatment. A review of the testimony given at the suppression hearing reveals no evidence established by the State to prove a voluntary and intelligent waiver on the part of the defendant.

The action of the trial court was correct in finding that the statements should be suppressed as having been involuntarily given, in violation of *Miranda*, and is affirmed.

AFFIRMED.

NORMAN W. GEHRKE AND ARDIS A. GEHRKE, APPELLEES, V. GENERAL THEATRE CORPORATION OF NORFOLK, A CORPORATION, APPELLANT.

298 N.W.2d 773

Filed November 14, 1980. No. 42967.

1. **Appeal and Error.** In an action at law, the findings of the trial court will not be disturbed on appeal unless clearly wrong.
2. ____. In considering whether the evidence supports the findings of the trial court, it must be considered in the light most favorable to the successful party.
3. **Landlords and Tenants: Commercial Leases: Caveat Emptor.** The rule of *caveat emptor* applies to leases of commercial real estate wherein control passes to the lessee. Absent fraud or concealment, it is the lessee's duty to examine the premises with respect to safety and suitability for his business.
4. **Landlords and Tenants.** Absent an express agreement to the contrary, a lessor is not bound to make any repairs.
5. **Landlords and Tenants: Latent Defects.** A lessor's duty with respect to latent defects is only to advise the prospective lessee of any such known defects, not to repair them.

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

Jewell, Otte, Gatz, Collins & Domina and Mapes & Mapes for appellant.

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

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

WHITE, J.

The appellant, General Theatre Corporation of Norfolk (hereafter General), was sued in the District Court for Madison County, Nebraska, by appellees, Norman W. and Ardis A. Gehrke (hereafter Gehrkes), for rents due at the rate of $850 per month. The Gehrkes recovered a judgment against General in the District Court for rent due from November 1, 1977, the date payments stopped, to August 1, 1979, the last due date prior to judgment. General appeals. We affirm.

The leased premises constitute a theater building in Norfolk, Nebraska. General operated the theater which it rented from the Gehrkes. In their petition, the Gehrkes alleged that General abandoned the premises on or about September 1, 1977, and neglected to pay rent due from November 1, 1977, to August 1, 1979. In its answer, General alleged that the Gehrkes had breached their obligation under the lease to repair the roof of the leased premises, and that due to the breach, the theater became unfit for use and, therefore, General had been constructively evicted and that no rent was due. The parties waived a jury and the District Court found for the Gehrkes.

In the review of this case, we keep in mind that this is an action at law and the findings of the trial court will not be disturbed unless clearly wrong. In determining whether the findings of the District Court are supported by the evidence, we must consider the evidence and all permissible inferences therefrom in a light most favorable to the successful party. *VSC, Inc. v. Lilja*, 203 Neb. 844, 280 N.W.2d 901 (1979).

General originally leased the theater building from the Gehrkes' predecessor, the Granada Building, on February 24, 1965, for a term of 5 years. The lease was extended by those parties in 1970 for an additional 5 years. In 1972, Gehrkes purchased the building and the lease agreement was assigned to them. In April 1975, the lease between General and Gehrkes was extended for another 5 years and, in September 1977, the building was vacated by General.

The immediate cause of the dispute between the parties in 1977 was the presence of a defect in a large section of the plaster ceiling above the auditorium portion of the theater. The ceiling appeared to be sagging away from the ceiling joists and General contended it constituted a danger to its patrons. The record shows that although the parties met to determine whose responsibility it was to undertake the expensive repair of the ceiling, they could not agree. The auditorium

portion of the building is six stories high and making repairs to the ceiling requires extensive use of scaffolding. It further appears from the evidence that during the term of the previous lease, the plaster from a portion of the ceiling had dislodged. It was unclear from the evidence who repaired the plastered ceiling on those occasions. General contends that the dangerous condition of the plaster ceiling was directly caused by a breach of the Gehrkes' obligation to keep the roof of the building in good repair. General claims that this failure to repair caused rainwater to seep onto the ceiling plaster; the plaster then absorbed the water; and the extra weight ultimately pulled the ceiling from the metal lath and ceiling joists. Evidence produced by the Gehrkes showed that the metal lath, to which the plaster was attached, was improperly nailed to the roof. When the lath was attached in 1927, the heads of nails used were too small to hold the lath in place. Instead, the smaller nails were bent over the lath to hold it to the ceiling joists. General contended that, should the court find that the falling of the plaster was not due to a leaky roof but to improper construction, the same was not readily apparent to them. They argued that such a defect was a latent defect and not covered by a duty to perform ordinary repairs and that General was not obligated under the terms of the lease to replaster the ceiling. The pertinent provision of Article VI of the lease is as follows: "The Lessor is to keep the roof and exterior of the building in repair during the term of this Lease, and Lessee is to make, at its own expense, all alterations, additions, improvements, heating, air conditioning or cooling and repairs which may become necessary to the interior of the said demised premises . . . ." General's contention that the damage resulted from a leaking roof is easily answered. A building contractor testified that the accumulated dust in the attic space between the suspended ceiling and the roof was evidence that the roof had not leaked in the area in which the plaster had sagged. This same contractor

testified that he believed the cause was the inappropriate construction and improper installation of the metal lath designed to hold the plaster. Over a period of years, the lath simply lost its grip and caused the plaster to sag and the ceiling ultimately to fall. General did introduce evidence to the effect that the sagging plaster was caused by leaks in the roof.

The trial court resolved the dispute in favor of Gehrkes. This conclusion is supported by evidence in the record, and that finding is binding on us. *VSC, Inc. v. Lilja, supra.* The trial court found that the improper installation of the lath was the cause of the sagging and the loss of the plaster. The issue then remaining is whether the lessor or the lessee is responsible for the repair of the plaster ceiling. The law of this jurisdiction regarding the relationship between a commercial landlord and tenant is the common law as modified by judicial interpretation.

"[I]t may be said that in this jurisdiction we have been long committed to these views, viz.:

'The rule of *caveat emptor* applies to leases of real estate, wherein the control passes to the lessee, and, in the absence of fraud, deceit or concealment, the duty devolves upon the lessee to examine the premises with respect to suitability for his business and with respect to safety.'" *Van Avery v. Platte Valley Land & Investment Co.*, 133 Neb. 314, 321, 275 N.W. 288, 292 (1937).

In the absence of an express agreement to the contrary, a lessor does not warrant the fitness or safety of the premises and the lessee takes them as he finds them. *Roan v. Bruckner*, 180 Neb. 399, 143 N.W.2d 108 (1966). Neither the original lease of 1965, nor the assignment in 1972, nor the extension in 1975 contained an express warranty regarding the fitness or safety of the building. There is no evidence that Gehrkes or any predecessor in title were aware of the defect in the installation of the metal lath that held the plaster, nor is there evidence of fraud or deceit. A lessor's duty with respect to latent defects is only to advise the prospective

lessee of any such known defects, not to repair them. *Roan v. Bruckner, supra; Blotcky v. Gahm*, 108 Neb. 275, 187 N.W. 640 (1922). The fact that the defect in the ceiling may have been latent does not place the duty to repair such defect on the lessor. Absent a contract to the contrary, lessor is not bound to make any repairs. *Blotcky v. Gahm, supra.* The contract defines the extent of his duty. *Reicheneker v. Seward*, 203 Neb. 68, 277 N.W.2d 539 (1979). The court properly found that General failed to prove that the damaged ceiling was due to the breach of a covenant in the lease by the Gehrkes; that the lease instead created an affirmative obligation on behalf of General to make necessary repairs; and that there was no breach of any duty by the Gehrkes, and, therefore, no constructive eviction by them. The trial court properly entered judgment for the lessors, the Gehrkes, for the balance due on rent under the lease to the date of judgment.

The trial court's judgment, being fully in accord with the law, is proper and is hereby affirmed.

AFFIRMED.

CLINTON, J., not participating.

AUGUST ROSS, APPELLANT, V. GOVERNORS OF THE KNIGHTS OF AK-SAR-BEN ET AL., APPELLEES.

299 N.W.2d 145

Filed November 21, 1980. No. 43016.

1. **Property Taxes: Tax Exemptions.** An exemption from property taxes granted under Neb. Rev. Stat. § 77-202 (Reissue 1976) may continue for 4 years unless a change in the use of the property occurs.
2. ____:____. In order to continue a property tax exemption during intervening years, the owner is required annually to file an affidavit certifying that no change in the use of the property has occurred since the exemption was granted.
3. ____:____. During intervening years, the county assessor or the County Board of Equalization may cause a property tax exemption to be re-

viewed even though no change in the use of the property has occurred.

4. ____: ____. In the absence of conclusive evidence that a change in the use of the property has occurred, the County Board of Equalization is not required to review property tax exemptions during intervening years.

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

Bruce G. Mason and August Ross of Ross & Mason for appellant.

Kennedy, Holland, DeLacy & Svoboda for appellee Ak-Sar-Ben.

Donald L. Knowles, Douglas County Attorney, and Rockford G. Meyer for appellee Board of Equalization.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, BRODKEY, WHITE, and HASTINGS, JJ., and COLWELL, District Judge.

BOSLAUGH, J.

This is an appeal from an order dismissing the plaintiff's petition in error to review an order of the Board of Equalization of Douglas County, Nebraska, continuing the exemption from property taxes granted the defendants the Governors of the Knights of Ak-Sar-Ben and Ak-Sar-Ben Exposition Company.

In 1976, the property was determined to be exempt from taxes. Prior to January 1, 1978, Ak-Sar-Ben filed affidavits certifying that the use of their property had not changed since tax exempt status was granted in 1976.

On May 11, 1978, the plaintiff, who is a resident and taxpayer of the County of Douglas, Nebraska, filed formal objections with the Board of Equalization alleging that the property did not qualify for exemption from taxes. At a hearing held on May 23, 1978, the Board of Equalization determined there had been no change in the use of the property and continued the exemptions. This action was commenced June 12, 1978.

Neb. Rev. Stat. § 77-202.03 (Reissue 1976), the statute then in effect, provided that when property has been exempted from taxation "it shall continue to be exempt for a period of four years. . . ." In intervening years, the owner is required to file an affidavit with the county assessor certifying that the use of the property has not changed during the year.

The statute further provided that the county assessor and the county board may cause the exemption to be reviewed in any year to determine whether the exemption should be continued and may do so even if the use of the property has not changed.

At the hearing on May 23, 1978, the Board of Equalization determined there had been no change in the use of the property and the exemptions should continue. It is this determination that the plaintiff sought to review by his petition in error.

The purpose of a proceeding in error in the District Court is to determine whether the final order of an inferior tribunal was in accordance with law. The determination as to whether errors of law occurred must be made from the record of the proceedings before the tribunal. New evidence may not be introduced in the District Court. The only evidence which may be considered is evidence which was before the tribunal. *Dlouhy v. City of Fremont*, 175 Neb. 115, 120 N.W.2d 590 (1963). If there is some competent evidence to support the order of the tribunal, it must be affirmed. *First Nat. Bank & Trust Co. v. Ley*, 182 Neb. 164, 153 N.W.2d 743 (1967).

The transcript which was filed in the District Court shows there was no evidence before the Board of Equalization to indicate a change in the use of the property had occurred. Under those circumstances, the board was not required to reexamine the matter and redetermine whether the defendants were entitled to the exemption which had been granted in 1976. Although the board had the power to review the exemptions, it was not required to do so under the evidence before it in this case.

On May 11, 1978, prior to the hearing before the Board of Equalization, the plaintiff filed a praecipe requesting that a subpoena be issued for the general manager of Ak-Sar-Ben and its books and records. On May 16, 1978, the board determined a subpoena should not be issued. The District Court found this determination was within the authority of the board and not arbitrary or capricious.

The issue before the Board of Equalization was whether a change in the use of the property had occurred. The objections filed by the plaintiff and his affidavit submitted to the board did not allege that any change in the use of the property had occurred. The record before us shows no prejudice to the plaintiff. Without determining whether the plaintiff might be entitled to compulsory process under different facts, we find there was no error in refusing to issue a subpoena in this case.

There being no error, the judgment of the District Court is affirmed.

AFFIRMED.

ROBERT A. MAU, APPELLANT, V.
THE OMAHA NATIONAL BANK, APPELLEE.

299 N.W.2d 147

Filed November 21, 1980. No. 43024.

1. **Employment Contracts: Termination of Employment.** A contract to give permanent employment, in the absence of some further express or implied stipulation as to the duration of the employment or of a good consideration in addition to the services contracted to be rendered, is no more than an indefinite general hiring terminable at the will of either party.
2. **Employment Contracts.** An agreement to give permanent employment simply means to give a steady job of some permanence, as distinguished from a temporary job or temporary employment.
3. **Employment Contracts: Termination of Employment.** In the absence of a promise on the part of the employer that the employment should continue for a period of time that is definite or capable of determina-

tion, such employment relationship is terminable at the will of the employer as it constitutes an indefinite general hiring.

4. ____:____. The general rule is that when the employment is not for a definite term, and there are no contractual or statutory restrictions upon the right of discharge, an employer may lawfully discharge an employee whenever and for whatever cause he chooses, without incurring liability.
5. **Public Policy: Courts: Contracts.** Courts should be cautious in holding contracts void on public policy grounds; and before they do so, prejudice to the public interest should clearly be presented.
6. **Courts: Questions of Law.** Where the facts adduced to sustain a finding are such that but one conclusion can be drawn when related to the applicable law, the court should decide the question as a matter of law.

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

John H. Kellogg, Jr., for appellant.

Janet Tungland and Soren S. Jensen of Swarr, May, Smith & Andersen for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, BRODKEY, WHITE, and HASTINGS, JJ., and COLWELL, District Judge.

BRODKEY, J.

This is an action by Robert L. Mau, plaintiff-appellant, seeking damages for his allegedly wrongful discharge from employment by the defendant-appellee, the Omaha National Bank. The plaintiff's claim for damages was dismissed by the District Court for Douglas County, Nebraska. We affirm.

The facts relevant to this appeal indicate that Mau had been employed by the defendant for 28 years prior to his termination on December 3, 1976. There was no written contract of employment entered with the bank, but the basic terms of his employment in 1948 were a starting salary of $100 per month, a work week of 40 hours, and 2 weeks vacation time to which he would be entitled after 1 year of employment. The plaintiff also participated in the appellee's retirement program and profit-sharing plan, and received health

insurance benefits from the bank. The plaintiff served in various capacities within the bank, and was supervisor of the mailroom at the time of his discharge. As supervisor, Mau was responsible for the delivery of incoming mail to the various departments within the bank and for processing the mail distributions sent out by the appellee. In addition, Mau was given supervisory responsibility over the bank's automobile pool.

The record reveals that the circumstances which led to the plaintiff's discharge centered around his failure to mail approximately 300 pension checks issued from accounts administered by the trust department of the bank. Upon receipt of numerous complaints regarding the nonreceipt of the checks, Mau's immediate supervisor inquired as to the whereabouts of the checks. Over the next 3 days, Mau repeatedly assured his supervisor that the checks had, in fact, been mailed. However, upon instruction to conduct a personal search of the mailroom, the appellant found the checks in a desk drawer. Shortly thereafter, Mau was terminated from employment by the appellee.

On April 19, 1978, the plaintiff filed a petition seeking damages for his wrongful discharge from employment. While the length of his contract of employment, as set out in his petition, is somewhat ambiguous, his first cause of action alleged that he had a contract with the defendant which guaranteed him employment either for life or to age 65. The remainder of plaintiff's petition, which alleged defamation of character and wrongful discharge based on age discrimination, was dismissed prior to the trial held on September 12 and 13, 1979. At the close of plaintiff's evidence at trial, the defendant made a motion for dismissal and a directed verdict, which was granted by the court on September 13, 1979. It is in the trial court's finding that the employment relationship between the parties was terminable at will, and that Mau's discharge was not in violation of public policy, that the appellant alleges error.

It is the contention of the plaintiff that, although no formal agreement was ever executed between the parties, a contract of employment was established, not only by the conversations between the parties, but also by the bank handbook and other publications and statements made to the appellant during the course of his employment. Mau testified at trial that he had been offered a *career* by the bank which was to last until retirement at age 65.

His testimony, as revealed by the record, was as follows:

"Q. [W]hat were the representations that [the bank] made to you when you first came into the bank with regards to what you could or could not expect if you took AIB [American Institute of Banking] courses?

"A. Well, they stressed the fact that they would like to have me take AIB courses because they better yourself and your career at the bank.

. . . .

"Q. Did he discuss with you then a career with the bank at that time?

"A. Yes, in a sense he did.

"Q. Did he discuss with you what a career meant at that time?

"A. That it was a way of bettering — well, what a career meant — it was a way of bettering yourself and being able to stay at the bank.

"Q. How long?

"A. Until you were sixty-five.

. . . .

"Q. Can you relate to us what you remember from the discussion with Mr. Alvison when you entered the bank in 1948?

"A. Just that they were glad to have me aboard and they told me, 'Now, we would like to have you stay here and, if you do stay here, we would like to have you take these courses like AIB,' and he stressed also, 'We have a pension plan here and, you know, we would just like to have you aboard here and start your career here.'"

Upon cross-examination, appellee's counsel inquired further into the formation of the contract, and the following dialogue took place:

"Q. When was this contract entered into between you and the bank?

"A. Well, right from the start. The first day I was told about the pension.

"Q. So the contract started the first day that you went to work there?

"A. Yes.

"Q. Was this contractual agreement, which you are talking about between yourself and the Omaha National Bank, did it change from time to time?

"A. Yes, it did. It was always made better.

"Q. Did you agree to all of these changes?

"A. Absolutely, they were in my favor.

"Q. Did you sign a piece of paper that each time you agreed to it?

"A. No.

. . . .

"Q. Did you ever have any meeting with any officer of the Omaha National Bank or any manager of the Omaha National Bank where you were asked to sign a piece of paper or any kind of memorandum which would indicate that you would have employment with the Omaha National Bank until the age of sixty-five?

"A. No."

It is clear that there was no specific agreement for the employment of the plaintiff until age 65. The plaintiff further contended that he manifested his agreement to the terms of the employment contract by accepting "the terms of Defendants employment policies and contract and engaged in the performance of services for a period in excess of 28 years." Defendant alleged that, by his actions, he had a "career" with the Omaha National Bank which was guaranteed for life or until retirement at age 65. We do not agree.

The threshold issue before this court is whether an employee who has been hired for an indefinite period

of time may bring a claim against his employer for damages for wrongful discharge. The general rule has been stated to be that "a contract to give a person permanent employment, in the absence of some further express or implied stipulation as to the duration of the employment or of a good consideration in addition to the services contracted to be rendered, is no more than an indefinite general hiring terminable at the will of either party." 53 Am. Jur. 2d *Master and Servant* § 32 (1970). In addition, this court has previously held that: "If there is no contract for any fixed term of employment, the employer may discharge, or the employee may stop work, at his own pleasure." *State v. Employers of Labor*, 102 Neb. 768, 772, 169 N.W. 717, 718 (1918). See, also, *Stewart v. North Side Produce Co.*, 197 Neb. 245, 248 N.W.2d 37 (1976); *Sinnett v. Hie Food Products, Inc.*, 185 Neb. 221, 174 N.W.2d 720 (1970); *Ploog v. Roberts Dairy Co.*, 122 Neb. 540, 240 N.W. 764 (1932). We note, however, that the case of *Sinnett v. Hie Food Products, Inc., supra*, is factually distinguishable from the present case because the plaintiff-employee in that case was suing for the recovery of a stock bonus allegedly due him at the time of his discharge from employment.

Plaintiff would have us find that his employment, or career, with the bank should be construed to mean a definite period such as life or until age 65, so as to avoid the "terminable at will" rule. This same argument was rejected by the Supreme Court of Kansas in *Johnson v. National Beef Packing Co.*, 220 Kan. 52, 551 P.2d 779 (1976), a case very similar in nature to the one at bar. In *Johnson*, the plaintiff-employee, a beef lugger at the defendant's plant, sought to establish an employment contract by arguing that the employer's "Company Policy Manual" constituted an express contract with the employee, or, in the alternative, a basis for establishing a contract of employment by implication. The court stated: "Plaintiff argues that the statements referred to were bind-

ing on the defendant in its employment relationship, and that they fix the employment duration at life or until an employee reaches retirement age." *Id.* at 54, 551 P.2d at 782. In rejecting plaintiff's argument that the manual constituted a contract, the court said: "A copy of the manual has been supplied to us with the record on appeal. It appears to be a general statement of company policies dealing with employee's benefits, insurance, vacations, holidays, etc., as well as general operating procedures and plant rules. . . . We find nothing in the manual expressly providing for a fixed term of employment, nor is there language from which a contract to that effect could be inferred." *Id.* The court held that the terms of the employees' manual were not bargained for by the parties and that any benefits conferred by it were mere gratuities. The court also rejected the argument that permanent employment should be construed to mean life or until age 65, and concluded that "an agreement to give permanent employment simply means to give a steady job of some permanence, as distinguished from a temporary job or temporary employment." *Id.* at 55, 551 P.2d at 782.

We concur with the aforementioned statements of the Kansas Supreme Court as they apply to the factual circumstances in the present case. In the instant case, none of the company books or documents provided plaintiff promised any definite term of employment, but only pointed out fringe benefits to the employee *if* he remained employed by the bank; and in addition, most of the materials were furnished to defendant after he commenced employment. One booklet even specified in capital letters: "THIS BOOKLET IS NOT A CONTRACT." There is no question that the plaintiff has rendered services over a period of 28 years, and that the employer was bound to compensate him for services rendered and received. However, even assuming *arguendo* that the publications relied upon constituted part of an employment contract, in the absence of a promise on the part of the employer

that the employment should continue for a period of time that is definite or capable of determination, such employment relationship would still be terminable at the will of the employer as it constitutes an indefinite general hiring. See *Forrer v. Sears, Roebuck & Co.*, 36 Wis. 2d 388, 153 N.W.2d 587 (1967); Annot., 35 A.L.R. 1432 (1925); Annot., 135 A.L.R. 646 (1941).

The general rule is that when the employment is not for a definite term, and there are no contractual or statutory restrictions upon the right of discharge, an employer may lawfully discharge an employee whenever and for whatever cause he chooses, without incurring liability. 53 Am. Jur. 2d *Master and Servant* § 43 (1970). Moreover, in the present case, we think it is clear that the plaintiff's discharge was not arbitrary or malicious, but for good cause. His termination was predicated upon the actions he took or failed to take, in regard to the lost pension checks. In reviewing this matter in a memorandum dated December 3, 1976, plaintiff's supervisor stated: "The major problem with regards to the termination is a situation that happened in the last couple of days. On Thursday, I was approached by the Trust Department regarding OPPD and Brandeis pension checks.

"Three hundred customers called in complaining that they did not receive their pension checks. I checked with the Mail Room and was assured that the pension checks were mailed out on Tuesday afternoon. Friday I was approached by Stan Traub regarding reissuing the pension checks. He stated that he talked with Bob Munnelly at the Post Office and asked him to trace them as he felt they were responsible for the loss of the checks. At that point, I talked with Bob Mau and instructed him to make sure that the checks were no where [sic] in the bank. Bob returned a few minutes later and stated he had found the 500 checks in a drawer in the Mail Room.

"I feel this is gross negligence on his part in not making sure that the checks were mailed."

Even if "good cause" for firing were required in this case, it is obvious that adequate cause existed at the time of plaintiff's discharge to support the decision made by the bank.

We recognize, however, that the "employment at will" rule is not, in some jurisdictions, an absolute bar to a claim of wrongful discharge. In a number of jurisdictions, an exception to the "terminable at will" rule has been articulated in recent years. Under this exception, an employee may claim damages for wrongful discharge when the motivation for the firing contravenes public policy. See, *Percival v. General Motors Corp.*, 539 F.2d 1126 (8th Cir. 1976); *Abrisz v. Pulley Freight Lines, Inc.*, 207 N.W.2d 454 (Iowa 1978); *Fortune v. National Cash Register Co.*, 364 N.E.2d 1251 (Mass. 1977); *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975); *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974); *Frampton v. Central Ind. Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973); *Petermann v. International Brotherhood of Teamsters*, 174 Cal. App. 2d 184, 344 P.2d 25 (1959).

So far as we are able to ascertain, Nebraska has not adopted this exception to the present time. Assuming *arguendo*, however, that such an exception were to be recognized in this jurisdiction, it is clear in this case that the plaintiff has failed in his burden to prove that his discharge was violative of a public policy of this state. We have held that "[c]ourts should be cautious in holding contracts void on ground of public policy and before they do so prejudice to the public interest should clearly appear." *Beaver Lake Assn. v. Beaver Lake Corp.*, 200 Neb. 685, 691, 264 N.W.2d 871, 875 (1978). The authorities dealing with "public policy" cited by the plaintiff in support of his claim are factually distinguishable from the instant case. For example, in *Petermann v. International Brotherhood of Teamsters, supra*, the plaintiff-employee had been subpoenaed to testify before a state legislative committee and was instructed by his employer to give

false testimony. In reversing a judgment on the pleadings for the defendant, the court stated that coercing perjury is "patently contrary to the public welfare." *Id.* at 189, 344 P.2d at 27.

In *Frampton v. Central Ind. Gas Co., supra,* the plaintiff-employee was fired after reporting an injury to her arm in order to file for workmen's compensation benefits. The court found that the employer's actions violated a statute prohibiting an employer from using any "device" to relieve himself of his liability under the workmen's compensation law.

In *Monge v. Beebe Rubber Co., supra,* the plaintiff-employee claimed that she was fired because she had refused to go out with her foreman. The trial court held that "a termination by the employer . . . which is motivated by bad faith or malice or based on retaliation is not in the best interest of the economic system or the public good and constitutes a breach of the employment contract." *Id.* at 133, 316 A.2d at 551.

The facts of the above cases are much stronger and clearer than those of the instant case on the question of violation of public policy. In this connection, see Annot., Employee's Arbitrary Dismissal as Breach of Employment Contract Terminable at Will, 62 A.L.R. 3d 271 (1975); Annot., Workmen's Compensation: Recovery for Discharge in Retaliation for Filing Claim, 63 A.L.R.3d 979 (1975); Case Note, 8 *Creighton L. Rev.* 700 (1975).

We conclude that the contract of employment between the plaintiff and the Omaha National Bank was clearly for an indefinite period of employment and was terminable at will, and that there is no evidence of any violation by the defendant of the public policy of Nebraska in plaintiff's discharge. Where the facts adduced to sustain a finding are such that but one conclusion can be drawn when related to the applicable law, the court should decide the question as a matter of law. *Mustion v. Ealy,* 201 Neb. 139, 266 N.W.2d 730 (1978). We conclude that the trial

court properly granted the defendant's motion for dismissal and a directed verdict, and its decision must be affirmed.

AFFIRMED.

BOSLAUGH, J., concurs in result.

STATE OF NEBRASKA, APPELLEE, V. ROBERT COLE, APPELLANT.

298 N.W.2d 776

Filed November 21, 1980. No. 43034.

1. **Post Conviction Relief: Constitutional Law.** In an action under the Post Conviction Act, the only errors cognizable are those which make the conviction void or voidable under the state or federal constitution.
2. **Post Conviction Relief: Appeal and Error.** Where an alleged error is known to the defendant at trial and he fails to raise it on direct appeal from the conviction, the issue is waived and may not be challenged in a later post conviction action to have the conviction and sentence vacated.
3. ____: ____. An issue already litigated on direct appeal from a conviction cannot again be raised in a post conviction review.
4. **Post Conviction Relief: Habitual Criminals.** A failure to challenge, during an habitual criminal hearing, the validity of a prior conviction offered for the purpose of enhancing punishment waives the issue of the validity of the previous conviction and the prior conviction cannot be challenged in a post conviction proceeding.

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

Robert Cole, pro se.

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

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

CLINTON, J.

This is an appeal from the District Court for Douglas County, Nebraska, in an action brought under the Post Conviction Act, to have a robbery conviction and

a subsequent sentence, as an habitual criminal, vacated. Pursuant to Neb. Rev. Stat. § 29-3001 (Reissue 1979), the District Court examined the files and records and found to its satisfaction that the appellant was entitled to no relief, denied an evidentiary hearing, and dismissed the petition to vacate the judgment and sentence.

As a basis for relief, the appellant, who represented himself in this court, alleged: (1) There was no showing in the record that a plea of guilty entered to a 1956 burglary charge, one of the two previous convictions used to support the enhanced sentence, was voluntarily and intelligently entered; (2) At the habitual criminal hearing, he was not sufficiently identified as the person who was convicted and sentenced in the two prior proceedings; (3) His robbery trial should have been declared a mistrial because the prosecution witness remarked, in the presence of the jury, that the witness had been threatened; and (4) His prior convictions were proven by certified, rather than authenticated, copies; therefore, their admission into evidence was erroneous and prejudicial.

The only errors which are cognizable in an action under the Post Conviction Act are those which would make the conviction void or voidable under either the state or federal constitution. Neb. Rev. Stat. § 29-3001 (Reissue 1979); *State v. DeLoa*, 194 Neb. 270, 231 N.W.2d 357 (1975).

Even if we assume, for the argument of this appeal only, that alleged grounds (2), (3), and (4) raise questions of constitutional dimension, they do not constitute grounds for setting aside the sentence, due to the following reasons. The record clearly establishes that the matter of proving appellant's identity as the person who was twice previously convicted and sentenced was raised in the original trial. The trial court found on adequate evidence that the appellant was the person who had been so previously convicted and sentenced. Following the trial, appellant ap-

pealed directly to this court; he failed to raise the identity issue at that time. *State v. Cole*, 192 Neb. 466, 222 N.W.2d 560 (1974). We have previously held that where an issue is known to the defendant at trial and he fails to raise it in his direct appeal, the issue is waived. *State v. McGhee*, 184 Neb. 352, 167 N.W.2d 765 (1969); *State v. Fowler*, 201 Neb. 647, 271 N.W.2d 341 (1978); *State v. Suggett*, 200 Neb. 693, 264 N.W.2d 876 (1978).

Concerning the matter on which appellant's claim for mistrial is founded, the record clearly establishes that this alleged error by the court was expressly waived. The appellant, himself, elected to proceed with trial.

Issue (4) was raised on direct appeal and decided adversely to the appellant. *State v. Cole, supra.* An issue already litigated on direct appeal and decided adversely to the defendant's claim cannot be raised again in post conviction review. *State v. Lacy*, 198 Neb. 567, 254 N.W.2d 83 (1977).

This brings us to appellant's claim that the guilty plea upon which his 1956 conviction was founded is not shown by the record to have been voluntarily and intelligently made. We have consistently held that the validity of a prior conviction offered to enhance punishment under the habitual criminal statute must be challenged at the habitual criminal hearing. Failure to challenge it at the trial level waives the issue. Once the issue is waived, the prior conviction is not subject to collateral attack in a post conviction proceeding. *State v. McGhee, supra; State v. Fowler, supra; State v. LaPlante*, 185 Neb. 816, 179 N.W.2d 110 (1970).

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DONALD M. HURLEY, APPELLANT.

299 N.W.2d 152

Filed November 21, 1980. No. 43188.

1. **Guilty Pleas.** A motion to withdraw a plea of guilty or nolo contendere should be sustained only if the defendant proves withdrawal is necessary to correct a manifest injustice and the grounds for withdrawal are established by clear and convincing evidence.
2. ——. When a plea of guilty or nolo contendere is made with full knowledge of the charge and the consequences of the plea, it will not be permitted to be withdrawn in the absence of fraud, mistake, or other improper means used in its procurement.
3. ——. A guilty plea or a plea of nolo contendere may not be withdrawn as a matter of right solely because the defendant chose to withhold facts from his attorney and the court which, if believed, might have prevented the attorney from recommending that the plea be entered or the court from accepting it.

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

Anthony S. Troia for appellant.

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

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, BRODKEY, WHITE and HASTINGS, JJ., and BURKHARD, District Judge.

HASTINGS, J.

Defendant was convicted of the crime of manslaughter, Neb. Rev. Stat. § 28-305 (Reissue 1979), following a plea of nolo contendere, and was sentenced to imprisonment for a term of 6 2/3 to 20 years. He appealed to this court, assigning a single error, i.e., that the trial court erred in overruling his motion to withdraw the plea of nolo contendere. We affirm.

Defendant appeared in court on November 13, 1979, with his then counsel and, at his request, was permitted to withdraw his not guilty plea previously entered. He then tendered a plea of nolo contendere.

The defendant was questioned thoroughly and extensively as to his background, understanding of the nature of his tendered plea, and realization of his constitutional rights. He related that he was 26 years of age, with a high school education, and able to read and write. He declared satisfaction with the services of his attorney and opportunity to discuss his case with him. The defendant was advised of the possible sentences, and denied that he had been promised anything by anyone in return for his tendered plea. He was free of threats, or actual force, or the influence of drugs or alcohol. His rights to plead not guilty, to a public trial by jury, to subpoena witnesses, to cross-examine the State's witnesses, and to testify in his own behalf or not, as he saw fit, were all explained to him. He stated that he understood all of those rights, as well as his presumption of innocence, and the State's burden of proof, and the requirement that a guilty verdict must be unanimous. Knowing all of those rights, the defendant nevertheless persisted in his plea of nolo contendere after being told that, by doing so, he was then waiving all of those enumerated rights.

The factual basis for the plea was furnished by the county attorney's office, in the presence of the defendant. It consisted of a recitation that the defendant had told the police that he and his wife had an altercation at the family home when he struck her; that she swallowed her tongue; and that he, the defendant, was not able to revive her. She was taken to the hospital, where she was pronounced dead. Having been satisfied of the factual basis, the court accepted the plea and found defendant guilty.

On December 17, 1979, defendant's counsel withdrew and, in his stead, the present counsel entered his appearance for defendant. On December 19, an evidentiary hearing was had in the District Court on defendant's motion to withdraw his plea of nolo contendere. Basically, defendant contends that his plea was not knowingly, understandingly, and voluntarily

entered because it was entered upon advice of counsel then representing him. It seems to be defendant's position that he acted in self-defense. In support of that contention, he refers to a witness, Dan Davis, who was present when the altercation occurred and who could corroborate that story. However, defendant admits that he did not tell his attorney of the existence of this witness because a person's marriage was "his own business and nobody else's." As a matter of fact, he told his attorney specifically that Davis did not witness the argument. He also admitted giving a statement to the police in which he stated that there wasn't any self-defense involved. The defendant also agreed that the trial judge had explained all of his rights to him and that he told the court that he was waiving those rights and entering his plea freely and voluntarily.

Dan Davis also testified at the hearing on defendant's motion to withdraw his plea. He said that he saw the victim come at the defendant with a small hammer; that he then left the house; that shortly thereafter the defendant came outside; and that they then went back into the house, where he observed the victim lying on the floor. He admitted that he told two different police officers he had not seen anything. His excuse for not telling the truth was that he didn't want to get involved. Also, upon questioning by defense counsel, he agreed that his former statements to the police had not been under oath, whereas the testimony at the hearing was under oath, and was the truth.

