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REPORTS OF CASES

DECIDED BETWEEN

MAY 16, 1981 and NOVEMBER 6, 1981

IN THE

Supreme Court of Nebraska

JANUARY TERM 1981 and SEPTEMBER TERM 1981

VOLUME CCIX

DONALD C. PATTON

OFFICIAL REPORTER

PRIESMAN GRAPHICS

OMAHA, NEBRASKA

1982

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BY DONALD C. PATTON, REPORTER OF THE SUPREME COURT

For the benefit of the State of Nebraska

SUPREME COURT

DURING THE PERIOD OF THESE REPORTS

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		John T. Grant	Omaha
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		Bryce Bartu	Seward
Sixth	Burt, Thurston, Dodge, and Washington	Mark J. Fuhrman	Fremont
		Darvid D. Quist	Blair
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Tenth	Adams, Clay, Phelps, Kearney, Harlan, Franklin, and Webster	Bernard Sprague William G. Cambridge	Red Cloud Hastings
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Twelfth	Sherman and Buffalo	DeWayne Wolf	Kearney
Thirteenth	McPherson, Logan, Lincoln, Dawson, Keith, Arthur, Grant, Hooker, and Thomas	Hugh Stuart Keith Windrum	North Platte North Platte
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CUMULATIVE LIST OF CASES DISPOSED OF WITHOUT OPINION

January and September 1981 Terms

No. 42980: **Nebraska State Bank, Ord v. Barta.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 43395: **Mid States By Products, Co. v. Janke Diesel Service, Inc.** Stipulation for dismissal of appeal allowed; appeal dismissed with prejudice, each party to pay own costs.

No. 43507: **Altmaier v. City of Kearney.** Stipulation for dismissal of appeal allowed; appeal dismissed; each party to pay own costs.

No. 43520: **Fentress v. Austin Power, Inc.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 43604: **State Fire Marshal of Nebraska v. Glebe.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 20-A(2).

No. 43681: **Russell v. Russell.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

Nos. 43705, 43706: **State v. Austin.** Motion of appellant for rehearing overruled.

No. 43724: **State v. Duncan.** Affirmed in part and in part remanded for further proceedings.

No. 43729: **Pollock v. Pollock.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 43750: **Bretthauer v. Bd. of Education.** Stipulation for dismissal of appeal allowed; appeal dismissed; each party to pay own costs.

Nos. 43770, 43771, 43772: **State v. Wade.** Motion of appellant for dismissal of appeal sustained; appeal dismissed.

No. 43794: **Chamberlin v. Chamberlin.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 43806: **State v. Carter.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 43808: **Marr v. Vickers-Des Moines Oil Co.**

Stipulation for dismissal of appeal allowed; appeal dismissed; each party to pay own costs.

No. 43818: **State v. Greer.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed.

No. 43819: **State v. Scott.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed.

No. 43827: **State v. Greer.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed.

No. 43836: **Wostoupal v. Wostoupal.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 43845: **Cahoy v. Mid America Investment Co.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No. 43855: **State v. Kelley.** Motion of appellee for summary affirmance sustained; judgment affirmed.

No. 43858: **State v. Walker.** Motion of appellee for summary dismissal sustained; appeal dismissed.

No. 43867: **Valentine Production Credit Assn. v. Brooker.** Settlement approved; by order of the court case remanded per stipulation of the parties.

No. 43882: **State v. Balcom.** Affirmed under Rule 20.

No. 43887: **State v. Ebberson.** Motion of appellee for summary affirmance sustained; judgment affirmed.

No. 43897: **State ex rel. Root v. Huth.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 43907: **State v. New.** Affirmed under Rule 20.

No. 43915: **State v. Coleman.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 43932: **State v. Floyd.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed.

No. 43933: **State v. Williams.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 43934: **State v. Williams.** Dismissed for failure to file briefs.

No. 43934: **State v. Williams.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed.

No. 43943: **State v. O'Keefe.** Affirmed under Rule 20.

No. 43947: **Scherer v. American Hail Management.** Stipulation for dismissal allowed; dismissed at appellant's costs.

No. 43949: **Ruzicka v. Ruzicka.** Motion of appellant for dismissal of appeal sustained; appeal dismissed; each party to pay own costs.

No. 43954: **State v. Kincaid.** Motion of appellant for suspension of sentence sustained.

No. 43954: **State v. Kincaid.** Motion of appellee for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 43959: **Meckel v. Meckel.** Affirmed as modified by report and order of the court.

No. 43960: **Kellogg Savings Bank v. Anderson.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 43962: **Hopkins v. Ronzzo.** Affirmed as modified by report and order of the court.

No. 43964: **State v. Segobia.** Motion and stipulation allowed; appeal dismissed with prejudice at costs of appellant.

No. 43967: **State v. Mendoza.** Affirmed; see Rule 20.

No. 43980: **Stevenson v. County Towing.** Stipulation for dismissal of appeal allowed; appeal dismissed; each party to pay own costs.

No. 43987: **Hermance v. Hermance.** Order of court granting motion of respondent to dismiss entered.

No. 43988: **State v. Dunham.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44003: **State v. Patterson.** Affirmed; see Rule 20.

No. 44009: **State v. Russell.** Affirmed; see Rule 20.

No. 44012: **Gardner v. Kearney County Community Hospital.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 44014: **Seaton v. Construction Sciences, Inc.** Motion of appellants for dismissal of appeal sustained; appeal dismissed at costs of appellants.

No. 44015: **State v. Degarmo.** Affirmed; see Rule 20.

No. 44018: **State v. Vasquez.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44019: **State v. Sanders.** Motion of court-appointed

counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44024: **State v. Cushing.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 44027: **Westlake v. Westlake.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 44028: **State v. Steinspring.** Affirmed under Rule 20.

No. 44029: **Forward Kimball Industries, Inc. v. Vowers.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 44030: **State v. Zelazny.** Affirmed; see Rule 20.

No. 44032: **State v. Curnyn.** Dismissed for failure to file briefs.

No. 44036: **Ekere v. The Omaha Savings & Loan Assn.** Stipulation allowed; appeal dismissed at costs of appellant.

No. 44037: **State v. Rabbass.** Affirmed; see Rule 20.

No. 44040: **State v. Dedmond.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44044: **State v. Thompson.** Dismissed for failure to file briefs.

No. 44045: **State v. Kiser.** Affirmed; see Rule 20.

No. 44051: **McKay v. Dinslage.** Dismissal of appeal by appellant allowed; appeal dismissed at costs of appellant.

No. 44053: **Vollstedt v. Vollstedt.** Dismissed for failure to file briefs.

No. 44059: **State v. Robinson.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44070: **Haug v. Sederstrom.** Motion of appellee for summary affirmance sustained; judgment affirmed; see Rule 20-A(2).

No. 44071: **Lanum v. Plattsmouth Metal Parts, Inc.** Dismissal of appeal by appellant sustained; appeal dismissed with prejudice at costs of appellant.

No. 44073: **Gifford v. Gifford.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 44075: **State v. Parker.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed.

No. 44076: **State v. McNitt.** Affirmed; see Rule 20.

No. 44077: **State v. Unruh.** Affirmed; see Rule 20; motion of appellee for summary affirmance denied as moot.

No. 44087: **Marvin v. Board of Education.** Stipulation for dismissal of appeal allowed; appeal dismissed with prejudice at costs of appellant.

No. 44090: **State v. Holman.** Order of May 15, 1981 dismissing appeal for failure to file briefs vacated; motion and stipulation allowed; brief day extended to June 3, 1981.

No. 44090: **State v. Holman.** Affirmed; see Rule 20.

No. 44092: **State v. Wenell.** Affirmed under Rule 20.

No. 44095: **State v. Sedivy.** Motion of appellee for summary dismissal sustained; appeal dismissed at costs of appellant.

No. 44098: **State v. Van Ackeren.** Stipulation allowed; sentence vacated and cause remanded for resentencing.

No. 44099: **State v. Zach.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44101: **State v. Jenkins.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44102: **State v. Parr.** Affirmed; see Rule 20.

No. 44107: **State v. Isaacson.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44109: **State v. Anderson.** Affirmed; see Rule 20.

No. 44111: **In re Interest of Ruzicka.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 44116: **State v. Siems.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44123: **Wiester v. Wiester.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 44124: **Williams v. Goodyear Tire & Rubber Co.** Motion of appellants for dismissal of appeal sustained; appeal dismissed at costs of appellants.

No. 44128: **State v. Wyman.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed.

No. 44129: **State v. Higgins.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed.

No. 44137: **In re Estate of Foote. Foote v. Schissler.**

Motion of appellant for dismissal of appeal sustained; appeal dismissed; each party to pay own costs.

No. 44138: **State v. Freeman.** Affirmed; see Rule 20.

No. 44139: **State v. Johnson.** Affirmed; see Rule 20.

Nos. 44140, 44141: **State v. Rieger.** Motion of appellant to consolidate appeals sustained; motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see rule 20-A(8).

No. 44145: **Vrbka v. Reisdorff.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 44146: **State v. Melton.** Affirmed; see Rule 20.

No. 44148: **Guess v. Guess.** Affirmed as modified by order of the court.

No. 44150: **State v. Sell.** By order of the court, the appeal in this case is dismissed as moot without prejudice to further appeal subsequent to the matter currently pending before the District Court.

No. 44153: **State v. Benson.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44155: **State ex rel. Paris v. Blue.** Motion of appellee for dismissal of appeal sustained; appeal dismissed as moot.

No. 44157: **State v. Hall.** Affirmed; see Rule 20.

No. 44158: **State v. Dawn.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44159: **State v. Moser.** Affirmed; see Rule 20.

No. 44162: **State v. Buzzell.** Affirmed; see Rule 20.

No. 44163: **State v. Vansant.** Affirmed; see Rule 20.

No. 44165: **Rossiter v. County of Sarpy.** Joint motion for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 44168: **In re Interest of Taylor.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 44173: **State v. Thomas.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

Nos. 44179, 44180: **State v. Vaughan.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44182: **Ehle v. Musgrave Real Estate.** Motion of appellants for dismissal of appeal sustained; appeal dismissed at costs of appellants.

No. 44190: **State v. Anderson.** Affirmed; see Rule 20.
No. 44191: **State v. Perry.** Affirmed; see Rule 20.
No. 44195: **State v. Olson.** Affirmed; see Rule 20.
No. 44197: **State v. Perry.** Affirmed under Rule 20.
No. 44198: **State v. Harrison.** Affirmed under Rule 20.
No. 44200: **State Bank of Merna v. Ellis.** Motion of appellant to dismiss appeal sustained; appeal dismissed.
No. 44202: **Henton v. Henton.** Dismissed for failure to file briefs.
No. 44203: **Callam v. City of Beatrice.** Stipulation for dismissal of appeal allowed; settlement approved; appeal dismissed at costs of appellant.
Nos. 44206, 44207: **State v. Schrader.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).
No. 44209: **State v. Conway.** Affirmed; see Rule 20.
No. 44210: **State v. Warford.** Affirmed; see Rule 20.
No. 44214: **Tri Con Liquor, Inc. v. Foster.** Motion for dismissal of appeal sustained; appeal dismissed at costs of appellant.
No. 44216: **City of Madison v. C & R Engineering.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.
No. 44219: **Franz v. Franz.** Affirmed as modified by Report and Order of the Court.
No. 44220: **Maikelis v. Sherwood Homes, Inc.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.
No. 44221: **State v. Yoyce.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).
Nos. 44226, 44227: **State v. King.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).
No. 44232: **State v. Carlisle.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).
No. 44234: **State v. McLean.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).
No. 44236: **State v. Huston.** Motion of appellant for dismissal of appeal sustained; appeal dismissed.
No. 44238: **Vesper v. Hall.** Motion of appellant to dismiss appeal sustained; appeal dismissed at costs of appellant.

No. 44241: **Walker v. Gotsch.** Stipulation for dismissal of appeal allowed; appeal dismissed with prejudice at costs of appellant.

Nos. 44244, 44245: **State v. Avila.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed.

No. 44249: **S & S Lumber Co. v. Parker.** Stipulation for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 44252: **State v. Wiedeman.** Affirmed; see Rule 20.

No. 44254: **State Realty, Inc. v. Wang.** Joint motion for dismissal sustained; order dismissing appeal per stipulation and agreement of the parties entered.

No. 44255: **State v. Molden.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44257: **Brosius v. Gothenburg Feed Products Co.** Motion of appellants for dismissal of appeal sustained; appeal dismissed at costs of appellants.

No. 44258: **Gothenburg Feed Products Co. v. Brosius.** Motion of appellants for dismissal of appeal sustained; appeal dismissed at costs of appellants.

No. 44260: **State v. Kaba.** Affirmed; see Rule 20.

Nos. 44262, 44268: **State v. Campbell.** Affirmed; see Rule 20.

No. 44271: **Rech v. Rech.** Affirmed as modified by report and order of the court.

No. 44272: **Stone v. Stone.** Motion and stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 44275: **State v. Armendariz.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44276: **Leising v. Leising.** Affirmed as modified by order of the court.

No. 44278: **State v. Brandy.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44279: **Patchen v. Patchen.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 44282: **State v. Gunderson.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44284: **State v. Minturn.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44285: **State v. Cherry.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed.

No. 44286: **State v. Brown.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed.

No. 44287: **State v. Horton.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed.

No. 44288: **State v. Jacobs.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed.

No. 44290: **State v. Falcone.** Affirmed; see Rule 20.

No. 44291: **Jeffries v. Jeffries.** Motion of appellee for dismissal of appeal sustained; appeal dismissed as moot.

No. 44296: **Cobb v. Cobb.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 44306: **In re Interest of Levy.** Motion of court-appointed counsel for the father for leave to withdraw appearance overruled.

No. 44319: **State v. Drath.** Motion of appellee for summary dismissal sustained; appeal dismissed; see Rule 20-A(1).

No. 44321: **Macklin v. Smith.** Affirmed as modified by report and order of the court.

No. 44322: **Vet-Co, Inc. v. Kizzier Leasing Co.** Motion of appellant for dismissal of appeal sustained; dismissed at costs of appellant.

No. 44323: **First Northwestern Trust Co. v. Kafka.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 44329: **State v. Doescher.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 44330: **State v. Petersen.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 44336: **State v. Hershey.** Affirmed; see Rule 20.

No. 44338: **Larsen v. Larsen.** Affirmed as modified by report and order of the court.

No. 44339: **Motsinger v. Bade.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 44341: **Commercial Engineering Co. v. Henery.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 44345: **State v. Greenwood.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44346: **State v. Roney.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44349: **State v. Vicars.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 44353: **State v. Dougherty.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44357: **Metro Lincoln Mercury v. Angelacos.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 44366: **State v. Stopak.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44367: **State v. Cook.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44369: **Alexander & Alexander, Inc. v. Alger.** Stipulation to dismiss appeal allowed; appeal dismissed.

No. 44370: **State v. Vaughn.** Affirmed; see Rule 20.

No. 44372: **Quackenbush v. Quackenbush.** Affirmed as modified by report and order of the court.

No. 44374: **Phillips v. Phillips.** Affirmed as modified by report and order of the court.

No. 44384: **Monk v. Monk.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 44403: **State v. Mister.** Motion of appellant for dismissal of appeal sustained; appeal dismissed.

No. 44404: **State v. Magnussen.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44408: **State v. Arrison.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44410: **State v. Ross.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44411: **State v. Watson.** Motion of appellant for dismissal of appeal sustained; appeal dismissed.

No. 44412: **State v. Rayes.** Affirmed; see Rule 20.

No. 44413: **State v. Uland.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44420: **Nichols v. Nichols.** Joint motion for dismissal of appeal sustained; appeal dismissed; each party to pay own costs.

No. 44426: **State v. Bixler.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44430: **Ivory v. Nebraska Furniture Mart.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. 44431: **Merriman v. Kratke.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellants.

No. 44437: **Derr v. Neville.** Stipulation to dismiss appeal allowed; appeal dismissed.

Nos. 44444, 44445: **State v. Dodd.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44447: **State v. Shropshire.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44449: **State v. Bush.** Motion of appellant for dismissal of appeal sustained; appeal dismissed.

No. 44451: **Johnston v. Johnston.** Dismissed for failure to file briefs.

No. 44452: **State v. Hack/Callans.** Motion of appellants for dismissal of appeal sustained; appeal dismissed.

No. 44453: **State v. McKinney.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44454: **State v. Graber.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44466: **Certified Improvements Co., Inc. v. Green.** Dismissed for failure to file briefs.

No. 44467: **State v. Coran.** Motion of appellant for dismissal of appeal sustained; appeal dismissed.

Nos. 44468, 44469: **State v. Henshaw.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44470: **State v. Gilmore.** Appeal dismissed for lack of jurisdiction.

No. 44471: **State v. Greene.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20(A)8.

No. 44479: **First Loan Co. v. Wampler.** Motion of appellant to dismiss appeal sustained.

No. 44483: **Richardson v. Schick.** Motion of appellants for dismissal of appeal sustained; appeal dismissed at costs of appellants.

No. 44489: **Ludvik v. Ludvik.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 44491: **Herron v. Herron.** Affirmed as modified by order of the Court.

No. 44495: **State v. Kirchhevel.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44499: **ITT Life Ins. Corp. v. Hopfensperger.** Motion of appellee for dismissal of appeal sustained; appeal dismissed as not being from a final order.

No. 44500: **State v. Boyer.** Motion of appellee for summary dismissal sustained; appeal dismissed; see Rule 20-A(1).

No. 44507: **State v. Grayer.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44523: **State v. Gladfelter.** Motion of court-appointed counsel for leave to withdraw appearance sustained; judgment affirmed; see Rule 20-A(8).

No. 44529: **Keister v. Godkin.** By order of the Court, appeal dismissed due to lack of jurisdiction.

No. 44531: **Traxler v. Moore.** Stipulation for dismissal of appeal allowed; appeal dismissed at costs of appellant.

No. 44533: **Summers v. Summers.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 44536: **Robinson v. Village of Shelton.** Motion of appellant for dismissal of appeal sustained; appeal dismissed with prejudice at cost of appellant.

No. 44542: **Old Mill Apartments, LTD. v. City of Omaha.** Affirmed as modified by order of the Court; each party to pay own costs.

No. 81-581: **Smith v. Wolfe.** Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 81-582: **Langner v. Langner**. Affirmed as modified by report and order of the Court.

No. 81-585: **In re Valuation, Pawnee County v. State Board of Equalization and Assessment**. Affirmed as modified by order of the Court at costs of appellee.

No. 81-588: **City of Omaha v. Omaha Police Union Local 101**. Motion of appellant for dismissal of appeal sustained; appeal dismissed with prejudice at costs of appellant.

No. 81-608: **Ard v. Ard**. Motion of appellant for dismissal of appeal sustained at costs of appellant.

No. 81-632: **Bissen v. Murray**. Motion of appellant for dismissal of appeal sustained; appeal dismissed with prejudice at costs of appellant.

No. 81-658: **Kosik v. Board of Education, School District of Gering**. Motion of appellant for dismissal of appeal sustained; appeal dismissed at costs of appellant.

No. 81-680: **Cronk v. Cronk**. Affirmed as modified by report and order of the Court.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

JANUARY TERM, 1981

ROBERT L. SCHMIDT, APPELLANT, V. CHIMNEY ROCK IRRIGATION DISTRICT, A CORPORATION, ET AL., APPELLEES.

305 N.W.2d 888

Filed May 22, 1981. No. 43231.

1. **Equity: Appeal and Error.** In an action in equity, it is the duty of the Supreme Court to try the issues de novo upon the record and to reach an independent conclusion without being influenced by the findings of the trial court, except, where the credible evidence is in conflict, to give weight to the fact that the trial court saw the witnesses and observed their demeanor while testifying, that it inspected the premises, and that its examination constituted evidence tending to influence belief or unbelief of the matters at issue in the case.
2. **Waters: Damages.** Where water from another source has been added to the water for which a defendant is liable and the combined water causes damage, it is incumbent upon the plaintiff to establish either that his entire damages would have occurred from the waters for which the defendant is liable, or to establish the amount of the damage caused by the water for which the defendant is liable.
3. **Injunction.** Injunctive relief is preventive, protective, and prohibitory; it will not issue to afford a remedy for what is past but only to prevent future mischief. Rights already lost and wrongs already perpetrated cannot be restrained or remedied by injunction.
4. **Waters.** Generally, where surface waters, which ordinarily result from rainfall or melted snow, collect and flow into a natural drainage channel or depression, they may not be dammed, diverted, or otherwise repelled by the owner of the land upon which they flow.

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

Holtorf, Kovarik, Nuttleman & Ellison, P.C., for appellant.

Winner, Nichols, Meister & Douglas for appellee.

Heard before KRIVOSHA, C.J., WHITE, BRODKEY, and HASTINGS, JJ., and CAPORALE, District Judge.

CAPORALE, District Judge.

Robert L. Schmidt (Schmidt), the plaintiff and appellant herein, sought to enjoin the defendants and appellees, Chimney Rock Irrigation District (District) and its officers, from maintaining its canal as to prevent water from entering plaintiff's irrigation system when water in the District's canal is low, and from flooding plaintiff's land when water in the District's canal is high, as well as for damages resulting from the destruction of Schmidt's Timothy hay meadow. The District sought to quiet title to the canal in itself against any claimed right of Schmidt to flow water over, under, or across the canal.

The trial court denied the plaintiff any relief and found that the District's title to the land on which the canal is situated is superior to any claimed right of the plaintiff to flow water over, under, or across the canal. For the reasons hereinafter set forth, we affirm the decision and judgment of the trial court.

This is an action in equity; it is therefore the duty of the Supreme Court to try the issues de novo upon the record and to reach an independent conclusion without being influenced by the findings of the trial court, except, where the credible evidence is in conflict, to give weight to the fact that the trial court saw the witnesses and observed their demeanor while testifying, that it inspected the premises, and that its examination constituted evidence tending to influence belief or unbelief of the matters at issue in the case. Neb. Rev. Stat. § 25-1925 (Reissue 1979); *Sullivan v. Hoffman*, 207 Neb. 166, 296 N.W.2d 707 (1980); *Engel v. Rhen Marshall, Inc.*, 206 Neb. 265, 292 N.W.2d 307 (1980).

We find the pertinent facts to be that the District's predecessor acquired, in 1894, fee simple ownership

of a strip of land 60 feet wide adjacent to the section line between Section 24, Township 20 North, Range 52 West of the 6th P.M., and Section 19, Township 20 North, Range 51 West of the 6th P.M., in Morrill County, Nebraska. The canal in question, which returns the District's waste water to the North Platte River, was built on this right-of-way sometime prior to 1914; it runs generally from north to south. Schmidt owns land to the east of and adjacent to the canal on which he has maintained a Timothy hay field. Since 1933 plaintiff and his predecessors have irrigated their land with water from Fawcus Springs, located to the west of the District's canal. The District has maintained a flume or other devices in its canal so as to allow water to flow from Fawcus Springs under the canal onto plaintiff's land through an artificial, manmade drainage channel. Water did discharge from the canal onto plaintiff's land in 1974 through a hole in the flume structure; however, that has not occurred since plaintiff's tenant Rogers repaired the hole and flume structure. Such difficulty as Schmidt experienced in getting water from Fawcus Springs onto his land during the same period was due to the inadequacy of his irrigation system.

Neb. Const. art. I, § 21, provides that no property shall be damaged for public use without just compensation therefor. We have held in the past that an irrigation district is liable, without negligence, for damages occasioned by seepage of its waters. *Halstead v. Farmers Irr. Dist.*, 200 Neb. 314, 263 N.W.2d 475 (1978); *Applegate v. Platte Valley Public Power and Irrigation District*, 136 Neb. 280, 285 N.W. 585 (1939); *Baum v. County of Scotts Bluff*, 169 Neb. 816, 101 N.W.2d 455 (1960). In *Lindgren v. City of Gering*, 206 Neb. 360, 292 N.W.2d 921 (1980), we found the evidence established that the Gering Irrigation District had been negligent in failing to repair a break in its canal. We observed, however, that even in the absence of negligence we would have affirmed the

trial court's finding of liability on the part of the District, but found it unnecessary to decide that case on the basis of strict liability in view of the fact that specific acts of negligence had been pleaded and proved. The evidence here establishes that, because of a hole in its canal, the District discharged its water onto plaintiff's land. It fails, however, to establish that the discharge of the District's water onto plaintiff's land was a proximate cause of plaintiff's damage; it could just as well have been entirely due to plaintiff's inadequate irrigation system. It is the plaintiff's burden to establish the proximate cause of his injury. *McGill v. Card-Adams Co.*, 154 Neb. 332, 47 N.W.2d 912 (1951). See, also, Restatement (Second) of Torts § 430, Comment e, and § 431, Comment e (1965), stating the necessity that conduct be a legal cause of the harm is equally applicable where the conduct results in strict liability as when it is negligent.

Even if it were to be assumed arguendo that the damages were caused by the combination of both the inadequacy of Schmidt's irrigation system and the discharge of the District's canal water onto plaintiff's land, the evidence still would not allow us to award damages. The record does not apportion the damage caused by the District's water, if any, and the damage caused by plaintiff's inability to irrigate, if any. Where water from another source has been added to the water for which a defendant is liable and the combined water causes damage, it is incumbent upon the plaintiff to establish either that his entire damages would have occurred from the waters for which the defendant is liable, or to establish the amount of the damage caused by the water for which the defendant is liable. *McGill v. Card-Adams Co., supra; Seibold v. Whipple*, 143 Neb. 167, 9 N.W.2d 154 (1943).

We turn now to the question of whether plaintiff was entitled to injunctive relief. The evidence is that the flume structure has been repaired and the District's

canal water is not presently being discharged onto plaintiff's land. Injunctive relief is preventive, protective, and prohibitory; it will not issue to afford a remedy for what is past but only to prevent future mischief. Rights, if any, already lost and wrongs, if such, already perpetrated cannot be restrained or remedied by injunction. *Stuthman v. Lippert*, 205 Neb. 302, 287 N.W.2d 80 (1980); *Michelsen v. Dwyer*, 158 Neb. 427, 63 N.W.2d 513 (1954). Accordingly, Schmidt is not entitled to the injunctive relief he seeks.

The remaining issue concerns that portion of the trial court's judgment which finds that the District's title to the land on which its canal is located is "superior to any claim of the Plaintiff to flow water under or over or across said canal." The evidence clearly establishes that the District has fee simple title to the land on which its canal is located. The question concerns Schmidt's right to flow water under and across the canal structure. Plaintiff has neither pled nor proved the acquisition of any right to so flow water across defendants' land. It has been held that, generally, where surface waters, which ordinarily result from rainfall or melted snow, collect and flow into a natural drainage channel or depression, they may not be dammed, diverted, or otherwise repelled by the owner of the land upon which they flow. *Sullivan v. Hoffman, supra; Rolfsmeyer v. Seward County*, 182 Neb. 348, 154 N.W.2d 752 (1967); *Nichol v. Yocum*, 173 Neb. 298, 113 N.W.2d 195 (1962).

The judgment of the District Court is affirmed.

AFFIRMED.

DALEE REALTY, INC., A CORPORATION, APPELLANT AND CROSS-APPELLEE, V. DONALD KUHL AND VAYLE KUHL, HUSBAND AND WIFE, APPELLEES AND CROSS-APPELLANTS.

305 N.W.2d 891

Filed May 22, 1981. No. 43254.

1. **Brokers: Options to Buy or Sell.** A broker is not entitled to a commission from a seller for producing a ready, willing, and able buyer, where the buyer is only willing to execute an option and the seller does not prevent exercise of the option.
2. **Contracts: Options to Buy or Sell.** The nature of a contract as an option or obligation to purchase is to be determined not by the name which the parties have given it but by the nature of the obligation which it imposes.
3. **Options to Buy or Sell.** An option is a binding offer to sell or buy, but is not a purchase agreement.
4. **Contracts.** Where a contract is on a regular printed form prepared by one party, an ambiguous provision in the printed portion should be construed most strictly against such party.

Appeal from the District Court for Cedar County: FRANCIS J. KNEIFL, Judge. Affirmed in part, and in part reversed with directions to dismiss.

Warren L. Reimer of Ptak, Ptak & Reimer for appellant.

Olds, Swarts & Ensz for appellees.

Heard before KRIVOSHA, C.J., WHITE, and HASTINGS, JJ., and HENDRIX and KNAPP, District Judges.

HENDRIX, District Judge.

This is an action by the plaintiff, DaLee Realty, Inc., a real estate broker, to recover commission upon a listing contract between plaintiff and defendants, Donald Kuhl and Vayle Kuhl, the owners of land, buildings, fixtures, bees, and equipment which were for sale. A jury was waived, and the case tried to the court on stipulated facts. The district judge found against the plaintiff for commission, but for the plaintiff for expenses in the sum of $2,064.24. The plaintiff appealed and the defendants cross-appealed.

We affirm the denial of commission and reverse the allowance of expenses.

The listing contract is entitled "Farm Listing Contract," is a form contract, and states that it was approved by the Nebraska Realtors Association in 1972. It contains two printed provisions particularly important to the resolution of the controversy. The first of these to appear provides for the payment of a commission of 7 percent of the sale price upon the happening of any of a number of certain events, among them one stating, "If a sale is made, or a purchaser found, who is ready, willing and able to purchase the property . . . ." The second of these provides for the payment of expenses incurred by the agent on conditions stating, "If a Purchase Agreement is entered into and subsequent thereto, any earnest money payment is returned in full to the prospective purchaser for any reason . . . ."

After the parties entered into the listing contract, plaintiff secured a prospective buyer by the name of Lyle DeBrunner. Mr. DeBrunner's attorney prepared a document entitled "Purchase Agreement," which was executed by defendants and Mr. DeBrunner on March 7, 1978. The agreement contained complete and full terms of purchase for the sum of $265,000. However, one of the provisions called for a downpayment of $1,000 in escrow by the prospective purchaser, and further stated: "If Buyer does not accept the terms of this contract on or before March 15, 1978, the earnest money shall be returned to Buyer and this contract shall be null and void." On March 15, 1978, Lyle DeBrunner notified the escrow agent and one of the defendants that he was not exercising his right to purchase. The transaction was never consummated.

Both the listing contract and the purchase agreement recited that among the items for sale were 1,800 colonies (of bees). The parties stipulated that if Lyle DeBrunner were called to testify, he would testify that

he did not exercise his right to purchase because he counted 860 beehives in Texas. It was further stipulated that if defendants were called to testify, they would testify that the maximum number of beehives which the defendant Donald Kuhl had would be 1,400. It was further stipulated that the plaintiff's expenses incurred relative to the listing contract were $2,064.24.

Under the agreement between Lyle DeBrunner and the defendants, Lyle DeBrunner had the option to make the purchase. He had no obligation to complete the transaction until or unless he exercised his option by acceptance of the contract on or before March 15, 1978. This he did not do, and in fact notified the defendants that he was not accepting the contract. On March 7, 1978, Mr. DeBrunner was only ready, willing, and able to execute a contract giving him an option to buy. He was not ready, willing, and able to buy. On March 15, 1978, Mr. DeBrunner was, of course, still not willing to buy.

It is the general rule that a broker is not entitled to a commission for producing a prospective buyer willing only to execute an option. 12 C.J.S. *Brokers* § 149b (1980); 12 Am. Jur. 2d *Brokers* § 188 (1964). More specifically, a broker is not entitled to a commission unless he has substantially performed what he has undertaken by his contract of employment. *Willard v. Preston*, 92 F.2d 851 (8th Cir. 1937). Since the plaintiff has not substantially performed, it is not entitled to recover commission.

The fact that there were fewer beehives than stated does not change this conclusion. This is not a suit for fraud or misrepresentation, nor is it a suit for damages. It is, instead, a suit on contract, alleging full performance. There has been no performance of the contract. There is, of course, an exception to the general rule which may allow recovery of commission in cases where the seller prevents the exercise of the option. Annot., 32 A.L.R.3d 321 at 339 (1970). While the shortage of bees may have been the reason for a failure

to exercise the option, there is no evidence that the seller prevented the exercise of the option.

The cross-appeal requests reversal of allowance of plaintiff's expenses incurred, on the theory that the instrument denominated "Purchase Agreement" was in reality an "Option Contract" and does not qualify under the conditions of the listing contract. We find this to be a correct position. It should be noted that the character of an instrument is determined not by the name which the parties have given it but by the nature of the obligation which it imposes. *Johnson v. Fitzke*, 234 Minn. 216, 48 N.W.2d 37 (1951). The agreement involved here imposes only an option. It should be further noted that purchase agreements and option contracts are mutually exclusive. A purchase agreement, or an agreement to purchase, is the contract by which one agrees to sell and the other to buy. An option is only a binding offer to sell or to buy. 77 Am. Jur. 2d *Vendor and Purchaser* § 28 (1975); 91 C.J.S. *Vendor and Purchaser* § 5 (1955). The instrument cannot be both.

Lastly, any ambiguity must be construed against plaintiff. Where a contract is on a regular printed form prepared by one party, an ambiguous provision in the printed portion should be construed most strictly against such party. *Lyman-Richey Sand & Gravel Co. v. State*, 123 Neb. 674, 243 N.W. 891 (1932).

The judgment of the District Court is affirmed as to the denial of commission, reversed as to the allowance of expenses, and it is directed that plaintiff's petition be dismissed at plaintiff's costs.

AFFIRMED IN PART, AND IN PART REVERSED WITH DIRECTIONS TO DISMISS.

VIOLA M. BIBOW, APPELLANT AND CROSS-APPELLEE, V. NORMAN L. GERRARD ET AL., APPELLEES AND CROSS-APPELLANTS.

306 N.W.2d 148

Filed May 22, 1981. No. 43340.

1. **Fraud: Damages.** Where there has been misrepresentation in the sale of real estate, the measure of damages is the difference between the value of the property conveyed and the value of the property if it had been as represented.
2. **Deeds.** Upon delivery and acceptance of an unambiguous deed, all prior negotiations and agreements are deemed merged therein.
3. **Fraud.** Where ordinary prudence would have prevented the deception, an action for the fraud perpetuated by such deception will not lie.

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

John Tavlin and Healey, Brown, Wieland, Kluender, McCord & Atwood for appellant.

Loren L. Lindahl of Edstrom, Bromm & Lindahl for appellees.

Neil W. Schilke of Sidner, Svoboda, Schilke, Wiseman & Thomsen for amicus curiae.

Heard before BOSLAUGH, MCCOWN, CLINTON, and BRODKEY, JJ., and MARTIN, District Judge.

BOSLAUGH, J.

This case arises out of a controversy concerning a sale of real estate in Saunders County, Nebraska. The defendants Norman L. Gerrard and Lorraine R. Gerrard owned a house and a bar which was located on a 3.65-acre tract of land near Cedar Bluffs, Nebraska. On June 1, 1976, the Gerrards listed this property for sale with the defendant Gateway Realty of Fremont, Inc. In the listing agreement the property was described as follows: "Address Rt. 1 Cedar Bluffs Legal Description NW¼ Sect. 22-17-7 15 acres more or less."

Gateway advertised the property for sale, stating that it consisted of "approximately 15 acres." The plaintiff read the advertisement and contacted the defendant Brad Martindale, a licensed real estate agent employed by Gateway. The plaintiff arranged to meet Martindale at the property on July 8, 1976. According to the plaintiff, her son-in-law, who was present, asked Martindale where the 15 acres were. Martindale then pointed out the boundaries of the property. Later, Mr. Gerrard pointed out the same boundaries to the plaintiff.

After looking over the Gerrard property, the plaintiff signed a written offer to purchase it for $37,500. The property was described in the purchase agreement as follows: "Address RR Cedar Bluffs, Nebr. Legal Description Approximately 15 acres more or less with a 3 bedroom home and bar." The Gerrards accepted the offer and signed the purchase agreement on July 8, 1976.

The purchase agreement was conditioned upon the purchaser "being able to obtain a liquor lisence [sic] equal to the lisence [sic] held by the sellers." Before closing the transaction the purchaser filed an application for a liquor license which contained a correct description of the property by metes and bounds and disclosed that the dimensions of the tract were approximately 200 feet by 794 feet.

A liquor license was not issued to the plaintiff until September 10, 1976, but the transaction was closed sometime in August. The plaintiff paid the balance of the purchase price and the Gerrards executed and delivered a deed conveying the property to the plaintiff. The deed described the property by metes and bounds and disclosed that the tract was approximately 200 feet by 794 feet.

This action was commenced on May 14, 1979. In her first cause of action the plaintiff sought to recover damages in the amount of $24,970 from the Gerrards for breach of contract. The second cause of action

was against all defendants for fraud and misrepresentation. The third cause of action sought damages from the Gerrards for breach of warranty.

The trial court found that the defendants had represented that the property consisted of 15 acres; that the plaintiff had relied upon the representation; and that the Gerrards had breached the contract by failing to convey more than 3.65 acres. The trial court fixed the damages at $6,100.

The plaintiff has appealed and the Gerrards have cross-appealed. The appeal relates only to the first and third causes of action. Since there was no warranty in the purchase agreement other than an agreement "to convey title to said property," the third cause of action for breach of warranty may be disregarded.

The assignments of error all relate to the amount of the recovery. The plaintiff contends that the trial court should have awarded her damages in the amount of $15,028.62. The contention is based upon an erroneous interpretation of the rule stated in *Ready Sand & Gravel Co. v. Cornett*, 184 Neb. 726, 171 N.W.2d 775 (1969), and opinion testimony of an expert witness called by the plaintiff. This witness testified that the value of the land was $1,800 per acre; the buildings, $25,400; and the property actually conveyed, $31,400.

The expert testimony as to value was not binding on the trial court. It is apparent from the record that the trial court did not accept the expert testimony in full.

The trial court found that the value of the property as represented was $37,500, the price that the parties had agreed upon; the value of the property conveyed was $31,400; and that the damages were the $6,100 difference between these amounts.

Generally, where there has been misrepresentation in the sale of real estate, the measure of damages is the difference between the value of the property conveyed and the value of the property if it had been as represented. See, *Dargue v. Chaput*, 166 Neb. 69,

88 N.W.2d 148 (1958); *Rothery v. Pounds*, 150 Neb. 25, 33 N.W.2d 347 (1948); *Falkner v. Sacks Bros.*, 149 Neb. 121, 30 N.W.2d 572 (1948). See, also, Annot., 13 A.L.R.3d 875. The plaintiff's assignments of error are without merit.

On the cross-appeal, the Gerrards' principal contention is that the plaintiff is barred from recovering damages by the doctrine of merger. The rule of merger, stated simply, is that upon delivery and acceptance of an unambiguous deed all prior negotiations and agreements are deemed merged therein. See, *Ingraham v. Hunt*, 159 Neb. 725, 68 N.W.2d 344 (1955); *Beren Corp. v. Spader*, 198 Neb. 677, 255 N.W.2d 247 (1977); *Hoke v. Welsh*, 162 Neb. 831, 77 N.W.2d 659 (1956). However, the doctrine of merger does not apply where there has been fraud or mistake.

The evidence in this case was undisputed that the number of acres being sold was misrepresented and the trial court found that the plaintiff had relied upon the representation. However, not all misrepresentations are actionable. It has long been the rule in this state that the reliance must be justified before it is actionable. Where ordinary prudence would have prevented the deception, an action for the fraud perpetuated by such deception will not lie. *Growney v. C M H Real Estate Co.*, 195 Neb. 398, 238 N.W.2d 240 (1976).

In this case the plaintiff inspected the property and the boundaries were pointed out to her. She filed an application for a liquor license which disclosed that the tract was approximately 200 feet by 794 feet. This description was contained in the deed executed at the time of closing.

The discrepancy in acreage between the amount claimed and the amount conveyed in this case was substantial. Some courts have stated there can be no recovery if the shortage is so glaring and palpable as to warn even an inexperienced purchaser. See *Loehr v. Manning*, 44 Wash. 2d 908, 272 P.2d 133

(1954). See, also, *Ralston v. Grinder*, 8 Ohio App. 2d 208, 221 N.E.2d 602 (1966), where purchasers' execution of second mortgage containing correct description was held to be notice.

The plaintiff here was not entirely inexperienced in real estate transactions. In 1966 or 1967, the plaintiff purchased a 4-acre tract near Cedar Bluffs which she subdivided and platted in 1976.

We believe the circumstances in this case were such that the plaintiff's reliance upon the defendants' representation was not justified. Since the misrepresentation was not actionable, the doctrine of merger is applicable and bars the plaintiff's recovery.

The judgment of the District Court as to the defendants Gerrard is reversed and the cause remanded with directions to dismiss the action as to the defendants Gerrard.

REVERSED AND REMANDED WITH DIRECTIONS.

RODNEY R. WATKINS, APPELLEE, V. SUZANNE WATKINS, APPELLANT.

305 N.W.2d 894

Filed May 22, 1981. No. 43386.

Alimony. In determining whether alimony should be awarded, the ultimate test is one of reasonableness.

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

P. M. Conley for appellant.

James E. Gordon and Ginsburg, Rosenberg, Ginsburg, Cathcart, Curry & Gordon for appellee.

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

PER CURIAM.

This is an appeal in a proceeding for the dissolution of a marriage. The trial court dissolved the marriage, awarded custody of the minor children, divided the marital property, and awarded alimony and child support to the respondent wife.

The parties were married in 1960. They have two minor children: Rodney, Jr., born August 10, 1961, and Karen, born June 1, 1963. A third child has reached his majority and was not affected by this proceeding.

The trial court awarded joint custody of the minor children to both parties. Physical custody of Rodney, Jr., was placed in the petitioner with reasonable rights of visitation granted to the respondent. Physical custody of Karen was placed with the respondent for the first 6 months and with the petitioner for the next 6 months, the physical custody to alternate between the parties during each succeeding 6-month period and with reasonable rights of visitation granted to each party during the time physical custody is placed with the other party.

Child support in the amount of $150 per month was awarded to the respondent during the time that she has physical custody of Karen. The petitioner was required to maintain health and accident insurance on the children until each of them has reached the age of majority.

The parties owned a residence property which they stipulated had a value of $42,000 and was subject to a mortgage in the amount of approximately $9,400. The property had been purchased in February 1976 from the respondent's mother for $16,000. The purchase agreement required the parties to provide "room, board and care, except medical care, in the home" to the respondent's mother for her lifetime. The respondent's mother suffered a stroke in October 1976 and has not been cared for in the home since that date. The trial court awarded the residence property to the respondent, subject to a note and second

mortgage to the petitioner in the amount of $16,500. The note was to become due at the time Karen becomes 19, the property was sold, or upon the respondent's death or remarriage, whichever is sooner. The note was to draw interest from the date it became due. The respondent was required to make the mortgage payments on the property.

The respondent was awarded alimony in the amount of $200 per month for 28 months, and thereafter in the amount of $100 per month for 32 months.

The respondent has appealed and contends that the child support and alimony which were awarded to her were inadequate and that provisions in regard to the residence property were erroneous.

At the time of trial, January 28, 1980, the respondent was 46 years of age. Although she had not worked since the marriage, she had been employed as a waitress and had done office work before the marriage. An ileostomy operation had been performed upon her 3 years before, she had phlebitis in one leg, and cataracts were forming upon her eyes. The record does not otherwise show whether she would be able to find employment at this time, but she testified that she would attempt to find employment.

The petitioner's age is not shown in the record. He had retired from the Air Force and was presently employed by a distributing company. His *gross* income was $12,931.60 in 1977 and $15,885.24 in 1978, including retirement pay. His current *net* income at the time of trial was $680.50 per month, plus Air Force retirement of $596.65 per month.

The respondent requests that the judgment be modified to increase the amount of the child support and alimony awarded to her and to increase her share of the marital property.

In determining whether alimony should be awarded, the ultimate test is one of reasonableness. *Baird v. Baird*, 196 Neb. 124, 241 N.W.2d 543 (1976). The total obligation imposed upon the party and that party's

ability to make the payments required must be considered in determining whether the award made was erroneous.

Rodney, Jr., became of age on August 10, 1980. Karen will be 19 on June 1, 1982. The obligation for child support payments under the judgment will terminate at that time. We find nothing in the record to require a modification of the award of child support.

Although the evidence shows the respondent has some health problems, there is no indication that she is unemployable. Her greatest handicap appears to be a lack of skills or prior training. The award of alimony which was made will give the respondent an opportunity to obtain further training to enhance her opportunity for employment.

The division of property appears to have been approximately equal between the parties. However, we believe it would be more equitable to award the residence property to the respondent subject only to the mortgage indebtedness of approximately $9,400. This property was acquired from the respondent's mother for much less than its market value, and the obligation to provide room, board, and care to her mother proved to be of short duration. Under these circumstances and all the other facts in the case, we believe the judgment should be modified to eliminate the provision awarding the petitioner the note and second mortgage in the amount of $16,500 on the property. As so modified, the judgment is affirmed.

The respondent is allowed the sum of $500 for the services of her attorney in this court.

AFFIRMED AS MODIFIED.

IN RE INTEREST OF MICHAEL TIMOTHY WOOD, RON FITZGERALD LINDEN, AND JAMES EUGENE LINDEN, MINOR CHILDREN UNDER THE AGE OF 18 YEARS. STATE OF NEBRASKA, APPELLEE, V. NORMA ELEANOR LINDEN, APPELLANT.

306 N.W.2d 151

Filed May 22, 1981. No. 43406.

1. **Juvenile Courts: Parental Rights.** Neb. Rev. Stat. § 43-209 (Reissue 1978) sets out six independent conditions, any one of which existing alone will justify termination of parental rights.
2. ——:——. There is no requirement that the court must implement a rehabilitation program for the parent of a child found to be dependent and neglected.
3. **Parental Rights.** The right of a parent to custody and control of his or her child is not an inalienable right.
4. **Child Custody.** The public has a paramount interest in the protection of children from abuse and neglect.
5. ——. The principal concern in custody cases is the best interests of the child.

Appeal from the District Court for Dawson County: KEITH WINDRUM, Judge. Affirmed.

Richard G. Kopf of Cook & Kopf, P.C., for appellant.

Byron W. Fallesen, Deputy Dawson County Attorney, and Glenn A. Clark for appellee.

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

WHITE, J.

Appellant appeals from an order of the District Court for Dawson County, Nebraska, affirming an order of the Dawson County Court terminating appellant's parental rights in three of her sons, Michael Timothy Wood, Ron Fitzgerald Linden, and James Eugene Linden. A fourth son, Joey Adam Donner, was born subsequent to the termination order of the county court, and appellant's parental rights as to Joey Adam Donner are not at issue here. Summonses were served on the putative fathers (apparently as

identified by appellant) of Ron and James Eugene (called Gene), but neither appeared in the proceedings by counsel or otherwise. Service was attempted on the putative father of Michael Timothy (called Tim), but he could not be located by the sheriff. We therefore consider here only the rights of the biological mother, without prejudice to any rights of the putative father. See, *In re Interest of Witherspoon*, 208 Neb. 755, 305 N.W.2d 644 (1981); *Cox v. Hendricks*, 208 Neb. 23, 302 N.W.2d 35 (1981).

The petition in this case, filed in September 1977, alleged that Tim and Ron were children within the meaning of Neb. Rev. Stat. § 43-202(2) (Reissue 1978), in that they "lack proper parental care by reason of the faults or habits of their parent, and that they are in a situation dangerous to life or limb." The evidence reflects that for several months prior to the filing of the petition, Tim and Ron were attending the Child Development Center in Cozad, a day school for developmentally disabled children. On several occasions, both boys came to school with bruises and scratches which aroused the suspicion of center staff members. The boys were examined by a doctor with reference to the injuries. On at least one occasion, Tim reported that "dad" had hit him with a stick, "dad" apparently being James Donner with whom appellant was living. Tim reported that "Mom did it," with reference to Ron's bruises on another occasion. Development center personnel contacted police and also the Multi-County Social Service Unit in Lexington. Appellant was a client of the unit and Lois Hayes of that agency discussed the boys' bruises with appellant and Donner. While Hayes did not accuse either appellant or Donner of inflicting the bruises on the boys, she did tell them that the bruises must stop and explained the possibility of appellant losing custody should the bruises be found to be the result of child abuse. Shortly thereafter, appellant came to Hayes' office and angrily terminated her

relationship with the unit, stating to Hayes that she did not "have any witnesses."

The petition was filed on September 26, 1977, in Dawson County Court. A hearing was held on September 26, 1977, and following that hearing the children were ordered left in appellant's custody until further hearing. On October 19, 1977, the county attorney of Dawson County filed an affidavit stating that Ron had appeared at the South Central Child Developmental Day-Care Center with "numerous bruises and scratches," and asking that both boys be taken into immediate custody. This request was granted by the court on the same day.

On October 24, 1977, an adjudication hearing was held, at which evidence was presented on the issue of the boys' status as children within the meaning of § 43-202(2). At that hearing, a neighbor, Mrs. Beulah Helberg, testified that on two occasions she had seen appellant strike both Ron and Tim repeatedly with a hard object of some kind while the boys were lying on the ground. Reports of the doctor and the development center staff were also admitted into evidence at this hearing, including the above-mentioned statements of Ron and Tim as to how they got the bruises. Nevertheless, the court ordered the children returned to appellant "as soon as reasonably possible" upon several conditions. One of the conditions was that Donner "refrain from residing in the home . . . until such time as he is able to demonstrate to the Court that he has consulted with a mental health professional regarding the imposition of appropriate discipline upon minor children." For reasons that do not appear in the record, the boys were returned to the custody of appellant while Donner was residing with her, and the record does not reflect that the required showing was made before their return.

On March 13, 1978, the county attorney filed another affidavit, this one showing that on February 27, 1978, and March 8, 1978, Ron again came to the

development center with injuries, which included a burn as well as bruises, and asking that a guardian ad litem be appointed for Tim and Ron. On March 17, 1978, a guardian ad litem was appointed and authorized to have the children examined by an independent physician, but again the boys were left in appellant's custody. On April 7, 1978, the guardian ad litem filed his report with the court, concluding that Tim and Ron had "indeed suffered injuries inconsistent with normal discipline" and recommending that they be removed from appellant's custody and placed in foster care for a minimum of 6 months. He also recommended that appellant be ordered to attend parenting classes and individual mental health therapy, and that Donner "have absolutely no contact with the . . . children . . . until he has demonstrated to this court that he has consulted with a mental health professional and that the results of such examinations have been presented to this court."

No action was taken on the guardian ad litem's recommendations until after the filing of yet another affidavit by the county attorney on April 24, 1978. The incident which prompted the filing of this affidavit is reflected in the evidence adduced at a hearing on this affidavit on April 24. The evidence showed that on the night of April 20, 1978, Lexington police were notified that the children were left alone in the trailer. Police investigated and found that the three boys, including Gene, were indeed alone in the trailer; that Gene was having trouble breathing due to a respiratory ailment, that he had a diaper rash so severe that scabs were forming on his legs, and that he was in his crib without covers; that Tim was asleep on a bed in the trailer without covers; that Ron was asleep on the floor next to the bed, wrapped in a blanket; and that the trailer was filthy. The officers removed the children from the trailer and they were placed in emergency foster care.

The affidavit filed after this incident for the first

time requested that appellant's parental rights be terminated. The court, after this hearing, ordered that the boys be placed in foster homes subject to reasonable rights of visitation by appellant.

On May 23, 1978, a hearing was held on the request to terminate appellant's parental rights. The previous adjudication of Tim and Ron as children within § 43-202(2) was allowed to stand, and Gene was also adjudicated such a child. The court then found that termination of parental rights was unwarranted at that time, but left the boys in foster homes subject to reasonable rights of visitation in appellant, excluding overnight visits. He ordered appellant into psychiatric counseling for 6 months and set a further hearing date of November 28, 1978.

At the second dispositional hearing in November, the report of appellant's counselor, Anthony Phillips, discussed the counseling he had done with appellant and concluded that there had been no significant change in appellant's parenting ability; that her therapy progress had been minimal; and recommended that Donner attend both group and individual counseling since "the children might legally be placed back with Mrs. Linden, but they will realistically live with both [her] and Mr. Donner." The court again refused to terminate appellant's parental rights. Its order, after this hearing, "encourage[d] specific attempts by the parties to implement regularly scheduled meaningful visitations," ordered another 6 months of counseling, and set a further dispositional hearing for May 31, 1979. This hearing was finally held on July 24, 1979.

At the July hearing, reports of both Phillips and Dr. Reba White, who took over as appellant's counselor after Phillips resigned, demonstrated that appellant had made very little progress in working through her emotional problems and tended to blame others for her lot in life rather than accepting responsibility for her own actions. Visitation, including overnights, had

been arranged, but the evidence showed that on at least one occasion Gene was returned to his foster home with a black eye after visiting with appellant and Donner. He also suffered from diarrhea upon his return from visits with them. The evidence also showed that appellant intended to continue to live with Donner; that Donner had gone to only three counseling sessions with Phillips and absolutely refused to attend sessions with Dr. White after Phillips' resignation. In sum, the evidence fully supported the finding of the court that "[t]his action has been pending since September 26, 1977, and little or no progress or prospects for progress has been shown by the Parents to provide the Children with parental care and protection . . . ." The court then ordered termination of appellant's parental rights in all three boys, which was affirmed on appeal by the District Court. We emphatically affirm.

It would seem that the above narrative would dispose of appellant's contention on appeal that she was not given a reasonable opportunity to rehabilitate herself. However, even if it does not, it is not the law in this state, as appellant would have us decide, that "parental rights may not be terminated unless the parent is given a reasonable opportunity to rehabilitate himself." Neb. Rev. Stat. § 43-209 (Reissue 1978) sets out six independent conditions, any one of which existing alone will justify termination of parental rights. Subsection (6), upon which appellant relies, sets out one of these conditions: "Following upon a determination that the child is one as described in subdivision (1) or (2) of section 43-202, reasonable efforts, under the direction of the court, have failed to correct the conditions leading to the determination." This does not mean that the parent must be given an opportunity to rehabilitate himself or herself even though one of the other five conditions set out in § 43-209 exists. It simply means that if the court has, in its discretion, ordered the parent to make reasonable efforts to

rehabilitate, failure of those efforts is another independent reason justifying termination of parental rights. This is what is meant by the case of *State v. Chant*, 202 Neb. 750, 277 N.W.2d 97 (1979), which appellant erroneously cites as authority for her claim that she is entitled to a reasonable opportunity to rehabilitate herself. That she is not so entitled is clearly expressed in *In re Interest of Carlson*, 207 Neb. 540, 543, 299 N.W.2d 760, 762 (1980), where this court held that: "There is no requirement that the court must implement a rehabilitation plan for the parent of a child found to be dependent and neglected . . . ."

Furthermore, it is abundantly clear from the record in this case that no opportunity to rehabilitate will ever be reasonable if the opportunities given appellant here were not. She was allowed to maintain custody of her children in the face of convincing evidence that she and Donner abused them. When the children were finally placed in foster care, appellant was still given more than a year thereafter to rehabilitate herself; and the record shows that every effort was made by appellant's counselors, the guardian ad litem, and even one of the foster mothers to assist appellant in overcoming her emotional problems and learning appropriate parenting techniques. Yet, the record also shows that the one who participated most reluctantly in these rehabilitation efforts was appellant herself, even though it was she who bore the responsibility to rehabilitate herself. *State v. Chant, supra.*

We cannot emphasize enough in cases such as these that "[t]he right of a parent to custody and control of his [or her] child is a natural, but not an inalienable, right. The public has a paramount interest in the protection of children from abuse and neglect." *In re Interest of Carlson, supra* at 543, 299 N.W.2d at 762. This public interest stems from the child's "right to grow up in a healthy and wholesome environment." *Id.* The larger issue in any case involving termina-

tion of parental rights is that right of the child identified in *Carlson*, and our duty to decide custody cases based on the best interests of the child requires that parental rights be subject to the rights of the child which make up its best interests. As we noted in *Meysenburg v. Meysenburg*, 208 Neb. 456, 458, 303 N.W.2d 783, 785 (1981): "It may very well be that the best interests of [the mother] would support a claim that the child be placed with her. . . . [H]owever, our principal concern is not the best interests of the mother but with the best interests of the child."

The three little boys involved here suffered physical, mental, and emotional abuse at the hands of appellant and Donner. The record demonstrates clearly that the developmental disabilities which prompted their placement in the Child Development Center have shown marked improvement since they were removed from appellant's custody. Although it was not required to do so, the court gave appellant more than reasonable opportunity to rehabilitate herself to the point where she could give her children proper parental care and supervision. After 2 years, she failed to do so, and the county court carried out its duty to the best interests of the children by terminating appellant's parental rights.

We note as well that the trial court found that termination of parental rights was justified under subsection (2) of § 43-209, finding specifically that "the Parents have substantially and continuously neglected the Children, and have refused to give the Children necessary parental care and protection." The evidence fully supports this finding, and the finding represents an independent justification for termination of appellant's parental rights in the three boys.

Appellant's final assignment of error concerns the trial court's denial of her application to have the court appoint a psychiatrist for her at the State's expense. This was a matter addressed to the sound discretion of the trial court, *State v. Suggett*, 200 Neb.

693, 264 N.W.2d 876 (1978), and will not be reversed on appeal absent abuse of discretion. The record demonstrates that, after the court's denial of her application, appellant hired a psychiatrist of her own accord but did not attempt to introduce into evidence the results of his examination either at the trial or on appeal. Further, appellant has not challenged the competence of Dr. Ernest Matuschka, the psychiatrist appointed by the court to evaluate her condition before the final dispositional hearing, nor did she present any evidence contradicting his evaluation. Thus, we find no abuse of discretion in the trial court's refusal to appoint a psychiatrist of appellant's choosing, and the assignment is without merit.

The decision of the county court terminating appellant's parental rights was correct in all respects, as was the order of the District Court affirming that decision. We therefore affirm the order of the District Court.

AFFIRMED.

KRIVOSHA, C.J., concurs in result.

SETTELL'S, INC., A CORPORATION, APPELLANT, V. PITNEY BOWES, INC., A CORPORATION, APPELLEE.

305 N.W.2d 896

Filed May 22, 1981. No. 43466.

1. **Directed Verdict.** A motion for a directed verdict should be sustained only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion.
2. **Uniform Commercial Code: Breach of Warranty: Proof.** A purchaser of goods under the Uniform Commercial Code claiming a breach of warranty must prove not only the warranty and the breach thereof; he must also prove the cause of the loss and the extent thereof.
3. **Uniform Commercial Code: Breach of Warranty: Damages.** The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods as accepted and the value they would have had if they had been as warranted.

4. **Damages: Proof.** Damages must be pled and proved, and the failure to offer proof on the issue of the value of goods as accepted will foreclose the method of determining damages from the court's consideration.
5. **Damages.** The trial court must refrain from submitting to the jury the issue of damages where the evidence is such that it cannot determine the issue without indulging in speculation and conjecture.

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

J. L. Krause for appellant.

Nelson & Harding, Robert D. Kinsey, Jr., and Tim Engler for appellee.

Heard before KRIVOSHA, C.J., MCCOWN, WHITE, and HASTINGS, JJ., and RICHLING, District Judge.

HASTINGS, J.

This is an action by Settell's, Inc., a small commercial printer, to recover from Pitney Bowes, Inc., a manufacturer and seller of large commercial printing equipment, damages suffered by the plaintiff in connection with the lease and sale of an automatic collator. Settell's claimed damages for breach of express and implied warranties under the Uniform Commercial Code. The case was tried to a jury, and at the close of all the evidence the trial court sustained the defendant's motion for a directed verdict and dismissed Settell's claim. Settell's appealed, assigning as error the directing of a verdict in favor of Pitney Bowes; the refusal to direct a verdict in favor of Settell's; and the refusal to grant a new trial. We affirm the District Court ruling.

In March of 1976 Robert Settell, the president of the plaintiff company, met with two representatives of Pitney Bowes regarding the possible acquisition of an automatic collator. Mr. Settell determined that the company could not afford to purchase the collator outright for $11,995, so a leasing arrangement was decided upon as the form of acquisition. Pitney Bowes arranged to sell the collator to NBC Leasing Company,

which would in turn lease the machine to Settell's for a 7-year period at a monthly rate of $256.99. Shortly after the agreement was signed, Pitney Bowes delivered and installed the collator and gave employees of Settell's instructions on the operation of the machine. Settell's testimony was that they had problems with the machine from the day it was delivered and they were never able to complete even one commercial job from March 10, 1976, to December 1977, when they finally gave up trying to use the collator after nearly 300 attempts. After each of these aborted attempts, the employees of Settell's collated the jobs manually.

After December of 1977 Settell's made written demand upon Pitney Bowes for removal of the machine, return of all money paid, and for satisfaction of the NBC lease. Pitney Bowes refused to do so. Settell's refused to make any further payments under the lease.

Thereafter, NBC Leasing brought suit against Settell's to recover under the lease. On the eve of the trial, that lawsuit was settled, with Settell's agreeing to pay to NBC Leasing $15,730.61, an amount only $202.77 less than would be paid if Settell's had completed the 7-year lease.

The instant case was a suit filed by Settell's against Pitney Bowes, seeking damages for a breach of warranty as well as for recovery of the amount expended in settlement of the NBC Leasing case. In sustaining defendant's motion for a directed verdict, the trial court made the following statement: "I think the damages are uncertain. I think the plaintiff has failed as a matter of law to introduce evidence in which the jury could establish damages without indulging in speculation and pure conjecture.

"As to their other allegations, it's not necessary to decide whether other points, whether there was sufficient evidence on the other points such as adequate notice and breach of warranty and so forth. So I don't

see any point in getting into that. I seriously question whether there was adequate notice given in the breach of warranty but I am not relying on that in sustaining this motion so all right, the motion of the defendant is sustained. The case is dismissed."

The rule regarding directed verdicts is well settled: "A trial court should direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom." *Krug v. Laughlin*, 208 Neb. 367, 371, 303 N.W.2d 311, 313 (1981).

A motion for a directed verdict must be treated as an admission of the truth of all material and relevant evidence submitted on behalf of the party against whom the verdict is sought, and that party is to be given the benefit of every inference which can reasonably be drawn. *El Fredo Pizza, Inc. v. Roto-Flex Oven Co.*, 199 Neb. 697, 261 N.W.2d 358 (1978).

When the purchaser of goods under the Uniform Commercial Code claims a breach of warranty, he must not only prove the warranty and the breach thereof; in addition, "[t]he purchaser has the burden of proving both the cause of the loss and the extent thereof. § 2-715, U.C.C., comments 4 and 5. Damages need not be proved with mathematical certainty, but the evidence must be sufficient to enable the trier of fact, in this case the jury, to estimate with a reasonable degree of certainty and exactness the actual damages. [Citation omitted.] It is the duty of the District Court to refrain from submitting to the jury the issue of damages where the evidence is such that it cannot determine that issue without indulging in speculation and conjecture." *Shotkoski v. Standard Chemical Manuf. Co.*, 195 Neb. 22, 28-29, 237 N.W.2d 92, 97 (1975).

The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods as accepted and the value they would have had if they had been as war-

ranted, unless special circumstances show damages of a different amount. Neb. U.C.C. § 2-714(2) (Reissue 1971). Further damages may be recovered under § 2-715 as incidental and consequential damages.

"In fixing the value of property if it were as warranted, as an element of the measure of damages, the purchase price has been said to be strong but not conclusive, the best, prima facie, strong prima facie, or, in the absence of other evidence, sufficient evidence of such value." 77 C.J.S. *Sales* § 367 at 1305 (1952); *Thompson Chrysler-Plymouth, Inc. v. Myers*, 48 Ala. App. 350, 264 So. 2d 893 (1972).

Damages are fixed by a comparison of the value of goods as warranted to the value of the goods as accepted, i.e., in their defective condition. Although the plaintiff presented evidence of the purchase price of the collator, it presented not even a scintilla of evidence of the value of the collator in the condition accepted.

"Although the ordinary measure, as provided in subsection (2) is usually the keystone for computing buyer's damages, *Valley Diecast Corp. v. A.C.W., Inc.*, 25 Mich. App. 321, 181 N.W.2d 303 (1970), *plaintiff has foreclosed this measure from the court's consideration by failing to either allege or offer proof on the issue of the 'value of the goods accepted,' i.e., in their defective state.* Damages, like any other element of plaintiff's cause of action, must be pled and proved, and the burden is on plaintiff to offer evidence of difference in value, if the judgment is to be based on that measure. *Neuman v. Spector Wrecking & Salvage*, 490 S.W.2d 875 (Tex. Civ. App. 1973); *Dolomite Limestone Products v. Kennedy Von Saun Manufacturing & Engineering Corp.*, 241 Mich. 279, 217 N.W. 26 (1928). In the absence of evidence demonstrating the amount of damages suffered, a buyer is not entitled to recover from seller for breach of warranty. *Opheim v. United Mobile Homes*, 511 P.2d 1289 (Wyo. 1973).

"Subsection (1) of 2-714, notably, provides an alternate rule allowing the computation of buyer's loss

'in any manner which is reasonable.' Thus, e.g., if the goods can be made to conform to the warranty by a reasonable expenditure, the cost of such expenditures may be the measure of damages for the breach. *Council Bros., Inc. v. Ray Burner Co.*, 473 F.2d 400 (CA 5 1973); *Meyers v. Antone*, 227 A.2d 56 (D.C. App. 1967). *Plaintiff, however, has offered no evidence of what such expenditures might amount to even though both plaintiff's experts appeared fully capable of offering such opinions based on their examinations of the H-100's defects." Fargo Mach. & Tool Co. v. Kearney & Trecker Corp.*, 428 F. Supp. 364, 382-83 (E.D. Mich. 1977).

Similarly, the plaintiff in the case at bar had foreclosed both methods of measuring damages from the jury as well as from this court on appeal.

The only alternative might be to assume that the value of the machine was zero. Under the right circumstances that might be a good and valid assumption, as the court held in *Swenson v. Chevron Chemical Co.*, 89 S.D. 497, 506, 234 N.W.2d 38, 44 (1975): "If the insecticide had been as warranted, it would apparently have been worth $717. In its defective condition it cost Plaintiff a considerable sum and must for practical purposes have been deemed by the jury to have been worth nothing. This conclusion is not unreasonable under the circumstances." However, a look at the record in the instant case reveals that the machine would probably have at least salvage value, if not be very valuable given the proper repairs and maintenance. A conclusion that the machine is worthless in these circumstances would not be reasonable.

Even though the plaintiff has not proven general damages under § 2-714, it still may recover damages under § 2-715 as incidental and consequential damages. In *Addressograph-Multigraph v. Zink*, 273 Md. 277, 329 A.2d 28 (1974), the court stated that although the buyer could have recovered damages under § 2-714, he for some reason sued only for consequential

damages. This did not preclude him from recovering the lesser sum.

The plaintiff attempted to prove consequential damages by submitting evidence of the amount of time spent on each collating job, the value of both employee and managerial time spent on each job, and the amount of attorney fees incurred by Settell's in its litigation of the dispute with NBC Leasing Company. However, as the defendant points out, there is no proof of what the job would have cost if the collator had been used, so there is no way to compare what the increase in costs was. Neither does the plaintiff prove, in any concrete manner, what he may have made in further profits. After objections to the evidence were sustained, Settell's made an offer of proof that the amount of attorney fees incurred by it in the earlier litigation was $6,142.80. No attempt was made to prove that this sum was fair and reasonable, and the evidence was properly excluded.

There simply appears to be a total failure of proof of damages. The reason for this does not appear to be for lack of damages, but more for lack of proof of them at trial.

The plaintiff's attorney had given the trial court no choice but to direct a verdict for the defendant, by a complete failure to prove his client's case. We similarly have no choice but to affirm that ruling.

AFFIRMED.

IN RE INTEREST OF MICHAEL LEE WAGNER, ANN SHERRY RUSSELL, JACK EDWARD RUSSELL, JR., AND MELVIN RAY RUSSELL, CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. KAREN RUSSELL, NATURAL MOTHER, JACK E. RUSSELL, SR., NATURAL FATHER, AND KEITH CAVES, NATURAL FATHER, APPELLANTS.

305 N.W.2d 900

Filed May 22, 1981. No. 43616.

1. **Juvenile Courts: Parental Rights.** Where the juvenile court has made a finding of neglect under Neb. Rev. Stat. § 43-209(2) (Reissue 1978), it need not afford the parent opportunity to correct the conditions underlying the finding before terminating parental rights.
2. **Parental Rights.** Although a parent's parental rights should not be terminated for the sole reason of conviction of crime and incarceration, the fact of incarceration may be considered along with other factors in determining whether parental rights should be terminated.
3. **Child Custody: Parental Rights: Appeal and Error.** In cases involving custody of neglected or dependent children and the termination of parental rights in juvenile court, the findings of the trial court will not be disturbed on appeal unless they are against the weight of the evidence.

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

Thomas R. Wolff for appellants Russell.

Frederick D. Stehlik of Daub, Stehlik & Smith for appellant Caves.

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

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

CLINTON, J.

This is an appeal from a judgment of the separate juvenile court of Douglas County, terminating the parental rights of Karen Russell and Jack E. Russell, Sr., husband and wife, and of Keith Caves. Four children

are involved: Michael Lee Wagner, Ann Sherry Russell, Jack Edward Russell, Jr., and Melvin Ray Russell. At the time the petition was filed on September 29, 1978, Michael was 4 years 6 months of age; Ann Sherry, 1 year 6 months; and Jack and Melvin, twins, were 4 months of age.

Karen is the mother of all four children. Jack is the father of Ann Sherry and the twins. Michael was born when Karen was 15 years of age and before her marriage to Jack. Keith Caves is the natural father of Michael Wagner.

The petition alleged that Karen and Jack were, through no fault of their own, unable to assume care, custody, and control of the children and that the children were without proper support under the provisions of Neb. Rev. Stat. § 43-202(1) (Reissue 1978). It further alleged that, by reason of certain specifically described acts or omissions of the parents, the children lacked proper parental care by reason of the faults or habits of the parents, all under the provisions of § 43-202(2).

As to Keith Caves, the petition alleged that Michael was homeless or destitute, or without proper support.

On October 2, 1978, the county attorney filed a motion for temporary custody, and on October 2, 1978, the court took custody and entered an order placing the possession of the children in the Douglas County Social Services for temporary placement in a foster home. Attorneys were appointed for all parties and hearings were held on October 16, 1978, January 30, 1979, April 11, 1979, September 7, 1979, April 8, 1980, May 13, 1980, and July 9, 1980.

On February 14, 1980, a motion for termination of parental rights was filed, which alleged, among other particulars, that Karen and Jack had failed to cooperate in a rehabilitation plan and that Caves was unable to provide habitation and support for Michael because he was then incarcerated in the Nebraska Penal and Correctional Complex for a term of several years.

Caves, pursuant to an order of the court, made ap-

pearances at the hearings of January 30, 1979, and April 8, 1980, and testified at the latter hearing. He also filed a resistance to the motion for termination.

On June 10, 1980, the court entered an order finding certain specific allegations of the petition to be true; that it was in the best interests of the children that parental rights be terminated; and that the children remain in the custody of the State of Nebraska, Department of Welfare (custody had been placed by a prior order), for adoptive purposes.

The Russells and Caves have separately appealed to this court.

Caves makes the following assignments of error: (1) The evidence does not show that he substantially, continuously, and repeatedly neglected his child and refused to give the child necessary parental care and protection. (2) The court erred in not directing and supervising for him a plan of rehabilitation as a parent. (3) The court erred in terminating his parental rights on the sole ground of his incarceration in the Nebraska Penal and Correctional Complex.

The sole assignment of error made by the Russells is that there exists in the record no clear and convincing evidence that they substantially or repeatedly neglected the children and refused to give the children necessary parental care and protection as required by Neb. Rev. Stat. § 43-209(2) (Reissue 1978).

We affirm.

With reference to Caves, the evidence is as follows. He admits paternity of Michael. However, the record does not show that he has acknowledged paternity in the form provided by statute, nor has there been any adjudication of the fact of paternity. No orders for support have ever been entered.

When Caves appeared before the court on January 30, 1979, he was 21 years of age. His exact date of birth is not shown. Michael was born in March of 1974. This would indicate that the child was conceived in June or July of 1973, at which time Caves was about 15 years of

age. Karen testified that Michael was conceived as a consequence of her being raped by Caves, but she gave no details or corroboration of this testimony other than what may be implied from Caves' testimony that he neither lived with nor dated Karen. He made no direct denial of the claim of rape and no inquiry was made of him on that point.

Caves began serving a 6- to 10-year term in the Nebraska Penal and Correctional Complex in April of 1977. During the approximately 3-year period after Michael's birth and before Caves' incarceration, he did not support the child, although he visited the baby on seven or eight occasions, and on one occasion, the first Christmas following his birth, made a gift of clothing. Karen testified that she did not want Caves' help and apparently detested him because of the manner in which she claims the child was conceived.

Caves' first visits with the child were made with Karen's consent, but later visits were made over her objection and without her knowledge through the cooperation of relatives of both Karen and Caves. Apparently the families were acquainted and lived in the same neighborhood.

The foregoing evidence, including Caves' incarceration, is sufficient to show that Caves neglected to and was incapable of carrying out his parental responsibilities during the 3 years previous to his incarceration. The fact of his later incarceration made it impossible for the court to direct and supervise a plan of "rehabilitating" Caves as a parent, even if it were required by law to do so. Where the juvenile court has made a finding of neglect under § 43-209(2), it need not afford the parent opportunity to correct the conditions underlying the finding before terminating parental rights. *State v. Duran*, 204 Neb. 546, 283 N.W.2d 382 (1979). Although a parent's parental rights should not be terminated for the sole reason of conviction of crime and incarceration, the fact of incarceration may be considered along with other factors in determining

whether parental rights should be terminated. *In re Sego*, 7 Wash. App. 457, 499 P.2d 881 (1972); *In re Welfare of Staat*, 287 Minn. 501, 178 N.W.2d 709 (1970).

Caves did not fulfill his parental responsibilities of support and maintenance. The familial relationship between him and Michael was almost totally absent. We say, in passing, that we have not purported to make any determination as to whether Michael was conceived as a consequence of a rape, and, hence, that factor is not considered in our conclusion. The best interests of the child require that the parental rights of Caves be terminated. See *Cox v. Hendricks*, 208 Neb. 23, 302 N.W.2d 35 (1981).

The child Michael apparently was in Karen's custody or that of Karen's mother until Karen's marriage to Jack, at which time Michael was about 2½ years old. He thereafter lived with Karen and Jack.

The evidence presented at the various hearings, if believed by the court, would permit it to find, by clear and convincing evidence, the following facts. The situation of Michael and the three Russell children first came to the attention of the Douglas County Child Protective Services in about May of 1978 as the result of a referral made by a nurse employed by a hospital in which Karen was a patient and from which she signed out against medical advice. This was at about the time of the birth of the twins. As a consequence of the referral, an investigation of the circumstances of the four children was made by a Child Protective Services social worker and a visiting nurse. Their testimony indicated that the children were not being properly fed and cared for and were being subjected to extremely unsanitary conditions hazardous to their health. It further indicated that Karen lacked the requisite knowledge and motivation to care for the children in a reasonably proper manner. The twins, apparently, were not growing at normal rates. The Child Protective Services arranged to have the twins examined at a clinic. It also arranged to have all the children cared for at a day-care center

while Karen worked or sought employment. Karen brought the children in the morning and picked them up in the evening. This type of care continued during a period of several months. During the entire period of time, the children arrived at the center unclean and always hungry. They had to be bathed by the center's staff as well as fed. Karen frequently failed to furnish sufficient formula for the twins, although it was available to her through Medicaid. One of the twins developed the disease called thrush. Karen was instructed by the visiting nurse to sanitize bottles and not interchange them between the twins. She failed to do so and the other twin caught the disease. Karen failed to secure refills of medication prescribed for the disease and the visiting nurse had to procure and deliver the medicine to the day-care center. During all this time, the visiting nurse conferred weekly or more frequently with Karen, offered advice, and gave training which went unheeded.

During the above period of time and thereafter until 1979, the family did not, except for a brief period, have a residence of its own. They moved from relative to relative and had about 10 different addresses from 1978 until the motion to terminate was filed in 1980. On August 22, 1978, the visiting nurse received a call from Jack's sister asking her to obtain formula for the twins. Shortly thereafter the visiting nurse received a call from Jack's mother indicating that Melvin was having difficulty in breathing. During the foregoing period the parents failed to keep some of the medical appointments that had been arranged for the children. Upon receiving the call, the nurse went to the day-care center, examined the child, and while she was there the child's breathing was interrupted. The doctor who had been seeing the children recommended immediate hospitalization of all the children and they were taken by ambulance to the hospital.

During this period, Jack and Karen were having marital difficulties and living apart part of the time,

and a divorce was pending. After the children were placed in the hospital, these proceedings were filed in the juvenile court and, after hearing, the court directed the children be placed in foster care. They remained in foster care from September 1978 until the order of termination was entered on June 10, 1980.

The evidence also indicated that Jack changed employment frequently, apparently on some occasions without cause. He also served a jail sentence for some offense during that period of time. Karen had been arrested for burglary and was likewise incarcerated for a short period during the same time Jack was in jail. During the time of common incarceration, the children were in the care of Jack's mother, the person who had informed the visiting nurse of the breathing problems of one of the twins.

The evidence also indicated that the parents used ADC money for purposes of bail and for the purchase of an automobile, when necessary transportation services would have been furnished by the Child Protective Services.

In order to assist Jack and Karen in becoming better parents, the court, on September 10, 1979, approved and ordered the implementation of a plan. This plan included, among other things, that Karen and Jack submit to psychological and psychiatric testing; pay $40 per month toward the support of the children while in foster care; attend training sessions designed to develop the knowledge, skills, and motivation required to carry out the obligations of parents to a reasonable degree; procure and maintain clean and adequate housing for the family; and Jack maintain employment.

On February 14, 1980, the county attorney filed the motion for termination of parental rights.

Either by stipulation or the introduction of evidence, the following facts were established. Jack and Karen completed the psychological testing and Karen completed the psychiatric testing. They made no financial contribution to the support of the children while they

were in foster care. Karen attended 8 of 23 parental sessions; Jack attended 6 of 15 such sessions. Karen regularly visited with the children; Jack did not visit the children after September 1979.

The evidence rather clearly indicated that Jack and Karen did not take seriously the possibility of losing their children until the motion for termination was filed. The psychological testing indicated that the parents had sufficient mental capability to carry out their parental obligations had they the proper motivation. It indicated, however, that they would have difficulty in maintaining regular employment.

Karen testified that the housing they proposed to use, furnished by her mother, had adequate space for only two children. The mother testified that they could have the housing "if they can keep it up."

Jack testified, when asked what his desires were with reference to the children: "A. Well, it's kind of hard to say, but I would just as soon have two because if you give us all four you are going to end up taking them because we couldn't financially support four kids. Q. Do you want the two children back? A. The two oldest ones, yes." He further testified: "I don't want them to terminate any rights, but I mean, if you are going to look at it realistically there's no way we can support four kids."

The evidence shows that all four children made great progress in health and mental growth while under foster care and their appearance and manner make them quite lovable.

While, to some extent, the court's findings are based upon somewhat conflicting evidence, we, on review de novo, take into consideration the fact that the trial judge observed the witnesses and is in a much better position than this court to draw conclusions concerning the capabilities and intentions of the parents.

The evidence was sufficient to establish clearly and convincingly that the parents had substantially and continuously neglected and refused to provide neces-

sary parental care and protection for the children, and that the best interests of the children would be served by terminating the parental relationship. *State v. Chant*, 202 Neb. 750, 277 N.W.2d 97 (1979).

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LARRY D. EBBERSON, APPELLANT.

305 N.W.2d 904

Filed May 22, 1981. No. 43684.

1. **Investigative Stops.** A police officer may in appropriate circumstances and in a proper manner approach a person for the purpose of investigating possible criminal behavior even though there is no probable cause to make an arrest.
2. ——. The test of whether an investigative stop is justified is whether the police officer has a reasonable suspicion founded upon articulable facts which indicate that criminal activity has occurred or is occurring and that the suspect may be involved.
3. ——. An investigatory stop must be justified by objective manifestation that the person stopped is, has been, or is about to engaged in criminal activity. In determining what cause is sufficient to authorize police to stop a person, the totality of the circumstances — the whole picture — must be taken into account.

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

James S. Jansen for appellant.

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

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

MCCOWN, J.

The defendant was found guilty by a jury of robbery and use of a firearm in the commission of a felony. He was sentenced to 10 to 15 years' imprisonment on the robbery count and 5 to 10 years' imprisonment on the

firearm count, the sentences to be served consecutively.

On the morning of February 1, 1980, at approximately 12:40 a.m., two black males entered a Kwik Shop at 50th and Grover Streets in Omaha, Nebraska. One of the men pointed a shotgun at an employee and ordered him to open the cash register. The man carrying the gun was described by the employee as about 5 feet tall, wearing a green jacket, black gloves, and a hat. The other man was described as approximately 5 feet 6 inches tall, also wearing a hat. The taller of the two men emptied the cash register. The gunman then ordered the employee to open the safe and the tall man took the contents of the safe, which included a green moneybag with a lock, a blue moneybag, and some rolls of change. The robbers left the store and ran north. The employee immediately called the police.

At approximately the same time two police officers in a cruiser were just leaving Interstate 80 at the 42nd Street exit. At that point Interstate 80 runs generally east and west. Grover Street is also an east-west street, a very short distance to the north of Interstate 80 in that area. The officers received a broadcast over police radio that a robbery had just occurred at the Kwik Shop at 50th and Grover Streets. The broadcast described the robbers as two small black males armed with a shotgun. The officers immediately drove north on 42nd Street to the intersection of 42nd and Grover Streets, which was 8 blocks east of the Kwik Shop, and parked their cruiser in a lot on the northwest corner of that intersection. Forty-second Street is the first north-south arterial street east of 50th Street which has an entrance to Interstate 80.

Within a minute after the officers parked the cruiser, they observed an automobile approaching the intersection from the west on Grover Street. The car stopped at the traffic signal at the intersection of 42nd and Grover Streets. The car was under a street light approximately 30 feet from the officers. The windows of the car were steamed up, except that the driver's window was rolled

down and the passenger window in the front seat was covered by a plastic trash bag. The officers observed two black males in the front seat of the automobile and the driver appeared to be short. The car turned north on 42nd Street and the officers followed it and stopped the car.

The officers asked the driver to produce his driver's license and registration. One of the officers noticed a movement in the rear seat, turned on his flashlight, and observed two individuals and a green coat which was bundled up on the back seat. He returned to the cruiser to request more information over the radio as to the description of the suspects, and was advised that one of the suspects had been wearing a khaki or green-colored jacket and black gloves. With this information the officers asked the occupants to get out of the car. Another police officer had arrived on the scene by that time and the officers found a green army field jacket and a pair of black gloves on the back seat. They also found a shotgun, a green and a blue moneybag, and some rolls of change on the floor. The defendant and the other suspects were placed under arrest. The evidence at trial established that the amount taken in the robbery was approximately $1,300 and the amount seized from the car was almost exactly the same amount.

The employee of the Kwik Shop was unable to identify the defendant at trial, but one of the other suspects testified as a witness for the State and testified that he and the defendant were the two robbers.

The jury found the defendant guilty on both counts and he was sentenced to 10 to 15 years' imprisonment for robbery and 5 to 10 years' imprisonment for use of a firearm in the commission of a felony, the sentences to be served consecutively.

The defendant's principal contention on appeal is that the District Court erred in failing to sustain the defendant's motion to suppress the physical evidence obtained from the automobile. The defendant asserts that the police officers had no adequate cause to make

the initial investigative stop of the automobile. The argument is that because there was no evidence that the automobile was violating any traffic regulations, there was, therefore, no objective manifestation that the defendant had been engaged in any criminal activity and the investigative stop of the automobile was unjustified. The assignment of error is predicated on the investigative stop and not on the search.

Police officers have statutory authority to "stop any person in a public place whom he reasonably suspects of committing, who has committed, or who is about to commit a crime . . . ." Neb. Rev. Stat. § 29-829 (Reissue 1979).

This court has essentially interpreted the scope of the statute to be coextensive with the requirements of the fourth amendment. In *State v. Booth*, 202 Neb. 692, 276 N.W.2d 673 (1979), we held that a police officer may in appropriate circumstances and in an appropriate manner approach a person for the purpose of investigating possible criminal behavior even though there is no probable cause to make an arrest.

The test of whether an investigative stop is justified is whether the police officer has a reasonable suspicion founded upon articulable facts which indicate that criminal activity has occurred or is occurring and that the suspect may be involved. See *State v. Anderson*, 204 Neb. 186, 281 N.W.2d 743 (1979).

The U.S. Supreme Court has addressed the standards that must be met in an investigatory stop to satisfy the requirements of the fourth amendment in *United States v. Cortez*, ___ U.S. ___, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981). The Court held that an investigatory stop must be justified by objective manifestation that the person stopped is, has been, or is about to be engaged in criminal activity. In determining what cause is sufficient to authorize police to stop a person, the totality of the circumstances — the whole picture — must be taken into account.

Police officers must have a particularized and objec-

tive basis for suspecting the person stopped of criminal activity. The assessment of the totality of circumstances includes all of the objective observations and considerations, as well as the suspicion drawn by a trained and experienced police officer by inference and deduction that the individual stopped is or has been or is about to be engaged in criminal behavior. See, *Brown v. Texas*, 443 U.S. 47, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979); *Delaware v. Prouse*, 440 U.S. 648, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979).

In the case at bar, the armed robbery was reported to the police immediately after it occurred and the police officers involved were only a short distance away on the first major north-south arterial east of the robbery scene. Their observation point was 8 blocks from the robbery scene and they knew that Grover Street was one of the few thoroughfares to the east from the robbery site. At that time of night there was little traffic on Grover Street. The automobile approached from the direction of the robbery site within minutes after the robbery, and there were two black males in the front seat and the driver appeared to be short. In the totality of the circumstances these experienced police officers knew that criminal activity had occurred and had a reasonable suspicion, founded upon articulable facts, to conclude that the persons in the automobile might be involved in that activity. The District Court, at the hearing on the motion to suppress, reached that conclusion on the facts and that determination was not clearly erroneous.

The defendant also contends that the trial court erred in overruling defendant's motion for a mistrial. During cross-examination of the employee of the Kwik Shop, the defendant's counsel asked him whether or not one of the investigating officers had been in the store and chatted with the employee about the case. The employee responded: "No. He just said that they got a really good case against them."

An objection was interposed and a motion for mistrial

was made. The objection was sustained and the jury was instructed to disregard the answer given, and the motion for mistrial was overruled. The answer was invited by defendant's counsel, and even if it had been wholly unresponsive it was clearly not so prejudicial as to require a new trial. Ordinarily, when an objection to improper evidence is sustained and the jury is instructed to disregard it, such an instruction is deemed sufficient to prevent prejudice. See *State v. Dittrich*, 191 Neb. 475, 215 N.W.2d 637 (1974).

Defendant's remaining assignments of error are without merit.

AFFIRMED.

DONALD MOSS AND BETTY MOSS, APPELLEES, V. LAMOINE SPECK, DOING BUSINESS AS LAMOINE SPECK CONSTRUCTION CO., APPELLANT.

306 N.W.2d 156

Filed May 29, 1981. No. 43241.

1. **Contracts: Damages.** Where defects in materials, construction, or workmanship are remediable without materially injuring or reconstructing any substantial portion of the building, the measure of damages is the cost of remedying the defects.
2. ____:____. Where the defects cannot be remedied without reconstruction of or material injury to a substantial portion of the building, the measure of damages is the difference between the value as constructed and the value if built according to the contract.
3. **Judgments: Appeal and Error.** The judgment of the trial court in a law action where a jury has been waived has the effect of a jury verdict and will not be set aside unless clearly wrong.

Appeal from the District Court for Hall County: BERNARD SPRAGUE, Judge. Affirmed.

Paine & Huston for appellant.

W. G. Blackburn of Cunningham, Blackburn, VonSeggern, Livingston, Francis & Riley for appellees.

Heard before KRIVOSHA, C.J., WHITE, AND HASTINGS, JJ., and HENDRIX and KNAPP, District Judges.

KNAPP, District Judge.

This is an action at law brought by Donald Moss and Betty Moss, husband and wife, against LaMoine Speck, doing business as LaMoine Speck Construction Co., alleging breach of warranties contained in the parties' written contract for the construction by defendant of a residence for plaintiffs.

Construction was completed, or nearly so, in early October 1976. Plaintiffs moved into the residence a few days later, although a required "occupancy permit" allowing them to do so had not yet been obtained from the city building inspector. On March 19, 1977, following a 10-inch snowfall, the roof of the residence "sagged" to such a degree that the city building inspector refused to issue the occupancy permit.

That official, together with a private engineer retained by plaintiffs, inspected the roof and suggested certain repairs thereto which were attempted by defendant, but to little avail. Thereafter, plaintiffs' engineer reinspected the roof and concluded that the original defects in construction had been compounded rather than cured by the attempted repairs and that replacement of the roof was required. Plaintiffs thereupon hired a second contractor who reconstructed the roof at a cost to plaintiffs of $20,207.80.

This action followed, plaintiffs alleging that defendant breached the contract by failing to construct the residence in a "workmanlike manner according to standard practices," and by failing to construct the residence so that it would be suitable for residential purposes and would comply with all applicable building codes.

The case was tried to the court, sitting without a jury. On the trial, defendant conceded that various substantial errors occurred in his construction of the

roof. Plaintiffs prayed for the amount they paid the second contractor, less certain credits admittedly due defendant. No evidence as to the value of the residence as constructed by defendant compared to its value if constructed in accord with the contract was offered by either party. The court entered judgment in favor of plaintiff in the sum of $16,934.60, that being the amount paid by plaintiffs to the second contractor less $3,273.20 plaintiffs conceded was due defendant for work done outside the terms of the contract.

On appeal, defendant concedes liability and questions only the measure of damages applied by the trial court, citing *A R L Corp. v. Hroch*, 201 Neb. 422, 268 N.W.2d 101 (1978), as the latest in a series of Nebraska cases reciting the rule that where defects in materials, construction, or workmanship are remediable without materially injuring or reconstructing any substantial portion of the building, the measure of damages is the cost of remedying the defects, but where the defects cannot be remedied without reconstruction of or material injury to a substantial portion of the building, the measure of damages is the difference between the value as constructed and the value if built according to the contract. The latter rule contemplates instances where the contract has been substantially complied with, the structure as completed will serve substantially as well as would the structure if completed according to contract, and completion in accord with the contract terms would either endanger the balance of the structure or be possible only at inordinate cost. 5 A. Corbin, Contracts § 1089 (1964). In the instant case the structure as completed could not qualify for an occupancy permit and was therefore totally without value for the purpose for which it was intended, replacement of the roof presented no danger to the balance of the structure, and there is no evidence that the cost was unreasonable or inordinate. "Without question, the contract breaker should pay the cost

of construction and completion in accordance with his contract unless he proves affirmatively and convincingly that such construction and completion would involve an unreasonable economic waste." 5 A. Corbin, *supra* at 488.

The judgment of the trial court in a law action where a jury has been waived has the effect of a jury verdict and will not be set aside unless clearly wrong. *Tibbs v. Fisher*, 208 Neb. 306, 303 N.W.2d 293 (1981).

The proper measure of damages under the evidence in this case is a question for the trier of fact. The trial court, the trier of fact, found the proper measure of damages to be the cost of remedying the defect. That finding cannot be said to be clearly wrong.

AFFIRMED.

MCDONALD'S CORPORATION, A DELAWARE CORPORATION, APPELLANT, V. MARKIM, INC., A NEBRASKA CORPORATION, APPELLEE.
MCDONALD'S CORPORATION, A DELAWARE CORPORATION, APPELLANT, V. ROSELI, INC., A NEBRASKA CORPORATION, APPELLEE.

306 N.W.2d 158

Filed May 29, 1981. No. 43287.

1. **Equity: Appeal and Error.** On appeal of an equity action, our review is de novo.
2. **Contracts.** Absent contrary statutory provisions, manufacturers are free to enter into franchise agreements for the distribution of their products as they see fit.
3. ——. Generally, any person may do business with whomsoever he desires. Also, he may refuse business relations with any person whomsoever, whether the refusal is based on reason, whim, or prejudice.
4. ——. A contract which provides that an existing franchise holder must be given first consideration for an extension or renewal of the term does not mean that such franchisee must be given thoughtful or sympathetic regard in preference to anyone else, but only that the franchisee's qualifications be examined first and that a decision by the franchisor regarding the granting or denying of such extension must be actually

and honestly exercised. Such decision must be made with entire good faith and not captiously or capriciously.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Reversed and remanded.

Maureen E. McGrath of Kutak, Rock & Huie and Burton Cohen and Ira Feldman for appellant.

Frederick S. Cassman of Abrahams, Kaslow & Cassman for appellees.

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

HASTINGS, J.

McDonald's Corporation filed these actions, which have been consolidated on appeal, seeking a declaratory judgment by the District Court for Douglas County of its obligations under franchise agreements with Markim, Inc., and Roseli, Inc. McDonald's also sought an injunction barring Markim and Roseli from using its trademarks, trade names, and service marks after the expiration date of their agreements. Markim and Roseli counterclaimed, alleging that McDonald's had acted in bad faith and had violated the Nebraska Franchise Practices Act by failing to renew their expiring franchises without good cause. The trial court determined that the Nebraska Franchise Practices Act was inapplicable retroactively; however, it did find that McDonald's had acted in bad faith, and therefore entered a mandatory injunction requiring McDonald's to extend each of the expiring franchise agreements for a period of 5 years.