Other than a statement by the defendant that "My plea . . . was entered on advice of my attorney . . . . And I feel innocent of the charge," there is nothing to indicate that the plea was entered other than voluntarily. We note from an examination of the rather extensive recitation of the facts surrounding the arraignment proceedings that the trial judge fully and fairly explained to the defendant all of his rights and privileges and the consequences of his plea. Accordingly, we have no reluctance in finding that the plea

was entered freely, voluntarily, and knowingly. Similarly, we have searched the record for possible error by way of excessiveness of the sentence. *State v. Price*, 198 Neb. 229, 252 N.W.2d 165 (1977). Defendant's action resulted in the strangulation death of his wife. He previously had been convicted of robbery, sentenced to a term of 3 years, paroled, revoked, and re-paroled, and served a sentence of 1 year's imprisonment for assault with intent to inflict bodily injury. Manslaughter is a Class III felony, and Neb. Rev. Stat. § 28-105 (Reissue 1979) provides for a possible penalty of from 1 to 20 years imprisonment. A sentence imposed within the limits provided by statute will not be reversed on appeal absent an abuse of discretion by the trial judge. *State v. Tipton*, 206 Neb. 731, 294 N.W.2d 869 (1980). Such abuse was not present in this case.

"This court has held on numerous occasions that a motion to withdraw a plea of guilty or nolo contendere should be sustained only if the defendant proves withdrawal is necessary to correct a manifest injustice and the grounds for withdrawal are established by clear and convincing evidence. [Citations omitted.] When a plea of guilty or nolo contendere is made with full knowledge of the charge and the consequences of the plea, it will not be permitted to be withdrawn in the absence of fraud, mistake, or other improper means used in its procurement." *State v. Kluge*, 198 Neb. 115, 119, 251 N.W.2d 737, 740 (1977).

We also have held that a defendant may not withhold evidence known to her at her trial and subsequently use it as a basis for a new trial. *Fugate v. State*, 169 Neb. 420, 99 N.W.2d 868 (1959). Additionally, we have held that a defendant may not base a motion for new trial on newly discovered evidence, where that evidence was known to him from the beginning, and he chose to withhold it for reasons of his own. "A defendant charged with a crime may not, for reasons of his own, experiment with one defense and when that fails him, invoke the aid of the law to experiment with another which was fully known to him at the

time." *Severin v. State*, 148 Neb. 617, 620, 28 N.W.2d 326, 328 (1947). Although the above two cases deal with a motion for new trial, the same reasoning applies where the motion is for withdrawal of a plea of nolo contendere.

In *State v. Miller*, 202 Neb. 443, 275 N.W.2d 614 (1979), we held "that a guilty plea may not be withdrawn as a matter of right solely because the defendant chose to withhold facts from his attorney and the court which, if believed, might have prevented the attorney from recommending that the plea be entered or the court from accepting it." *Miller* at 446, 275 N.W.2d at 616.

Clearly, this is not a case in which the granting or leave to withdraw the plea is necessary to correct a manifest injustice. The judgment of the District Court was correct, and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. STEVEN C. VICARS, APPELLANT.

299 N.W.2d 421

Filed November 21, 1980. No. 43223.

1. **Search and Seizure: Constitutional Law.** The capacity to claim the protection of the fourth amendment as to unreasonable searches and seizures depends not upon a property right in the invaded place, but upon whether the person who claims the protection of the amendment has a legitimate expectation of privacy in the invaded place.
2. ____: ____. Fourth amendment protection extends not only to one's home but also to one's curtilage, which is usually defined as a small piece of land, not necessarily enclosed, around a dwelling house and generally includes buildings used for domestic purposes in the conduct of family affairs.
3. **Search and Seizure: Search Warrants.** A search warrant which directs that a search be made of a specific dwelling house also authorizes the search of outbuildings included within the curtilage, although not described specifically.

4. **Evidence: Appeal and Error.** The reception of evidence collateral to any issue in the case intended to affect the credibility of a witness falls within the discretion of the trial court, and, absent an abuse of discretion, it is not grounds for reversal.
5. **Sexual Assault: Spousal Privilege.** First degree sexual assault under the terms of Neb. Rev. Stat. § 28-319(1)(c) (Reissue 1979), which involves an actor who is 19 years of age or older and a victim who is less than 16 years of age, comes within the meaning of "rape" as contained in Neb. Rev. Stat. § 27-505(3)(a) (Reissue 1979), which prevents the claim of the husband-wife privilege.
6. **Pretrial Discovery.** Subsection (4) of Neb. Rev. Stat. § 29-1919 (Reissue 1979), which permits the trial court, upon ascertaining that a party to a proceeding has failed to comply with orders for discovery under the provisions of Neb. Rev. Stat. §§ 29-1912 to 1921 (Reissue 1979), to "[e]nter such other order as it deems just under the circumstances," gives the court broad discretion which, under the circumstances existing, may include the entry of no order at all.
7. **Lesser-Included Offense.** Where the prosecution has offered uncontroverted evidence on an element necessary for conviction of the greater crime, but not necessary for the lesser offense, the defendant must offer at least some evidence to dispute the issue if he wishes to have the benefit of a lesser-included offense instruction.
8. **Jury Instructions.** The court may properly refuse a requested instruction where the substance of the request is covered in those actually given.

Appeal from the District Court for Jefferson County: WILLIAM B. RIST, Judge. Affirmed.

Joseph F. Chilen of Denney & Chilen for appellant.

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

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

HASTINGS, J.

The defendant, Steven C. Vicars, has appealed from the denial of a motion for new trial by the District Court for Jefferson County. The defendant was charged with violating Neb. Rev. Stat. § 28-319(1)(c) (Reissue 1979), i.e., first degree sexual assault where the actor is 19 years of age or older and the victim is less than 16 years of age, and the victim has been subjected to sexual penetration. After conviction by a jury, the court sentenced

the defendant to a period in the Nebraska Penal and Correctional Complex of not less than 5 nor more than 8 years at hard labor.

The defendant assigned the following as error: (1) The District Court erred in overruling a motion to suppress certain physical evidence obtained as a result of a search of defendant's calf shed, pursuant to a search warrant that described his residence; (2) The refusal to allow defense counsel to impeach the credibility of the complaining witness on cross-examination; (3) The permitting of the defendant's wife, over objection, to testify against him; (4) The receipt into evidence of two exhibits which had not been produced for defendant's inspection pursuant to a pretrial discovery order; (5) The refusal to instruct the jury on lesser-included offenses; and (6) The refusal to instruct the jury with a cautionary instruction. We affirm the judgment of the District Court.

At the time of the offense, the defendant was 31 years of age and the victim, H, was 15 years of age. The complaining witness testified that on the night of the occurrence she had been babysitting for the defendant's children while the defendant, his wife, and two friends went out for the evening. During the early morning hours, defendant drove H home. It was enroute to her home that, H stated, the defendant turned off the highway and drove down a gravel road and into a field, where the defendant stopped the car. H testified that the defendant then pulled her over to him, told her he needed somebody, fondled her pelvic region, and then subjected her to sexual penetration. She also testified that she was experiencing her menstrual period at the time of the assault. The defendant then drove her home in silence.

The defendant testified that he remembers very little about the happenings that night. He stated that he began drinking beer that afternoon about 3:30, and by dinner time he had consumed approximately 12 beers; he and one dinner guest consumed a quart of whiskey

during dinner; and the defendant had five or six beers at a tavern that evening and two more mixed drinks upon returning to the defendant's home at the end of the evening. The only things that the defendant could remember from the time he and H got into his car so he could take her home to the time they reached her home, were as follows: "Well I remember goin' down Highway 8. . . . And I remember stoppin' in front of her house. . . . And I remember comin' back home or I remember bein' back home." He later testified: "I remember talking to her a little bit in front of her place." The only other thing the defendant could recall was that he got sick and vomited once, but he couldn't remember if H was with him at the time.

The victim said nothing about the incident that night when she went home, or the next day. However, the third day she did confide in a friend, and in the early morning hours that same day she ran away to her natural father in Florida. Further relevant facts will be detailed in connection with the discussion on each assignment of error.

The first assignment of error is that the District Court erred in overruling a motion to suppress certain evidence seized after a search of the defendant's residence and outbuildings. The investigating officers were informed by the defendant's wife that when he returned from taking the babysitter home, she had noticed stains on the front of his blue jeans. The next day she also noticed red stains on his undershorts. Mrs. Vicars testified that she washed the shorts, but hid the blue jeans. A search warrant was issued to search the residence of the defendant for bloody clothing.

The defendant lived on a farmstead on which were seven permanent structures, including a house and several sheds. The defendant rented four of those structures, including the house and three sheds. The blue jeans were found in one of the sheds which was used at various times as a rabbit hutch, a calf shed for bucket feeding young calves, and as a garage. The police

officers conducting the search initially had been informed by the defendant's wife that the blue jeans were in the residence of the defendant. After searching the residence, the police officers again contacted the defendant's wife, and were told she had removed them from the house and placed them in a white plastic garbage bag in a rabbit hutch in the calf shed. The police officers then searched the calf shed and seized the blue jeans. The defendant moved to suppress the blue jeans, arguing that they were outside the scope of the search warrant, and that the warrant described the residence of the defendant but not the outbuildings.

There is no doubt that the Constitution of the United States, as well as the Constitution of Nebraska, protects against unreasonable searches and seizures. In the words of the U.S. Supreme Court: "[T]he question is whether the challenged search or seizure violated the Fourth Amendment rights of a criminal defendant who seeks to exclude the evidence obtained during it. That inquiry in turn requires a determination of whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect." *Rakas v. Illinois*, 439 U.S. 128, 140, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978). The interest protected was defined by *Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967), where the Supreme Court held that the capacity to claim the protection of the fourth amendment depends not upon a property right in the invaded place, but upon whether the person who claims the protection of the amendment has a legitimate expectation of privacy in the invaded place. 389 U.S. at 353. Therefore, the question we are faced with is whether the defendant had a legitimate expectation of privacy in the calf shed where the blue jeans were found.

The calf shed was one of four of the seven buildings on the premises which the defendant leased. The other three leased buildings were the house in which the defendant and his family lived, and two sheds used for

storage. The calf shed was located about 100 feet from the house, on the opposite side of a chain link fence which surrounded the yard. The shed was first used to raise rabbits, but was later used to house bucket calves. The defendant's wife referred to it as the garage.

"Fourth Amendment protection extends not only to one's home but also to one's 'curtilage.' Curtilage is usually defined as a small piece of land, not necessarily enclosed, around a dwelling house and generally includes buildings used for domestic purposes in the conduct of family affairs." *State v. Kender*, 60 Hawaii 301, 304, 588 P.2d 447, 449 (1978).

The calf shed was clearly used by the defendant's family in their farming operation in such a manner that there was certainly a reasonable expectation of privacy in the shed that comes within fourth amendment protection.

The connected question is whether the search of that shed was made pursuant to a valid search warrant. The defendant argues that the search warrant did not extend to the calf shed because the description therein is as follows: "A green single family dwelling described as: Original Town of Thompson, Lots 16 to 22, Fr. Lots 11-15, 29S 8C 1BAF 8 Blk 7 . . . ." The defendant contends that the search warrant describes the place to be searched as the house only, and does not include any of the outbuildings. The question of whether an outbuilding, which is in the curtilage of a dwelling house, may be searched under the same warrant as that building, even though it is not specifically described, was dealt with in the case of *Bellamy v. State*, 134 Ga. App. 340, 214 S.E.2d 383 (1975). The court stated: "'Curtilage' comes down from early English days. An out-building on the grounds is within the 'curtilage' and may be searched under such a warrant, though not described specifically." *Id.* at 340, 214 S.E.2d at 384.

This view is not new. For instance, in *Ford v. State*, 34 Okla. Crim. 184, 185, 245 P. 909, 910 (1926), it was stated: "Ordinarily, a search warrant covers the cur-

tilage and appurtenances of the place described." See, also, *Seals v. State*, 157 Tenn. 538, 545, 11 S.W.2d 879, 881 (1928), which also held: "It is our opinion that a search warrant directing that a search be made of a principal building, identified by street number, authorizes the search of an outhouse so clearly appurtenant to and a part of the same premises as the coal house here involved." Even back in 1865, it was stated: "It would destroy the utility of the proceeding, if, beside the building principally named, all other buildings and places of concealment upon the same premises, occupied in connection with it and by the same person, could not also be searched, and by virtue of the same warrant." *Meek v. Pierce and another*, 19 Wis. 318, 321 (1865).

We, therefore, hold that by finding that the defendant had a reasonable expectation of privacy in the calf shed in question, a valid search warrant would be required for the search and seizure of the blue jeans. We also hold that the search warrant included the calf shed as an outbuilding appurtenant to and within the curtilage of the dwelling house, and, therefore, it was within the scope of the warrant. The District Court did not err in overruling the motion to suppress the evidence seized in that search.

The second error assigned by the defendant is that the District Court refused to allow defense counsel to impeach the credibility of the complaining witness on cross-examination concerning prior inconsistent statements referring to previous sexual relations with the defendant and whether there was force involved in the assault. Since neither consent nor force was an element of the crime charged, the District Court correctly excluded evidence on those two issues. The defendant argues that he was prejudiced by being unable to impeach the credibility of the complaining witness, since her veracity was of the utmost importance. We have previously held that the reception of evidence collateral to any issue in the case intended to affect the credi-

bility of a witness falls within the discretion of the trial court, and, absent an abuse of discretion, it is not grounds for reversal. *State v. King*, 197 Neb. 729, 733, 250 N.W.2d 655, 658 (1977). After reviewing the evidence, we find that there was no abuse of discretion and that the defendant was not prejudiced because, in fact, sufficient evidence was admitted which reflected upon the truth and veracity of the complaining witness.

There was testimony by a girl friend of the complaining witness: "She told me she shouldn't have told me that 'cause it wasn't true and that it could get her in a lot of trouble if it came out." The wife of the defendant testified that the victim first denied the incident and then admitted the incident in the same afternoon. The victim herself testified on cross-examination that she had at first denied the incident, but then again stated that it did occur. The victim also testified that the reason she ran away from home was to cope with the situation she found herself in after the assault. However, other witnesses testified that the victim had given her reasons for running away as relating to her problems at home, specifically that she wasn't getting along with her stepfather. We are satisfied that there was sufficient evidence before the jury which would tend to impeach the credibility of the complaining witness.

The defendant's third assignment of error is that the trial court permitted the defendant's wife, over objection, to testify against him. The defendant argues that Neb. Rev. Stat. §27-505 (Reissue 1979) established a privilege which may be waived only with the consent of both spouses. The defendant further argues that the exception in subsection (3) of that statute does not apply, since the crime with which he was charged was not rape, but sexual assault in the first degree. Subsection (3) states: "These privileges may not be claimed: (a) In any criminal case where the crime charged is rape . . . ." Defendant insists that sexual assault in the first degree is not embraced within the term "rape."

The defendant was charged with subjecting a girl less than 16 years of age to sexual penetration, himself being over 19 years of age. This constitutes what was formerly known as statutory rape.

"A primary rule of construction is that the intention of the Legislature is to be found in the ordinary meaning of the words of a statute in the connection in which they are used and in light of the mischief to be remedied. [Citation omitted.] When the intent of the Legislature is clear, it is the duty of the courts to construe it in accordance with such intent. A sensible construction will be placed upon it to effectuate the object of the legislation rather than a literal meaning that would have the effect of defeating the legislative intent. [Citations omitted.]" *PPG Industries Canada Ltd. v. Kreuscher*, 204 Neb. 220, 228, 281 N.W.2d 762, 768 (1979).

"Sexual assault in the first degree includes within the scope of its definition rape, forcible sodomy, and statutory rape, as well as other forms of sexual assault not heretofore defined by our statutes." *State v. Country*, 194 Neb. 570, 572-73, 234 N.W.2d 593, 595 (1975). The intent behind this common law privilege is that it fosters the harmony and sanctity of the marriage relationship. See *Trammel v. United States*, 445 U.S. 40, 100 S. Ct. 906, 63 L. Ed. 2d 186 (1980). Our statute defines exceptions where these privileges may not be claimed. A reading of those exceptions shows that they deal with situations in which the harmony and sanctity of the marriage relationship have been breached or probably have been breached. The crime committed by the defendant is the same whether it is termed first degree sexual assault or statutory rape, and has the same effect on the harmony and sanctity of the marriage relationship.

The crime with which the defendant was charged certainly comes within the ordinary meaning of "rape." It is clear that the Legislature intended to include the crime of rape in its ordinary meaning in the privilege statute. Therefore, the District Court was not in error

when it ruled that the defendant could not claim the husband-wife privilege.

The defendant's fourth assignment of error is that the District Court received into evidence, over objection, two exhibits which are the birth certificates of the complaining witness and the defendant, and which had not previously been produced for the defendant's inspection, pursuant to the court's pretrial discovery order. Neb. Rev. Stat. §29-1919 (Reissue 1979) states that if, at any time during the course of the proceedings, it is brought to the attention of the court that a party has failed to comply with orders for discovery, the court may do one of four things. Under subsection (4) of that statute, the court may "[e]nter such other order as it deems just under the circumstances." That section gives the District Court broad discretion under the circumstances which may exist. See *State v. Batchelor*, 191 Neb. 148, 214 N.W.2d 276 (1974). We find that the District Court did not abuse its discretion in determining that the defendant was not prejudiced by the failure of the State to present the birth certificates to the defendant's counsel prior to trial, as required by the discovery order.

The defendant's fifth assignment of error is that the trial court refused to instruct the jury, as proposed by the defendant, on lesser-included offenses. Specifically, the defendant requested the court to instruct the jury on second degree sexual assault as a lesser-included offense. Second degree sexual assault requires only sexual contact as opposed to sexual penetration. This court has uniformly applied the rule that: "When the evidence entirely fails to show an offense of a less degree than that charged in the information it is not prejudicial error to omit to give an instruction defining an offense of such less degree." *State v. Tamburano*, 201 Neb. 703, 706-07, 271 N.W.2d 472, 474 (1978).

In *Tamburano*, we made it clear that where the prosecution has offered uncontroverted evidence on an element necessary for conviction of the greater

crime, but not necessary for the lesser offense, the defendant must offer at least some evidence to dispute the issue if he wishes to have the benefit of a lesser-included offense instruction. The defendant points to the testimony of the victim that her pelvic region was fondled by the defendant as being evidence of second degree sexual assault. However, defendant produced no evidence to controvert her testimony that there was penetration. The case at bar is similar to the *Tamburano* case in that, in both cases, the sole evidence relating to sexual penetration was that of the victim and in both cases, evidence included the defendant's bloody clothing. In *Tamburano*, the defendant did not testify and in this case the defendant did testify, but he could not remember what, if anything, happened on the way to H's home. The trial court committed no error in refusing an instruction on a lesser-included offense where there was no evidence to require it.

The sixth and final assignment of error is that the District Court refused to give defendant's proposed cautionary instruction advising how easy it is for a person to accuse another of first degree sexual assault and to require the jury to examine the testimony of the victim with caution. A similar complaint was made by the defendant in *Fulton v. State*, 163 Neb. 759, 81 N.W.2d 177 (1957). This court held that the instructions given, particularly instruction No. 18, which in substance advised the jury of the grave importance of its factfinding function in the administration of justice, were sufficient. Strangely enough, the trial court's instruction No. 22 in this instance was essentially identical with instruction No. 18 in *Fulton, supra.* Additionally, here the trial court gave the required NJI instructions relating to the function of the jury, burden of proof, reasonable doubt, and the elements of the crime. The court may properly refuse a requested instruction where the substance of the request is covered in those actually given. *State v. Samuels*, 205 Neb. 585, 289 N.W.2d 183 (1980).

The defendant's assignments of error are not sustained by the record, and the judgment of the trial court is affirmed.

AFFIRMED.

CLINTON, J., not participating.

KRIVOSHA, C.J., concurring.

I concur fully with the results reached by the majority in this case. I write separately, however, because I think it unnecessary for us to decide whether appellant had a legitimate expectation of privacy in the calf shed where the blue jeans were found in this case that would give rise to a fourth amendment right.

We have found in this case that a search warrant was obtained which, by description, included the calf shed as part of the curtilage. Having made that determination, I see no purpose in declaring that appellant had a legitimate expectation of privacy under the facts.

The facts disclose that appellant did not even know that the blue jeans had been placed in the calf shed and that, in fact, they had been hidden by appellant's wife without his knowledge or permission. Does one have a legitimate expectation of privacy in property which has been unknowingly taken from one and hidden without one's knowledge? The recent U.S. Supreme Court decisions of *Rawlings v. Kentucky*, ___ U.S. ___, 100 S. Ct. 2556, 65 L. Ed. 2d 633 (1980), and *United States v. Salvucci*, ___ U.S. ___, 100 S. Ct. 2547, 65 L. Ed. 2d 619 (1980), at least raise some serious question about when a person has a legitimate expectation of privacy so that a claim based upon a fourth amendment violation can be raised or entertained. Unlike the majority who specifically find herein that, under the facts, appellant had a reasonable expectation of privacy in the calf shed, I would defer that question to another time and another case. Here, there was a warrant which did include the shed. Our discussion about appellant's legitimate expectation of privacy seems to me to be gratuitous. I would await answering the question of whether

one has a legitimate expectation of privacy in absconded property to a case which requires us to answer that question after the parties have fully and adequately briefed and argued the question to us. The answer to that question may not be quite as clear as we have indicated in our majority opinion today.

STATE OF NEBRASKA, APPELLEE, V. THOMAS L. WELCHEL, APPELLANT.

299 N.W.2d 155

Filed November 21, 1980. No. 43224.

1. **Robbery.** An essential element of the crime of robbery is that the theft be accomplished by the use of force, violence, or intimidation. Force relied upon must be sufficient to effect a transfer of the property from the victim to the robber and, if it is sufficient to overcome resistance, the degree is immaterial.
2. ——. The taking of the property under the provisions of Neb. Rev. Stat. § 28-324 (Reissue 1979) need not be from the "person." It is sufficient if it is taken from the individual's personal presence, protection, or control. The essence of the statute is that the money or property must be in the possession or under the control of the victim and that violence or putting in fear was the means used by the robber to take it.
3. **Intent.** Intent is a mental process and intention must be determined from all the evidence, facts, and circumstances of the case, inclusive of the act, and is ordinarily for decision by the trier of the facts.

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

Dennis R. Keefe, Public Defender, Richard L. Goos, Chief Public Defender, and Dennis G. Carlson for appellant.

Paul L. Douglas, Attorney General, and Linda A. Akers for appellee.

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

CLINTON, J.

Defendant, Thomas L. Welchel, age 26 at the time of the crime, was charged with having, on July 13, 1978, committed a first degree sexual assault upon a female, age 21, whom we will hereafter refer to as the victim or by the appropriate pronoun. Defendant was charged in a second count with having, on the same occasion, robbed her by forcibly and by violence, or by putting in fear, taking from her the sum of about $20.

The defendant entered a plea of nolo contendere to the charge of sexual assault. The record clearly establishes that the plea was voluntarily and intelligently made. Evidence was received by stipulation on the issue of whether the defendant was a mentally disordered sexual offender and the court found he was not.

The defendant pleaded not guilty to the robbery charge and waived a jury trial. He also made other waivers necessary to try the case in the fashion employed. The defendant waived his right to confront witnesses and the right to object to evidence as hearsay. The defendant did not testify on his own behalf and that right was expressly waived. All these waivers appear to have been voluntarily and intelligently made with advice of counsel.

Pursuant to stipulation, the defendant was tried by the court upon documentary evidence, including a deposition of the victim taken on behalf of the defendant, the deposition of a physician who examined the victim shortly after the incident, investigative reports compiled by police officers, and other evidence. No statement by him, exculpatory or otherwise, was offered at trial.

The trial judge accepted the plea to the assault charge, found the defendant guilty of both charges, and sentenced him to a term of 7 to 10 years on the charge of sexual assault and to a term of not less than 3 nor more than 10 years on the robbery count, the terms to be served consecutively.

On appeal to this court, only the following two errors are assigned: (1) The court erred in finding the defendant guilty of robbery because the evidence was insufficient, as a matter of law, to warrant such a conclusion, and (2) The sentences and their imposition as consecutive terms are excessive. We affirm the judgment and sentences.

The evidence, which defendant claims was insufficient to support his robbery conviction, appears throughout the record in a rather disjointed fashion because of the manner in which this case was tried, all as previously described. However, it was sufficient for the judge, as the trier of fact, to find the following. On the evening of July 12, 1978, at about 8:30 p.m., the victim went to a tavern in north Lincoln. She held a full-time job, but was also employed part-time at the tavern. She was not working on the evening involved; she visited, drank, and danced with friends and acquaintances until closing time.

At some time during the evening, the defendant, who was present at the tavern, approached the victim, introduced himself as "Tom," and asked her to dance. She declined. During the course of the evening she, on at least one occasion, paid for drinks with coins contained in a small lidded jar which she carried in her purse. These coins were quarters, dimes, and nickels which she accumulated while working as a waitress at the tavern. She also had a $10 and a $1 bill in her billfold, along with credit cards and personal identification. She used the dollar bill to pay for a drink.

The victim left the tavern at 1 a.m., July 13. As she was walking through the parking lot, the defendant suddenly approached and began a conversation with her. He walked the victim to her automobile and asked her to drive him to his own car which was located elsewhere on the lot. She apparently acceded to the request and defendant got into her car. She drove him to another part of the lot. He then throttled her with

his hands, forced her to disrobe, and placed a belt strap around her neck, drawing it tight. He drove her car northward out of Lincoln. The victim remained captive about 2 1/2 or 3 hours. During that time, he repeatedly assaulted her sexually by vaginal, rectal, and oral penetration. He further sexually abused her by thrusting various hard objects into her bodily openings. He also beat her with the strap, used it as a leash to lead her, and subjected her to other indignities which we will not describe. Some of the assaults occurred in the car and some outside of it.

After the first series of assaults, the defendant dressed and entered the car, leaving the victim lying naked on the ground with the strap about her neck. She stated she was in fear for her life. At that time, she was about 4 feet from the car. She could see the defendant's face, but not the rest of him. She heard the coins being emptied from the glass jar. Later, she found the empty jar and her billfold in the back seat of the car. The $10 bill was missing from her billfold. Some time during this period, defendant told the victim he knew where she lived. The inference is that he obtained this information from the contents of her billfold. He threatened to kill her if she told anyone about the incident.

Defendant then got the victim into the car and started back to Lincoln. Sexual assaults were repeated on the way.

He let her leave the car about 1/2 mile from the tavern. He told her she would find her car in the parking lot at the tavern. Defendant then apparently drove the car to the tavern lot and left it. She walked to the tavern, found her car, and drove to her place of residence. There, she told her female roommate that she had been raped and robbed. The roommate called the rape crisis center. The police were notified. The victim was taken to a hospital for examination and treatment.

The examining physician found bruises, abrasions,

swelling, and wounds about the body, including internal injuries. The physician stated, in her deposition, that among the considerable number of sexual assault victims she had examined, she had never seen one as badly abused as this victim.

The victim identified defendant as her attacker. She selected his picture from a group of photographs of young men. The defendant was later apprehended in the state of California.

Defendant argues that the evidence does not, as a matter of law, support his robbery conviction. This contention is based upon the premise that no evidence was introduced showing that the victim's money was taken forcibly and by violence, or by putting in fear. It is argued that the evidence conclusively shows that the force, violence, and intimidation, or putting in fear, were the means by which the sexual assaults were committed and that the theft was "subordinate and incidental"; that the assaults were "sexual in character" and motivation. The defendant argues that he made no demand for the victim's property as evidenced by her own deposition: "He never demanded any money from me," and "He just made me fear of my life, but not for property . . . ." Thus, defendant claims, there was no evidence of robbery, but merely of larceny.

The difficulty with the latter part of this argument is that a thief may commit the crime of robbery without demanding property from his victim or causing his victim to fear its loss. A demand for property and fear of its loss are not constituent elements of robbery.

Robbery is an offense against both the victim's person and property. "In so far as it is against the person, it consists . . . [of] personal violence or personal intimidation." *Cobern v. State*, 273 Ala. 547, 550, 142 So. 2d 869, 870 (1962), quoting *Thomas v. State*, 91 Ala. 34, 9 So. 81 (1890). Suppose, e.g., that a robber approached a victim from the rear, hit him on the head, rendered him unconscious, and then relieved him of his jewelry,

money, and watch. Merely because the robber made no demand for the victim's valuables and the victim never feared losing his property, it would be ludicrous to argue that the evidence is insufficient to support a robbery verdict.

Defendant also argues that no evidence was introduced from which it may be inferred that he intended to use violence and intimidation to take the victim's property when the initial sexual assaults, i.e., those preceding the theft, were committed. Instead, defendant claims, the theft was a mere afterthought. To support this argument, the defendant cites *State v. Blunt*, 187 Neb. 631, 193 N.W.2d 434 (1972); 77 C.J.S. *Robbery* § 7, p. 452; and *Wilson v. State*, 170 Neb. 494, 103 N.W.2d 258 (1960), *cert. denied* 364 U.S. 887, 81 S. Ct. 178, 5 L. Ed. 2d 108 (1960). Defendant also relies upon a quotation from C.J.S. which says: "The force or intimidation essential to robbery need not precede the taking of the property. However, it must either precede or be contemporaneous with such taking, in the sense that the force or intimidation must be concurrent or concomitant with the taking. Subsequent force cannot relate back to the act of taking so as to be considered force accompanying the act, and the general rule is that violence or intimidation subsequent to a taking by other means will not render the act robbery." 77 C.J.S. *Robbery* § 11, p. 457.

Neb. Rev. Stat. § 28-324 (Reissue 1979) reads, in part: "A person commits robbery if, with the intent to steal, he forcibly and by violence, or by putting in fear, takes from the person of another any money or personal property of any value whatever."

In *Wilson v. State, supra*, we said at 504, 103 N.W.2d at 266: "The essence of the statute is that the money or property must be in the possession or under the control of the victim and that violence or putting in fear was the means used by the robber to take it." As interpreted by this court, it is not necessary that the property be taken from the "person." It is sufficient if it is taken

from the individual's personal presence, protection, or control. *Cherpinsky v. State*, 122 Neb. 52, 238 N.W. 917 (1931). Defendant seems to concede that this requirement is satisfied by the evidence here.

In *State v. Blunt, supra*, we said at 632, 193 N.W.2d at 435: "An essential element of the crime of robbery is that the theft be accomplished by the use of force, violence, or intimidation. See § 28-414, R. R. S. 1943. Force relied upon must be sufficient to effect a transfer of the property from the victim to the robber and if it is sufficient to overcome resistance, the degree is immaterial."

We have also said that in order for a theft to constitute the crime of robbery, it must be accomplished either by force or violence or by placing in fear. *State v. Adkins*, 200 Neb. 775, 265 N.W.2d 454 (1978).

We must bear in mind that the question before us is not whether the trier of fact was entitled to find that the theft was a mere larceny. Clearly, he might have done so if he was convinced that the theft was an afterthought. If the trial had been before a jury, defendant would, no doubt, have been entitled to an instruction on larceny as a lesser-included offense. The question is whether he was required by the evidence to do that, i.e., was a conclusion of larceny the only reasonable inference supported by the evidence. Equally clearly, it was not.

Intent is a mental process and, in the absence of a direct expression of intention by the actor, that intention (as well as the time of its formation — where material) must be inferred from the nature of the acts and the surrounding circumstances. *State v. Journey*, 201 Neb. 607, 271 N.W.2d 320 (1978); *State v. Brown*, 174 Neb. 393, 118 N.W.2d 332 (1962).

It is but to state the obvious to say that intentions to rape and to rob may coexist. Violence immediately preceded the theft. The evidence before the court permitted the inference that defendant may have, from the beginning, intended both to rob and to rape.

Clearly, it also permits the inference that effects of the violence and intimidation still existed when the theft occurred. The trier of fact was entitled to find that the theft was accomplished by force or intimidation. See, *Cobern v. State, supra; State v. Iaukea*, 56 Hawaii 343, 537 P.2d 724 (1975); *Howard v. Commonwealth*, 313 Ky. 667, 233 S.W.2d 282 (1950).

Defendant argues various claimed discrepancies between the victim's statements and what she allegedly told others as shown by the officers' investigation reports. These were matters of detail and raised, at most, questions of credibility. Credibility is for the trier of fact and not this court on appeal. *Wilson v. State, supra.*

The claim that the sentences are excessive is wholly without merit.

AFFIRMED.

JACOB WILLIAMS, APPELLANT, V. WILLIAMS JANITORIAL SERVICE AND AETNA INSURANCE COMPANY, APPELLEES.

299 N.W.2d 160

Filed November 21, 1980. No. 43289.

1. **Workmen's Compensation: Appeal and Error.** The findings of fact made by the Workmen's Compensation Court after rehearing shall have the same force and effect as a jury trial in a civil case, and will not be set aside unless clearly wrong.
2. **Workmen's Compensation: Employer and Employee.** There is no single test by which the determination of a workman as an employee may be made. This must be determined from all the facts in the case.

Appeal from the Nebraska Workmen's Compensation Court. Affirmed.

Jacob Williams, pro se.

Patrick B. Donahue of Cassem, Tierney, Adams, Gotch & Douglas for appellees.

Heard before BOSLAUGH, BRODKEY, and HASTINGS, JJ., and BLUE and CAPORALE, District Judges.

BLUE, District Judge.

On July 26, 1978, plaintiff was washing a skylight at Millard High School in Omaha, Nebraska, at which time he fell from the roof and received injuries to his legs.

As a result of this accident, the plaintiff filed an action in the Nebraska Workmen's Compensation Court against Williams Janitorial Service and Aetna Insurance Company, alleging that he was an employee of Williams Janitorial Service, and praying for benefits under the workmen's compensation act. Aetna is a workmen's compensation carrier for Williams Janitorial Service.

Defendants answered, alleging that Aetna issued a workmen's compensation policy to Jacob Williams, doing business as Williams Janitorial Service, and the plaintiff is not entitled to compensation benefits for the reason that plaintiff was an employer and not an employee of Williams Janitorial Service.

At a hearing before a single judge in the compensation court, in which the plaintiff claimed that his wife, Doris Jean Williams, was the owner of Williams Janitorial Service, and that he was an employee at the time of the accident, it was found that the plaintiff was not an employee at the time of the accident, and the petition was dismissed. Upon a rehearing by the full compensation court, it was again found that the plaintiff was not an employee and the plaintiff's petition was again dismissed.

The record shows that Williams Janitorial Service is in the business of cleaning newly constructed buildings prior to their occupancy. This business was started in 1975 by Doris Jean Williams, with about five employees. Williams Janitorial Service was never incorporated and there is no ownership of the business outside of the Williams family. Plaintiff apparently became involved with the Williams Janitorial Service

in the last part of 1976, after leaving his job at a packing plant.

Plaintiff purchased workmen's compensation insurance for Williams Janitorial Service, and was the only person that handled all of the insurance policies and bonds on behalf of Williams Janitorial Service. The insurance policy issued by Aetna was in the name of Jacob Williams, doing business as Williams Janitorial Service. Plaintiff applied for all of the bonds of Williams Janitorial Service, which listed plaintiff as owner of Williams Janitorial Service. Plaintiff's insurance agent, John Bush, testified that plaintiff never objected to the plaintiff's name being listed as owner on all of the insurance policies and bonds. Shortly after Williams Janitorial Service was started, plaintiff discussed operating procedures and the method of payment with his wife. Both plaintiff and his wife testified that, at that time, plaintiff advised his wife to change the method of payments so that Williams Janitorial Service would be more profitable. The testimony was uncontradicted that plaintiff did virtually all the bidding and estimates for Williams Janitorial Service, and worked on the scene with the general contractor. Plaintiff, as well as his wife, did the actual cleaning work from time to time. However, plaintiff did the actual cleaning work only when he felt like it and when he felt that the job was good enough. The evidence was uncontradicted that plaintiff never received an hourly salary, but rather, received about 40 percent of the profit for the jobs that he actually worked on. Both plaintiff and his wife testified that no directions were given to plaintiff for any of the actual work that he did on the jobsites. The checking account in the name of Williams Janitorial Service was used by both plaintiff and his wife. Plaintiff's insurance agent, John Bush, testified that he was required to send a form from Aetna to the plaintiff for completion, calling for all the names of employees of Williams Janitorial Service. This form was later re-

turned to Mr. Bush by plaintiff and did not contain plaintiff's name. All of plaintiff's tax returns indicate that plaintiff considered himself self-employed for purposes of tax returns. From 1976 to 1978, plaintiff repeatedly filed a social security self-employment tax form. In addition to all of the above, plaintiff consistently held himself out as owner of Williams Janitorial Service and a self-employed person to the general contractors, insurance companies, insurance agent, Internal Revenue Service, and even to St. Joseph's Hospital where he was taken following his accident.

Only an employee is entitled to workmen's compensation benefits. Neb. Rev. Stat. § 48-101 (Reissue 1978) states: "When personal injury is caused to an employee by accident or occupational disease, arising out of and in the course of his or her employment, such employee shall receive compensation therefor from his or her employer if the employee was not willfully negligent at the time of receiving such injury." Neb. Rev. Stat. § 48-115 (Reissue 1978) states, in part: "The terms employee and workman are used interchangeably and have the same meaning throughout this act. The said terms . . . shall be construed to mean: . . . Every person in the service of an employer who is engaged in any trade, occupation, business, or profession as described in section 48-106, under any contract of hire, expressed or implied, oral or written . . . ."

Under the Nebraska workmen's compensation act, the determination of a claimant's status as an employee involves an evaluation of the facts of each case. *Stephens v. Celeryvale Transport, Inc.*, 205 Neb. 12, 286 N.W.2d 420 (1979); *Voycheske v. Osborn*, 196 Neb. 510, 244 N.W.2d 74 (1976). The burden of proof is upon the employee to prove the nature of the relationship. *Stephens v. Celeryvale, supra; Voycheske v. Osborn, supra.*

The issue upon appeal, whether or not the plaintiff was an employee, is a question of fact. The standard

of review governing factual determinations of the Workmen's Compensation Court is governed by the relevant portion of Neb. Rev. Stat. § 48-185 (Reissue 1978), which provides: "The findings of fact made by the Nebraska Workmen's Compensation Court after rehearing shall have the same force and effect as a jury verdict in a civil case." That statute also limits the grounds of reversal to four which include: "(3) [T]here is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award . . . ."

In applying this statute, we have held the findings of fact made by the Workmen's Compensation Court on rehearing will not be set aside on appeal unless clearly wrong. *Wolfe v. American Community Stores*, 205 Neb. 763, 290 N.W.2d 195 (1980).

The finding of fact by the compensation court that plaintiff was not an employee at the time of the accident is supported by sufficient competent evidence, and the judgment must be affirmed.

AFFIRMED.

RUTH I. CHRISP, APPELLANT, V. DEAN E. CHRISP, APPELLEE.

299 N.W.2d 162

Filed December 1, 1980. No. 42901.

1. **Property Division.** A division of property during marriage between husband and wife that is equitable and fair will not be nullified in a court of equity.
2. **Property Division: Divorce.** There is no mathematical formula by which property awards can be precisely determined, but they are to be determined by the facts in each case.
3. ____: ____. The spouse providing the financial consideration for property acquired during the marriage is not entitled to that property to the exclusion of the spouse providing consideration in the form of domestic support.
4. ____: ____. In a marriage of long duration, and where the parties were parents of all children involved, an award of one-third to one-half of the property is equitable.

5. ____:____. Upon divorce, a division of property must take into consideration the circumstances of the parties, the duration of the marriage, 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.

Appeal from the District Court for Custer County: JAMES R. KELLY, Judge. Affirmed in part, and in part reversed and remanded with directions.

Schaper & Schaper and James B. Luers of Wolfe, Hurd & Rierden for appellant.

Tedd C. Huston, P.C., for appellee.

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

WHITE, J.

This is an appeal in a marriage dissolution case. The District Court dissolved the marriage, awarded appellant custody of the parties' 17-year-old son, awarded each party all property titled in his or her own name, and ordered appellee to pay $13,789 to appellant. On appeal, the appellant assigns as error the District Court's division of property as being patently unfair on the basis of the evidence presented and the District Court's failure to restore to appellant her inherited property or otherwise compensate her in any way for her substantial contribution to the marriage. We affirm in part and, in part, reverse and remand.

The parties were married in 1950. Neither party brought any money or property into the marriage. For 3 years, the parties lived on and farmed property owned by appellant's father. In 1953, the parties purchased a quarter section of land on which they lived and farmed. Several years later, the appellant inherited approximately 520 acres of land. The inheritance gave rise to marital difficulties. In 1969, the appellee conveyed to appellant his interest in their jointly acquired quarter section of land and appellant quitclaimed to appellee her entire interest in 360

acres of the land which she had inherited. These transfers were done in an attempt to reconcile the marriage. From that time until the date of this action in 1977, each party maintained his or her own property and separate accounts. In 1970, the parties sold their jointly owned farm equipment and livestock and divided the proceeds. Appellant purchased a house and invested the remainder of her share. The appellant, the appellee, and their minor child lived in the house purchased by appellant until the date of the divorce. Appellee purchased 600 acres of land with his share of the proceeds during this period.

The division of property in 1970 resulted in each party owning approximately one-half of the property acquired up to that time. The agreement between the parties to divide their property was not unconscionable. At the time, both parties agreed that the division was fair and equitable and, for that reason, the trial court adopted it. Because the division was equitable, it will not be disturbed on appeal. The property titled in each parties' name as a result of that division will remain the separate property of each and is not considered in the division of marital property by this court. The 160 acres referred to as the Bartak quarter, and the 160 acres of inherited property not transferred to appellee were awarded to appellant as her separate property. The 360 acres transferred to appellee by appellant in 1969 was awarded to appellee as his separate property. That part of the trial court's decision that each party retain property titled in his or her own name is affirmed.

The only property subject to division upon divorce is property acquired by these parties after 1970. The trial court excluded this property in the division of the marital estate and its decision is, therefore, in part, reversed.

Even though the parties had divided their property and managed their financial affairs separately, they remained married to each other and the appellee con-

tinued to live in appellant's home until 1977. We have held that there is no mathematical formula by which property awards can be precisely determined, but they are to be determined by the facts in each case. *Matlock v. Matlock*, 205 Neb. 357, 287 N.W.2d 690 (1980). Neb. Rev. Stat. §42-365 (Reissue 1978), the statute then in effect, provided that the spouse providing the financial consideration for property acquired during the marriage is not entitled to that property to the exclusion of the spouse providing consideration in the form of domestic support. *Matlock v. Matlock, supra.* The property acquired by both parties between 1970 and 1977 constitutes the property to be considered in the marital estate in this case. This includes the residence in Arnold, Nebraska, valued at $34,500, the 600 acres acquired by appellee in 1971 and 1972 valued at $257,330, and the 1.84 acres purchased by appellee valued at $17,500. The total value of the marital estate to be divided is $309,330.

In determining what percentage of the marital estate each person is to receive, the court is to consider all pertinent facts in reaching an award that is just and equitable. *Matlock v. Matlock, supra; Pfeiffer v. Pfeiffer*, 203 Neb. 137, 277 N.W.2d 575 (1979). We have stated that in a marriage of long duration, and where the parties were parents of all children involved, an award of one-third to one-half of the property is equitable. *Knigge v. Knigge*, 204 Neb. 421, 282 N.W.2d 581 (1979). In all instances, the division must take into consideration the circumstances of the parties, the duration of the marriage, 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. *Matlock v. Matlock, supra; Campbell v. Campbell*, 202 Neb. 575, 276 N.W.2d 220 (1979).

The record shows that both appellant and appellee have individually and jointly contributed property and other valuable services to the marriage. Because

the marriage lasted for 27 years and both parties did contribute substantially to the acquisition of a marital estate, each party is entitled to one-half of the value of the property included in that estate. The decision of the District Court is, in part, reversed and remanded with directions that the property listed as the marital estate and valued as listed be divided equally between the parties. Each party is entitled to retain the property titled in his or her own name and in his or her possession and appellee is ordered to pay $120,165 to appellant in 10 annual installments of $12,016.50. This amount represents one-half the difference between the property in appellant's possession and that in appellee's possession.

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

KRIVOSHA, C.J., concurring, in part, and, in part, dissenting.

I concur, in part, and, in part, I dissent from the majority. I concur in that portion of the majority opinion which affirmed the trial court's decision that each party retain property titled in his or her own name.

I dissent, however, from that portion of the majority opinion which orders the appellee to pay to the appellant an additonal $120,165. We have frequently declared that this court is not inclined to disturb the division of property by the trial court unless it is patently unfair on the record. *Rinderknecht v. Rinderknecht*, 204 Neb. 648, 284 N.W.2d 569 (1979); *Blome v. Blome*, 201 Neb. 687, 271 N.W.2d 466 (1978).

The distribution of property and fixing of alimony rest in the sound discretion of the District Court and, in the absence of an abuse of discretion, will not be disturbed on appeal. *Phillips v. Phillips*, 200 Neb. 253, 263 N.W.2d 447 (1978); *Ritter v. Ritter*, 205 Neb. 668, 289 N.W.2d 526 (1980); *Van Cleave v. Van Cleave*, 201 Neb. 211, 266 N.W.2d 900 (1978).

Neither the majority opinion nor the record in this case indicates how the trial court's decision was patently unfair on the record. While the parties retained the formal appearance of marriage after they divided their property in 1970, for all practical purposes they were no longer married and conducted both their financial affairs and their private lives as if they were separate. Based upon what record we have before us, I find no justification in penalizing the appellee for his diligence with that portion of the estate which he received by reason of the parties' voluntary division in 1970. I would have affirmed the trial court's action in its entirety and not attempted to second-guess the trial court, who had the opportunity to see and observe and hear the various witnesses.

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

JOHN R. MOACKLER, JR., APPELLANT, V.
PHILLIP D. FINLEY, APPELLEE,
GREAT PLAINS INSURANCE CO., INC., GARNISHEE.

299 N.W.2d 166

Filed December 1, 1980. No. 42962.

1. **Default Judgments: Motions to Vacate.** Where a motion is made to open, modify, or vacate a judgment within the time in which the court has power to grant it, it is not indispensable that the motion be disposed of within the original term. In such case, the rights of a party seeking relief become fixed at the time the motion is filed, and not at the time of the disposition of the motion, even if that is in a subsequent term. To the extent that *Johnston Grain Co. v. Tridle*, 175 Neb. 859, 124 N.W.2d 463 (1963), is inconsistent with this holding, it is overruled.
2. **Default Judgments: Motions to Vacate: Appeal and Error: Presumptions.** The setting aside of a default judgment is to a large extent within the discretion of the trial court, and it will be presumed, unless there is evidence to the contrary, that such discretion was properly exercised.

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

Nelson & Harding and Richard S. Reiser and Pamela K. Black for appellant.

Michael F. Kinney of Cassem, Tierney, Adams, Gotch & Douglas for appellee.

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

HASTINGS, J.

The plaintiff, John R. Moackler, has appealed from an order of the District Court for Douglas County, Nebraska, setting aside and vacating a default judgment which had been entered against the defendant, Phillip D. Finley, in the amount of $15,000 plus costs. The plaintiff assigns as error that the District Court abused its discretion when it set aside the judgment after the expiration of the term of court in which the judgment was rendered. For the reasons to follow, we affirm.

Moackler sustained personal injuries while riding as a passenger in Finley's automobile when it was involved in a one-car collision on April 27, 1977. Finley was advised by letter dated June 24, 1977, from Moackler's attorney that a claim was being made, which letter was forwarded to Finley's liability insurance carrier, Great Plains Insurance Co., Inc. The letter was acknowledged by the insurance company by letter dated July 11, 1977, in which it stated that it would be available to discuss the matter whenever the attorney was in a position to do so. Nothing further was done until the attorney again wrote Great Plains in some detail on April 25, 1978, demanding settlement in the amount of $13,750. According to the insurance company's records, it responded on April 27, 1978, with a telephone call to the attorney, at which time it offered $1,000 in settlement of the case.

No further communication was had with either the insurance company or Finley, and on May 19, 1978, suit was filed against Finley, who at that time was a

nonresident of Nebraska. Service was obtained by service of process through the Secretary of State, pursuant to Neb. Rev. Stat. § 25-530 (Reissue 1979), which service was perfected by the filing of an affidavit on December 21, 1978. On February 2, 1979, a hearing was had on Moackler's motion for default judgment, which was sustained, and judgment was entered on February 13, 1979, against Finley in the amount of $15,000.

The first notice that Great Plains had of this litigation was when it was served with a summons in garnishment on March 29, 1979. The insurance carrier filed its answer, denying that it was indebted to Finley in any amount. An application for judgment against Great Plains, based on its policy of liability insurance issued to Finley, was filed; hearing was had on June 1, 1979; and judgment was entered on June 21, 1979, against Great Plains in the amount of $15,000. The defense of Great Plains was that it had not been notified of the original lawsuit, to its prejudice. At the garnishment hearing, stipulations were entered into between Moackler and Great Plains that: (1) The insurer had notice of the claim pending in this action, but that the insurer did not receive notice of the lawsuit in which the judgment was entered until it was served with the garnishee summons; and (2) The defendant, Finley, did not have notice of the lawsuit in which the judgment was entered, but did have notice of the claim.

Although there was no communication between Finley and Great Plains after the original notification of the accident, the latter did retain counsel for Finley during the last week in June 1979. On June 26, 1979, an attorney appearing in behalf of Finley, filed a special appearance, and moved to set aside and vacate the default judgment entered against the defendant on February 13, 1979. The defendant further filed a proposed answer, setting forth as a defense to liability that the plaintiff was a guest in his automobile and

that the plaintiff assumed the risk of any hazard created by the defendant's consumption of intoxicating beverages.

The District Court entered an order on July 12, 1979, vacating the default judgment. The plaintiff then filed a motion for a new trial, which was overruled. The default judgment had been entered in the January court term, which was adjourned on June 29, 1979. The order setting aside and vacating that judgment was entered on July 12, 1979, which was in the new term. Included as part of the order adjourning the January term was an order continuing all cases, motions, and matters pending, or not otherwise disposed of, into the next term of court.

The plaintiff argues on appeal that the District Court abused its discretion when it vacated the default judgment in a term of court beyond that in which the judgment was rendered. Neb. Rev. Stat. §25-2001 (Reissue 1979) specifies in which instances the District Court has power to vacate or modify its own judgments or orders after the term at which such orders or judgments were made. None of the reasons to vacate or modify set forth in that section are applicable here. However, it is the position of the defendant that the District Court had the authority to vacate the default judgment since the motion to vacate was made during the term of court in which the original judgment was made; the parties had a hearing on the motion to vacate during that term; and the court continued all matters not yet disposed of to the next term.

The plaintiff points out that in *Lyman v. Dunn*, 125 Neb. 770, 775, 252 N.W. 197, 199 (1934), we said: "We adhere to the principles heretofore followed and hold that the trial court had no discretionary power or authority to vacate the judgment on application made within the judgment term but considered and ruled on at a subsequent term." This holding was approved more recently in *Johnston Grain Co. v. Tridle*, 172 Neb. 859, 124 N.W.2d 463 (1963). We take this opportunity to reconsider that ruling.

Our law is clear that a court has inherent power to vacate or modify its own judgments at any time during the term at which those judgments are pronounced, and such power exists entirely independent of any statute. *Bradley v. Slater*, 58 Neb. 554, 78 N.W. 1069 (1899). It is equally clear that § 25-2001 specifies in what instances the District Court has the power to vacate or modify its own judgments or orders after the term has been adjourned. The issue with which we are faced is whether the District Court loses its jurisdiction to vacate an order when the term ends, if the motion to vacate was made during the term in which the judgment was rendered and none of the grounds for vacation exist pursuant to § 25-2001.

We believe the better rule is that the court retains the authority to rule upon the motion to vacate if the motion was made within the original term. Neb. Rev. Stat. § 24-310 (Reissue 1979) states: "Upon any final adjournment of the court, all business not otherwise disposed of shall stand continued generally." Once a motion is made and has not yet been ruled upon, the motion is pending, and when the term is adjourned that pending motion cannot be other than a matter "not otherwise disposed of." The court retains jurisdiction by law to rule on the motion.

That the court retains jurisdiction when the motion is made within the term is not a new view. In *Amy v. Watertown*, 130 U.S. 301, 9 S. Ct. 530, 32 L. Ed. 946 (1889), this issue was raised and answered as follows:

"The errors assigned are:

"1. That the court had no jurisdiction or power to vacate the judgment at a subsequent term.

. . . .

"We have no difficulty with regard to the first question raised by the plaintiffs in error. It is clear from the record that the application to set aside the judgment was made at the same term it was rendered." *Amy* at 313.

The court in *Amy* pointed out that the motion was

made within the term and set for hearing, but was not heard or ruled upon until the subsequent term. "The objection, therefore, of want of jurisdiction to set aside the judgment on account of lapse of time is without foundation in fact." *Amy* at 313.

See, also, 46 Am. Jur. 2d *Judgments* § 703 (1969), in which it is stated: "The general rule is that where a motion is made to open, modify, or vacate a judgment within the time in which the court has power to grant it, it is not indispensable that the motion be disposed of within the term. In such case, the rights of a party seeking relief become fixed at the time the motion is filed, and not at the time of the disposition of the motion, even if that is a subsequent term."

In *Ferguson v. Sabo*, 115 Conn. 619, 162 A. 844 (1932), it was held that the general rule that a court may not modify a judgment at a term subsequent has certain exceptions. One of those exceptions is: "[I]f proceedings to vacate or modify a judgment are begun during the term at which it was rendered and continued to a later term the matter remains *in fieri* and the court may act upon it at a subsequent term." *Ferguson* at 622, 162 A. at 845.

Again, the exception was set out in *Holmes v. Holmes*, 66 Wyo. 317, 334-35, 211 P.2d 946, 953 (1949): "It is true that it is a general rule that after a term of court is ended, all final judgments and decrees ordinarily pass beyond the control of the court *unless steps are taken during the term* by motion or otherwise to set aside or modify or correct them." (Emphasis supplied.)

In *Grubb v. Milan*, 249 Ill. 456, 94 N.E. 927 (1911), the court held that when a motion is made during the term to vacate a judgment, the court will retain jurisdiction of the cause, and have full power to act upon and decide the motion at a subsequent term. "Such a motion pending and undetermined at the end of a term is continued to the next term by force of the statute, and the legal effect is to stay a final judgment

until the overruling of the motion." *Id.* at 460, 94 N.E. at 929. That principle was reiterated in *Corwin v. Rheims*, 390 Ill. 205, 61 N.E.2d 40 (1945). For further authority, see Annot., 168 A.L.R. 204 (1947).

Since we now hold that a court retains jurisdiction to rule on a motion to vacate a judgment that is still pending at the end of a court term, we find that the District Court was not in error when it ruled on the motion in the subsequent term. To the extent that *Johnston Grain Co. v. Tridle, supra*, is inconsistent with this holding, it is overruled.

The plaintiff further argues that even if the District Court had the authority to rule on the motion to vacate in the subsequent term, it abused its discretion in doing so. "[W]here a judgment has been entered by default and a prompt application has been made at the same term to set it aside, with the tender of an answer or other proof disclosing a meritorious defense, the court should on reasonable terms sustain the motion and permit the cause to be heard upon the merits." *Beliveau v. Goodrich*, 185 Neb. 98, 101, 173 N.W.2d 877, 879 (1970). See, also, *Beren Corp. v. Spader*, 198 Neb. 677, 255 N.W.2d 247 (1977).

It is uniformly recognized that the matter of setting aside a default judgment is to a large extent within the discretion of the trial court, and it will be presumed, unless there is evidence to the contrary, that such discretion was properly exercised. *Diplomat Inn, Inc. v. Weindorf*, 206 Neb. 565, 293 N.W.2d 861 (1980).

The defendant made application within the same term of court to vacate the default judgment and tendered proof disclosing a meritorious defense. There is no showing of any abuse of discretion by the trial court. "The effect of setting aside or vacating a judgment, generally speaking, is to leave the matter in controversy open for future determination, and that determination must afford the parties in interest the

right to a fair trial." *Miller v. Schlereth*, 151 Neb. 33, 46-47, 36 N.W.2d 497, 506 (1949).

The order vacating the default judgment is affirmed.

AFFIRMED.

BOSLAUGH, J., dissents.

CLINTON, J., not participating.

DUFFY BROTHERS CONSTRUCTION CO., INC., AND WESTERN CASUALTY AND SURETY CO., APPELLANTS, V. PISTONE BUILDERS, INC., APPELLEE.

299 N.W.2d 170

Filed December 1, 1980. No. 42982.

1. **Workmen's Compensation: Contractors and Subcontractors: Joint and Several Liability.** Under the provisions of Neb. Rev. Stat. § 48-116 (Reissue 1978), when a contractor fails to require a subcontractor to carry workmen's compensation insurance, and an employee of the latter sustains a job-related injury, the contractor shall be included within the term employer and, with the immediate employer-subcontractor, shall be jointly and severally liable to pay compensation under the terms of the workmen's compensation act.
2. ____:____:____. The joint and several liability imposed by Neb. Rev. Stat. § 48-116 (Reissue 1978) is for the sole benefit of the injured workman; the statute in no way determines whether it is the statutory or actual employer who is primarily liable.
3. ____:____:____. Between the statutory employer and the actual employer, under the provisions of Neb. Rev. Stat. § 48-116 (Reissue 1978), the liability of the latter should be regarded as primary and that of the former as secondary.
4. **Workmen's Compensation: Contractors and Subcontractors: Indemnity.** Under the Nebraska workmen's compensation act, a statutory employer is entitled to indemnity from the actual employer with the amount being limited to all sums which the former has paid in good faith upon a matured obligation, or has been forced to pay in satisfaction of a compensation award.
5. ____:____:____. Generally speaking, an employer paying an injured workman his wages in lieu of compensation is entitled to credit for such benefits computed by the number of weeks paid, rather than the dollar amount.

Appeal from the District Court for Douglas County: RUDOLPH J. TESAR, Judge; JOHN T. GRANT on motion for rehearing. Reversed and remanded with directions.

Dustin & Tighe for appellants.

No appearance for appellee Pistone.

Heard before KRIVOSHA, C.J., MCCOWN, BRODKEY, and HASTINGS, JJ., and STUART, District Judge.

HASTINGS, J.

Duffy Brothers Construction Co., Inc. (Duffy), has appealed from an order of the District Court for Douglas County, Nebraska, dismissing its petition which sought indemnity from Pistone Builders, Inc. (Pistone). Duffy sued for indemnification for workmen's compensation benefits paid by Duffy to an injured employee of Pistone, Harry N. Spencer, after an award by the Workmen's Compensation Court which found Duffy and Pistone jointly liable for benefits, pursuant to Neb. Rev. Stat. § 48-116 (Reissue 1978). Duffy assigns that the court was in error in failing to find that the plaintiff was entitled to be indemnified for the benefits paid to the injured employee. We reverse and remand.

Spencer was injured while employed as a carpenter for Pistone on a job site where Pistone was a subcontractor for Duffy. Spencer injured the index and middle fingers of his right hand when they were caught in a radial saw, and he was not able to work from February 18, 1978, until June 5, 1978. During this period Pistone paid Spencer his regular wages of $240 per week. After the injury, Spencer was informed that Pistone was not covered by workmen's compensation insurance, and he then brought suit against both Pistone and Duffy. The Workmen's Compensation Court entered an award in favor of Spencer for medical benefits in the amount of $2,140.33, and found that he was entitled to temporary total disability of $140 per week for the 15 weeks that he was off work, and that since

Pistone had paid Spencer his regular wages, it should be given credit to offset the disability payments due. The court further found that the defendants were jointly and severally liable for the award. No finding with regard to permanent partial disability to the hand was made because a doctor's report had not been received by the court.

Duffy entered into an agreement with Spencer in which it paid the medical bills previously ordered by the compensation court, as well as a lump sum amount to Spencer of $3,339. The agreement, entitled "Receipt and Assignment," purported to be a satisfaction of the Workmen's Compensation Court award "for a workmen's compensation injury and claim occurring on February 18, 1978"; an assignment to Duffy of Spencer's claim against Pistone; and a subrogation to Duffy and its insurer of all rights and claims to which Spencer was entitled under the workmen's compensation act that arose from the aforementioned injury. The "Receipt and Assignment" did not explain the lump sum payment. Duffy then brought suit against Pistone for indemnification for the amount paid by Duffy to Spencer in settlement of the claim. It is from a finding for Pistone, and a dismissal of the petition, that Duffy has appealed.

Section 48-116 states, in pertinent part: "Any person, firm or corporation creating or carrying into operation any scheme, artifice or device to enable him, them or it to execute work without being responsible to the workmen for the provisions of this act, shall be included in the term employer, and with the immediate employer shall be jointly and severally liable to pay the compensation herein provided for and be subject to all the provisions of this act."

Duffy was held liable in the Workmen's Compensation Court under this section as a contractor which let part of its contract to Pistone, as subcontractor, but did not require Pistone to procure workmen's compensation insurance. The statute imposed joint and several liability upon the general contractor, in this

instance, along with the immediate employer, Pistone. Duffy's position is that it should be allowed to recover under a theory of indemnity for the amounts paid. Duffy argues that the immediate employer, Pistone, is primarily liable for the judgment and it, Duffy, is only secondarily liable; therefore, under the principles of indemnity, Pistone should be obligated to reimburse Duffy for the amount of its loss. Pistone did not appear in this court.

In most of the 41 states with statutes imposing liability upon a general contractor in a case like this one, the statute provides that the general contractor is entitled to reimbursement from the subcontractor. 1C Larson, Workmen's Compensation Law § 49-11 (1980). Nebraska has no such statutory provision, and, therefore, it is necessary to examine various legal principles contained in the case law and legal encyclopedias.

"A person who, in whole or in part, has discharged a duty which is owed by him but which as between himself and another should have been discharged by the other, is entitled to indemnity from the other, unless the payor is barred by the wrongful nature of his conduct." Restatement of Restitution § 76 (1937).

"The obligation to indemnify may grow out of an implied contractual relation or out of a liability imposed by law. Thus, where one is compelled to pay money which in justice another ought to pay, or has agreed to pay, the former may recover from the latter the sums so paid, unless the one making the payment is barred by the wrongful nature of his conduct." 42 C.J.S. *Indemnity* § 20 (1944). See, also, *National Indem. Co. v. United States*, 444 F. Supp. 1356 (C.D.Cal. 1977).

"The right of *indemnity* rests upon a difference between the primary and the secondary liability of two persons each of whom is made responsible by the law to an injured party. It is a right which enures to a person who, without active fault on his own part,

has been compelled, by reason of some legal obligation, to pay damages occasioned by the initial negligence of another, and for which he himself is only secondarily liable. The difference between primary and secondary liability is not based on a difference in *degrees* of negligence or on any doctrine of *comparative* negligence . . . . It depends on a difference in the *character* or *kind* of the wrongs which cause the injury and in the nature of the legal obligation owed by each of the wrongdoers to the injured person. . . . But the important point to be noted in all the cases is that secondary as distinguished from primary liability rests upon a fault that is imputed or constructive only, being based on some legal relation between the parties, or arising from some positive rule of common or statutory law . . . ." *Builders Supply Co. v. McCabe*, 366 Pa. 322, 325-28, 77 A.2d 368, 370-71 (1951) (emphasis in original).

In *Melburn v. Walker*, 279 F. Supp. 740, 742 (D. Neb. 1968), Judge Van Pelt stated: "This court is of the opinion that when the Nebraska Supreme Court is squarely presented with the issue of whether or not to allow indemnity, it will decide in favor of allowing it, if in fact it has not already been adopted in the decisions mentioned. The rule allowing indemnity is well recognized and is of widespread acceptance. . . . In addition, it can be persuasively argued that Nebraska has already adopted the policy of indemnity, in fact if not in name. In Emerson v. Western Seed & Irr. Co., 116 Neb. 180, 216 N.W. 297, 56 A.L.R. 327 (1927), the court adopted the principle of indemnity in a respondeat superior case."

Of course, in *Royal Ind. Co. v. Aetna Cas. & Sur. Co.*, 193 Neb. 752, 229 N.W.2d 183 (1975), we rejected the longstanding rule against contribution between negligent joint tort-feasors and adopted the "general rule . . . that one who is compelled to pay or satisfy the whole or bear more than his just share of a common burden or obligation, upon which several persons are

equally liable or which they are bound to discharge, is entitled to contribution against the others . . . ." *Id.* at 756, 229 N.W.2d at 185.

Perhaps it could be argued that the liability imposed upon the general contractor by the terms of § 48-116 is joint and several with that of the primary employer and, therefore, the plaintiff is only entitled to contribution. However, it is our opinion that the statute imposing joint and several liability on the various contractors is for the sole "benefit of the injured workman, and in no way determines as between them which is primarily liable, because their liability is fixed purely for the injured workman." *Tayloe Paper Co. v. Jameson*, 211 Tenn. 232, 238, 364 S.W.2d 882, 885 (1963).

Where the statute making a contractor jointly and severally liable with its subcontractor for workmen's compensation benefits due an employee of the latter fails to provide any method whereby the liability is to be fixed as between the two employers, the question of any right of the one to recover from the other must be determined on equitable principles. *Tayloe Paper Co. v. Jameson, supra.*

We hold that, between the plaintiff contractor and the defendant subcontractor, the liability of the latter should be regarded as primary and that of the former as secondary. Whether the one employer is to be regarded as the surety for the other, or as a quasi-guarantor for the compensation, or otherwise, Duffy and its insurer have been obligated by the award and have been forced to pay compensation which logically and equitably should have been made by Pistone, the only actual employer of the injured workman. *Johnson v. Mortenson*, 110 Conn. 221, 147 A. 705 (1929).

The question then turns to whether Duffy is entitled to indemnification for the amount paid pursuant to the "Receipt and Assignment" settlement, or whether it is limited to the amount of the Workmen's Compensation Court award. It must be pointed out that the

"Receipt and Assignment," which evidenced the agreement between Duffy and Spencer, was filed with the District Court and made an exhibit in the case at bar. However, there is no evidence in the record that the settlement was approved by the Workmen's Compensation Court, or a district court, or even that an application was filed for approval. Neb. Rev. Stat. § 48-136 (Reissue 1978) provides that the parties have a right to settle matters of compensation between themselves; however, they must file a copy of such settlement with the compensation court, and no such settlement is binding unless it is in accord with the workmen's compensation act. Neb. Rev. Stat. § 48-140 (Reissue 1978) further states that no settlement shall be final unless it is in conformity with the act, and approved by a finding of the compensation court, and a district court or any appellate court. See, also, *Miller v. Schlereth*, 151 Neb. 33, 36 N.W.2d 497 (1949). Such agreements not in conformity with the act have been held to be void and of no effect. *James v. Rainchief Constr. Co.*, 197 Neb. 818, 251 N.W.2d 367 (1977); *Duncan v. A. Hospe Co.*, 133 Neb. 810, 277 N.W. 339 (1938). Pistone cannot be bound by an agreement that is not even binding on the parties to the agreement.

Indemnification in favor of a statutory employer and against the actual employer under the Nebraska workmen's compensation act is limited to all sums which the former has paid in good faith upon a matured obligation or has been forced to pay in satisfaction of a compensation award. *Johnson v. Mortenson, supra.* The amount which Duffy would be entitled to collect from Pistone by way of indemnification is limited to the amount of the unpaid award for medical bills, the sum of $2,140.33.

Pistone, in effect, has already paid that portion of the award representing temporary disability when it paid Spencer his regular wages of $240 per week for 15 weeks, for which the compensation court gave Pistone credit. "The amount of the credit is not the

amount of wages paid, but the amount of compensation due for the particular week. . . . In other words, the credit is for the week, not for a number of dollars, and the excess cannot be carried over as a credit against other weeks of liability." 2 Larson, Workmen's Compensation Law § 57.47 (1980). Therefore, Pistone was given credit for the 15 weeks of temporary total disability ordered by the award.

There being no dispute of fact, the judgment of the District Court is reversed and the cause is remanded, with directions to enter a judgment in favor of the plaintiff and against the defendant, in the amount of $2,140.33.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE INTEREST OF O'DONNELL. STATE OF NEBRASKA, APPELLEE, V. JOHN EDWARD O'DONNELL, JR., APPELLANT.

299 N.W.2d 428

Filed December 1, 1980. No. 43017.

1. **Parental Rights: Appeal and Error.** A review of a juvenile case in this court is by trial de novo, and the order terminating parental rights must be supported by clear and convincing evidence.
2. **Child Custody.** The custody of a child is to be determined by the best interests of the child, keeping in mind that a court may not deprive the natural parents of custody unless it is shown that such parents are unfit to perform the duties imposed by the relation, or that they have forfeited that right.
3. **Parental Duties.** Generally, both parents are obligated to perform the duties prescribed by Neb. Rev. Stat. §§ 43-201 et seq. (Reissue 1978), as well as those inherent in the parent-child relationship, and the father cannot delegate those duties to the mother and expect to be held harmless if she neglects the children.

Appeal from the Separate Juvenile Court of Douglast County: JOSEPH W. MOYLAN, Judge. Affirmed.

Dennis B. Smouse for appellant.

Donald L. Knowles, Douglas County Attorney, and Francis T. Belsky for appellee.

Heard before KRIVOSHA, C.J., MCCOWN, BRODKEY, and HASTINGS, JJ., and STUART, District Judge.

HASTINGS, J.

John Edward O'Donnell, Jr., appeals from the order of the Separate Juvenile Court of Douglas County, Nebraska, which terminated his parental rights to his three sons, now aged 5, 4, and 3 years. O'Donnell assigns as error that the decision was not supported by sufficient evidence and the decision was contrary to law. We affirm.

The O'Donnell children were originally removed from their mother's home on December 19, 1977, because of filthy living conditions and the poor physical condition of the children. On January 13, 1978, a petition was filed in the Separate Juvenile Court alleging that the three boys came within Neb. Rev. Stat. §§ 43-202(2) (b) and 209(2) (Reissue 1978). Section 43-202(2) (b) gives the juvenile court exclusive original jurisdiction as to any minor child "who lacks proper parental care by reason of the fault or habits of his parent, guardian, or custodian." Section 43-209(2) gives the court authority to terminate parental rights when it is in the best interests of the child and "The parents have substantially and continuously or repeatedly neglected the child and refused to give the child necessary parental care and protection."