McDonald's appealed from the adverse rulings and assigned the following as error: (1) The court erred in finding that McDonald's acted wrongfully in exercising its discretion and acted in bad faith; (2) The court erred in holding that McDonald's did not fulfill its obligation to give appellees "first consideration" to an "additional franchise period" when it decided

that it did not want to have any further franchise relation with them; and (3) The court erred in not enjoining appellees from using McDonald's trademarks, trade names, and service marks after the agreed expiration dates of their franchises. We reverse.

Markim and Roseli are corporations whose principal business is the operation of McDonald's restaurants as franchisees in the national system of fast-food hamburger restaurants. Some background is necessary to understand the ownership of the franchise rights. During the period from 1959 to 1964, when McDonald's was still in its infant stages, Bernard Copeland and John Skoog acquired a total of six McDonald's franchises in the Omaha-Council Bluffs area. In each instance, McDonald's granted a franchise and entered into a sublease of the premises for a term of 20 years. The first franchise was entered into in 1959 for the location at 8022 West Dodge Road, and the second franchise was entered into in 1961 for the location at 4802 Ames Street. Late in 1964, Eli I. Schupack and Julian J. Wineberg, who were partners in a Chicago accounting firm, on behalf of themselves and other investors, purchased the six franchises from Copeland and Skoog. McDonald's consented to the assignment of the franchises and subleases upon the express condition that Schupack and Wineberg continue to retain ownership of 51 percent of the stock of the corporations holding the franchises, and that one of the men move to Omaha and devote substantially all of his time to the active management of the six McDonald's restaurants. Eli Schupack moved to Omaha and has managed the six restaurants since the acquisition. The investors acquired a seventh restaurant in 1971 with a 20-year franchise term, which Schupack also manages.

Each restaurant is owned by a different corporation of which Schupack and Wineberg own 51 percent. The appellee Markim, Inc., is the owner of the Dodge Street

restaurant, and appellee Roseli, Inc., owns the Ames Street restaurant. The original 20-year term of the Dodge Street franchise expired on February 8, 1980, and the Ames Street franchise is to expire on December 12, 1981. Pursuant to company policy to meet in the 17th year of a 20-year franchise to determine whether the franchisee will have his franchise renewed, the McDonald's rewrite committee met on August 23, 1977, to discuss the Ames Street and Dodge Street restaurants. At the conclusion of the discussion, the committee voted unanimously not to grant any additional franchise periods to appellees after the current franchise periods expire. Markim and Roseli were notified of this action by letters dated March 6, 1978, and May 8, 1979, respectively.

Subsequent to notification of the denial of the franchise renewal, it appears that appellees contended that their agreements contained a renewal option. That claim was later dropped. However, McDonald's commenced these actions, seeking a declaratory judgment that it had fully complied with its franchise agreement to give appellees first consideration for renewal and that it was not obligated to offer appellees an additional franchise period. The clause in the franchise agreement which is in issue stated:

"20. This agreement and said franchise and license granted hereunder, unless theretofore terminated, shall be and remain in full force and effect for a period of twenty (20) years from and after the first day of the month following the month during which the said establishment shall have been constructed and equipped as hereinbefore provided. *If at the end of the franchise term of twenty years the premises are available and Licensee is determined in good standing by Licensor, Licensee will be given first consideration for an additional franchise period of five years,* consistent with Licensor's rights and interests in the property." (Emphasis supplied.)

Prior to trial, McDonald's filed a motion for partial

summary judgment which the trial court sustained, and from which no appeal has been taken. In that motion McDonald's asked the court to decide the issues of (a) the meaning of paragraph 20 and the nature of the rights and obligations it created, and (b) the applicability of the Nebraska Franchise Practices Act, Neb. Rev. Stat. §§ 87-401 et seq. (Cum. Supp. 1980), effective July 22, 1978. The court held that there were no genuine issues of material fact involved in those two issues, and that McDonald's was entitled to judgment as a matter of law. The court found that the Nebraska Franchise Practices Act was not intended to apply retroactively and therefore the statutes were not applicable to the franchises involved in this lawsuit, and that McDonald's was not subject to nor in violation of the act. The court further found that the "first consideration" clause of paragraph 20 is clear and unambiguous and does not grant an option to the defendants for an extended 5-year term, nor does it obligate McDonald's to extend the franchise for an additional 5 years. However, according to the trial court's orders, the clause does require McDonald's to review and reflect upon the facts concerning the defendants' qualifications and capabilities as franchisees before considering anyone else for the franchise at the particular locations. The clause did not, in the trial court's opinion, impose any obligation on McDonald's to exercise its discretion in favor of extending defendants' franchises even if the relevant facts disclose that defendants are qualified for an additional 5-year term. In other words, once McDonald's complied with the obligation to give first consideration to the defendants, McDonald's could consider anyone else for the subsequent franchise should McDonald's desire to continue doing business at those locations. Such findings appear in the court's two orders, and are conclusive as to the parties.

After the case was tried to the court, it entered a decree reaffirming and incorporating its partial sum-

mary judgment findings and conclusions. The decree stated: "22. The Court finds that McDonald's, in each instance, failed to give Markim or Roseli 'first consideration' within the meaning of Paragraph 20, since 'first consideration' implies that such consideration will be given in a reasonable manner and based upon good faith and the requirements of reasonableness and good faith consideration were not afforded by McDonald's to the defendants." The court found that evidence establishing lack of good faith was based in part on litigation pending between McDonald's and defendants which was on appeal to this court from an adverse decision, and from which management must have harbored some resentment and dissatisfaction with Eli Schupack for the filing of the suit (see *Schupack v. McDonald's System, Inc.*, 200 Neb. 485, 264 N.W.2d 827 (1978)); emphasis that was placed on Schupack's failure to donate to a voluntary advertising fund; letters of refusal to renew that were sent at unreasonable and unconscionable lengths of time subsequent to the decision of the committee; the management of McDonald's that misled defendants by encouraging franchisees to speak up with regard to complaints and assured them that no recrimination would result; and the overall testimony of management that was based on subjective reasoning on the part of witnesses for McDonald's with little or no justification for the conclusions reached by those witnesses that the disharmony between Schupack and McDonald's was caused solely by Schupack's actions.

The court then ordered that each of the franchises be extended an additional 5 years under the terms of the original franchise agreement. On appeal, McDonald's assigns as error that the trial court erred in finding, as a matter of fact, that McDonald's acted in bad faith. Appellant argues that the court erroneously equated "good faith" with "good cause," and thereafter applied an improper standard of good faith. The question on appeal is what the proper standard

is and whether McDonald's applied that standard when it refused to renew the franchises. This being an equity action, our review is de novo. *Botsch v. Leigh Land Co.*, 205 Neb. 401, 288 N.W.2d 31 (1980).

The position taken by appellees is that the Nebraska Franchise Practices Act is not applicable, but it did establish the public policy of the state, and therefore this court should, as a matter of common law, require a showing of good cause before a franchise can be terminated or not renewed. To adopt such a position would in substance retrospectively apply the act, and we decline to do so. An indication of what is the common law relating to franchisors and franchisees can be gleaned from *United States Brewers' Assn., Inc. v. State*, 192 Neb. 328, 220 N.W.2d 544 (1974). In that case, actions were brought to determine the constitutionality of Neb. Laws 1971, L.B. 234, as amended by Neb. Laws 1972, L.B. 66. L.B. 234 related to the distribution of beer in the state, and L.B. 66 related to the distribution of alcoholic liquors in the state. The laws protected distributors against termination of their franchises without a showing by the manufacturer of good cause, and specified what shall not constitute good cause, as well as what shall be considered in determining whether good cause exists. This court determined that the act was an unreasonable invasion of the personal and property rights of the plaintiffs, and declared the laws unconstitutional.

"Prior to the enactment of L.B. 234 and L.B. 66, the manufacturers of beer and alcoholic liquors were free to enter into contracts with distributors concerning the distribution of their products as they saw fit. The plaintiffs had the same rights in this regard as the manufacturers of other products. See Barish v. Chrysler Corp., 141 Neb. 157, 3 N.W.2d 91." *United States Brewers' Assn.* at 330, 220 N.W.2d at 546.

Barish v. Chrysler Corporation, 141 Neb. 157, 3 N.W.2d 91 (1942), was an action to recover damages under the Junkin Act for injuries to business and

property which arose from termination of franchise contracts by defendants Chrysler Corporation and Dodge Brothers. The contracts contained express terms for termination. The syllabus to that case states: "Any person may do business with whomsoever he desires. Also, he may refuse business relations with any person whomsoever, whether the refusal is based on reason, whim or prejudice. And where, by the terms of a contract, it is specified that either party may terminate the agreement at any time, such termination may likewise be had as stipulated and upon the conditions in such contract contained." This appears to be a statement of the common law of Nebraska relating to franchise agreements prior to the enactment of the Nebraska Franchise Practices Act.

The only requirement of McDonald's was that it give the licensee "first consideration for an additional franchise period of five years." Strangely enough, there is a paucity of case law construing the term "first consideration." As a matter of fact, the only case found remotely bearing on this subject is one relating to a labor bargaining agreement. In *Utility Co-Workers Association v. Public Service Electric and Gas Company*, 344 F.2d 102 (3d Cir. 1965), the bargaining agreement between the parties provided that "'[w]hen a vacancy occurs . . . the Company agrees that it will extend to other stenographic employees in the Commercial Office first consideration for promotion to the secretarial position.'" In syllabus 1 of that opinion, it is stated in part that "'first consideration' for promotion to the secretarial position did not mean that employer was bound to give commercial office employee 'thoughtful or sympathetic regard' in preference to anyone else, and hence employer which examined commercial office employee's qualifications first properly selected another applicant to fill vacancy in office of confidential secretary." And from the body of the opinion: "What

the company was bound to do under Section 5 was to examine the Commercial Office employee's qualifications first, which it admittedly did." *Id.* at 103.

In the final analysis, the obligation to give a licensee "first consideration for an additional franchise period" places no burden of any significance upon McDonald's. The actions of McDonald's should be reviewed not in terms of whether it had good cause to refuse the franchise, but whether it complied with the contract provision dealing with termination and renewal.

The rule in this state is where a contract states that the opinion or decision of a designated person is to be conclusive, then all that is required is that the judgment be actually and honestly exercised. *Thurman v. City of Omaha,* 64 Neb. 490, 90 N.W. 253 (1902). Such a decision must be made with entire good faith and not captiously or capriciously. *Melson v. Turner,* 125 Neb. 603, 251 N.W. 172 (1933). The question then is whether McDonald's exercised its judgment actually and honestly when it gave the appellees "first consideration" as defined by the partial summary judgment order.

After a review of the record, we disagree with the trial court's conclusion that McDonald's acted in bad faith. McDonald's only obligation under the "first consideration" clause was to consider Markim and Roseli for a furtherance of its franchise relationship prior to considering any other prospective franchisee for those locations. It had a duty to carry out this obligation in good faith, defined as honestly and actually, and not captiously or capriciously. McDonald's carried out this obligation when it met to determine whether or not it wished to continue a franchise relationship with Markim and Roseli at their respective locations. The meeting involved the joint discussion and consideration of eight of the top management personnel of McDonald's. They met for over 2 hours and discussed all aspects of the past relationship with Mr. Schupack and his corporations and the

prospects for improving relations in the future. They discussed such things as pending litigation; noncooperation; outspoken criticism of McDonald's by the franchisee; failure to adhere to company policies and training procedures; vacillating ratings in the area of quality, service, and cleanliness inspections from year to year; and apparent resistance to attitude changes. It is not dishonest or capricious to take such factors into consideration in determining whether or not the company wished to continue a business relationship with a particular franchisee. Whether the committee's conclusions were all fully supported by the record is not necessarily determinative. The important consideration is that from an examination of all the evidence which they had, the committee members unanimously came to the conclusion that such a situation did in fact exist and, as such, a continuation of the relationship was intolerable. These factors and that conclusion may or may not constitute good cause to terminate a franchise, but by the same token they are not evidence of dishonesty and capriciousness in refusing to extend a franchise period.

The order of the District Court is reversed, and the cause is remanded for the issuance of an injunction barring the defendants from using McDonald's trademarks, trade names, and service marks after the expiration date of their franchise agreements, and for further action consistent with this opinion.

REVERSED AND REMANDED.

CLINTON, J., participating on briefs.

KRIVOSHA, C.J., dissenting.

I must respectfully dissent from the majority in this case. The majority has concluded that the requirement of paragraph 20 of the agreement that McDonald's will give first consideration for an additional franchise merely requires McDonald's to, in good faith, mull the matter over in its mind. I do not believe

that either the language of that provision or the obvious intent of the parties can support such a conclusion.

The language of the agreement is, in my mind, clear and unambiguous. The pertinent portion provides: "If at the end of the franchise term of twenty years the premises are available and Licensee is determined in good standing by Licensor, Licensee *will be given* first consideration for an additional franchise period of five years, consistent with Licensor's rights and interests in the property." (Emphasis supplied.)

This is language prepared by the licensor and as such must be construed most favorably for the licensee and against the licensor and in accordance with the reasonable intentions of the parties. See, *Bishop Buffets, Inc. v. Westroads, Inc.*, 202 Neb. 171, 274 N.W.2d 530 (1979); *Gunset v. Mossman*, 196 Neb. 529, 243 N.W.2d 783 (1976).

It appears to me that the word "given" in paragraph 20, though not as artfully drawn as it might be, did intend to bestow upon licensee an absolute right, subject only to two conditions. The first condition is that the premises are available. And the second condition is that the licensee be in good standing. When those two conditions are met, then the licensee is to be given the "first right of refusal." The word "given" as used in paragraph 20 is a verb. Any definition of the word "given" as a verb implies to hand over or deliver to the person to whom the right is directed. See Webster's Third New International Dictionary, Unabridged, 959-60 (1968). It appears to make little sense to suggest that the parties would specifically enumerate two very basic requirements, the availability of a lease and the good standing of the licensee, as a prerequisite to a meaningless option vested solely in the licensor. It occurs to me that if the licensee was not in good standing as determined by the licensor, the licensor would not even bother to "mull over" the possibility of granting to the licensee an additional

franchise. Why then require, as a condition precedent to "giving first consideration," that the licensor determine the licensee to be in good standing? Good standing, under the terms of the agreement, required that the licensee do a host of things, all of which were intended for the benefit of the licensor and the licensor's business.

Here we have a situation in which the premises are available and the licensee has never been declared by the licensor not to be in good standing. Yet the licensor has determined that the licensee should not be granted an additional franchise. To suggest that a contract is drafted and consideration paid by the licensee to the licensor for that contract and all that the licensee gets in return for that is the courtesy of a thought, even though rendered in good faith, seems to me to ignore the realities of the business world and the obvious intent of the parties. Paragraph 20 as interpreted by the majority is rendered meaningless. I cannot believe that businesspersons enter into complicated business transactions for meaningless purposes. Apparently the trial court reached that same conclusion in compelling McDonald's to grant to the appellees an additional franchise. I agree with the action of the trial court and I would have affirmed its decision.

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

VALERIE A. BROWN, APPELLANT, V. NEBRASKA PUBLIC POWER DISTRICT, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA; LEXINGTON ALFALFA DEHYDRATORS, INC., A CORPORATION; AND LESLIE H. TURNER, APPELLEES.

306 N.W.2d 167

Filed May 29, 1981. No. 43464.

1. **Summary Judgment.** The primary purpose of the summary judgment statute is to pierce sham pleadings and to further dispose of cases where there is no genuine claim or defense.
2. ——. The court examines the evidence, with a view most favorable to the party against whom the motion is directed, to discover if any real issue of fact exists. If reasonable persons might reach different conclusions, the motion should be denied and the case tried on its merits.
3. **Highways.** One causing an obstruction on the highway must use ordinary care to prevent injury to others using the highway.
4. **Words and Phrases: Highways.** An obstruction includes anything which will interfere with the public's use of the highway easement, and includes inanimate objects or substances which are just as dangerous and obstructive as solid obstructions.
5. **Negligence: Proximate Cause.** The question whether negligence is such a continuing and substantial factor in producing an accident as to be a proximate cause of the injury, taking into consideration the foreseeability of the intervening act, is a question of fact.

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

Stanley J. Bell and John A. Wagoner for appellant.

Kay & Kay for appellees.

Heard before KRIVOSHA, C.J., MCCOWN, WHITE, and HASTINGS, JJ., and MORAN, District Judge.

HASTINGS, J.

The appellant, Valerie A. Brown, appealed from an order of the District Court for Dawson County which sustained a motion for summary judgment against Brown and in favor of the appellee Nebraska Public Power District (NPPD). Brown assigns as error the sustaining of the motion for summary judgment and the overruling of her motion for a new trial. We reverse.

This is an action for damages for personal injuries sustained in an automobile-truck collision which occurred on June 19, 1974. Valerie Brown was driving her automobile from Lexington, Nebraska, to North Platte, Nebraska, via U.S. Highway 30 and Darr Road to Interstate 80. Her two minor children were passengers in the automobile. While driving south on Darr Road, she saw what she thought was dust blowing across the highway. She continued on, and when she drove into it she realized that it was smoke, not dust. After a short period, the smoke became dense and she decided to turn around and go back to Lexington. Brown turned west onto a graveled county road and attempted to make a U-turn back onto Darr Road to head north. Sometime during the U-turn the Brown car was struck broadside by a northbound truck hauling alfalfa, which truck was driven by defendant Leslie H. Turner.

Turner had been hauling hay since 6 a.m. that day, and had traveled Darr Road several times prior to the accident. He first noticed smoke just before 2 p.m. while traveling south on Darr Road. Turner saw three men and a pickup on the east side of Darr Road, and it appeared that they had just started burning out the ditch. Turner stated that the smoke did not amount to much, and his southbound lane was pretty clear. He proceeded south through the smoke and drove approximately 2 miles farther to a field where he picked up a load of hay and then began to return north on Darr Road to the mill.

While traveling north, Turner noticed that the smoke where Darr Road and the graveled county road intersected had become "real heavy." The smoke came from the east side of the road at the corner of the intersection and flowed west, straight across the road. The smoke covered both lanes as well as the intersecting county road. The evidence is not clear as to how fast the truck was traveling, other than testimony that it could not have been exceeding 55 miles per hour and

that Turner had his foot on the accelerator when entering the smoke. Once he entered the smoke, Turner said visibility was negligible and he did not see the Brown car until he was right upon it. The Brown car was facing east in the northbound lane and was struck broadside right in the center of the car. There were skid marks from both vehicles of slightly more than 100 feet from the intersection, straight north. Both children were killed, and Valerie Brown suffered severe and permanent injuries as a result of the collision.

The smoke was created by employees of NPPD who were burning the weeds in the borrow pit of defendant's right-of-way to prepare it for irrigation waters. The three employees had been sent out to burn the ditch, using a propane burner pulled by a tractor. Two of the men were responsible for the burning and one was responsible for fire control; the latter was equipped with a pickup carrying a supply of 100 gallons of water in a tank attached to a powered sprayer, and 50 or 100 feet of hose. According to Kenneth Kring, the man responsible for fire control, he considered his duties as being limited to keeping fire from spreading across the field, and that he was not responsible for the smoke or the hazards caused by the shift in the direction of the wind that might blow it across the highway. According to the employees, the fire was never out of control, although Kring did describe the wind as "Shifty, squirrely winds. Breezes." Kring's attention was focused on keeping the fire away from the fields, and the other two employees were operating the equipment to do the actual burning. None of them noticed the smoke blowing across the road.

Kring, who testified by means of his deposition, stated that he was told by Mr. Atterberry, the NPPD manager who assigned him to this job, "Make sure you don't get it across the road. This is — if you can anyway help it." He also said that he didn't make any effort

to determine the wind conditions because he wasn't around when they started the fire. Additionally, he had come upon the scene driving from the east to the west, and had driven through the smoke. He said it was drifting north, but he couldn't tell if it was drifting west. He did acknowledge that the fire had burned over to the west edge of the ditch, closer to Darr Road. He was asked whether he remembered seeing smoke moving westward across Darr Road, and he replied, "No, because I was on the east side of the ditch putting the fire out. . . . I could have cared less. I was interested in that fire right there."

Valerie Brown filed suit against both the driver of the truck, Leslie Turner, and NPPD for recovery of damages for personal injuries. Both defendants filed motions for summary judgment. The court overruled the motion by defendant Turner, but sustained the motion of NPPD. Plaintiff's motion for a new trial against defendant NPPD was overruled and this appeal was taken.

"The moving party is not entitled to summary judgment except where there exists no genuine issue as to any material fact and where, under the facts, he is entitled to judgment as a matter of law. Upon a motion for summary judgment the court examines the evidence, not to decide any issue of fact, but to discover if any real issue of fact exists." *Pettis v. Lozier*, 205 Neb. 802, 806, 290 N.W.2d 215, 217 (1980). The primary purpose of the summary judgment statute is to pierce sham pleadings and to further dispose of cases where there is no genuine claim or defense. *Partridge v. Younghein*, 202 Neb. 756, 277 N.W.2d 100 (1979). The court should take the view of the evidence most favorable to the party against whom the motion is directed, and give to that party the benefit of all favorable inferences which may reasonably be drawn from the evidence. If reasonable persons might reach different conclusions, the motion should be denied and the case tried on its merits.

Farro v. Rubottom, 202 Neb. 120, 274 N.W.2d 149 (1979).

The position taken by NPPD is that even if all of the plaintiff's allegations are true, she has no genuine claim against NPPD; that there is no genuine issue of fact; and that reasonable minds could not conclude other than that the acts allegedly committed by NPPD constitute a mere "condition." A condition is not a proximate cause, and there would therefore be no basis for liability to the plaintiff. To support its argument, NPPD refers us to *Anderson v. Byrd*, 133 Neb. 483, 275 N.W. 825 (1937). *Anderson* involved an automobile collision which occurred when two cars were passing through smoke that had settled down over the highway. The smoke came from one or both locomotives that had been involved in a train wreck prior to the automobile collision. In that case, we held that the smoke was a condition and not a proximate cause of the accident, citing to authority which held that the activities of inanimate things are usually mere conditions and not causes. At first blush, *Anderson* would appear to be the same situation as the case at bar. However, after closer scrutiny it can be seen that the situations are very different.

"The rule adopted in this state is: '* * * when one engaged in the lawful use of the highway causes an obstruction to be placed upon it in such a manner as to be dangerous to traffic, he must use ordinary care to prevent injury to others where he knows that said obstruction is calculated to do injury to travelers upon said highway. The negligence in such a case consists of having placed an obstruction upon the street, and leaving it in such a manner as will be dangerous to others using the street.' Simonsen v. Thorin, 120 Neb. 684, 234 N.W. 628, 81 A.L.R. 1000.

"An obstruction, in the sense here used, includes anything which will interfere with the public's reasonable use of the highway easement." *Shupe v.*

County of Antelope, 157 Neb. 374, 377, 59 N.W.2d 710, 713 (1953).

Although this rule has normally been applied to articles which are solid and physically impede free movement of a vehicle on a highway, there is no reason why it should not be extended to cover inanimate objects or substances which are just as dangerous and obstructive. See *Hutchinson v. Fouts*, 349 F.2d 946 (8th Cir. 1965).

The situation created by burning weeds in the borrow pit is also cause for liability under the theory of the Restatement (Second) of Torts § 371 (1965): "A possessor of land is subject to liability for physical harm to others outside of the land caused by an activity carried on by him thereon which he realizes or should realize will involve an unreasonable risk of physical harm to them under the same conditions as though the activity were carried on at a neutral place." The commentators use the following illustration: "A is burning brush on his farm, at a place one hundred feet from a public highway. A high wind blows smoke from the brush fire in a thick curtain across the highway, obstructing the view of passing motorists. Because their view is obstructed B and C, driving automobiles, collide in the smoke, although they are in the exercise of all reasonable care, and are injured. A is subject to liability to both B and C."

Following the Restatement is *Timmons v. Reed*, 569 P.2d 112, 124 (Wyo. 1977), which states: "The landowner in close proximity to a public highway must exercise reasonable care to avoid injury to the traveling public arising from unnecessarily-dangerous conditions created by him on the land, where the consequences of a failure to do so are reasonably foreseeable. [Citation omitted.] A violation of this duty constitutes negligence."

The rule was also followed in *Westerman v. Stout*, 232 Pa. Super. 195, 335 A.2d 741 (1975), which involved an automobile accident that was the apparent result

of a thick fog created by a cooling tower owned by United Aircraft. "United Aircraft cannot now argue that although they knew that fog was created, they had no notice that it would cover the turnpike and create a traffic hazard. United Aircraft must be charged with knowledge that once the fog was created, it could be blown onto the road surface. It was bound to anticipate the action of the wind and realize that the man-made fog could reach the roadway and cause visibility problems." *Westerman* at 201, 335 A.2d at 745.

For further authority, see, Annot., 150 A.L.R. 371 (1944); *Gulf Oil Corp. v. Turner*, 235 So. 2d 464 (Miss. 1970), and *Moore v. Plymouth*, 249 N.C. 423, 106 S.E.2d 695 (1959), and the cases cited therein.

Should a jury find that either Mr. Turner or Mrs. Brown was negligently operating his or her vehicle, such finding would not necessarily insulate any liability on the part of NPPD. "Generally, the effect of an intervening negligent act is tested by determining whether it was such as might reasonably have been foreseen as a consequence of the claimed negligence of the original actor. . . . The law does not require precision in foreseeing the exact hazard or consequence which happens. It is sufficient if what occurs is one of the kind of consequences which might reasonably be foreseen. The question whether negligence is, in view of the intervening negligence of a third person, such a continuing and substantial factor in producing an accident as to be a proximate cause of the injury, is a question of fact, rather than a question of law." *Libbey-Owens Ford Glass Co. v. L & M Paper Co.*, 189 Neb. 792, 801, 205 N.W.2d 523, 529 (1973).

Taking the view most favorable to Mrs. Brown, and giving to her the benefit of all favorable inferences which may reasonably be drawn from the evidence, we conclude that there are genuine issues of fact which should have been submitted to the jury. The facts presented could support a finding of negligence

on the part of NPPD if there is sufficient proof that NPPD, through its employees, placed an obstruction upon the highway which is known to be dangerous to travelers on the highway, and that NPPD had failed to use ordinary care to prevent injury to others. The question whether such negligence is a continuing and substantial factor in producing the accident so as to be a proximate cause of the injury is also a question of fact to be submitted to the jury. We conclude that it was error to sustain defendant NPPD's motion for summary judgment, and that the judgment should be reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

WILLIAM H. SHERWOOD, ADMINISTRATOR WITH WILL ANNEXED OF THE ESTATE OF FLOYD TILSON BROWN, DECEASED, APPELLEE, AND J. LELAND BROWN, APPELLANT, V. F. STANTON BROWN ET AL., APPELLEES.

306 N.W.2d 171

Filed May 29, 1981. No. 43465.

1. **Trial: Judicial Notice.** Where cases are interwoven and interdependent and the controversy involved has already been considered and determined by the court in former proceedings involving one of the parties now before it, the court has the right to examine its own records and take judicial notice of its own proceedings and judgments in the former action.
2. **Trusts.** Where a constructive trust has been imposed, the court may trace the trust res into the hands of subsequent purchasers who are not bona fide purchasers for value and without notice.

Appeal from the District Court for Furnas County: JACK H. HENDRIX, Judge. Reversed and remanded with directions.

Barry L. Hemmerling and Jeffrey, Jeffrey, Hahn & Hemmerling, P.C., for appellant.

John Wightman of Wightman, Fallesen & Bacon for appellees Brown et al.

Heard before KRIVOSHA, C.J., MCCOWN, WHITE, and HASTINGS, JJ., and RICHLING, District Judge.

WHITE, J.

Plaintiff, J. Leland Brown, appeals from a decision of the Furnas County District Court granting defendants' motion for summary judgment in this action to quiet title to a parcel of real estate in Furnas County, Nebraska. This action is one of a series of related cases from Furnas County involving J. Leland Brown and F. Stanton Brown, brothers, the estate of their deceased father, Floyd T. Brown, the Stamford Bank (Nebraska), and its holding company, Stamford Banco, Inc. Pertinent parts of the 10-year-plus history of the present case and the related cases are set out below.

The deceased (hereafter Floyd) owned property in Furnas County, Nebraska, which he farmed under terms of a partnership with his elder son, F. Stanton Brown (hereafter Stanton). This operation will be referred to as the Nebraska Partnership. Floyd also owned land in Madison County, Mississippi, which he and J. Leland Brown (hereafter Leland) operated as a partnership (hereafter Mississippi Partnership). Bank accounts for both partnerships, as well as the separate personal bank accounts of Floyd and Stanton (Leland had no personal account), were kept at the Stamford Bank (hereafter Bank) which in 1968 was purchased by a holding company, Stamford Banco, Inc. (hereafter Banco). In 1962 Floyd's separate personal account at the Bank was closed out, and in 1963 he was declared legally incompetent and Stanton was appointed his guardian, and another account was opened at the Bank entitled Floyd T. Brown, Incompetent, F. Stanton Brown, Guardian.

Stanton at all times pertinent lived in Furnas County, while Leland lived in Mississippi. Floyd journeyed

back and forth between Nebraska and Mississippi. It would appear from the records of the various related cases (all filed as part of the bill of exceptions in this case) that the Bank viewed Stanton as a representative of all the Brown family bank accounts, and it is conceivable, although hotly disputed, that at least at times Leland and Floyd depended upon Stanton to handle the banking operations, if only for geographical reasons. However, it not being necessary to a decision in this case, we make no decision as to whether or not Stanton was legally authorized to draw checks on all the Brown accounts at the Bank.

In 1966, or before (another disputed matter), Leland began to become aware that certain large amounts of money he had mailed to Nebraska for deposit to the Mississippi Partnership account had found their way into other Brown family accounts. It is disputed as to whether Leland mailed the money, in the form of checks, to Stanton or directly to the Bank. At any rate, Leland investigated and in 1968 brought an action in Furnas County Court, *In the Matter of the Guardianship of Floyd T. Brown*, asking an accounting by Stanton for his activities and expenditures as Floyd's guardian. Shortly after this action was commenced, Floyd died, and William F. Sherwood was appointed administrator with the will annexed of Floyd's estate. In late 1969 Leland's guardianship action resulted in a judgment surcharging Stanton approximately $65,000 for his activities as Floyd's guardian. Sherwood appealed that decision to Furnas County District Court, which became case No. 7096 in that court. In the meantime, Sherwood, as administrator, had filed a separate action in Furnas County District Court, *Sherwood v. Brown*, against both Leland and Stanton, asking that they both account to the estate for money and property then in their possession or control. This became case No. 7091. Case Nos. 7096, the guardianship appeal, and 7091, the administrator's accounting action against both sons,

were consolidated for trial in February 1970. At that time neither case yet involved the parcel of real estate involved in the present case. In May 1970 Leland filed a third-party complaint against the Bank in the consolidated cases. Most of the petition was eventually stricken and, as to the remainder, a jury found that the action was barred by the statute of limitations. In October 1970 Leland sought leave to file another third-party complaint in the consolidated cases, this one against Banco, and in the proposed petition filed with the court brought in for the first time the parcel of realty involved here.

Leland's proposed third-party petition against Banco contains basically the same allegations as are contained in the petition filed in this case, so they will be set out here. He alleged that on July 25, 1961, Stanton purchased the west one-half of the west one-half of Section 10, Township 1 North, Range 21 West of the 6th P.M., Furnas County, Nebraska (hereafter Farrand Quarter), from the estate of Walter I. Farrand at a referee's sale. To pay for the land, Stanton issued two checks on his personal account and borrowed money from the Bank to cover them. He also borrowed $15,000 from the Veterans Administration and gave that agency a mortgage on the Farrand Quarter in that amount. Leland further alleged that Stanton's personal indebtedness to the Bank grew to $18,500 by June 13, 1962, and that on that date Stanton reduced his personal indebtedness by $16,000 when he transferred $10,000 of his own notes to the Nebraska Partnership account and $6,000 of his own notes to Floyd's personal account. On April 9, 1970, Stanton gave the Bank a deed to the Farrand Quarter in exchange for the Bank's canceling approximately $23,000 in Stanton's notes and its assuming the Veterans Administration mortgage. On April 20, 1970, the Bank conveyed the Farrand Quarter to Banco, whose officers and directors were largely the officers and directors of the Bank. Leland's proposed

petition then stated that neither the Bank nor Banco could have been bona fide purchasers in good faith since they knew of the alleged note transfer by Stanton, which Leland claimed gave Floyd's estate an interest in the property. He asked that title to the Farrand Quarter be quieted in the heirs of Floyd and that the deed to the Bank and to Banco be set aside.

On February 11, 1971, Leland's motion for leave to file this proposed petition was overruled by the District Court. On May 14, 1971, Leland and Sherwood filed the present quiet title action against Stanton, the Bank, Banco, and Paul and Duane Johnson (hereafter Johnsons), who, in September 1970, had received a deed to the Farrand Quarter from Banco. The petition filed in the present case alleged that Stanton retired the notes he had transferred with the proceeds from (1) the sale of Mississippi Partnership cattle and (2) a loan from the Lamar Life Insurance Company which was secured by a mortgage on land owned by Floyd in Mississippi. The gist of the petition is that since the notes which had covered Stanton's personal checks to purchase the Farrand Quarter were part of the personal indebtedness he had reduced by transferring the notes, and since he had allegedly misappropriated the cattle proceeds and loan proceeds to retire these notes, his title to the Farrand Quarter was obtained by fraud. Although the petition did not request the imposition of a constructive trust on the Farrand Quarter, it was upon that theory that the case was argued in the District Court and in this court. In the present action, defendants Bank, Banco, and Johnsons eventually moved for summary judgment, which was granted by the District Court on the basis that no constructive trust could be imposed since there appeared to have been no "wrongdoing at the inception of the title." Sherwood is no longer in the case as a plaintiff, having settled all the estate's claims against the Bank and Banco for $12,500. See *Brown v. Sherwood*, 203 Neb. 209, 278 N.W.2d 565 (1979).

As to the remaining parties, we must reverse the judgment of the trial court. The issue of a constructive trust upon the Farrand Quarter has been fully litigated as between Leland, Stanton, and Sherwood. In a 1972 judgment in the consolidated cases, the District Court ruled on the constructive trust issue. We quote from the memorandum opinion incorporated into that judgment: "[T]he estate claims a constructive trust in the ostensible profit of $13,080.00, six-sixteenths to Mississippi Partnership and ten-sixteenths to Floyd. . . . In this case, the property was initially purchased on the credit of Stanton. Then Stanton borrowed funds to the extent of $6,920.00, the debts being later transferred to two entities along with an additional transfer of $9,080.00 of other debts. Then, the notes were paid in different proportions by one of the entities and a different entity. . . .

. . . .

". . . The court does feel . . . that . . . a portion of the consideration paid by Stanton can be traced to Floyd and the Mississippi Partnership. . . . The Veterans Administration Loan was obtained on Stanton's credit, and transferred to the Stamford Bank. No part of that credit has been traced to the res. Therefore, only *seven twenty-seconds of the Farrand Quarter is determined to be held in trust.*

"Seven twenty-seconds of the profit of $13,080.00, or $4,161.82, is charged to Stanton. The Estate shall be credited with ten-sixteenths of said amount, or $2,601.10. The Mississippi Partnership shall be credited with six-sixteenths of said amount, or $1,560.66." (Emphasis supplied.) *Sherwood v. Brown,* Nos. 7091 and 7096. Memorandum Opinion of May 19, 1972.

Although neither party in the briefs to this court points out the fact of this prior decision of the District Court in the consolidated cases, this court has held that: "'[W]here cases are interwoven and interdependent and the controversy involved has already

been considered and determined by the court in former proceedings involving one of the parties now before it, the court has the right to examine its own records and take judicial notice of its own proceedings and judgments in the former action.'" *Johnson v. Marsh*, 146 Neb. 257, 262, 19 N.W.2d 366, 369 (1945); *Reeves v. Watkins*, 208 Neb. 804, 305 N.W.2d 815 (1981). The decision in the consolidated cases was appealed to this court by Leland in 1973, but was dismissed on his own motion. In addition, the memorandum opinion and, in fact, the entire record in the consolidated cases were filed as part of the bill of exceptions in the present case, and thus we may examine those records, given the undeniable interdependence of the Brown cases. Our examination finds that, as between Leland and Stanton, the constructive trust issue was conclusively settled by the order of the District Court in the consolidated cases. Thus, the issue of Stanton's fraud may not now be relitigated. *Peterson v. The Nebraska Nat. Gas Co.*, 204 Neb. 136, 281 N.W.2d 525 (1979).

As between Leland and these defendants, we note that the petition filed in this case does not allege any independent or unrelated fraud upon Leland by the Bank, Banco, or Johnsons *at the time* they obtained their respective titles to the Farrand Quarter. The allegations against these defendants, in sum, raise the issue of their status as bona fide purchasers for value without notice of Stanton's fraud with respect to that parcel of property. The only manner in which their status as such could present an issue would be if Leland has been unable to collect the proceeds of the funds upon which the trial court in the consolidated cases imposed a constructive trust. If he has been unable to collect, Nebraska law allows the courts to trace the trust res into the hands of subsequent purchasers who are not bona fide purchasers for value and without notice. *Meier v. Geldis*, 148 Neb. 304, 27 N.W.2d 215 (1947); *Meier v. Trosper*, 152 Neb. 184,

40 N.W.2d 811 (1950); *Meier v. Meyer*, 153 Neb. 222, 43 N.W.2d 502 (1950).

In the consolidated cases, the trial court imposed a constructive trust upon seven twenty-seconds of the profit received by Stanton when he transferred the Farrand Quarter to the Bank, with a portion of the money so entrusted to be credited to the Mississippi Partnership, of which Leland would be entitled to one-half interest. In 1973 Leland brought proceedings in garnishment, based on that judgment, to obtain approximately $25,000 of Stanton's funds which were held at the time by Sherwood. The record in the consolidated cases shows that Leland signed a receipt for $25,915.11 as a result of successful garnishment of those funds. However, the total amount of money due Leland or the Mississippi Partnership from Stanton as a result of the 1972 order in the consolidated cases was in excess of $25,000, and thus we have no way of knowing whether or not the garnished funds represented payment to Leland from Stanton for misappropriation of Leland's funds in the Farrand Quarter purchase. On remand, therefore, it will be for the District Court to determine whether or not Leland has, in this or any other manner, collected the amount of money due him from Stanton by virtue of the constructive trust already imposed. If he has received that money from Stanton, there will be no need to determine the bona fide purchaser status of the defendants Bank, Banco, or Johnsons since there will be no need to trace the res into their hands. However, if the money Leland received in garnishment proceedings did not include payment per the constructive trust, the court must then determine the bona fide purchaser status of these defendants as it relates to tracing the trust res into their hands. Consequently, there is a genuine issue of a material fact to be determined and summary judgment should not have been granted. *State ex rel. Schuler v. Bd. of County Commissioners*, 205 Neb. 647, 289 N.W.2d 514 (1980).

We therefore reverse and remand for proceedings consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

IN RE INTEREST OF J.L.L., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. E.F.L., HIS FATHER, APPELLANT.

306 N.W.2d 175

Filed May 29, 1981. No. 43545.

1. **Juvenile Courts: Appeal and Error.** An appeal of a juvenile case to this court is heard de novo upon the record; and the findings of fact by the trial court which heard and observed the witnesses and parties are accorded great weight and will not be set aside on appeal unless they are against the weight of the evidence or there is a clear abuse of discretion.
2. **Parental Rights.** An order of the juvenile court terminating parental rights under Neb. Rev. Stat. § 43-209 (Reissue 1978) must be supported by clear and convincing evidence.
3. **Juvenile Courts: Statutes: Constitutional Law.** Neb. Rev. Stat. § 43-209 (Reissue 1978) is sufficiently definite, both facially and as applied in this case, to withstand constitutional attack based on vagueness.
4. **Parental Rights.** The right of a parent to maintain the custody of his or her child is a natural but not inalienable right, and the public has a paramount interest in the protection of the rights of a child.

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

Dennis R. Keefe, Lancaster County Public Defender, and Don C. Bauermeister for appellant.

Ron Lahners, Lancaster County Attorney, and Richard Hautzinger for appellee State.

Richard McClain, guardian ad litem.

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

BRODKEY, J.

E.F.L., appellant and natural father of J.L.L., appeals to this court from an order entered by the separate juvenile court of Lancaster County, Nebraska, terminating his parental rights to his son, who was born October 1, 1970. We affirm.

The record in this case reveals that the juvenile court first became involved with J.L.L. on November 30, 1976, when the Lancaster County attorney filed a petition alleging that the child was within the meaning of Neb. Rev. Stat. § 43-202(1) (Reissue 1978) because of lack of proper parental care and support. The petition alleged: "Said child is without proper parental care and support in that his father is incarcerated in the Lincoln City Jail, Lincoln, Nebraska, and the whereabouts of his mother is unknown. There are no known relatives who are able to provide care for said child, all in Lancaster County, Nebraska." After a hearing on the petition, held on December 13, 1976, the court determined that the allegations were true, adjudicated J.L.L. to be a dependent child within the court's jurisdiction, and placed him in the temporary custody of the Lancaster County Department of Public Welfare for placement in an approved foster home.

On January 24, 1977, the Lancaster County attorney filed a supplemental petition with the court, alleging the child to be within both subsections (1) and (2) of § 43-202, for the reason that: "Said child is without proper parental care due to the fault and habits of his father and in that his mother is unable to provide care for him. The father of said child has been sentenced to a term of 28 months to 5 years at the Nebraska Penal and Correctional Complex on a conviction of grand larceny. The father of said child has a history of anti-social, criminal behavior and has allowed the child to accompany him while in the commission of burglaries. The lifestyle and criminal activity of the father has provided an unsuitable model for the child. The mother of said child has had no contact with the child for two years. She lives in a board and room situation which is

not adequate for the care of the child and because of mental and emotional instability is unable to provide care and supervision for the child, all in Lancaster County, Nebraska." A hearing on the supplemental petition was held on February 9, 1977, following which the court entered its decree finding that J.L.L. was both a dependent and neglected child as defined in the aforementioned statute. The hearing was continued to March 3, 1977, at which time the court determined that the child should not participate in any visitations with his father until psychological evaluations of the appellant had been completed.

On May 20, 1977, the matter came before the juvenile court for further hearing to determine the visitation rights of the parties herein. At that time, the court found that the child would not be harmed by closely supervised visits with his father, and ordered that they take place; provided, however, that the assigned caseworker could alter the visitations if the child was adversely affected by such visitations.

E.F.L. was paroled from the Nebraska Penal and Correctional Complex on November 21, 1978. It appears that he then found employment in Lincoln, rented an apartment, and continued his supervised visits with his son. On January 16, 1979, on his motion for a modification of the court's visitation order, the court ordered that he could begin unsupervised visitations with his son, beginning February 26, 1979. The order of the juvenile court, however, was objected to for a number of reasons by the guardian ad litem for the child, including that the visitations were against the express wishes of the child; because of the previous threats of the father to remove the child from the jurisdiction; and also in view of the statements of the child that he had been sexually abused by his father. The guardian ad litem appealed the juvenile court's visitation order to this court, and the order allowing unsupervised visitation was stayed during the pendency of the appeal. In our opinion in that case we reversed the order of the juvenile court which had allowed unsupervised visitations

between the child and his father. However, on November 21, 1979, and prior to the release of our opinion above referred to, the father was arrested and was charged with two counts of burglary. He pled nolo contendere to both counts, and was subsequently sentenced to two terms of 5 to 10 years in the Nebraska Penal and Correctional Complex, said terms to run concurrently with each other.

Thereafter, on January 23, 1980, the Lancaster County attorney filed a second supplemental petition in which he prayed for an order terminating all parental rights between the father and son. A hearing on the petition was held on January 31, 1980, at which time the natural mother of the child, since divorced, appeared and entered her "admission" to the allegations of the petition that she was unable to care for and support her child. The father also appeared at the hearing and entered a denial to the allegations contained therein. The court then entered an order accepting the admission of the mother and set the date for the formal contested hearing on the allegations against the father.

The contested hearing was held on March 5 and March 10, 1980, on that portion of the second supplemental petition which requested termination of the parental rights of E.F.L. In its decree, entered on March 24, 1980, the court found that the allegations of neglect and dependency were substantiated by clear and convincing evidence, and ordered that the father's parental rights be terminated. A subsequent motion for new trial was overruled, and he has appealed to this court, contending that the evidence presented was not sufficient to terminate his parental rights and that Neb. Rev. Stat. § 43-209(2), (4), and (6) (Reissue 1978) should be held unconstitutional for vagueness.

It is well established that an appeal of a juvenile proceeding to this court is heard de novo upon the record; that the findings of fact by the trial court will be accorded great weight because the trial court heard and observed the parties and witnesses; and the trial court's findings will not be set aside on appeal unless

they are against the weight of the evidence or there is a clear abuse of discretion. *In re Interest of Goodon*, 208 Neb. 256, 303 N.W.2d 278 (1981); *In re Interest of Morford*, 207 Neb. 627, 300 N.W.2d 795 (1981); *State v. Duran*, 204 Neb. 546, 283 N.W.2d 382 (1979).

Under § 43-209 the juvenile court may terminate parental rights between the parents of a child and such child when the court finds such action to be in the best interests of the child and it appears by the evidence that any one or more of the six specified conditions exist, including:

"(2) The parents have substantially and continuously or repeatedly neglected the child and refused to give the child necessary parental care and protection;

. . . .

"(4) The parents are 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 child;

. . . .

"(6) Following upon a determination that the child is one as described in subdivision (1) or (2) of section 43-202, reasonable efforts, under the direction of the court, have failed to correct the conditions leading to the determination."

It is the general rule that an order of the juvenile court terminating parental rights under § 43-209 must be supported by clear and convincing evidence. *In re Interest of Hill*, 207 Neb. 234, 298 N.W.2d 143 (1980); *State v. Wedige*, 205 Neb. 687, 289 N.W.2d 538 (1980); *State v. Souza-Spittler*, 204 Neb. 503, 283 N.W.2d 48 (1979).

We have reviewed the record in the present case and have concluded that the evidence contained in the record amply supports the decision of the juvenile court to terminate the parental rights of E.F.L. The foster care mother of the child testified that the child exhibited signs of mental and emotional stress, including

nightmares and hyperactivity, after being with his father. She indicated that his condition had improved after he was removed from his father's care. She also stated that the child became upset when he learned of his father's criminal activities.

Carol Crumpacker, a child psychologist at the Child Guidance Center in Lincoln, testified that she had met with the child once a week for approximately 1 year. She stated that he exhibited conflicting feelings toward his father and that he had experienced feelings of guilt because of his father's criminal conduct. Dr. Crumpacker also testified that the child expressed much anger and ambivalence toward his father, and that it would be in the child's best interests to be placed in a stable family environment. Dr. Crumpacker stated that she thought it would be best to terminate the parental rights of the father.

Sandy Carmichael and Kathleen Dombrowski, both social workers with the Lancaster Public Welfare Department, testified that they had supervised visitations between the child and his father. The visitations took place at the Nebraska Penal and Correctional Complex and at an apartment rented by the appellant after his parole. Both women stated that there was very little interaction between the boy and his father during the visitations, and that the father spent most of his time discussing his future plans with the social workers. It appears that the father told both social workers that if his parental rights were terminated he would take his son away when he got out of prison. Both of the social workers stated that the son was apprehensive about visiting his father.

Finally, at a hearing held in this matter on March 3, 1980, the son testified as to his treatment by his father. He stated that there had been several occasions when sexual contact had occurred between him and his father. He also stated that his father had told him to keep the sexual contacts a secret between the two of them. In addition, he testified that his father had taken

him with him when he burglarized an apartment.

The trial court found that the termination of the parental rights was justified, basing its decision on the established evidence of continuing criminal conduct of the type in which the father had involved the son in the past, and his continued and repeated neglect and failure to provide proper parental care and support. In its order the court did not specifically mention the evidence of his sexual abuse of the child, although there is ample evidence in the record to establish this fact.

We determine that the findings of the trial court are supported by clear and convincing evidence in the record on appeal, and that the order terminating the parental rights of the father is correct and should be affirmed.

We also wish to comment briefly on appellant's assignment of error that § 43-209(2), (4), and (6) (Reissue 1978) is unconstitutionally vague. We have previously passed upon this issue in several prior opinions of this court, and the constitutionality of § 43-209 has been upheld with respect to the termination of parental rights under the above statute. See, *In re Interest of Morford*, 207 Neb. 627, 300 N.W.2d 795 (1981); *State v. Souza-Spittler*, 204 Neb. 503, 283 N.W.2d 48 (1979); *State v. Metteer*, 203 Neb. 515, 279 N.W.2d 374 (1979); and *State v. A.H.*, 198 Neb. 444, 253 N.W.2d 283 (1977). In *Linn v. Linn*, 205 Neb. 218, 286 N.W.2d 765 (1980), we had under consideration the constitutionality of Neb. Rev. Stat. § 42-364 (Reissue 1978), which deals with the termination of the parental rights of children in dissolution actions. In *Linn* we held that the termination of parental rights because it is in the "best interests and welfare of the children," as provided for in § 42-364(4), is not sufficiently specific to apprise parents of why the state may find it necessary to terminate parental rights and is an insufficient warning of prohibited conduct by which the parents can regulate their parental activities. As such, it is impermissibly vague and is unconstitutional. In that case, however, we approved the consti-

tutionality of § 43-209, stating at 223, 286 N.W.2d at 768-69: "What a far cry those standards are from the ones involved in this case. Section 42-364, R.R.S. 1943, provides in part as follows: '(4) Whenever termination of parental rights is placed in issue by the pleadings or evidence, the court shall forthwith appoint an attorney as guardian ad litem to protect the interests of any minor children. Such guardian ad litem shall forthwith personally investigate the facts and circumstances on all matters pertinent to the best interests and welfare of the children. *If it appears to the guardian ad litem that the best interests and welfare of the children may require the termination of the parental rights of one or both parents,* he shall apply to the court in writing or orally on the record for such termination. *The court may then terminate the parental rights of one or both parents after notice and hearing and shall serve notice thereof upon the parents.*' (Emphasis supplied.)

"The statute goes on to provide that the court shall notify the parents of their right to counsel at the expense of the county if they are indigent. However, it sets forth no guidelines for the court to follow, although presumably the permission to terminate parental rights after notice and hearing shall be as the 'best interests and welfare of the children may require.' This is the same general standard required of the juvenile courts as set forth in section 43-209, R.R.S. 1943, without the additional requirement that at least one of six conditions going to the unfitness of the parents has been found to exist. In addition to the two cited in State v. A.H., 198 Neb. 444, 253 N.W.2d 283 (1977), the statute also sets forth abandonment of the child, repeated neglect and withholding of parental care, failure to provide necessary subsistence, education, or other care necessary for the child's health, or that the child has been determined to be a child described in section 43-202 (1) or (2), R.R.S. 1943."

In support of his contention that § 43-209(2), (4), and (6) is void for vagueness, the appellant relies principally

on an Iowa case, *Alsager v. District Court of Polk Cty., Iowa*, 406 F. Supp. 10 (S.D. Iowa 1975), in which the U.S. District Court, in discussing the constitutionality of the Iowa statute with reference to the termination of parental rights, did hold the provisions of that statute to be unconstitutionally vague. We believe the statutes of Nebraska and Iowa are clearly distinguishable, and that the provisions of § 43-209 are much more specific and precise than are the provisions of the Iowa statute. However, we need not decide that issue in this case, even if we were inclined to change our previous position with reference to the constitutionality of the Nebraska statute, for the reason that the *Alsager* case was appealed to the U.S. Court of Appeals, Eighth Circuit, which case is found at 545 F.2d 1137 (1976). In that case the court affirmed the decision of the lower court on the grounds that the plaintiffs were denied procedural due process because of failure to receive adequate notice, and also that the state did not have a compelling interest sufficient to justify permanent termination of the parent-child relationships. However, with reference to the attack on the Iowa statute because of vagueness and overbreadth, the court on appeal stated at 1137-38:

"Other issues reached by the district court, *viz.*, the vagueness and overbreadth attacks upon the facial validity of *Code of Iowa* § 232.41(2)(b) and (d), 406 F. Supp. at 17-21 and 24, and the appropriate standard of proof at a parental termination hearing, 406 F. Supp. at 25, need not now be resolved in order to effect a plenary disposition of the present controversy between the parties, and we do not reach such issues. . . .

. . . .

"Since we expressly reserve a ruling on the question of whether the Iowa statutory provisions at issue in this case are facially unconstitutional, there is no collateral estoppel effect to be accorded the district court's resolution of this question in the future."

We have frequently held that the right of a parent to maintain the custody of his or her children is a natural

but not inalienable right and the public has a paramount interest in the protection of the rights of a child. *State v. A.H.*, 198 Neb. 444, 253 N.W.2d 283 (1977); *State v. Logan*, 204 Neb. 204, 281 N.W.2d 753 (1979). We think it is clear that the State does, indeed, have a "compelling state interest" justifying termination of parental rights, particularly under the facts of the instant case as set out and discussed in some detail above.

We feel that we should point out one further matter with reference to the status of the natural mother of J.L.L. In its order terminating the parental rights of the father in this case, the court stated: "The legal custody of [J.L.L.] is continued with the Lancaster County Department of Public Welfare for care in an approved foster family home, subject to further hearings and orders of this court as they relate to the rights of [the natural mother]."

We conclude, therefore, that appellant's assignments of error are without merit and that the separate juvenile court of Lancaster County properly terminated the parental rights of appellant based upon the evidence in the record, and we determine that the order of the separate juvenile court was correct and should be affirmed.

AFFIRMED.

KRIVOSHA, C.J., concurs in result.

STATE OF NEBRASKA, APPELLEE, V. LARRY E. SMITH, APPELLANT.

306 N.W.2d 181

Filed May 29, 1981. No. 43685

1. **Constitutional Law: Right to Counsel: Identification Procedures: Indictments and Informations.** The sixth amendment right to assistance of counsel at a police lineup attaches only at or after the time that adversary judicial proceedings have been initiated against the defendant by the filing of an indictment or information.
2. **Constitutional Law: Indictments and Informations: Identification Procedures.** A preindictment or preinformation lineup may be challenged on due process grounds if the lineup is unnecessarily suggestive and conducive to irreparable mistaken identification.

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

Jerry N. Stehlik, Deputy County Public Defender, for appellant.

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

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

WHITE, J.

Appellant was convicted by a jury in the District Court for Buffalo County, Nebraska, of robbery and the use of a firearm to commit a felony, and was found by the court to be an habitual criminal. He received a sentence of 10 to 15 years in prison for the robbery and a consecutive sentence of 1 to 2 years for the use of a firearm in the commission of a felony, with credit given for 131 days previously served. He appeals, assigning as error the trial court's failure to suppress in-court identification of him by two eyewitnesses to the robbery. We affirm.

Appellant was arrested at about 3:30 a.m. on April 9, 1980, approximately 4 hours after the Best Western Inn in Kearney was robbed near midnight on April 8, 1980.

About 12 hours after appellant's arrest, and before the filing of formal charges against him, a lineup was conducted by the Kearney police, participated in by appellant and four other men. The motel desk clerk on duty at the time of the robbery and another eyewitness to the robbery both identified defendant at the lineup, as they did at trial. Both before and during trial, appellant moved to suppress the identifications on the ground that the lineup was unduly suggestive. The motions were overruled. In this court, appellant contends, additionally, that the identifications should be suppressed because he was not represented by counsel at the time of the lineup and thus his sixth amendment right to assistance of counsel in a criminal proceeding was violated.

In *Kirby v. Illinois*, 406 U.S. 682, 688, 92 S. Ct. 1877, 32 L. Ed. 2d 411 (1972), the U.S. Supreme Court held that the sixth amendment right to assistance of counsel in a lineup situation "attaches only at or after the time that adversary judicial proceedings have been initiated against" the defendant by the filing of an indictment or information. This is also the rule in Nebraska. *State v. Nance*, 197 Neb. 95, 246 N.W.2d 868 (1976). Appellant was not entitled to assistance of counsel at the time the lineup here was held since formal charges had not then been filed against him, and, thus, the identification may not be suppressed on that ground.

A preindictment or preinformation lineup may still be challenged on due process grounds if the lineup is unnecessarily suggestive and conducive to irreparable mistaken identification. *Kirby v. Illinois, supra; Stovall v. Denno*, 388 U.S. 293, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967). However, the trial court determined that the lineup in this case was not unconstitutionally suggestive, and we agree. Although appellant was the only one of the five men in the lineup with shoulder-length hair, both witnesses who identified him testified that they did so on the basis of his facial features and general body structure. In addition, the evidence shows that

appellant was wearing a large hat at the time of the robbery and not at the lineup, which tends to corroborate the witnesses' testimony that hair length was not a major factor in their identification of him. The lineup was not unduly suggestive, and this assignment of error is without merit. Although not urged by the State, it is obvious from the record that the witnesses saw the defendant in clear light for 20 minutes at distances as close as 2 feet and had an independent recollection of him sufficient to permit them to independently identify him at trial, even if the previous lineup evidence had been suppressed. Further, the defendant's fellow participant in the robbery testified at trial and identified the defendant as the person who held the gun on the witness victims. The appeal is thus totally without merit and the judgment and sentence of the trial court are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
DONALD F. MOORE, APPELLANT.

306 N.W.2d 183

Filed May 29, 1981. No. 43699.

Homicide: Sentences. A sentence to life imprisonment for second degree murder is effective as an indeterminate sentence of 10 years to life.

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

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

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

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

BOSLAUGH, J.

The defendant, Donald F. Moore, appeals from a

sentence of life imprisonment for second degree murder. The defendant was originally charged with murder in the first degree in the robbery and shooting of Omaha cab driver Reuel Eugene Van Ness, Jr. Later he agreed to plead guilty to an amended information charging second degree murder. The defendant, in this appeal, contends that the sentence imposed was excessive.

Although the sentence to life imprisonment was the maximum sentence authorized for the offense, under our decisions it is an indeterminate sentence of 10 years to life. See, *State v. Randall*, 208 Neb. 248, 302 N.W.2d 733 (1981); *State v. Thompson*, 189 Neb. 115, 201 N.W.2d 204 (1972).

Prior to the acceptance of the defendant's guilty plea, the trial court examined the defendant to determine the extent and nature of his involvement in the offense. The defendant stated that, on the evening of August 22, 1979, he and his 21-year-old brother, Carey Dean Moore, planned to rob a cab driver. The two had gone to a movie earlier in the evening and then proceeded to the Smoke Pit restaurant where Carey called a cab. Carey and the defendant had something to eat while waiting for the cab.

When the cab arrived, Carey indicated to the defendant that it was the cab they would rob. The defendant said that one of the reasons they chose that particular driver was because he was old and less likely to chase them.

The defendant knew that his brother was carrying a loaded .32-caliber automatic pistol and had considered that there might be some shooting. During questioning by the court, the defendant stated: "Mr. Moore: I took in consideration that there might be some shooting. The Court: And why? Was that something Dean said or just the fact you had a gun? Mr. Moore: Yes. . . . The Court: But you knew you were going to rob him or at least try to? Mr. Moore: Right. The Court: And you knew there

was a possibility of him being killed or shot? Mr. Moore: Yes."

The brothers instructed the driver to take them to Dam Site No. 16 outside of Omaha. Upon reaching the dam site, Carey produced the gun and demanded that the driver hand his money to the defendant. After receiving $70 from the driver, the defendant stepped from the cab. The defendant's brother then shot the cab driver, Reuel Eugene Van Ness, Jr., in the back, three or four times, killing him. Van Ness fell from the cab. The defendant then got behind the wheel and drove the taxi back to Omaha while his brother remained in the back seat wiping away fingerprints. The defendant parked the taxi approximately 6 blocks from their home. They divided the money taken from the driver, and then walked home.

The defendant's brother, Carey Dean Moore, has been convicted of first degree murder and sentenced to death.

The defendant bases his appeal for a reduction in sentence on the fact that at the time of the offense he was only 14 years of age, and urges that he was under the influence of his older brother at the time of the commission of the murder. The record, however, indicates that the defendant was fully aware of the possible consequences of the armed robbery.

The trial judge, in imposing the sentence of life imprisonment, noted that there was ample evidence to support a conviction for first degree murder under the felony murder statute and that, while the defendant was only 14 years old, he had been involved in prior criminal activity. The defendant's attitude, as disclosed in the psychiatric report, was an additional reason given for the sentence imposed.

The savage nature of the crime and the defendant's willing and knowing participation in it fully support the judgment of conviction and the sentence imposed. The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL W. SARE, APPELLANT.

306 N.W.2d 164

Filed May 29, 1981. No. 43946

Assault: Words and Phrases. Multiple injuries including a cerebral concussion and nasal fracture constitute serious bodily injuries which will support a conviction for first degree assault under Neb. Rev. Stat. § 28-308(1) (Reissue 1979).

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

Stephen Greenberg for appellant.

Paul L. Douglas, Attorney General, and Mark D. Starr for appellee.

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

BOSLAUGH, J.

The defendant appeals from a conviction for first degree assault of Rodney Smiley on or about July 5, 1980. The State dismissed a second count of first degree assault in return for the defendant's plea of guilty. The defendant was represented by private counsel at the arraignment and was extensively questioned by the trial judge to determine that the plea was voluntarily and intelligently made. The District Court accepted the defendant's plea and sentenced the defendant to a term of 5 to 15 years' imprisonment in the Nebraska Penal Complex.

The defendant contends the District Court committed a plain error in that there was no factual basis for the plea to assault in the first degree, and the sentence imposed was excessive.

At a felony arraignment the trial court is required to ascertain there is a factual basis for the plea before a plea of guilty may be accepted. *State v. LeGear*, 187 Neb. 763, 193 N.W.2d 763 (1972). The factual basis may

be determined from inquiry of the defendant, inquiry of the county attorney, or examination of the presentence report. *Id.* at 766, 193 N.W.2d at 765.

Here the trial court was advised by the county attorney of the facts surrounding the offense. The trial court also made use of a thorough presentence report which described the assault in detail and the extent of injuries to Smiley.

The defendant argues that the injuries suffered by Smiley were not sufficient to support a conviction for assault in the first degree under Neb. Rev. Stat. § 28-308(1) (Reissue 1979), which requires that the victim sustain "serious bodily injury." Serious bodily injury is defined in Neb. Rev. Stat. § 28-109(20) (Reissue 1979) as follows: "Serious bodily injury shall mean bodily injury which involves a substantial risk of death, or which involves substantial risk of serious permanent disfigurement, or protracted loss or impairment of the function of any part or organ of the body."

In 1977 the defendant was sentenced to 2 years' imprisonment for assault with intent to rob Smiley. This charge resulted from an armed robbery of a filling station at which Smiley was the attendant. Smiley identified the defendant as the robber. After being released from prison, the defendant threatened Smiley on several occasions.

The assault involved in this case took place on a farm in Sarpy County where a number of young people were having a party. The defendant and four other companions, at least one of whom was armed, sought out Smiley and proceeded to beat him severely. The defendant struck Smiley 10 to 15 times in the face and kicked him repeatedly.

Smiley's girl friend, who was an eyewitness to the attack, described his injuries as follows: "Yes, he lost alot of blood, both of his eyes were black, cracked teeth falling, his one eye was so swollen it just looked like a slit, his nose was broken in four different places, his nasal passages were clogged because the walls were

pressing against them, his lips were all swollen, he's got bruises all over, his legs got bruises up and down, he's got bruised bones in his rib cage, two concusions [sic]." Smiley was hospitalized for 5 days and underwent surgery for removal of a bone fragment that was floating unattached in his nasal passage.

Smiley was off work for 3 weeks following his release from the hospital and his medical expense was in excess of $2,000. At sentencing, the trial court noted from the presentence report the severe nature of the beating Smiley had received. The court stated: "It wasn't just a broken nose. There was a brain concussion with it, there were bruises and contusions around the body. When he tried to get up and get away from you, and not just you, but there was another one with you that was helping you beat up on him, and all he was doing was walking with his girlfriend, and when he tried to get away from you, you chased him around and smashed his head into the hood of a truck with enough force that there was blood left on the hood."

The presentence report established a factual basis for the plea of guilty to first degree assault because it shows the victim suffered serious bodily injury. The victim sustained a cerebral concussion, was unconscious for 15 minutes, and suffered a serious nasal fracture. This finding is supported by decisions in other jurisdictions which have reviewed similar aggravated battery statutes. Serious bodily injury or great bodily harm was found to support convictions in cases involving similar or lesser injuries. *Baker v. State*, 246 Ga. 317, 271 S.E.2d 360 (1980) (broken nose and bruises); *People v. Caliendo*, 84 Ill. App. 3d 987, 405 N.E.2d 1133 (1980) (fractured ribs and lacerations); *People v. Rickman*, 73 Ill. App. 3d 755, 391 N.E.2d 1114 (1979) (broken ankle); *State v. Colomy*, 407 A.2d 1115 (Me. 1979) (contusion of the kidney); *State v. Fuger*, 170 Mont. 442, 554 P.2d 1338 (1976) (broken nose and fractured palate); *Commonwealth v. Alexander, Aplnt.*, 237 Pa. Super. Ct. 111, 346 A.2d 319 (1975) (broken nose and blackened eyes).

The maximum sentence for first degree assault is 20 years' imprisonment and/or a $25,000 fine. A trial court is given wide discretion in sentencing. A sentence which is within statutory and constitutional limitations will not be disturbed on appeal in the absence of an abuse of discretion. *State v. Janis*, 207 Neb. 491, 299 N.W.2d 447 (1980).

This is an extreme case. The assault was a savage and brutal beating which was entirely without provocation. The motive of revenge because of the victim's previous identification of the defendant as the armed robber in the 1977 offense aggravated this offense and called for a severe penalty. There was no abuse of discretion.

The judgment is affirmed.

AFFIRMED.

ACCENT SERVICE COMPANY, INC., APPELLEE, V. VIOLET EBSEN, APPELLANT.

306 N.W.2d 575

Filed June 5, 1981. No. 43353.

1. **Minors: Emancipation.** The emancipation of a child by a parent may be proved by circumstantial evidence or by an express agreement, or implied from the conduct of the parties.
2. ____:____. Where a minor departs from the family home with parental consent, takes his personal belongings with him, thereafter furnishes his own support and receives nothing from his parent, that minor becomes emancipated, thereby relieving the parent from liability to those who furnish necessaries of life to the minor.
3. ____:____. A parent may be held liable for necessaries of life furnished to an emancipated minor, where the parent orally or in writing agrees to the payment for such necessaries.

Appeal from the District Court for Knox County: MERRITT C. WARREN, Judge. Reversed and remanded with directions to dismiss.

Frank Roubicek for appellant.

No appearance for appellee Accent.

Heard before KRIVOSHA, C.J., WHITE, and HASTINGS, JJ., and VAN PELT and CAPORALE, District Judges.

VAN PELT, District Judge.

This is an appeal from a $2,555.01 judgment of the District Court of Knox County, Nebraska, entered in favor of the plaintiff-appellee, as assignee, against the defendant-appellant for hospital expenses incurred by defendant's son. The District Court, in affirming the judgment of the county court, found that the evidence was insufficient to establish emancipation by the minor, and that the evidence did establish a contractual liability on the part of the defendant to pay for her son's medical services.

Appellant's first assignment of error is that the trial court erred in finding that there was insufficient evidence of a complete emancipation. Violet Ebsen, a widow, and her 18-year-old son, Dwaine, lived together until approximately December 1976. Dwaine then began associating and staying overnight with people his mother did not like and of whom she did not approve. Arguments over his associations and conduct took place in December of 1976 and in January of 1977. As a result of one such argument, on February 1, 1977, Dwaine took his personal belongings and moved from his mother's home in Verdigre, Nebraska, to Orchard, Nebraska. Both the mother and son agreed that he should move out and support himself. After moving out, Dwaine received no further support from his mother. On February 24, 1977, while still living in Orchard, Dwaine was shot and taken to a hospital in Norfolk, Nebraska. There, the hospital expenses were incurred that are the subject of this litigation. After being hospitalized for 2 weeks, Dwaine returned to his mother's home for 3 days and then left. He has been self-supporting and has not returned to his mother's home since leaving.

Whether Dwaine Ebsen was emancipated at the time of his hospitalization is relevant, since the complete emancipation of a child relieves the parent from liability to those who furnish necessaries of life to that child. *Brosius v. Barker*, 154 Mo. App. 657, 136 S.W. 18 (1911); *Timmerman v. Brown*, 268 S.C. 303, 233 S.E.2d 106 (1977); *Poudre Valley Hospital District v. Heckart*, 491 P.2d 984 (Colo. App. 1971).

The emancipation of a child by a parent may be proved by circumstantial evidence or by an express agreement, or implied from the conduct of the parties. *Adams & Burke Co. v. Cook*, 82 Neb. 684, 118 N.W. 662 (1908). Although this court has not had an occasion to discuss the factors to be considered in determining whether a minor has become emancipated, they were recently analyzed in Annot., 98 A.L.R. 3d 334, 335-36 (1980): "In general, even in the absence of statute, parents are under a legal as well as a moral obligation to support, maintain, and care for their children, the basis of such a duty resting not only upon the fact of the parent-child relationship, but also upon the interest of the state as parens patriae of children and of the community at large in preventing them from becoming a public burden. However, various voluntary acts of a child, such as marriage or enlistment in military service, have been held to terminate the parent's obligation of support, the issue generally being considered by the courts in terms of whether an emancipation of the child has been effectuated. In those cases involving the issue of whether a parent is obligated to support an unmarried minor child who has voluntarily left home without the consent of the parent, the courts, in actions to compel support from the parent, have uniformly held that such conduct on the part of the child terminated the support obligation.

"Correlative to a parent's obligation of support and maintenance of a minor child is the liability of a parent to others who have performed the support obligation

for the parent by furnishing the child with necessaries. Generally, a parent's liability for necessaries furnished a minor child will depend on a variety of circumstances, but it appears clear that no liability exists where the parent has been ready and willing at all times to supply necessaries himself and to otherwise fulfill his obligation to support the child. Thus, it has been held that a parent was not liable to a third person furnishing necessaries to an unmarried minor child while voluntarily living apart from the parent with consent, the courts concluding that in such a case the parent was under no obligation to support the child and that the child carried with him no authority to bind the parent for the necessaries furnished. However, a parent has been held liable for necessaries furnished his unmarried minor child by a third person while the child was living apart from the parent without consent, where there was evidence that the parent authorized the sale of the goods to the child."

Where a child departed from the family home and the parent consented to the departure, the child was found to be emancipated in *Holland v. Hartley*, 171 N.C. 376, 88 S.E. 507 (1916); in *Poudre Valley Hospital District v. Heckart, supra;* and in *Timmerman v. Brown*, 268 S.C. 303, 233 S.E.2d 106 (1977).

In the instant case, after several months of arguing and the defendant in effect telling her son to either change his behavior or move out, he left his mother's home with her consent. From that time until the hospital expense was incurred, he furnished his own support and received nothing from his mother. Under these facts, Dwaine Ebsen became emancipated, and his mother became relieved of liability to those furnishing him necessaries.

Appellant's second assignment of error is that the trial court erred in finding that there was evidence of a contractual agreement by the defendant to pay her son's hospital expenses. If such an agreement existed, defendant would be liable, regardless of her

son's emancipation, under general principles of contract law.

The county court was unable to make a finding that there was or was not a contractual agreement, but entered judgment for the plaintiff on the basis that Dwaine Ebsen was not emancipated. The District Court affirmed the judgment of the county court, with the following additional finding: "3. That Defendant authorized Plaintiff's assignor to furnish medical services of an emergency nature to her minor son, Dwaine Ebsen, orally and by the execution of Exhibit '3' in writing, immediately prior to the furnishing of the first of said services."

Exhibit 3, referred to, is a consent to operation, anesthetics, and other medical services. This document contains no language of a promise, express or implied, to pay for the services. Lucille Loberg, the hospital employee who was present when the defendant signed exhibit 3, testified that normally the hospital uses another document which specifies how the bill is to be paid. However, no such document signed by the defendant was ever produced or received in evidence.

Nor does the record reveal any oral promise to pay the hospital expenses. The closest testimony to such a promise was in the county court, where the defendant, under examination by the plaintiff's attorney, stated that by signing exhibit 3 she wanted her son attended to and wanted him to stay alive. Under examination by her own attorney, she testified that at no time did she say anything to anyone at the hospital that she could or would pay the bill. Plaintiff has the burden of proving any oral or written agreement by a preponderance of the evidence. There is no such evidence in the record.

It should be noted that as to both assignments of error it is difficult to ascertain the plaintiff's exact position, since it filed no brief in this court and did not appear at oral argument. For the reasons set forth above, the order and judgment of the District Court

are reversed, and the cause is remanded with directions to dismiss plaintiff's petition and cause of action, at plaintiff's costs.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

LAGORD ASSOCIATES, A PARTNERSHIP, APPELLANT, V. COUNTY OF CASS, NEBRASKA, APPELLEE.

306 N.W.2d 578

Filed June 5, 1981. No. 43362.

1. **Taxation: Valuation.** Neb. Rev. Stat. § 77-112 (Reissue 1976) does not require the taxing authorities to utilize all the factors set forth therein in ascertaining the actual value of property for taxation. Instead, they may use such factors or a combination thereof which are determined to be applicable in determining actual value under the Constitution of Nebraska.
2. **Taxation: Valuation: Appeal and Error.** In an appeal to the District Court from the action of the county board of equalization fixing the value of real property for tax purposes, the court shall affirm the action taken by the board unless evidence is adduced establishing that the action of the board was unreasonable or arbitrary, or unless evidence is adduced to establish that the property of the appellant is assessed too low.
3. ____:____:____. In an appeal to the county board of equalization or to the District Court, and from the District Court to this court, the burden of proof imposed on the complaining taxpayer is not met by showing a mere difference of opinion unless it is established by clear and convincing evidence that the valuation placed upon his property when compared with valuations placed on other similar property is grossly excessive and is the result of a systematic exercise of intentional will or failure of plain duty, and not mere errors of judgment.

Appeal from the District Court for Cass County: RAYMOND J. CASE, Judge. Affirmed.

Robert C. Doyle of Walsh, Walentine, Miles, Fullenkamp & O'Toole for appellant.

Ronald D. Moravec, Cass County Attorney, for appellee.

Heard before KRIVOSHA, C.J., WHITE, and HASTINGS, JJ., and VAN PELT and CAPORALE, District Judges.

VAN PELT, District Judge.

This is an appeal by the plaintiff taxpayer from an order of the Cass County District Court which affirmed the assessment of plaintiff's property made by the Cass County Board of Equalization. The plaintiff owns the Nottingham Court apartments, a 48-unit complex near Plattsmouth. The actual value of this property for tax purposes in 1978 was $315,000. The Cass County assessor revalued the property as of January 1, 1979, at $739,425. The State Board of Equalization and Assessment increased all Cass County property an additional 9 percent, raising the actual value for tax purposes of the subject property to $805,975.

Plaintiff's principal contention on appeal is that the county board's action was grossly excessive, arbitrary, and unreasonable since it relied solely on reproduction cost less depreciation, plus a gross rent multiplier, and overlooked the six other factors specified in Neb. Rev. Stat. § 77-112 (Reissue 1976). Particularly, plaintiff contends that earning capacity and relative location should have been considered.

The plaintiff's expert witness testified to an opinion of $500,000 to $550,000, utilizing the factors suggested by plaintiff. Plaintiff additionally relies upon the testimony of the County's expert that, utilizing an earning capacity valuation, the property would be worth $403,000. Under the income approach, the plaintiff's expert arrived at a value of $438,000.

The County argues that a valuation utilizing reproduction cost less depreciation is the most reasonable for this property, and that comparable sales of units in Plattsmouth substantiate the assessed value. The plaintiff's expert agreed, respecting the comparables, testifying to a market value of between $658,000 and $781,000. The County further contends that the earning

capacity approach relied on by the plaintiff is suspect because of evidentiary conflicts regarding occupancy. Finally, it asserts that the assessment utilized on the subject property is consistent with the methods used on all other property within Cass County. Section 77-112 provides: "Actual value of property for taxation shall mean and include the value of property for taxation that is ascertained by using the following formula where applicable: (1) Earning capacity of the property; (2) relative location; (3) desirability and functional use; (4) reproduction cost less depreciation; (5) comparison with other properties of known or recognized value; (6) market value in the ordinary course of trade; and (7) existing zoning of the property." Nothing in the above statute requires the county assessor or county board to use all of the factors set forth therein. Instead, they may use such factors or a combination thereof which they determine to be applicable in determining actual value under the Constitution of Nebraska. See *County of Gage v. State Board of Equalization and Assessment*, 185 Neb. 749, 178 N.W.2d 759 (1970).

In *Bumgarner v. County of Valley*, 208 Neb. 361, 365-66, 303 N.W.2d 307, 310 (1981), this court recently summarized the law applicable to this case as follows:

"While an appeal from a county board of equalization is heard as in equity and is tried de novo, Neb. Rev. Stat. § 77-1511 (Reissue 1976) requires that: 'The court shall affirm the action taken by the board unless evidence is adduced establishing that the action of the board was unreasonable or arbitrary, or unless evidence is adduced establishing that the property of the appellant is assessed too low.'

"In an appeal to the county board of equalization or to the District Court, and from the District Court to this court, the burden of persuasion imposed on the complaining taxpayer is not met by showing a mere difference of opinion unless it is established by clear

and convincing evidence that the valuation placed upon his property when compared with valuations placed on other similar property is grossly excessive and is the result of a systematic exercise of intentional will or failure of plain duty, and not mere errors of judgment. *Hastings Building Co. v. Board of Equalization*, 190 Neb. 63, 206 N.W.2d 338 (1973).

"This court has consistently reaffirmed the principles set out in *Newman v. County of Dawson*, 167 Neb. 666, 672, 94 N.W.2d 47, 50 (1959), where we said: 'It has been frequently recognized by this court that absolute or perfect equality and uniformity in taxation cannot be attained. Something more than a difference of opinion must be shown. It must be demonstrated by evidence that the assessment is grossly excessive and is a result of arbitrary or unlawful action, and not a mere error of judgment. A claim of disproportionate assessment is not sustained when supported only by opinion evidence that the property is assessed at a higher proportion to its actual value than some other property. Such a contention must be sustained by evidence that the valuation is arbitrary or capricious, or so wholly out of line with actual values as to give rise to an inference that the assessor and county board of equalization have not properly discharged their duties. Mere errors of judgment do not sustain a claim of discrimination. There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity.' See, also, *Nash Finch Co. v. County Board of Equalization*, 191 Neb. 645, 217 N.W.2d 170 (1974)."

The evidence in the record fails to establish that the action of the Cass County board was unreasonable or arbitrary. Nor does the record show by clear and convincing evidence that the valuation, when compared with valuations placed on other similar property, is grossly excessive and the result of a systematic exercise of intentional will or failure of a plain duty. The record simply reflects a difference of opinion as to

value. The judgment of the District Court affirming the board's action was correct and it is, therefore, affirmed.

AFFIRMED.

NORMA DANNER, APPELLANT, V. MYOTT PARK, LTD., APPELLEE.

306 N.W.2d 580

Filed June 5, 1981. No. 43401.

1. **Trial: Jury Instructions.** Jury instruction that a landlord may, in the absence of unusual circumstances, if any it finds, without violating its duty to exercise reasonable care for the safety of a tenant or a tenant's visitors, await the end of a snowstorm and a reasonable time thereafter before removing ice and/or snow from outside entrances, walks, platforms, or steps, *disapproved.*
2. ——: —— A jury instruction which misstates issues or defenses and has a tenDency to confuse the jury is erroneous.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Reversed and remanded for new trial.

John J. Hanley for appellant.

Ronald H. Stave and J. Michael Coffey of Sodoro, Johnson, Daly, Stave, Cavel & Coffey for appellee.

Heard before KRIVOSHA, C.J., MCCOWN, WHITE, and HASTINGS, JJ., and MORAN, District Judge.

MORAN, District Judge.

This is an appeal by the plaintiff, Norma Danner, from a judgment for the defendant, Myott Park, Ltd., a limited partnership, entered on a jury verdict in a personal injury case. Plaintiff's motion for a new trial was overruled.

The principal error assigned is on an instruction given by the trial court.

Plaintiff was an overnight guest in her daughter's apartment in the 217-unit Myott Park apartment complex in Omaha, Nebraska, owned by the defendant. The complex was of wood frame construction. Wood stairways with wood railings provided the only access to the apartment. The stairway was open to the elements, and the steps (described as steep) rose from ground level to a landing which served two apartments. Plaintiff, age 43, arrived at the apartment the evening of November 8, 1977. She recalled that it could have been raining. Climatological data from Eppley Airfield disclosed rain at midnight and snow and blowing snow at successive 3-hour intervals until noon of November 9th. Winds during that time varied from 17 to 25 knots per hour and the temperature dropped from 40 degrees at midnight to 33 degrees at noon. Plaintiff left the apartment at 2:30 p.m. on November 9th to telephone her employer to determine whether she should report for work because of the weather. Friends, who by prearrangement were to pick her up to take her to work, arrived at the apartment parking lot, and one saw her "flying through the air" down the stairway. She landed in a sitting position at the foot of the stairway and was injured. Witnesses described the stairway and railings as snowy and icy. Plaintiff testified she never looked outside before leaving the apartment but learned of the snow from television news reports. Schools were closed that day. She was familiar with the steps. She did not look down as she proceeded down the stairway. The resident manager testified it was snowing when she arrived for work shortly before 9 a.m. on November 9th. Winds were high and the snow was beginning to drift. Snow continued until sometime after 2 p.m. When the manager arrived for work she began removing snow around the office. By 9 a.m. the entire three-man maintenance crew was shoveling snow. A maintenance employee testified he salted the steps with chemical melt in the morning between 9:45 and 11:30 a.m. The manager testified that she observed the steps in

question that day, that they had been shoveled, and that she ordered the application of chemical melt after the shoveling of the steps. She did not verify compliance with her order. The witnesses who came to pick up plaintiff testified it was not snowing when they arrived at the complex. One witness returned the following day and photographed the stairway. Two photographs were in evidence. Snow is visible on the lower steps. Small patches of snow appear on the upper steps. He testified that the scene depicted was at least as bad as it was the day earlier at the time of the fall. The other witness testified the scene substantially reflected the condition at the time of the accident. The apartment lease included the requirement in Neb. Rev. Stat. § 76-1419 (1) (c) (Reissue 1976) that the landlord keep all common areas of the premises in a clean, safe condition.

The trial court instructed the jury on issues of negligence and contributory negligence. Instruction No. 8 reads:

"Where a landlord reserves a portion of the leased premises for the common use of its tenants, the landlord is required to keep the portion so reserved in a reasonably safe condition for its tenants and their visitors.

"A landlord is not subject to liability for bodily harm to its tenants' visitors on account of a condition of that part of the premises used in common by its tenants and under the landlord's possession and control unless:

"1. The condition created an unreasonable risk of harm to its tenants and their visitors; and

"2. The landlord knew, or in the exercise of reasonable care should have known, of the dangerous condition and the risk involved therein; and

"3. The landlord was afforded a reasonable time within which to make the condition safe or to give to its tenants and their visitors adequate warning to enable such persons to avoid harm; and

"4. The landlord in the exercise of reasonable care could have made the condition safe.

"As used in this instruction, the term 'unreasonable

risk of harm' means a risk that a reasonable person, under all the circumstances of the case, would not allow to continue."

This instruction was approved in *Schwab v. Allou Corp.*, 177 Neb. 342, 128 N.W.2d 835 (1964). Compare Restatement (Second) of Property § 17.3 (1977).

The error assigned in this court is in giving instruction No. 9 which was the trial court's modification of a similar instruction requested by defendant. Instruction No. 9 reads: "You are instructed that a landlord may, in the absence of unusual circumstances, if any you find, without violating its duty to exercise reasonable care for the safety of a tenant or a tenant's visitors, await the end of a snow storm and a reasonable time thereafter before removing ice and/or snow from outside entrances, walks, platforms or steps."

It is apparent that this instruction takes from the jury a factor which it might consider in paragraph 3 of instruction No. 8.

Plaintiff's theory is that defendant either failed to adequately clean the stairway or overlooked it in its snow- and ice-cleaning operations. Defendant contends that it cleaned the stairway. It is possible that additional snow accumulated after the stairway was cleared. If so, defendant contends that it was proper to give instruction No. 9. It is difficult to understand how this instruction could apply to the facts here because all of the evidence is that defendant began clearing operations at 9 a.m.

The propriety of the challenged instruction has never been before the court in the past. The weight of authority appears to support it. See *Mattson v. St. Luke's Hospital*, 252 Minn. 230, 89 N.W.2d 743 (1958).

We believe, however, that the instruction creates more problems than it purports to solve. The jury was adequately instructed in this respect in paragraph 3 of instruction 8. It was for the jury to determine under the evidence whether defendant was afforded a reasonable time to make the condition safe or give adequate warn-

ing. One does not have to reflect long to think of situations where giving the challenged instruction results in injustice. This was the position of the court in *Cramer v. Van Parys*, 7 Wash. App. 584, 500 P.2d 1255 (1972), where it affirmed the trial court's refusal to give the jury a similar instruction. In that case the court said at 593, 500 P.2d at 1262: "Whether a landlord was negligent in failing to remove snow from common areas is best left to the jury. In weighing the relevant circumstances, a jury might consider the nature and size of the apartment, the age and number of tenants expected to use the slippery area, the size of the area in need of cleaning, the current and anticipated weather conditions and the practicality of other safety measures or methods of ingress and egress. In weighing these factors, a jury might hold the urban landlord of a large building to a different standard of care than the rural landlord of a small building who does not live in the building. To permit any landlord under any circumstance to always wait until the end of a storm before removing snow would create a rigidity in the law inconsistent with the innumerable variables that are possible."

Defendant distinguishes the *Cramer* case because the instruction here added the phrase "in the absence of unusual circumstances, if any you find." One may inquire what are unusual circumstances, and should not a trial court define them. Circumstances are what a jury considers when determining the reasonableness of conduct.

We disapprove of the instruction. Giving it in this case was particularly prejudicial because the jury could have found that improper clearing of snow and ice, or overlooking the cleaning of the stairs, was of no consequence because defendant had a right to wait until the end of the storm before doing anything at all.

We have held that a jury instruction which misstates issues or defenses and has a tendency to confuse the jury is erroneous. *Bartels v. Retail Credit Co.*, 185 Neb.

304, 175 N.W.2d 292 (1970); *Zimmerman v. Continental Cas. Co.*, 181 Neb. 654, 150 N.W.2d 268 (1967).

Defendant contends that in any event it was entitled to a directed verdict in its favor under principles announced in *Nance v. Ames Plaza, Inc.*, 177 Neb. 88, 128 N.W.2d 564 (1964), in that the plaintiff had knowledge or should have had knowledge of the condition comparable to that of the defendant, and thus the defendant could not be guilty of negligence. This case is distinguishable. Here, plaintiff had no choice but to use the only means available to leave the apartment. As her daughter's guest, plaintiff had the right to assume that defendant would comply with its contractual duty to keep the common stairway in a clean, safe condition. *Robinson v. Belmont Co.*, 94 Colo. 534, 31 P.2d 918 (1934).

During oral argument, defendant abandoned its claim that plaintiff was contributorily negligent as a matter of law.

REVERSED AND REMANDED FOR A NEW TRIAL.

SANITARY AND IMPROVEMENT DISTRICT NO. 1 OF ADAMS COUNTY, NEBRASKA, A POLITICAL SUBDIVISION, ET AL., APPELLANTS, V. COUNTY OF ADAMS, NEBRASKA, APPELLEE.

306 N.W.2d 584

Filed June 5, 1981. No. 43426.

1. **Statutes.** Statutes in pari materia must be construed together.
2. ____. An independent legislative act covering the entire subject of legislation to which it relates may incidentally modify or change existing statutes without referring to them.
3. ____. Where a general statute, if standing alone, would include the same matter as the special act, and thus conflict with it, the special act will be considered as an exception to the general statute, whether it was passed before or after such general enactment. Where the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one; and where the general act is later, the special statute will be

construed as remaining an exception to its terms, unless it is repealed in express words or by necessary implication.

Appeal from the District Court for Adams County: BERNARD SPRAGUE, Judge. Affirmed.

Brock & Seiler for appellants.

Arthur C. Toogood, Adams County Attorney, for appellee.

Heard before BOSLAUGH, CLINTON, and BRODKEY, JJ., and REAGAN and NORTON, District Judges.

NORTON, District Judge.

This is an appeal from a declaratory judgment proceeding in the District Court of Adams County, Nebraska.

Plaintiffs are Sanitary and Improvement District No. 1 of Adams County, Nebraska, a political subdivision, and Robert Trenchard, Robert Hardin, Vance Anderson, Donald L. Brock, and Frank Boyd, trustees of the sanitary and improvement district and landowners of Adams County, Nebraska, all of whom are hereinafter referred to as SID No. 1. The defendant is the County of Adams, Nebraska, hereinafter referred to as County.

SID No. 1 was organized during the year 1964, pursuant to the provisions of Neb. Rev. Stat. §§ 31-727 through 31-762 (Reissue 1978), as amended. Subsequent to its organization, a plat of the district was filed with the register of deeds of Adams County, Nebraska, declaring all streets contained therein to be public. In reality, SID No. 1 contains only two streets involved in this controversy, Highland Drive and Madden Road. On September 8, 1976, the County notified SID No. 1 that it would remove snow from the two streets mentioned for a fee of $100 per year; and, on February 27, 1979, the County adopted a resolution stating in substance that SID No. 1 would be required to pay for maintenance, grading, snow removal, and culvert work on said streets effective July 1, 1979. This action resulted. The issue

presented to the trial court was whether or not the evidence was sufficient to declare the County responsible for maintenance, grading, snow removal, and culvert work on said streets. The trial court found for the defendant. We affirm.

The sole issue for consideration on this appeal is the responsibility of Adams County for maintenance, grading, snow removal, and culvert work performed within the boundaries of SID No. 1 under the circumstances of this case.

SID No. 1 argues in substance that the streets in question are roads rural in nature, open to the public, designated mail routes, and thereby part of the primary road system of the County; further, that Neb. Rev. Stat. § 39-1402 (Reissue 1978) vests the power and authority to maintain public roads in the County, and that Neb. Rev. Stat. §§ 39-2001(1) and 39-2003 (Reissue 1978) require the County to maintain at its expense all county roads which fall into the classification of primary roads. The counterargument of the County in substance is that there is a special act dealing with sanitary and improvement districts, and the construction, improvement, and maintenance of the streets or roads contained therein; that there is no indication in that act that the Legislature intended to impose this burden upon any county which might be involved; that the statutes referred to by SID No. 1 are general statutes; and that where special acts exist they are to be considered an exception to general legislation dealing with the same subject matter, unless that special act is repealed in express words or by necessary implication. The County further argues that a county can exercise only such powers as are expressly conferred upon it, and any reasonable doubt as to a grant of power must be resolved against it.

The evidence presented to the trial court would show that the streets in question were open and used by the public, and were rural in nature. Moreover, the evidence indicates that the State of Nebraska has in the

past included said streets in establishing the factor for allocation of road funds in Adams County, and that the County has collected funds from the state on the basis of the factor established. There is some conflict surrounding the matter of how the streets became mail route roads. The County admits they have been so designated by the U.S. Post Office; and the minutes of a meeting of the board of the County held on or about September 8, 1976, contain the following brief statement in regard to said streets: "Said roads are presently mail route roads." The record is silent as to whether the County has ever made an official designation as to the classification of said streets as is required in §§ 39-2001 through 39-2003. The uncertainty on the latter two points is not material to a decision in this case.

Article 7 of Chapter 31 is devoted entirely to the subject of sanitary and improvement districts. It is divided into five portions, part two of which contains §§ 31-727 through 31-762, dealing with districts formed under the act of 1949. By the terms of this act and these particular sections, sanitary and improvement districts may be formed for various purposes, including the installation of "a system of sidewalks, public roads, streets, and highways . . . ." § 31-727. The act also provides that the board of trustees of any district shall have the power to provide "for establishing, maintaining, and constructing sidewalks, public roads, streets, and highways, including the grading, changing grade, paving, repaving, graveling, regraveling, widening or narrowing roads, resurfacing or relaying existing pavement, or otherwise improving any road, street, or highway within the district . . . ." § 31-740. Further, this act provides that the district may borrow money for its corporate purposes and issue general obligation bonds, and that it "*shall* annually levy a tax on the assessed value of all the taxable property in the district, except intangible property, sufficient to pay . . . for the maintenance and repairing of any sidewalks, public roads, streets, and highways

. . . ." (Emphasis supplied.) § 31-739.

In its petition for creation SID No. 1 prayed for an order finding that it had been duly organized and entitled to exercise *all* rights, powers, and privileges granted by law to districts organized under §§ 31-727 through 31-762. Attached to the petition are the articles of incorporation. Article VII thereof states that one of the purposes of SID No. 1 shall be "installing a system of public roads, streets, and highways . . . ." and that the board of trustees shall be invested with power "for establishing, maintaining and constructing of public roads, streets, and highways, including the grading, changing grades, paving, repairing, graveling, regraveling, widening or narrowing of roads, resurfacing or relaying existing pavement, or otherwise improving any road, street, or highway within the district . . . ." By Article VIII, the owners are obligated "to pay the tax or taxes which may be levied . . . and . . . assessed against them, to pay the expenses which may be necessary . . . [for] the cost of grading, changing grade, paving, repairing, graveling, regraveling, widening or narrowing roads, resurfacing or relaying existing pavement, or otherwise improving any public roads, streets, or highways within the district . . . ." On May 8, 1964, a decree was entered in the District Court of Adams County, Nebraska, approving the organization of SID No. 1 under the proposed articles. No appeal was taken and this order became final. Thereafter, bonds were issued in the manner provided by law for various purposes, including street improvements, and special assessments were levied for the repayment of the same.