The court placed the children in the temporary custody of Douglas County Social Services for placement in a foster home. The matter came up for an adjudication hearing on April 10, 1978, but was continued because the mother was not present. On August 1, 1978, the adjudication hearing was held, although the mother was again not present, and it was adjudged that the children came within the meaning of

§§ 43-202(2) and 209(2) and that the children should remain in temporary custody; and the parental rights of both parents were taken under advisement pending a predisposition evaluation. After several hearings and continuances, the matter came up for a disposition hearing on February 5, 1979. The court ordered that the parental rights remain under advisement and that the father should comply with a plan set forth by the court and to be supervised by Douglas County Social Services and the Separate Juvenile Court.

The court-ordered plan required the father to do the following: maintain adequate housing with suitable furnishings; participate in a positive parenting group weekly; maintain an adequate savings account; maintain regular visitation with the children; cooperate with the child protective services worker and juvenile court service officer to comply with this plan; and inform juvenile officials as to any change of address. The court further ordered the father to reimburse the Douglas County Social Services foster care unit in the sum of $100 per month for the care of the children.

A review hearing was held on June 4, 1979, at which time the court ordered extended overnight visits with the father for the three children, and left in force the February 5 order. A review hearing was again held on August 13, 1979, at which time additional reports were received from the juvenile court service officer and the representative of Douglas County Social Services. On August 20, 1979, an order was entered finding that the natural parents failed to take action to eliminate the conditions which led to the findings as to §§ 43-202(2) and 209(2), and that it was in the best interests of the minor children that the parental rights be terminated. The father only has appealed from the denial of a motion for a new trial.

A review of a juvenile case is by trial de novo and the order terminating parental rights must be supported by clear and convincing evidence. *State v.*

Burger, 205 Neb. 340, 288 N.W.2d 22 (1980). The custody of a child is to be determined by the best interests of the child, keeping in mind that a court may not deprive the natural parents of custody unless it is shown that such parents are unfit to perform the duties imposed by the relation, or that they have forfeited that right. *State v. Best*, 173 Neb. 483, 113 N.W.2d 650 (1962).

The father has argued that the decision to terminate his parental rights is not supported by clear and convincing evidence. In fact, he maintains that if the mother of the children had been a better housekeeper, the petition in this matter would probably not have been filed. Most of the facts surrounding the findings as to neglect and failure to provide necessary parental care and protection are not in dispute.

Before the children were removed from the home, they were, on approximately 30 occasions, observed to be clothed in insufficient clothing; there were no sheets on their beds day or night; their bodies were in generally poor condition hygienically; the home was rarely stocked with a sufficient supply of foodstuffs even though the mother was eligible for food stamps and food commodities; the residence was usually in complete disarray and the odor of urine permeated it; and the children were always observed in urine-soaked diapers and often lying on urine-soaked mattresses. The children were sometimes left without adult supervision. The youngest child was diagnosed a "failure to thrive secondary to maternal social factors"; the back of his head was flat; and he was at first thought to be retarded and deaf because he did not respond to his environment. After several months in foster care and a great deal of attention, he is now an attractive and normal child.

The second child had several developmental delays, and when taken into custody, had severe diaper rash that essentially covered his entire body. His mother testified that he had had the rash since he was

1 month old, and it should be noted that he was taken into custody when he was 15 months old.

The father of the children took the position throughout the proceedings that his wife was not a good housekeeper and did not clean the home or care for the children's needs adequately. He testified that he essentially left the care of the children up to their mother, and it was she who neglected her duties. The father admitted that he had changed a wet diaper only two times in the approximately 2½ years before the children were placed in foster care. He never cleaned the house and only occasionally watched the children. Mr. O'Donnell testified, "See, I was brought up an old fashioned person. I go to work, I take care of the finances and she stays home and takes care of the house and kids. It's as easy as that." He testified that he recognized that the children had been neglected and that his wife was not caring for them properly. However, he did not attempt to remove the children from the wife's care, nor would he himself provide for the children's needs.

The children's mother testified that when her husband was not living with her and she was receiving Aid to Families with Dependent Children (ADC), her husband would take her to cash the monthly check and give her only enough money to pay the rent and buy half of her allotted food stamps. The rest of the money he would keep for himself or spend on car repairs. Mrs. O'Donnell testified that the reason she allowed her husband to keep this money was the fear of being beaten by him. Mrs. O'Donnell further testified that her husband had a bad employment history and contributed very little to the support of herself or their three children. This is corroborated by the testimony of Mr. O'Donnell, as well as by his own mother.

There is sufficient evidence that Mr. O'Donnell was not in compliance with the court-ordered plan which set out factors to correct the conditions leading to the findings of neglect and failure to provide for the necessary parental care and protection of the three

children. Mr. O'Donnell contributed only a total of $150 for the support of his children over a 6-month period, in spite of a court order requiring him to contribute $100 per month. During this time period, Mr. O'Donnell had purchased a new 1979 Mustang automobile with car payments of $179 per month, plus $24 per month on the loan for the downpayment. He failed to obtain adequate housing and an adequate savings account, and did not fully take advantage of the extended visitation privileges. The father had an adequate opportunity to correct the conditions that led to the findings of neglect. He did not do so.

Neither are we convinced by the argument that the father of the children should not be blamed for the mother's failure as a housekeeper and mother. Both parents have the duties as described in Neb. Rev. Stat. §§ 43-201 et seq. (Reissue 1978), as well as those inherent in the parent-child relationship. A father cannot delegate those duties to the mother of his children and expect to be held harmless if she neglects the children. There is no question that the poor sanitary conditions and poor physical hygiene worked to the physical injury of the children.

The evidence is clear and convincing that the order terminating the parental rights of the father is supported by the facts and circumstances. The order of the Separate Juvenile Court is affirmed.

AFFIRMED.

EUNICE HARRINGTON INVESTMENTS, LTD., APPELLANT, V. CHARLES G. WALLACE, JR., APPELLEE.

299 N.W.2d 174

Filed December 1, 1980. No. 43031.

1. **Water Law: Surface Waters.** Lower lands are under a natural servitude to receive the surface water of higher lands flowing along accustomed and natural drainways.
2. ____:____. Waters flowing along accustomed and natural drainways are not diffused surface waters and may not be dammed, repelled, or diverted without liability.
3. ____:____. A lower landowner who builds a structure across a natural drainway must provide for the natural passage through such obstruction of all the water which may be reasonably anticipated to drain therein.
4. ____:____. The owner of the higher land may not collect waters upon his land and discharge them in greater quantity than what would have reached the lower land by natural drainage.
5. **Water Law: Surface Waters: Irrigation.** Waste irrigation waters are not surface waters which may be discharged into a drainway as a matter of right, and such waters may not be discharged in injurious quantities.

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

Larry R. Baumann for appellant.

John R. Brogan of Brogan, McCluskey & Wolstenholm for appellee.

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

BOSLAUGH, J.

The plaintiff, a limited partnership, is the owner of a 40-acre tract of land described as the northwest quarter of the northwest quarter of Section 19, Township 12 North, Range 3 West of the 6th P.M. in York County, Nebraska. The defendant owns a 120-acre tract immediately to the south, described as the southwest quarter of the northwest quarter and the west half of the southwest quarter of the same section.

Although there is some conflict in the evidence, the record shows that prior to 1973, surface water on

the plaintiff's land tended to collect in a natural depression running generally north and south near the center of the tract and then drain to the south toward the defendant's land, where it would collect in a basin or depression located across the boundary between the plaintiff's and the defendant's land.

For many years there had been a ridge or raised area running east and west along the north boundary of the defendant's land. Following heavy rains the water would extend across both tracts. As the water evaporated and receded, the ridge along the boundary would divide the water so that separate basins would exist on each side of the boundary. In 1973, the plaintiff did some leveling on his property. The result was to increase the runoff of surface water toward the defendant's land. The plaintiff commenced irrigation in 1974 and, to some extent, waste irrigation water flowed from the plaintiff's land onto the defendant's land.

In the fall of 1974, the defendant raised the level of the raised area 12 to 14 inches by grading and filling the roadway which ran along the raised area. In the spring of 1975, water backed onto the plaintiff's land because of the raised roadway on the defendant's land. On March 5, 1975, the plaintiff commenced this action to enjoin the defendant from maintaining the dike and to recover damages for the flooding of his cropland. The plaintiff alleged the roadway constituted a dike across a natural waterway.

The defendant's answer alleged the embankment had been constructed to protect his land from increased runoff and waste irrigation water from the plaintiff's land. The defendant sought injunctive relief to prevent the plaintiff from destroying the embankment and damages for the destruction of crops caused by the water discharged onto his land.

The trial court found that the plaintiff's petition should be dismissed and that the defendant was entitled to maintain the existing embankment along the north

boundary of his land subject to installing a culvert with a flow line no higher than an assumed elevation of 52.9 feet as shown on exhibit 33, a Soil Conservation Service topographical map dated May 3, 1956. The plaintiff was enjoined from entering upon the defendant's land and from permitting waste irrigation water to flow upon the defendant's land. The defendant was awarded damages in the amount of $288. The plaintiff has appealed. There is no cross-appeal.

The general rules applicable in this type of case were stated in *Nichol v. Yocum*, 173 Neb. 298, 113 N.W.2d 195 (1962). Lower lands are under a natural servitude to receive the surface water of higher lands flowing along accustomed and natural drainways. Such waters are not diffused surface waters and may not be dammed, repelled, or diverted without liability.

A lower landowner who builds a structure across a natural drainway must provide for the natural passage through such obstruction of all the water which may be reasonably anticipated to drain therein.

The owner of the higher land may not collect waters upon his land and discharge them in greater quantity than what would have reached the lower land by natural drainage. *Young v. City of Scribner*, 171 Neb. 544, 106 N.W.2d 864 (1960). Waste irrigation waters are not surface waters which may be discharged into a drainway as a matter of right, and such waters may not be discharged in injurious quantities. *Peters v. Langrehr*, 188 Neb. 480, 197 N.W.2d 698 (1972).

The plaintiff's contention seems to be that the judgment of the District Court permits the defendant to maintain a dam across a natural drainway so that water which would flow naturally onto the defendant's land is prevented from entering upon his land. We conclude the record does not support this contention.

In resolving the conflicts in the evidence, we consider that the trial court saw and heard the witnesses and, at the request of the parties, viewed the premises.

The record shows that a topographical map of the defendant's land was prepared in 1956 by the Soil Conservation Service. This map, which is exhibit 33 in the record, is the map referred to in the judgment. It was made before any leveling had been done upon the defendant's land and reflects the contours of the land as it existed in its natural state. The map shows a low area along the north line of the defendant's property. The lowest point is approximately 550 feet east of the west line and has an assumed elevation of 51.0 feet. The lowest point at which water could escape to the south from this area is approximately 1,000 feet south of the north line and has an elevation of 52.9 feet, 1.9 feet higher than the low point along the north line of the defendant's property.

The record in this case is not as satisfactory as it might be because there is no survey which correlates the elevation of the land on each side of the boundary between the tracts. However, it is quite clear that the ridge or raised area along the boundary has existed for many years with the result that all surface water from the plaintiff's land did not drain onto the defendant's land. Water would pond on the plaintiff's land until it had accumulated to an extent sufficient to flow over the top of the raised area.

Upon the record in this case, we think the trial court arrived at a proper resolution of the dispute between the parties. The effect of the judgment is to put the parties in approximately the same position they were in before the contours and elevations of the land were changed. Water draining to the south on the plaintiff's land will be prevented from entering onto the defendant's land until it reaches the flow line of the culvert which the defendant will be required to maintain. The flow line of the culvert is the lowest point at which water could escape to the south from the basin area before any leveling was done. The culvert eliminates ponding on the plaintiff's land due to the increase in the elevation of the raised area along the

north line of the defendant's land, which occurred in 1974.

The judgment of the District Court is affirmed.

AFFIRMED.

KRIVOSHA, C.J., concurs in result.

GERTRUDE I. DOHT, APPELLEE, V. VILLAGE OF WALTHILL, THURSTON COUNTY, NEBRASKA, A MUNICIPAL CORPORATION, APPELLANT.

299 N.W.2d 177

Filed December 1, 1980. No. 43092.

1. **Municipal Corporations: Streets and Sidewalks.** A municipal corporation is not an insurer of those using its public sidewalks, but must use reasonable and ordinary care in the construction, maintenance, and repair thereof so that they will be safe for a traveler upon them who is using ordinary care and caution.
2. ____: ____. Slight holes or depressions in a sidewalk which are not in the nature of traps, and from which danger could not be reasonably anticipated, are not defects for which an action will lie against a municipality.

Appeal from the District Court for Thurston County: WALTER G. HUBER, Judge. Reversed and remanded with instructions to dismiss.

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

Margolin, Ryan, Gildemeister & Willia and Smith, Smith & Boyd for appellee.

Heard before BOSLAUGH and WHITE, JJ., and COLWELL, RIST, and HOWARD, District Judges.

RIST, District Judge.

Gertrude I. Doht brought this action against the Village of Walthill, Nebraska, under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 to

2420 (Reissue 1977, Cum. Supp. 1980), for injuries sustained when she fell upon a public sidewalk of said Village. Following trial to the court, plaintiff recovered judgment against defendant in the amount of $30,000 and costs of the action.

The defendant Village has appealed to this court assigning as error the failure of the trial court to sustain defendant's motion for summary judgment, and after trial, the finding of actionable negligence by defendant, and failing to find plaintiff guilty of contributory negligence sufficient to bar recovery. We consider this appeal as one from the trial of the cause.

The evidence of the accident is not substantially disputed. On April 2, 1977, at approximately 4:30 p.m., the plaintiff, her daughter, and her granddaughter were proceeding east on a public sidewalk on the south side of Main Street in the defendant Village. The day was sunny and dry. Plaintiff and her family had just crossed an intersecting street and proceeded a short distance on the sidewalk to a point where it began to abut a store building, when plaintiff stepped on a raised portion of the sidewalk with her heel, slipped off the raise, continued sliding on some gravel or debris, and fell backward, fracturing her left leg. At the time plaintiff fell, she was walking approximately 12 inches to 18 inches from the store building. The raise in the sidewalk slab at that point was 1 1/2 to 1 3/4 inches, as shown by the measurements in the photographs in evidence.

Plaintiff testified that her vision was good; that as she approached the point of the accident, she noticed the sidewalk ahead had gravel and debris on it and that the sidewalk appeared to have several cracks and appeared broken up; that at the time of the accident, she was looking down the sidewalk at some point ahead of her and not at where she was stepping. The photographs of the sidewalk offered by plaintiff and received in evidence show a sidewalk with a number of slight irregularities for some distance ahead of plain-

tiff in the direction she was traveling, including the area where she fell.

There is no evidence that the defendant Village had received any complaint or notice with respect to the condition of the sidewalk where the accident occurred.

The threshold question is whether, under the evidence, defendant Village breached any duty it had with respect to its sidewalks. The Village is not an insurer of the safety of those using its public ways, but has the duty to use reasonable diligence to keep sidewalks in reasonably safe condition for the use of persons passing over them. *Hupfer v. City of North Platte*, 134 Neb. 585, 279 N.W. 168 (1938); *Gaver v. City of Columbus*, 141 Neb. 832, 4 N.W.2d 924 (1942); *Frenchy v. City of Scottsbluff*, 179 Neb. 324, 138 N.W.2d 30 (1965). It has also been the consistent position of this court that slight holes or depressions in public ways, including sidewalks, 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. *Hupfer v. City of North Platte, supra; Christensen v. City of Tekamah*, 201 Neb. 344, 268 N.W.2d 93 (1978). 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. *Christensen v. City of Tekamah, supra.*

Given the facts of this case, we find the sidewalk defect here involved is such a minor irregularity that negligence may not be predicated thereon. To do so would render the Village an insurer of the safety of pedestrians, which is not its duty or obligation.

Plaintiff argues that the irregularity is in the nature of a trap because it drops away from the direction plaintiff was traveling and is not readily apparent. We disagree. The dropoff was visible to anyone traveling in the direction of plaintiff when in near proximity to it and readily apparent to anyone using due care.

We further find that plaintiff did not exercise due

care as she proceeded down the sidewalk. Given her admitted knowledge of the unevenness of the sidewalk ahead of her and the gravel and debris thereon, she failed to look where she was stepping and only looked to some point a distance ahead. This does not meet the standard of care required in the circumstances.

While the findings of a trial court on such an issue under the Political Subdivisions Tort Claims Act will not be disturbed unless clearly wrong, we find the trial court so erred in this case.

We, therefore, reverse the trial court's judgment for plaintiff and remand with instructions to dismiss the action.

REVERSED AND REMANDED WITH INSTRUCTIONS TO DISMISS.

LUCILLE HOFFMAN, APPELLANT, V. KATHRYN A. CRAWFORD, APPELLEE.

299 N.W.2d 179

Filed December 1, 1980. No. 43095.

Drunk Driving. In the absence of evidence as to the effect upon a driver of alcohol consumed by him, the issue of intoxication should not be submitted to the jury.

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

James P. Miller for appellant.

Patrick B. Donahue of Cassem, Tierney, Adams, Gotch & Douglas for appellee.

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

BOSLAUGH, J.

This was an action for damages arising out of an automobile accident. The plaintiff, Lucille Hoffman,

was a passenger in an automobile operated by the defendant, Kathryn A. Crawford, when the Crawford automobile struck the rear end of another automobile that was stopped. As a result of the collision, the plaintiff was injured.

The accident happened at about 4:30 p.m. on March 26, 1979. The plaintiff and the defendant had been to a wedding and had stopped at a bar after the ceremony. While at the bar, the defendant consumed one can of beer and part of a second can.

The accident happened at the intersection of 78th and Harrison Streets near Omaha, Nebraska. Harrison is a two-lane paved street which runs east and west. Seventy-eighth Street running north from Harrison intersects Harrison approximately 30 or 40 feet east of 78th Street running south from Harrison.The defendant had turned on to Harrison at 84th Street and was proceeding east at approximately 35 miles per hour. As the defendant approached 78th Street, she saw an automobile headed west which was stopped partly in her lane waiting for traffic to clear so that it could turn south onto 78th Street. The defendant turned slightly to the right and passed this automobile and then proceeded east approximately 40 or 50 feet before the collision occurred. The automobile with which the defendant's automobile collided was stopped waiting for the vehicle in front of it to turn north onto 78th Street. The defendant gave no explanation for the accident other than that she did not see the automobile in front of her in time to stop.

The amended petition alleged that the accident was the result of gross negligence on the part of the defendant in failing to keep her vehicle under reasonable control, in driving at an excessive rate of speed, in failing to keep a proper lookout, and in driving under the influence of intoxicating liquor. The last specification of negligence was not submitted to the jury, which returned a verdict for the defendant. The plaintiff contends it was error to withdraw this specification of negligence from the jury.

Although there was evidence that the defendant had consumed one can of beer and part of another a short time before the accident happened, there was no evidence that the defendant was intoxicated or under the influence of intoxicating liquor at the time the accident happened. In the absence of evidence as to the effect upon a driver of alcohol consumed by him, the issue of intoxication should not be submitted to the jury. *Fortin v. Hike*, 205 Neb. 344, 287 N.W.2d 681 (1980); *Branch v. Wilkinson*, 198 Neb. 649, 256 N.W.2d 307 (1977).

The plaintiff testified that, as the defendant drove out of the shopping center where the bar was located, the automobile struck a sewer inlet, and the plaintiff said, "Hey, watch it." The defendant testified that she did not recall the incident and it is not clear from the record exactly what the inlet was or where it was located. The record is clear that the plaintiff made no other complaint about the defendant's driving at any time before the accident.

A police sergeant employed by the city of La Vista came to the scene of the accident and made an investigation. This officer testified that he was at the scene of the accident for 20 to 30 minutes and talked with the defendant. He further testified that he noticed nothing unusual about the defendant's speech, walk, or demeanor; he did not smell alcohol on her breath; he found no reason to administer a field sobriety or alkasensor test; and in his opinion, the defendant was not intoxicated. Upon the evidence in this case, it would have been error to submit the issue of intoxication to the jury.

The judgment of the District Court is affirmed.

AFFIRMED.

SHERILL L. DOUGLAS, APPELLANT, V. PIZZA HUT OF CRETE, NEBRASKA, APPELLEE.

299 N.W.2d 181

Filed December 1, 1980. No. 43104.

Workmen's Compensation: Appeal and Error. Findings of fact made by the Workmen's Compensation Court after rehearing have the effect of the verdict of a jury and will not be set aside unless clearly wrong.

Appeal from the Nebraska Workmen's Compensation Court. Affirmed.

Herbert J. Friedman for appellant.

Michael P. Cavel of Sodoro, Johnson, Daly, Stave, Cavel & Coffey for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, BRODKEY, WHITE, and HASTINGS, JJ., and MORAN, District Judge.

BOSLAUGH, J.

This is an appeal in a proceeding under the workmen's compensation act. The plaintiff, Sherill L. Douglas, was employed as a waitress by the defendant, Pizza Hut of Crete, Nebraska. While at work on February 22, 1979, the plaintiff slipped and fell and was injured.

Following the accident, the plaintiff was treated for injuries to her right wrist and right knee. She now claims that she also injured her neck and back in the accident and is totally disabled.

At the hearing before a single judge of the compensation court, the plaintiff recovered an award for temporary total disability and medical and hospital expenses. Upon rehearing before three judges of the compensation court, the plaintiff again recovered an award for temporary total disability and medical and hospital expenses. The compensation court on rehearing found specifically that there was no evidence of permanent disability and no evidence that her

claimed neck and back injuries were caused by the accident on February 22, 1979.

The plaintiff has appealed and contends that the compensation court erred in failing to find that she was totally disabled as a result of neck and back injuries sustained in the accident on February 22, 1979.

The evidence is that the accident happened at about 9 p.m. At about midnight, the plaintiff was taken to the hospital where she was examined by a physician's assistant. The hospital record shows the plaintiff was complaining about her wrist and knee and that her lower back was hurting "a little."

On the following day, the plaintiff was examined by Dr. Walter E. Gardner. Dr. Gardner testified that the plaintiff had pain in her right wrist and right knee but had no other complaints at that time. Dr. Gardner saw the plaintiff again on March 5 and March 27. On both occasions, her complaints were limited to the right wrist and knee. Dr. Gardner also saw the plaintiff on April 10 and May 8. At that time, Dr. Gardner felt she had recovered from the injury to her knee and wrist.

The plaintiff was examined again by Dr. Gardner on July 26, 1979. That was the first time the plaintiff mentioned a neck injury to Dr. Gardner.

The plaintiff had consulted Dr. Thomas G. Bauer, a chiropractor, on April 17, 1979. Dr. Bauer found that the plaintiff was suffering from pain in the area of her neck and lower back and performed seven adjustments on the plaintiff between April 19 and May 10. On the basis of the history related to him by the plaintiff, Dr. Bauer testified that she had a misalignment of the vertebrae in the neck and the lower back as a result of the accident. Dr. Bauer estimated the plaintiff had sustained a 10 percent permanent partial disability.

The plaintiff also consulted Dr. Joseph A. Houle of the Thomas-Davis Clinic at Tucson, Arizona, on July 9, 1979. Dr. Houle and his associates had prescribed

various medications, physiotherapy, traction, and exercise. On the basis of the history related to him by the plaintiff, Dr. Houle testified her neck and back pain was related to the accident on February 22, 1979.

The petition which the plaintiff filed in the compensation court on March 7, 1979, alleged that her injuries were a "fractured wrist and injury to knee." In response to interrogatories served by the defendant, the plaintiff stated that her understanding of the nature of the injuries she suffered in the accident on February 22, 1979, was, "Fractured to my wrist on the right hand side. Soreness in my right knee (sprain)." In her testimony, the plaintiff attempted to explain the answer by stating the word "sprain" in parentheses "was meant to have been the back."

The question of whether there was any causal relation between the accident on February 22, 1979, and the plaintiff's alleged back and neck difficulty was one of fact. The findings of fact made by the Workmen's Compensation Court after rehearing now have the effect of the verdict of a jury and will not be set aside unless clearly wrong. *Mohr v. Soil Mover Mfg.*, Co., *ante* p. 261, 298 N.W.2d 166 (1980). The findings of fact in this case have ample support in the record.

The allegations of the petition, the answer to the interrogatory, and the testimony of Dr. Gardner all support the findings of the compensation court. Dr. Houle admitted that his opinion was based in part upon the assumption that the neck and back difficulty had developed soon after the accident. X-ray examination of the plaintiff's back by Dr. Houle disclosed degenerative arthritic changes which he testified were not due to the accident and could account for her present complaints.

Since the record contains sufficient competent evidence to sustain the award, the judgment must be affirmed.

AFFIRMED.

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

299 N.W.2d 182

Filed December 1, 1980. No. 43233.

1. **Speedy Trial.** The primary burden is upon the State to bring the accused person to trial within the time provided by law and if he is not brought to trial within that time, he is entitled to an absolute discharge from the offense alleged in the absence of an express waiver or waiver as provided by statute.
2. **Speedy Trial: Waiver.** The failure of the accused 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.
3. **Speedy Trial.** If a trial court relies on Neb. Rev. Stat. § 29-1207(4) (f) (Reissue 1979) 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 the extensions of time.

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

Thomas M. Kenney, Douglas County Public Defender, and Bennett G. Hornstein for appellant.

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

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, BRODKEY, WHITE, and HASTINGS, JJ., and BURKHARD, District Judge.

KRIVOSHA, C.J.

The appellant, Kenneth Kinstler, appeals from a conviction following a bench trial on November 28, 1979, at which time, after stipulating to the admission of police reports in lieu of testimony, the appellant was found guilty of kidnapping. On December 27, 1979, he was sentenced to a term of 2 years' probation. Appellant maintains that the trial court erred in overruling appellant's earlier motion for discharge based upon the State's failure to grant him a trial

within 6 months, as required by Neb. Rev. Stat. § 29-1207 (Reissue 1979). Our examination of the record and the law applicable thereto leads to the inescapable conclusion that the appellant's contention is correct and, accordingly, we must reverse the action of the trial court and order the appellant discharged.

All of the facts in this case are without dispute. They point up, however, what it was that concerned this court when we decided the case of *State v. Shaw*, 202 Neb. 766, 277 N.W.2d 106 (1979).

The undisputed facts disclose that on March 7, *1973*, a female student at the University of Nebraska at Omaha, having finished her class at approximately 6:40 p.m. of that day, was walking to her car in the student parking lot behind the administration building. She opened the car door, got in, and when attempting to close the door, was prevented from doing so by the appellant who told her that he had just committed a robbery and needed to meet a friend in Waterloo, Nebraska. He forced himself into the car by displaying a small gun and threatened her that if she caused a fuss she might get hurt. He forced her to drive to Waterloo where she was told to pull off the road beside the Elkhorn River where they waited for approximately an hour. At approximately 8:30 p.m., appellant tied her hands behind her back with a nylon stocking and tried to tie another around her mouth to gag her. At this time, appellant stated he needed a drink and took the student to a nearby bar where he threatened to do something to hurt her if she left the car when he went inside. When he left, the woman left the car and ran to a nearby home where police were called. Appellant was thereafter arrested and, after being advised of his rights and waiving them, admitted to the police the commission of the crime.

Appellant was charged on March 23, 1973, with kidnapping and the use of a firearm to which the ap-

pellant entered formal charges of not guilty. Following entry of his not guilty pleas, his then counsel determined that appellant may be a treatable sexual sociopath pursuant to then existing Neb. Rev. Stat. § 29-2901 (Reissue 1975). On August 29, 1973, after examination, appellant was determined to be a treatable sexual sociopath; the criminal proceedings were indefinitely postponed; and the appellant was committed to the Lincoln Regional Center where he was on March 27, *1979*, the date upon which this court filed its opinion in *State v. Shaw, supra.* In the *Shaw* case, we held that the provisions of the Nebraska sexual sociopath legislation permitting the imposition of a criminal sentence to be deferred indefinitely, and in some cases, for many years, until a defendant's ultimate release from commitment, denied such defendant a final sentence and judgment from which he might appeal and thereby violated principles of due process and equal protection. We therefore held in *State v. Shaw, supra* at 771, 277 N.W.2d at 110, that "pursuant to section 29-2902, R. R. S. 1943, criminal proceedings in a case in which there is probable cause to believe that defendant is a sexual sociopath may be adjourned and the sentence suspended until proceedings pursuant to the sexual sociopath law have been completed. Upon completion of those proceedings, at the earliest possible time thereafter, defendant shall be returned to the District Court wherein he was convicted. At that time an appropriate sentence on the criminal charge shall be imposed." We concluded the opinion in *State v. Shaw, supra* at 772, 277 N.W.2d at 111, by ordering that, "All persons presently in custody as sexual sociopaths, who have not been sentenced for the sexual assaults which led to their being declared a sexual sociopath, should be returned to the district in which they were convicted for the purpose of sentencing on the criminal charge."

On April 30, 1979, Jack M. Cleavenger, then acting director of the Nebraska Department of Public

Institutions, wrote a letter to Judge John C. Burke, one of the district judges in and for the 4th Judicial District, and the judge who had presided over earlier proceedings in this case, alerting the court to the *Shaw* decision's possible application to the instant case. On May 14, 1979, Judge Burke responded with a letter to Mr. Cleavenger advising him that the Douglas County Attorney had been apprised of the matter and that action would occur within 2 weeks to return appellant to court to conform to the *Shaw* decision.

In May of 1979, the Nebraska Legislature, then being in session, repealed the then existing sexual sociopath statutes and enacted in their stead Neb. Rev. Stat. §§ 29-2911 to 2921 (Reissue 1979), relating to mentally disordered sex offenders. The act was passed with the emergency clause and became effective upon the Governor's signature on May 23, 1979. The newly enacted statutes acknowledged our statements in *Shaw* and specifically provided that, "All persons now committed under Chapter 29, article 29, as either a sexual psychopath or a sexual sociopath, shall forthwith be returned to the district court which committed them for review and disposition consistent with the terms of sections 29-2911 to 29-2921." § 29-2921.

Notwithstanding all of those facts, it was not until October 25, 1979, that an order was entered directing the Douglas County sheriff to return the appellant to Omaha for an arraignment which was held on October 30, 1979. Appellant was confined at the Lincoln Regional Center during all of this time. On November 27, 1979, appellant filed a motion for discharge for lack of speedy trial, which was denied by the trial court immediately prior to appellant's trial and conviction of kidnapping which occurred on November 28, 1979.

Our disposition of this matter is controlled entirely by the mandate of the Nebraska Legislature, found in Chapter 29, article 12 of the Revised Statutes of Nebraska. These sections simply prescribe the details

which are, in essence, mandated by the sixth amendment to the Constitution of the United States which requires, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ," as well as our own Nebraska Constitution, art. I, § 11. Section 29-1207 provides, in part, as follows:

"(1) Every person indicted or informed against for any offense *shall* be brought to trial within six months, and such time shall be computed as provided in this section.

"(2) Such six-month period shall commence to run from the date the indictment is returned or the information filed. . . .

"(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.)

There then follows a list of time periods which are excluded in computing the time for trial. It may reasonably be argued that the exclusionary period set forth in § 29-1207(4) would justifiably have excused failing to try the appellant during the period between March 23, 1973, when the information was filed, and March 27, 1979, when this court filed its opinion in *State v. Shaw, supra.* For purposes of this appeal, however, we need not concern ourselves with that period of time. The record shows that appellant in this case was not brought to trial within 6 months of either the date of our decision in *State v. Shaw* or the enactment of the mentally disordered sex offenders act. There is, therefore, no point in time in this case from which one may begin computing time that will result in the appellant having been brought to trial within 6 months of that date.

In a series of decisions rendered by this court since the enactment of the speedy trial laws by the Leg-

islature of the State of Nebraska, we have announced that the primary burden is upon the State to bring the accused person to trial within the time provided by law and that, if he is not brought to trial within that time, he is entitled to an *absolute discharge* from the offense alleged, in the absence of an express waiver or waiver as provided by statute. Moreover, we have held that the failure of the accused 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 and, further, we have held that, if a portion of the statute is to be tolled by reason of one of the exceptions in the statute, the State has the burden of proving by a substantial preponderance of the evidence that such exception is applicable. We have further held that if a trial court relies on § 29-1207(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 the extensions of time. See, *State v. Johnson*, 201 Neb. 322, 268 N.W.2d 85 (1978); *State v. Hankins*, 200 Neb. 69, 262 N.W.2d 197 (1978); *State v. Alvarez*, 189 Neb. 281, 202 N.W.2d 604 (1972); *State v. Brown*, 189 Neb. 297, 202 N.W.2d 585 (1972).

The State argues that the delay was not unreasonable and we should overlook the precise time, citing us to the case of *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). *Barker* simply established an accused's right to a speedy trial, recognizing that the Constitution prescribes no specific time which must be met to satisfy a speedy trial. There was, however, no statute involved in *Barker* as there is in the instant case and *Barker* is, therefore, of no help in our disposition of this matter.

There are no specific findings made in this case which would satisfy the requirements of § 29-1207(4) (f) and, therefore, the provisions of Neb. Rev. Stat.

§ 29-1208 (Reissue 1979) must be followed. That section provides: "If a defendant is not brought to trial before the running of the time for trial, as extended by excluded periods, he *shall* be entitled to his absolute discharge from the offense charged and for any other offense required by law to be joined with that offense." (Emphasis supplied.) As with any statute of limitations, the courts are without discretion to ignore the running of such a statute, absent a tolling of the statute. See, *Westinghouse Electric Supply Co. v. Brookley*, 176 Neb. 807, 127 N.W.2d 465 (1964); *Shaurette v. Capitol Erecting Co.*, 23 Wis. 2d 538, 128 N.W.2d 34 (1964); *Ginkowski v. Ginkowski*, 28 Wis. 2d 530, 137 N.W.2d 403 (1965). This court, therefore, is left without any alternative in view of the Legislature's requirement expressed in § 29-1208, which, as we have noted, merely prescribes the details generally required by the sixth amendment to the Constitution of the United States. Whether one considers our decision in *State v. Shaw, supra*, as the mechanism which triggered the running of time for trial or the Legislature's enactment of the mentally disordered sex offenders act, either date was more than 6 months prior to the date on which trial was had. That being the case, we are left with no other alternative but to reverse the action of the trial court in overruling the motion for discharge and remand the proceedings back to the District Court with instructions to enter an order discharging the appellant from the custody which he has been in for approximately 7 years.

REVERSED AND REMANDED WITH DIRECTIONS.

BOSLAUGH, J., dissenting.

Neb. Rev. Stat. § 29-1207 (Reissue 1979) provides that "The period of delay resulting from *other proceedings* concerning the defendant," shall be excluded in computing the time in which the defendant must be brought to trial. (Emphasis supplied.)