In giving effect to the intent of the Legislature in the adoption of legislation, this court has stated that statutes in pari materia must be construed together. *State v. Howard*, 193 Neb. 45, 225 N.W.2d 391 (1975). The court has further stated: "'An independent legislative act covering the entire subject of legislation to which it relates may incidentally modify or change existing statutes without referring to them.'" *Thompson*

v. Commercial Credit Equipment Corp., 169 Neb. 377, 386, 99 N.W.2d 761, 767 (1959). "'[W]here the general statute, if standing alone, would include the same matter as the special act, and thus conflict with it, the special act will be considered as an exception to the general statute, whether it was passed before or after such general enactment. Where the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one; and where the general act is later, the special statute will be construed as remaining an exception to its terms, unless it is repealed in express words or by necessary implication.'" *Id.* at 387, 99 N.W.2d 761, 768.

There can be no question that article 7 of Chapter 31, while adopted at various times, is a special, independent legislative act in itself, intended to cover the entire subject of sanitary and improvement districts in this state. It contains broad provisions conveying powers which include those intended to deal with the matter of the construction, improvement, and maintenance of roads within the districts.

An examination of the general statutes cited by the parties and of the special act discloses no language which would repeal, either expressly or by implication, the plain language of all legislation under consideration. Therefore, in adopting the act in question, the Legislature has in effect created an exception to the general statutes dealing with the responsibility of counties to provide for the construction, improvement, and maintenance of roads within districts legally organized for those purposes. It is noted that one of the specific purposes of SID No. 1 was to provide public streets and highways. The evidence discloses that the board, acting under powers granted to it, did in fact construct the streets in question. The act then imposes an affirmative duty upon the board to levy a tax to pay for those very items which SID No. 1 now wishes to transfer to the County. The existence of that duty indicates without question that these responsibilities are

solely those of SID No. 1.

We are not prepared to say that under circumstances different from this case some responsibility might arise on the part of a county for the maintenance and improvement of roads within a sanitary and improvement district. However, in the instant case the evidence before the trial court and this court does not disclose any circumstances imposing an obligation on the part of Adams County, and is therefore insufficient to support the claim of SID No. 1.

The judgment of the District Court is affirmed.

AFFIRMED.

CHRISTOPHER L. OTTO, APPELLANT, V. LEE HAHN, APPELLEE.

306 N.W.2d 587

Filed June 5, 1981. No. 43504.

1. **Workmen's Compensation.** The whole character of the employment must be considered to determine whether an employee is a farm laborer within the meaning of the Workmen's Compensation Act.
2. **Legislative Intent.** When interpreting legislative acts we are concerned with the intent of the Legislature in adopting the same.
3. ——. In determining that intent, we consider the history of the legislation and weigh a reasonable interpretation against an unreasonable or absurd construction.
4. **Legislative Intent: Constitutional Law.** When the Legislature chooses to inaugurate reforms in the area of economics or social welfare, it is not required to make the choice between attacking every aspect of a problem or not attacking the problem at all, as long as the action has a rational basis and is free from invidious discrimination.
5. **Workmen's Compensation: Constitutional Law: Proof.** The one attacking the exemption of farm laborers from the provisions of the Workmen's Compensation Act as a violation of equal protection has the burden of proving that there is no rational basis for the classification.

Appeal from the Nebraska Workmen's Compensation Court. Affirmed.

Law Offices of Kenneth Cobb, P.C., and John B.

McCauley and Law Office of Lynn D. Hutton, Jr., P.C., for appellant.

James G. Egley of Moyer, Moyer & Egley for appellee.

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

HASTINGS, J.

The appellant, Christopher L. Otto, has appealed from an order of the Workmen's Compensation Court dismissing his petition for disability benefits. The one-judge Workmen's Compensation Court found that Otto was an exempt farm laborer and was therefore not entitled to benefits under the Workmen's Compensation Act. Upon rehearing by a three-judge panel, pursuant to Neb. Rev. Stat. § 48-179 (Reissue 1978), the original order was affirmed and the petition dismissed. The appellant assigns as error the failure to award compensation, the failure to find that farming is a hazardous occupation, and the refusal of the court to declare the farm laborer exemption in violation of the fourteenth amendment of the U.S. Constitution. We affirm.

Christopher Otto was a full-time employee of the defendant, Lee Hahn, and was the victim of an accident which occurred while Otto was tearing out some steps leading to the defendant's farmhouse. While pulling a nail out of the steps with a flat bar, the nail broke off and flew up and struck Otto in the right eye. As a result of the accident the retina became detached, and as of January of 1980 the vision in Otto's right eye was limited to light perception.

The duties of the appellant's employment included cleaning pigpens, feeding cattle and pigs, plowing, disking, building fences and pens, and various miscellaneous jobs on the farm. Otto worked approximately 45 hours per week, and worked only for the defendant on his farm and at no other location.

It is well established that a workman is not a farm laborer simply because he is doing work on a farm, nor

because the task on which he is engaged happens to be what is ordinarily considered farm labor. The whole character of the employment must be considered to determine whether he is a farm laborer. *Campos v. Tomoi*, 175 Neb. 555, 122 N.W.2d 473 (1963); *Hawthorne v. Hawthorne*, 184 Neb. 372, 167 N.W.2d 564 (1969). A review of the whole character of Otto's employment supports the conclusion that he is a farm laborer within the meaning of the Workmen's Compensation Act.

Employers of farm laborers have been exempted from the act since its inception. "(2) The following are declared not to be hazardous occupations and not within the provisions of this act: Employers of household domestic servants and employers of farm or ranch laborers . . . ." Neb. Rev. Stat. § 48-106(2) (Reissue 1978).

The appellant argues that the classification of farming as a nonhazardous occupation is unreasonable and arbitrary and therefore a violation of the equal protection clause of the fourteenth amendment. Evidence was presented to prove that farming is one of the most hazardous occupations existing today. The appellant contends that the character of farming has changed since the early part of this century when the Workmen's Compensation Act was first adopted, and the classification of farming as nonhazardous may have been reasonable then, but by present standards it is unjustified.

What legislative history we have been able to find indicates that the Legislature never made a legislative finding that farming is nonhazardous. It appears that the description in the exclusion was merely the result of bill drafting and various amendments. "SECTION 1. The common law system governing the remedy of workmen against employers for injuries received in hazardous work is inconsistent with modern industrial conditions. . . . SEC. 2 *There is a hazard in all employment*, but certain employments have come to be, and are recognized as being inherently constantly dangerous. This act is intended to apply to all such inherently hazardous works and occupations . . . ." House Roll No. 193, pp. 1-2,

Thirty-third Session, 1913. (Emphasis supplied.) The bill went further and listed specifically all such extra-hazardous occupations. The Senate bill as introduced was in the same language. Senate File No. 1, pp. 1-2, Thirty-third Session, 1913. The latter bill was amended to even more exhaustively enumerate the occupations to which the act was to apply, with the result being a list of vocations one and one-half single-spaced legal sized pages long. Committee of the Whole Amendments, Senate File No. 1, April 4, 1913. The bill was again amended by a House Committee, and the result, which more nearly resembles the current statute, removed the long list of occupations and substituted the following:

"Sec. 6. (1). The provisions of this act shall apply to the State of Nebraska and every governmental agency created by it, and every employer in this state employing five or more employees, in the regular trade, business, profession or vocation of such employer.

"(2). The following are declared not to be hazardous occupations and not within the provisions of this act; employers of household domestic servants, employers of farm laborers and all employers employing less than five employees, in the regular trade, business, profession or vocation of such employer . . . ." House Committe of the Whole Amendments to Senate File No. 1, Thirty-third Session, April 14, 1913.

It appears that the use of the term "hazardous" in the amendment relates back to the intent of the legislators to cover employments considered to be inherently constantly dangerous. Certain employments were intended to come within the provisions of the act and others were intended to be excluded. In order to shorten the list of included occupations, the legislators decided to include all employers with certain exceptions. It is unfortunate that they used the term "not hazardous" in the exclusion, since they clearly recognized that there is a hazard in all employment. It is equally clear that they did not intend to extend the provisions of the act to employers of domestic servants, employers of farm la-

borers, and all employers employing less than five employees in any other vocation. It would, of course, be ridiculous to assume that the Legislature believed that there is a hazard where five employees work, and there is no hazard where only four are working on the identical job.

"It is the intent of the Legislature with which we are here concerned. In determining that intent, we consider the history of the legislation and the reasonableness of an interpretation when weighed against an unreasonable or absurd construction evidently not intended by the Legislature." *Johnson v. School Dist. of Wakefield*, 181 Neb. 372, 376, 148 N.W.2d 592, 595 (1967).

It becomes apparent that farm laborers were excluded from the act not because farming is nonhazardous but because the Legislature chose not to extend the coverage of the act to that class for a possibly political or social reason. The question we must decide is not whether the legislative classification of farm labor as "nonhazardous" is unreasonable, but whether the Legislature can exempt farm laborers as a class from the act without contravening the equal protection clause of the fourteenth amendment.

The classification is tested by the standard of *Dandridge v. Williams*, 397 U.S. 471, 485, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970): "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78. 'The problems of government are practical ones and may justify, if they do not require, rough accommodations — illogical, it may be, and unscientific.' *Metropolis Theatre Co. v. City of Chicago*, 228 U.S. 61, 69-70. 'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to

justify it.' *McGowan v. Maryland*, 366 U.S. 420, 426."

The equal protection clause does not require the Legislature to choose between attacking every aspect of a problem or not attacking the problem at all; it is sufficient if the action taken is rationally based and free from invidious discrimination. *Prendergast v. Nelson*, 199 Neb. 97, 256 N.W.2d 657 (1977). "Refined analysis and simplistic logic when applied to the practical impact of a particular classification produces many times an appearance of inequality and discrimination. This is especially true close to the borderlines. But the sharpness of the lines drawn does not create an irrationality of classification or an invidious discrimination. This is particularly true when the sword of legislative policy deals with broad problems of economics and social welfare." *Thompson v. Board of Regents of University of Nebraska*, 187 Neb. 252, 256, 188 N.W.2d 840, 843 (1971).

In every constitutional challenge there attaches the presumption that all acts of the Legislature are constitutional with all reasonable doubts resolved in favor of constitutionality. *American Fed. of S., C. & M. Emp. v. Dept. of Public Institutions*, 195 Neb. 253, 237 N.W.2d 841 (1976). In reviewing the statute we do not pass judgment on the wisdom or the necessity of the legislation, nor whether the statute is based upon assumptions which are scientifically substantiated. Even misguided laws may nevertheless be constitutional. *Stoehr v. Whipple*, 405 F. Supp. 1249 (D. Neb. 1976).

The appellant cites, as support for the proposition that the farm labor exemption is a denial of equal protection, *Gallegos v. Glaser Crandell Co.*, 388 Mich. 654, 202 N.W.2d 786 (1972). The Michigan Supreme Court determined that the classification of agricultural employers for different treatment under the Michigan Workmen's Compensation Act is a violation of the equal protection clause. We do not find that holding particularly persuasive, especially since the Michigan act does not exclude all agricultural workers, but makes distinc-

tions based upon those agricultural workers who are paid on a piecework basis and those who do not work 35 or more hours per week for the same employer for 13 or more consecutive weeks. That decision has not, as some commentators expected, started a trend toward invalidating agricultural exemptions. 1C Larson, Workmen's Compensation Law § 53.10, n. 84 (1981); Note, *Workmen's Compensation Laws and Equal Protection: Does GALLEGOS Portend the Demise of the Agricultural Exclusion?* 1973 Duke L.J. 705.

The appellant further cites *Benson v. N.D. Workmen's Comp. Bureau*, 283 N.W.2d 96 (N.D. 1979), which agreed with the trial court's conclusion that the exclusion of agricultural employees from the benefits of the Workmen's Compensation Act was unreasonable and contrary to the expressed purpose of the act. Although the court affirmed the award of benefits to Benson, an agricultural employee, it was unable to declare the agricultural exclusion unconstitutional because it failed to have a concurrence of four members of that court.

A challenge similar to the case at bar was presented to the Supreme Court of Montana in *State ex rel. Hammond v. Hager*, 160 Mont. 391, 503 P.2d 52 (1972). That court discussed the various reasons that its legislature may have had for the agriculture exclusion and determined that the petitioner had not met his burden to negative every conceivable basis which might support the legislative action. The claimant in the case of *Anaya, Jr. v. Indust. Comm.*, 182 Colo. 244, 247, 512 P.2d 625, 626 (1973), met the same fate: "It is not our province to comment on the logic or policy of the General Assembly in making this exclusion. Rather, our duty is to determine whether there is a reasonable basis for this classification. We think there is and, at least, with a presumption of constitutionality, the petitioner has failed to overcome that presumption."

Even more recently the New Mexico Court of Appeals was called upon to interpret the scope of the farm and ranch workers' exemption to the Workmen's Compensa-

tion Act. "Cueto also seems to argue that the exemption denies him equal protection. It does not; the exemption is not arbitrary, but has a reasonable basis." *Cueto v. Stahmann Farms, Inc.*, 94 N.M. 223, 224, 608 P.2d 535, 536 (1980).

A parallel can be found in federal case law which involves the agricultural exclusion from the unemployment compensation laws. There the exclusion has also been held to be constitutional.

"When the legislature chooses to inaugurate a reform as sweeping as that which is represented by unemployment compensation, it is often forced to make compromises which, whether in the name of politics or economy, are often impossible of explanation in strictly legal terms. Realizing this, the Courts have refused to require that the State remedy all aspects of a particular mischief or none at all. [Citations omitted.] Hence the exclusion of agriculture from unemployment compensation can be seen as an indirect subsidy of a 'beneficent enterprise', or as an effort to save the compensation fund from the drain which would result from the inclusion of another large 'deficit industry', or even as a necessary political compromise without which it would have been impossible to inaugurate a most important reform in American institutions. Whether all of this is good policy is of course not the question before us. We can only ask if these justifications are rational by the loose standards of *Carmichael, Steward Machine*, and *Dandridge*, cit. *supra*. We conclude that they are." *Romero v. Hodgson*, 319 F. Supp. 1201, 1203 (N.D. Cal. 1970), *aff'd*, 403 U.S. 901, 91 S. Ct. 2215, 29 L. Ed. 2d 678 (1971).

Romero was treated as controlling precedent in *Doe v. Hodgson*, 344 F. Supp. 964 (S.D.N.Y. 1972). The latter case was an action brought by nine agricultural laborers challenging the constitutionality of certain federal and state legislations' exclusions of benefits and protection from agricultural workers. Five federal officials and three state officials were named as defendants, including the chairman of the Workmen's Compensation Board. The court determined that *Romero* was control-

ling even though the challenge in the earlier case was limited to unemployment compensation. The tax scheme is the same and "the court perceives . . . no sound basis for reconsidering at this level a recent decision of the Supreme Court following the thus far settled course of adjudging statutes singly, with an eye to their distinct rationales and asserted justifications, for purposes of constitutional tests." *Doe* at 968.

We therefore conclude that in the area of economics and social welfare the Legislature is not required to make the choice between attacking every aspect of a problem or not attacking the problem at all, as long as the action has a rational basis and is free from invidious discrimination. The appellant has not met his burden of proving that there is no rational basis for the classification of farm labor employers, and has not overcome the presumption of constitutionality. The judgment of the Workmen's Compensation Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CHARLES H. SHARSKI, APPELLANT.

306 N.W.2d 592

Filed June 5, 1981. No. 43565.

1. **Criminal Attempt: Indictments and Informations.** In the absence of a motion to quash, an information which alleges an attempt to commit an act or acts which if successful would constitute a statutory crime sufficiently charges an attempted crime so as to withstand a jurisdictional attack made for the first time on appeal.
2. **Statutes: Constitutional Law: Appeal and Error.** For a question of constitutionality of a statute to be considered in this court it must be properly raised in the trial court. If it is not raised in the trial court, it will be considered as waived in this court.
3. **Statutes.** Difficulty in determining the meaning of the language of a statute does not automatically render it unconstitutionally vague and ambiguous.

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

Thomas M. Kenney, Douglas County Public Defender, and Bennett G. Hornstein for appellant.

Paul L. Douglas, Attorney General, and John Boehm for appellee.

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

BRODKEY, J.

Charles H. Sharski, the defendant and appellant herein, appeals to this court from his conviction in the District Court of Douglas County, Nebraska, of the charge of attempted second degree arson, in violation of Neb. Rev. Stat. § 28-201 (Reissue 1979). The case was tried before a jury on April 16, 1980, which found the defendant guilty of the attempted second degree arson of the Quebec Lounge in Omaha, Nebraska. The court sentenced Sharski to a term of 2 to 4 years' imprisonment in the Nebraska Penal and Correctional Complex. We affirm as modified.

By way of factual background, it appears that on the evening of February 7, 1980, at approximately 7:30 p.m., the defendant accompanied his roommate, Terry Lytle, to the Quebec Lounge. While they were at the establishment, Sharski and Lytle consumed several pitchers of beer and several "shots" of schnapps. At approximately 12:45 a.m., an altercation broke out between Sharski, his roommate, and the owner of the lounge, Robert Dempsey, who testified that Sharski and Lytle had been harrassing employees of the lounge. The altercation terminated quickly, however, and Sharski and Lytle were ejected from the lounge.

Dempsey testified that he remained at the lounge after its normal closing hour in order to install a water heater in the basement of the building. He stated that at approximately 3 a.m., when looking for some tools which were kept behind the bar, he heard a noise emanating from outside the west side of the building. Dempsey investigated the noise, and he observed through a

nearby window an individual who was holding a pop bottle which had a rag inserted in the top. The individual was attempting to ignite the rag with a lighter held in the other hand. Dempsey knocked on the window pane, at which time the individual, later identified as the defendant, dropped the bottle and fled from the scene. Subsequently, it was discovered that the bottle contained gasoline, and the defendant was apprehended.

In his brief on appeal, Sharski makes the following assignments of error: (1) That the District Court erred in adjudging him guilty on an information which failed to charge the essential statutory elements of attempted second degree arson; (2) That the statute defining criminal attempt was unconstitutionally vague; and (3) That the sentence imposed by the court exceeded permissible statutory limits and should be reduced.

The information which charged the defendant alleged in part as follows: "Charles H. Sharski late of the County of Douglas aforesaid, in the County of Douglas and State of Nebraska aforesaid, then and there being, did then and there intentionally attempt to damage a building by starting a fire or causing an explosion, said building being located at 4830 Ames Avenue in the City of Omaha, Douglas County, Nebraska, being occupied by Quebec Lounge, said property being owned by Robert Dempsey . . . ."

This court has recently had the opportunity to review the general criminal attempt statute embodied in § 28-201, which states:

"(1) A person shall be guilty of an attempt to commit a crime if he: (a) Intentionally engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or (b) Intentionally engages in conduct which, under the circumstances as he believes them to be, constitutes a substantial step in a course of conduct intended to culminate in his commission of the crime.

"(2) When causing a particular result is an element of the crime, a person shall be guilty of an attempt to com-

mit the crime if, acting with the state of mind required to establish liability with respect to the attendant circumstances specified in the definition of the crime, he intentionally engages in conduct which is a substantial step in a course of conduct intended or known to cause such a result.

"(3) Conduct shall not be considered a substantial step under this section unless it is strongly corroborative of the defendant's criminal intent."

In *State v. Sodders*, 208 Neb. 504, 510, 304 N.W.2d 62, 66 (1981), we stated that "in the absence of a motion to quash, an information which alleges an attempt to commit an act or acts which if successful would constitute a statutory crime sufficiently charges an attempted crime so as to withstand a jurisdictional attack made for the first time on appeal." See, also, *State v. Meredith*, 208 Neb. 637, 304 N.W.2d 926 (1981). In the present case, no motion to quash was ever filed by the defendant, and we determine that the information is adequate to withstand the jurisdictional attack defendant raises for the first time on appeal.

We now address defendant's claim that the aforementioned criminal attempt statute is unconstitutionally vague. We note at the outset that this issue was not raised or presented below but, rather, is raised for the first time on appeal. The rule is well settled as follows: "For a question of constitutionality of a statute to be considered in this court it must be properly raised in the trial court. If it is not raised in the trial court, it will be considered as waived in this court." *State v. McConnell*, 201 Neb. 84, 89, 266 N.W.2d 219, 221 (1978); *State v. Mayes*, 183 Neb. 165, 159 N.W.2d 203 (1968). However, even if the issue were properly before us in this appeal, we think that it is without merit. As we noted in *Sodders, supra*, at 507, 304 N.W.2d at 65, § 28-201 may be "inartfully drafted and unduly complex. However, difficulty in determining the meaning of the language of a statute does not automatically render it unconstitutionally vague and ambiguous." We believe that the infor-

mation in the present case adequately informed Sharski of the crime with which he was charged.

Finally, we turn to defendant's contention that the sentence imposed by the trial court exceeds the permissible statutory limits set for indeterminate sentences. The defendant in this case was convicted of attempted second degree arson. We note that the crime of second degree arson is a Class III felony as defined under Neb. Rev. Stat. § 28-503 (Reissue 1979), and carries a statutory penalty of 1 to 20 years' imprisonment. However, under Neb. Rev. Stat. § 28-201 (4) (Reissue 1979), criminal attempt is a Class IV felony when the crime attempted is a Class III felony. The penalty for a Class IV felony under Neb. Rev. Stat. § 28-105 (Reissue 1979) is a maximum of 5 years' imprisonment, a $10,000 fine, or both, with no prescribed minimum.

The trial court sentenced the defendant to an indeterminate term of from 2 to 4 years' imprisonment. The indeterminate sentencing statute, Neb. Rev. Stat. § 83-1,105 (Reissue 1976), provides that: "[T]he minimum limit fixed by the court shall not be less than the minimum provided by law *nor more than one-third of the maximum term* . . . ." (Emphasis supplied.) See, also, *State v. Suggett*, 189 Neb. 714, 204 N.W.2d 793 (1973); *State v. Miles*, 194 Neb. 128, 230 N.W.2d 227 (1975).

In the present case the minimum portion of the indeterminate sentence fixed by the court, 2 years, exceeds by 4 months the proscription of one-third of the maximum sentence of 5 years. Under § 83-1,105, as conceded by the State in its brief on appeal, defendant's minimum sentence should have been 20 months, rather than the 2 years which the trial court imposed.

Under Neb. Rev. Stat. § 29-2308 (Reissue 1979), this court is authorized to reduce the sentence imposed by the District Court when, in our opinion, the sentence is excessive. In this case, as demonstrated above, the sentence imposed on the defendant exceeded the maximum allowed minimum penalty for a Class IV

felony. The sentence imposed by the trial court must, therefore, be modified; and we determine that the minimum limit of the defendant's sentence should be 20 months' imprisonment in the Nebraska Penal and Correctional Complex, with the maximum term of the sentence to remain at 4 years.

For the reasons stated above, the judgment of the trial court must be and is hereby affirmed, and the sentence imposed is ordered modified to meet the required statutory limitations.

AFFIRMED AS MODIFIED.

KRIVOSHA, C.J., concurs in result.

STATE OF NEBRASKA, APPELLEE, V. EDWARD A. TEATER, APPELLANT.

306 N.W.2d 596

Filed June 5, 1981. No. 43666.

1. **Criminal Law: Confessions.** In determining whether the State has shown the admissibility of custodial statements by the requisite degree of proof, this court will accept the factual determination and credibility choices made by the trial judge unless they are clearly erroneous, and in so doing we will look to the totality of the circumstances.
2. **Right to Counsel: Waiver.** Once the right to counsel and the right to remain silent have been invoked by a defendant, the defendant cannot be persuaded to waive his rights and there is a strong presumption against waiver. If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.
3. **Miranda Rights.** Once *Miranda* warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.
4. **Criminal Law: Confessions.** To be admissible, a statement or confession must be free and voluntary. It must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence.

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

Dennis R. Keefe, Lancaster County Public Defender, and Dennis Carlson for appellant.

Paul L. Douglas, Attorney General, and John Boehm for appellee.

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

MCCOWN, J.

The defendant was found guilty of robbery after trial to the court without a jury and sentenced to not less than 2 years' nor more than 4 years' imprisonment.

On October 20, 1979, at about 3 p.m., a man described as approximately 6 feet tall, weighing approximately 250 pounds, and wearing a pair of greasy coveralls and a ski mask entered a service station office at 21st and Holdrege Streets in Lincoln, Nebraska, produced a gun, forced the attendant to go into the restroom, and took over $100. The attendant saw only one person, although he heard voices in the office during the course of the robbery. The police were called and the officers immediately began an investigation in the neighborhood.

At approximately 3:30 p.m. two police officers who were investigating the robbery saw the defendant, who was 6 feet tall and weighed 150 pounds, and Fred Maguire, who was 5 feet 11 inches tall and weighed 260 pounds, come out of a residence which was near the service station. The officers told the two men they were investigating the robbery and wanted to know what the men were doing. The officers asked Maguire for permission to look at a pair of coveralls in the back seat of his automobile, which was parked near the residence. Permission was given. The officers took the coveralls, and one of the officers then took Maguire to the service station where the service station attendant told them that Maguire looked like the robber. Maguire was then

placed under arrest and taken to the police station. Maguire was later charged with armed robbery, pleaded guilty to an amended charge of theft, and was sentenced to 8 months in jail.

Meanwhile, another officer asked the defendant to produce the money he had on his person. The officer took the money, and he and the defendant then waited near the police car for approximately 20 minutes. The defendant was then asked to accompany the officer to police headquarters.

Upon arriving at the police station the defendant was placed in a holding room by himself. The time was approximately 4 p.m. The evidence of the police officers was that soon after the defendant was placed in the holding room the officers read the *Miranda* rights statement to the defendant and the defendant agreed to talk to the police but denied any involvement in the robbery. The defendant completed a standard waiver form and made no request for an attorney. When the defendant denied involvement in the robbery the officers then left him alone in the holding room.

At approximately 5:20 p.m. two police officers returned to the holding room. One of the officers read to and discussed with the defendant possible charges and penalties for robbery and related crimes and told the defendant that it was the officer's opinion that it would be 10 years before the defendant would be released. The officers also admitted that there was a conversation with the defendant concerning the ages of the defendant's children, the length of possible prison terms for him, and the respective ages of his children upon release. Although the officers testified that they made no promises, threats, or inducements to the defendant to make a statement, they admitted that they told the defendant that it would be to his benefit, or better for him, if he made a statement at that time. The defendant again denied involvement in the robbery and the officers left.

Shortly before 7:30 p.m. Detective Peschong and Of-

ficer Melton entered the holding room and the defendant was asked if he had been read his *Miranda* rights, to which he responded in the affirmative. Detective Peschong then asked the defendant to sign a consent to search form giving the officers permission to search the defendant's residence, which the defendant signed. The defendant was again asked about his involvement in the crime and again denied any knowledge of the robbery. The defendant was then informed that the officers had knowledge of his involvement and that he was under arrest for the robbery. The defendant requested that the officers give back the consent to search but was told that it would not be returned. At this point the defendant invoked his rights and advised the officers that he did not wish to speak with them and that he wanted an attorney.

As the officers prepared to leave the room the defendant said something about "it wasn't supposed to be like that." The officers stopped and Detective Peschong told the defendant that he was just trying to get the incident cleared up with as little trouble as possible. The defendant did not reply and the officers then asked him if he was aware of his *Miranda* warnings and if he would be willing to go ahead and speak to them without an attorney. Upon an affirmative reply the officers then obtained an oral statement implicating the defendant in the robbery. A written statement was obtained later that night. No police officer contacted an attorney or gave the defendant an opportunity to contact an attorney at any time before a bond hearing 2 days later.

The defendant's testimony was that he was interrogated on at least two more occasions between 4 p.m. and 7:30 p.m. and that on all five occasions he had requested an attorney and the officers had responded that he would get an attorney in time. He also testified that, in addition to talking about the penalties and the defendant's children, the officers had requested him to take a polygraph test and had told him that if he passed the test he could go home. He testified that he refused and again requested a lawyer.

The defendant was charged with the robbery. A lawyer was appointed for him and the defendant entered a not guilty plea. There was a pretrial hearing on the defendant's motion to suppress the statements. The motion was overruled. The defendant waived jury trial and the case was tried to the court without a jury. The defendant did not testify at trial. The court found the defendant guilty and sentenced him to not less than 2 nor more than 4 years' imprisonment. This appeal followed.

The critical issue on this appeal is whether or not the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to counsel within the mandates of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), and whether the motion to suppress the statements should have been granted.

In determining whether the State has shown the admissibility of custodial statements by the requisite degree of proof, this court will accept the factual determination and credibility choices made by the trial judge unless they are clearly erroneous, and in so doing we will look to the totality of the circumstances. *State v. Irwin*, 191 Neb. 169, 214 N.W.2d 595 (1974); *State v. Prim*, 201 Neb. 279, 267 N.W.2d 193 (1978).

The trial court in this case obviously accepted the officers' version of the facts. For that reason we have set out the facts which are undisputed or established by the testimony of the officers separately from the defendant's version. The undisputed facts establish that the defendant requested an attorney and refused to talk to the police officers without an attorney at the interrogation at approximately 7:30 p.m. on October 20, 1979. There is also no dispute that the police officers continued their efforts and obtained a statement immediately after the defendant had invoked his right to counsel and his right to remain silent simply because the defendant made a statement that "it wasn't supposed to be that way."

This court has previously set out the *Miranda*-imposed requirements on police officers when a suspect invokes

his constitutional right to remain silent and his right to counsel. In *State v. Fuller*, 203 Neb. 233, 238-39, 278 N.W.2d 756, 759-60 (1979), this court said: "Although Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), does not require an absolute halt to all conversations by the police with the defendant once the right to silence is asserted, observance of the constitutional right is tested by the circumstances to determine whether the right was 'scrupulously honored.' . . .

"Recent cases consider the validity of a subsequent waiver of the once-asserted right to counsel under certain circumstances. [Citations omitted.] These cases hold that the defendant cannot be persuaded to waive his rights and there is a strong presumption against waiver. 'If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.' [Citing *Miranda v. Arizona.*]"

In *In re Interest of Durand*, 206 Neb. 415, 293 N.W.2d 383 (1980), this court said: "Once *Miranda* warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease."

To be admissible, a statement or confession must be free and voluntary. It must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. *State v. Smith*, 203 Neb. 64, 277 N.W.2d 441 (1979).

The State takes the position that a complaint by a defendant about police conduct occurring in the course of interrogation may be treated as justification for ignoring his request for counsel and his right to remain silent simply because he voices the complaint immediately after he has invoked his rights. The evidence is undisputed that the defendant's assertion of his constitutional

right to remain silent and right to counsel was not "scrupulously honored." The evidence was insufficient, as a matter of law, to meet the heavy burden resting on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. The motion to suppress should have been granted.

In view of the determination made it is unnecessary to discuss the defendant's remaining assignments of error. The conviction and sentence are vacated and the cause remanded to the District Court.

CONVICTION AND SENTENCE VACATED.
REVERSED AND REMANDED.

CLINTON and HASTINGS, JJ., concur in result.

STATE OF NEBRASKA, APPELLEE, V.
KALON D. STRICKLAND, APPELLANT.

306 N.W.2d 600

Filed June 5, 1981. No. 43620.

1. **Criminal Law: Confessions.** In determining whether the State has shown the admissibility of custodial statements by the requisite degree of proof, this court will accept the factual determination and credibility choices made by the trial judge unless they are clearly erroneous, and in so doing we will look to the totality of the circumstances.
2. **Confessions: Miranda Rights.** The admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his right to cut off questioning was scrupulously honored.
3. **Confessions: Miranda Rights: Waiver.** The applicable standard to determine the admissibility of statements made by an accused during a custodial interrogation is whether the accused intelligently, knowingly, and voluntarily waived his right to remain silent and his right to have counsel present at that time.

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

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

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

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

CLINTON, J.

The defendant was charged with the crime of burglary and entered a plea of not guilty. Motions to suppress physical evidence and a confession were filed. Hearings were heard on these motions and the motions were overruled. The defendant then waived his right to a trial by jury and consented to be tried before the court upon documentary evidence consisting of the complete police reports of the investigation, which included the written confession. He was found guilty by the court and sentenced to a term of 2 to 3 years in the Nebraska Penal and Correctional Complex.

The sole assignment of error on appeal to this court is that the court erred in refusing to suppress the statement or confession given by the defendant to the police following his arrest.

The arguments which the defendant makes supporting the assignment of error are two. (1) Where the person in custody has, after the *Miranda* warnings have been given, initially refused to make a statement, but at a later time agrees to make a statement, then it is to be presumed that the latter waiver is involuntary and a heavy burden rests upon the State to overcome that presumption, and the State has not overcome the presumption in this case. (2) The defendant could not waive his right to remain silent in the absence of the presence of or notice to counsel.

The nature of the two assignments makes it possible to discuss them together. A review of the evidence pertinent to the issue is necessary before the governing legal principles are discussed. At about 4:30 a.m. on Saturday, July 14, 1979, police officers on patrol received radio calls indicating that a burglary had just occurred at "Canfield's," a sporting goods and

gun store located at 2415 Cuming Street in Omaha. The police had previous information of recent burglaries in which weapons were stolen, the description of an automobile believed involved in these burglaries, and an address at which the guns were being marketed, to wit, 19th and Clark Streets, Omaha, Nebraska. An eyewitness to the Canfield burglary described the automobile involved in the Canfield burglary as similar to the one involved in the other reported burglaries.

One or more police vehicles were dispatched to the 19th and Clark Streets location. A vehicle matching the description of the car believed involved was being parked and two individuals, one being the defendant, got out. The other person, a female, was seen to dispose of a handgun by dropping it. Four new shotguns, some with sales tags still on, were observed in the back seat of the automobile. The defendant was observed getting out of the car and was arrested. The shotguns were later identified as those taken in the Canfield burglary. Keys to the auto were found on the person of the female. She was also arrested. The defendant was identified by an eyewitness to the burglary as looking like the man who had entered Canfield's and removed the guns and placed them in the car.

At 6:26 a.m. at the police station, the *Miranda* warning and rights were read to the defendant by Sergeant Mohatt. The defendant answered all the questions in the affirmative except the last, as to which he answered no, i.e., he would not make a statement. The defendant did not ask for an attorney. There was no further interrogation at that time.

Some hours later on July 14, pursuant to standard practice, the *Miranda* warnings were again administered by members of the burglary unit to see if the accused had changed his mind. He had not. He did not request an attorney at that time.

On July 16 at 10:25 a.m., Sergeant Kocourek of the burglary unit again administered the *Miranda*

warnings. This time the defendant answered all of the questions in the affirmative, including the following: "Q. Knowing your rights in this matter, are you willing to make a statement to me now? A. Yes."

Defendant then gave a short written statement in which he admitted his part in the burglary and implicated the other two suspects. On Saturday morning at 8 or 8:30 a.m., a member of the Douglas County Public Defender's office, apparently pursuant to a standard practice and presumably in accordance with the duties placed upon the public defender by Neb. Rev. Stat. §§ 29-1804.03 and 29-1804.04 (Reissue 1979), appeared at the police station for the purpose of talking to all prisoners suspected of or charged with a felony. There he talked to the defendant. He told the defendant he would probably be representing him at his arraignment and twice advised him not to give the police officers any information. The testimony is that one such admonition took place within the hearing of police officers.

There is some conflicting evidence. The defendant, at the suppression hearing, testified that his decision to make a statement was induced by various threats, promises, and inducements which he claimed were made to him by various police officers. The testimony was denied by the police officers allegedly involved. Defendant also testified that he was not allowed to use the telephone from the time of the arrest until Monday afternoon. The police records indicate that all the suspects were denied telephone privileges during the initial stages of the investigation beginning at 4:30 a.m. until 3:20 p.m. on July 14, at which latter hour an order was made: "The Suspect [earlier identified in the report] Can Have Telephones." The trial judge who heard the testimony, in announcing his decision on the motion to suppress, stated that he accepted the testimony of the officers and not that of the defendant.

The defendant's counsel acknowledges that all state

and federal courts, except the state of New York, have refused to adopt a per se rule that the invocation of the right to remain silent prohibits all further questioning without the presence of counsel. Defendant relies upon *State v. Johns*, 185 Neb. 590, 597, 177 N.W.2d 580, 585 (1970), where we said: "Repetitions of advisory warnings are not a satisfactory substitute for granting an unequivocal request for counsel." In this case, however, the evidence does not show that the defendant ever made a request for counsel or that counsel be present during the interrogation. He did not even testify that his telephone requests were for the purpose of calling counsel. Over 48 hours elapsed between the second time the *Miranda* rights were given and his second refusal and the third time his rights were read, at which time he agreed to make a statement.

Factfindings by the trial court on motion to suppress, etc., are accepted by us unless clearly wrong. In *State v. Teater, ante* p. 127, 131, 306 N.W.2d 596, 598-99 (1981), we held: "In determining whether the State has shown the admissibility of custodial statements by the requisite degree of proof, this court will accept the factual determination and credibility choices made by the trial judge unless they are clearly erroneous, and in so doing we will look to the totality of the circumstances. [Citations omitted.]"

Accepting the factfindings of the trial judge, the evidence then shows that after each of the occasions on July 14 when he declined to make a statement, the defendant's right to cut off questioning was scrupulously honored. In *Michigan v. Mosley*, 423 U.S. 96, 96 S. Ct. 321, 46 L. Ed. 2d 313 (1975), the Supreme Court of the United States held that a second request after the passage of a significant period of time could be made and did not violate *Miranda* principles. The court there said at 104: "We therefore conclude that the admissibility of statements obtained after the person in custody has decided to remain silent depends

under *Miranda* on whether his 'right to cut off questioning' was 'scrupulously honored.'" In *North Carolina v. Butler*, 441 U.S. 369, 99 S. Ct. 1755, 60 L. Ed. 2d 286 (1979), the Supreme Court of the United States, on an appeal from the Supreme Court of North Carolina where that state court held (interpreting *Miranda*) that where a defendant had once refused to make a statement there could be no subsequent waiver without counsel, held at 374-75: "The *per se* rule that the North Carolina Supreme Court has found in *Miranda* does not speak to these concerns. There is no doubt that this respondent was adequately and effectively apprised of his rights. The only question is whether he waived the exercise of one of those rights, the right to the presence of a lawyer. Neither the state court nor the respondent has offered any reason why there must be a negative answer to that question in the absence of an *express* waiver. This is not the first criminal case to question whether a defendant waived his constitutional rights. It is an issue with which courts must repeatedly deal. Even when a right so fundamental as that to counsel at trial is involved, the question of waiver must be determined on 'the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.'" The record indicates that the defendant has had considerable experience in the criminal courts.

Our own court has recently held: "The applicable standard to determine the admissibility of statements made by an accused during a custodial interrogation is whether the accused intelligently, knowingly, and voluntarily waived his right to remain silent and his right to have counsel present at that time." *State v. Jackson*, 205 Neb. 806, 290 N.W.2d 458 (1980) (syllabus of the court). See, also, *State v. Moore*, 189 Neb. 354, 202 N.W.2d 740 (1972); *State v. Fuller*, 203 Neb. 233, 278 N.W.2d 756 (1979).

Since the preparation of this opinion but before its

adoption by the court, the opinion of the Supreme Court of the United States in *Edwards v. Arizona*, 49 U.S.L.W. 4496, was released on May 18, 1981. The court there held that the use of a petitioner's confession against him at his trial violated his right under the fifth and fourteenth amendments to have counsel present during custodial interrogation as declared in *Miranda* where, having exercised his right on January 19 to have counsel present during his interrogation, the petitioner did not validly waive that right on the following day.

We do not believe that the case governs this one for various reasons. In *Edwards* the proceeding had already reached the accusatory stage. The complaint had been filed. In the case before us the matter was still in the investigatory stage. In *Edwards* the defendant had specifically invoked his right to have counsel present; in the case before us defendant had not requested counsel at any of the times the *Miranda* cautions were given.

The facts in *Edwards* show that the accused had been given the *Miranda* warnings and agreed to make a statement. Later he changed his mind and said: "'I want an attorney before making a deal.'" Questioning ceased but he was not given an attorney. Later the *Miranda* warnings were given and he agreed to and did make a statement. The Supreme Court of the United States said (and these words contain the critical distinction): "Here, the critical facts as found by the Arizona Supreme Court are that Edwards asserted his right to counsel and his right to remain silent on January 19, but that the police, without furnishing him counsel, returned the next morning to confront him and as a result of the meeting secured incriminating oral admissions. Contrary to the holdings of the state courts, Edwards insists that having exercised his right on the 19th to have counsel present during interrogation, he did not validly waive that right on the 20th. For the following reasons, we agree.

"First, the Arizona Supreme Court applied an erroneous standard for determining waiver *where the accused has specifically invoked his right to counsel.*" (Emphasis supplied.) *Id.* at 4497.

The record is sufficient to clearly support the trial court's finding that there was an intelligent and voluntary waiver of the right to the presence of counsel at the time the statement was given, and we cannot say it was clearly erroneous. The evidence likewise supports the trial court's conclusion that the confession was intelligently and voluntarily given.

AFFIRMED.

IN RE INTEREST OF RONALD DUANE SHELBY AND MARTHA JOAN SHELBY, CHILDREN UNDER THE AGE OF 18 YEARS. STATE OF NEBRASKA, APPELLEE, V. WILMA SHELBY, APPELLANT.

306 N.W.2d 604

Filed June 5, 1981. No. 43694.

Parental Rights. Parental rights between a parent and child may be terminated when the parent has abandoned the child for 6 months or more immediately prior to the filing of the petition and such action is in the best interests of the child. Neb. Rev. Stat. § 43-209 (Reissue 1978).

Appeal from the District Court for Phelps County: BERNARD SPRAGUE, Judge. Affirmed.

Person, Dier, Person & Osborn for appellant.

Paul L. Douglas, Attorney General, and Stephen R. Illingworth for appellee.

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

BOSLAUGH, J.

Wilma Darlene Shelby appeals from an order

terminating her parental rights to her children, Ronald, born July 18, 1975, and Martha, born September 30, 1973.

The children had been placed in foster care on August 31, 1977, because the mother had been arrested as a fugitive on an extradition warrant from Kansas. A petition was filed on September 15, 1977, alleging the children were "deprived of parental care for the reason that the mother [Wilma Shelby] is in custody in the State of Kansas on criminal charges and is apparently wanted in other jurisdictions and this lack of parental care is likely to continue for an indefinite period." An order of the county court entered that day placed custody in the court with supervision by the Phelps County Department of Public Welfare.

During the next 2½ years the children remained in foster care. There was no contact between the children and their mother during this time except an occasional telephone call and a few letters.

On October 25, 1979, a petition for termination of parental rights was filed, alleging abandonment for more than 6 months. Attempts to notify the mother by certified mail were unsuccessful, the notices being refused or returned as addressee unknown. On November 2, 1979, the mother called the clerk's office inquiring about the date of hearing and whether she could appear by counsel. Further attempts at personal service were unsuccessful, so service by publication was authorized on December 5, 1979.

On February 6, 1980, the date set for hearing, the mother did not appear, but telephoned the county judge and requested a continuance. The order of the county court recites that the mother admitted that she had known of the hearing for more than 30 days. The county court continued the hearing to February 15, 1980, and appointed counsel for the mother. A guardian ad litem for the children had been appointed sometime before December 5, 1979.

The mother appeared in person and by counsel at

the hearing on February 15, 1980. The county court found that the mother had abandoned the children for more than 6 months and terminated the parental rights of the mother. Upon appeal to the District Court the order was affirmed. The mother has now appealed to this court. The principal assignments of error relate to the sufficiency of the evidence to support the order terminating parental rights.

The record shows that appellant was absent from her children for a period of approximately 2½ years. Neither child's birth certificate lists a father and no one claiming to be the father visited the children during this period. At the time appellant was arrested by the Phelps County sheriff for extradition to Kansas, Ronald was 2 and Martha was 4 years old. The children were placed in the custody and care of a foster care family. Wilma Shelby served jail sentences in Kansas and Illinois on bad check charges. Following these brief sentences, she and a married male companion moved around the country. Appellant spent time in Kansas, Arkansas, Tennessee, Colorado, Alabama, and several towns in Illinois.

Appellant's contact with her children was infrequent and limited to a few phone calls and letters. From March 1978 through December 1978, appellant made no contact whatsoever with her children.

At the time the children were placed in foster care, they were ill-clothed and dirty. Ronald suffered from a severe case of diarrhea. Martha had repeated nightmares and showed signs of abuse administered by her mother and her male companion. Martha suffered great anxiety when she spoke with her mother during her infrequent phone conversations.

A psychologist testified that the children have grown intellectually, emotionally, and psychologically since being placed in foster care. The children recognize the foster parents as their psychological parents. The foster parents have expressed the desire to adopt the children.

In a similar case of abandonment this court stated: "It is, to say the least, unfair for the parent to leave the child in a legal limbo and regardless of length of time of separation to assert natural rights of the parent to custody. The paramount interests of the public and the court is the protection of the children, and where, as here, the finding of the juvenile court and District Court is not against the weight of the evidence or a clear abuse of discretion, their determination will be upheld. State v. Norwood, 194 Neb. 595, 234 N.W.2d 601; State v. Randall, 187 Neb. 64, 187 N.W.2d 586.

"We said in Goodman v. Goodman, 180 Neb. 83, 141 N.W.2d 445: 'Children are not chattels.' A bare assertion of parental natural right cannot prevail against the clear best interests of the children and the overwhelming evidence of disinterest and abandonment." *State v. Hernandez*, 199 Neb. 386, 389-90, 259 N.W.2d 272, 274 (1977).

The record contains clear and convincing evidence that Wilma Shelby abandoned her children within the meaning of Neb. Rev. Stat. § 43-209 (Reissue 1978) and that it was in the best interests of the children that her parental rights be terminated.

The appellant raises for the first time on appeal an issue concerning the county court's failure to appoint counsel for the mother at the September 15, 1977, detention hearing. Appellant argues that she was denied due process, since she was never advised by an attorney that she had a right of visitation following the children's placement in foster care.

Neb. Rev. Stat. § 43-205.06 (Reissue 1978) provides for the appointment of counsel in juvenile proceedings. "When any minor under eighteen years of age shall be brought without counsel before a juvenile court . . . [t]he judge shall inform such minor and his parent or guardian of their right to counsel at county expense if none of them is able to afford counsel. If the minor or his parent or guardian desires to have counsel appointed for such minor, or the parent or guardian

of such minor cannot be located, and the judge ascertains that none of such persons are able to afford an attorney, the judge shall forthwith appoint an attorney to represent such minor for all proceedings before the judge in the juvenile court . . . ." The court, under this section, is directed to appoint counsel for the minor in cases where the parent cannot be located only after it is determined that that party could not afford an attorney. The communication which came from appellant prior to the second hearing seemed to indicate that she had acquired an attorney. Nevertheless, when it was brought to the attention of the court, the court appointed an attorney for the mother. Appellant's attorney then requested and was granted a continuance. No further continuances were requested. Under the circumstances, the appellant was provided a full and fair hearing and was fully represented by competent appointed counsel.

The order which was entered at the detention hearing on September 15, 1977, was in the nature of a temporary order. It was necessary because of the emergency created by the arrest and extradition of the mother to Kansas. The mother has raised no question in this proceeding concerning the propriety or necessity of foster care at that time.

The mother's complaint that she was not advised of her right to visit the children has no merit. Her imprisonment in Kansas and Illinois was of rather short duration. After her release from imprisonment there was nothing to prevent her from taking steps to regain custody of the children. In fact, on March 31, 1978, she advised the foster mother that she would come to Holdrege, Nebraska, on April 15, 1978, to pick up the children. Nothing further was heard from the mother until December 11, 1978. The mother and her companion called again on March 19, 1979, and told the children "they'd be after them very soon."

The record demonstrates quite clearly that the mother had little interest in the children. She was

content to leave them in foster care while she traveled about the country. It was not until she learned of the termination proceedings that she exhibited any concern.

Nothing could be gained by a further hearing at this time on whether the children should have been placed in the custody of the court on September 15, 1977. The evidence which sustains the finding of abandonment, together with the evidence of abuse and neglect, would compel a similar finding at this time.

The record contains clear and convincing evidence that Wilma Darlene Shelby abandoned her children for more than 6 months within the meaning of § 43-209, and that it was in the best interests of the children that her parental rights be terminated.

The judgment of the District Court is affirmed.

AFFIRMED.

NANCY LEE KULLBOM, APPELLANT, V. TERRENCE L. KULLBOM, APPELLEE.

306 N.W.2d 844

Filed June 12, 1981. No. 43189.

1. **Divorce: Appeal and Error.** Dissolution of marriage actions are tried de novo on the record; however, this court, in reaching its decision, 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.
2. **Alimony: Property Division.** Although alimony and allocation of property rights are distinguishable and have different purposes in marriage dissolution proceedings, they are still closely related in the matter of determining the amount to be allowed, and circumstances may require that they be considered together to determine whether the court has abused its discretion.
3. **Property Division.** If the parties fail to agree upon a property settlement which the court finds to be conscionable, the court shall order an equitable division of the marital estate. The court shall include as part of the marital estate, for purposes of the division of property at the time

of dissolution, any pension plans, retirement plans, annuities, and other deferred compensation benefits owned by either party, whether vested or not vested. Neb. Rev. Stat. § 42-366(8) (Cum. Supp. 1980).

4. ——. The trial court retains broad discretion in valuing pension rights and in dividing such rights between the parties.

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

Warren S. Zweiback of Zweiback, Brady & Kasher, P.C., for appellant.

Steven J. Lustgarten of Lustgarten & Roberts for appellee.

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

BRODKEY, J.

Nancy Lee Kullbom (Nancy), petitioner-appellant herein, has appealed to this court from a decree entered by the District Court of Douglas County, Nebraska, dissolving the marriage of the petitioner and Terrence L. Kullbom (Terrence), the respondent-appellee. In its decree entered on December 14, 1979, the trial court found that the marriage between the parties was irretrievably broken and dissolved the marital relationship. The court awarded custody of the minor children, Nick, Kelly Sue, and Matthew, to the petitioner, subject to reasonable rights of visitation by Terrence; ordered Terrence to pay child support in the sum of $250 per child per month until such time as the minor children attain majority, become emancipated, or die, or until further order of the court; and required Terrence to continue medical and health insurance in effect for the children and pay all uninsured medical and dental expenses. The court awarded the residence of the parties in Omaha, Nebraska, to Nancy and required her to assume and pay the mortgage on said property. The court also awarded to Nancy all the furniture and household items located in the residence; her jewelry; a 1978

Malibu station wagon, subject to a lien thereon; title to a life insurance policy; a coin collection; and a racehorse known as "Burnham" owned by the parties. The court further ordered Terrence to pay Nancy alimony in the amount of $1,500 per month for 121 months or until the death or remarriage of the petitioner. The court also required Terrence to maintain in full force certain life insurance policies in favor of the petitioner and minor children to the extent of the alimony and child support obligations.

In its decree, the court awarded to Terrence all his jewelry, personal effects, and household items located in his apartment; a 1979 Datsun, subject to a lien thereon; title to four life insurance policies; all rights, if any, to acquire certain football tickets to attend home football games of the University of Nebraska at Lincoln; and any rights to obtain certain season ticket seats to attend horseraces at Ak-Sar-Ben. In addition, Terrence was awarded all of the parties' interest in pension and profit-sharing plans maintained by Oral Maxillo-Facial Surgeons, Inc.; all common stock of said corporation owned by the parties; and all interest of the parties in certain investment partnerships known as Chanticleer Realty Associates, Ltd., and Blackstone, Ltd. Terrence was ordered to pay all the outstanding indebtedness incurred by the parties prior to December 1, 1979, and was relieved of all mortgage obligations upon the house and the payment of the lien upon Nancy's automobile. Finally, Terrence was ordered to pay attorney fees and costs to Nancy's attorney in the amount of $11,480, as well as those of his own attorney.

In her brief on appeal, Nancy makes the following assignments of error: (1) That the court erred in awarding her less than an equitable share in the property owned by the parties; (2) That the alimony awarded to her is inadequate in light of the circumstances of the parties; (3) That the child support award is inadequate in light of the circumstances of

the parties; and (4) That the court erred in not considering as a marital asset the husband's vested interest in pension and profit-sharing plans.

The factual background of this appeal, as revealed in the record, indicates that the parties were married in Gibbon, Nebraska, on September 7, 1963. At the time of their marriage, Terrence was a dental student, with no earnings and a negative net worth of between $5,000 and $10,000. Nancy had recently graduated from nursing school, and upon their marriage the parties moved to Iowa City, Iowa, where Terrence attended the dental school at the University of Iowa. Nancy became employed at the University Hospital and worked to support the parties. The couple's first child, Nick, was born on August 2, 1964. Terrence graduated from dental school in June of 1966, at which time he joined the armed services and was stationed in northern California until his discharge in 1968. During this period, the parties' second child, Kelly Sue, was born on October 23, 1968. Upon his discharge from the service, Terrence entered private practice in Sturgis, South Dakota, where he remained for 1 year. Thereafter he was accepted into an oral surgery residency program at the University of Nebraska at Omaha in 1970. After the parties moved to Omaha in May of 1970, Nancy returned to work as a nurse in local hospitals while her husband completed the residency program. Terrence completed his residency in May of 1973, at which time he became employed by his present employer, Oral Maxillo-Facial Surgeons. Nancy then quit working as a nurse, and the parties' third child, Matthew, was born on December 27, 1973.

It is well established that dissolution of marriage cases are tried de novo on the record; however, this court, in reaching its decision, 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. *Witcig v. Witcig*, 206 Neb. 307, 292 N.W.2d 788 (1980); *Boroff v. Boroff*,

204 Neb. 217, 281 N.W.2d 760 (1979). Although alimony and allocation of property rights are distinguishable and have different purposes in marriage dissolution proceedings, they are still closely related in the matter of determining the amount to be allowed, and circumstances may require that they be considered together to determine whether the court has abused its discretion. *Olson v. Olson*, 195 Neb. 8, 236 N.W.2d 618 (1975). See, also, *Burton v. Burton*, 205 Neb. 865, 290 N.W.2d 658 (1980); *Ragains v. Ragains*, 204 Neb. 50, 281 N.W.2d 516 (1979); *Sullivan v. Sullivan*, 192 Neb. 841, 224 N.W.2d 542 (1975). In determining what percentage of the marital estate each person is to receive, the court must consider all pertinent facts in reaching an award that is just and equitable. *Chrisp v. Chrisp*, 207 Neb. 348, 299 N.W.2d 162 (1980); *Matlock v. Matlock*, 205 Neb. 357, 287 N.W.2d 690 (1980). The court, in dividing the property, must take into consideration the circumstances of the parties, the duration of the marriage, the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party. Neb. Rev. Stat. § 42-365 (Reissue 1978). See, also, *Buker v. Buker*, 205 Neb. 571, 288 N.W.2d 732 (1980); *Ragains v. Ragains, supra.*

Nancy first assigns as error the action of the District Court in dividing the marital estate of the parties. The record discloses that both Nancy and Terrence have individually and jointly contributed property and other valuable services to the marriage. The parties were both 39 years of age at the time of trial and had accumulated a net worth of approximately $260,000 during their marriage. The property acquired by the parties during their 16 years of marriage comprises the bulk of the parties' marital

estate. In view of the fact that both parties contributed substantially to the acquisition of the marital estate, we believe each party is entitled to one-half of the value or equity of the property in that estate. *Chrisp v. Chrisp*, 207 Neb. 348, 299 N.W.2d 162 (1980). A review of the record convinces us that a fair and equitable division of the marital estate has not been made. At trial, it was established that Terrence has an annual income in excess of $100,000. His income includes an annual car allowance of $6,000, a salary of approximately $75,000, and an annual contribution from his employer to his pension and profit-sharing plans of $18,500. In addition, the respondent earns approximately $5,500 in stipends as a part-time instructor at Creighton University and the University of Nebraska Medical Center. The petitioner, on the other hand, has not been employed outside the home since 1973. At the time of trial, according to the evidence and by stipulation of the parties, Terrence's interest in the pension and profit-sharing plans totaled $75,133.25, which the trial court awarded him in its decree. In addition, he was awarded the parties' interest in Oral Maxillo-Facial Surgeons, Inc., the value of which was in dispute and contested, and ranged from a minimum of $48,000 to a maximum of $116,000, depending on whether outstanding accounts receivable were included in computing the book value of the corporation. He was also awarded the parties' partnership interests in Chanticleer Realty Associates, Ltd., and Blackstone, Ltd., which were valued at $54,400 and $15,000, respectively.

Nancy, however, was awarded the parties' residence in Omaha, which was valued at $97,650, but which is subject to a mortgage of $69,747. This results in a net award to the petitioner of $27,903 of equity in the house.

Nancy contends that the trial court erred by not considering the respondent's pension and profit-sharing plans as part of the marital estate, subject

to division by the court. This contention necessitates an examination of the law of this state with reference to pensions and pension plans as marital property. As late as May 28, 1980, this court followed the rule that a pension of one party to a marriage, unless its terms provide otherwise, is not a joint fund for the benefit of the other party and is not ordinarily subject to division as part of a property settlement, but may be considered as a source for the payment of alimony. *Witcig v. Witcig, supra.* See, also, *Andersen v. Andersen,* 204 Neb. 796, 285 N.W.2d 692 (1979); *Howard v. Howard,* 196 Neb. 351, 242 N.W.2d 884 (1976). However, in 1980 the Nebraska Legislature added subsection (8) to Neb. Rev. Stat. § 42-366 (Reissue 1978), which became effective July 19, 1980; and § 42-366(8) (Cum. Supp. 1980) now provides: "If the parties fail to agree upon a property settlement which the court finds to be conscionable, the court shall order an equitable division of the marital estate. *The court shall include as part of the marital estate, for purposes of the division of property at the time of dissolution, any pension plans, retirement plans, annuities, and other deferred compensation benefits owned by either party, whether vested or not vested.*" (Emphasis supplied.) It now appears, therefore, that by virtue of the action of the Legislature, the law of this state now requires that pension plans and retirement plans shall be included as part of the marital estate for the purposes of the division of property at the time of dissolution. In *Witcig v. Witcig,* 206 Neb. 307, 292 N.W.2d 788 (1980), we pointed out the problems inherent in the determination of the value of pension interests and the contingent nature of such interests, and as a result thereof in that case decided to follow our previous rule as announced in *Howard v. Howard, supra.* Other courts which have followed the new rule announced by the Nebraska Legislature have experienced problems in determining the valuation of pension rights for the purpose of the

division of marital property in dissolution actions. In *Bloomer v. Bloomer*, 84 Wis. 2d 124, 129-35, 267 N.W.2d 235, 238-41 (1978), the Supreme Court of Wisconsin stated: "Although it is settled that pension rights must be considered, trial courts are presented with a complex task in properly valuing the rights in those plans. . . .

"The problem of valuing prospective benefits under a pension plan is frequently exacerbated by the fact that unmatured rights may be terminated by death, discharge, or other contingencies. [Citations omitted.] Valuation is further complicated by the dual nature of most pension plans. If the employee continues to work until retirement, the payments to the employee, to the extent derived from employer's contributions, are in the nature of deferred compensation. If, however, the employee terminates work before retirement age, the usual plan provides at least for the return of employee contributions. . . . A variety of methods of valuation have been approved in the individual cases, without any analysis of the proper theory for valuing the asset. . . .

. . . .

"None of what we have said detracts from the fact that the trial court retains broad discretion in valuing pension rights and in dividing them between the parties. . . .

. . . .

". . . There are at least three ways in which the value can be determined. Whether any one of these methods is an appropriate exercise of discretion depends upon the circumstances of the case, the status of the parties, and whether the result is a reasonable valuation of the marital asset." The court in *Bloomer* proceeded to discuss the three methods referred to, the first being that the court could consider the amount of the employee's contributions to the fund plus interest and award the wife an appropriate share. Second, the trial court could attempt to calculate the present value of the

employee's retirement benefits when they vest under the plan, stating that under either of the first two methods the trial court would have the discretion to order the payment to the wife of her share in either a lump sum or in installments, depending primarily on the other assets and relative financial positions of the parties. The third method referred to by the court, which it states has been used widely in other states and is referred to as an alternative in *Pinkowski v. Pinkowski*, 67 Wis. 2d 176, 226 N.W.2d 518 (1975), is to determine a fixed percentage for the wife of any future payments the husband receives under the plan, payable to her as, if, and when paid to the husband. With reference to this third plan, the court in *Bloomer* states at 136, 267 N.W.2d at 241: "Under this approach, of course, it is unnecessary to determine the value of the pension fund at all. The court need do no more than determine the appropriate percentage to which the non-employee spouse is entitled."

In *Pinkowski, supra* at 184, 226 N.W.2d at 522, the court stated: "In view of the fact that there are sufficient assets for the court to make a distribution to the wife out of the proceeds of the house after including the value of the pension fund, we reverse that portion of the judgment. The court may then exercise its discretion in determining what the division of the assets between the parties should be. The court may, on the other hand, impose a trust on the pension fund and require the husband to pay any part received into court. The court may determine either a percentage or a specific amount that the wife should receive of such fund and provide for payment to her of her share in lump sum or in instalments depending upon how the funds are eventually received by the husband. Thus the court may withhold distribution of a pension fund asset between the parties until the money is actually received when he retires."

In the instant case, however, we have no problem with the valuation of the pension and profit-sharing

trusts, as the parties have stipulated their value to be $75,133.25. The appellee contends, however, that the court "obviously" took the value of the pension and profit-sharing trusts into account when considering the amount of the alimony award. While it is, of course, possible that the court did consider the value of the trusts, it is not at all clear from the record that it did so, particularly in view of the fact that, although the court divided and allocated the property between the parties in its decree, it did not place any specific values upon the items awarded to each party. We conclude that an equitable division of the marital property requires that Nancy be awarded 50 percent of the stipulated value of the trusts in question, in the amount of $37,566.75. However, since it is obvious that the appellee will not receive the value of such trusts until some unspecified time in the future, we conclude that he should not be required to pay Nancy the additional sum represented by her share of the trusts until he receives it, particularly in view of the fact that she has been awarded other specific property from the marital assets. This is not to say, however, that the respondent may not, if he chooses, pay Nancy the sum referred to in a lump sum, or by installments, prior to the time that he receives the benefits from the two trusts, for whatever reason.

Another matter which must be considered in connection with the property division between the parties is the action of the trial court in awarding Nancy the racehorse, Burnham, which the evidence in the record establishes has a value of $6,000. It is Nancy's contention that this racehorse should have been awarded to Terrence and that she should be awarded the value of the animal. The evidence in the record shows that Terrence bought the horse for the purpose of training it to become a racehorse. The witness, O. J. Glass, farm manager and horse trainer at the Glass & O'Day Stables, testified that the cost of maintaining the horse could be as high

as $500 per month if it is placed into training. Because of the expense involved in training the horse, and the substantial expense in feeding it, we conclude that in this case Nancy is fully justified in looking this gift horse in the mouth and objecting to that part of the award by the trial court. We therefore conclude that Terrence should be awarded the horse, Burnham; and, in lieu thereof, Nancy should be awarded the value of the horse in the amount of $6,000.

Appellant also contends that the award of the trial court with reference to the amount of child support and alimony is too low. Our review of the record convinces us that the trial court did not abuse its discretion in the amount awarded for these purposes and that we should not disturb such award on appeal to this court.

Appellant has also requested an award of an attorney fee for the services of her attorney in this court. We note that the trial court awarded an attorney fee for services in that court in the amount of $11,480, of which amount $10,000 represented an attorney fee and $1,480 costs and expenses. The trial court was apparently convinced of the value of her attorney's services after a hearing to set the amount of the fee. At that hearing appellant's attorney introduced into evidence a very itemized and detailed statement of the amount of the time devoted by him and by his associate in this dissolution action, as well as the hourly rates customarily charged for the services of each of them. The amount of the fee awarded by the trial court is not an issue in the appeal to this court. A review of the record convinces us that much of the work required in an appeal to this court was already performed in connection with the trial in the District Court. We are of the opinion that the appellant should receive an additional amount of $2,000 for the services of her attorney in appealing the case to this court.

Except as modified above, the decree entered by the trial court should be, and hereby is, affirmed.

AFFIRMED AS MODIFIED.

COADY, District Judge, dissents.

McCOWN, J., concurring.

Some cautionary comments may be appropriate in this case. Here the value of the pension was stipulated and the methods of valuation discussed in the opinion are those which have been approved by various courts. Rights under pension contracts vary greatly and in most cases the court has no power to alter the terms of the contract or provide for its payment in any fashion other than that required by the contract. The terms of the pension contract also affect the valuation of the pension itself.

The majority opinion does not require any specific methods of valuation to be used by the District Court nor restrict its broad discretion in valuing pension rights. Neither does the majority opinion imply that pensions themselves must be divided in kind between the parties but only that the value of any pension or retirement plan shall be included as a part of the marital estate.

CLINTON, J., joins in this concurrence.

LEROY SPRUNK AND IRENE SPRUNK, APPELLEES, V. HENRY DITTER AND MABEL DITTER, APPELLANTS.

306 N.W.2d 850

Filed June 12, 1981. No. 43436.

1. **Injunction: Contempt.** The disobedience of an injunction must be willful before a breach of it may be punished as a contempt.
2. **Contempt.** If there is a question as to what a court intends by its order, a party who acts on his own interpretation does so at his peril.
3. **Damages: Contempt.** An award of damages is improper in a contempt proceeding.

Appeal from the District Court for Platte County: ROBERT R. MORAN, Judge. Affirmed as modified.

Thomas R. Burke and Lyman L. Larsen of Kennedy, Holland, DeLacy & Svoboda and Wilbur L. Johnson of Johnson & Skorupa for appellant.

Edward Asche for appellee.

Heard before BOSLAUGH, CLINTON, and BRODKEY, JJ., and REAGAN and NORTON, District Judges.

BOSLAUGH, J.

The defendants, Henry Ditter and Mabel Ditter, appeal from an order of the District Court entered on April 1, 1980, finding them in contempt for willfully failing to comply with the order of the District Court entered on January 29, 1979. The order directed the defendants to restore elevations on their land to those existing prior to 1963; to pay a fine of $500 and the costs of the proceeding; and to pay all costs and damages sustained by the plaintiffs because of the defendants' failure to comply with the previous order of the court. The defendant Henry Ditter was also sentenced to 15 days' imprisonment, but execution of the sentence was suspended upon condition that the defendants comply with the order.

The litigation arises out of a controversy concerning drainage across farmland in Platte County, Nebraska. The plaintiffs, Leroy Sprunk and Irene Sprunk, own the northeast quarter of the northeast quarter of Section 10, Township 17 North, Range 3 West of the 6th P.M. in Platte County, Nebraska. The defendants own the west half of the northwest quarter of Section 11, which lies directly east of the plaintiffs' land. Mildred Ditter and Darlene Whitlow own the west half of the northeast quarter and the east half of the northwest quarter of Section 10.

A natural depression or drainway runs through the land of Mildred Ditter and Darlene Whitlow, across the plaintiffs' land, and then across the defendants' land. Water drains across the plaintiffs' land, through two culverts under a road lying between the plaintiffs' and the defendants' land, and then across the defendants'

land where it empties into a ditch on the Union Pacific Railroad right-of-way.

In 1963 the defendants leveled their land and erected a dike along the west boundary of their land. The result was to obstruct the drainage of water from the plaintiffs' land. This action was commenced on August 26, 1964, to compel the defendants to remove the dike and restore their land to the elevations existing prior to 1963.

On April 18, 1975, the trial court found that the defendants had obstructed the natural flow of water in the drainway across their land, and ordered the defendants to remove the dike and artificial fills on their land which obstructed or impeded the natural flow of water and to restore their lands to the natural levels which existed prior to 1963. The plaintiffs were awarded damages in the amount of $2,632.13, and the defendants were enjoined from interfering with the flow of water in the natural drainway upon their land as it would flow in the natural course of drainage.

On May 7, 1976, the defendants were ordered to show cause why they should not be punished for contempt for failure to comply with the order of April 18, 1975. On June 18, 1977, the trial court found the defendants had failed to comply with the order of April 18, 1975, and they were given until December 15, 1977, to comply with the order. On January 29, 1979, this order was modified and the defendants were given until May 1, 1979, to comply with the order of the court. A further extension to July 1, 1979, was granted on June 5, 1979.

On September 19, 1979, the plaintiffs again filed a motion alleging the defendants had failed to comply with the order of January 29, 1979. The trial on this motion resulted in the order of April 1, 1980, from which this appeal was taken. No appeal was taken from any of the previous orders of the trial court. All orders previous to the order of April 1, 1980, became final, are res judicata, and are binding upon the defendants.

The defendants contend the order of April 1, 1980,

was erroneous because the defendants had substantially complied with the order of January 29, 1979; the "language of duty" in the order of January 29, 1979, was improperly expanded; the proceeding was barred by the rules of res judicata or double jeopardy; and there can be no recovery of damages in a contempt proceeding.

Since there was no appeal from the order of January 29, 1979, the issue now is limited to whether the record shows the defendants willfully failed to comply with that order. The disobedience of an injunction must be willful before a breach of it may be punished as a contempt. *Kasparek v. May*, 174 Neb. 732, 119 N.W.2d 512 (1963).

Much of the defendants' argument centers around the finding in the order of January 29, 1979, that "the plaintiffs have failed to prove beyond a reasonable doubt that the defendants have not removed the dike so as to restore their land at that point to the level existing prior to 1963." The defendants contend that evidence as to elevations in the dike area along the west boundary should not have been received or considered because the January 29, 1979, order was res judicata and determined that the dike area had been restored to pre-1963 levels. The problem with the defendants' argument is apparent when the language of the order is considered together with the previous orders.

The order of January 29, 1979, was a *partial* modification of the order of June 18, 1977, which found that the defendants had failed to completely remove the dike as required by the previous orders. The June 18, 1977, order found that "the elevations which should have been attained on the west side of the defendants' property" were those shown in column 1, letters A through H on exhibit 16B. The order further provided that to the extent the dike extends north or south from the designated elevations in column 1, "the dike should have been removed to elevations corresponding to the level of defendants' land immediately to the east of the dike."

The order of January 29, 1979, also referred to the order of April 18, 1975, which required that the dike construction be removed *and the lands be restored to conditions existing previous to the land-leveling operations and the construction of the dike.* The 1979 order found specifically that the defendants had "wilfully failed to restore the elevations on their lands to those existing prior to 1963. Those elevations and their locations on the defendants' lands are set forth on Exhibit 1, attached hereto and incorporated by reference."

Although the 1979 order found that the plaintiffs had failed to prove that the dike had not been removed, the trial court found that the evidence did show that the defendants had willfully failed to restore the elevations on their lands to those existing prior to 1963.

The elevations shown on exhibit 1, which was attached to and made a part of the order of January 29, 1979, were derived from the survey of the defendants' property made in 1962, before the leveling work took place. The 1962 survey determined elevations at stations 60 feet apart. The first row of stations east of the west boundary were located 60 feet east of the centerline of the road lying between the plaintiffs' land and the defendants' land. Since the road was 66 feet wide, the distance between the west fence line and the first row of stations east of the fence line was 27 feet. The principal controversy between the parties relates to the land between the fence line and the first row of stations east of the fence line.

After the order of January 29, 1979, the defendants did considerable work on their land but did nothing to reduce the elevations on the 27 feet lying west of the first row of stations. The result was that this land remained at the elevation resulting from the leveling work and was an artificial obstruction to water draining from the lands to the west and flowing through the culverts under the road west of the defendants' land.

This is illustrated by the elevations shown on exhibit 1 at the first four stations directly east of the 30-inch cul-

vert. The 1962 survey shows these elevations to be 47.5 feet. The evidence shows that after the land had been leveled, these elevations going from west to east were, respectively, 48.1, 47.6, 47.9, and 47.7 feet. In other words, for water to drain across the defendants' land as it had prior to 1963, the land at these stations had to be restored to an elevation of 47.5 feet and that elevation be maintained *between the fence line* and the first station. This was what the June 18, 1977, order required in reference to elevations to be attained "on the west side" of the defendants' property.

From our examination of the record we conclude that the defendants have not complied with the order of January 29, 1979, in that they have not restored their land to the elevations existing prior to 1963, particularly in the 27 feet directly east of the west fence line and in the area east of the culverts.

The order of April 1, 1980, is affirmed in all respects except as hereinafter modified. The defendants shall have an additional 90 days after the date on which the mandate of this court is filed in the District Court in which to comply with the order of April 1, 1980.

If the defendants were in doubt as to what was required to comply with the order of January 29, 1979, their proper remedy was to obtain the further advice and instructions of the trial court. As we stated in *Kasparek v. May*, 174 Neb. 732, 740, 119 N.W.2d 512, 518 (1963): "When there is a question as to what a court intends by its order, and one acts on his own interpretation, he does so at his peril."

However, in this case, because of the possibility of confusion resulting from the finding in the order of January 29, 1979, that the plaintiffs had not proved that the dike had not been removed so as to restore the land at that point to the level existing prior to 1963, we conclude that it would be inequitable to enforce that part of the order of April 1, 1980, which required the defendants to pay a fine of $500 and the defendant Henry Ditter to be imprisoned in the county jail for 15 days.

Accordingly, that part of the order is vacated.

Since an award of damages is improper in a contempt proceeding, that part of the order of April 1, 1980, relating to damages after January 29, 1979, is vacated. See *Kasparek v. May, supra.*

The order of April 1, 1980, as modified, is affirmed. All costs are taxed to the defendants.

AFFIRMED AS MODIFIED.

REAGAN, District Judge, concurring.

I concur with the majority opinion except for the conclusion that it would be inequitable to enforce the sanctions imposed upon the defendants.

Imposition of sanctions by a trial court after a contempt adjudication is an exercise of discretion that is reviewable only for an abuse of discretion. 17 C.J.S. *Contempt* § 124(5) (1963). In the case of *Smolczyk v. Gaston,* 147 Neb. 681, 686, 24 N.W.2d 862, 865-66 (1946), this court stated: "The trial court had the parties before him and had a better opportunity to judge the degree of willfulness and contumaciousness of the contempt than does this court. An examination of the record reveals ample evidence to sustain the action of the trial court. Unless an abuse of discretion is evident, offenses against the authority and dignity of a court must be left largely to the judgment of the court against which the offense was directed. Unless such a rule be followed, trial courts will be greatly handicapped in protecting the authority and dignity of the courts and in maintaining a public attitude of general obedience to law as announced by judicial pronouncement."

No abuse of discretion exists in this case. I would modify the trial court's order only to the extent the jail sentence of the defendant Henry Ditter would be suspended if he complied with the April 1, 1980, order within 90 days from the mandate of this court.

STATE OF NEBRASKA, APPELLEE, V. ELIZABETH VICTORIA FARR, APPELLANT.

306 N.W.2d 854

Filed June 12, 1981. No. 43667.

1. **Statutes: Legislative Intent.** A sensible construction will be placed upon a statute to effectuate the object of the legislation rather than a literal meaning that would have the effect of defeating the legislative intent.
2. ——:——. The legislative intent, when apparent from the whole statute, is not to be thwarted by strained and unusual interpretations of particular words not required under the circumstances.
3. **Statutes.** It is a fundamental rule of statutory construction that, if possible, a court will try to avoid a construction which leads to absurd, unjust, or unconscionable results.
4. ——. A statute should be construed in the context of the object sought to be accomplished, the evils and mischief sought to be remedied, and the purpose to be served.
5. **Evidence: Appeal and Error.** It is not the province of this court to resolve conflicts in the evidence, pass upon 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.

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

P. M. Conley 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, Elizabeth Victoria Farr (Farr), was convicted of violating Neb. Rev. Stat. § 28-912 (Reissue 1979) by unlawfully removing herself from official detention following conviction for the commission of an offense, and was ordered by the trial court to be incarcerated in an institution under the jurisdiction of the Department of Correctional Services for a period of 1 year. It is from this judgment and order Farr now ap-

peals to this court. We affirm.

On December 27, 1978, Farr was sentenced to 1 year's probation for a misdemeanor offense of destruction of property. On May 8, 1979, an affidavit to revoke her probation was filed. On May 25, 1979, Farr pled nolo contendere to the motion to revoke her probation and she was sentenced to a term of 6 months in the county jail. She began to serve her sentence on June 3, 1979.

The record further discloses that Farr and a member of the Lincoln Police Department (detective) knew each other and that from time to time Farr had given police officers, including this detective, information regarding various criminal matters. Shortly after July 1, 1979, and while Farr was serving her 6-month sentence in the city jail, the detective saw her in the hallway of the jail and asked her if she had any idea about a series of robberies that had been going on at several Safeway stores in Lincoln and at several Arby's restaurants in Lincoln during the month of June 1979 involving a white female suspect. Farr told the detective she might possibly be able to help and he told her he would talk to her about it later.

A few days later the detective returned to the jail where he visited with Farr about the robberies. Farr was shown a composite drawing of the suspect in the robbery cases. She thought the drawing was familiar but could not, at that time, remember the individual's name.

When the detective and Farr met again in the hallway of the jail several days later, she told him she thought she had a piece of paper at her mother's house that had the name of the suspect in the robbery written upon it. The detective arranged to take Farr to her mother's house to look for the paper with the name written upon it. She was then taken by the detective to her mother's home where they looked for the paper. After a short time, Farr reported to the detective that she was unable to locate the piece of paper but thought she knew some people who lived at an apartment house in Lincoln who might be able to help her. When they arrived at the

apartment they apparently found that the people that the appellant was looking for had moved, and Farr was returned to the jail.

The detective next spoke to Farr a few days later when she called regarding the physical condition of her boyfriend who had been arrested. She advised the detective that if she were able to speak to her boyfriend she was certain that she could find out the name of the individual involved in the armed robberies. As a result of that offer, a meeting was arranged between herself and her boyfriend, and Farr was brought to police headquarters where she met with her boyfriend. Further conversation followed concerning the possible robbers of the Safeway stores and Arby's restaurants, but Farr was still unable to provide the detective with the name and she was returned to jail.

On July 10, 1979, Farr again contacted the detective and advised him that she had been unable to get in contact with her boyfriend who, she said, knew the name of the robber, but claimed that if they went to her mother's home again she could look for her boyfriend along the way or that he might be at her mother's house. She also advised the detective that she could look again for the piece of paper that had the robbery suspect's name written on it. She further advised the detective that her mother, who was watching her children while she was in jail, was ill and she would like to check on the welfare of her children who were staying with her mother. The detective testified that Farr actually begged him to take her so that she could check on the welfare of her children and that she guaranteed that if she was allowed to do that she would provide the name of the robbery suspect.

As a result of that offer, the detective checked Farr out of jail and took her to her mother's house in a police cruiser. Farr and the detective both entered the mother's house. When Farr went into a bedroom the detective stepped outside of the living room onto the front porch and lit a cigarette. He waited on the porch for about 1 or 1½ minutes. When he did not hear or see

anyone inside the house, he went into the house and called Farr by name. He then walked through the house and could not find her. Farr's mother appeared and told him that Farr had taken off running. The detective attempted to locate Farr in the area but was unsuccessful. She was apprehended and returned to jail some 36 or 37 days later.

Farr's principal argument is that when the police detective removed her from jail and took her to her mother's home it was solely for personal reasons and not official reasons. She therefore maintains that while she was with the detective she was not in legal custody and therefore could not violate § 28-912(1). We believe that the argument is neither persuasive nor correct.

The pertinent portions of the statute involved in this action provide as follows: "(1) A person commits escape if he unlawfully removes himself from official detention . . . . Official detention shall mean . . . detention in . . . any facility for custody of persons under . . . conviction of crime . . . or any other detention for law enforcement purposes . . . .

. . . .

"(3) Irregularity in bringing about or maintaining detention . . . shall not be a defense to prosecution under this section if the escape is from . . . detention pursuant to commitment by official proceedings."

In examining the statute, we must keep certain rules of construction in mind. To begin with: "A sensible construction will be placed upon a statute to effectuate the object of the legislation rather than a literal meaning that would have the effect of defeating the legislative intent." *State v. Nance*, 197 Neb. 257, 260, 248 N.W.2d 339, 341 (1976). " 'The legislative intent, when apparent from the whole statute, is not to be thwarted by strained and unusual interpretations of particular words not required under the circumstances . . . . ' " *Tom & Jerry, Inc. v. Nebraska Liquor Control Commission*, 183 Neb. 410, 419, 160 N.W.2d 232, 239 (1968). "It is a fundamental rule of statutory construction that, if possible, a court will try to avoid a construction which leads to

absurd, unjust, or unconscionable results." *State v. Saltzman*, 194 Neb. 525, 531, 233 N.W.2d 914, 918 (1975). Furthermore: "A statute should be construed in the context of the object sought to be accomplished, the evils and mischief sought to be remedied, and the purpose to be served." *State v. Nance, supra* at 260, 248 N.W.2d at 341.

In the recent case of *City of Lincoln v. Nebraska Liquor Control Comm.*, 208 Neb. 630, 634, 304 N.W.2d 922, 925 (1981), we said: "A statute is not to be read as if open to construction as a matter of course. Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain the meaning. In the absence of anything to indicate the contrary, words must be given their ordinary meaning. It is not within the province of a court to read a meaning into a statute that is not warranted by legislative language. Neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute." See, also, *O'Neill Production Credit Assn. v. Schnoor*, 208 Neb. 105, 302 N.W.2d 376 (1981).

We believe that when we apply the rules noted above to the statute in question and the facts of this case, we can reach no other conclusion but that Farr did indeed commit an escape in violation of § 28-912.

The evidence unquestionably supports the view that at the time Farr fled from her home she was then being detained in a facility for custody of persons under conviction, pursuant to commitment by official proceedings; and the fact that she was then temporarily in the custody of a member of the Lincoln Police Department, authorized to remove individuals from the confines of the jail complex for official purposes, does not change the situation. Clearly, Farr knew that she was not free to go or to accept any offers which would preclude her returning to the jail complex as soon as the purpose of her going to her mother's home was concluded.

Farr vigorously argues that the purpose of removing her from the jail complex and taking her to her mother's home was not for official business, but rather for the

personal benefit of Farr. In this regard there is indeed some conflict in the evidence. Farr maintains that her trip to her mother's home was purely for personal reasons and without any intent to obtain for the police detective the name of a burglary suspect. The police detective, on the other hand, vigorously denies that to be the case, and maintains that he would not have taken her to her mother's home at her request but for her assurance that if he did so she would deliver to him the name of the burglar at some point in time, if not right then. He testified on direct examination as follows:

"Q Was the purpose of your transporting the defendant to the premises at 2030 P Street in Lincoln, Lancaster County, Nebraska, on July 10th, 1979, to pursue the investigation of the armed robberies you have earlier described?

. . . .

"A Yes.

"Q And that, at least, was your purpose, is that correct?

"A Yes, sir.

"Q Did you have any other purpose in going to that address?

"A Yes, sir.

"Q What was the other purpose?

"A Miss Farr has been a source of information for me for quite a few number of years, and I have done numerous things in order to keep her supplying this source of information, and I was afraid that if I didn't take her there on that particular day, even though I didn't feel that she was going to come up with the name that she had promised, that she would become angry or get mad and would refuse to supply information to me in the future regarding these cases that were currently under investigation, or future cases that would be under investigation."

The evidence of the detective, if believed, would clearly establish that his purpose in taking Farr out of the jail complex and to her mother's home, from whence she fled, was because of police motives and not because

of personal motives. Farr disputes that fact, but that conflict was resolved by the trial court and is not for us to reexamine. "It is not the province of this court to resolve conflicts in the evidence, pass upon 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. Woodruff*, 205 Neb. 638, 640-41, 288 N.W.2d 754, 757 (1980). See, also, *State v. Carter*, 205 Neb. 407, 288 N.W.2d 35 (1980); *State v. Clermont*, 204 Neb. 611, 284 N.W.2d 412 (1979). Under the facts in this case it is clear that at the time Farr fled she was both still being detained in custody pursuant to commitment by official proceedings as a person convicted of a crime and in custody of the police detective for law enforcement purposes. The trial court was correct in its finding, and its judgment and sentence must be affirmed.

AFFIRMED.

JOHN R. HANLON, COMMISSIONER OF LABOR, APPELLEE, V. JOHN C. BODEN, APPELLEE, AND OMAHA SYMPHONY ASSOCIATION, APPELLANT.

306 N.W.2d 858

Filed June 12, 1981. No. 43676.

1. **Employment Security Law.** Under the Nebraska Employment Security Law a week of unemployment with respect to any individual shall mean any week during which he performs less than full-time work and the wages payable to him with respect to such week are less than his weekly benefit amount.
2. ——. The disqualification of employees of educational institutions and professional athletes for unemployment benefits under Neb. Rev. Stat. § 48-628(h) and (i) (Reissue 1978) does not include professional symphony musicians.
3. ——. The beneficent provisions of an unemployment compensation act should receive a liberal construction in favor of those claiming benefits under it.

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

James L. Quinlan of Fraser, Stryker, Veach, Vaughn, Meusey, Olson & Boyer, P.C., for appellant.

Pamela A. Mattson for appellee Hanlon. Thomas J. Jenkins of Gast and Kielty for appellee Boden.

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

MCCOWN, J.

The claimant filed a claim for unemployment benefits which was allowed by the Deputy Commissioner of Labor. The employer appealed. The decision was reversed by an appeal tribunal. The Commissioner of Labor appealed to the District Court. The District Court reversed the decision of the appeal tribunal and reinstated the award of the Deputy Commissioner of Labor and the employer has appealed to this court.

The claimant, John C. Boden, is a professional musician who completed his third season as a principal horn player with the Omaha Symphony on May 15, 1979. During the 1978-79 season Boden had been working under the terms of a master agreement negotiated between his employer, Omaha Symphony Association, and his union, the Omaha Musicians' Association, and under an individual musician's contract between the Omaha Symphony, Inc., and Boden. Under Boden's contract he agreed to play 180 "services" during the period of time between September 1978 and May 15, 1979. A salary of $7,800 was payable in 16 equal installments on the 15th and final day of each month during the "season." Payment for additional "services" or for solo performances, or other items affected by the master agreement, were payable in addition on the pay dates following the performance. A "service" is a concert or rehearsal as defined in the master agreement.

Prior to May 1, 1979, Boden and the symphony entered into a new contract for the period from September 10,

1979, through May 18, 1980, the conditions of which were the same as the 1978-79 contract except that the total salary was $8,000.

On May 15, 1979, Boden's contract for the 1978-79 symphony season was completed and he collected his last paycheck on that date. Boden had two private recording sessions as an independent contractor immediately after May 15th. Finding no further work, he filed his claim for unemployment benefits on or about May 20, 1979. He also contacted Opera/Omaha and listed himself at the Musicians' hiring hall and made other attempts to obtain employment. From June 11, 1979, through July 15, 1979, Boden was employed in connection with a music festival in Peru, Nebraska, and that period of time is not involved here.

On June 11, 1979, the Deputy Commissioner of Labor determined that Boden was separated from his employment with the Omaha Symphony Association on May 15, 1979, when the contract of employment was fulfilled by both parties, and that the fulfillment placed the claimant in an unemployed status as defined by Neb. Rev. Stat. § 48-602(18) (Reissue 1978) and he was therefore entitled to claim benefits.

The symphony association appealed the deputy's determination to the Nebraska Appeal Tribunal. The appeal tribunal found that the contract of employment covered a period of months, ending May 15, 1979, and that salary payments were made only during the contract period. The tribunal determined that compensation was, in fact, an annual salary and that the contract of employment was for an annual sum and that compensation paid during the contract period was payable with respect to the entire year and not with respect to the actual days of service or actual months for concert season performances. The tribunal therefore determined that Boden had no weeks of unemployment during the 52-week period from the beginning of performance of services under the contract and was therefore ineligible for any unemployment insurance benefits.

The Commissioner of Labor filed a petition for review in the District Court. After hearing, the District Court specifically found that Boden was unemployed as required by Neb. Rev. Stat. § 48-627 (Reissue 1978) in that his contract of employment with the Omaha Symphony Association expired at the conclusion of the last scheduled service for the Omaha Symphony Association. The District Court determined that the contract between the claimant and the Omaha Symphony Association was a seasonal contract and not an annual contract as evidenced by the fact that the symphony association did not control the employee in any manner after the season was completed. The District Court therefore reversed the findings and decision of the appeal tribunal and reinstated the determination of the Deputy Commissioner of Labor and awarded the claimant all benefits that he was entitled to under the Employment Security Law. The Omaha Symphony Association has appealed.

The position of the symphony association on appeal is that the salary payable for the symphony season was actually an annual salary payable with respect to each week of the year and that it should be treated as if it were a salary for teaching or a salary for a professional athlete.

Section 48-602 contains the basic definitions of the Employment Security Law, and subsection (18) of that section provides: "Week of unemployment with respect to any individual shall mean any week during which he performs less than full-time work and the wages payable to him with respect to such week are less than his weekly benefit amount."

Under the contracts involved in this case the contract period extended from a specific date in September of one year to a specific date in May of the next year. The master agreement refers to the "season" and requires that payment for the number of guaranteed services will be made in 16 equal installments, relative to the individual musician's guarantee, on the 15th and final day of each month during the "recognized season." Neither

the master agreement nor the individual musician's contract places any obligations upon any party as to employment or services or the payment of wages or salary during the "off season." The master agreement, however, does require written notice from either party to renew or terminate an individual musician's contract "for the coming season" at a time prior to the end of the current contract period. Under the contracts here no wages were payable to Boden "with respect to" any week in the off season, unless his salary can be said to be on an annual basis but payable over a shorter period of time. The symphony association contends that Boden was actually employed on an annual salary basis and should be considered to be in the same class as teachers or professional athletes. The major problem with that argument is that teachers and professional athletes are specifically disqualified for benefits by statute.

Neb. Rev. Stat. § 48-628 (Reissue 1978) provides that an individual shall be disqualified for benefits for any week of unemployment under various specified circumstances. Subsection (h) disqualifies a teacher from benefits for any week of unemployment between two successive academic years, if there is a contract or a reasonable assurance that the teacher will perform services for any educational institution in the next academic year.

Subsection (i) disqualifies a professional athlete for any week of unemployment between two successive sports seasons if such individual performed such services in the first of such seasons and there is a reasonable assurance that such individual will perform such services in the later of such seasons. It should be noted also that subsection (g) disqualifies an individual for any week of unemployment if such individual is a student.

While there may be similarities between teachers, professional athletes, and professional symphony musicians, there can be no doubt that the language of § 48-628(h) and (i) is clearly and precisely limited to employees of educational institutions and professional athletes. The

Legislature may be free to extend the disqualifications to other classes of employees but this court cannot do so without rewriting the statute.

The symphony association urges this court to construe § 48-628 liberally in order to deny unemployment benefits to Boden. It is generally held that the beneficent provisions of an unemployment compensation act should receive a liberal construction in favor of those claiming benefits under it. See 81 C.J.S. *Social Security* § 159 (1977). This court has also held that the Employment Security Law is to be liberally construed in order to accomplish its beneficent purposes. See, *Hunter v. Miller*, 148 Neb. 402, 27 N.W.2d 638 (1947); *Parson v. Chizek*, 201 Neb. 754, 272 N.W.2d 48 (1978). These beneficent purposes are not served by a strained construction of the statutes which will deny an unemployed worker the benefits of the act.

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

AFFIRMED

STATE OF NEBRASKA, APPELLEE, V. JOHN L. AUSTIN, APPELLANT.

306 N.W.2d 861

Filed June 12, 1981. Nos. 43705, 43706.

1. **Municipal Corporations: Municipal Ordinances.** A city of the primary class is granted power by the Legislature to make all ordinances not inconsistent with the general laws of the state as may be necessary to promote the public health, safety, and welfare. The authority to enforce such ordinances is granted to such city in the area which is within the city or within 3 miles of the city and outside of any organized city or village. Neb. Rev. Stat. § 15-236 (Reissue 1977).
2. **Constitutional Law: Municipal Ordinances: Statutes.** Ordinances and statutes are presumed to be constitutional, and their unconstitutionality must be clearly established. Courts will not pass upon a question of constitutionality unless it becomes necessary to do so.
3. **Evidence: Judgments.** Where there is a total lack of evidence to establish that defendant dumped or deposited refuse upon his property

on the dates alleged in the complaints, in violation of Lincoln Municipal Code § 8.28.020, defendant's convictions and sentences must be vacated and set aside.

Appeal from the District Court for Lancaster County: HERBERT A. RONIN, Judge. Affirmed in part, and in part reversed.

Dennis R. Keefe, Lancaster County Public Defender, Don C. Bauermeister, and Jerry Soucie for appellant.

John C. McQuinn, Assistant City Prosecutor, for appellee.

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

BRODKEY, J.

John L. Austin, the defendant and appellant herein, appeals to this court from an order of the District Court of Lancaster County affirming his convictions in the municipal court of Lincoln, Lancaster County, Nebraska, finding him guilty of the violation of two separate ordinances of that city, and imposing fines upon the defendant for such violations. In the first complaint filed against him it was alleged in count I thereof that on or about June 18, 1979, he "did dump or deposit refuse at property legally described as the northeast quarter of south half of Lot 17 of the southeast quarter, Township 9 North, Range 6 East to [sic] the Sixth P.M. of Stockwell Subdivision, Lancaster County, Nebraska, in violation of Lincoln Municipal Code section 8.28.020." In count II of that complaint, it was alleged that on or about June 18, 1979, he failed to keep the above-described property "free from rubbish, trash, junk and or other offensive and unwholesome matter and did permit conditions liable to produce diseases which are conducive to the breeding and existence of rats, mice, flies, mosquitoes, bacteria, and other rodents and insects, all of which conditions constitute a public nuisance," contrary to

§ 8.44.040 of the Lincoln Municipal Code. The second complaint filed against the defendant also contained two counts charging violations of the same sections of the Lincoln Municipal Code as in the first complaint, but alleged that such violations occurred on or about June 22, 1979. The two complaints were consolidated for trial before the Lincoln Municipal Court on October 17, 1979, which court found the defendant guilty as charged under both complaints and fined him the sum of $100 on each count. The defendant then appealed the convictions and sentences to the District Court of Lancaster County, Nebraska, which court sustained the motion of the State to affirm the judgments and sentences imposed by the municipal court, and found that there was a factual basis for so doing and that the sentence imposed in each count was proper and not an abuse of discretion by the trial court. A subsequent motion for a new trial was overruled by the District Court, and the defendant has now appealed to this court. We affirm in part and reverse in part.

The record in this case reveals that the property in question, which was acquired by the defendant in 1955, is approximately 3½ acres in size and is located outside the corporate boundaries of the city of Lincoln, but is within 3 miles of the Lincoln city limits.

At trial it was established that in January of 1979 Austin was notified by the Lincoln-Lancaster County Health Department that certain conditions existing upon his property were causing a health hazard. Bruce Baugh, an environmental sanitarian for the health department, testified that he first visited the property "right after" January 1, 1979, and twice a week thereafter, but there had been no substantial change in the condition of the property. At trial, Baugh described the premises as follows: "There were numerous abandoned autos. There was a large pile of scattered lumber lying on the ground, scattered thereabouts. There was a pool of standing water,

which is for — which would — conducive to mosquito breeding. There was farm equipment, obsolete farm equipment. There was various pieces of commercial equipment. There was various, various pieces of household appliances or household fixtures, such as discarded parts of toilet stools, weeds." When asked whether the condition of the property was conducive as a breeding place for rodents, Baugh responded: "Yes, it would. And the condition of the property is very conducive to the existence and breeding of rodents, mosquitoes, and it was a health hazard. It is a — also could be classified as a public nuisance. The property has been in that — has been in that condition for some time and is very much a — conducive to the existence of rodents. There is ample food supply for rodents and this [sic] conditions on the property offer very good harborage. Excellent harborage."

Also called as a witness at trial was Robert T. Wheeler, code administrator in the inspections division of the city of Lincoln. Wheeler testified that he notified the defendant on several different occasions to clean up the property. He stated that the defendant had informed him that the property would be cleaned up in 6 months, but no action was taken by June 18, 1979. Wheeler also testified to the fact that the defendant's property was not designated a dumping ground by the city of Lincoln. The final witness to testify at trial was the defendant, who appeared pro se in the action before the municipal court. He admitted on cross-examination that he had placed various vehicles and machinery on his property, but gave no testimony as to the date or dates he had done so.

At the conclusion of the trial, Judge Donald R. Grant advised the defendant that the State had sustained its burden of proving that he was in violation of the city ordinances. However, he deferred sentencing the defendant for 3 weeks so that the defendant could clean up the property. Judge Grant stated: "All I'm doing is telling you that if you get this cleaned up,

get this — you can have this stuff all hauled out there to a — away from there and clean this property up, that I will consider that in assessing penalties. If you do not, I will also consider that fact in assessing penalties. And I'm willing to continue this for a three-week period to see if you want to spend your money one way or another way, or as the gentlemen indicated, you may even make some money on it." After 3 weeks, however, the defendant still had failed to clean up the property, and he was subsequently fined $100 on each of the four counts set out in the complaints.

As previously indicated, the defendant appealed the judgments of the municipal court to the District Court, which affirmed the trial court. We note, however, that although the defendant had represented himself in the trial in the municipal court, he was appointed counsel who represented him in the hearing before the District Court.

Defendant's principal contentions in his appeal to this court are: (1) That a primary city does not have the specific power to impose a fine or imprisonment on an individual for depositing or failing to remove old machinery from his property which is outside the corporate limits of the city, but within its 3-mile jurisdictional border, and therefore the courts did not have jurisdiction to convict him under the ordinances of the city of Lincoln, above referred to; and (2) That there was a failure of proof on the part of the State with reference to his convictions for depositing rubbish on his property, as alleged in count I of both complaints.

Appellant challenges the validity of § 8.28.020 of the Lincoln municipal ordinances. That section, which deals with the designation by the city council of "dumping grounds," reads as follows: "The city council, shall, by resolution, designate a place or places, public or private, for the dumping and disposal of garbage, scavenger matter, rubbish, refuse, rubble from demolished buildings or structures, filth, slops, manure,

ashes, offal, human excrement and other offensive or obnoxious substances. It shall also provide a place or places for the burying or disposal of dead animals. It shall be unlawful for any person to dump, deposit or otherwise dispose of any garbage, scavenger matter, rubbish, refuse, rubble from demolished buildings or structures, filth, slops, manure, ashes, offal, human excrement and other offensive or obnoxious substances or bury or dispose of any dead animals within the corporate limits of the city *or within three miles of the limits thereof,* upon any ground, premises or place other than that designated by the city council as herein provided." (Emphasis supplied.)

We note that the power of a Nebraska municipal corporation to make and enforce such ordinances must be authorized by state statute. In the instant case, the city of Lincoln is a city of the primary class and is governed by Chapter 15 of the Nebraska Revised Statutes, two sections of which are directly applicable to the resolution of this appeal. Neb. Rev. Stat. § 15-236 (Reissue 1977) provides for the control of disease by a primary city as follows: "A primary city may make all such ordinances, by-laws, rules and regulations not inconsistent with the general laws of the state as may be necessary or expedient to promote the public health, safety and welfare, including ordinances, by-laws, rules and regulations as may be necessary or expedient to prevent the introduction or spread of contagious, infectious or malignant diseases. *This power and authority is granted to such city in the area which is within the city or within three miles of the city and outside of any organized city or village.* It may create a department of health, make laws and regulations for that purpose, *and enforce all ordinances, by-laws, rules and regulations made as authorized herein as provided in section 15-263.*" (Emphasis supplied.)

Neb. Rev. Stat. § 15-263 (Reissue 1977) defines the enforcement authority granted cities of the primary

class and the penalties which may be imposed on any person found to be in violation of the city ordinances. Section 15-263 provides in pertinent part: "A primary city may make all such ordinances, by-laws, rules, and regulations not inconsistent with the general laws of the state as may be necessary or expedient, in addition to the special powers otherwise granted by law . . . for promoting the public health, safety, convenience, comfort, morals, and general interests and welfare of the inhabitants of the city, and to enforce all ordinances by providing for imprisonment of those convicted of violations thereof at hard labor for a period not to exceed six months *and to impose forfeitures, fines, and penalties not exceeding five hundred dollars for any one offense*, recoverable with costs, and, in the default of the payment thereof, to provide for confinement in the city prison or county jail . . . ." (Emphasis supplied.)

It was pursuant to the specific authority granted by the aforementioned statutes that the city of Lincoln adopted § 8.28.020 of the Lincoln Municipal Code, which has previously been set out in full above and need not be repeated here. We note, however, that the term "refuse," as referred to in § 8.28.020, is defined in § 8.28.010(d) and also in § 8.44.060(c) of the Lincoln Municipal Code to include discarded automobile bodies, automobiles, parts of automobiles, machinery, parts of machinery, and any other waste matter or material not herein designated as garbage which accumulates in the conduct of a household, business establishment, shop or factory of any kind or nature. It is clear that the articles of materials found on defendant's property were "refuse" within the meaning of that term as used in the foregoing sections of the city ordinances.

The defendant was also convicted of violating § 8.44.040 of the Lincoln Municipal Code. Subsection (a) of that ordinance provides as follows: "It shall be the duty of every owner, lessee, tenant or occupant

of any lot or parcel of ground within the city *or within three miles of the corporate limits thereof* to keep said premises owned, leased, or occupied by him free from garbage, refuse, rubbish, brush, trash, junk, old building material, offal, manure, and any other offensive or unwholesome matter, and it shall be unlawful for such owner, lessee, tenant, or occupant of such lot or parcel of ground to permit, keep or maintain thereon any such condition liable to become putrid or injurious to the public health, or any such condition liable to produce disease, or which is conducive to the breeding and existence of rats, mice, flies, mosquitoes, bacteria, or any other rodents or insects. *The maintenance or permitting of any of the foregoing conditions on any such lot or parcel of ground is hereby declared to be a public nuisance and shall constitute a misdemeanor punishable as hereinafter provided in this code.*" (Emphasis supplied.)

It is the general and well-established rule that ordinances and statutes are presumed to be constitutional, and that their unconstitutionality must be clearly established; and further that courts will not pass upon a question of constitutionality unless it becomes necessary to do so. *Aschenbrenner v. Nebraska P.P. Dist.*, 206 Neb. 157, 291 N.W.2d 720 (1980); *State ex rel. Douglas v. Nebraska Mortgage Finance Fund*, 204 Neb. 445, 283 N.W.2d 12 (1979); *Metropolitan Utilities Dist. v. City of Omaha*, 171 Neb. 609, 107 N.W.2d 397 (1961); *United Community Services v. The Omaha Nat. Bank*, 162 Neb. 786, 77 N.W.2d 576 (1956). Construed in this context, we are convinced that the ordinances under which the appellant was charged were adopted under a specific grant of authority from the Legislature as embodied in the aforementioned statutes. *Chase v. County of Douglas*, 195 Neb. 838, 241 N.W.2d 334 (1976); *Jacobs v. City of Omaha*, 181 Neb. 101, 147 N.W.2d 160 (1966); *Christensen v. City of Fremont*, 45 Neb. 160, 63 N.W. 364 (1895). It is clear that the City of Lincoln was

given specific powers to control and regulate the disposition of refuse within the city and within a 3-mile area outside the corporate limits in order to promote the public health and prevent the spread of disease. In addition, § 15-263 clearly provides the city with authority to enforce said ordinances through the imposition of fines and other specified penalties.

The evidence, as revealed in the record and adduced as testimony at trial, clearly establishes that the appellant is the owner of land which is located within the 3-mile jurisdictional boundary outside the corporate limits of the city of Lincoln, which land was not a designated dumping ground for the city. The evidence also establishes that there exists on the property certain articles of refuse and other conditions which are favorable to the breeding of rodents, mosquitoes, and bacteria; that the conditions described on said property create a health hazard to the community; and that the appellant was given ample time to correct conditions after he received notice from the Lincoln-Lancaster County Health Department. It was only after appellant's repeated failure to clean up his property that he was penalized by the trial court.

The record indicates that the ordinances promulgated by the city of Lincoln are reasonably related to the control and prevention of disease. We conclude that the provisions of §§ 8.28.020 and 8.44.040 are clearly applicable and enforceable within the 3-mile zone outside the city's corporate limits under the power granted to the city by § 15-236.

We now address the question of the sufficiency of evidence presented at the trial to sustain the conviction of the defendant on the charges contained in the four counts in the complaints filed against him. We have no trouble in finding that the evidence was sufficient to sustain his conviction on the counts of failing to remove the refuse under § 8.44.040, as it is clear

that the "refuse" was discovered on the property on both June 18, 1979, and June 22, 1979, on which dates the property was actually inspected by the city official. However, we have more difficulty with reference to the charges contained in the complaints in which it is alleged that on both of the aforesaid dates the defendant dumped or deposited refuse on the property. A careful review of the record in this case convinces us that there is no evidence whatsoever in the record to sustain the allegation that even "on or about" the dates mentioned the defendant dumped or deposited such refuse on the property. It is true that the record reflects admissions on the part of the defendant that after his return from the Army and his purchase of the property in question, he had brought automobiles and other various articles onto the property, and perhaps had even moved their location from time to time on the property; but nowhere did he admit, nor was any evidence adduced, with reference to the date or dates this was done; nor does the evidence in any way establish that the "dumping or depositing" was done on or about June 18, 1979, or on or about June 22, 1979, as alleged in the complaints. That being so, we are convinced that the State has not established by sufficient evidence what it has alleged in count I of its complaints; and, therefore, the convictions of the defendant for violating § 8.28.020, and the sentences imposed by the court thereafter for such violations, must be vacated and set aside. Defendant's convictions and sentences with references to count II of the complaints, involving § 8.44.040, are sustained.

AFFIRMED IN PART, AND IN PART REVERSED.

CLINTON, J., participating on briefs.

CURTIS HELGENBERGER, APPELLANT, V. CAROLYN HELGENBERGER, APPELLEE.

306 N.W.2d 867

Filed June 12, 1981. No. 43761.

1. **Child Custody: Child Support: Judgments.** A decree awarding custody of a minor child and fixing child support payments is not subject to modification in the absence of a material change in circumstances occurring subsequent to the entry of the decree of a nature requiring modification in the best interests of the child.
2. **Child Custody: Sexual Misconduct.** Sexual misconduct is a factor which may be considered in determining what is in the best interests of minor children, but it is not necessarily determinative. The nature of the act or acts, the circumstances surrounding the commission thereof, and the probable effects as are related to the future welfare of the children must be carefully considered.

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

Thomas R. Wolff for appellant.

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

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

KRIVOSHA, C.J.

The appellant, Curtis Helgenberger (Mr. Helgenberger), appeals from an order entered by the District Court for Dodge County, Nebraska, denying Mr. Helgenberger's application to modify a decree of the District Court for Dodge County, Nebraska, entered on the 26th day of March 1980 with respect to the custody of his minor child, Brad Helgenberger (Brad). We affirm.

The record discloses that Mr. Helgenberger and the appellee, Carolyn Helgenberger (Mrs. Helgenberger), were married on March 13, 1976. At the time of the marriage Mrs. Helgenberger had a daughter by a previous marriage. Custody of the daughter is not involved in this matter. Of the marriage, one

child, Brad, was born to the parties on January 24, 1977. On March 26, 1980, a decree of dissolution was entered by the District Court for Dodge County, Nebraska, dissolving the marriage of the parties.

It appears that both parties were represented by counsel at the time the dissolution was granted and, as part of the matter, the parties entered into a property settlement agreement which recited in part: "2. Child Custody. That both parties are fit and proper persons to be awarded the care, custody and control of the minor child, namely Brad, born January 24, 1977, but, subject to further order of the Court, the custody of said minor child shall remain joint between both Husband and Wife, with possession to be as follows: a. Wife shall have possession of said child at all times not specified herein . . . . b. Husband shall have possession of said child as the parties agree upon, including, but not limited to, (1) Every Friday beginning in the A.M. to every Sunday in the A.M. (2) Every other holiday, commencing with Easter, 1980. (3) Every Fathers Day. (4) Every Christmas either on the six days prior to Christmas Eve, including Christmas Eve, or on Christmas Day and the six days following Christmas Day. (5) Every month of August, commencing with 1980, during which time the Wife shall have possession from Friday P.M. to Sunday P.M. during said month. As set forth herein, the parties may agree to such other times of possession as is in the best interest of said child." The property settlement agreement was approved by the District Court and incorporated into a decree entered by the District Court on March 26, 1980.

On August 21, 1980, Mr. Helgenberger filed an application for modification of the decree, requesting that full custody of Brad be placed with him and that reasonable visitation rights be granted to Mrs. Helgenberger. The basis for the application for modification provided as follows: "Petitioner further alleges that in accordance with the decree and property settlement entered heretofore on March 26, 1980, both parties,

Petitioner and Respondent, were granted joint custody of said child, with visitation rights specifically set out therein. Petitioner now alleges that it is in the best interest of the child to modify the decree to provide custody only in the Petitioner, with possession in the Petitioner, and reasonable visitation rights to the Respondent."

After hearing on the application, the trial court, on September 10, 1980, entered its order in which the trial court specifically found that said order should be denied, "because of failure to demonstrate a change of circumstances since the entry of decree herein . . . ."

Mr. Helgenberger presents this case to this court as though this appeal is a direct appeal from the decree entered by the District Court on March 26, 1980, in which custody of Brad was granted to Mrs. Helgenberger. We believe, in that respect, Mr. Helgenberger is in error. It must be kept in mind that this is not a direct appeal wherein we are examining the trial court's finding as to the best interests of the child, but, rather, a proceeding wherein a decree was entered by the court pursuant to a property settlement agreement voluntarily entered into by the parties and from which no appeal was taken. The real question presented to the trial court initially, and to us on appeal, is whether the decree concerning child custody should be modified.

We have frequently noted that a decree awarding custody of a minor child and fixing child support payments is not subject to modification in the absence of a material change in circumstances occurring subsequent to the entry of the decree of a nature requiring modification in the best interests of the child. See, *Youngberg v. Youngberg*, 193 Neb. 394, 227 N.W.2d 396 (1975); *Gray v. Gray*, 192 Neb. 392, 220 N.W.2d 542 (1974). In the case of *Bokelman v. Bokelman*, 202 Neb. 17, 22, 272 N.W.2d 916, 919 (1979), we said: "A decree fixing custody of minor children will not be modified unless there has been

a change in circumstances indicating that the person having custody is unfit for that purpose or that the best interests of the children require such action. The determination of the trial court with respect to changing the custody of minor children will not ordinarily be disturbed unless there is a clear abuse of discretion or it is clearly against the weight of the evidence." See, also, *Carper v. Rokus*, 194 Neb. 113, 230 N.W.2d 468 (1975); *Ritchey v. Ritchey*, 208 Neb. 100, 302 N.W.2d 372 (1981). The basis for that rule appears to be articulated in part in our decision in *Miller v. Miller*, 196 Neb. 146, 148, 241 N.W.2d 666, 668 (1976), wherein we said: "Minor children are entitled to stable home conditions. They are not chattels and their custody should not be the subject of a continuous contest between divorced parents at the expense of their well-being."

Our examination of the record convinces us that the trial court was correct in its finding that there was no material change in circumstances or that the best interests of the minor child required such modification. The evidence was clear that Brad was being well cared for by Mrs. Helgenberger. The principal basis for Mr. Helgenberger's claim that there has been a material change in circumstances justifying a change of custody for the best interests of the child is evidence that Mrs. Helgenberger has permitted a male acquaintance to remain at the family home overnight on several occasions. On these occasions the children were also in the home. While it appears from the record that on some of these occasions Mrs. Helgenberger and her male acquaintance may have engaged in sexual relations, the evidence is clear that the children were asleep and totally unaware of what was transpiring.

Likewise, the evidence indicates that on one occasion Mrs. Helgenberger and the children spent the night in the home of her male acquaintance. The record discloses that the parties did not on that

occasion engage in sexual relations and the children were totally unaware that Mrs. Helgenberger was anywhere except asleep with them in the living room, though it appears she did occupy the bed of her acquaintance during some part of the night.

While the action of Mrs. Helgenberger in permitting her male acquaintance to spend the night on occasion in her home or her spending one night with the children in his home may not be laudatory, nor an indication that she has on all occasions used the best of discretion, the evidence falls substantially short of establishing that she is not fit to have custody of Brad or that his best interests demand any change.

In the recent case of *Batenhorst v. Batenhorst*, 205 Neb. 601, 604, 288 N.W.2d 740, 742 (1980), we said: "Sexual misconduct is a factor which may be considered in determining what is in the best interests of minor children, but it is not necessarily determinative. [Citations omitted.] The nature of the act or acts, the circumstances surrounding the commission thereof, and the probable effects as are related to the future welfare of the children must be carefully considered." Also, see cases cited in *Ritchey v. Ritchey, supra.*

Our examination of the entire record leads us to the same conclusion reached by the trial court to the effect that this conduct by Mrs. Helgenberger was not a material change in circumstances affecting the well-being of the minor child and did not justify the modifying of the decree. For that reason the judgment of the trial court is affirmed.

AFFIRMED.

McCOWN, J., concurs in result.

HERMAN WIEDEMAN, APPELLEE, V. JAMES E. SIMON CO., INC., APPELLANT.

307 N.W.2d 105

Filed June 19, 1981. No. 43293.

1. **Adverse Possession.** To claim by adverse possession, the claimant must show by a preponderance of the evidence actual, open, exclusive, and continuous possession under a claim of ownership for 10 years.
2. ——. To gain title by adverse possession against a true owner, acts of dominion over the land must be so open, notorious, and hostile as to put an ordinarily prudent person on notice of the fact that his lands are in the adverse possession of another.
3. ——. Sufficiency of possession depends upon the character of the land and the use that can reasonably be made of it.
4. ——. When a fence is constructed as a boundary line, although it is not the actual boundary line, and the parties claim ownership of land up to the fence for the uninterrupted statutory period, the claimant gains title to such land by adverse possession.

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

Winner, Nichols, Meister & Douglas for appellant.

Wright & Simmons for appellee.

Heard before BOSLAUGH and WHITE, JJ., and RONIN, BARTU, and KELLY, District Judges.

BARTU, District Judge.

Defendant-appellant, James E. Simon Co., Inc., appeals the decision quieting title of a 2.57-acre tract in the plaintiff-appellee, Herman Wiedeman, by adverse possession and from an award for damages.

The 2.57-acre tract in question is a strip of land approximately 100 feet by 1,150 feet lying south of the legal line between the north and south halves of the north half of Section 27, Township 22 North, Range 54 West of the 6th P.M. in Scotts Bluff County, Nebraska. Plaintiff is the record title owner since 1965 by deed from David Wiedeman, his father, of the north half of the north half of that section, and defendant is the record title owner since 1977 by deed from

John C. Herstead and Helen A. Herstead of land adjoining that of the plaintiff on the south, described as that part of the south half of the north half of Section 27 north of the Winter's Creek canal right-of-way.

At least as far back as 1944 there has been a fence in the general vicinity of the boundary line between the two properties, running east and west. From the west line of the section the fence runs approximately straight east about 1,150 feet, then jogs north about 100 feet to near the line between the north half of the north half and the south half of the north half of Section 27. It is this area between the actual boundary and the fence to the south which is in dispute.

The land comprising the strip and the land either side of it to the north and south consist of a sandy-gravel soil covered with cactus, junk, and variable grass. It has been used as a dump ground, and the trash that has been dumped there was never completely cleaned up. The fence along the south side of the disputed area was connected with the fence along the road on the west side of defendant's property. There has never been a fence along the road on the west end of the disputed area or along the west side of plaintiff's land.

When Wiedeman moved to the property in 1944 as tenant for his father, part of the disputed area had been used as a dump. He put up a sign prohibiting dumping and cleaned up some of the trash. The second year he was on the land he pastured the land in the disputed area. He has pastured the area about every third year since then, up until about 3 years prior to trial, in conjunction with pasturing the roughage from a rotation of beets and corn on the farmland to the north.

In pasturing this land, the plaintiff would put up an electric fence on the west and north and completely fence in the disputed land with the rest of his land. When this land was pastured there was a high of 200 to

250 cattle on the land for 6 weeks to 2 months. Limited vegetation in the disputed area would not justify a permanent fence on the west and pasturing it each year. The plaintiff also rented land, including the disputed area, a couple of times to persons who pastured sheep thereon. At one time he hauled gravel out of the disputed area for use in his yard. Throughout the years, the plaintiff maintained the fence which bordered the disputed area on the south.

At no time did defendant's predecessors in title, the Hersteads and L. M. Bryan, claim ownership to any land north of the fence. There was a period of time for approximately 10 years prior to the Hersteads' ownership that the plaintiff leased the land south of the fence under an oral lease with L. M. Bryan. There was no evidence that the plaintiff did or intended to lease land north of the fence. The plaintiff claimed ownership of the disputed land and used the land up to the fence continuously since 1944. In the past there had been negotiations undertaken by the plaintiff to sell land, of which the disputed area was a part, to people who wanted to build homes thereon. At one time the plaintiff offered to sell an acre for $4,000 and turned down an offer of $3,500. Another time the plaintiff was offered $50,000 by a contractor for 8 acres of farmland and gravel area.

Lew Herstead, son of the defendant's predecessor in title, testified that he did not have any knowledge of the plaintiff maintaining the fence and did not ever see any cattle pastured in the disputed area. However, Herstead was never out on the land when this would have been going on. He did not believe the fence to be on the exact survey mark and did not know "where the land was lost from or gained." Herstead also testified that he had the impression that Wiedeman thought the fence was not quite on the line, but that "he lost as much as we had, that it was a give and take proposition between the two lines."

After the defendant purchased its property in 1977,

it began making preparations for gravel excavation on the disputed area. About this time, Cecil Simon, superintendent for the defendant, approached the plaintiff to let him know what they would be doing. Simon testified that he knew the plaintiff had been using that land up until that time. The defendant had a survey made, tore down the fence, drilled a well, and began to excavate gravel on the disputed area.

This matter is triable in this court de novo. However, in determining an appeal in an equity action involving questions of fact, this court will, in determining the weight of the evidence where there is an irreconcilable conflict therein on a material issue, consider the fact that the trial court observed the witnesses and their manner of testifying.

This court has many times set forth the standard for the burden of proof of adverse possession as a preponderance of the evidence to show that the claimant had been in actual, open, exclusive, and continuous possession under a claim of ownership for 10 years. *Pettis v. Lozier*, 205 Neb. 802, 290 N.W.2d 215 (1980); *Barnes v. Milligan*, 200 Neb. 450, 264 N.W.2d 186 (1978); *Cunningham v. Stice*, 181 Neb. 299, 147 N.W.2d 921 (1967); *Mentzer v. Dolen*, 178 Neb. 42, 131 N.W.2d 671 (1964); *Purdum v. Sherman*, 163 Neb. 889, 81 N.W.2d 331 (1957).

Defendant argues that the burden of proof in an adverse possession case is by clear and convincing evidence and that the plaintiff failed to meet that burden. To the extent that *Foos v. Reuter*, 180 Neb. 301, 142 N.W.2d 552 (1966), and *Wells v. Tietge*, 143 Neb. 230, 9 N.W.2d 180 (1943), establish a clear and convincing standard, they are overruled.

To gain title by adverse possession against a true owner, acts of dominion over the land must be so open, notorious, and hostile as to put an ordinarily prudent person on notice of the fact that his lands are in the adverse possession of another. *Shirk v. Schmunk*, 192 Neb. 25, 218 N.W.2d 433 (1974); *Whaley v. Mingus*,

188 Neb. 351, 196 N.W.2d 516 (1972); *Mentzer v. Dolen, supra; Fitch v. Slama*, 177 Neb. 96, 128 N.W.2d 377 (1964).

The sufficiency of the possession in an action of this kind depends upon the character of the land and the use that can reasonably be made of it. The possession is sufficient if the land is used continuously for the purpose to which it is adapted. *Cunningham v. Stice, supra; James v. McNair*, 164 Neb. 1, 81 N.W.2d 813 (1957); *Oliver v. Thomas*, 173 Neb. 36, 112 N.W.2d 525 (1961); *Walker v. Bell*, 154 Neb. 221, 47 N.W.2d 504 (1951).

Where a fence is constructed as the boundary line, although it is not the actual boundary line, and the parties claim ownership of land up to the fence for the uninterrupted statutory period, the parties gain title to such land by adverse possession. *Conkey v. Anderson Farms, Inc.*, 205 Neb. 708, 289 N.W.2d 541 (1980); *Vetick v. Kula*, 197 Neb. 209, 247 N.W.2d 637 (1976); *Hendrickson v. Glaser*, 204 Neb. 492, 283 N.W.2d 41 (1979); *Shirk v. Schmunk, supra; Abood v. Johnson*, 189 Neb. 87, 200 N.W.2d 20 (1972); *McCain v. Cook*, 184 Neb. 147, 165 N.W.2d 734 (1969).

The nature and character of the disputed tract was near to wasteland insofar as agricultural purposes were concerned. Its terrain was gently rolling with a sandy-gravel soil which rendered it useless for crop production. Prior to plaintiff's possession in 1944, it was used as a dumping ground for junk. Subsequent to his possession it was used continuously for the grazing of livestock as growth of vegetation and rotation of other crops on grounds north of the disputed tract would permit. The only natural vegetation it supported was cactus, sagebrush, and isolated bunches of grass.

Subsequent to plaintiff's possession he posted the disputed tract, closing it to dumping. He continuously maintained the perimeter fence on the south side of the tract. These acts, coupled with the use of the land

continuously for the purpose to which it was adapted, were all open, notorious acts of dominion which gave notice to defendant's predecessors in title of plaintiff's claim to the disputed tract.

The evidence conclusively establishes that the plaintiff and defendant's predecessors in title considered the south fence on the disputed strip as the boundary line between their respective properties from 1944 to the time that the defendant purchased the land with notice of plaintiff's claim to the same.

Plaintiff has shown, by a preponderance of the evidence, actual, open, exclusive, and continuous possession of the disputed tract under a claim of ownership for more than 10 years. The District Court's decision quieting title to the disputed tract in the plaintiff should be and is hereby affirmed.

Defendant concedes that the trial court's assessment of damages for the removal of gravel was correct if the plaintiff had title to the disputed tract. Defendant does argue, however, that the plaintiff failed to show, by a preponderance of the evidence, ownership of the fence destroyed by the defendant. This contention is without merit inasmuch as plaintiff did assert claim to the real estate and all appurtenances thereto by his maintenance and use of the fence as his own. Evidence establishes $700 as the fair and reasonable replacement cost of the fence destroyed. Plaintiff's award of damages from the defendant in the sum of $1,808.84 for the removal of gravel and in the sum of $700 for the destruction of a fence, in a total sum of $2,508.84, should be and is hereby affirmed.

AFFIRMED.

IN RE INTEREST OF HIATT. STATE OF NEBRASKA, APPELLEE, V. CHRISTINE HIATT, APPELLANT.

307 N.W.2d 108

Filed June 19, 1981. No. 43327.

1. **Parental Rights.** An order of the juvenile court terminating parental rights under Neb. Rev. Stat. § 43-209(6) (Reissue 1978) must be supported by clear and convincing evidence.
2. ——. The juvenile court may terminate all parental rights of parents when the court finds such action to be in the best interests of the child or children and it appears by the evidence that one or more of the conditions set out in Neb. Rev. Stat. § 43-209 (Reissue 1978) exist.
3. **Child Custody.** While there may be no direct affirmative evidence of child abuse, where there is ample evidence of neglect and a lack of proper parental care directly and adversely injurious to the health, safety, and well-being of the child, the best interests of the child become paramount.
4. **Parental Rights.** Parental rights may be forfeited by substantial, continuous, and repeated neglect of a child and a failure to discharge the duties of parental care and protection.

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

Maureen Fitzgerald Brown of Brown Law Offices for appellant.

Donald L. Knowles, Douglas County Attorney, and Francis T. Belsky for appellee State.

Donald B. Fiedler, guardian ad litem.

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

MCCOWN, J.

This is a proceeding for termination of parental rights. The separate juvenile court of Douglas County terminated the parental rights of the mother and father of two children. The mother has appealed.

In June 1975 the appellant and John Hiatt, Jr., were married in Utah. The appellant was 14 years old and pregnant, and her husband was 15 years old.

On January 10, 1976, their first son was born and the second boy was born on April 10, 1977. Financial and other problems were present from the beginning of the marriage. The father was employed only occasionally and the mother was receiving ADC allotments. On several occasions the mother obtained food and supplies for the children from her grandmother and her father. In July 1977 the mother requested a caseworker for Child Protective Services to place the boys in temporary foster care for 2 weeks until the mother could "get things together." The boys were returned to the mother after 16 or 17 days when she requested it. The marital situation of the parents and the home life provided for the boys deteriorated from July 1977 through January 1978. The caseworker for Child Protective Services made numerous home visits and talked to the mother frequently, both in person and by telephone. During this period of time the home was described as very dirty, with unwashed dishes, diapers, and trash all around. On numerous occasions there was either no food or a grossly inadequate supply of food for the children in the home. The sole financial support for the family was the ADC check and the father took part of that for his personal use.

On January 27, 1978, the parents delivered the two boys to the caseworker and told her they could no longer care for the children. The parents had previously been advised of the consequences of delivering custody and of possible court intervention.

A detention hearing was held on February 16, 1978. By the time of the hearing the parents had apparently changed their minds and sought to regain custody of the boys. Both parents testified, however, that it would be difficult to provide for the children at that time and that it would be better for the children to remain in the custody of the State for the time being. At the close of the hearing the court ordered the children to remain in the custody of the State and continued the

case for 6 to 8 weeks.

On May 18, 1978, an adjudication hearing was held. The parents, their counsel, and the guardian ad litem for the children all appeared. The parents admitted the allegations of the petition that the two children were homeless or destitute or without proper support within the meaning of Neb. Rev. Stat. § 43-202(1) (Reissue 1978). The separate juvenile court found that the children were within the meaning of § 43-202(1) on proof beyond a reasonable doubt and ordered the custody of the children to remain with the State until further order of the court. At the time of the hearing the parents were living in South Dakota, were having marital difficulties, and the mother was pregnant again.

The mother filed a divorce petition in June 1978, but the parties were reconciled and a third child was born on October 29, 1978. A further disposition hearing was held in the present case on December 18, 1978. The court ordered the father to obtain employment and provide a stable source of income for the family, and both parents were ordered to obtain adequate housing and furniture, to cooperate with court officers and to visit the children regularly, and the children were continued in the custody of the State. The mother reactivated her divorce petition and a decree was entered on July 5, 1979. The mother was given custody of the third child and the custody of the two children under the jurisdiction of the juvenile court in this proceeding was reserved pending further order of the juvenile court.

A motion for termination of the parental rights of the mother and father was filed on August 21, 1979. Hearing was set for September 27, 1979, but stay was granted because of the active military service of the mother. She joined the U.S. Army Reserves and reported for duty at Fort Leonard Wood, Missouri, on July 6, 1979, and was thereafter assigned to Fort Jackson, South Carolina, for additional training.

She returned to Nebraska on October 9, 1979. After further continuance, a hearing was held on the motion for termination of parental rights on December 19, 1979. At the outset of the hearing the father admitted the allegations of the motion for termination of parental rights and his rights are no longer involved.

A supervisory service officer of the juvenile court who had been working with the parents since February 1978 testified that the mother's situation had not improved since 1978, and that, in her opinion, if the mother were given custody of the children she would not care for them. She testified that the mother had visited her children only twice in the previous 6 months and that when the mother left for military service she left no forwarding address and the juvenile court and Child Protective Services did not know her whereabouts. She also testified that the children had been in foster care for 2 years and that the younger boy did not even know his mother. She also testified that the mother was admitted to the Nebraska Psychiatric Institute in the spring of 1979 and, upon release, stayed at the Women's Shelter for a few days and joined the Army approximately 6 weeks later.

Caseworkers for Child Protective Services and Douglas County Social Services also testified, generally confirming the testimony of the juvenile court service officer and particularly that the mother visited with the children on only a few of the many authorized occasions and sometimes scheduled a visit and failed to appear. In the opinion of the caseworkers the best interests of the children required the termination of parental rights. The guardian ad litem for the children joined the State in requesting the termination of parental rights.

The mother testified in her own behalf and testified that she felt she could support the three children on her ADC benefits plus her Army pay and a government grant which she received while she was attending a technical college. Essentially, her testimony was

that she believed she could take care of her children, but that if her children were returned to her and things did not work out she could always relinquish her parental rights then.

At the conclusion of the hearing the separate juvenile court terminated the parental rights of the mother and the father under Neb. Rev. Stat. § 43-209(6) (Reissue 1978). The mother has appealed.

An order of the juvenile court terminating parental rights under § 43-209 must be supported by clear and convincing evidence. *In re Interest of Goodon*, 208 Neb. 256, 303 N.W.2d 278 (1981).

The juvenile court may terminate all parental rights of parents when the court finds such action to be in the best interests of the child or children and it appears by the evidence that one or more of the conditions set out in § 43-209 exist. *In re Interest of Goodon, supra.*

While there may be no direct affirmative evidence of child abuse, where there is ample evidence of neglect and a lack of proper parental care directly and adversely injurious to the health, safety, and well-being of the child, the best interests of the child become paramount. *In re Interest of Kimsey*, 208 Neb. 193, 302 N.W.2d 707 (1981).

Parental rights may be forfeited by substantial, continuous, and repeated neglect of a child and a failure to discharge the duties of parental care and protection. *In re Interest of Witherspoon*, 208 Neb. 755, 305 N.W.2d 644 (1981).

In the case at bar the evidence was clear and convincing and the trial court did not abuse its discretion in entering its order terminating parental rights.

AFFIRMED.

KRIVOSHA, C.J., dissenting.

As I have on several previous occasions, I believe we have once again overreacted to a situation in affirming the trial court's action in terminating parental rights in this case. See, dissent of Krivosha,

C.J., *In re Interest of Cook*, 208 Neb. 549, 304 N.W.2d 390 (1981). It appears to me, in the instant case, we have once again appropriately declared that an order of the juvenile court terminating parental rights under Neb. Rev. Stat. § 43-209(6) (Reissue 1978) must be supported by clear and convincing evidence and then proceeded to terminate parental rights absent the necessary clear and convincing evidence.

There is no question but that the mother in the instant case experienced difficulties in raising her children. Before she was 19 she was the mother of three children and divorced from her husband.

But, as the majority notes, she apparently recognized her need to obtain some training so that she could provide for her children financially and emotionally. It is for that reason that she joined the military service and went on active duty, leaving her children with the State until she obtained the necessary training so she could return and provide a home for her children.

In the instant case there was no evidence of any physical abuse by the mother toward the children. It appears from the record that just at the time that the mother was ordered to give up her children she had made substantial strides in providing for her children. The record reflects that at the time of the termination hearing she had obtained housing for herself and her three children, obtained adequate furnishings for herself and her three children, cooperated fully with court personnel, and had obtained a marketable skill. It may very well be that we would wish for all families to be so constituted that all children enjoy all of the benefits that are often provided by well-trained, middle-class families. Such, however, is not the reality of life, and we should not be so quick to terminate parental rights because of a mother's inability to provide her children with as much as a potential adoptive parent might provide. I would have reversed and remanded.

CLINTON, J., joins in this dissent.

RICHARD V. SYAS, APPELLANT, V. NEBRASKA METHODIST HOSPITAL FOUNDATION, A CORPORATION, APPELLEE.

307 N.W.2d 112

Filed June 19, 1981. No. 43374.

1. **Directed Verdict.** The party against whom a verdict is directed is entitled to have all controverted facts resolved in his favor and to have the benefit of every reasonable inference deducible from the evidence.
2. **Negligence: Invitor-Invitee.** A possessor of land is not an insurer of the safety of business invitees on its land.
3. ——:—— A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he (1) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, (2) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (3) fails to exercise reasonable care to protect them against the danger.
4. **Trial.** Where the facts presented to sustain an issue are such that but one conclusion can be drawn when related to the applicable law, it is the duty of the court to decide the question as a matter of law and not submit it to a jury.

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

Charles I. Scudder for appellant.

Ronald H. Stave and Joseph S. Daly of Sodoro, Johnson, Daly, Stave, Cavel & Coffey for appellee.

Heard before KRIVOSHA, C.J., MCCOWN, WHITE, and HASTINGS, JJ., and MORAN, District Judge.

MORAN, District Judge.

This is appeal from a directed verdict for the defendant, Nebraska Methodist Hospital Foundation (hospital), after the plaintiff, Richard V. Syas (Syas), presented his evidence in a slip-and-fall case. The trial judge determined that Syas was guilty of contributory negligence to a degree sufficient to bar his right to recover from the hospital. We affirm.

As we must, we assume the truth of the material and relevant evidence presented by Syas, find every

controverted fact in his favor, and give him the benefit of every reasonable inference deducible from the evidence. *Crawford v. Soennichsen*, 175 Neb. 87, 120 N.W.2d 578 (1963).

On March 6, 1978, Syas drove from his home in Hancock, Iowa, to the hospital in Omaha, Nebraska, to pick up his teenage daughter who was to be released from the hospital that day after surgery performed the previous week. There was snow on the ground all the way. He arrived about 11 a.m. and parked his automobile in the hospital's parking lot where snow had been moved into piles. He entered the hospital and made arrangements for his daughter's discharge. He was told to bring his car to the second level entrance where hospital personnel would bring her. He returned to his car and drove up a private road to the second level. He had never used this road before. The lane nearest the entrance was a fire lane in which parking was prohibited, but was used as a pickup and dropoff area. There were parked cars in this lane, and there was evidence that this was a chronic situation which the hospital had not remedied. Syas stopped in the second lane opposite the entrance. The area was protected by a permanent canopy, and the pavement in that area contained an electrical heating system designed to prevent icing of water tracked onto the pavement by automobiles and melting snow which might blow onto the roadway under the canopy. The day was cold and windy. Climatological data showed air temperature at Eppley Airfield near Omaha on March 6, 1978, was 27 degrees at 9 a.m. and 33 degrees at noon. Syas testified that as he drove up the rampway everything looked normal. He saw no broken pieces of concrete, or chuckholes. He observed only two things: the cars parked in the fire lane and his daughter being wheeled outside the door in a wheelchair. Her leg was in a cast. Syas stopped his car in the second lane opposite the entrance and about 12 feet from his daughter, left the car, looked toward his daughter, took

two steps, slipped and fell to the roadway, and was injured. He attempted to rise, and slipped and fell again. While on the pavement Syas saw a combination of ice and water covering an area approximately 2 feet by 2 feet. A witness who testified she had no difficulty seeing it described it as "like a wet spot . . . that didn't have a lot of water on it but it had . . . frozen over the night. I don't know if you would call that ice or if you would call it frost. . . . It was wet." While walking, Syas did not look down to see the condition of the pavement. He testified that if he had looked, he probably would have seen the ice and walked around it or proceeded with caution. He thought the area would be clean because he had been told to go there to pick up his daughter and thought there would not be any ice there.

Hospital maintenance personnel called by the plaintiff testified to inspecting the area about an hour after the accident. They saw no ice. One witness testified the area was slippery from water where vehicles had traveled through it. Vapor was observed rising from the pavement, indicating the heating coils were functioning. There was no evidence of icing under the canopy before the accident or of complaints to the hospital in that regard.

Syas contends on appeal that there were jury questions of negligence and contributory negligence.

While the trial judge directed a verdict on the basis of Syas' contributory negligence, we think the case should be disposed of on the threshold question of the hospital's negligence.

The hospital was not an insurer of the safety of business invitees on its premises. *Jeffries v. Safeway Stores, Inc.*, 176 Neb. 347, 125 N.W.2d 914 (1964). The conditions of its liability to a business visitor are spelled out in NJI 8.22. This instruction tracks Restatement (Second) of Torts § 343 (1965):

"A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land

if, but only if, he

"(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and

"(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

"(c) fails to exercise reasonable care to protect them against the danger."

Our cases are consistent. See, *Crawford v. Soennichsen*, 175 Neb. 87, 120 N.W.2d 578 (1963); *Brandtert v. Scottsbluff Nat. Bank & Trust Co.*, 194 Neb. 777, 235 N.W.2d 864 (1975).

Where the facts presented to sustain an issue are such that but one conclusion can be drawn when related to the applicable law, it is the duty of the court to decide the question as a matter of law and not submit it to a jury. See *Crawford v. Soennichsen, supra.*

There are two inferences which can be drawn from the evidence. Either the heating system had malfunctioned and ice formed on the pavement or Syas slipped on water on the pavement, there because of vehicular traffic. If the first is true, there is no evidence of knowledge by the hospital of the condition or of a failure to exercise reasonable care to discover it. If the second inference is true, there is no evidence that the hospital should have expected Syas would not have discovered or realized the danger or would have failed to protect himself against it. See *Nance v. Ames Plaza, Inc.*, 177 Neb. 88, 128 N.W.2d 564 (1964). There was no issue of negligence by the hospital to submit to the jury.

Counsel for Syas has devoted a considerable portion of his brief and argument to the hospital's failure to keep open the pickup area near the entrance. We fail to see that this makes the rules in Restatement (Second) of Torts § 343 (1965) inapplicable.

AFFIRMED.

KRIVOSHA, C.J., dissenting.

I find that I must respectfully dissent from the majority's opinion in this case. I agree with the majority's conclusion that: "Where the facts presented to sustain an issue are such that but one conclusion can be drawn when related to the applicable law, it is the duty of the court to decide the question as a matter of law and not submit it to a jury." My difficulty with the majority's opinion, however, is its conclusion that the evidence in this case was such that reasonable minds could reach but one conclusion to the effect that the hospital should have expected Syas to have seen the defect and to have protected himself accordingly.

The evidence, as pointed out by the majority opinion, discloses that Syas stopped his car in the second lane opposite the entrance and about 12 feet from his daughter, left the car, looked toward his daughter, took *two steps*, slipped and fell to the roadway, and was injured. He attempted to rise, and slipped and fell again. I am unable to conclude how it can be said, as a matter of law, that the hospital could have reasonably expected that Syas would have discovered the danger. I find it not at all unreasonable to believe that Syas, concerned about the welfare of his recently injured daughter, might not have been able to discover the danger in just two steps. That is not to say that his failure to see the danger establishes negligence on the part of the hospital, but only to suggest that it created a question of fact. When different minds may reasonably draw different conclusions from the same facts as to whether they establish negligence or contributory negligence, such issues should be submitted to the jury. See, *Beck v. Trustin*, 177 Neb. 788, 131 N.W.2d 425 (1964); *Buie v. Beamsley*, 171 Neb. 181, 105 N.W.2d 738 (1960). In *Moats v. Lienemann*, 188 Neb. 452, 454, 197 N.W.2d 377, 379 (1972), we said: "'In determining the question of whether the evidence is sufficient to submit the issues of negligence and contributory negligence to the jury, a party is entitled

to have all conflicts in the evidence resolved in his favor and the benefit of every reasonable inference that may be deduced from the evidence, and if reasonable minds might draw different conclusions from a set of facts thus resolved in favor of a party, the issues of negligence and contributory negligence are for a jury.'"

I would have submitted the issues of negligence and contributory negligence to the jury. For that reason, I would have reversed and remanded.

WHITE, J., joins in this dissent.

O'NEILL PRODUCTION CREDIT ASSOCIATION, APPELLEE, V. LARRY D. MITCHELL ET AL., APPELLANTS.

307 N.W.2d 115

Filed June 19, 1981. No. 43398.

1. **Equity: Appeal and Error.** In an equity action it is the duty of the Supreme Court to retry the issues of fact involved upon the evidence in the record and, upon such trial de novo, to reach an independent conclusion.
2. **Mortgages: Consideration.** A preexisting debt is a valuable and sufficient consideration for a mortgage given to secure that debt.
3. _____: _____ A real estate mortgage given to secure the preexisting debt of another is supported by valuable and sufficient consideration.
4. **Mortgages: Equity.** Although mortgage clauses which undertake to secure subsequent debts are not favored in equity and are carefully scrutinized and strictly construed, they will, in the absence of other legal prohibition, be enforced to the extent they are determined to have been within the intent of the parties.
5. **Mortgages: Acknowledgments.** A mortgage on real estate, other than as to the homestead, executed and delivered by the mortgagor is valid between the parties, even though it was not lawfully acknowledged.
6. **Homesteads: Estoppel.** Where the statutory requirements of signature and acknowledgment by both husband and wife to encumbrance of a homestead are wanting, they cannot be supplied by estoppel. An interest in the homestead simply will not pass nor be created unless the documents for that purpose are signed and acknowledged by both husband and wife.

Appeal from the District Court for Holt County:

HENRY F. REIMER, Judge. Affirmed in part, and in part reversed and remanded with directions.

William W. Griffin for appellants.

Edward E. Hannon for appellee.

Heard before KRIVOSHA, C.J., WHITE, and HASTINGS, JJ., and VAN PELT and CAPORALE, District Judges.

CAPORALE, District Judge.

The defendants-appellants, Larry D. and JoAnn Mitchell, husband and wife, and Larry's parents, Adrian L. and Eva L. Mitchell, husband and wife, are land contract vendees. The plaintiff-appellee, O'Neill Production Credit Association (Association), sought foreclosure of a lien claimed to have arisen by virtue of an assignment by the Mitchells of their interests in the land contract to the Association. The trial court found that a lien had been created and decreed foreclosure. For the reasons which follow, we affirm in part and reverse in part.

This is an action in equity; it is therefore the duty of the Supreme Court to retry the issues of fact involved upon the evidence in the record and, upon such trial de novo, to reach an independent conclusion. Neb. Rev. Stat. § 25-1925 (Reissue 1979); *Sullivan v. Hoffman*, 207 Neb. 166, 296 N.W.2d 707 (1980); *Parry v. State Farm Mut. Auto Ins. Co.*, 191 Neb. 628, 216 N.W.2d 875 (1974).

The evidence is not in conflict on the material issues. On March 9, 1967, the Mitchells, jointly and as tenants in common, entered into a contract with William J. and Elizabeth M. Meusch, husband and wife. Under the terms of that contract the Mitchells were to purchase certain land from the Meusches. Title was to be conveyed to the Mitchells when the extended installment payments due the Meusches were completed. A portion of the land which is the subject of the contract is the homestead of Larry and JoAnn.

The Association had lent money to Larry and JoAnn

in the past, and on January 22, 1975, took a promissory note from them, jointly and severally, in the amount of $325,000. On that same day, the Association presented an Assignment of Purchase Agreement (Assignment) to Larry. The Assignment undertook to "transfer, assign and set over" to the Association the Mitchells' title and interest in and to the land contract until an unspecified and unidentified "indebtedness, whether now owning or hereafter incurred, shall be satisfied and paid."

On February 11, 1975, Larry took the Assignment to a notary public. The notary certified that all four Mitchells had appeared before him and acknowledged the "instrument" to be their voluntary act and deed. JoAnn, Adrian, and Eva never appeared before the notary, nor were their signatures affixed to the Assignment when the notary signed his certificate. JoAnn did testify at trial that she had voluntarily and freely signed the Assignment.

Thereafter, between June 14, 1975, and June 21, 1976, the Association lent another $73,887.88 to Larry and an additional $19,160 to Larry and JoAnn. No money was ever lent by the Association to Adrian or Eva.

Appellants' assignments of error may be summarized as claiming that the trial court erred in determining that the Assignment was supported by valid consideration and in finding that JoAnn Mitchell was estopped to deny the validity of her acknowledgment with respect to the younger Mitchells' homestead interest.

It is clear that the assignment of the executory land contract between the Meusches and the Mitchells given to secure the debt in question is to be treated as a mortgage. *Grandjean v. Beyl*, 78 Neb. 349, 110 N.W. 1108 (1907); *Burrows v. Hovland*, 40 Neb. 464, 58 N.W. 947 (1894); *Scharman v. Scharman*, 38 Neb. 39, 56 N.W. 704 (1893). We have also held that a preexisting debt is a valuable and sufficient consideration for a mortgage given to secure that debt. *Longfellow v. Barnard*, 58 Neb. 612, 79 N.W. 255 (1899), *aff'd on rehearing*, 59 Neb.

455, 81 N.W. 307 (1899); *Morrill v. Skinner*, 57 Neb. 164, 77 N.W. 375 (1898); *Steen v. Stretch*, 50 Neb. 572, 70 N.W. 48 (1897). It is true that each of those cases is factually distinguishable from the one at bar. *Longfellow* involved the assignment by the mortgagee of a fraudulent mortgage to secure a creditor of the mortgagor. In *Morrill*, the property subject to the husband's mortgage was conveyed to the mortgagor's wife in a divorce settlement wherein the wife agreed to assume and pay the husband's mortgage and further gave her own separate mortgage and note. *Steen* presented a situation wherein the maker of a note later executed a mortgage to secure its payment to the mortgagee who had sold the note to another and agreed to forbear collection efforts. Nonetheless, the cases establish that a preexisting debt owed by the mortgagor to the mortgagee is valid consideration for a mortgage given to secure that debt. We have found no Nebraska case, and counsel have cited us none, which clearly holds that a real estate mortgage given to secure the preexisting debt of another is supported by valid consideration. However, it is generally held that the consideration required to support a mortgage need not flow from the mortgagee to the mortgagor; it is sufficient that the mortgagee parted with consideration. 55 Am. Jur. 2d *Mortgages* § 100 (1971); 59 C.J.S. *Mortgages* § 88 (1949). See, also, *Leach v. Treber*, 164 Neb. 419, 82 N.W.2d 544 (1957). It is likewise generally held that the consideration necessary to support a suretyship obligation need not pass directly to the surety; a consideration moving to the principal alone will suffice. 74 Am. Jur. 2d *Suretyship* § 14 (1974). Thus, a real estate mortgage given to secure the preexisting debt of another is supported by valuable and sufficient consideration. Consequently, the Assignment creates a valid lien as to the interests of Adrian and Eva with respect to the debt owed by Larry and JoAnn to the Association on February 11, 1975.

The matter of the loans made by the Association to Larry and JoAnn after February 11, 1975, is a different

question. The difficulty with those subsequent loans rests in the ambiguity of the Assignment. There can be no question as to what debt was being secured at the time the Assignment was executed, as only the one debt represented by Larry and JoAnn's joint note existed. However, as to "indebtedness . . . hereafter incurred," the Assignment identifies neither the nature of the future debt nor the future debtor. Although mortgage clauses which undertake to secure subsequent debts are not favored in equity and are carefully scrutinized and strictly construed, they will, in the absence of other legal prohibition, be enforced to the extent they are determined to have been within the intent of the parties. *Holiday Inns v. Sucher-Schaefer*, 77 Mich. App. 658, 259 N.W.2d 179 (1977); *Freese Leasing v. Union Trust & Sav. Bank*, 253 N.W.2d 921 (Iowa 1977); *First v. Byrne*, 238 Iowa 712, 28 N.W.2d 509 (1947); 59 C.J.S. *Mortgages* § 178 (1949). Here it cannot be said that the so-called dragnet clause contained in the Assignment clearly and unequivocally obligated Adrian and Eva to secure future indebtedness incurred by Larry and JoAnn, or by anyone else. The Assignment therefore created no lien against the interests of Adrian and Eva with respect to any money advanced by the Association after February 11, 1975. The foregoing conclusion makes it unnecessary for us to determine the applicability and effect, if any, of Neb. Rev. Stat. § 76-238.01 (Reissue 1976), which deals, among other things, with future advances on mortgaged real estate.

We now turn to the homestead interest. It is well established that a mortgage on real estate, other than as to the homestead, executed and delivered by the mortgagor is valid between the parties, even though it was not lawfully acknowledged. *Prudential Ins. Co. v. Holliday*, 191 Neb. 144, 214 N.W.2d 273 (1974); *Mitzner v. Putnam*, 186 Neb. 664, 185 N.W.2d 665 (1971). The question under the circumstances of this case is whether JoAnn is estopped from asserting the invalidity of her acknowledgment. We hold that she is not. Neb. Rev.

Stat. § 40-104 (Reissue 1978) provides, with certain exceptions not material here, that the homestead of a married person cannot be encumbered unless the instrument is executed and acknowledged by both husband and wife. It has long been the law of this state that where the statutory requirements of signature and acknowledgment by both husband and wife to encumbrance of a homestead are wanting, they cannot be supplied by estoppel. *Davis v. Thomas*, 66 Neb. 26, 92 N.W. 187 (1902); *Betts v. Sims*, 25 Neb. 166, 41 N.W. 117 (1888). See, also, *McIntosh v. Borchers*, 196 Neb. 109, 241 N.W.2d 534 (1976), *appeal after remand*, 201 Neb. 35, 266 N.W.2d 200 (1978). We see no reason to depart from that rule. An interest in the homestead simply will not pass nor be created unless the documents for that purpose are signed and acknowledged by both husband and wife. Thus, there can be no lien on that portion of the land contract interest which relates to the homestead of Larry and JoAnn.

Moreover, only $19,160 of the $93,047.88 lent by the Association after February 11, 1975, is JoAnn's debt; she did not join in the execution of the notes signed by Larry for the balance.

Accordingly, we affirm the decree of the trial court as to Adrian and Eva except as to the indebtedness incurred by Larry or Larry and JoAnn after February 11, 1975, in regard to which we reverse. We affirm as to Larry and JoAnn except as to the homestead interest, in regard to which we reverse. We also reverse as to JoAnn with regard to that portion of the indebtedness incurred after February 11, 1975, in which she did not join.

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

GLADYS L. WYATT, EXECUTRIX OF THE ESTATE OF JOHN N. WYATT, DECEASED, APPELLANT. V. BURLINGTON NORTHERN, INC., ET AL., APPELLEES.

306 N.W.2d 902

Filed June 19, 1981. No. 43402.

1. **Railroads: Motor Vehicles: Negligence.** A traveler on a highway, when approaching a railroad crossing, has a duty to look and listen for the approach of trains. He must look, where by looking he could see, and listen, where by listening he could hear, and if he fails without a reasonable excuse to exercise such precautions, then he is guilty of contributory negligence more than slight as a matter of law and no recovery can be had for damages resulting from a collision with a passing train.
2. **Railroads: Motor Vehicles.** A motorist approaching a railroad grade crossing shall stop and not proceed across the crossing, until he can do so safely, if a train approaching within approximately one quarter mile of the crossing emits a signal audible from such distance, or the train is plainly visible and in hazardous proximity to the crossing. Neb. Rev. Stat. § 39-655(1) (Reissue 1978).
3. **Railroads: Motor Vehicles: Negligence.** The duty of a motorist approaching a grade crossing is such that even if the train fails to give warning signals of its approach to the crossing, the motorist can not recover if he recklessly fails and neglects to have his vehicle under control where by looking and listening at the proper time he could have seen the approaching train in time to stop before reaching the crossing.
4. **Railroads: Motor Vehicles: Right-of-Way.** There is no duty on the part of the engineer operating a railroad train to yield the right-of-way to a motorist approaching a grade crossing until the situation is such as to indicate to a reasonably prudent person that to proceed would probably result in a collision. At that time it becomes the duty of the engineer to exercise ordinary care to avoid an accident, even to the extent of yielding the right-of-way.

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

Wright & Simmons for appellant.

Knudsen, Berkheimer, Beam, Richardson & Endacott for appellee Burlington.

Holtorf, Kovarik, Nuttleman & Ellison, P.C., for appellee Shires.

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

BOSLAUGH, J.

This is an appeal in a wrongful death action. The plaintiff's decedent, John Wyatt, was killed in a railroad crossing accident when the pickup truck which he was driving south on 21st Avenue was struck broadside by an eastbound Burlington Northern train. The accident happened shortly after 5 p.m. on January 30, 1974, at the 21st Avenue crossing of the Burlington Northern tracks east of Scottsbluff, Nebraska. The defendants are the railroad company and the engineer, John G. Shires.

At the close of the plaintiff's evidence the trial court dismissed the plaintiff's amended petition on the motions of the defendants. The plaintiff has appealed. The assignments of error relate to the dismissal of the petition and the refusal of the trial court to admit documentary evidence containing statistical information concerning railroad crossing accidents and fatalities.

The record shows that 21st Avenue, also known as the sugar factory road, is a two-lane gravel road running north and south. The railroad tracks run slightly southeast to northwest and cross 21st Avenue at an angle of approximately 67 degrees. The crossing was marked by a standard railroad crossbuck sign which was located just north of a spur track or siding which crossed 21st Avenue approximately 15 feet north of the main line track. A second siding or spur track that leads into the sugar factory crosses 21st Avenue approximately 760 feet north of the main line track. The sugar factory spur was marked by a separate warning sign. A paved highway known as the South Beltline Highway, runs parallel to the main track and approximately 100 feet south. A stop sign on 21st Avenue protects the intersection at the Beltline highway.

There is a "dump" or raised area consisting of dirt, rock, and pieces of metal west of 21st Avenue and north of the tracks which to some extent obstructs the vision of traffic approaching the crossing from the north. The evidence, however, is undisputed that from a point 300 feet north of the crossing Wyatt had a clear and unob-

structed view of the track from the crossing west to a point 400 feet west of the crossing.

The train which was involved in the accident consisted of an "SD" type diesel engine, a loaded hopper car, and a way car or caboose. The entire train was approximately 134 feet long and 14 feet high. The train had left Bayard, Nebraska, that morning and proceeded west to Morrill, Nebraska. The train was returning to Bayard, Nebraska, when the accident happened. The locomotive had only one set of controls and when operated with the short hood forward the controls were on the right side of the locomotive. Since there were no facilities to turn the locomotive at Morrill, the locomotive was operated with the long hood forward on the return trip to Bayard, Nebraska.

The engineer in charge of the locomotive at the time of the accident was the defendant Shires, but the locomotive was actually being operated by the fireman, James Butcher. The engineer's seat was constructed so that it would slide forward or backward and swivel to the right or left. To operate the locomotive with the long hood forward, Butcher turned the engineer's seat and slid it back toward the short hood so that he could look in the direction that the locomotive was traveling.

As the train approached the 21st Avenue crossing, it was proceeding at a speed of approximately 26 to 28 m.p.h. The warning bell and the headlight were operating. The locomotive was also equipped with either a flashing amber light on top of the cab or an oscillating headlight, which was operating. At the whistle post approximately 1,200 feet west of the crossing, Butcher began to blow the whistle and continued to do so until the locomotive reached the crossing.

Both Shires and Butcher were looking out the windows of the cab of the locomotive to the northeast and saw Wyatt approaching the crossing from the north at a speed of approximately 30 m.p.h. or better. Shires testified that when the locomotive was 200 feet or less west of the crossing, Wyatt was approximately 300 feet north

of the crossing. At that time Shires said to Butcher, "I don't think he's going to stop." At about the same time Butcher placed the brakes in "emergency" which resulted in a maximum application of the brakes to all wheels of the train and disconnected the power in the locomotive from the traction motors. Wyatt did not slow down or stop and the collision occurred.

Although the sun was shining, it was low in the southwest and at such an angle that Wyatt would have had to look to the right of the sun to see the train. Both Shires and Butcher testified that they watched Wyatt from the point 300 feet north of the crossing, and Wyatt did not look to the west and did not slow down as he approached the crossing. After the accident there were no skid marks or other indication that Wyatt had attempted to stop.

The trial court sustained the motions of the defendants for a directed verdict and dismissed the petition on the ground that the plaintiff's decedent Wyatt was guilty of contributory negligence more than slight as a matter of law.

The rules which are applicable to motorists approaching railroad grade crossings in this state are well settled. In *Thomas v. Burlington Northern R.R., Inc.*, 203 Neb. 507, 510-11, 279 N.W.2d 369, 372 (1979), we said: "It is a well-established rule in Nebraska that a traveler on a highway, when approaching a railroad crossing, has a duty to look and listen for the approach of trains. He must look, where by looking he could see, and listen, where by listening he could hear, and if he fails without a reasonable excuse to exercise such precautions, then he is guilty of contributory negligence more than slight, as a matter of law, and no recovery can be had for damages resulting from a collision with a passing train. Milk House Cheese Corp. v. Chicago, B. & Q. R. R. Co., 161 Neb. 451, 73 N.W.2d 679. See, also, Loudy v. Union P. R. R. Co., 146 Neb. 676, 21 N.W.2d 431; McIntosh v. Union P.R.R. Co., 146 Neb. 844, 22 N.W.2d 179; Mundt v. Chicago, R. I. & P. R. Co., 136 Neb. 478, 286 N.W. 691;

Moreland v. Chicago & N. W. R. Co., 117 Neb. 456, 220 N.W. 692; Askey v. Chicago, B. & Q. R. Co., 101 Neb. 266, 162 N.W. 647; Chicago, B. & Q. R. Co. v. Schwanenfeldt, 75 Neb. 80, 105 N.W. 1101."

Neb. Rev. Stat. § 39-655(1) (Reissue 1978), enacted in 1973, provides in part: "(1) Whenever any person driving a vehicle approaches a railroad grade crossing under any of the circumstances set forth in this section, the driver of such vehicle shall stop within fifty feet but not less than fifteen feet from the nearest rail of such railroad and shall not proceed until he can do so safely. The requirements of this subsection shall apply when: . . . (c) A railroad train approaching within approximately one quarter mile of the highway crossing emits a signal audible from such distance and such railroad train, by reason of its speed or nearness to such crossing, is an immediate hazard; or (d) An approaching railroad train is plainly visible and is in hazardous proximity to such crossing."

The statute was clearly applicable to Wyatt in this case. The train was "plainly visible" and had emitted a signal within approximately one quarter of a mile of the crossing which was audible from that distance.

The duty of a motorist approaching a grade crossing is such that even if the train fails to give warning signals of its approach to the crossing, the motorist can not recover if he recklessly fails and neglects to have his vehicle under control where by looking and listening at the proper time he could have seen the approaching train in time to stop before reaching the crossing. *Milk House Cheese Corp. v. Chicago, B. & Q.R.R. Co.*, 161 Neb. 451, 73 N.W.2d 679 (1955).

The ordinary rules of the road which are applicable to motor vehicles crossing at highway intersections have no application to railroad trains approaching grade crossings. Although railroad trains may not have an absolute right-of-way at grade crossings under all conditions, there is no duty on the part of the engineer operating the train to yield the right-of-way until the situation

is such as to indicate to a reasonably prudent person that to proceed would probably result in a collision. At that time it becomes the duty of the engineer to exercise ordinary care to avoid an accident, even to the extent of yielding the right-of-way. *Carter v. Chicago, B. & Q.R.R. Co.*, 175 Neb. 188, 121 N.W.2d 44 (1963). The defendants in this case complied fully with these rules and did everything possible in an effort to stop the train when it became reasonably apparent that Wyatt might not stop before reaching the crossing.

Much of the plaintiff's argument is directed to her contention that Wyatt was hard of hearing and may not have heard the whistle or warning bell because he was probably driving the truck with the windows closed and the radio turned on at a high volume. This, of course, would not excuse the decedent but merely tended to prove contributory negligence. If Wyatt was hard of hearing he was under an obligation to maintain an increased vigilance for warning signals. To place himself in a situation where he would be unable to hear warning signals would not be a defense or excuse for his failure to use due care.

The plaintiff further argues that the sun, which was low in the west, may have prevented the decedent from clearly seeing the train, which was in plain sight. The sun was a condition and, like snow, fog, or blinding lights, would not excuse Wyatt's failure to see the train. *C. C. Natvig's Sons, Inc. v. Summers*, 198 Neb. 741, 255 N.W.2d 272 (1977).

The evidence shows, quite conclusively, that Wyatt drove his truck onto the crossing directly in front of the train in total disregard of the crossing sign and all of the warning signals which were being given by the railroad employees. In fact, the evidence indicates that it is probable that Wyatt would not have been able to stop at the stop sign at the Beltline highway intersection. From a point approximately 300 feet north of the crossing, Wyatt did not look to the right or make any attempt to slow down or stop before reaching the railroad crossing.

The failure to maintain a proper lookout and control over his vehicle was contributory negligence more than slight as a matter of law and sufficient to bar any recovery.

Although the motion was sustained on the basis of the contributory negligence of the deceased, there was no substantial evidence of negligence on the part of the railroad company and its employees. The train was being operated in a careful manner and at a reasonable rate of speed. When it appeared that the decedent would not stop before reaching the crossing, the train brakes were placed in "emergency" in an effort to avoid the accident.

The documentary evidence the plaintiff attempted to introduce, which contained statistical information concerning grade crossing accidents and fatalities, was not relevant to any issue before the court and was properly excluded.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. FREDERICK WHITE, APPELLANT.

306 N.W.2d 906

Filed June 19, 1981. No. 43573.

1. **Arrests: Words and Phrases.** An arrest is taking custody of another person for the purpose of holding or detaining him to answer a criminal charge. It is defined as the taking, seizing, or detaining of the person of another.
2. **Arrests.** To effect an arrest there must be actual or constructive seizure or detention of the person arrested, or his voluntary submission to custody, and the restraint must be under real or pretended legal authority.
3. ——. Constructive, as distinguished from physical, restraint sufficient to constitute a constructive seizure or detention of an arrestee exists where an officer has the intention to effect an arrest, that intention has in some way been communicated to the arrestee, the arrestee understands that he is under legal restraint, and the officer has the apparent present power to

control the person even though he has not yet asserted physical control.

4. ——. A touching is not necessarily essential to effectuate an arrest.
5. **Criminal Law: Evidence.** It is competent for the prosecution to put in evidence all relevant facts and circumstances which tend to establish any of the constituent elements of the crime with which the accused is charged even though such facts and circumstances may prove or tend to prove that the defendant committed other crimes.
6. **Lesser-Included Offense: Arrests.** A lesser-included offense is one which is necessarily established by proof of the greater offense. To be a lesser-included offense, the elements of the lesser offense must be such that it is impossible to commit the greater without at the same time having committed the lesser. Resisting arrest is not a lesser-included offense of escape for, among other reasons, the crime of escape does not necessarily involve the use of force.
7. **Criminal Law: Prosecuting Attorneys: Constitutional Law.** So long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file, generally rests entirely in his discretion. Within the limits set by the Legislature's constitutionally valid definition of chargeable offenses, the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation so long as the selection was not deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.

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

Dennis R. Keefe, Lancaster County Public Defender, and Michael D. Gooch 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.

The defendant was tried before a jury on a charge of escape from official detention. Neb. Rev. Stat. § 28-912 (Reissue 1979). The information alleged that on a certain date the defendant unlawfully removed himself from official detention while he was under arrest for a felony. He was also charged with being an habitual criminal. He was found guilty by the jury on the charge of the escape and by the court on the habitual criminal

charge, and sentenced to a term of 10 years' imprisonment.

On appeal to this court, he assigns and argues the following claims of error: (1) The evidence was insufficient to support the finding of guilt on the escape charge and the court erred in not granting the defendant's motion for a directed verdict; (2) The instruction defining arrest was erroneous; (3) The defendant was denied a fair trial because of repeated references during trial to the reason for the arrest; (4) The court erred in not granting the defendant's request for an instruction permitting the jury to find the defendant guilty of "the lesser-included offense" of resisting arrest; and (5) The court erred in finding the defendant guilty on the habitual criminal charge because the habitual criminal statute is unconstitutional as applied.

The first two assignments are closely related and may be conveniently considered together.

Section 28-912, insofar as applicable here, provides that "[a] person commits escape if he unlawfully removes himself from official detention . . . . Official detention shall mean arrest . . . ." The defendant argues that the evidence was insufficient to permit the jury to find that the defendant was under arrest at the time of his "escape," and that in the instruction to the jury defining arrest, the court should have included, in accordance with the defendant's request, the words, "mere words are not enough" to constitute an arrest. He does not otherwise attack the instruction. The instruction given was the following: "Arrest: An arrest is taking custody of another person for the purpose of holding or detaining him to answer a criminal charge. It is defined as the taking, seizing, or detaining of the person of another, (1) by touching or putting hands on him; (2) or by any act that indicates an intention to take him into custody and that subjects him to the actual control and will of the person making the arrest; or (3) by the consent of the person to be arrested.

"To effect an arrest, there must be actual or con-

structive seizure or detention of the person arrested, or his voluntary submission to custody, and the restraint must be under real or pretended legal authority. There can be no arrest where there is no restraint or where the person sought to be arrested is not conscious of any restraint. If the person arrested understands that he is in the power of the one arresting and submits in consequence, it is not necessary that there be an application of actual force, in manual touching of the body, or a physical restraint that may be visible to the eye. The act relied upon as constituting an arrest must have been performed with the intent to effect an arrest and must have been so understood by the party arrested. In all cases in which there is no manual touching or seizure, or any resistance, the intention of the parties are important. There must have been the intention on the part of one of them to arrest the other and the intent on the part of the other to submit, under the belief and impression that submission was necessary. However, no formal declaration of arrest is required."

The arresting officer, Spanel, testified that he and a fellow officer, both in plain clothes and in an unmarked car, were making an investigation of a sexual assault alleged to have occurred earlier. Their particular assignment was to procure an identification of the suspect who had been described by the victim as a black male in his 20s, bearded, height 5 feet 6 inches to 5 feet 9 inches, and weighing 140 to 160 pounds. The suspect also had upon his left forearm some unusual markings consisting of scar tissue or other unusual discoloration of the skin. The officers had a composite drawing of the facial features of the suspect made from information given by the victim. The suspect wore metal-rimmed spectacles.

At about 9:55 p.m. on August 17, 1979, the two officers were operating in the neighborhood of 24th and Q Streets in the city of Lincoln. Officer Spanel was seated in the automobile. His companion officer was at an apartment in the vicinity to check out information

they had received from a member of the black community a short time earlier. While Spanel was seated in the automobile he observed two black males, one of whom was the defendant White, approach on 24th Street. When they neared the automobile Spanel called to them, asking: "Have you guys got a minute?" The two young men came toward the car. Spanel got out of the vehicle and identified himself as a police officer by showing his official identification card and badge. He then explained that he was investigating a sexual assault and handed to defendant's companion, Nevins, the composite drawing and asked if he could identify the individual or knew anyone looking like the picture. Nevins indicated he could not. Then either Nevins or the officer handed the drawing to defendant. As defendant extended his arm to take the photograph, his forearm projected from underneath his sleeve and Spanel observed on the forearm markings which resembled those which the victim had described. Defendant otherwise matched the description of the suspect. Spanel, without waiting for comment by defendant, took back the photograph and immediately announced that defendant was under arrest for a felony offense, describing it by name, and indicated that he would have to come to headquarters.

At this time arises a conflict in the evidence. Spanel testified that he reached into the car for his radio transmitter and sent a message asking for assistance. At about the same time he called to Officer Lutz, his companion, to assist him. All of this, he said, took from 15 to 30 seconds, during which time defendant remained in position. When Spanel turned back toward defendant, the latter struck him twice with his fist, once in the face and once on the shoulder. Defendant did not testify. Nevins testified that Spanel asked them both to look at the picture and asked if they knew anyone or had seen anyone who looked like that. Nevins responded "no." Defendant reached out and took the picture. As he did so Spanel announced that he was going to take de-

fendant down to the station. Two or three seconds elapsed and then defendant struck the officer twice and fled. It was not until after that that the officer reached into the car and called for a backup unit.

Spanel testified that he made the call for the backup unit after announcing the arrest because he did not want to transport defendant in an unmarked car. He said he did not attempt to place his hands upon defendant because it was his understanding that some black persons resented being touched in sensitive situations.

Defendant was pursued by Spanel and other officers and surrendered about 2 blocks from the place where the action began. He did so at that time without resistance. The officer who assisted Spanel testified: "I heard a call of an officer in foot pursuit and requesting assistance. It was not clear to me which officer it was." He did not recall hearing other requests, just transmissions indicating direction of travel and location. Defendant argues this conclusively establishes that defendant's version of the order of events is the correct one.

It is not for this court to decide the disputed questions of fact, nor to determine precisely what occurred or the order of events. The only questions before us on the first two assignments are questions of law: First, did the trial court err in not including in instruction No. 9 the phrase, "mere words are not enough" to constitute an arrest? Second, was the evidence sufficient to permit the jury to find that the defendant was under arrest when he fled?

The answer to these questions depends, we believe, for reasons hereinafter set forth, upon what is meant by constructive seizure or detention.

It may seem strange but it is true that even after 200 years of history in this country there is still some dispute about what constitutes an arrest and the legal consequences which flow from it. If anything, the complexities of the problem are increasing; the result, in a

large degree, of the interaction of the law of arrest and exclusionary rules as well as the distinction between an investigative detention and arrest within the meaning of the fourth amendment.

The defendant's contention that he was not under arrest is, in the language of his brief, based on the following premise: "[T]here was a total failure of competent proof to support the material allegations that the defendant was under arrest. Defendant respectfully submits that there was no evidence on which to believe that he was subjected 'to the actual control and will' of Officer Spanel. The only act of dominion or order made by the officer was for defendant to accompany him downtown. The defendant forcefully rejected this request. The defendant did not in fact go with the officer until after the chase.

"Defendant's slight pause before the chase began is hopelessly ambiguous. [Citations omitted.] There is no evidence that defendant understood himself to be in the power of the officer or that he submitted or consented to being restrained."

The instruction earlier quoted and given by the court in this case appears to be essentially the one approved by this court in *Schmidt v. Richman Gordman, Inc.*, 191 Neb. 345, 215 N.W.2d 105 (1974).

All courts agree that one of the elements necessary to effectuate an arrest is "actual or constructive seizure or detention of the person."

We hold that constructive, as distinguished from physical, restraint sufficient to constitute a constructive seizure or detention of an arrestee exists where an officer has the intention to effect an arrest, that intention has in some way been communicated to the arrestee, the arrestee understands that he is under legal restraint, and the officer has the apparent present power to control the person even though he has not yet asserted physical control. *State v. Vaughn*, 12 Ariz. App. 442, 471 P.2d 744 (1970); *State v. Parnell*, 221 So. 2d 129 (Fla. 1969); *Bey v. State*, 355 So. 2d 850 (Fla. App. 1978);

State v. Rocheleau, 117 N.H. 792, 378 A.2d 1381 (1977); *State v. Donahue*, 420 A.2d 936 (Me. 1980); *Price v. United States*, 119 A.2d 718 (D.C. 1956).

The evidence in this case was sufficient to permit the jury to find that constructive restraint existed. It is not disputed that the officer announced the arrest and that the physical proximity of the officer and the defendant were such that the officer could have, had he so chosen, attempted to exert physical control; that the defendant knew he was under legal restraint and not free to leave is evidenced by the fact that he obviously felt it necessary to assault the officer in order to effectuate his freedom of movement. A few courts have held that there must exist at least some slight touching by the officer to effectuate an arrest. We reject the necessity of such an act. An arrestee has a legal obligation to surrender himself to an officer who has properly identified himself and has announced the arrest.

Some courts, even those whose definition of effectuating an arrest includes constructive constraint, announce the rule that mere words cannot constitute an arrest. See, e.g., *State v. Powers*, 386 A.2d 721 (Me. 1978). That opinion, however, is somewhat confusing in that it seems to approve a lower court charge that an actual touching is not necessary to effectuate an arrest. Whether or not mere words can constitute constructive restraint will necessarily depend upon the facts of the case. If the circumstances are such that the arresting officer has no reasonable present capability to exercise physical control, then mere words may not constitute a constructive restraint. Under the particular evidence in this case, the court did not err in refusing to include in the instruction the phrase, "mere words cannot constitute an arrest." We note that it is legislative policy that force is not to be used in making an arrest unless the "actor believes that such force is immediately necessary to effect a lawful arrest." Neb. Rev. Stat. § 28-1412(1) (Reissue 1979).

The defendant contends that he was deprived of a fair trial because of testimony that he was arrested for a

felony and by references by the prosecution in argument and in questions that the arrest was for a felony. Defendant's argument is that Neb. Rev. Stat. § 27-404(2) (Reissue 1979), limiting the purposes for which evidence of other crimes is admissible, barred the testimony and the remarks. Section 27-404(2) provides: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

That statute is irrelevant. The court charged the jury on the elements of the crime as follows: "1. That on or about August 17, 1979, the defendant, Fred White, was under official detention on a felony charge in Lancaster County, Nebraska,

"2. That on said date said defendant did unlawfully remove himself from such official detention."

Section 28-912, which defines the crime of escape, provides in subsection (5): "Escape is a Class III felony where: (a) The detainee was under arrest for or detained on a felony charge or following conviction for the commission of an offense . . . ." Except as provided in subsection (5), escape is a Class IV felony. The information had originally charged that he removed himself from official detention while under arrest under a charge of first degree forcible sexual assault. On defendant's motion before trial, the words "first degree forcible sexual assault" were stricken, leaving only the words "on a felony charge."

Being under detention for a felony was an element of the degree of crime charged and it was necessary for the State to prove the same. It was relevant and material that it be proved by the testimony and it was proper to refer to it in questioning and argument. The defendant would have had a right to complain had it not been proved. "It is competent for the prosecution to put in evidence all relevant facts and circumstances which tend to establish any of the constituent elements of the

crime with which the accused is charged even though such facts and circumstances may prove or tend to prove that the defendant committed other crimes." *State v. Knecht*, 181 Neb. 149, 157, 147 N.W.2d 167, 173 (1966). The contention is without merit.

The defendant requested that the jury be charged on the "lesser-included offense" of resisting arrest. This contention is without merit.

Neb. Rev. Stat. § 28-904 (Reissue 1979) defines the crime of resisting arrest. It provides, insofar as is relevent here: "(1) A person commits the offense of resisting arrest if, while intentionally preventing or attempting to prevent a peace officer, acting under color of his official authority, from effecting an arrest of the actor or another, he:

"(a) Uses or threatens to use physical force or violence against the peace officer or another; or

"(b) Uses any other means which creates a substantial risk of causing physical injury to the peace officer or another; or

"(c) Employs means requiring substantial force to overcome resistance to effecting the arrest."

The crime of escape may, but does not necessarily, include the use of force. Neb. Rev. Stat. § 28-913 (Reissue 1979).

In *State v. Colgrove*, 197 Neb. 375, 376, 248 N.W.2d 780, 781 (1977), as well as in several other recent cases, we have defined lesser-included offense as: "A lesser included offense is one which is necessarily established by proof of the greater offense. [Citation omitted.] To be a lesser included offense, the elements of the lesser offense must be such that it is impossible to commit the greater without at the same time having committed the lesser."

It should be observed that some of the cases we have cited in connection with assignments (1) and (2) have noted that arrest is not only an act that occurs at a particular time but also a process or a state that may continue for a period, e.g., until incarceration or release

on bail.

This appears to be one of those cases where, under the particular state of the evidence, the prosecutor might have had a choice of charging either escape or resisting arrest, but could not, under the particular facts, have charged and convicted of both. The State took the risk of an improper choice and gets the benefit of choosing correctly. The court did not err in refusing to include an instruction on lesser-included offense.

The defendant's last assignment urges that the habitual criminal statute, Neb. Rev. Stat. § 29-2221 (Reissue 1979), is unconstitutional as applied and violates the due process clause of the U.S. Constitution because the prosecutor's discretion as to whether or not to file the habitual criminal count in a particular case is not subject to statutory standards or judicial review. The full scope of the defendant's argument is set forth in Note, *A Closer Look at Habitual Criminal Statutes*, 16 Am. Crim. L. Rev. 275 (1979). Neither the defendant nor the author of the article cites any case authority to support the proposition. We have rejected similar arguments. *State v. Martin*, 190 Neb. 212, 206 N.W.2d 856 (1973). The Supreme Court of the United States, in *Bordenkircher v. Hayes*, 434 U.S. 357, 364, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978), has said: "In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion. Within the limits set by the legislature's constitutionally valid definition of chargeable offenses, 'the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation' so long as 'the selection was [not] deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.'" There is no evidence in the record to indicate that the discretion in this case was based upon any such unjustifiable

standard. The defendant's last assignment is not meritorious.

AFFIRMED.

MCCOWN, J., concurs in result.

IN RE INTEREST OF CHANDRA LOUISE KAIN AND MELODY RENEE KAIN, CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. BARBARA KAIN, APPELLANT.

307 N.W.2d 119

Filed June 19, 1981. No. 43732.

1. **Juvenile Courts: Appeal and Error.** An appeal of a juvenile proceeding to this court is heard de novo upon the record; and the findings of fact by the trial court will be accorded great weight because the trial court heard and observed the parties and witnesses. The trial court's findings will not be set aside on appeal unless they are against the weight of the evidence or there is a clear abuse of discretion.
2. **Parental Rights.** When natural parents cannot rehabilitate themselves within a reasonable time after the adjudication hearing, the best interests of the children require that a final disposition be made without delay.

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

Michael Kelley of Kelley & Kelley for appellant.

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

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

BRODKEY, J.

Barbara Kain, appellant and natural mother herein, appeals to this court from an order entered by the separate juvenile court of Douglas County, Nebraska, termi-

nating her parental rights to Chandra Louise Kain, born April 20, 1974, and also to Melody Renee Kain, born June 29, 1977. We affirm.

The record in this case indicates that on April 10, 1978, the Douglas County attorney filed a petition in the juvenile court which alleged that Chandra and Melody were children within the meaning of Neb. Rev. Stat. § 43-202(1) (Reissue 1978) in that they were both under the age of 18 years, homeless or destitute, and without proper parental support. The petition further alleged that the children were within the meaning of § 43-202(2)(c) in that Barbara Kain, natural mother of said children, either "neglects, is unable to, or refuses to provide proper necessities of subsistence, education, or other care necessary for the health, morals, or well-being of said children . . . ." On that same date, the juvenile court ordered that temporary custody of the children should be placed with Douglas County Social Services. On April 25, 1978, a detention hearing was held, following which the juvenile court ordered that the children be placed in an appropriate foster care facility, and that Barbara be granted reasonable rights of visitation.

On June 14, 1978, an adjudication hearing was held, at which time Barbara admitted to those portions of the petition which alleged that she had left her children without adult supervision for extended periods of time. The hearing was continued until October 2, 1978, at which time, based on the allegations contained in the petition which were admitted to by their natural mother, the court found the children to be within the meaning of § 43-202(1). On that date, the court ordered that Barbara: "a. Continue her counseling at Child Saving Institute; b. Maintain suitable housing; c. be allowed one day a week visitation, as arranged by Douglas County Social Services . . . ."

It next appears that a motion for review was filed by the children's guardian ad litem on January 26, 1979. The motion requested a hearing based upon a report the guardian ad litem had received from Dr. Thomas Jae-

ger, a child psychiatrist who was treating Barbara and her children. The psychiatric report, admitted as exhibit 2, stated:

"I've had occasion to see Chandra in individual play therapy during the past several months and find that she essentially presents as a 4 year old girl who falls in a category of children who are psycho-socially deprived. In addition, she manifests considerable anxiety secondary to the psycho-social deprivation that she has incurred as well as by a withdrawing behavior whenever this level of anxiety becomes too overwhelming for her.

"During the time that I have seen her in individual play therapy, the repeated leitmotif is often the fact that Barbara (her biological mother) has hit her for one reason or another during the times that she stays with her on weekends and holidays. This has come up on more than one occasion and on the last visit after careful inspection by both myself, our receptionist and the driver for Douglas County Social Services, there was a notable bruise on the right lateral side of the thigh which could only have been incurred as a result of her being hit with a metallic object such as the buckle of a belt. There were also some numerous marks over her body as well.

"The fact that this seems to be occurring on a regular basis at least according to what Chandra is telling me, leaves me with a very uneasy feeling. I believe that this child is a probably [sic] candidate for further serious abuse if this type of behavior that her mother's demonstrating is allowed to continue."

A hearing on the motion filed by the guardian ad litem was held on February 12, 1979, at which time the court ordered that Barbara continue counseling sessions with the Child Saving Institute. The court also ordered that overnight visitations by Melody should continue, but that such visitations by Chandra should be discontinued. The next hearing in this matter was held on May 8, 1979, on the oral motion of the guardian ad litem that all visitation in the home of the children's

mother be suspended. The motion was sustained by the juvenile court and all overnight visitations with Barbara were discontinued.

On September 20, 1979, another hearing in this matter was held, at which time the court found that the best interests of the children would be served by placing them in the temporary custody of the Nebraska Department of Public Welfare for foster care. In addition, the court ordered that Barbara: "a. Maintain suitable housing; b. Maintain suitable employment; and c. continue counseling with Thomas Jaeger, M.D. on behalf of her daughter, Chandra Louise Kain."

On January 21, 1980, the Douglas County attorney filed a motion for termination of parental rights, which alleged as follows: "That Chandra Louise Kain and Melody Renee Kain come within the meaning of Nebraska Revised Statutes, 1943, Section 43-209(6), Reissue 1978, because reasonable efforts, under the direction of the Court, have failed to correct the conditions leading to the aforementioned determination, towit: A. That Barbara Kain, natural mother of said children, maintain suitable housing. Barbara Kain failed to obtain and/or maintain suitable housing. On November 22, 1979, the service officer made independent inquiries and located a home for Barbara Kain. The residence has subsequently been in a state of disarray and without an adequate food supply during the visits of said children. B. That Barbara Kain, natural mother of said children, maintain stable employment. Barbara Kain has failed to obtain and/or maintain stable employment. C. That Barbara Kain, natural mother of said children, continue counseling with Dr. Jaeger. Barbara Kain has missed only one counseling session, but the therapist states that Barbara Kain is not capable of long range planning in her own life, and in the absence of major human services intervention is likely to become more ineffectual at her own maintenance, as well as that of said children."

A hearing on the motion was commenced on Febru-

ary 4, 1980, and was continued to a later date. Subsequent hearings were held before the juvenile court on April 21, 1980, May 14, 1980, June 30, 1980, and July 3, 1980. Testimony was presented before the court by witnesses during the aforementioned hearings, and the motion of the Douglas County attorney was thereafter taken under advisement by the court. On August 13, 1980, the court entered an order finding that the allegations of the motion pertaining to Barbara were true, and that Chandra and Melody were children within the meaning of Neb. Rev. Stat. § 43-209(6) (Reissue 1978) in that reasonable efforts had failed to correct the conditions leading to the juvenile court's determination that the children were within § 43-202(1). The court ordered that the parental rights of Barbara be terminated. A subsequent motion for new trial was overruled, and the appellant now appeals to this court.

In her brief on appeal, Barbara assigns as error: (1) The court erred in finding that the termination of her parental rights was in the children's best interests; and (2) The court erred in finding sufficient evidence to support the termination order.

The applicable rules of law are well established. An appeal of a juvenile proceeding to this court is heard de novo upon the record; and the findings of fact by the trial court will be accorded great weight because the trial court heard and observed the parties and witnesses. Also, the trial court's findings will not be set aside on appeal unless they are against the weight of the evidence or there is a clear abuse of discretion. *In re Interest of J.L.L., ante* p. 76, 306 N.W.2d 175 (1981); *In re Interest of McKee*, 208 Neb. 623, 304 N.W.2d 918 (1981); *In re Interest of Morford*, 207 Neb. 627, 300 N.W.2d 795 (1981); *State v. Duran*, 204 Neb. 546, 283 N.W.2d 382 (1979).

Neb. Rev. Stat. § 43-209 (Reissue 1978), the section dealing with the termination of parental rights, reads in pertinent part as follows: "The court may terminate all parental rights between the parents or the mother of a

child born out of wedlock and such child when the court finds such action to be in the best interests of the child and it appears by the evidence that one or more of the following conditions exist: . . . (6) Following upon a determination that the child is one as described in subdivision (1) or (2) of section 43-202, reasonable efforts, under the direction of the court, have failed to correct the conditions leading to the determination."

We have reviewed the record in the present case and have concluded that the evidence contained therein amply supports the decision of the juvenile court to terminate the parental rights of Barbara. Dr. Thomas Jaeger, the child psychiatrist mentioned above, testified that he has had contact with Chandra since October 10, 1978, and with Melody since October 2, 1979. He stated that Chandra was a child who has insufficient stimulation and suffered psychological deprivations from the lack of parental interest expressed from her mother. Dr. Jaeger testified as follows: "When I saw her initially, she presented as a rather bizarre child, almost to the point, that in my differential, I was suspicious she was suffering from a thought disorder. That means, at that time, things were not following sequentially, things were not in order. She had problems with anuresis and copresis, had been soiling in her pants, and bed wetting in the day as well as the night, seemed extremely anxious, physiologically." He also stated that he found similar conditions with Melody.

As to Barbara, Dr. Jaeger stated that in his opinion he did not believe she has the capacity to be an effective parent. He testified: "As far as the sessions went on, I did notice when I would — I suppose I would call a more detached attitude toward the children. By that I mean, that at times, although Mrs. Kain was there in body, at times she seemed indifferent to what was going on with the children and amongst themselves, especially at times when they naturally might either get rambunctious or have a particular need that needed attending to. It seemed to me that at times we would have to remind

Mrs. Kain that perhaps one or the other needed to be taken care of even as far as physical needs." Dr. Jaeger did express encouragement, however, with the progress the children have made while in foster care.

Bonnie Bremer, a caseworker with Child Protective Services of Douglas County, testified that she worked with Barbara in an attempt to help Barbara rehabilitate herself and to meet the court order. She found that Barbara would not care for herself and stated that she made little effort to meet the requirements set by the juvenile court. Bremer stated that Barbara Harris, the court service officer, found the house where Barbara Kain lives, but that the appellant failed to maintain the house. Bremer testified that she had to assist Barbara in going to the store in order that adequate food would be in the home for the children's visitations. She also stated that during such visitations there was little interaction between the mother and children.

Barbara Harris, service officer with the juvenile court, testified that she explained the rehabilitation plan with Barbara Kain numerous times, and made many home visits over a 2-year period. She testified that Barbara exhibited little interaction with the children. This observation was also expressed by Margaret Mullins, a psychologist at Richard Young Hospital, who administered tests to Barbara and watched her behavior with her children.

The trial court found that the termination of the parental rights was justified, basing its decision on the evidence that 2 years had passed since the petition in this case was filed and that Barbara was unable to rehabilitate herself during that time. This court has held that when natural parents cannot rehabilitate themselves within a reasonable time after the adjudication hearing, the best interests of the children require that a final disposition be made without delay. *In re Interest of McKee, supra*; *State v. Chant*, 202 Neb. 750, 277 N.W.2d 97 (1979). That, unfortunately, is the situation in this case.

We conclude that the action taken by the separate juvenile court was correct and supported by the evidence appearing in the record. The judgment of the juvenile court must be affirmed.

AFFIRMED.

JESSIE L. AKINS, APPELLANT, V. HAPPY HOUR, INC., ET AL., APPELLEES.

306 N.W.2d 914

Filed June 19, 1981. No. 43765.

1. **Workmen's Compensation: Words and Phrases.** "Earning power," as used in Neb. Rev. Stat. § 48-121(2) (Reissue 1978), is not synonymous with wages, but includes eligibility to procure employment generally, ability to hold a job obtained, and capacity to perform the tasks of the work, as well as the ability of the workman to earn wages in the employment in which he is engaged or for which he is fitted.
2. **Workmen's Compensation: Second Injury Fund.** Under Neb. Rev. Stat. § 48-128 (Reissue 1978), if an employee who has a preexisting permanent partial disability which was known to the employer prior to the occurrence of a subsequent compensable injury receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree or percentage of disability caused by the combined disabilities is substantially greater than that which would have resulted from the last injury considered alone and of itself, the employer at the time of the last injury is liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability, and for the additional disability the employee shall be compensated from the Second Injury Fund.
3. ——: ——. The purpose of Neb. Rev. Stat. § 48-128 (Reissue 1978) is not to provide compensation for the previous disability but to provide compensation for permanent partial or total disability resulting from a combination of the previous fact condition with a compensable injury. It is the previous fact condition combined with a second compensable injury causing permanent partial or total disability in fact that establishes the right of the employee to compensation from the Second Injury Fund.