The time from April 17, 1973, when the defendant

requested that an inquiry be made as to whether he was a sexual sociopath, until October 25, 1979, when he was ordered by the trial court to be returned for arraignment, should be excluded from computation as delay resulting from "other proceedings." If this period of time is excluded the defendant is not entitled to be discharged under § 29-1207.

The defendant has demonstrated, on several occasions, that he is indeed a dangerous person. It was at his request that all criminal proceedings were suspended indefinitely. It is a general principle that periods of delay occasioned by requests of a defendant should not work to the prejudice of the State. I would apply that principle in this case.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL HORTMAN, APPELLANT.

299 N.W.2d 187

Filed December 1, 1980. No. 43318.

1. **Motions for New Trial.** Where a motion for new trial is based on newly discovered evidence, the rule is well established that the newly discovered evidence must be of such a nature that, if offered and admitted at the former trial, it probably would have produced a substantial difference in result.
2. _____. Newly discovered evidence concerning credibility of witnesses testifying at the former trial is not sufficient to support a motion for new trial on the basis of newly discovered evidence.
3. **Character Evidence: Criminal Trials.** In a criminal trial, a defendant may not offer evidence of his general character or reputation for truth and veracity until it has been attacked.
4. _____:_____. In a criminal trial, a defendant may only offer character evidence under Neb. Rev. Stat. § 27-404(1) (a) (Reissue 1979) of a pertinent character trait.
5. **Sentences: Appeal and Error.** A sentence imposed by the trial court within statutory limits will not be disturbed on appeal unless there has been an abuse of discretion.

Appeal from the District Court for Gage County: WILLIAM B. RIST, Judge. Affirmed.

A. James McArthur for appellant.

Paul L. Douglas, Attorney General, and Shanler D. Cronk for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, BRODKEY, WHITE, and HASTINGS, JJ., and BURKHARD, District Judge.

WHITE, J.

The defendant was charged in a two-count complaint filed in the county court of Gage County as the result of incidents which occurred on September 23, 1979, while the defendant was an employee of the Beatrice State Developmental Center. The defendant was charged in count I of the complaint with the crime of assault, Neb. Rev. Stat. § 28-310 (Reissue 1979), a Class I misdemeanor, and in count II, for the violation of Neb. Rev. Stat. § 28-708 (Reissue 1979), causing or allowing an incompetent to be cruelly punished or placed in a situation which endangered his health, also a Class I misdemeanor. A Class I misdemeanor is punishable by a term of up to 1 year in the county jail. The defendant was found guilty after a trial to a jury and sentenced to two concurrent terms of 10 months in the county jail and ordered to pay the costs of the prosecution. The defendant appealed to the District Court for Gage County, Nebraska. He filed a motion for new trial in the county court on the grounds of newly discovered evidence which, under Neb. Rev. Stat. § 29-2101(5) (Reissue 1979), is restricted to "evidence material for the defendant which he could not with reasonable diligence have discovered and produced at the trial . . . ." On appeal to the District Court, the judgment and sentence of the county court were affirmed. Defendant prosecutes an appeal to this court. We affirm.

The defendant assigns four errors in this court: (1) That the District Court failed to order a new trial on the basis of newly discovered evidence; (2) That the county court erred in excluding proffered evidence

of defendant's general reputation for truthfulness; (3) That the verdict is not sustained by sufficient evidence; and (4) That the sentence is excessive. A factual background is necessary.

Both the defendant, Michael Hortman, and the principal witness for the state, Donald Wilson, were employees of the Beatrice State Developmental Center. They were ward attendants in charge of a group of severely mentally retarded patients in one section of the home. Wilson, a recent employee of the home, had gone to work on September 23, 1979, as a ward attendant at 6:30 a.m. and had intended to work until 3 p.m., his normal shift. Because another employee failed to report to work, he was asked and agreed to assist the defendant, Hortman, in the necessary preparation for bathing and feeding the 16 severely retarded persons in their charge. Wilson testified that while he was engaged in giving several patients a whirlpool bath, the defendant, Hortman, was supervising several other residents while they were showering. Wilson first observed the victim, Conrad Baker, a severely retarded male who had been a resident of the home for 26 years, standing nude in the bathing area. At this time, the defendant, Hortman, asked Wilson to go to the clothing area in a separate part of the facility and get a plastic gallon jug. Wilson did so, gave it to Hortman, and Hortman took Conrad Baker by the arm over to the washbasin, filled the jug with cold water, and poured it over the nude body of Baker. Wilson testified that, immediately thereafter, Hortman took Baker to the northwest corner of the bathroom, "shoved him up into the corner and opened the window up." At that time, according to the witness, "He told [him] to stand there and freeze his fucking ass off." The air from the open window was cold. After approximately 5 or 6 minutes, Wilson left the bathing room area to get his next resident for the whirlpool and, upon returning, he observed the defendant holding "Mr. Conrad's (sic) two arms up into his chest and

hitting him in the stomach while he was still in the same corner." Wilson testified that he remonstrated and asked what Hortman thought he was doing. He stated that Hortman "turned around with somewhat of a grin and stepped back, and then stepped back to Mr. Baker again and hit him again in the stomach, one more time." A short time later, when Wilson had taken a patient out of the whirlpool, the victim had left the bathroom and gone to the bedroom area. The defendant asked Wilson where Baker had gone and was told that he had gone to the bedroom. The witness then observed Hortman holding Baker in a headlock, pulling the victim with him up to the hallway door, and with Baker's head under his arm, Hortman "walks Conrad directly into the left side of the steel door frame. . . . After that happened the blood started spurting out Mr. Baker's eyebrow."

We will discuss the assignments of error in the order presented. During the cross-examination of the witness Wilson, he was asked when he had reported the assault and mistreatment of Conrad Baker to the officials at the home. September 23, 1979, was a Sunday. Wilson stated that his first report had been made to the chaplain at the institution on Tuesday, September 25. When asked why he had not made a report on Monday, September 24, Wilson testified that he was upset about the incident, got drunk, and did not report for work that next day. The truth of Wilson's testimony that he had been drunk the next day is the matter to which the newly discovered evidence relates.

The proffered testimony offered at a hearing in the county court was that of one Martha Mason, an employee of the Nebraska Job Service center. She had interviewed Wilson on the morning of September 24, 1979, and she testified that he did not appear to be intoxicated and that his conduct was in no way unusual. The second witness was one Rolly Salts, the manager of Marshall Produce in Wymore, Nebraska. Salts testified that Wilson appeared at his business

in Wymore between 10 and 11 on the morning of September 24, 1979, and that he did not smell any odor of alcohol on the witness although he "noticed that he [Wilson] had the shakes, like if he had previously been on a drunk." Defendant asserts here that the evidence could not have been ascertained with reasonable diligence before the trial and that the evidence is of such a character that, if believed by the jury, it would be likely to change the result. We disagree.

In *State v. Munson*, 204 Neb. 814, 818-19, 285 N.W. 2d 703, 706-07 (1979), we said: "It must be noted, however, that even if the evidence in this case were considered to have been produced with reasonable diligence, there are additional requirements before a new trial may be granted. The rule is well established that newly discovered evidence must be of such a nature that, if offered and admitted at the former trial, it *probably* would have produced a substantial difference in result. Such evidence must be relevant and credible, and not merely cumulative. It must involve something other than the credibility of witnesses who testified at the former trial. State v. Smith, 202 Neb. 501, 276 N.W.2d 104 (1979); State v. French, 200 Neb. 137, 262 N.W.2d 711 (1978); Finnern v. Bruner, 170 Neb. 170, 101 N.W.2d 905 (1960). We have stated that new evidence tendered in support of a motion for new trial on the ground of newly discovered evidence must be so potent that, by strengthening evidence already offered, a new trial would probably result in a different verdict. State v. Seger, 191 Neb. 760, 217 N.W.2d 828 (1974) . . . ."

As observed in the District Court, the new testimony did not necessarily contradict Wilson's testimony at trial. The newly discovered evidence was collateral to the issue and merely went to the credibility of the witness and would not likely have resulted in a different verdict. The county court and the District Court properly overruled the motion for new trial based on newly discovered evidence.

The second assignment of error arose in testimony of defendant's witness, one James E. Smith, a coemployee of the defendant and the witness Wilson at the Beatrice State Developmental Center. The State, in its case-in-chief, had not introduced any evidence with respect to the defendant's reputation for truth or veracity in the Beatrice community. Defendant's counsel asked the question of Mr. Smith: "I might ask you if you were familiar with Mr. Hortman's reputation in this community for truth and veracity?" The State objected to the question and the objection was sustained. The county court and District Court were correct. Neb. Rev. Stat. § 27-404 (Reissue 1979), Rule 404 of the Nebraska Rules of Evidence, provides, in part: "(1) Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except: (a) Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same . . . ." Under § 27-404(1) (a), defendant can only introduce evidence of a pertinent character trait or traits, not his general character or reputation. In a criminal action, pertinent traits are those involved in the crime on trial, e.g., honesty in theft cases or peacefulness in murder cases. General reputation for truth and veracity in the community is not a pertinent trait in the crime of assault or abuse of an incompetent. Defendant argues that this testimony is admissible under Neb. Rev. Stat. § 27-608 (Reissue 1979), Rule 608. However, § 27-608 excludes the proffered evidence. It provides, in part: "(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 witness

could not testify to Hortman's good character for truth and veracity because defendant's character had not been attacked in this case. The trial court was correct in excluding the proffered evidence.

The next assignment of error, the allegation by the defendant that the verdict was not sustained by sufficient evidence, will not be further discussed. If the triers of fact believed the witness Wilson, as they did, there was sufficient evidence to sustain the conviction on both counts. The assignment is without merit.

The defendant alleges finally that the sentence was excessive. The penalty for a Class I misdemeanor is a maximum of not more than 1 year imprisonment, or a $1,000 fine, or both. Neb. Rev. Stat. § 28-106 (Reissue 1979). The maximum penalty to which the defendant could have been sentenced was up to 2 years imprisonment. Because the defendant received concurrent sentences, although near the maximum for each charge, he will serve slightly less than half of the maximum to which he could have been sentenced. In view of the obvious vulnerability of the victim, a severely mentally retarded man, and his defenselessness, the crime cannot be characterized as other than a vicious one. We have said that a sentence imposed by the trial court within statutory limits will not be disturbed on appeal unless there has been an abuse of discretion. *State v. Tweedy*, 197 Neb. 851, 251 N.W.2d 380 (1977). No abuse of discretion appears here.

The assignments of error are without merit. The judgment and sentences of the trial court, as affirmed by the District Court, are affirmed.

AFFIRMED.

GUARANTEED FOODS OF NEBRASKA, INC., A CORPORATION, APPELLEE, V. RAYMOND E. RISON AND GERTRUDE RISON, HUSBAND AND WIFE, APPELLANTS.

299 N.W.2d 507

Filed December 5, 1980. No. 42960.

1. **Contracts.** The general rule is that parties are bound by the agreement they have entered into, and the fact that the bargain is a hard one will not entitle a party to be relieved therefrom if he assumed it fairly and voluntarily.
2. **Uniform Commercial Code: Contracts: Unconscionability.** Under the Nebraska Uniform Commercial Code, if the court as a matter of law finds a contract or any clause therein to be unconscionable at the time it was made, the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
3. **Uniform Commercial Code: Sales of Goods.** Article 2 of the Nebraska Uniform Commercial Code applies only to transactions in goods.
4. **Uniform Commercial Code: Sales of Goods: Words and Phrases.** The term "goods" as used in article 2, means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (covered by article 8) and things in action. "Goods" also includes the unborn of young animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (Neb. U.C.C. § 2-107 (Cum. Supp. 1980)).
5. **Appeal and Error.** It is the established rule in this jurisdiction that defenses not raised or litigated in the trial court cannot be urged for the first time on appeal.
6. **Contracts: Unconscionability: Pleadings.** The issue of unconscionability must be pleaded in order to be considered by the court.
7. **Uniform Commercial Code: Statute of Frauds: Contracts.** Under Neb. U.C.C. § 2-201(3) (Reissue 1971), a contract which does not satisfy the requirements of a writing as required by the statute of frauds for the sale of goods, but which is valid in other respects is enforceable with respect to goods for which payment has been made and accepted or which have been received and accepted.
8. **Attorney Fees.** A party must plead and prove conditions precedent to be entitled to an allowance of an attorney fee under Neb. Rev. Stat. § 25-1801 (Reissue 1979).

Appeal from the District Court for York County: BRYCE BARTU, Judge. Affirmed as modified.

John R. Brogan of Brogan, McCluskey & Wolstenholm for appellants.

Kenneth R. Lang of Angle & Lang for appellee.

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

BRODKEY, J.

Guaranteed Foods of Nebraska, Inc., plaintiff and appellee herein, brought this action in the county court of York County to recover the sum of $1,052.52, which it alleged represented the balance due it under two installment contracts entered into between it and the appellants-defendants, Raymond and Gertrude Rison, husband and wife. The first cause of action in the petition involved a contract for the purchase of a membership in Guaranteed Foods permitting the defendants to purchase food and other nonfood items, including appliances. The second cause of action in plaintiff's petition involved the balance allegedly due on a contract with plaintiff for the purchase of food products, which were subsequently delivered and allegedly consumed by the defendants.

The facts relevant to this appeal, as revealed in the record, indicate that on February 7, 1977, a representative of Guaranteed Foods arrived at the home of the defendants pursuant to a prearranged appointment. The ensuing interview, which lasted approximately 2½ hours that evening, was continued the following night, February 8, 1977, at which time available food purchase plans were discussed. Testimony in the record reveals that, in presenting the food plans to the Risons, the representative of Guaranteed Foods informed the defendants that they would enjoy long term savings of $4,000 over a 10-year period which would amount to a savings on their food bills of approximately 25 percent. However, it was later admitted by counsel for plaintiff at oral argument of this matter before this court that the potential sav-

ings to the defendants amounted to approximately $2.32 per week. Although plaintiff's membership program included the right to purchase nonfood items such as appliances, furniture, and other merchandise at a "membership discount," the defendants did not purchase a food freezer for the reason that they already owned one.

It further appears from the record that when the Risons purchased their membership on February 8, 1977, they executed an installment sales contract for $850 representing the cost of the membership. However, added to this base amount, as set out in the contract, were finance charges, charges for life insurance, and sales tax, making the total amount due under the contract $1,194.96. The contract also shows that the Risons made a downpayment at that time of $30 to apply against the membership costs, and the contract provided that the balance due thereunder should be paid in 35 monthly installments of $32.36, together with interest thereon at the rate of 18 percent per annum. Shortly after entering into their membership agreement with the plaintiff, the defendants, on February 10, 1977, placed a grocery order for food products, which were delivered to them on February 16, 1977. Upon the delivery of the grocery items on that date, the defendant Raymond E. Rison, executed an additional installment sales contract for $582.16 which, with the finance charge added thereto, amounts to the sum of $608.60, to be paid in five equal monthly installments of $121.72 each on the 18th day of each month beginning March 18, 1977.

Shortly thereafter, after further consideration of the matter, the Risons became disenchanted with their membership contract and the quality of the food products delivered to them, and attempted to cancel their membership pursuant to the terms of the contracts entered into by them. The record reveals that on Sunday, February 20, 1977, the Risons drove to Grand Island, Nebraska, and Raymond Rison deposited

a letter signed by him under the door of the place of business of Guaranteed Foods, notifying it of his intent to cancel the membership agreement, as well as the contract for the food products, and demanding a return of the $30 downpayment. It is clear that Guaranteed Foods received the letter, as on the following evening, Monday, February 21, 1977, the president of Guaranteed Foods telephoned the Risons inquiring as to the reason for their cancellation. The record indicates that, in that telephone conversation, the president urged the defendants to continue with the program, and the Risons agreed at that time to "give it a try." During the following 4 months, the defendants consumed many of the food products they had purchased and also made payments on both contracts totaling the sum of $593.96. However, on July 13, 1977, the Risons notified Guaranteed Foods, and its assignees of the contracts, that no further payments would be made as they were not obligated to Guaranteed Foods.

The action came on for trial before the judge of the county court of York County, sitting without a jury, on February 8, 1979. In its decree, the court found in favor of the defendants and against the plaintiff on the first cause of action involving the membership agreement and dismissed that cause of action. In so doing, the court also found that the notice of cancellation given by Rison to Guaranteed Foods was valid and that the membership contract between Guaranteed Foods and the Risons was void (without specifying the reason for doing so). As to the second cause of action, involving the contract for the purchase of food products, the court found that the defendants received and used the food, and entered judgment against the defendants in the amount of $111.32 plus a reasonable attorney fee and court costs. On appeal, the District Court for York County, in a trial de novo on the record, reversed the holding of the trial court with reference to the membership agreement, finding that

the agreement had been performed through May 1977, a period of 4 months after the execution of the contract and also found that the defendants failed to prove by a preponderance of the evidence the cancellation of the agreement pursuant to its terms. The court found that the defendants were indebted to the plaintiff on the first cause of action in the sum of $941.20, which included interest at 18 percent per annum through February 23, 1980, and entered judgment to that effect. With regard to the second cause of action, the District Court found that the plaintiff had fully performed its contract for the purchase of food and grocery products and that there remained due and owing the plaintiff from the defendants the sum of $111.32, and affirmed the judgment of the county court on that cause of action.

The Risons thereafter perfected their appeal to this court. In their brief, their principal assignments of error, which they claim justify reversal of the judgment of the District Court, are that the court erred: (1) In failing to find that the enforcement of the installment contract for payment of the membership agreement produced an unconscionable result contrary to the provisions of Neb. U.C.C. § 2-302 (Reissue 1971); and (2) In failing to find that the Risons had effectively cancelled the membership agreement and both installment contracts in compliance with the cancellation provisions set forth in all of said contracts. They also allege that the court erred in awarding attorney fees to Guaranteed Foods in the sum of $300. We shall discuss these issues in the order they are presented above.

Discussing first the claim of the defendants that the court erred in not finding the contracts to be "unconscionable" § 2-302, some background will be helpful. Prior to the adoption of the Uniform Commercial Code in 1963, the general view was that parties were bound by the agreements they entered into, and the fact that the bargain was a hard one was held not

to entitle a party to be relieved therefrom if he had assumed it fairly and voluntarily. 67 Am. Jur. 2d *Sales* § 116 (1973). However, in 1963, Nebraska adopted the Uniform Commercial Code, which provides, in § 2-302:

"(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

"(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination."

67 Am. Jur. 2d *Sales* § 116 at 232, summarizes the changes made by the Uniform Commercial Code with reference to "unconscionable contracts" as follows: "The Uniform Commercial Code directly permits a court to hold a contract or term thereof unenforceable, or limited in its application by reason of being 'unconscionable.' The Code provides that if a court finds as a matter of law that a sales contract or any clause thereof is 'unconscionable' at the time it was made, the court may refuse to enforce the contract as a whole or any clause found unconscionable, or the court may limit the effect of such clause in order to avoid any 'unconscionable result.' The Code also provides that the parties have the right to present evidence as to the commercial setting, purpose, and effect of any allegedly unconscionable contract to aid the court in determining the question of unconscionability."

To the present date, we have found no Nebraska cases, nor have we been cited any by the parties to this appeal, which have applied or interpreted § 2-302, and

it appears that we will be unable to do so in this case for several reasons.

It is clear from a perusal of Neb. U.C.C. §2-102 (Reissue 1971) that article 2 of the Code is intended to apply only to transactions in goods. That section provides: "Unless the context otherwise requires, this article applies to *transactions in goods;* it does not apply to any transaction which although in the form of an unconditional contract to sell or present sale is intended to operate only as a security transaction nor does this article impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers." (Emphasis supplied.) Neb. U.C.C. §2-105 (Reissue 1971) defines the term "goods," as used in article 2, as follows: "'Goods' means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (article 8) and things in action. 'Goods' also includes the unborn of young animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (section 2-107)." The definition of "goods," as used in article 2, stresses the element of "movability" of the item in question.

It is clear from the above definition that the groceries and food products covered by the second contract would clearly fall within the definition of "goods," and be governed by the provisions of the Uniform Commercial Code. The same, however, cannot be said with reference to the membership contract, and we have discovered no cases which have specifically passed upon this question. Under the above definition of "goods," however, it would seem to be highly questionable whether such a contract would be considered as "goods" and subject to the provisions of the Uniform Commercial Code. However, even assuming *arguendo* that the membership contract in question permitting the purchase of food and also nonfood items including

appliances and furniture would constitute "goods" and be subject to the provisions of the Uniform Commercial Code, we are precluded from considering the issue of unconscionability under § 2-302 of the Code in the instant case, for the reason that the issue was neither raised nor litigated as a defense in the trial court, and hence can be neither urged nor considered for the first time on appeal to the Supreme Court. A review of the record in this case discloses that the issue of unconscionability was raised by the Risons for the first time in their brief to this court. Nothing appears in their amended answer alleging unconscionability as a defense. It is a well-established rule in this jurisdiction that defenses not raised or litigated in the trial court cannot be urged for the first time on appeal. *Smith v. Wrehe*, 199 Neb. 753, 261 N.W.2d 620 (1978). See, also, *Meyer v. Meyer*, 180 Neb. 379, 142 N.W.2d 922 (1966).

We are also of the opinion that the issue of unconscionability must be pleaded in order to be considered by the court. While there is a dearth of authority on this question, there are cases indicating that such issue is required to be pleaded, rather than being considered by the court *sua sponte*. In *Patterson v. Walker-Thomas Furniture Co.*, 277 A.2d 111, 114, 9 U.C.C. Rep. 27, 31 (D.C. Ct. App. 1971), it is stated: "An unsupported conclusory allegation in the answer that a contract is unenforceable as unconscionable is not enough. Sufficient facts surrounding the 'commercial setting, purpose and effect' of a contract at the time it was made should be alleged so that the court may form a judgment as to the existence of a valid claim of unconscionability and the extent to which discovery of evidence to support that claim should be allowed." The above quotation from *Patterson* was cited with approval in *Morris v. Capitol Furniture & Appliance Co.*, 280 A.2d 775, 9 U.C.C. Rep. 577 (D.C. Ct. App. 1971). White & Summers, Uniform Commercial Code (2d ed. 1980), concedes that there is authority for the

proposition that the defendant must plead the issue of unconscionability as an affirmative defense, although they indicate that U.C.C. § 2-302(1) would seem to permit a court to raise the issue *sua sponte*. On page 150 of the above treatise it is stated: "At least one court has said that the defendant must plead the issue [of unconscionability] as an affirmative defense. Yet the words of 2-302(1) seem to permit a court to raise the issue *sua sponte*." They add: "Furthermore, the party raising the issue has the burden of proof, at least according to some courts, and must show that the contract or clause was unconscionable at the time of contracting." The evidence in the record does not indicate that the Risons either pleaded the issue of unconscionability in their amended answer nor sustained their burden of proof by evidence at the trial. While we would not be hesitant to meet the issue of unconscionability squarely were it properly presented to us, we are unable to do so in this case.

We now discuss the issue of whether the Risons effectively cancelled their contracts under the terms thereof relating to cancellation on their visit to the offices of the company on Sunday, February 20, 1977. A perusal of the Membership Sales Agreement executed by the parties indicates that there are conflicting provisions contained therein with reference to the buyer's right to cancel. The first said provision reads as follows: "Should the family named in this agreement find that Guaranteed Foods service has been misrepresented in any way, this agreement may be cancelled by notifying the home office of Guaranteed Foods, Inc., in writing within 72 hours from the delivery date of the original food order." Also printed in capital letters at the bottom of the membership agreement is the following language: "YOU THE BUYER, MAY CANCEL THIS TRANSACTION AT ANY TIME PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY AFTER THE DATE OF THIS TRANSACTION. SEE THE ATTACHED NOTICE

OF CANCELLATION FORM FOR AN EXPLANATION OF THIS RIGHT." The Membership Sales Agreement received in evidence as exhibit 4 does not, however, have attached to it the notice of cancellation referred to. However, the installment sales contract received in evidence as exhibit 3 has printed upon it the following:

"BUYER'S RIGHT TO CANCEL

"You may cancel this agreement by mailing a written notice to Guaranteed Foods of Hastings and Grand Island, Inc. 2316 South Locust Grand Island, NE 68801 before midnight of the third business day after you signed this agreement. If you wish, you may use this page as that notice by writing 'I hereby cancel' and adding your name and address." The installment sales contract covering the purchase of the meat and groceries received in evidence as exhibit 16 also contains a provision:

"NOTICE OF CANCELLATION

"You may cancel this transaction, without any penalty or obligation, within three business days from the above date." Although this last contract is dated "2-15-77," it is clear from the testimony that the actual date of the receipt of the groceries and the execution of the agreement was February 16, 1977. It is clear from an examination of the above documents that the provisions for cancellation by the buyer are, in many respects, conflicting.

In this connection, we are forced to agree with the conclusion of the District Court that the Risons did not effectively cancel their contracts under any of the provisions for cancellation contained in the aforementioned contracts. Under the first provision for cancellation contained in the Membership Sales Agreement, providing that the agreement may be cancelled by notifying the home office of Guaranteed Foods, Inc., in writing within 72 hours from the delivery date of the original food order [the delivery date being February 16, 1977], it is clear from the evidence that

the Risons did not notify the home office of Guaranteed Foods in Grand Island until Sunday, February 20, 1977, a period in excess of the 72 hours granted under that provision. Had they so desired, there was ample opportunity to notify the company within the 72-hour period following the delivery of the food products. With reference to the second cancellation provision printed at the bottom of the Membership Sales Agreement, permitting cancellation at any time prior to midnight of the third business day after the date of this transaction [February 8, 1977], and also the provision contained in the installment sales contract for the membership permitting cancellation by mailing a written notice to the company before midnight of the third business day after signing the agreement [also February 8, 1977], it is equally clear that the Risons failed to comply with those provisions. Since the cancellation was first attempted on Sunday, February 20, 1977, it is obvious that more than 3 business days had elapsed after the execution of the agreements in question on February 8, 1977. We conclude that the District Court was correct in its finding that the Risons had not effectively cancelled the contracts in question by their actions on February 20, 1977.

We also point out, however, with respect to the liability for the food delivered, the contract for the sale of the food is clearly subject to the provisions of the Nebraska Uniform Commercial Code as a sale of "goods," as previously defined.

The provision with reference to the formal requirements of the statute of frauds is contained in Neb. U.C.C. § 2-201 (Reissue 1971). However, in this regard, subsection 2-201(3) provides as follows: "A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable . . . . (c) with respect to goods for which payment has been made and accepted or which have been received and accepted (section 2-606)." The evidence is uncontradicted that the Risons accepted and used the

meat and grocery products in question, and hence, under the aforementioned subsection, are liable for the value thereof; and the trial court was correct in entering judgment in favor of Guaranteed Foods for the balance due under that contract, $111.32.

We now briefly discuss the contention of the Risons that the court erred in awarding attorney fees to Guaranteed Foods. In its judgment, the District Court awarded the plaintiff, Guaranteed Foods, judgment against the defendants, the Risons, in the sum of $300 for attorney fees. The applicable section which must be considered in this connection is, as stated in the brief of the appellee, Neb. Rev. Stat. § 25-1801 (Reissue 1979). That section provides: "Any person, partnership, association, or corporation in this state having a claim, which amounts to two thousand dollars or less, against any person, partnership, association, or corporation doing business in this state, for . . . (8) charges covering articles and services affecting the life and well-being of the debtor which are adjudged by the court to be necessaries of life, may present the same to such person, partnership, association, or corporation, or to any agent thereof, for payment in any county where suit may be instituted for the collection of the same. If, at the expiration of ninety days after the presentation of such claim, the same has not been paid or satisfied, he may institute suit thereon in the proper court. If he shall establish his claim and secure judgment thereon, he shall be entitled to recover the full amount of such judgment and all costs of suit thereon, and, in addition thereto, interest on the amount of the claim at the rate of six per cent per annum from the date of presentation thereof, and, if he has an attorney employed in the case, an amount for attorney fees as provided in this section. . . ." We have held that a party must plead and prove conditions precedent to be entitled to an allowance of an attorney fee under the above section. *Haley v. Fleming*, 148 Neb. 407, 27 N.W.2d 626 (1947). There is nothing in

the record to show compliance with the conditions precedent set out in the aforementioned section, particularly that the court adjudged the items sued for, including the membership agreement, to be necessaries of life; nor that they were presented for payment and not paid within the 90 days referred to. That being so, the allowance of the attorney fees to the plaintiff in this action was error, and the judgment must be modified to eliminate the award of the attorney fees.

No other errors appearing in the record, the judgment of the District Court should be and hereby is affirmed, except as modified above.

AFFIRMED AS MODIFIED.

NEBRASKA PUBLIC POWER DISTRICT, A PUBLIC CORPORATION, APPELLEE, V. HERSHEY SCHOOL DISTRICT ET AL., APPELLANTS.

299 N.W.2d 514

Filed December 5, 1980. No. 42965.

1. **Public Utilities: Tax Exemptions: Constitutional Law.** A public power district is a governmental subdivision of the state within the meaning of Neb. Const. art. VIII, § 2, and all of its property is exempt from taxation except as otherwise provided by the Constitution.
2. **Taxation: Constitutional Law.** The provisions of the Constitution in relation to taxation are not grants of power but are limitations on the taxing power of the state.
3. **Legislature: Constitutional Law.** The Legislature cannot circumvent an express provision of the Constitution by doing indirectly what it may not do directly.
4. **Constitutional Law: Statutes.** Constitutional provisions should receive a broader and more liberal construction than statutes, and constitutions are not subject to the rules of strict construction.
5. **Public Utilities: Statutes: Constitutional Law.** Neb. Rev. Stat. § 79-1370 (Cum. Supp. 1980), by requiring public electric entities to make specific mandatory payments to school districts, violates the provisions of Neb. Const. art. VIII, § 11.

Appeal from the District Court for Lincoln County: KEITH WINDRUM, Judge. Affirmed.

John P. Murphy of Ruff & Murphy for appellants Hershey School Dist. et al.

Thomas M. Shanahan of McGinley, Lane, Mueller, Shanahan & McQuillan for appellant Ogallala School Dist.

John R. McPhail and Barlow, Johnson, DeMars & Flodman for appellee.

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

MCCOWN, J.

The plaintiff, Nebraska Public Power District, a public corporation, brought this action against the defendant school districts seeking a declaratory judgment that Neb. Rev. Stat. § 79-1370 (Cum. Supp. 1980) is unconstitutional. The District Court for Lincoln County, Nebraska, found that § 79-1370 was unconstitutional and in violation of Neb. Const. art. VIII, § 11. The defendant school districts have appealed.

The plaintiff power district is a public corporation and a political subdivision of the State of Nebraska, and operates electrical generation and distribution systems within the State of Nebraska. Its property is exempt from taxation under Neb. Const. art. VIII, § 2.

In 1972, the plaintiff commenced construction of an electrical generation facility located near Sutherland, Nebraska. Construction of the facility continued over a period of years and involved some 1,500 construction workers. Many of their children were enrolled in various schools in the area. In 1978, the Legislature enacted § 79-1370 which became effective on March 16, 1978. That section provides: "In any year when the parents of at least ten per cent of the students or thirty-five students, whichever is less, attending public schools in any school district are employed in the construction of any electric generating facility, the public power district, municipality, electric cooperative, electric membership corporation,

or other entity constructing and owning such facility shall pay to such school district one half of the amount derived by taking the total operating expense of such school district for the preceding year less any federal funds received and any state funds received under Chapter 79, article 13, divided by the average daily attendance of resident and nonresident students in such school district for the preceding school year, multiplied by the number of children of such employees attending such school district."

During the summer and fall of 1978, the school boards of the defendant school districts submitted their claims under the statute to the plaintiff. In December 1978, the plaintiff filed its petition seeking a declaratory judgment as to the constitutionality of § 79-1370. The action was tried in the District Court for Lincoln County, Nebraska, on July 3, 1979, and on August 1, 1979, the District Court issued its memorandum opinion finding that § 79-1370 is in violation of Neb. Const. art. VIII, § 11, and is unconstitutional. The defendant school districts have appealed.

Some historical background is appropriate. The original enabling act providing for the creation and operation of public power districts in Nebraska was enacted in 1933. Thereafter, protests arose over the loss of tax revenue which would be sustained by the state and its various governmental subdivisions if tax exempt public power districts acquired the taxable properties of privately owned electrical facilities. The Legislature then enacted statutes which required any public power district which acquired property of an existing privately owned utility to make payments "in lieu of taxes" to the various taxing entities in amounts equal to those paid by the private utility in the year immediately preceding the purchase or acquisition. Payments in lieu of taxes on real property purchased from other than a private utility were required on the same basis for the year of acquisition, but for subsequent years the appropriate county

board of equalization was to determine the amount to be paid in lieu of taxes on such real estate "as equity and justice may require." See Neb. Rev. Stat. §§ 70-651 and 652 (Reissue 1958) (repealed 1959).

In the years that followed, case law in Nebraska and elsewhere raised substantial questions as to whether mandatory payments in lieu of taxes constituted an indirect attempt to tax public property which was otherwise exempt from taxation under the Constitution. In order to settle the issues, an amendment to the Constitution was proposed and adopted in 1958. That is the amendment involved here. Neb. Const. art. VIII, § 11, provides: "Every public corporation and political subdivision organized primarily to provide electricity or irrigation and electricity shall annually make the same payments in lieu of taxes as it made in 1957, which payments shall be allocated in the same proportion to the same public bodies or their successors as they were in 1957.

"The legislature may require each such public corporation to pay to the treasurer of any county in which may be located any incorporated city or village, within the limits of which such public corporation sells electricity at retail, a sum equivalent to five (5) per cent of the annual gross revenue of such public corporation derived from retail sales of electricity within such city or village, less an amount equivalent to the 1957 payments in lieu of taxes made by such public corporation with respect to property or operations in any such city or village. The payments in lieu of tax as made in 1957, together with any payments made as authorized in this section shall be in lieu of all other taxes, payments in lieu of taxes, franchise payments, occupation and excise taxes, but shall not be in lieu of motor vehicle licenses and wheel taxes, permit fees, gasoline tax and other such excise taxes or general sales taxes levied against the public generally.

"So much of such five (5) per cent as is in excess of an amount equivalent to the amount paid by such

public corporation in lieu of taxes in 1957 shall be distributed in each year to the city or village, the school districts located in such city or village, the county in which such city or village is located, and the State of Nebraska, in the proportion that their respective property tax mill levies in each such year bear to the total of such mill levies."

In 1959, the Legislature implemented the constitutional amendment and provided that every public power district owning property with respect to which it made payments in lieu of taxes in 1957 shall continue to pay annually the same amounts in the same manner so long as it continues to own such property. See Neb. Rev. Stat. § 70-651.01 (Reissue 1976). Former §§ 70-651 and 652 were repealed.

The appellant school districts contend that the Legislature has plenary power over a public corporation and that the provisions of § 79-1370 constitute only a statutory directive for the use of public funds held by a public power district and do not constitute a tax or a payment in lieu of taxes. The school districts argue that the obligation imposed upon a public power district by § 79-1370 should be called an impact charge for services rendered for the benefit of school children whose presence in the area was caused by and was for the benefit of the power districts.