Appeal from the Nebraska Workmen's Compensation Court. Reversed and remanded with directions.

Robert C. Wester of Schirber Law Offices, P.C., for appellant.

Hensen & Engles, P.C., for appellee Happy Hour.

Paul L. Douglas, Attorney General, and John R. Thompson for appellee State.

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

MCCOWN, J.

This is a workmen's compensation case involving an award against the Second Injury Fund.

The plaintiff was born January 28, 1926. He has a fifth grade education. He lost his left arm at the elbow in an automobile accident in 1952. His employer made arrangements for him to continue working after the automobile accident until the plant was later closed. Thereafter plaintiff worked in various restaurants and bars until 1964 when he purchased the Happy Hour lounge in Omaha, Nebraska. In 1976 he sold the lounge and was retained by the purchaser as an employee with his main duties consisting of running the kitchen and occasionally the bar.

On August 17, 1978, plaintiff sustained a severe cut between the thumb and index finger of his right hand while he was washing dishes. He underwent surgery on two occasions, but the severed tendon did not knit. The stipulated medical testimony is that the second injury resulted in a 45 to 55 percent disability of the thumb, which translates to a 10 to 12 percent disability of the body as a whole. The total physical disability suffered from the combined injuries is a 62 percent permanent disability of the body as a whole.

Plaintiff returned to work in January 1979 and worked until April 1979 when the lounge was closed. Between April 1979 and July 1979, the plaintiff sought employment and applied to between 25 and 30 restaurants but was unsuccessful. In July 1979 plaintiff ultimately obtained a job at a Howard Johnson restaurant, running the kitchen on the midnight shift. Plaintiff is unable to open jars, open the freezer door,

clean the meat slicer, or pick up small objects. Nevertheless, plaintiff has been able to retain his job at Howard Johnson's with some assistance from other employees, and was earning as much or more than he was earning at the time of the injury to his thumb.

The Workmen's Compensation Court, at the initial hearing, found that the second injury resulted in a permanent partial disability to the plaintiff's right thumb, which, combined with the loss of his left arm in the prior accident, resulted in a 59 percent permanent partial disability to the body as a whole, and that plaintiff had suffered a substantially greater disability than that which would have resulted from the second injury considered alone and of itself. The court awarded plaintiff a 12 percent disability to the body as a whole for the second injury alone against the employer and its insurance company, and 47 percent permanent partial disability to the body as a whole against the Second Injury Fund. On rehearing the Workmen's Compensation Court found that the plaintiff had failed to prove that he had suffered a substantially greater disability from the combined disabilities than that which would have resulted from the second injury to his thumb considered alone and of itself. The court therefore modified the award by awarding the plaintiff permanent partial disability for the injury to his right thumb against the employer and its insurance carrier and dismissed his petition as to the Second Injury Fund. Plaintiff has appealed.

The relevant statute is Neb. Rev. Stat. § 48-128 (Reissue 1978). The relevant portion of that statute provides: "If an employee who has a preexisting permanent partial disability whether from compensable injury or otherwise, which is or is likely to be a hindrance or obstacle to his obtaining employment or obtaining reemployment if the employee should become unemployed and which was known to the employer prior to the occurrence of a subsequent compensable injury, receives a subsequent compensable injury resulting in additional

permanent partial or in permanent total disability so that the degree or percentage of disability caused by the combined disabilities is substantially greater than that which would have resulted from the last injury, considered alone and of itself; and if the employee is entitled to receive compensation on the basis of the combined disabilities, the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability, and for the additional disability the employee shall be compensated out of a special trust fund created for that purpose, which sum so set aside shall be known as the Second Injury Fund."

The Workmen's Compensation Court, on rehearing, found that the plaintiff had failed to prove that he had suffered a substantially greater disability than that which would have resulted from the last injury considered alone and of itself, because the evidence showed that the plaintiff had returned to work as a cook and was earning as much as, if not more than, he was earning at the time of the injury.

Disability under the Workmen's Compensation Act is defined in terms of employability and earning capacity rather than in terms of loss of bodily functions. *Johnson v. Village of Winnebago*, 197 Neb. 845, 251 N.W.2d 176 (1977).

"Earning power," as used in Neb. Rev. Stat. § 48-121(2) (Reissue 1978), is not synonymous with wages, but includes eligibility to procure employment generally, ability to hold a job obtained, and capacity to perform the tasks of the work, as well as the ability of the workman to earn wages in the employment in which he is engaged or for which he is fitted. If, after injury, an employee receives the same or higher wages than before injury, it is indicative, although not conclusive, of the fact that his earning power has not been impaired. *Sidel v. Travelers Ins. Co.*, 205 Neb. 541, 288 N.W.2d 482 (1980).

While it was entirely proper for the Workmen's Compensation Court to consider the wages the plaintiff received after the injury, the court, on rehearing, disregarded the evidence which established a reduction in the plaintiff's earning power and employability. The evidence established not only many attempts to secure employment without success but also established that at least one employer did not believe the plaintiff was capable of performing the job of cook and that other employees would have to carry part of his employment load. When the plaintiff finally found a job it was on the graveyard shift, the only one he could handle due to his injuries. It is apparent that plaintiff's employability with his combined disabilities is substantially less than it would have been if he had only the injury to his thumb.

The evidence established a substantial reduction in the plaintiff's capacity to perform the tasks of his employment under his combined disabilities compared with his capacity to perform the tasks of his employment if he had suffered only the injury to his thumb. The evidence also established that plaintiff is unable to perform his job without help to compensate for his injuries. It is also obvious that plaintiff's ability to hold a job has been substantially reduced. The fact that plaintiff has made extraordinary efforts to overcome his handicap or that an employer has been generous in employing a handicapped individual ought not to destroy his right to benefits under the Workmen's Compensation Act.

Under previous versions of § 48-128 which limited recovery against the Second Injury Fund to cases of permanent total disability, this court has applied the rule of construction that the Workmen's Compensation Act is to be liberally construed so that its beneficent purposes may not be thwarted by technical refinement of interpretation. Section 48-128 was amended in 1971 to provide for recovery against the Second Injury Fund in cases of partial as well as total disability. In cases prior

to that amendment we held that an employee who has permanent total disability as a result of a combination of injuries sustained in separate accidents is entitled to compensation out of the Second Injury Fund even though the injuries sustained in the separate accidents were schedule injuries which would otherwise be compensated under Neb. Rev. Stat. § 48-121(3) (Reissue 1978). See, *Franzen v. Blakley*, 155 Neb. 621, 52 N.W.2d 833 (1952); *Camp v. Blount Bros. Corp.*, 195 Neb. 459, 238 N.W.2d 634 (1976). Both cases hold that the purpose of § 48-128 is not to provide compensation for the previous disability but to provide compensation for permanent total disability resulting from a *combination* of the previous fact condition with a compensable injury. In *Camp* we said: "It is the previous fact condition combined with a second compensable injury causing permanent total disability in fact that establishes the right of the employee to compensation from the Second Injury Fund." *Id.* at 465, 238 N.W.2d at 638.

The present language of § 48-128 extends the liability of the Second Injury Fund to permanent partial disability as well as permanent total disability wherever the percentage of disability caused by the combined disabilities is substantially greater than that which would have resulted from the last injury considered alone and of itself.

In effect, the State contends that the Second Injury Fund should be liable only for the increased disability caused by, but not including, the prior disability. The specific language of the statute and express policy of the Workmen's Compensation Act are contrary to that contention. Although workmen's compensation statutes differ in their precise terms, the rule expressed in the great majority of such statutes is that the Second Injury Fund is liable for the difference between the compensation that would have been payable for the second injury alone and the compensation payable for the combined injuries. See 2 Larson, Workmen's Compensation Law § 59.34(a) (1981). The specific language of § 48-128

clearly fits that statutory pattern.

The parties indicate considerable confusion as to the provision of a portion of § 48-128 requiring the employer to establish, by written records, that the employer had knowledge of the preexisting disability at the time the employee was hired. The language was taken directly from the statutes of another state in which the procedures provided for full recovery by the employee against the employer and then required the employer to take action against the Second Injury Fund to reduce the employer's liability. The section does not fit the Nebraska statutory pattern, but it is unnecessary for us to pass upon the issue here because the evidence is completely undisputed that the employer did have actual knowledge of the preexisting disability at the time the plaintiff was employed. The Workmen's Compensation Court, at the initial hearing, found that the statutory provision for written records did not come into play where the injury and disability is as obvious as the amputation of an arm.

While the findings of fact of the Workmen's Compensation Court on rehearing will not ordinarily be set aside unless clearly wrong, this court may reverse or modify an award of the Workmen's Compensation Court where there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award, or the findings of fact by the court do not support the order or award. See Neb. Rev. Stat. § 48-185 (Reissue 1978).

The finding of the Workmen's Compensation Court after rehearing that the degree or percentage of disability caused by the combined disabilities was not substantially greater than that which would have resulted from the last injury considered alone and of itself is not supported by the evidence. The initial award of the Workmen's Compensation Court is supported by the evidence and should not have been modified.

In view of the disposition made it is unnecessary to consider the plaintiff's remaining assignments of error.

The decision of the Workmen's Compensation Court on rehearing is reversed and remanded with directions to reinstate the initial award in the Workmen's Compensation Court. Plaintiff is allowed an attorney fee of $1,000 for services of his attorney in this court.

REVERSED AND REMANDED WITH DIRECTIONS.

HASTINGS, J., dissenting.

I respectfully dissent from the majority opinion. There is no authority of which I am aware which permits the translation of a scheduled disability into a disability of the body as a whole where as here the effect of the injury is the usual and natural one expected. *Broderson v. Federal Chemical Co.*, 199 Neb. 278, 258 N.W.2d 137 (1977); *Guerin v. Insurance Co. of North America*, 183 Neb. 30, 157 N.W.2d 779 (1968). Had the two injuries arisen out of the same accident, the plaintiff would have been limited in his recovery to the two scheduled disabilities. Neb. Rev. Stat. § 48-121(3) (Reissue 1978). The character of the injury is not changed by Neb. Rev. Stat. § 48-128 (Reissue 1978).

I am authorized to state that BOSLAUGH, J., joins in this dissent.

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

307 N.W.2d 123

Filed June 19, 1981. No. 43804.

1. **Convictions: Appeal and Error.** This court will not interfere on appeal with a conviction based upon evidence unless it is so lacking in probative force that the court can say as a matter of law that it is insufficient to support a verdict of guilt beyond a reasonable doubt.
2. ——: —— 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.

Appeal from the District Court for York County: BRYCE BARTU, Judge. Affirmed in part, and in part reversed and remanded.

Larry R. Baumann of Kelley, Wallace, Scritsmier, Moore, Romatzke & Byrne, P.C., for appellant.

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

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

KRIVOSHA, C.J.

The appellant, Walter Rolling (Rolling), appeals from several convictions and sentences entered by the District Court for York County, Nebraska, following trial to a jury. Rolling was charged in an amended complaint with two counts of theft by unlawful taking or disposition of movable property, one count involving property of the value of more than $100 but less than $300 and the other involving property of the value of $300 or more but not over $1000, in violation of Neb. Rev. Stat. § 28-511(1) (Reissue 1979); one count of attempted armed robbery in violation of Neb. Rev. Stat. §§ 28-324(1) and 28-201(1) (b) (Reissue 1979); and one count of use of a weapon to commit a felony in violation of Neb. Rev. Stat. § 28-1205(1) (Reissue 1979). In addition, the information charged Rolling with being an habitual criminal under the provisions of Neb. Rev. Stat. § 29-2221 (Reissue 1979).

Following the jury verdict finding Rolling guilty on all four substantive counts, the trial court sentenced Rolling as follows: Count I, theft, 161 days' imprisonment in the York County jail, with credit given for time served; count II, theft, 1 year's imprisonment in the Nebraska Penal and Correctional Complex; count III, attempted robbery, 5 years' imprisonment in the Nebraska Penal and Correctional Complex; count IV, use of firearm to commit a felony, not less than 4 nor more

than 7 years' imprisonment in the Nebraska Penal and Correctional Complex; and on count V, the charge of being an habitual criminal, the trial court *specifically* sentenced Rolling to a term in the Nebraska Penal and Correctional Complex of not less than 4 nor more than 7 years. The sentences on counts I, II, and III were to be served concurrently. The sentences on counts IV and V were likewise to be served concurrently to each other but consecutively to counts I, II, and III. Rolling appeals from that judgment and order, claiming that the evidence was insufficient for the jury to find him guilty beyond a reasonable doubt and that the sentences imposed were harsh and a clear abuse of discretion. We affirm in part, and in part reverse and remand with instructions.

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

The proper procedure to be followed to correct the situation in the instant case is set out in our earlier decision of *State v. Gaston*, 191 Neb. 121, 214 N.W.2d 376 (1974), wherein we held that where a defendant found

guilty of a substantive crime as well as being an habitual criminal is improperly sentenced, both sentences must be set aside and this court should remand the action back to the trial court for proper sentencing. We said in *State v. Gaston, supra* at 123, 214 N.W.2d at 377: "On direct appeal this court has the power to remand a cause for a lawful sentence where the one pronounced was void as being beyond the power of the trial court to pronounce and where the accused himself invoked appellate jurisdiction for the correction of errors." The sentences imposed in this case being illegal, our action must be to remand the cause back to the trial court for proper sentencing consistent with the law.

Having thus disposed of the plain error, we shall now direct our attention to the assignments of error listed by Rolling. They are two in number: (1) The evidence was insufficient for the jury to find the defendant guilty beyond all reasonable doubt; and (2) The sentences imposed for all counts were harsh and an abuse of discretion. In view of the fact that the sentences are illegal and sentencing must be done again, we need not concern ourselves with the second assignment. We address only the first assignment to the effect that the evidence was insufficient for the jury to find the defendant guilty beyond all reasonable doubt.

The events involved in the instant appeal concern three separate occurrences, all involving the same Conoco service station located at the York interchange just off of Interstate 80. The first incident, which occurred on March 21, 1980, concerned the taking of a York State Bank moneybag containing coins from the Conoco station. On the day in question, Rolling was at the service station for some period of time. The evidence discloses that Rolling was seen in the area that the moneybag was kept, which was a place where customers were not to be. He was seen leaving this area with a folded magazine in his hand. Upon dropping the magazine, he departed from the station and immediately walked to his car and opened the trunk. At about 4 p.m. that same day, the

testimony disclosed that Rolling appeared at a drive-in window of First Federal Savings & Loan Association of York, Nebraska. He was seen taking money from a York State Bank bag located in the trunk of the car. The moneybag was identical to the type in which the Conoco station's coins were kept.

The second incident occurred on March 29, 1980, when Rolling again appeared at the Conoco station requesting assistance in removing his vehicle from a ditch a little over a mile east of the station. On this particular evening the owner of the station had directed one of his employees to place a briefcase containing the station's receipts for that day in a red wrecker in front of the station. The evidence discloses that Rolling saw the briefcase being placed in the wrecker. An eyewitness testified that later that same night, and after the station had closed, an automobile similar to the car driven by Rolling pulled up next to the wrecker and someone exited from the passenger door and tried to gain entrance to the wrecker. The wrecker was entered and the witness observed a man enter back into the automobile from the passenger side. There was testimony that the only way of gaining entrance into Rolling's car was from the passenger side, the driver side door being inoperable.

The third and fourth counts involved an occasion on April 4, 1980, and were for armed robbery and the use of a weapon at the same Conoco station. The station employee testified that at approximately 8:40 p.m., while closing the Conoco station, he was accosted by a man he identified as Rolling. Rolling demanded the station's money. When the employee refused to give him the money, a scuffle ensued, during which the employee testified that a knife was pulled by Rolling and the employee was cut on the hand. The employee testified that he recognized Rolling as he had seen him on two previous occasions at the service station.

While it is true that the evidence was in conflict, it cannot be said that the jury could not have found Rolling

guilty. We have, on numerous occasions, held: "'This court will not interfere on appeal with a conviction based upon evidence unless it is so lacking in probative force that the court can say as a matter of law that it is insufficient to support a verdict of guilt beyond a reasonable doubt.'" *State v. French*, 206 Neb. 92, 98, 291 N.W.2d 248, 251 (1980). See, also, *State v. Meadows*, 203 Neb. 197, 277 N.W.2d 707 (1979).

Moreover, we have repeatedly said: "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, 409, 288 N.W.2d 35, 36 (1980). See, also, *State v. Muniz*, 203 Neb. 206, 277 N.W.2d 712 (1979).

The jury resolved the dispute against Rolling and we are not in a position to say it had no basis for reaching the conclusion it did. We therefore find that the evidence was sufficient to permit the jury to find the defendant guilty as charged.

The convictions, therefore, are affirmed and the matter remanded to the trial court for proper sentencing.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM M. RESLER, JR., APPELLANT.

306 N.W.2d 918

Filed June 19, 1981. No. 43831.

1. **Criminal Law: Search and Seizure.** Law enforcement officers may enter private premises without either an arrest or a search warrant to preserve life or property, to render first aid and assistance, or to conduct a general inquiry into an unsolved crime, provided they have reasonable grounds to believe that there is an urgent need for such assistance and protective action, or to promptly launch a criminal investigation involving a substantial threat of imminent danger to either life, health, or property, and provided, further, that they do not enter with an accompanying intent to either arrest or search. If, while on the premises, they inadvertently discover incriminating evidence in plain view, or as a result of some activity on their part that bears a material relevance to the initial purpose for their entry, they may lawfully seize it without a warrant.
2. ——. —— The basic elements of the emergency doctrine exception may be summarized in the following manner: (1) The police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property; (2) The search must not be primarily motivated by intent to arrest and seize evidence; and (3) There must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched.

Appeal from the District Court for Adams County: FRED R. IRONS, Judge. Affirmed.

Whelan, Foote & Scherr, P.C., 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, William M. Resler, Jr. (Resler), appeals from a conviction based upon a jury verdict finding Resler guilty of four counts of burglary and two counts of first degree sexual assault. The trial court sentenced Resler to the Nebraska Penal and Correctional Complex for a term of not less than 6 years nor

more than 10 years on each conviction of burglary, and for a term of not less than 10 years nor more than 15 years for each conviction of first degree sexual assault, each sentence to be served concurrently.

Resler appeals to this court, principally maintaining that the trial court erred in not suppressing certain evidence which Resler maintains was obtained in violation of his rights under the fourth amendment to the Constitution of the United States. It appears to us that the specific issue raised by Resler involving the fourth amendment has not heretofore been decided by this court. On a close reading of the record and an examination of the numerous decisions rendered by other jurisdictions which have addressed this specific fourth amendment issue, we find that the action of the trial court in refusing to suppress the evidence was, in all respects, correct. Furthermore, we find that the other assignments of error raised by Resler must likewise be rejected. The judgment must be affirmed.

The record discloses that beginning in late 1978 and continuing during 1979, Hastings, Nebraska, was afflicted by a series of unsolved burglaries as well as several sexual assaults. All of the burglaries, as well as the sexual assaults, were committed in residences occupied by females and in each instance undergarments belonging to the female occupants were taken. With the exception of a man who was charged and later released in connection with one of the sexual assaults, no one was arrested for any of these crimes until Resler was taken into custody shortly after December 11, 1979. Although the record is unclear as to the basis for the belief, it does appear that during all this time a Sergeant Murphy of the Hastings Police Department suspected that Resler was involved in all these crimes. He had asked that he be called in on any incident involving Resler, regardless of the time of day or night.

Late on the evening of December 10, 1979, the occupants of an apartment unit at 745 South Baltimore Avenue heard noises in the lower level of their apart-

ment and called the police. The apartment was a part of a complex consisting of a series of 16 free-standing rowhouse-type units. Resler lived in one of the units.

Later, in the early morning hours of December 11, and apparently before the police arrived, another tenant, Thomas Waddle, saw a prowler outside his window. Waddle watched the prowler as he went from apartment to apartment in the complex, checking doors. Waddle secured his .22-caliber rifle, went out of doors, and followed the prowler. Waddle observed the prowler enter an apartment, and when the prowler came out of the apartment Waddle ordered him to stop or be shot. The prowler started running and Waddle shot at the prowler. The prowler fell to his knees, though at the time it was uncertain as to whether he fell because he had been shot or because he was attempting to get out of range of the rifle. In any event, in a moment the prowler regained his footing and proceeded running once again. At about the time that Waddle fired his shot, a Hastings police officer arrived at the scene. When the officer heard the shot he joined in the chase. Two other civilians also joined the chase and the four of them pursued the prowler, though they were unable to apprehend him. The prowler eventually eluded the four when he went over a picket fence farther on down the street. Waddle testified that at that point he recognized the prowler as a tenant whom he knew resided in Resler's apartment, although at the moment he did not know him by name. Apparently, he had seen Resler on other occasions coming in and out of his apartment and working on his automobile near the apartment.

Two other police officers conducted a search of the neighborhood from their cruisers. Those officers, the initial responding officer, and the several civilians then reconnoitered in the parking lot outside Resler's apartment to consider what to do. A radio call had been made for Sergeant Murphy pursuant to his earlier request.

At approximately 1:05 a.m. on the morning of December 11, 1979, Sergeant Murphy arrived at the scene. The other officers present briefed Murphy on what had happened, including the fact that Waddle believed that he struck Resler when he fired at him. At this point an investigation of the outside of Resler's apartment was made and it was discovered that the apartment door was open. There were no lights on in Resler's apartment. Though no one had reported any person entering or leaving Resler's apartment, it is clear that during the time of the chase it was possible for someone to have doubled back and gone into Resler's apartment without being seen. At this point in time, Sergeant Murphy determined to enter Resler's apartment, believing that Resler had been shot and was in need of first aid.

Upon entering the apartment the officers did not find Resler present but did observe in plain view a host of items previously reported stolen in the burglaries, as well as several pairs of women's panties later used to link Resler with several unsolved sexual offenses. Nothing was seized during this entry and the officers made no effort to search the apartment except to quickly observe what was in plain sight. Realizing that Resler was not in the apartment, they immediately withdrew and sought to obtain a search warrant for the apartment. The search warrant was obtained based upon what they had observed in clear view. The first search warrant was issued at about 4:10 p.m. on December 11, 1979. It was served, and items were seized from Resler's apartment at approximately 4:30 p.m. the same day. A second search warrant was issued and served on the morning of December 13, 1979. The second search warrant was made necessary because the officers did not list in the first warrant all of the items they wanted to seize from the apartment.

Resler maintains that the search warrant was obtained with information resulting from an illegal entry into his apartment and therefore the evidence obtained

was the "fruit of a poisonous tree" and inadmissible at trial. See *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). Resler maintains that absent exigent circumstances a law enforcement officer may not enter the residence of a suspect to arrest him or search his home without a warrant or without consent to enter. Resler relies upon *Payton v. New York, Riddick v. New York*, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980), in support of this position.

It is true that both *Payton and Riddick* stand for the proposition that a police officer who has not obtained either an arrest warrant or a search warrant cannot make a nonconsensual and warrantless entry into a suspect's home in the absence of exigent circumstances. The difficulty with Resler's argument is that he fails to recognize the exigent circumstances present in the instant case. While exigent circumstances generally have been defined to exist where the suspect is in a position to flee as when he is in a car, or when the evidence is located in a place or under such conditions that it is likely to be destroyed while a warrant is sought, a further condition has been recognized as an exigent circumstance authorizing a warrantless or nonconsensual entry into a suspect's home. This exception is known as the "emergency doctrine."

The applicability of the "emergency doctrine" as an exigent circumstance was reaffirmed by the U.S. Supreme Court in the recent case of *Mincey v. Arizona*, 437 U.S. 385, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978), wherein the Court said at 392: "We do not question the right of the police to respond to emergency situations. Numerous state and federal cases have recognized that the Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid." The opinion then cites in support of this statement a number of state and federal cases which have specifically articulated the emergency doctrine as it has developed as an exception to the fourth

amendment's warrant requirement.

While no one case seems to have gathered together all the elements of the emergency doctrine, a reading of many of the cases decided in other jurisdictions supports the view taken by one commentator who has defined the doctrine as follows: "Law enforcement officers may enter private premises without either an arrest or a search warrant to preserve life or property, to render first aid and assistance, or to conduct a general inquiry into an unsolved crime, provided they have reasonable grounds to believe that there is an urgent need for such assistance and protective action, or to promptly launch a criminal investigation involving a substantial threat of imminent danger to either life, health, or property, and provided, further, that they do not enter with an accompanying intent to either arrest or search. If, while on the premises, they inadvertently discover incriminating evidence in plain view, or as a result of some activity on their part that bears a material relevance to the initial purpose for their entry, they may lawfully seize it without a warrant. Thus, to qualify as an emergency exception, there must reasonably appear to exist an exigency in the course of which a discovery related to the purpose of the entry is made. The exigent circumstances legitimate the presence, and the relevance of the discovery to the justification for the entry sanctions the seizure." See Mascolo, *The Emergency Doctrine Exception to the Warrant Requirement Under the Fourth Amendment*, 22 Buffalo L. Rev. 419, 426-27 (1973).

One of the cases specifically cited by the U.S. Supreme Court in *Mincey* is the case of *Root v. Gauper*, 438 F.2d 361 (8th Cir. 1971). In the *Root* case the Eighth Circuit said: "For purposes of the instant case, the emergency or exigency doctrine may be stated as follows: police officers may enter a dwelling without a warrant to render emergency aid and assistance to a person whom they reasonably believe to be in dis-

tress and in need of that assistance. In applying this doctrine, two principles must be kept in mind. (1) Since the doctrine is an exception to the ordinary Fourth Amendment requirement of a warrant for entry into a home, the burden of proof is on the state to show that the warrantless entry fell within the exception. [Citations omitted.] (2) An objective standard as to the reasonableness of the officer's belief must be applied.

"'* * * [I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. * * * And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search "warrant a man of reasonable caution in the belief" that the action taken was appropriate?' Terry v. Ohio, 392 U.S. 1, 21-22, 88 S. Ct. 1868, 1880, 20 L. Ed. 2d 889 (1968)." *Root v. Gauper, supra* at 364-65.

One of the most often-cited cases involving the "emergency doctrine" is the case of *People v. Mitchell*, 39 N.Y.2d 173, 347 N.E.2d 607, 383 N.Y.S.2d 246 (1976), *cert. denied*, 426 U.S. 953, 96 S. Ct. 3178, 49 L. Ed. 2d 1191 (1976). In the course of its opinion, the *Mitchell* court set out some helpful guidelines for the application of the emergency doctrine, saying at 248-49, 347 N.E.2d at 609-10: "[W]e think it necessary to articulate some guidelines for the application of the 'emergency' doctrine. The basic elements of the exception may be summarized in the following manner: (1) The police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property. (2) The search must not be primarily motivated by intent to arrest and seize evidence. (3) There must be some reasonable basis, approximating probable cause, to associate the emergency with the

area or place to be searched.

"The first requisite is that the police have valid reasons for the belief that an emergency exists, a belief which must be grounded in empirical facts rather than subjective feelings . . . .

"The second requirement is related to the first in that the protection of human life or property in imminent danger must be the motivation for the search rather than the desire to apprehend a suspect or gather evidence for use in a criminal proceeding. . . .

"Finally, the limited privilege afforded to law enforcement officials by the emergency exception does not give them carte blanche to rummage for evidence if they believe a crime has been committed. There must be a direct relationship between the area to be searched and the emergency."

For other cases supporting the "emergency doctrine" as an exigent circumstance, see, *United States v. Goldenstein*, 456 F.2d 1006 (8th Cir. 1972); *State v. Jones*, 608 P.2d 1220 (Or. App. 1980); *Horack v. Superior Court*, 3 Cal. 3d 720, 478 P.2d 1, 91 Cal. Rptr. 569 (1970); *People v. Smith*, 7 Cal. 3d 282, 496 P.2d 1261, 101 Cal. Rptr. 893 (1972); *State v. Matsen*, 287 Or. 581, 601 P.2d 784 (1979); *State v. Beede*, 119 N.H. 620, 406 A.2d 125 (1979), *cert. denied*, __U.S.__, 100 S. Ct. 1659, 64 L. Ed. 2d 244 (1980), *rehearing denied*, __U.S.__, 100 S. Ct. 2980, 64 L. Ed. 2d 850 (1980); *Shepherd v. State*, 343 So. 2d 1349 (Fla. App. 1977); *State v. Pires*, 55 Wis. 2d 597, 201 N.W.2d 153 (1972); *United States v. Presler*, 610 F.2d 1206 (4th Cir. 1979); *State v. Sanders*, 8 Wash. App. 306, 506 P.2d 892 (1973); *People v. Hill*, 12 Cal. 3d 731, 528 P.2d 1, 117 Cal. Rptr. 393 (1974); *State v. Campbell*, 15 Wash. App. 98, 547 P.2d 295 (1976); *State, etc. v. District Court, etc.*, 591 P.2d 656 (Mont. 1979); *State v. Monroe*, 101 Idaho 251, 611 P.2d 1036 (1980); *Patrick v. State*, 227 A.2d 486 (Del. 1967); *State v. Theodosopoulos*, 119 N.H. 573, 409 A.2d 1134 (1979), *cert. denied*, __U.S.__, 100 S. Ct. 2964, 64 L. Ed. 2d 839

(1980); *People v. Lovitz*, 39 Ill. App. 3d 624, 350 N.E.2d 276 (1976), *cert. denied*, 434 U.S. 842, 98 S. Ct. 141, 54 L. Ed. 2d 107 (1977); *People v. Kepi*, 65 Ill. App. 3d 327, 382 N.E.2d 642 (1978).

We believe the guidelines of the *Mitchell* case, as well as the principles announced in the *Root* case, are fully applicable and present in the instant case sufficient to have justifiably created an exigent circumstance which allowed the officers to enter Resler's apartment without a warrant and without consent.

In the instant case, it is apparent that Murphy and the other officers had justifiable reason to believe that Resler had been shot and wounded and was in need of emergency first aid. Waddle reported that he had fired at Resler and Resler had fallen to the ground. When Murphy and the other officers arrived at Resler's apartment in the early morning of December 11, 1979, they found Resler's door open, without any apparent explanation. They could have reasonably concluded, as they did, that Resler was wounded and had returned to the apartment, perhaps too weak to either close the door or turn on a light. They were therefore justified in believing that an emergency existed in which they had an obligation to enter the apartment, find Resler, and provide him necessary first aid.

It is likewise clear from the evidence that they had no intent to arrest Resler or to make any search of the apartment. This is apparent by their behavior both at the apartment and later that day when they found Resler at his mother's home. The moment they determined that Resler was not present they left the apartment. They made no effort to try to determine whether there was any property located anywhere else not in plain view, and made no effort to seize any property, including the property in plain view. Furthermore, when they found Resler later that morning at his mother's home he was not arrested even though he had been identified as the primary suspect. He was not arrested until sometime after December 11, 1979.

Finally, they had a reasonable basis, approximating probable cause, to associate the emergency with the place to be searched. It was completely reasonable to assume that a person shot as a prowler and therefore unable to seek emergency aid from a doctor or hospital without giving himself up would seek cover in his own apartment located immediately in the area where he was shot and where he was last seen.

All of these factors taken into account make it clear that the officers did not have an intent to arrest or to make an unreasonable search when they entered Resler's apartment and, in fact, had but a single interest: providing Resler with emergency aid, if necessary. That action falls completely within the emergency doctrine exception to the fourth amendment prohibition against warrantless, nonconsensual searches. The trial court was entirely correct in refusing to suppress the evidence seized through the warrants obtained by reason of the officers' entry into Resler's apartment, and there is no error.

Resler has assigned two other alleged errors which can be quickly disposed of, the most serious problem presented having now been addressed. Resler maintains that the trial court erred in not granting a motion for directed verdict on the grounds of insufficient evidence. An examination of the record discloses that there was ample evidence of property and underclothing in Resler's apartment belonging to victims of the burglaries and sexual assaults. In addition, there was other evidence, including samples of Resler's pubic hair, blood, and saliva which connected him with the sexual assaults, as well as evidence from the victims of the assaults who identified Resler as the individual who committed the assaults upon them. To be sure, there was a dispute about those facts, but, nevertheless, there was sufficient evidence upon which the jury could justifiably find Resler guilty. In *State v. Pena*, 208 Neb. 250, 253, 302 N.W.2d 735, 737 (1981), we said: "[T]he verdict of a jury must

be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it." We further said in *Pena, supra* at 253, 302 N.W.2d at 737: "[I]n determining the sufficiency of the evidence to sustain a conviction in a criminal prosecution, it is not the province of this court to resolve conflicts in the evidence, pass upon the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence, as such matters are for the jury." To the same effect, see *Vanderheiden v. State*, 156 Neb. 735, 57 N.W.2d 761 (1953). Examining the record as a whole, we are unable to say that the jury was not justified in reaching the conclusions it did. That being the case, we are not at liberty to undo the findings of the jury.

The last assignment raised by Resler is to the effect that the sentences imposed are excessive. The crimes in these cases were serious and displayed both a plan to engage in crime and a plan to totally disregard one's responsibility to abide by the mores of the community. The sentences are well within the statutory limits and we have repeatedly held that a sentence imposed within statutory limits will not be disturbed on appeal absent a clear abuse of discretion. See *State v. Kramer*, 203 Neb. 658, 279 N.W.2d 634 (1979). We are unable to find any evidence of an abuse of discretion and are therefore duty-bound to affirm the sentence.

Having found that all of Resler's assignments of error must be overruled, we therefore affirm the judgment and sentence of the trial court in all respects.

AFFIRMED.

OTTO GASPAR, APPELLANT AND APPELLEE, V. STERLING R. FLOTT AND MARY ELLEN FLOTT, APPELLEES AND APPELLANTS, AND MID CITY BANK, INC., A BANKING CORPORATION, APPELLEE.

307 N.W.2d 500

Filed June 26, 1981. No. 43252.

1. **Res Judicata.** The conclusiveness of a prior judgment precluding subsequent litigation of the same cause of action between the same parties is much broader in its application than a determination of the questions actually involved in the prior action.
2. **Causes of Action: Words and Phrases.** A cause of action has been defined 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 defendant.
3. **Contracts.** As a general rule, the covenants of a contract will be considered and held as dependent conditions to be performed by the respective parties unless it is clear that the parties intended them to be independent.

Appeal from the District Court for Douglas County: JOHN T. GRANT, Judge. Affirmed in part, affirmed in part as modified, and in part reversed and remanded.

Michael A. Nelsen of Schmid, Ford, Mooney & Frederick for appellant Gaspar.

Robert F. Peterson of Lydick & Peterson for appellants Flott.

Dirk W. DeRoos and J. Thomas Marten of Kutak Rock & Huie for appellee Mid City.

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

COADY, District Judge.

The parties will be disappointed in the brevity of this opinion, but a full statement of the facts would not be helpful. The printed evidence examined snugly fills a box 10 inches by 18 inches by 12 inches. Three documents which have been reviewed as one contract consist

of twenty-two legal size pages. The full bill of exceptions in a prior 9-day jury trial is also a part of this record.

Otto Gaspar, as agent for the Graf family residing in Munich, Germany, hereinafter referred to as Gaspar, purchased two residential apartment-townhouse complexes from Sterling R. Flott and Mary Ellen Flott, hereinafter referred to as Flott. A contract, or contracts, was made up and executed as of April 5, 1974. Eleven pages of the writings were labeled "Offer to Purchase" and the next ten pages were labeled "Management Agreement." The offer to purchase contained the usual details set forth in a purchase contract, consisting of description, consideration, buyer and seller warranties, and written representations. Somewhat unusual were promises by Flott that the minimum monthly gross income would be $95,493 and that the 1975 general real estate taxes would not increase above a stated amount. If the gross was not obtained or the real estate tax ceiling violated, the purchase price was to be reduced by a certain formula. To ensure those promises, Flott promised to provide Gaspar with a letter of credit drawn upon a bank. The document also provided that it was understood that the parties would enter into a management agreement for at least 1 year.

The management agreement referred to the offer to purchase and provided that Flott be paid $60,000 a year to manage the complexes. The balance of the writing contains instructions and procedures for management, as well as a definition of Flott's powers, duties, and responsibilities as manager.

On July 15, 1974, the second defendant herein, Mid City Bank, Inc., hereinafter referred to as Bank, issued Gaspar a letter of credit to guarantee the terms of both the offer to purchase and the management agreement, up to a limit of $150,000. Because no issue has been made and it appears absolutely clear that the Bank, as a guarantor or surety, merely stands in the $150,000 shoes of Flott, no authority will be presented on the point. The Bank has the same rights as Flott, no more

and no less.

Sometime thereafter, Gaspar filed suit against the Bank and Flott, seeking a reduction of the purchase price on the apartment complexes as a result of Flott's failure to meet the rental guarantee set out in the offer to purchase. That was the only breach sued upon, and on September 22, 1977, a jury gave Gaspar a verdict which canceled certain mortgages and awarded judgment against the Bank in the sum of $50,000. No appeal was filed by any party.

After the jury verdict, Gaspar again sued the Bank and Flott upon five additional alleged violations of the offer to purchase and three alleged violations of the management agreement. Both defendants filed answers and the issues were made up. The Bank filed a motion for summary judgment, a hearing was had thereon, and Judge Tesar entered an order which dismissed Gaspar's suit against the Bank. Gaspar appeals that order. We affirm in part and reverse part of that decision.

Flott also filed a motion requesting summary judgment against Gaspar. Gaspar retaliated with a motion for partial summary judgment against Flott. The two motions were heard together, and Judge Grant entered a judgment for Gaspar and against Flott in the sum of $134,605.47. Flott appeals. We affirm with modifications.

Flott and the Bank argue to this court that by reason of the rule of res judicata, Gaspar was barred from prosecuting any further action on the writings making up the parties' contract once the jury verdict was final. Gaspar claims that a contract doctrine of divisible agreements prevents operation of the rule.

To a party wanting a matter decided by the doctrine of res judicata, it seems natural to quote the black letter law repeated in so many cases, such as *Norlanco, Inc. v. County of Madison*, 186 Neb. 100, 181 N.W.2d 119 (1970), wherein it is said: "The rule of res judicata is grounded, first, on a public policy and the necessity to terminate litigation and, second, the hardship on a person by being vexed more than once for the same

cause. The conclusiveness of a prior judgment precluding subsequent litigation of the *same cause of action* between the same parties is much broader in its application than a determination of the questions actually involved in the prior action; the conclusiveness of the judgment *in such case* extends not only to matters actually determined but also to other matters which properly could have been raised and determined and those which were necessarily adjudicated or necessarily implied in the final judgment, whether formally raised or not." The words "same cause of action" and "in such case" were italicized by this writer to draw attention to the limited meaning of the black letter law above set forth.

A cause of action has been defined 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 defendant. *City of Alliance v. Cover-Jones Motor Co.*, 154 Neb. 900, 50 N.W.2d 349 (1951). This court, by its ruling on fact situations in several cases, has established that the conclusiveness of a prior judgment, including matters which might have been raised under the doctrine of res judicata, does not apply where a second or latter action is a separate and distinct cause of action. See, *Gayer v. Parker & Son*, 24 Neb. 643, 39 N.W. 845 (1888); *Peters v. Meyer*, 131 Neb. 847, 270 N.W. 312 (1936); *American Province Real Estate Corp. v. Metropolitan Utilities Dist.*, 178 Neb. 348, 133 N.W.2d 466 (1965); *Hickman v. Southwest Dairy Suppliers, Inc.*, 194 Neb. 17, 230 N.W.2d 99 (1975); *Suhr v. City of Scribner*, 207 Neb. 24, 295 N.W.2d 302 (1980). Absent an order for consolidation, there is nothing in the law that requires a party to join in one suit several distinct causes of action. *Suhr v. City of Scribner, supra.* If the reader can keep the above rules in mind, then the numerous cases concerning res judicata, issue preclusion, and collateral estoppel will form a comprehensible pattern of fact situations.

As to actions on contracts, the cases of *Hamilton v.*

Thrall, 7 Neb. 210 (1878), *Haurigan v. Chicago & N.W.R. Co.*, 80 Neb. 132, 113 N.W. 983 (1907), and *Farmers Union Cooperative Elevator Federation v. Carter*, 152 Neb. 266, 40 N.W.2d 870 (1950), stand for the proposition that, as a general rule, the covenants of a contract will be considered and held as dependent conditions to be performed by the respective parties unless it is clear that the parties intended them to be independent. Those three cases decided that the contracts therein were not severable, but the case of *Wilcox v. Badger Motor Car Co.*, 99 Neb. 189, 155 N.W. 891 (1915), produced a divisible contract.

At least three other decisions found contract actions to be divisible. In two, *Burwell & Ord Irrigation & Power Co. v. Wilson*, 57 Neb. 396, 398, 77 N.W. 762, 763 (1899), and *Barnes v. Barker*, 113 Neb. 113, 118, 202 N.W. 430, 432 (1925), it was said: "Generally speaking, the test is that where there are several undertakings, each supported by a distinct consideration, the contract is severable." *Reichert v. Mulder*, 121 Neb. 11, 235 N.W. 680 (1931), indicated that whether a contract is entire or several is a question of intentions apparent in the instrument. In an unambiguous contract, it is to be determined from the language, the subject matter, and the construction placed upon it by the parties in light of the surrounding circumstances. The case probably utters the last word when the opinion forthrightly states, "A contract which in its nature and purpose is susceptible of division and apportionment is divisible and severable." *Id.* at 14, 235 N.W. at 682.

Both in his written and oral argument, Gaspar insists that each covenant in a contract can be separately sued upon. We find no authority for or reason in that argument. We are convinced, upon inspection of the evidence herein, that the parties intended two separate contracts or one divisible contract. The offer to purchase and the management agreement provide the basis for two separate and distinct causes of action.

Our decision then requires us to inspect and comment

on Gaspar's amended petition. What he calls the first, second, fourth, seventh, and eighth causes of action, we simply declare to be elements of the breach of his cause of action on the offer to purchase. Therefore, the doctrine of res judicata prevents him from suing on those elements, and Judge Tesar is affirmed in his ruling to that extent. Elements three, five, and six of said amended petition are elements of an alleged breach of the management agreement, and Judge Tesar's ruling is reversed to that extent and the alleged breach remanded to the District Court for trial.

We next consider Judge Grant's ruling which awarded partial summary judgment for Gaspar and against Flott. Gaspar argues that this ruling should be affirmed because the trial court awarded judgment on the basis that Flott failed to timely respond to a request for admissions previously filed by Gaspar. While that presentation is correct, a search of the pleadings shows that it is no answer to a valid defense of res judicata.

Gaspar filed his amended petition on August 3, 1978, and Flott filed an answer thereto on August 22, 1978, wherein the defense of the prior jury action was pleaded. As to the promises contained in the offer to purchase, the conclusiveness of the prior judgment was well and flexing its muscles when Gaspar made his request of Flott for admissions on April 25, 1979. The trial judge had to consider the defense and deny all claims springing from the offer to purchase.

Because this case has more technical problems than any good lawyer could dream up, we have yet to look at the specifics of Judge Grant's order for partial summary judgment. Part of the judgment, $40,159.54 to be exact, was awarded on the claim that Flott used certain rental payments he collected as manager to pay his personal expenses instead of delivering them to Gaspar. We have already decided that there is no bar to a suit on the management agreement and must decide whether this part of the partial summary judgment is valid.

The transcript has made this part of our decision

easy. The request for admissions asked Flott to admit two propositions, which we quote: "12. That subsequent to the sale of the aforesaid apartment complexes by the defendants Flott to the plaintiff, the defendants Flott caused rental income received subsequent to such sale to be used to pay for expenditures incurred by the defendants Flott prior to the sale of the aforesaid apartment complexes to the plaintiff. 13. That the amount of the rental income referred to in Request for Admission No. 12 above was $40,159.54." Flott's failure to deny or admit such request would ordinarily sustain summary judgment because there is no real controverted fact in evidence. But the Flotts did ask leave to file a response out of time, which was refused. On pages 93 and 94 of the transcript are the proffered answers as follows: 12. "Admit" and 13. "Deny. Expenditures were made in the amount of $37,523.88." We find that Judge Grant's ruling on Gaspar's motion for partial summary judgment should be affirmed with the amount of judgment modified to award $37,523.88.

At the time that these matters are once again taken up in the District Court, we suppose that someone will wonder if the Bank is now barred by the rule of res judicata from litigating the $37,523.88 partial judgment we have just approved to Gaspar against Flott. The question is not before us at this time, but it is suggested that the parties carefully read our opinion and observe our holding on the facts in *Midwest Franchise Corp. v. Wakin*, 201 Neb. 450, 268 N.W.2d 737 (1978).

Finally, we must discuss the request of the Bank to charge Gaspar for the costs of preparing the jury trial bill of exceptions and transcript and the supplemental transcript. We deny this request. It must be pointed out that the jury did not consider the same issues as were considered in the motions for summary judgment. We believe this request was made because the subtle distinctions between different ideas — res judicata, issue preclusion, and collateral estoppel — have not been

recognized by the parties. We might also point out that the transcripts need not contain the briefs of the parties to the trial court and that all unnecessary inclusions make our review difficult.

AFFIRMED IN PART, AFFIRMED IN PART AS MODIFIED, AND IN PART REVERSED AND REMANDED.

CLINTON, J., concurs in result.

IN RE GUARDIANSHIP OF BEN L. BREMER, A PROTECTED PERSON. BERYL CARY, APPELLANT AND CROSS-APPELLEE, V. WILLIAM B. WEIR, GUARDIAN, APPELLEE AND CROSS-APPELLANT.

307 N.W.2d 504

Filed June 26, 1981. No. 43368.

1. **Guardians and Conservators: Judgments.** An order of a county court approving a final settlement of the accounts of a guardian or conservator, made or entered at a formal hearing of which all interested parties had notice, is a judgment which becomes res judicata and can only be vacated on such proof of fraud as would justify the setting aside of any other judgment.
2. **Guardians and Conservators: Pleadings.** If the object of a petition is to set aside an order approving a final account between a guardian or a conservator and his ward for fraud, it must allege some distinct and specific act of fraud from which the petitioner suffered injury. It is also necessary that such petitioner negative all fault or negligence on his part.
3. **Estates: Fees.** If not otherwise compensated for services rendered, any visitor, lawyer, physician, conservator, or special conservator appointed in a protective proceeding is entitled to reasonable compensation from the estate.
4. **Estates: Attorney Fees: Costs.** Either the county court or the District Court on appeal ordinarily has discretionary power and authority to order payment of costs and, in proper cases, to order payment of reasonable fees to attorneys for services rendered to a good faith trustee out of the trust estate in litigation.

Appeal from the District Court for Chase County: JACK H. HENDRIX, Judge. Affirmed in part, and in part reversed and remanded with directions.

Murphy, Pederson, Piccolo & Anderson for appellant.

Terry E. Savage for appellee.

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

MCCOWN, J.

The appellant filed objections to the final account and petition for final settlement of the guardian of Ben L. Bremer, a protected person, and prayed that the guardian be surcharged for alleged breaches of fiduciary duties. The county court, after hearing, entered its order finding that there was no breach of fiduciary duty by the guardian and approved the final accounting and inventory and discharged the guardian from his trust. Attorney fees for representation of the guardian were denied. Appeal was taken to the District Court. The District Court affirmed the orders of the county court in all respects and this appeal followed.

On April 21, 1970, Ben L. Bremer filed a petition in the county court alleging that by reason of infirmities of age and physical disability he was unable to manage his estate and requested the appointment of William B. Weir as his conservator. The county court appointed Weir as conservator on the same day. Ben L. Bremer had four children, two sons, Duane and Byron, and two daughters, Duanne Deane Dixon and Beryl Cary, who were his only heirs. Beryl Cary is the appellant in this case.

Shortly after his appointment the conservator embarked on a project to convert three quarter sections of the Bremer farmland to irrigation. The county court, the ward, and the members of his family knew of the plan.

Two farm leases were made by the conservator, one with Edwin L. Fuehrer as lessee of two quarter

sections, and one with Byron Bremer which included one quarter section similar in nature to the Fuehrer quarters. The conservator filed a request for authorization to make such leases, and on January 15, 1971, the county court entered its order ex parte authorizing the conservator to make such leases. The Fuehrer lease was for 5 years beginning with the 1971 crop year and was for a cash rent of $1,500 per quarter section per year. The land had previously been leased on a crop share basis and Ben L. Bremer had been receiving approximately one-half of that amount per year. The term of the Byron Bremer lease and the cash rent per quarter section were identical to those of the Fuehrer lease. The appellant has raised no objections to the Byron Bremer lease and it is not in issue here.

At the time the leases were executed the conservator also negotiated a 5-year equipment lease for two center pivot irrigation systems between 3 Circle Irrigation, Inc., lessor, an irrigation company in which the conservator had an interest, and Fuehrer, as lessee. The evidence is that the court and the Bremer heirs were informed of the sprinkler leases. Fuehrer testified that he was not required to lease or purchase the sprinkler systems from anyone and that the equipment lease was in no way tied to the lease of the land. Fuehrer was unrelated to the Bremer family or to the conservator and was selected because of his farming ability.

A year or two after the Fuehrer equipment leases were executed the conservator and his brother terminated their interests in 3 Circle Irrigation, Inc., and became the owners of the Fuehrer equipment and thereafter earned a profit from the equipment lease.

In 1971 the conservator applied for and obtained court authorization to drill two irrigation wells on the land leased to Fuehrer and to install a well and pump at a total expense of approximately $18,000. In the spring of 1972 the conservator paid $1,100 to

level a portion of the land covered by the Fuehrer lease. In 1974 the conservator installed two stock wells at a cost of approximately $3,000, but the yearly Fuehrer rent was increased to amortize the cost of the stock wells.

The evidence is apparently undisputed that the ward, the heirs, and the court knew the terms of the 1971 lease and the facts of the irrigation expenditures during the period of that lease.

In 1975, several months before the 1971 leases were to expire, the conservator advised some of the Bremer family members that he anticipated renewing the leases to the same tenants. Duane Bremer then submitted a written bid to the county court offering to lease the two Fuehrer quarters for the sum of $4,000 per quarter per year. On May 29, 1975, the conservator wrote to all four of the Bremer heirs advising them that he intended to more than double the rentals payable under the Fuehrer and Byron Bremer leases, and specifically advising them that he expected to lease the two Fuehrer quarters to Fuehrer for the sum of $8,000 per year for an additional term of 5 years.

On June 3, 1975, the conservator executed a new lease for the two Fuehrer quarters for a term of 5 years beginning January 1, 1976, for a cash rental of $8,000 per year. That lease was also filed with the court, although the conservator did not request court approval. The conservator also renewed the Byron Bremer lease for 5 years. That portion of the lease which included the one quarter section similar in nature to the Fuehrer quarters was renewed at a cash rental of $4,000 per year.

At the time the conservator executed the 1975 Fuehrer lease he and his brother again leased the two pivot systems to Fuehrer for a term of 5 years at a slightly higher rental price.

On January 5, 1977, the conservator filed his petition and final account praying for approval of his acts and doings and his discharge as conservator. The petition

recited that the ward's infirmities had progressed and that a guardianship for a protected person was required, and prayed for the appointment of William B. Weir as the guardian. Ben L. Bremer and all the heirs were given due notice of the filing of the petition and of the date of hearing on the petition. On January 31, 1977, following hearing, the county court approved and allowed the final account of the conservator, allowed a final fee to the conservator, and ordered his discharge. The county court also appointed William B. Weir guardian of the person and estate of Ben L. Bremer and set his bond as guardian.

On July 12, 1977, Ben L. Bremer died. On February 9, 1978, William B. Weir filed his petition for final settlement and discharge as guardian. The appellant, Beryl Cary, filed objections to discharge and prayed that the guardian be surcharged for alleged breaches of fiduciary duty based upon the conservator's actions in connection with the two Fuehrer leases of 1970 and 1975. Testimony at trial was basically directed to the reasonable rental value of the land leased to Fuehrer at the respective times of the two leases. The appellant's expert witness, who had not previously appraised farm leases and who conceded that he sought opinions from unnamed persons in the area and found no comparable leases on file, testified that in his opinion the fair market rental for the 1970 lease would have been $10,600 per year, and that the fair market rental at the time of the 1975 lease would have been approximately $16,000 per year. The evidence for the guardian was that the rents were reasonable and were based upon the market price of leases of similar land in the area at the time.

The county court, in an oral opinion, found that the 1970 lease rental was unreasonably low but did not involve any breach of fiduciary duty. The court also found that the 1975 lease rental was reasonable, and also found that due to the actions of the conservator and guardian the entire assets of the estate had been very substantially increased.

On May 15, 1978, the court entered its written order finding that there was no breach of fiduciary duty by William B. Weir during the period of time he acted as conservator or guardian of the estate, approved the final accounting and inventory of the guardian, and discharged him from his trust. At a subsequent hearing the county court denied the guardian's request for allowance of an attorney fee for the defense of the objections.

On appeal the District Court found that the evidence did not show that the land was leased to Fuehrer as an inducement for the lease of the sprinkler systems and that the lease considerations for the land in the leases of 1970 and 1975 were fair, reasonable, and within the limits of the market. The District Court affirmed and approved all orders of the county court and this appeal followed.

The appellant's position is that the rentals fixed in the Fuehrer leases of 1970 and 1975 in the conservatorship were unreasonably low, and that the guardian may now be surcharged for his acts as a conservator because he accepted the leases as guardian which he had executed as conservator.

There can be no dispute but that all the affirmative actions of William B. Weir which are complained of by the appellant were done in his capacity as conservator. It is also clear that the court, the ward, and all of his heirs had actual notice of the existence and terms of both leases, and also had legal notice of the final accounting and petition for discharge of the conservator and of the appointment of the guardian.

The general rule in most jurisdictions is that a final settlement of the accounts of a guardian, executor, administrator, conservator, or other trustee judicially determined at a formal hearing of which all interested parties have notice is considered to be a judgment which becomes res judicata. See, 39 Am. Jur. 2d *Guardian and Ward* § 173 (1968); 39 C.J.S. *Guardian & Ward* § 165a (1976). Nebraska follows that rule.

An order of a county court approving a final settlement between a guardian and his ward can only be vacated on such proof of fraud as would justify the setting aside of any other judgment. *In re Guardianship of Protsman*, 136 Neb. 192, 285 N.W. 494 (1939). If the object of a petition is to set aside an order approving a final account between a guardian and his ward for fraud, it must allege some distinct and specific act of fraud from which petitioner suffered injury. It is also necessary that such petitioner negative all fault or negligence on his part. *Id.* at 195, 285 N.W. at 496. See, also, *In re Estate of Josephson*, 138 Neb. 193, 292 N.W. 595 (1940). There is no evidence of fraud in this record.

Appellant relies on *In re Guardianship of Phillips*, 144 Neb. 183, 13 N.W.2d 99 (1944). That case is clearly distinguishable. It is distinguishable on its facts because it involved an unauthorized investment made without statutorily required court approval, and the successor guardian accepted the assets with knowledge and without any accounting from the prior fiduciary. Even more importantly, the case is distinguishable because the ward was a minor and was incapable of challenging any accounting of the former guardian, even if one had been made. Under such circumstances, no issue of res judicata could have been involved.

Aside from the principles of res judicata, the evidence in the record in the present case supports the findings of both the county court and the District Court that there was no breach of fiduciary duties on the part of William B. Weir, either as conservator or as guardian. The judgment of the District Court approving the final account of the guardian and discharging him from his trust is fully supported by the evidence.

On cross-appeal the guardian contends that reasonable attorney fees should have been allowed from the guardianship assets for the services of the guardian's attorney in conducting the defense against the appellant's objections to his final account. The county

court disallowed any attorney fee on the basis that the defense was personal to the guardian and not for the benefit of the estate. The District Court also found that the guardian was defending in a personal capacity and that no statute or custom provides for attorney fees in such cases.

In the present case the guardian was not only acting as guardian of the person of Ben L. Bremer but was also acting as guardian of the estate of a protected person. In essence, he was acting not only as guardian of the person but, under appropriate protective order, as a special conservator under the provisions of Neb. Rev. Stat. § 30-2630 (Reissue 1979).

Neb. Rev. Stat. § 30-2643 (Reissue 1979) provides: "If not otherwise compensated for services rendered, any visitor, lawyer, physician, conservator or special conservator appointed in a protective proceeding is entitled to reasonable compensation from the estate." Even in the absence of such a specific statute, the county court has authority to allow reasonable fees to a fiduciary acting under the court's authorization and control for services reasonably required to be performed in connection with his fiduciary duties. While the allowance of an attorney fee to the guardian rests in the sound discretion of the court, the general rule is that a guardian or other fiduciary may be allowed attorney fees necessarily incurred in preparing his final account and in defending it against objections, and for any legal expenses necessarily incurred in asserting or defending the ward's rights. See, 39 C.J.S. *Guardian & Ward* § 164b (1976); 39 Am. Jur. 2d *Guardian and Ward* § 180 (1968).

In general, if the final order in the litigation involved finds the fiduciary guilty of a breach of duty or orders him to account to the estate, the estate is not liable for his attorney fees. If the fiduciary's defense of his acts is fully successful, he is ordinarily entitled to recover the reasonable costs necessarily incurred. In *Scully v. Scully*, 162 Neb. 368, 76 N.W.2d 239 (1956),

this court held that either the county court or the District Court on appeal ordinarily has discretionary power and authority to order payment of costs and, in proper cases, to order payment of reasonable fees to attorneys for services rendered a good faith trustee out of the trust estate in litigation. See, also, *Linn v. Linn*, 146 Neb. 666, 21 N.W.2d 283 (1946). To make a fiduciary personally responsible for all attorney fees reasonably incurred in the successful defense of his actions as fiduciary would impose an unconscionable burden on fiduciary service without justification.

The record in the present case shows that the county court denied "any further fee" to the guardian and for his attorney for services in connection with the objections to the final account. The record does not indicate what fees had previously been allowed, nor is there sufficient evidence of the nature and extent of the services involved upon which to base the determination of a reasonable fee in the county court.

The judgment denying the allowance of any fee to the guardian's attorney for services in connection with the appellant's objections was in error and, upon remand to the District Court, the District Court shall determine and allow a reasonable fee for the services of the guardian's attorney in the District Court; and upon further remand to the county court, the county court shall determine and allow a reasonable attorney fee for services in that court. The guardian's attorney is allowed a fee of $750 for services in this court. All attorney fees are payable from the assets of the guardianship estate. Costs are assessed to the appellant.

That part of the judgment of the District Court approving the final accounting of the guardian and discharging him from his trust is affirmed. That part of the judgment denying the allowance of attorney fees is reversed and the cause is remanded with directions.

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

SOKOL CAMP ASSOCIATION OF OMAHA, NEBRASKA, APPELLEE, V. JAMES J. VELEHRADSKY, SR., APPELLANT.

307 N.W.2d 510

Filed June 26, 1981. No. 43469.

Appeal from the District Court for Douglas County: THEODORE L. RICHLING, Judge. Reversed and remanded with directions.

Daniel W. Ryberg for appellant.

John P. Miller of Miller & Rowen, P.C., for appellee.

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

HASTINGS, J.

The plaintiff, Sokol Camp Association of Omaha, Nebraska, originally commenced this action in the municipal court of the city of Omaha to collect a $500 initiation fee and $250 in annual dues arising out of the membership of the defendant, James J. Velehradsky, Sr., in the association. From a judgment entered against the defendant in the sum of $725 in the municipal court, an appeal was taken to the District Court for Douglas County. The District Court modified the judgment to $500, apparently eliminating the claim for $225 in annual dues. This action of the District Court is difficult to understand because the defendant admitted on cross-examination that he had "no quarrel" with the fact that he owed that amount. However, only the defendant has appealed from the $500 judgment; and because the plaintiff has not seen fit to cross-appeal, we can ignore the claim for annual dues.

The defendant assigns as error the finding of both the municipal court and the District Court that the initiation fee was validly assessed and that defendant came within the definition of a "new individual member." We reverse and dismiss.

The association was organized in 1936 for the purpose

of social and cultural enhancement of Czechoslovakian ideals. The association owns certain land near Valley, Nebraska, which it sells in parcels to persons who become members and stockholders in the association, and which entitles them to have a right of access to the clubhouse and certain common grounds. The defendant has been a member of the association since approximately 1955, and served as one of its board members for two terms. He owned one unimproved lot, and in 1977 entered into a land contract to purchase an improved lot.

On June 2, 1973, the association passed a resolution, which for the first time in its history provided for an initiation fee. The fee was initially set at $300 and was later raised to $500. The minutes of the meeting at which the fee was adopted stated: "Sramek read Art. II of the By-Laws and Art. VIII, Section B of the Articles of Incorporation. After discussion, Frank Kroupa moved and Claude Jelen seconded the motion, 'That an initiation fee be assessed for new individual members in the amount of $300.00. That such initiation fee be waived for transfers of property within the immediate family. The definition of immediate family for this purpose shall be father, mother, son, daughter, brother, or sister.' Motion passed uanaimously [sic]. A letter informing all members will be sent at a later date."

The association attempted to assess the initiation fee of $500 against the defendant based on the purchase made in 1977. The defendant refused to pay the fee, contending that the resolution passed by the board was not effective to assess an initiation fee; rather, the board was required to amend the bylaws to accomplish this result. He further contends that if the resolution was effective, he did not come within the definition of "new individual member" and therefore should not have been assessed the fee.

The articles of incorporation state in article VIII (b): "The Board of Directors shall make proper grant of privileges of the Association under satisfactory and reason-

able regulations to members of any class provided by the Board, such members to pay annual dues to be fixed by the Board of Directors, and the Board may prescribe in addition to annual dues, an initiation fee."

The bylaws state in article II, § 2: "Initiation fees shall be not to exceed $__ for Individual Members, of not to exceed $__ for Associate Members, and of not to excees [sic] $__ for Organization Members; Provided, the Board of Directors, in its discretion, may waive the same." None of the blanks were filled in.

It is clear that the articles of incorporation give the board the authority to assess an initiation fee. Because the bylaws show no amount in the blank left for a limitation on the maximum amount to be assessed does not in any way place a limitation on the authority already granted by the articles. The resolution setting the amount to be assessed at the board meeting was within the board's authority. An amendment to the bylaws was unnecessary. The appellant's first assignment of error is without merit.

The second assignment of error concerns the effect of the resolution. The articles define "individual member" as "being a stockholder, duly elected, who shall purchase and hold a lot within the grounds of this Association . . . ." The resolution assesses an initiation fee for "new individual members." Both parties concede that the defendant was a member of the association prior to the purchase of the 1977 lot. Both corporate bylaws and the articles of incorporation are to be construed reasonably and according to the common and approved usage of the language employed. 18 Am. Jur. 2d *Corporations* §§ 83, 168. It is clear that the defendant had been an "individual member" for years prior to the effective date of the 1973 resolution. It is not so clear how he could later become a "new individual member" within the common meaning of that phrase. We are of the opinion that the defendant was already an individual member of the association, and by merely purchasing another parcel of land he did not suddenly become a new member. This is

particularly true since the reason for assessing an initiation fee is as expressed by Claude L. Jelen, a board member: "[W]e felt that people coming in now would have the benefit of a lot of work that had been done at Camp, the benefit of, of the buil--, use of the building and the use of the grounds. And, so, we felt that any, anyone coming in now, should pay something toward, toward those increased benefits that were available to them."

The defendant is not a "new individual member" within the common meaning of the words, and should not have been assessed the initiation fee. The judgment is reversed and the cause is remanded to the District Court with directions to vacate the judgment of the municipal court and to dismiss plaintiff's action.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V.
CURTIS J. BRANCH, APPELLANT.

307 N.W.2d 512

Filed June 26, 1981. No. 43568.

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

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

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

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

CLINTON, J.

The defendant was charged with murder in the first degree and found guilty by a jury of murder in the second degree. He was sentenced to a term of life im-

prisonment. On appeal to this court he makes and argues two assignments of error: (1) The sentence is excessive; and (2) The court erred in permitting the introduction into evidence of three photographs of the body of the deceased. The facts surrounding the crime are the following. The defendant, at the time of the crime, was 24 years of age. He and the victim had been living together, along with the victim's 7-year-old son, for a period of about 3 years following the defendant's honorable discharge from the military service. The record indicates that there had been a series of quarrels between the defendant and the victim and that he had on occasion used violence upon her.

On the day of the crime they had quarreled. When he returned to the home later in the evening the quarrel continued. The defendant testified in his own behalf and said that the killing was an accident which occurred when, during the quarrel, he shoved her against the wall and she struck her head. The testimony of the pathologist was that the death was caused by a manual strangulation which would have required substantial force applied over a period of 5 to 10 minutes. The hyoid bone of the throat was fractured.

The defendant's only criminal record consists of an absence without leave from the Army for a period of 1½ months. He apparently returned to the Army voluntarily. He has a rather long string of traffic offenses. He has not been convicted of a felony or other crime. He is a high school graduate and, at the time of his arrest, was employed by the division of parks of the city of Omaha.

The sentence imposed is the maximum provided by law for the offense of which he was convicted, but we cannot, because of the gravity of the crime, say that the sentence is excessive.

The defendant argues that the tendency of the photographs to which he objects to excite the passion and prejudice of the jury exceeded their probative value, were cumulative, and, therefore, their admission constituted prejudicial error which requires a new trial. One of the

photographs was taken in the garage where the defendant had deposited the body after the killing and shows the body in the condition in which it was found. It indicates bleeding from the mouth. The other two photographs were taken on the slab in the morgue before the autopsy. One of these photographs shows the same bleeding from the mouth as the one taken in the garage. The other photograph shows bruises about the throat. Both of the latter photographs are corroborative of the testimony of the pathologist as well as is the one of the body where it was discovered.

The admission of the photographs was not erroneous. See, *State v. Williams*, 205 Neb. 56, 287 N.W.2d 18 (1979); *State v. Freeman*, 201 Neb. 382, 267 N.W.2d 544 (1978); *State v. Partee*, 199 Neb. 305, 258 N.W.2d 634 (1977); *State v. Dittrich*, 191 Neb. 475, 215 N.W.2d 637 (1974).

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
EARL L. FRANKLIN, APPELLANT.

307 N.W.2d 513

Filed June 26, 1981. No. 43652.

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

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

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

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

KRIVOSHA, C.J.

The appellant, Earl L. Franklin, appeals from a judgment based upon a conviction of guilt returned by a jury after trial. Franklin was convicted of the crimes of robbery and use of a firearm in the commission of a felony. He was sentenced to a term of 4 to 6 years on the robbery charge and 2 to 4 years on the use of a firearm charge, to be served consecutively to the robbery sentence. Franklin raises but a single issue in this appeal. He maintains that a conviction for a crime which is based solely upon uncorroborated eyewitness identification is insufficient. The disposition of this case is governed by our opinion in *State v. Ammons*, 208 Neb. 812, 813-14, 305 N.W.2d 812, 814 (1981), wherein we reaffirmed our earlier position and said: "It has long been the rule in this state that except in certain crimes such as sexual assault, a conviction may rest upon the testimony of a single eyewitness." Our holding in *Ammons* is dispositive of this appeal. The judgment is affirmed.

AFFIRMED.

CONNIE L. OSTEEN, WIDOW OF ALBERT S. OSTEEN, ET AL., APPELLEES, V.
A. C. AND S., INC., ET AL., APPELLEES,
PETER KIEWIT SONS' COMPANY, APPELLANT.

307 N.W.2d 514

Filed June 26, 1981. No. 43692.

1. **Workmen's Compensation: Limitations of Actions.** Where an occupational disease results from the continual absorption of small quantities of some deleterious substance from the environment of the employment over a considerable period of time, an afflicted employee can be held to be injured only when the accumulated effects of the substance manifest themselves, which is when the employee became disabled and entitled to compensation; and the date of injury, within the meaning of the Workmen's Compensation Act, is the date when the disability is first incurred and the period of limitations runs from that date.
2. **Workmen's Compensation: Liability.** Where a worker has contracted an occupational disease by exposure to a harmful substance over a period of years in the course of successive employments, the employer who most

recently exposed the worker to the harmful substance is liable to pay the entire award.

3. **Workmen's Compensation.** The policy of liberal construction of the Workmen's Compensation Act for the benefit of the claimant is the rule in Nebraska.
4. **Workmen's Compensation: Liability.** Where the employment at the time of disability was not of a kind contributing to the disease, the employer at the time of the most recent exposure which bears a causal relation to the disability is generally liable for the entire compensation.
5. ——:——. An injurious exposure must be of the type which could cause the disease, given prolonged exposure, and once the requirement of some contributing exposure has been met, courts will not go on to weigh the relative amount or duration of the exposure under various employers.
6. **Workmen's Compensation: Appeal and Error.** In a workmen's compensation case, the findings by the Workmen's Compensation Court have the force and effect of a jury verdict and will not be set aside unless clearly wrong.
7. **Workmen's Compensation: Evidence.** In determining the sufficiency of evidence necessary to sustain an award of the Nebraska Workmen's Compensation Court, 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.
8. **Workmen's Compensation.** All calculations to be made under the provisions of Neb. Rev. Stat. § 48-121 (Reissue 1978), and amendments thereof, have reference to wages, percentages, and results as of the time of injury.

Appeal from the Nebraska Workmen's Compensation Court. Affirmed.

Holtorf, Kovarik, Nuttleman & Ellison, P.C., and James M. Mathis and M. J. Javoronok for appellant.

Michael Kelley of Kelley & Kelley for appellee Osteen.

Neil W. Schilke, P.C., of Sidner, Svoboda, Schilke, Wiseman & Thomsen for appellee Vaughn Insulation.

Michael P. Cavel of Sodoro, Johnson, Daly, Stave, Cavel & Coffee for appellee Taylor Insulation.

Richard D. Sievers of Marti, Dalton, Bruckner, O'Gara & Keating, P.C., for appellee Johns-Manville.

Barlow, Johnson, DeMars & Flodman for appellee

Inseco, Inc., Central Insulation & Engineering Co., and Thermal Products, Inc.

Norman H. Wright of Fraser, Stryker, Veach, Vaughn, Meusey, Olson & Boyer, P.C., and Theodore J. Stouffer of Cassem, Tierney, Adams, Gotch & Douglas for appellee Owens-Corning Fiberglas Corp.

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

WHITE, J.

Appellant, Peter Kiewit Sons' Company, appeals from an award on rehearing by the Nebraska Workmen's Compensation Court awarding compensation based on Neb. Rev. Stat. §§ 48-101 et seq. (Reissue 1978) to appellee, Connie L. Osteen, surviving spouse of Albert S. Osteen. Mr. Osteen died on March 18, 1977, of peritoneal mesothelioma, a rare form of abdominal cancer caused by exposure to asbestos particles. Mr. Osteen was a member of Insulators and Asbestos Workers Local 39 and worked as an insulator from 1941 until a few weeks prior to his death. His employment was by the "union hall" method wherein an employer contacts the union agent requesting workers for a particular job, and the agent then assigns available workers to the requested job. Mr. Osteen worked for many employers during his years as an insulator and appellee brought her claim against approximately 40 of these employers, including appellant. After a hearing before the one-judge Workmen's Compensation Court, the court found that mesothelioma was an occupational disease and, therefore, appellee was entitled to compensation under Neb. Rev. Stat. § 48-122 (Reissue 1978) in the amount of $100 per week, the amount to be divided between appellee and the then minor child, Mark, until Mark reached his majority. Thereafter, appellee would receive $100 per week for the remainder of her widowhood. Applying the so-called "last injurious exposure" rule, Judge Paul E. LeClair ordered Vaughn Insulation to pay the entire award. On rehearing, the

three-judge Workmen's Compensation Court affirmed the award in all respects except that it ordered appellant, Kiewit, to pay the entire award. Appellant assigns numerous errors. We affirm.

Appellant first argues that appellee's claim is barred by the statute of limitations which was in effect at the time Mr. Osteen was employed by Kiewit in 1974 and 1975. Those limitations, appearing at Neb. Rev. Stat. §§ 48-133 and 48-137 (Reissue 1968), bar claims for compensation not filed within 6 months of the occurrence of an injury or within 6 months after death and suits for compensation not filed within 1 year after the accident. In 1977 the statutes were changed to provide that notice of a claim to an employer be given "as soon as practicable after the happening thereof" and for a 2-year time limit on filing suits for compensation. §§ 48-133 and 48-137 (Reissue 1978).

Apparently, appellant is urging that the Workmen's Compensation Court's finding that appellant is liable amounts to a finding that Mr. Osteen's "injury" occurred while he was employed by Kiewit and, thus, the claim was not filed within 6 months of the "injury" since notice was not given of a claim until June 24, 1977. However, as will be more fully developed elsewhere in this opinion, the rule under which appellant was found liable is applied in cases where the onset of the occupational disease cannot be pinpointed as stemming from a distinct incident and, thus, the finding of liability by the lower court is not a finding that Mr. Osteen's "injury" occurred while he was in Kiewit's employ for statute of limitation purposes. The correct interpretation of the statute of limitations to be applied in this case appears in *Hauff v. Kimball*, 163 Neb. 55, 61, 77 N.W.2d 683, 687 (1956): "'Where an occupational disease results from the continual absorption of small quantities of some deleterious substance from the environment of the employment over a considerable period of time, an afflicted employee can be held to be "injured" only when the accumulated effects of the

substance manifest themselves, which is when the employee becomes disabled and entitled to compensation; and the "date of injury," within the meaning of the Workmen's Compensation Act, is the date when the disability is first incurred, and the . . . period of limitations runs from that date . . . .'"

On February 1, 1977, Mr. Osteen ceased working and entered the hospital for diagnosis of an abdominal disorder. Cancer was subsequently discovered during surgery and Mr. Osteen died on March 18, 1977. An autopsy on that date disclosed that the cause of death was peritoneal mesothelioma, and claimant first became aware that the cause of death was employment related. Notice was given on June 24, 1977, and the petition was filed in the Workmen's Compensation Court on January 27, 1978. The earliest date upon which we could hold that the disease manifested itself in disability was February 1, 1977. Using that date as the "date of injury," it is plain that claimant gave notice and filed her petition within the statutory time limits.

Appellant next argues that there is no competent medical evidence that peritoneal mesothelioma is a compensable occupational disease under the Nebraska Workmen's Compensation Act. According to Neb. Rev. Stat. § 48-151 (Reissue 1978), "[t]he term occupational disease shall mean only a disease which is due 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." The Workmen's Compensation Court found that peritoneal mesothelioma is a compensable occupational disease, and its findings of fact have the force and effect of a jury verdict and will not be set aside unless clearly wrong. *Scamperino v. Federal Envelope Co.*, 205 Neb. 508, 288 N.W.2d 477 (1980).

The evidence demonstrates that the incidence of peritoneal mesothelioma is almost negligible in the population at large, but approaches 7 percent in

asbestos workers. According to one of appellee's expert medical witnesses, the incidence of this disease in the population in general "is very, very small, so small that it's hard to put a number on it. A number that you commonly see in the scientific literature is perhaps one in 10,000 deaths may be due to mesothelioma in the general population. But even that number, it's kind of a guess, because the incidence is so low." However, a study cited by the same witness, in which initially healthy asbestos workers were "followed" by researchers "to see what happened to them," found that approximately 7 percent eventually died of mesothelioma. Conversely, several studies which traced the employment history of men who had died of mesothelioma found that between 60 percent and 80 percent of those decedents had a history of prolonged exposure to asbestos in their employment. We find that there is sufficient competent medical evidence to support the Workmen's Compensation Court's finding that peritoneal mesothelioma is a compensable occupational disease.

Appellant next argues that the Workmen's Compensation Court erred in applying the so-called "last injurious exposure" rule to determine which employer should bear liability for payment of the award. According to this rule, where a worker has contracted an occupational disease by exposure to a harmful substance over a period of years in the course of successive employments, the employer who most recently exposed the worker to the harmful substance is liable to pay the entire award. 4 Larson, Workmen's Compensation Law § 95.21 (1981). In some states, this rule is codified by statute. See, *McSpadden v. Big Ben Coal Co.*, 288 N.W.2d 181 (Iowa 1980); *Stanley v. Hinchliffe*, 395 Mich. 645, 238 N.W.2d 13 (1976). A number of jurisdictions follow this rule even in the absence of statute. See, *Holden v. Willamette Industries., Inc.*, 28 Or. App. 613, 560 P.2d 298 (1977); *Duaine Brown Chevrolet Co. v. Industrial Com'n*, 29 Utah 2d 478, 511 P.2d 743 (1973);

Bond v. Rose Ribbon & Carbon Mfg. Co., 42 N.J. 308, 200 A.2d 322 (1964). Nebraska has no statute stating rules for determining liability in the successive employer situation, so the issue is one of first impression in this state.

The alternative to imposing liability based upon the last injurious exposure would be to somehow apportion liability among all the employers who exposed Mr. Osteen to asbestos. This would involve devising a formula based upon some factor, such as length of exposure, severity of exposure, degree of aggravation of the first harmful exposure, wage rates, or any of a multitude of factors which could be utilized. We think if apportionment is to be the rule in Nebraska, the factor upon which it is to be based is necessarily the type of policy decision best left to the Legislature.

Although occasionally courts have applied the apportionment rule in the absence of statute, those cases which have done so have presented a situation involving successive separate, identifiable injuries, with one occurring during the claimant's employment with a prior employer and an aggravating injury occurring during a subsequent employment. See, *United Painters & Decorators v. Britton*, 301 F.2d 560 (D.C. Cir. 1962); *Dunbar Fuel Co. v. Cassidy*, 100 N.H. 397, 128 A.2d 904 (1957); *Quinn v. Automatic Sprinkler Co.*, 50 N.J. Super. 468, 142 A.2d 655 (1958); *Goetz v. Bulk Commodity Carriers*, 303 Minn. 197, 226 N.W.2d 888 (1975). We are aware of no cases in which a court has, in the absence of legislation, apportioned liability for a progressive occupational disease in which neither the onset of the disease nor the degree of aggravation by subsequent exposures can be accurately determined. Having no legislative guidance in the matter, we thus affirm the lower court's application of the "last injurious exposure" rule for the reasons set out below.

As noted above, there is no doubt that the disease which caused Mr. Osteen's death is an occupational disease which afflicts asbestos workers. However, it is

almost impossible to pinpoint which exposure "caused" the disease, since the claimant's expert medical witnesses agreed that no exposure to asbestos could be exonerated as the cause of the tumor. Thus, we are unable to assign liability to the employer whose exposure of Mr. Osteen to asbestos "caused" his occupational disease, since the inception of the disease cannot be pinpointed and, additionally, since it is believed that cumulative exposures are harmful as well. The application of the last injurious exposure rule eliminates this guesswork. As stated in *Tennessee Tufting Co. v. Potter*, 206 Tenn. 620, 630, 337 S.W.2d 601, 602 (1960), a case from a state where this rule is statutory, the purpose of the rule is "to avoid the issue when the disease or disability came into existence, which issue often involves difficulty, uncertainty and speculation."

In *Alloy Surfaces Company v. Cicamore*, 221 A.2d 480 (Del. 1966), the claimant employee suffered severe mouth and gum infection and lost all his teeth due to exposure to chrome compounds in his work. The Delaware court noted: "The present case is a good example of a situation where qualified specialists cannot trace the history of a disease with any satisfactory degree of certainty; the most they could say was that its development was a matter of months or years. It would indeed be a hardship to place that burden of proof upon the employee . . . ." *Id.* at 486. In the absence of statute, that court adopted the last injurious exposure rule, stating: "If the majority rule placing responsibility upon the last carrier, which we are now accepting as the law of this State, be deemed unjust, the remedy lies with the General Assembly." *Id.* at 487.

A reminder of the root purpose of workmen's compensation legislation appears in *Wilson v. Van Buren County*, 198 Tenn. 179, 186, 278 S.W.2d 685, 688 (1955): "[W]e are constrained to so interpret our Workmen's Compensation Law as will best serve the interests of employees who suffer from an occupational disease, rather than attempt an adjustment of their rights in the

light of equities that may exist between [successive employers]."

Holden v. Willamette Industries, Inc., 28 Or. App. 613, 560 P.2d 298, 301 (1977), found that the last injurious exposure rule is "particularly harmonious with the policy of liberal construction for the worker . . . ." The policy of liberal construction of the Workmen's Compensation Act for the benefit of the claimant is likewise the rule in Nebraska. *Wilson v. Brown-McDonald Co.*, 134 Neb. 211, 278 N.W. 254 (1938).

Under the last injurious exposure rule, it is not always the case that the last employer of the claimant will be the one which produced the last injurious exposure. As stated in 4 Larson, Workmen's Compensation Law § 95.21 at 17-79 (1981): "In the case of occupational disease, liability is most frequently assigned to the carrier who was on the risk when the disease resulted in disability, *if the employment at the time of disability was of a kind contributing to the disease.*" (Emphasis supplied.) Thus, in the case where a claimant was not being exposed to the harmful substance by his employer at the time the disease manifested itself in disability, the procedure is as stated in *Underwriters at Lloyds, London v. Alaska Indus. Bd.*, 160 F. Supp. 248, 250 (D. Alaska 1958): "Rather than defeat the claim of the employee where the employment at the time of disability was not of a kind contributing to the disease, the employer at the time of the most recent exposure which bears a causal relation to the disability is generally liable for the entire compensation."

The last injurious exposure, to be "injurious," must indeed bear a causal relationship to the disease. Howsation Law § 95.21 at 17-79 (1918): "In the case of that the exposure must be *of the type which could* cause the disease, given prolonged exposure. As described in *Mathis v. State Accident Insurance Fund*, 10 Or. App. 139, 499 P.2d 1331 (1972), an exposure which will support imposition of liability under this rule need not

be proved to have been a "material contributing cause" of the disease. Indeed, to so require would bring the employee back to Square One by requiring "proof of the unprovable and litigation of the unlitigable." *Holden v. Willamette Industries, Inc., supra* at 301. As Larson notes at 17-87: "[O]nce the requirement of some contributing exposure has been met, courts . . . will not go on to weigh the relative amount or duration of the exposure under various employers . . . . As a result, in some cases carriers and employers that have been on the risk for relatively brief periods, perhaps only a few weeks, have nevertheless been charged with full liability for a condition that had developed over a number of years." As noted by the Workmen's Compensation Court in its opinion and award on rehearing in this case: "[E]ven though liability imposed under this rule can have a harsh result, there will be a spreading of the risk when the total picture of asbestos litigation is considered and this rule is applied on a nationwide basis."

The Workmen's Compensation Court found that the evidence showed that the last injurious exposure of Mr. Osteen to asbestos fibers occurred while he was in the employ of the appellant. Coworkers of Mr. Osteen on the Kiewit job testified that on that job Mr. Osteen worked for several days, possibly as long as 3 weeks, with old insulation and products which contained asbestos. Claimant's expert medical witness testified that, in his opinion within a reasonable medical certainty, mesothelioma can occur within a lesser latency period than 5 years and that an exposure of less than 1 month could be causally related to the subsequent development of mesothelioma. 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. *McCann v. Holy Sepulchre Cemetery Assn.*, 205 Neb. 444, 288 N.W.2d 45 (1980). We find there is sufficient evidence in the record to support the lower court's finding that the last injurious exposure occurred while Mr. Osteen was employed by appellant.

Appellant next claims that appellee's award should be limited to $89 per week, which was the statutory maximum compensation rate in effect at the time Mr. Osteen was employed by Kiewit. Neb. Rev. Stat. § 48-122 (Cum. Supp. 1974). The Workmen's Compensation Court awarded benefits of $100 per week, the statutory maximum in effect on February 2, 1977, when Mr. Osteen ceased working due to his disease. § 48-122 (Cum. Supp. 1976). This action was correct since, as noted above, in the case of an occupational disease such as this one, the "'date of injury,' within the meaning of the Workmen's Compensation Act, is the date when the disability is first incurred . . . ." *Hauff v. Kimball*, 163 Neb. 55, 61, 77 N.W.2d 683, 687 (1956). According to *Chadd v. Western Cas. & Sur. Co.*, 166 Neb. 483, 89 N.W.2d 586 (1958): "All calculations to be made under the provisions of section 48-121, R.R.S. 1943, and amendments thereof, have reference to wages, percentages, and results as of the time of the injury." (Syllabus of the court.) Since the date of injury in this case was February 1, 1977, the lower court correctly applied the rate in effect on that date.

Finally, appellant argues, apparently, that appellee is not entitled to attorney fees in this court because of certain payments made to her by Jelco, Inc., and A. H. Bennett Company pursuant to stipulations between those companies and appellee. Basically, the stipulations stated that in return for a payment to appellee of $1,250 from each company, appellee would present no evidence against either company, would not resist a motion to dismiss made at the close of her case by either company, and would credit the amount received against any possible award made against the stipulating company. Appellant argues that this amounts to a modification of the award on appeal which would forbid an

allowance of attorney fees in this court under Neb. Rev. Stat. § 48-125 (Reissue 1978), since the stipulations were "accepted by the Nebraska Workmen's Compensation Court on rehearing."

On rehearing, the stipulations were offered into evidence, at which time the following colloquy took place between the court and various attorneys: "THE COURT: The mere fact that the exhibit is offered and the fact that the exhibit may be received would not indicate that the Court would necessarily feel or find that all items contained therein are absolutely verity and truthful.

"MR. STOUFFER: All right.

"MR. NEVINS: I don't see how that could be binding on the Court at all.

"THE COURT: I agree with you, Mr. Nevins."

It is difficult to see how this amounts to a reduction of the award on appeal. The payments were to be credited only in the event that liability was assessed against either Jelco, Inc., or A. H. Bennett Company. Such was not the case either on rehearing or in this court. Appellant has received no reduction in the award against it in this case on appeal, and, thus, appellee is entitled to an attorney fee of $2,500 in this court.

Appellant's assignments of error are without merit. The award of the Workmen's Compensation Court on rehearing is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. HAROLD D. NOKES, APPELLANT.

307 N.W.2d 521

Filed June 26, 1981. No. 43751.

1. **Post Conviction.** An evidentiary hearing in a proceeding for post conviction relief may be denied if the trial court finds, on examination of its files and records, that the proceeding is without foundation.
2. **Post Conviction: Motion to Vacate.** A motion to vacate a judgment and

sentence under the Post Conviction Act cannot be used as a substitute for an appeal or to secure a further review of issues already litigated.

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

Duane L. Nelson for appellant.

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

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

BOSLAUGH, J.

This is an appeal in a proceeding for post conviction relief brought under Neb. Rev. Stat. § 29-3001 (Reissue 1979). In 1974 the defendant entered pleas of guilty to one count of first degree murder and one count of second degree murder. He was sentenced to consecutive life sentences on each count. The convictions and sentences were affirmed on direct appeal in *State v. Nokes*, 192 Neb. 844, 224 N.W.2d 776 (1975).

On April 29, 1980, the defendant filed a motion for post conviction relief which alleged that his guilty pleas had been obtained in an unconstitutional manner. The District Court, after reviewing the files and records of the case, overruled the motion without granting an evidentiary hearing.

The defendant alleges on appeal that the District Court erred in not conducting an evidentiary hearing on the adequacy of defense counsel and misconduct by the prosecution in obtaining defendant's guilty pleas. This court has held that an evidentiary hearing may be denied if the trial court finds, on examination of its files and records, that the proceeding is without foundation. *State v. Nicholson*, 183 Neb. 834, 164 N.W.2d 652 (1969); *State v. Ronzzo*, 181 Neb. 16, 146 N.W.2d 576 (1966).

On the direct appeal in this case, *State v. Nokes, supra*, the defendant raised the issues of effective assistance of counsel and the voluntariness of the defendant's guilty

pleas. As to the latter issue, this court stated: "In State v. Hall, 188 Neb. 130, 195 N.W.2d 201, we held that the standard for determining the validity of a guilty plea is whether or not it represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. See North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162. Not only was the plea here a clearly voluntary and intelligent choice among alternative courses of action, there was also ample evidence to establish that the murder of Mrs. Hoyt was premeditated." *Id.* at 848, 224 N.W.2d at 779.

As to the defendant's contention that he had been denied effective assistance of counsel, we stated: "Here Harold D. Nokes' trial counsel performed at least as well as a lawyer with ordinary training and skill in the criminal law in his area, and conscientiously protected the interests of his client within the test standards set out in State v. Leadinghorse, *ante* p. 485, 222 N.W.2d 573." *Id.* at 850, 224 N.W.2d at 780.

The issues raised by the defendant in this post conviction proceeding were decided adversely to him on the direct appeal. These matters will not again be considered here. A motion to vacate a judgment and sentence under the Post Conviction Act cannot be used as a substitute for an appeal or to secure a further review of issues already litigated. *State v. Lacy*, 198 Neb. 567, 568, 254 N.W.2d 83 (1977); E.g., *State v. McDonnell*, 192 Neb. 500, 222 N.W.2d 583 (1974). See, also, Hoffman, *Trial Court Responses to Claims for Relief Under the Nebraska Post Conviction Act: A Taxonomy*, 58 Neb. L. Rev. 355 (1979).

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. LARRY A. JONES, APPELLANT.

307 N.W.2d 126

Filed June 26, 1981. Nos. 43782, 43783.

1. **Final Orders: Appeal and Error.** An order overruling a special appearance is not a final order from which an appeal can be taken.
2. ——:——. In the absence of a final order which disposes of a case, this court has neither authority nor jurisdiction to act on an attempted appeal and the same will be dismissed.
3. **Constitutional Law: Jurisdiction: Courts.** Article III, § 2 of the Constitution of the United States, which grants original jurisdiction to the Supreme Court of the United States in cases in which a state may be a party, is neither a mandatory nor an exclusive grant of jurisdiction so as to deprive the state courts of jurisdiction in cases involving a state and one of its citizens.
4. **Judgments: Appeal and Error.** Where the record affirmatively shows that the only ruling complained of is clearly right and plainly in accordance with law, an appeal will be dismissed as frivolous.

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

Larry A. Jones, pro se.

Paul L. Douglas, Attorney General, and John Boehm for appellee.

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

PER CURIAM.

These appeals involve two automobile speeding violations allegedly occurring on August 15, 1980, as to case No. 43782, and on February 24, 1980, as to case No. 43783. Both cases were prosecuted in the county court of Merrick County, appealed to the District Court for Merrick County, and then to this court, where they were consolidated for argument. The appellant, Larry Jones, appeared pro se, and his brief contains no statement of the case, no assignments of error, no statement of facts, and only some propositions of law set forth in the most

vague form as a part of an argument that in itself is at best confusing and irrelevant. Appellant requests no relief, but the one conclusion we can make from the brief and his oral argument is that he believes that only the Supreme Court of the United States has jurisdiction over either of these cases. This belief, it would seem, is based on Article III, § 2, clause 2, of the Constitution of the United States. "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original jurisdiction." We dismiss both appeals as frivolous.

In case No. 43782, no final disposition was ever made by the county court. Appellant filed a special appearance challenging the jurisdiction of the court. He appealed to the District Court the order of the county court overruling his special appearance. The District Court dismissed the appeal as not timely and not involving an appealable decision, and remanded the cause to county court for further proceedings. That action was correct. An order overruling a special appearance is not a final order from which an appeal can be taken. *Root v. School Dist. No. 25*, 183 Neb. 22, 157 N.W.2d 877 (1968). In the absence of a final order which disposes of a case, this court has neither authority nor jurisdiction to act on an attempted appeal and the same will be dismissed. *Busboom v. Gregory*, 179 Neb. 254, 137 N.W.2d 825 (1965).

A final judgment of conviction was had in case No. 43783. Although no question of the sufficiency of the evidence is raised, we note that the evidence fully supports the action of the trial court. We pass only on appellant's claim that the state courts lack jurisdiction because of the Constitution of the United States. The applicability of Article III, § 2, of the U.S. Constitution, relied upon by the appellant as granting exclusive authority to the Supreme Court of the United States to hear his cases, was succinctly stated by that very Court in *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 446, 65 S. Ct. 716, 89 L. Ed. 1051 (1945): "It is not enough that a State is plain-

tiff. The original jurisdiction is confined to civil suits where damage has been inflicted or is threatened, not to the enforcement of penal statutes of a State." The Court goes on to explain that whatever the jurisdiction of the Supreme Court under that provision might be, it is not mandatorily exclusive. "Clause 2 does not grant exclusive jurisdiction to this Court in the cases enumerated by it. . . . And it has been held that the exercise of that jurisdiction is not mandatory in every case. . . . The Court in its discretion has withheld the exercise of its jurisdiction where there has been no want of another suitable forum to which the cause may be remitted in the interests of convenience, efficiency and justice." *Id.* at 464-65.

Jurisdiction of the county court of Merrick County is clearly present as provided by Article V, § 1, of the Constitution of the State of Nebraska and Neb. Rev. Stat. § 24-517 (Reissue 1979).

When the record shows affirmatively that the only ruling complained of is clearly right and plainly in accordance with law, an appeal will be dismissed as frivolous. *In re Estate of Landon*, 98 Neb. 706, 154 N.W. 215 (1915). The appeals are dismissed.

APPEALS DISMISSED.

STATE OF NEBRASKA, APPELLEE, V. KENNETH H. STABLER, APPELLANT.

306 N.W.2d 925

Filed June 26, 1981. No. 43837.

1. **Criminal Law: Evidence.** In determining whether two charges constitute the same offense, the test to be applied is whether each charge requires proof of different facts or evidence.
2. **Criminal Law.** A distinction exists between an offense and the unlawful act out of which it arises, it being possible that two or more distinct offenses may grow out of the same transaction or act.

3. **Criminal Law: Constitutional Law: Double Jeopardy.** The rule that a person cannot be twice put in jeopardy for the same offense has no application where two separate and distinct crimes are committed by one and the same act. The constitutional inhibition is directed to the identity of the offense and not to the act.
4. **Criminal Law: Lesser-Included Offense.** A lesser-included offense is one which includes some of the elements of the crime charged without the addition of any element irrelevant to the crime charged.

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

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

Paul L. Douglas, Attorney General, and Ruth Anne E. Galter for appellee.

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

BOSLAUGH, J.

The defendant appeals from a conviction in District Court for driving while intoxicated, third offense, following his conviction in county court for refusal to submit to a chemical test under Neb. Rev. Stat. § 39-669.08 (Reissue 1978). Both charges grew out of the same incident. The defendant contends that his plea in bar, based on his conviction on the refusal charge, should have been sustained by the trial court.

The record shows the defendant was arrested at approximately 9 p.m. on April 26, 1980, near the intersection of 22nd and Vine Streets in Lincoln, Nebraska. The defendant's vehicle was observed stopped in a no-parking area on 22nd Street with the defendant in the driver's seat. The engine was running and the lights were on. As the police officer approached the vehicle, it moved forward several feet. The officer requested that the defendant place the vehicle in park and get out of the car. The defendant appeared to be intoxicated, and the officer observed a beer can next to the defendant. He

also smelled the odor of alcohol coming from the vehicle. After a preliminary breath test had been administered, the defendant was placed under arrest and taken to police headquarters.

At the police station the arresting officer read an implied consent form to the defendant. The defendant was asked to submit to a breath test but he refused. The defendant was then charged with refusal to submit to a chemical test under the implied consent statute, § 39-669.08, and with driving while intoxicated, third offense, under § 39-669.07.

On May 9, 1980, the defendant was found guilty in county court on the refusal charge and was sentenced to 7 days in jail and his operator's license suspended for 6 months.

On May 15, 1980, the defendant filed a plea in bar in the District Court, alleging the conviction on the refusal charge barred the prosecution for driving while intoxicated. The plea in bar was overruled.

The evidence at the trial in the District Court consisted primarily of the transcript of the evidence received in the county court at the trial on the refusal charge. The transcript contained the arresting officer's testimony on the issue of the defendant's refusal to take the chemical test and included the officer's opinion that the defendant was in fact intoxicated at the time he was arrested. The trial court found the defendant guilty of driving while under the influence of alcohol and sentenced him to 1 to 2 years' imprisonment.

The defendant contends his conviction and sentence for driving while under the influence violated the double jeopardy clause of the fifth amendment to the U.S. Constitution. Since the transcript of the refusal trial was the basis of the conviction for driving under the influence, the defendant argues they were one and the same offense. In determining whether two charges constitute the same offense, the test to be applied is whether each charge requires proof of different facts. *State v. Robinson*, 202 Neb. 210, 274 N.W.2d 553 (1979).

In *State v. Goodloe*, 197 Neb. 632, 250 N.W.2d 606 (1977), we upheld convictions for willful reckless driving, third and subsequent offenses, and operation of a motor vehicle to avoid arrest. Addressing the defendant's double jeopardy argument in that case, we stated at 634, 250 N.W.2d at 609: "This court has held that a distinction exists between an offense and the unlawful act out of which it arises, it being possible that two or more distinct offenses may grow out of the same transaction or act; and the rule that a person cannot be twice put in jeopardy for the same offense has no application where two separate and distinct crimes are committed by one and the same act, because the constitutional inhibition is directed to the identity of the offense and not to the act. Jeppesen v. State, 154 Neb. 765, 49 N.W.2d 611 (1951). In that case we stated: 'Neither in the Constitution of the United States nor in the Constitution of Nebraska is there any prohibition against successive prosecutions if the wrongful act is the cause of separate and distinct offenses.' "

It is clear from reading the statutes involved in this case that they create separate and distinct offenses. A conviction for refusal to submit to a chemical test requires proof that the defendant was advised of the consequences of refusing; the defendant was requested to provide a sample of his blood, breath, or urine; and the defendant refused to submit a sample. None of these facts are elements of the crime of driving while under the influence.

The defendant's contention that driving under the influence is a lesser-included offense of the crime of refusal is equally without merit. A lesser-included offense is one which includes some of the elements of the crime charged without the addition of any element irrelevant to the crime charged. *State v. Aby*, 205 Neb. 267, 287 N.W.2d 68 (1980).

In order to convict the defendant of the crime of driving while under the influence, it was necessary for the prosecution to prove beyond a reasonable doubt that the

defendant was "intoxicated" within the meaning of the statute. Evidence of this fact was contained in the officer's testimony at the refusal trial, but intoxication was not an element of the offense of refusal to submit to a chemical test.

The judgment of the District Court is affirmed.

AFFIRMED.

MCCOWN, J., concurs in result.

STATE OF NEBRASKA, APPELLEE, V. MIGUEL V. FLORES, APPELLANT.

307 N.W.2d 523

Filed June 26, 1981. No. 43965.

1. **Jury Trials: Municipal Ordinances: Constitutional Law.** The Legislature may provide for the trial of petty offenses in violation of a city or village ordinance without a jury when Article I, § 6, of the Constitution of Nebraska is not violated.
2. ____:____:____. A defendant who is charged with the violation of a city ordinance, with a maximum authorized penalty of 6 months' incarceration, is not entitled to a jury trial under the U.S. Constitution.

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

William H. Mecham for appellant.

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

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

BOSLAUGH, J.

The defendant appeals from a judgment of the District Court affirming his conviction for damage to property in violation of a municipal ordinance of the city

of Omaha, § 20-158. The maximum penalty under the ordinance was a fine of $500 and 6 months' imprisonment.

The defendant was arraigned on September 10, 1980, and trial was set for September 24, 1980. A written demand for a jury trial was filed on September 16, 1980. It was denied on September 17, 1980. A trial to the court resulted in defendant's conviction. He was fined $350 and sentenced to 30 days in the county jail. The assignments of error relate to the denial of his demand for a jury trial.

The statute providing for jury trials in the municipal court excepts "criminal cases arising under city or village ordinances." Neb. Rev. Stat. § 24-536 (Reissue 1979). In a prosecution under a similar municipal ordinance, we stated: "Under the city ordinance applicable, the maximum possible exposure to imprisonment of the defendant was 6 months. It was not required that he have a jury trial under the United States Constitution. Duncan v. Louisiana, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491, recently reaffirmed in Baldwin v. New York, 399 U.S. 66, 90 S. Ct. 1886, 26 L. Ed. 2d 437. The Nebraska statute, section 24-536, R.S. Supp., 1972, excludes criminal offenses of the nature involved in this case from the availability of a jury trial. In State v. Amick, 173 Neb. 770, 114 N.W.2d 893, we held that: 'It is within the power of the Legislature to provide that the trial of petty offenses in violation of a city or village ordinance shall be triable without a jury when Article I, section 6 of the Constitution is not violated. * * *.' See, also, State v. Peterson, 183 Neb. 826, 164 N.W.2d 649." *State v. Johnson*, 191 Neb. 535, 537, 216 N.W.2d 517, 519 (1974).

The defendant in this case had no constitutional or statutory right to a jury trial.

The judgment of the District Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RALPH E. THOMAS, APPELLANT.

307 N.W.2d 128

Filed June 26, 1981. No. 43982.

Criminal Law: Sentences. When sentencing a criminal defendant to a term of imprisonment under the indeterminate sentencing statute, the minimum limit of the sentence fixed by the court shall not be less than the minimum provided by law nor more than one-third the maximum term. Neb. Rev. Stat. § 83-1,105 (Reissue 1976).

Appeal from the District Court for York County: BRYCE BARTU, Judge. Affirmed as modified.

Bradley E. Barrows for appellant.

Paul L. Douglas, Attorney General, and John Boehm for appellee.

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

BRODKEY, J.

Ralph E. Thomas, the defendant and appellant herein, appeals to this court from his sentence imposed by the District Court of York County, Nebraska, for the offense of carrying a concealed weapon, in violation of Neb. Rev. Stat. § 28-1202 (Reissue 1979). The defendant was originally charged in a complaint filed on August 22, 1980, with one count of carrying a concealed weapon and one count of possession of a firearm by a felon, in violation of Neb. Rev. Stat. § 28-1206 (Reissue 1979). On October 24, 1980, the defendant entered into a plea bargain whereby he pled guilty to the concealed weapons charge, and the possession of a firearm count of the complaint was dismissed. On December 5, 1980, Thomas was sentenced to an indeterminate term of not less than 3 nor more than 5 years' imprisonment in the Nebraska Penal and Correctional Complex. We affirm as modified.

In his brief on appeal, the defendant alleges the following assignments of error: (1) The District Court erred by imposing a minimum limit to the indeterminate sentence which exceeds one-third the maximum term; and (2) The sentence imposed by the District Court is excessive.

Thomas was convicted of carrying a concealed weapon, which crime is a Class IV felony as defined in § 28-1202. The penalty for a Class IV felony under Neb. Rev. Stat. § 28-105 (Reissue 1979) is a maximum of 5 years' imprisonment, a $10,000 fine, or both, with no prescribed minimum. The trial court sentenced the defendant to an indeterminate term of 3 to 5 years' imprisonment. The indeterminate sentencing statute, Neb. Rev. Stat. § 83-1,105 (Reissue 1976), provides that: "[T]he minimum limit fixed by the court shall not be less than the minimum provided by law *nor more than one-third of the maximum term* . . . ." (Emphasis supplied.) See, also, *State v. Sharski, ante* p. 122, 306 N.W.2d 592 (1981); *State v. Miles,* 194 Neb. 128, 230 N.W.2d 227 (1975); *State v. Suggett,* 189 Neb. 714, 204 N.W.2d 793 (1973).

In the present case the minimum portion of the indeterminate sentence fixed by the trial court, 3 years, exceeds by 16 months the proscription of one-third of the maximum sentence of 5 years. Under § 83-1,105, as conceded by the State in its brief on appeal, defendant's minimum sentence should have been 20 months, rather than the 3 years which the trial court imposed.

Under Neb. Rev. Stat. § 29-2308 (Reissue 1979), this court is authorized to reduce the sentence imposed by the District Court when, in our opinion, the sentence is excessive. In this case, as demonstrated above, the sentence imposed by the trial court exceeded the maximum allowed minimum penalty for a Class IV felony. The sentence imposed by the trial court must, therefore, be modified; and we determine that the minimum limit of the defendant's sentence should be 20 months' imprisonment in the Nebraska Penal and

Correctional Complex.

In reference to the defendant's second assignment of error, we have reviewed the record forwarded to this court and have determined that the maximum term of imprisonment imposed by the trial court is not excessive. Even discounting the favorable terms of the plea bargain, in which another pending charge against the defendant was dismissed, we are of the opinion that Thomas' record indicates that he is not entitled to any reduction of his sentence. His criminal record is lengthy and includes incarceration in the Oklahoma State Prison for assault with a deadly weapon and also for second degree burglary. We believe that the trial court was fully justified in sentencing the defendant to imprisonment, and that the sentence imposed by the court is not excessive nor an abuse of the court's discretion.

For the reasons stated above, the judgment of the trial court is affirmed, and the sentence imposed is ordered modified to meet the required statutory limitations.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, COMPLAINANT, V. MERRITT E. JAMES, RESPONDENT.

307 N.W.2d 524

Filed June 26, 1981. No. 44004.

Original action. Judgment of reprimand.

On motion for the court.

PER CURIAM.

The respondent, Merritt E. James, has filed with this court a conditional admission of guilt of the formal

charges filed against him by the Counsel for Discipline of the Nebraska State Bar Association.

Respondent is charged with a violation of Canon 6, DR 6-101(A)(3), and Canon 7, DR 7-101(A)(2), and with a violation of his license to practice law as provided in Neb. Rev. Stat. § 7-104 (Reissue 1977).

While representing a claimant in the Workmen's Compensation Court, the respondent recovered an award which included the amount of $821.25 which had been paid by Blue Cross Blue Shield of Nebraska. Pursuant to agreement, the check for $821.25 was mailed to Blue Cross Blue Shield of Nebraska for endorsement with respondent's check for $547.50, the amount of the recovery, less a one-third attorney fee. The check for $821.25 was endorsed and returned to respondent with a letter that his check would not be deposited for 1 week. Respondent's check to Blue Cross Blue Shield of Nebraska was deposited and was returned marked insufficient funds. After discussion with the respondent, the amount of the check was sometime later paid over to Blue Cross Blue Shield of Nebraska.

The respondent, having failed to use a trust account for client's funds and having failed to promptly transmit client's funds to the client, is guilty of unprofessional conduct and is hereby publicly reprimanded for conduct violative of the Canons of Ethics and of his oath as a member of the bar of this court.

JUDGMENT OF REPRIMAND.

STATE OF NEBRASKA, APPELLEE, V. CHARLES E. JOHNSON, APPELLANT.

307 N.W.2d 525

Filed June 26, 1981. No. 44054.

1. **Misdemeanors: Sentences.** Where an individual is convicted of a misdemeanor and given an indeterminate sentence which is to be served in an institution under the jurisdiction of the Department of Correctional Services, the provisions of Neb. Rev. Stat. § 83-1,105 (Reissue 1976) should apply.
2. **Convictions: Probation and Parole.** No defendant, once convicted, is entitled to be placed on probation as a matter of law.

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

Clay B. Statmore 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 COLWELL, Retired District Judge.

KRIVOSHA, C.J.

The appellant, Charles E. Johnson, appeals from a judgment entered by the District Court for Lancaster County, Nebraska, finding Johnson guilty of two counts of misdemeanor issuing a bad check in violation of Neb. Rev. Stat. § 28-611 (Reissue 1979). Johnson was sentenced to an indeterminate term of ½ year to 1 year in an institution under the jurisdiction of the Department of Correctional Services for each count, the second sentence to be served consecutively to the first with credit being given for time already spent in jail. The record reflects that originally Johnson was charged with two counts of felony issuing a bad check. Pursuant to a plea agreement the State agreed to dismiss the felony charges and Johnson pled "no contest" to the two counts of misdemeanor issuing a bad check.

Johnson now maintains that the trial court committed

three errors, justifying a reversal of his conviction. The errors assigned by Johnson are as follows: (1) The trial court should not have found appellant guilty upon his plea of "no contest" because of a lack of factual basis upon which to make such a finding; (2) The sentence of the trial court was excessive; and (3) The trial court erred and abused its discretion in not placing defendant on probation.

We turn first to the second assignment of error to the effect that the sentence of the trial court was excessive. We have not heretofore specifically ruled on the question of whether Neb. Rev. Stat. § 83-1,105 (Reissue 1976) applies to a misdemeanor conviction. Section 83-1,105 provides that: "Except where a term of life is required by law, in imposing an indeterminate sentence upon the offender, the court may: (1) Fix the minimum and maximum limits of the sentence, but the minimum limit fixed by the court shall not be less than the minimum provided by law nor more than one-third of the maximum term, and the maximum limit shall not be greater than the maximum provided by law . . . ." We now believe it appropriate to declare that where an individual is convicted of a misdemeanor and given an indeterminate sentence which is to be served in an institution under the jurisdiction of the Department of Correctional Services, the provisions of § 83-1,105 should apply. We emphasize, however, that the rule applies in only those misdemeanor cases in which the defendant has been given an indeterminate sentence and ordered to serve the indeterminate sentence in an institution under the jurisdiction of the Department of Correctional Services. In view of our action herein, it is necessary that the minimum sentences given Johnson be modified and reduced from ½ a year to ⅓ of a year.

Turning then to Johnson's first assignment of error to the effect that his plea of no contest should not have been accepted because of a lack of factual basis upon which to make such a finding, we reject the assignment. An examination of the record makes it manifestly clear

that there was sufficient evidence from which the court could conclude that Johnson was aware that the checking account had been closed and that no money had been put into the account after October 3, 1979.

After Johnson entered his plea, the court asked the prosecutor to relate to the court the facts underlying the charge. We have heretofore approved this practice where the accused pleads either guilty or "no contest." See, *State v. Daniels*, 190 Neb. 602, 211 N.W.2d 127 (1973); *State v. Hill*, 204 Neb. 743, 285 N.W.2d 229 (1979). Specifically, the deputy county attorney, in the presence of Johnson, stated: "The state's evidence would further show that the defendant [Johnson] and Marvin Mitchell continued to write checks and cashed in checks on the account after they had received the notice and knowing that the account had been closed and there was no money in the account at the time the checks were written. And further, the State would call as a witness, Marvin Mitchell, who would testify substantially as I have related, that the defendants were aware that the checking account had been closed and there was no money had been [sic] put in the account at the time that the checks were written, at a time after October 3rd, 1979."

Johnson neither objected to the statements nor offered anything to contradict the statements made by the deputy county attorney. These statements, together with the police report and the presentence report, were more than sufficient to justify the court's finding Johnson guilty as charged. The assignment of error is rejected.

Finally, with regard to the third assignment of error that the trial court erred and abused its discretion in not placing Johnson on probation, we likewise reject the assignment. No defendant, once convicted, is entitled to be placed on probation as a matter of law. See *State v. Swails*, 195 Neb. 406, 238 N.W.2d 246 (1976). In the instant case the record discloses that after Johnson was charged, and while he was awaiting trial, he was in-

volved in an assault upon a University of Nebraska-Lincoln coed. The trial court obviously realized that Johnson had no intention of being a law-abiding citizen and required some period of incarceration as punishment for his crimes. In sentencing Johnson the trial court said: "I guess the thing that bothers me is the problems you've had since this offense; particularly the assault that took place down at the University. Quite frankly, because of that, I don't think I can put you on probation. I just feel there would be a sufficient likelihood that you would engage in other criminal conduct and I just don't feel that I can take that chance." The action of the trial court was entirely justified and did not constitute an abuse of discretion. Absent evidence of an abuse of discretion, a sentence imposed by the trial court within the statutory limits should be affirmed. See *State v. Carey*, 199 Neb. 288, 258 N.W.2d 141 (1977).

The judgment of the trial court finding Johnson guilty upon his plea of no contest and sentencing him, except as modified herein, is affirmed.

AFFIRMED AS MODIFIED.

BEVERLY ANN GRADY, APPELLEE, V. GILBERT DEAN GRADY, APPELLANT.

307 N.W.2d 780

Filed July 2, 1981. No. 43113.

1. **Contempt.** One cannot be held in contempt of court for acts which became prohibited by a court order entered subsequent to their commission.
2. ——. An action to enforce a court order is normally a mere civil contempt and requires the appropriate standard of proof applicable thereto.

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

Bauer, Galter, Geier, Flowers & Thompson for appellant.

Ginsburg, Rosenberg, Ginsburg, Cathcart, Curry & Gordon for appellee.

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

WHITE, J.

This is an appeal from an order entered by the District Court for Lancaster County, Nebraska, finding the appellant, Gilbert Dean Grady, to be in contempt of court. The parties to this action were formerly husband and wife, having been divorced on May 12, 1978. The case was appealed to this court and was affirmed here at *Grady v. Grady*, 204 Neb. 595, 284 N.W.2d 402 (1979). Although attempts were made to do so by the appellant, the decree was never superseded. We will not repeat the facts of the case or the details of the decree approved by the trial court except so far as the same are pertinent to this discussion as they are contained in *Grady v. Grady, supra.*

According to the provisions of the decree, the appellee, Beverly Ann Grady, was awarded all the capital stock in two corporations, the principal assets of which were two motels. The businesses operated by the appellant included, among other things, six corporations. In both the principal case and the evidence presented at this hearing, there is considerable evidence that it was the custom and practice of the appellant to regularly transfer comparatively large sums of money between the various corporations as the requirements of those corporations manifested themselves. There was also evidence of substantial purchases made by a principal company of supplies and equipment which in turn were allocated to the various corporations. The bookkeeping practices could only be described as somewhat bizarre, consisting of a yearend reconciliation by a firm of accountants of the various debts and credits that should be accorded to the various corporations for income tax purposes.

In December 1978, 7 months after the decree was

entered, appellee filed a motion for contempt citation against appellant, alleging the terms of the decree with regard to the properties to be transferred to her, and alleging that appellant had failed to release certain liens, as ordered, and that appellant had improperly removed money from those corporations after the entry of the decree, all done willfully, contemptuously, and without just cause. The trial court in its order found three principal grounds for holding the appellant in contempt: (1) In failing to release secondary mortgages against property held by Carpenter Enterprises, Inc., and Flamingo Motels, Inc., the motel corporations that had been awarded to Beverly Ann; (2) In failing to turn over all the assets of those two corporations pursuant to the court's order of May 12, 1978, and a further order of August 7, 1978, and in diverting assets of those corporations without specifically accounting for such withdrawals; and (3) In failing to turn over all assets of the corporations to Beverly Ann Grady as ordered by the court, in that Gilbert Grady caused policies of insurance for said corporations to be canceled where he had no authority to do so, apparently appropriating any returned premium to his own use. The evidence is clear that after the entry of the decree, the appellant, Gilbert Dean Grady, failed and refused to turn over to Beverly Ann the stock certificates in the two corporations until August 1978. From and after the entry of the decree, and even after August 10, 1978, he continued to operate the motels, expending money from various checking accounts, apparently collecting the receipts, and he had not, even at the date of the hearing in June 1979, produced an accounting of those transactions.

There was also evidence that between the date of the submission of the case in January 1978 and May 1978 there were a considerable number of transactions involving those same two motels, including a considerable expenditure of funds which is not accounted for. The

appellant appropriately points out that one cannot be held in contempt of court for acts which became prohibited by a court order entered subsequent to their commission. A contrary ruling would have the effect of an ex post facto law. See *Chicago, B. & Q. R. Co. v. State*, 47 Neb. 549, 66 N.W. 624 (1896). The point is well taken. The trial court's order, insofar as it held the appellant in contempt for removing said sums from the corporations and failing to account for them prior to the entry of the decree, was in error.

Appellant also assigns as error that the trial court was in error in holding that there was evidence sufficient to establish that the appellant's conduct was willful and contumacious. It is clear, insofar as the second and third principal grounds for contempt are concerned, that the appellant's argument is not well taken. On and after May 12, 1978, the appellant was under a continuing obligation to obey the court's order in transferring the stock of the two corporations to the appellee. He did not do so until 3 months later, and, further, continued to improperly divert assets until the time of the hearing. He was guilty of willful contempt. Further, in his actions with respect to all financial transactions involving those corporations on and after the date of the decree, those acts were totally unauthorized and were in willful disobedience to the court's order. The appellant suggests that somehow he may be excused from his actions involving corporations which the court had directed to be transferred to another by saying that this was his usual method of operation. One usually does not operate or remove funds from a corporation that one no longer owns or controls.

As to item three, the evidence is clear that an insurance policy belonging to the company was in fact canceled after the premium had been paid and the proceeds applied to the personal interest of the appellant, Gilbert Grady. This was in open defiance and

disobedience of the trial court's order.

Insofar as the first principal item of the contempt proceedings, in failing to release the secondary mortgages, appellee introduced evidence of the various financial transactions entered into by the appellant. The appellant asserted simply that he could not pay off the secondary mortgages by reason of certain adverse tax consequences resulting from forced sales of heavily mortgaged but highly appreciated real estate, and that he could not release those secondary mortgages because he simply did not have the funds with which to do so. There was no evidence introduced by the appellee which would suggest otherwise. We agree with the appellant that there is not sufficient evidence to show that the appellant had the means with which to discharge the secondary mortgages.

In its order holding the appellant in contempt of court, the trial court sentenced the appellant to a term of 90 days in the county jail of Lancaster County. Any remaining sentence could be suspended by releasing the secondary mortgages against properties owned by Carpenter Enterprises, Inc., and Flamingo Motels, Inc., and by accounting for and returning the assets of Carpenter Enterprises, Inc., and of Flamingo Motels, Inc., which the court found appellant had improperly diverted beginning in December 1977. We modify that order. We affirm the sentence of the trial court, but modify the terms for the appellant to purge himself of contempt by striking as a condition the failure to release secondary mortgages, as appellee did not prove in the trial court that appellant had the capacity or funds to release said mortgages. We further modify by confining the terms of repayment in paragraph two from the date of the decree, May 12, 1978, and by striking from said order any requirement that the appellant be held in contempt for expenditures occurring prior to the date of the decree. By reason of the considerable period that elapsed between the date of submission and the date of the decree, it is

apparent that the evidence on which the trial court based its decision was only partially true at the date the decree was entered. However, this was the responsibility of appellant's counsel. There may exist some appropriate means to modify that decree; we merely state that one cannot be held in contempt for actions which took place in advance of a date when one was under a direction not to commit them.

The appellant suggests on brief and oral argument that the contents of a certain sealed deposition of the appellant's accountant was not read or considered by the trial court. This matter is considered de novo by this court and the contents of the deposition of the accountant are not persuasive. They merely relate to the rather bizarre accounting practices and financial practices, as discussed above, of the appellant's business conduct. There is no direct evidence that a copy of the deposition was not read or that the deposition was not opened and resealed; but, regardless of that fact, there is no persuasive evidence contained therein which would purge the appellant of the contempt of the court's order, essentially of looting corporations that he was under direction to turn over to another.

We have stated that an action to enforce a court order is normally a mere civil contempt and requires the appropriate standard of proof applicable thereto instead of the stricter "proof beyond a reasonable doubt" standard applied to criminal contempts. See *Eliker v. Eliker*, 206 Neb. 764, 295 N.W.2d 268 (1980). This being a civil contempt, we apply the standard of proof applicable in a civil proceeding. However, the contempt of the appellant is so clearly established that it would satisfy even the stricter standard of proof were the same to apply.

The judgment and sentence of the District Court holding the appellant in contempt, as modified, are affirmed.

AFFIRMED AS MODIFIED.

JOHN E. JOHNSON, APPELLEE, V. SHARON C. JOHNSON, APPELLANT.

307 N.W.2d 783

Filed July 2, 1981. No. 43269.

1. **Divorce: Words and Phrases.** When a personal relationship with another under the institution of marriage has deteriorated to the point that the parties can no longer live together, the marriage is irretrievably broken.
2. **Divorce: Property Division.** The rules for determining division of property in an action for dissolution of marriage provide no mathematical formula by which such awards can be precisely determined; they are to be determined by the facts in each case.
3. ——:—— Generally speaking, awards in cases of this kind vary from one-third to one-half the value of the property involved, depending upon the facts and circumstances of the particular case, and particularly so where the marriage is of long duration and the parties are the parents of the children involved.
4. **Property Division: Appeal and Error.** This court is not inclined to disturb the division of property made by the trial court unless it is patently unfair on the record.
5. **Property Division: Interest.** The trial court has the inherent power, in adjusting the rights of the parties, to provide that a money allowance to be paid in installments shall not draw interest until a certain date.
6. **Divorce: Property Division.** In an action for dissolution of marriage, a court may divide property between the parties in accordance with the equities of the situation, irrespective of how legal title is held.
7. **Alimony.** In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion under Neb. Rev. Stat. § 42-365 (Reissue 1978) is one of reasonableness.
8. **Appeal and Error.** Errors assigned but not discussed will generally not be considered by the Supreme Court.
9. **Divorce: Attorney Fees.** There is no rule which requires a trial court to necessarily award attorney fees in accordance with the value of the services in a divorce case. The award of attorney fees is discretionary with the trial court and depends upon a variety of factors, including all the circumstances, such as the amount of the division of property and alimony awarded, the earning capacity of the parties, and the general equities of the situation.

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

Winner, Nichols, Meister & Douglas, P.C., for appellant.

Martin, Mattoon, Matzke & Mattoon for appellee.

Heard before KRIVOSHA, C.J., MCCOWN, BRODKEY, and HASTINGS, JJ., and HICKMAN, District Judge.

HICKMAN, District Judge.

This dissolution of marriage action was commenced on April 25, 1979, in Kimball County, Nebraska, by petitioner husband, John E. Johnson, the appellee herein, who will be referred to as John, against the respondent wife, Sharon C. Johnson, the appellant herein, who will be referred to as Sharon. Trial was held on November 6 and 7, 1979, and the District Court, on December 17, 1979, entered a decree dissolving the marriage, awarding custody of the minor children to Sharon, subject to John's right of reasonable visitation, ordering John to pay $250 per month per child for child support, and dividing the property. This appeal followed. Sharon sets forth 20 assignments of error, but has abandoned 5 assignments, and the remaining 15 can be grouped as follows: The trial court erred (1) in finding that the marriage was irretrievably broken and awarding a dissolution of the marriage rather than a decree of separate maintenance; (2) in awarding Sharon an inequitable division of the property; (3) in failing to award interest on the unpaid balance of the payments ordered; (4) in not awarding Sharon one-half of the value of the prepaid expenses on growing crops; (5) in determining certain values and in making mathematical errors in the court's findings and in the computation of values placed on specified items of real and personal property; (6) in determining that certain gifts were made to the petitioner alone rather than to the parties jointly; (7) in failing to award alimony; (8) in awarding inadequate child support because the award made no provision for an increase in child support as each of the children reaches majority; and (9) in awarding inadequate attorney fees.

John and Sharon were married October 26, 1957,

when they were 20 years and 19 years old, respectively. As a result of the union, five children were born, the first of which died shortly after birth. The remaining four children ranged in age from 12 years to 17 years at the time of trial.

John graduated from high school in 1955, and thereafter served in the Navy for approximately 2 years. Following marriage he commenced farming and has become a successful wheat farmer in Kimball County. After her high school graduation, Sharon worked as a secretary until the marriage, and during the 22 years since has fulfilled her obligations as a loyal and helpful farm wife and mother in the home and on the farms which have been acquired. At trial the health of both parties was not an issue.

The marriage relationship first became strained in 1973 when Sharon learned of John's extramarital activities and confronted him about them. After discussions, Sharon forgave John and they continued to live together, but, according to John, Sharon did not forget and thereafter continually nagged at him and kept track of his activities. According to John, the final straw came in early 1979 when he was locked out of the house after attending a sports function in which his son was involved. Thereafter, John slept in the basement until he acquired a mobile home and moved into it on March 12, 1979. The court ordered the parties to see a marriage counselor. John attended once, and it is obvious that because of his attitude he was told not to come back.

At the trial John stated that he had tried for 6 years following 1973 to reconcile with his wife but that, due to Sharon's attitude and actions, no further efforts were likely to be fruitful. John further stated that he no longer could live with Sharon and that he believed their marriage to be irretrievably broken. Sharon is very active in her church and, following the teachings of her religion, does not believe in divorce. One of the sources of tension in the marriage apparently

was Sharon's strict religious position against artificial birth control. Sharon testified that she did not believe the marriage was irretrievably broken and she said that she and the children would welcome John back into the family home.

On review in this court, the factual determinations of the trial court are entitled to considerable deference. "While in a divorce action the case is to be tried de novo, 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 facts rather than the opposite. Patton v. Patton, 203 Neb. 638, 279 N.W.2d 267 (1979). Obviously a trial court weighs the credibility of the witnesses and the evidence and determines what evidence should be given the greater weight in arriving at a factual determination on the merits. The testimony need not be accepted in its entirety and the trier of fact must use a commonsense approach and apply that common knowledge which is understood in the community." *Boroff v. Boroff*, 204 Neb. 217, 218-19, 281 N.W.2d 760, 761-62 (1979).

The trial court found that the marriage was irretrievably broken, relying heavily upon the failure of some 6 years of reconciliation efforts. It is true, as noted above, that the parties disagreed on this question and that their testimony conflicted as to whether their marriage was irretrievably broken. Under the rule stated above, the trial court was entitled to decide which version of the facts to give the greater weight. Apparently the court decided that John's testimony was more credible under the circumstances. Seen in that light, the facts of the case fully justify the trial court's finding that the marriage was irretrievably broken, and that finding is affirmed.

With regard to the division of the marital estate, the trial court determined, based on the evidence, that the total assets owned by the parties at the time this action was commenced had a value of $961,672.92.

The majority of these assets consisted of farmland, wheat on hand or under loan, wheat sold but not paid for, and farm machinery. The court found that John was entitled to have set off to him $139,474.42 as gifts received from his mother. There were debts of $4,750. The parties therefore had disposable marital assets of $817,448.50.

John has built his dryland farming business into an efficient unit and has acquired the proper and necessary farm machinery to handle the large number of acres he owns and leases. The court, rather than destroy the efficiency of the farming unit and leave John without the wheat production required to pay a monetary award, granted Sharon $24,712, consisting of checking and savings accounts, automobiles, and household furnishings; $150,000 cash; and $15,000 per year for a period of 12 years, or a total of $354,712, which constitutes 43 percent of the marital property. The court also imposed upon John an initial child support obligation of $250 per month per child.

This court has consistently held that the rules for determining division of property in an action for dissolution of marriage provide no mathematical formula by which such awards can be precisely determined; they are to be determined by the facts in each case. The court will consider all pertinent facts in reaching an award that is just and equitable. *Matlock v. Matlock*, 205 Neb. 357, 287 N.W.2d 690 (1980). Generally speaking, awards in cases of this kind vary from one-third to one-half the value of the property involved, depending upon the facts and circumstances of the particular case, *Ragains v. Ragains*, 204 Neb. 50, 281 N.W.2d 516 (1979), and particularly so where the marriage is of long duration and the parties are the parents of all the children involved, *Knigge v. Knigge*, 204 Neb. 421, 282 N.W.2d 581 (1979). This court is not inclined to disturb the division of property made by the trial court unless it

is patently unfair on the record. *Ritter v. Ritter*, 205 Neb. 668, 289 N.W.2d 526 (1980). As noted, the general rule in cases such as this is that property awards should range from one-third to one-half of the value of the property involved. In this case, Sharon received an award clearly within those guidelines. It cannot be said that such an award is patently unfair. Accordingly, we affirm the trial court's division of property.

Sharon's third assignment of error is that the trial court failed to award interest on the unpaid balance of the payments ordered.

John and Sharon's taxable income from 1975 through 1978 averaged $27,322. If the average of the annual depreciation for those years, $17,985, is added thereto, they had an average total available of $45,307. The trial court has awarded $15,000 to Sharon per year for 12 years, plus an initial sum of $1,000 per month child support which, we recognize, will decline as each child reaches majority. However, the first year from the aforementioned average, Sharon will receive $27,000. John will have an average of $18,307 with which to operate the farms and live on. Had the court awarded interest on the installment payments at 8 percent per annum, the first year's interest would have been $12,000 and could have created an intolerable burden on John. Furthermore, it is clear that the trial court has the inherent power, in adjusting the rights of the parties in a marriage dissolution proceeding, to provide that a money allowance payable in installments shall not draw interest until payment is due. *Nickel v. Nickel*, 201 Neb. 267, 267 N.W.2d 190 (1978). The trial court did not err in refusing to award interest on the unpaid installments.

Sharon next assigns as error the failure to award her one-half of the value of prepaid farming expenses. Although John farms a large number of acres, one-half of the tillable land is summer-fallowed each year, that is to say, it generally lies idle without a crop to be

harvested, but is prepared for the following year's crop. This requires an outlay of cash for tilling, seed, and planting in the fall of the year next preceding the harvest. At trial John testified that the prepaid expenses on the summer-fallowed land which had been planted were $50,000. Sharon claims that such prepaid expenses amount to an asset which could be included in the total marital property subject to division between the parties. It seems to us that prepaid expenses for preparing the land and for planting a crop which is some 6 to 7 months from harvest should not be considered an asset subject to division between the parties. The primary reason for that result in the circumstances presented by this case is the speculative nature of the expected return on such an expenditure. The trial court was correct in not considering the prepaid expenses as an asset to be divided.

With regard to the alleged errors in values placed on certain parcels of real estate and in the mathematical calculations of the trial court, we find that we must likewise reject this assignment of error. The claimed errors, if indeed such mistakes exist in the record, relate to values of various items and are not of such a serious nature as to render the decision of the trial court incorrect.

Sharon next claims that certain gifts from John's mother were gifts to the parties, and therefore the real value of the gifts, totaling $139,474.42 as found by the trial court, should not have been set off to John.

John has three brothers and three sisters and, in an effort to give each of the children an equal gift of either land or money, John's mother held a family meeting and each child decided whether he or she desired money or land at the value used for federal estate tax purposes in the estate of John's father. When the decision by each child had been made, John's mother would send a check for a specific amount to each of the children desiring land. That child

would in turn deposit the check and issue his or her own check back to the mother for that amount. In this manner the land was paid for through a series of annual gifts and the mother would have sufficient liquid funds to make cash gifts to the children desiring cash instead of land. When John had paid for the first farm from the gifts from his mother, the deed was made out at John's request to both Sharon and himself. Two other farm sites were acquired in this fashion but were deeded to John alone.

The trial court, in making its determination relating to the property division, was entitled to consider the fact that Sharon contributed nothing to the acquisition of these properties and that the source of the funds used to acquire the farms were gifts from John's mother. In an action for dissolution of marriage, a court may divide property between the parties in accordance with the equities of the situation, irrespective of how legal title is held. *Cozette v. Cozette*, 196 Neb. 780, 246 N.W.2d 473 (1976).

In this connection, Sharon also complains that certain U.S. Savings Bonds which John had acquired before marriage and then transferred after marriage into both of their names should not have been set off to him. The bonds were acquired with funds obtained from John's share of a mineral trust set up after the death of his father, under which each child had a one-seventh interest, as well as from direct gifts from his mother. At the time of his marriage, John had $33,000 in savings bonds, less $3,000-$4,000 used to purchase a pickup truck earlier in 1957 which was brought into the marriage. After marriage these bonds were used to build the family home, build a Quonset, and buy machinery. Sharon relies on our statement in *Andersen v. Andersen*, 204 Neb. 796, 798, 285 N.W.2d 692, 694 (1979): "It is apparent that gifts made to another party during the course of a long marriage such as this should appropriately be a part of the

entire marital estate . . . ." Sharon fails to recognize that the bonds placed into her name were cashed shortly after the marriage and the funds were used as previously indicated. Were the bonds still in existence, there would be some merit to her claim.

The record reflects that the trial court credited John with $58,224.42 as "other assets owned by John at time of marriage plus subsequent gifts made by mother." Sharon claims this should have been only $22,589.14. The record reflects that at marriage John had bonds totaling $29,000 to $30,000, that he brought $21,381 in other property into the marriage, and that at least $17,575 of the subsequent gifts of $30,593.12 made by his mother was used to purchase the land. In addition, the court did not give John any credit for his mineral interest, which has generated $49,655 since the marriage, but considered the one-seventh mineral interest valued at $10,000 as marital property for the purpose of valuing the marital estate, even though it directly resulted from the mineral trust created for John by his mother. We will not disturb the finding of the trial court.

The trial court in its findings and decree did not award alimony to Sharon and she has thereupon assigned error.

In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion under Neb. Rev. Stat. § 42-365 (Reissue 1978), as well as the former decisions of this court, is one of reasonableness. *Kosnopfl v. Kosnopfl*, 206 Neb. 524, 293 N.W.2d 854 (1980). The statute provides in part: "[T]he court may order payment of such alimony by one party to the other . . . as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party

to engage in gainful employment without interfering with the interests of any minor children in the custody of such party."

Further, in applying the statute, this court has said: "It is the general rule that a judgment of the District Court is supported by a presumption of correctness, and this court is not inclined to disturb the alimony award made by the trial court unless it is patently unfair on the record." *Cole v. Cole*, 208 Neb. 562, 565, 304 N.W.2d 398, 400 (1981); *Buker v. Buker*, 205 Neb. 571, 288 N.W.2d 732 (1980). The record in this case reveals that Sharon has been awarded some $354,712, or 43 percent of the marital estate. In addition, she will currently receive $1,000 a month in child support. During the first year after the dissolution, she will receive $27,000 as a result of the decree. Presumably, she will also have at her disposal the sizable investment income potentially derivable from the $150,000 lump sum cash payment ordered as part of the property division. Upon this record, we cannot say that the refusal to award alimony was patently unfair. The trial court's decision in this regard is affirmed.

Sharon next assigns that the court erred in awarding inadequate child support because the court made no provision for an increase in child support as each of the children reaches his or her age of majority.

This assignment of error is not argued or discussed in appellant's brief. It has long been a rule in this state that errors assigned but not discussed will generally not be considered by this court on appeal. Neb. Ct. R. 8.a.2.(3) (Rev. 1977); *Countryside Mobile Homes of Lincoln, Inc. v. Schade*, 204 Neb. 209, 281 N.W.2d 756 (1979). Should there be a material change in the circumstances requiring a modification of the child support, provision therefor has been made by the Legislature. See Neb. Rev. Stat. § 42-364 (Reissue 1978).

Sharon's final assignment of error relates to the

fee the court allowed her attorneys. The trial of this case lasted approximately 1½ days, and Sharon and John and John's appraiser were the only witnesses. In addition, Sharon offered several exhibits. The court allowed Sharon $3,000 for attorney fees and the cost of her appraiser, who did not testify. There is no rule which requires a trial court to necessarily award attorney fees in accordance with the value of the services in a divorce case. The award of attorney fees is discretionary with the trial court and depends on a variety of factors, including all the circumstances, such as the amount of the division of property and alimony awarded, the earning capacity of the parties, and the general equities of the situation. *Brown v. Brown*, 199 Neb. 394, 259 N.W.2d 24 (1977). We cannot say that the award of attorney fees in this case was either incorrect or an abuse of discretion.

The decree of the District Court is affirmed. Sharon is awarded the sum of $1,000 for the services of her attorney in this court.

AFFIRMED.

FIRST DATA RESOURCES, INC., A DELAWARE CORPORATION, APPELLEE, V. OMAHA STEAKS INTERNATIONAL, INC., A NEBRASKA CORPORATION, APPELLANT.

307 N.W.2d 790

Filed July 2, 1981. No. 43347.

1. **Contracts: Consideration.** While executory and before a breach, the terms of a written contract may be changed by a subsequent parol agreement; and such subsequent agreement requires no new consideration.
2. **Contracts.** In order for an agreement to be voidable by reason of economic duress, it must not only have been obtained by means of pressure brought to bear, but the resulting agreement must be unjust, unconscionable, or illegal.
3. **Pleadings.** An answer to a petition which fails to allege an essential ele-

ment of a claimed defense of economic duress or business coercion is subject to a demurrer.

4. **Contracts.** A party cannot maintain an action on a contract without a prior substantial compliance on its part.
5. **Contracts: Negligence.** A right to recover on a contract does not obtain when the party seeking to recover has performed its obligations in a negligent manner.
6. **Contracts: Substantial Performance.** A party to whom performance is owed should receive at least approximately what it bargained for.
7. **Contracts: Substantial Performance: Words and Phrases.** "Substantial performance" is a relative term and whether it exists or not is a question to be determined in each case with reference to the existing facts and circumstances.
8. **Pleadings: Evidence.** If an answer properly pleads a defense, it is error to prohibit a defendant from offering evidence in support thereof.
9. **Prejudgment Interest.** Where the amount of a claim is liquidated, compensation in the form of prejudgment interest is allowed as a matter of right.
10. ____. A claim is liquidated if the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance upon opinion or discretion.

Appeal from the District Court for Douglas County: KEITH HOWARD, Judge. Reversed and remanded with directions.

Warren S. Zwieback and Thomas F. Flaherty of Zwieback, Brady & Kasher, P.C., for appellant.

Frank F. Pospishil and Harvey B. Cooper of Abrahams, Kaslow & Cassman for appellee.

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

HASTINGS, J.

The plaintiff, First Data Resources, Inc. (FDR), is a computer data processing organization which furnished computer services to Omaha Steaks International, Inc. (OSI), an organization which sold and shipped gourmet meats to various customers. FDR brought this action in the District Court for Douglas County to recover for its services claimed to have been rendered under the terms of a written contract as amended. OSI in its answer claimed the invalidity of the contract amendment by

reason of economic duress. It also alleged the failure of the plaintiff to perform required services and deliver necessary materials in a careful, diligent, and workmanlike manner, and counterclaimed for damages claimed to have resulted from such breach of contract. At the close of the plaintiff's case, and before the defendant had offered any evidence, FDR demurred ore tenus and moved to direct a verdict in its favor. After OSI, with leave of the court, dismissed its counterclaim, the trial court sustained both the demurrer and the motion and entered judgment in favor of FDR for $82,913.75, including $7,146.21 in prejudgment interest. This action OSI assigns as error on appeal. We reverse and remand.

On December 19, 1975, the parties entered into a written agreement whereby FDR agreed to furnish certain services and materials to OSI for which the latter was to pay the sum of $1.24 per "receiver" entered into the OSI processing system. Also, OSI was to pay certain charges for what the contract referred to as "Additional Services." The term of the agreement was for a period of 1 year from and after February 1, 1976, "after which period this Agreement shall remain in effect until terminated by either First Data or OSI upon ninety days prior written notice." On April 18, 1977, FDR wrote a letter to OSI advising that the pricing of FDR's services was unsatisfactory "and in accordance with the terms of our existing data processing Agreement, please consider this our notice to terminate our Agreement effective July 31, 1977." The letter went on to state that FDR wanted to continue offering services to OSI, but only if it could make a reasonable profit on such transactions. Therefore, FDR stated, if the business relationship was to stay in existence, a new agreement would have to be executed which would be effective August 1, 1977. FDR sent an additional letter dated April 28, 1977, in which a new rate of $1.92 per receiver was suggested.

By letter dated May 19, 1977, from OSI to FDR, OSI

stated that it accepted the offer of $1.92 "under extreme economic duress." The letter went on to say: "First Data Resources management knows very well that Omaha Steaks International cannot arrange for replacement of this service under such short notice. . . . Therefore, we reluctantly accept your offer of 18 May 1977 according to the terms of your letter of 18 May [sic] 1977." A "First Amendment to Agreement for Data Processing Services," containing the new terms, was executed by the parties on June 8, 1977, to be effective August 1, 1977. At OSI's request, this agreement was terminated and OSI ceased giving FDR any of its regular data processing business in January of 1978, although there were some winddown services that continued for several months.

In its amended petition FDR alleged the execution of the two agreements previously mentioned and claimed performance on its part in accordance with the amended agreement, a request for payment of services rendered to OSI until the date of termination, and a refusal on the part of OSI to make payment in accordance with the invoices submitted. By its second amended answer and counterclaim, OSI admitted the execution of the agreements. However, it claimed that it executed the "First Amendment to Agreement . . . for the sole reason that Plaintiff would not live up to its obligation under the agreement dated December 19, 1975, in that Plaintiff knew by reason of the Plaintiff's intimate association with the Defendant that the Defendant could not replace the Plaintiff's services within the time during which the Plaintiff threatened to cease rendering such services and the Plaintiff further knew that without Plaintiff's services, Defendant could not conduct its business, but Plaintiff nevertheless threatened to terminate its services and thereby forced Defendant to execute the . . . Agreement . . . such that the . . . Agreement is not binding on Defendant." OSI further alleged that such actions on the part of FDR in obtaining the execution of such agreement constituted the use of eco-

nomic duress by FDR. OSI then claimed that FDR failed to perform its part of the agreement in a workmanlike manner in that it negligently and carelessly caused erroneous worksheets and shipping instructions and duplicate shipping labels to be issued to OSI, resulting in duplicate orders being filled by OSI at a cost to OSI of $28,000 and loss of OSI employees' time of $4,500. Finally, OSI incorporated all of the allegations of its answer into what it called a counterclaim and requested damages in the amount of $32,500.

In sustaining the demurrer ore tenus and the motion for a directed verdict, the trial court reasoned that once the defendant dismissed its counterclaim based upon FDR's alleged negligent performance of the terms of the agreement, OSI had abandoned that defense, leaving only the defense of economic coercion. In examining the defendant's amended answer the court decided as a matter of law that the factual allegations, including admissions of fact contained therein, did not fit our requirements to plead a case of economic duress or coercion. Therefore, because the plaintiff had made out a prima facie case and the defendant was left without any affirmative defense, the trial court reasoned that FDR was entitled to judgment as a matter of law.

Perhaps the leading and most definitive case on the subject of business compulsion or economic duress is *Carpenter Paper Co. v. Kearney Hub Pub. Co.*, 163 Neb. 145, 78 N.W.2d 80 (1956). This was a case in which the facts were strikingly similar to those of the instant case. The parties had entered into a contract in 1942 whereby the plaintiff was to furnish newsprint at a certain price. The contract was for 1 year, renewable from year to year unless canceled in writing by either party. In November of 1947 an agreement was entered into by the parties raising the price per ton for newsprint delivered. The suit spawning the appeal was for newsprint sold and delivered in March of 1954. The defendant insisted that it should only be charged on the 1942 contract basis, claiming that it had gone along with the 1947

change "only because he had no other choice since he had to have newsprint." *Id.* at 150, 78 N.W.2d at 83.

This court declared that the appellant was not under legal obligation to continue supplying newsprint at the price provided for in the original contract. We then stated: "'While executory and before a breach, the terms of a written contract may be changed by a subsequent parol agreement; and such subsequent agreement requires no new consideration.'" *Carpenter Paper Co.* at 150, 78 N.W.2d at 83. We then cited with approval *Newland v. Child*, 73 Idaho 530, 254 P.2d 1066 (1953), and declared that in order for an agreement to be voidable by reason of economic duress, it must not only have been obtained by means of pressure brought to bear, but the resulting agreement must be unjust, unconscionable, or illegal. We concluded by saying: "It [the plaintiff] only sought to handle it on a more profitable basis. This it had a perfect right to do if, in doing so, it did not make unjust demands upon appellee in view of all the circumstances then existing." *Carpenter Paper Co.* at 152, 78 N.W.2d at 84.

OSI seeks to avoid the rather obvious application of *Carpenter Paper Co.* to the facts of its own case by citing *McCubbin v. Buss*, 180 Neb. 624, 144 N.W.2d 175 (1966). There we stated: "If a person threatens to do what he has a legal right to do, his threat ordinarily does not constitute business coercion. This rule has been stated in a form which arguably implies that no threat is wrongful unless there would be an independent liability for the threatened act. [Citing *Carpenter* and others.] If the implication was made, the rule was overstated. An unjust and inequitable threat is wrongful, although the threatened act would not be a violation of duty in the sense of an independent actionable wrong in the law of crimes, torts, or contracts." *Id.* at 628, 144 N.W.2d at 178. Two comments would seem to deny OSI's reliance upon *McCubbin.* The threat involved was to fire the plaintiff if he did not sign an agreement rescinding a stock-purchase contract which he possessed. As this court

pointed out, the plaintiff yielded his rights in order to preserve his means of livelihood, the defendant bargained from strength, and the consideration for the discharge of the stock-purchase contract was inadequate. Secondly, *McCubbin* did not overrule *Carpenter* in suggesting that to be wrongful a threat need not constitute the basis for an independent actionable wrong. It did not disturb the ruling of *Carpenter* that the agreement, supposedly the result of pressure, must be either illegal, *unjust*, or *unconscionable*.

FDR was perfectly within its rights in electing to terminate the agreement according to its terms rather than continue to do business on what it considered to be a losing basis. OSI in no way alleges in its answer that the amended agreement produced a contract the terms of which were either illegal, unjust, or unconscionable. Having failed to allege an essential element of the defense of economic duress or business coercion, the answer was subject to demurrer, and the trial court was correct in sustaining the demurrer ore tenus.

The next question to be decided is whether or not the trial court was correct in directing a verdict in favor of FDR, thereby depriving OSI of any opportunity to present evidence in support of its alleged defense. FDR insists that such action was correct because the defendant's pleaded defense of economic coercion was dismissed by the court and the counterclaim was dismissed by OSI. Therefore, according to FDR, the defendant's answer contained only a general denial which was insufficient to allow the production of evidence in behalf of OSI in the face of the judicial admissions made by its counsel. However, an examination of the record reveals something substantially less than an unequivocal admission on the part of OSI that FDR had fully performed its obligations.

After moving for a directed verdict in favor of OSI because there "has been no proof which would permit the jury to find in favor of the Plaintiff," the defendant's lawyer was asked by the court: "Is it . . . conceded . . . al-

though you haven't put on any evidence on the point, that the . . . remainder of the charges on the invoices showing the total as this last witness has testified to have, in fact, been shown by evidence." Counsel replied that "[t]he charges have been shown." The court then continued: "What then exactly is your point then with respect to the remainder. I want to make sure I understood that." Mr. Zwieback replied: "*That it has not been shown that the services were rendered* or that the charges were fair and reasonable, Judge. The charges are on the invoices." (Emphasis supplied.) The court then asked: "I understand that the charges are in reference — relate to the agreement, the validity of which you contest. However, it is your point, just so I get this clear in my mind, the services which those charges represent have in fact been rendered." Mr. Zwieback replied: "*That is one of the points.* We are not talking about the twenty-four hundred" (emphasis supplied), to which the court replied: "No, that is separate," and counsel responded, "Okay, that is correct." As a matter of fact, it seems rather clear to us that defendant's counsel did deny that the services required by the contract were performed, both on the record and in the answer. Plaintiff cites *Midland-Ross Corp. v. Swartz*, 185 Neb. 484, 176 N.W.2d 735 (1970), for the proposition that following the establishment of a prima facie case by the plaintiff, the court should not permit the defendant to introduce evidence where the answer does not state a defense, but rather should direct a verdict for the plaintiff. It should not require the citation of authority to establish the converse of that rule, i.e., that if the answer does plead a defense it would be error to prohibit the defendant from offering evidence in support thereof. Nonperformance can be proved under a general denial. For that reason, the defendant should have been given the opportunity to present its evidence tending to establish nonperformance on the part of the plaintiff. For that reason, the judgment of the District Court is reversed and the cause is remanded for further proceedings consistent with

this opinion.

Because there is still a possibility of a judgment in favor of the plaintiff upon a retrial of this case, we should mention the error claimed by the defendant because of the awarding of prejudgment interest. This is clearly answered by *Abbott v. Abbott*, 188 Neb. 61, 195 N.W.2d 204 (1972). "Where the amount of a claim is liquidated, compensation in the form of prejudgment interest is allowed as a matter of right. 'A claim is liquidated if the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance upon opinion or discretion.'" *Id.* at 67, 195 N.W.2d at 209. The trial court applied the correct rule.

REVERSED AND REMANDED WITH DIRECTIONS.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 763, AFL-CIO, APPELLANT, V. OMAHA PUBLIC POWER DISTRICT, APPELLEE.

307 N.W. 2d 795

Filed July 2, 1981. No. 43367.

1. **Commission of Industrial Relations: Jurisdiction.** The Commission of Industrial Relations, as an administrative body, has no power or authority other than that specifically conferred by statute or by a construction necessary to accomplish the plain purpose of the act.
2. ____:____ Under the provisions of Neb. Rev. Stat. § 48-819 (Cum. Supp. 1980), the Commission of Industrial Relations has no authority to enforce its own orders, such orders only being enforceable in an appropriate proceeding in courts of this state.
3. **Commission of Industrial Relations: Contracts.** An order of the Commission of Industrial Relations constitutes a contract between the parties, enforceable as any other contract entered into by the parties.
4. **Commission of Industrial Relations: Prejudgment Interest.** An order of the Commission of Industrial Relations, once sued upon, may bear prejudgment interest, just as certain other contracts sued upon may bear prejudgment interest; however, such fact does not authorize the Com-

mission of Industrial Relations to order the payment of interest as a part of its order. Such authority lies solely with an appropriate court and comes into effect only when entered by that appropriate court, in the same manner to which any other suit upon a contract would be subject to the payment of prejudgment interest if and when ordered by an appropriate court.

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

M. H. Weinberg of Weinberg & Weinberg, P.C., for appellant.

Hird Stryker of Fraser, Stryker, Veach, Vaughn, Meusey, Olson & Boyer, P.C., for appellee.

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

KRIVOSHA, C.J.

The appellant, International Brotherhood of Electrical Workers Local 763, AFL-CIO (IBEW), appeals from an order entered by the District Court for Douglas County, Nebraska, sustaining a demurrer filed by the appellee, Omaha Public Power District (OPPD). The demurrer was filed in response to an amended petition filed by IBEW seeking declaratory relief pursuant to the Uniform Declaratory Judgments Act, Neb. Rev. Stat. §§ 25-21,149 to 25-21,164 (Reissue 1979). IBEW elected to stand on its amended petition and not plead further, and accordingly the District Court dismissed the action filed by IBEW. We affirm the judgment of the trial court in all respects.

IBEW was, at all times relevant to this action, the exclusive bargaining agent for the employees of OPPD. In 1978 an industrial dispute arose between the parties when they were unable to reach agreement on a new labor contract by the time the existing contract expired on May 31, 1978. The dispute was taken to the Commission of Industrial Relations (CIR) and was docketed there as case No. 270. Following a hearing before the CIR, the CIR entered an order dated No-

vember 28, 1978, purporting to resolve the dispute by making certain findings concerning wages, terms, and conditions of employment. Following the entry of the CIR's order on November 28, 1978, the parties worked together in an attempt to extrapolate wage rates from the wage determinations made by the CIR in its order. A supplemental order was entered by the CIR in case No. 270 on February 28, 1979. The purpose of that order was to resolve remaining disagreements over wage rates for one group of OPPD employees. Following this final order, neither party appealed case No. 270, and its order purportedly became final.

Notwithstanding the fact that a final order was entered by the CIR, the parties continued to dispute certain portions of the final order. On August 13, 1979, IBEW filed a document with the CIR, designated by IBEW as a "request for implementation and clarification of opinion and order." The CIR docketed the matter as a new action, assigning to it case No. 316. The principal purpose of the request filed by IBEW was to seek implementation of an apprenticeship program apparently required under the earlier CIR order in case No. 270, and for the further purpose of seeking an order from the CIR requiring OPPD to pay 8 percent interest on the CIR wage order entered in case No. 270 on November 28, 1978.

On November 7, 1979, the CIR entered an order in which it found that the rates of pay set forth in its earlier order of November 28, 1978, were first paid on paychecks dated May 4, 1979, covering the period April 21, 1979, to May 4, 1979. The payment for the period June 1, 1978, to April 21, 1979, was made May 18, 1979. No interest was added to the checks. In its order entered November 7, 1979, the CIR made some general reference to the matter of interest, writing in part: "Under the provisions of § 48-819, R.R.S. 1943, orders of this Commission have the same force and effect as like orders of the District Court. Section

45-103, R.R.S. 1943 provides that judgments of the District Court draw interest at 8% per annum. The statutory language is conclusive, and we conclude that our orders draw interest at the statutory rate.

"The Order of November 28, 1978 in Case No. 270, not having been appealed, is not subject to collateral attack. [Citations omitted.]

"We need not consider respondent's defenses, since they may be raised either by motion to quash or by separate action for injunction should petitioner decide to pursue the matter by transcript and execution under the first sentence of § 48-819, R.R.S. 1943.

"ORDERED, that the dispute herein is resolved as set forth above."

While the clear implication of the order entered by the CIR on November 7, 1979, in case No. 316, is that it found that interest should be paid by OPPD on the salaries due and owing, it does not so order the same to be done. Moreover, a reading of the order in case No. 316 makes it unclear as to whether the allegedly ordered interest is to run from November 28, 1978, when the CIR's order was first entered, or from the date of its supplemental order on February 28, 1979, or part from November 28, 1978, and part from February 28, 1979. The answer to that question obviously would depend upon the introduction of evidence as to what the facts of the matter were, even if the CIR had authority to order the payment of interest.

Following the entry of the order by the CIR in case No. 316 on November 7, 1979, IBEW filed an action in the District Court for Douglas County, Nebraska, on February 1, 1980, seeking declaratory relief. OPPD filed a demurrer which was thereafter sustained by the trial court.

IBEW then filed an amended petition in which it alleged the historical facts concerning the dispute in both case Nos. 270 and 316. It further alleged that: "On November 7, 1979, an Opinion and Order of the Commission of Industrial Relations was entered find-

ing in favor of the Petitioner [IBEW] that 8% interest was due and owing on the Order of November 28, 1978 in Case No. 270 and directing the Petitioner to seek enforcement in the District Court." A reading of the order of the CIR fails to disclose either a specific finding that interest was due on its order of November 28, 1978, or directing IBEW to seek enforcement. The only other allegation which begins to even approach an allegation of fact from which any controversy could be gleaned is paragraph 15 of IBEW's amended petition wherein it is alleged: "That on or about January 15, 1980, the Respondent refused to comply with the Order of the Commission of Industrial Relations entered in Case No. 316 on December 19, 1979 [sic]." As indicated earlier, a reading of the order entered by the CIR in case No. 316 fails to disclose what it is that the CIR did in fact order, other than to appear to make a declaration that interest is due on its orders from the date of their entry.

The trial court did not give any reason for its sustaining of the demurrer. We must therefore attempt to determine if there is no basis upon which the demurrer could have been sustained. Our examination of the transcript presented to us, which is the only matter presented to the court for review, discloses that indeed the amended petition failed to state facts sufficient to constitute a cause of action and thereby made it subject to a demurrer.

IBEW's argument appears to be that because the order of the CIR is declared by statute to be identical to an order of the District Court, interest is due from the date that the order of the CIR is entered. See Neb. Rev. Stat. § 48-819 (Cum. Supp. 1980).

Section 48-819, however, must be read in light of what this court has heretofore said concerning both the jurisdiction of the CIR and the effects of its orders. In *University Police Officers Union v. University of Nebraska*, 203 Neb. 4, 277 N.W.2d 529 (1979), we held that the CIR's powers are limited to those provided for in Neb.

Rev. Stat. § 48-818 (Cum. Supp. 1980). And recently, in *Transport Workers of America v. Transit Auth. of City of Omaha*, 205 Neb. 26, 30, 286 N.W.2d 102, 105 (1979), we held that the CIR, as an administrative body, "has no power or authority other than that specifically conferred by statute or by a construction necessary to accomplish the plain purpose of the act." We further held in *Transport Workers of America v. Transit Auth. of City of Omaha, supra*: "The authority of the Commission of Industrial Relations is carefully circumscribed. Its procedures are prescribed by statute. Its jurisdiction is clearly defined and is limited to what are clearly legislative concerns." *Id.* at 30-31, 286 N.W.2d at 105.

"That the authority of the CIR is limited to disputes between a public employer and a public employee absent an agreement is made even clearer when we examine the provisions of sections 48-818 and 48-819, R.R.S. 1943. Section 48-818 specifically limits the findings and orders of the CIR to establishing or altering 'the scale of wages, hours of labor, or conditions of employment, or any one or more of the same.' Specifically, section 48-818 provides: 'In making such findings and order or orders the Court of Industrial Relations shall establish rates of pay and conditions of employment which are comparable to the prevalent wage rates paid and conditions of employment maintained for the same or similar work of workers exhibiting like or similar skills under the same or similar working conditions.' . . .

"Likewise, under the provisions of section 48-819, R.R.S. 1943, the CIR has no authority to enforce its own orders, such orders only being enforceable in an appropriate proceeding in courts of this state." *Id.* at 32-33, 286 N.W.2d at 106.

The language of § 48-819 to the effect that orders of the CIR are binding on all parties and are deemed to be of the same force and effect as like orders entered by a District Court does not mean that orders entered by the

CIR are orders entered by the District Court. Rather, the language of the statute means that once an order is entered by the CIR, the rights of the parties are established and a suit need not be brought in the District Court to establish the rights of the parties. On the other hand, however, the language of § 48-819 makes it clear that a suit to enforce the rights and obligations of the parties must, indeed, be brought in the District Court, and an order of the CIR is not enforceable as a matter of right without the aid of the District Court as if the mere entry of the order by the CIR made it an order of the District Court for all legal purposes. Unless and until a District Court does in fact enter an order of enforcement, the order of the CIR constitutes a contract between the parties, enforceable as any other contract entered into by the parties.

While it may very well be true that an order of the CIR, once sued upon, may bear prejudgment interest, just as certain other contracts sued upon may bear prejudgment interest (see, *Fleming Realty & Ins., Inc. v. Evans*, 199 Neb. 440, 259 N.W.2d 604 (1977); *Frank McGill, Inc. v. Nucor Corp.*, 195 Neb. 448, 238 N.W.2d 894 (1976); *Mid States Engineering v. Rohde*, 182 Neb. 590, 156 N.W.2d 149 (1968)), such fact does not authorize the CIR to order the payment of interest as a part of its order. Such authority lies solely with an appropriate court and comes into effect only when entered by that appropriate court, in the same manner to which any other suit upon a contract would be subject to the payment of prejudgment interest if and when ordered by an appropriate court.

The recitation of fact by the CIR in its order of November 7, 1979, that orders of the CIR are to be treated in the same manner as judgments of a District Court could not and did not subject the "contract" created by the CIR for IBEW and OPPD on November 28, 1978, to the payment of interest at that time.

Moreover, an allegation by IBEW in its amended petition seeking declaratory relief to the effect that "on

or about January 15, 1980, the Respondent refused to comply with the Order of the Commission of Industrial Relations entered in Case No. 316 on December 19, 1979 [sic]," likewise failed to allege facts sufficient to constitute a cause of action, both by reason of the fact that the allegation was a mere conclusion and not an allegation of fact and by reason of the fact that the CIR's order purporting to require OPPD to pay interest at that time was beyond the authority of the CIR as presently prescribed by the applicable statutes. Having failed to allege facts upon which declaratory relief could be granted, the trial court was correct in sustaining the demurrer of OPPD.

The instant case once more points up the difficulty of attempting to operate under the current statutory provisions for resolving public employer-public employee disputes. Each case coming to this court makes those deficiencies even more apparent. Courts, however, are not designed to fill statutory gaps and should not seek to replace the legislative branch of government. The arguments made by counsel for IBEW before this court in this case are more properly for the Legislature, which should be determining how the deficiencies in the act could best be cured. The fact, however, that there are deficiencies which should be corrected is not sufficient to either state a cause of action or to entitle the parties to declaratory relief. The judgment of the trial court in sustaining the demurrer and dismissing the petition of IBEW is affirmed.

AFFIRMED.

CLINTON and BRODKEY, JJ., concur in result.

BOSLAUGH, J., dissenting.

I am unable to join the opinion of the court because I believe it to be in error in several important respects.

The operative facts in this case, which are set out in the plaintiff's amended petition, are quite simple. The plaintiff is the bargaining agent for employees of the defendant. A labor dispute existed between the defend-

ant and its employees. A proceeding before the Commission of Industrial Relations resulted in an order fixing the wages for the defendant's employees for the period in dispute. A later order of the commission modified the first order. Neither party appealed from either order of the commission.

A dispute arose between the parties concerning the validity of the two orders of the commission. The plaintiff commenced this action to determine whether the orders were valid. The District Court sustained a demurrer to the petition, dismissed the petition, and this court affirmed. Our opinion, however, proceeds *to declare* the rights of the parties in regard to the interest provision in the commission's order. Thus, although holding that the plaintiff has no right to declaratory relief, this court grants declaratory relief.

The order fixing wages was effective in 1978. The defendant did not comply with the order until 1979. The amount due each employee for wages at the new rate was a debt which was liquidated and on which each employee could have recovered prejudgment interest in an action for the balance due. Whether this was a matter that properly should have been before the commission, the fact remains that the commission had jurisdiction of the parties, the matter related to wages in dispute, and no appeal was taken from the order. In the interest of judicial efficiency and practical resolution of minor disputes of this nature, I believe the better rule would be to hold that the parties were bound by the order of the commission.

Many of the difficulties referred to in the opinion of the court would be eliminated if this court would follow its earlier decisions. In *School Dist. of Seward Education Assn. v. School Dist. of Seward,* 188 Neb. 772, 778-79, 199 N.W.2d 752, 756-57 (1972), we said: "Article XV, section 9, Constitution of Nebraska, obviously was intended to be an exception to Article II of the Constitution. The language of the amendment, 'Laws may be enacted providing for the investigation, submission

and determination of controversies,' coupled with the designation 'An Industrial Commission,' indicates a commission with administrative powers. The last sentence providing for appeals from its *final orders* and *judgments* means a commission with some judicial powers to determine controversies. The report of the joint committee that it was authorizing a commission with combined administrative, legislative, and judicial powers clearly indicates the type of commission or agency the Constitutional Convention was authorizing. In this respect, it is in the same category as Article IV, section 20, which created the Railway Commission. We have heretofore held that the Railway Commission has legislative, executive, and judicial powers as an exception to Article II. See, In re Lincoln Traction Co. (1919), 103 Neb. 229, 171 N.W. 192; Swanson v. Sorensen (1967), 181 Neb. 312, 148 N.W.2d 197. The same is true with the Court of Industrial Relations. In adopting the constitutional provision authorizing an Industrial Commission, it was made an independent part of the Constitution of Nebraska, and not as an amendment to Article II."

It is irrelevant to say that the Legislature could have established the commission independently of constitutional authorization. The fact is the commission was established pursuant to the enabling provision in the Constitution. Neb. Rev. Stat. §§ 48-802, 48-803 (Reissue 1978). Although the jurisdiction of the commission is necessarily limited to resolving matters related to labor disputes, I believe the better rule is that the commission exercises all three functions of government in resolving the disputes within that area which are brought before it.

McCOWN, J., joins in this dissent.

JANET F. LEE, SPECIAL ADMINISTRATRIX OF THE ESTATE OF DUANE LEE, DECEASED, APPELLANT, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLEE.

307 N.W.2d 800

Filed July 2, 1981. No. 43385.

1. **Political Subdivisions Tort Claims Act: Appeal and Error.** In a proceeding brought under the Political Subdivisions Tort Claims Act, the findings of fact by the trial court will not be overturned unless clearly wrong.
2. **Emergency Vehicles.** The driver of an emergency vehicle has a duty not to drive in reckless disregard for the safety of others.
3. ——. The provisions of Neb. Rev. Stat. § 39-608 (Reissue 1978) shall not relieve the driver of an emergency vehicle from the duty to drive with due regard for the safety of all persons, nor shall such provisions protect such driver from the consequences of his reckless disregard for the safety of others.
4. ——. A police officer pursuing a traffic violator is required to observe the care which a reasonably prudent man would exercise in the discharge of official duties of a like nature under like circumstances.
5. **Judgments: Evidence.** In determining the sufficiency of the evidence to sustain a judgment, it must be considered in the light most favorable to the successful party, every controverted fact must be resolved in his or her favor, and he or she is entitled to the benefit of every inference that can reasonably be deduced from the evidence.

Appeal from the District Court for Douglas County: KEITH HOWARD, Judge. Affirmed.

Paul E. Watts, Gerald E. Moran, Mark S. Trustin, and Larry R. Taylor of Watts & Moran for appellant.

Herbert M. Fitle, Omaha City Attorney, James E. Fellows, and Patrick W. Kennison for appellee.

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

WHITE, J.

Appellant, Janet F. Lee, administratrix of the estate of Duane Lee, appeals from a judgment of the District Court for Douglas County, Nebraska, in favor of the City of Omaha in this wrongful death action. Appellant's decedent was killed on May 23, 1976, when the

automobile he was driving was struck by a van driven by Terry L. Recek at the intersection of 20th and J Streets in Omaha, Nebraska. Recek at the time was being pursued at high speeds by officers of the Omaha Police Department. On May 16, 1977, appellant filed a claim against the City of Omaha pursuant to the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1977). The claim was denied by the city on October 24, 1977. On March 23, 1978, appellant withdrew her claim and subsequently filed this action against the City of Omaha and Officers Michael A. O'Keefe, R. Scott Hillabrand, and Howard J. Lawler, alleging that negligence in conducting and in failing to break off the chase before Recek's vehicle collided with Mr. Lee's vehicle was the proximate cause of Mr. Lee's death. After a bench trial on the merits, the District Court found that the officers were guilty of no negligence and entered judgment for the appellee. Appellant assigns this finding as error on appeal. We affirm.

The high-speed chase here involved began at approximately 8:40 p.m. on May 23, 1976, when Officers Hillabrand and Lawler, who were on their dinner break at a fast-food restaurant on 24th between F and G Streets in South Omaha, observed a blue and white van with license plates 59 Comm. 294 which was parked next door at a bar and package liquor store. Officer Hillabrand had last seen those plates on a different van belonging to Terry Recek whose operator's license had been impounded for 30 days by Omaha Municipal Court Judge Cropper on April 29, 1976. The officers then observed a person leave the liquor store and enter the van through the passenger door. Although there is some dispute on the point, the evidence shows that Officer Hillabrand, while still in the restaurant, radioed to Officer O'Keefe to come to the location and "check" this van for "a party" driving on a suspended license. Officer O'Keefe testified that when he received the call from Hillabrand, the name Terry Recek "popped right in my

head" and he proceeded toward the area. In the interim, Hillabrand and Lawler had returned to their patrol car and began following the van after its driver left the liquor store, first going south on 24th Street and then turning west on G Street. On 25th between F and G Streets, the officers used the public address unit in their vehicle to request that Recek pull over and stop, and at that point Recek increased his speed. The officers began pursuing Recek and pursued him back and forth across an approximately 10-block area of South Omaha.

When the chase reached 24th and E Streets, Officer O'Keefe appeared on the scene. He testified that he positively identified the driver of the fleeing van as Recek at that time. For the duration of the chase, all the vehicles involved ignored stops signs and traffic signals, although the officers testified that they slowed at all intersections, drove the wrong way on at least one one-way street, and exceeded the posted speed limit of 35 miles per hour by at least 10 miles per hour, and more at times. In addition, Officer O'Keefe collided with a legally parked vehicle as he left an alley in the course of the chase, and the evidence indicates that there was a near collision at the intersection of 24th and I Streets involving both police vehicles and another vehicle proceeding lawfully at that intersection. Both police vehicles used their sirens and flashing red lights at all times during the chase and continually broadcast the progress of the chase to the central dispatcher at police headquarters, as was standard procedure. Hillabrand and O'Keefe testified that it did not occur to them to cease pursuit, although each testified that they had formed the opinion that Recek would not stop even if the chase continued. After the officers pursued Recek for approximately 7 minutes, Recek ran a stop sign at the intersection of 20th and J Streets and struck the Lee vehicle which was being driven through the intersection. Mr. Lee was killed immediately. Following the collision, Recek fled on foot for a short distance until police caught him. Recek subsequently pled guilty to a

charge of motor vehicle homicide and was sentenced to 1 to 2 years in prison.

Prior to May 23, 1976, Recek had been involved in several incidents with Omaha police in South Omaha, from which it can be concluded that he had a propensity to run from the police. Two weeks prior to this chase Hillabrand and Lawler had engaged in another chase with Recek in the area, but he escaped them after a few blocks. In February 1976 O'Keefe had chased Recek for a distance of 4 or 5 blocks. That chase had resulted in Recek's arrest for a moving violation, disorderly conduct, and improper display of plates. There was additional evidence of other encounters between Omaha police and Recek which indicated a propensity on Recek's part to bait police and then engage them in a chase.

On appeal, appellant contends that, armed with this knowledge of Recek's encounters with police in the past, it was negligence for the police officers to begin the chase since, at the time Hillabrand and Lawler began the chase, Recek was committing no moving violations and it would have been a simple matter for them to later cite him for driving while his operator's license was impounded. Appellant further contends that after Officer O'Keefe positively identified the driver of the fleeing van as Recek, it was negligence on the part of the police to continue the chase since all officers had independently concluded that Recek would not stop. However, the trial court found as a fact that the officers were not negligent, either in beginning or continuing the chase; and in a proceeding brought under the Political Subdivisions Tort Claims Act, the findings of fact by the trial court will not be overturned unless clearly wrong. *Lindgren v. City of Gering*, 206 Neb. 360, 292 N.W.2d 921 (1980). Since the record does not permit us to hold that the finding of no negligence was clearly wrong, we must affirm.

There is no doubt that in Nebraska, and in other jurisdictions as well, the duty of law enforcement officers

to apprehend violators of the law must be balanced with a duty of care to the general public as well. As we stated in *Hammon v. Pedigo*, 173 Neb. 787, 796, 115 N.W.2d 222, 227 (1962): "[A] duty is imposed upon [the] driver [of an emergency vehicle] to operate the emergency vehicle in such a manner that he will not do so in reckless disregard to the safety of others." This duty in Nebraska is imposed by statute. Neb. Rev. Stat. § 39-608 (Reissue 1978) sets out a number of traffic privileges exercisable by emergency vehicles "when responding to an emergency call or when in the pursuit of an actual or suspected violator of the law . . . ." However, subsection (5) of the statute states: "The provisions of this section shall not relieve the driver of such emergency vehicle from the duty to drive with due regard for the safety of all persons, nor shall such provisions protect such driver from the consequences of his reckless disregard for the safety of others." Appellee itself has recognized this duty by stating in its standard operating procedure manual: "At no time shall emergency driving conditions necessitate any unsafe driving practices. All speed shall be reasonable and proper.

. . . .

"All pursuits shall be terminated when the risks outweigh the desirability of apprehension.

. . . .

". . . *Driving of the police vehicle under all levels of operation . . . does not exempt the driver from the consequence of reckless disregard for the safety of others.*" Therefore, appellant is correct in her contention that the police owed a duty of due care under the circumstances to persons in the class of persons which included the decedent.

As stated in *Hammon v. Pedigo, supra* at 799, 115 N.W.2d at 228, a police officer pursuing a traffic violator "is required to observe the care which a reasonably prudent man would exercise in the discharge of official duties of a like nature under like circumstances."

The question then becomes whether or not that duty

to appellant's decedent was breached by the officers in this case. The weight of authority holds that this is a question to be decided by the finder of fact. In an action brought under the Political Subdivisions Tort Claims Act, §§ 23-2401 et seq., the factfinding task belongs to the trial court, § 23-2406, and the findings of a District Court in proceedings under the act will not be disturbed on appeal unless they are clearly wrong. *Lindgren v. City of Gering, supra.*

In determining the sufficiency of the evidence to sustain a judgment, it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in his favor and he is entitled to the benefit of every inference that can reasonably be deduced from the evidence. *Daniels v. Andersen,* 195 Neb. 95, 237 N.W.2d 397 (1975). Viewed by this standard, we cannot say that the record discloses that the findings of the trial court in this case were *clearly* wrong.

It is, of course, tragic that an innocent third party lost his life as the result of a police chase of an offender who, at the time the chase began, was committing no moving traffic violations and whose only offense at the time he was observed by police was driving while his operator's license was under impoundment. However, the trial court could have believed, from the record, that at the time Officers Hillabrand and Lawler observed the van at the liquor store just prior to the chase, they had not positively identified the driver as Mr. Recek, and, thus, were not certain that the driver would engage them in a chase when they attempted to stop him. By the time Officer O'Keefe joined in the pursuit and positively identified Recek, Recek was then committing or had immediately before committed numerous moving violations. The trial court could have inferred, from the record, that given the light traffic conditions in the area at that time on a Sunday evening, the desirability of apprehension of Recek outweighed the risk of pursuit and that all the officers involved had so concluded. It is

undisputed that both patrol cars used their sirens and revolving red lights during the entire pursuit; and from the testimony, the trial court could have believed that the police vehicles slowed at all intersections and that their speeds were reasonable and proper under the circumstances. It must be remembered that foresight, not hindsight, is the standard by which negligence is determined, and that even an action which in retrospect turns out to have been ill-advised may still have been reasonable under all the circumstances.

Under the standard of review applicable to actions of this kind, we hold that the trial court's findings, on this record, are not clearly wrong and affirm the judgment of the District Court in favor of the appellee.

AFFIRMED.

DIX LATHROP, APPELLANT, V.
JAMES MCBRIDE, APPELLEE.

307 N.W.2d 804

Filed July 2, 1981. No. 43410.

1. **Libel and Slander: Limitations of Actions.** An action for slander must be brought within 1 year from the date the cause of action accrues.
2. ____:____. An action for slander accrues at the time of publication.
3. ____:____. A slander is published when the words are spoken and understood by a third person to pertain to the person slandered.
4. ____:____. Ignorance of the publication or of the evidence probative of the plaintiff's claim does not postpone the operation of the statute of limitations.

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

Noren & Burns for appellant.

Whitney, Newman & Mersch and Baylor, Evnen, Curtiss, Grimit & Witt for appellee.

Heard before BOSLAUGH, CLINTON, and BRODKEY,

JJ., and BURKHARD and WOLF, District Judges.

CLINTON, J.

This is an action by the plaintiff Lathrop against the defendant McBride for damages allegedly caused by defamatory oral statements claimed to have been made by McBride about the plaintiff on or about August 18, 1977.

The plaintiff's petition was filed on March 9, 1979. It alleged that on June 6, 1977, the defendant was one of the five members of the Board of Educational Lands and Funds of the State of Nebraska; that about that date the plaintiff submitted to the board an application for employment as "fieldman-appraiser" to be located at Ogallala, Nebraska; that on August 18, 1977, the plaintiff was interviewed by the board for the position for which he had applied; and that by letter dated August 24, 1977, he was notified that the position was not offered to him. It further alleged that on August 29, 1977, the plaintiff traveled to the residence of the chairman of the board and made inquiry of him as to why he had not been hired. He was then told by the chairman that the *defendant McBride* "had told him (Mr. Allington) and the other board members that defendant had obtained and received information of a derogatory nature from a former employer of the plaintiff, the Farmers Home Administration, and for this reason plaintiff had not been hired for said position by said board." It alleged that he was unable to obtain from the chairman either "the specific source or the specific contents of said derogatory information allegedly received by defendant from the Farmers Home Administration."

A large part of the petition is given to allegations of the various efforts of the plaintiff, continuing from August 30, 1977, until September 13, 1978, to secure the above items of information. It then alleges that on the latter date the plaintiff discovered that the source of the information was one Dwight Theobald,

his supervisor while employed by the Farmers Home Administration, and that the nature of the derogatory information was the plaintiff's alleged inability to get along with and communicate with people, and his inability to take supervision and to deal with the public. It then alleged that the statements made by the defendant were false; that they were made with actual malice and reckless disregard for the truth; and that, as a proximate result of the slander, the plaintiff did not obtain the job for which he had applied and for which he was qualified and would otherwise have received.

The defendant's amended answer alleged, among other defenses, that statements made by the defendant were true, that they were privileged, and that the cause of action was barred by the statute of limitations.

The reply of the plaintiff alleged "that Defendant and others did everything possible to conceal the source and contents of the defamatory statement, and that Plaintiff did not know or become aware of the material facts necessary for the accrual of this cause of action until September 13, 1978."

The defendant filed a motion for summary judgment, and at the hearing thereon there was received the depositions of Mr. Theobald and both of the parties to this action, as well as certain affidavits. Also offered by the plaintiff, but refused by the court, were proceedings of a hearing before the Department of Labor in which the Board of Educational Lands and Funds was defendant, based upon the plaintiff's claim that he was denied the position in question because of the refusal to grant him a veteran's preference as required by law.

The trial court granted the motion for summary judgment on the ground that the cause was barred by the statute of limitations.

The plaintiff appeals to this court and makes the following assignments of error: (1) The trial court erred in refusing to receive exhibits 4 and 4a and

exhibit 3, all of which are or pertain to the proceedings before the Commissioner of Labor; (2) The trial court erred in holding the cause was barred by the statute of limitations; and (3) The court erred in granting the motion for summary judgment because there were material questions of disputed fact.

We affirm on the grounds that the undisputed facts show that the cause of action is barred by the statute of limitations. Neb. Rev. Stat. § 25-208 (Reissue 1979).

Section 25-208 provides that actions for libel, slander, and certain other causes of action must be brought within 1 year. This court and, as far as we have been able to ascertain, all other courts have held that a cause of action for slander or libel accrues on the date of publication of the defamatory matter. *Patterson v. Renstrom*, 188 Neb. 78, 195 N.W.2d 193 (1972); *Tennyson v. Werthman*, 167 Neb. 208, 92 N.W.2d 559 (1958); *Reller v. Ankeny*, 160 Neb. 47, 68 N.W.2d 686 (1955). In the case of slander, the publication takes place when the words are spoken and understood by a third person to pertain to the person slandered. 53 C.J.S. *Libel and Slander* § 82 (1948). Ignorance of the publication or of the evidence probative of the plaintiff's claim does not postpone the operation of the statute. *Patterson v. Renstrom, supra; Grist v. The Upjohn Company*, 1 Mich. App. 72, 134 N.W.2d 358 (1965); *Brown v. Chicago, Rock Island & Pacific Railroad Co.*, 323 F.2d 420 (8th Cir. 1963); *Hartman v. Time*, 64 F. Supp. 671 (E.D. Pa. 1946). Although there are exceptions, the above is the general rule applying to many types of causes of action. *Grand Island School Dist. #2 v. Celotex Corp.*, 203 Neb. 559, 279 N.W.2d 603 (1979).

The plaintiff, in his brief, argues that there is evidence in the record which tends to show the defendant fraudulently concealed facts necessary to the "accrual" of the cause of action for slander and that the statute did not begin to run until he discovered

those facts on September 13, 1978. He relies upon *Rucker v. Ward*, 131 Neb. 25, 267 N.W. 191 (1936), and a dictum in *Patterson v. Renstrom, supra.* In *Patterson* we said at 80, 195 N.W.2d at 194: "Here there is no allegation of fraud or fraudulent concealment. By analogy the statute of limitations under section 4 of the Clayton Act involves related issues. Under that statute mere ignorance of the facts constituting a cause of action, in the absence of the defendant's fraud, and mere ignorance of the evidence which would be probative of the plaintiff's claim, will not suffice to postpone the operation of the statute of limitations." In *Rucker* (described as an action for fraud) the fourth syllabus was: "'One who wrongfully conceals a material fact necessary to the accrual of a cause of action against him, and such concealment causes the opposite party to delay the filing of suit, cannot avail himself of the statutes of limitation as a defense.' *Liberty Nat. Bank v. Lewis*, 172 Okla. 103, 44 Pac. (2) 127."

The statement in *Rucker* is limited to wrongful concealment of a material fact necessary to the *accrual* of the cause of action. In that case the plaintiff was to be paid a certain sum of money by the defendant when the latter received it from a third party. The defendant, over a period of time, upon inquiry by the plaintiff, kept informing him that the money had not been received, when, in fact, it had been. In *Patterson* (although the question was not involved) we intimated that the statute of limitations on a cause for libel might not begin to run if there was a fraudulent concealment. The context in which that statement was made and the facts of that case indicate that we were referring to fraudulent concealment of the fact of the libel. As previously stated, in that case we said at 80, 195 N.W.2d at 194: "[M]ere ignorance of the evidence which would be probative of the plaintiff's claim, will not suffice to postpone the operation of the statute of limitations." Neither of the

principles on which the plaintiff relies is applicable here. In *Rucker* the defendant concealed the fact that the money had been received, i.e., that the cause had accrued. The statement in *Patterson*, upon which the plaintiff relies, is dictum and in any event not applicable to the facts before us.

In this case the record shows without any dispute that 11 days after the alleged publication the plaintiff knew that derogatory statements had been made about him, that the defendant was the one who had made them, and that was the stated reason he did not get the employment. He then knew that a cause of action had accrued. An action could then have been filed and discovery used to procure the evidential details. The record does not show, nor did the plaintiff plead in his reply, any fraudulent concealment. The record merely shows at most that the defendant and the board chairman refused to tell him what had been said or to disclose the source. This case comes within the principle that "mere ignorance of the evidence which would be probative of the plaintiff's claim" is not sufficient to toll the operation of the statute of limitations.

The trial court was correct in its ruling that the cause was barred by the statute of limitations. This makes it unnecessary to discuss the other assignments made by the plaintiff or to discuss the various other defenses raised by the defendant.

AFFIRMED.

JANEANE STANEK, APPELLEE, V. EDWARD JOHN SWIERCZEK AND MESSER'S AUTO BODY SUPPLY, INC., APPELLANTS.

307 N.W.2d 807

Filed July 2, 1981. No. 43414.

1. **Motor Vehicles: Negligence.** The sudden emergency rule cannot be successfully invoked by either party in a negligence case unless there is competent evidence to support a conclusion that a sudden emergency actually existed, and then it cannot be successfully invoked by one who has brought that emergency upon himself by his own acts or who has not used due care to avoid it.
2. ——:——. It is a general principle that it is negligence as a matter of law for a motorist to drive a motor vehicle on a public highway at such a rate of speed that it cannot be stopped or turned aside in time to avoid an obstruction discernible within the range of his vision ahead, and the rule applies to driving in the daytime when vision is obstructed by physical conditions.
3. **Negligence: Damages.** It is a fundamental principle of the law of damages that a person who suffers personal injury because of the negligence of another is entitled to recover for the reasonable value of medical care and expense incurred for the treatment of the injuries to the time of trial, as well as the cost of those reasonably certain to be incurred in the future.
4. **Damages: Insurance.** The cost of a general health policy may not be substituted for proof of past and future medical expenses.

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

Thomas A. Gleason of Boland, Mullin & Walsh for appellants.

Daniel G. Dolan of Dolan, Dinsmore & Davis for appellee.

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

CLINTON, J.

Plaintiff Stanek brought this action for personal injuries and property damage resulting from a collision which occurred on January 3, 1977, between a motor vehicle operated by her and one driven by the

defendant Swierczek in the course of his employment by the defendant Messer's Auto Body Supply, Inc. The trial court found as a matter of law that the defendants were guilty of negligence which was the proximate cause of the collision. It submitted to the jury the questions of proximate cause and the amount of damages. The jury returned a verdict in the sum of $13,445.

The defendants have appealed to this court and assign and argue that the trial court erred in the following respects: (1) In directing a verdict against the defendants on the issue of liability; (2) In refusing to instruct the jury on the doctrine of sudden emergency (NJI 3.09) as requested by the defendants; and (3) In failing to sustain the objections of the defendants to the introduction in evidence of the cost to the plaintiff of procuring a policy of health insurance after the accident, and in instructing the jury that it could consider such cost as an element of damage included in "[t]he reasonable cost of medical and hospital insurance incurred to date and reasonably expected to continue in the future," which proximately resulted from the negligence of the defendants.

We hold that the court properly found as a matter of law that the negligence of the defendants was the sole proximate cause of the collision and that the trial court was correct in refusing to instruct on the sudden emergency doctrine. We further hold that the court erred in permitting the jury to consider, as an element of damage, the cost of medical and hospital insurance procured after the accident. We reverse the judgment and remand the cause for retrial on the issue only of the amount of damages proximately caused by the defendants' negligence.

The facts of the accident are without significant dispute. The collision occurred on Railroad Avenue, just north of its intersection with Drexel Street in the city of Omaha. Railroad Avenue is a four-lane street. The plaintiff, driving in the southbound inside

lane of Railroad Avenue, stopped her car at the edge of the intersection and signaled a left-hand turn. She waited for oncoming traffic in the northbound lanes to clear in order to make that turn. She testified she had been waiting for about a minute when she was struck in the rear by the vehicle operated by Swierczek.

Swierczek's version of the accident was that he was proceeding south in the inside lane of traffic on Railroad Avenue, following a van at about two to four lengths. The van suddenly turned into the outside lane to go around the plaintiff's car. Swierczek then saw the plaintiff's car for the first time. He had not been able to see the plaintiff's car because the van's windows were dirty and he could not see through them. He testified he could not turn right because of traffic in the outside lane. He slammed on his brakes and slid on slush into the plaintiff's car. The photographs received in evidence indicate that damage to the plaintiff's car was severe.

We discuss the first two assignments together. The sudden emergency instruction which the defendants requested be given is as follows: "When a person by a sudden emergency which is not due to his own negligence is placed in a position of immediate danger and has insufficient time to determine with certainty the best course to pursue, he is not held to the same accuracy of judgment as is required under ordinary circumstances, and if he pursues a course of action to avoid an accident, such as an ordinary, prudent person placed in a similar position might choose, he is not guilty of negligence, even though he did not adopt the wisest choice." NJI 3.09. It is a general rule: "[S]ubject to exceptions not applicable to this case . . . it is negligence as a matter of law for a motorist to drive an automobile on a public highway at any time at a speed or in such manner that it cannot be stopped or its course changed in time to avoid a collision with an object or obstruction discernible within the range of vision in the direction he is traveling."

Stanley v. Ebmeier, 166 Neb. 716, 90 N.W.2d 290 (1958) (syllabus of the court). It is a general principle that it is negligence as a matter of law for a motorist to drive a motor vehicle on a public highway at such a rate of speed that it cannot be stopped or turned aside in time to avoid an obstruction discernible within the range of his vision ahead, and the rule applies to driving in the daytime when vision is obstructed by physical conditions. *Pool v. Romatzke*, 177 Neb. 870, 131 N.W. 2d 593 (1964).

"The emergency rule cannot be successfully invoked by either party in a negligence case unless there is competent evidence to support a conclusion that a sudden emergency actually existed, and then it cannot be successfully invoked by one who has brought that emergency upon himself by his own acts or who has not used due care to avoid it." *Davis v. Dennert*, 162 Neb. 65, 75 N.W.2d 112 (1956) (syllabus of the court). The sudden emergency rule is not applicable when the invoking party brings about the situation himself by a failure to exercise due care. *Stanley v. Ebmeier, supra; Ritchie v. Davidson*, 183 Neb. 94, 158 N.W.2d 275 (1968).

The obstruction of the defendant's view by the van was simply an existing condition of which the defendant was fully aware. The same may be said of the condition of the street. A driver, traveling on city streets carrying a considerable amount of traffic, should anticipate that a vehicle preceding him may change lanes and may be required to do so by the slowing or stopping of vehicles making lawful turns. There is no evidence that either plaintiff or the driver of the van was guilty of any negligence whatsoever. The presence and movement on the street of these vehicles under the circumstances shown by the evidence were simply conditions of which the defendant was aware or bound to anticipate. *Maurer v. Harper*, 207 Neb. 655, 300 N.W.2d 191 (1981), is distinguishable because there the evidence was in dispute, and the

cars in question were traveling on an interstate limited-access highway with no directly intersecting streets and no left turns were permitted. The court did not err in directing the verdict against the defendant on the issue of liability for the collision, or in refusing to instruct on the doctrine of sudden emergency.