The school districts contend that the provisions of the statute are comparable to the provisions of federal law which provide impact funds to local schools to offset the increased costs and burden caused by the attendance of children whose parents are involved in federal governmental activity. The obvious distinction between the federal law and § 79-1370 is that the federal legislation simply appropriates federal funds subject to the control of Congress.

In effect, the appellant school districts contend that because the state has plenary power over a public corporation, the state can require a public corporation to expend its funds for a public purpose, subject only

to the same constitutional limitations, as though it were directing the appropriation and disposition of general funds of the state. We disagree.

Neb. Const. art. VIII, § 11, provides that the in lieu of tax payments authorized by the section shall be in lieu of all other taxes and payments in lieu of taxes with specified exceptions. The amendment specifies not only which taxes and payments may not be assessed, but those which may be.

The critical issue here is whether the payments imposed on a public power district under the provisions of § 79-1370 are taxes or payments in lieu of taxes in violation of art. VIII, § 11.

Neb. Const. art. VIII, § 2, is also relevant here. It provides, in part: "The property of the state and its governmental subdivisions shall be exempt from taxation." In *Platte Valley Public Power & Irrigation District v. County of Lincoln*, 144 Neb. 584, 14 N.W.2d 202 (1944), this court held that a public power district is a governmental subdivision of the state within the meaning of that section and all of its property is exempt from taxation.

This court has consistently held that the Legislature is vested with the taxing power without limit, subject only to restrictions contained in the Constitution. It is, therefore, axiomatic that the provisions of the Constitution in relation to taxation are not grants of power but are limitations on the taxing power of the state. See, *State ex rel. School Dist. of Scottsbluff v. Ellis*, 168 Neb. 166, 95 N.W.2d 538 (1959); *Sandberg v. State*, 188 Neb. 335, 196 N.W.2d 501 (1972). The Legislature cannot circumvent an express provision of the Constitution by doing indirectly what it may not do directly. *United Community Services v. The Omaha Nat. Bank*, 162 Neb. 786, 77 N.W.2d 576 (1956); *State ex rel. Rogers v. Swanson*, 192 Neb. 125, 219 N.W.2d 726 (1974).

Constitutional provisions should receive a broader and more liberal construction than statutory provisions and constitutions are not subject to the rules of strict

construction. *University Police Officers Union v. University of Nebraska*, 203 Neb. 4, 277 N.W.2d 529 (1979).

Black's Law Dictionary 1307 (5th ed. 1979) defines a tax as "An enforced contribution of money or other property, assessed in accordance with some reasonable rule or apportionment by authority of a sovereign state on persons or property within its jurisdiction for the purpose of defraying the public expenses." The essential characteristics of a tax are that it is not a voluntary payment but an enforced contribution and, in its essential characteristics, is not a debt.

The school districts argue that the payments imposed upon a public power district under § 79-1370 do not constitute a tax or a payment in lieu of taxes but, instead, should be treated as an impact fee, or a direction to transfer funds, or by any title other than a tax or a payment in lieu of taxes. The argument rests upon the premise that the payments are imposed because of some sort of duty or obligation upon the public power district to pay for services rendered by the school districts to students who are children of construction workers employed by companies engaged in the construction of a power district facility. In essence, the school districts contend that the payments should be treated as payment for services rendered. The problem with that argument is that the students are residents of the school districts. Even if nonresidents were involved, the legal obligation for tuition would rest upon the parents. Even if it be assumed that an obligation somehow might be extended to employers of parents, the construction companies are the employers of the parents and the school districts are required by law to furnish school instruction to qualified resident students. As the trial court found, the services rendered by the school districts were not for the benefit of the power district, nor could they be, since instruction in the common schools of this state is required to be free. See Neb. Const. art. VII, § 1.

Under the specific language of art. VIII, § 11, unless

the payments involved here are something other than taxes, or payments in lieu of taxes, such payments are in violation of the constitutional provisions. Under the evidence, the payments required to be made by the plaintiff to the school districts here constituted taxes or payments in lieu of taxes in addition to those payments authorized by the Constitution. They were not in payment of a debt or for services rendered by the school districts for the benefit of the power district.

Neb. Rev. Stat. § 79-1370 (Cum. Supp. 1980), by requiring public electric entities to make specific mandatory payments to school districts, violates the provisions of Neb. Const. art. VIII, § 11.

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

AFFIRMED.

KRIVOSHA, C.J., concurring

I concur in the result reached by the majority in this case. However, I would have decided this case on the basis that the statute in question, Neb. Rev. Stat. § 79-1370 (Cum. Supp. 1980), is invalid because it creates an unreasonable classification and is applied in an arbitrary manner and, therefore, violates Neb. Const. art. III, § 18. That provision of our state's Constitution prohibits legislative enactment of local or special laws with regard to the several subjects listed therein. The prohibitions of art. III, § 18, are to an extent limited to the subjects listed in the Constitution, see, e.g., *Stewart v. Barton*, 91 Neb. 96, 135 N.W. 381 (1912), but we must also be guided by the plain and clear language of the constitutional provision. The last sentence of art. III, § 18, states, "In all other cases where a general law can be made applicable, no special law shall be enacted." It is this constitutional directive which invalidates § 79-1370.

While it is true that the Legislature may classify the subjects, persons, or objects as to which it legislates, such classifications must rest upon differences in

situation or circumstances between the things dealt with in one class and those dealt with in another. As we have said in *State, ex rel. Cone, v. Bauman*, 120 Neb. 77, 82-83, 231 N.W. 693, 695 (1930): "The rule is well established that the legislature may, for the purpose of legislating, classify persons, places, objects or subjects, but such classification must rest upon some difference in situation or circumstance which, in reason, calls for distinctive legislation for the class. The class must have a substantial quality or attribute which requires legislation appropriate or necessary for those in the class which would be inappropriate or unnecessary for those without the class."

Legislative classification may not be done in an arbitrary or unreasonable manner. Arbitrary classification may result in special legislation. See *United Community Services v. The Omaha Nat. Bank*, 162 Neb. 786, 77 N.W.2d 576 (1956).

In this case, the Legislature has created a class consisting of electric utilities and made that class subject to assessments for the education of the children of persons engaged in constructing power plants. The basis for such charges appears to be the impact which a large influx of such students can have on a small school district's finances. The Legislature has simply ignored the similar impact which can result from other types of large construction projects. Thus, § 79-1370 discriminates against some entities with construction projects and in favor of others. The purpose of the statute — to alleviate financial stress on local school districts — does not account for such discrimination in the class created by the act. "Exceptions contained in a legislative classification cannot be justified if the discrimination thus made has no reasonable relation to the purposes of the act in which it is found." *United States Cold Storage Corp. v. Stolinski*, 168 Neb. 513, 526, 96 N.W.2d 408, 417 (1959). Thus, the statute at issue here creates a classification which includes electric utility companies constructing power

plants but excludes any other company or organization engaged in large construction projects. There is no rational distinction which explains why the construction of a power generating facility should cause the utility district to pay for the education of residents of the school district any more than construction of an interstate highway system through a school district, or the construction of an airfield, or any other large construction project should trigger such a result. Simply because it is suggested that the construction of a generating facility may have an impact upon a local school district is not to say that any other large project may not have such an impact. Because the exclusion from the act of all entities except power districts has no discernible relation to the purpose of the act, the classification is unreasonable and in violation of art. III, § 18.

Furthermore, § 79-1370 runs afoul of the Constitution on another ground. The statute provides no guidance for distinguishing between the children of construction workers who are residents of the local school district and those who are not. It would seem, if the purpose of the enactment was to diminish the financial impact on school districts which must educate the children of transient construction workers, that the statute should include some mechanism by which the assessment against the utility district would be based solely on the number of children who are members of these "transient families." However, no such device can be found within the statute. It simply does not address the situation in which workers employed in constructing a power plant are also residents and taxpayers of the local school district. In such a circumstance, under § 79-1370, the school district would, in effect, be the beneficiary of double taxation. This unreasonable result is produced directly by the arbitrary application of the law called for by the plain language of the statute itself. The statute requires utility districts to pay an assessment for the educa-

tion of the children of workers employed in the construction of a power plant. It makes no distinction for those families — workers and school children — who lived in the local school district before construction was proposed or begun. The utility district would be required to pay for all. This application of the statute has no relation to the purpose of the act which, once again, was to ease the budgetary burdens caused by a sharp *increase* in the size of the student body due to an influx of *new* students into the local district.

I write today because I do not wish for the holding in this case to suggest to the Legislature that it may not, under any circumstance, require a public utility to make payments simply because such payments may not be voluntary and, therefore, have some of the characteristics of a tax or a payment in lieu of tax. If required payments are otherwise appropriate, mere resemblance to a tax will not invalidate them. There may be a host of situations where such a payment is not in violation of either Neb. Const. art. VIII, § 2, or § 11, and also satisfies the prohibition of special legislation in Neb. Const. art. III, § 18.

PATRICIA MAY AND JAMES W. MAY, DOING BUSINESS AS THE BIDDERS CHOICE, APPELLANTS, V. MARIJO CORPORATION, A NEBRASKA CORPORATION, AND JOSEPH CIESLIK, APPELLEES.

299 N.W.2d 433

Filed December 5, 1980. No. 43066.

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

William T. Ginsburg of Zuber & Ginsburg for appellants.

E. Dean Hascall for appellees.

Heard before KRIVOSHA, C.J., MCCOWN, and HASTINGS, JJ., and COLWELL and CANIGLIA, District Judges.

CANIGLIA, District Judge.

This is a law action arising out of a lease dispute between the plaintiffs, lessees, and defendants, lessors. In their petition, plaintiffs allege that the defendants breached the lease by not providing quiet enjoyment and use of the premises, and cite other violations of the lease by the defendants, and accordingly seek damages. The defendants filed an answer generally denying liability and a cross-petition for rent due until the expiration of the lease. A trial to the jury resulted in a verdict for the defendants on the plaintiffs' petition and for a judgment of $1,501.22 in favor of the defendants on their cross-petition. The lower court entered judgment on the verdict and the plaintiffs have appealed, assigning as error that the verdict was not supported by the evidence and was contrary to law. We affirm.

For convenience, the appellants and appellees will be referred to as plaintiffs and defendants, respectively.

In their appeal, the plaintiffs have raised the following propositions of law. Where there is a question as to the meaning of a contract, it is to be construed most strongly against the party preparing it. *Omaha P. P. Dist. v. Natkin & Co.*, 193 Neb. 518, 227 N.W.2d 864 (1975); *Abboud v. Cir Cal Stables*, 190 Neb. 396, 208 N.W.2d 682 (1973); *Podewitz v. Gering Nat. Bank*, 171 Neb. 380, 106 N.W.2d 497 (1960). In an ambiguous lease, a reasonable and practical construction is given the lease by determining the intentions of the parties at the time the lease was made. Any disturbance by his lessor of a lessee's possession which renders the premises unfit for occupancy for the purposes for which they were leased or which deprives the lessee of the beneficial use of the premises, causing him to abandon

them, amounts to a constructive eviction. *Kimball v. Lincoln Theatre Corporation*, 129 Neb. 446, 261 N.W. 842 (1935); 3 Thompson on Real Property § 1132 at 474-83 (1980). The measure of damages in a case of breach of contract is the amount which will compensate the injured person for the loss which a fulfillment of the contract would have prevented or the breach of it has entailed. *Midlands Transp. Co. v. Apple Lines, Inc.*, 188 Neb. 435, 197 N.W.2d 646 (1972); *Ranchland Auto, Inc. v. Cleveland*, 188 Neb. 804, 199 N.W.2d 702 (1972).

The defendants do not disagree with these propositions of law, and an examination of the instructions given by the learned trial court discloses that the jury was properly instructed on each of the propositions of law cited.

During the trial, lengthy and copious evidence was adduced by the plaintiffs and defendants and submitted to the jury. It would be to no avail to review the evidence other than to comment that it is in conflict on the issues raised by this appeal. Under these circumstances, it is not the province of this court to weigh or resolve conflicts of the evidence.

The credibility of the witnesses and the weight to be given their testimony are solely for the consideration of the jury, *Pearson v. Richard*, 201 Neb. 621, 271 N.W.2d 326 (1978), and unless clearly wrong, a verdict by a jury based on conflicting evidence will not be set aside on appeal. *Sortino v. Paynter*, 206 Neb. 348, 292 N.W.2d 916 (1980); *C I T Financial Services of Kansas v. Egging Co.*, 198 Neb. 514, 253 N.W.2d 840 (1977). The evidence in this case, although conflicting, does support the verdict and the judgment is, therefore, affirmed.

AFFIRMED.

ROBERT W. KOLL ET AL., APPELLEES, V. STANTON-PILGER DRAINAGE DISTRICT, APPELLANT.

299 N.W.2d 435

Filed December 5, 1980. No. 43118.

1. **Dismissal and Nonsuit.** Plaintiff may dismiss an action without prejudice to a future action as a matter of right at any time before final submission of case.
2. **Demurrers: Final Orders.** An order sustaining a demurrer is not a final order and is not a final submission of the case.

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

Grady, Caskey & Thor for appellant.

Vince Kirby for appellees.

Heard before BOSLAUGH, BRODKEY, and HASTINGS, JJ., and BLUE and CAPORALE, District Judges.

BLUE, District Judge.

The plaintiffs filed an action in the District Court for Stanton County, Nebraska, seeking injunctive relief and damages. In the course of the proceedings, a second amended petition was filed, to which the defendant filed a demurrer claiming that the petition did not state facts sufficient to constitute a cause of action and that there was a misjoinder of parties and of causes of action. This demurrer was sustained by the court on September 11, 1979, and the plaintiffs were given 2 weeks in which to file another amended petition. Plaintiffs did not file another amended petition within that time; and on October 15, 1979, defendant filed a motion for a default judgment, asking that the action be dismissed with prejudice. Plaintiffs appeared for a hearing on the motion for default; however, without hearing this motion, the trial court, on plaintiffs' motion, granted plaintiffs leave to dismiss the action without prejudice as a matter of right, for the reason that the case had not been finally adjudicated.

The defendant filed a motion for new trial. In overruling this motion, the trial judge indicated that the dismissal was a discretionary matter with the court. Defendant has now appealed, claiming not only that plaintiffs had no right to dismiss without prejudice, but also that the court abused its discretion by allowing the dismissal.

Neb. Rev. Stat. § 25-601 (Reissue 1979) provides, in part, that an action may be dismissed without prejudice to a future action by the plaintiffs before the final submission of the case to the jury, or to the court where the trial is by the court. It is well settled in Nebraska that a plaintiff may dismiss his action without prejudice as a matter of right at any time before final submission. It is a statutory right and not a matter of judicial grace or discretion. *Gebhart v. Tri-State G. & T. Assn.*, 181 Neb. 457, 149 N.W.2d 41 (1967); *Giesler v. City of Omaha*, 175 Neb. 706, 123 N.W.2d 650 (1963).

The question then to be considered in determining whether plaintiffs had a right to dismiss under § 25-601 is whether the sustaining of a demurrer is a final submission of the case, as claimed by defendant. A "final submission" within the rule that plaintiffs can dismiss only before final submission, contemplates a submission on both the law and the facts, and is a final submission only when nothing remains to be done to render it complete. 27 C.J.S. *Dismissal and Nonsuit* § 20b (1959).

A demurrer under Neb. Rev. Stat. § 25-806 (Reissue 1979) merely challenges defects shown on the face of the petition, which defects often can be corrected by the pleader. In fact, Neb. Rev. Stat. § 25-854 (Reissue 1979) contemplates that, if a demurrer is sustained, an adverse party may amend if the defect could be remedied by way of amendment. Although there may be some cases in which a right to amend is curtailed, ordinarily it is error for the court not to grant leave to amend when the defect could be cured by

amendment. *Cagle, Inc. v. Sammons*, 198 Neb. 595, 254 N.W.2d 398 (1977).

It is well-settled law that the sustaining of a general demurrer not followed by a judgment of dismissal terminating the litigation does not constitute a final order reviewable by this court. *Root v. School Dist. No. 25*, 183 Neb. 22; 157 N.W.2d 877 (1968).

There are few cases dealing with whether the plaintiffs have a right to dismiss after the sustaining of a demurrer to the petition. One such case is *Alphons Custodis C. Con. Co. v. Aetna In. Co.*, 160 Ill. App. 140 (1911), where the defendant demurred to an amended declaration and, after a hearing, the court sustained the demurrer and gave the plaintiff 30 days in which to amend its declaration and, before the time was up, the plaintiff moved the court for leave to take a nonsuit. It was held that the trial court did not err in allowing the nonsuit; the appellate court rejected the contention that the case had been submitted for final decision upon a general demurrer and that, therefore, it was too late for the plaintiff to take a nonsuit in view of the statute barring a nonsuit where a case was tried before the court without a jury unless taken "before the case is submitted for final decision." The appellate court stated that no final judgment was entered, the trial court merely making an interlocutory order and sustaining the demurrer and giving leave to amend.

In the present case, while plaintiffs did not amend their petition within the time set, we believe that generally the practice in this state would have been to permit an amendment out of time. In any event, the trial court had not considered the motion for default, so there had been no final submission of the case. It appears that the courts have liberally construed a party's right to dismiss an action. This court has stated in *Giesler v. City of Omaha, supra* at 709, 123 N.W.2d at 652: "The right to dismiss is liberally construed in favor of the right, but strictly construed to the

extent that it is in derogation of the common law. In Plattsmouth Loan & Bldg. Assn. v. Sedlak, 128 Neb. 509, 259 N.W. 367, this court quoted with approval the following: 'The right of a plaintiff to take a nonsuit or dismiss the action upon discovery at any stage of the trial that, in the then state of his case, he cannot recover or safely proceed further, is essential to an efficient administration of the law and often enables justice to prevail when otherwise it would miscarry. * * * So the wisdom and policy of the common law always freely accorded the privilege to litigants, while statutory limitations of its exercise have usually been restricted by the courts within their exact terms.'"

We conclude that the sustaining of a demurrer to the petition does not constitute a final submission of the case to the court and, therefore, the plaintiffs have a right to a dismissal without prejudice.

Defendant cites two cases, *Bee Building Co. v. Dalton*, 68 Neb. 38, 93 N.W. 930 (1903), and *Fronk v. Evans City Steam Laundry Co.*, 70 Neb. 75, 96 N.W. 1053 (1903), for the proposition that a demurrer which is sustained is a final submission. A reading of these cases shows that, at that time, the term "demurrer to the evidence" was used interchangeably with a "motion for directed verdict." In those cases, the plaintiffs had submitted their evidence to the jury and rested. The defendants made a motion for a directed verdict, which was sustained. Plaintiffs then dismissed without prejudice. The Supreme Court said that those dismissals were not a matter of right, as the cases had been finally submitted. Those cases are readily distinguishable from the present case. Defendant also cites the case of *State v. Scott*, 22 Neb. 628, 36 N.W. 121 (1888), in which a peremptory writ of mandamus was applied for in the Supreme Court. A demurrer was filed, and the court issued an order denying the writ. It was held that the case could not be dismissed without prejudice; but here again, the case had been finally submitted and determined.

The order of the District Court dismissing the action without prejudice is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. HARRY STICKELMAN, APPELLANT.

299 N.W.2d 520

Filed December 5, 1980. No. 43222.

1. **Probable Cause: Search and Seizure: Search Warrants.** In evaluating the showing of probable cause necessary to support a search warrant, only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause.
2. **Search and Seizure: Search Warrants.** Affidavits for search warrants must be tested and interpreted in a commonsense and realistic fashion; where the circumstances are detailed, where reasons for crediting the source of information is given, and when the magistrate has found probable cause to exist, the court should not invalidate the warrant by interpreting the affidavit in a hyper-technical manner.
3. **Probable Cause: Search and Seizure: Search Warrants.** Observations by fellow officers engaged in a common investigation are a reliable basis for a warrant and probable cause is to be evaluated by the collective information of the police as reflected in the affidavit, and is not limited to the firsthand knowledge of the officer who executes the affidavit.
4. **Search and Seizure: Search Warrants.** There is a presumption of validity with respect to the affidavit supporting the search warrant.
5. **Search and Seizure: Search Warrants: Burden of Proof.** To challenge the veracity of an affidavit for a search warrant based upon allegations of false and misleading statements contained therein, there must be a showing of deliberate falsehood or of reckless disregard for the truth, accompanied by an offer of proof.
6. **Appeal and Error: Criminal Trials.** In determining the sufficiency of evidence necessary to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
7. **Appeal and Error: Evidence.** A trial court's determination of the admissibility of physical evidence will not ordinarily be overturned except for a clear abuse of discretion.

Appeal from the District Court for Lincoln County: HUGH STUART, Judge. Affirmed.

Sean J. Brennan, Scott P. Helvie, and Shelley K. Stall for appellant.

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

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, BRODKEY, WHITE, and HASTINGS, JJ., and BURKHARD, District Judge.

BRODKEY, J.

Harry Stickelman, the defendant, and appellant herein, appeals to this court from his conviction by the District Court for Lincoln County, Nebraska, for possessing more than 1 pound of marijuana in violation of Neb. Rev. Stat. §28-416(5) (Reissue 1979), and his subsequent sentence by the court to 90 days' imprisonment in the Lincoln County jail with credit granted for 22 days the defendant spent in jail following his arrest. The case was tried to the court pursuant to appellant's waiver of trial by jury on November 7, 1979. We affirm.

His principal assignment of error on appeal to this court is that the District Court erred in overruling his motion to suppress evidence seized pursuant to a federal search warrant, which appellant contends was not issued pursuant to probable cause to believe that the property described in the warrant was in the residence to be searched at the time the warrant was issued. He further contends that the magistrate who signed the federal search warrant was unable to make an independent determination that probable cause existed to believe that the evidence described in the warrant was in the residence to be searched at the time the warrant was issued. He also assigns as error that the State failed to prove beyond a reasonable doubt at the trial that the appellant was guilty of possession of marijuana, and also that the evidence was insufficient

to establish that appellant was in control of the premises where the marijuana was seized. Finally, he contends that the District Court erred in admitting evidence at the trial, over appellant's objection, with insufficient foundation for the admissibility of such evidence.

By way of factual background, it appears that on July 31, 1979, Agent William H. Petersen, Jr., of the Bureau of Alcohol, Tobacco and Firearms filed an affidavit in the U.S. Magistrate's office in Omaha, Nebraska, for the purpose of obtaining a federal search warrant. In his affidavit, Petersen alleged that at 3:30 a.m. on July 25, 1979, gunshots were heard in the village of Brady, Nebraska. According to Lincoln County Deputy Sheriff Don Knudsen, who heard the shots, they sounded like gunfire from an automatic weapon and he identified the shots as such. Deputy Knudsen based his identification upon his 5 years' experience in the Nebraska National Guard where he had handled automatic firearms in his capacity as an infantryman. The deputy described the shots as coming from the area in town in which the defendant's mobile home was located.

During his investigation of the occurrence, Deputy Knudsen interviewed Mrs. Susie Hoaglund and Mrs. Janet Miesbauer, neighbors of the defendant. Both women informed Officer Knudsen that they had been awakened by the sound of gunfire which came from the direction of the Stickelman residence. They stated that the bursts had occurred in even, rapid succession of about "10 to 12 shots, in which each shot was fired 'before the last one quit echoing.'" In addition, Officer Knudsen stated that he had been told by Delora Stickelman, the defendant's ex-wife, that Stickelman was in possession of an "AR-16" automatic weapon. The defendant's former mother-in-law, Ola Maxine Connelley, was also reported as stating that the defendant had an "Army-type weapon" at his residence.

On July 29, 1979, the defendant was arrested after he barricaded himself inside the house of his former father-in-law. At the time he was arrested, Stickelman was armed with a semi-automatic weapon, which was seized, but no automatic firearm was found at this time.

On July 30, 1979, Agent Petersen was contacted by Deputy Knudsen and Marvin Holscher of the Lincoln County Attorney's office, in order to obtain a warrant to search the premises of a Champion mobile home located on the west 75 feet of Lots 7 through 12, Block 19, in Brady, Lincoln County, Nebraska, for an automatic weapon and other firearms. Agent Petersen ran several checks on defendant's criminal record and was advised that Stickelman had been convicted of a felony in 1977, for which he had been sentenced to 1 year in the Nebraska Penal and Correctional Complex; that as a convicted felon, the defendant had never applied for or been granted relief from disability as it pertains to felons possessing firearms. In this connection, see 26 U.S.C. § 5861(d); and also 18 U.S.C. § 922(h), which makes it unlawful for a person who has been convicted of a crime punishable by imprisonment for a term exceeding 1 year to receive or possess an unregistered firearm.

On the basis of the statements and information set forth in Petersen's affidavit, the magistrate issued the search warrant, and the police executed it on the same day. Entry to the mobile home was made by a key furnished by defendant's ex-wife. Although no automatic weapon was found at the residence, the law enforcement officers found rounds of both live and spent ammunition of various calibers "laying all around the area in the living room." The officers also found marijuana being cultivated in a bedroom, the walls and ceiling of which were lined with aluminum foil, and with plastic on the floor and grow lights hanging from the ceiling. In a spare bedroom, they found a large plastic bag containing approximately 5 pounds of marijuana, and also assorted pills and a scale. Ten growing

marijuana plants were also found in a garden outside the mobile home.

The rule is well established that, in evaluating the showing of probable cause necessary to support a search warrant, only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause. *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969); *State v. Bazis*, 190 Neb. 586, 210 N.W.2d 919 (1973). It is also well established that affidavits for search warrants must be tested and interpreted in a commonsense and realistic fashion; and that where the circumstances are detailed, where reasons for crediting the source of information is given, and when the magistrate has found probable cause to exist, the court should not invalidate the warrant by interpreting the affidavit in a hyper-technical manner. *State v. Payne*, 201 Neb. 665, 271 N.W.2d 350 (1978).

In the present case, the information in the affidavit for the search warrant contained not only the observations made by Deputy Knudsen, but also those made by the defendant's ex-wife and neighbors. On the basis of this information, we believe it is reasonable to conclude that probable cause existed for the belief that the defendant was probably in possession of an automatic weapon or other firearms, and therefore in violation of the federal statutes which prohibit their possession by a convicted felon. In passing on the validity of a search warrant, this court has held that observations by fellow officers engaged in a common investigation are a reliable basis for a warrant and that probable cause is to be evaluated by the collective information of the police as reflected in the affidavit, and is not limited to the firsthand knowledge of the officer who executes the affidavit. *State v. Huggins*, 186 Neb. 704, 185 N.W.2d 849 (1971). With regard to the information obtained by Deputy Knudsen in his interviews with citizen informants, their reports are presumed to be reliable. *State v. Payne, supra.* Considering all the information contained in the affidavit for the search warrant, we

conclude it was sufficient to establish not only the probability of the occurrence of a crime, but also the secreting of evidence on the premises.

The defendant contends, however, that the search warrant issued in this case should be suppressed because it was issued on the basis of a "misleading" affidavit. Specifically, the defendant alleges that the evidence presented at the District Court hearing on his motion to suppress was inaccurate and incomplete, such that the federal magistrate was prevented from making an independent determination as to the issue of probable cause. The defendant challenges the description given by his ex-wife of the weapon he possessed, which was referred to in the affidavit as an "AR-16" automatic weapon. At trial, his wife denied making this statement but admitted that the defendant had been in possession of an "AR-15" semi-automatic weapon. The defendant also challenges the description of the area of town from which Deputy Knudsen heard the gunshots, and claims that the description made was inconsistent with the location of his residence.

In *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978), which case has been consistently approved and followed since its issuance, the U.S. Supreme Court ruled that criminal defendants could challenge the validity of search warrants based on affidavits containing statements that were deliberate falsehoods or made with reckless disregard for the truth. The test articulated in *Franks* for determining whether a defendant is entitled to a hearing to examine the contents of the affidavit for a search warrant is three-pronged. First, the challenger is to attack *only* the veracity of the affiant, and not of any other informant. Second, he or she must make a "substantial preliminary showing," including allegations of "deliberate falsehood or a reckless disregard for the truth," supported by an offer of proof. The court stated: "Finally, if these requirements are met, and if, when material that is the subject of the alleged falsity or reckless

disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required." *Id.* at 171-72. According to *Franks*, if all three requirements are met, the defendant is entitled to an evidentiary hearing. If, at such hearing, he can establish perjury or reckless disregard, and the "excision of the challenged matter leaves the affidavit with insufficient content to establish probable cause, the warrant must be voided." *United States v. Young Buffalo*, 591 F.2d 506, 509 (9th Cir. 1979).

In discussing the defendant's burden of proof, the Supreme Court in *Franks v. Delaware, supra* at 171, stated: "There is, of course, a presumption of validity with respect to the affidavit supporting the search warrant. To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. *Allegations of negligence or innocent mistake are insufficient.* The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant." (Emphasis supplied.)

The record in this case establishes that on November 6, 1979, a hearing was held before the District Court on the defendant's motion to suppress the evidence seized pursuant to the federal search warrant. It is clear that Stickelman had the burden of establishing the falsehood of the affidavit at the hearing. A perusal of the record of the hearing held in this case makes it clear that the defendant had failed to do so. The state-

ments in the affidavit which the defendant challenged were not those made by the affiant, Agent Petersen, but were those of Stickelman's ex-wife and Deputy Knudsen. The defendant also failed to allege or establish that the challenged information contained in the affidavit was "deliberately false or made in reckless disregard of the truth." Defendant's contention in his brief that the affidavit contained misleading inaccuracies or omissions is not supported under the standards set forth in *Franks v. Delaware, supra.* Finally, we note that in denying the defendant's pretrial motion to suppress, the trial court specifically found that the inaccuracies contained in Peterson's affidavit were not material and held that even without them there was still ample information to support the issuance of the search warrant. The court was correct in overruling the defendant's motion to suppress the evidence and in finding that probable cause existed for the issuance of the federal search warrant.

The defendant also contends that the evidence introduced at trial was insufficient to support the trial court's finding that he was in possession of the marijuana seized from the mobile home. Stickelman maintains that the testimony introduced at trial did not establish that he was in control of the premises where the marijuana was seized. In support of this proposition, the defendant cites *State v. Klutts,* 204 Neb. 616, 284 N.W.2d 415 (1979), in which we held that "[w]here circumstantial evidence is relied upon, the circumstances proven must relate directly to the guilt of the accused beyond all reasonable doubt in such a way as to exclude any other reasonable conclusion." *Id.* at 618, 284 N.W.2d at 417, quoting *State v. Eberhardt,* 176 Neb. 18, 125 N.W.2d 1 (1963). In *State v. Klutts,* the only evidence of the defendant's connection with the searched premises was a police officer's statement that the city directory identified the premises as the defendant's residence. This was held to be hearsay and insufficient proof of

defendant's control of the premises searched.

In the present case, however, testimony of three different sources clearly establishes that the premises searched was the residence of the defendant. First, the defendant's ex-wife, Delora Stickelman, testified that although she did not live with the defendant, she knew that he resided in a Champion mobile home as described in the warrant and as the residence which was searched on July 31, 1979. In addition, she testified that she had provided the law enforcement officers with the key with which they were able to enter the mobile home. Second, Deputy Knudsen and the defendant's neighbors further testified that the trailer searched was the residence of the defendant. Finally, Officer James N. Avery of the Nebraska State Patrol testified that he participated in the search of the premises and had observed telephone bills and other mail addressed to the defendant.

The evidence in this case is more than sufficient to establish the defendant's actual or constructive possession of the marijuana seized at the mobile home. In determining the sufficiency of evidence necessary to sustain a conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the trier of fact and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Carter*, 205 Neb. 407, 288 N.W.2d 35 (1980). See, also, *State v. Fowler*, 201 Neb. 647, 271 N.W.2d 341 (1978); *State v. Tiff*, 199 Neb. 519, 260 N.W.2d 296 (1977).

As his final allegation of error, the defendant claims that the trial court erred in admitting certain exhibits at trial because the State failed to establish a complete chain of custody of the marijuana. The defendant cites our decision in *State v. Bobo*, 198 Neb. 551, 253 N.W.2d 857 (1977), as support for the proposition that "objects

which relate to or explain issues or form part of a transaction are admissible only when duly identified and shown to be in substantially the same condition as they were at the time in issue. When objects pass through several hands before being produced in court, it is necessary to establish a complete chain of evidence, tracing possession of the object to the final custodian, and if one link in the chain is missing, the object may not be introduced in evidence." In *State v. Bobo*, a bag of marijuana had been admitted into evidence against the defendant. This court reversed because the State was not able to establish a chain of possession of the bag because the witness had obtained one bag of marijuana from the defendant and another bag from another person, put them both in the same pocket, and was unable to identify which one had come from the defendant.

In the present case, the facts are readily distinguishable from those set out in *State v. Bobo*. The testimony reveals that the marijuana was seized by Agent Petersen who took the exhibits to his motel room in North Platte, Nebraska. The defendant challenges the fact that Agent Petersen kept the evidence in his locked motel room when he left to eat a meal. On August 1, 1979, Agent Petersen delivered the exhibits to Investigators Avery and Ball. However, at trial the two investigators disagreed on the date the exchange was made. Investigator Avery testified that he received the exhibits on August 1, 1979. In any event, the exhibits were then turned over to the State Patrol laboratory, whose chemists tested the substance on August 16, 1979. It appears from the evidence that transfers of the exhibits from Agent Petersen to Investigator Avery, thence to Investigator Ball, and then to the chemists all took place at the State Patrol office in North Platte, Nebraska.

The rule is well established that a trial court's determination of the admissibility of physical evidence will not ordinarily be overturned except for a clear

abuse of discretion. See, *State v. Torrence*, 192 Neb. 720, 224 N.W.2d 177 (1974); *State v. Apker*, 204 Neb. 577, 284 N.W.2d 14 (1979). In *State v. Apker*, we held that an exhibit is admissible, so far as identity is concerned, when it has been identified as being the same object about which the testimony was given. It must be shown to the satisfaction of the trial court that no substantial change has taken place in the exhibit so as to render it misleading. As long as the article can be identified, it is immaterial in how many or in whose hands it has been. In the present case, we conclude that the record reflects a continuous chain of custody. Each person having custody identified the objects as the controlled substance that had been seized from the defendant's residence, and also testified that it was in substantially the same condition as when it was received. The method of storing the exhibits eliminated the reasonable likelihood of intermeddlers having tampered with the exhibits. The trial court was correct in finding that there was sufficient foundation to admit the exhibits into evidence, and no abuse of discretion occurred in doing so.

The judgment of the District Court must be affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. STEVEN J. ROBBINS, APPELLANT.

299 N.W.2d 437

Filed December 5, 1980. No. 43418.

1. **Juries: Juror Misconduct.** The obtaining of affidavits from jurors to determine whether there was improper conduct or communication with or by jurors during separation is an acceptable means of obtaining the necessary facts.
2. **Juror Misconduct: Motions for New Trial: Appeal and Error.** A motion for a new trial for alleged misconduct is addressed to the sound

discretion of the trial court, and a ruling made thereon will not be disturbed on appeal unless an abuse of that discretion is shown.