We now turn to the third assignment of error. As a result of the collision, plaintiff suffered a whiplash-type injury to soft tissue. She was treated by her family physician. He prescribed medication, wet heat packs, and the use of a cervical collar. He saw plaintiff in his office on January 3, 1977, and several times thereafter over a period of a few months. He last saw her on February 29, 1980, in preparation for trial. Her condition gradually improved, although she was still having minimal symptoms at the time of trial which would grow worse after participating in athletic activities such as swimming. The doctor predicted that the symptoms would continue for quite a long length of time. No one could say for certain how long. She saw two other physicians. Their testimony was not presented. However, one prescribed a home cervical traction unit and the other gave her a book on care of the neck. He also prescribed certain exercises which she was still carrying out at the time of trial. Her family doctor testified that in the future the use of cervical traction could be appropriate. Her family doctor did not refer her to a specialist, nor did he recommend nor did she receive hospitalization. He did not feel that there was any permanent disability.

Plaintiff incurred medical and drug expense for the above-described services and equipment, but no proof was made of the amount.

At the time of the accident, plaintiff was a high school student and employed only part time. Five months after the accident, on June 1, 1977, plaintiff went to work for the United States National Bank. As

an employee of the bank, she was entitled, without physical examination or restriction, to coverage under the employer's group health policy at a cost of $5.10 per month. She elected not to take that coverage because she was still covered by her parents' family policy. In July of 1978 she applied for group coverage with her employer and was unable to obtain group coverage because she still had symptoms of her injury. She then procured, from the insurer which carried her employer's group policy, individual coverage which was the same as that in the group policy, at a cost of $49.52 per month. An underwriter for the insurer testified that a new employee was entitled to coverage under the group policy within 31 days of beginning employment without evidence of insurability or a health statement. "Late entrant[s]," i.e., those not choosing to take the insurance during the first 31 days of employment, were considered on an individual basis. Plaintiff would be eligible for group coverage 1 year after complete recovery, i.e., after she had not been treated for 1 year. She would become eligible for reconsideration on May 1, 1980.

The contents and coverage of the individual policy were not offered in evidence. In her brief, plaintiff says that she "asks for increased health insurance premiums to serve the purpose of *such a fund* in protecting her from the costs of continued medical care necessitated by her injuries." (Emphasis supplied.) The reference, "such a fund," refers to the case of *Niles v. City of San Rafael*, 42 Cal. App. 3d 230, 116 Cal. Rptr. 733 (1974), where the jury awarded $50,000 as a medical emergency fund in a $4,025,000 verdict. That case involved an 11-year-old quadraplegic with a life expectancy of 69.6 years, who would be completely disabled for life and therefore would be incapable of doing anything for himself. The amount of the verdict was challenged on appeal. The court, in holding the verdict reasonable, said at 241, 116 Cal. Rptr. at 739: "Respondents point *to evidence supporting*

the following composition of the verdict." (Emphasis supplied.) Included in the items described was the medical emergency fund.

Plaintiff asserts the following proposition of law: "A plaintiff whose future expenses for normal health insurance will be increased by reason of tortiously inflicted injury is entitled to recover his added expenses for health insurance from the tortfeasor." She cites various texts and case authorities for the proposition. We have examined them all and none support the general proposition. The cases cited include such factual situations as increased costs of a premature delivery over normal delivery where the premature birth was caused by the defendant's negligence, and added laundry expense because of bladder incontinence resulting from a negligently caused injury. None of the above cases are support for the proposition asserted.

It is a fundamental principle of the law of damages that a person who suffers personal injury because of the negligence of another is entitled to recover for the reasonable value of medical care and expense incurred for the treatment of the injuries incurred to the time of trial, as well as the cost of those reasonably certain to be incurred in the future. *Yount v. Seager*, 181 Neb. 665, 150 N.W.2d 245 (1967).

In this case the plaintiff seeks to substitute a different measure of damages and one which the evidence does not show with reasonable certainty bears any relationship whatever to the medical expense incurred or reasonably certain to be incurred in the future. We think we may take judicial notice of the fact that the general health policy covers a variety of ailments and injuries and offers a variety of benefits and that the cost thereof bears no relationship whatever to the cost of treating a specific injury. We have been cited no authority which holds the cost of a general health policy may be substituted for proof of past and future medical expenses. The record contains no proof of

any kind to show any correlation between the cost of the health insurance and medical expenses to be incurred by the plaintiff in the future.

The judgment is reversed and the cause remanded for a new trial on the damage issue only.

REVERSED AND REMANDED.

CHRIS D. MANZER, APPELLANT, V. CLIFFORD PENTICO, DOING BUSINESS AS PENTICO INSURANCE AGENCY, APPELLEE.

307 N.W.2d 812

Filed July 2, 1981. No. 43424.

1. **Insurance: Principal and Agent.** It is the duty of an insured to advise the agent as to the insurance he wants, including the limits of the policy to be issued.
2. **Summary Judgment.** Summary judgment shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law.

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

Curtiss & Baird for appellant.

Dennis E. Martin of Dwyer, O'Leary & Martin, P.C., for appellee.

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

MCCOWN, J.

Plaintiff brought this action for damages against the defendant insurance agent for the defendant's alleged failure to obtain insurance to cover plaintiff's custom farming operations. After the taking of depositions and filing of interrogatories the District Court sustained defendant's motion for summary judgment and dis-

missed plaintiff's petition.

Plaintiff's petition alleged that the defendant had breached an oral contract to obtain insurance to cover the plaintiff's custom farming operations, and also alleged that defendant had agreed to obtain such insurance but had negligently failed to do so. Defendant's answer denied the material allegations of plaintiff's petition, alleged that defendant had no knowledge that plaintiff was engaged in the custom farming business, and set forth various affirmative defenses.

The record shows that plaintiff operates his own 240-acre dairy farming operation, a farm implement business, and a custom farming business. The plaintiff first purchased casualty insurance coverage for his dairy farming operation from the defendant in 1969 and from that time on the defendant provided the plaintiff with insurance coverage for the 240-acre operation. Defendant knew that plaintiff was engaged in the farm implement business but the defendant did not handle the insurance for that business. The defendant testified that he had no knowledge or notice that plaintiff was engaged in the custom farming business.

On June 15, 1977, while performing custom farming operations, the plaintiff improperly sprayed a client's field with 2-4-D, causing damages determined to be approximately $10,000. The plaintiff submitted the claim to defendant under the farm liability policy issued to the plaintiff through the defendant. The insurer denied liability on the ground that the policy did not cover custom farming operations. The plaintiff then commenced this action against the defendant.

The evidence is undisputed that the defendant was never directly informed of plaintiff's custom farming operations. The evidence is also undisputed that the defendant never told the plaintiff that custom farming operations were covered under the farm liability policy. The plaintiff admitted that he could not remember specifically informing the defendant of the custom farming operations or requesting the defendant to

provide insurance coverage for those operations.

Following the hearing on defendant's motion for summary judgment the District Court found that there was no genuine issue of material fact and that defendant was entitled to judgment as a matter of law. The District Court sustained the motion for summary judgment and dismissed plaintiff's petition.

On appeal the plaintiff contends that there is an issue of fact as to whether the defendant had knowledge that plaintiff was engaged in custom farming operations. Plaintiff relies upon his own testimony that at some time before 1977 he told the defendant in a conversation that the plaintiff had fertilized a crop on the wrong land and the owner had been very angry with him because of the error. Although that conversation may have been material as to whether the defendant should have known that the plaintiff was engaged in custom farming operations, it was not material as to whether the plaintiff had ever requested insurance coverage for his custom farming business, or whether the defendant had ever agreed to provide such coverage.

The case of *Kenyon & Larsen v. Deyle*, 205 Neb. 209, 286 N.W.2d 759 (1980), is decisive of the case at bar. In that case we held that it is the duty of an insured to advise the agent as to the insurance he wants, including the limits of the policy to be issued. See, also, *Collegiate Mfg. Co. v. McDowell's Agency, Inc.*, 200 N.W.2d 854 (Iowa 1972).

Upon a motion for summary judgment the judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law. Neb. Rev. Stat. § 25-1332 (Reissue 1979).

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

AFFIRMED.

JEANETTE MACK, APPELLANT, V. DALE ELECTRONICS, INC., APPELLEE.

307 N.W.2d 814

Filed July 2, 1981. No. 43668.

1. **Workmen's Compensation: Proximate Cause.** The mere fact that one may become ill or experience pain during employment does not in and of itself prove that the employee is disabled as a result of an "accident" arising out of and in the course of employment, entitling the individual to compensation under the Nebraska Workmen's Compensation Act. In order to receive that compensation it is necessary that the employee establish that the difficulties which the employee is experiencing were caused by an "accident" as defined by the Workmen's Compensation Act.
2. **Workmen's Compensation: Evidence: Proof.** Unless the character of the injury is objective, that is, where its nature and effect are plainly apparent, then it is a subjective condition necessitating expert testimony.
3. ____:____:____. Where the claimed injuries are of such a character as to require skilled and professional persons to determine the cause and extent thereof, the question is one of science. Such a question must necessarily be determined from the testimony of skilled professional persons and cannot be determined from the testimony of unskilled witnesses having no scientific knowledge of such injuries. The employee must show by competent medical testimony a causal connection between the alleged injury, the employment, and the disability.

Appeal from the Nebraska Workmen's Compensation Court. Affirmed.

Larry R. Baumann for appellant.

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

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

KRIVOSHA, C.J.

The appellant, Jeanette Mack (Mack), appeals from an order entered by a three-judge panel of the Nebraska Workmen's Compensation Court which, on rehearing, denied to Mack any right of recovery and dismissed her petition for the reason she failed to provide medical evidence showing a causal connection between the alleged accident and the claimed dis-

ability. We have reviewed the record and have determined that the action of the three-judge panel in dismissing the petition was correct, and we therefore affirm.

The relevant facts are virtually without dispute. It appears that Mack was employed by the appellee, Dale Electronics, Inc. (Dale), and was performing her duties for Dale on October 4, 1978. Her duties included operating a coding machine which, in part, painted transistors. As part of her duties, Mack was to clean the machine near the end of her duty shift. In doing so, Mack was to lift a 5-gallon container of paint dissolver and pour it into a little canister on the coding machine which removed the paint in the machine. Mack maintains that on October 4, 1978, while lifting and pouring dissolver from the 5-gallon can into the little canister, she felt and heard her back snap and has since that time, as a result of the "snap," suffered pain, discomfort, and an inability to perform as she did before her alleged accident. The principal difficulty with her argument, however, is that she has been unable to produce any medical testimony which will connect the cause of her alleged difficulty with the claimed accident which she maintains occurred on October 4, 1978.

Mack has been to a number of physicians, including a general practitioner, an orthopedist, and a neurosurgeon. None of them were able to find any objective evidence of residual disability attributable to the accident in question. Likewise, they were unable to state with any degree of medical certainty that her claimed problems are in any way connected to her alleged accident on October 4, 1978.

Mack maintains that the production of such evidence is not necessary. She maintains that she is entitled to recover solely on the basis that she has produced evidence to show that before October 4, 1978, she felt well and was able to do everything, and that after October 4, 1978, she has had constant

pain and is unable to do anything. The difficulty with that argument is that it totally ignores the language of the Workmen's Compensation Act. Neb. Rev. Stat. § 48-101 (Reissue 1978) provides as follows: "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." (Emphasis supplied.)

Neb. Rev. Stat. § 48-151(2) (Reissue 1978) defines the word "accident" as follows: "The word accident as used in this act shall, unless a different meaning is clearly indicated by the context, be construed to mean an unexpected or unforeseen injury happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury. The claimant shall have a burden of proof to establish by a preponderance of the evidence that such unexpected or unforeseen injury *was in fact caused by the employment. There shall be no presumption from the mere occurrence of such unexpected or unforeseen injury that the injury was in fact caused by the employment.*" (Emphasis supplied.) The language of the statute is abundantly clear. The mere fact that one may become ill or experience pain during employment does not in and of itself prove that the employee is disabled as a result of an "accident" arising out of and in the course of employment, entitling the individual to compensation under the act. In order to receive that compensation it is necessary that the employee establish that the difficulties which the employee is experiencing were caused by an "accident" as defined by the Workmen's Compensation Act. In *Smith v. Stevens*, 173 Neb. 723, 725-26, 114 N.W.2d 724, 726 (1962), we said in part: "Plaintiff must show a causal connection between the accident suffered by him and the alleged disability."

Mack's reliance upon her testimony that before the pain experienced at work she could do everything, and after the pain she is disabled, absent objective evidence that an accident as defined by the act caused such disability, is misplaced. The evidence is insufficient even under a liberal construction of the Workmen's Compensation Act.

In *McCann v. Holy Sepulchre Cemetery Assn.*, 205 Neb. 444, 448, 288 N.W.2d 45, 48 (1980), we said: "[U]nless the character of the injury is objective, that is, where its nature and effect are plainly apparent, then it is a subjective condition necessitating expert testimony. [Citation omitted.] This is such a case requiring expert medical testimony to show the requisite causal connection between the injury and the claimed disability." And in *Eiting v. Godding*, 191 Neb. 88, 91-92, 214 N.W.2d 241, 244 (1974), we said: "Where the claimed injuries are of such a character as to require skilled and professional persons to determine the cause and extent thereof, the question is one of science. Such a question must necessarily be determined from the testimony of skilled professional persons and cannot be determined from the testimony of unskilled witnesses having no scientific knowledge of such injuries." The employee must show by competent medical testimony a causal connection between the alleged injury, the employment, and the disability.

Where, as here, Mack is unable to produce any medical testimony connecting her discomfort with anything which occurred during the course of her employment, including the event on October 4, 1978, she has simply failed to meet her burden under the act and cannot recover. That was the finding made by the three-judge panel of the Workmen's Compensation Court on rehearing. The finding of the Workmen's Compensation Court on rehearing may not be set aside on the basis of the record as we find it. In *McCann v. Holy Sepulchre Cemetery Assn.*, *supra* at 448-49, 288 N.W.2d at 48, we said: "The findings of fact made

by the Nebraska Workmen's Compensation Court on rehearing have the same force and effect as a jury verdict in a civil case, and such order may be reversed or set aside with respect to the evidence only where there is not sufficient evidence in the record to warrant the order or judgment. In testing the sufficiency of the evidence to support the findings, every controverted fact must be resolved in favor of the successful party and he should have the benefit of every inference that can be drawn therefrom. [Citations omitted.] Such findings on rehearing will not be set aside on appeal unless clearly wrong." In view of the fact that the record fails to disclose any evidence of causal connection, the judgment of the Workmen's Compensation Court must be affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WARREN R. WATTS, APPELLANT.

307 N.W.2d 816

Filed July 2, 1981. No. 43789.

1. **Search Warrants: Motor Vehicles.** Generally, less stringent warrant requirements have been applied to vehicles.
2. **Search and Seizure: Motor Vehicles.** One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects.
3. **Warrantless Searches: Motor Vehicles: Probable Cause.** The smell of marijuana, standing alone, is sufficient to furnish probable cause for the warrantless search of a motor vehicle where there is sufficient foundation as to the expertise of the officer making the search.
4. **Search and Seizure: Motor Vehicles: Probable Cause.** The finding of a quantity of suspected illicit drugs by an officer making a legitimate search of an automobile may serve to substantiate that officer's suspicions and furnish additional probable cause for him to make a complete search of the vehicle.
5. **Statutes: Arrests.** Neb. Rev. Stat. § 28-416(6)(a) (Reissue 1979) merely authorizes the issuance of citation in the case of certain violations and

does not prohibit a police officer from arresting the offender whenever otherwise authorized by law.

6. **Constitutional Law: Arrests: Search and Seizure.** The constitutionality of a search incident to an arrest does not depend on whether there is any indication that the person arrested possesses weapons or evidence. The fact of a lawful arrest, standing alone, authorizes a search.
7. **Search and Seizure.** Under certain circumstances, a furtive movement can produce the legal justification to search an automobile.

Appeal from the District Court for Keith County: HUGH STUART, Judge. Affirmed.

John P. Murphy of Ruff & Murphy for appellant.

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

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

HASTINGS, J.

The defendant, Warren R. Watts, a resident of Colorado, has appealed from the District Court for Keith County where he was convicted of the offense of possession of marijuana with the intent to distribute, deliver, or dispense, in violation of Neb. Rev. Stat. § 28-416(1)(a) (Reissue 1979). The defendant was found guilty by the court sitting without a jury, and was sentenced to a term of probation for 2 years. The defendant assigns as error the failure to sustain his motion to suppress evidence seized pursuant to a warrantless search of defendant's car. We affirm.

On April 13, 1980, Watts was stopped by State Trooper Byron Lane of the Nebraska State Patrol for exceeding the speed limit. Trooper Lane approached the driver's side of the vehicle where the window was rolled down, and obtained Watts' driver's license and a rental agreement showing the car to be rented to the defendant. At that time Lane detected the smell of burnt marijuana. Trooper Lane then issued a warning

for speeding to Watts and asked him if there was or had been any marijuana in the vehicle, to which Watts replied, "No." The trooper then told Watts that he had smelled marijuana and asked him if he could look in the vehicle. Watts did not consent to the search. Trooper Lane looked over the back seat and saw a clear plastic bag containing a small amount of marijuana in plain view in a cooler with the lid partially off. At that time the defendant was placed under arrest for possession of marijuana and advised of his *Miranda* rights.

Trooper Lane then asked Watts if he had the trunk key, to which Watts replied that he had had it that morning but he could not locate it at that time. Lane then did a pat-down search of Watts, and found the key to the trunk in one of defendant's socks. Lane opened the trunk of the vehicle and observed three large trash bags, each containing twenty 1-pound bags of marijuana.

The defendant's sole assignment of error is the trial court's refusal to suppress the evidence found pursuant to the search of the automobile.

The U.S. Supreme Court has recognized a distinction between the warrantless search and seizure of automobiles or other movable vehicles and the search of a home or office. "Generally, less stringent warrant requirements have been applied to vehicles." *Cardwell v. Lewis*, 417 U.S. 583, 589-90, 94 S. Ct. 2464, 41 L. Ed. 2d 325 (1974). The treatment of automobiles has been based in part on their inherent mobility, which often makes obtaining a warrant impractical.

"The answer lies in the diminished expectation of privacy which surrounds the automobile: 'One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. . . . It travels public thoroughfares where both its occupants and its contents are in plain view.' *Cardwell v. Lewis*, 417 U.S. 583, 590

(1974) (plurality opinion)." *United States v. Chadwick*, 433 U.S. 1, 12, 97 S. Ct. 2476, 53 L. Ed. 2d 538 (1977).

We have constantly held that the smell of marijuana, standing alone, is sufficient to furnish probable cause for the warrantless search of a motor vehicle where, as here, there was sufficient foundation as to the expertise of the officer. *State v. Daly*, 202 Neb. 217, 274 N.W.2d 557 (1979), and the cases cited therein. We have further held that the odor of burned marijuana coming from the driver's compartment of a truck was sufficient probable cause to search the truck. *State v. Ruzicka*, 202 Neb. 257, 274 N.W.2d 873 (1979).

The defendant argues that the state trooper may have had probable cause to search the interior of the car, but after finding the bag of marijuana in the cooler, he could search no further without independent reason to believe that there was marijuana in the trunk. For support, the defendant refers this court to *Wimberly v. Superior Court*, 16 Cal. 3d 557, 547 P.2d 417, 128 Cal. Rptr. 641 (1976); *Commonwealth v. White*, 374 Mass. 132, 371 N.E.2d 777 (1977); *State v. Patino*, 163 N.J. Super. 116, 394 A.2d 365 (1978); and others. The holdings in those cases to the contrary notwithstanding, we believe it just as logical to conclude that the finding of the small amount of marijuana in the passenger compartment, after being told by the defendant that none existed, simply served to substantiate the officer's suspicions and furnish additional probable cause to make a complete search of the automobile. Having found a quantity of illicit drugs in one part of the automobile does not sensibly suggest the probability that no more such substance is present.

However, we need not reach this issue in the case at bar. Following the lawful seizure of marijuana from the cooler, the officer had probable cause to and did in fact arrest the defendant. Contrary to the position taken by the defendant, § 28-416(6)(a) simply authorizes the issuance of a citation rather than an arrest. It does not detract from the peace officer's

general authority to "arrest and detain any person found violating *any law* of this state." (Emphasis supplied.) Neb. Rev. Stat. § 29-401 (Reissue 1979). Also, Neb. Rev. Stat. § 29-404.02 (Reissue 1979) authorizes a peace officer to arrest a person without a warrant if the officer has "reasonable cause to believe that such person has committed . . . (2) a misdemeanor, and the officer has reasonable cause to believe that such person . . . (c) may destroy or conceal evidence of the commission of such misdemeanor; or (d) has committed a misdemeanor in the presence of the officer." The arrest was lawful.

"The constitutionality of a search incident to an arrest does not depend on whether there is any indication that the person arrested possesses weapons or evidence. The fact of a lawful arrest, standing alone, authorizes a search." *Michigan v. DeFillippo*, 443 U.S. 31, 35, 99 S. Ct. 2627, 61 L. Ed. 2d 343 (1979). See, also, *Rawlings v. Kentucky*, 448 U.S. 98, 100 S. Ct. 2556, 65 L. Ed. 2d 633 (1980).

The search of the defendant revealed the key to his automobile trunk secreted in a sock. By this time, the officer had legitimate knowledge that the automobile contained marijuana; that the defendant had lied to the officer about that fact as well as his knowledge of the existence or location of the trunk key; and that the defendant had deliberately placed the trunk key in a place where he felt the officer would not be able to find it. At this point the officer certainly had probable cause to believe that more marijuana might be found in the trunk.

Under certain circumstances, a furtive movement can produce the legal justification to search an automobile. *State v. Zimmerman*, 23 N.C. App. 396, 209 S.E.2d 350 (1974). In that case, it was held that defendant's furtive attempt to conceal a house key in the front seat of his automobile was sufficient justification for search of the automobile where there was probable cause to believe that the existence

of such key would be evidence of the defendant's guilt. Here, similar surreptitious actions and evasive answers on the part of the defendant justified the questioned search. See, also, *State v. Booth*, 202 Neb. 692, 276 N.W.2d 673 (1979); Annot., 45 A.L.R.3d 581 (1972).

Finally, in *State v. Kretchmar*, 201 Neb. 308, 267 N.W.2d 740 (1978), reversed on other grounds at 203 Neb. 663, 280 N.W.2d 46 (1979), we approved a warrantless search of the trunk of defendant's automobile by an officer who smelled the odor of marijuana about the car and opened the trunk over the protestations and in spite of the physical opposition of the defendant.

The defendant's motion to suppress was correctly overruled, and the judgment of the District Court is affirmed.

AFFIRMED.

KRIVOSHA, C.J., MCCOWN, and WHITE, JJ., concur in result.

STATE OF NEBRASKA, APPELLEE, V. RICHARD E. CEMPER, APPELLANT.

307 N.W.2d 820

Filed July 2, 1981. No. 43809.

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. ____:____. A person has no legitimate expectation of privacy in an open field in which he has no personal ownership or possessory rights, and cannot claim the protection of the fourth amendment as to unreasonable searches and seizures.

Appeal from the District Court for Holt County:

HENRY F. REIMER, Judge. Affirmed.

Kirk E. Naylor, Jr., for appellant.

Paul L. Douglas, Attorney General, and Mark D. Starr for appellee.

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

MCCOWN, J.

The defendant was found guilty of the unlawful manufacture of a controlled substance in violation of Neb. Rev. Stat. § 28-416(1)(a) (Reissue 1979) and sentenced to imprisonment for a term of 3 years, fined $1,000, and given credit for jail time.

The defendant waived jury trial, and by stipulation of the parties the transcript from the preliminary hearing and the evidence and testimony introduced at the hearing on defendant's motion to suppress constituted the record at trial. The defendant objected to all the evidence based on the contention that the evidence was obtained in violation of the defendant's fourth amendment right to be free from unreasonable searches and seizures.

Sometime prior to August 28, 1979, Trooper Hayes of the Nebraska State Patrol had received information from a confidential informant whose information had previously been reliable that there was a cultivated marijuana patch near O'Neill, Nebraska. On August 28, 1979, the informant told Hayes that he had located the marijuana patch in an irrigated cornfield southeast of O'Neill, Nebraska. That night Hayes, accompanied by the informant, entered the cornfield involved here through an open gate adjacent to a county road. After penetrating the growing corn for approximately 175 yards they found what appeared to be a very large patch of growing marijuana in the middle of the cornfield. Hayes took a small sample of the plants and left.

The samples were later tested and found to be marijuana.

The cornfield is located on a quarter section of land on the west side of U.S. Highway 275 approximately 3½ miles southeast of O'Neill. The quarter section is owned by Cemper Land Company, a partnership consisting of several members of the family of the defendant. The portion of the property located nearest the highway is occupied and used primarily by Cemper Equipment Company, which is owned by Ron Cemper, a brother of the defendant. There are several buildings on the part of the property occupied by Cemper Equipment Company which are used daily for storage and repair of equipment.

Hilger Land Company was farming the cropland on a sharecrop basis for 1979 and performed the planting, cultivation, and subsequently the harvesting of the corn crop. Several Hilger brothers were involved in the operation but none of them were on the property during the times involved here.

The defendant was employed by Cemper Equipment Company as a welder. He testified that he had also been given responsibilities by Cemper Land Company in connection with the center pivot irrigation system and in applying fertilizer to the corn. The record does not indicate that the defendant had an ownership interest in Cemper Land Company, Cemper Equipment Company, or Hilger Land Company, or any personal possessory interest in the land except as an employee.

The cornfield is on the portion of the quarter section farthest away from Highway 275 and to the west of the property occupied and used by Cemper Equipment Company. A seldom-used country road is located on the west side of the quarter section, and there is a gate in the fence along that road which is used in connection with the farming operation. That gate was always left open and it is the gate through which Trooper Hayes and the informant went into the field. The entire field is enclosed by a barbed wire fence with two openings in

the fence on the east side of the property along Highway 275. At some time the property had been posted with no-trespassing signs but they had been shot off. No signs were posted at any of the times involved here.

The marijuana patch was located approximately in the center of the cornfield and approximately ⅛ of a mile west of the buildings of the Cemper Equipment Company. The growing marijuana was not visible from the borders of the property, from the buildings, nor from any location outside the cornfield due to the height of the growing corn. After August 28, 1979, Trooper Hayes made periodic observations of the property from the road and on September 18, 1979, again entered on the property with the informant and again observed the marijuana patch. On September 20, 1979, Hayes took a State Patrol investigator with him and showed him the marijuana patch. A full investigation followed, and on September 28, 29, and 30, and on October 2, the State Patrol conducted aerial surveillance of the property and took aerial photographs which are in evidence.

In the afternoon of October 3, 1979, an investigator of the State Patrol entered the property and hid in the corn near the marijuana patch. Thereafter three individuals, one of whom was the defendant, entered the marijuana patch and for approximately an hour picked and bundled the marijuana and the officer took photographs of the activity. When the three persons left the field they were arrested.

Jury trial was waived and the District Court found the defendant guilty as charged and sentenced him to imprisonment for a term of 3 years, fined him $1,000, and gave credit for jail time.

The sole issue on this appeal is whether Trooper Hayes' entry into the cornfield on August 28, 1979, constituted an unreasonable search within the meaning of the fourth amendment. The defendant asserts that he had a legitimate expectation of privacy in the invaded place and that the search was therefore illegal. The

State contends that under the "open fields doctrine" of *Hester v. United States*, 265 U.S. 57, 44 S. Ct. 445, 68 L. Ed. 898 (1924), the specific protection accorded by the fourth amendment to the people in their "persons, houses, papers, and effects" is not extended to the open fields and that the search here was not illegal.

The defendant asserts that the open fields doctrine focusing on property rights in an invaded place has no further validity since *Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967); *Rakas v. Illinois*, 439 U.S. 128, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978); and *Rawlings v. Kentucky*, 448 U.S. 98, 100 S. Ct. 2556, 65 L. Ed. 2d 633 (1980). Those cases reflect the holdings of the Supreme Court of the United States that 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. This court has already followed that mandate in at least two cases. See, *State v. Vicars*, 207 Neb. 325, 299 N.W.2d 421 (1980); *State v. Ohler*, 208 Neb. 742, 305 N.W.2d 637 (1981).

In the case now before us the critical question is, therefore, whether the defendant had a legitimate expectation of privacy in the marijuana patch in the middle of a cornfield under the circumstances disclosed by this record.

Following the decision in *Katz v. United States, supra*, some courts took the position that the *Katz* case had sounded the death knell of the open fields doctrine and had overruled *Hester* sub silentio. Other courts took the position that a straightforward application of *Hester* and the open fields doctrine was still proper. Nebraska adopted this position. See *State v. Poulson*, 194 Neb. 601, 234 N.W.2d 214 (1975). Still other courts took the view that as a per se exception to the fourth amendment the open fields doctrine had been substantially undermined by the doctrine that the fourth amendment pro-

tects people, not places. The open fields doctrine of *Hester* is viewed as merely an application of the principle that the fourth amendment protections do not apply where no reasonable expectation of privacy exists. Commentators on the subject have concluded that whichever of the approaches a particular court takes will seldom make any difference in terms of outcome. See, Lafave, Search and Seizure, A Treatise on the Fourth Amendment, § 2.4 at 334-35 (1978); Ringel, Searches and Seizures, Arrests and Convictions, § 8.4 (1980).

The original underpinnings of the open fields doctrine reflected the conclusion that it was unreasonable to conclude that objects placed in an open field would be safe from the prying eyes or hands of trespassers or other persons who might be present on the property. The open fields doctrine did not rest on ownership or possessory rights, but under the former emphasis on "place" there were still issues of standing which generally required rights of ownership or possession in the "place" in order to challenge a search. Although the focus on both of those issues of "place" and "standing" has now shifted to the person asserting the protection of the amendment, the use of property concepts in determining the presence or absence of the privacy interests protected by the fourth amendment has not been abandoned. See *Rakas v. Illinois, supra.*

In the case at bar the defendant asserts that he had a legitimate reasonable expectation of privacy in the middle of a cornfield which was owned by one company, of which he was an employee, and farmed by another company, with which he had no connection, in a rural area and on land on which no one resided. The field was enclosed by an ordinary barbed wire fence and the property was not posted against trespassers. At least one gate was always open. Although the marijuana was not visible from the borders of the property, it was clearly visible by aerial surveillance.

In the rural areas of this state it would be difficult to

find a landowner who would believe that no person would enter on his open field without permission. Hunters, fishermen, and other technical trespassers are so commonly expected in the rural areas of this state that a failure to post trespassing signs is regarded by many persons as almost an implied permission to enter. It is incomprehensible that an employee, who has no personal ownership or possessory interest in an open field, should have any legitimate expectation of privacy.

The fourth amendment protects persons but it does not protect them in every circumstance and in every place, public or private. Ownership and possessory rights in "places" are still important in determining whether or not a particular person has a legitimate expectation of privacy in a particular place. The open fields doctrine is not completely dead. Its reincarnated substance is still a vital part of the broader constitutional concept of freedom from unreasonable searches and seizures.

We hold that under the circumstances here the defendant had no legitimate expectation of privacy in an open field in which he had no personal ownership or possessory rights and therefore cannot claim the protection of the fourth amendment as to unreasonable searches and seizures.

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

AFFIRMED.

KRIVOSHA, C.J., BOSLAUGH, BRODKEY, WHITE, and HASTINGS, JJ., concur in result.

STATE OF NEBRASKA, APPELLEE, V. EARL ROSENBERRY, APPELLANT.

307 N.W.2d 823

Filed July 2, 1981. No. 44043.

Judgments: Sentences. A judgment denying probation and imposing a sentence within the limits prescribed by statute will not be disturbed in the absence of an abuse of discretion.

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

Luckey, Sipple & Hansen and Mark M. Sipple for appellant.

Paul L. Douglas, Attorney General, and Ruth Anne E. Galter for appellee.

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

BOSLAUGH, J.

The defendant was charged in an amended complaint filed in the county court with operating a motor vehicle while under the influence of alcoholic liquor, second offense. Upon a plea of guilty he was sentenced to 18 months' probation. The probation included a fine of $200, 30 days in jail after 6 months of probation, and 30 days in jail at the end of the probation period, but the court for good reason could waive all or any part of the jail sentences. The defendant was required to enter a 30-day inpatient treatment for alcoholism at his own expense. The order further provided the defendant's operator's license would be impounded for 1 year, but after the defendant had returned from inpatient treatment the court would consider driving privileges based on the defendant's performance at inpatient treatment.

The defendant did not accept the terms of the probation but appealed to the District Court. The

District Court remanded the cause to the county court on the ground there was no final order because the sentence of probation was a conditional order which had not been accepted by the defendant. The defendant did not appeal from the order of the District Court and there is no issue in this court concerning the order remanding the cause to the county court for further proceedings.

On November 12, 1980, the defendant was sentenced to 5 days in jail, fined $300, and his operator's license was revoked for a period of 1 year. The defendant again appealed to the District Court, where the sentence was affirmed. The defendant has now appealed to this court and contends that the sentence imposed was excessive and the trial court abused its discretion in failing to grant probation.

The offense to which the defendant pleaded guilty was a Class III misdemeanor with a maximum penalty of 3 months' imprisonment, a $500 fine, or both. Neb. Rev. Stat. § 39-669.07(2) (Reissue 1978); Neb. Rev. Stat. § 28-106(1) (Reissue 1979). A 1-year suspension of the operator's license is mandatory under the statute. The sentence of 5 days in jail with a fine of $300 was well within the statutory maximum.

The offense involved in this case was somewhat aggravated because it also involved leaving the scene of a property damage accident. On the night that the defendant was arrested he had been drinking at a tavern in Shelby, Nebraska. After leaving the tavern the defendant drove his pickup truck into the front of a beauty shop. He then backed away and left the scene of the accident. His offense in 1977 had also involved leaving the scene of a property damage accident.

On August 4, 1980, after the first sentencing hearing in county court, the defendant completed a 30-day inpatient treatment for alcoholism at the Veterans Hospital in Lincoln, Nebraska. Although the reports concerning that treatment do not appear in the record,

they were available to the county judge at the sentencing hearing on November 12, 1980. The record does indicate that the defendant participated only minimally in the discussion sessions and had attended "probably 8" Alcoholics Anonymous meetings after his discharge from the hospital. The defendant also admitted that on one occasion he had consumed a small quantity of beer. These were matters that the county court could consider and did consider in determining whether to place the defendant on probation.

The record does not show an abuse of discretion in failing to grant probation. The judgment is affirmed.

AFFIRMED.

KRIVOSHA, C.J., concurs in result.

JOHN R. DOYLE ET AL. V.
UNION INSURANCE COMPANY, A CORPORATION, ET AL.;
FIRST NATIONAL BANK & TRUST COMPANY OF LINCOLN,
A CORPORATION, APPELLEE, V.
WILLKIE, FARR & GALLAGHER, APPELLANT.

308 N.W.2d 322

Filed July 10, 1981. No. 43197.

1. **Attorney Fees.** An attorney's claim for professional services against persons sui juris, or against the property of such persons, must rest upon a contract of employment, express or implied, made with the person sought to be charged or with his agent.
2. **Pleadings: Words and Phrases.** The term "application" is a generic term which includes, but is not limited to, motions.
3. **Affidavits.** As a general rule, an affidavit is not admissible to establish facts material to the issue being tried.
4. **Trial: Evidence.** It is within the discretion of the District Court to take testimony orally for the determination of issues of fact arising upon motions, and not a right of either party to compel the adduction of such testimony.

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

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

Warren C. Johnson of Cline, Williams, Wright, Johnson & Oldfather for appellee First National.

M. J. Bruckner and W. Scott Davis of Marti, Dalton, Bruckner, O'Gara & Keating, P.C., for class.

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

BRODKEY, J.

This is the second appeal of the above-captioned case to this court. The general factual background of this litigation is set out in our first opinion in *Doyle v. Union Ins. Co.*, 202 Neb. 599, 277 N.W.2d 36 (1979), and will not be repeated here except as pertinent and necessary to understand the issues in this appeal.

This action involves the claim of Willkie, Farr & Gallagher, a New York law firm, for attorney fees allegedly performed for and on behalf of First National Bank & Trust Company of Lincoln, appellee in this appeal, the trustee under a certain trust agreement entered into on March 19, 1973, by and between the old Union Insurance Company (Mutual) and the new Union Insurance Company, a stock company, both of Lincoln, Nebraska, who are referred to in the trust agreement as grantors, and First National Bank & Trust Company of Lincoln, hereinafter referred to as Trustee, or First National. It appears that Willkie, Farr & Gallagher submitted to the Trustee a statement in the amount of $17,552.55 for professional services rendered to the trust during the years 1976 and 1977 on account of the claim by the Internal Revenue Service from the trust for tax payments in connection with the transfer of the assets of the old Union Insurance Company (Mutual) to the new Union Insurance Company (Stock). Willkie, Farr

& Gallagher successfully defended the tax claim by the Internal Revenue Service, and obtained a substantial reduction in the amount of the deficiency claimed. Upon receipt of the invoice of the law firm for such services, the Trustee, on November 30, 1979, filed in the original action in the District Court of Lancaster County what it entitled an "Application." In its application, First National alleged it was trustee for the tax escrow account held for the benefit of policyholders of Union Insurance Company (Mutual), and alleged the receipt of the statement for professional services above referred to from Willkie, Farr & Gallagher, and further alleged that the trustee had not in any manner retained Willkie, Farr & Gallagher to represent the Union Insurance Company (Mutual) policyholders and suggested that the court hold a hearing with reference to a claim of that law firm. The prayer of that application was as follows: "WHEREFORE, this Trustee prays that after due notice and hearing the Court determine whether the claim filed by Willkie, Farr & Gallagher as described above should be paid, and if so, the amount thereof and the party who should make payment, and for such other relief as is just and equitable in the premises."

Following a hearing held on December 18, 1979, the District Court entered its order finding, in material part, as follows: "The court finds that the claim of Willkie, Farr & Gallagher should be and hereby is denied and that all the amount in controversy shall be paid to the policyholders of Union Insurance Company (Mutual) pursuant to the terms of the order of distribution entered by this court." Willkie, Farr & Gallagher has appealed to this court from that order, alleging in its assignments of error: (1) That the trial court erred in denying its claim for attorney fees; and (2) That the trial court erred in refusing to admit in evidence the affidavit and attachments thereto of Jack H. Nusbaum, a member of that firm.

At this point, it will be helpful to examine the facts and background of the original action. *Doyle* originated as a class action suit filed on behalf of the policyholders of the old Union Insurance Company, a mutual company, against the directors of that company. In that action it was alleged that the directors had violated their fiduciary duty by selling the assets of Union (Mutual) to a newly created stock company, Union Insurance Company (Stock), for less than their real value. On appeal, this court affirmed the judgment of the District Court rendered against the directors after trial in the sum of $2,567,500 as damages, which amount was in addition to the $8,300,000 value placed on the dividend declared to the Union (Mutual) policyholders. *In that action, Willkie, Farr & Gallagher represented the defendant directors of Union (Mutual).*

As previously stated, on March 19, 1973, and prior to trial, a trust agreement was entered which created a tax escrow account for the benefit of the Union (Mutual) policyholders, pending a final determination as to the tax status of certain dividends. That trust agreement, dated March 19, 1973, provided that First National was to act as trustee of the account and was to hold the trust funds in escrow with authority to invest the trust assets on favorable terms until such time as the grantors received a final determination of the tax controversy. The grantors of the trust were Union (Mutual) as the original grantor until April 19, 1973, at which time it ceased to exist, and the new Union (Stock) was to succeed to the rights and liabilities of the old Union (Mutual). Specifically, the trust agreement provided, *inter alia*, as follows:

"THIRD: Dividend and Bulk Reinsurance Agreement. This trust agreement arises as a result of a Bulk Reinsurance Agreement which is attached hereto and incorporated herein. *The trust property is a dividend payable to policyholders* of Union Insurance Company (Mutual), dependent upon receipt of favorable ruling

from the Internal Revenue Service all or more fully set out in the Bulk Reinsurance Agreement attached hereto and incorporated herein.

"FIFTH: Termination of Trust. Upon receiving a final determination from the Internal Revenue Service the Grantors shall advise the Trustee of such determination and this trust agreement shall forthwith terminate and the trust property along with all gains arising therefrom of any nature whatsoever shall be returned to the grantors for distribution to the eligible policyholders of Union Insurance Company (Mutual) as they are defined in the attached Bulk Reinsurance Agreement; provided, however, that the Grantors may, with the specific written approval of the Director, Nebraska Department of Insurance, to [sic] terminate this trust upon 30 days notice to the Trustee." (Emphasis supplied).

On December 1, 1977, the U.S. Tax Court rendered its decision with regard to the tax dispute; and, as previously stated, on September 6, 1979, the appellant rendered its bill for attorney fees to First National, following which First National filed its "Application" in the District Court of Lancaster County.

In our original opinion in this matter, we stated: "Whatever the merits of the tax arguments with the Internal Revenue Service, that part of the tax escrow account remaining after final settlement with the Internal Revenue Service was Old Union's property, having arisen either from a refund of past income tax, or reserves for taxes which were not in fact payable. Furthermore, the bulk reinsurance contract specifically provided that the amount remaining would be paid to the policyholders of Old Union. The argument of the appellants on this item is ludicrous and merits no further discussion." *Doyle* at 623, 277 N.W.2d at 48.

Notwithstanding, the appellant contends on appeal that the trust has received a substantial benefit

from the services rendered before the tax court and that this court should impose a contract to prevent unjust enrichment on the part of the Trustee.

Under the terms of the trust agreement, the duties and authority granted to the Trustee were extremely limited. The Trustee was granted authority to invest the assets and the income in certificates of deposit and U.S. Treasury Notes as in the discretion of the Trustee would provide the highest rate of return. The Trustee was also obligated to render semiannual accounts to the grantors and to the director of the Nebraska Department of Insurance. Nowhere does the trust agreement grant authority to the Trustee to conduct any litigation or to retain counsel. Rather, the trust agreement states that upon the dissolution of Union (Mutual) on or about April 19, 1973, Union (Stock) would be deemed the successor grantor of the trust and succeed to all the assets, liabilities, rights, and obligations of the mutual company. It would appear that after the dissolution of Union (Mutual), the obligation to resolve the tax dispute fell to Union (Stock) as the remaining grantor through such counsel as it retained.

The trust agreement also explicitly provided that when the grantors received a final determination from the Internal Revenue Service, it was the responsibility of Union (Stock) as the surviving grantor to advise the Trustee of that determination. Thereafter, the trust agreement would terminate and the trust property would be returned to the grantor for distribution to eligible policyholders of Union (Mutual). It was also provided under the agreement that the Trustee would receive no compensation for its role as Trustee, and the authority as to expenditures was limited to reimbursement for actual expenses incurred. We note that when this agreement was made in 1973, the Nebraska Trustees' Powers Act had not been enacted and the Trustee was reduced to a stakeholder to invest the funds, pending a final determination by the

Internal Revenue Service.

At the hearing held in this matter on December 18, 1979, Robert Kahm, vice president and trust operations officer for First National, testified that the Trustee had not retained the appellant law firm to represent the trust in the action before the tax court. The record discloses that the Trustee executed powers of attorney for the tax years involved to the accounting firm of Touche Ross & Co., at the request of the grantor. No evidence was presented that this power was ever delegated to the appellant. The sole power of attorney given by the Trustee to the appellant pertains to an Internal Revenue Service audit of the trust fiduciary for the taxable year ending January 31, 1975, and does not pertain to the tax deficiency controversy before the tax court.

Under the terms of the trust agreement it is clearly contemplated that a resolution of the tax dispute was to be pursued by the grantors, with the Trustee acting as a mere escrow agent until a final determination by the tax court. Upon such determination, the agreement contemplates the return of the trust property to the grantor, who is required to distribute the trust property to the eligible policyholders of Union (Mutual). It would appear that the appellant firm was hired by the successor grantor, Union (Stock), pursuant to its obligation under the agreement. Any actions taken were those performed pursuant to instructions of the grantor; and nothing in the record indicates any conduct on the part of the Trustee which would lead the appellant to believe that payment for its legal services would be made from the trust assets, which by law belonged to the policyholders of Union (Mutual).

The appellant also urges this court to apply principles of quasi-contract in this case to prevent unjust enrichment on the part of the Trustee. A similar argument was rejected by this court in the case of *In re Estate of Kierstead*, 121 Neb. 423, 237 N.W. 299 (1931), in which case attorneys who represented

certain heirs of the estate sought to recover attorney fees from other heirs who were not represented by the attorneys but who had benefited as the result of a settlement procured by the attorneys. The District Court found for the intervenor attorneys and allowed the recovery of a limited fee. On appeal, this court reversed the holding of the trial court, stating: "'An attorney's claim for professional services against persons *sui juris*, or against the property of such persons, must rest upon a contract of employment, express or implied, made with the person sought to be charged or with his agent. No one can legally claim compensation for voluntary services to another, however beneficial they may be, especially where rendered without his knowledge or consent, nor for incidental benefits and advantages to one, flowing to him on account of services rendered to another by whom the attorney may have been employed. * * * So, where one of several parties, all of whom are equally interested in a cause, employs an attorney to conduct the case for him, and the benefit of such services from the nature of the case extends to all the other interested parties, the other parties, merely by standing by and accepting the benefit of such services without objection, do not become liable for the attorney's fees.'" *Id.* at 426, 237 N.W. at 300.

In the present case, it appears that the appellant performed legal services for the successor grantor under the trust agreement which indirectly benefited the policyholders of Union (Mutual). The plaintiff class was already represented by counsel; and the precedent and logic of *Kierstead* compels us to conclude that appellant is not entitled to attorney fees from the Trustee merely because it claims to have benefited the policyholders of Union (Mutual). We would also note at this point that during the time period for which the appellant seeks payment, the firm of Willkie, Farr & Gallagher was actively opposing the interests of the policyholders of Union (Mutual), as is evident

from the opinion in *Doyle.*

The appellant also contends that the trial court erred by refusing to admit into evidence the affidavit of Jack Nusbaum, an attorney in appellant's law firm. We note that the bill submitted by Willkie, Farr & Gallagher does not itemize the work that was performed or the time spent preparing the case for which it seeks payment from the tax escrow account. The record indicates that no member of the appellant firm was personally present at the hearing to support its claim, and that the affidavit of Nusbaum was not submitted to the court or opposing counsel until the day before the hearing.

In support of its contention that the affidavit in question should have been admitted in evidence by the trial court, the appellant contends that the application filed by First National in this case was in fact a "motion," and that under our statutes, it is proper to use affidavits in connection with motions. Neb. Rev. Stat. § 25-908 (Reissue 1979) defines the term "motion" as follows: "A motion is an application for an order addressed to the court or a judge in vacation, by any party to a suit or proceeding, or one interested therein." Likewise, Neb. Rev. Stat. § 25-1244 (Reissue 1979) provides: "An affidavit may be used to verify a pleading, to prove the service of a summons, notice or other process, in an action, to obtain a provisional remedy, an examination of a witness, a stay of proceedings, *or upon a motion,* and in any other case permitted by law." (Emphasis supplied.) The application of this latter section apparently bothered the trial court, too, as it stated in response to the argument to that effect before it: "I have always thought when they were talking about motion, they were talking about motions that we are used to in pleadings, motion to make more definite and certain, motion for summary judgment and that type of thing."

In a broad general sense, every petition filed at the commencement of an action is, in effect, an application

to the court for an order or rule of the court. It is to be noted, however, that the Trustee in this case instigated this proceeding with reference to a declaration of its liability to pay attorney fees from the escrow account by filing in the original action what it has termed an "Application." In *Wright v. Royse*, 43 Ill. App. 2d 267, 193 N.E.2d 340 (1963), the court held that the word application was a generic term which includes, but is not limited to, motions. In that case, the court stated: "Appellees cite several cases which hold, consistently with the definition contained in Black's Law Dictionary that 'motions' are 'applications.' Appellees then argue that if 'motions' are 'applications,' therefore, all 'applications' are 'motions' and must be made in the form of a written motion, in accordance with prescribed motion procedures. This is a nonsequitur. The word 'application' is a generic term which includes, but is not limited to 'motions.'" *Id.* at 274, 193 N.E.2d at 343. In this connection we have also noted the case *In re Meyer v. Meyer, Admin.*, 138 Ind. App. 649, 215 N.E.2d 556 (1966), which case involved an appeal from a judgment awarding the appellant, a practicing attorney, the sum of $5,000 as an additional fee for professional services rendered as the attorney to the administrator of the estate of Mary Meyer, deceased. In that case the court held that where the duties of an attorney to the administrator were at an end and there was nothing further to be resolved and his connections to the estate were completely severed, even though the estate was kept open, the entry of an award for attorney fees constituted a "final judgment" and not an "interlocutory decree." Although the facts of that case were admittedly somewhat different from the facts of the instant case, we believe there is an analogy between the two situations, notwithstanding in the instant case the "Application" was filed a considerable length of time after the determination of the merits of the original action. We do not believe that the hearing

on the application in this case was a "preliminary, collateral and interlocutory matter" under § 25-1244. The general rule is that an affidavit is not admissible to establish facts material to the issue being tried. *Banks v. Metropolitan Life Ins. Co.*, 142 Neb. 823, 8 N.W.2d 185 (1943). However, even if we were to interpret or consider the "Application" filed in this case as a motion, it would not, we believe, in any way change the validity of the action of the trial court in refusing to accept the affidavit in question into evidence. In *Erdman v. National Indemnity Co.*, 180 Neb. 133, 138, 141 N.W.2d 753, 756 (1966), we held: "'It is within the discretion of the district court to take testimony orally for the determination of issues of fact arising upon motions, *and not a right of either party to compel the adduction of such testimony.*'" (Emphasis supplied.)

After the conclusion of the prior appeal, the judgment fund and the tax escrow account were, in effect, merged for the purpose of distribution. It was at this time that the claim of the appellant for attorney fees from the tax escrow account occasioned the filing of the "Application" by First National. The District Court had jurisdiction over the judgment fund, and properly held the hearing below to determine the validity of the appellant's claim against the tax escrow account. We determine that the order of the trial court was proper and must be affirmed, so that an orderly distribution of the tax escrow fund may be completed. We do not mean to hold or imply that appellant is not entitled to recover from its client for the services rendered, but only that appellant is not entitled to be paid for such services from the tax escrow account represented by the Trustee, First National.

The judgment of the District Court must be affirmed.

AFFIRMED.

FLORENCE F. LANE, APPELLEE AND CROSS-APPELLANT, V. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, A FOREIGN CORPORATION, APPELLANT AND CROSS-APPELLEE.

308 N.W.2d 503

Filed July 10, 1981. No. 43270.

1. **Insurance: Motor Vehicles: Statutes.** Neb. Rev. Stat. § 60-509.01 (Reissue 1978), providing for uninsured motorist coverage, was enacted for the benefit of the innocent victim of a financially irresponsible motorist, and is to be liberally construed to fully accomplish that purpose.
2. **Insurance: Motor Vehicles: Judgments.** It is not a prerequisite to recovery under an uninsured motorist policy provision that judgment first be obtained against the uninsured motorist as a condition precedent to bringing suit against the automobile liability insurer.
3. **Expert Witnesses: Words and Phrases.** Although it is frequently stated that medical testimony must be given with "reasonable medical certainty," it is sufficient when such testimony is stated in terms of "probability." In this connection, "reasonable certainty" and "reasonable probability" are one and the same thing.
4. **Expert Witnesses.** If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise. Neb. Rev. Stat. § 27-702 (Reissue 1979).
5. **Jury Instructions: Appeal and Error.** When a litigant has approved instructions in the trial court, either by word or act, he cannot thereafter effectively complain of instructions given.
6. _____: _____. Instructions must be taken as a whole and construed together, and where the instructions covered the issues and fairly submitted the case to the jury, the jury's verdict will not be disturbed unless it is clearly erroneous.
7. **Attorney Fees.** In determining the award of attorney fees, the court *may consider* the actual agreement existing between a litigant and his attorney, including an obligation to pay a contingent fee, particularly if such contract is customary in the locality. However, such agreement is neither the sole factor nor a factor to be given any greater weight than any other factor. The test is whether the fee is reasonably compensatory for the services rendered.
8. **Attorney Fees: Appeal and Error.** The trial court ordinarily has a better opportunity for practically appraising the award of attorney fees, and an appellate court will only interfere to correct a patent injustice where the allowance is clearly excessive or insufficient.

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

Wayne J. Mark of Fraser, Stryker, Veach, Vaughn, Meusey, Olson & Boyer, P.C., for appellant.

Warren C. Schrempp and Steven Lefler for appellee.

Heard before KRIVOSHA, C.J., MCCOWN, CLINTON, BRODKEY, WHITE, and HASTINGS, JJ., and RONIN, Retired District Judge.

PER CURIAM.

Florence F. Lane (Florence), plaintiff-appellee herein, brought this action in the District Court of Douglas County, Nebraska, against State Farm Mutual Automobile Insurance Company (State Farm), defendant-appellant, to recover for personal injuries received arising from a motor vehicle collision, and has sued her insurer under the uninsured motorist provision of three insurance policies owned by the plaintiff. After a jury trial, a verdict was returned in favor of the plaintiff in the sum of $28,450, and the court subsequently taxed costs and attorney fees in the sum of $5,000 for the services of plaintiff's counsel against the defendant. We affirm.

The facts surrounding this appeal are as follows. On September 19, 1977, at approximately 5 p.m., the plaintiff was driving a car which collided with one driven by Debra Bronson (now Debra Logan), but hereinafter referred to as Debra. Florence was driving her vehicle northbound on 90th Street, a thoroughfare consisting of two northbound traffic lanes and two southbound traffic lanes. A concrete median separates the opposing traffic lanes; however, two left turn lanes are cut into the median to provide access to local shopping centers and businesses. Prior to the accident, Debra was traveling southbound on 90th Street and entered the left turn median lane intending to cross the northbound traffic lanes and go into a nearby parking lot. As she pulled across the northbound lanes, she struck the automobile being driven by the plaintiff. Florence sustained injuries

to her neck, back, and knees and was transported by ambulance to a nearby hospital where she was treated and released. Debra was subsequently cited for negligent driving.

In her original petition filed in the District Court of Douglas County on March 1, 1978, the plaintiff named as parties defendant to the action State Farm, Debra Bronson, and Martha J. Bronson. On April 17, 1978, State Farm filed a demurrer to the petition, alleging that it failed to state a claim upon which relief could be granted for the reason that it failed to allege a judgment against Debra, who was alleged in the petition to be an uninsured motorist under the laws of the State of Nebraska. A hearing was held on the demurrer on May 1, 1978, and the court subsequently entered an order sustaining the demurrer on the basis of misjoinder of causes of action, and gave the plaintiff 14 days to amend her petition. See *Eich v. State Farm Mut. Automobile Ins. Co.*, 208 Neb. 714, 305 N.W.2d 621 (1981).

On May 9, 1978, plaintiff filed her amended petition naming State Farm as the only defendant, and praying for a judgment against State Farm for "all sums for which the insured, the plaintiff herein, shall be legally entitled to recover as damages from the owner or operator of the uninsured motor vehicle in question . . . ." State Farm subsequently filed a demurrer to the amended petition, alleging that it also failed to state a cause of action. After the hearing on the defendant's second demurrer was held, the trial court entered an order on May 25, 1978, overruling the demurrer. The defendant was given 14 days to answer plaintiff's amended petition. In its answer, State Farm admitted to issuing one policy of automobile insurance to the plaintiff and that said policy contained uninsured motorist coverage in the amount of $15,000. State Farm denied in its answer that Debra was an uninsured motorist, and alleged that the accident occurred as the proximate result of

contributory negligence on the part of the plaintiff.

Notwithstanding the denial contained in the answer to the amended petition filed by State Farm that Debra was an uninsured motorist, at the commencement of the trial of the matter on November 6, 1979, the following stipulation was entered into between the parties, as reflected by the record, as follows:

"MR. MARK: The next matter to take up is with respect to the answer of defendant's [sic] with the possibility that this amendment could be expanded to include the admission of the existence of other State Farm Insurance policies, upon confirmation of same defendant would at this time ask leave to amend its answer with respect to apparently there was some duplication, Paragraph 6 and 7, so as to delete Paragraph 6 and 7 and to add a new paragraph which would state that defendant admits at all times material here to [sic] Debra I. Bronson was an uninsured motorist, that the vehicle operated by Debra I. Bronson was an uninsured motor vehicle under the laws of the State of Nebraska and under the terms of the policy of insurance in force and effect between Florence F. Lane and State Farm Mutual Automobile Insurance Company.

"THE COURT: But in the event that you also amended to admit the two other policies, would you want to —

"MR. MARK: I would. To the extent that we can confirm this morning the existence of the two other policies, I would admit the vehicle was an uninsured vehicle under those policies as well.

"THE COURT: Under the terms of any policies of insurance that were in force and effect.

"MR. MARK: Fair enough, Your Honor, I don't have any problem.

"THE COURT: You would have no objection to that amendment?

"MR. SCHREMPP: No.

"THE COURT: Leave is granted and the petition

may be amended accordingly. The answer may be amended accordingly."

By virtue of the foregoing stipulation of the parties, and approval by the trial court, the issue of whether Debra was an uninsured motorist under defendant's policy and whether the vehicle was an uninsured vehicle thereunder appears to have been completely removed from the case. The record also reveals a further stipulation between the parties was subsequently entered into as follows:

"(At 11:35 a.m. on November 7, 1979, with counsel for the parties and the parties present, and the jury in the box, the following proceedings were had:)

. . . .

"MR. SCHREMPP: Your Honor, may we stipulate, Mr. Mark, that at the time of the collision involved in this case there were three policies of insurance totaling $45,000 of uninsured motorist coverage in force and effect at that time, and subject to distribution in this case.

"MR. MARK: It is so stipulated, Your Honor.

"THE COURT: Very well, the stipulation is accepted and received as evidence . . . ."

We also note that immediately prior to the commencement of trial, the defendant made an offer to confess judgment in favor of the plaintiff in the amount of $12,500, which offer, however, was rejected, and the case then proceeded to trial as an ordinary automobile negligence action.

At the close of the evidence adduced at trial, plaintiff moved for a directed verdict in her favor on the issue of liability, leaving to the jury only the issues of proximate cause of plaintiff's injuries and damages. This motion was sustained by the trial court. State Farm also orally moved for a directed verdict on the issues of liability and proximate causation, which motion was overruled by the court. The matter was submitted to the jury on the issue of damages, and the jurors were instructed that their verdict could not exceed the

total amount of coverage provided by the defendant.

On November 8, 1979, the jury returned a verdict in favor of the plaintiff and assessed the amount of her recovery in damages in the sum of $28,450. The trial court taxed the costs of the trial to the defendant. A motion by defendant for a new trial was overruled by the trial court. A subsequent hearing was held to determine the allowance of attorney fees for plaintiff's counsel, following which the trial court ordered that an attorney fee in the amount of $5,000 be taxed to the defendant. Plaintiff's counsel also filed a motion for new trial on the award of attorney fees only, which motion was overruled, and the issue is raised by plaintiff's counsel in his cross-appeal.

In its brief on appeal, State Farm assigns as error: (1) That the trial court erred in holding that the plaintiff need not plead and prove a judgment against the uninsured motorist in order to sustain her cause of action against State Farm, which was the effect of the trial court's overruling defendant's demurrer to plaintiff's amended petition; (2) That the trial court erred in sustaining plaintiff's motion for a directed verdict on the issue of liability and in refusing to submit the issue of plaintiff's comparative negligence to the jury; (3) That the trial court erred in overruling defendant's motion for a directed verdict on the issue of the causal connection between the accident and plaintiff's alleged injury to her right knee because of a lack of competent medical evidence stated to a reasonable medical certainty relating said injury to the accident; or in the alternative that the trial court erred in failing to instruct the jury that the plaintiff had the burden of proving the causal relationship between the injury and the accident to a reasonable medical certainty by direct and competent testimony before damages could be awarded; and (4) That the court erred in instructing the jury that State Farm was obligated to pay the plaintiff all sums which she

has sustained as damages as a proximate result of the accident, said sums not to exceed the sum of $45,000; and also in instructing the jury that its verdict may not in any event exceed the total amount of the coverage provided by State Farm, in the sum of $45,000.

The principal issue raised by the defendant in this appeal is whether an insured motorist must obtain a judgment against an uninsured motorist as a condition precedent to recovering against his insurer under an uninsured motorist insurance policy. The almost universal rule in this regard is that he need not. This question is reviewed at length in Widdis, *A Guide to Uninsured Motorist Coverage* § 7.16 (1969), wherein that eminent authority states at 269-70: "In several cases, insurance companies have argued that the claimant must secure a determination on the issues of fault and damages by suing the uninsured motorist before he may bring an action against the insurance company under the uninsured motorist coverage. This approach has been rejected, except in Georgia, South Carolina, and Virginia." In the 1980 Supplement to the above volume, in the same section, Professor Widdis states at 318-19: "Although it would seem to be a matter that should be beyond dispute under both the terms of the endorsement and in light of the historical development leading up to this coverage, the right of the insured to sue his own insurer without first bringing an action against the uninsured motorist continues to be raised as an issue. The reported opinions of the courts almost uniformly support the right of an insured to proceed directly against the insurance company." In the same section previously referred to, the author, in discussing the contrary rule adopted by Georgia, South Carolina, and Virginia, states at 320: "In addition — in an opinion which in the view of this writer represents a tortured interpretation of the applicable statute and endorsement provisions — the Supreme Court of Tennessee has

adopted this view." Without in any way intending to be exhaustive of the jurisdictions which have adopted the general rule, we cite as exemplary the following cases: *State Farm Mutual Automobile Ins. Co., Inc. v. Griffin*, 51 Ala. App. 426, 286 So. 2d 302 (1973); *Byrn v. American Universal Ins. Co.*, 548 S.W.2d 186 (Mo. App. 1977); *Associated Indemnity Corporation v. Cannon*, 536 P.2d 920 (Okla. 1975); *Winner v. Ratzlaff*, 211 Kan. 59, 505 P.2d 606 (1973); *Home Ins. Co. v. Williams*, 252 Ark. 1012, 482 S.W.2d 626 (1972); *Ind. Ins. Co. v. Noble*, 148 Ind. App. 297, 265 N.E.2d 419 (1970); *Puckett v. Liberty Mutual Insurance Company*, 477 S.W.2d 811 (Ky. 1971); *Harthcock v. State Farm Mutual Automobile Ins. Co.*, 248 So. 2d 456 (Miss. 1971); *Grayson v. National Fire Insurance Company*, 313 F. Supp. 1002 (D. Puerto Rico 1970).

Our statute on uninsured motorist coverage appears as Neb. Rev. Stat. § 60-509.01 (Reissue 1978), and provides in part: "No policy insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance or use of a motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto, in limits for bodily injury or death set forth in section 60-509, under provisions approved by the Director of Insurance, for the protection of persons insured thereunder *who are legally entitled to recover damages* from owners or operators of uninsured motor vehicles and hit-and-run motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom . . . ." (Emphasis supplied.)

In interpreting this provision, we have previously held that § 60-509.01 was enacted for the benefit of the innocent victim of a financially irresponsible motorist and it is to be liberally construed to fully

accomplish that purpose. *Protective Fire & Cas. Co. v. Woten*, 186 Neb. 212, 181 N.W.2d 835 (1970).

Prior to the enactment of § 60-509.01, uninsured motorist coverage was permissible at the option of the purchaser of the automobile liability policy. Section 60-509.01 is considered mandatory in the sense that insurance companies must offer uninsured motorist coverage with every automobile liability policy issued in this state, but the insured may reject the coverage. The required minimum coverage limits of such policies are set out in Neb. Rev. Stat. § 60-509 (Reissue 1978).

In support of its position that the insured motorist must first obtain a judgment against the uninsured motorist as a condition precedent to bringing suit against the insurance carrier under the uninsured motorist coverage provisions, State Farm cites *Crossley v. Pacific Employers Ins. Co.*, 198 Neb. 26, 251 N.W.2d 383 (1977). We conclude, however that *Crossley* is clearly distinguishable and not authority for the position taken in this case so far as Nebraska law is concerned. In *Crossley*, a Nebraska resident was involved in an automobile accident in Colorado and the accident was analyzed in terms of Colorado no-fault insurance laws, and not under § 60-509.01; and this court determined that the law of the place where the accident occurred governs not only the amount of the recovery but also the right to recover.

Defendant's argument was also rejected by the Supreme Court of Kansas in *Winner v. Ratzlaff, supra*, a case in which the plaintiff sought damages for the wrongful death of his wife, who was struck and killed by a car while walking across a street. Plaintiff sought recovery against his insurance carrier under the terms of his uninsured motorist policy. In construing the Kansas uninsured motorist statute, a statute similar to our own, the court stated at 63-65, 505 P.2d at 610-11:

"The purpose of legislation mandating the offer of

uninsured motorist coverage is to fill the gap inherent in motor vehicle financial responsibility and compulsory insurance legislation and this coverage is intended to provide recompense to innocent persons who are damaged through the wrongful conduct of motorists who, because they are uninsured and not financially responsible, cannot be made to respond in damages [citation omitted]. As remedial legislation it should be liberally construed to provide the intended protection.

"40-284 contains no language stating that suit must first be filed or judgment obtained against the uninsured motorist. In a nutshell, the coverage mandated is that which the beneficiary 'shall be legally entitled to recover as damages' sustained at the hands of an uninsured motorist. We cannot translate this language into the requirement urged by appellees. Knowledge of the context in which this coverage developed forcefully attests to the fact it was in part promulgated to eliminate just such a condition precedent. . . .

"We construe the words 'legally entitled to recover as damages' to mean simply that the insured must be able to establish fault on the part of the uninsured motorist which gives rise to the damages and to prove the extent of those damages. This would mean that in a direct action against the insurer the insured has the burden of proving that the other motorist was uninsured, that the other motorist is legally liable for damage to the insured, and the amount of this liability. In resisting the claim the insurer would have available to it, in addition to policy defenses compatible with the statute, the substantive defenses that would have been available to the uninsured motorist such as contributory negligence, etc. [citation omitted].

"We have recognized the right of the uninsured motorist insurance carrier to intervene as a matter of right in an action brought by its insured against

an uninsured motorist where its application is timely and its interests are not being adequately represented [citation omitted]. Multiple litigation is never desirable and there is a public interest economically in avoiding it wherever possible to do so in a fair and workable manner. Everything considered, we hold it is not requisite to recovery against an uninsured motor liability carrier that judgment first be obtained against the uninsured motorist."

We concur with the aforementioned pronouncements of the Kansas Supreme Court as they apply to the factual circumstances in the present case; and we hold that it is not a prerequisite to recovery that judgment first be obtained against the uninsured motorist as a condition precedent to bringing suit against the insured motorist's liability carrier. To the extent that *Eich v. State Farm Mut. Automobile Ins. Co.*, 208 Neb. 714, 305 N.W.2d 621 (1981), holds to the contrary, it is overruled. In its brief on appeal, State Farm has pointed out certain problems of trial which could, and occasionally do, arise under the application of the majority rule which we adopt. Suffice it to say that if a change in the existing law is necessary or desirable, that change should be effected by action of the Legislature, and not by a tortured interpretation by this court. We also point out that under the Nebraska statute, as above quoted, there is no requirement whatsoever that a suit be brought and judgment obtained against the uninsured motorist as a precondition to an action against the insurance carrier.

We next consider defendant's assignment that the court erred in sustaining plaintiff's motion for directed verdict on the issue of liability and in refusing to submit the issue of plaintiff's comparative negligence to the jury. Considering first the question of whether the evidence in the record establishes the negligence of Debra, the uninsured motorist, the record reveals that on September 19, 1977, at approximately 5 p.m.,

a collision occurred between the automobiles driven by Florence and Debra as set out earlier in this opinion. Florence testified that she was traveling north on 90th Street in the curb traffic lane at a speed of 30 to 35 m.p.h., and that there was other traffic to the left of her and she did not see Debra's automobile until it hit her. The actual speed limit in effect at that location does not appear in the record, but the record strongly suggests that Florence was not exceeding the speed limit at the time.

Debra testified that she was traveling south on 90th Street and that she was generally familiar with the streets in that vicinity. She stated that she entered the southbound left turn lane with the intent of crossing the northbound lanes to go to a Kentucky Fried Chicken restaurant on the east side of 90th Street. She further testified as follows:

"Q. As you were stopped there in this traffic lane, what was your understanding as to how many traffic lanes there were for northbound traffic? A. Well, I at the time had thought that was the only lane of traffic. Q. As you sat here on the 19th of September, waiting to make your turn, you thought there was a left turn lane and one through traffic lane and that was all on 90th Street? A. Right. Q. After the gentleman signaled you to go, what happened? A. Well, I got halfway into my turn and I ran into the car of Florence Lane. Q. Which of these traffic lanes did the accident occur in? A. It actually occurred in the far righthand lane. . . . Q. Did you see the Lane vehicle at all prior to impact? A. No, I didn't. . . . Q. As you were executing this turn were you looking on to the south up 90th Street in the direction from which cars may come? A. I don't think I was looking up south, I was looking more or less straight ahead of me."

On cross-examination, Debra testified as follows: "Q. Well, Debra, you don't claim that Mrs. Lane did anything wrong, do you? A. No, I'm not saying that. Q. You never have claimed that? A. I know I'm at

fault." However, on motion of the defendant, the latter remark was stricken by the court as not responsive.

It seems clear that under the facts of this case Debra was clearly guilty of negligence in several other respects. As driver of the left turning automobile, Debra was required by statute not to turn her vehicle to the left unless and until such movement could be made with reasonable safety. Neb. Rev. Stat. § 39-652 (Reissue 1978). In doing so, she was also required by statute to yield the right-of-way to any vehicle approaching from the opposite direction which is so close as to constitute an immediate hazard. Neb. Rev. Stat. § 39-636 (Reissue 1978). We have also held that a motorist must see what is in plain sight. *Davis v. Spindler*, 156 Neb. 276, 56 N.W.2d 107 (1952); *Caldwell v. Heckathorn*, 176 Neb. 704, 127 N.W.2d 182 (1964). Moreover, it is established law that a driver who fails to see another who is favored over him is guilty of negligence as a matter of law. *Schanaman v. Ramirez*, 206 Neb. 212, 292 N.W.2d 39 (1980); *Bonnes v. Olson*, 197 Neb. 309, 248 N.W.2d 756 (1976). There is little doubt that the evidence in the record established negligence on the part of Debra, or that reasonable minds would have found otherwise.

Defendant contends, however, that the trial court should have submitted the issue of Florence's contributory negligence to the jury. We conclude that the evidence clearly establishes that Florence was not negligent in the operation of her vehicle and that she was struck broadside by the car driven by Debra, who was attempting to make a left turn across the northbound traffic lanes. The facts and law cited in *Oberhelman v. Blount*, 196 Neb. 42, 241 N.W.2d 355 (1976), are in many respects similar to the facts and law involved in the instant case, and the language and reasoning of *Oberhelman* is persuasive. In the instant case, the plaintiff was as innocent a victim as was

the plaintiff in *Oberhelman*, and the uninsured motorist was as patently guilty of negligence by objective proof as was the defendant in *Oberhelman*. In *Oberhelman*, the defendant alleged that Oberhelman was negligent in six respects, to wit, (1) that he failed to keep a proper lookout; (2) that he failed to keep his vehicle under proper control; (3) that he drove at a high and dangerous rate of speed that was not commensurate with the conditions of the roadway or the condition of the traffic then existing; (4) that he failed to yield to defendant his half portion of the highway; (5) that he failed to yield the right-of-way to the defendant; and (6) that he failed to slow down, stop, or swerve his vehicle or take other means at hand to avoid the collision. This court ruled against all six of defendant's contentions, and found Oberhelman was not guilty of contributory negligence, stating at 48, 241 N.W.2d at 359:

"Having concluded that there was insufficient evidence to sustain an affirmative finding of contributory negligence on any one of the six specifications upon which the court instructed the jury, we find that the submission of plaintiff's contributory negligence and comparative negligence was error, which was not cured by the verdict for the plaintiff because the jury was thereby allowed to compare negligence and thus reduce the damages due plaintiff. Such error is therefore prejudicial.

"The finding of negligence on the part of defendant which proximately caused the collision is abundantly supported by the record."

Likewise, in the instant case, we conclude that the trial court acted properly in not submitting the issue of comparative negligence to the jury, and had no alternative but to direct a verdict in favor of Florence on the issue of liability.

We next consider defendant's contention that the trial court erred in overruling defendant's motion for a directed verdict on the issue of the causal connec-

tion between the accident and plaintiff's alleged injury to her right knee because of plaintiff's failure to adduce competent medical testimony stated in terms of the reasonable medical certainty as to that fact; also that the trial court erred in failing to instruct the jury that the plaintiff had the burden of proving the causal relationship between the alleged injury and the accident to a reasonable medical certainty by direct and competent testimony of competent medical experts. Defendant in this case relies heavily upon the testimony of a Dr. Bowman, an orthopedic surgeon in Omaha, who succeeded his former partner Dr. Max Kinney who originally treated Florence after the accident. Dr. Kinney was subsequently killed in a airplane accident, and Dr. Bowman testified at the trial in his place, both from Dr. Kinney's notes and records and from his own examination and consultation with Florence. Dr. Bowman testified at the trial, and in response to the question put to him on direct examination, "Doctor, can you state to a reasonable degree of medical certainty that the right knee complaints which she has as of her last visit, are related to the accident of September 19, 1977?" he replied, "Only by history. I have no other reason to think so, other than the fact that she told me so, and she told me so a year after the accident or something." However, Dr. Bowman also testified at the trial as follows: "Q. Doctor, did you determine whether or not there would be any permanent residuals as a result of this bruising of the knee and soft tissue strain to the back? A. Yes, I did. Q. What did you determine to be the nature of that, of that permanent involvement? A. It was my opinion that she had some permanent impairment of her neck, of five per cent; I think that would include the lumbar spine. Actually neck and lumbar spine. So it's really a permanent impairment of the spine of five percent, *and of her right knee* of seven per cent." (Emphasis supplied.)

Notwithstanding that Dr. Bowman testified that

he could not state to a reasonable degree of medical certainty that the injury to Florence's right knee, which she complained of, was related causally to the accident of September 19, 1977, he did testify from Dr. Kinney's notes. Dr. Bowman was asked: "Q. On the reports that Dr. Kinney had provided you, would you have any reason to doubt anything Dr. Kinney would say in those reports? A. No. Q. In early March of 1978, that visit, that Mrs. Lane made with Dr. Kinney, did Dr. Kinney make mention of whether or not she had complaints of both of her knees? A. Yes, he did. Q. What was that notation? A. She complains of both knees hurting her. Q. And given the fact that, again assuming that she was in an accident on September 19, would it be fair to assume that in early March of '78 the pain above her knees was related causally to the accident of September 1977?

. . . .

"THE WITNESS: Yes."

Florence also testified that when she was first sent to Dr. Kinney she complained of problems with her back and knees, stating: "My right knee was the one that had the cuts on them [sic], and my left knee was numb." Her husband, William J. Lane, also testified at the trial that when he got her home from the hospital he noticed her knees were cut open and she could hardly walk.

Defendant complains that the medical evidence with reference to the injury to Florence's right knee did not use the magic words "reasonable medical certainty." Although it is generally stated that medical testimony must be given with "reasonable medical certainty," we have been unable to find any Nebraska case which specifically so states. It has frequently been held that medical testimony couched in terms of "possibility" is not sufficient, although when such testimony is in terms of "probability" it is sufficient. We have held that "reasonable certainty" and "reasonable probability" are one and the same thing. In

Marion v. American Smelting & Refining Co., 192 Neb. 457, 460-61, 222 N.W.2d 366, 368-69 (1974), we stated:

"Plaintiff devotes several pages of his brief to an attempt to determine whether this court has moved away from the rule of establishing causation to the degree of reasonable certainty to a more liberal rule of establishing causation to a degree of reasonable probability. Actually, this is a distinction without a difference.

"In Welke v. City of Ainsworth (1965), 179 Neb. 496, 138 N.W.2d 808, we defined 'probably' as 'reasonably; credibly; presumbly; in all probability; so far as the evidence shows; and, very likely.' We suggested that on many occasions in the past we had said 'an award of compensation in a workmen's compensation case may not be based on possibility, *probability*, or speculative evidence,' and suggested that a review of those cases indicated that the decisions would have been the same in every instance if we had merely said the award '"may not be made on possibilities or speculative evidence."'

"We further suggested that in the area of certain disabilities, it is impossible for a reputable doctor to testify with absolute certainty that one cause and one cause alone is the reason for the disability. Absolute certainty is not required. Medical diagnosis is not that exact a science. Even though in most instances a certain result may follow, to be accurate the medical expert hedges by the use of the word 'probably.' A review of the cases since Welke v. City of Ainsworth, *supra*, demonstrates that reasonable certainty and reasonable probability mean exactly the same thing when used in medical testimony."

We also note that the new Nebraska Evidence Rules, with reference to testimony by experts, do not require that medical experts testify "with reasonable certainty." The test would seem to be whether their specialized knowledge will assist the trier of fact to

understand the evidence or to determine a fact in issue. Neb. Rev. Stat. § 27-702 (Reissue 1979) provides as follows: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Likewise, Neb. Rev. Stat. § 27-703 (Reissue 1979) provides: "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence."

In light of what we have stated above, we believe that the foundation for the medical testimony given in this case with reference to the injuries to Florence's right knee was sufficient, and also the fact that it was the result of the accident in question. The evidence presented a question of fact for resolution by the jury, and the jury did so. On appeal, it is not the province of the Supreme Court to weigh and resolve conflicts in the evidence or weigh the credibility of the witness; these functions are for the trier of fact. *Commodity Traders, Inc. v. Palmer*, 203 Neb. 667, 280 N.W.2d 49 (1979); *Mustion v. Ealy*, 201 Neb. 139, 266 N.W.2d 730 (1978).

Finally, the defendant contends that the trial court committed error by instructing the jury that it was limited in returning a verdict, if any, in an amount not to exceed $45,000. Defendant claims that this instruction was prejudicial. The record reveals, however, that counsel for the defendant made no objection to the allegedly prejudicial instructions at the instruction conference. In fact, the record reveals that both parties stipulated to the court, in front of the jury, that there were three policies of insurance totaling

$45,000 in uninsured motorist coverage. At no time during the instruction conference or at trial did counsel object to the court's proposed instructions, although ample time and opportunity to examine the instructions and interpose such an objection was presented defense counsel. This court has held that when a litigant has approved instructions in the trial court, either by word or act, he cannot thereafter effectively complain of instructions given. *Exchange Bank of Gibbon v. Ashley*, 191 Neb. 259, 214 N.W.2d 632 (1974); *Swearingen v. Sloggett*, 189 Neb. 482, 203 N.W.2d 442 (1973). Our review of the instructions given in this case indicates that they fairly submitted the issues to the jury. Instructions must be taken as a whole and construed together, and where the instructions covered the issues and fairly submitted the case to the jury, the jury's verdict will not be disturbed unless it is clearly erroneous. *Hayes v. Anderson Concrete Co., Inc.*, 186 Neb. 771, 186 N.W.2d 477 (1971); *Schmidt v. Knox*, 191 Neb. 302, 215 N.W.2d 77 (1974).

Counsel for the plaintiff has cross-appealed to this court, alleging that the award of $5,000 in attorney fees made by the trial court for his services to the plaintiff was inadequate. He filed his application for an attorney fee under Neb. Rev. Stat. § 44-359 (Reissue 1978), and a separate hearing was held before the trial judge subsequent to the return of the verdict by the jury. Plaintiff's attorney testified that he had a contingent fee contract with the plaintiff for one-third of the amount of her recovery. He argued that the policy behind the legislation awarding attorney fees in actions brought against an insurance company upon a policy issued by them was to make the plaintiff whole, and not to penalize the successful party by requiring the payment of attorney fees out of her recovery. Plaintiff's counsel argues, therefore, that he should be entitled to an attorney fee award under the foregoing section in sufficient amount as to leave the plaintiff the gross amount of her recovery awarded

by the jury, which in this case amounted to $28,450. Plaintiff's counsel has cited no legislative history of the statute in question which bears out his statement with reference to the alleged purpose of the act, nor have we been able to find such an expression of intent.

In its order awarding plaintiff the sum of $5,000 as attorney fees, the trial court cited the case of *Ruby Coop. Co. v. Farmers Elevator Mut. Ins. Co.*, 197 Neb. 605, 250 N.W.2d 239 (1977), for the proposition that the reasonable sum allowed as an attorney fee under the statute to a beneficiary suing to collect insurance proceeds has no relation to the fee contracted for on a contingency basis. However, an opinion by this court rendered in *Prucka v. Papio Nat. Resources Dist.*, 206 Neb. 234, 292 N.W.2d 293 (1980), issued after the order of the trial court with reference to the fee for plaintiff's attorney, states that the court *may consider* the actual agreement existing between a litigant and his attorney, including an obligation to pay a contingent fee, particularly if such contract is customary in the locality. The opinion further provides that while the actual agreement is neither the sole factor nor a factor to be given any greater weight than any of the other factors, it may, nevertheless, be considered. However, in the earlier case of *Schimonitz v. Midwest Electric Membership Corp.*, 182 Neb. 810, 157 N.W.2d 548 (1968), which case involved the award of an attorney fee under Neb. Rev. Stat. § 76-720 (Reissue 1976), which deals with eminent domain proceedings, this court stated: "However, we do not interpret the reference in section 76-720, R.R.S. 1943, to a reasonable fee to mean a contingent fee. The fee contemplated by this section is one that is reasonably compensatory for the services rendered. There is no showing in the record of the time spent by counsel in preparation for trial or otherwise. The record indicates a trial of 2 days duration. Any fee allowed must be based on an estimate of the time and preparation required for

the record before us." *Id.* at 816, 157 N.W.2d at 552.

In the instant case, at the hearing for the allowance of the fee to be awarded to plaintiff's attorney, as well as in his brief on appeal, the plaintiff's attorney testified and stated that he did not keep any time records in this case, and generally speaking did not keep time records. In the present case, we cannot say that the award of the attorney fee determined by the trial court after a hearing on the matter was unreasonable or an abuse of discretion. However, we note that a trial court ordinarily has a better opportunity for practically appraising the situation, and an appellate court will only interfere to correct a patent injustice where the allowance is clearly excessive or insufficient. *Omaha Paper Stock Co. v. California Union Ins. Co.*, 200 Neb. 31, 262 N.W.2d 175 (1978). While the record reveals that able counsel for the plaintiff in this case conducted the litigation with great skill, and the results of his efforts reflect his diligence and ability, as well as the time devoted in the preparation and trial of the case, nevertheless we are unable to state that the fee awarded him by the trial court was not a reasonable fee, and hence we affirm the judgment of the trial court in that regard. There can, of course, be little question that the plaintiff's attorney is entitled to recover on his contingent fee contract with his client in the amount of one-third of the recovery in the amount of $28,450, or a total of $9,483. The trial court awarded a fee of $5,000, leaving a balance remaining of $4,483. The manner and source from which plaintiff's attorney collects the balance due him is not a matter for this court to decide, but is strictly a matter between the attorney and his client. However, we award plaintiff an attorney fee for services in this court in the amount of $2,000.

No errors appearing in the record, we conclude that the judgment of the District Court must be, and hereby is, affirmed.

AFFIRMED.

CLINTON, J., dissents.

HASTINGS, J., concurring.

I concur in the result reached by the majority today. The requirement of one or two lawsuits in uninsured motorist cases presents no problem of any deep philosophical significance, and I would prefer to opt for a rule of simplicity and general acceptance.

However, in applying the rule announced today, I believe that it is essential to require any such trial to be bifurcated so as to avoid the complications resulting from one jury trying to decide tort liability and damages on the one hand and the contract liability of the insurance company as well.

E. ARLENE OEHLRICH, PERSONAL REPRESENTATIVE OF THE ESTATE OF HERMAN E. OEHLRICH, DECEASED, APPELLEE, V. GATEWAY REALTY OF COLUMBUS, INC., A CORPORATION, APPELLANT.

308 N.W.2d 327

Filed July 10, 1981. No. 43363.

1. **Brokers.** A broker earns his commission and becomes entitled thereto when he produces a purchaser who is ready, able, and willing to purchase at a price and upon terms specified by the principal or satisfactory to him.
2. **Contracts: Principal and Agent.** If a contract contemplates that an agent shall receive compensation for sales of which the agent was the procuring cause, the agent is entitled to a commission on sales procured by him although the sales were actually consummated by the principal after the termination of the agency.
3. **Summary Judgment.** Summary judgment may be properly granted where there exists no genuine issue as to any material fact in the case, and where under the facts the moving party is entitled to judgment as a matter of law.
4. **Contracts: Questions of Law.** When the provisions of a contract, together with the facts and circumstances that aid in ascertaining the intent of the parties thereto, are not in dispute, the proper construction of such contract is a question of law.

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

Patrick A. Brock for appellant.

Raymond E. Baker of Baker & Beck for appellee.

Heard before BOSLAUGH, CLINTON, and BRODKEY, JJ., and WOLF and BURKHARD, District Judges.

BURKHARD, District Judge.

This is an action for an accounting for the payment of real estate commissions which E. Arlene Oehlrich, personal representative of the estate of Herman E. Oehlrich, deceased, appellee, claims are owing under the terms of an employment contract between the decedent, hereinafter called Oehlrich, and Gateway Realty of Columbus, Inc., appellant, hereinafter called Gateway.

The trial court granted a partial summary judgment in favor of Oehlrich for listing commissions regarding two pieces of property, one being a farm owned by Richard Triba and the other being a residential property owned by Charles Allphin. The judgment was in the amount of $1,970.10 and costs in the amount of $70.20. Gateway's motion for new trial was overruled, and this appeal was then taken. We affirm.

Gateway assigns as error that (1) the District Court erred and abused its discretion in determining that there were no genuine issues of material fact; (2) the District Court erred in finding that it was the intent of the parties that Oehlrich was entitled to real estate commissions on all business finalized by him regardless of when the commissions were collected or earned; (3) the judgment was not sustained by sufficient evidence and is contrary to the evidence; (4) the judgment is contrary to the law; and (5) the District Court erred in not finding that the real estate commissions were earned after Oehlrich's death and had not accrued prior to his death pursuant to the terms of the employment contract.

Gateway, as a real estate broker, operates a general

real estate business in the city of Columbus, Nebraska, and as such, in the course of its business, procures listings of real estate for sale to prospective purchasers thereof. On January 3, 1977, Gateway and Oehlrich entered into a written contract of employment whereby Oehlrich would act as a real estate salesman pursuant to the terms of the employment contract. As part of his duties under the employment contract, Oehlrich was to use his best efforts to sell, lease, or rent real estate listed with Gateway and to solicit additional listings for Gateway in connection with Gateway's real estate business. Oehlrich was to be paid on a commission basis.

The employment contract provided for commissions to be divided between Gateway and Oehlrich when collected, and provided that when commissions were collected from the party or parties for whom the service was performed Gateway was to hold the commissions in trust for Oehlrich. It also provided that such division and distribution of commissions should take place as soon as practicable after the collection of any such commissions.

Oehlrich's commission as a listing salesman under his contract of employment was 27½ percent of the total commission.

While under the employ of Gateway and while the employment contract was in full force and effect, Oehlrich obtained real estate listings on behalf of Gateway, two of which are the subject of this appeal. One was a farm listing contract executed on behalf of Gateway by Oehlrich for the sale of a farm owned by Richard Triba, with the listing dated August 30, 1976, and effective until March 1, 1977. The other one was a residential listing contract executed on behalf of Gateway by Oehlrich involving the Charles Allphin property, with the listing contract dated October 11, 1976, and effective until January 11, 1977, but subsequently extended to February 11, 1977. On February 7, 1977, Oehlrich died. Thereupon, following Oehlrich's death, the Triba property was sold by a Gateway Realty of

Omaha agent on February 11, 1977, to Norval Augustin. Then, on February 22, 1977, the Allphin property was sold by the Nebraskaland Allied Agency of Columbus, Nebraska, to R. E. Valsnik. Both of these properties were thus sold through other brokers and agents by means of the multiple listing service within the real estate community. Eventually, upon the closing of these transactions, Gateway as the listing broker was paid a commission as to both the Triba property and as to the Allphin property, even though the Allphin property was sold after the expiration date of the listing contract.

Paragraph 4 of the employment contract provides in part as follows: "When the Salesman shall perform any service hereunder, whereby a commission is earned, said commission shall, when collected, be divided between the Broker and Salesman, in which division the Salesman shall receive a proportionate share as set out in the Broker's 'commission schedule' in effect at the time such commission is earned, and the Broker shall receive the balance." Gateway contends that a commission was not earned by Oehlrich as a result of the two listings. Gateway asserts, and rightfully so, that a broker earns his commission and becomes entitled thereto when he produces a purchaser who is ready, able, and willing to purchase at a price and upon terms specified by the principal or satisfactory to him. *Wisnieski v. Coufal*, 188 Neb. 200, 195 N.W.2d 750 (1972). We are concerned here, however, not with a selling salesman but with a *listing* salesman. Oehlrich had done all that was required of him to earn a commission as a listing salesman when he obtained the two listings. He himself did not have to produce a ready, able, and willing purchaser. He just had to wait for the property to be sold and for Gateway to receive its commission, which was done, in order to collect his commission.

Paragraph 7 of the employment contract provides as follows: "This contract and the association created hereby, may be terminated by either party hereto at any

time upon notice given to the other; but the rights of the parties to any commission which accrued prior to such notice shall not be divested by such termination." This is the only provision in the contract pertaining to termination of the contract. It seems clear, obvious, and fair that if termination of the contract under paragraph 7 did not divest Oehlrich of any rights to a commission which accrued before a notice of termination, then he was not divested of, and did not lose, those rights if termination of the contract were brought about by other means, such as his death.

If a contract contemplates that an agent shall receive compensation for sales of which the agent was the procuring cause, the agent is entitled to a commission on sales procured by him although the sales were actually consummated by the principal after the termination of the agency. 3 C.J.S. *Agency* § 343 (1973).

In the instant case, Oehlrich's rights to a commission had accrued prior to his death, because, upon his obtaining the Triba and Allphin listings, such rights arose, became vested, and came into existence, even though the commission would not be payable until the property was sold and the commission collected.

Paragraph 11 of the employment contract provides as follows: "This Agreement shall be binding upon and inure to the benefit of the parties hereto, their respective heirs, executors, personal representatives, estate, successors and assigns." From this paragraph, it is clear that the parties intended that the personal representative of any deceased party would have the benefit of the contract. The contract was a personal service contract, and the only conceivable benefit which could pass to the personal representative would be the right to receive funds due Oehlrich under the contract. Paragraph 11 clearly indicates that the intent of the parties was not to terminate payment of commissions to an agent by virtue of the death of the agent.

Summary judgment may be properly granted where there exists no genuine issue as to any material fact in

the case, and where under the facts the moving party is entitled to judgment as a matter of law. Neb. Rev. Stat. § 25-1332 (Reissue 1979).

When the provisions of a contract, together with the facts and circumstances that aid in ascertaining the intent of the parties thereto, are not in dispute, the proper construction of such contract is a question of law. *Bishop Cafeteria Co. v. Ford*, 177 Neb. 600, 129 N.W.2d 581 (1964).

There exists no genuine issue as to any material fact in the record of the instant case. The summary judgment which precipitated this appeal relates only to listing commissions relative to the Triba and Allphin property. There is no dispute that the employment contract existed, that Oehlrich performed a service under the contract when he obtained the two listings, that the two listings he obtained eventually were sold, and that a commission was paid to Gateway as a result of the sale of the two listings. Oehlrich did all that was required of him to entitle him to a commission as listing agent. His rights, upon his death, passed to his personal representative.

The assignments of error of appellant are without merit. The judgment of the trial court is affirmed.

AFFIRMED.

HONSTEIN TRUCKING, A PARTNERSHIP CONSISTING OF STEVEN E. HONSTEIN AND HARRY HONSTEIN, APPELLEE AND CROSS-APPELLANT V.
SANDHILLS BEEF, INC., A CORPORATION, APPELLANT AND CROSS-APPELLEE.

308 N.W.2d 331

Filed July 10, 1981. No. 43456.

1. **Threshers' Liens.** The purpose of the thresher's lien law is to give notice by statute to all prospective purchasers of grain and to the owners thereof within 30 days after the completion of combining of the possible existence of a lien by the person who combined the grain.

2. ——. The purpose of the thresher's lien statute is to protect the rights to payment of the combiner who is not a party to the payment arrangements between the seller of the grain and the purchaser.
3. ——. The thresher's lien statute is remedial in nature and requires a liberal construction.
4. **Threshers' Liens: Replevin.** The thresher's lien statute gives to the holder of a thresher's lien the rights of enforcement given to owners of secured interests in property as outlined in Neb. U.C.C. art. 9 (Reissue 1971), including the right to bring an action in replevin.
5. **Threshers' Liens.** Where one commingles property subject to a lien with other property alike in quality and value, the lien is not extinguished so long as there is on hand sufficient property alike in quality and value to satisfy the lien.
6. **Trial: Appeal and Error.** In a trial to the court in a law action, the findings of facts by the trial court have the force and effect of a jury verdict and will not be set aside unless clearly wrong.