Appeal from the District Court for Otoe County: RAYMOND J. CASE, Judge. Affirmed.

Casey & Elworth for appellant.

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

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, BRODKEY, WHITE, and HASTINGS, JJ., and FAHRNBRUCH, District Judge.

HASTINGS, J.

This case is appearing before us for the second time. The opinion from the first appeal is found in *State v. Robbins*, 205 Neb. 226, 187 N.W.2d 55 (1980). In that proceeding, the defendant appealed from the order of the District Court which overruled his motion for a new trial after a conviction of first degree murder and a sentence of life imprisonment. The sole assignment of error was that the trial court erred in allowing the jurors to separate after the case had been submitted to the jury without the consent of the defendant or his counsel, contrary to Neb. Rev. Stat. § 29-2022 (Reissue 1979). This court affirmed the conviction and sentence, but set aside the order of the District Court overruling the motion for a new trial. We then ordered the cause remanded to the District Court for a hearing to determine whether there was improper conduct or communication with or by the jurors during separation, resulting in prejudice to the defendant. That court was further directed to either grant or overrule the motion for a new trial, depending upon its further findings.

At the ordered hearing, each juror was interrogated under oath, and they all stated that they remembered the trial judge giving an admonition against communicating with each other or third persons, and to refrain

from exposure to any news account of the trial. All of them stated that they had not violated any of those admonitions.

It developed during the questioning of the jurors that they had all been contacted individually by the county attorney's office in advance of the hearing, and had been asked questions similar to those propounded at the hearing. In addition, immediately following that questioning, they were presented with pre-prepared affidavits, identical in content, which they were asked to and did sign. However, at the hearing, the facts testified to by each juror conformed substantially to those contained in the affidavit.

The defendant assigns as error on this appeal, generally the failure to grant a new trial, and specifically "that the prosecuting attorneys in obtaining affidavits from the jurors destroyed their credibility as witnesses." It seems to be the defendant's position that because the county attorney enjoys a position of power and prestige in the community, it would be impossible or difficult to refuse his request, and, once having signed the affidavit, a juror would not be able to testify to the contrary. Such a position presupposes that the affidavits either were false or were suggestive of the answers which the county attorney desired. Neither hypothesis is supported by the record. Each juror testified that he or she answered the county attorney's questions before being shown the particular affidavit, and that it did reflect the true facts.

There is nothing improper about either party interrogating a witness in advance of a hearing of this nature. Additionally, the obtaining of affidavits from jurors to determine whether there was improper conduct or communication with or by jurors during separation is an acceptable means of obtaining the necessary facts. *State v. Robbins, supra.*

A motion for a new trial for alleged juror misconduct is addressed to the sound discretion of the trial court, and a ruling made thereon will not be disturbed

on appeal unless an abuse of discretion is shown. *State v. Hunt*, 178 Neb. 783, 135 N.W.2d 475 (1965). No such abuse is revealed by the record, and the State has sustained its burden of proof to rebut the presumption of prejudice resulting from the failure of the District Court to comply with § 29-2022. The order and judgment of the trial court are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. CINDY MATOUSEK, APPELLEE.

299 N.W.2d 432

Filed December 4, 1980. No. 43695.

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

Vincent Valentino, York County Attorney, for appellant.

George E. Brugh for appellee.

Heard before WHITE, J.

WHITE, J.

On April 2, 1980, defendant was charged with unintentionally causing the death of another while engaged in the operation of a motor vehicle, in violation of Neb. Rev. Stat. § 39-669.07 (Reissue 1978), driving under the influence of alcoholic liquor or drug, or Neb. Rev. Stat. § 39-669.01 (Reissue 1978), reckless driving. Defendant filed a motion to suppress evidence, specifically the test results of blood samples taken from defendant. After a hearing on the motion, the court ordered that blood samples taken from defendant on January 16, 1980, be suppressed as inadmissible evidence against the defendant. The State has appealed this order pursuant to Neb. Rev. Stat. § 29-824 (Re-

issue 1979). The order of the District Court suppressing the evidence is reversed and remanded.

At the hearing in April 1980, testimony was offered concerning defendant's state of consciousness immediately after the accident and at the time the blood samples were taken. This testimony, along with affidavits of people present at the scene of the accident and at the hospital, was offered at the hearing on defendant's motion to suppress.

The court received this evidence but granted the motion on the ground that the blood had not been taken at the direction of a physician. Neb. Rev. Stat. § 39-669.09 (Reissue 1978) replaced the statute requiring such blood samples to be taken under the direction of a physician and that requirement has been repealed. For this reason, the order of the District Court is reversed.

Defendant, however, urges this court to consider other factual issues which may be determinative in deciding to suppress or allow this evidence. The question is one of fact: Was the defendant conscious and coherent at the time the blood was taken? Because the District Court did not decide this issue, it is remanded for resolution pursuant to Neb. Rev. Stat. §§ 39-669.08 and 39-669.10 (Reissue 1978).

REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. EDWARD ROBERT EASLEY, APPELLEE, AND EVELYN KULHANEK, APPELLANT.

299 N.W.2d 439

Filed December 12, 1980. No. 42988.

1. **Parental Duties: Child Support.** Prosecution may be brought under Neb. Rev. Stat. § 28-449(1) (Reissue 1975), failure to support wife, child, or stepchild, even though a child support judgment, either incident to

a decree of divorce or separation or otherwise, has been entered against the person charged.

2. ____:____. Where a person prosecuted under Neb. Rev. Stat. § 28-449(1) (Reissue 1975) has previously been ordered to pay child support in a divorce decree, the measure of his liability is the amount provided in the decree.
3. **Sureties: Bonds.** Statutory provisions which require approval of bonds are for the protection of the public, not for the benefit of sureties; sureties cannot object that approval and acceptance were not within the prescribed time.
4. ____:____. The liability of a surety on statutory undertakings is measured by the terms of the statute rather than by the terms set forth in the agreement, where the two are in conflict. The statute forms a controlling part of every such agreement.
5. ____:____. The law at the time of the execution of a statutory bond is a part of it; if it gives to the bond a certain legal effect, it is as much a part of the bond as if in terms incorporated therein.

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

Thomas B. Thomsen of Sidner, Svoboda, Schilke, Wiseman & Thomsen for appellant.

Loren L. Lindahl and Thomas W. Lipps for appellee.

Heard before KRIVOSHA, C.J., MCCOWN, and WHITE, JJ., and COLWELL and HUBER, District Judges.

WHITE, J.

Appellant, a surety, furnished a bond on behalf of the defendant, who was convicted, in accordance with the provisions of Neb. Rev. Stat. § 28-449 (Reissue 1975), failure to support wife, child, or stepchild. The defendant pleaded guilty on September 9, 1977, and on the defendant's application, a bond was set in the sum of $5,000 "with sufficient surety to be approved by the Court. Condition that the defendant will provide support for minor children." Subsequently, after a hearing on August 21, 1979, the defendant was found to have failed to make ordered support payments, and the bond was partially forfeited to the extent of the arrearages. The surety appeals. We affirm.

Appellant-surety assigns as error: (1) The court's

refusal to dismiss the motion to forfeit since the trial court had not approved the bond prior to August 21, 1979; and (2) The court's refusal to release the surety on the ground that the obligation of the bond had been materially altered as the result of the court's 1979 order in the divorce case, which increased the defendant's child support obligation.

The defendant and his wife were divorced on September 6, 1973. Child support was ordered and later increased to $180 per month beginning April 1, 1974, and increased again to $225 on January 22, 1979. Apparently, the defendant did not regularly pay his child support, and the normal efforts at collection were ineffectual due to his absences from the state. The State filed a complaint against defendant in August 1977. The bond was filed in October 1977.

On August 21, 1979, the court approved the bond and ordered that appellant, as surety for defendant Easley, pay $1,040. On the same day, appellant filed a "Termination and Withdrawal of Bond" with the District Court because of the court's untimely approval of the bond. On August 23, 1979, appellant filed a motion for new trial. On September 10, 1979, the motion was overruled.

Appellant contends that defendant was charged under the wrong section of the statutes and that the bond is therefore invalid. The District Court ordered bond set according to Neb. Rev. Stat. § 28-449.01 (Reissue 1975). Appellant contends that defendant could only be charged under Neb. Rev. Stat. § 28-450 (Reissue 1975). This argument is without merit. Subsection (2) of § 28-449 reads: "(2) Prosecution may be brought under subsection (1) of this section although a child support judgment, either incident to a decree of divorce or separation or otherwise, has been entered against the person charged." Under those circumstances, a person can be prosecuted only if he fails to make ordered payments, and the measure of his liability under § 28-449 is the amount provided

in the decree. *Dimond v. State*, 110 Neb. 519, 194 N.W. 725 (1923). Subject to the provisions of Neb. Rev. Stat. §§ 42-364 (Reissue 1974) and 42-365 (Reissue 1978), that amount may be modified after the decree has been entered.

Appellant's second contention is that, because the District Court did not approve the bond until after the breach, the appellant, as surety, was released. This contention is likewise without merit. In *Paxton v. State*, 59 Neb. 460, 472, 81 N.W. 383, 385 (1899), we stated that statutory provisions which required approval of bonds are "for the protection of the public, and not for the benefit of sureties; and they, consequently, can not be heard to object that approval and acceptance were not within the prescribed time." See, also, *Holt County v. Scott*, 53 Neb. 176, 73 N.W. 681 (1897).

Finally, appellant relies on the theory that a surety will be released from a bond obligation where some material change in the underlying obligation is made without notifying the surety. That basic principle will not release appellant as surety under the facts of this case. The bond ordered pursuant to § 28-449.01 was a statutory bond. Because it was a statutory bond, the language of the bond must be construed in light of the statute authorizing it. "The liability of a surety on statutory undertakings is measured by the terms of the statute rather than by the terms set forth in the agreement, where the two are in conflict, as the statute forms a controlling part of every such agreement." *State Surety Co. v. Peters*, 197 Neb. 472, 475, 249 N.W.2d 740, 742 (1977).

Although, generally speaking, provisions of a bond will be strictly construed so as not to extend the duties of the parties beyond the scope of the obligations according to the express terms of the contract, a surety giving a bond under the provisions of a law, and for a public purpose, is bound to know the law. *Giese v. Engelhardt*, 175 N.W.2d 578 (N.D. 1970); 12 Am. Jur.

2d *Bonds* § 26 (1964). "The law at the time of the execution of a statutory bond is a part of it; if it gives to the bond a certain legal effect, it is as much a part of the bond as if in terms incorporated therein." *State Surety Co. v. Peters, supra* at 475, 249 N.W.2d at 742, quoting *Sun Ins. Co. v. Aetna Ins. Co.*, 169 Neb. 94, 98 N.W.2d 692 (1959).

"The question then is how the statute in effect at the time the bond was executed may affect the instrument." *State Surety Co. v. Peters, supra* at 476, 249 N.W.2d at 742. Section 28-449(2) clearly makes the amount set forth in the decree the measure of liability where a divorce decree has been entered. *Dimond v. State, supra.* Just as clear are the statutory provisions for modification of alimony and support awards. These provisions all modify the express terms of any bond given under § 28-449.01. When the decree was modified, there was no alteration, material or otherwise, of the original bond. The bond implicitly provided for such increases in support payments.

Appellant's argument that the District Court's release of the Stuyvesant Insurance Company effectively released her from her obligation on the bond is without merit. Appellant purported to join the insurance company on the bond under a power of attorney. However, on its face, the power of attorney executed by the insurance company expressly excluded bonds for payment of support or alimony. The insurance company was never bound and appellant was not released.

The appellant is liable on her bond, as the District Court found, and the judgment of the District Court is affirmed.

AFFIRMED.

NEIL W. SCHILKE, INDIVIDUALLY AND AS TRUSTEE, APPELLANT, V. SCHOOL DISTRICT NO. 107 ET AL., APPELLEES.

299 N.W.2d 527

Filed December 12, 1980. No. 43028.

1. **Judgments: Void Judgments: Collateral Attack.** Only a void judgment is subject to collateral attack.
2. **Judgments: Collateral Attack.** Where the court has jurisdiction of the parties and the subject matter, its judgment is not subject to collateral attack.
3. **Administrative Orders: Collateral Attack.** The rule as to collateral attack is not limited to courts of general jurisdiction, but also applies to administrative boards and tribunals acting in a quasi-judicial capacity.
4. **Judgments: Administrative Orders: Collateral Attack.** Even though a judicial body errs in holding that a petition is sufficient, if it had jurisdiction, such holding will not subject the judgment rendered to collateral attack.
5. **Petitions.** An error in the description contained in a petition to alter a school district boundary under Neb. Rev. Stat. §79-403 (Reissue 1976) will not invalidate the petition where it is clear from a reading of the entire petition what land is intended.
6. **Municipal Corporations: Estoppel: Principal and Agent.** A city or county is not estopped by the unauthorized conduct, representations, promises, or pledges of its officers and agents, absent official acquiescence in and approval of the same by such governmental unit.

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

Sidner, Svoboda, Schilke, Wiseman & Thomsen for appellant.

James B. Gessford of Perry, Perry, Witthoff & Guthery for appellees.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, BRODKEY, WHITE, and HASTINGS, JJ., and COLWELL, District Judge.

HASTINGS, J.

The plaintiff, Neil W. Schilke, individually and as trustee, a landowner in Saunders County, Nebraska, filed a petition for declaratory judgment, seeking a

determination that a freehold transfer of a tract of land from one school district to another was invalid. The defendants are School District No. 107, School District No. 105, the Saunders County superintendent of schools, the county treasurer, and the county assessor. Plaintiff and all defendants except for School District No. 105 filed motions for summary judgment. The District Court for Saunders County, Nebraska, overruled plaintiff's motion and granted defendants' motion, dismissing plaintiff's petition. The plaintiff has appealed from the overruling of his motion for a new trial, with the following assignments of error: (1) The decision that the transfer was effective is contrary to the facts and the law; (2) The legal description in the petition was insufficient to effect a transfer; (3) The freehold board cannot transfer land without the prior approval of the county board; (4) The petition was based on a statute which was repealed without a savings clause before the action on the petition was filed; and (5) The county officials are estopped to deny the truth of a factual representation made to plaintiff. For the following reasons, we affirm.

The facts are not in controversy. On April 11, 1968, Frank Stepanek, a single man, conveyed to Victor and Judith Stepanek, by warranty deed, a tract of land located in the southeast quarter of the southeast quarter of Section 32, Township 17, Range 8, Saunders County, Nebraska, described by metes and bounds as follows: "Commencing at the Southeast (SE) corner of Section 32, Township 17, Range 8, in Saunders County, Nebraska, thence North 553 feet to the point of beginning; thence West 458 feet; thence North 190 feet; thence East 458 feet; thence South 190 feet to the place of beginning."

On August 1, 1969, Victor and Judith Stepanek filed a freeholder's petition with the Saunders County superintendent of schools, seeking a transfer of their property from School District No. 105, a nonaccredited Class I district, to School District No. 107, an accredited

Class II district. The petition described the property as: "The Southeast Quarter (SE ¼) of the Southeast Quarter of Sec. 32, T. 17 R. 8, Thence North 553 feet to the point of beginning; thence West 458 feet; North 190 feet; thence East 458 feet; thence South 190 feet." Obviously, the description omitted the words "Commencing at the Southeast corner of." Other than that, the petition on its face was in compliance with Neb. Rev. Stat. § 79-403(1) and (2) (Reissue 1966), alleging that children of high school age resided on the property; however, school records indicate that, in August of 1969, the Stepaneks had only one child of school age and that child's date of birth was May 8, 1962.

On August 4, 1969, L.B. 1378, 1969 Neb. Laws, C. 710, §§ 1-4, became effective, and changed the law governing freehold transfers so that land could be transferred from a nonaccredited district to an accredited district if there were children of "school age" rather than of "high school age." The hearing on the petition was held, pursuant to published notice, on August 20, 1969, and the petition was approved that date by the freehold board. The records of the county superintendent, the county assessor, and the county treasurer all indicate that after 1969 the property was located and taxed in School District No. 107.

The plaintiff, Schilke, purchased the land in question on August 27, 1977. Prior to purchase of the land, Schilke attempted to ascertain in which school district the property was located, and his secretary was informed by someone in the office of the county superintendent that the property was located in School District No. 105. A Saunders County map of school districts, printed as of September 1, 1975, shows Section 32 to be in School District No. 107, with the exception of two areas which, although not conclusively described, approximate the southeast quarter of the southwest quarter, and the southeast quarter of the southeast quarter. After Schilke learned that the

property was located in School District No. 107, he filed this petition for declaratory judgment, seeking to have the 1969 freehold transfer declared invalid.

Where a judgment is attacked in a way other than a proceeding in the original action to have it vacated, reversed, or modified, or a proceeding in equity to prevent its enforcement, the attack is a "collateral attack." *County of Douglas v. Feenan*, 146 Neb. 156, 18 N.W.2d 740 (1945); *State ex rel. Southeast Rural Fire P. Dist. v. Grossman*, 188 Neb. 424, 197 N.W.2d 398 (1972). Only a void judgment is subject to collateral attack. *Stanton v. Stanton*, 146 Neb. 71, 18 N.W.2d 654 (1945); *Davis Management, Inc. v. Sanitary & Improvement Dist. No. 276*, 204 Neb. 316, 282 N.W.2d 576 (1979).

It is well settled that where the court has jurisdiction of the parties and the subject matter, its judgment is not subject to collateral attack. *State ex rel. Southeast Rural Fire P. Dist., supra.* This rule is not limited to courts of general jurisdiction, and has been held to apply to administrative boards and tribunals acting in a quasi-judicial capacity. *Cacek v. Munson*, 160 Neb. 187, 69 N.W.2d 692 (1955). See, also, Neb. Rev. Stat. §25-1901 (Reissue 1979) and *School Dist. No. 49 v. Kreidler*, 165 Neb. 761, 87 N.W.2d 429 (1958).

We have recognized the distinction between want of jurisdiction and error in the exercise of jurisdiction. "'Where jurisdiction has once attached, mere errors or irregularities in the proceedings, however grave, although they may render the judgment erroneous and subject to be set aside in a proper proceeding for that purpose, will not render the judgment void, and until set aside it is valid and binding for all purposes and cannot be collaterally attacked.'" *Cacek* at 198-99, 69 N.W.2d at 699, quoting 33 C.J. *Judgments* §39 (1924).

The issue, therefore, is whether the freehold board had jurisdiction of the subject matter and the parties. The plaintiff had argued that the petition alleged that

the children were of high school age and this was a misstatement of fact on which the board relied. The plaintiff further argued that the petition was filed under Neb. Rev. Stat. § 79-403 (Reissue 1966) before its amendment and, therefore, the old law applies, and the petitioners could not have been granted the transfer because their child was of school age rather than high school age, even though the new law would grant them relief.

It is the rule in this jurisdiction that the sufficiency of a petition is not the test of jurisdiction. "'Even though the court commits error in holding it sufficient if it had jurisdiction, such holding will not subject the judgment rendered to collateral attack.'" *Wistrom v. Forsling*, 144 Neb. 638, 641-42, 14 N.W.2d 217, 219 (1944), quoting *Logan County v. Carnahan*, 66 Neb. 693, 95 N.W. 812 (1903).

"Whether the facts stated in the petition constituted a cause of action and entitled the plaintiffs to relief, was a judicial question which the trial court had authority to consider and decide; and it is a universal principle — an axiom of law — that where a court has jurisdiction of both the subject-matter and the parties, power to decide implies authority to decide either way — to reach either a right or a wrong conclusion — and, in conformity therewith, to pronounce a judgment that will be conclusive upon the litigants and those in privity with them, unless reversed, vacated or modified in an appellate or other direct proceeding instituted for that purpose. The sufficiency of the petition is not a test of jurisdiction; although it may be defective in substance it will support a judgment if the court has authority to grant the relief demanded and the facts upon which the demand is based are intelligibly set forth." *Dryden v. Parrotte*, 61 Neb. 339, 340-41, 85 N.W. 287, 287-88 (1901). See, also, *Wistrom, supra.*

Plaintiff complains that the description contained in the petition and notice was incomplete and insuf-

ficient to confer jurisdiction on the freehold board or to authorize transfer of the subject property. "[A]n error in the description will not invalidate the petition [to alter a school district boundary] where it is clear from a reading of the entire petition what land is intended." 78 C.J.S. *Schools and School Districts* § 37 at 702 (1952). A petition for the formation of a school district which describes the boundaries by the name of the farms is sufficient. *DeHaven v. Hardinsburg G. C. S. D. No. 4*, 164 Ky. 511, 175 S.W. 994 (1915).

The records introduced into evidence disclosed that Frank Stepanek owned the entire 40 acres described as the southeast quarter of the southeast quarter of Section 32, except for the 190 feet by 458 feet tract of land conveyed to Victor and Judith Stepanek, and which was the subject of the transfer to School District No. 107. The description in the petition was sufficient to clearly identify the property involved, and the freehold board gained jurisdiction of the parties and the subject matter when that petition was filed, pursuant to § 79-403(1) and (2) (Reissue 1966). Notice was given; a hearing was held; and the board authorized the transfer from School District No. 105 to School District No. 107, a matter certainly within its authority and jurisdiction. That judgment became final, and cannot at this time be collaterally attacked because any defect in the petition neither voids the judgment nor robs the board of its jurisdiction.

Nevertheless, plaintiff insists that the deed from Frank Stepanek to Victor and Judith Stepanek, and the ordered transfer by the freehold board of the land in question to School District No. 107, was a subdivision of land within the meaning of Neb. Rev. Stat. §§ 23-372 to 377 (Reissue 1962), in effect at the time. Because such "subdivision" was accomplished without first having been approved by the Saunders County board, the plaintiff reasons that all proceedings were void. However, there is no evidence in the record that the Saunders County board had adopted "comprehen-

sive and uniform platting and subdivision regulations." Section 23-376 provided that "The provisions of sections 23-373 to 23-377 shall not apply in any county . . . until the county board of such county has duly adopted comprehensive and uniform platting and subdivision regulations . . . ." Therefore, approval of the "subdivision" was not required in this instance.

Another assertion of the plaintiff is that the petition was filed on August 1, 1969, and, since § 79-403 (Reissue 1966) was repealed and reenacted, effective August 4, 1969, by L.B. 1378, with no specific savings clause, there remained no statutory authority for the original filing. He further asserts no hearing could be held on the then unauthorized petition, and the petition should have been refiled to comply with the new law. In support of these assertions, the plaintiff cites *Clark v. Sweet*, 187 Neb. 232, 188 N.W.2d 889 (1971). However, that case merely stands for the proposition that a pending petition before an administrative board is not a "pending action" within the meaning of the general savings statute, Neb. Rev. Stat. § 49-301 (Reissue 1978). That case indicated that the statute in effect at the time of the hearing was applicable, rather than the statute in effect at the time of the filing. Further, *Clark*, *supra*, did not hold that the petition must be refiled under the new statute in order for the board to maintain its jurisdiction, and we find no reason to hold so now.

Finally, the issue of equitable estoppel is raised. This is based on plaintiff's statement that his secretary was told by someone in the county superintendent's office that this particular property was in School District No. 105, and that a map prepared by the county superintendent's office could be interpreted as supporting that statement. There seems to be no disagreement that the official records in the office of the county superintendent, as well as in the offices of the county assessor and the county treasurer, revealed that the property in question was transferred to School District

No. 107 in 1969. There is nothing in the record to support a finding that the statement made by the unknown employee in the county superintendent's office was authorized. As a matter of fact, the evidence is to the contrary. "The general rule is that while ordinarily a municipality may not be estopped by unauthorized conduct, representations, promises or pledges of the officers, it may, within the limitation of its legal powers, be estopped by its *official acquiescence in, and approval of, acts originally unauthorized.*" *May v. City of Kearney*, 145 Neb. 475, 489, 17 N.W.2d 448, 457 (1945) (emphasis supplied).

"No estoppel of a municipality can grow out of dealings with public officers of limited authority. A municipality is not estopped by the unauthorized acts of its officer or agent." *City of Cozad v. Thompson*, 126 Neb. 79, 84, 252 N.W. 606, 608 (1934). If the representations were made, which we must assume for the purposes of this appeal, there is nothing in the record to suggest "official acquiescence in, and approval of," the same.

The plaintiff's assignments of error are without merit, and the order and judgment of the District Court were correct and are affirmed.

AFFIRMED.

DIANE ALLEN, PERSONAL REPRESENTATIVE OF THE ESTATE OF MARY BEATRICE CARPENTER, DECEASED, APPELLEE, V. DEALER ASSISTANCE, INC., A CORPORATION, APPELLANT.

299 N.W.2d 744

Filed December 12, 1980. No. 43049.

1. **Conversion.** Conversion is any distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein.
2. ——. An action for conversion is not maintainable unless the plaintiff,

at the time of the alleged conversion, was entitled to the immediate possession of the property.

3. **Conversion: Damages.** In an action for damages alleged to have been sustained by reason of the conversion of personal property, the plaintiff must recover, if at all, upon the strength of his own title and not upon the weakness of the title of the defendant.
4. **Intent of Parties: Contracts: Principal and Agent: Consignment.** The primary test of whether a transaction in the form of an agency to sell or a consignment created the relation of buyer and seller or one of principal and agent is the intention of the parties as gathered from the whole scope and effect of the language used. The label which the parties give to the transaction does not determine its character, and courts look beyond mere labels and examine the contract as a whole in order to ascertain the intention of the parties.
5. **Sales of Goods: Consignment: Principal and Agent.** If a transferee acquires absolute dominion over goods, with the right to sell and dispose of goods at prices and upon terms as he sees fit, and becomes bound to pay a specified price for them, either at a specified time or upon occurrence of a specified future event, as when he resells them, he becomes the purchaser and title thereto passes to him at once.

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

Van Steenberg, Brower, Chaloupka, Mullin & Holyoke for appellant.

Rick L. Ediger of Raymond, Olsen & Coll, P.C., for appellee.

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

KRIVOSHA, C.J.

The appellant, Dealer Assistance, Inc., a corporation, (Dealer) appeals from a decision of the District Court for Scotts Bluff County, Nebraska, which entered judgment in the amount of $13,000, plus interest, in favor of the appellee, Diane Allen, as personal representative of the estate of Mary Beatrice Carpenter, deceased, (Carpenter) and against Dealer. The judgment was based upon a finding by the trial court that Dealer had unlawfully converted the prop-

erty of Carpenter, to Carpenter's damage. Dealer maintains that the trial court erred in entering the judgment as it did. We agree with Dealer and accordingly reverse and dismiss the action.

The record herein discloses that Leisure Living Mobile Homes, Inc. (Leisure), a Nebraska corporation, was engaged at Mitchell, Nebraska, in the business of selling new and used mobile homes. On July 21, 1975, Leisure executed and delivered to Dealer a security and financing statement securing a floor plan agreement, which statement was filed in the office of the Scotts Bluff county clerk on July 28, 1975. The financing statement covered all new and used mobile homes of Leisure then owned or thereafter acquired.

In the spring of 1976, Carpenter purchased from Leisure a Chickasha mobile home (coach) for the sum of $12,555. Apparently, Carpenter became dissatisfied with the coach and decided to purchase a Geer mobile home from Leisure, intending to trade the coach in to Leisure in connection with the purchase of the Geer. While Leisure maintained at the time of trial that Carpenter merely consigned the coach to Leisure, the record does not support that claim.

Carpenter had earlier removed the coach to Wyoming, where she lived. Apparently, Leisure was unable to pay for the Geer mobile home purchased by Carpenter until the coach was sold. In order to overcome that difficulty, Leisure and Carpenter both executed a promissory note in favor of the Lusk State Bank for the sum of $12,967. The proceeds of the loan were sent to Geer Sales to discharge Leisure's debt on the new Geer mobile home purchased by Carpenter. To secure the note, a security agreement covering both the Geer mobile home and the coach were also signed by Carpenter and Leisure and delivered to the Lusk State Bank. At the time of signing the security agreement, a manufacturer's statement of origin to the coach was delivered to the Lusk State Bank with instructions to hold it until the coach had been sold.

When the sale was completed, Leisure would instruct the Lusk State Bank to deliver the manufacturer's statement of origin to the new buyer.

In connection with the loan, Leisure wrote to the Lusk State Bank as follows: "Please be advised that on this date I have signed with Mary B. Carpenter a note and Security Agreement and Financing Statement dated December 1, 1976 in the amount of $12,967.00 for six months with your bank and the intention of this letter is to advise you that within a period of six months I will have disposed of a 1976 14' x 75' 'Chickashaw [sic] Medallion' mobile home that Mary B. Carpenter has *traded in* on the purchase of a 1976 'Geer' 14' x 70' mobile home. Mrs. Carpenter has pledged her mobile home as collateral on this note but *the responsibility for paying the principal and interest will be borne by myself or my company*, Leisure Living Mobile Homes, Inc. of Mitchell, Nebraska. As soon as a sale has been consummated on the 1976 'Chickashaw [sic] Medallion' 14' x 75' mobile home, I will immediately pay your bank in full with the proceeds from said sale." (Emphasis supplied.)

On June 6, 1977, Leisure removed the coach from Wyoming to Leisure's sale lot at Mitchell, Nebraska, where the trailer was held for resale with other trailers owned by Leisure. No sign or other notation was attached to the coach informing the public that the coach was held on consignment.

On September 30, 1977, Dealer repossessed the coach from Leisure's lot, along with two other trailers owned by Leisure. Dealer's basis for taking possession of the trailers was a claim that Leisure was then delinquent in its payment of charges due Dealer from Leisure.

On October 3, 1977, Carpenter obtained a Wyoming certificate of title to the coach and filed suit against Dealer for damages alleged to have been suffered by Carpenter by reason of Dealer's taking possession of the coach from Leisure. There is some evidence in

the record that after Dealer had taken possession of the coach from Leisure and suit by Carpenter was filed, Carpenter paid the Lusk State Bank the amount due on the note and obtained an assignment of the bank's interest. However, no claim is made in this suit that the basis of Carpenter's action arises out of any rights of the bank. Rather, the suit is based upon Carpenter's alleged right to immediate possession.

The trial court found that the coach was merely consigned to Leisure by Carpenter and, therefore, Carpenter was the owner of the property when Dealer took possession of it. Leisure and Carpenter both conceded that neither the provisions of Neb. U.C.C. § 2-326(3)(a) nor § 2-326(3)(c) (Reissue 1971) were complied with in that neither was a sign placed on the coach advising the general public that the property was held on consignment, nor was any filing made. However, the trial court specifically found that the provisions of Neb. U.C.C. § 2-326(3)(b) (Reissue 1971) were sufficiently complied with to bring the property within an exception to the Uniform Commercial Code. Section 2-326(3)(b) provides, in effect, that even though there may be no sign placed on the mobile home and even though no official filing is made, if Leisure is generally known by its creditors to be substantially engaged in selling the goods of others, its failure to place a sign on the mobile home or formally file some security document does not preclude Carpenter from maintaining that the property was held by Leisure on consignment.

Before proceeding to determine whether the trial court was correct in its determination, we must first decide whether the transaction between Carpenter and Leisure involving the coach was, in fact, a sale or a consignment. If it was a sale, Carpenter had no further interest in the coach and could not have maintained an action for conversion. The reason why Carpenter would be unable to maintain this action is apparent. The general definition of conversion, long

accepted in this and other jurisdictions, is any distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein. *Polley v. Shoemaker*, 201 Neb. 91, 266 N.W.2d 222 (1978). Furthermore, we have held that an action for conversion is not maintainable unless the plaintiff, at the time of the alleged conversion, was entitled to the immediate possession of the property. *Jessen v. Blackard*, 159 Neb. 103, 65 N.W.2d 345 (1954). From our earliest decisions, we have continuously declared that in an action for damages alleged to have been sustained by reason of the conversion of personal property, the plaintiff must recover, if at all, upon the strength of his own title and not upon the weakness of the title of the defendant. *Holmes v. Bailey*, 16 Neb. 300, 20 N.W. 304 (1884); *Jessen v. Blackard, supra.*

Therefore, unless Carpenter was entitled to the immediate possession of the coach at the time Dealer repossessed it, Carpenter cannot maintain an action for conversion. We believe the facts of this case compel a finding that the transaction was, indeed, a sale and not a consignment and that Carpenter, therefore, was not entitled to the immediate possession of the coach, and not entitled to maintain an action in conversion.

As noted in 67 Am. Jur. 2d. *Sales* § 35 (1973), "The primary test whether a transaction in the form of an agency to sell or consignment created the relation of buyer and seller or one of principal and agent was the intention of the parties to be gathered from the whole scope and effect of the language used. The label which the parties give to the transaction [does] not determine its character, and courts [look] beyond mere labels and [examine] the contract as a whole in order to ascertain the intention of the parties."

In the early case of *Buffum v. Descher*, 1 Neb. (Unoff.) 736, 96 N.W. 352 (1901), we said that if a transferee acquires absolute dominion over the goods,

with the right to sell and dispose of goods at prices and upon terms as he sees fit, and becomes bound to pay a specified price for them, either at a specified time or upon the occurrence of a specified future event, as when he resells them, he becomes the purchaser and title thereto passes to him at once. Likewise, see, *Mack v. Drummond Tobacco Co.*, 48 Neb. 397, 67 N.W. 174 (1896); *Yoder v. Haworth*, 57 Neb. 150, 77 N.W. 377 (1898); *Wolf v. Schaben*, 272 F.2d 737 (8th Cir. 1959); *Rotterman v. General Mills, Inc.*, 245 Iowa 229, 61 N.W.2d 718 (1953).

As we keep these principles in mind and examine the facts of the case, we can reach no other conclusion except that this was a sale. The initial motive for delivering the coach to Leisure was Carpenter's purchase of a new mobile home from Leisure. Had Leisure been in a financial position to pay off the amount due on the Geer home, it would have been unnecessary for Carpenter to have executed any note with the Lusk State Bank. It is clear from the entire transaction with the Lusk State Bank that borrowing the money was for the benefit of Leisure and not for the benefit of Carpenter. The letter sent by Leisure to Lusk State Bank clearly points that out. Leisure's letter admits that the coach had been "traded in" to Leisure and that, while Carpenter's name does appear on the note, Leisure is primarily responsible for the payment and will pay the same when the coach has been sold.

The price at which the coach was to be sold and the terms under which the coach was to be sold were left solely to Leisure. From the record we have here, Carpenter had no authority or right to dictate either the price or the terms at which the coach would be sold. Furthermore, the record is totally devoid of any evidence to indicate that Carpenter could have demanded the return of the coach at any time if it were not sold by Leisure either in a seasonable time or at an appropriate price. If, for some reason, the coach were sold

for less than the amount due the bank, the letter sent by Leisure to the bank clearly indicates that Leisure would be obligated to come up with the balance. Likewise, any amount over and above that owed to the Lusk State Bank would belong to Leisure. Carpenter had no claim on either the coach or the proceeds realized from the sale of it. One is unable to see any evidence which would indicate that Carpenter believed that she was retaining any further interest in the coach except to the extent that it was security for a note at the Lusk State Bank which Carpenter had signed, along with Leisure. We believe that fact, however, is not sufficient to establish a consignment and the transaction must be considered to have been a sale. Having, therefore, determined that the transaction was a sale and not a consignment, we are further required to determine that Carpenter was not entitled to the immediate possession of the coach. To be sure, it would appear that prior to the time the coach was repossessed by Dealer, Carpenter had no right of possession in the coach. Therefore, having no right of possession, Carpenter had no right to sue in conversion. The fact that Carpenter later acquired the unrecorded security interest of Lusk State Bank is not sufficient to grant to Carpenter a basis to sue in conversion on her own behalf. Some serious question may exist of whether an action by the Lusk State Bank would even have been maintainable due to the fact that the security interest of the bank was unrecorded prior to the taking by Dealer. Be that as it may, we need not consider that issue because the pleadings in this case are not based upon any right of the Lusk State Bank, but are limited solely to a claim by Carpenter that she was entitled to immediate possession and was denied that right by Dealer. The facts do not bear that out and, therefore, the trial court was in error in entering judgment for Carpenter and against Dealer. We, therefore, reverse the decision of the trial court and remand

the matter to the trial court with instructions to dismiss the action.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

BRODKEY and WHITE, JJ., concur in result.

WILLIAM G. VILES, APPELLANT, V. OLD SECURITY LIFE INSURANCE COMPANY AND COLONY CHARTER LIFE INSURANCE COMPANY OF LOS ANGELES, CALIFORNIA, SUCCESSOR OF OLD SECURITY LIFE INSURANCE COMPANY, APPELLEES.

299 N.W.2d 532

Filed December 12, 1980. No. 43073.

1. **Summary Judgment.** The primary purpose of the summary judgment statute is to pierce sham pleadings and to dispose of, without the necessity of expense and delay of trial, those cases where there is no genuine claim or defense.
2. ——. Where the allegations of the pleadings have been pierced by a motion for summary judgment and the resistance to the motion fails to show that a genuine issue of fact exists, summary judgment should be granted.

Appeal from the District Court for Washington County: WALTER G. HUBER, Judge. Affirmed.

James P. Miller for appellant.

Thomas A. Gleason of Boland, Mullin & Walsh for appellees.

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

KRIVOSHA, C.J.

The appellant, William G. Viles (Viles), appeals from the order of the District Court for Washington County, Nebraska, which sustained the motion for summary judgment of the appellees, Old Security

Life Insurance Company and Colony Charter Life Insurance Company of Los Angeles, California. We affirm.

Sometime in August 1973, Old Security Life Insurance Company (Security Life) issued a disability income plan policy to Viles. The policy had two provisions pertinent to this action. Part 10 under the heading "Sickness Benefits" provided as follows:

"Lifetime Confining Sickness Disability Benefits

"The company will pay at the rate of Two Hundred ($200.00) Dollars per month for one day or more from the date of the first medical treatment and so long as the Insured lives, if Such Sickness causes the Insured total disability, total loss of time, and *requires continuous confinement within doors* except for necessary visits to a physician's office, or to a hospital for treatment, and Such Sickness requires regular and personal attendance by a licensed physician, surgeon, osteopath or chiropractor, other than the Insured." (Emphasis supplied.)

Part 12 under the same heading provided as follows:

"Non-confining Sickness Disability Benefits for Three Months

"The Company will pay at the rate of Two Hundred ($200.00) Dollars per month for one day or more but not to exceed three months, if Such Sickness *does not require continuous confinement within doors* but does cause continuous total disability, total loss of time and requires regular attendance by a licensed physician, surgeon, osteopath or chiropractor other than the insured." (Emphasis supplied.)

The distinction between the two paragraphs is apparent. While both of them require that the insured be totally disabled, if the total disability does not require confinement within doors, the insured is paid $200 per month, not to exceed 3 months. If the disability is of such nature that it requires continuous confinement within doors, the insured receives payment of $200 per month for as long as the insured lives and

the disability continues causing the insured to be confined within doors.

In 1974 and 1975, Viles underwent hip surgery in which both of his hips were replaced. Security Life believed, at that time, that Viles was totally disabled and confined to his home and proceeded to pay him pursuant to Part 10 of the policy. In 1977, Security Life, now believing that they were in error in their original determination, advised Viles that, effective February 10, 1977, they would no longer pay him under Part 10 of the policy. Instead, they believed that he was only entitled to receive payment under Part 12 in that, while he was totally disabled, he was not required to be confined to his home. Viles rejected the company's contention and commenced suit to require Security Life to continue making payment to him under Part 10 of the policy. In response to the suit, Security Life filed a motion for summary judgment and, in support of its motion, took the depositions of both the appellant and the appellant's physician, Dr. Michael O'Neil.

Dr. O'Neil testified by deposition that the hip operation was a success and, therefore, he released appellant to return to work several months after the surgery. Dr. O'Neil did not advise the appellant to stay in his own home and, in fact, stated that the appellant would have been encouraged, within reason, to move about and leave his home for purposes not connected with treatments of his illness. No medical testimony was introduced to the contrary and no medical evidence appears anywhere in this record to indicate that appellant's disability, if it exists, requires him to be confined to his home.

Moreover, Viles' deposition disclosed that he was not, in fact, confined to his home and was able to get about if he so desired. He specifically admitted that he was able to leave the house to go to the store or to the bank and that, since December of 1974, he has been able to go out of the house for anything he de-

sired. He, likewise, is able to drive an automobile as he wishes and does presently drive an automobile. Mr. Viles was asked the following question during the deposition: "Is it fair to say, then, that you were physically able to leave home and travel about for purposes not connected with your illness ever since April of 1974?" His answer was, "Yes." As we have indicated, there have been no counter-showings filed by Viles to refute any of the evidence introduced which would indicate that, while Viles may be totally disabled, he is not, in fact, required to be confined to his home.

Viles argues to us that the provisions of the policy should not be narrowly construed and the fact that there is evidence that he occasionally goes out does not preclude him from recovering under the terms of the policy. In support of this claim, he cites to us the case of *Mackprang v. National Casualty Co.*, 127 Neb. 877, 257 N.W. 248 (1934). The facts of the *Mackprang* case, however, are not at all similar to the instant case. In *Mackprang*, it was clear that the insured was totally disabled *and* confined to his home. We said in *Mackprang* at 884, 257 N.W. at 251: "Where an insured, totally disabled, is taken twice in a car a distance of a few blocks for a short time to impart information particularly within his knowledge about a business with which he had been connected, but performs no work, he is not prevented from recovery of benefits under a health insurance policy for period which insured is 'necessarily, continuously and actually confined within the house.'" We agree with our holding in *Mackprang*.

However, as we noted, the facts of the instant case are not at all similar to *Mackprang*. Not only does Viles admit he goes to various places outside the home on a regular basis, but we are unable to find any evidence in the record which justifies Viles' claim that he is required to be confined to his home. His own doctor testified that he did not, at any time, instruct

Viles to be confined to his home and would have encouraged him to return to work and to get out. Apparently, Viles' decision to do otherwise is of his own choice and without medical necessity. Viles' situation is certainly different from the two isolated trips in a car over a short distance noted in the *Mackprang* decision. Nothing in the evidence establishes that Viles' disability "requires continuous confinement within doors," as required by the terms of the policy. Absent that showing, the company was completely justified in refusing to continue making payments to Viles. Viles, indeed, may be totally disabled for purposes of working. Under those circumstances, he would be entitled to collect under Part 12 of the policy, but not Part 10.

In *Mutual Benefit Health and Accident Assn. v. Milder*, 152 Neb. 519, 548, 41 N.W.2d 780, 796 (1950), we said: "[T]here must be a substantial confinement within doors and regular medical attendance therein by reason of the illness. There may be needful and beneficial interruption of the confinement with the approval and advice of his physician in attempts to restore the health of the insured, and there may be necessary deviation from confinement indoors on account of occurrences or emergencies over which he has no control, but this does not mean that the requirement of confinement within doors may be ignored or disregarded, and recovery had under this provision of the policy merely because insured is totally disabled and suffers a total loss of time. If an insured is able to and does leave his home and travels about as he desires for purposes not connected with his sickness, as the evidence summarized herein shows appellee did for the larger part of the time with which this case is concerned, he is not continuously confined indoors within the meaning of a policy of the kind involved herein." What we said in *Milder* applies with equal force in the instant case.

The trial court, therefore, was correct, under the

facts, in sustaining the motion for summary judgment and not awaiting the taking of evidence at trial. The primary purpose of the summary judgment statute is to pierce sham pleadings and to dispose of, without the necessity of expense and delay of trial, those cases where there is no genuine claim or defense. *Page v. Andreasen*, 200 Neb. 641, 264 N.W.2d 682 (1978). Where the allegations of the pleadings have been pierced by a motion for summary judgment and the resistance to the motion fails to show that a genuine issue of fact exists, summary judgment should be granted. *Page v. Andreasen, supra.* Under the circumstances, the trial court had no discretion in the matter and was obligated to grant the motion for summary judgment. Accordingly, then, the judgment of the trial court is affirmed.

AFFIRMED.

ANDY VAUGHN HOWARD, APPELLANT, V. MYRA MAY HOWARD, APPELLEE.

299 N.W.2d 442

Filed December 12, 1980. No. 43094.

1. **Divorce: Decrees.** The control of a divorce decree during the 6-month period pending finality is within the sound judicial discretion of the trial court.
2. **Divorce: Modification of Decree.** Neb. Rev. Stat. § 42-372 (Reissue 1978) does not bar modification of the divorce decree to include alimony, where none was awarded in the final decree, if such modification is sought within the 6-month period after the decree has been filed.
3. _____: _____. Permitting the trial court to modify its decree within 6 months impliedly requires a showing of good cause where the court vacates a decree on its own motion without opportunity to produce evidence with respect to the terms of the proposed modification.

Appeal from the District Court for Lancaster County: SAMUEL VAN PELT, Judge. Affirmed in part, and in part reversed and remanded.

Thomas R. Lamb of McArthur, Lamb, Lyford & Gilmore for appellant.

Gary R. Pearson for appellee.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, BRODKEY, WHITE, and HASTINGS, JJ., and MORAN, District Judge.

WHITE, J.

On May 4, 1979, the District Court for Lancaster County, Nebraska, entered a decree dissolving the marriage of the parties, awarding custody of the minor children, dividing the property, fixing child support, and ordering the appellant-husband to pay debts incurred during the marriage of approximately $7,000. The decree made no provision for alimony. In July 1979, appellant filed a petition in bankruptcy and, although the record is not clear, he apparently listed some of the debts he had been ordered to pay and for which, in due course, he received a discharge.

On October 22, 1979, the District Court vacated the decree of May 4, 1979, and entered, without further hearing, a modified decree identical in all respects with the original decree except that the provision requiring appellant to pay debts was stricken and a provision ordering appellant to pay appellee-wife $200 per month for 36 months was added. The action of the District Court arose on a motion for citation of the appellant for contempt for failure to pay the debts. The trial court received evidence indicating appellee had been subjected to collection pressure by the creditors, and concluded appellant had no intention to pay the debts and that the bankruptcy petition was a fraud on the court and a frustration of the decree. After a motion to set aside the modified decree was overruled, this appeal was filed. We affirm in part and, in part, reverse and remand.

Appellant assigns as error: "The court erred in redetermining the rights of the parties on the merits

following the vacation of the original decree without . . . a rehearing on the merits."

At the outset, appellee suggests that the trial court had the authority under Neb. Rev. Stat. § 25-2001 (Reissue 1979) to modify the decree during the same term. The rules of the District Court are filed with the Clerk of the Supreme Court pursuant to the rule adopted April 5, 1978, and we take judicial notice of those rules. *State v. Barrett*, 200 Neb. 553, 264 N.W.2d 434 (1978). Rule II of the District Court for Lancaster County provides: "There shall be two regular terms of court each year, the January Term and the September Term, said terms to commence on dates in each of said months to be designated by the judges." The appellee filed two motions to vacate; however, both such motions were overruled and there was no appeal from that ruling. Since there was no pending motion to modify or vacate, the court took the action to modify or vacate on its own motion. That action was taken at a different term.

Implicit in the trial court's action are the following questions: (1) Did the trial court have power to vacate the decree? (2) Was the trial court authorized to enter a modified decree providing for alimony, without a further hearing, when none was provided for in the original decree?

Neb. Rev. Stat. § 42-372 (Reissue 1978) provides that, absent appeal, "the court may, at any time within such six months [of the date of the decree], vacate or modify its decree."

"'The control of a divorce decree during the 6-month period pending finality is within the sound judicial discretion of the trial court.'" *Miller v. Miller*, 190 Neb. 816, 817, 212 N.W.2d 646, 647 (1973) quoting *Zachry v. Zachry*, 185 Neb. 336, 175 N.W.2d 616 (1970). The District Court did not exceed its authority in vacating the decree.

Before considering whether a hearing was necessary prior to the entry of a modified decree, we are faced

with Neb. Rev. Stat. § 42-365 (Reissue 1978), which reads, in part: "Unless amounts have accrued prior to the date of service of process on a petition to modify, orders for alimony may be modified or revoked for good cause shown, but when alimony is not allowed in the original decree dissolving a marriage, such decree may not be modified to award alimony."

In *Haug v. Haug*, 195 Neb. 377, 238 N.W.2d 455 (1976), this court was considering an application to modify a decree of divorce entered more than 6 months before the application was filed. We held a modification could not be allowed to provide alimony where no provision for alimony was made in the final decree.

We think that the provisions of § 42-365 and § 42-372 can be reconciled. Although we have discovered no precedents, we hold that § 42-372 allows a modification within the 6 months before the decree is final to provide for alimony where none was awarded in the final decree. We further hold that § 42-365 is limited in its application to those situations in which, except for this statute, the court could not otherwise modify or vacate the decree.

Should the court have granted appellant a further hearing? In this factual context, we hold that it should have. We said in *Miller v. Miller*, *supra* at 817, 212 N.W.2d at 647: "Section 42-372, R. S. Supp., 1972, permitting the trial court to modify its decree within 6 months, impliedly requires a showing of good cause." While the showing requiring modification might result in the same evidence being introduced as in the contempt hearing, the appellant will have notice at a subsequent hearing of the proposed modification and be prepared to introduce evidence. We do not hold that, after every vacation of a decree, a trial court must hold a further hearing to modify; simply that one is required when a court, in effect, vacates a decree on its own motion without opportunity to produce evidence with respect to the terms of the proposed modification.

The order vacating the decree is affirmed; the modified decree is set aside; and the cause is remanded to the District Court for further proceedings not inconsistent herewith.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

THE METROPOLITAN TECHNICAL COMMUNITY COLLEGE AREA, A TECHNICAL COMMUNITY COLLEGE AREA, APPELLANT, V. SOUTH OMAHA INDUSTRIAL PARK DEVELOPMENT CORPORATION, A NONPROFIT CORPORATION, AND OMAHA INDUSTRIAL FOUNDATION, A NONPROFIT CORPORATION, APPELLEES.

299 N.W.2d 535

Filed December 12, 1980. No. 43108.

1. **Summary Judgment.** 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. In considering such a motion, the trial court must take the view of the evidence most favorable to the party against whom the summary judgment motion is directed, giving to that party the benefit of all favorable inferences that may be reasonably drawn from the evidence.
3. ——. 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.
4. **Questions of Fact.** When undisputed facts require the exercise of reason and judgment so that one reasonable mind may infer that a controlling fact exists and another that it does not exist, there is a question of fact.

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

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

Neil B. Danberg, Jr., of Kennedy, Holland, DeLacy & Svoboda for appellees.

Heard before KRIVOSHA, C.J., MCCOWN, and WHITE, JJ., and COLWELL and HUBER, District Judges.

KRIVOSHA, C.J.

This is an appeal from a judgment entered by the District Court for Douglas County, Nebraska, sustaining a motion for summary judgment filed by one of the appellees herein, Omaha Industrial Foundation, a nonprofit corporation (OIF). Several assignments of error are made by the appellant, the Metropolitan Technical Community College Area (Metro Tech). For purposes of this appeal, however, we need only consider whether a genuine issue as to a material fact existed. If such an issue existed, the trial court erred in granting the motion for summary judgment. Our review of the case convinces us that a genuine issue as to a material fact did exist and that the trial court, therefore, was in error in granting the motion for summary judgment. Therefore, we reverse and remand.

Shortly after its formation in April of 1974, Metro Tech began looking for campus sites in the Omaha, Nebraska, metropolitan area. Metro Tech chose as a first priority a campus in South Omaha. At that time, one of the appellees herein, South Omaha Industrial Park Development Corporation (South Omaha Corp.), was offering land for sale in an industrial park located in South Omaha. OIF served as the sales agent for South Omaha Corp. The particular tract in question was a part of what was once Omaha's thriving stockyards and meatpacking industry and which was, in the late 1960's, idled and abandoned.

South Omaha Corp., with funds raised from private sources, including individuals, businesses, and banks, purchased a tract of land on the site of the old stockyards, immediately to the west of the South Omaha business district. Following the purchase of the real

estate, the U.S. Department of Commerce awarded the city of Omaha a federal redevelopment grant to create a 106-acre industrial park.

The engineer selected to design the industrial park was the Leo A. Daly Company. According to Mr. Ed Cambridge, an employee of the Daly Company, the purpose of the project, after the land was acquired, was to clear and grade the land and install utilities and streets for industrial sites. However, before the land could be turned into an industrial park, various buildings on the land had to be demolished, including the large Armour packing plant and various livestock pens.

In formulating specifications for the industrial park, and specifically for clearing the land after the structures had been demolished, the Daly Company, in cooperation with the Omaha Public Works Department, concluded that foundation and debris should be cleared down to 2 feet below grade but not below that point. After the specifications were established, contracts were let and the work commenced on the creation of the South Omaha Industrial Park which was completed in late 1973.

Once the park had been completed, the South Omaha Corp. engaged OIF as a broker to assist in the sale of the land. Metro Tech became interested in acquiring some of the land for the development of its campus. The land sale was negotiated primarily between the president of Metro Tech, Dr. Marm Harris, and the executive director of OIF, Richard Sorenson. Harris maintains that, during the negotiations, Sorenson represented to Harris that the prior building structures on the premises had been demolished and dug up; that the debris had been removed; and that the land was fully developed, ready to build on and suitable for Metro Tech campuses. Sorenson admitted that he advised Harris that, "The buildings are now torn down, the site has been readied for con-

struction and it is available for sale." The land was purchased by Metro Tech.

When Metro Tech began construction, it discovered that the site would not support building foundations because of the condition of the soil below the surface. Beginning only 2 feet below ground level were found building remnants, subterranean rooms, tunnels, drains, layers of brick and mortar, broken concrete, and miscellaneous decomposable materials which had not been either completely demolished or removed. As a result, Metro Tech had to spend over $95,000 to remove the debris and other material and to fill and compact the earth before it constructed the first two campus buildings on the site.

Metro Tech filed suit against OIF and South Omaha Corp. maintaining that, by reason of false representations and concealment of the fact that the land was not ready to be built upon, Metro Tech suffered damage. A second cause of action sought damages for an alleged breach of express and implied warranties. OIF then filed its motion for summary judgment which was sustained by the District Court.

It appears that the central question is whether a representation that the land is "fully developed industrial land, suitable for industrial buildings and development, and ready to build on" meant that all of the buildings previously located on the site had been demolished, all of the debris removed, the soil compacted and made ready to accept foundations, as contended by Metro Tech; or whether that statement simply meant that the land was not agricultural land, had been leveled, had utilities to its site, and would accommodate future construction, as contended by OIF.

As we indicated at the outset, we need not resolve how that issue should be decided. All we need determine is whether there was, indeed, a genuine issue of material fact. In *McDowell v. Rural Water Dist. No. 2*, 204 Neb. 401, 410, 282 N.W.2d 594, 599 (1979), we

said, "The rules relating to the issuance of summary judgments have often been considered and are well settled in this jurisdiction. . . . '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.'" 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 the summary judgment is directed, giving to that party the benefit of all favorable inferences that may be reasonably drawn from the evidence. *Valentine Production Credit Assn. v. Spencer Foods, Inc.*, 196 Neb. 119, 241 N.W.2d 541 (1976); *Farmland Service Coop, Inc. v. Klein*, 196 Neb. 538, 244 N.W.2d 86 (1976). This court has stated that 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); *Fisher v. Stuckey*, 201 Neb. 439, 267 N.W.2d 768 (1978). Likewise, we have stated that summary judgment should not be used to deprive a litigant of a formal trial if there is a genuine issue of fact. *Miller v. Aitken*, 160 Neb. 97, 69 N.W.2d 290 (1955).

There appears to be no conflict as to what was said. The conflict is over the meaning of what was said. Unless we can say that, as a matter of law, "fully developed" or "ready to build on" meant that the land was cleared and leveled, equipped with adequate utilities, provided with paved roads, and served by access to numerous transportation facilities, as contended by the appellee, then the granting of the motion for summary judgment was premature. No case is cited to us, nor are we able to discover any case in which it has been determined that the words involved herein have a clear and recognized meaning.

The record at this time can support at least two reasonable inferences. One is the position taken by OIF to the effect that no inference could be drawn concerning the ground below the surface; that what was meant was that the site was no longer farmland, but had utilities and was ready for further development. Another reasonable inference, as suggested by Metro Tech, is that the statement meant that all the debris had been removed and a building could be constructed without additional site preparation cost. When undisputed facts require the exercise of reason and judgment so that one reasonable mind may infer that a controlling fact exists and another that it does not exist, there is a question of fact. *Hirsch v. Jones*, 191 N.Y. 195, 83 N.E. 786 (1908). In reviewing motions for a directed verdict, a similar situation to what is here involved, we have frequently said that, where different minds may draw different conclusions from the evidence or there is a conflict in the evidence, the matter at issue must be submitted to the jury. *Boardman v. McNeff*, 177 Neb. 534, 129 N.W.2d 457 (1964); *Crusinberry v. Merryman*, 176 Neb. 479, 126 N.W.2d 481 (1964); *Hancock v. Parks*, 172 Neb. 442, 110 N.W.2d 69 (1961).

If, indeed, the words admittedly used by OIF to Metro Tech have an accepted meaning in the building industry, the record does not so indicate, and a question of fact, therefore, exists. Likewise, if the words have no recognized meaning in the industry, then, indeed, what OIF intended the words to mean and what Metro Tech should have reasonably understood the words to mean raises a genuine issue of fact as to a material issue. In either event, the record, at this time, is insufficient to sustain a motion for summary judgment. For that reason, the decision of the District Court in sustaining OIF's motion for summary judgment is reversed and remanded for proceedings in accordance with this opinion.

REVERSED AND REMANDED.

HUBER, District Judge, concurring.

I agree with the foregoing opinion. However, may I point out that a decision sustaining a motion for a directed verdict may be of questionable precedent in ruling on a motion for a summary judgment. In ruling on a motion for a summary judgment, the precise question is whether a genuine issue of material fact exists. In ruling on a motion for a directed verdict, the precise question is whether reasonable minds could differ on the genuine issue or issues of material fact or facts. Thus, on a motion for summary judgment, all we have to do is decide if the issue exists, without deciding it, but on a motion for a directed verdict, we do decide such issue or issues to the extent of whether or not reasonable minds might differ with respect to such issue or issues.

STATE OF NEBRASKA, APPELLANT, V. DOUGLAS R. HINCHION, SALVATRICE F. DIBIASE AND SAM DIBIASE, ROBERT D. OLSEN, AND JOHN CULLEN ET AL., APPELLEES.

299 N.W.2d 748

Filed December 12, 1980. Nos. 43381, 43382, 43383, and 43384.

1. **Wiretaps.** In passing on the validity of an order to intercept wire or oral communications, the court may consider only information brought to the attention of the magistrate.
2. **Informants: Wiretaps.** For an affidavit based on a tip from an informant to be sufficient, the affidavit must set out some of the underlying circumstances sufficient to enable the magistrate to independently judge the validity of the informant's conclusion that the criminal activities were being carried on where and as he said they were and some of the underlying circumstances from which the affiant concluded that the informant was credible or his information reliable.

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

Donald L. Knowles, Douglas County Attorney, Robert C. Sigler, and Richard M. Jones for appellant.

J. William Gallup for appellees Cullen et al.

No appearance for appellees Hinchion, Olsen, and DiBiase.

Heard before KRIVOSHA, C.J., BOSLAUGH, MCCOWN, BRODKEY, WHITE, and HASTINGS, JJ., and BURKHARD, District Judge.

MCCOWN, J.

In these criminal cases, the State appeals from orders granting motions to suppress wiretap evidence. The four cases involve the same wiretap application and order and the cases have been consolidated on appeal.

These appeals were docketed prior to the release of *State v. Anderson and Hochstein, ante* p. 51, 296 N.W.2d 440 (1980). They were unaffected by that decision and are, therefore, disposed of under Neb. Rev. Stat. § 86-705(12) (Reissue 1976).

On November 1, 1979, the county attorney for Douglas County, Nebraska, filed an affidavit and application for an order authorizing the interception of telephone communications of John F. Cullen, Frank Nebbia, Thomas Kolosseus, Edward Paltani, and other individuals whose identities were then unknown, over two designated Omaha, Nebraska, telephone listings.

The affidavit of the county attorney recited how telephones are utilized by bookmakers in gambling operations. It recited that Thomas Kolosseus and Edward Paltani were known gamblers in Omaha, and that both had been convicted on multiple gambling counts in the years 1975 through 1977, and that some of these convictions were on the basis of authorized telephone surveillance. The affidavit also recited that, although police officers had conducted extensive surveillance in 1979 at the residence and business of Thomas Kolosseus and at a location in which Edward Paltani had been conducting illegal bookmaking operations in 1977, they had been unable to establish evidence as to where Kolosseus was conducting an illegal book-

making operation, or evidence to establish an illegal bookmaking operation by Paltani. The affidavit recited, however, that the officers believed there was going to be a merger between Kolosseus' gambling operations and the gambling operations of Edward Paltani.

The affidavit also recited that a reliable informant, whose reliability had been proven by previously providing true and accurate information concerning illegal gambling, had advised officers that John Cullen and Frank Nebbia were conducting an illegal gambling operation at 1348 South 24th Street, which was Cullen's residence, and were using telephone number (402) 346-8098 and another telephone, the number of which the informant did not know.

The informant, who had previously seen both men, also advised officers that, on October 19, 1979, Thomas Kolosseus and Edward Paltani were at 1348 South 24th Street, and had been there together on several occasions.

The officers checked computer records and found that John Cullen's residence was shown as 1348 South 24th Street, and that he had no criminal record. Frank Nebbia's residence was 308 South 49th Avenue, Omaha, and he also had no criminal record. Upon checking with the telephone company, the officers were advised that telephone number (402) 346-8098 was a nonpublished telephone number listed to John F. Cullen at 1348 South 24th Street, Omaha, Nebraska. That number had call waiting with three extensions. There was also a "teen line" at the same address, and the nonpublished telephone number was (402) 346-0595, and that number had two extensions and call waiting capabilities.

On the evening of October 22, 1979, officers checked the residence at 1348 South 24th Street. They found it to be a two-story single-family dwelling. Lights were on in the house but the shades were pulled. Five vehicles registered to various Omaha owners were parked in the area. One of the vehicles was registered to Judy Nebbia, whose residence was 308 South 49th Avenue. None of the vehicles were registered to Cullen. While the offi-

cers were conducting surveillance, an automobile pulled up and the driver went inside the residence. The officers checked registration information and found the car was registered to an individual the officers believed was the son of a deceased bookmaker.

At about 11 p.m. on the 25th of October, 1979, the officers again checked the residence. On that occasion, four vehicles were parked at the location, one of which was registered to Judy Nebbia and none of which were registered to Cullen. One of the four vehicles was registered to an individual who was believed by the officers to have been involved with another gambler. On one other occasion, the vehicle registered to Judy Nebbia was again seen at the South 24th Street residence.

The affidavit also recited that an officer who had conducted numerous surveillances of both Kolosseus and Paltani over the past 3½ years had never known them to be associated together, nor had he ever seen them meet, and that neither of them, during various surveillances, had ever been known to contact the other by telephone. Based on the information that the informant had given as to Kolosseus and Paltani being together at 1348 South 24th Street, the officer believed that Kolosseus and Paltani were attempting to enlarge and merge their gambling operations.

The affidavit recited that the affiant had been advised that the vice unit had an informant who was providing information which could and would provide officers with sufficient evidence to obtain a search warrant for 1348 South 24th Street and to arrest John Cullen and Frank Nebbia. The affidavit also recited that, although police investigative methods such as search warrants, surveillances, and informants might provide enough evidence to arrest John Cullen and Frank Nebbia, the affiant believed such methods would fail as to Kolosseus and Paltani. The application and affidavit, therefore, requested an order to intercept the communications of John Cullen, Frank Nebbia, Thomas Kolosseus, and Edward Paltani.

On November 1, 1979, based on the affidavit, the District Court entered its order finding that there was probable cause to believe that John F. Cullen had committed, or was about to commit, the offense of gambling, and there was probable cause to believe that the facilities from which communications were to be intercepted were being used to commit the offense of gambling; and that normal police investigative procedures appeared unlikely to be successful as to John F. Cullen's illegal gambling operation. The District Court found that John F. Cullen was the specific individual whose communications were to be intercepted and authorized the interception of telephone communications involving the offense of gambling over the two Omaha, Nebraska, telephone numbers listed to John F. Cullen and located at 1348 South 24th Street, Omaha, Nebraska.

As a result of information gathered from the interceptions authorized by the order of November 1, 1979, subsequent applications and orders for interceptions of telephone communications of various other individuals were later made and several defendants were charged with various felonies and misdemeanors thereafter. The defendants in the four cases involved here then moved the court for an order suppressing the intercepted communications resulting from the November 1, 1979, order and the several amendments and extensions to that order.

Hearing on the motions was held on February 28, 1980. Briefs were submitted and the matter taken under advisement, and on March 24, 1980, the District Court entered its order finding that the information received under the extensions and modifications of the order of November 1, 1979, were the result of that order and were, therefore, invalid if the original order was invalid. The court found that there was no basis shown for the manner in which the information was received by the allegedly reliable informant, nor any corroboration by subsequent investigation insofar as Paltani and

Kolosseus were concerned. The court also found that the order of November 1, 1979, was not based on a sufficient showing of probable cause; and that insofar as the alleged operations of Nebbia and Cullen were concerned, investigative techniques other than wiretapping would probably have been sufficient; and that the showing with respect to probable cause did not affirmatively demonstrate that other investigative techniques would not be successful. The District Court, therefore, sustained the motions of the respective defendants to suppress all intercepted wire communications obtained as a result of the order dated November 1, 1979, and the subsequent orders. The State has appealed under the statutory authorization of § 86-705(12) and of Neb. Rev. Stat. § 29-824 (Reissue 1979).

It should be noted that, although the original application and affidavit requested an order authorizing interception of telephone communications of Kolosseus, Paltani, Nebbia, and Cullen, the wiretap order found probable cause only as to John Cullen and authorized interception of his telephone communications only.

The statutes of this state authorizing the interception of wire or oral communications require that the application shall be made in writing upon oath or affirmation, including a full and complete statement of the facts and circumstances relied upon to justify the belief that an order should be issued. Neb. Rev. Stat. § 86-705 (3) (Reissue 1976) provides: "Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that: (a) There is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 86-703; (b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous; and (d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person."

The critical issue in these cases is whether the affidavit states facts sufficient to constitute probable cause to issue an order authorizing the interception of telephone communications of John Cullen. In passing on the validity of an order to intercept wire or oral communications, just as in the case of a search warrant, the court may consider only information brought to the attention of the magistrate. See *State v. Holloway*, 187 Neb. 1, 187 N.W.2d 85 (1971).

The U.S. Supreme Court has consistently required that any decision as to whether probable cause exists should be made by a neutral and detached magistrate rather than by a policeman. See *Johnson v. United States*, 333 U.S. 10, 68 S. Ct. 367, 92 L. Ed. 436 (1948). The magistrate or commissioner must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause and should not accept without question the complainant's mere conclusion that the person has committed a crime. See *Giordenello v. United States*, 357 U.S. 480, 78 S. Ct. 1245, 2 L. Ed. 2d 1503 (1958).

While hearsay information is appropriate to be received by a magistrate on the issue of probable cause, it is not sufficient in itself unless a substantial basis for crediting the hearsay is presented to the magistrate and constitutes more than the mere conclusion of the informant. *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964), and *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969), established the rule that for an affidavit based on a tip

from an informant to be sufficient, the affidavit must set out some of the underlying circumstances sufficient to enable the magistrate to independently judge the validity of the informant's conclusion that the criminal activities were being carried on where and as he said they were, and some of the underlying circumstances from which the affiant concluded that the informant was credible or his information reliable. Those rules have been consistently followed by this court. See, *State v. Holloway, supra; State v. Payne*, 201 Neb. 665, 271 N.W.2d 350 (1978).

In the *Spinelli* case, which also involved a gambling operation, the court expressed the underlying reason for the rule. "In the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation." *Spinelli* at 393 U.S. 416.

In the present cases, as well as in *Spinelli*, the informant's tip is a necessary element in a finding of probable cause. There is no allegation that the information given by the informant came from personal knowledge on his part, nor does the affidavit indicate in any fashion how the informant came to conclude that gambling operations were being conducted by Cullen at the residence in question. The informant advised the affiant that Kolosseus and Paltani were at the location of 1348 South 24th Street on October 19, 1979, but the affidavit does not state that the informant saw them there, nor does it give any information as to how or where he obtained that information. The same circumstances exist with respect to each separate item of information which came from the informant. Insofar as the circumstances disclosed by the affidavit are concerned, the informant's information may have been based on nothing more substantial than a casual rumor or even pure speculation.

In the absence of the information from the informant, the affidavit recited only that there were two unlisted telephone lines into a two-story single-family residence at 1348 South 24th Street, Omaha, Nebraska, one with three extensions, the other with two extensions, and both with call waiting service. The house was the residence of an individual, and presumably his family, and the individual had no prior criminal record of any kind. The affidavit also showed that, on two different occasions, there were several cars parked at the location, one of which was registered to a member of the household of a suspected gambler. The affidavit also recited that, on one occasion, the son of a deceased gambler had gone into the house. That information constituted the sum and substance of the showing with respect to probable cause to believe that Cullen was conducting an illegal gambling operation on the premises, if the information from the informant be disregarded.

In addition to the deficiencies on the issue of probable cause, the affidavit also affirmatively admitted that investigative techniques other than a wiretap would have probably produced evidence sufficient to obtain a search warrant for the premises and to arrest Cullen, and the District Court in these cases made a specific finding to that effect. The application and affidavit for the wiretap therefore failed to establish two of the four essential requirements set out in § 86-705(3).

The District Court specifically found that the order of November 1, 1979, was not based on a sufficient showing of probable cause and that the showing with respect to probable cause did not affirmatively demonstrate that other investigative techniques would not be successful. The District Court, therefore, sustained the motions of the respective defendants in these cases to suppress all intercepted wire communications obtained as a result of the order dated November 1, 1979, and the subsequent orders resulting from that order. That action was correct and is affirmed.

AFFIRMED.