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

Van Steenberg, Brower, Chaloupka, Mullin & Holyoke for appellant.

Winner, Nichols, Meister & Douglas for appellee.

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

WHITE, J.

Appellant, Sandhills Beef, Inc., appeals from an order of the District Court for Scotts Bluff County, Nebraska, ordering it to deliver to appellee, Honstein Trucking, 4,477.92 cwt. of corn or, in the alternative, to pay appellee the value of such corn, which the court found to be $17,240. Appellee, a commercial combiner of grain, sued the appellant, a corporation that engages in extensive cattle feeding operations, in replevin to recover 10,956.52 bushels of corn against which the appellee claimed a thresher's lien under the terms of Neb. Rev. Stat. §§ 52-501 to 52-503 (Reissue 1978). The District Court found that the lien was timely filed and notice given; that the corn combined and delivered by appellee to appellant was commingled with other corn in appellant's feedlot and that appellant had on hand

at all times pertinent more than 10,956.52 bushels of corn; and that appellee has a valid lien on 4,477.92 cwt. of corn and is entitled to delivery of that amount of corn or its monetary value of $17,240.

Appellant appeals, assigning as error that the District Court erred (1) in finding that replevin was a proper remedy under §§ 52-501 et seq.; (2) in finding that the lien attached to the corn in the appellant's hands when the notice of lien was both filed with the county clerk and served on the appellant after the sale and delivery of the corn; (3) in failing to find that delivery of the corn to the appellant shifted the claimed lien from the corn to any purchase price remaining in the appellant's hands; (4) in finding that the specific corn was commingled and that the lien attached to other than the specific corn; and (5) in failing to find that the claimed lien expired when the specific corn was consumed by livestock prior to delivery of notice of lien to appellant. Appellee cross-appeals, assigning as error the District Court's calculations as to the amount of the lien. We affirm the District Court's findings and judgment in all respects.

The case arose when one Chuck Meyer entered into a contract with the appellee to combine 1,260 acres of corn at $20 per acre. Part of the corn was to have been stored at Meyer's farm and the remainder was to be hauled to market. Ultimately, all of the corn was sold instead to the appellant for delivery to the appellant's feedlot. The combining of the corn started in mid-November 1979 and finished on December 8, 1979. Before the appellee began delivery to the appellant, Meyer received from the appellant the sum of $100,000. The value of the corn at the time of the delivery was $4.10 per hundredweight. A total of 1,145 tons of corn were delivered. On January 4, 1980, less than 30 days from the date that the combining was completed, the appellee filed with the county clerk of Scotts Bluff County notice of a thresher's lien pursuant to § 52-501, and the notice was mailed to the appellant by U.S. mail

on January 8, 1980. This notice, received by the appellant on January 9, 1980, was the only notice, oral or written, given to the appellant of a claimed thresher's lien. However, appellant's manager admitted that by mid-November 1979 he knew appellee was doing the combining for Meyer. The corn when delivered to appellant was either piled in an open silage pit or immediately processed and fed to the appellant's cattle. The appellant was receiving other corn during the time that the appellee was delivering Meyer's corn, the corn was substantially commingled, and at all times there were at least 10,195 bushels of corn in the silage pit. Appellee received $5,000 in partial payment from Meyer, but a dispute arose between Meyer and the appellant as to a balance due Meyer from appellant. Any balance due and owing Meyer from the appellant has not been paid and is the subject of litigation between those parties.

Section 52-501 essentially provides that the owner of a combine used in combining grain shall have a lien upon such grain or corn which he shall combine for either the agreed amount or the reasonable value of the combining services; and to perfect said lien he shall file in the office of the county clerk of the county where the combining was done a notice of the lien, which notice shall designate (1) the name of the person for whom the combining was done; (2) the amount due for the services; (3) the amount covered by the lien; (4) the place where the grain or corn is located; and (5) the date on which the combining was done. The notice shall be filed within 30 days after the combining is done. In the event the grain is to be sold, it is the duty of the seller to notify the purchaser that the combining bill has not been paid. The statute then provides that in the event the corn is sold or consigned with the consent or knowledge of the party entitled to a lien thereon within 30 days after the date of such combining, the lien shall not attach to the grain or to the purchase price thereof unless the party entitled to the lien shall notify the purchaser in writing of the lien. The statute further provides that the lien may be

foreclosed in the manner and form provided for the foreclosure of secured transactions as provided in Neb. U.C.C. art. 9 (Reissue 1971), and that said foreclosure shall be instituted within 30 days after the filing of the lien. Section 52-502 provides, in effect, that the lien shall not attach to the corn in the hands of an innocent purchaser unless all the notices provided for in § 52-501 shall have been given. It is essentially the position of the appellant that the lien is not effective as against it because it was an innocent purchaser for value, which took delivery and paid for the grain without notice of any lien, and that the lien is not retroactive to the date on which the threshing was commenced. It is clear from the record, and not disputed by the parties, that the appellee's lien was filed with the county clerk and notice given to the appellant by the appellee within 30 days after the completion of the combining of Meyer's corn, although, admittedly, subsequent to the purchase of and payment for the grain by the appellant. Further, it is clear that by mid-November appellant's manager knew appellee was combining the corn for Meyer. Although there are no cases in Nebraska interpreting the lien statute to guide the court, the exact situation has been presented to other courts under statutes substantially similar to that in Nebraska. In *Mitchell v. Elevator Co.*, 15 N.D. 495, 107 N.W. 1085 (1906), an action was brought to recover damages against the defendant elevator for the conversion of grain on which the plaintiff claimed a thresher's lien. The defense was that since the lien was not on file at the time the grain was purchased, although the purchase was made within 30 days of the time of the threshing, the defendant was an innocent purchaser. Section 4824, R.C.C. (1899), the North Dakota statute then in effect, provided: "Any person entitled to a lien under this chapter, shall within thirty days after the threshing is completed, file * * * a statement in writing * * * showing the amount and quantity of grain threshed * * * and a description of the land upon which the grain was grown." Section 4825 provided:

"Such lien shall have priority over all other liens and incumbrances upon such grain." The court, in a holding for the plaintiff, said: "To construe this statute so that purchasers of the grain during the 30 days could purchase it without liability, would defeat the purpose of it to a great extent. The intention of the legislature clearly was to subject the grain to a lien for the threshing during the 30 days and this lien became enforceable upon the filing of the claim during the 30 days.... After the filing of claim for a lien, the lien exists as a matter of law against all liens or claims. The statute deprives the purchaser of nothing. He gets all that the owner had a right to sell to him. He knows as a matter of law that the owner cannot lawfully sell, except subject to the lien of the thresher, if it develops that he has any. The statute is notice to the purchaser of the right to a thresher's lien on the grain, up to 30 days from the threshing.... The defendant bought the grain with notice which was as effectual as though the statement for a lien was on file. He acted at his peril, and the statute deprives him of no constitutional or vested right of property." *Mitchell v. Elevator Co., supra* at 500-01, 107 N.W. at 1086-87. *Hahn v. Sleepy Eye Milling Co. et al.*, 21 S.D. 324, 112 N.W. 843 (1907); *Blank v. Fenton*, 54 N.D. 837, 211 N.W. 590 (1926). See, also, generally, 3 Am. Jur. 2d *Agriculture* § 14 (1962); 3 C.J.S. *Agriculture* § 122 (1973).

The sole and only purpose of the thresher's lien law was to give notice by statute to all prospective purchasers of grain and to the owners thereof within 30 days after the completion of combining of the possible existence of a lien by the person who combined the grain. The appellee did not waive that right by delivering the grain nor did he violate any rights of the appellant by failing to inform it at the time of delivery. Appellant's assignment manager knew at the time of delivery that the corn was being combined by appellee for Meyer. In addition, appellant was engaged in a business which involved purchasing large quantities of grain, some of it harvested by custom combiners.

Having been in such a business for years, appellant hardly fits the image of an innocent purchaser, unaware of the thresher's lien statute and the attendant business risks. The assignment is without merit.

Appellant next argues that the District Court erred in failing to find that delivery of the corn to appellant shifted the claimed lien from the corn to any purchase price then remaining in the hands of the appellant. However, in the present case, appellant claims that it paid Meyer $100,000 for the corn in advance of the combining. Whether there is any purchase price remaining in the hands of the appellant is the subject of a pending lawsuit between appellant and Meyer. To construe the statute as appellant wishes would force appellee to await the outcome of that lawsuit and, thus, defeat the entire purpose of the thresher's lien statute. The purpose of the lien is to protect the right to payment of the combiner who is not a party to the payment arrangements between the seller of the grain and the purchaser. Allowing the purchaser to escape the effect of the statute merely by paying the seller in advance would remove the protection now granted the combiner by the statute. This court has previously held that the mechanic's lien law, Neb. Rev. Stat. § 52-101 et seq. (Reissue 1978), is remedial in nature and requires a liberal construction. *Peters v. Halligan*, 182 Neb. 51, 152 N.W.2d 103 (1967). The same principle of construction applies to the thresher's lien. Thus, the trial court was correct in finding that the lien here attached to the corn, and this assignment of error is without merit.

Appellant also raises the issue of whether replevin is an appropriate remedy for the enforcement of a thresher's lien under § 52-501. Section 52-501 gives to the holder of a thresher's lien the rights of enforcement given to owners of secured interests in property as outlined in Neb. U.C.C. art. 9 (Reissue 1971). Section 9-503 states as follows: "Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done

without breach of the peace or may proceed by action." Under the plain terms of article 9, the action in replevin, which is essentially to regain possession of goods, is provided for and plainly granted to the appellee. The assignment of error is without merit.

Appellant's final assignment of error suggests that the corn delivered to it was, in fact, destroyed by being fed to the appellant's cattle prior to the time the lien was filed and, therefore, the lien did not attach. The evidence indicates that the corn delivered to the appellant was commingled with other corn and that at all times there was on hand in the silage pit where the grain was stored a sufficient quantity of corn to respond to the judgment of the court. Generally, where one commingles property subject to a lien with other property alike in quality and value, the lien is not extinguished so long as there is on hand sufficient property alike in quality and value to satisfy the lien. See *First Nat. Bank v. Morgan*, 172 Neb. 849, 112 N.W.2d 26 (1961). See, also, generally, 66 Am. Jur. 2d *Replevin* § 8 (1973); 77 C.J.S. *Replevin* § 13 (1952). This assignment of error is without merit.

On cross-appeal, the appellee assigns as error that the trial court failed to allow the full recovery of which it claims to be $20,200, contending that the contract was an indivisible contract to combine Meyer's corn for $25,200, rather than a contract to combine 1,260 acres at $20 per acre. In this factual question, there was evidence which would support the trial court's findings that appellee actually combined only 1,112 acres and that the contract was divisible. In a bench trial in a law action, the findings of fact by the trial court have the force and effect of a jury verdict and will not be set aside unless clearly wrong. *Lee v. City of Omaha, ante* p. 345, 307 N.W.2d 800 (1981). Here, the findings of the trial court are supported by the evidence and, thus, the assignments of error are without merit.

The judgment of the trial court is affirmed.

AFFIRMED.

IN RE APPLICATION OF GREYHOUND LINES, INC. AMERICAN BUS LINES, INC., DOING BUSINESS AS TRAILWAYS, INC., APPELLANT, V. GREYHOUND LINES, INC., APPELLEE.

308 N.W.2d 336

Filed July 10, 1981. No. 43457.

1. **Motor Carriers: Proof.** The burden is on the applicant for a certificate of public convenience and necessity to show he has met all the requirements of the statutes.
2. **Public Service Commission: Appeal and Error.** Upon an appeal from an order of the commission granting a certificate, this court may decide only whether the commission acted within the scope of its authority and whether the order in question was reasonable and not arbitrarily made.
3. ____;____. This court will not disturb an order of the commission based on evidence unless the evidence shows that the order was unreasonable or arbitrary.
4. **Motor Carriers.** In determining the issue of public convenience and necessity, controlling questions are whether the operation will serve a useful purpose responsive to a public demand or need; whether this purpose can or will be served as well by existing carriers; and whether it can be served by applicant in a specified manner without endangering or impairing the operations of existing carriers contrary to public interest.
5. ____. In considering a determination of the public convenience and necessity, the utility of a "closed door" policy and the value of a competitive market to the public must be considered.
6. ____. The purpose of the Nebraska Motor Carrier Act was regulation for the public interest. Its purpose was not to stifle legitimate competition but to foster it.
7. **Public Service Commission.** The determination of the public interest is one that is peculiarly for the determination of the commission.
8. **Public Service Commission: Judgments.** If there is evidence to sustain the finding of the commission, this court cannot intervene. It is only where the findings of the commission are against all the evidence that this court may hold that the commission's finding on the evidence is arbitrary and capricious.

Appeal from the Nebraska Public Service Commission. Affirmed.

Lavern R. Holdeman of Peterson, Bowman & Johanns for appellant.

James E. Ryan of Ryan & Williams, P.C., for appellee.

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

BOSLAUGH, J.

This is an appeal from an order of the Nebraska Public Service Commission granting an application filed by Greyhound Lines, Inc., for authority to operate as a common carrier by motor vehicle, over regular routes, transporting passengers, baggage, mail, express, and newspapers in the same vehicle with passengers between Lincoln, Nebraska, and Grand Island, Nebraska, serving no intermediate points, via Interstate 80. Grand Island, Nebraska, is approximately 100 miles west of Lincoln, Nebraska.

A protest was filed by American Bus Lines, Inc., doing business as Trailways, Inc., which has authority to operate over the same route. No other protest to the application was filed. After 6 days of hearings on the application in Lincoln and Grand Island, the commission concluded, with one commissioner dissenting, that the application of Greyhound should be granted. Trailways appeals from that order.

The protestant holds authority to operate over U.S. Highway 34 between Lincoln and Grand Island, serving all intermediate points. The applicant holds authority to operate over U.S. Highways 30 and 30A between Omaha and Grand Island, and also over U.S. Highway 6 between Omaha and Lincoln. In 1962 the applicant applied for authority to operate between Lincoln and Grand Island serving no intermediate points. The authority was granted by the commission but upon appeal to this court the order was reversed. See *The Greyhound Corp. v. American Buslines Inc.*, 178 Neb. 9, 131 N.W.2d 664 (1964).

Since the applicant is authorized to operate over Interstate 80 as an alternate route, it now operates buses through Omaha to Lincoln, Grand Island, and points west, and also in the opposite direction, but without authority to convey passengers to Lincoln from

the west, or from Lincoln to the west. This "closed door" service requires eastbound passengers from Grand Island to travel to Omaha and then return to Lincoln if they wish to use the applicant's service to Lincoln. Westbound passengers must first travel to Omaha and then return to Lincoln in order to use the applicant's service to Grand Island. The same restrictions apply to the applicant's express package service between Lincoln and Grand Island.

In *Black Hills Stage Lines, Inc. v Greyhound Corp.*, 174 Neb. 425, 118 N.W.2d 498 (1962), it was noted that a closed door passenger operation is difficult for waiting passengers to understand and may at times result in wasteful transportation. That circumstance is present in this case because the applicant is already providing the service but the "closed door" restriction prevents the public from using the service without traveling to or from Omaha in order to use the applicant's service between Lincoln and Grand Island. As the assistant director of traffic for Greyhound stated: "The crux of Greyhound's proposal, and the purpose of this entire application, is simply to allow Greyhound to serve Lincoln, Ne. as an intermediate point stop on its operations over Interstate Highway 80. Greyhound simply wants to open its doors to provide service to Lincoln, Ne." An application for the type of certificate involved in this case is governed by Neb. Rev. Stat. § 75-311 (Reissue 1976), which provides: "A certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found after notice and hearing *that the applicant is fit, willing, and able properly to perform the service proposed,* and to conform to the provisions of sections 75-301 to 75-322.01 and the requirements, rules, and regulations of the commission thereunder and that the proposed service, to the extent to be authorized by the certificate, whether regular or irregular, passenger or property, *is or will be required by the present or future public convenience and necessity;* other-

wise such application shall be denied." (Emphasis supplied.)

The burden is on the applicant for a certificate to show he has met all the requirements of § 75-311. See *The Greyhound Corp. v. American Buslines Inc., supra.*

Upon an appeal from an order of the commission granting a certificate, this court may decide only whether the commission acted within the scope of its authority and whether the order in question was reasonable and not arbitrarily made. *Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp.*, 186 Neb. 261, 182 N.W.2d 648 (1971). This court will not disturb an order of the commission based on evidence unless the evidence shows that the order was unreasonable or arbitrary. *The Greyhound Corp. v. American Buslines Inc., supra; Preisendorf Transp., Inc. v. Herman Bros., Inc.*, 169 Neb. 693, 100 N.W.2d 865 (1960).

The record shows that the applicant Greyhound proposes to operate 3 eastbound and 2 westbound schedules daily over Interstate 80 between Grand Island and Lincoln. The buses on this route are all air-conditioned and lavatory-equipped. Terminal facilities and commission agents are already present in the areas involved in the application. All Greyhound buses now operating through Lincoln have excess capacity to accommodate additional passengers. Financial information provided by the company shows it is financially fit, willing, and able to perform the service applied for.

The evidence clearly supports the commission's finding that Greyhound was fit, willing, and able to perform the proposed service. The appellant Trailways attacks the commission's finding that the certificate "is or will be required by the present or future public convenience and necessity." "This court has consistently held: 'In determining the issue of public convenience and necessity, controlling questions are whether the operation will serve a useful purpose responsive to a public demand or need; whether this purpose can or will be served as well by existing carriers; and whether it can be served by ap-

plicant in a specified manner without endangering or impairing the operations of existing carriers contrary to public interest.' Miller v. Consolidated Motor Freight, Inc., 168 Neb. 712, 97 N.W.2d 265. See, also, Houk v. Peake, 162 Neb. 717, 77 N.W.2d 310; Basin Truck Co. v. R.B. 'Dick' Wilson, Inc., 166 Neb. 665, 90 N.W.2d 268." *Black Hills Stage Lines, Inc., v. Greyhound Corp.*, 174 Neb. 425, 429, 118 N.W.2d 498, 500-01 (1962).

More than 50 public witnesses testified in support of Greyhound's application, taking up over 600 pages of the record. The witnesses included representatives of local government subdivisions in the affected area, chamber of commerce representatives, officials from the universities, businessmen engaged in package delivery, retired citizens' organizations, and private individuals. While much of the testimony was repetitive, the consensus of the witnesses' testimony described Trailways' service as inadequate with regard to its schedules. Most of the witnesses cited a need for more and better schedules and service.

The package express shippers generally expressed a dissatisfaction with the lack of daytime schedules on Trailways. One shipper went so far as to describe the present service as "no bus service at all." Incidental complaints were also registered with regard to the failure to notify customers on the arrival of packages.

The lack of daytime schedules was cited by individuals who used Trailways to travel to western Nebraska to visit relatives, or return on visits from school. The facilities of Trailways in many cities are closed during most of the scheduled stops. No witness appeared in opposition to the application other than the area operations manager for Trailways.

The evidence before the commission indicated a marked reduction by Trailways in schedules between Lincoln and Grand Island since 1962. At the time of the hearing, Trailways' Lincoln to Grand Island service departed Lincoln at 5:20 p.m. and 11:15 p.m., and arrived

in Grand Island at 7:45 p.m. and 1:10 a.m., respectively. From Grand Island, Trailways buses departed at 5:25 a.m. and 7:05 p.m., and arrived in Lincoln at 7:35 a.m. and 9:20 p.m., respectively. These schedules were part of Trailways' transcontinental system which serves major markets on the east and west coasts. Two of Greyhound's proposed schedules between Lincoln and Grand Island would provide daytime service.

The Greyhound representative testified there would be no significant impact on Greyhound's "northern" route if the application for service to Lincoln over Interstate 80 was granted.

The Trailways' operations witness noted that Trailways was not a profitable operation over the route covered by the application. The witness estimated that if the Greyhound application was granted, $84,000 in revenue would be diverted to Greyhound from Trailways.

The "closed door" restriction which applied to Greyhound's interstate service to Lincoln was suspended by the Interstate Commerce Commission in 1979 for 90 days ending September 25. Trailways' operations witness was unable to provide evidence of a significant diversion of traffic from Trailways to Greyhound as a result of the lifting of the restriction during suspension.

The commission, while noting that some revenue diversion would result from its order granting the application, found that it would not impair Trailways' operations contrary to the public interest. The commission found a public need for additional bus schedules, as provided for in Greyhound's application. In granting the application, the commission described the history of Trailways' deteriorated schedule as "tantamount to an abandonment of service by Trailways over that route."

In considering a determination of the public convenience and necessity, the utility of a "closed door" policy and the value of a competitive market to the public must be considered. This court has noted: "'The purpose of the Nebraska Motor Carrier Act was regulation

for the public interest. Its purpose was not to stifle legitimate competition but to foster it. Its purpose was not to create monopolies in the transportation industry but to eliminate discrimination, undue preferences or advantages, and unfair or destructive competitive practices. Legitimate competition is a normal attribute of our free enterprise system. It must be permitted to exist and the law contemplates that it shall.'" *Shanks v. Watson Bros. Van Lines*, 173 Neb. 829, 833, 115 N.W.2d 441, 444-45 (1962); *Black Hills Stage Lines, Inc. v. Greyhound Corp.*, 174 Neb. 425, 118 N.W.2d 498 (1962).

Trailways argues that this court's decision in *The Greyhound Corp. v. American Buslines Inc., supra*, should control this appeal. In that case, however, we noted there was no substantial showing of insufficiency of capacity or lack in quality of service by American, and that the evidence disclosed preponderantly that the facilities of American were good and the operating conditions satisfactory.

The commission, in its order, distinguished that earlier decision when it found a lack of quality service by Trailways and operational facilities that were not good. The finding of the commission in this regard is supported by the record.

The evidence in this case shows that the authority applied for will serve a useful purpose that is responsive to a public demand and need. It also shows that the service will not be adequately performed by the existing carrier in the area. The determination as to whether the service to be performed by the applicant would endanger or impair the operations of the existing carrier contrary to the public interest was an issue peculiarly for the commission. *Black Hills Stage Lines, Inc. v. Greyhound Corp., supra.* It was the duty of the commission to weigh the need for new service and the detriment to accrue to the existing carrier, and to determine what was consistent with the public interest.

The determination of the public interest is one that is peculiarly for the determination of the commission. If

there is evidence to sustain the finding of the commission, this court cannot intervene. It is only where the findings of the commission are against all the evidence that this court may hold that the commission's finding on the evidence is arbitrary and capricious. *Neylon v. Petersen & Petersen, Inc.*, 181 Neb. 143, 147 N.W.2d 488 (1966).

The findings of the commission are supported by the record and its order must be affirmed.

AFFIRMED.

IN RE INTEREST OF LEE HOLLEY, A CHILD UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V.
HAROLD HOLLEY ET AL., APPELLANTS.
IN RE INTEREST OF JENNIFER HOLLEY, A CHILD UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V.
HAROLD HOLLEY ET AL., APPELLANTS.

308 N.W.2d 341

Filed July 10, 1981. Nos. 43649, 43650.

1. **Parental Rights.** The interest of the state which is protected by Neb. Rev. Stat. § 43-209 (Reissue 1978) is that of protecting minor children from serious abuse and serious neglect.
2. ——. The interest of the state protected by Neb. Rev. Stat. § 43-209 (Reissue 1978) is a compelling state interest.
3. ——. The word "may" in Neb. Rev. Stat. § 43-209 (Reissue 1978) is designed to allow the judge to weigh each individual case in the light of the degree of seriousness of the conduct, its effect upon the best interests of the child, the likelihood of continuation, and the results of attempted corrective measures, and then to determine whether or not parental rights must be terminated. Such discretion is not constitutionally impermissible.
4. ——. Rules governing termination of parental rights 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.
5. ——. Courts have the discretion to experiment with foster care and visi-

tation arrangements while keeping in mind that there is a compelling state interest to be protected and that the best interests of the child may require complete termination of parental rights eventually.

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

Dennis R. Keefe, Lancaster County Public Defender, and Marie Ashe for appellants.

Ron Lahners, Lancaster County Attorney, and Richard J. Hautzinger for appellee.

Darrell K. Stock, guardian ad litem.

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

WHITE, J.

This is an appeal from the separate juvenile court of Lancaster County from an order terminating the parental rights of the appellants, Ann and Harold Holley, in their children, Lee and Jennifer Holley. The termination order was entered May 28, 1980, pursuant to the provisions of Neb. Rev. Stat. § 43-209(5) (Reissue 1978). After trial, the court found that both Ann and Harold Holley were unable to discharge their parental responsibilities because of mental illness in the case of Ann, and mental deficiency in the case of Harold, and that in the case of both appellants such conditions would continue for a prolonged and indeterminate period. Appellants' motions for new trial were overruled and they have perfected this appeal. They assign as error: (1) That the trial court erred in overruling their motion to dismiss; and (2) That the trial court erred in failing to find § 43-209 constitutionally defective by its claimed failure to require the showing of a compelling state interest to justify termination, and by its claimed failure to require that the State pursue the least restrictive alternative means to achieve the compelling state interest.

The older child, Lee Holley, was born on July 20, 1977. On July 22, 1977, an amended petition was filed

alleging that Lee Holley was without proper parental care and support through no fault of his parents, in that the parents of the child are emotionally unstable and unable to provide proper care for the child. The amended petition alleged that while still in the hospital the mother was heard to state that she did not care if the baby died and that the father had put a blanket over the face of the child while visiting and stated "let him suffocate." After a hearing on this amended petition on July 28, 1977, the trial court ordered the custody of Lee placed with Ethel Louise Paul, paternal grandmother of the child. An adjudication hearing was held on August 9, 1977. Evidence adduced at this hearing indicated that Ann Holley suffered from hallucinations and delusions, had been hospitalized for severe emotional problems three times in the 2½ years preceding the hearing, and was not personally able to assume responsibility for the child's care. Other evidence at this hearing indicated that Harold Holley was also emotionally unstable. After this hearing, the trial court found the child to be a dependent child pursuant to Neb. Rev. Stat. § 43-202(1) (Reissue 1978) and ordered Lee placed in the joint custody of the appellants and Ethel Louise Paul, further ordering that a caseworker from the welfare department was to visit the home, supervise the care of Lee, and to see that the appellants were instructed in parenting skills. The appellants and Lee then moved into the home of Ethel Paul and her husband where they remained until January 1978.

In January 1978 appellants moved into their own apartment and the child remained in the home of Ethel Paul. On March 8, 1978, a further dispositional hearing was held at the request of the appellee. At this hearing Ethel Paul testified that she was no longer physically able to care for Lee, and the appellants recommended that Lee be placed with Glen and Sandy Tubbs, cousins of Harold Holley. The testimony of Ann Holley's psychiatrist at this hearing indicated that Ann was still suffering from hallucinations and delusions and that

she was unable to respond well to stress. It was the testimony of the psychiatrist that Ann Holley would not be able to deal appropriately with the child in an emergency situation and that she was not emotionally capable of caring for the child at that time. The psychiatrist's testimony also indicated that Harold Holley was readily overwhelmed, and his mental condition prevented him from reasoning out how to react to stressful situations. Following this hearing, the trial court ordered Lee placed in an approved foster home that could best meet his needs, and he was placed in the home of Sandy and Glen Tubbs. The court at this hearing also ordered that visitation should be arranged for Ann and Harold Holley and that Ann and Harold should continue to correct the conditions of dependency and neglect found to exist if they desired to resume custody of Lee. The appellants were ordered to follow the recommendations of the welfare department caseworker, visit with Lee, obtain counseling with the Lincoln-Lancaster Mental Health Center, and to cooperate with agencies that could teach them proper child care.

On October 16, 1978, a daughter, Jennifer, was born to the appellants. Appellants immediately signed a voluntary foster-care agreement to place Jennifer in foster care. The child, Jennifer, was placed in the home of Bob and Sandy Rosecrans and visitations were arranged. On January 3, 1979, a petition was filed with the juvenile court of Lancaster County requesting an adjudication and alleging that Jennifer was without proper parental care and support through no fault of the parents due to the voluntary foster placement. At a hearing on this petition on January 10, 1979, the court found that Jennifer was a dependent child within the meaning of § 43-202(1) and that temporary custody of Jennifer should be placed with the Lancaster County Division of Public Welfare.

On August 10, 1979, appellee filed supplemental petitions with regard to both Lee and Jennifer request-

ing that the appellants' parental rights in the children be terminated. The petitions alleged that the parents were unable to care for the children even after months of instruction by workers from the Lancaster County Division of Public Welfare; that the parents were mentally and emotionally incapable of assuming the responsibility of caring for the children; that they were unable to discharge parental responsibilities because of mental illness or mental defects; and that the conditions would continue for a prolonged, indeterminate period. After numerous continuations, the termination hearing was held on May 21, 1980. The evidence adduced at this hearing indicated that the emotional and mental problems of Ann Holley had not improved. Her psychiatrist, Dr. J. Boman Bastani, testified that stress would accelerate Ann Holley's illness and that she was in no position to handle the stress of parenting due to her mental illness. Testimony at this hearing indicated that Harold Holley was 100 percent physically disabled by an arthritic condition which will not improve and will probably worsen. Testimony by an orthopedist, Dr. Harold R. Horn, indicated that Harold's disability was such that he could not respond if the child was in danger. Psychiatric and intellectual evaluations of Harold indicated that he is mildly mentally retarded and is functioning at around the fifth grade level, emotionally and intellectually.

Dr. Robert G. Osborne, a psychiatrist, testified that Harold's concept of parenting was analogous to that of a child playing house and that he demonstrated a lack of continuity and consistency in caring for the children. Dr. Osborne testified that it was his opinion that Harold Holley would be unable to teach the children the necessary social skills and that his inability would be lifelong.

At this hearing, the most damaging testimony came from Scott Kerl, a caseworker with the Lancaster County Division of Public Welfare, from Carol Christopher of Child Protective Services, Margaret Reid, a social service worker, and Janis Houfek of

Homemakers' Services from the division of public welfare. These witnesses testified that the Holleys had been extremely uncooperative with all the services offered by the division of public welfare and had made very little progress in basic parenting skills such as feeding and changing the children. The evidence at this hearing further indicated that the parents were unable or unwilling to discipline the children, particularly in dangerous situations such as playing with electrical cords or playing near a fan. There was evidence from several witnesses that on many of the visits when the Holley children were brought to the Holleys' apartment to visit them, Harold Holley refused to get out of bed and come out into the living room and visit with the children. There was also testimony that the children were frightened of Harold and Ann and that there were no demonstrations of affection running from the children to their parents. Following this hearing, the trial court found that the best interests of the children, Lee and Jennifer, required termination of the appellants' parental rights. We affirm.

We will first consider appellants' assignment of error that § 43-209 is unconstitutional. Appellants first argue that their right to due process is violated by that statute in that it fails to require a compelling state interest to justify termination of parental rights. Appellants rely heavily on the case of *Alsager v. District Court of Polk Cty., Iowa*, 406 F. Supp. 10 (S.D. Iowa 1975), in which the U.S. District Court for the Southern District of Iowa held that "to sustain its compelling interest burden, the state must show that the consequences, in harm to the children, of allowing the parent-child relationship to continue are more severe than the consequences of termination." *Id.* at 23. Appellants' argument is that by not requiring a showing of actual or imminent harm to the child before termination of parental rights may take place, § 43-209 does not require a compelling state interest to be shown before parental rights may be terminated.

We note that the circumstances of this case are greatly different than those which were present in the *Alsager* case. While the District Court in its opinion in *Alsager* did not marshal the evidence which was presented in the juvenile court, the opinion does set out the Iowa statute under which the parents' rights were terminated. We note that the Iowa statute did not contain a reason for termination similar to subsection (5) of § 43-209 under which appellants' parental rights were terminated. Subsection (5) of the Nebraska statute allows the court to terminate parental rights when it finds that: "The parents are unable to discharge parental responsibilities because of mental illness or mental deficiency, and there are reasonable grounds to believe that such condition will continue for a prolonged indeterminate period." It is plain from the wording of the Nebraska statute, as was noted by the separate juvenile court in its memorandum opinion, that the statute by its terms does not permit termination of parental rights for any mental illness or mental deficiency. The only mental illness or mental deficiency which will suffice to terminate parental rights under this subsection is that which renders the parent unable to discharge parental responsibilities, and it is also necessary that the court find reasonable grounds to believe that the condition will continue for a prolonged, indeterminate period. Thus, it is plain that the statute ties the mental problems of the parent to the parent's ability to properly raise and care for the child. While the statute does not, as appellants would require, use the magic words "actual or imminent harm to the child," it is neither necessary nor even appropriate that the statute be so worded. The interest of the state, which is protected by this statute, is, as we noted in the case of *State v. Metteer*, 203 Neb. 515, 522, 279 N.W.2d 374, 378 (1979), "protecting minor children from serious abuse and serious neglect . . . ." This manner of wording the interest to be protected makes the interest no less compelling than it would be were the statute worded as

appellants argue it ought to be.

Even assuming for the sake of argument that the statute's literal wording does not state a compelling state interest, the federal court in the *Alsager* case noted that a facially defective statute can be saved by "a state court construction restricting the vague standards to constitutionally permissible bounds." 406 F. Supp. at 19. The construction which was placed on § 43-209(5) by the case of *State v. Metteer, supra,* is such a limiting construction. Therefore, we find that the statute of which appellants complain does protect a compelling state interest and is thus not unconstitutional in that respect.

Appellants next argue that the statute, even if it protects a compelling state interest, is unconstitutional in that it fails to require that the state pursue the least restrictive alternative means to achieve such compelling interest. However, appellants fail to note that the statute in question does not require termination of parental rights when a parent is found to be within subsection (5) of the statute. As we state in *State v. Metteer, supra* at 521, 279 N.W.2d at 378: "The word 'may' in the statute is designed to allow the judge to weigh each individual case in the light of the degree of seriousness of the conduct, its effect upon the best interests of the child, the likelihood of continuation, and the results of attempted corrective measures, and then to determine whether or not parental rights must be terminated. Such discretion is not constitutionally impermissible."

In addition, in *In re Interest of Hill,* 207 Neb. 233, 239, 298 N.W.2d 143, 146 (1980), this court stated that rules governing termination of parental rights "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."

There is nothing in the Nebraska termination statute which prevents a court from devising unique foster care

and visitation arrangements when it finds that such would be in the best interests of the child, as opposed to total termination of parental rights. See Derdeyn, Rogoff, & Williams, *Alternatives to Absolute Termination of Parental Rights After Long-Term Foster Care*, 31 Vanderbilt L. Rev. 1165 (1978). While the statute may not set out a "checklist" of alternative arrangements to be attempted in an effort to find the one that best suits the best interests of the child, the *Hill* and *Metteer* cases make it plain that complete termination of parental rights is indeed a last resort and that courts have the discretion to experiment with foster care and visitation arrangements while keeping in mind that there is still a compelling state interest to be protected, and that the best interests of the child may require complete termination of parental rights eventually.

It is clear from the record in this case that the separate juvenile court did terminate appellants' parental rights as a last resort, and that prior to termination that court authorized a variety of experimental situations to assist appellants in gaining the necessary parenting skills which would have allowed them to regain custody of their children. However, the record is replete with evidence that after 2½ to 3 years of intensive instruction, visitation, and mental health counseling, appellants were unable to master even the most basic skills of diapering and feeding the children. In addition, the record demonstrates that the visitations arranged by the social workers between appellants and their children were not successful in terms of developing an affectionate child-parent relationship between the Holleys and their children. The record demonstrates that the children, Lee and Jennifer, were frightened of the Holleys; that many times Harold Holley refused or was unable to get out of bed to visit with the children; that neither Harold nor Ann understood the emotional needs of the children; and that many times the appellants were more interested in visiting with the adults who brought the children to the Holley apartment than

in playing with the children. The record also demonstrates that the appellants were unable to understand the seriousness of certain situations which posed a danger to the children and were unable or unwilling to protect or discipline the children to prevent the occurrence or reoccurrence of such situations. The record is clear that the separate juvenile court then did terminate appellants' parental rights only as a last resort to protect the best interests of the minor children, Lee and Jennifer Holley.

Appellants' final contention is that the trial court erred in finding that it was shown by clear and convincing evidence that termination of appellants' parental rights was in the best interests of the children. As we said in *State v. Logan*, 204 Neb. 204, 281 N.W.2d 753 (1979), on appeal, while this court is free to hear the case de novo on the record, the findings of fact by the juvenile court should be accorded great weight because the juvenile court heard and observed the parties and the witnesses. A review of the record shows that the findings of fact by the trial court were not in error. Appellant Ann Holley suffered from delusions and hallucinations and had been diagnosed as suffering from chronic undifferentiated schizophrenia by more than one psychiatrist. These hallucinations and delusions prevented her from dealing with the real world and prevented her from learning proper parenting skills. The record also shows that appellant Harold Holley was 100 percent physically disabled and, in addition, was functioning at only a fifth or sixth grade level intellectually and was unable to grasp the concepts necessary to be able to raise the children properly. In addition, his physical disabilities would have made it impossible for him to remove the children from dangerous situations in an emergency. The evidence also demonstrated, as the trial court found, that in all probability the parents' mental problems would continue for a prolonged and indefinite period and that it was unlikely they would ever be able to regain custody of their children. Tragi-

cally, we find no evidence in the record which would indicate that it would be in the best interests of the minor children, Lee and Jennifer Holley, to allow the appellants to maintain a "residue of visitation rights" as counsel for the appellants urges.

Therefore, we find that the order of the separate juvenile court of Lancaster County terminating appellants' parental rights to their children, Lee and Jennifer Holley, was correct in all respects, and we affirm that order.

AFFIRMED.

CERES FERTILIZER, INC., A COLORADO CORPORATION, APPELLANT, V.
FRED O. BEEKMAN, APPELLEE.

308 N.W.2d 347

Filed July 10, 1981. No. 43754.

1. **Uniform Commercial Code: Secured Transactions: Judgments.** The recovery of a judgment for a debt, except to the extent that it has been satisfied, does not prevent later proceedings to enforce a security interest under the Uniform Commercial Code given to secure its payment.
2. **Secured Transactions: Attachments.** Upon dissolution of an attachment, ordinarily all property attached should be returned to the defendant owner.

Appeal from the District Court for Gage County: WILLIAM B. RIST, Judge. Affirmed as modified.

Joseph M. Caffall and Fredrick L. Swartz for appellant.

James G. Sharp of Everson, Noble, Wullschleger, Sutter, Sharp & Korslund for appellee.

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

HASTINGS, J.

Ceres Fertilizer, Inc., has appealed from an order and judgment on the mandate of the District Court for Gage County which directed that funds held by the clerk of the District Court be paid to Fred Beekman's assignees. The funds had been held pursuant to an attachment which had been determined to be invalid upon appeal to this court in *Ceres Fertilizer, Inc. v. Beekman*, 205 Neb. 768, 290 N.W.2d 199 (1980). The appellant assigns as error: (1) The trial court's finding that by bringing suit on the note, plaintiff had made an election of remedies and therefore precluded future reliance upon the security agreement; (2) The holding that Ceres had no lien against the funds held by the clerk of the District Court; and (3) The order that those funds be paid to Beekman's assignees.

As was set forth in detail in our previous opinion, Beekman had executed a promissory note in favor of Ceres which was secured by a security agreement and financing statement which recited that it covered certain of Beekman's corn then being stored in Chase County. Ceres commenced its action on the note against Beekman in the District Court for Gage County, and in conjunction with that lawsuit had an attachment issued to Chase County which was levied against the proceeds from the sale of the allegedly secured corn. By order of the District Court for Chase County, those funds were transmitted to the clerk of the District Court for Gage County. Beekman's motion to dissolve the attachment was denied by the District Court for Gage County, and after trial a money judgment was entered against Beekman on the promissory note. On appeal, we found that the attachment was improperly obtained and therefore ordered it dissolved. However, jurisdiction did not depend upon the attachment because of the defendant's general appearance, and following an examination of the record on the merits, we affirmed the money judgment in favor of Ceres.

This court's decision was filed on March 18, 1980, in which we remanded the cause for proceedings con-

sistent with our determination that the attachment placed upon Beekman's property was invalid. On March 21, 1980, Fred Beekman made two assignments. One assignment was to Thomas J. Beekman for 50 percent of all money held by the clerk of the District Court for Gage County which is his property, and the other assignment was to his attorney, Arnold Wullschleger, for the other 50 percent of the money held by the clerk. Both assignments were filed with the clerk of that court on the same date.

The District Court held a hearing on the issues remanded, and entered its order and judgment on the mandate as follows: The judgment against Beekman in favor of Ceres on the promissory note, in the amount of $48,415.60, with interest, was affirmed. The order of attachment was dissolved. The funds held by the clerk of the District Court for Gage County were to be paid as follows: (1) To the United States of America Internal Revenue Service, the sum of $3,774.23, plus interest and penalties; and (2) The remainder of the funds to be paid one-half to Arnold E. Wullshleger and one-half to Thomas J. Beekman, pursuant to the assignments.

The court made the finding that Ceres had no claim to the funds by virtue of the judgment awarded or by virtue of any security agreement executed by Beekman. The court stated that Ceres had elected to sue upon the promissory note in lieu of asserting any rights under the security agreement and, by virtue of said election, Ceres' rights now accrue from that judgment and Ceres may not assert claims under that security agreement. The court further held that Ceres did not have a lien based upon the judgment itself.

The first assignment of error concerns the ruling that plaintiff had made an election of remedies by suing on the note and therefore could not now rely on the security agreement for a first lien. Neb. U.C.C. § 9-501(1) (Reissue 1971) states: "(1) When a debtor is in default under a security agreement, a secured party has the rights and remedies provided in this part and except as

limited by subsection (3) those provided in the security agreement. He may reduce his claim to judgment, foreclose or otherwise enforce the security interest by any available judicial procedure. If the collateral is documents the secured party may proceed either as to the documents or as to the goods covered thereby. A secured party in possession has the rights, remedies and duties provided in section 9-207. *The rights and remedies referred to in this subsection are cumulative.*" (Emphasis supplied.)

The above section has been consistently interpreted to mean that a creditor may choose to sue on a promissory note and recover judgment on an underlying debt without losing his rights and remedies to recover on the security agreement. *Matter of Hill*, 472 F. Supp. 844 (D. Kan. 1979).

"The recovery of a judgment for a debt, except to the extent that it has been satisfied, does not prevent later proceedings to enforce a mortgage or other lien given to secure its payment. This Court has held that the creditor is not deprived by the judgment of his right to resort to a fund, or to avail himself of a lien or security held for the debt." *Ruidoso State Bank v. Garcia*, 92 N.M. 288, 290, 587 P.2d 435, 437 (1978).

The remedies are cumulative and a creditor need not choose one remedy to the exclusion of the others. "The Code, and pertinent judicial decisions, established that a secured creditors [sic] need not 'elect' his choice of remedies. He may pursue those methods of collection afforded under the Code or through judicial processes otherwise available. Nor by effectuating the latter course of action, does the creditor relinquish any rights obtained by virtue of his security interest." *Bilar, Inc. v. Sherman*, 40 Colo. App. 38, 41, 572 P.2d 489, 491-92 (1977). See, also, *Cracco v. Cox*, 66 App. Div. 2d 447, 414 N.Y.S.2d 404 (1979).

Therefore, by suing on the note and recovering a judgment, Ceres has not foreclosed its rights which arise from the security agreement. The trial court was in

error in holding that the doctrine of election of remedies applies here to preclude claims under any security agreements.

Ceres complains in its second assignment of error of the finding by the trial court that plaintiff had no lien against the funds being held by the court. It seems beyond argument that no lien existed by reason of the money judgment. "All . . . goods and chattels of the debtor, shall be bound [for the satisfaction of a judgment] from the time they shall be seized in execution . . . ." Neb. Rev. Stat. § 25-1504 (Reissue 1979). No execution has as yet been issued.

However, the court in its findings went further and concluded that "plaintiff has no claim . . . by virtue of . . . any security agreement heretofore executed by the defendant . . . ." It is apparent that such a finding was based on the court's theory that Ceres had made an election of remedies which we have already declared to be incorrect.

Neb. U.C.C. § 9-306 (Reissue 1971) provides that in spite of the sale or other disposition by the debtor of the collateral, the security interest may continue in such property and in any identifiable proceeds received by the debtor. It is also true that where funds are obtained by the unauthorized sale of goods subject to a security interest, a transferee of the proceeds of such sale may be liable to the secured party. *Alter v. Bank of Stockham*, 53 Neb. 223, 73 N.W. 667 (1897).

In light of these authorities, the possibility remains that Ceres has a security interest in the funds even though they be the subject of a written assignment. However, that issue was not presented to the court by either the pleadings or the evidence and so remains unresolved.

Under the state of the record now existing, the District Court was correct in directing the return of the funds in the hands of the clerk to the defendant or his assignees. Upon dissolution of an attachment, ordinarily all property attached should be returned to the defend-

ant. 7 C.J.S. *Attachment* § 369 (1980). There is no question but that Beekman was the owner of the proceeds of the sale of the corn and Ceres, at most, claimed rights as a secured creditor. "We are still of the opinion that the trial court had no choice but to order the repayment of the proceeds of the attachment sale to the tenant-appellee because at that time and *under the pleadings and evidence in the case* before said court, the tenant was the owner of the crops and the landlord merely a lienholder thereof." (Emphasis supplied.) *Barnes v. Burke*, 47 Ala. App. 253, *opinion denying rehearing* at 263, 253 So. 2d 46, 56 (1970), *cert. granted and aff'd* 287 Ala. 725, 253 So. 2d 56 (1971).

Except to the extent that the District Court was in error in deciding the issue of the efficacy of any lien arising from the security agreement, Ceres' second and third assignments of error are without merit, and the judgment is affirmed.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. DAVID D. DITTER, APPELLANT.

308 N.W.2d 350

Filed July 10, 1981. No. 43815.

1. **Appeal and Error: Jurisdiction.** Filing of a notice of appeal in this court vests exclusive jurisdiction in this court.
2. **Criminal Law: Motions for New Trial: Appeal and Error.** In the absence of a motion for new trial in a criminal case, the only issues remaining for argument are whether the pleadings support the judgment and whether the judgment is excessive.
3. **Motions for New Trial.** A motion for new trial filed while the case is on appeal to this court is a nullity.

Appeal from the District Court for Hall County: JOHN C. WHITEHEAD, Judge. Affirmed in part, and in part dismissed.

L. William Kelly of Kelly & Kelly for appellant.

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

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

WHITE, J.

This case comes to the court in a unique posture. A number of procedural and substantive questions as to our jurisdiction are raised by the State. Because of the jurisdictional defects, we have before us only the question of whether the sentence imposed on the defendant was excessive.

The defendant, David D. Ditter, pled guilty to the crime of first degree murder, Neb. Rev. Stat. § 28-303(1) (Reissue 1979), and was sentenced on November 15, 1979, after a hearing by the trial court on the aggravating and mitigating circumstances, to a term of imprisonment for life, the least sentence allowable under § 28-303.

No motion for new trial was filed and a notice of appeal was filed on December 13, 1979.

Notwithstanding the notice of appeal filed in this court, vesting exclusive jurisdiction in this court, new counsel on May 19, 1980, filed pleadings denominated motion for new trial and motion to vacate verdict and request for new trial. See *State v. Allen*, 195 Neb. 560, 239 N.W.2d 272 (1976). The pleadings alleged various infirmities in the process of the plea and sentence of constitutional dimension. The motion was not verified as is required by Neb. Rev. Stat. § 29-3001 (Reissue 1979) of the Nebraska Post Conviction Act. Nevertheless, the court proceeded to a hearing, made findings of fact, and denied the relief. A second notice of appeal was filed and the entire matter is before the court.

It is settled law in this state that in the absence of a motion for new trial in a criminal case, the only issues remaining for argument are whether the pleadings support the judgment and whether the sentence is

excessive. *State v. Kelley*, 198 Neb. 805, 255 N.W.2d 840 (1977). The pleadings support the judgment, and the sentence is clearly not excessive. The trial court could not impose a lesser sentence than the one imposed.

The second motion for new trial, in addition to not being timely filed, was filed while the matter was on appeal to this court. It was a nullity. See *State v. Allen, supra.*

As to the motion to vacate, counsel asks us to waive compliance with the requirements of our Post Conviction Act. We decline to do so, both for the purpose of adhering to the plain terms of the Post Conviction Act and so that, should he so desire, defendant may avail himself of the terms of that act to provide this court with an adequate record to review the alleged errors of constitutional dimension.

We affirm the judgment of the trial court insofar as the claim that the sentence was excessive and dismiss so much of this appeal as purports to be an appeal from denial of post conviction relief.

AFFIRMED IN PART, AND IN PART DISMISSED.

CARYL SUE KOCARNIK, APPELLANT, V. JOHN CHARLES KOCARNIK, JR., APPELLEE.

308 N.W.2d 352

Filed July 10, 1981. No. 43860.

1. **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.
2. **Motions for New Trial: Evidence.** In order to make a sufficient showing for new trial upon the ground of newly discovered evidence, the proof in support thereof must show that such evidence was then available which neither the litigant nor his counsel could have discovered by the exercise of reasonable diligence, that it was not merely cumulative, but competent, relevant, and material and with relation to a material issue, and of such character as to reasonably justify a belief that its admission would probably bring about a different result if a new trial were granted.
3. **Alimony: Property Division: Appeal and Error.** A judgment of the

trial court fixing the amount of alimony or making distribution of the property will not be disturbed on appeal in the absence of an abuse of discretion.

4. **Attorney Fees: Costs.** The award of attorney fees and the taxing of costs is discretionary with the District Court.

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

David L. Herzog for appellant.

James A. Hogan for appellee.

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

KRIVOSHA, C.J.

The appellant, Caryl Sue Kocarnik, appeals from a decree entered by the District Court for Douglas County, Nebraska, on October 7, 1980. The decree specifically dissolved the marriage between the appellant and her husband, John Charles Kocarnik, Jr., appellee herein. Further, the order provided that the custody of the minor children of the parties, James Murry Kocarnik and Regina Lynn Kocarnik, be awarded to the father, John Charles Kocarnik, Jr., subject to broad reasonable rights of visitation by appellant mother. The order awarded no alimony to appellant and granted to appellee the family home, together with all the household goods and furniture located in the family home, subject to any mortgage or encumbrance which appellee was to assume, and further subject to a $6,000 lien in appellant's favor, to be paid upon the occurrence of certain events. It is apparent that appellee father was awarded the home in order to raise the minor children. The order further divided certain other properties of the parties and ordered appellee to pay to appellant the sum of $3,000 in monthly installments and an additional $750 to apply upon appellant's attorney fee.

Appellant has assigned numerous errors alleged to have been committed by the trial judge. The two most significant errors assigned appear to be that the trial

court erred in granting the custody of the minor children to the appellee father and in not granting to appellant a new trial based upon newly discovered evidence. We have now examined those specific assignments of error, as well as the other assignments raised by appellant, and conclude that none of the assignments are meritorious. The judgment of the trial court is therefore affirmed in all respects.

The facts of the case are not particularly unique or different from the hundreds of other domestic relations cases coming before the courts today. The parties, each in their early thirties, had been married approximately 10 years. As a result of the marriage there have been two minor children born to the parties, a son 10 years of age and a daughter 6 years of age at the time of trial. Both of the parties are employed during the day and both of them would require some outside assistance in caring for the children during the day. Each of the parties consumed a considerable amount of time at trial leveling charges and countercharges concerning each other's fitness to have custody of the children. In some respects the testimony may have been counterproductive. Little purpose would be served in repeating those charges except to exacerbate an already strained situation. Upon conclusion of the trial, after hearing all the evidence and speaking to both of the children in the presence of counsel, the court concluded, as we would conclude, both parties were fit and proper to be the custodial parent of the minor children of the parties, although the court noted that appellant's conduct in many respects was unwise and questionable. We would agree with that conclusion as well. The trial court concluded, however, that "considering all of the testimony and the interviews with the minor children of the parties, and considering particularly the manner and feeling evidenced by the testimony of each of the parties as heard and observed by this Court, the best interests of the minor children of the parties are better served by awarding the care, custody, and control of the minor

children to [appellee] subject to reasonable visitation rights more specifically referred to elsewhere in this Decree." We have reviewed the bill of exceptions in detail, as we are required to do in cases of this nature, and have concluded from our reading that the evidence regarding the custody of the children supports the conclusions reached by the trial court. Reviewing the record de novo, we reach the same conclusions as did the trial court concerning the custody of the children.

Appellant argues that absent the court's finding that she is unfit, she is entitled to preference with regard to custody of the minor children. Whatever may have heretofore been the rule, the passage of the so-called "no-fault" divorce statutes in this state has eliminated any presumption that a mother has greater rights to the custody of minor children than the father. In *Kockrow v. Kockrow*, 191 Neb. 657, 662, 217 N.W.2d 89, 92 (1974), we said: "As we interpret our no-fault divorce statute, under all ordinary circumstances the father and mother of minor children born in lawful wedlock have an equal and joint right to their custody and control, and neither has a superior right over the other." Likewise, in *Kringel v. Kringel*, 207 Neb. 241, 244, 298 N.W.2d 150, 153 (1980), we said: "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."

Furthermore, while we do review the case before us de novo, we cannot ignore the fact that the trial court had the opportunity of viewing all the parties, including the children whom he interviewed in the presence of both counsel for the parties. Specifically, in *Curfman v. Curfman*, 207 Neb. 1, 3-4, 295 N.W.2d 299, 301 (1980), we recently said: "'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.'"

Our examination of the record fails to disclose to us any evidence that the trial court, in any manner, committed error or abused its discretion regarding the custody of the children. To the contrary, as already noted, we reach the same conclusions as did the trial court. It was clear that either party may have effectively fulfilled the obligation of a parent. There was, however, sufficient evidence to indicate that, on balance, the best interests of the children opted in favor of a finding that their custody should be with the appellee father. The assignment of error is overruled.

Turning then to the second principal assignment of error raised by appellant, that the trial court erred in failing to grant the appellant a new trial because of newly discovered evidence, we likewise must reject that claim.

It appears from the record that the newly discovered evidence would be testimony of a psychologist to the effect that granting custody of the children to the father instead of the mother would not be in the children's best interests. That, in no manner, constitutes newly discovered evidence as defined by our laws, even if it was relevant. The question of custody of the children was always one of the issues in the lawsuit. Appellee, in his answer, specifically requested that he have the care, custody, and control of the minor children. Much of the testimony adduced during the course of the trial made it

clear that appellee was seeking the care, custody, and control of the minor children. If appellant and appellant's counsel were not mindful of that fact, either by reason of the answer filed by appellee or the evidence offered at trial, they must of necessity have been aware of the potential that the court would grant custody of the children to the appellee when, in the presence of both counsel, the court inquired of the children with whom they wished to live. Appellant made no effort to offer the evidence of the psychologist even at that point and before the court entered the decree. To now contend that counsel was unaware that custody of the children might be granted to the appellee, and therefore could not have produced evidence to show what the effect of such an order would be, is to totally ignore the state of the record and the true purpose of the "newly discovered evidence" rule.

In *Pence v. Liermann*, 191 Neb. 614, 616-17, 216 N.W.2d 746, 747-48 (1974), this court said: "'In order to make a sufficient showing for new trial upon the ground of newly discovered evidence, the proof in support thereof must show that such evidence was then available which neither the litigant nor his counsel could have discovered by the exercise of reasonable diligence, that it was not merely cumulative, but competent, relevant, and material and with relation to a material issue, and of such character as to reasonably justify a belief that its admission would probably bring about a different result if a new trial were granted.'" The evidence offered by appellant in support of her claim for a new trial fails to meet any of the tests set forth in the *Pence* decision. The evidence was neither evidence which could not have been discovered by the exercise of reasonable diligence, nor was it evidence of such a character as to reasonably justify a belief that its admission would probably bring about a different result. Such offered evidence was clearly not within the meaning of the "newly discovered evidence" rule, and the trial court was correct in refusing to grant a new trial

based upon such claim.

Appellant's further assignments of error concerning the trial court's failure to grant alimony and her objection to the distribution of property likewise must be overruled. In *Amen v. Amen*, 207 Neb. 694, 697, 301 N.W.2d 74, 76 (1981), we said: "In determining whether alimony should be awarded, the ultimate test is one of reasonableness. [Citations omitted.]

"Although the rules for determining alimony or division of property in an action for dissolution of marriage provide no mathematical formula by which division can be determined, the decision rests on the facts in each case and the sound discretion of the trial court. [Citations omitted.]

. . . .

"A judgment of the trial court fixing the amount of alimony or making distribution of the property will not be disturbed on appeal in the absence of an abuse of discretion."

We are unable to say that a reading of the record discloses any abuse of discretion on the part of the trial court regarding either a division of the property or the denial of alimony. Appellant is gainfully employed and will have sufficient funds to maintain herself. Nor is she required to make any contribution to the support of the minor children. It has likewise been ordered that she receive back her share of the contribution made to the family home, as well as certain other contributions. We cannot say that the trial court abused its discretion by failing to grant alimony, and the assignments of error concerning that matter must be overruled.

Finally, appellant contends that the trial court erred in refusing to grant a larger attorney fee. The trial did indeed take several days. An examination of the bill of exceptions, however, raises some serious question as to whether all that was presented to the court might not have been done in less time. Had an effort been made to try the necessary issues in the case, rather than the animosity which existed between the parties, perhaps less

time would have been consumed. As we said in *Ritchey v. Ritchey*, 208 Neb. 100, 105, 302 N.W.2d 372, 376 (1981): "'The award of attorneys' fees and the taxing of costs is discretionary with the District Court.'" Again we find no abuse of discretion.

Having found that the trial court was correct in all respects, the judgment must be affirmed.

AFFIRMED.

KNOELL CONSTRUCTION COMPANY, INC., APPELLEE, V. JAMES A. HANSON ET AL., APPELLANTS.

308 N.W.2d 356

Filed July 10, 1981. No. 43908.

Equity: Appeal and Error. It is the duty of this court on appeal of an action in equity to try the issues de novo and to reach an independent conclusion without being influenced by the findings of the trial court except to give weight to the fact that the trial court saw the witnesses and observed their demeanor while testifying, that it inspected the premises, and that its examination constituted evidence tending to influence belief or unbelief on the matters at issue in the case.

Appeal from the District Court for Valley County: JAMES R. KELLY, Judge. Affirmed.

Richard G. Kopf of Cook & Kopf, P.C., for appellants.

Steven O. Stumpff of Stumpff & Washburn for appellee.

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

MCCOWN, J.

This is an action to foreclose a mechanic's lien based upon an express contract for leveling the defendants' land. This is the second appearance of this case in this court. See *Knoell Constr. Co., Inc. v. Hanson*, 205 Neb. 305, 287 N.W.2d 435 (1980). In that case this court af-

firmed the District Court finding that there was an express contract for the sum of $40,000, upon which $28,000 had been paid. The evidence was undisputed that some work remained to be done. The case was remanded to the District Court for the limited purpose of taking evidence and determining how many acres were to be leveled, how many acres remained undone, and the reasonable value of the work remaining to be done.

On remand, additional evidence was taken and the District Court determined that there was never an agreement as to the number of acres to be leveled but the parties did agree on what land was to be leveled. The court found that there were 24 acres left to be leveled and that the reasonable value of performing the work would be $2,880. The District Court gave the defendants credit for the sum of $2,880 in addition to the $28,000 previously paid and entered its decree in the sum of $9,120 in favor of plaintiff, with interest, and foreclosed the mechanic's lien. The defendants have appealed.

At the outset of the trial on remand it was stipulated that the bill of exceptions from the prior trial could be considered by the court without the necessity of recalling the witnesses. The evidence at the former trial was taken without surveys or scale maps or drawings and was confusing in many respects as is indicated in our former opinion. Exhibit 35, a survey map of the land, was used at the rehearing but it is difficult to correlate testimony based on that exhibit to testimony at the first trial. There was a broad agreement as to the general extent of the area to be leveled but a conflict in the evidence as to how many acres that area included. The evidence was directly contradictory as to the number of acres remaining to be done and the reasonable cost of completing the work.

The plaintiff's testimony was that 15 acres of land remained to be completed and that the reasonable cost of the work needed to complete the contract would be

$120 per acre, a total of $1,800. That evidence was corroborated by the testimony of an agricultural engineer. The defendants' evidence was that 41 acres of land remained to be completed and a land leveling contractor testified that the reasonable cost of completing the work on those 41 acres would be $27,675. The defendants also offered evidence that an additional 5 acres remained to be completed and that the reasonable cost of completing that 5 acres would be $3,465. That evidence, however, was excluded by the trial court. At the second trial the District Court also made a personal inspection and observation of the premises.

After trial the District Court found that the work on 24 acres of land remained to be completed and that the reasonable cost of completing the work would be $120 per acre, or $2,880. The District Court therefore gave defendants credit for the sum of $2,880 against the $12,000 remaining to be paid and foreclosed plaintiff's mechanic's lien in the sum of $9,120, plus interest.

The defendants first contend that the findings of fact made by the District Court are not supported by the evidence because there is no specific testimony in the record that 24 acres remain to be completed, and no witness testified that the cost of completing that 24 acres was $2,800. The defendants therefore contend that the findings of fact do not conform to the evidence. The trial court is not required to accept one party's or one witness' version of the facts but is required to reach an independent conclusion as to those facts. This is not a case in which the damages are uncertain, conjectural, and speculative. The trial court was required to reconcile extensive conflicts in the evidence and testimony and to reach a conclusion based upon the evidence. Where it has been proven that damage has resulted and the only uncertainty is the exact amount, it is sufficient if there is evidence from which the amount of the damages can be ascertained with reasonable certainty. *Delp v. Laier*, 205 Neb. 417, 288 N.W.2d 265 (1980).

In the case at bar the trial court had the benefit of a

personal inspection and observation of the premises which are the subject of this action and also saw and heard the witnesses. It is the duty of this court on appeal of an action in equity to try the issues de novo and to reach an independent conclusion without being influenced by the findings of the trial court except to give weight to the fact that the trial court saw the witnesses and observed their demeanor while testifying, that it inspected the premises, and that its examination constituted evidence tending to influence belief or unbelief on the matters at issue in the case. *Engel v. Rhen Marshall, Inc.*, 206 Neb. 265, 292 N.W.2d 307 (1980).

The defendants also assert that the District Court erred in excluding testimony that 46 rather than 41 acres remained to be completed, and that the cost of completing the additional 5 acres would be $3,465. Offers of proof were made, but the District Court excluded the evidence upon the ground that the defendants' testimony at the prior trial constituted a judicial admission that only 41 acres remained to be completed.

Defendants contend that the testimony at the prior trial did not constitute a judicial admission but was, at most, only an evidentiary admission. Whether the defendants' testimony constituted a judicial or an evidentiary admission, the result here is unaffected. The trial court accepted the defendants' testimony at the prior trial as an admission. Whether evidence contradicting such admissions was admitted or excluded on remand, the admissions remained, and the trial court made its factual determinations based on conflicting testimony.

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).

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

AFFIRMED.

LINCOLN TELEPHONE AND TELEGRAPH COMPANY, A CORPORATION, APPELLANT AND CROSS-APPELLEE, V. COUNTY BOARD OF EQUALIZATION OF THE COUNTY OF YORK OF THE STATE OF NEBRASKA AND COUNTY OF YORK, NEBRASKA, APPELLEES AND CROSS-APPELLANTS.

308 N.W.2d 515

Filed July 17, 1981. Nos. 43343, 43344.

1. **Political Subdivisions: Appeal and Error.** An appeal to the District Court from action of the county board of equalization is heard as in equity, and upon appeal therefrom to this court it is tried de novo.
2. **Taxation: Valuation.** Taxes on tangible property are to be levied by valuation uniformly and proportionately.
3. **Taxation: Valuation: Proof.** The burden of proof is upon a taxpayer to establish his contention that the value of his property has not been fairly and proportionately equalized with all other property, resulting in a discriminatory, unjust, and unfair assessment.
4. **Taxation: Valuation.** Authorities charged with the duty of valuing property for taxation are not limited to just one method of determining value, and the ultimate question is whether the method used ultimately attains a reasonable degree of uniformity in value.
5. ____:____. Tangible property is to be valued at actual value for tax purposes and assessed at 35 percent of actual value; however, an assessment will not be set aside merely because it was not assessed at actual value where property is proportionately valued in a reasonable degree.
6. ____:____. Approximation of value and uniformity is all that can be accomplished and substantial compliance with the requirement of equalization and uniformity of taxation laid down by the federal and state Constitutions is all that is required, and such provisions are satisfied when designed and manifest departure from the rules is avoided.
7. ____:____. In order for a taxpayer to secure a reduction in the assessed value of his property, it must be demonstrated that the assessed value is grossly excessive, or that its value has not been fairly and proportionately equalized.

8. **Rules of Evidence: Expert Witnesses.** The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. Neb. Rev. Stat. § 27-703 (Reissue 1979).
9. **Taxation: Valuation.** For purposes of taxation, actual value, market value, and fair market value are synonymous terms.
10. **Judgments: Appeal and Error.** A proper judgment will not be reversed because the trial court gave an erroneous reason for its rendition.

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

Richard W. Smith and Charles E. Lowe of Woods, Aitken, Smith, Greer, Overcash & Spangler for appellant.

Vincent Valentino, York County Attorney, and Michael J. Murphy for appellees.

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

CLINTON, J.

These two actions are appeals from the County Board of Equalization (hereinafter board) of York County, Nebraska, denying the protests of the plaintiff, the Lincoln Telephone and Telegraph Company (hereinafter LT&T), by which it sought reductions in the assessed value of its personal property located in York County, Nebraska, for the years 1976 and 1977. For the year 1976, LT&T returned its property at an assessed value of $1,159,566. For the year 1977, it returned its property at an assessed value of $1,482,914. In making this return it used the prescribed Form 10. More will be said about Form 10 when the contentions of LT&T are discussed. By its protests, LT&T asked that the assessed value for 1976 be reduced to $651,676 and for the year 1977 to $829,584. The board denied the protests for both years and, for the year 1976, increased the valuation to $1,420,815.

The two actions were consolidated for trial on appeal to the District Court and are consolidated for briefing and argument in this court.

The District Court reversed the action of the board in increasing the 1976 valuation and affirmed the action in denying the requested reductions. We affirm the judgment of the District Court.

The basis of LT&T's protests to the board was the claim that, although its personal property was returned at 35 percent of its actual value for each of the years in question, real estate in the county was being assessed at 19.67 percent of actual value for the year 1976 and at 19.58 percent of actual value for the year 1977. It asserted, therefore, that it was being taxed discriminatorily in violation of the provision of Neb. Const. art. VIII, § 1, which requires that taxes upon tangible property (with exceptions not pertinent here) shall be levied by valuation uniformly and proportionately. It also asserts that valuation was discriminatory in violation of the equal protection clause of the fourteenth amendment to the U.S. Constitution. See, *Grainger Brothers Co. v. Board of Equalization*, 180 Neb. 571, 144 N.W.2d 161 (1966); *Sioux City Bridge v. Dakota County*, 260 U.S. 441, 43 S. Ct. 190, 67 L. Ed. 340 (1923). In accordance with the mandate of these two cases, LT&T urges that the valuation of its property be reduced by the difference between 35 percent and the 19.67 and 19.58 percentages earlier mentioned and which represent the sales assessment ratio as determined by its expert witness using data furnished by the Department of Revenue.

Before discussing the evidence in this case and the specific contentions and arguments of the parties, we first state the legal principles of law governing our review and those which are pertinent to a determination of the principal issue which is the question of proportionality.

An appeal to the District Court from action of the county board of equalization is heard as in equity,

and upon appeal therefrom to this court it is tried de novo. *Grainger Brothers Co. v. Board of Equalization, supra; Collier v. County of Logan,* 169 Neb. 1, 97 N.W.2d 879 (1959). Taxes on all tangible property and franchises are to be levied by valuation uniformly and proportionately. *Grainger Brothers Co. v. Board of Equalization, supra.* The burden of proof is upon a taxpayer to establish his contention that the value of his property has not been fairly and proportionately equalized with all other property, resulting in a discriminatory, unjust, and unfair assessment. *Grainger Brothers Co. v. Board of Equalization, supra.* Authorities charged with the duty of valuing property for taxation are not limited to just one method of determining value, and the ultimate question is whether the method used ultimately attains a reasonable degree of uniformity in value. *Banner County v. State Board of Equalization & Assessment,* 206 Neb. 715, 295 N.W.2d 682 (1980). Tangible property is to be valued at actual value for tax purposes and assessed at 35 percent of actual value; however, an assessment will not be set aside merely because it was not assessed at actual value where property is proportionately valued in a reasonable degree. Neb. Rev. Stat. § 77-201 (Cum. Supp. 1980); *Chicago, R.I. & P.R. Co. v. State,* 111 Neb. 362, 197 N.W. 114 (1923).

A great deal of the record in this case is taken up with evidence, including expert opinion testimony, as to whether the use of the sales assessment ratios determined actual value of the real estate for tax purposes in this particular case. The testimony of the board's witnesses tended to show, for a variety of reasons, that the sales assessment ratio was not an indicator of market value. The evidence of LT&T tended to establish that the sales assessment ratio was a valid indicator of market value in this case. Considerable evidence was introduced to show that personal property generally was valued at actual value. Other testimony, oral and documentary, all by

experts, was devoted to establishing the value of LT&T property as a unit and allocating a proportion of that value to the personal property having its situs in York County. LT&T's evidence tended to show that the actual value of its personal property was less than that shown on Form 10. The board's evidence tended to show that the actual value of the LT&T property was considerably greater than that shown on Form 10, and that the use of the formulas provided by Form 10 did not result in a determination of actual value. The board's expert testified the actual value of the personal property was as follows: January 1, 1976, $4,765,800; January 1, 1977, $6,042,490. LT&T's expert fixed the values of the same property as follows: January 1, 1976, $2,754,900; January 1, 1977, $3,320,250. These conflicting opinions contrast with the returned value of $3,313,045 for 1976 and $4,236,897 for 1977.

The District Court, based on that evidence, wrote memorandum opinions in which it found, among other things, that real estate in York County was systematically assessed at less than actual value; that personal property generally was valued at actual value; that it was not possible, however, to determine from the evidence the degree of difference; and that the values of the personal property of LT&T reported on Form 10 for the years 1976 and 1977 were not the actual values of the property for the years in question. It also found that there was no evidence to support the 1976 increase in valuation.

The keystone of LT&T's position is stated in its brief as follows: "It should be presumed that the use of the Form 10 for the return of telephone company tangible personal property results in the return of such property at its fair and reasonable value for tax purposes. The County had the burden of overcoming this presumption and of establishing by clear and unequivocal proof that the use of the Form 10 resulted in an unfair and unreasonable determination of the actual value of

LT&T's tangible personal property situated in York County." LT&T points out that Neb. Rev. Stat. § 77-304 (Reissue 1976) requires the Tax Commissioner to approve all forms, schedules, books of instructions, etc., as may be necessary or expedient to the proper administration of the tax laws, and that Neb. Rev. Stat. § 77-305 (Reissue 1976) requires the Tax Commissioner to prescribe forms for the schedules for listing and assessment of personal property. It also notes that rule 16 of the Property Assessment and Appraisals Rules and Regulations, Nebraska Department of Revenue (1971), has approved Form 10.

It is now necessary to describe the information called for by Form 10. Line 1 requires the disclosure without itemization of the *book* value of tangible personal property (except materials and supplies) outside cities and villages. Line 2 requires the disclosure without itemization of the total *book* value of the same kind of property in cities and villages. Line 3 is simply the sum of lines 1 and 2. Line 4 is 60 percent of line 3. Line 5 requires the listing of the *actual* value of materials and supplies. Line 6 is described as the *total actual value* of all tangible personal property and is the sum of lines 4 and 5, i.e., book value less 40 percent depreciation. Line 7 is the assessed value, or 35 percent of line 6.

The testimony indicated that new items are added to the amounts on lines 1 and 2 at cost, including installation, etc. No further depreciation is ever taken except the 40 percent resulting from the use of the 60 percent component on line 4.

To support its contention that the use of Form 10 should be presumed to result in a determination of actual value and that the burden of proof is upon the taxing authorities to show otherwise, LT&T relies upon the general rule that actions taken by a governmental agency are presumed valid and the burden is upon the litigant to show otherwise. *Hammer v. Department of Roads*, 175 Neb. 178, 120 N.W.2d

909 (1963). That case involved an eminent domain proceeding in which highway construction limited access to certain property owners. The landowners sought to enjoin the right of the exercise of the power of eminent domain. There was also a claim of estoppel. There was no question in that case but that the power of eminent domain was properly exercised, and the principles of law relating to presumptions of the legality of the action of a government agency were not necessary to the determination of the case and certainly have no application in this particular case.

LT&T also relies upon the holding of this court in *Rodeo Tel. Membership Corp. v. County of Greeley*, 181 Neb. 492, 149 N.W.2d 357 (1967). That case involved the valuation of the tangible personal property of a telephone company. The telephone company reported an actual value of $43,270. The assessor raised the valuation to $86,088. The taxpayer's protest was rejected by the board of equalization and the taxpayer appealed. We affirmed the action of the board.

LT&T here asserts that the court in *Rodeo* placed its approval on the use of Form 10 as a means of determining actual value. The recital of facts in that case leads to an inference that the taxpayer did not report on Form 10. It also may be inferred that the assessor, in increasing the valuation, used a method, although not described literally as Form 10, that appears to have been that form or one at least calling for identical information prescribed by the Form 10 here involved. The opinion in that case recites that the information is based upon valuations reported by the taxpayer to the Nebraska State Railway Commission for determining the value of the tangible personal property included in the rate base for rate-making purposes.

The *Rodeo* case did not involve a question of "uniformity" or "proportionality" of taxation. The only question involved was whether the property was valued *in excess* of its actual value. The court in that

case noted at 495, 149 N.W.2d at 359: "[T]he 40 percent allowance for depreciation here seems reasonable, *if not excessive*, in arriving at an actual value for taxation." (Emphasis supplied).

The two cases in question and the statute do not support LT&T's claim of a presumption that Form 10 establishes actual value. The Nebraska Constitution, art. VIII, § 1, establishes the rule of taxation "by valuation uniformly and proportionately." Forms and schedules approved by the state for the purpose of establishing value must all be directed to effectuating the constitutional principle of proportionality or the statutory command that property be taxed at actual value. The adoption or approval of a form cannot prevail over the Constitution.

As far as burden of proof is concerned, *Rodeo* itself recites the rule that the taxpayer must establish that the value is excessive.

We have frequently recognized that approximation of value and uniformity is all that can be accomplished and that substantial compliance with the requirement of equalization and uniformity of taxation laid down by the federal and state Constitutions is all that is required, and such provisions are satisfied when designed and manifest departure from the rules is avoided. *Collier v. County of Logan*, 169 Neb. 1, 97 N.W.2d 879 (1959).

In order for a taxpayer to secure a reduction in the assessed value of his property, it must be demonstrated that the assessed value is grossly excessive, or that its value has not been fairly and proportionately equalized. *Collier v. County of Logan, supra.*

Even though it be conceded that LT&T's evidence has established that real estate is taxed in York County for the years in question at approximately 20 percent of actual value, rather than the 35 percent required by statute, it still remains necessary, in order for LT&T to show disproportionate taxation, to prove that its tangible personal property is assessed at sub-

stantially in excess of 20 percent of actual value. This it has not done. First, we decline to say that book value, less depreciation of 40 percent, establishes a presumption of actual value. Additionally, there is substantial evidence that the amounts reported on Form 10 were substantially less than actual value. Evidence in the record indicates that while Form 10 may have at one time resulted in a value approximating actual value, that was no longer true. A number of different types of analyses and appraisals had been done by the Department of Revenue which indicated that the information called for by Form 10 did not, under current inflationary conditions, accomplish that purpose. The board's expert testified that the use of Form 10 resulted in equalization with real estate because "there is as big a lag here as there is in real estate."

One more item pertinent to the proportionality discussion may be added. Because there were no sales of telephone companies such as LT&T, all expert witnesses who testified valued the property of the company by means of the capitalization of income approach and then allocated a portion of that value to York County equal to the percentage that the personal property of LT&T located in York County bore to the total personal property of LT&T not otherwise taxed. On surrebuttal, the board called as a witness a professor of finance who was also a certified public accountant. He testified that the method used by LT&T's principal valuation witness resulted not in a valuation of "the net utility plant," but in "a valuation of the debt and equity securities of the Lincoln Telephone and Telegraph Company."

We find on de novo review that LT&T has failed to establish by the evidence that its tangible personal property in York County was assessed at more than 20 percent of its actual value and, therefore, it is not entitled to the relief which it requests. The fact that the evidence tended to show that other types of personal

property were valued at close to 35 percent of actual value does not give LT&T any cause for complaint, because it obviously was not harmed because another taxpayer's property was valued at a greater proportion of actual value than its own.

LT&T argues some additional assignments of error which it claims require either reversal or that this court disregard certain portions of the board's evidence. LT&T objected to the surrebuttal testimony of the witness earlier referred to because the expert did not hold a real estate appraiser's license. It relies upon the provisions of Neb. Rev. Stat. § 81-8,286(1) (Cum. Supp. 1980), which provides: "No person shall, after January 1, 1974, act as a real estate appraiser without a license issued by the commission. This section shall not apply to any person exempted by any other provision of sections 81-8,276 to 81-8,287. No person shall testify as an appraiser before any tribunal, court, judge, referee, or judicial committee without being licensed under the provisions of sections 81-8,276 to 81-8,287." The argument is that, because the assets of the whole company must be valued and then the value allocated, the witness necessarily had to value real estate and hence was disqualified as a witness under the above statute. The objection is not well taken for two reasons. It does not appear from the record that the witness was making an appraisal of real estate. He was making a critique of a method of appraisal of a public utility property and in particular the use of the capitalization method to value intangible personal property of a utility in the manner that it was done by the expert witness whose appraisal was being criticized.

The record establishes that the valuation of public utilities, including telephone companies, calls for specialized knowledge that a person holding a real estate appraiser's license would not necessarily have. Neither LT&T nor the board's principal witness on valuation appears to have been licensed under

§ 81-8,286 or under the reciprocity provisions of Neb. Rev. Stat. § 81-8,279 (Cum. Supp. 1980), although both appear to have qualifications as real estate appraisers as well as appraisers of utility properties. The board objected to testimony of LT&T's valuation witness, a large portion of whose testimony related to establishing the sales assessment ratio valuations of real estate in York County. The objection was founded on the provisions of § 81-8,286(1). The trial court overruled the objection. Both the witness for LT&T and the witness for the board, on the issue of valuation of utility property, used information furnished by others, specifically LT&T's report to stockholders which showed the valuations of the various classes of property belonging to the company. This they were entitled to do under the provisions of Neb. Rev. Stat. § 27-703 (Reissue 1979), which says: "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence."

LT&T assigns as error the refusal of the trial court to require the production of what is referred to as the "Cleminshaw appraisal." This was a countywide appraisal being performed pursuant to a contract with the county board. The appraisal began in November 1974 and was substantially complete by January 1, 1977, although the record does not show that it had yet been delivered to the board. The apparent purpose of requiring the production was to fortify LT&T's claim that real estate in the county was undervalued in the years in question. We point out, however, that LT&T prevailed on this contention and the trial court so found, and we have no reason to find otherwise. Production of the appraisal would not have aided LT&T for reasons already discussed, namely, in order to establish disproportionate

taxation the taxpayer is required to prove both parts of the equation, i.e., the percentage of actual value at which its own property was assessed and that the other property in the same class (real and personal property [with specific exceptions, such as automobiles, not pertinent] being in the same class) is undervalued. LT&T has failed to establish the first part of that equation.

LT&T urges that the trial court erred because it founded its decision upon a purported distinction between actual value and market value of real estate and that it was not possible for the court to determine the percentage of difference between the actual value of real estate and the actual value of personal property and, therefore, could give LT&T no relief.

LT&T points out that in interpreting Neb. Rev. Stat. § 77-201 (Cum. Supp. 1980) and § 77-112 (Reissue 1976), we have repeatedly said that for purposes of taxation, actual value, market value, and fair market value are synonymous terms. *Richards v. Board of Equalization*, 178 Neb. 537, 134 N.W.2d 56 (1965).

Our reading of the memorandum opinion leaves us puzzled as to the distinction the trial court was making. We, however, adhere to the historic definition. We recognize, of course, that in cases such as this where there is no market or no sale of like property, actual or market value must be arrived at by theoretical methods commonly used by appraisers qualified in the particular field. Whatever the trial court meant by its discussion, it nonetheless arrived at the correct result. A proper judgment will not be reversed because the trial court gave an erroneous reason for its rendition. *Strauss v. Square D Co.*, 201 Neb. 571, 270 N.W.2d 917 (1978).

The board has cross-appealed and urges that the increase in the 1976 valuation made by the board be restored. The trial court found that the increase was supported by no evidence. The record indicates that the increase was based upon sale by LT&T of

the stock of a cable television system owned by it, the total sale price of which was greater than the actual value of the assets returned for taxation. Such a sale is not the sale of the tangible personal property of the corporation. Even if we assume comparability of the nature of the underlying assets (and there is no evidence to show that), that evidence did not support the increase.

The judgment of the lower court is, in all respects, affirmed.

AFFIRMED.

DENNIS TROUT, APPELLEE, V.
OLSON BROTHERS MANUFACTURING COMPANY,
A NEBRASKA CORPORATION, APPELLANT.

308 N.W.2d 522

Filed July 17, 1981. No. 43468.

1. **Evidence: Appeal and Error.** In a law action it is not within the province of the Supreme Court to weigh or resolve conflicts in the evidence. The credibility of witnesses and the weight to be given their testimony are for the trier of fact.
2. **Jury Verdicts: Appeal and Error.** A verdict by a jury based upon conflicting evidence will not be set aside on appeal unless it is clearly wrong.

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

Lathrop, Albracht & Swenson for appellant.

Abrahams, Kaslow & Cassman for appellee.

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

MCCOWN, J.

This is an action on a written agreement to pay plaintiff termination pay of $25,000 in the event his

employment was terminated by the defendant corporation without plaintiff's consent. A jury returned a verdict for the plaintiff and judgment was entered on the verdict by the District Court. The defendant has appealed.

At the times material here, the defendant, Olson Brothers Manufacturing Company, was a Nebraska corporation engaged in the general business of manufacturing pivot irrigation systems. Its principal office was in Atkinson, Nebraska, approximately 200 miles northwest of Omaha. Theodore Olson and his wife owned 50 percent of the stock, and his brother, Carroll Olson, and his wife owned the other 50 percent. From the inception of the corporation Theodore (Ted) was president and Carroll was vice president and treasurer.

In late April or early May 1979 the plaintiff, Dennis Trout, was hired by the corporation as vice president and chief operating officer. His salary was $50,000 a year, with a severance payment of 3 months' salary if his employment was terminated by the corporation without his consent. On May 24, 1979, plaintiff was elected to the board of directors of the corporation. Plaintiff's evidence was that the corporation was in serious financial difficulty at the time plaintiff was hired and that his main responsibilities were to control and secure and improve the corporation's financial position. Ted denied that the corporation was in serious financial difficulty but admitted that the corporation was having cash flow problems.

The largest creditor of the corporation was Banco Financial Corporation which had a loan agreement with the corporation, based on current accounts receivable up to a maximum of $4 million. The corporation's largest account receivable debtor was Southwest Farms, a Texas corporation which was wholly owned by Ted Olson. As of August 29, 1979, Southwest Farms owed the defendant corporation $662,000 and Ted was disputing the amount.

The evidence is uncontradicted that on August 29, 1979, the financial condition of the defendant was such that if Southwest Farms did not pay the $662,000 owing to the corporation by August 31 the loan agreement with Banco would be in default and the corporation would not have funds to meet its payroll.

Banco called plaintiff three times on August 29 in regard to the financial situation, and in the final conversation instructed plaintiff to prepare a plan for financial recovery and to come to the offices of Banco in Minneapolis, Minnesota, for further discussions the next day. On August 30, 1979, the plaintiff Trout, Lee Duhacek, comptroller of the corporation, one of the corporation's attorneys, and several other members of the corporate staff went to Minneapolis and met with Banco officials. At that meeting the parties entered into an informal financial agreement. As a part of that agreement Banco required that (1) beginning August 31 no further shipments were to be made to Southwest Farms; (2) Ted and Carroll Olson were to meet with Banco in Lincoln within 10 days; (3) a mortgage on real estate owned by the corporation was to be executed on August 31 to Banco; and (4) $500,000 was to be paid to Banco on August 31. In exchange, Banco would postpone the payment of interest then due, waive the overage on the loan, and loan additional funds to meet the August 31 payroll and certain outstanding freight bills against an already pledged IRS refund.

The corporation representatives returned from Minneapolis on the evening of August 30 and brought with them a letter from Banco addressed to Ted and Carroll Olson which stated that unless the Southwest Farms account was paid by August 31, Banco would terminate financing. Ted Olson had been in Texas on August 30 and returned to Atkinson, Nebraska, about midnight. Later that night he received a telegram from Banco containing the same information as the letter.

When plaintiff arrived at work on the morning of August 31, he was advised that the $500,000 transfer of funds to Banco would not be made on that day in accordance with orders from Ted. Later that morning, Ted, Carroll, Duhacek, and the plaintiff met at the offices of the corporation and discussed the financial situation. Ted was outraged and furious. He said he did not need Banco and was not going to meet with any bankers or deposit money from Southwest Farms into the corporation account or execute any second mortgage. He suggested that he would meet the payroll by depositing $500,000 into his personal account.

When Ted left, Carroll Olson, Duhacek, and the plaintiff decided that Ted would have to be removed as president and that they would call a special meeting of the board of directors to meet at the offices of the corporation's attorneys in Omaha, Nebraska, at 5 p.m. that afternoon.

There were five members of the board of directors, Ted Olson, Carroll Olson, Lee Duhacek, Dale Wilson, and Dennis Trout, the plaintiff. All of them were also employees of the corporation and all were at the corporation office in Atkinson, Nebraska, on August 31 except Dale Wilson. He was at the State Fair in Lincoln, Nebraska, in charge of the corporation's promotional booth. Verbal notice was given to each of the five directors. The evidence is somewhat in conflict as to the exact time at which Ted was notified, but it was sometime between 11:30 a.m. and 1:30 p.m.

At approximately noon Carroll Olson, Duhacek, and the plaintiff picked up the corporate records and took them to an accountant's office in Atkinson. They met there to avoid Ted because they were afraid of his violent reaction. At approximately 1 p.m., Ted came into the accountant's office. He was extremely angry. There was testimony that a physical scuffle between Ted and Carroll occurred at the time and Ted told Duhacek and the plaintiff that they were fired.

Carroll Olson, Duhacek, and the plaintiff flew to Omaha in a chartered plane. The directors' meeting was called to order at approximately 5:30 p.m. in the offices of the corporation's attorneys in Omaha, Nebraska. Four of the five directors were present. Ted Olson was not present. Carroll Olson was elected temporary chairman and Duhacek was elected temporary secretary. The board amended Article III, section 4, of the bylaws of the corporation by deleting provisions that the president could not be removed from office except by vote of all the directors of the corporation other than the president and substituting a provision that any or all elected officers of the corporation may be removed from office without notice and without assigning any cause by the vote of a majority of the directors present at any regular or special meeting at which a quorum is present. The board then adopted a resolution removing Ted Olson as president and chief executive officer of the corporation and elected Carroll Olson as president and chief executive officer of the corporation, effective immediately. The directors then adopted a resolution authorizing the officers of the corporation or any one of them to execute and deliver to Banco Financial Corporation a second real estate mortgage on certain described real estate owned by the corporation and also authorized and directed the officers of the corporation to list certain property for sale.

The actions of the board were all taken by affirmative vote of three to one with Wilson voting "no." Upon completion of these actions the meeting of the board of directors was adjourned.

After the directors' meeting was adjourned, Carroll Olson, as president of the corporation, made an agreement with the plaintiff to continue as vice president and chief operating officer of the corporation at an annual salary of $50,000 per year, and that in the event of the termination of his employment by the corporation without his consent, plaintiff would be paid termi-

nation pay of $25,000 within 7 days after the termination. The agreement was confirmed in writing signed by Carroll Olson as president and chief executive officer of Olson Brothers Manufacturing Company.

On September 2, 1979, an agent on behalf of Ted Olson offered plaintiff $25,000 to resign immediately. The offer was refused. On September 6 Carroll Olson entered into an agreement to sell all his stock in the corporation to Ted Olson. Under the agreement Carroll was to resign as president and vote to reelect Ted as president and plaintiff's position as both a director and an officer was to be terminated. A special meeting of stockholders and directors was held on September 7, 1979, at which that agreement was consummated and plaintiff was fired. When plaintiff was notified of his termination as an officer and director of the corporation he made oral and written demand for the $25,000 severance pay, which was refused by the corporation. This action was filed on September 26, 1979.

The case was tried to a jury in April 1980 and the jury returned a verdict for the plaintiff in the sum of $25,000. This appeal followed.

The defendant contends that as a matter of law there was insufficient notice to Ted Olson of the special directors' meeting and insufficient proof of any financial emergency and that the actions taken at the special directors' meeting in Omaha, Nebraska, on August 31, 1979, were invalid and of no force and effect and that the act of Carroll Olson in making the employment contract with the plaintiff was, therefore, an ultra vires act and not binding on the corporation.

The bylaws of the corporation which are involved here were the initial bylaws of the corporation, ratified and adopted by the stockholders, board of directors, and officers of the corporation on January 2, 1968. A portion of Article II, section 3, of the bylaws provided: "Regular meetings of the Board of Directors may be held without call or formal notice, at such

places, within or without the State of Nebraska, and at such times as the Board may determine by formal resolution. Special meetings may be held at any place, either within or without the State of Nebraska, as may be called by the president or any two members of the Board of Directors. Except as otherwise provided herein, notice of meetings of the Board of Directors shall be given either personally or by mail, and if by mail, such notice shall be sufficiently given if deposited in the United States mail not less than five (5) days prior to such meeting, addressed to the director, with postage thereon prepaid. Waiver by a director in writing of notice of any directors' meeting, whether before or after the time of such meeting, shall be equivalent to giving such notice. Attendance of a director at such meeting shall constitute a waiver of notice of such meeting."

Article II, section 4, provides in part: "A majority of the Board of Directors shall be necessary and sufficient to constitute a quorum for the transaction of business at all meetings thereof, and the act of a majority of the directors present at a meeting at which a quorum is present shall be the act of the Board of Directors."

Article IX provides: "The Board of Directors shall have the power, by the affirmative vote of a majority thereof, to make, alter, or repeal the By-laws of the corporation; provided, however, that a majority of the stockholders at any regular or special meeting may make, alter or repeal the By-laws, and the Board of Directors shall not thereafter alter or repeal any portion of the By-laws which have been so made, altered, or repealed by the stockholders."

In the case at bar the evidence is undisputed that each director, including Ted Olson, had actual personal notice of the special meeting of the board of directors, and four of the five directors attended the special meeting. The defendant corporation now contends that the notice did not give Ted Olson a reasonable amount

of time in which to travel to the meeting.

The problem with that contention is that the jury was specifically instructed that the notice that must be given to the members of the board of directors for a special meeting must be given a reasonable length of time before the time fixed for the meeting of the board of directors, affording each of them a reasonably ample time to attend. The issue of what was a reasonable time under the circumstances present here was specifically submitted to the jury and the jury determined that issue.

The defendant corporation also contends that there was no financial emergency sufficient to justify a special directors' meeting on such short notice. The defendant concedes that the giving of notice of a special directors' meeting may be excused because of an emergency which demands immediate attention, at least so far as an absent or inaccessible director is concerned. See Fletcher, Cyclopedia of the Law of Private Corporations § 408 (rev. perm. ed. 1969). In this case the jury was instructed that a real emergency to the corporation which demanded immediate attention could excuse the requirement of notice but a fancied emergency could not. The jury was also instructed that a financial crisis of a serious nature to the corporation, if it found such a condition existed, can be a real emergency. Just as with the issue of reasonable time of notice, the issue of whether or not an emergency existed was specifically submitted to the jury and the jury determined that issue.

Finally, the defendant corporation argues that because the initial bylaws were ratified and adopted by the board of directors and by the stockholders, none of the bylaws could thereafter be altered, amended, or repealed by the board of directors, even though Article IX specifically gives the board of directors the power to do so. The defendant cites no authority for the proposition nor have we found any.

The bylaws themselves provide: "The Board of Di-

rectors shall have the power, by the affirmative vote of a majority thereof, to make, alter, or repeal the By-laws of the corporation . . . ." That power is limited only by the proviso that if the stockholders at a regular or special meeting make, alter, or repeal any portion of the bylaws, the board of directors shall not thereafter alter or repeal that portion. If those provisions be interpreted to mean that the ratification of the initial bylaws of the corporation by the stockholders is an exercise of the proviso, then the board of directors has no power whatever to make, alter, or repeal the bylaws. Under the circumstances here, the proviso did not come into operation and the board of directors had the power to make, alter, or repeal the bylaws of the corporation.

The case before us is a law action tried to a jury. The verdict of the jury turned upon a determination of the factual issues based on conflicting evidence. The instructions covered the issues and fairly submitted the case to the jury. In a law action it is not within the province of the Supreme Court to weigh or resolve conflicts in the evidence. The credibility of witnesses and the weight to be given their testimony are for the trier of fact. A verdict by a jury based upon conflicting evidence will not be set aside on appeal unless it is clearly wrong. *Merten v. Pedersen*, 199 Neb. 34, 255 N.W.2d 869 (1977).

The verdict of the jury was not clearly wrong and the judgment of the District Court was correct and is affirmed.

AFFIRMED.